

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**FILED**

AUG 29 2003

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re FOUNDRY NETWORKS, INC.  
SECURITIES LITIGATION,

Master File No. C 00-4823 MMC

This Document Relates to:

**ORDER GRANTING DEFENDANTS'  
MOTION TO DISMISS PLAINTIFFS'  
FIFTH AMENDED COMPLAINT**

ALL ACTIONS

(Docket No. 123)

Before the Court is defendants' motion to dismiss plaintiffs' Fourth Amended Complaint<sup>1</sup> pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), filed April 7, 2003.<sup>2</sup> The matter came on regularly for hearing on June 13, 2003. John K. Grant and Shirley H. Huang of Milberg Weiss Bershad Hynes & Lerach LLP appeared on behalf of plaintiffs. Shirli Fabbri Weiss and Roy K. McDonald of Gray Cary Ware & Freidenrich LLP appeared on behalf of defendants. Having considered the papers submitted in support of and in opposition to the motion, and the arguments of counsel, the Court hereby rules as follows.

<sup>1</sup>As discussed *infra*, because the Court subsequently allowed plaintiffs to file a Fifth Amended Complaint, the Court will consider the instant motion as a motion to dismiss the Fifth Amended Complaint.

<sup>2</sup>In addition to Foundry Networks, Inc. ("Foundry"), the individual defendants, and the positions they held during the class period, are: Bobby R. Johnson, Jr. ("Johnson"), Foundry's Chief Executive Officer ("CEO") and Chairman of the Board; Timothy D. Heffner ("Heffner"), Foundry's Vice President for Finance and Administration and Chief Financial Officer ("CFO"); Lee Chen ("Chen"), Foundry's Vice President for Software Engineering and Quality and Assurance; Robert W. Shackleton ("Shackleton"), Foundry's Vice President for North American Sales; Ken K. Cheng ("Cheng"), Foundry's Vice President for Marketing and Product and Program Management; and H. Earl Ferguson ("Ferguson"), Foundry's Vice President for Hardware Engineering. (See *id.* ¶ 19(a)-(f).)

## BACKGROUND

1  
2 The underlying facts are discussed in the Court's prior orders filed June 6, 2002 and  
3 February 14, 2003, and are incorporated herein by reference.

4 In its February 14, 2003 order, the Court granted, with leave to amend, defendants'  
5 motion to dismiss plaintiff's Third Amended Complaint ("TAC"), in which plaintiffs asserted  
6 a claim under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C.  
7 § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission ("SEC"), 17 C.F.R.  
8 § 240.10b-5, as well as a claim based on control person liability under § 20(a) of the  
9 Exchange Act, 15 U.S.C. § 78t(a). The Court found that plaintiffs had failed to adequately  
10 plead that any of the six sets of statements in question were false or misleading, and that  
11 plaintiffs had failed to plead facts sufficient to raise a strong inference of scienter. On  
12 March 17, 2003, plaintiffs filed their Fourth Amended Complaint, which asserts, as did the  
13 TAC, a claim under § 10(b) of the Exchange Act and Rule 10b-5 of the SEC, and under  
14 § 20(a) of the Exchange Act, in addition to a new claim for insider trading under § 20A of  
15 the Exchange Act, 15 U.S.C. 78t-1. On April 7, 2003, defendants filed the instant motion.

16 On June 13, 2003, the Court conducted a hearing on defendants' motion to dismiss  
17 plaintiff's Fourth Amended Complaint, upon conclusion of which the Court deemed the  
18 matter submitted. On June 19, 2003, plaintiff filed a motion, by which plaintiff sought an  
19 order from the Court allowing briefing on plaintiff's request to file a Fifth Amended  
20 Complaint. The Fifth Amended Complaint is essentially identical to the Fourth Amended  
21 Complaint, with the single exception that it includes one additional paragraph for purposes  
22 of alleging an additional false statement. On July 1, 2003, the Court granted plaintiffs'  
23 request, and on July 15, 2003 plaintiffs filed a Motion to Supplement Complaint and  
24 Further Opposition to Defendants' Motion to Dismiss, to which defendants, on July 29,  
25 2003, filed opposition. Both the Motion to Supplement and the opposition thereto address  
26 at length the additional allegations set forth in the Fifth Amended Complaint and the  
27 sufficiency thereof to support a claim under § 10(b). By separate order filed concurrently  
28 herewith, the Court has granted plaintiffs' Motion to Supplement, by which plaintiffs are

1 afforded leave to file their Fifth Amended Complaint. Because the parties have been  
2 afforded ample opportunity to address the additional allegations contained therein, the  
3 Court will consider the Motion to Dismiss, as supplemented by the briefing on the Motion to  
4 Supplement, as if the Motion to Dismiss had been directed in the first instance to the Fifth  
5 Amended Complaint (hereafter "FAC").

## 6 LEGAL STANDARD

### 7 A. Rule 12(b)(6)

8 Under Rule 12(b)(6), a complaint should not be dismissed unless a plaintiff can  
9 prove "no set of facts in support of his claim that would entitle him to relief." See Parks  
10 Sch. of Bus., Inc. v. Symington, 51 F. 3d 1480, 1484 (9<sup>th</sup> Cir. 1995). In ruling on a motion  
11 to dismiss, the court must accept a plaintiff's factual allegations as true and construe them  
12 in the light most favorable to plaintiff. See Gompper v. VISX, Inc., 298 F.3d 893, 895 (9<sup>th</sup>  
13 Cir. 2002). "[C]onclusory allegations of law and unwarranted inferences are insufficient to  
14 defeat a motion to dismiss for failure to state a claim." Epstein v. Washington Energy Co.,  
15 83 F. 3d 1136, 1139 (9<sup>th</sup> Cir. 1996).

### 16 B. Section 10(b) and the PSLRA

17 Section 10(b) of the Exchange Act states that "[i]t shall be unlawful for any person  
18 . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any  
19 manipulative or deceptive device or contrivance in contravention of such rules and  
20 regulations as the Commission may prescribe." See 15 U.S.C. § 78j(b). A plaintiff bringing  
21 a claim for securities fraud must show: (1) a false and misleading statement or omission of  
22 material fact; (2) scienter; (3) reliance; and (4) damages. See Paracor Fin., Inc. v. General  
23 Electric Capital Corp., 96 F. 3d 1151, 1157 (9<sup>th</sup> Cir. 1996).

24 A plaintiff alleging a cause of action for securities fraud is subject to "heightened  
25 pleading" standards as set forth in the PSLRA. See In re Silicon Graphics Inc. Sec. Litig.,  
26 183 F. 3d 970, 974 (9<sup>th</sup> Cir. 1999). Under the PSLRA, a plaintiff in a private securities  
27 fraud action alleging material misstatements or omissions must "specify each statement  
28 alleged to have been misleading; the reason or reasons why the statement is misleading;

1 and if an allegation regarding the statement or omission is made on information and belief,  
2 the complaint shall state with particularity all facts on which that belief is formed.” See 15  
3 U.S.C. § 78u-4(b)(1).

4 The PSLRA also provides that “the complaint shall, with respect to each such act or  
5 omission alleged to violate this chapter [the Securities Exchange Act of 1934], state with  
6 particularity facts giving rise to a strong inference that the defendant acted with the  
7 required state of mind.” See 15 U.S.C. § 78u-4(b)(2). In this circuit, as a general matter,  
8 the required state of mind is “deliberate or conscious recklessness.” See No. 84 Employer-  
9 Teamster Joint Council Pension Trust Fund v. America West Holding Corp., 320 F. 3d 920,  
10 931 (9<sup>th</sup> Cir. 2003) (quoting Silicon Graphics, 183 F. 3d at 979.) If the challenged  
11 statement is forward-looking, however, the requisite state of mind is “actual knowledge.”  
12 See id. (quoting 15 U.S.C. § 78u-5(c)(1)). In determining whether plaintiffs’ allegations are  
13 sufficient to raise a strong inference of scienter, a court must consider (1) “the total of  
14 plaintiffs’ allegations,” even though some allegations may be individually lacking, and (2)  
15 “all reasonable inferences capable of being drawn from the allegations, including  
16 inferences unfavorable to the plaintiffs.” See America West, 320 F. 3d 920, 938 (9<sup>th</sup> Cir.  
17 2003) (internal quotations and citations omitted.)

18 Because “falsity and scienter in private securities fraud cases are generally strongly  
19 inferred from the same set of facts,” the Ninth Circuit has incorporated the falsity and  
20 scienter requirements “into a single inquiry.” See Ronconi v. Larkin, 253 F. 3d 423, 429  
21 (9<sup>th</sup> Cir. 2001); see also America West, 320 F. 3d at 932 (noting courts “generally  
22 examines the falsity and scienter requirements at the same time.”) In conducting this  
23 inquiry, a court is to determine whether “particular facts in the complaint, taken as a whole,  
24 raise a strong inference that defendants intentionally or with deliberate recklessness made  
25 false or misleading statements to investors.” See Ronconi v. Larkin, 253 F. 3d at 429.

## 26 DISCUSSION

27 The Court first examines plaintiffs’ revised allegations as to statements previously  
28 alleged to be false or misleading. The Court next addresses the allegedly false statement-

1 set forth in the first instance in plaintiffs' FAC. Lastly, the Court addresses plaintiffs' new  
2 § 20A claim for insider trading.

3 **A. Section 10(b) Claim: Statements Previously Alleged**

4 Defendants argue that the FAC does not cure the deficiencies detailed in the  
5 Court's prior order dismissing the TAC. Specifically, defendants contend that with respect  
6 to plaintiffs' claim for securities fraud, (1) plaintiffs have failed to adequately plead that the  
7 statements were false or misleading, (2) plaintiffs have failed to plead sufficient facts to  
8 give rise to a strong inference that defendants acted with the requisite scienter, and (3) the  
9 forward-looking statements on which plaintiffs rely are not actionable under the PSLRA's  
10 "Safe Harbor" provisions.

11 As noted, the Court found that plaintiffs' TAC failed to adequately plead facts  
12 sufficient to show that any of the six sets of statements upon which plaintiffs relied were  
13 false or misleading. In their opposition to defendants' motion to dismiss, plaintiffs state that  
14 they "have amended their Complaint with respect to statements made in (1) defendants'  
15 October 17, 2000 conference call and (2) an October 24, 2000 interview of [defendant and  
16 Foundry CEO] Bobby Johnson published on November 13, 2000 in The Wall Street  
17 Transcript," but that they "have not materially amended their Complaint with respect to the  
18 September 6, 2000 statements, the September 7, 2000 conference call, the October 17,  
19 2000 press release or the November 14, 2000 Form 10-Q filing." (See Opp. at 1:18-22, n.  
20 3.) Although plaintiffs "incorporate their prior arguments by reference" with respect to such  
21 latter statements, plaintiffs "do not ask the Court to reconsider the prior ruling on these  
22 statements." (See id.)

23 Accordingly, the Court examines herein plaintiffs' allegations only as to the  
24 statements made in the October 17, 2000 conference call and the October 24, 2000  
25 interview.<sup>3</sup> Plaintiffs' opposition addresses four such statements: (1) the October 17, 2000

---

26  
27 <sup>3</sup>In evaluating the sufficiency of these allegations, the Court hereby GRANTS  
28 defendants' Request for Judicial Notice, filed April 7, 2003, wherein defendants request  
judicial notice of various press releases and SEC filings.

1 statement that Foundry was “comfortable with a full year 2000 revenue target of  
2 approximately \$400 million,”<sup>4</sup> (2) the October 24, 2000 statement that Foundry was seeing  
3 “good overall demand”; (3) the October 24, 2000 statement that Foundry’s “biggest  
4 challenge [was] to . . . continue to meet demand”; and (4) the October 24, 2000 statement  
5 that Foundry “plan[ned] to continually increase quarterly profits each and every quarter.”  
6 (See Opp. at 2; FAC ¶¶ 36, 42.)<sup>5</sup>

7 As plaintiffs concede, defendants’ October 17, 2002 revenue forecast and  
8 October 24, 2000 profit forecast are forward-looking statements. See America West, 320  
9 F. 3d at 936 (“A ‘forward-looking statement’ is any statement regarding (1) financial  
10 projections, (2) plans and objectives of management for future operations, (3) future  
11 economic performance, or (4) the assumptions ‘underlying or related to’ any of these  
12 issues.”) Accordingly, to adequately allege scienter with respect to such statements,  
13 plaintiffs must plead with particularity facts giving rise to a strong inference that the  
14 defendant acted with actual knowledge that the statements were false or misleading. The  
15 two remaining statements, that Foundry was seeing “good overall demand” and that  
16 Foundry’s “biggest challenge [was] to continue to meet demand,” concern then existing  
17 conditions and, consequently, are not forward-looking. See id. at 937 (finding the  
18 statements “the settlement agreement’s provisions will not have a material adverse effect  
19 on the Company’s operations” and “we are not anticipating any major increase in

---

20  
21 <sup>4</sup>Although plaintiffs’ FAC quotes verbatim numerous statements made in the  
22 October 17, 2000 conference call, (see FAC ¶ 36.) plaintiffs’ opposition to the instant  
motion relies exclusively on this one particular statement.

23 <sup>5</sup>Plaintiffs argue that the statements made at the October 24, 2000 interview should  
24 be deemed to have been made as of November 13, 2003, the publication date of the  
25 interview in The Wall Street Transcript. Plaintiffs allege, as they have in the previous  
26 complaints, that Johnson and Foundry “maintained the ability to correct and/or revise the  
27 statements in the article” between the time the interview took place and the time it was  
28 published.” (See FAC ¶ 42.) In its June 6, 2002 order dismissing the SAC, the Court  
noted that plaintiffs had failed to plead any facts supporting this allegation. See 15 U.S.C.  
§ 78u-4(b)(1)(B) (providing plaintiff must “state with particularity all facts” supporting  
plaintiff’s belief that statement is false or misleading). Neither plaintiffs’ TAC nor FAC  
introduced any new facts in support of the allegation. As a consequence, the statements  
are properly deemed made as of October 24, 2003, the date defendant Johnson made the  
statements to The Wall Street Transcript.

1 maintenance costs or the costs of oversights going forward” were not forward-looking  
2 because each was “a description of the present effects” of a settlement agreement.)  
3 Accordingly, the requisite state of mind as to these statements is deliberate or conscious  
4 recklessness.

5 As in the TAC, plaintiffs allege that the above statements were false or misleading  
6 for six reasons. First, plaintiffs allege that despite Foundry’s favorable third quarter  
7 results, defendants knew, based on several internal documents and discussions, that  
8 demand for their products was decreasing as a result of weak sales and demand in July  
9 2000. (See FAC ¶¶ 41, 43.) Second, plaintiffs allege that Foundry had “significantly  
10 increas[ed] the number of contingency sales deals it made with its customers” in order to  
11 offset the slowing demand for Foundry’s products. (See FAC ¶¶ 41, 43.) Third, plaintiffs  
12 allege that Foundry “concealed the fact that the third quarter results had only been  
13 achieved by making early shipment of product that had been ordered for shipment later in  
14 the fourth quarter,” thus decreasing fourth quarter sales. (See FAC ¶¶ 41, 43.) Fourth,  
15 plaintiffs allege that defendants knew that fourth quarter demand had been reduced based  
16 on internal shipment and forecast reports that revealed that Foundry was “forecasting and  
17 shipping approximately 25% below prior projections and that sales revenue had dropped  
18 approximately 20%.” (See FAC ¶¶ 41, 43.) Fifth, plaintiffs allege that according to a  
19 “senior networking executive” for one of Foundry’s competitors, “demand was declining in  
20 October of 2000 and [there was] a substantial lack of new orders at that time, particularly  
21 in the ISP business area where his company had a significant overlap with Foundry in the  
22 same projects.” (See FAC ¶ 28.) Sixth, plaintiffs allege that defendants knew of the  
23 weakening demand in the fourth quarter because Foundry sales personnel had indicated  
24 they would not be able to meet their sales quotas in the fourth quarter and thereafter  
25 requested lower quotas. (See FAC ¶¶ 27(d), 29.)

26 In its February 14, 2003 order, the Court found that each of these allegations was  
27 deficient. For the reasons discussed in the court’s prior orders dated June 6, 2002 and  
28 February 14, 2003, and for the reasons discussed below, although plaintiffs have

1 bolstered several of these allegations with new facts, the allegations remain insufficient  
2 under the PSLRA to show that defendants actually knew the statements in question were  
3 false or misleading when made, or were deliberately reckless in making such statements.

#### 4 **1. Weak Demand**

5 The FAC again alleges, as in the TAC, that the statements in question were false  
6 or misleading when made because defendants knew, by July 2000, that demand for  
7 Foundry's products was weakening. Specifically, plaintiffs allege, as in the TAC, that  
8 (1) during a semi-annual National Sales Conference in July 2000, Johnson and Robert W.  
9 Shackleton, Foundry Vice President - North American Sales, "indicated that Foundry  
10 expected slowing sales trends and softening demand" (see FAC ¶ 25(a)); (2) Johnson  
11 circulated a company-wide e-mail "on or about July 20, 2000," discussing "poor month-to-  
12 date sales results" (see FAC ¶ 25(b)); (3) Foundry's "internal actual-to-plan July 2000  
13 reports revealed that Foundry was failing to make its internal July sales plan . . . and was  
14 suffering a 30% miss for that month" (see id.); and (4) Johnson, in late September 2000,  
15 circulated a memorandum that "discussed the slowing sales to ISPs."<sup>6</sup> (See FAC ¶26.)

16 As noted in the Court's prior orders, even assuming plaintiffs' allegations are  
17 sufficient to demonstrate that Foundry in fact experienced disappointing sales in July  
18 2000, such allegations, in light of the record third quarter revenues experienced by  
19 Foundry as of the end of September 2000,<sup>7</sup> are insufficient to demonstrate that the  
20 statements made by defendants were false or misleading when made on October 17,  
21 2000 and October 24, 2000. Plaintiffs offer no additional facts, but argue that the  
22 statements at the July conference demonstrate defendants knew at that time that demand  
23 for Foundry's products was weak and would continue to weaken. (See Opp. at 14.) The  
24 fact that Foundry executives remarked at a sales meeting in July 2000 that they

---

25  
26 <sup>6</sup>"ISPs" are Internet Service Providers.

27 <sup>7</sup>To the extent that plaintiffs' allegations as to contingency sales and early shipments  
28 draw into question the strength of Foundry's third quarter results, such allegations, as  
discussed infra, remain inadequate.

1 anticipated "slowing sales trends and softening demand," however, fails to raise an  
2 inference that defendants' revenue and profit forecast statements, or statements  
3 respecting demand, were false or misleading when made several months later in October  
4 2000. No facts are alleged indicating either the time period to which the statement  
5 "slowing sales trends and softening demand" refers, or the effect of any such "slowing" or  
6 "softening." Indeed, Foundry had been experiencing strong growth, in each quarter, from  
7 Foundry's first quarter 1998 and it continued to do so through the third quarter 2000.<sup>8</sup>  
8 Plaintiffs' allegations as to the September 2000 memorandum do not assist in clarifying  
9 the above-noted ambiguities as plaintiffs' description of that memorandum is itself  
10 ambiguous, providing no facts as to the period, extent or effect of the slowing sales  
11 "discussed" therein. Without such additional facts, and in light of Foundry's record third  
12 quarter revenues in September 2000, plaintiffs' allegations remain insufficient to  
13 demonstrate either that the statements were false or to raise the requisite strong inference  
14 of scienter.

## 15 **2. Contingency Sales**

16 In its prior orders, the Court found insufficient plaintiffs' allegations as to  
17 contingency sales because plaintiffs had failed to allege: (1) any facts demonstrating that  
18 Foundry increased the number of contingency sales in response to decreasing demand,  
19 (2) the number of contingency sales actually made and the significance of these sales to  
20 Foundry's total business revenues, (3) facts indicating whether Foundry ever recognized  
21 any of these contingent sales as revenue, let alone in violation of generally accepted  
22 accounting principles ("GAAP"), and (4) whether any such contingency sales resulted in  
23 product returns caused by a customer's inability to pay. Plaintiffs were notified that, in  
24 order to satisfy the particularity requirement of the PSLRA, additional information was  
25 needed, such as the number of contingency sales actually made, to whom they were

---

26  
27 <sup>8</sup>Foundry's quarter-over-quarter growth from first quarter 1998 through third quarter  
28 2000 is evidenced in Foundry's Forms 10-K and 10-Q filed with the SEC. (See Reply at  
10; Resley Decl. Exs. B-1, B-2, B-3.)

1 made, the risks associated with such sales and the significance of these sales to  
2 Foundry's total business revenues.

3 As plaintiffs' FAC adds no new facts respecting contingency sales, the above-  
4 referenced deficiencies remain. Indeed, plaintiffs now state, for purposes of the instant  
5 motion, they are not asserting the contingency sales violated GAAP. Although plaintiffs  
6 argue that Foundry approximately doubled its contingency sales "in reaction to the  
7 weakened demand for Foundry's products," (see Opp. at 16), plaintiffs fail to offer any  
8 facts to show such connection, nor do plaintiffs allege any facts to show whether, and to  
9 what extent, an increase in contingency sales would affect Foundry's reported fourth  
10 quarter revenues. Barring any such facts, plaintiffs' conclusory assertion that an increase  
11 in contingency sales resulted from weakened demand fails to provide any support for  
12 plaintiffs' allegation that the statements in question were false or misleading, or that  
13 defendants acted with the requisite degree of scienter. See Epstein v. Washington  
14 Energy Co., 83 F. 3d 1136, 1139 (9<sup>th</sup> Cir. 1996) ("conclusory allegations of law and  
15 unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a  
16 claim.")

### 17 **3. Early Shipments**

18 In the TAC, plaintiffs alleged that Foundry CEO Johnson had "directed the sales  
19 and shipping departments to go ahead and ship product in September that customers had  
20 indicated should not to be shipped until the fourth quarter," and that these "unauthorized  
21 early shipments" resulted in Foundry's ability "to report record third quarter revenues."  
22 (See TAC ¶ 26(d)) In its February 14, 2003 order, the Court found these allegations were  
23 insufficient, as plaintiffs had failed to allege facts (1) reflecting the source of information as  
24 to the allegations; (2) indicating whether any such products were returned, to support the  
25 assertion that the shipments were "unauthorized" or sent without customer approval;  
26 (3) respecting the number of such early deliveries, the number of customers affected, or  
27 the identity of any such customers affected; (4) showing that demand actually had  
28 decreased or that Foundry had initiated the early shipments in order to conceal weakening

1 demand for its products; (5) showing that any decrease in Foundry's internal forecast was  
2 in fact the result of the early shipments; (6) setting forth the amount of revenue that such  
3 early shipments involved represented; and (7) indicating whether Foundry violated GAAP  
4 by engaging in any such practice.

5 Plaintiff's FAC supplies additional facts as to (1) the source of plaintiffs' information  
6 as to the alleged early shipments and (2) the amount of revenue affected by such  
7 shipments. Plaintiffs now allege that a former Foundry finance employee, alleged in the  
8 TAC to have provided plaintiffs with this information, was told by a "sales order section  
9 manager" that "Johnson had directed" the early shipments. (See FAC ¶ 27(d).) The FAC  
10 also includes, for the first time, allegations that a Foundry sales manager was "told by  
11 sales representatives that . . . management was insisting that orders scheduled for  
12 shipment in the fourth quarter of 2000 be sent in September so that revenue could be  
13 recognized in the third quarter," and that sales representatives, "includ[ing] Craig Hedges,  
14 Martina Pavloff and Scott Banning" were "concerned and complained that the order  
15 pipeline had been depleted by Foundry's third quarter shipments." (See FAC ¶ 29.) In  
16 addition, plaintiffs allege, without identifying a source, that the early shipments served to  
17 shift approximately \$5.2 million in revenues from the fourth quarter to the third quarter.  
18 (See FAC ¶ 27(d).)

19 Plaintiff's revised allegations respecting the alleged early shipments remain  
20 insufficient. As the court in Silicon Graphics noted, in order to satisfy the particularity  
21 requirement of the PSLRA, a "plaintiff must provide, in great detail, all the relevant facts  
22 forming the basis of her belief." Silicon Graphics, 183 F. 3d at 985. Here, although the  
23 FAC alleges that two Foundry employees claim, based on conversations with sales  
24 personnel, that "Johnson" and "management" had directed the early shipments, the FAC  
25 fails to plead any facts demonstrating that the early shipments were initiated in order to  
26 offset weakening demand for Foundry's products, rather than for some other reason.  
27 Indeed, plaintiffs have removed from the FAC allegations made in the TAC that the early  
28 shipments were unauthorized or sent without customer approval. Whereas the TAC

1 alleged that Foundry customers had indicated the products "should not be shipped," until  
2 the fourth quarter and that the early shipments were "unauthorized," the FAC states only  
3 that the customers had indicated the shipments "were not required" until the fourth quarter  
4 and includes no allegation that the shipments were "unauthorized." (See TAC ¶ 26(d),  
5 FAC ¶ 27(d).)

6 Moreover, plaintiffs fail to plead with the requisite particularity their new allegation  
7 regarding the amount of revenue implicated by the alleged early shipments. Plaintiffs fail  
8 to provide any facts about the source of such information, stating only, and generally, that  
9 "the early shipments depleted the order backlog for Foundry's product in the fourth quarter  
10 of 2000 by approximately \$5.2 million." See FAC ¶ 27(d); ABC Arbitrage v. Tchuruk, 291  
11 F. 3d 336, 352 (5<sup>th</sup> Cir. 2001) (noting that an informant must be described "with sufficient  
12 particularity to support the probability that the person in the position occupied by the  
13 source would possess the information alleged); In re Secure Computing Corp. Sec. Litig.,  
14 120 F. Supp. 2d 810, 817 (N.D. Cal. 2000) ("[I]f Plaintiffs make an allegation that is based  
15 on a statement from a witness, they must reveal all facts about that witness that were  
16 material to the formation of their belief that the witness' statement is accurate.") This  
17 omission is particularly significant given plaintiffs' failure to allege any new facts to  
18 address other deficiencies noted in the Court's prior order as to the number of customers  
19 affected by the early shipments, the identity of any such customers, and whether any such  
20 products were in fact returned.

21 Lastly, even assuming, arguendo, that plaintiff's revised allegations as to early  
22 shipments have been pled with sufficient particularity, such allegations are insufficient to  
23 show defendants knew that fourth quarter revenues would be significantly depleted. The  
24 amount of revenue by which plaintiffs allege Foundry's order backlog was depleted, \$5.2  
25 million, is comparatively minor, representing only 4.6% of Foundry's reported third quarter  
26 revenues of \$113 million, and only 4.1% of the \$128 million forecasted for the fourth  
27  
28

1 quarter.<sup>9</sup> A transfer in such amount fails to adequately demonstrate falsity, as it does not  
2 show that Foundry would not be able to meet its revenue or profit forecasts or that  
3 Foundry was not seeing good customer demand.<sup>10</sup> Moreover, plaintiffs allege no facts  
4 demonstrating that defendants failed to take these early shipments into account in issuing  
5 Foundry's public revenue and profit forecasts in October 2000. Finally, a transfer of such  
6 limited magnitude is insufficient to raise the requisite strong inference that the defendants  
7 acted with knowledge or with deliberate recklessness as to the falsity of the statements in  
8 question.<sup>11</sup>

9 Accordingly, plaintiffs' allegations as to early shipments remain insufficient to  
10 demonstrate either that the statements were false when made or to raise the requisite  
11 strong inference of scienter.

#### 12 **4. Internal Reports**

13 Plaintiffs' TAC alleged that defendants knew that fourth quarter demand had been  
14 reduced based on two types of internal reports: "a shipment report that showed actual  
15 shipments for the month-to-date" ("shipment report"), and "a forecast report that projected  
16 shipments for the remaining weeks and months of the current quarter and for the following  
17 quarter" ("forecast report"). (See TAC ¶ 26(a).)<sup>12</sup> In its February 14, 2003 order, the Court  
18 found that plaintiffs' pleadings lacked sufficient detail to meet the requirements of the

---

19  
20 <sup>9</sup>In that Foundry had already reported revenues of \$272 million for the first three  
21 quarters of 2000, a revenue forecast of \$400 million for the year implies a forecast of \$128  
million in revenue for the fourth quarter. (See Opp. at 2.)

22 <sup>10</sup>Indeed, plaintiffs themselves allege that Foundry had experienced a 30% decrease  
23 in revenues in July, (see FAC ¶ 25(b)), and Foundry nonetheless was able to recover and  
post record revenues of over \$113 million in the third quarter, a figure well above Foundry's  
projections for that quarter, even if one discounts the \$5.2 million.

24 <sup>11</sup>As defendants note, any showing of scienter is additionally undermined by the fact  
25 that, despite plaintiffs' contention that the early shipments were motivated by defendants'  
26 desire to bolster third quarter revenue and sell their shares of Foundry stock, Foundry's  
27 third quarter revenues of \$113.2 million exceeded analysts' projections by approximately  
\$13 million, a number far in excess of the \$5.2 million allegedly transferred to the third  
quarter to bolster the third quarter numbers. (See FAC Exs. A, E, F, H.)

28 <sup>12</sup>As described in greater detail *infra*, the "forecast report" is simply a report of  
existing orders scheduled for shipment during the current and following quarter.

1 PSLRA. See Silicon Graphics, 183 F. 3d at 985 (holding where plaintiff relies on internal  
2 reports, plaintiff must provide “adequate corroborating details,” which include “at least  
3 some specifics from those reports as well as such facts as may indicate their reliability”).  
4 Specifically, the Court held that although plaintiffs had pled enough facts as to the  
5 reliability of the reports, plaintiffs had failed to plead an “adequate description” of the  
6 reports’ content. See Silicon Graphics, 183 F. 3d at 985 (“Nor does [plaintiff] include an  
7 adequate description of [the internal reports’] contents which we believe—if they did  
8 exist—would include countless specifics regarding ASIC chip shortages, volume shortages,  
9 negative financial projections, and so on.”); see also Lipton v. Pathogenesis Corp., 284 F.  
10 3d 1027, 1036 (9<sup>th</sup> Cir. 2002) (holding allegations insufficient where plaintiffs failed to  
11 plead, inter alia, “in any detail, the contents of any such report or the purported data”).

12 Additionally, assuming, arguendo, the internal reports had been pled with the  
13 requisite particularity, the Court found the factual allegations as to the content of the  
14 shipment reports and forecast reports were insufficient to demonstrate falsity or scienter.  
15 Specifically, the Court found that plaintiffs had failed to plead facts showing what  
16 Foundry’s internal fourth quarter forecast report had been prior to the alleged 25%  
17 decrease and, critically, that plaintiffs had failed to plead facts showing the relationship  
18 between the internal shipment/forecast reports and the public forecast, or how the  
19 information from the internal reports was utilized by Foundry in arriving at its public  
20 forecast. Rather, as the Court noted, plaintiffs’ TAC merely assumed that there would be  
21 no changes in revenue stream within the quarter itself, and that the public forecast  
22 statement would be based solely on the shipments forecasted at the beginning of the  
23 quarter. Consequently, the Court found, without further information as to how the reports  
24 were utilized by Foundry, the allegations as to the internal reports were insufficient to raise  
25 a strong inference that defendants, in their public forecasts, intentionally or with deliberate  
26 recklessness made false or misleading statements to investors.

27 In the FAC, plaintiffs have revised their allegations as to the internal reports. As  
28 discussed below, however, those allegations, both as to the shipment reports and the

1 forecast reports, remain inadequate.

2 a. Shipment Reports

3 Plaintiffs FAC adds several facts respecting the content of the shipment reports. In  
4 particular, plaintiffs now allege that their source, a former finance employee with Foundry,  
5 became aware, in October 2000, of a decrease in shipments because he could finish  
6 processing invoices by midday, whereas "in prior quarters it would take the entire day to  
7 process invoices." (See FAC ¶ 27(e).) The employee "compared shipping reports during  
8 October and November with shipments for the months in the prior quarter," which  
9 "comparison revealed that both invoices and total dollar volume shipped had decreased at  
10 least 20%." (See id.) The employee noted that "[i]n the previous quarter the shipment  
11 reports indicated that Foundry issued approximately 400 to 500 invoices a week, but  
12 beginning in October the invoices dropped to 320 to 400 invoices a week with a similar  
13 drop in revenue shipments," and the "proportion of large shipments (over \$10,000)  
14 dropped from approximately 55% of the invoices in September to 40% in October." (See  
15 id.)

16 The above allegations set forth, with adequate specificity, the content of the  
17 shipment reports in question. Nevertheless, the shipment reports fail to raise a strong  
18 inference that defendants intentionally or with deliberate recklessness made false or  
19 misleading statements to investors. Defendants' revenue forecast was made on October  
20 17, 2000, and the statements that Foundry "plan[ned] to continually increase quarterly  
21 profits each and every quarter," was seeing "good overall demand," and that Foundry's  
22 "biggest challenge [was] to . . . continue to meet demand," were made on October 24,  
23 2000. Consequently, defendants had, at best, two weeks of October shipment reports  
24 available to them before issuing their public forecast and an additional week before  
25 making their statements respecting demand and quarterly profits. As set forth in greater  
26 detail below, in light of the fact that plaintiffs fail to include allegations as to the manner in  
27 which Foundry's public forecast was derived, the fact that internal shipment reports  
28 showed that shipments per week for the first few weeks of October were lower than

1 “shipments for the months in the prior quarter,” (see FAC ¶ 27(e)), is insufficient to show  
2 that either the revenue or profit forecasts were false or misleading when made.<sup>13</sup> (See  
3 FAC ¶ 27(e).) Nor would any such decrease, without more, suffice to show the  
4 statements that Foundry was experiencing “good overall demand” and that its “biggest  
5 challenge [was] to . . . continue to meet demand” were false or misleading when made.  
6 Defendants fail to plead with particularity any facts establishing that a decrease in  
7 shipments for two to three weeks indicated that Foundry was not experiencing “good  
8 overall demand” or that “continu[ing] to meet demand” was not Foundry’s biggest  
9 challenge, let alone facts sufficient to raise a strong inference that defendants either knew  
10 these statements were false or misleading, or made the statements with deliberate  
11 recklessness as to their falsity.

12 b. Forecast Reports

13 Plaintiffs make only one change in their allegations as to the content of the forecast  
14 reports. Plaintiffs’ TAC had alleged: “When the forecast shipments report was printed at  
15 the end of September and again during October, Foundry’s revenue forecast for the fourth  
16 quarter had fallen approximately 25% below the prior September forecast.” (See TAC ¶  
17 26(d).) Plaintiff’s FAC amends this sentence to read as follows: “When the forecast  
18 shipments report was printed at the end of September and again during October,  
19 Foundry’s revenue forecast for October had fallen approximately 25% below the prior  
20 September forecasts and the forecast for November was approximately 5% less than the  
21 October forecast.” (See FAC ¶ 27(d).) As with the TAC, plaintiffs’ FAC fails to adequately  
22 allege the content of the forecast reports. Accordingly, this allegation is not pled with the  
23 particularity required by the PSLRA.

24 Moreover, even assuming that the forecast reports are pled with sufficient  
25 particularity, plaintiffs again have failed to allege any facts showing that a decrease  
26 reflected in Foundry’s internal forecast reports demonstrates that defendants knew that

---

27  
28 <sup>13</sup>As plaintiffs note in their opposition, revenues and profits are closely connected.  
(See Opp. at 19.)

1 the statements respecting revenue, profit and demand were false when made or that  
2 defendants were deliberately reckless in making such statements. As the Court in its prior  
3 order surmised from the allegations in the TAC, and is now made clear in the FAC, (see  
4 FAC ¶ 27(a)), the internal forecast reports were generated mechanically by a software  
5 program, reflecting only a "snapshot," as of the date of the report, of existing orders  
6 scheduled to be shipped during that quarter and the following quarter. (See Feb. 14, 2003  
7 Order at 15:20.) In its prior order, the Court found this snapshot, without more, insufficient  
8 to demonstrate falsity or scienter. The FAC fails to provide any new factual allegations to  
9 cure this deficiency. First, plaintiffs again fail to allege the amount of forecasted revenue  
10 reflected in Foundry's earlier internal forecast report, i.e., the report prepared prior to the  
11 alleged 25% decrease. Second, plaintiffs again fail to allege facts regarding the  
12 relationship between any internal forecast report and the public forecast, specifically, how  
13 the information contained in an internal forecast report was utilized by Foundry in  
14 determining its public forecast. See In re Harmonic, 163 F. Supp. 2d 1079, 1094  
15 (N.D.Cal. 2001) (noting plaintiffs "do not indicate how such information was utilized at  
16 [defendant corporation], or by whom.") Rather, plaintiffs assume, as in the TAC, that the  
17 public forecast was based solely on orders placed at the beginning of the quarter, without  
18 taking into account changes in revenue stream within the quarter itself or any other factors  
19 Foundry may have considered in determining its public forecast. For the reasons set forth  
20 in the Court's prior order, plaintiffs' allegations, without such additional facts, remain  
21 insufficient to raise a strong inference that defendants intentionally or with deliberate  
22 recklessness made false or misleading statements in their public forecasts, as there is no  
23 sufficient showing that Foundry could not have met its revenue and profit projections.

24 Accordingly, the allegations as to internal reports fail to demonstrate that the  
25 statements in question were false or misleading when made, or to raise the requisite  
26 strong inference of scienter.

27 ///

28 ///

1           **5. Statements by Networking Executive**

2           In its June 6, 2002 order, the Court held that statements made by an unidentified  
3 competitor regarding demand for the competitor's services were insufficient to  
4 demonstrate the level of demand for Foundry products, as there was no showing that  
5 Foundry was in the same economic position as the unidentified entity. As plaintiffs have  
6 not amended or offered any new facts respecting this allegation, it remains inadequate.

7           **6. Requests from Sales Personnel**

8           Plaintiff's TAC alleged that "during September 2000, Foundry's sales personnel  
9 had indicated, based on the current sales forecast, that they did not believe that they  
10 would be able to meet their sales quotas in the fourth quarter," and thereafter "asked to  
11 have their quotas reduced, but were refused." (See TAC ¶26(d)). In its February 14, 2003  
12 order, the Court found this allegation insufficient because the identification of the "sales  
13 personnel" was too general and there were no allegations with respect to whom they  
14 made their request, the manner in which they received the information giving rise to their  
15 alleged concerns, or the extent to which they sought to have their quotas reduced. (See  
16 February 14, 2003 Order at 13-14.)

17           The FAC adds several facts to bolster this allegation. To information supplied by a  
18 former Foundry finance employee, the FAC adds the following:

19           At the beginning of October, the witness learned about arguments between  
20 the sales force and management. Sales representatives were looking at  
21 falling 25 to 30% short, or more, for the quarter and complained that the  
22 quotas were completely unrealistic based on the depleted pipeline. The  
witness recalls conversations with Kathy Henley and Ben Taft, that sales  
representatives wanted their quotas reduced to be commensurate with  
Foundry's drop in business.

23 (See FAC ¶ 27(d).) Additionally, the FAC contains allegations that a Foundry sales  
24 manager, not referenced in the TAC, states that (1) sales representatives, "includ[ing]  
25 Craig Hedges, Martina Pavloff and Scott Banning," were "concerned and complained that  
26 the order pipeline had been depleted by Foundry's third quarter shipments," (2) "fourth  
27 quarter sales were 'dead' from the beginning of the quarter due to the fact that Foundry  
28 had drained the channel with the early shipments," and (3) "[t]he sales representatives

1 warned management that their sales quotas were unrealistic due to the depleted pipeline  
2 for orders.” (See FAC ¶ 29.)

3 Plaintiff’s revised allegations remain insufficient for several reasons. First, the  
4 information from the finance employee remains vague and uncertain. No mention is  
5 made of who Kathy Henley and Ben Taft are, or what the source of their information is  
6 respecting sales representatives allegedly “want[ing] their quotas reduced to be  
7 commensurate with Foundry’s drop in business.” Moreover, plaintiffs fail to specify the  
8 source of the finance employee’s information that “[s]ales representatives were looking at  
9 falling 25 to 30% short, or more, for the quarter and complained that the quotas were  
10 completely unrealistic based on the depleted pipeline.” Finally, the statement that this  
11 employee “learned about” arguments between the sales force and management raises  
12 more questions than it answers. The source of the employee’s knowledge is not stated,  
13 let alone who in “management” engaged in any such arguments. Accordingly, these  
14 allegations are not made with the requisite particularity, and do not cure the deficiencies  
15 noted in the Court’s prior order.

16 Nor are the statements by the Foundry sales manager pled with the requisite  
17 particularity. Although three sales representatives are identified, Craig Hedges, Martina  
18 Pavloff and Scott Banning, the information that these individuals “were concerned and  
19 complained that the order pipeline had been depleted by Foundry’s third quarter  
20 shipments” is too vague to demonstrate the falsity of any statement at issue herein.  
21 Equally vague is the statement by this individual that “fourth quarter sales were ‘dead’  
22 from the beginning of the quarter due to the fact that Foundry had drained the channel  
23 with the early shipments.” It is unclear what is meant by the phrase “fourth quarter sales  
24 were dead” as a result of early shipments, given that the early shipments are alleged to  
25 have involved only \$5.2 million in revenue. Lastly, the statement that “[t]he sales  
26 representatives warned management that their sales quotas were unrealistic due to the  
27 depleted pipeline for orders” fails to demonstrate knowledge or deliberate recklessness as  
28 to falsity. Not only is the FAC vague as to whether “the sales representatives” refers to

1 the three named representatives or to other, unnamed representatives, but, as with the  
2 information provided by the finance employee discussed above, it is unclear who in  
3 Foundry 'management' was so warned, and under what circumstances.

4 Plaintiffs rely on two cases from this district in which the district court held that  
5 "warnings" by sales personnel as to projected revenue supported a finding of scienter.  
6 See In re PeopleSoft, Inc., 2000 WL 1737936 (N.D. Cal.); In re HI/FN, Inc. Securities  
7 Litigation, 2000 WL 33775286 (N. D. Cal.) Plaintiff's reliance is misplaced. In HI/FN, the  
8 court was presented with particularized allegations demonstrating that sale personnel had  
9 confronted executives within top management with regard to revenue forecasts. The  
10 plaintiffs provided detailed allegations as to a quarterly sales meeting attended by the  
11 company's sales staff and its Chief Executive Officer, wherein the sales staff presented a  
12 revenue forecast of \$43 million for the upcoming fiscal year, and the Company's Chief  
13 Executive Officer "angrily wrote over this forecast, replacing it with a \$65 million  
14 projection." See HI/FN, 2000 WL 33775286 at \*2. Further, plaintiffs therein described  
15 additional, specific meetings between the sales staff and the defendants, providing  
16 specific allegations as to the dates and locations of the meetings, the particular  
17 defendants in attendance, and the information conveyed therein. See HI/FN, 2000 WL  
18 33775286 at \*8. Arguably, the allegations regarding the confrontations in PeopleSoft are  
19 less particularized. There, the plaintiffs had alleged that "field representatives were telling  
20 management in loud and highly confrontational terms that quotas and budgets could not  
21 be met, so contentiously that management fired the naysayers." See PeopleSoft, 2000  
22 WL 1737936 at \*3. In PeopleSoft, as in HI/FN, however, the plaintiffs had demonstrated  
23 the falsity of the revenue and earnings forecast statements there at issue by including  
24 specific allegations regarding significant problems with particular, and important,  
25 customers and accounts. See HI/FN, 2000 WL 33775286 at \*8-9; PeopleSoft, 2000 WL  
26 1737936 at \*2.

27 Here, plaintiffs have provided only generalized allegations of employee comments  
28 and complaints about quotas, without specifying the particular occasions on which such

1 comments and/or complaints were made or to which, if any, of the defendants herein such  
2 remarks were conveyed. In addition, unlike in HI/FN and PeopleSoft, plaintiffs rely on  
3 more general allegations concerning the demand for Foundry's products, without including  
4 the type of specific, concrete allegations as to problems with customers or accounts  
5 sufficient to establish the falsity of the statements in question herein, let alone raise a  
6 strong inference of scienter.

7 Accordingly, plaintiffs' allegations regarding requests from sales personnel fail to  
8 demonstrate that the statements in question were false or misleading when made, or to  
9 raise the requisite strong inference of scienter.

#### 10 **7. Proximity**

11 Plaintiffs argue that the temporal proximity of the alleged misrepresentations in  
12 October 2000 and the disclosure of Foundry's second quarter results on December 19,  
13 2000, in plaintiffs' words, the "revelation of the bad news," is evidence of scienter. (See  
14 Opp. at 19-20.) Assuming events separated by an interval of nearly two months can be  
15 characterized as "proximate," such proximity may only serve to "bolster" a complaint;  
16 proximity alone is not sufficient to satisfy the requirements of the PSLRA. See Ronconi v.  
17 Larkin, 253 F. 3d 423, 437 (9<sup>th</sup> Cir. 2001).

#### 18 **8. Scienter: Stock Sales**

19 In its prior orders, the Court held that plaintiffs' allegations regarding defendants'  
20 stock sales were insufficient to raise an inference of scienter. As plaintiffs plead no new  
21 facts respecting such sales, the allegations remain inadequate in that regard.

#### 22 **9. Scienter: Totality of Plaintiff's Allegations**

23 As discussed above, plaintiffs' allegations are insufficient to establish that  
24 defendants made false or misleading statements with the requisite state of mind. When  
25 considered together in their entirety, defendants' allegations remain insufficient. Plaintiffs  
26 have failed to plead facts sufficient to raise a strong inference that defendants made false  
27  
28

1 or misleading statements with the requisite scienter.<sup>19</sup> At most, the allegations may give  
2 rise to a “reasonable inference” that defendants knew the statements in question were  
3 false when made. “The existence of a ‘reasonable inference,’ however, does not satisfy  
4 the PSLRA’s requirement that plaintiffs allege particular facts that give rise to a ‘strong  
5 inference’ of scienter on the part of [d]efendants.” See In re Read-Rite Corp Sec. Litig.,  
6 335 F. 3d 843, 848-49 (9<sup>th</sup> Cir. 2003.)

7 Accordingly, plaintiffs have failed to state a claim based on statements made in the  
8 October 17, 2000 conference call or October 24, 2000 interview in The Wall Street  
9 Transcript, or upon any of the other statements on which plaintiffs relied prior to the filing of  
10 the FAC.

#### 11 **B. Section 10(b) Claim: December 2000 Statement**

12 Plaintiffs’ FAC includes a new allegation of a false statement, specifically, that  
13 Foundry Treasurer Mike Iburg (“Iburg”) and Foundry Director of Product Marketing Marshal  
14 Eisenberg (“Eisenberg”),<sup>20</sup> made a false statement to an analyst at a Lehman Brothers  
15 conference held between December 6, 2000 and December 8, 2000, which statement was  
16 published in a December 8, 2000 Lehman Brothers’ report titled “Internet Infrastructure  
17 Industry Update” (“Update”). (See McDonald Decl. Ex. A.)<sup>21</sup> The Update contains the  
18 following paragraph:

19 During the Lehman Brothers 2<sup>nd</sup> Annual T3 Conference in Orlando,  
20 Florida, we hosted a dinner with Marshall Eisenberg, Director of Product  
21 Marketing, and Michael Iburg, Treasurer, of Foundry Networks. With  
22 management reiterating that business remains on tract [sic], we continue  
23 to believe that fundamentals remain solid for Foundry and believe the

23 <sup>19</sup>In light of the Court’s holding that plaintiffs have failed to adequately allege falsity  
24 and scienter, the Court need not reach defendants’ argument that the forward-looking  
25 statements on which plaintiffs rely are not actionable under the PSLRA’s “Safe Harbor”  
26 provisions.

26 <sup>20</sup>Neither Iburg nor Eisenberg is named as a defendant in the instant action.

27 <sup>21</sup>The Court hereby GRANTS defendants’ Request for Judicial Notice filed June 24,  
28 2003, wherein defendants seek judicial notice of the entire Lehman Brothers’ report as well  
as the stock prices of companies mentioned in that report.

1 company remains well placed to meet or potentially exceed our high-end  
2 fourth quarter revenue target of 130.2 million (+15% QoQ).

3 (See McDonald Decl. Ex. A.)

4 Defendants raise four arguments as to why the amendment is unavailing:

5 (1) plaintiffs cannot impute the analyst's forecast as to fourth quarter revenue to  
6 defendants; (2) the statement "business remains on track" is not actionable as a matter of  
7 law; (3) even if the statement were actionable, plaintiffs fail to allege facts sufficient to  
8 establish either falsity or scienter; and (4) plaintiffs fail to connect the alleged statement  
9 with any of the defendants. (See Opp. to Mot. to Suppl. Compl. at 2.)

10 Defendants argue that the only portion of the Update that can be attributed to Iburg  
11 and Eisenberg is the statement prefaced by "management reiterat[es]," specifically, that  
12 "business remains on tract [sic]," and that the additional statement, "we continue to believe  
13 that fundamentals remain solid for Foundry and believe the company remains well placed  
14 to meet or potentially exceed our high-end fourth quarter revenue target of \$130.2 million,"  
15 is no more than the opinion of the analyst, for which defendants cannot be held liable.  
16 (See Opp. to Mot. to Suppl. Compl. at 2.) Plaintiffs do not argue that defendants are liable  
17 for the analyst's prediction as to Foundry's fourth quarter revenues, but only for the  
18 statement that "business remains on track."<sup>22</sup>

19 Defendants next argue that "[a] statement that a company's business or product is  
20 "on track" is general optimism and is immaterial as a matter of law." (See Opp. to Mot. to  
21 Suppl. Compl. at 2.) As noted, a claim under § 10(b) requires a false or misleading  
22 statement or omission of material fact. See Paracor Fin., 96 F.3d at 1157. "No matter how  
23 untrue a statement may be, it is not actionable if it is not the type of statement that would  
24 significantly alter the total mix of information available to investors." See In re Apple  
25 Computer, Inc. Sec. Litig., 243 F. Supp. 2d 1012, 1025, (N.D.Cal. 2002); see also Basic v.

---

26 <sup>22</sup>As plaintiffs do not seek to attribute the analyst's forecast to defendants, the Court  
27 need not address defendants' argument that the analyst relied on other reasons articulated  
28 in the Update in reaching his conclusion that Foundry would attain the projected revenue.  
(See Mot. to Suppl. Compl. at 3-4.)

1 Levinson, 485 U.S. 224, 231-32 (1988) (holding with respect to omissions, to fulfill the  
2 materiality requirement under § 10(b), “there must be a substantial likelihood that the  
3 disclosure of the omitted fact would have been viewed by the reasonable investor as  
4 having significantly altered the ‘total mix’ of information made available”) (internal quotation  
5 and citation omitted).

6 Numerous cases have held that “[g]eneral statements of optimism and ‘puffing’  
7 about a company or product are not actionable.” See id.; see also Parnes v. Gateway  
8 2000, Inc., 122 F.3d 539, 547 (8<sup>th</sup> Cir. 1997) (“[S]oft, puffing statements generally lack  
9 materiality because the market price of a share is not inflated by vague statements  
10 predicting growth. No reasonable investor would rely on these statements, and they are  
11 certainly not specific enough to perpetrate a fraud on the market.”) (internal quotation  
12 omitted); Howard Gunty Profit Sharing v. Quantum Corp., 1997 WL 514993 at \*4 (“Vague,  
13 amorphous statements, like ‘soft forecasts’ which are ‘mere puffery,’ are inactionable  
14 because reasonable investors do not consider “soft” statements or loose predictions  
15 important in making investment decisions.”) (quoting Raab v. General Physics Corporation,  
16 4 F.3d 286, 289-90 (4<sup>th</sup> Cir. 1993).

17 Here, defendants cite to several cases in which the court held statements that a  
18 company was “on track” were not actionable. In Hillson Partners Limited Partnership, 42 F.  
19 3d 204 (4<sup>th</sup> Cir. 1994), the Fourth Circuit found statements that the defendant company  
20 was “on track to exceed 1990, [its] record year for net income” and “on track toward  
21 reaching [the] previously forecast goal of record full-year profits,” were not actionable  
22 because the statements were not, inter alia, “specific dollar predictions.” See id. at 215-16.

23 In Allison v. Brooktree Corporation, 999 F. Supp. 1342 (N.D.Cal. 1998), the court found  
24 the statements “I think we’re on track,” and “the BtV chipset was on track to ship in  
25 July/August,” to be inactionable, “vague statements of optimism.” See id. at 1348. And in  
26 Copperstone v. TCSI Corporation, 1999 WL 33295869, the court held that the statement  
27 “business was on track,” was not actionable, because “reasonable investors do not  
28 consider ‘soft’ statements or loose predications important in making investment decisions.”

1 See id. at \*8 n.5. Here, the “on track” statement is even less specific than the statements  
2 in Hillson Partners and Allison, and, as the court observed in Copperstone in evaluating an  
3 almost identical statement, is the type of statement “reasonable investors do not consider.”  
4 See id. at \*8 n.5.

5 Plaintiffs cite to no case, and the Court is aware of none, wherein it has been held  
6 that a general statement such as “business remains on track” is sufficient to support a  
7 § 10(b) claim. Indeed, plaintiffs fail to address defendants’ argument as to actionability in  
8 any respect. Rather, plaintiffs seek to read into the statement the additional words “to  
9 report increasing revenues of \$128 million for the fourth quarter.” (See Mot. to Supp.  
10 Compl. at 5:15-16.)

11 The fact that defendants had earlier made more specific statements as to revenue  
12 projections, however, is not, without more, sufficient to alter the character of the later-made  
13 statement. If such were the case, the vast majority of otherwise “soft” statements  
14 concerning a company’s outlook would become actionable, as long as a defendant had  
15 earlier made a more specific statement. As a consequence, to recognize such an  
16 exception would essentially eviscerate the rule precluding reliance on general statements  
17 of optimism. Moreover, the statement at issue herein, “business remains on track,” was  
18 made almost two months after the public forecasts and includes no cross-reference, even  
19 a general one, to any prior statement or report.<sup>23</sup> Even the context in which it was made by  
20 Iburg and/or Eisenberg is unknown, as the update does not purport to attribute any other  
21 statements to them. In sum, the statement is too general, too vague, and too “soft” to be  
22 considered material.

23 Accordingly, the statement that business “remains on track” is not sufficient to  
24 support a claim under § 10(b).<sup>24</sup>

---

25  
26 <sup>23</sup>The statement at issue here is far more “soft” in nature than the statements found  
27 inactionable in Hillson Partners, which statements made at least general reference to the  
28 company’s “record year” and “previous forecast goal.” See Hillson Partners, 42 F.3d at  
215-16.

<sup>24</sup>In light of this finding, the Court need not address defendants’ remaining  
arguments as to the December statement.

1 **C. Section 20(a)**

2 To plead a prima facie case under § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a),  
3 plaintiffs must plead: "(1) a primary violation of federal securities laws; and (2) that the  
4 defendant exercised actual power or control over the primary violator." Howard v. Everex  
5 Systems, Inc., 228 F.3d 1057, 1065 (9<sup>th</sup> Cir. 2000). There can be no liability under § 20(a)  
6 if a primary violation of § 10(b) is not sufficiently pled. See Heliotrope General Inc. v. Ford  
7 Motor Co., 189 F.3d 971, 978 (9<sup>th</sup> Cir. 1999); Klein v. General Nutrition Companies, Inc.,  
8 186 F.3d 338, 344 (3<sup>rd</sup> Cir. 1999). As plaintiffs have failed to adequately plead a § 10(b)  
9 claim, plaintiffs' § 20(a) claim must be dismissed as well.

10 **D. Insider Trading**

11 Plaintiffs' FAC alleges, for the first time, a claim for insider trading in violation of  
12 § 20A of the Exchange Act against defendants Chen, Cheng, Ferguson, Johnson and  
13 Shackleton. (See FAC ¶ 29.)

14 Under § 20A of the Exchange Act, "[a]ny person who violates any provision of this  
15 chapter or the rules or regulations thereunder by purchasing or selling a security while in  
16 possession of material, nonpublic information shall be liable . . . to any person who,  
17 contemporaneously with the purchase or sale of securities that is the subject of such  
18 violation, has purchased . . . or sold . . . securities of the same class." See 15 U.S.C. 78t-1.

19 In order to assert a claim for insider trading in violation of § 20A, a plaintiff must  
20 show a predicate violation of the securities laws. See In re VeriFone Sec. Litig., 11 F. 3d  
21 865, 872 (9<sup>th</sup> Cir. 1993) (dismissing claim under § 20A where plaintiffs failed to allege  
22 "actionable independent underlying violation of the [Securities Exchange Act of 1934]"). In  
23 light of the Court's holding that plaintiffs have failed to plead a viable claim for securities  
24 fraud under § 10(b) of the Exchange Act and Rule 10b-5 of the SEC, plaintiffs' claim for  
25 insider trading in violation of § 20A of the Exchange Act likewise fails.

26 ///

27 ///

28 ///

1 **CONCLUSION**

2 For the reasons stated above:

3 1. Defendants' motion to dismiss is hereby GRANTED.


4 2. Plaintiffs have now had five opportunities to state a claim consistent with the  
5 requirements of the PSLRA, and there is no indication that plaintiffs would be able to  
6 amend to cure the deficiencies remaining. Accordingly, plaintiff's Fifth Amended Complaint  
7 is hereby DISMISSED.

8 This order closes Docket No. 123.

9 The Clerk shall close the file.

10 **IT IS SO ORDERED.**

11 Dated: **AUG 29 2003**

  
MAXINE M. CHESNEY  
United States District Judge

CERTIFICATE OF SERVICE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

In re: Foundry Networks, Inc. Securities Litigation

C-00-4823 MMC

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 29, 2003, I served a true and correct copy(ies) of the attached, by placing said copy in a postage paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy(ies) into an inter-office delivery receptacle located in the office of the Clerk.

Patrick J. Coughlin  
Randi D. Bandman  
John K. Grant  
Shirley H. Huang  
Milberg Weiss Bershad Hynes  
& Lerach  
100 Pine Street, Suite 2600  
San Francisco, CA 94111  
  
Sandy A. Liebhard  
Bernstein Liebhard & Lifshitz  
10 East 40th Street  
New York, NY 10016  
  
Shirli Fabbri Weiss  
Robert W. Brownlie  
Mark H. Hamer  
Gray Cary Ware & Freidenrich  
4365 Executive Drive, Suite 1100  
San Diego, CA 92121-2133

William S. Lerach  
Milberg Weiss Bershad Hynes  
& Lerach  
401 B Street, Suite 1700  
San Diego, CA 92101

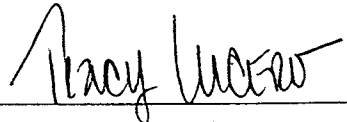
Susan D. Resley  
Gray Cary Ware & Freidenrich  
153 Townsend Street, Ste. 800  
San Francisco, CA 94107-2500

David Priebe  
Roy K. McDonald  
Gray Cary Ware & Freidenrich  
1755 Embarcadero Road  
Palo Alto, CA 94303-3340

**United States District Court**  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Richard W. Wieking  
CLERK, U.S. DISTRICT COURT

by:   
\_\_\_\_\_  
TRACY LUCERO  
Deputy Clerk