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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 CEMENT MASONS & PLASTERERS ) Case No. 11-01016 SC  
9 JOINT PENSION TRUST, )  
10 Individually and on Behalf of ) ORDER GRANTING MOTION TO  
All Others Similarly Situated, ) DISMISS  
11 Plaintiffs, )  
12 v. )  
13 EQUINIX, INC., STEPHEN M. )  
SMITH, and KEITH TAYLOR, )  
14 Defendants. )  
15 )  
16 )

17 **I. INTRODUCTION**

18 Plaintiffs Cement Masons & Plasterers Joint Pension Trust  
19 ("Cement Masons") and the International Brotherhood of Electrical  
20 Workers Local 697 Pension Fund ("IBEW") (collectively,  
21 "Plaintiffs") bring this putative securities class action against  
22 Equinix, Inc. ("Equinix"), and Equinix's CEO, Stephen M. Smith  
23 ("Smith"), and CFO, Keith D. Taylor ("Taylor") (collectively,  
24 "Defendants"). Plaintiffs assert that the price of Equinix stock  
25 was artificially inflated between July 29, 2010 and October 5, 2010  
26 ("the Class Period") due to allegedly false and misleading  
27 statements made by Defendants, and that Equinix's stock price  
28 plummeted over 33 percent when the falsity of these statements was

1 revealed. Now before the Court is Defendants' Motion to Dismiss  
2 Plaintiffs' First Amended Complaint ("FAC"). ECF No. 29 ("MTD").  
3 The Motion is fully briefed. ECF Nos. 17 ("Opp'n"), 20 ("Reply").  
4 Pursuant to Civil Local Rule 7-1(b), the Court finds the motion  
5 suitable for determination without oral argument. For the reasons  
6 set forth below, the Court GRANTS Defendants' Motion to Dismiss and  
7 DISMISSES the FAC WITH LEAVE TO AMEND.

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9 **II. BACKGROUND**

10 Equinix is a public corporation that provides carrier-neutral  
11 data centers and internet exchanges. ECF No. 26 ("FAC") ¶ 2. The  
12 Company connects businesses with partners and customers around the  
13 world through a global platform of high-performance data centers  
14 called International Business Exchanges ("IBXs"). Id. IBX data  
15 centers enable customers to safeguard their infrastructure, house  
16 their assets and applications closer to users, and collaborate with  
17 partners and customers. Id. Equinix generates substantially all  
18 of its revenue through three offerings available to customers at  
19 its ninety-two IBX data centers: collocation services,  
20 interconnection services, managed IT services. Id. ¶ 4. These  
21 services provide customers with shared, equipped facilities for  
22 their computer and data systems. See id. ¶¶ 5-7.

23 Equinix acquired Switch and Data, one of its competitors,  
24 during the second quarter of 2010. Id. ¶ 8. Equinix's overall  
25 financial results for that quarter were positive. On July 28,  
26 2010, the day before the commencement of the Class Period, the  
27 Company issued a press release announcing that it had posted its  
28 thirtieth consecutive quarter of sequential growth, reporting

1 revenues of \$296.1 million. Id. ¶¶ 8, 48. In the same release,  
2 Equinix offered financial projections for the third quarter 2010  
3 ("3Q10") and fiscal year 2010 ("FY10"). Id. ¶ 48. Equinix  
4 forecasted 3Q10 revenue of \$335 to \$338 million and FY10 revenue of  
5 \$1.225 to \$1.235 billion (the "July 28 guidance"). Id. Adjusted  
6 EBITDA<sup>1</sup> for FY10 was expected to be between \$535 and \$540 million.  
7 Id.

8 Also on July 28, 2010, Defendants made a number of statements  
9 concerning Equinix's pricing strategy and the integration of Switch  
10 and Data. On a conference call, responding to investor questions  
11 about whether Equinix could maintain its firm pricing in the face  
12 of an increasingly competitive environment, Smith commented: "We're  
13 not going to go below a threshold," id. ¶ 36; and "[w]e're  
14 maintaining the discipline on the floors and ceilings we have on  
15 our pricing and the sales force is staying very, very disciplined  
16 on price," id. ¶ 51. Smith conceded that there would be certain  
17 exceptions to this stable pricing strategy: "[I]n certain markets  
18 we're going to get some pricing pressure on certain deals. If it's  
19 a strategic deal and it's a magnetic deal for us, we'll get more  
20 aggressive." Id. ¶ 51. As to Switch and Data, Defendants offered  
21 a positive assessment of the company's integration into Equinix.  
22 In the July 28, 2010 press release, Equinix stated: "The  
23 integration of Switch and Data is ahead of schedule." Id. ¶ 8.  
24 During the July 28, 2010 conference call, Smith stated: "The sales  
25 organizations have been completely integrated with full cost

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26 <sup>1</sup> Adjusted EBITDA is defined as income or loss from operations plus  
27 depreciation, amortization, accretion, stock-based compensation  
28 expense, restructuring charges, acquisition costs, and gains on  
asset sales.

1 synergies already achieved in the sales function." Id. ¶ 50.  
2 Taylor echoed this sentiment, stating: "We've got the sales forces  
3 cross-selling into both assets. They're all part of one team today  
4 . . . so the structure all the way up to the sales leader in North  
5 America has been in place for weeks now." Id.

6 Taylor spoke with investors again on September 15, 2010,  
7 echoing many of the statements from July 28, 2010. Commenting on  
8 the stability of Equinix's pricing, Taylor affirmed: "[W]e're not  
9 going to trade price for volume"; id. ¶ 65; and "this is sort of a  
10 consistent message you've heard from us previously, that pricing is  
11 stable, it's firm," id. ¶ 66. Taylor also stated: "I think as we  
12 look into 2011 on our Q3 earnings call, I think it's fair to assume  
13 that we are going to give out guidance. We have a high degree of  
14 confidence in our ability to do that." Id. ¶ 65.

15 Equinix had less positive news to report on October 5, 2010,  
16 the last day of the Class Period. Equinix announced in a press  
17 release that it now expected 3Q10 revenue of \$328 to \$330 million,  
18 a 2.2 percent reduction from the July 28 guidance, and FY10 revenue  
19 of 1.215 billion, a 1.2 percent reduction from the July 28  
20 guidance. Id. ¶ 13. In a conference call with investors on the  
21 same day, Smith stated that the downward revision was due to an  
22 "understatement of churn" (i.e., customer attrition), lower than  
23 expected revenues related to the company's Switch and Data assets,  
24 and customer discounts that were not fully contemplated when  
25 Equinix offered the July 28 guidance. Id. ¶¶ 70-71. Smith  
26 explained:

27 [W]e just had an assumption that was missed in the  
28 guidance. . . . Should've seen it in Q2. We caught it

1 part way through. We wanted to see the September flash  
2 so we'd make darn sure we knew what the heck we were  
3 looking at. And that's why we decided to get that behind  
us, looking at the September flash and getting it out to  
you guys today.

4 Id. ¶ 71.

5 Smith also addressed Equinix's pricing strategy and the Switch  
6 and Data integration during the October 5, 2010 conference call.

7 As to pricing, Smith stated: "[D]uring the second and third  
8 quarters, there were certain discounts and credit memos issued to a  
9 number of strategic customers." Id. ¶ 70. Smith elaborated that  
10 Equinix had adjusted prices "just over 10%" for two key "magnet"  
11 customers, id. ¶ 73, explaining that "if a large customer is  
12 willing to commit long term in large volume, we are going to get  
13 flexible in our pricing with them." Id. ¶ 74. With respect to the  
14 Switch and Data integration, Smith stated:

15 We are five months into our integration plan, and we've  
16 been able to achieve cost synergy targets, resulting in a  
17 7-point improvement to the Switch and Data adjusted  
EBITDA margins. . . . We still have work to do to  
18 realign the combined sales organizations, but our  
expectations are that we will see improvements in the  
19 utilization of the former Switch and Data assets as we  
exit 2010.

20  
21 Id. ¶ 71.

22 Investors were apparently displeased with the October 5, 2010  
23 announcements. Equinix's stock price fell from \$106.09 on October  
24 5 to \$70.34 the next day, a one-day loss of over 33 percent of  
25 shareholder equity. Id. ¶ 17.

26 Cement Masons, which had purchased Equinix stock during the  
27 Class Period, filed the instant action in federal court on March 4,  
28 2011. ECF No. 1 ("Compl."). IBEW, another Equinix stockholder

1 that is represented by the same counsel as Cement Masons, was  
2 appointed as lead plaintiff on August 8, 2011. ECF No. 23 ("Aug.  
3 8, 2011 Order"). The FAC was filed about six weeks later. The FAC  
4 asserts causes of action for: (1) violations of Section 10(b) of  
5 the Securities Exchange Act of 1934 ("the Exchange Act") and of  
6 United States Securities and Exchange Commission ("SEC") Rule 10b-  
7 5; and (2) violations of Section 20(a) of the Exchange Act. FAC ¶¶  
8 93-98. The crux of the FAC is that Defendants made a number of  
9 false and misleading statements concerning: (1) Equinix's financial  
10 forecasts for 3Q10 and FY10; (2) Equinix's pricing strategy; (3)  
11 the integration of Switch and Data's sales force; and (4) Equinix's  
12 ability to provide accurate financial forecasts.<sup>2</sup> Plaintiffs  
13 allege that these false and misleading statements artificially  
14 inflated Equinix's stock price and that, when the truth was finally  
15 revealed, Equinix's stock price plummeted.

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17 **III. LEGAL STANDARD**

18 **A. Motion to Dismiss**

19 A motion to dismiss under Federal Rule of Civil Procedure  
20 12(b)(6) "tests the legal sufficiency of a claim." Navarro v.  
21 Block, 250 F.3d 729, 732 (9th Cir. 2001). "Dismissal can be based  
22 on the lack of a cognizable legal theory or the absence of  
23 sufficient facts alleged under a cognizable legal theory."  
24 Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
25 1988). "When there are well-pleaded factual allegations, a court  
26 should assume their veracity and then determine whether they

27  
28 <sup>2</sup> The FAC also targets Defendants' statements concerning churn  
rates, see, e.g., FAC ¶ 52, but Plaintiffs appear to have abandoned  
those allegations in their opposition papers.

1 plausibly give rise to an entitlement to relief." Ashcroft v.  
2 Iqbal, 129 S. Ct. 1937, 1950 (2009). However, "the tenet that a  
3 court must accept as true all of the allegations contained in a  
4 complaint is inapplicable to legal conclusions. Threadbare  
5 recitals of the elements of a cause of action, supported by mere  
6 conclusory statements, do not suffice." Id. (citing Bell Atl.  
7 Corp. v. Twombly, 550 U.S. 544, 555 (2007)). The court's review is  
8 generally "limited to the complaint, materials incorporated into  
9 the complaint by reference, and matters of which the court may take  
10 judicial notice." Metzler Inv. GMBH v. Corinthian Colls., Inc.,  
11 540 F.3d 1049, 1061 (9th Cir. 2008) (citing Tellabs, Inc. v. Makor  
12 Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)).

13 **B. Section 10(b)**

14 Section 10(b) of the Exchange Act makes it unlawful "[t]o use  
15 or employ, in connection with the purchase or sale of any security  
16 registered on a national securities exchange . . . any manipulative  
17 or deceptive device or contrivance in contravention of such rules  
18 and regulations as the [Securities and Exchange] Commission may  
19 prescribe . . . ." 15 U.S.C. § 78j(b). One such rule prescribed  
20 by the Commission is Rule 10b-5, which states that "[i]t shall be  
21 unlawful for any person . . . [t]o engage in any act, practice, or  
22 course of business which operates or would operate as a fraud or  
23 deceit upon any person, in connection with the purchase or sale of  
24 any security." 17 C.F.R. § 240.10b-5(c). Plaintiffs must plead  
25 five elements to establish a violation of Rule 10b-5.  
26 Specifically, Plaintiffs must demonstrate "(1) a material  
27 misrepresentation or omission of fact, (2) scienter, (3) a  
28 connection with the purchase or sale of a security, (4) transaction

1 and loss causation, and (5) economic loss." In re Daou Sys., 411  
2 F.3d 1006, 1014 (9th Cir. 2005).

3 Plaintiffs must also meet the heightened pleading standards of  
4 Federal Rule of Civil Procedure 9(b) and the Private Securities  
5 Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4. The  
6 PSLRA requires plaintiffs to "specify each statement alleged to  
7 have been misleading [and] the reason or reasons why the statement  
8 is misleading." 15 U.S.C. § 78u-4(b)(1). Additionally, the  
9 complaint must "state with particularity facts giving rise to a  
10 strong inference that the defendant acted with the required state  
11 of mind." Id. § 78u-4(b)(2). The "required state of mind" for  
12 establishing securities fraud is the knowing, intentional, or  
13 deliberately reckless disclosure of false or misleading statements.  
14 See Daou, 411 F.3d at 1014-15. "The stricter standard for pleading  
15 scienter naturally results in a stricter standard for pleading  
16 falsity, because falsity and scienter in private securities fraud  
17 cases are generally strongly inferred from the same set of facts,  
18 and the two requirements may be combined into a unitary inquiry  
19 under the PSLRA." Id. at 1015 (internal quotation marks omitted).

20  
21 **IV. DISCUSSION**

22 **A. Plaintiffs' Section 10(b) Claim**

23 The Court finds that Plaintiffs' Section 10(b) claim fails  
24 because Plaintiffs have not alleged any actionable statements. As  
25 set forth below, Defendants' July 28 financial forecasts are  
26 protected by the PSLRA safe harbor for forward-looking statements.  
27 Defendants' statements regarding Equinix's pricing strategy and the  
28 Switch and Data integration are not actionable because Plaintiff



1 has failed to plead that the statements were false. Taylor's  
2 statement regarding Equinix's ability to provide accurate financial  
3 guidance constitutes a non-actionable expression of corporate  
4 optimism. The Court also rejects Plaintiffs' argument that  
5 Defendants somehow violated a duty to correct the July 28 guidance.  
6 Additionally, Plaintiffs' theory of fraud is undermined by the fact  
7 that Smith and Taylor held onto their Equinix stock during the  
8 Class Period.

9           1.     Financial Forecasts for 3Q10 and FY10

10           Plaintiffs allege that Defendants knew that Equinix would fail  
11 to meet its July 28 forecasts for 3Q10 and FY10 at the time the  
12 forecasts were made. These forecasts were revised by a few  
13 percentage points on October 5, purportedly because of an  
14 understated churn rate, lower than expected revenues from Switch  
15 and Data assets, and a failure to account for customer discounts  
16 and settlements. The Court finds that these forecasts are not  
17 actionable because they fall under the PSLRA safe harbor for  
18 forward-looking statements.

19           The PSLRA defines a forward-looking statement as "a statement  
20 containing a projection of revenues, income (including income  
21 loss), earnings (including earnings loss) per share, capital  
22 expenditures, dividends, capital structure, or other financial  
23 items." 15 U.S.C. § 78u-5(i)(1). Such statements may fall within  
24 the safe harbor if: (A) they are "identified as forward-looking"  
25 and "accompanied by meaningful cautionary statements identifying  
26 important factors that could cause actual results to differ  
27 materially from those in the forward-looking statement"; or (B) the  
28 plaintiff fails to prove the projections were made with "actual

1 knowledge" that they were false and misleading. Id. § 78u-  
2 5(c)(1)(A)-(B). Thus, a defendant's state of mind is irrelevant if  
3 the challenged statements are identified as forward-looking and  
4 accompanied by meaningful cautionary language. In re Cutera Sec.  
5 Litig., 610 F.3d 1103, 1113 (9th Cir. 2010).

6 To be meaningful, cautionary language "ought to be precise and  
7 relate directly to the forward-looking statements at issue." In re  
8 Copper Mt. Secs. Litig., 311 F. Supp. 2d 857, 882 (N.D. Cal. 2004).  
9 However, "the PSLRA does not require a listing of all factors that  
10 might make the results different from those forecasted." Id.  
11 (emphasis in the original). Nor does "the law . . . require  
12 specification of the particular factor that ultimately renders the  
13 forward-looking statement incorrect."<sup>3</sup> In re Nuvelo, Inc. Secs.  
14 Litig., No. C 07-4056 VRW, 2008 WL 5114325, at \*16 (N.D. Cal. Dec.  
15 4, 2008). Adequate cautionary language is provided "when an  
16 investor has been warned of risks of a significance similar to that  
17 actually realized." Harris v. Ivax Corp., 182 F.3d 799, 807 (11th  
18 Cir. 1999).

19 Plaintiffs do not dispute that the July 28 revenue forecasts  
20 for 3Q10 and FY10 were forward-looking statements. Opp'n at 23.  
21 However, they contend that the forecasts do not qualify for the  
22 PSLRA safe harbor because they were not accompanied by meaningful  
23 cautionary language. Id. This argument lacks merit. Among the  
24 risk factors identified by the July 28 press release were

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25  
26 <sup>3</sup> Indeed, the report that accompanied the PSLRA specified that  
27 "failure to include the particular factor that ultimately causes  
28 the forward-looking statement not to come true will not mean that  
the statement is not protected by the safe harbor." H.R. Conf.  
Rep. 104-369, at 44 (1995), reprinted at 1995 U.S.C.C.A.N. 730,  
743.

1 "unanticipated costs or difficulties relating to the integration of  
2 companies we have acquired"; "competition from existing and new  
3 competitors"; and "the loss or decline in business from our key  
4 customers." RJN Ex. 3.<sup>4</sup> The press release also directed investors  
5 to further discussions of risk factors contained in its recent  
6 quarterly and annual reports filed with the SEC. Id. Likewise, at  
7 the outset of the July 28 investors conference call, listeners were  
8 told that Equinix would be making forward-looking statements, and  
9 were advised that risks could cause actual results to differ from  
10 projections. FAC Ex. C at 2. Again, the company referred  
11 listeners to recent SEC filings for a fuller list of potential  
12 risks and uncertainties. Id. The cited 10-Q contains a sixteen-  
13 page "Risk Factor" section, which discusses, among other things:  
14 the risk of increased churn; the possibility of increased pricing  
15 pressure from competitors; the risk that Equinix would be unable to

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17 <sup>4</sup> In support of their motion to dismiss Defendants filed a Request  
18 for Judicial Notice ("RJN"), attaching seventeen exhibits. ECF No.  
19 31 ("RJN"). Federal Rule of Evidence 201 permits a court to take  
20 judicial notice of a fact "not subject to reasonable dispute in  
21 that it is . . . capable of accurate and ready determination by  
22 resort to sources whose accuracy cannot reasonably be questioned."  
23 When ruling on a 12(b)(6) motion to dismiss a § 10(b) action,  
24 courts must consider the complaint in its entirety, including  
25 "documents incorporated into the complaint by reference, and  
26 matters of which a court may take judicial notice." Tellabs, 551  
27 U.S. at 322. Where a plaintiff fails to attach to the complaint  
28 the documents upon which the complaint is premised, a defendant may  
attach such documents in order to show that they do not support the  
plaintiff's claim. In re Pac. Gateway Exch., Inc., 169 F. Supp. 2d  
1160, 1164 (N.D. Cal. 2001). Additionally, a court may take  
judicial notice of public filings, such as those made with the SEC.  
Dreiling v. Am. Exp. Co., 458 F.3d 942, 946 n. 2 (9th Cir. 2006).  
For the purposes of this Order, the Court takes judicial notice of  
Exhibits 2, 3, 15, and 16 to the RJN.

1 "integrate acquired businesses"; and dependence on key "magnet  
2 customers." RJN Ex. 2 at 43-59.

3 Plaintiffs contend that the cautionary language in Equinix's  
4 press release and SEC filings is insufficient since it "does not  
5 warn or allude to the possibility that the Company would simply  
6 ignore and fail to account for known customer discounts and  
7 settlements that would severely and negatively impact the revenue  
8 forecasts." Opp'n at 23. The Court disagrees. First, Equinix  
9 need not have warned of the exact risk that caused the company to  
10 miss its forecast. Nuvelo, 2008 WL 5114325, at \*16. Second, the  
11 cautionary language in Equinix's SEC filings did warn of the  
12 possibility of pricing pressure and the dependence on magnet  
13 customers, factors which purportedly caused Equinix to offer  
14 discounts and settlements to its customers. The SEC filings also  
15 directly identified other risks that purportedly contributed to the  
16 revision of the revenue forecasts, including understatement of  
17 churn and lower than expected revenues from Switch and Data. Thus,  
18 taken together, Equinix's cautionary language "warned of risks of a  
19 significance similar to those actually realized." Ivax, 182 F.3d  
20 at 807. Third, contrary to Plaintiffs' suggestion, it does not  
21 appear that Equinix's failure to account for customer discounts  
22 "severely" impacted its revenue forecasts, since Equinix's July 28  
23 forecasts were only off by a few percentage points.

24 Even if the July 28 forecasts were not accompanied by  
25 meaningful cautionary language, Plaintiffs do not plead that  
26 Defendants had actual knowledge that their forecasts could not be  
27 achieved at the time they were made. See Cutera, 610 F.3d at 1113.  
28 Plaintiffs argue that Smith must have known that Equinix could not

1 meet its July 28 forecasts because he admitted that he approved and  
2 was aware of the discounts offered to certain strategic customers  
3 during 2Q10 and 3Q10. Opp'n at 18 (citing FAC ¶¶ 36, 70-71, 73).  
4 The argument is unavailing. While Smith may have been aware of  
5 Equinix's customer discounts as early as 2Q10, there is no  
6 indication that he knew that the July 28 forecasts failed to  
7 account for these discounts. Indeed, on October 5, Smith stated  
8 that he only learned of the defects in the forecasting model  
9 "partway through" the third quarter. FAC ¶ 71. The plausibility  
10 of Smith's statement is strengthened by the fact that the July 28  
11 forecasts were only a few percentage points off.

12 Plaintiffs further argue that Smith and Taylor must have known  
13 that there was something wrong with the forecasts since Taylor  
14 stated that management had "exceptional visibility" into Equinix's  
15 financial model. Opp'n at 19. Specifically, Taylor had boasted on  
16 July 28: "This is our thirtieth consecutive quarter of revenue and  
17 adjusted EBITDA growth and strong proof point of the exceptional  
18 visibility we have into this - our financial model and the track  
19 record of strong execution." FAC ¶ 49. The Court finds that  
20 Taylor's statement is too vague to be actionable or support an  
21 inference that Defendants had "actual knowledge" that Equinix could  
22 not achieve its revenue forecasts.

23 Accordingly, the Court finds that the July 28 forecasts fall  
24 under the PSLRA safe harbor because they were identified as  
25 forward-looking statements and accompanied by meaningful cautionary  
26 language. Plaintiffs' allegations regarding the July 28 forecasts  
27 also fail for the independent reason that Plaintiffs have not  
28

1 adequately pled that Defendants had actual knowledge that the  
2 forecasts were incorrect at the time they were made.

3           2.    Equinix's Pricing Strategy

4           Plaintiffs allege that Defendants misled investors about  
5 Equinix's pricing strategy. Specifically, Plaintiffs point to  
6 Defendants' July 28 and September 15 statements that Equinix's  
7 pricing was "firm" and "stable," e.g., "we're maintaining the  
8 discipline on the floors and ceilings we have on our pricing and  
9 the sales force is staying very, very disciplined on price," FAC ¶  
10 51; "pricing is holding firm," id. ¶ 54; "we're not going to trade  
11 price for volume," id. ¶ 65; "pricing is stable, it's firm," id. ¶  
12 66. Plaintiffs allege that these statements were false, pointing  
13 to Smith's October 5 statement that "during the second and third  
14 quarters, there were certain discounts and credit memos issued to a  
15 number of strategic customers." Id. ¶ 70.

16           Plaintiffs' allegations fail because Defendants maintained a  
17 consistent position on pricing throughout the class period. During  
18 the July 28 conference call, Smith conceded: "there are certain  
19 markets where certain pressure - pricing pressure [sic] and pricing  
20 behaviors are going to change." Id. ¶ 51. Smith also stated:  
21 "[I]f it's a strategic customer[,] we might get a little more  
22 aggressive [on pricing]." Id. ¶ 52. Consistent with these  
23 statements, Equinix offered price discounts to a few strategic  
24 customers during the second and third quarters of 2010. Id. ¶ 70.

25           Defendants argue Smith and Taylor's earlier statements  
26 concerning price are too "vague, generalized, and unspecific" to be  
27 actionable. MTD at 21. That may be overstating things. Had  
28 Equinix offered steep discounts to all of its customers while

1 Defendants represented that prices were "firm" and "stable,"  
2 Plaintiffs might have a claim. But that is not the case here.  
3 Equinix allegedly offered discounts to only a few key customers --  
4 a strategy disclosed to investors at the beginning of the class  
5 period -- and there is no indication that pricing varied for the  
6 rest of Equinix's customer base.

7 For these reasons, the Court finds that Plaintiffs have failed  
8 to adequately plead the falsity of Defendants' statements  
9 concerning Equinix's pricing strategy.

10 3. Switch and Data Integration

11 Likewise, Plaintiffs fail to adequately plead the falsity of  
12 Defendants' statements concerning the integration of Switch and  
13 Data. Equinix acquired Switch and Data on April 30, 2010, about  
14 three months prior to the class period. FAC ¶ 8. During the July  
15 28 conference call Smith said of the merger: "the sales  
16 organizations have been completely integrated" and the integrated  
17 sales organization "in North America has been in place for weeks  
18 now." FAC ¶ 50. Plaintiffs argue that these statements were shown  
19 to be false by admissions made by Smith on October 5. Opp'n at 15.  
20 Contrary to Plaintiffs' argument, the October 5 statements do not  
21 constitute an admission that the Switch and Data sales force was  
22 not completely integrated or that the integrated sales force was  
23 not in place as of July 28. Read as a whole, the October 5  
24 statement merely indicates that revenue from Switch and Data assets  
25 was lower than expected and that Equinix "ha[d] work to do" to  
26 improve the performance of these assets. Id. ¶ 70.

27 ///

28 ///

1                   4.     Defendants' Ability to Provide Accurate Forecasts

2             Plaintiffs also target Taylor's September 15 statement that  
3 Defendants "ha[d] a high degree of confidence in [their] ability"  
4 to offer guidance. Id. ¶ 65. Plaintiffs allege that the statement  
5 was materially false, as evidenced by the fact that Smith admitted  
6 that Defendant knew "partway through" the third quarter that the  
7 July 28 forecasts were false. Id. ¶ 71. The Court finds that  
8 Taylor's September 15 statement cannot support a claim for  
9 securities fraud since it constitutes a non-actionable expression  
10 of corporate optimism. See Cutera, 610 F.3d at 1111 ("A mildly  
11 optimistic, subjective assessment hardly amounts to a securities  
12 violation."). Further, Plaintiffs fail to show that the September  
13 15 statement was false. Since the July 28 forecasts were only a  
14 few percentage points off, Defendants may have truthfully  
15 maintained a high degree of confidence in their ability to offer  
16 guidance.

17                   5.     Duty to Update

18             Though it is not clearly set forth in the FAC, Plaintiffs also  
19 argue that Defendants had a duty to correct their July 28 forecasts  
20 and that they violated this duty by waiting until October 5 to  
21 offer new, corrected guidance. Opp'n at 16; FAC ¶ 32. Plaintiffs  
22 once again point to Smith's statement that Defendants learned of  
23 problems with the July 28 guidance "partway through" the quarter  
24 and waited to correct this problem until they had reviewed "the  
25 September flash." Opp'n at 16 (citing FAC ¶¶ 70-71). This  
26 argument fails for a number of reasons.

27             First, the PSLRA does not impose a duty to update forward-  
28 looking statements. 15 USCS § 78u-5(d). Plaintiffs cite two cases



1 from this district referring to a duty to update or correct, In re  
2 LDK Solar Sec. Litig., No. C 07-05182 WHA, 2008 WL 4369987, at \*10  
3 (N.D. Cal. Sep. 24, 2008); Coble v. Broadvision Inc., No. C 01-  
4 01969 CRB, 2002 WL 31093589, at \*7 (N.D. Cal Sep. 11, 2002). Opp'n  
5 at 16. However, neither case specifically addresses the duty to  
6 update in the context of forward-looking statements.

7 Second, even if a duty to update forward-looking statements  
8 exists, it would be unreasonable to apply it in circumstances such  
9 as this, where a forecast varies by only one or two percentage  
10 points. To hold otherwise would place companies in the untenable  
11 position of having to constantly update the public about de minimis  
12 changes in forecasts -- changes which are to be expected as more  
13 current data becomes available.

14 Third, Defendants did provide investors with an updated  
15 forecast on October 5. Plaintiffs argue that this update was  
16 unreasonably delayed, but this conclusion does not follow from the  
17 facts pled. Smith stated that the company waited to review "the  
18 September flash" before notifying the public so as to ensure the  
19 new forecast would be accurate. In light of the circumstances,  
20 that appears to be a reasonable precaution. After all, Defendants  
21 were dealing with inherently uncertain predictions and variances of  
22 only a few percentage points.

23 6. Stock Sales

24 Plaintiffs' allegations of fraud are further undercut by the  
25 fact that the FAC does not explain why Defendants would knowingly  
26 overstate their forecasts by a few percentage points, only to  
27 reveal the truth just ten weeks later. Plaintiffs do not allege  
28 that Smith, Taylor, or anyone else engaged in improper stock sales

1 or otherwise benefited from the alleged scheme to inflate Equinix's  
2 stock price. As Defendants point out, Taylor did not sell a single  
3 Equinix share during the class period and Smith only sold 5,275  
4 shares pursuant to a pre-established Rule 10b5-1 plan. MTD at 23;  
5 RJN Exs. 15, 16.<sup>5</sup> By contrast, Smith disposed of about 34,000  
6 shares in the six months preceding the class period and 53,000  
7 shares in the succeeding six months. RJN Ex. 16. Likewise, Taylor  
8 sold 13,000 shares in the six months prior to the class period, and  
9 roughly 15,000 shares in the six months after the class period.  
10 RJN Ex. 15. In other words, Smith and Taylor held on to Equinix  
11 stock when its price was allegedly inflated and sold when it was  
12 not.

13 While "the absence of a motive allegation is not fatal,"  
14 Tellabs, 551 U.S. at 325, it may significantly undermine a  
15 plaintiff's theory of fraud. In the instant action, Plaintiffs  
16 have not only failed to allege a motive but also an actionable  
17 statement. Ultimately, Plaintiffs' theory of fraud is predicated  
18 on a considerable drop in the price of Equinix stock, presumably  
19 caused by Equinix's failure to meet its July 28 forecasts.  
20 Plaintiffs' Section 10(b) allegations amount to little more than  
21

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22 <sup>5</sup> Plaintiffs object to RJN Exhibits 15 and 16, SEC Form 4's  
23 describing Smith and Taylor's stock sales, on the grounds that they  
24 are not referred to or relied upon by the FAC. ECF No. 33 ("RJN  
25 Opp'n"). Plaintiffs' objections are OVERRULED. A court may  
26 consider materials, even if they are not referenced in the  
27 pleading, so long as they meet the requirements for judicial notice  
28 set forth in Federal Rule of Evidence 201. Rosenbaum Cap. LLC v.  
McNulty, 549 F. Supp. 2d 1185, 1189 (N.D. Cal. 2008). Plaintiffs  
do not dispute that Smith and Taylor's Form 4's are "not subject to  
reasonable dispute" and "capable of accurate and ready  
determination by resort to sources whose accuracy cannot reasonably  
be questioned." Fed. R. Ev. 201. Accordingly, the Court takes  
judicial notice of them.

1 fraud by hindsight. Accordingly, Plaintiffs' Section 10(b) claim  
2 is DISMISSED.

3 **B. Plaintiffs' Section 20(a) Claim**

4 Absent an underlying violation of the Exchange Act, there can  
5 be no control person liability under Section 20(a). Paracor Fin.,  
6 Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1161 (9th Cir.  
7 1996). Because Plaintiffs have not pled a violation of Section  
8 10(b), their control person claim is also DISMISSED. See Shurkin  
9 v. Golden State Vinters, Inc., 471 F. Supp. 2d 998, 1027 (N.D. Cal.  
10 2006), aff'd 303 Fed. Appx. 431 (9th Cir. 2008).

11  
12 **V. CONCLUSION**

13 For the foregoing reasons, the Court GRANTS Defendants  
14 Equinix, Inc., Stephen M. Smith, and Keith Taylor's Motion to  
15 Dismiss. Plaintiffs Cement Masons & Plasterers Joint Pension Trust  
16 and the International Brotherhood of Electrical Workers Local 697  
17 Pension Fund's First Amended Complaint is DISMISSED WITH LEAVE TO  
18 AMEND. Plaintiffs may file an amended complaint within thirty (30)  
19 days of this Order. Failure to do so will result in dismissal of  
20 this action with prejudice.

21  
22 IT IS SO ORDERED.

23  
24 Dated: March 2, 2012



25 UNITED STATES DISTRICT JUDGE  
26  
27  
28