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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CURTIS WESTLEY, *et al.*,
Plaintiffs,
v.
OCLARO, INC., *et al.*,
Defendants.

No. C-11-2448 EMC

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS SECOND
AMENDED COMPLAINT
(Docket No. 63)**

Plaintiffs have filed a class action against Oclaro, Inc. and two of its officers, Alain Couder and Jerry Turin, for violations of the federal securities laws. In essence, Plaintiffs charge Defendants with making false and misleading statements about Oclaro’s customer demand and how Oclaro could be expected to fare for the first quarter of 2011 (“1Q11”) and for the calendar year. See SAC ¶ 1. Currently pending before the Court is Defendants’ motion to dismiss Plaintiffs’ second amended complaint (“SAC”). Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **GRANTS** the motion to dismiss.

I. FACTUAL & PROCEDURAL BACKGROUND

In their SAC, Plaintiffs allege as follows.

Oclaro is a company that manufactures and distributes core optical network components and subsystems to global telecom equipment manufacturers. See SAC at 1 n.1; see also SAC ¶ 20. During the class period, Mr. Couder was Oclaro’s CEO and a member of the board of directors. See SAC ¶ 21. During the class period, Mr. Turin was Oclaro’s CFO. See SAC ¶ 22. The putative class

1 consists of persons who purchased or otherwise acquired Oclaro common stock between May 6 and
2 October 28, 2010. *See* SAC ¶ 1.

3 According to Plaintiffs, from May to August 2010, Defendants made false statements that,
4 *e.g.*, (1) current customer demand for Oclaro’s products was strong and that (2) revenues and
5 earnings for 1Q11 would increase. *See* SAC ¶ 1.

6 A. False Statements

7 1. May 2010

8 On May 6, 2010, Oclaro filed a Form 424(b)(5) Prospectus Supplement with the SEC for a
9 secondary offering of 6.9 million shares of common stock to the public. *See* SAC ¶¶ 2, 4, 40. In the
10 SEC filing, Oclaro stated that: (1) “We are currently seeing a return of customer demand which had
11 decreased as a result of economic conditions in the preceding 18 to 24 months”; and (2) “customer
12 demand has recently increased in our markets.” SAC ¶ 40.

13 Plaintiffs allege that the above statements were false because, in fact, Oclaro “had
14 experienced a material decline in customer order trends in [April 2010].” SAC ¶ 45. Plaintiffs
15 claim that, as a result of the April 2010 decline, Oclaro’s book-to-bill ratio declined from 1.35 (in
16 March 2010) to just over 1 (in June 2010). *See* SAC ¶¶ 6-7. A book-to-bill ratio is the ratio of
17 orders taken (booked) to products shipped and bills sent (billed). It is used as a tool in determining
18 whether demand for a product is rising or falling. “A ratio of above 1 implies that more orders were
19 received than filled, indicating strong demand, while a ratio below 1 implies weaker demand.”
20 SAC at 3 n.4.

21 2. June 2010

22 In June 2010, Mr. Turin made statements at a conference (the RBC conference), indicating
23 that (1) Oclaro was experiencing a surge in customer demand and that (2) customer demand was true
24 customer demand – *i.e.*, not just a reflection of customers building up their inventories – which
25 Oclaro knew because (a) it was close to its customers and therefore had visibility into what their

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1 needs were¹ and (b) the book-to-bill ratio did not stay at the level of 1.35 (from March 2010).² See
2 SAC ¶¶ 8, 47-48.

3 According to Plaintiffs, these statements were false because, as noted above, there had
4 actually been a decline in customer demand in April 2010. See SAC ¶ 49. Plaintiffs also claim that
5 the statement about Oclaro’s visibility into its customers needs was false because a confidential
6 witness – a former Oclaro vice president of sales – confirmed that “purported close customer
7 relationships could not be converted in any way into confidence in the strength of firmness of
8 customer orders.” SAC ¶¶ 13; see also SAC ¶¶ 32, 49, 76. According to the confidential witness,
9 “Oclaro’s customers were often reluctant to provide detailed information about their own needs to
10 that suppliers like Oclaro would not dedicate manufacturing capacity to other customer’s needs,”
11 and “these nuances are known to those who are experienced in the industry” as well as to Mr. Turin
12 and Mr. Couder specifically. SAC ¶ 76(c). Thus, at best, Defendants “only had good visibility or a
13 ‘good grip’ into customer demand for about two weeks forward” but, “beyond a couple [of] weeks,
14 . . . visibility into what customers might do with orders scheduled for even 30 days out was ‘a reach’
15 and beyond that was ‘a crap shoot.’” SAC ¶ 76(d).

16 3. July and August 2010

17 On July 29, 2010, Oclaro issued a press release announcing its 4Q10 and FY10 financial
18 results. See SAC ¶ 52. In the same press release, Oclaro reported “accelerated and increasing
19 financial forecasts,” in particular, for 1Q11.³ SAC ¶ 52. For example, for 1Q11, revenues were
20 expected to be in the range of \$120 to \$126 million, and non-GAAP gross margins in the range of 31
21 to 33%. See SAC ¶ 53.

22 ¹ Mr. Turin stated: “[W]e’re pretty close to our customers and pretty close to what they’re
23 doing from a forecast and volume point of view.” SAC ¶ 48.

24 ² Mr. Turin suggested that, if the book-to-bill ratio had stayed high “for a couple of quarters,
25 then you might be building up something in the system” – *i.e.*, the customers might be building up
their inventories. SAC ¶ 48.

26 Mr. Turin and Mr. Couder also suggested that the customer demand was actually based on
27 true end user need “in part because of the short lead times associated with customer demand
requirements.” SAC ¶ 34 (quoting a statement by Mr. Turin that “‘I don’t think ultra short lead
times are consistent with an inventory rebuild’”).

28 ³ 1Q11 would end on October 2, 2010. See SAC ¶ 53.

1 On July 29, 2010, Oclaro also held a conference call to discuss the 4Q10 and FY10 financial
2 results. During the call, Mr. Turin made statements about Oclaro’s current strong customer demand.
3 See SAC ¶ 54. He also made statements about how Oclaro was expected to perform in 1Q11,
4 consistent with the press release described above, and even beyond. See SAC ¶¶ 56-57. Similar to
5 above, Mr. Turin attributed the customer demand to true customer demand and not inventory
6 buildup by customers. See SAC ¶ 58.

7 Finally, during the July 29, 2010, conference call, Mr. Turin suggested that Oclaro would
8 meet its 1Q11 forecast because, as of that date, “85% to 90% of orders needed to meet [the] 1Q11
9 outlook were already secured,” with these “order figures represent[ing] end user demand, rather than
10 customers stocking up on inventory.” SAC ¶ 11; see also SAC ¶¶ 58-59. Mr. Turin declined to
11 answer analyst questions about whether the absolute level of orders had declined.⁴ See SAC ¶ 59.
12 Plaintiffs suggest that this was because Mr. Turin knew that orders had declined, not increased, from
13 the quarter ending March 2010. See SAC ¶ 76(e). Plaintiffs indicate that Mr. Turin was aware of
14 the decline because he got weekly bookings reports and “thus [was] aware of order flows on a
15 weekly basis.” SAC ¶ 45.

16 Shortly thereafter, on August 11, 2010, Mr. Turin made comments during a conference (the
17 Morgan Keegan conference), during which he reiterated that (1) Oclaro had 90% coverage for 1Q11
18 and (2) customer demand was strong for all Oclaro products. See SAC ¶ 73. When Mr. Turin was
19 questioned about his claim of 90% coverage, he indicated that he was confident about the number
20 because Oclaro had only a few large customers and had close relationships with those customers.
21 See SAC ¶¶ 74-75. This visibility “virtually removed the risk of inventory build up and order
22 cancellations.” SAC ¶ 74. Mr. Turin also indicated that Oclaro’s customers had ““push[ed] most of
23 the inventory risk back on us There’s not a lot of room in their food chains to build up
24 inventory.”” SAC ¶ 75.

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28 ⁴ In third-party reports, analysts repeated the statements that had been made during the conference call. See SAC ¶¶ 71-72.

1 Plaintiffs maintain that the above statements were false because, as noted above, a
2 confidential witness – a former Oclaro vice president of sales – has reported that Oclaro does not in
3 fact have visibility into customer needs. *See generally* SAC ¶ 76.

4 B. Disclosures of Truth

5 As alleged in the SAC, the truth was partially disclosed on July 29, 2010, and subsequently
6 on October 28, 2010.

7 Plaintiffs allege that there was a partial disclosure on July 29, 2010, because, during the
8 conference call on that day, Mr. Turin admitted that there was “a little bit of a slowdown in early
9 April [2010] as people digested the huge order flow in March.” SAC ¶ 59. Plaintiffs allege that,
10 although there was a decrease in Oclaro’s stock price as a result of this disclosure in July, *see, e.g.*,
11 SAC ¶¶ 66-67; SAC at 26 n.7 (pointing to analyst reports suggesting a link between the decrease in
12 the book-to-bill ratio to the decline in stock price), the stock price remained artificially inflated
13 because of Defendants’ “continued misleading statements concerning increasingly strong customer
14 demand, claims of significant visibility into customer needs, and [claims] that the Company already
15 had 85% to 90% of the order coverage . . . needed to meet its increased 2Q11 forecasts.” SAC ¶ 70.

16 According to Plaintiffs, the final disclosure took place on October 28, 2010, when Oclaro
17 issued a press release in which it reported, *inter alia*, its 1Q11 financial results (ending October 2,
18 2010). *See* SAC ¶ 82. Previously, Oclaro had predicted – for 1Q11 – revenues in the range of \$120
19 to \$126 million and non-GAAP gross margins in the range of 31 to 33%. *See* SAC ¶ 53. As it
20 turned out, Oclaro’s revenues were on the low end of the range for 1Q11 (\$121 million) and it
21 missed its gross margins (29%). *See* SAC ¶ 82. Apparently, these results were due to a decrease in
22 customer demand, with customer cancellations beginning in at least the second week of September
23 2010. *See* SAC ¶¶ 82(d), 84, 87-88. During a conference call on October 28, 2010, Mr. Couder
24 admitted to customer cancellations in September 2010 (inventory corrections) and to limited
25 visibility into customer needs. *See* SAC ¶ 84.

26 C. Claims

27 Based on, *inter alia*, the above allegations, Plaintiffs have asserted two federal securities
28 claims against Oclaro and its executives Mr. Couder and Mr. Turin:

- 1 (1) Violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5.
2 (2) Violation of § 20(a) of the Act.

3 In the pending motion to dismiss, Defendants seek dismissal of both claims.

4 **II. DISCUSSION**

5 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss based on the
6 failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). A motion to
7 dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the claims alleged. *See Parks*
8 *Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). In considering such a motion, a court
9 must take all allegations of material fact as true and construe them in the light most favorable to the
10 nonmoving party, although “conclusory allegations of law and unwarranted inferences are
11 insufficient to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
12 2009). While “a complaint need not contain detailed factual allegations . . . it must plead ‘enough
13 facts to state a claim to relief that is plausible on its face.’” *Id.* “A claim has facial plausibility when
14 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
15 defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *see*
16 *also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007). “The plausibility standard is not akin to
17 a ‘probability requirement,’ but it asks for more than sheer possibility that a defendant acted
18 unlawfully.” *Iqbal*, 129 S. Ct. at 1949.

19 In ruling on a motion to dismiss, a court may consider not only the complaint itself but also
20 documents incorporated into the complaint by reference and matters of which a court may take
21 judicial notice. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). In
22 the instant case, Defendants have filed a request for judicial notice. Plaintiffs have made a partial
23 objection to the request. Where it is necessary for the Court to make a ruling, it has so indicated in
24 this order. In essence, the Court may take judicial notice of everything except for the
25 presentations/handouts given at conferences. (This would not include the July 2010 conference call
26 headed up by Oclaro itself.)

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1 B. Elements of § 10(b)/10b-5 Claim

2 As noted above, Plaintiffs have asserted two claims against Defendants: (1) a § 10(b)/10b-5
3 claim and (2) a § 20(a) claim. Section 10(b) and Rule 10b-5 essentially impose liability for
4 securities fraud. There are five elements that must be proven to establish a violation of Rule 10b-5.
5 More specifically, a plaintiff must show ““(1) a material misrepresentation or omission of fact, (2)
6 scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation,
7 and (5) economic loss.” *Id.* at 990. As for § 20(a), it essentially provides for derivative liability;
8 that is, it “makes certain ‘controlling’ individuals also liable for violations of section 10(b) and its
9 underlying regulations.” *Id.*

10 Because Plaintiffs have brought securities fraud claims, Rule 12(b)(6) is not the only
11 governing legal standard; so too are Rule 9(b) and the Private Securities Litigation Reform Act
12 (“PSLRA”). Rule 9(b) provides that, “[i]n alleging fraud or mistake, a party must state with
13 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). As for the
14 PSLRA, it requires that a plaintiff alleging securities fraud

15 “plead with particularity both falsity and scienter.” Thus, to properly
16 allege falsity, a securities fraud complaint must now “specify each
17 statement alleged to have been misleading, the reason or reasons why
18 the statement is misleading, and, if an allegation regarding the
19 statement or omission is made on information and belief, . . . state with
20 particularity all facts on which that belief is formed.” To adequately
21 plead scienter, the complaint must now “state with particularity facts
22 giving rise to a *strong inference* that the defendant acted with the
23 required state of mind.”

20 *Zucco*, 552 F.3d at 990-91 (emphasis added).

21 In the instant case, Defendants challenge Plaintiffs’ securities fraud claims on the ground that
22 Plaintiffs have failed to adequately plead both falsity and scienter. Defendants also argue that
23 Plaintiffs have inadequately pled loss causation.

24 B. Falsity

25 1. May and June 2010 Statements

26 Plaintiffs assert that Defendants made false and misleading statements in May and June 2010
27 by referring to strong current customer demand when, in fact, just in April 2010, Oclaro had
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1 experienced a slowdown in such demand. Previously, the Court held that there were insufficient
2 allegations that the slowdown was material:

3 As the complaint currently stands, there is essentially no indication
4 that the slowdown was significant or material. For example, the
5 slowdown was only for “a little bit.” FAC ¶ 58. Furthermore, it
6 appears that there was a slowdown only from “the huge order flow
7 [that Oclaro had] in March.” FAC ¶ 58. There is nothing to indicate
8 that the slowdown meant that Oclaro’s order levels had, *e.g.*, dropped
9 below normal or was instead a drop relative to an unusually strong
10 March. This is particularly true since it appears that the performance
11 for the entire quarter met expectation.

12 Docket No. 58 (Order at 3).

13 In their papers, Defendants argue that Plaintiffs have still failed to establish that the April
14 2010 slowdown was material. Defendants emphasize that the huge customer demand in March was
15 the anomaly and suggest that the April slowdown was just part of a trend back to more normal or
16 rational numbers by June. *See* Mot. at 5. Moreover, there is no dispute that Oclaro had a strong
17 quarter, exceeding its guidance. *See* Mot. at 6.

18 Defendants’ argument is not without force. While this is a close question, the Court
19 concludes that given the inferences that must be drawn in Plaintiffs’ favor and the applicable
20 standard of materiality, a dismissal under Rule 12(b)(6) is not warranted. “For purposes of securities
21 fraud, ‘materiality depends on the significance the reasonable investor would place on the withheld
22 or misrepresented information.’ A statement is material if ‘a reasonable investor would have
23 considered it useful or significant.’” *United States v. Jenkins*, 633 F.3d 788, 802 (9th Cir. 2011).
24 Even if March was the anomaly, that does not necessarily mean that a reasonable investor would
25 deem a subsequent decline – even if to more regular levels – unimportant. As a point of comparison,
26 in *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009), *aff’d* 131 S. Ct. 1309
27 (2011), the Ninth Circuit disagreed with the district court’s conclusion that the plaintiffs had failed
28 to adequately allege materiality because the number of complaints of which the defendants were
29 aware was not statistically significant. The court emphasized: “In relying on the statistical
30 significance standard to determine materiality, the district court made a decision that should have
31 been left to the trier of fact.” *Id.* at 1179. “Questions of materiality . . . involv[e] assessments
32 peculiarly within the province of the trier of fact. Thus, the ultimate issue of materiality [is]

1 appropriately resolved as a matter of law only where the omissions are so *obviously* important to an
2 investor, that reasonable minds cannot differ on the question of materiality.” *Id.* at 1178 (emphasis
3 added; internal quotation marks omitted); *see also Matrixx*, 131 S. Ct. at 1318-19 (rejecting “a
4 bright-line rule that reports of adverse event associated with a pharmaceutical company’s products
5 cannot be material absent a sufficient number of such reports to establish a statistically significant
6 risk that the product is in fact causing the events”).

7 That a reasonable investor might deem the decline in the instant case important is supported
8 by allegations in Plaintiffs’ complaint – in particular, allegations that (1) the April 2010 downturn
9 was responsible for the decline in the book-to-bill ratio from 1.35 in March 2010 to just over 1 in
10 June 2010, *see* SAC ¶ 63, and that (2) the July 2010 disclosure of the decline in the book-to-bill ratio
11 led to an immediate decline in the stock price. *See* SAC ¶ 65; *No. 84 Employer-Teamster Joint*
12 *Council Pension Trust Fund v. America West Holding Corp.*, 320 F.3d 920, 935 (9th Cir. 2003)
13 (noting that even if slightly delayed decline in stock price after a disclosure supports a finding of
14 materiality). The fact that several securities analysts posited the stock price drop was due, at least in
15 part, to the decline in the book-to-bill ratio also supports a finding of materiality. *See* SAC ¶ 66
16 (noting that the Bloomberg report stated: “Some investors may be disappointed in the deceleration in
17 [Oclaro] book-to-bill”); SAC ¶ 67 (noting that the Auriga report stated: “[T]his deceleration may
18 disappoint certain class of investors”; although adding that “the steady growth prospects should be
19 seen as a positive by longer-term shareholders”); SAC at 26 n.7 (noting that Stifel report noted: “The
20 undue weakness in the stock and sector was likely due to investors interpreting a sharp fall in the
21 book-to-bill . . . as a sign that the optical cycle was ending and the industry would return to a trend
22 of declining profitability as supply exceeds demand after several quarters of the industry being
23 supply constrained”).

24 In their papers, Defendants argue that there were other reasons for the decline in the stock
25 price, *see, e.g.*, Reply at 4, 14-15, but this is really a loss causation argument rather than one of
26 materiality. As noted above, Defendants also suggest that the April 2010 slowdown was not
27 material because Oclaro actually exceeded its guidance for the quarter that covered the May and
28 June 2010 statements. *See* Mot. at 6. While this is certainly a significant fact that favors

1 Defendants, it does not establish as a matter of law that the April 2010 decline was not material. As
2 Plaintiffs point out, in *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011), the Second
3 Circuit found the lower court’s materiality analysis problematic precisely because it

4 place[d] too much emphasis on . . . the fact that a loss in one portfolio
5 company might be offset by a gain in another portfolio company. [The
6 defendant] is not permitted, in assessing materiality, to aggregate
7 negative and positive effects on its performance fees in order to avoid
8 disclosure of a particular material negative event. *Cf.* SAB No. 99,
9 Fed. Reg. at 45,153 (noting in the context of aggregating and netting
10 multiple misstatements that “[r]egistrants and their auditors first
11 should consider whether each misstatement is material, irrespective of
12 its effect when combined with other misstatements”). Were we to
13 hold otherwise, we would effectively sanction misstatements in a
14 registration statement or prospectus related to particular portfolio
15 companies so long as the net effect on the revenues of a public private
16 equity firm like [the defendant] was immaterial.

17 *Id.* at 719. Furthermore, in *Fecht v. Price Co.*, 70 F.3d 107 (9th Cir. 1995), the Ninth Circuit
18 implicitly rejected the lower court’s reasoning that, as a matter of law, “the defendants’ failure to
19 disclose the losses sustained by the warehouses opened in the expansion program was not a material
20 omission because it is the profitability of the Company as a whole, not any one particular aspect of
21 the Company’s operations, that is significant.” *Id.* at 1080 (emphasis omitted).

22 For the reasons stated above, the Court holds that Plaintiffs have alleged enough facts which,
23 while not very compelling, suffice to support a finding of materiality for purposes of Rule 12(b)(6)
24 where all reasonable inferences are drawn in Plaintiffs’ favor. To the extent Plaintiffs claim that
25 there were statements in June 2010 about good customer visibility which were false, that is, in
26 essence, addressed in the next section below.

27 2. July and August Statements

28 For the July and August statements, Plaintiffs seem to arguing falsity with respect to
statements that Oclaro already had 85-90% order coverage for 1Q11; statements that orders
represented true end-user demand and not an inventory buildup; and statements that Defendants had
“a great deal of visibility” into what their customer needs are. SAC ¶ 76(a). Plaintiffs also argue
that forecasts about 1Q11 and beyond were false and misleading in that they were premised on
purported visibility into customer demand and purported order coverage of 85-90%. These
statements are all related. In other words, Plaintiffs seem to be taking the position that: (1)

1 statements about 85-90% coverage were false and misleading because Defendants did not
2 adequately disclose the risk that these orders could be cancelled and in fact suggested that the orders
3 were firm by touting good customer visibility; and (2) statements about true end-user demand were
4 false and misleading because Defendants did not actually know this to be the case because they
5 lacked good customer visibility although they claimed to the contrary. Thus, this claim of falsity
6 turns on Defendants' claims of good customer visibility. According to Plaintiffs, Defendants lacked
7 good customer visibility; in support of this allegation, Plaintiffs rely on a confidential witness known
8 as FE1.

9 As pled in the complaint, "FE1 is a former Oclaro Senior Vice President of Sales who
10 worked at the Company between 2007 and 2011. FE1 was responsible for sales of all Oclaro's
11 products" SAC ¶ 76(b). According to FE1, "Oclaro's customers were often reluctant to
12 provide detailed information about their own needs so that suppliers like Oclaro would not dedicate
13 manufacturing capacity to other customer's needs." SAC ¶ 76(c). Furthermore, according to FE1,
14 even though Mr. Turin "regularly met with top executives at Oclaro's key customer accounts," and
15 even though there were "good relationships with customers," Defendants "only had good visibility
16 or a 'good grip' into customer demand for about two weeks forward"; "the Company was not likely
17 to receive cancellations of orders scheduled to be delivered less than a couple weeks out." SAC ¶
18 76(d). "[B]eyond a couple [of] weeks, . . . visibility into what customers might do with orders
19 scheduled for even 30 days out was 'a reach' and beyond that was 'a crap shoot.'" SAC ¶ 76(d).

20 Defendants challenge Plaintiffs' reliance on FE1 in three way. First, they argue that FE1's
21 statements lack foundation. Second, they argue that the statements are lacking in factual
22 particularity. Finally, they argue that FE1's explanation of Oclaro's visibility into customer demand
23 is consistent with Defendants' contemporaneous statements about customer visibility.

24 As to the first argument, Defendants fail in any substantive way to establish why FE's
25 statements are lacking in foundation. In fact, Ninth Circuit case law indicates that a court's concern
26 with respect to a confidential witness is whether he or she is "described with sufficient particularity
27 to establish [his or her] reliability and personal knowledge" – *i.e.*, "with sufficient particularity to
28 support the probability that a person in the position occupied by the source would possess the

1 information alleged.” *Zucco*, 552 F.3d at 995 (discussing confidential witnesses whose statements
2 were introduced to establish scienter, as opposed to falsity). Given that FE1 was a former senior
3 vice president responsible for all sales of Oclaro, it is a fair inference that he or she has knowledge
4 about what visibility Oclaro had into customers’ needs.

5 As for the second argument, Defendants seem to contend that FE1’s statements are lacking in
6 particularity because he or she fails to allege any specific information regarding customer orders
7 and/or cancellations. *See* Mot. at 8; Reply at 6. This argument is not particularly persuasive
8 because it is not clear why FE1 would have to point to specific customers orders and/or
9 cancellations simply to establish the falsity of a claim that Defendants had good customer visibility.

10 Finally, with respect to the third argument, it is hard to say, as a matter of law, that
11 Defendants’ public statements about customer visibility are entirely consistent with FE1’s
12 statements. As alleged in the complaint, Mr. Turin stated the following at the Morgan Keegan
13 conference in August 2010:

14 “[W]e’re very close to our customers. The customer base we support
15 are the major telecomm equipment companies and that’s a close
16 relationship. If I had 500 customers of the same size and you couldn’t
17 drill down to the different areas within the business, you would have
18 less visibility. *But we have a great deal of visibility with these guys.*
19 We’ve not seen order cancellations. When we come to a quarter and
20 there are orders that are unfulfilled, those tend to roll into the next
21 quarter.”

22 FAC ¶ 75 (emphasis added). There were no real qualifications about customer visibility – *e.g.*, that
23 visibility was only short-term at best, as FE1 contends.

24 Admittedly, Defendants did make other public statements about customer orders. For
25 example, in an SEC filing, Oclaro stated:

26 Some customers provide us with their expected forecasts for our
27 products several months in advance, but many of these customers may
28 decrease, cancel or delay purchase orders already in place, and the
impact of any such actions may be intensified given our dependence
on a small number of large customers. If any of our major customers
decrease, stop or delay purchasing our products for any reason, our
business and results of operations would be harmed. Cancellation or
delays of such orders may cause us to fail to achieve our short-term
and long-term financial and operating goals and result in excess and
obsolete inventory.

1 Skola Decl., Ex. 5, at 40 (10Q). These statements go more toward the issue of whether Defendants
2 are immune from liability based on the safe harbor provision of the PSLRA or the bespeaks caution
3 doctrine discussed below. To the extent Defendants rely on Mr. Couder’s statement, in the July
4 2010 conference call that “our customers have a very short visibility into carrier orders [a]nd,
5 therefore, we get very short-term orders,” Skola Decl., Ex. 3, at 9, that statement is more along the
6 lines of what FE1 asserts. However, short-term orders do not necessarily preclude visibility into
7 customer needs on a longer-term basis. Even if there were only short-term orders, that does not
8 mean customers could not still give guidance to Defendants about what their needs would be on a
9 longer-term basis. Thus, again, it is hard to say, as a matter of law, that this statement is consistent
10 with what FE1 contends.

11 The Court thus concludes that Plaintiffs have adequately alleged falsity with respect to the
12 July and August 2010 statements as well. The Court notes, however, that, while a reasonable jury
13 could find falsity based on the allegations in the SAC, a reasonable jury could also decline to find
14 such. The general nature of the allegedly false statements makes this a less than compelling case.
15 Moreover, a reasonable jury could find that statements about 85-90% coverage were not misleading
16 because the fact of such coverage at the time was true. A reasonable jury could also find that
17 statements about Oclaro’s having “a great deal of visibility with [customers],” SAC ¶ 75, were not
18 misleading in that Defendants did have close relationships with its customers (as FE1 essentially
19 admits, *see* SAC ¶ 76(d)), Defendants did have visibility into customer needs for at least a few
20 weeks out, and there had not been a history of order cancellations. The Court only rules that when
21 viewed in Plaintiffs’ favor, the allegations that Defendants’ statements were misleading are
22 sufficient to survive a Rule 12(b)(6) motion.

23 C. Safe Harbor/Bepeaks Caution

24 Defendants argue that, even if there is enough in the SAC to establish falsity, the safe harbor
25 provision of the PSLRA and/or the bespeaks caution doctrine immunize them from liability.

26 Under the PSLRA’s safe harbor provision:

27 a person . . . shall not be liable with respect to any forward-looking
28 statement, whether written or oral, if and to the extent that –

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(A) the forward-looking statement is –
(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement

15 U.S.C. § 78u-5(c)(1). Because the bespeaks caution doctrine provides for immunity in essentially the same circumstances as does the safe harbor provision, *see Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 948 (9th Cir. 2005) (noting that the PSLRA safe harbor provision codifies the bespeaks caution doctrine for forward-looking statements); *Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004) (noting that “[t]he PSLRA created a statutory version of [the bespeaks caution] doctrine by providing a safe harbor for forward-looking statements identified as such, which are accompanied by meaningful cautionary statements”), the Court addresses the two protections simultaneously and without differentiation. *See, e.g., In re Copper Mt. Secs. Litig.*, 311 F. Supp. 2d 857, 876 (N.D. Cal. 2004) (stating that “it is appropriate to consider the two protections simultaneously”).

1. May and June 2010 Statements

As noted above, Plaintiffs claim that the comments in May and June 2010 about strong current demand were materially false or misleading because of the April 2010 slowdown. Defendants admit that the safe harbor provision and the bespeaks caution doctrine apply to forward-looking statements only, and here Plaintiffs are challenging as false or misleading statements about strong *current* customer demand. *See Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 990 (9th Cir. 2008) (noting that “descriptions of the present aren’t forward-looking”). Defendants argue that, nevertheless, the safe harbor provision and bespeaks caution doctrine are applicable because, even though the statements may be about current or present demand, that demand is being used to make predictions about the future, and, under 15 U.S.C. § 78u-5(i)(1)(D), not only are predictions about the future protected but also “any statement of the assumptions underlying or relating [thereto].” 15 U.S.C. § 78u-5(i)(1)(D).

Defendants do have case authority to support their position, namely, *Hockey v. Medhekar*, No. C-96-0815 (MHP), 1997 WL 203704 (N.D. Cal. Apr. 15, 1997) (Patel, J.), and *In re Metawave*

1 *Communications Corp. Securities Litigation*, 298 F. Supp. 2d 1056 (W.D. Wash. 2003). In *Hockey*,
2 a company’s predictions of increasing earnings were based on past or present facts, including robust
3 product demand. According to Judge Patel, statements about these past or present facts were
4 covered by the safe harbor provision because they were “‘assumptions underlying or relating to’
5 statements of future economic performance.” *Id.* at *5. Similarly, in *In re Metawave*
6 *Communications Corp. Securities Litigation*, 298 F. Supp. 2d 1056 (W.D. Wash. 2003), the
7 company projected favorable results in the future based on existing demand. According to the court,
8 the statements about existing demand “are forward-looking statements because they are
9 ‘assumptions underlying or relating to’ a financial projection or future economic performance.” *Id.*
10 at 1085.

11 While *Hockey* and *Metawave* support Defendants’ position, they are in this Court’s view
12 problematic. Most notably, neither case explains how a past or present *fact* can be deemed an
13 “assumption.” Only assumptions underlying a prediction about the future are protected by the safe
14 harbor provision. *See Harris v. Ivax Corp.*, 182 F.3d 799, 806 (11th Cir. 1999) (noting that
15 “[o]bserved facts [about, *e.g.*, depressed customer orders] are not ‘assumptions,’ and they are not
16 any kind of prediction, either, that would put them within the definition of a forward looking
17 statement”).

18 Moreover, there are a number of cases which expressly hold that statements about past or
19 present demand are not covered by the safe harbor provision. For example, in *Makor Issues &*
20 *Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702 (7th Cir. 2008), the Seventh Circuit noted that, when the
21 company

22 told the world that sales of its [product] were “still going strong,” it
23 was saying both that current sales were strong and that they would
24 continue to be so, at least for a time, since the statement would be
25 misleading if [the company] knew that its sales were about to collapse.
The element of prediction in saying that sales are “still going strong”
does not entitle [the company] to a safe harbor with regard to the
statement’s representation concerning current sales.

26 *Id.* at 705; *see also Sgalambo v McKenzie*, 739 F. Supp. 2d 453, 478 (S.D.N.Y. 2010) (noting that
27 “[m]any of the alleged misstatements are not forward-looking because they either state a present or
28 historical fact alone or incorporate forward-looking aspects into statements of present or historical

1 fact” – *e.g.*, “[s]tatements reporting test results from the wells and predicting future well
2 performance based on those results”); *Backe v Novatel Wireless, Inc.*, 607 F. Supp. 2d 1145, 1160
3 (S.D. Cal. 2009) (noting that “[p]laintiff alleges statements other than forward-looking statements
4 that were false and misleading, such as financial results and statements concerning present product
5 demand”).

6 The Court finds these cases persuasive. The fact remains that a statement about a past or
7 current fact can demonstrably be proven false. That is what distinguishes such facts from forward-
8 looking predictions. The Court rejects Defendants’ contention that the safe harbor provision or the
9 bespeaks caution doctrine protects them from liability.

10 2. July and August 2010 Statements

11 As above, Defendants argue that, even if they made any false or misleading statements in
12 July and August 2010, those statements are protected by the safe harbor provision in the PSLRA or
13 the bespeaks caution doctrine.

14 Similar to above, Plaintiffs contend that statements about current or present demand are not
15 covered by either the safe harbor provision or the bespeaks caution doctrine as they are not forward
16 looking. As to the forecast for 1Q11 and beyond, Plaintiffs do not dispute that they are, in essence,
17 forward looking, thus putting the safe harbor provision and bespeaks caution doctrine into play.
18 Plaintiffs argue, however, that any purported warnings were inadequate – at the very least, the Court
19 cannot rule on their adequacy as a matter of law.

20 As a general matter, “boilerplate language warning that investments are risky or general
21 language not pointing to specific risks is insufficient to constitute a meaningful cautionary warning.
22 The cautionary warning ought to be precise and relate directly to the forward-looking statements at
23 issue.” *In re Copper Mt. Secs. Litig.*, 311 F. Supp. 2d 857, 882 (N.D. Cal. 2004); *see also*
24 *Institutional Investors Group v. Avaya, Inc.*, 564 F.3d 242, 256 (3d Cir. 2009) (stating that, “[t]o
25 suffice, the cautionary statements must be substantive and tailored to the specific future projections,
26 estimates or opinions in the prospectus which the plaintiffs challenge”); *Harris*, 182 F.3d at 807
27 (stating that, “when an investor has been warned of risks of a significance similar to that actually
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1 realized, she is sufficiently on notice of the danger of the investment to make an intelligent decision
2 about it according to her own preferences for risk and reward”).

3 The statements at issue in July and August 2010 can be broken down into three groups: (1)
4 statements made in Oclaro’s press release of July 29, 2010; (2) statements made during Oclaro’s
5 conference call with analysts and investors, also on July 29, 2010; and (3) statements made during
6 the Morgan Keegan conference in August 2010.

7 a. July 29, 2010 Press Release

8 A copy of the July 29, 2010, press release can be found in Oclaro’s 8K filed on July 29,
9 2010. *See* Skola Decl., Ex. 2 (press release). In the press release, Oclaro made predictions about
10 how it would fare in 1Q11. With respect to those predictions, Oclaro noted:

11 These statements are forward looking and actual results may differ
12 materially. Please see the Safe Harbor Statement in this earnings
13 release for a description of the important risk factors that could cause
14 actual results to differ, and refer to Oclaro, Inc.’s most recent annual
and quarterly reports on file with the Securities and Exchange
Commission (SEC) for a more complete description of the risks.

15 Skola Decl., Ex. 2, at 2. The Safe Harbor Statement in the press release provided as follows:

16 There are a number of important factors that could cause actual results
17 or events to differ materially from those indicated by such forward-
18 looking statements, including the impact of continued uncertainty in
19 world financial markets and any resulting reduction in demand for our
products . . . as well as the factors described in Oclaro’s most recent
annual report on Form 10-K, most recent quarterly reports on Form
10-Q and other documents we periodically file with the SEC.

20 Skola Decl., Ex. 2, at 3.

21 Oclaro’s 10Q filed on May 4, 2010, identified multiple risks related to its business, including
22 the following:

- 23 • “[c]ontinued uncertain demand has had, and may continue to have, a material adverse effect
24 on our results of operations”;
- 25 • “[s]ome customers provide us with their expected forecasts for our products several months
26 in advance, but many of these customers may decrease, cancel or delay purchase orders
27 already in place, and the impact of any such actions may be intensified given our dependence
28 on a small number of large customers”; and

1 • “[c]ancellation or delays of such orders may cause us to fail to achieve our short-term and
2 long-term financial and operating goals and result in excess and obsolete inventory.”
3 Skola Decl., Ex. 4, at 40 (10Q).

4 It is a close call as to whether the language above constitutes meaningful cautionary
5 language such that the safe harbor and/or bespeaks caution protection should apply. Notably, the
6 warnings include “references to specific factors that were either the same or of similar significance
7 to the actual causes of [Oclaro’s] downturn.” *Copper Mt.*, 311 F. Supp. 2d at 882. However,
8 arguably, the warnings were not sufficient because they were not enough to counter Oclaro’s more
9 specific professed visibility into customer demand resulting from its close relationships with its
10 customers. *Cf. SEC v. Tecumseh Holdings Corp.*, 765 F. Supp. 2d 340, 353 (S.D.N.Y. 2011) (noting
11 that “adequate cautionary language would have disclosed that – in September 2001, when the
12 multi-million dollar profit projections were made – [the company was] operating at a loss”; adding
13 that “[e]ven the statement ‘[t]he Company . . . has not yet generated any operating profit’ fails to
14 adequately caution how unrealistic [company’s] profit projections were because . . . it fails to
15 disclose that the Company was currently *losing* money”) (emphasis in original). At least a
16 reasonable jury could so find.

17 Under Ninth Circuit law, if there is a legitimate factual dispute as to whether that cautionary
18 language is sufficient, then dismissal is not warranted. *See, e.g., Livid Holdings*, 416 F.3d at 947
19 (stating that “[d]ismissal on the pleadings under the bespeaks caution doctrine . . . requires a
20 stringent showing: There must be sufficient ‘cautionary language or risk disclosure [such] that
21 reasonable minds could not disagree that the challenged statements were not misleading”); *Fecht*,
22 70 F.3d at 1082 (in discussing bespeaks caution doctrine, stating that “[a] motion to dismiss for
23 failure to state a claim will succeed only when the documents containing defendants’ challenged
24 statements include ‘*enough* cautionary language or risk disclosure’ that ‘reasonable minds’ could not
25 disagree that the challenged statements were not misleading”) (emphasis in original); *see also In re*
26 *UTStarcom, Inc. Secs. Litig.*, 617 F. Supp. 2d 964, 972 n.12 (N.D. Cal. 2009) (“find[ing] that the
27 application of the PLSRA safe harbor to any purely forward-looking statements involves a factual
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1 dispute that is not appropriately resolved at the pleading stage”). The Court therefore cannot dismiss
2 the claims based on the statements made in the press release.

3 b. July 29, 2010 Conference Call

4 Similar to above, Oclaro made predictions about 1Q11 in the July 29, 2010, conference call
5 with analysts and investors. During the conference call, the following cautionary statements were
6 made:

7 Today’s statements made about management’s future
8 expectations, plans or prospects of Oclaro and its business, including
9 statements concerning future financial targets and financial guidance .
10 . . . and Oclaro’s plans, objectives, expectations and intentions with
11 respect to future operations, financial objectives, products and growth
12 opportunities, and any assumptions underlying these statements
13 constitute forward-looking statements for the purposes of the Safe
14 Harbor provisions of the [PSLRA].

15 There are a number of important factors that could cause actual
16 results or events to differ materially from those indicated by such
17 forward-looking statements, including the impact of continued
18 uncertainty in the world financial markets and any resulting reduction
19 in demand for our products . . . as well as the factors described in
20 Oclaro’s most recent annual report on form 10-K, most recent
21 quarterly reports on form 10-Q, and other documents we periodically
22 file with the SEC.

23 Skola Decl., Ex. 3, at 1-2 (conference call). As noted above, Oclaro’s 10Q filed on May 4, 2010
24 identified risks related to customer demand.

25 The published transcript of the conference call included an additional warning⁵:

26 In the conference calls upon which Event Transcripts are
27 based, companies may make projections or other forward-looking
28 statements regarding a variety of items. Such forward-looking
statements are based upon current expectations and involve risks and
uncertainties. Actual results may differ materially from those stated in
any forward-looking statement based on a number of important factors
and risks, which are more specifically identified in the companies’
most recent SEC filings. Although the companies may indicate and
believe that the assumptions underlying the forward-looking
statements are reasonable, any of the assumptions could prove
inaccurate or incorrect and, therefore, there can be no assurance that
the results contemplated in the forward-looking statements will be
realized.

⁵ It does not appear that this warning was given during the conference call, but rather was added when the conference call was transcribed and published.

1 Skola Decl., Ex. 3, at 15.

2 The analysis above with respect to the July 29, 2010, press release is largely applicable here
3 as well. In fact, the above statements appear, if anything, more akin to non-specific boilerplate
4 warnings insufficient to confer immunity. *See In re Copper Mt. Secs. Litig.*, 311 F. Supp. 2d at 882.
5 At the very least, reasonable minds could disagree as to the adequacy of the warnings (in particular,
6 those warnings incorporated by reference from the 10Q), and so dismissal is not warranted with
7 respect to the claims based on the conference call.

8 c. August 2010 Morgan Keegan Conference

9 As noted above, the August 2010 statements were statements made by Oclaro at the Morgan
10 Keegan conference. The cautionary language to which Defendants point is contained in a document
11 which appears to be a slide presentation. *See* Skola Decl., Ex. 9 (Morgan Keegan conference
12 transcript); Skola Decl., Attachment C, at 16 (chart on cautionary language). Defendants have asked
13 the Court to take judicial notice of the document but the document does not meet the standards of
14 Federal Rule of Evidence 201. *See* Fed. R. Evid. 201(b) (providing that “[t]he court may judicially
15 notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the
16 trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources
17 whose accuracy cannot reasonably be questioned”). The Court therefore declines to dismiss the
18 claims based on the statements made at the Morgan Keegan conference at this time.

19 D. Scienter

20 In addition to the element of falsity, Defendants challenge the adequacy of Plaintiffs’
21 pleading of the element of scienter. As noted above, “[t]o adequately plead scienter, the complaint
22 must now ‘state with particularity facts giving rise to a *strong inference* that the defendant acted
23 with the required state of mind.’” *Zucco*, 552 F.3d at 991 (emphasis added). “[W]hen ‘determining
24 whether the pleaded facts give rise to a “strong” inference of scienter, the court must take into
25 account plausible opposing inferences.’” *Id.* “[A] securities fraud complaint will survive a motion
26 to dismiss under Federal Rule of Civil Procedure 12(b)(6) ‘only if a reasonable person would deem
27 the inference of scienter *cogent and at least as compelling* as any opposing inference one could draw
28 from the facts alleged.’” *Id.* (emphasis in original). “The court must determine whether ‘all of the

1 facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any
2 individual allegation, scrutinized in isolation, meets that standard.” *Id.* Hence, the element scienter
3 under the PSLRA is subject to a more rigorous review than falsity or materiality.

4 1. May and June 2010 Statements

5 The basic issue here is whether there are allegations supporting a strong inference that
6 Defendants knew of the April 2010 slowdown and that the April 2010 slowdown belied Oclaro’s
7 claim of a “return to customer demand” and a recent increase and “surge” in customer demand.
8 Based on the SAC, Plaintiffs seem to take the position that Defendants knew of the slowdown
9 because, as Mr. Turin admitted during the July 2010 conference call, “we get weekly bookings
10 reports.” SAC ¶ 45 & Ex. 1, at 16 (conference call). Plaintiffs further argue that scienter can be
11 inferred – at least with respect to the May 2010 statements – based on Defendants’ motive to make
12 misleading statements about strong current customer demand, *i.e.*, to ensure that the stock offering
13 in May 2010 would be profitable, thus “enabl[ing] Oclaro to spend \$19.5 million of the cash
14 proceeds to make strategic investments [*e.g.*, an alliance with ClariPhy] and to acquire Mintera,”
15 both critical to Oclaro’s future success. SAC ¶ 30.

16 a. Weekly Bookings Reports

17 Plaintiffs’ reliance on the weekly bookings reports as a basis to establish knowledge is
18 problematic in light of Ninth Circuit case law.

19 The Ninth Circuit has noted that

20 [t]he most direct way to show both that a statement was false when
21 made and that the party making the statement knew that it was false is
22 via contemporaneous reports or data, available to the party, which
23 contradict the statement. Past securities fraud litigants have relied on
24 the fact that corporations typically produce internal reports, and have
25 alleged that such reports contained negative information without ever
26 having seen any particular documents. At its worst, this strategy
27 allowed plaintiffs to bring securities fraud suits with little more basis
28 than the fact that the stock price had fallen. We have held that “a
proper complaint which purports to rely on the existence of internal
reports would contain at least *some specifics from those reports* as
well as such facts as may indicate their reliability.”

27 *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1230-31 (9th Cir. 2004)
28 (emphasis added).

1 In the instant case, even if the Court were to assume that the weekly bookings reports
2 identified by Plaintiffs were reliable, Plaintiffs have not provided any specifics about those reports.
3 Presumably, they show something about order bookings, but it is not clear whether, *e.g.*, the
4 information about bookings would be presented in such a way that Defendants would recognize a
5 monthly decline or, more to the point, a trend significant enough such that Defendants’
6 representation of a recent increase or surge in customer demand was likely knowingly or recklessly
7 false and misleading. The Court concludes Plaintiffs have failed to make a “strong showing” of
8 scienter with respect to these representations.

9 In *In Re Silicon Graphics Securities Litigation*, 183 F.3d 970 (9th Cir. 1999), *abrogated on*
10 *other grounds as stated in South Ferry LP v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008), the
11 plaintiff argued that the company’s officers made positive statements about the company even
12 though they knew from internal reports that there were problems. *See id.* at 984. The plaintiff
13 identified three specific internal reports and even identified the specific problems that the reports
14 exposed. *See id.* at 984 (noting that, according to the plaintiff, “the Flash reports, Financial
15 Statements/Packages and Stop Ship reports announced that: (1) SGI was not shipping the Indigo2
16 workstation in volume; (2) North American and European sales remained slow; and (3) SGI would
17 not meet its revenue and growth targets for FY96”). According to the plaintiff, “the officers
18 conducted several meetings during which they entered into a ‘conspiracy of silence’ whereby they
19 agreed to downplay the seriousness of the company’s problems.” *Id.* at 985.

20 The Ninth Circuit held that the plaintiff had failed to “plead facts to corroborate her
21 allegations.” *Id.*

22 She does not mention, for instance, the sources of her information with
23 respect to the reports, how she learned of the reports, who drafted
24 them, or which officers received them. *Nor does she include an*
25 *adequate description of their contents* which we believe – if they did
26 exist – would include countless specifics regarding ASIC chip
27 shortages, volume shortages, negative financial projections, and so on.
28 We would expect that a proper complaint which purports to rely on the
existence of internal reports would contain *at least some specifics from*
those reports as well as such facts as may indicate their reliability.

In the absence of such specifics, we cannot ascertain whether
there is any basis for the allegations that the officers had actual or
constructive knowledge of [the company’s] problems that would cause

1 their optimistic representations to the contrary to be consciously
2 misleading.

3 *Id.* (emphasis added).

4 Similarly, in *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027 (9th Cir. 2002), the Ninth Circuit
5 concluded that there were insufficient allegations establishing a strong inference of scienter. The
6 plaintiff in *Lipton* claimed that the company “knew that patient demand [for a drug manufactured by
7 the company] was flat because the company had access to (1) internal reports on sales data and (2) . .
8 . patient demand data [provided by IMS, an information vendor]. According to plaintiffs, both types
9 of data informed the defendants that 1Q99 sales would be lower than investors were led to believe.”

10 *Id.* at 1035.

11 We first address plaintiffs’ allegation that PathoGenesis “could
12 regularly track its sales data” to show that the defendants knew or
13 should have known that patient demand for TOBI [the drug] was flat
14 during the class period. In *Silicon Graphics*, we explained that a
15 “proper complaint which purports to rely on the existence of internal
16 reports would contain at least some specifics from those reports as
17 well as such facts as may indicate their reliability.” Here, plaintiffs
18 merely assert in conclusory terms that the defendants had access to
19 internal data demonstrating a decline in sales of TOBI. Plaintiffs do
20 not identify any internal reports of “sales data,” much less plead, in
21 any detail, the *contents* of any such report or the purported data.
22 Without this information, as was the case in *Silicon Graphics*, “we
23 cannot ascertain whether there is any basis for the allegations that the
24 officers had actual or constructive knowledge” of flat patient demand
25 “that would cause their optimistic representations to the contrary to be
26 consciously misleading.”

27 We next address the claim that defendants had access to IMS
28 data that allegedly informed the defendants that patient demand for
 TOBI was flat. The plaintiffs’ complaint states: “Based on the IMS
 data available, defendants knew, or were reckless in not knowing, and
 failed to disclose that patient demand for TOBI was flat (and not
 increasing) during the Class Period.” But again, this allegation does
 not give rise to a strong inference that defendants acted with deliberate
 or conscious recklessness. Although plaintiffs refer to the existence of
 the IMS data and make a general assertion about what they think the
 data shows, plaintiffs do not allege with particularity *any specific*
 information showing that prescription data informed defendants that
 patient demand for TOBI was flat. Plaintiffs do not mention a specific
 IMS document relied on by defendants such as a particular IMS
 report, graph or chart. Nor do they detail with particularity the *content*
 of such data. Rather, plaintiffs merely allege that PathoGenesis tracked
 patient demand using data provided by IMS and that this data
 supposedly indicated that patient demand was flat. As we held in
 Silicon Graphics, negative characterizations of reports relied on by

1 insiders, without specific reference to the contents of those reports, are
2 insufficient to meet the heightened pleading requirements of the
3 PSLRA. We hold that plaintiffs' allegations of negative internal
reports and IMS data are insufficient to demonstrate deliberate or
conscious recklessness.

4 *Id.* at 1035-36 (emphasis added).

5 In contrast to *Silicon Graphics* and *Lipton*, the Ninth Circuit did in *Nursing Home*, 380 F.3d
6 at 1226, conclude that the scienter requirement had been met. There, the plaintiffs alleged that the
7 company maintained a database with sales information and that, because "the top executives admit
8 to having monitored the database, Oracle must have been aware that it was not going to meet its
9 sales projections earlier in the third quarter, and that its statements to the contrary were therefore
10 made with scienter." *Id.* at 1231. The court acknowledged that,

11 [a]t first glance, these allegations might seem comparable to
12 those made in *Lipton v. PathoGenesis Corp.*, 284 F.3d 1027 (9th Cir.
13 2002). There, plaintiffs alleged that defendant corporation
14 PathoGenesis "could regularly track its sales data" and that the
15 company "tracked patient demand using data provided by IMS
16 [Health, an information vendor, which] indicated that patient demand
was flat." We held that such allegations were insufficient to plead
scienter under the PSLRA because, although "plaintiffs referred to the
existence of the IMS data and made a general assertion about what
they think the data showed," they had no hard numbers or other
specific information.

17 By contrast, Plaintiffs here have hard numbers and make
18 specific allegations regarding large portions of Oracle's sales data.
19 The Complaint contains specific statements from former employees
and managers in various regions of the United States (and working in a
number of different departments) testifying to a major slowdown in
sales. . . .

20

21 [A] number of large deals were either lost or delayed early in
22 the third quarter. Four of those deals alone would have totaled up to \$
23 186 million. These deals account for nearly 75% of the total
24 third-quarter shortfall. It was clear by December 2000 and January
25 2001 that these deals had either fallen through entirely or would not
26 take place during the third quarter. It is reasonable to believe that
Oracle had known, prior to its March 1 report, that it would not reach
its projected earnings, particularly since Ellison acknowledged that "I
was involved in an awful lot of these deals."

27 ///

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1 *Id.* at 1231-32. The court went on to take note of, *inter alia*, suspicious insider trading by Mr.
2 Ellison and improper revenue accounting records which also contributed to its conclusion that the
3 knowledge requirement had been met. *See id.* at 1232-33.

4 The instant case is closer to *Silicon Graphics* and *Lipton* rather than *Nursing Home*. Here,
5 Plaintiffs present no specific evidence as to the content of the weekly booking reports. There is no
6 evidence what those reports disclosed of actual sales, absolute numbers of bookings, or anything
7 else. There is no evidence that the reports actually revealed the decline in book-to-bill ratio from
8 March to April 2010. Even if the reports did reveal that decline, that would not establish a strong
9 inference of scienter because there is no evidence that Defendants' awareness of a one-month
10 decline in that statistic, particularly when viewed in the context of strong March sales and a good
11 quarter, negated in Defendants' mind the accuracy of Oclaro's more general claim of a recent
12 increase in consumer demand. Indeed, not only were sales for the relevant quarter consistent with
13 Defendants' expectations, the book-to-bill ratio for April 2010 was still 1, a generally positive
14 indicator of demand.

15 The instant case stands in contrast to *Nursing Home*, where there were many factors other
16 than a decline in sales that led the Ninth Circuit's to find that the allegations of scienter were
17 adequate. The sales decline in *Nursing Home* was likely known by top executives because: (1)
18 there was a major drop in sales and (2) Mr. Ellison's admitted that he had personal involvement in
19 those sales. Here, the drop in a one-month indicator for April 2010 was not demonstrated to be
20 within Defendants' knowledge under the allegations in the complaint and in any event, even if it
21 was, that does not establish a strong indicator that Oclaro's general statements about a recent
22 increase in consumer demand were knowingly or recklessly false.

23 b. Core Operations

24 As noted above, Plaintiffs seem to have argued scienter on the part of Defendants based on
25 the weekly bookings reports alone. However, to the extent Plaintiffs have suggested – or might
26 suggest – that knowledge may be inferred because key officers would be aware of facts critical to
27 Oclaro's core operations, such as sales volume, that argument has problems as well.

28

1 The Ninth Circuit has held that the core-operations theory *by itself* is usually not enough to
2 establish a strong inference of scienter. That is, “[w]here a complaint relies on allegations that
3 management had an important role in the company but does not contain additional detailed
4 allegations about the defendants’ actual exposure to information, it will usually fall short of the
5 PSLRA standard.” *South Ferry LP v. Killinger*, 542 F.3d 776, 784 (9th Cir. 2008) (although adding
6 that the theory can be combined with other allegations to support a strong inference of scienter).
7 Only in rare situations will the core operations theory be enough – *e.g.*, where a loss is of such
8 magnitude to the company that it would be “absurd” for management not to know. *Id.* at 786. For
9 example,

10 [i]n *Berson v. Applied Signal Technology, Inc.*, 527 F.3d 982
11 (9th Cir. 2008), we permitted a securities plaintiff to rely on the core
12 operations inference without particularized allegations about
13 defendants’ access to the relevant information. In *Applied Signal*, the
14 defendants allegedly failed to disclose “stop-work orders” from its
15 largest customers even though those orders had “a devastating effect
16 on the corporation’s revenue.” The first stop-work order “halted
17 between \$ 10 and \$ 15 million of work on the company’s largest
18 contract with one of its most important customers,” and the second
19 halted \$ 8 million. The complaint alleged that only two government
20 agencies made up 80% of the company’s revenue, making the loss of
21 even one contract disastrous for the entire company. Moreover, the
22 defendants admittedly knew about the stop-work orders only two
23 weeks after the alleged false statements. All of these factors put
24 *Applied Signal* into the exceedingly rare category of cases in which the
25 core operations inference, without more, is sufficient under the
26 PLSRA.

19 *Id.* at 785 n.3.

20 In the instant case, Plaintiffs have claimed “actual exposure” based on the weekly bookings
21 reports but, for the reasons discussed above, that position is problematic. There is no allegation that
22 there was such a major decline in Oclaro’s sales that it would be “absurd” for management not to
23 know. Indeed, while we know there was a one-month decline in book-to-bill ratio, Plaintiffs made
24 no allegation about the magnitude of any decline in sales in April 2010. Nor have Plaintiffs alleged
25 there was a significant downward trend negating an otherwise strong quarter and which would have
26 clearly signaled to management a problem of the magnitude in *Berson*.

27 ///

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1 c. Motive

2 With respect to the statements in May 2010, Plaintiffs also argue that there was a clear
3 motive for Oclaro representing that customer demand was strong – *i.e.*, Oclaro wanted to
4 characterize itself as a strong company in order to have its May 2010 stock offering succeed. The
5 problem for Plaintiffs is that motive *by itself* is not enough to establish a strong inference of scienter,
6 at least in the Ninth Circuit. In *Silicon Graphics*, 183 F.3d at 970, the Ninth Circuit stated:

7 [A]lthough facts showing mere recklessness or a motive to commit
8 fraud and opportunity to do so may provide *some* reasonable inference
9 of intent, they are not sufficient to establish a strong inference of
10 deliberate recklessness. In order to show a strong inference of
deliberate recklessness, plaintiffs must state facts that come closer to
demonstrating intent, as opposed to mere motive and opportunity.

11 *Id.* at 974 (emphasis added); *see also In re Terayon Communs. Sys.*, No. C 00-01967 MHP, 2002
12 U.S. Dist. LEXIS 5502, at *28, 33-34 (N.D. Cal. Mar. 29, 2002) (stating that “[f]acts showing mere
13 recklessness or a motive to commit fraud and an opportunity to do so may provide some reasonable
14 inference of intent, but they are not sufficient to establish a strong inference of deliberate
15 recklessness”; adding that “facts showing motive and opportunity to commit fraud can provide
16 confirming reasonable inferences that help establish a strong inference along with other
17 allegations”). More recently, the Ninth Circuit has emphasized:

18 allegations of routine corporate objectives such as the desire to obtain
19 good financing and expand are not, without more, sufficient to allege
20 scienter; to hold otherwise would support a finding of scienter for any
company that seeks to enhance its business prospects.

21 *In re Rigel Pharms., Inc. Secs. Litig.*, No. 10-17619, 2012 U.S. App. LEXIS 18743, at *39-40 (9th
22 Cir. Sept. 6, 2012). While Plaintiffs claim there was a more specific motive here beyond routine
23 corporate objectives in that Oclaro was planning a May, 2010 stock offering, that only provides a
24 marginally stronger case for motive. It is, however, not as strong as where those charged with
25 misstatements stood to gain personally, such as through insider trading. *See Silicon Graphics*, 183
26 F.3d at 986 (noting that “‘unusual’ or ‘suspicious’ stock sales by corporate insiders may constitute
27 circumstantial evidence of scienter”). Moreover, the May stock offering provides no motive for the
28 subsequent June 2010 statement challenged herein.

1 d. Summary

2 The Court concludes that, even taking into consideration the facts alleged in the complaint
3 collectively, Plaintiffs have failed to plead enough allegations to give rise to a strong inference of
4 scienter for the May and June 2010 statements.

5 2. July and August 2010 Statements

6 As noted above, the July and August 2010 statements turn on the alleged falsity of
7 Defendants' claim that they had good visibility into customers' needs. Thus, the issue here is
8 whether there are allegations giving rise to a strong inference that Defendants knew, in fact, that
9 they did not have such visibility. Plaintiffs assert that Defendants had knowledge based on
10 representations made by the confidential witness, FE1.

11 In *Zucco*, the Ninth Circuit noted that

12 a complaint relying on statements from confidential witnesses must
13 pass two hurdles to satisfy the PSLRA pleading requirements. First,
14 the confidential witnesses whose statements are introduced to establish
15 scienter must be described with sufficient particularity to establish
their reliability and personal knowledge. Second, those statements
which are reported by confidential witnesses with sufficient reliability
and personal knowledge must themselves be indicative of scienter.

16 *Zucco*, 552 F.3d at 995. Ultimately, the court held that, in the case before it, "the SAC describes the
17 confidential witnesses' job titles and employment information with ample detail to satisfy [the]
18 requirement that a complaint make apparent a confidential witnesses' position within the defendant
19 corporation, [but] the SAC fails to allege with particularity facts supporting its assumptions that the
20 confidential witnesses were in a position to be personally knowledgeable of the information
21 alleged." *Id.* "Some of the confidential witnesses were simply not positioned to know the
22 information alleged, many report only unreliable hearsay, and others allege conclusory assertions of
23 scienter. These allegations are not sufficient to raise a strong inference of scienter because they
24 demonstrate that the confidential witnesses are not reliable." *Id.* at 996.

25 Here, Plaintiffs have alleged enough to establish that FE1 was in a position within Oclaro
26 with knowledge of Oclaro's sales experience and practices. However, some of FE1's assertions of
27 *knowledge* of the part of Defendants are wholly conclusory. For example, in ¶ 76(d), Plaintiffs
28 allege that "[D]efendants knew that the Company only had good visibility or a 'good grip' into

1 customer demand for about two weeks forward.” SAC ¶ 76(d). But Plaintiffs do not allege any
2 specific facts explaining the basis for the claim that Defendants had such knowledge.

3 Plaintiffs’ strongest allegation on scienter is in ¶ 76(c). Here, Plaintiffs allege that, according
4 to FE1, “Oclaro’s customers were often reluctant to provide detailed information about their own
5 needs so that suppliers like Oclaro would not dedicate manufacturing capacity to other customer’s
6 needs,” and “these nuances are known to those who are experienced in the industry, and were known
7 to [Mr.] Turin and [Mr.] Couder.” SAC ¶ 76(c). Although the claim that Mr. Turin and Mr. Couder
8 had knowledge of “these nuances” is in and of itself conclusory, presumably, Plaintiffs are making
9 the point that, as executives of Oclaro, Mr. Turin and Mr. Couder were likely experienced in the
10 industry, and therefore had the knowledge of customers’ tendencies.

11 While this is Plaintiffs’ best allegation in the SAC, the Court does not find that it is sufficient
12 to give rise to a *strong* inference of scienter. First, Plaintiffs have essentially assumed that the
13 individual defendants were experienced in the industry by virtue of their position alone. While it is
14 a fair inference that an executive would know of certain facts related to a company, *e.g.*, a major loss
15 to the company (*see* discussion, *supra*, discussing the core operations theory), it is not clear that an
16 executive would necessarily know details such as precisely how far out in advance Oclaro knew of
17 customer needs. Second, while Defendants’ statements about good customer visibility were
18 misleading – at least a reasonable jury could so find based on the allegations in the SAC – they were
19 not so dramatically misleading or outright false that the only reasonable inference is that Defendants
20 must have possessed the requisite intent in making them. The statements were somewhat general
21 and, if they were misleading, they were not starkly so. Given the generality and fluidity of the
22 statements regarding visibility, a strong inference of scienter requires more specific allegations than
23 made herein. Finally, it is notable that there does not appear to be any motive for Defendants to
24 make the false or misleading statements about good customer visibility. By this point in time, the
25 May 2010 stock offering had already been completed. Furthermore, as Defendants point out, there
26 is no allegation or evidence of any suspicious insider trading by the individual defendants.

27 In their opposition, Plaintiffs argue that the Court should not take into account the lack of
28 any motive allegations because motive is not “required to allege scienter.” Opp’n at 19. While the

1 Court agrees that the absence of a motive allegation is not “dispositive,” it is still a “relevant” fact,
2 as the Supreme Court has expressly stated. *Matrixx*, 131 S. Ct. at 1324; *see also Cutsforth v.*
3 *Renschler*, 235 F. Supp. 2d 1216, 1250 (M.D. Fla. 2002) (stating that, “if a motive to commit fraud
4 can be a relevant [although not dispositive] circumstance supporting a claim of scienter, it would
5 seem that an inability to show motive can be a relevant circumstance indicating the lack of
6 scienter”); *accord In re Acterna Corp. Secs. Litig.*, 378 F. Supp. 2d 561, 576-77 (D. Md. 2005).

7 Plaintiffs assert that, even if the absence of a motive allegation is considered, the Court still
8 should not take into account the lack of any suspicious insider trading as a fact weighing against
9 scienter. Plaintiffs maintain that, “because the SAC does not *rely* on insider trading allegations to
10 demonstrate scienter, . . . the absence of such allegations is irrelevant to the scienter analysis.”
11 Opp’n at 19 (emphasis added). The Court finds this argument problematic as well. The Court is
12 obligated to take a “holistic approach” in evaluating scienter, *Rigel*, 2012 U.S. App. LEXIS 18743,
13 at *40, and, because the Court may take judicial notice of the individual defendants’ Oclaro stock
14 sales (as reflected in the SEC Forms 4 which are public records),⁶ the presence or absence of insider
15 trading is a fact that could be considered by the Court as a part of its holistic approach.⁷ *See, e.g.,*
16 *Acterna*, 378 F. Supp. 2d at 576-77 (taking note that “Plaintiffs have not alleged any concrete

17 _____
18 ⁶ Although Plaintiffs have objected to Defendants’ request for judicial notice of the SEC
19 Forms 4, their objection is really one of relevance and not that the documents may not be judicially
20 noticed pursuant to the Federal Rule of Evidence 201. *See* Docket No. 68 (Pls.’ Rep. at 3-4). The
21 Court notes that, although it does not take judicial notice of the contents of the SEC
22 filings, *see In re Thornburg Mort., Inc. Secs. Litig.*, No. CIV 07-0815 JB/WDS, 2009 U.S. Dist.
23 LEXIS 124549, at *14 (D.N.M. Dec. 21, 2009), Plaintiffs have not made any claim that the contents
24 of the documents are not true. The Court therefore takes judicial notice of the SEC Forms 4 and has
25 no basis for believing that the truth of the documents is in dispute.

26 ⁷ The Court respectfully disagrees with Judge White’s statement in *In re Pixar Securities*
27 *Litigation*, 450 F. Supp. 2d 1096 (N.D. Cal. 2006), that, in two prior cases from this District, “the
28 plaintiffs did not rely on allegations of insider trading to establish scienter” and “[t]herefore, the
courts found that the failure to allege selling or trading did not negate the inference of scienter.” *Id.*
at 1107. In *In re Nuko Information Systems, Inc. Securities Litigation*, 199 F.R.D. 338 (N.D. Cal.
2000), Judge Infante stated that “[a] fair reading of this SAC does not suggest claims of insider
trading” but rather a claim that “Defendants knowingly overstated revenues for 1Q97 in an attempt
to inflate Nuko’s stock prices and secure a deal with Internext”; thus, “[u]nder these circumstances,
the absence of Defendants’ selling or trading has little bearing on determining whether Plaintiffs’
have adequately pleaded scienter.” *Id.* at 344-45. In *In re U.S. Aggregates, Inc.*, No. C 01-1688
CW, 2003 U.S. Dist. LEXIS 12168 (N.D. Cal. June 24, 2003), Judge Wilken simply indicated that
certain evidence, including the lack of any evidence of insider trading, was not enough to negate an
inference of bad motive. *See id.* at *12-13.

1 benefits that could be realized by the alleged false statements” – *e.g.*, that “the individual Defendants
2 sold any stock during the class period, thereby taking advantage of their fraudulent scheme to
3 artificially inflate the company’s share price”; concluding that “[t]his shortfall, coupled with the
4 weak inferences to be drawn from Plaintiffs’ other allegations, undermines Plaintiffs’ assertion that
5 the individual Defendants acted with the required state of mind”).

6 The Court also notes that Plaintiffs’ position is in some tension with the Ninth Circuit’s
7 recent decision in *Rigel*. In *Rigel*, the plaintiffs did not allege that the individual defendants had
8 actually engaged in insider trading in their complaint; rather, they simply alleged that the “individual
9 defendants knew that the value of their stock options would increase if [the company] reported
10 positive results from the clinical trial.” *Rigel*, 2012 U.S. App. LEXIS 18743, at *40-41. Even
11 though the plaintiffs did not allege actual insider trading, the Ninth Circuit still took into account the
12 lack of insider trading. The Ninth Circuit noted: “[B]ecause none of the defendants [actually] sold
13 stock during the period between the allegedly fraudulent statements and the subsequent public
14 disclosure of the detailed data, which is the period during which they would have benefitted from
15 any allegedly fraudulent statements, the value of the stock and stock options does not support an
16 inference of scienter.” *Id.* at *41.

17 In sum, taking a “holistic approach” in evaluating scienter, *id.* at *40, the Court finds that
18 there are insufficient allegations to give rise to a strong inference of scienter with respect to the
19 allegedly misleading statements made by Defendants in July and August 2010.

20 E. Loss Causation

21 Because Plaintiffs have failed to make an adequate showing on scienter in their SAC,
22 dismissal of the complaint is warranted. The Court, however, still provides some analysis on the
23 issue of loss causation as that has some bearing on whether Plaintiffs should be given leave to
24 amend their complaint.

25 Loss causation is the “causal connection between the material misrepresentation and the
26 loss.” *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). According to Defendants, Plaintiffs
27 have failed to adequately plead loss causation because (1) the partial disclosure on July 29, 2010,
28 and the final disclosure on October 28, 2010, did not actually correct anything that Oclaro had said

1 previously, and (2) Plaintiffs have failed to demonstrate that the decline in the stock price was not
2 due to other reasons – for example, that the decline was part of a sector-wide downturn or due to
3 other negative news about Oclaro that was disclosed on the same date.

4 1. Correction

5 Defendants’ first argument is not persuasive. As discussed above, Plaintiffs allege that, on
6 July 29, 2010, Oclaro disclosed for the first time the slowdown in April; this was plausibly
7 contradictory to its statements in May and June that there was a current increase or surge in
8 customer demand. At the very least, a reasonable jury could find the comments about current
9 customer demand to be misleading given what had taken place in April⁸ and that the later disclosure
10 of the book-to-bill ratio was corrective.

11 As for the disclosure on October 28, 2010, the most notable correction was that 1Q11 results
12 were not as strong as predicted (there was a miss on gross margin and adjusted EBITDA, even
13 though revenues were met). There was also arguably a correction through Oclaro’s disclosure that it
14 had limited visibility into customer demand and that the decline in orders was due to an inventory
15 correction (*i.e.*, demand was not based in fact on true end-user demand).

16 2. Other Causes for Stock Price Decline⁹

17 As for Defendants’ second argument, it too is not convincing. Defendants correctly point out
18 that, in *Dura*, 544 U.S. at 336, the Supreme Court noted that a decline in stock price may be due to
19 reasons other than fraud – *e.g.*, “changed economic circumstances, changed investor expectations,
20 new industry-specific or firm-specific facts, conditions, or other events.” *Dura*, 544 U.S. at 343.
21 However, this statement must be taken in the proper context.

22
23 ⁸ The Court need not address Defendants’ contention that Plaintiffs’ event study, used to
24 show materiality and/or loss causation with respect to the July 2010 drop in stock price, was flawed.
25 As Plaintiffs point out, reliance on an event study is not necessary at the pleading stage. *See* Opp’n
at 23.

26 ⁹ Defendants have asked the Court to take judicial notice of a decline in stock price in other
27 companies in the same industry. Plaintiffs’ objection is overruled because the value of stock “can be
28 accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”
Fed. R. Evid. 201(b)(2). Plaintiffs admitted as much in their opposition brief to the first motion to
dismiss. *See* Docket No. 50 (Opp’n at 24 n.10) (stating that a court may take judicial notice of the
stock price of a publicly traded company).

1 In *Dura*, the Supreme Court characterized the Ninth Circuit decision under review as holding
2 that all that a securities fraud plaintiff had to do to establish loss causation was establish an inflated
3 price on the day of misrepresentation. See *Dura*, 544 U.S. at 342. The Court stated that this legal
4 holding was not correct, explaining as follows:

5 For one thing, as a matter of pure logic, at the moment the transaction
6 takes place, the plaintiff has suffered no loss; the inflated purchase
7 payment is offset by ownership of a share that at that instant possesses
8 equivalent value. Moreover, the logical link between the inflated
9 share purchase price and any later economic loss is not invariably
10 strong. Shares are normally purchased with an eye toward a later sale.
11 But if, say, the purchaser sells the shares quickly *before* the relevant
12 truth begins to leak out, the misrepresentation will not have led to any
13 loss. If the purchaser sells later *after* the truth makes its way into the
14 marketplace, an initially inflated purchase price *might* mean a later
15 loss. But that is far from inevitably so. When the purchaser
16 subsequently resells such shares, even at a lower price, that lower
17 price may reflect, not the earlier misrepresentation, but changed
18 economic circumstances, changed investor expectations, new
19 industry-specific or firm-specific facts, conditions, or other events,
20 which taken separately or together account for some or all of that
21 lower price.

22 *Id.* at 342-43 (emphasis added). The Court’s explanation as to why it was rejecting the Ninth
23 Circuit’s holding cannot be equated with a requirement that a plaintiff must plead that a stock price
24 did not decline for reasons other than fraud.

25 Moreover, in *Dura*, the Supreme Court agreed with the principle that loss causation is
26 established where a plaintiff alleges that, after the truth becomes known, the price of the stock falls.
27 As the Court stated in *Dura*, “the Restatement of Torts, in setting forth the judicial consensus, says
28 that a person who ‘misrepresents the financial condition of a corporation in order to sell its stock’
becomes liable to a relying purchaser ‘for the loss’ the purchaser sustains ‘when the facts . . .
become generally known’ and ‘as a result’ share value ‘depreciate[s].’” *Id.* at 344; see also *id.* at
347 (stating that “[t]he complaint’s failure to claim that *Dura*’s share price fell significantly after
the truth became known suggests that the plaintiffs considered the allegation of purchase price
inflation alone sufficient”). The Ninth Circuit has confirmed that this is all that is required post-
Dura. See, e.g., *Berson*, 527 F.3d at 990 (indicating that, “where defendants overstated the firm’s
revenues, and where stock prices dropped immediately after defendants revealed the firm’s ‘true
financial condition,’ plaintiffs adequately pled loss causation”); *In re Daou Sys.*, 411 F.3d 1006,

1 1027 (9th Cir. 2005) (concluding that “the TAC’s assertions of a steep drop in Daou’s stock price
2 following the revelation of Daou’s true financial situation are sufficient to enable the complaint to
3 survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)”).

4 At the end of the day, all that Plaintiffs have to do at this juncture of the proceedings is
5 “*plausibly* establish loss causation,” not definitively establish it. *In re Gilead Scis. Secs. Litig.*, 536
6 F.3d 1049, 1057 (9th Cir. 2008) (emphasis added). “[Any] skepticism is best reserved for later
7 stages of the proceedings when the plaintiff’s case can be rejected on evidentiary grounds.” *Id.*
8 Because, as discussed above, Plaintiffs have tied a decline in the stock price to a revelation of the
9 “truth” on July 29, 2010, and October 28, 2010, the motion to dismiss on the ground that loss
10 causation has not been adequately pled is without merit.

11 Moreover, the Court notes that Plaintiffs have made allegations in their complaint that the
12 decline in stock price was not attributable to an industry-wide downturn, as Defendants have
13 suggested. In particular, Plaintiffs have pointed out that, unlike Oclaro, Oplink (a competitor) did
14 not experience demand/order softness and further beat analyst estimates for 1Q11. *See* SAC ¶¶ 90-
15 92. In their opposition brief, Plaintiffs further point out that, even though Oplink did experience a
16 downturn on October 28, 2010, the next day, it had an upsurge presumably because the market had
17 had a chance to take into account its positive 1Q11 results. *See* Opp’n at 24.

18 Furthermore, Plaintiffs alleged that the July 2010 drop in stock price was attributed, at least
19 by some analysts, to the decline in the book-to-bill ratio, which was a result of the April 2010
20 slowdown. Therefore, even if there was other negative news about Oclaro that was disclosed in July
21 2010, *see* Reply at 14-15, the particular disclosure about the April 2010 slowdown is alleged to have
22 had some significance. Even with an industry downturn, or even with other negative news about
23 Oclaro, that does not preclude the possibility that a decline in stock price was attributable at least in
24 part to a securities fraud. The Ninth Circuit has noted that

25 [a] plaintiff is not required to show “that a misrepresentation was the
26 *sole* reason for the investment’s decline in value” in order to establish
27 loss causation. “As long as the misrepresentation is one substantial
28 cause of the investment’s decline in value, other contributing forces
will not bar recovery under the loss causation requirement” but will
play a role “in determining recoverable damages.”

1 *Daou*, 411 F.3d at 1025 (emphasis in original).

2 **III. CONCLUSION**

3 For the foregoing reasons, the Court rejects Defendants’ arguments that Plaintiffs’ SAC is
4 lacking with respect to allegations of falsity and loss causation and that, as a matter of law,
5 Defendants’ conduct is immunized by the safe harbor provision or bespeaks caution doctrine. The
6 Court, however, agrees with Defendants that Plaintiffs have failed to make sufficient allegations to
7 give rise to a strong inference of scienter and, on that basis, grants Defendants’ motion to dismiss.


8 The only question remaining is whether Plaintiffs should be given leave to amend. Because
9 the Court cannot say at this juncture that amendment would be futile (the Court’s prior order
10 granting Defendants’ motion to dismiss addressed only the issue of falsity, not scienter), the Court
11 shall allow Plaintiffs one final opportunity to amend their complaint.

12 Plaintiffs shall have thirty (30) days from the date of this order to file their third amended
13 complaint. If no amended complaint is timely filed, then the Clerk of the Court shall enter judgment
14 in favor of Defendants and close the file in this case.

15 This order disposes of Docket No. 63.

16
17 IT IS SO ORDERED.

18
19 Dated: September 21, 2012

20 
21 _____
22 EDWARD M. CHEN
23 United States District Judge
24
25
26
27
28