STATES COURT FOR OF NORTH CAROLINA

DIVISION

LEONARD ASH,

Others

POWERSECURE

SIDNEY HINTON, CHRISTOPHER

ORDER

On 2014,

("PowerSecure"), Sidney "defendants") On October 10, 2014,

On 2014,

30]. On 2015,

On April30, 2015,

On 2015, 49-50]. IN THE UNITED DISTRICT THE EASTERN DISTRICT

EASTERN No. 4:14-CV-92-D

C. Individually and on ) Behalf of All Similarly Situated, )

Plaintiffs, )

v. )

INTERNATIONAL, ) INC., and )

T. HUTTER, )

Defendants. )

May 22, plaintiff Leonard C. Ash filed a securities class action suit against PowerSecure International, Inc. Hinton, and Christopher T. Hutter (collectively, [D.E. 1]. the court granted a motion to consolidate this case with two other cases and named Maguire Financial, LP, as lead plaintiff. [D.E. 22]. December 29, plaintiffs filed a consolidated securities class action suit against defendants [D .E. February 26, defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted [D.E. 35] and filed a supporting memorandum [D.E. 36]. Defendants also submitted various materials and asked the court to take judicial notice of or incorporate by reference these materials in considering the motion to dismiss [D.E. 38].

plaintiffs responded in opposition to the motion to dismiss [D.E. 47] and the motion for judicial notice [D.E. 48]. June 4, defendants replied [D.E. As explained below, the court grants defendant's motion for judicial notice and motion to dismiss the complaint.

"utility customers."

("CEO") ("CFO")

("DG"), ("EE"), ("UI"). "provide

demand." UI "products

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"encountering inefficiencies"

10. I. PowerSecure provides and energy technologies to electric utilities and their industrial, institutional, and commercial Compl. [D.E. 30] 3. Defendant Hinton is and was the president and chief executive officer ofPowerSecure during the proposed class period of August 8, 2013, to May 7, 2014. ld. 1, 21. Defendant Hutter was PowerSecure's chieffmancial officer during the proposed class period. ld. 1, 22. PowerSecure has three operating segments: interactive distributed generation energy efficiency and utility infrastructure ld. 3. PowerSecure's DG systems a highly dependable backup power supply during power outages, and provide a more efficient and environmentally friendly source of power during high cost periods of peak power ld. PowerSecure's and services include transmission and distribution system construction and maintenance, installation of advanced metering and efficient lighting, and emergency storm ld. The DG and segments each contribute

approximately 41% of PowerSecure' s revenues, with the EE segment contributing most of the remainder. Id. 4.

Plaintiffs allege that, over the class period, defendants made numerous material misrepresentations and omissions that artificially inflated PowerSecure' s publicly-traded share price, thus facilitating two ofPowerSecure's acquisitions during the class period and personally enriching Hinton. See, id. 8-15. Plaintiffs state that these misrepresentations and omissions hid from investors that PowerSecure was significant operational issues and caused, in part, by a significant geographic change in an existing customer's service area, a longer sales cycle in its DG segment as PowerSecure forwent smaller projects in favor of larger projects, and the unreliability of workflow from a new customer. ld. Specifically, plaintiffs allege that defendants made materially false or misleading statements or omissions on August 7, 2013,

2 2013, 10,2014, April30, 2014,

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On 2013, November 6, March and as well as failing to disclose known trends in violation of SEC regulations. id. 59, 61.

A. August 7, PowerSecure filed a Form for the second quarter of and issued a press release that stated, in part, second quarter results and all time high backlog illustrate the continued momentum we are seeing across our business as we deliver differentiated, best-in-class solutions to our Id. 29. The press release quoted Hinton as saying,

has never been in a stronger position for long term success." Id. a conference call that same day, Hinton made several comments about PowerSecure's business, including prospects for this business for continued growth look very, very and "we have got our foot on the gas to ensure our continued success in the second half of this year and in and in and Id. In discussing PowerSecure's segment, Hinton added, among other comments, that the 133% year-over-year just tells you how strong the business is for us and our prospects for this business, for continued growth look very, very that PowerSecure had

d) a $49 million three-year contract renewal," and that same drivers for this business that we have seen over the past few quarters remain Id. 33; see also id. 35.

Plaintiffs allege that these statements were materially false or misleading because defendants failed to adequately disclose that PowerSecure was significant and financially draining operational inefficiencies and other problems that inevitably would have a negative impact on revenues and id. 29, 32, 34, 36.

August 8, the price of PowerSecure shares rose more than and closed at $17.71 per share. Id. 37. August PowerSecure sold 2.3 million shares of its common stock in a public offering at a price of $16 per share. Id. 38. August 16, Hinton sold

3 200,000 PowerSecure On 2013, PowerSecure

On 2013, PowerSecure 2013

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partner." See 40. 1 PowerSecure

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PowerSecure won." 2014 2015

PowerSecure 2014 shares of common stock in a public offering at a price of $16 per share. Id. August 21, the offering and the Hinton offering each closed. Id.

B. November 6, announced its third-quarter results for and issued a press release that stated, realized inefficiencies in our utility infrastructure unit related to the advanced deployment of crews in anticipation of being selected for a significant long-term revenue opportunity with a major new utility Id. After explaining that

expected these inefficiencies to affect results for the next two quarters, the press release noted that margin as a percentage of revenue increased 6.2 percentage points to 7.3 percent in 3Q .... Id. also issued another press release that stated, "Now that the utility has formally selected for this role, specific volumes of work will be determined in the coming quarters. The [C]ompany estimates that in and it could be asked to double its work volumes and could realize $25-$35 million of revenue annually .... Id. 42 (alteration in original).

a conference call that same day, Hinton commented that third quarter results continued our tremendous momentum in new order flow has been and continued progression of our backlog positions us very strongly for continued Id. 43. In speaking of the segment, Hinton also highlighted major new utility infrastructure win that has the potential-this is significant. I want to be very clear, this win has the potential to be the largest contract that has ever Id. 45. Hinton further stated that "we currently estimate that in and we could be asked to double our work volumes with them and as a

1 The complaint states that released its third-quarter results on this day, but this appears to be an error. [D.E. 37-8, 37-21].

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result realize $25 million to $3 5 million of revenue annually from this expanded Id.

Plaintiffs allege that these statements were materially false or misleading because defendants only guessing as to the amount of work that might be assigned if the [UI] contract was awarded to they failed to disclose the extent of their operational inefficiencies, and they were experiencing a longer sales cycle as a result of a decision to seek out larger business opportunities while neglecting [PowerSecure's] smaller Id. 41-43, 46-48.

November 7, 2013, PowerSecure shares closed at a price of$17.63 per share. Id. 49.

c. March 2014, PowerSecure released its fourth-quarter and full-year financial results for 2013 and held a conference call to discuss the results. Id. that conference call, Hinton again discussed the utility company referenced in the November 6, 2013 conference call, stating,

continue to expect that relationship will yield $25 million to $35 million of revenue annually. However, until we have greater visibility with the customer, we will keep the majority of this work out of our backlog, other than near term revenues that we expect to Id. Hinton added that "we have visibility into what we believe will be another very good year in 14 for our utility infrastructure Id.

Plaintiffs allege that these statements were materially false or misleading because defendants had reasonable basis that the described relationship with the new customer would yield $25 million to $35 million of revenue and they failed to disclose that PowerSecure's work backlog was unsustainable. Id.

March 11, 2014, the price ofPowerSecure shares reached a class-period high of$27.44 per share in intraday trading and closed at $25.28 per share, a one-day increase of more than 9.4%. Id.

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D. or about April 2014, PowerSecure disseminated to its shareholders its Annual Report, which contained a signed letter from Defendant Hinton to PowerSecure shareholders, dated April Id. The signed letter stated that growth continues to be driven by new business awards from new utility partners and by expanding our business with existing partners .. . . [W]e have visibility into what we believe will be another very good year in for our utility infrastructure Id.

Plaintiffs allege that these statements were materially false or misleading because defendants failed to disclose PowerSecure's operational inefficiencies and the increased length of the sales cycle. Id.

E. May 7, 2014, after the close of trading, PowerSecure issued a press release announcing first-quarter results for 2014. Id. 76. PowerSecure announced a net loss of almost $4.3 million, as gross margins decreased from 30.6% to 20.9%, cost of sales increased 34%, operating expenses increased 3 9%, and revenue from the DG segment decreased 17%. I d. In a conference call that same day in which defendants Hinton and Hutter explained the fmancial results, Hinton stated in part that

had a customer, a key that- I think we said it specifically, that $7.5 million of work in the fourth quarter that we then got $1 million of work in the first one .... We adjust, we try to guess the rhythm of how work is released and it's a relatively new account and we just guessed Id.

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May 8, 2014, the price ofPowerSecure common stock dropped from $18.60 to a decrease of more than 62%, on "extraordinary trading volume of over million See id. 84.

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rely." Von May 22, 2014, the named plaintiff filed suit against defendants. [D.E. 1]. 10, 2014, the court granted a motion to consolidate this case with two other cases and named Maguire Financial, LP, as the lead plaintiff. [D.E. 22]. December 29, 2014, plaintiffs filed an amended complaint. [D.E. 30].

II. The court first addresses defendants' motion for judicial notice and incorporation by reference [D.E. 39]. In ruling on a motion to dismiss, a court must consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial Tellabs. Inc. v. Makor Issues & Rights. Ltd., 551 U.S. 308,322 (2007); see Inre PEC Sols .. Inc. Sec. Litig., 418 F.3d 379, 388 n.7 (4th Cir. 2005) ("[W]e are not strictly limited to the four comers of the complaint when examining this complaint: since it relies upon a public document a court may as well without converting the motion to dismiss into a motion for summary Greenhouse v. MCG Capital Corp., 392 F.3d 650, 656 (4th Cir. 2004) ("[A] court ruling on a 12(b)(6) motion may look to documents or articles cited in the complaint .... (quotation omitted)). Courts may take judicial notice of SEC filings, historical stock prices, and analyst reports (for the purpose of determining disclosure or market knowledge, but not for the truth of the matters asserted in the reports). See Kramer v. Time Warner Inc., 937 F.2d 767, 774 (2d Cir. 1991); see also Cozzarelli v. Inspire Pharm .. Inc., 549 F.3d 618, 625 (4th Cir. 2008) (examining documents outside the complaint to determine a disclosure issue); PEC Sols., 418 F .3d at 390 & n.1 (taking judicial notice of the defendants' SEC filings related to sale of stock); Greenhouse, 392 F.3d at 656-57 ("A court ruling on a 12(b )( 6) motion may look to ... SEC filings, press releases, stock price tables, and other material on which the plaintiffs allegations necessarily (quotation omitted)); cf. Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 400,406 (9th Cir. 2009) ("Courts may take

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780 607-08. "[a]lthough judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact (quotation omitted).

Defendants submitted 21 exhibits. See [D.E. 37-3-37-23]. Plaintiffs challenge six ofthese exhibits as unincorporated documents and, as for the incorporated documents, they challenge the

use of any of these Exhibits ... as evidence of the truth of their [D.E. 48] 3-4 (challenging exhibits 11, 16, 17, and 21 as unincorporated). 2

As for the incorporated documents, the court may "treat such a document as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule United States v. Ritchie, 342 F.3d (9th Cir. The court grants defendants' motion for incorporation by reference with respect to these documents.

As for the unincorporated documents, defendants submitted four SEC filings, including Form 4s that Hinton filed concerning his transactions in PowerSecure stock. The SEC filings contained in exhibits 16, 17, and 21, and-in light of the allegations contained in the complaint-the Roth Capital Partners analyst reports in exhibits and 11 are the proper subject of judicial notice. Cf. Phillips v. LCI lnt'l. Inc., F.3d (4th Cir. 1999) (reviewing a proxy statement); Kramer, 937 F.3d at 774. Moreover, the court rejects plaintiffs' reliance on Zak v. Chelsea Therapeutics International, Ltd., F.3d 597 (4th Cir. to exclude Hinton's Form 4s. In Zak, the district court had relied on the defendants' submission of SEC filings regarding their stock transactions in finding that the plaintiffs failed to adequately plead scienter. F.3d at

The Fourth Circuit reversed, noting that plaintiffs asserting securities fraud claims frequently bolster allegations regarding scienter by asserting unusual sales of stock by

2 Plaintiffs do not object to Exhibit 5, a chart ofPowerSecure historical prices. [D.E. 48] 4; see Greenhouse, 392 F.3d at 655 n.4.

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U.S. (2009); 550 U.S. (2007); 708 2013); 302 2008).

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unlawfully." U.S. "labels conclusions" "formulaic individuals accused of committing securities fraud, the plaintiffs in the present case did not include this type of allegation in their I d. at Thus, the SEC documents were not ... an integral part of ... the plaintiffs' complaint, the district court should not have considered those documents in reviewing the sufficiency of the plaintiffs' Id. Here, in contrast, plaintiffs specifically alleged that Hinton and PowerSecure sold stock during the class period and that these sales, which were and suspicious in timing and for Hinton, are evidence of scienter. See Compl. [D.E. Thus, the court may take judicial notice of the Form 4s and the other unincorporated documents and grants defendants' motion for judicial notice and incorporation by reference [D.E. 38-39].

III. A motion to dismiss under Rule 12(b )( 6) tests the legal and factual sufficiency of a complaint. See Fed. R. Civ. P. 12(b)(6); Ashcroftv. Iqbal, 556 662,678 Bell Atl. Corp. v. Twombly, 544, 555-56 Vitol. S.A. v. Primerose Shipping Co., F.3d 527, 543 (4th Cir. Giarratano v. Johnson, 521 F.3d 298, (4th Cir. The court need not accept a complaint's conclusions oflaw. See Iqbal, 556 at 678-79; Twombly, at 555; Nemet Chevrolet, Ltd. v. Consumeraffairs.com. Inc., 591 F.3d 255 (4th Cir. As for a complaint's factual sufficiency, a party must plead facts to state a claim to relief that is plausible on its Twombly, at assertions of cannot

the line between possibility and plausibility of entitlement to Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. (quotation omitted); see Vitol. S.A., F.3d at 543. plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted Iqbal, 556 at 678. A plaintiff armed with nothing more than and or a recitation of the elements of a

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"state P. O(b) U.S.C. 240.10b- ("SEC") 10(b). See U.S.C. U.S. LP

2009); 2007).

O(b) Ob- "(1)

S. 1309, (2011) Partners.

U.S. (2008); Pharm U.S. (2005).

Private ("PSLRA")

Private Pub. 104-67, 109 737,749-50 U.S.C.

10 action" cannot proceed. Twombly, at 555 & n.3; S.A., F.3d at 543; Francis, 588 F.3d at 193. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 at 679.

To survive a Rule 12(b )(6) motion to dismiss a fraud claim, a plaintiff generally must with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. 9(b). The pleading standard is even higher for alleged violations of section 1 of the Securities Exchange Actof1934 ("Exchange Act"), codified at 15 § 78j(b), or Rule lOb-5, see 17 C.P.R. 5, which the Securities Exchange Commission promulgated under the authority of section

15 § 78u-4(b); Tellabs, 551 at 313-14; Matrix Capital Mgmt. Fund. v. BearingPoint. Inc., 576 F.3d 172, 181-82 (4th Cir. Teachers' Ret. Sys. ofLa. v. Hunter, 477 F.3d 162, 172 (4th Cir.

To establish liability under section 1 and Rule 1 5, a plaintiff must prove six elements: a material misrepresentation 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 or omission; (5) economic loss; and (6) loss causation." Matrixx Initiatives. Inc. v. Siracusano, 131 Ct. 1317 (quotation omitted); Stoneridge Inv. LLC v. Scientific-Atlanta. Inc., 552 148, 157 Matrix Capital, 576 F.3d at 181; see also Dura

.. Inc. v. Broudo, 544 336, 341-42 The Securities Litigation Reform Act also added a safe harbor for certain forward-looking statements. Securities Litigation Reform Act of 1995, L. Stat. (codified at 15 § 78u-5). This safe harbor precludes liability for allegedly material misrepresentations under certain circumstances, including if (1) the forward-looking

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available." 10(b) 10b-5 "decidedly statement is as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking (2) the forward-looking statement is immaterial; or (3) the plaintiff fails to prove that the forward-looking statement made by a natural person, was made with actual knowledge by that person that the statement was false or 15 U.S.C. § 78u-5(c)(1). A forward-looking statement includes statement containing a projection of revenues, income ... , earnings ... per share, ... or other financial statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the and statement of future economic 15 U.S.C. § 78u-5(i)(1).

Defendants contend that plaintiffs have failed to sufficiently plead the first two elements: a material misrepresentation or omission, and scienter. Defs.' Mem. Supp. Mot. Dismiss [D.E. 36]

The court addresses each in turn.

A. As for the first element, a plaintiff must each statement alleged to have been misleading [and] the reason or reasons why the statement is 15 U.S.C. § 78u-4(b)(1); see Matrixx Initiatives, 131 S. Ct. at 1318 n.4. The statement must be as to a material

Matrixx Initiatives, 131 S. Ct. at 1318 (emphasis omitted); Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988). A statement is material is a substantial likelihood that [its] disclosure . . . would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made Matrixx Initiatives, 131 S. Ct. at 1318 (quotation omitted). Section

and Rule do not prohibit any misrepresentation-no matter how willful, objectionable, or flatly false--of immaterial facts, even if it induces reactions from investors that,

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material." "soft" "puffing" "the

growth." Physics City 2005) "loosely specific" "too

decision");

"[a]t "[P]rojections

laws." 290 "[s]ilence, 10b-5." U.S. "Rule 10b-5

false." 240,

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misleading."

PowerSecure'

UI 2013, 2013, 10,2014, andApril30, 2014, in hindsight or otherwise, might make the misrepresentation appear Greenhouse, 3 92 F .3d at 656. Immaterial statements include or statements because market price of a share is not inflated by vague statements predicting Raab v. Gen. Corp., 4 F.3d 286, 289 (4th Cir. 1993); see ofMonroe Emps.' Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 671 (6th Cir. (collecting cases and finding optimistic statements insufficiently

and squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment Howard v. Haddad, 962 F.2d 328, 331 (4th Cir. 1992) (finding the alleged misstatements immaterial because most they amounted to 'puffery"').

of future performance not worded as guarantees are generally not actionable under the federal securities Raab, 4 F .3d at (quotation omitted).

Furthermore, absent a duty to disclose, is not misleading under Rule Basic, 485 at 239 n.17. imposes such a duty to disclose only when silence would make other statements misleading or Taylor v. First Union Corp. of S.C., 857 F.2d 243-44 (4th Cir. 1988); see Matrixx Initiatives, 131 S. Ct. at 1321 is required under these provisions only when necessary to make statements made, in the light of the circumstances under which they were made, not (quotation and alteration omitted)).

Essentially, plaintiffs' complaint alleges that defendants failed to disclose certain information, including the terms of a new contract with a significant customer, s shift in strategy toward fewer, larger, and more profitable opportunities, and operational inefficiencies driven by a contract with a new customer, and that, absent such disclosure, 26 statements that defendants made on August 7, November 6, March were materially false or misleading. The court addresses the statements in chronological order.

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1. August 7, 13, defendants made nine statements that plaintiffs claim are materially false or

misleading. 3

Eight of these statements, however, are immaterial because they are precisely the kind expressions of optimism from company that are not actionable under the federal securities laws. Raab, 4 F.3d at For example, a reasonable investor would not rely on Hinton's statements that PowerSecure was seeing momentum ... across our that has never been in a stronger position for long term or that ''we have got our foot on the gas to ensure our continued success in the second half of this year and in and in and as guarantees of future performance. Compl. [D.E. 29-31; cf. App. [D.E. 37-2] 1-2 (statements 1-5, 7-9).

With respect to the ninth alleged misrepresentation, plaintiffs claim that Hinton made a material misstatement when he stated that were blessed to announce securing a $49 million three-year contract renewal, both the renewal and expansion, with one of the largest investor on utilities in the Compl. [D.E. 33; cf. App. [D.E. 37-2] 1 (statement 6). Plaintiffs argue that this was misleading because the contract was not a renewal but new contract in a new, distant location from an existing and that a result of this relocation, PowerSecure was forced to hire and train new workers at great expense and essentially start Compl. [D.E.

34. Although defendants argue that there is little real difference between a renewal with the same customer and a new contract with the same customer, see Defs.' Mem. Mot. Dismiss [D.E. 36] 18, given the relatively small number of contracts that PowerSecure worked on, see Compl. [D.E. 5, a reasonable investor might find the distinction between the two as having

3 The court has compared the consolidated complaint with defendants' appendix reciting the highlighted statements and refers (for ease of reference) to the alleged misrepresentations as outlined in the appendix. App. [D.E. 37-2].

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Omnicare. 2009) "growth outlook" "call[ed] character"); CDO 2004) ("Any

management]."). significantly altered the total mix of information because the new contract would

require a significant investment in hiring and training new personnel and lead to underutilization of existing personnel. See id. 34. Moreover, the statement is not forward-looking, and therefore does not qualify for the statutory safe harbor, because it is represents a present or historical fact. See 15 § 78u-5(i)(1) (definition of a forward-looking statement). Thus, plaintiffs sufficiently allege that this statement was materially misleading.

2. November 6, defendants made 12 statements that plaintiffs claim are materially false or misleading. SeeApp. [D.E. 37-2] 2-4. Five of these statements are immaterial because they are optimistic expressions, not guarantees of future performance, and a reasonable investor would not view them as significantly altering the total mix of information available. See Compl. [D.E.

43, 45; cf. App. [D.E. 37-2] 3-4 (statements 13, 15, 18, and 21).

Two more statements fall into the statutory safe harbor and thus cannot serve the basis of a private securities claim. PowerSecure stated in a press release, filed with a Form 8-K that Hutter signed, that PowerSecure that in and it could be asked to double its work volumes and could realize $25-$35 million of revenue annually from this expanded Compl. [D.E. 42; [D.E. 37-21] 14; cf. App. [37-2] 2 (statement 12). This statement falls into the heartland of a forward-looking statement. Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Inc., 583 F.3d 935, 943 (6th Cir. (holding a statement about immaterial because it attention to its [own] predictive

GSC Partners Fund v. Washington, 368 F.3d 228, 242 (3d Cir. reasonable reading of this statement, would make one skeptical about the recovery of the full [dollar amount estimated by The statement was identified as forward looking and

14 See "not guarantees" PowerSecure's 10-K); 2009); Com., 807 ("[W]hen

reward."). On 2014 2015

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See 10;

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partner," "some inefficiencies," 30] 40;

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PowerSecure 30] accompanied by sufficiently meaningful cautionary language that warned investors of the very risk that was later realized. [D.E. 37-21] 4, 11 (noting that the statements are and referring the reader to Form Institutional Inv'rs Grp. v. Avaya. Inc., 564 F.3d 242, 257-58 (3d Cir. Harris v. Ivax 182 F.3d 799, (11th Cir. 1999) an investor has been warned of risks of a significance similar to that actually realized, she is sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preferences for risk and that day's conference call, Hinton repeated that ''we currently estimate that in and we could be asked to double our work volumes with them and as a result realize $25 million to $35 million of revenue annually from this expanded

Compl. [D.E. 45; [D.E. 37-17] 5; cf. App. [D.E. 37-2] 3 (statement 17). Again, this statement is a forward-looking statement that was identified as such and accompanied by meaningful cautionary language. [D.E. 37-17] 2; [D.E. 37-9] [D.E. 37-21] 11.

The remaining five statements are not materially misleading for lack of adequate disclosure, as plaintiffs claim. In two of them, disclosed the negative effect of operational inefficiencies to the advanced deployment of crews in anticipation of being selected for a significant long-term revenue opportunity with a major new utility predicted continued and discussed changes in operating margins. Com pl. [D.E. [D.E. 37-21] 8; cf. App. [D.E. 37-2] 2 (statements Thus, defendants disclosed and discussed the very issue that later contributed to the negative financial results of which plaintiffs now complain.

allege that three more November 6, statements are misleading because defendants had no reasonable basis for estimating that could realize $25 to $35 million in annual revenues fromanewUI customer. Compl. [D.E. 44, 46; [D.E. 37-15] 13; cf. App. [D.E. 37-2] (statements 14, 16, 19). For this argument, which plaintiffs repeat throughout

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2302-03 (20 aaiPharma 507, 510 2007). the complaint, see, Compl. [D.E. 42, 48, 51, 53, plaintiffs rely on a May 7, statement in which Hinton said, speaking of that new customer, a great account. No issue with them at all. We adjust, we try to guess the rhythm of how work is released and it's a relatively new account and we just guessed [D.E. 37-15] 13 (emphasis added). argument-that any guess of future revenue streams has no reasonable basis and is therefore misleading-has no basis in law. See Teachers' Ret. Sys., 477 F.3d at 181 failed venture, standing alone, does not permit a reasonable inference of Raab, 4 F.3d at (finding

]redictions of future immaterial because such predictions almost always prove to be wrong in and are the company's best guess as to how the future will play

Moreover, plaintiffs' allegations ignore the context of the complete November 6, conference call, in which Hinton stated, want to be clear though, we do not currently have the $25 million to $35 million of annual opportunity in our revenue backlog. The million does not include that. We will add that to the backlog as we see specific volumes start to firm Compl. [D.E. 45; [D.E. 37-17] 5 (emphasis added). In context, Hinton's statements were forward- looking statements, accurately couched as estimates that had yet to Thus, they were not materially misleading.

3. March defendants made four statements that plaintiffs allege are materially

The first statement, in which Hinton discussed the new contract and reiterated his earlier prediction of $25 to $35 million in annual revenues, is not materially misleading. Compl. [D.E. [D.E. 37-6] 4-5; cf. App. [D.E. 37-2] 4 (statement 22). claim that this

4 Defendants are not liable for statements made by investment analysts. See Janus Capital Grp. v. First Derivative Traders, 131 S. Ct. 2296, 11 ); In re Inc. Sec. Litig., 521 F. Supp. 2d (E.D.N.C.

16 "guess" 290;

"our growth"

30] Omnicare,

"expect[ed] 2014 20 percent"

289-90; 30]

On 30, 2014, "With

2014 business." 30] 59-60;

289-90.

O(b) Ob-5 "failed trends" 303 30] 303 "any

operations." "affirmative statement had no reasonable basis because it was a is incorrect as a matter oflaw. See Raab, 4 F.3d at see also Teachers' Ret. Sys., 477 F.3d at 181. Similarly, Hutter's statements comparing the current revenue backlog to the past revenue backlog and noting that backlog implies continued call attention to their own predictive character and are not materially misleading. See Compl. [D.E. [D.E. 37-6] 8; 583 F.3d at 943; cf. App. [D.E. 37-2] 5 (statements 24-25). Finally, Hutter's statement that defendants gross margins to continue to be in the mid to high is immaterial as a matter of law and, as a forecast of future economic performance, falls within the statutory safe harbor. See Raab, 4 F .3d at

Compl. [D.E. [D.E. 37-6] 2 (identifying forward-looking statements); [D.E. 37-8] 11 (meaningful cautionary language); cf. App. [D.E. 37-2] 5 (statement 23).

4. April Hinton signed a letter in which he stated, in part, that our expanding utility relationships, strong backlog, and the high quality of our sales pipeline, we have visibility into what we believe will be another very good year in for our utility infrastructure

Compl. [D.E. cf. App. [D.E. 37-2] 5 (statement 26). This statement amounts to puffery and is immaterial as a matter oflaw. See Raab, 4 F.3d at

5. Plaintiffs also allege that defendants violated section 1 and Rule 1 when they to disclose known in violation ofltem of SEC Regulation S-K. Compl. [D.E. 61. Item requires companies to describe, in certain SEC filings, known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing 17 C.F.R. § 229.303(a)(3)(ii). Plaintiffs allege that defendants had an duty to disclose known trends

17 uncertainties"

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303 See Oran 2000) Plaintiffs' 303 lO(b) lOb-S.

Oran, 303 "affirmative disclose," O(b) Ob-S,

See Oran, 303 "disclosure lOb-S." Oran Ob-5 303 Ob-S "must shown." Oran "plaintiffs

[lOb-S], SK-303 liability." Sec. 1046, 10S4-S6 2014) ("In 303 lO(b) lOb-5. Such "); Shah

2013 20, 2013) Pension Va. 2006).

2015), Oran.

"Item 303's 10-Qs or and that they failed to do so thereby violating the federal securities laws. Compl. [D.E. 63-67.

Item does not create a private right of action. v. Stafford, 226 F .3d 27S, 287 (3d Cir. (Alito, J.). argument relies on the implicit claim that a violation ofltem

amounts to a per se violation of section and Rule The Fourth Circuit has not ruled on this issue.

In the Third Circuit considered whether Item imposed on the defendant an

obligation to under section 1 and Rule 1 several studies linking the defendant's drugs to heart-valve defects. 226 F .3d at 279, 287. As then-Judge Ali to noted in his opinion for the Third Circuit, Item 's obligations extend considerably beyond those required by Rule Id. at 288. The court reasoned that, because the materiality standards under Rule 1 and Item differed significantly, a duty to disclose under Rule 1

be separately Id. The court concluded that because have failed to plead any actionable misrepresentation or omission under ... Rule cannot provide a basis for Id.; see also In re NVIDIA Corp. Litig., 768 F.3d (9th Cir.

sum, we hold that Item does not create a duty to disclose for purposes of Section and Rule a duty to disclose must be separately shown .... v. GenVec. Inc., No. 8:12-cv-341-DKC, WL S348133, at *1S n.16 (D. Md. Sept. (unpublished); Iron Workers Local16 Fund v. Hilb Rogal & Hobbs Co., 432 F. Supp. 2d S71, S83 (E.D.

In opposition to this analysis, plaintiffs cite Stratte-McClure v. Morgan Stanley, 776 F.3d 94 (2d Cir. and argue that the NVIDIA court misread In Stratte-McClure, the Second Circuit held that affirmative duty to disclose in Form can serve as the basis for

18 10(b)." 101. Oran "a -303' 10b-5." 103 Oran, Oran

303 Ob-5 "so

10b-5 established." 03-D4.

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"a

10b-5"

Oran Ob-5 Oran, 303

10b-5

Ob-5. ("[Item 303]

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303 disclosure."). Ob-5

303 10b-5 30]  30]

Oran, "[s]uch a securities fraud claim under Section 776 F.3d at The Stratte-McClure court concluded that was not contrary because of then-Judge Alito's statement that violation of SK s reporting requirement does not automatically give rise to a material omission under Rule

Id. at (quoting 226 F.3d at 288). Thus, the Stratte-McClure court reasoned, suggested that an Item violation could give rise to a material Rule 1 omission long as the omission is material under Basic, and the other elements ofRule have been Id. at 1

This court finds reasoning, and NVIDIA's interpretation persuasive. When then-Judge Alito's statement that violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule is placed in full context of the discussion, including the significant differences in materiality standards under the two rules, it is apparent that required a plaintiff to independently show a duty to disclose under Rule 1 standards. See 226 F.3d at 287-88. Item is not a magic black box in which inadequate allegations under Rule are transformed, by means ofbroader and different SEC regulations, into adequate allegations under Rule 1 See Exchange Act Release No. 34-26831, 54 Fed. Reg. 22,427, 22,430 n.27 (May 24, 1989) mandates disclosure of specified forward-looking information, and specifies its own standard for disclosure-i.e., reasonably likely to

have a material effect. This specific standard governs the circumstances in which Item requires disclosure. The probability/magnitude test for materiality approved by the Supreme Court in Basic ... is inapposite to Item A plaintiff cannot seek to bring an action under Rule 1 in the guise of an Item violation when the same underlying alleged omissions are not sufficient to state a Rule violation. Compare Compl. [D.E. 34, 36, 41, with Compl. [D.E. 63. Rather, as then-Judge Alito properly concluded in a duty to disclose must be separately

19 shown." Oran, 303

2013

See 30]

"state

mind." U.S.C. "a defraud." U.S. "more

intent." "This inferences." S. U.S. ("To

plaintiff."

S. U.S.

"pleading requirement."

S.

20 226 F.3d at 288. Thus, plaintiffs' allegation that defendants violated Item fails to state a claim.

In sum, plaintiffs sufficiently allege one material misrepresentation: Hinton's August 7, statement that PowerSecure had secured a $49 million three-year contract renewal when the contract was in a different geographic area and would require the hiring and training of new workers.

Compl. [D.E. 33. The remaining statements are immaterial, fall within the statutory safe harbor, or are not false or rendered misleading by inadequate disclosure.

B. As for the second element, a plaintiff must with particularity facts giving rise to a strong inference that the defendant acted with the required state of 15 § 78u- 4(b)(2)(A). The required state of mind is scienter, or mental state embracing intent to deceive, manipulate, or Tellabs, 5 51 at 319 (quotation omitted). A strong inference is one that is than merely plausible or reasonable-it must be cogent and at least as compelling as any opposing inference ofnonfraudulent Id. at 314. standard requires courts

to take into account plausible opposing Matrixx Initiatives, 131 Ct. at 1324 (quotation omitted); see Tellabs, 551 at 323-24 determine whether the plaintiff has alleged facts that give rise to the requisite strong inference of scienter, a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the (quotation omitted). In comparing alternative inferences, the court considers all allegations holistically. Matrixx Initiatives, 131 Ct. at 1324; Tellabs, 551 at 323.

The Fourth Circuit has held that, in addition to intentional misconduct, recklessness is sufficient to satisfy the scienter Matrix Capital, 576 F.3d at 181; see Cozzarelli, 549 F.3d at 623; cf. Matrixx Initiatives, 131 Ct. at 1323-24 (assuming without

O(b "so

it." 780 ("[T]he 'severe.'"); Pub. LLP, 305, 2009); if"the

scienter." Pub. 780 "prevents 10(b)

questionable"). Plaintiffs

UI "problems UI 2014 disclosures"; PowerSecure

30] 86-101.

UI

10(b) lOb-5.

statements"). deciding that recklessness may establish scienter). In the context of section 1 ), a reckless act is one highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of Matrix Capital, 576 F.3d at 181 (quotation omitted); see Zak, F .3d at 613 recklessness necessary to support a finding of scienter must be Emps.' Ret. Ass'n of Colo. v. Deloitte & Touche 551 F.3d 313 (4th Cir. Cozzarelli, 549 F.3d at 623. The scienter requirement is not met

inference that defendants acted innocently, or even negligently, [is] more compelling than the inference that they acted with the requisite Emps. Ret. Ass'n, 551 F.3d at 313; see Zak, F.3d at 613 (noting that the scienter requirement section from devolving into a penalty for business decisions that, in hindsight, appear

make three broad allegations concerning scienter: (1) as senior executive officers, Hutter and Hinton

had access to and were briefed on information about the day-to-day affairs of the company and therefore knew about the difficulties facing the segment; (2) a confidential witness ( CW 1) alleges that affecting the Company's business significantly pre-dated the May

and (3) and Hinton had pecuniary motives to deliberately mislead the public. See Compl. [D.E.

Viewing the single alleged material misrepresentation regarding whether a contract was new or renewed, plaintiffs' complaint fails to adequately plead scienter and therefore fails to state a claim under section and Rule See Matrix Capital, 576 F.3d at 187 (determining whether defendants acted with scienter "with respect to those [misstated or misleading] Alternatively, viewing all the allegations in the complaint and attached documents holistically, plaintiffs have failed to state with particularity facts giving rise to a strong inference that defendants

21 "most

day-to-day," 30] CEO. See "matrix organization," "numerous

leaders," "the leaders."

UI 1092, "Senior UI 2011 2014." 30] UI 2013, PowerSecure "shut

Palm Florida"

Power ("FP&L").

2013

UI

"detailed exposure"

"core operations" See Yates 890 2000); 30] "the

prospects"). acted with scienter. As explained below, the more plausible inference is that defendants, at most, negligently failed to adequately disclose additional information about the extent of operational inefficiencies and a change in corporate strategy that failed to result in the predicted growth.

As for defendants' positions in the company, apart from alleging that Hutter was one of PowerSecure's senior executive officers ... responsible for overseeing [PowerSecure's] business and operations Compl. [D.E. 87, most of the allegations center on Hinton's role as id. 87-90. The

complaint alleges that Hinton managed a

had direct reports including multiple sales leaders, product leaders, operations leaders and functional and operated day-to-day business in direct contact with individual sales Id. 88 (quotation omitted). Plaintiffs do not, however, state any facts showing that defendants actually knew of the alleged problems in the segment. Cf. City of Roseville Emps.' Ret. Sys. v. Sterling Fin. Corp., 963 F. Supp. 2d 1119 (E.D. Wash. 2013). 5 Rather, they rely on the testimony ofCW1, a former Vice President of Sales in the group, from late through January Compl. [D.E. 92. According to CW1, problems with the group started as early as May when had to the two or three offices it had been operating in the area of West Beach, and start over in Ft. Meyers, Florida, after gaining a new contract with Florida & Light Company Id. 93. Thus, plaintiffs' complaint relies on the combination ofCW1 's allegations of problems existing as far back as May and Hinton's and Hutter's positions as PowerSecure's senior executive officers to create the inference that both defendants actually knew about the problems in the segment.

5 The complaint lacks the allegations establishing the defendants' actual sufficient to base knowledge on the doctrine. v. Mun. Mortg. & Equity. LLC, 744 F.3d 874, (4th Cir. 2014); In re Autodesk. Inc. Sec. Litig., 132 F. Supp. 2d 833, 843-44 (N.D. Cal. cf. Compl. [D.E. 87 (alleging that matters at issue here ... were at the core of the Company's business and were critical to its overall performance and

22 FP&L Oncor "in

knowledge"

Partners. 2009); 560, Va. 2006)

Partners. Pipefitters Plan 2013 1192004, 2013) Pontiac

2012);

ofPowerSecure PowerSecure, 2013

("[A] venture."); 30] PowerSecure "needed funds"). October 2013

"potential consideration" PowerSecure

PowerSecure CW1 's allegations are fatally undermined in at least two ways. First, the complaint does not allege that CW1 had personal knowledge of the contract or the Texas-based project. See id. 93-94. Rather, the complaint only alleges that CW1 was a position at the Company to have personal and lists CW1's job title. I 92 (emphasis added). This conclusory allegation does not establish

personal knowledge ofCW1 's subsequent statements, particularly when that knowledge is not corroborated by other evidence. See Zucco LLC v. Digimarc Corp., 552 F.3d 981, 995-96 (9th Cir. In re Trex Co. Sec. Litig., 454 F. Supp. 2d 573 (W.D.

(plaintiffs bear the burden of proving personal knowledge). Second, the complaint fails to allege that CW1 had any communications or meetings with Hinton or Hutter, thus precluding personal knowledge of what those defendants actually knew. Accordingly, the court declines to credit CW1 's allegations. Zucco LLC, 552 F.3d at 995-96; Local No. 636 Defined Benefit v. Tekelec, No. 5:11-CV-4-D, WL at *12 (E.D.N.C. Mar. 22, (unpublished); City of Gen. Emps.' Ret. Sys. v. Stryker Corp., 865 F. Supp. 2d. 811, 834 n.9 (W.D. Mich. In re Trex Co., 454 F. Supp. 2d at 573.

Finally, plaintiffs' allegations of the pecuniary motives and Hinton do not support a strong inference of scienter. As for the August 16, public offering of 2.3 million shares-nine days into the proposed class period-adds little inference of fraud. See Cozzarelli, 549 F.3d at 627 strong inference of fraud does not arise merely from seeking capital to support a risky Compl. [D.E. 98 (alleging that received $34.4 million in The 8, acquisition of Encari, LLC is somewhat more probative of pecuniary motive, although the complaint alleges only that there was additional earn-out that would be half-financed by common stock, without detailing the conditions under which would actually pay, whereas the primary

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200,000 2013; 138,770 2013,

10,000 2014, 30]  100.

"final divorce." ("[I]nsider

2001) ("Insider

information." 4:04-CV-3342, 2006 U.S. 10, 2006)(unpublished). 200,000 2013, 2013. 30]  100;

30]  101.

"problems UI 2014

Period." 30]  "the UI 2013" payment was a cash payment of $4.8 million. Compl. [D.E. 99 (emphasis added).

As for Hinton, plaintiffs allege that he effectively made three stock sales during the class period: shares on August 16, shares on December 19, pursuant to a separation agreement for his pending divorce; and shares on February 4, also pursuant to his pending divorce. Compl. [D.E. The latter two sales do not raise an inference of scienter because they were made pursuant to a division of marital assets in conjunction with the Reporting Person's pending [D.E. 37-22] 7, 9; see Teachers' Ret. Sys., 477 F.3dat 184

trading can imply scienter only if the timing and amount of a defendant's trading were 'unusual or suspicious.'"); Ronconi v. Larkin, 253 F.3d 423, 435 (9th Cir. trading is suspicious only when it is dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside (quotation and alterations omitted)); In reIntegrated Elec. Servs., No. Dist. LEXIS 1425, at *4-6 (S.D. Tex. Jan. As for the first sale, Hinton offered for sale shares on August 16, or roughly 32% of his then-current holdings, and the sale closed on August 21,

Compl. [D.E. see [D.E. 37-22] 3. Plaintiffs allege that this sale was out ofline with prior trading practices. Compl. [D.E. This sale, however, does not support a strong inference of scienter for several reasons: (1) the public offering came nine days into the proposed class period and after only five of the twenty-six alleged misleading statements, the only material one of which was that Hinton improperly referred to a contract as a renewal rather than a new contract; 6

(2) the amount of the offering, which was roughly 32% of his then-current holdings, was

6 Again, the court declines to credit, for lack of personal knowledge, CW1 's allegation that

affecting the Company's business significantly pre-dated the May disclosures, as far back as the beginning of the Class Compl. [D.E. Furthermore, even if credited, CW1 's allegation that group stopped growing in the third and fourth quarters of

is not probative of Hinton's knowledge of any alleged operational inefficiencies or other

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2013 275,000 2014 17,015

"sold holdings" "the increased"

540 1049, 1067 2008) "[w]e

scienter"); ("One

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2009); 1150, 2008) ("The

2013 id.,

"sold sales." Pis.' Opp'n

540 1067.

"allow scienter." 540 1067. offset less than four months later with his December 5, receipt of shares (albeit restricted shares), followed by an April 7, receipt of an additional restricted shares, resulting in a net positive change (excluding the shares sold as part of the divorce agreement), [D.E. 3 7-22] 5, 11; and (3) the failure of Hutter, his alleged coconspirator, to sell any PowerSecure shares. See, Cozzarelli, 549 F .3d at 627-28 (declining to fmd a strong inference of scienter where defendants 13%, 12%, and 3% of their and total holdings of each defendant

while the defendants allegedly failed to adequately disclose information regarding an ongoing medical study); Metzler Inv. GMBH v. Corinthian Colls .. Inc., F.3d (9th Cir. (declining to find scienter where a defendant sold 37% of his shares because typically require larger sales amounts[-]and corroborative sales by other defendants-to allow insider trading to support Ronconi, 253 F.3d at 436 insider's well timed sales do not support the 'strong inference' required by the statute where the rest of the equally knowledgeable insiders act in a way inconsistent with the inference that the favorable characterizations of the company's affairs were known to be false when (citation omitted)); In re Advanta Corp. Sec. Litig., F.3d 525, (3d Cir. 1999), abrogation on other grounds recognized Institutional Inv'rs Grp. v. Avaya. Inc., 564 F.3d 242, 276 (3d Cir. In re Dot Hill Sys. Corp. Sec. Litig., 594 F. Supp. 2d 1161 (S.D. Cal. insider trading allegations are problematic because the insider sales ... preceded the vast majority of the alleged misrepresentations."). 7

problems as of the August 7, statement, just over one month into the third quarter. See 94.

7 Plaintiffs attempt to distinguish Metzler by citing the court's reasoning that the defendant in a manner consistent with their pre-Class Period Mem. Mot. Dismiss [D.E. 47] 45 n.42; see Metzler, F.3d at That reasoning, however, was in addition to the court's independent rationale that larger sales amounts were required to insider trading to support Metzler, F.3d at Moreover, with respect to Hutter's lack of sales, the cases that plaintiffs cite stand only for the proposition that the absence of sales by coconspirators is

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"state inference"

780 "prevents O(b)

questionable").

"state

mind."

20(a) 20(b) 30]  10(b)

Opp'n Hinton's sale of stocks supports, at best, a very weak inference of scienter.

In sum, viewing all the allegations holistically, plaintiffs' complaint fails to with particularity facts giving rise to a strong that defendants acted with scienter or severe recklessness. Excluding CW1 's allegations for lack of personal knowledge, the complaint essentially states that defendants must have known of or recklessly disregarded the operational inefficiencies, possible failure of a change in corporate strategy to pursue higher-margin projects, and the possibility of a new client delaying work, supported by the fact that PowerSecure and Hinton made public offerings of PowerSecure common stock nine days into the proposed class period. This inference of scienter is not as compelling as the competing inference that defendants innocently or negligently failed to fully disclose to the market (and competitors) information about the change in corporate strategy to pursue higher-margin opportunities, and the extent of existing and potential operational inefficiencies driven by estimates of future work flow. See Zak, F.3d at 613 (the scienter requirement section 1 from devolving into a penalty for business decisions that, in hindsight, look Thus, looking at all allegations, plaintiffs have failed to adequately plead scienter.

Here, plaintiffs have failed to with particularity facts giving rise to a strong inference that the defendant acted with the required state of 15 U.S.C. § 78u-4(b)(2)(A). Thus, the court grants defendants' motion to dismiss count one.

IV. Plaintiffs also allege violations of sections and of the Exchange Act by Hinton and Hutter. Compl. [D.E. 125-32. In light ofthe disposition of plaintiffs' section and

not dispositive, not whether the court can use the lack of allegations in weighing competing inferences. See Pls. Mem. Mot. Dismiss [D.E. 47] 46.

26 10b-5

Pls.' Opp'n

October 2015. 2015,

SO ORDERED. t.<'day 2015. Rule claim, the court dismisses these counts and the complaint as a whole. Cozzarelli, 549 F .3d at 628. In so doing, the court gives leave to plaintiffs to amend their complaint. See Mem.

Mot. Dismiss. [D.E. 47] 16 n.7.

v. In sum, the court GRANTS defendants' motion for judicial notice and incorporation by reference [D.E. 38] and motion to dismiss [D.E. 35]. The court hereby DISMISSES without prejudice plaintiffs' complaint. If plaintiffs elect to amend their complaint, they shall file the amended complaint by 16, Defendants shall have until November 23, to file any renewed motion to dismiss.

This of September

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