United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

VIJAY FADIA, et al.,

Plaintiffs,

v.

FIREEYE, INC., et al.,

FireEye.

Case No. 5:14-cv-05204-EJD

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS; DENYING PLAINTIFF'S MOTION TO STRIKE AS MOOT

Re: Dkt. Nos. 75, 82

Lead Plaintiffs State-Boston Retirement System and Vijay Fadia ("Plaintiffs") filed a Class Action Complaint against FireEye, Inc. ("FireEye") and its Chief Executive Officer David DeWalt ("DeWalt"), Chief Financial Officer Kevin Mandia ("Mandia"), and Chief Operating Officer Michael Sheridan ("Sheridan") (collectively "Defendants") on November 24, 2014. Dkt. No. 1. Plaintiffs then filed an amended complaint ("FAC") on June 29, 2015. Dkt. No. 72 ("FAC"). Presently before the court is Defendants' Motion to Dismiss the amended complaint. Dkt. No. 75 ("Mot.").

Federal jurisdiction arises pursuant to 28 U.S.C. § 1331, and Section 27 of the Exchange Act, 15 U.S.C. § 78aa. Oral argument on the motion was held on November 19, 2015. Having carefully reviewed the parties' briefing, the Court GRANTS Defendants' Motion to Dismiss for the reasons explained below.

I. FACTUAL AND PROCEDURAL BACKGROUND

FireEye, a Delaware corporation with its principal executive offices in California, develops and sells products and services that provide real-time detection of and protection from cyber-

attacks. FAC at ¶¶ 2, 32. FireEye sells these products and services via direct and indirect sales teams, primarily targeting large enterprise and government customers. Id. at ¶ 3.

FireEye became a public company in September 2013, and acquired privately held Mandiant Corporation ("Mandiant") shortly thereafter in December of 2013. Id. at ¶ 6. Mandiant sells software products that detect cyber-threats on remote devices (i.e. laptops, desktops, laptops, computers, tablets, smartphones etc.) that access a corporate network. Id. With its acquisition, FireEye could offer customers products and services that detect threats along both strategic points on the network and on these remote devices. Id.

Both lead Plaintiffs purchased FireEye stock on the open market during the class period[1] and allegedly suffered damages as a result of a drop in FireEye's stock price. The stock price dropped by 22% on May 7, 2014, 11.42% on August 6, 2014, and 14.98% on November 4, 2014. Id. at ¶ 29. Plaintiffs allege the stock price declined due to material misrepresentations made by Defendants throughout the class period.

Individual Defendants DeWalt, Mandia, and Sheridan were all employed by FireEye through the duration of the class period. Id. at ¶¶ 33-35. DeWalt served as CEO from May 2012 onwards, Mandia served as FireEye's CFO from 2011, and Sheridan served in the capacities of Chief Financial Officer and Senior Vice President from 2011 onwards. Id. at ¶¶ 33-35.

Plaintiffs allege that Defendants, due to their positions of control and authority, had access to FireEye's internal corporate documents, and participated in drafting, preparing, and approving the statements that gave rise to this lawsuit. Id. at ¶¶ 37-38. Plaintiffs further allege that Defendants were obligated to disseminate accurate and truthful information about FireEye's operations and that the alleged misrepresentations were in violation of these obligations. Id. at ¶ 40.

Plaintiffs also contend that Defendants DeWalt, Mandia, and Sheridan deceived investors

---

[1] The class period spans from January 2, 2014 to November 4, 2014. FAC at ¶ 1.

by distorting the true state of FireEye's business, forcing plaintiffs and other buyers to purchase FireEye's stock at an artificially inflated price. Id. at ¶ 41. Plaintiffs also point out that since the alleged misrepresentations were made by individual defendants - all of whom served as senior officers overseeing the company's operations - they are attributable to the company. Id. at ¶ 42. The misrepresentations and omissions pertain to the Mandiant integration, the Mandiant Infinite Response (or "MIR") endpoint threat detection product, a belated announcement of a change in the revenue recognition policy, an alleged shift in revenue from products to services, the appointment of a new head of sales, and the company's overall financial performance. Id. at ¶¶ 50; see also Dkt. No. 78 ("Opp.") at 10-15.

Plaintiffs allege that the post-acquisition integration of Mandiant and FireEye was going quite poorly. Id. at ¶ 107. FireEye was having trouble merging the two companies' products, retaining its customer base, and fighting off competitors. Id. at ¶ 140. Plaintiffs also allege that there was a significant slowdown in sales due to "mass confusion" in the sales force, a lengthening of the sales cycle, and increased competition from the market place – all which Plaintiffs claim Defendants failed to mention in the numerous press conferences, earnings call, and public events held during the class period. Id. at ¶¶ 140-207.

Plaintiffs contend Defendants also concealed product integration problems, specifically with respect to MIR. Id. at ¶¶ 67-68. MIR was designed to monitor 10,000 endpoints (10,000 individual laptops, desktops, tablets, and smartphones), but "was unable to monitor more that 3000-4000 before dropping offline." Id. Next, FireEye missed analyst's expectations of $30 million in revenue by only reporting $24.3 million, which allegedly caused the stock price to drop by 22.84%. Id. at ¶¶ 79, 81. The next drop in stock price came on August 6, 2014 following an announcement of a change in the revenue recognition policy for FireEye's email products. Plaintiffs contend Defendants informed the public shortly before August 6 that it would recognize the revenue generated by the sale of its email products *at the time of shipment* – a break from to its previous practice of recognizing it pro rata over a three year contract term. Id. at ¶¶47-49.

According to Plaintiffs, this change caused an 11.42% drop in FireEye's stock price. Id. at ¶22.

Plaintiffs also contend that a third drop in stock price of 14.98% occurred due to Defendants' failure to acknowledge an "unexpected shift in revenue from product to services." Id. at ¶¶ 24, 135. Analysts surmised that a "slower than anticipated growth" in product revenue was the cause of the drop in stock price. Id. at ¶ 137.

Finally, Plaintiffs allege Defendants reaped significant rewards by selling thousands of shares allegedly within a few days after the Secondary Public Offering. Id. at ¶¶ 77-78. Specifically, DeWalt, Mandia, and Sheridan sold 485,656, 227,586, and 121,733 shares at a price of $79.54, collecting proceeds in the amounts of $38,629,078.24, $18,102,190.44, and $9,682,642.82 respectively. Id. at ¶ 78. Plaintiffs contend that the amount, timing, and consistency of the stocks sales indicate a strong inference of scienter. Plaintiffs rely on statements made by Defendants, analysts, and seven confidential witnesses ("CW") to support these allegations. Id. at ¶¶ 65-71, 92-119, 140-209. Additionally, these allegations form the basis of Plaintiffs claims under sections 10(b), 10b-5(a) and (c), and 20(a).

Plaintiffs' commenced this action on November 24, 2014, and filed an amended complaint on August 29, 2015. Defendants moved to dismiss the FAC - the operative complaint. Plaintiffs filed an opposition. This matter has been fully briefed and a hearing was held on November 19, 2015.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient specificity to "give the defendant fair notice of what the…claim is and the grounds upon which it rests." Bell At. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and internal quotations committed). A complaint that falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level" such that the claim "is plausible on its face." Twombly, 550 U.S. at 556-57.

In addition to Rule 8's requirements, fraud cases are also governed by the heightened pleading standard of Rule 9(b). The Rule 9(b) requirement "has long been applied to securities complaints." Zucco Partners LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009) (citing Semegen v. Weidner, 780 F.2d 727, 729, 734–35 (9th Cir. 1985)). In accordance with that rule, courts in the past required plaintiffs in securities fraud cases to plead falsity with particularity, while allowing scienter to be alleged generally. Id. However, in 1995 Congress enacted the Private Securities Litigation Reform Act (PSLRA), which "significantly altered pleading requirements in securities fraud cases." Id. (quoting Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002)). Under the PSLRA, to survive a motion to dismiss, a plaintiff must now plead both falsity and scienter with particularity. In re Daou Sys., Inc., 411 F.3d 1006, 1014 (9th Cir. 2005).

III. EVIDENTIARY ISSUES

A. Defendants' Request for Judicial Notice and Plaintiffs' Motion to Strike

Defendants ask the court to take judicial notice of 23 documents attached as exhibits 1-22 to the Declaration of Doru Gavril in support of Defendant's motion to Dismiss. See Dkt. No. 76 ("Gavril Decl."), ("Exhs. 1-22"). Most of these documents are SEC filings, transcripts from earnings calls, and a chart that includes a compilation of data from exhibits 5, 9, 10, 11, 12, and 13. Plaintiffs assert that Exhibit 1 should be striken from the record because it improperly assumes the truth of the contents of the SEC filings and includes additional attorney calculations of SEC filings.

In ruling on a Rule 12(b)(6) motion to dismiss, court "must consider…documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). "Under Federal Rule of Evidence 201, facts subject to judicial notice are adjudicative facts that are not subject to reasonable dispute." City of Royal Oak Retirement System v. Juniper Networks, Inc., 880 F. Supp. 2d 1045, 1058 (N.D. Cal. 2012) (citations and internal quotations omitted).

Since Plaintiffs object only to Exhibit 1, the court takes judicial notice of Exhibits 2-23, which are comprised of SEC filings and transcripts from earnings calls. See Id. (citations and internal quotations omitted). And because the chart in Exhibit 1contains facts subject to reasonable dispute, the court declines to take judicial notice of it. Therefore, the motion to strike Exhibit 1 is moot.

B. Plaintiffs' Request for Judicial Notice

Plaintiffs request judicial notice of the following court records: (1) the Consolidated First Amended Class Action Complaint pending in the California Superior Court of Santa Clara County, (2) the Tentative Ruling on Defendants' demurrer in the California Securities Action, and (3) the order after the hearing on July 10, 2015 with respect to the demurrer and joinder to the demurrer in the Consolidated First Amended Complaint. See Dkt. No. 81 at 2-3.

The court grants Plaintiffs' unopposed request for judicial notice of the above documents. See Hanover Insurance Co. v. Fremont Bank, 68 F. Supp. 3d 1085, 1092, n.1 (N.D. Cal. 2014); see also Louis v. McCormick & Schmick Restaurant Corp., 460 F. Supp. 2d 1153, 1155, n.4 (C.D. Cal. 2006) ("Under Rule 201 of the Federal Rules of Evidence, the court may take judicial notice of the records of state courts…").

IV. DISCUSSION

A. Sufficiency of the allegations Under the PSLRA

To adequately state a claim under Section 10(b) and Rule 10b-5, a plaintiff must allege facts sufficient to establish: "(1) a material representation or omission by the defendant, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance upon the misrepresentation, (5) economic loss, and (6) loss causation." Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37-38 (2011) (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008)).

i. Material Misrepresentation

In order to adequately plead material misrepresentation or omission under § 10(b), the

PSLRA requires plaintiffs to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1)(B); see also In re Tesla Motors, Inc. Sec. Litig., 75 F. Supp. 3d 1034, 1041-42 (N.D. Cal. 2014).

A material misrepresentation differs significantly from corporate puffery. Puffery is an expression of opinion, while a misrepresentation is a knowingly false statement of fact. Oregon Public Employees Retirement Fund v. Apollo Group, Inc., 774 F.3d 598, 606 (9th Cir. 2014). Moreover, the Ninth Circuit has noted that investors do not rely on puffery when making investment decisions. In re Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010); see also Brody v. Transitional Hosps. Corp., 280 F.3d 997, 1006 ("…a statement will not mislead even if it is incomplete or does not include all relevant facts") (citations and internal quotations omitted). Finally, "mildly optimistic, subjective assessment[s]…[do not] amount to a securities violation." In re Cutera Sec. Litig., 610 F.3d at 1111.

An omission, by contrast, "refers to the failure to disclose material information about a company." Desai v. Deutsche Bank Sec. Ltd. 573 F.3d 931, 939 (9th Cir. 2009). "[A]n omission is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of the information made available." Juniper Networks, 880 F. Supp. 2d at 1061 (citations and internal quotations omitted) (emphasis added).

Additionally, when plaintiffs' rely on statements from confidential witnesses (CW) to support their allegations, the PSLRA's particularity standard must be satisfied. Personal sources in a complaint must be described "with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." In re Daou Sys., 411 F.3d at 1015; see also In re Lockheed Martin, 272 F. Supp. 2d at 940. Thereafter, a number of decisions in this district have followed the same approach. See In re OmniVision

Technologies, Inc. Sec. Litig., 937 F. Supp. 2d 1090, 1109 (N.D. Cal. 2013) (same); Wozniak v. Align Technology, Inc., No. C-09-3671-MMC, 2011 WL 2269418, *4 (N.D. Cal. 2012) (same); In re LDK Solar Sec. Litig., 584 F. Supp. 2d 1230, 1256, n.2 (N.D. Cal. 2008) (same); Mulligan v. Impax Laboratories, Inc., 36 F. Supp. 3d 942, 962 (N.D. Cal. 2014) (same).

"To determine whether a confidential witness is sufficiently reliable, courts look to the level of detail provided by the confidential sources, the corroborative nature of the other facts alleged…[including] the coherence and plausibility of the allegations, the number of sources, the reliability of sources, and similar indicia." Gammel v. Hewlett-Packard Co., No. SACV-11-1404-AG, 2013 WL 1947525, *11 (May 8, 2013) (citations and internal quotations omitted)(emphasis added).

Recognizing that the heightened pleading standard applies here, and since the majority of allegations are derived from statements made by confidential witnesses, the preliminary inquiry is whether Plaintiffs satisfy the heightened pleading requirement with respect to these witnesses.

1. Confidential Witnesses

Defendants assert that Plaintiffs' allegations derived from CW statements fail to satisfy the heightened pleading requirement because the allegations are impermissibly vague and the CWs lack the personal knowledge necessary to make the allegations. Mot. at 21. Plaintiffs argue otherwise.

Plaintiffs rely on statements made by seven confidential witnesses. CW1 is identified as a former Mandiant Sales Engineer and a key advisor to the Mandiant sales team that reported to Mandiant's Worldwide Director of Sales Engineers. He joined and worked for FireEye from July 2013 to August 2014 and allegedly made comments about scalability issues related to Mandiant's MIR solution. FAC at ¶¶ 66, 68, 69. CW2 was a former Regional Sales Manager at FireEye from September 2011 to September 2014, sold all of FireEye's products in Florida, Georgia, and Bermuda, and reported directly to the Senior Director of Sales. Id. at ¶92. CW2 stated that the integration added new people that were not knowledgeable about FireEye's products, which

created issues for field sales personnel. Id. at ¶ 94.

CW3 was a former Senior Director of Infrastructure at FireEye from March 2010 to August 2014, reported directly to the Chief Information Officer, and said that FireEye decided to do a mass lay-off in August because "the integration was not going well." Id. at ¶¶102-103. CW4 was a former Director of Strategic Solutions and Chief Cyber Solutions Strategist from May 2014 to September 2014, and stated that the integration was going poorly because multiple people were serving in duplicate roles, and Mandiant and FireEye was "operating on different sets of sales projections." Id. at ¶¶106.

CW5 served as a Senior Manager from August 2013 to January 2015, reported to Alden Huen – Senior Manager of Business Systems, and opined that the integration was "difficult" because Mandiant "had not brought over some of their systems." Id. at ¶110, 112. CW6 was a former Senior Revenue Manager in the UK from May 2014 to August 2014, and allegedly said that executives knew the likelihood of specific deals closing by quarter-end, and that they were getting constant updates from Salesforce. Id. at ¶118. CW7 served as a former Senior Director of Sales from May 2014 to April 2015, tracked deals, and participated in weekly calls that discussed sales in various regions. Id. at ¶119.

The FAC satisfies the particularity requirements with respect CWs 1-6. Each of these witnesses' job title, length of time employed at FireEye, and statements made are described with adequate specificity. Moreover, these witnesses were in a position to know the alleged information with reasonable probability. It is not clear, however, what statements CW7 made or why his or her input is needed. As such, the FAC fails to satisfy the particularity requirement with respect to CW7.

2. The Mandiant Integration

Plaintiffs allege Defendants falsely represented that the Mandiant Integration was progressing successfully. According to Plaintiffs, Defendants failed to disclose a significant post integration slowdown in sales, a lengthening of sales cycles due to integration inefficiencies,

increased competition in the marketplace, and friction with its channel partners. Opp. at 17; see also FAC at ¶140.

Defendants counter that Plaintiffs' claims and allegations fail because they are unsupported by particularized facts. Reply at 8-9. Specifically, they assert that Plaintiffs' allegations are based on "impressions of former employees" and lack important details such as dates, number of customers and partners affected, or deals won by competitors. Id. at 11. Moreover, they contend Plaintiffs fail to show how any of these allegations contradict Defendants' statements. Id. at 12. Finally, Defendants emphasize that their press releases, registration statement, and other public disclosures adequately informed the public of the risks and uncertainties associated with the integration. Mot. at 16-17.

Defendants allegedly made several misrepresentations or omissions during press releases, earnings calls, conferences, technology talks, and various public events from January 2, 2014 to November 2, 2014. See FAC at ¶¶ 142-203. The court will address each of these statements in turn.

On January 2, 2014, Plaintiffs allege that Defendants made the following misrepresentations:

- Mandiant's endpoint products, which are already integrated with the FireEye platform, enable security teams to make faster, more accurate decisions about potential security incidents while eliminating blind spots…
- The combination of the two companies is a natural extension of [a strategic] partnership and their integrated product offering…
- Many customers have now deployed [Mandiant Infinite Response and FireEye web] integrated solution, proving the synergy potential between the companies…
- …MIR and MSO [both Mandiant products] can drop right into the FireEye sales and install base as well as cross-sell into the Mandiant base…so the product synergies here are very strong…
- [After the integration, FireEye's business has] a bigger services component; but as I mentioned in my comments, on a combined basis services are only going to make up 15% to 17% of our current makeup of revenues…without talking about specific percentages…I would tell you the products and the recurring

> subscriptions…will grow faster as a business than the services… you will continue to see that product and product subscription and recurring revenue growth outpace the service part of the business, which would therefore imply that services as a percentage should move to a smaller percentage than that over time.
>
> - [FireEye] looks more like a product company than anything else…On the Mandiant side it is more and more product as well.

¶¶ 148.

According to Plaintiffs, the above statements constitute material misrepresentations or omissions for three reasons. First, Defendants allegedly concealed problems associated with integrating Mandiant's core MIR solution (a key Mandiant product) with FireEye's platform, leading customers to purchase products from FireEye's competitors. See FAC at ¶¶ 140, 143, 145, 147, 149, and 151. Second, that there was significant slowdown in sales due to "mass confusion" and lack of knowledge about the company's new products. Id. Third, Plaintiffs assert these problems caused a lengthening of the sales cycles, which Defendants concealed. Id.

Plaintiffs' allegations are deficient for several reasons. First, the statement regarding the integration of the two companies' products allowing for more accurate decision making is not contradicted by any of Plaintiffs allegations or arguments. Moreover, there is no evidence to suggest the security teams were unable to make faster and more accurate decisions about potential security incidents. In fact, none of Plaintiffs' allegations or arguments directly address this statement. As such, this allegation fails.

Second, statements such as a combination of two companies is a "natural extension…of a partnership," "product synergies are strong," and companies enjoy "synergy potential" have been found to be examples of corporate optimism. Grossman v. Novell, Inc., 120 F.3d 1112, 1121-22 (10th Cir. 1997) (holding that statements such as a company had substantial success integrating the sales forces of two companies, and that the merger presented a compelling set of opportunities are non-actionable statements of corporate optimism); see In re Level 3 Comm., Inc. Sec. Litig., 667 F.3d 1331, 1340 (2012) (holding that "this year is really focused on integrating and getting synergies from all those acquisitions" is a vague and meaningless "management-speak" upon

which *no reasonable investor* would base a trading decision).

Moreover, Plaintiffs fail to adequately link the statements made on January 2 with reasons why they are misrepresentations. Instead, they select statements made by Defendants that generally discuss the integration, list merger issues that most companies face, and urge the court to draw an unreasonable contextual inference. Without more, Plaintiffs have failed to satisfy the particularity requirement with respect to the statements made on January 2, 2014.

Next, on February 11, 2014, Plaintiffs allege that the following statements made by Defendants constitute material misrepresentations:

- …the integration is progressing rapidly and smoothly.
- …the synergies across every segment of the combined product road map became more and more evident.
- We trained another 350 channel representatives, including 135 reps from international distributors and resellers.
- We're going to continue to scale services…but not at a faster pace than we are going to be selling products…15% to 17% would be service oriented…
- We focused heavily on Mandiant products this past week with…350 of our partners, and we made great progress.

¶¶ 152, 155, and 156. Plaintiffs contend the above statements are material misrepresentations for four reasons. In addition to concealing a significant sales slowdown that caused "mass confusion, problems associated with the integration of the MIR solution with FireEye's platform, a lengthening of the sales cycles, Plaintiffs contend FireEye omitted to report that it experienced friction with its channel partners. Id. at ¶¶ 140, 143, 145, 147, 149, 151, 158.

The statements made on February 11, 2014 are not actionable. CEOs and executives of companies that merge with or acquire other companies often describe ongoing mergers as smooth, rapid, and successful – which courts regularly deem corporate puffery. See Grossman, 120 F.3d at 1121-22 (reasoning that "moving rapidly to a fully integrated sales force…" is a vague statement of corporate optimism that courts "routinely dismiss"); see In re Level 3, 667 F.3d at 1340 (reasoning that a statements such as "…integration of all the acquired companies is progressing

well and we're beginning to see the benefits of synergies from those transactions" are non-actionable); See In re Dot Hill Sys. Corp. Sec. Litig., 594 F. Supp. 2d 1150, 1158 (S.D. Cal. 2008) (reasoning that integration of technology was on schedule and continuing smoothly, and already a success was corporate puffery).

Next, the accuracy of the statement regarding the 350 partners is not disputed by Plaintiffs, and evidence strongly suggests that the services did in fact constitute 15% to 17% of FireEye's revenue. See Dkt. No. 76- 13 ("Ex. 13") at 20. As such, the statements made on February 11, 2014 are not actionable misrepresentations.

On May 6 and 20, 2014, Plaintiffs allege FireEye made the following misrepresentations in its first quarter earnings call:

- We have had our most successful sales training and partner event [ever] at our inaugural Momentum conference in Las Vegas.
- Moreover, in the subsequent 60 days we conducted over 40 field seminar events…[a]ll in all, we generated explosive growth in incremental pipeline for the Company.
- …[W]e had a record number of cross-sell opportunities, with 15 significant deals where we sold Mandiant and FireEye together…these included some of the largest transaction[s] in the quarter…
- …the amount of leads coming from [recruiting partners is a] really nice metric that is expanding…
- …[the number of no-touch deals that we were getting was] a record for us…
- …the trends and indications are in the right direction for us in terms of what we are doing.
- The head to head battles with any competitor resulted in near flawless execution and win rates. I would say 100%.
- Any conversions to a competitor…to my knowledge…is zero. I have not seen a single transaction when somebody moves from FireEye to Wildfire [a competitor]
- …I don't see the competition as a major factor for us…the competitive landscape looks good.
- We had the products integrated at least at some level…

- …we are off to a really good start from a products point of view.
- …the FireEye sales team would sell every Mandiant product…
- Mandiant business and the FireEye business both were very healthy…both models were really good.
- We feel confident that…sales are coming online well and performing…[we are having] explosive [pipeline] growth…
- …We do a very good job showing the value of our product…our win rates are very high…particularly after we've shown the technology to a company.
- [After the incident responses we had] very quick product sales.

FAC at ¶¶167, 175. Plaintiffs assert the above statements are material misrepresentations for several reasons. In addition to concealing a significant sales slowdown that caused "mass confusion, problems associated with the integration of the MIR solution with FireEye's platform, a lengthening of the sales cycles, omitted to report that it experienced friction with its channel partners, Plaintiffs assert Defendants failed to disclose pushback they experienced from customers that were disinterested in purchasing products from both FireEye and Mandiant. FAC at ¶176.

These statements are not actionable because comments such as FireEye was "off to a really good start from a products point of view," "trends and indications are in the right direction," "FireEye sales team would sell every Mandiant product," "Mandiant business and FireEye business both were very healthy," and "win rates are very high…," among several others, are typical examples of non-actionable statements of corporate optimism. See Wozniak v. Align Tech., Inc., 850 F. Supp. 2d 1029, 1036 (N.D. Cal. 2012) ("outstanding retail results," "business will be good this year," and "industry leading growth," are non-actionable statements of corporate optimism); See In re ECOtality, Inc. Sec. Litig, No. 13-03791-SC, 2014 WL 4634280, *8 (N.D. Cal. Sep. 16, 2014) (reasoning that "we're doing well and I think we have a great future," "everything is clicking," and "old products are doing well" are non-actionable statements of corporate optimism) (citations and internal quotations omitted); see also In re Dot Hill, 594 F. Supp. 2d at 1158 (reasoning that stating integration of technology was on schedule, continuing smoothly, and already a success constitutes a non-actionable statement of corporate optimism).

Accordingly, the statements made on May 6 and 20, 2014 are examples of non-actionable statements of corporate optimism and puffery.

Finally, on May 29, and in June, August, and September, and November of 2014, Plaintiffs allege Defendants made the following materially misrepresentations:

- Product revenue in our business would be 40% to 45% of the mix…we have reiterated that guidance for the year.
- [with respect to the acquisition] we [have] had a good start…we spent about 8000 hours worth of training to get both sales forces up to speed on our technologies.
- …the mix between product revenue and product subscription revenue is not a factor for the way we look at our business…In fact we almost like more product subscription than we like product because it creates a longer-term ratable business model for the company…
- We had a blend difference between product and product subscription in the quarter largely due…[to the Mandiant Integration]
- [We are not]…restructuring [the]…sales operations…We're just trying to bring in some new leadership…[there is] no major change…
- The number of companies that we've cross-sold to is picking up…they are shortening the sales cycle…
- …We…did a lot better in Q2 than we did in Q1 when it came to cross-selling…the competition really hasn't had any impact that's of notice.
- Sales cycles have been very consistent…when we compete head-on…we feel we have a substantial gap.
- We think the pipeline and outlook looks good…purchasing products is a primary driver…our sales force is making great progress ramping up
- We haven't lost our channel partners… [t]hey remain very strong, in terms of relationships… we've spent a lot of time with the channel to ensure that… conflicts are addressed…the significant majority of the time…it really hasn't been a problem.
- I don't think that there was restructuring…we're going to have some overlap in employees…We may have hired into some regions that…may not have been exactly where we should have made our bets…
- …I can't be more pleased [with the Mandiant acquisition]…We are finding ourselves with a tremendous amount of synergy…

FAC at ¶¶167, 175, 176, 178, 179 181-203. According to Plaintiffs, these statements are

misrepresentations because the CWs allegedly said Defendants failed to disclose that there was a slowdown and mass confusion in the sales force, lengthening of the sales cycles, pushback from customers, and friction with its channel partners. Additionally, Plaintiffs assert Defendants' statement regarding restructuring was an omission because it failed to disclose that the company had terminated employees due to integration issues. Id. at ¶¶ 201. According to Plaintiffs, the termination of employees negatively impacted product sales. Id. at ¶¶ 200-201.

The statements made in May, June, August, September, and November of 2014 are non-actionable because they represent typical examples of puffery and corporate optimism, were not directly contradicted or addressed by Plaintiffs, or were simply statements of fact. Additionally, the court does not find Plaintiffs assertion that FireEye failed to discuss alleged layoffs a material omission.

"[A]n omission is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of the information made available." Juniper Networks, 880 F. Supp. 2d at 1061 (citations and internal quotations omitted) (emphasis added).

Here, the question posed to DeWalt during the August 5, 2014 earnings call specifically referenced restructuring within the sales department. See FAC at ¶ 185. DeWalt denied that there was any restructuring. See FAC at ¶¶ 185, 186. Plaintiffs' argue that this denial constitutes an material omission of the lay-offs that occurred within the company. However, a reasonable investor would discern from DeWalt's complete response that he was merely trying to clarify ambiguities regarding the word "restructuring." Moreover, DeWalt *admitted* that there was "some overlap of employees." From this, a reasonable investor would infer that layoffs were imminent or could have already occurred. And since Plaintiffs fail to provide details regarding the extent and severity of layoffs (other than a conclusory statement that it was a "mass-layoff"), it cannot be found that there was a significant alteration in the total mix of information available to reasonable investors. See FAC at ¶¶102-103. As such, the alleged omission is non-material.

In sum, Plaintiffs have inadequately pled material misrepresentations with respect to the Mandiant Integration.

3. Product Revenue, Revenue Recognition Policy Change, and Services Revenue

Plaintiffs' allege Defendants' failure to disclose integration problems adversely impacted product revenue, causing a 22.84% reduction in the stock price on May 7, 2014 and a 14.98% drop in the stock price in November of 2014. Opp. at 13, 14, 18-19. Additionally, they contend Defendants' belated announcement of a change in revenue recognition policy of its email product caused an 11.42% reduction in the stock price. Finally, Plaintiffs assert Defendants downplayed the services component of overall revenue. Opp. at 18-19; see also FAC at ¶ 19. Defendants dispute Plaintiffs' allegations, asserting that they lack particularity, while emphasizing that FireEye met all its guidance estimates. Id. at 9-10. Defendants then contend that the service component accounted for 16.9% of total revenue, which was within the 15%-17% range initially projected.

Plaintiffs' allegation that FireEye's stock price dropped due to Defendants failure to disclose integration problems is deficient – primarily because it is an unreasonable, self-serving inference, that is unsupported by the facts. No analyst expressly stated that the 22.84% or 14.98% drop was due to Defendants' inability to meet analysts' earnings estimates. More importantly, even if an analyst had expressly stated so, Defendants are only bound by or obligated to meet these estimates if they expressly or impliedly agree to do so. In re Syntex Corp. Sec. Litig., 95 F.3d 922, 934 (9th Cir. 1996) ("In order to be liable for unreasonably disclosed third-party forecasts, defendants must have put their imprimatur, express or implied, on the projections."); Id., 95 F.3d at 934. As such, Plaintiffs' fails to adequately link their self-serving inference to Defendants in any meaningful way, rendering Plaintiffs' allegations deficient.

Plaintiffs' allegation regarding Defendants delayed revenue recognition policy is likewise deficient. Just as in product revenue, Plaintiffs' rely on comments, estimates, and analysts'

predictions to make their case, while failing to link any statements made by Defendants regarding revenue recognition – express or implicit – with any drop in the share price. None of the Defendants adopted or agreed with any analyst's prediction regarding recognition policy change. In fact, Defendant Sheridan's statement that this change did not have a significant impact on second quarter results is bolstered by the fact that Defendants met or exceeds their revenue guidance estimates throughout the class period. See Ex. 5 at 7-8; Ex. 9 at 7; Ex. 10 at 7-8; Ex. 11 at 8-9; Ex. 12 at 10; and Ex. 13 at 8-9.

Finally, since evidence suggests that the services component was within the 15% - 17% range specified by Defendants, Plaintiffs' allegation that Defendants downplayed the services component is inaccurate, and as such, is deficient.[2] See Dkt. No. 76- 13 ("Ex. 13") at 20.

4. Statutory Safe Harbor Provision

"Forward-looking statements are not actionable as a matter of law if they are identified as such and accompanied by meaningful cautionary statements identifying important facts that could cause actual results to differ materially from those in the forward looking statement." See Police Retirement Systems of St. Louis v. Intuitive Surgical, Inc., No. 10-CV-03451-LHK, 2012 WL 1868874, *10 (N.D. Cal. May 22, 2012) (citations and internal quotations omitted). "A forward looking statement is any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions underlying or related to any of these issues." Id. (citations and internal quotations omitted).

Defendants identify the following statements as falling under the Safe Harbor Provision:

- We will be able to deliver fully integrated products and services that help organizations protect themselves from attacks
- I believe there's a number of additional near-term opportunities, including the ability to sell FireEye's existing products into Mandiant's base of more than 500 customers

[2] Professional Services revenue is $72,103,000, which is 16.94% of the total revenue amount of $425,662,000. See Ex. 13 at 20.

- Immediate short-term synergy will be the length of the FireEye sales cycle. Being closer to the breach crated by the Mandiant service engine can significantly shorten the product cycles and increase the average sales price
- We're going to continue to scale services people, but not at a faster pace than we are going to be selling products
- We see many synergies between the companies

See FAC at ¶¶8-11, 56-57, 144.

The statement regarding the fully integrated products and services includes the phrase "We will," which indicates that Defendants will, at some point in the future, deliver integrated products and services to its customers. In re Violin Memory Sec. Litig., No. 13-CV-5486-YGR, 2014 WL 5525946, at *13-14 (N.D. Cal. Oct. 31, 2014) (The phrase "we will" develop a derivative product to our Velocity PCIe Flash Memory Card is forward looking). Next, a reference to additional near-term opportunities is just that – a reference to sales opportunities in the near future, making it a forward looking statement.

The statement that the length of the FireEye sales cycle will be an immediate short-term synergy is an identification of an existing benefit, making it representation of a current fact. Additionally, Defendants comment that they will continue to scale services people, shows that some degree of scaling has already occurred and that future scaling will be calibrated at a pace that is slower than that of products. Such a statement is a representation of current fact. Mallen v. Alphatec Holdings, Inc., 861 F. Supp. 2d 1111, 1126 (S.D. Cal. 2012) (holding that revenues will continue to grow is a statement that concerns historical and current fact); see also In re TETRA Techs., Inc., Inc. Sec. Litig., No. 4:08-CV-0965, 2009 WL 6325540, at *32 (S.D. Tex. July 9, 2009) (holding that "onshore business continues to grow rapidly" is a statement of historical fact unprotected the Safe Harbor provision). Finally, the comment that FireEye *sees many synergies* between the companies demonstrates that synergies have already been identified, making it a current representation of fact. Mallen, 861 F. Supp. 2d at 1126 (holding that "we have already begun to realize synergies" is a representation of historical or current fact).

Since only the first two statements are forward looking, they may fall under the safe harbor

provision if accompanied by meaningful cautionary statements. Prior to the press conference held on January 2, 2014, FireEye's Vice President of Investor Relations, Kate Patterson, informed individuals on the call that FireEye would be making forward-looking statements regarding the company's billing and revenue results, expected benefits of the company's acquisition of Mandiant, product development and integration plans, industry trends and customer adoption of the company's solutions, and the expected capabilities and benefits of integrated and new products. See Dkt. No. 76-15 at 4. Patterson also informed individuals that they can refer to the most recent 10-Q filings for a more detailed description of the risks and uncertainties associated with the merger. Id. at 4.

The 10-Q form provides a comprehensive list of disclosures with factors that FireEye admits might delay product releases. For starters, with respect to fully integrating products and services, the operative disclosure states: "Although the market expects rapid introduction of new products…the development of these products and enhancements is difficult and the timetable for commercial release and availability is *uncertain* because there can be significant time lags between initial beta releases and the commercial availability of new products and enhancements." Dkt. No. 76-6 at 8. Additionally, Defendants admitted that they may experience "unanticipated delays" in the availability of new products and enhancements to its platform and fail to meet customer's timing expectations. The disclosures also identify several new products like the NX1000, Oculus, and SaaS. When viewed in totality, these disclosures constitute meaningful cautionary statements. See In re Violin, 2014 WL 5525946, *13-14 (holding that disclosures about the successful development and completion of a specific product like the PCLE card being uncertain constitutes an extensive and substantive disclosure); see also Plevy v. Haggerty, 38 F. Supp. 2d 816, 832 (C.D. Cal. 1998) (reasoning that a company's abundant and specific risk disclosures puts the investing public on notice and the public "cannot be heard to complain that the risks were masked as mere contingencies.").

With respect to selling FireEye's products to Mandiant customers, Defendants extensively

discuss competitors such as Cisco Systems, IBM, HP, and Juniper that might "emulate or integrate virtual-machine features similar to [FireEye's] into their own products," all of which would adversely affect FireEye's revenue. Dkt. No. 76-6 at 7. Moreover, Defendants emphasize the fact that its larger competitors have "substantially broader product offerings," which would discourage users from purchasing their products. Id. These admissions clearly identify the factors that would affect the company's product sales, making them meaningful cautionary disclosures. For all of these reasons, the first two statements fall within the Safe Harbor provision, and Plaintiffs will be precluded from relying on them to support their misrepresentation allegations.

ii. Scienter

In addition to satisfactorily alleging falsity, Plaintiffs in securities fraud actions must state with particularity the "facts evidencing scienter, i.e., the defendant's intention to deceive, manipulate, or defraud." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (citations and internal quotations omitted). "The Ninth Circuit has articulated a two-part inquiry for scienter: first, [the court must] determine whether any of the allegations, standing alone, are sufficient to create a strong inference of scienter; second, if no individual allegation is sufficient, ... the court [must] conduct a holistic review of the same allegations to determine whether the insufficient allegations combine to create a strong inference of intentional conduct or deliberate recklessness." Brown v. China Integrated Energy, Inc., 875 F. Supp. 2d 1096, 1105 (C.D. Cal 2012) (citations and internal quotations omitted).

The court must evaluate scienter in the context of the entirety of the complaint. Tellabs, 551 U.S. at 323. A strong inference of scienter will be "cogent and at least as compelling as any opposing inference of non-fraudulent intent." Id. at 314. A complaint will survive "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Id. at 324.

1. Confidential Witness Statements

Plaintiffs assert that the CW witness allegations support an inference of scienter because

the CWs are numerous and possess first-hand knowledge of the allegations. Opp. at 24. Defendants counter that the CW allegations are not sufficient to satisfy the scienter requirement because the CWs did not have personal contact with Defendants, asserted vague allegations, and were low-level employees with no access to company-wide information. Reply at 14-15.

"To satisfy the PSLRA, a complaint relying on statements from confidential witnesses must past two hurdles." Zucco, 552 F.3d at 995. "First, the confidential witnesses whose statements are introduced to establish scienter must be described with sufficient particularity to establish their reliability and personal knowledge." Id. (citations and internal quotations omitted.). "Second, those statements which are reported by confidential witnesses with sufficient reliability and personal knowledge must themselves be indicative of scienter." Id. Conclusory allegations are typically insufficient to establish scienter. In re Cadence Design Sys., Inc. Sec. Litig., 654 F. Supp. 2d 1037, 1046 (N.D. Cal. 2009) ("conclusory allegations that a defendant must have known about particular wrongdoing are, standing alone, generally insufficient.").

For the reasons previously stated, the first prong has been satisfied with respect to CWs 1-6. The job title, length of time employed at FireEye, and statements made by these CWs was described with adequate specificity. Moreover, these witnesses were in a position to know the alleged information with reasonable probability. It is not clear, however, precisely what CW7 said or why his or her input is needed. As such, the FAC fails to satisfy the particularity requirement with respect to CW7. As such, the court reiterates that it will consider the statements made by each of these confidential witnesses.

Upon review, however, it is clear that the CW statements fail to establish a strong inference of scienter. CW6 merely asserts that he participated in a "war room" on the last days of the quarter calling sales, and that the Salesforce software "constantly" updated FireEye employees. Opp. at 25-26. However, there is no allegation, indication, or evidence that CW6 was instructed to misrepresent the status of the Mandiant integration, FireEye's financial condition, or otherwise omit material information. In re Cadence, 654 F. Supp. 2d at 1047 (reasoning that a CW that was

not instructed to do anything wrong is a factor that weighs against scienter). CW6's participation in a meeting is merely routine corporate activity - hardly indicative of scienter.

CWs 2-5 allegedly said that the acquisition created "a lot of confusion," loss of channel business was "a very big deal," and that the cultures of the two companies lacked synergy. FAC at ¶107. There is no adequate explanation, however, of what "a very big deal" meant or whether the lack of synergy resulted in FireEye suffering a quantifiable adverse effect. The CWs entirely fail to support their allegations with concrete and readily verifiable figures or explanations. As such, these statements also fail to support an inference of scienter.

Finally, CW1 purportedly said that there were integration issues with the MIR product, which required the product team to "babysit" customers while the problem was resolved. These are typical examples of delays and corporate mismanagement - insufficient to satisfy the scienter requirement. See Sorkin, LLC v. Fischer Imaging Corp., No. 03-CV-00631-R, 2005 WL 1459735, *10 (D. Col. Jun. 21, 2005) (holding that vague allegations about customer complaints or quality control problems do not establish scienter); see also Anderson v. Spirit Aerosystems Holdings, Inc., 827 F.3d 1229, 1239-40 (10th Cir. 2016) ("generalized descriptions…of delays and mismanagement do not contribute to a cogent, compelling inference of scienter.").

For all of the above reasons, the CW statements when viewed individually or holistically, fail to justify an inference of scienter.

2. Defendants' Stock Sales

Plaintiffs contend that the amount, timing, and inconsistent nature of Defendants' stock sales support an inference of scienter. Opp. at 27. Specifically, Plaintiffs allege that stock sales amounting to $66 million - constituting 17.6%, 8.7%, and 15% of DeWalt, Mandia, and Sheridan's stock holdings - are large and suspicious enough to support an inference of scienter. Id. Additionally, Plaintiffs contend the timing of the stock sales is suspect because it was sold near all-time highs, and while officials were making optimistic statements about the company's financial condition. Id. at 28. Finally, Plaintiffs argue that these sales were inconsistent because

Defendant did not sell any shares in the year following the secondary public offering. Id.

Defendants counters that the stock sales are not suspicious because higher percentage of stock sales have been found to be insufficient indications of scienter. Reply at 16. Moreover, Defendants asserts they sold stocks *during* and not after the public offering. Id. at 17. Finally, Defendants contend that since they were "legally forbidden to trade before and after the secondary offering," an inference of scienter cannot be drawn. Id. at 17-18.

"Unusual or suspicious stock sales by corporate insiders may serve as circumstantial evidence of the requisite scienter but only if the insider trading is dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information." In re Splash Tech. Holdings, 160 F. Supp. 2d 1059, 1081 (N.D. Cal. 2001) (citations and internal quotations omitted). "Relevant factors to consider when determining whether stock sales meet this standard are: (1) the amount and percentage of shares sold; (2) the timing of the sales; and (3) the consistency between the sales and the insider's prior trading history." Id.; see also Ronconi v. Larkin, 253 F.3d 423, 435 (9th Cir. 2001) (same). "Although viable circumstantial evidence of scienter, stock sales alone cannot create a strong inference of scienter." In re Splash, 160 F. Supp. 2d at 1081 (citations and internal quotations omitted).

Here, Dewalt, Mandia, and Sheridan collectively sold stocks worth $66 million. Plaintiffs allege this amount equates to 17.6%, 8.7%, and 15% of Defendants total stock holdings, instead of Defendants stated percentages of 9.5%, 7%, and 9.6%. This discrepancy, Plaintiffs assert, was an attempt on the part of Defendants to distort the stock percentages sold by including both unvested and vested stocks. These and other facts, Plaintiffs assert, support a strong inference of scienter. The court disagrees.

Even if Plaintiffs calculations are taken at face value, courts have held that higher percentages of stock sales failed to raise a strong inference of scienter. Silicon Graphics, 183 F.3d at 987-88 (9th Cir. 1999) (no scienter inference when stocks sales were in excess of 75.3% of stock holdings); Meltzer, 540 F.3d at 1049, 1067 (9th Cir. 2008) (holding that there was no

scienter even when one defendant sold 37% of his stock holdings and another sold 100%); In re ImmersionCorp. Sec. Litig., No. C–09-4073-MMC, 2011 WL 871650, *7 (N.D. Cal. Mar. 11, 2011) (holding that defendants that sold 100% and 92.88% of current stock, but retained 79.11% and 90.28% of their total holdings when exercisable options were included failed to raise a strong inference of scienter).

Plaintiffs rely primarily on No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Corp. v. American West Holding Corp.., Nursing Home Pension Fund, Local 144 v. Oracle Corp., Batwin v. Occam Networks, Inc., and In re SeeBeyond Tech. Corp. Sec.Litig. to support their arguments. See 320 F.3d 920 (9th Cir. 2003); 380 F.3d 1226 (9th Cir. 2004); No. CV-07-2750-CAS, 2008 WL 2676364, at *1 (C.D. Cal. July 1, 2008); 266 F. Supp. 2d 1150 (C.D. Cal. 2003). However, the facts and circumstances surrounding the stock sales in these cases are distinguishable from the current case.

In Am. West, the court ruled that the investors stock sales were suspicious because they were dramatically out of line with prior trading practices, totaling nearly 100% of their stock holdings. Am. West, 320 F.3d at 939 ("Most of the individuals sold 100% of their shares, with the lowest percentage being 88%"). In contrast, Defendants sold their FireEye stock only during the secondary public offering, had no prior trading history, and retained a majority of their shares. Moreover, the court in Am. West cautions against inferring scienter simply because the amount and percentages of the sales are large. 320 F.3d at 939.

And while the court in Oracle Corp. ruled that the stocks sold by Oracle's CEO Larry Ellison, which amounted to $900 million and constituted 2.1% of his stock holdings, was "truly astronomical," this fact cannot be seen in isolation. The Oracle Corp court notes that there were improper accounting records kept, customers had inadvertently overpaid Oracle, and Ellison sold his stock at a time when several of Oracle's business deals fell through, causing a significant reduction in Oracle's earnings. 380 F.3d at 1232. No such accounting irregularities or dubious business practices are alleged here. Defendants also met or exceeded their guidance expectations

throughout the class period.

Batwin is non-analogous because the Batwin court reasoned there were significant violations of GAAP that took place over an extended period of time, including premature recognition and overstating of company revenues. Batwin, 2008 WL 2676364, at *13-14. Finally, the court in SeeBeyond reasoned that Defendants deliberately misled investors and analysts by making it seem as if they voluntarily deferred their revenue announcements. In fact, they were instructed to defer revenue disclosure by an outside accounting firm – E & Y. 266 F. Supp. 2d at 1169 (C.D. Cal. 2003).

Here, in contrast to the above cases, there are no allegations of GAAP violations, and certainly no evidence that indicates Defendants were informed to delay disclosures of their earnings reports. Instead, Defendants retained approximately 82.4% to 91.3% of their total holdings, had no prior trading history, and would suffer significant losses if FireEye's stock price dropped – facts that weighs against an inference of scienter. See In re Hansen Natural Corp. Sec. Litig., 527 F. Supp. 2d 1142, 1160 (C.D. Cal. 2007).

Next, Plaintiffs' argument that the timing and consistency of Defendants sales supports scienter is also unpersuasive for several reasons. Even assuming Defendants sold their stocks at a price that was close to the stock's all-time high, "this alone is not sufficient for scienter purposes." In re Tut. Sys, Inc. Sec. Litig., No. C-01-02659-CW, 2002 WL 35462358, *11 (N.D. Cal. Aug. 15, 2002). Moreover, Plaintiffs' reliance on In re Tut Sys. is misplaced. In In re Tut Sys., Defendants sold significant portions of their holdings – 46.5% – within a very short time, while here, Defendants sold at most 17.6% of their stock holdings. Third, since Defendants entered into lock-up agreements before and after the secondary public offering, they lack a meaningful trading history, which weighs against a finding of scienter. In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1095 (9th Cir. 2002); In re Pixar Sec. Litig., 450 F. Supp. 2d 1096, 1105 (N.D. Cal. 2006) ("Without a meaningful trading history…the Court cannot conclude that Bax's trades were suspicious and thus supportive of scienter.").

For all of the above reasons, Plaintiffs have failed to establish that the stock sales support a strong inference of scienter.

3. Core Operations Theory

Core Operations may support a strong inference of scienter under following three circumstances:

> First, the allegations may be used in any form along with other allegations that, when read together, raise an inference of scienter that is cogent and compelling, thus strong in light of other explanations…Second, such allegations may independently satisfy the PSLRA where they are particular and suggest that defendants had access to the disputed information…Finally, such allegations may conceivably satisfy the PSLRA standard in a more bare form, without accompanying particularized allegations, in rare circumstances where the nature of the relevant fact is of such prominence that it would be absurd to suggest that management was without knowledge of the matter.

South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 785-86 (9th Cir. 2008). More importantly, the role of corporate officers and their access to information may support a strong inference of scienter if supported by "detailed and specific allegations about the management's exposure to factual information within the company." In re Maxwell Technologies, Inc. Sec. Litig., 18 F. Supp. 3d 1023, 1041 (S.D. Cal. 2014). "In rare circumstances, particularized allegations are not needed where the nature of the relevant fact is of such prominence that it would be absurd to suggest that management did not have knowledge of it." Id.

Here, Plaintiffs' argue that a strong inference of scienter can be drawn from the following facts: Defendants were high level corporate officers that attended board meetings, had a "hands-on" management style, and could access FireEye's reports, press releases, public filings, and other statements. FAC at ¶ 248. The court disagrees. While informative, more is needed to establish a strong inference of scienter. In re Peoplesoft, Inc., No. C-99-0472-WHA, 2000 WL 1737936, at *4 (N.D. Cal. May 25, 2000); see In re Taleo Corp. Sec. Litig., No. C-09-00151-JSW, 2010 WL 597987, *8 (N.D. Cal. Feb. 17, 2010) ("[g]eneral allegations of defendants' hands on management style, their interaction with other officers and employees, their attendance at monthly

meetings…are not sufficient to establish scienter") (citations and internal quotations omitted); see also In re Autodesk, Inc. Sec. Litig., 132 F. Supp. 2d 833, 843-44 (N.D. Cal. 2000) (similar). At a minimum, Plaintiffs needed to have provided information about precisely what was said by the parties in these meetings, which facts the Defendants were exposed to, and why this exposure supports an inference of scienter. Plaintiffs also fail to provide evidence that suggests the current circumstances are somehow rare, which justifies an inference of scienter without particularized allegations.

As such, Plaintiffs allegations fail to raise a strong inference of scienter under the core operations theory.

4. Replacement of Head of Sales

Plaintiffs assert Defendant's announcement of a new Head of Sales bolsters an inference of scienter. Opp. at 30. Defendants counter that facts of the case are non-analogous to the facts in cases cited by Plaintiffs because the head of sales remained part of the company and took on a different role while the individuals in Plaintiffs' cases were no longer employed by the company. Reply 19-20.

Plaintiffs' arguments are unpersuasive. Since the court has found that Plaintiffs' other scienter allegations fail to support a strong inference of scienter, the determinative inquiry is whether a replacement of the Head of Sales, when viewed in conjunction with these failed allegations, supports an inference of scienter. The court finds that it does not. Where, as here, a replacement of the head of sales support is unaccompanied by any additional evidence of wrongdoing on the part of the Defendants, an inference of scienter is unlikely. See In re Downey Sec. Litig., No. CV-08-3261-JFW, 2009 WL 2767670, at *13 (C.D. Cal. Aug. 21, 2009) (holding that Plaintiffs allegations fail to support an inference of scienter if the facts alleged do not suggest any wrongdoing or fraudulent activity associated with employee terminations); see also Middlesex Retirement System v. Quest Software Inc, 527 F. Supp. 2d 1164 (C.D. Cal. 2007) (holding that scienter exists when an officer resigned in order to *avoid cooperating* with an internal

investigation).

Accordingly, the replacement of head of sales fails to support a strong inference of scienter. In sum, the above allegations, when viewed individually and collectively, fail to support a strong inference of scienter.

iii. Loss Causation

The element of loss causation needs to be analyzed only if the second element of scienter is satisfied. In re Verifone Sec. Litig., No. 5:13-CV-01038-EJD, 2016 WL 1213666, at *9 (N.D. Cal. Mar. 29, 2016); see Stevens v. InPhonic, Inc., 662 F. Supp. 2d 105, 125 (D.C. 2009); see also In re AOL, Inc. Repurchase Offer Litig., 966 F. Supp. 2d 307, 312 (S.D.N.Y. 2013). "To prove loss causation, the Plaintiffs must demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the Plaintiffs." Oregon Public Employees Retirement Fund v. Apollo Grp., 774 F.3d 598, 608 (9th Cir. 2014) (citations and internal quotations omitted.).

Here, since Plaintiffs fail to satisfactorily plead the material misrepresentation and scienter elements, the loss causation analysis is unnecessary.

V. SCHEME LIABILITY – Rules 10b-5(a) and (c)

Plaintiffs assert they have adequately plead a claim under scheme liability because of Defendants' deceptive conduct, including making false and misleading statements about the Mandiant integration. Opp. at 32.

Where a Plaintiff's sole basis for scheme liability arises out of the alleged misrepresentations or omissions that form the basis of a Rule 10b-5(b) claim, courts have reasoned that scheme liability does not apply. Scott v. ZST Digital Networks, Inc., 896 F. Supp. 2d 877, 893 (C.D. Cal. 2012) (citations and internal quotations omitted).

Here, the court finds that Plaintiffs scheme liability claim fails because it rests entirely on the allegations that form the basis of the 10b-5(b) claim. See S.E.C. v. Mercury Interactive, LLC, No. 5:07-CV-02822-WHA, 2011 WL 5871020, at *2 (N.D. Cal. Nov. 22, 2011) (citing WPP

Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1057 (9th Cir. 2011)).

Accordingly, Plaintiffs' scheme liability claim fails.

VI. CONTROL PERSON CLAIM – Section 20(a)

Plaintiffs assert Defendants' day-to-day control over FireEye's operations is enough for them to state a claim under scheme liability. Opp. at 33.

Congress established liability under § 20(a) for "[e]very person who, directly or indirectly, controls any person liable" for violations of the securities laws. 15 U.S.C. § 78t(a). To prevail on its claim under Section 20(a) of the Securities and Exchange Act ("Exchange Act"), Plaintiff must demonstrate "a primary violation of federal securities law" and that "the defendant exercised actual power or control over the primary violator." Zucco, 552 F.3d at 990. Section 20(a) claims may be dismissed if plaintiff "fails to adequately plead a primary violation of section 10(b)." Id.

Since Plaintiffs fail to allege a viable Section 10(b) or Rule 10b-5 claim, the court finds that Plaintiffs have likewise failed to adequately allege a Section 20(a) claim. Id.

VII. CONCLUSION

For the reasons stated above, the court GRANTS Defendants' motion to dismiss with leave to amend. Any amended complaint must be filed within fifteen days of the date of this Order.

IT IS SO ORDERED.

Dated: November 14, 2016

EDWARD J. DAVILA
United States District Judge