

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re ZUMIEZ INC. SECURITIES LITIGATION	Case No. C07-1980-JCC <u>CLASS ACTION</u>
This Document Relates To:  ALL ACTIONS.	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

This matter comes before the Court on Defendants' Motion to Dismiss Consolidated Amended Complaint (Dkt. No. 42), Plaintiffs' Response (Dkt. No. 47), and Defendants' Reply (Dkt. No. 49). Having thoroughly considered the parties' briefing and the relevant record, the Court finds that oral argument is unnecessary and hereby GRANTS Defendants' motion.

**I. BACKGROUND**

**A. The Company's Statements, Earnings, and Stock Prices in Fiscal 2007**

Zumiez Inc. ("Zumiez" or the "Company") runs a chain of mall-based retail stores that specialize in action sports related apparel, footwear, equipment and accessories. (Am. Compl. ¶ 2 (Dkt. No. 35 at 1).) The Company has pursued an aggressive growth strategy, increasing the number of stores by more than 20% per year, so that it was operating 235 stores by the end

1 of the 2006 fiscal year. (*Id.*; 3/14/07 Q4 2006 Conference Call 1 (Dkt. No. 44-2)<sup>1</sup>.) The  
2 Company's growth strategy was very successful, and it increased earnings per share by 64% in  
3 2004 (\$0.17 to \$.028), by 68% in 2005 (\$0.28 to \$0.47), and by 55.3% in 2006 (\$0.47 to  
4 \$0.73). (Am. Compl. ¶ 100 (Dkt. No. 35 at 34).)

5 On March 14, 2007, Zumiez announced record earnings for the fourth quarter of 2006  
6 and made projections for the 2007 fiscal year. (3/14/07 Q4 2006 Conference Call 1 (Dkt. No.  
7 44-2).) The Company reaffirmed its commitment to expanding its retail square footage by 20%  
8 per year and announced that it accordingly expected to open 50 new stores in 2007. (*Id.* at 2.)  
9 Zumiez expected its "comparable-store sales" (meaning the sales in stores that had been open  
10 for over one year) to continue to grow "in the mid-single digit range." (*Id.*) The company also  
11 projected total earnings per share of \$0.94 to \$0.96 in 2007, an increase of approximately 30%  
12 from 2006. (*Id.*) The Company announced that it expected this growth rate to be relatively  
13 uniform across the four quarters of 2007. (*Id.*) In response to this announcement, Zumiez's  
14 stock price increased from \$36.21 on March 14, 2007, to \$39.56 on March 15, 2007. (Am.  
15 Compl. ¶ 3 (Dkt. No. 35 at 2).)

16 On May 23, 2007, Zumiez announced its earnings for the first fiscal quarter of 2007,  
17 consisting of February, March, and April. (5/23/07 Q1 2007 Conference Call 1 (Dkt. No. 44-  
18 4).) Zumiez's Chief Executive Officer ("CEO"), Richard Brooks, announced that the company  
19 had opened 19 new stores during the quarter. (*Id.*) He reported that comparable-store sales had  
20 increased 11.3% as compared to the same quarter a year before, and that earnings per share for  
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22 <sup>1</sup> The Court takes judicial notice of the transcripts of the conference calls referenced in  
23 Plaintiffs' Consolidated Amended Complaint and the other statements that form the basis of  
24 Plaintiffs' claim. The Court generally considers these documents only for the fact that the  
25 statements were made; however, the Court also assumes the truth of certain uncontested facts.  
26 In particular, the Court assumes the truth of the Company's reported yearly, quarterly, and  
weekly earnings, which Plaintiffs do not contest; indeed, Plaintiffs extensively use the  
Company's reported earnings to support their claims. (*See, e.g.*, Am. Compl. ¶¶ 13, 16, 19, 20,  
100, 103, 129, 131, 150 (Dkt. No. 35).)

1 the quarter had reached \$0.06, a 50% increase from first quarter of 2006. (*Id.*) He announced  
2 that he was “pleased with [the Company’s] results for the first quarter and . . . remain[ed]  
3 cautiously optimistic for the balance of the year,” and reaffirmed the Company’s projections  
4 that the year’s earnings per share would grow 30% from fiscal year 2006. (*Id.* at 2.) After the  
5 announcement, Zumiez’s stock price dropped somewhat to \$38.92 on May 24, 2007. (Am.  
6 Compl. ¶ 8 (Dkt. No. 35).)

7 The Company announced its second fiscal quarter earnings on August 22, 2007.  
8 (8/22/07 Q2 2007 Conference Call 1 (Dkt. No. 44-6).) Brooks announced that the Company  
9 had opened 12 new stores during the quarter and was on track to open all of its 50 new stores  
10 before the Thanksgiving holiday. (*Id.*) Brooks reported comparable-store sales growth of  
11 11.2%, 13.7%, and 9.7% for May, June, and July, respectively, and announced earnings per  
12 share of \$0.11 for the quarter, an 83% increase over the second quarter of 2006. (*Id.*) Zumiez’s  
13 Chief Financial Officer (“CFO”), Trevor Lang, announced that the Company was raising its  
14 guidance for the 2007 fiscal year to project earnings per share of \$0.97 to \$0.99, an increase of  
15 \$0.03 from its previous projections. (*Id.*) This new projection corresponded to a 33% to 36%  
16 growth over earnings in fiscal 2006. Around the time of this announcement, Zumiez’s stock  
17 price rose to \$47.89. (Am. Compl. ¶ 10 (Dkt. No. 35).)

18 On October 18, 2007, Brooks and Lang presented at the Wachovia Consumer Growth  
19 Conference. (10/18/07 Wachovia Presentation 1 (Dkt. No. 44-8).) Brooks reminded the  
20 audience that the Company was “on track” to open “the 50 stores that were planned for this  
21 year.” (*Id.*) Brooks also announced that the Company was “on track again to grow earnings of  
22 at least 30% this year.” (*Id.*)

23 In addition to the quarterly conference call, the Company also held short calls to  
24 announce monthly earnings. (11/07/07 Oct. 2007 Conference Call 1 (Dkt. No. 44-11).) On  
25 November 7, 2007, Lang reported the Company’s October earnings, including 5.1%  
26 comparable-store sales growth for the month. (*Id.* (reporting weekly comparable-store sales

1 growth of 7.1%, 6.9%, 5.4% and 1.1% for each of the four weeks, in order.) The Company  
2 announced that it expected to report earnings per share of \$0.27 to \$0.28 in the third quarter, a  
3 growth of only 13% to 17% as compared to the same quarter in 2006. (*Id.*) Lang explained that  
4 this was below the Company's "internal projections, primarily due to the timing of certain  
5 nonequity incentive compensation accruals and, to a lesser extent, higher operational costs."

6 (*Id.*) He then announced:

7       We are taking a more conservative outlook for the remainder of fiscal 2007, due  
8       to the reliance on seasonal merchandise in the fourth quarter. We now expect  
9       full-year fiscal 2007 earnings per diluted share to be in the range of \$0.92 to  
      \$0.94, compared to fiscal 2006 earnings of \$0.73 per diluted share.

10 (*Id.*) This lowered projection corresponded to an earnings growth rate of 26% to 29%. In  
11 response, Zumiez's stock price dropped from \$39.45 on November 7, 2007, to \$26.13 on  
12 November 9, 2007. (Am. Compl. ¶ 13 (Dkt. No. 35).)

13       Three weeks later, on November 29, 2007, the Company officially announced its third  
14 quarter earnings. (11/29/07 Q3 2007 Conference Call 1 (Dkt. No. 44-15).) Zumiez CEO  
15 Brooks declared that the third quarter had been "solid," with comparable-store sales growth of  
16 13.2% (17.4% for August, 13.9% for September, and 5.1% for October). (*Id.*) He explained  
17 that October comparable-store sales "were softer than prior months due to a slow start for  
18 winter related merchandise." (*Id.*) Brooks reported earnings per share of \$0.28 for the quarter,  
19 on the high-end of the Company's guidance, and reiterated that several expenses had  
20 negatively impacted the bottom-line growth. (*Id.*) In particular, Zumiez CFO Lang reported  
21 that the expense increase primarily "was driven by a shift in the timing of our home office  
22 bonus accrual," but was also somewhat affected by increased "shrink and distribution  
23 expenses."<sup>2</sup> (*Id.* at 2; *see also id.* at 9.) Lang reiterated the Company's yearly earnings-per-  
24 share projection of \$0.92 to \$0.94, explaining that "[t]his assumes an upper single-digit

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26 <sup>2</sup> According to the Complaint, "shrink" expenses are expenses related to theft. (Am. Compl. ¶ 99 (Dkt. No. 35 at 33).)

1 [comparable-store sales] increase for the fourth quarter.” (*Id.* at 3.) Brooks also provided a  
2 preview of the month-to-date November comparable-store sales growth, noting that “through  
3 yesterday, [they were] in line with our earnings guidance.” (*Id.* at 2.) He also explained: “We  
4 are particularly encouraged by our [comparable-store sales growth] over the Thanksgiving  
5 holiday weekend which was up in the mid-teens.” (*Id.*) At the same time, in answering  
6 analysts’ questions, both Brooks and Lang expressed concerns regarding winter-related  
7 merchandise. Brooks noted that weak winter-related sales were continuing into November,  
8 with comparable-store sales in that area about 5% behind the same time the previous year, and  
9 that the slower sales of winter-related merchandise were primarily in areas that had  
10 experienced unusually warm weather. (*Id.* at 3, 4, 7.) Brooks noted that when a late winter  
11 finally comes, there is generally a “pop in business” to capture the pent-up demand, but that  
12 “the later [the warm weather] goes, I think the less pent-up demand you capture” “because  
13 people just choose not to make the investment in new gear if the season’s going to be really  
14 short.” (*Id.* at 7–8.) He also said it was difficult to predict because “obviously, the  
15 macroenvironment I think at this point also affects that question as to how big of an increase  
16 you get if, when the snow hits.” (*Id.* at 8.) In response to an analyst’s question about whether  
17 there was any cushion in the Company’s guidance in case of continued poor winter  
18 merchandise sales, Lang was optimistic that the company was “pretty well positioned from an  
19 inventory perspective” to reposition inventory and cancel orders before having to take large  
20 markdowns; however, Lang emphasized that “[t]he cold business in the fourth quarter really  
21 starting in October represents about 20% of our business” and concluded that “if winter just  
22 doesn’t happen well then we’re going to have a problem at this point that we would need to  
23 take a look at.” (*Id.* at 5.)

24 Although Brooks had said that the November month-to-date comparable-store sales  
25 growth was in-line with the “upper single-digit” guidance for the fourth quarter, the November  
26 sales growth did not end up meeting these projections. On December 5, the Company

1 announced its complete November sales, and reported that after taking into account the last  
2 three days of the month, comparable-store sales had increased only 5.6% from November  
3 2006. (12/05/07 Nov. 2007 Conference Call 1 (Dkt. No. 44-17).) Lang explained that the  
4 weekly comparable-store sale increases were 2.4%, 4.2%, 11.9%, and 2.5% for weeks 1–4,  
5 respectively. (*Id.*) In response to this announcement, Zumiez’s stock price fell to \$25.13 on  
6 December 6, 2007. (Am. Compl. ¶ 17 (Dkt. No. 35 at 8).)

7         Zumiez’s December sales results turned out to be even worse. On January 7, 2008, the  
8 Company announced that comparable-store sales had increased only 3.9% in the five-week  
9 period ending January 5. (1/07/08 Dec. 2007 Conference Call 1 (Dkt. No. 44-19).) In the first  
10 three weeks of the period, comparable-store sales had actually decreased as compared to the  
11 year before. (*Id.* (reporting comparable-store sales growth of -1.2% in the first week, -1.8% in  
12 the second week, and -5.2% in the third week).) These sales bounced back in the last two  
13 weeks of the period (*id.* (reporting comparable-store sales growth of 23.5% in the fourth  
14 (Christmas) week and 16% in the fifth (New Year’s) week)), but these gains were not enough  
15 to bring the monthly results close to the “upper single-digit” comparable-store sales growth  
16 that the Company had projected for the quarter. Based on the quarter-to-date sales results, the  
17 Company revised its projections for the full fiscal year down to earnings per share of \$0.82 to  
18 \$0.83, an overall growth rate of 12% to 15% over the past year’s figures. (*Id.*) After the  
19 announcement, Zumiez’s stock price fell to \$16.31. (Am. Compl. ¶ 19 (Dkt. No. 35 at 8).)

20         On March 13, 2008, the Company announced earnings per share of \$0.86, above its  
21 revised projections but still far short of its initial expectations. (3/13/08 Q4 2007 Conference  
22 Call 2 (Dkt. No. 44-21).) In the conference call, Brooks explained the difficulties of operating  
23 its mall-based retail stores in the downturned economic climate, noting that while some of the  
24 Zumiez’s competitors were adopting a more promotional approach to boost short-term gains,  
25 the Company felt it would be imprudent to adopt a short-term strategy that could adversely  
26 impact its long-term earnings potential. (*Id.* at 1.) Instead, the Company had opted to continue

1 its growth-based strategy and to weather the economic downturn. (*Id.*) Lang acknowledged that  
2 there had been concern among analysts regarding the performance of the Company’s newly  
3 opened stores, in particular because 20 of the 50 stores opened in 2007 were built in California,  
4 Arizona, Nevada, and Florida—all markets that were experiencing difficult operating  
5 environments. (*Id.* at 2.) Lang explained that new stores historically performed at about 70% of  
6 mature stores in terms of sales, and that the stores opened in 2005 and 2006 “came in at about”  
7 those volumes in their first full years of operations. (*Id.* at 2.) He reported that the class of 2007  
8 stores was “currently trending below that average,” and while it was difficult to accurately  
9 project sales because many of the new stores had not been open long, “the current expectation  
10 [was that] they would do just over 60% versus the historic levels [of] 70%.” (*Id.* at 2, 6.) In  
11 response to an analyst’s question, Lang explained that if you removed the new stores in  
12 California, Arizona, Nevada, and Florida from consideration, the percentage sales volumes  
13 became “substantially closer to that historic average of 70%,” but that while “you get most of  
14 the way there[, y]ou’re not going to be quite at 70%.” (*Id.* at 6.) Lang also noted that the stores  
15 in these troubled states “were doing very well through back to school, and we believe the [new  
16 stores opened in 2007] will be fine once the econom[y] returns to more historic levels.” (*Id.* at  
17 2.)

#### 18 **B. Plaintiffs’ Allegations of Wrongdoing**

19 Plaintiffs bring this class action lawsuit on behalf of all persons who purchased Zumiez  
20 common stock between March 14, 2007, and January 4, 2008 (the “Class Period”), against the  
21 Company, Richard Brooks (Zumiez’s CEO), Trevor Lang (Zumiez’s CFO), and Thomas  
22 Champion (Zumiez’s co-founder and Chairman of the Board). (Am. Compl. ¶ 1 (Dkt. No. 35 at  
23 1).) Plaintiffs allege that Defendants engaged in a scheme to defraud shareholders by making  
24 materially false and misleading statements and engaging in insider trading. (*Id.* ¶ 175–87.)

25 Plaintiffs allege that the Company was suffering from serious internal problems, that it  
26 was expanding too fast to hire and retain quality employees (*see id.* ¶¶ 35, 38, 41, 50), that

1 certain types of merchandise were underperforming (*see id.* ¶¶ 43, 54), that stores often had  
2 shortages and inventory problems (*see id.* ¶¶ 34, 47), and that “shrink” (i.e., theft of  
3 merchandise) was a common problem (*see id.* ¶¶ 39, 51). Plaintiffs claim that these problems  
4 contributed to decreased sales, particularly at Zumiez’s newly-opened stores, many of which  
5 were in new markets or in markets heavily affected by the economic downturn. (*See id.* ¶¶ 5,  
6 85.) Plaintiffs assert that, in light of these alleged company-wide problems, Zumiez’s earnings  
7 projections were unreasonable. (*See id.* ¶¶ 4, 14.)

8           Specifically, Plaintiffs challenge six different statements as false or misleading. First,  
9 they claim that, on March 14, 2007, Zumiez had no reasonable basis to introduce its initial  
10 guidance for fiscal 2007 of \$0.94 to \$0.96 in earnings per share, and the Individual Defendants  
11 knew that, in light of the alleged problems, actual earnings would be lower than projected. (*See*  
12 *id.* ¶¶ 76–102.) Second, they claim that, for the same reasons, the Company had no reasonable  
13 basis for reaffirming its guidance on May 23, 2007. (*See id.* ¶¶ 103–13.) Third, Plaintiffs allege  
14 that Zumiez had no reasonable basis to raise the earnings-per-share guidance on August 22,  
15 2007, to \$0.96 to \$0.99, and that these increased projections resulted purely from pressure to  
16 maintain a high stock price. (*See id.* ¶¶ 114–23.) Fourth, Plaintiffs claim that it was false and  
17 misleading for Brooks to assert on October 18, 2007, that the Company was “on track again to  
18 grow earnings of at least 30% this year.” (*See id.* ¶¶ 124–33.) Fifth, Plaintiffs allege that the  
19 Company had no reasonable basis for lowering its guidance down to \$0.92–\$0.94 on  
20 November 7, 2007, because the Individual Defendants knew that even these reduced  
21 projections were unrealistically optimistic. (*See id.* ¶¶ 134–40.) Finally, Plaintiffs allege that  
22 the Company had no reasonable basis for reaffirming this guidance on November 29, 2007,  
23 and that it was false and misleading for Brooks to claim that the November month-to-date  
24 comparable-store sales growth was in line with the “upper single-digit” rate that the Company  
25 had projected for the fourth quarter. (*See id.* ¶¶ 141–50.)  
26

1 Defendants move to dismiss, arguing that Plaintiffs have failed to satisfy the “exacting  
2 pleading requirements” for securities fraud complaints set forth in the Private Securities  
3 Litigation Reform Act of 1995 (“PSLRA”). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,  
4 127 S. Ct. 2499, 2504 (2007).

## 5 **II. DISCUSSION**

6 Under the PSLRA, a complaint must “specify each statement alleged to have been  
7 misleading, the reason or reasons why the statement is misleading, and, if an allegation  
8 regarding the statement or omission is made on information and belief, the complaint shall  
9 state with particularity all facts on which that belief is formed.” 15 U.S.C. § 74u-4(b)(1);  
10 *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001). The complaint must also, “with respect  
11 to each act or omission . . . , state with particularity facts giving rise to a strong inference that  
12 the defendant acted with the required state of mind.” 15 U.S.C. § 74u-4(b)(2). The “required  
13 state of mind” depends on whether or not the statement is “forward-looking.” For forward-  
14 looking statements, Plaintiffs must state facts giving rise to a strong inference that Defendants  
15 had “actual knowledge . . . that the statement was false or misleading.” *Id.* § 74u-5(c)(1)(B);  
16 *Ronconi*, 253 F.3d at 429; *see also Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996)  
17 (holding that a financial forecast is “false or misleading” “if (1) the statement is not actually  
18 believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of  
19 undisclosed facts tending seriously to undermine the statement’s accuracy”); *In re Apple*  
20 *Computer Inc.*, 127 F. App’x 296, 300 (2005) (unpublished) (stating that a revenue projection  
21 is not actionable unless the speaker “knew th[e] revenue target was unattainable when made”).  
22 For non-forward-looking statements, the complaint “must plead, in great detail, facts that  
23 constitute strong circumstantial evidence of deliberately reckless or conscious misconduct.” *In*  
24 *re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970, 974 (9th Cir. 1999); *see also*  
25 *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). Under either  
26 standard of scienter, a “strong inference” is an inference that, when considering the complaint

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1 in its entirety, is “*cogent and at least as compelling as any opposing inference one could draw*  
2 *from the facts alleged.*” *Zucco*, 552 F.3d at 991 (emphasis in original) (*quoting Tellabs*, 127 S.  
3 Ct. at 2509). Because “falsity and scienter in private securities fraud cases are generally  
4 strongly inferred from the same set of facts,” the requirement that the complaint plead a  
5 “strong inference” of scienter correspondingly results in a stricter standard for pleading falsity;  
6 as a result, courts in the Ninth Circuit generally combine the two analyses into a “unitary  
7 inquiry.” *Ronconi*, 253 F.3d at 429; *see also In re Daou Systems Inc. Securities Litigation*, 411  
8 F.3d 1006, 1016 (2005); *In re Vantive Corp. Securities Litigation*, 283 F.3d 1079, 1091 (2002).

9 As an initial matter, it is important to note that, at least on the surface, the Company’s  
10 various projections over the course of the 2007 fiscal year appear perfectly reasonable and  
11 consistent with prior performance. On March 14, 2007, Zumiez announced record earnings for  
12 the fourth quarter of 2006 and projected that in 2007 earnings per share would grow  
13 approximately 30%, a relatively conservative estimate considering that the company had  
14 averaged over 60% growth in the previous three fiscal years. (Am. Compl. ¶¶ 3, 100.) The  
15 Company explained that it expected this growth to be distributed relatively evenly over the  
16 four quarters and that it expected comparable-store sales to grow “in the mid-single digit  
17 range.” (3/14/07 Q4 2006 Conference Call 2 (Dkt. No. 44-2).) In the first quarter, Zumiez  
18 reported earnings per share growth of 50% and comparable-store sales growth of 11.3%,  
19 beating both of its initial projections and suggesting that its original guidance, which it  
20 reaffirmed, was not unreasonable. (*See* 5/23/07 Q1 2007 Conference Call 1–2 (Dkt. No. 44-4).)  
21 The Company similarly outperformed its expectations in the second fiscal quarter, with  
22 earnings per share increasing 83% over the previous year and comparable-store sales growing  
23 11.6%. (8/22/07 Q2 2007 Conference Call 1 (Dkt. No. 44-6).) After announcing this  
24 unexpectedly favorable performance, the Company raised its guidance to project earnings-per-  
25 share growth of approximately 33% to 36% for the fiscal year, (*id.* at 2) still relatively  
26 conservative in light of its growth in prior years and over the first half of 2007. The third

1 quarter started strong, with comparable-store sales growth of 17.4% in August and 13.9% in  
2 September, but sales began to drop off in October, with comparable-stores sales increasing  
3 7.1% in the first week, 6.9% in the second, 5.4% in the third, and only 1.1% in the fourth.  
4 (11/29/07 Q3 2007 Conference Call 1 (Dkt. No. 44-15); 11/7/07 Oct. 2007 Conference Call 1  
5 (Dkt. No. 44-11).) Midway through October, before the bulk of the decline, Brooks announced  
6 at the Wachovia conference that the Company was “on track again to grow earnings of at least  
7 30% this year,” already somewhat less optimistic than the Company’s previous projection.  
8 (10/18/07 Wachovia Presentation 1 (Dkt. No. 44-8).) After witnessing poor performance in the  
9 end of October and beginning of November, Zumiez promptly lowered its guidance on  
10 November 7, 2007, projecting earnings per share to grow only 26% to 29% over the course of  
11 the fiscal year. (11/7/07 Oct. 2007 Conference Call 1 (Dkt. No. 44-11).) The Company  
12 reaffirmed this guidance on November 29, 2007, in part based on its strong performance over  
13 Thanksgiving weekend, (11/29/07 Q3 2007 Conference Call 1 (Dkt. No. 44-15), but then  
14 lowered its guidance further on January 7, 2008, after seeing poor performance in late  
15 November and dismal performance in early December, (1/07/08 Dec. 2007 Conference Call 1  
16 (Dkt. No. 44-19)). At the end of the fiscal year, the Company finally reported earnings that  
17 slightly exceeded these final projections. (3/13/08 Q4 2007 Conference Call 2 (Dkt. No. 44-  
18 21).)

19 To survive the exacting requirements of the PSLRA, Plaintiffs must plead, with  
20 sufficiently particularity, facts that raise a strong inference that Defendants made false or  
21 misleading statements with at least deliberate recklessness. *See Vantive*, 283 F.3d at 1085. In  
22 other words, Plaintiffs must plead particular facts that, if believed, would raise an inference of  
23 fraud “at least as strong as any opposing inference,” *Tellabs*, 127 S. Ct. at 2511, including the  
24 relatively straightforward interpretation that the Company’s projections were honest and  
25 reasonable attempts to predict performance, adjusted at various points over the course of the  
26 fiscal year based on the Company’s actual performance in changing market conditions.

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1 One obvious difficulty with Plaintiffs' theory is that, from March until mid-October,  
2 Zumiez not only met, but significantly exceeded, its prediction of "mid-single digit"  
3 comparable-store sales growth. (See 5/23/07 Q1 2007 Conference Call 1–2 (Dkt. No. 44-4);  
4 8/22/07 Q2 2007 Conference Call 1 (Dkt. No. 44-6); 11/29/07 Q3 2007 Conference Call 1  
5 (Dkt. No. 44-15); 11/7/07 Oct. 2007 Conference Call 1 (Dkt. No. 44-11).) Similarly, the  
6 Company far exceeded its projected 30% growth in earnings per share in both of the first two  
7 fiscal quarters. (See 5/23/07 Q1 2007 Conference Call 1–2 (Dkt. No. 44-4); 8/22/07 Q2 2007  
8 Conference Call 1 (Dkt. No. 44-6).) Therefore, to raise a credible inference that the Company's  
9 predictions during this time period were false or misleading, Plaintiffs must allege facts to  
10 suggest not only that Defendants knew of undisclosed problems within the company, but that  
11 these known problems (1) would somehow not manifest a negative effect on earnings until the  
12 later quarters, and (2) were not taken into account when calculating the Company's projected  
13 earnings. Plaintiffs allege hardly *any* such facts, much less facts sufficient to raise a *strong*  
14 inference of wrongdoing.

15 **A. Forward-Looking Earnings Projections**

16 Plaintiffs claim that five of Zumiez's earnings projections in 2007—issued on March  
17 14, May 23, August 22, November 7, and November 29—were false or misleading. These  
18 various projections were undoubtedly forward-looking. See 15 U.S.C. § 78u-5(i)(1) (defining  
19 "forward-looking statement" to include "a statement containing a projection of revenues,  
20 income . . . , earnings . . . , or other financial items"). Therefore, to survive the exacting  
21 pleading requirement of the PSLRA, Plaintiffs must plead particular facts sufficient to raise a  
22 strong inference that Defendants made these projections with actual knowledge that they  
23 lacked any reasonable basis in fact. *Provenz*, 102 F.3d at 1487.

24 The Court finds that Plaintiffs have failed to plead their allegations with sufficient  
25 particularity and have failed to raise a strong inference that Defendants made their earnings  
26

1 projections with actual knowledge that they were false or misleading.<sup>3</sup> Indeed, the flaws in  
2 Plaintiffs' complaint are legion, and the allegations fail on several levels. First, Plaintiffs rely  
3 primarily on eleven confidential witnesses, most, if not all, of whom were in no position to  
4 have information concerning company-wide performance. Second, Plaintiffs attempt to use  
5 Defendants' own statements against them, but in so doing they blatantly misrepresent these  
6 statements and take them completely out of context. Third, Plaintiffs make hardly any  
7 allegations about the timing of the alleged problems, so one has no way of knowing if they  
8 existed during the class period and, if so, for which portions. Fourth, even if the company was  
9 facing operational difficulties at the time the various statements were made, Plaintiffs fail to  
10 allege sufficient facts to suggest that these difficulties were not factored into the analysis that  
11 the Company used to generate its stated projections. Finally, Plaintiffs attempt to rely on  
12 certain of the Defendants' stock sales to infer scienter, but they allege no specific facts to  
13 suggest that these stock sales were unusual or suspicious.

#### 14 **1. Confidential Witnesses**

15 Plaintiffs rely primarily on allegations made by eleven confidential witnesses ("CWs").  
16 (*See* Am. Compl. ¶¶ 32–65 (Dkt. No. 35 at 11–19).) In the Ninth Circuit, "a complaint relying  
17 on statements from confidential witnesses must pass two hurdles to satisfy the PSLRA  
18 pleading requirements." *Zucco*, 552 F.3d at 995.

19 First, the confidential witnesses whose statements are introduced to establish  
20 scienter must be described with sufficient particularity to establish their  
21 reliability and personal knowledge. Second, those statements which are reported  
22 by confidential witnesses with sufficient reliability and personal knowledge  
23 must themselves be indicative of scienter.

24 *Id.*

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25 <sup>3</sup> Because the Court finds that the Complaint lacks the particularity to infer falsity or  
26 scienter, it does not consider Defendants' argument that the forward-looking statements were  
accompanied by sufficient cautionary language to invoke the PSLRA's "Safe Harbor"  
provisions under 15 U.S.C. § 78u-5(c)(1)(A). (*See* Mot. 12–17 (Dkt. No. 42).)

1 In this case, all eleven confidential witnesses are identified as former Zumiez  
2 employees who either resigned or were terminated before the end of the Class Period. (Am.  
3 Compl. ¶¶ 33, 34, 36, 40, 42, 44, 50, 52, 55, 59, 61 (Dkt. No. 35).) CW3 and CW8 served as  
4 assistant store managers; CW1, CW2, CW4, CW5, CW6, and CW11 were full store managers;  
5 and CW7, CW9, and CW10 each oversaw three or four stores. (*Id.*) Both CW2 and CW8  
6 appear to have left the Company before the Class Period even began. (*Id.* ¶¶ 34, 52.)

7 Many of the confidential witnesses make broad statements about the health of the  
8 Company, but the Complaint fails to allege specific facts “to establish their reliability and  
9 personal knowledge” regarding this Company-wide information. For example, many of the  
10 witnesses make broad allegations that Zumiez was expanding too fast and could not hire or  
11 retain sufficiently experienced employees. (*See, e.g., id.* ¶ 35 (“CW2 . . . stated that Zumiez  
12 was expanding too rapidly and that everyone knew it.”); *id.* ¶ 38 (“CW3 stated Zumiez did not  
13 have enough experienced employees to expand as fast as the Company did.”); *id.* ¶ 41; *id.* ¶ 49;  
14 *id.* ¶ 50). Some witnesses claimed that sales were faltering Company-wide (*id.* ¶¶ 33, 59),  
15 others claimed that newly opened stores failed to meet sales goals (*id.* ¶ 59), and yet others  
16 claimed that certain markets were doing especially poorly (*id.* ¶ 34 (Northwest and Arizona)).  
17 Most of these allegations are made without setting forth the basis for the opinions or providing  
18 any facts to suggest that the witnesses were positioned to accurately assess the Company’s  
19 performance on such a broad scale. Several of the allegations are explicitly based on unreliable  
20 hearsay. (*See id.* ¶ 34 (“[A]fter resigning in March 2007, former colleagues told CW2 that  
21 markets in the Northwest and Arizona were down in 2007.”); *id.* ¶ 34 (“[D]istrict managers  
22 told CW10 that Company-wide sales were not great.”).) CW9 broadly claims that “Company-  
23 wide sales were discussed at meetings attended by store managers, district managers, Brooks  
24 and Campion” (*id.* ¶ 56), but this is uncorroborated by the other witnesses and the Complaint  
25 gives no indication as to which of CW9’s sweeping statements comes from information  
26 obtained at these meetings. Because the Complaint fails to plead with particularity facts to

1 indicate that these statements are reliable and based on the witnesses' personal knowledge, the  
2 Court finds that these broad allegations do not support inferences of either falsity or scienter.  
3 *Zucco*, 552 F.3d at 996.

4 The confidential witnesses also make certain anecdotal statements regarding the  
5 performance of their own stores. (*See, e.g., id.* ¶ 37 (“CW3 recalled several instances, in which  
6 the Portland store did not reach the sales goals included in the morning e-mail and that there  
7 were days when sales were substantially less than the goal.”); *id.* ¶ 62 (“CW11 said that sales  
8 at the Garland store failed to meet projections in 2007, and were way below expectations.”).)  
9 Given the witnesses' positions at these stores, the Court finds that these allegations are pled  
10 with sufficient indicia of reliability. However, these statements hardly raise an inference that  
11 the alleged problems were widespread throughout the Company. By the end of 2007, Zumiez  
12 operated 285 stores across the country (*see id.* ¶ 2); it is hardly surprising that some of these  
13 stores suffered operational difficulties. That Plaintiffs were able to find a dozen managers  
14 whose stores underperformed expectations does little, if anything, to support their broader  
15 allegations.

## 16 2. Timing of the Alleged Problems

17 Even if the Court were to fully credit each of the CWs' broad, unreliable allegations of  
18 Company-wide difficulty and poor performance in specific segments, the witnesses provide  
19 little to no indication as to when these problems occurred. Instead, employees who allegedly  
20 worked at the Company for years make broad, unspecific allegations: “Zumiez had problems  
21 with loss prevention and shrink” (*id.* ¶ 39); “CW6 said there were problems receiving  
22 inventory from corporate ” (*id.* ¶ 47); “CW9 said it was very rare for new stores to meet sales  
23 goals” (*id.* ¶ 56). These problems are not alleged to have occurred at any specific time, and so  
24 they cannot suggest an inference that any individual statement was unreasonable.

25 Plaintiffs similarly point to problems that the Company admittedly faced at the *end* of  
26 the 2007 fiscal year and unreasonably assume that these same problems existed over the course

1 of the entire year. For example, on March 13, 2008, when the Company finally announced its  
2 earnings for the 2007 fiscal year, Zumiez CFO Lang noted that new stores had historically  
3 performed at about 70% of mature stores but that the batch of stores opened in 2007 were  
4 “currently trending below that average.” (3/13/08 Q4 2007 Conference Call 2 (Dkt. No. 44-21)  
5 (emphasis added).) He explained that it was difficult to project how these stores would perform  
6 because many had not been open long, but projected that “the *current* expectation [was that]  
7 they would do just over 60% versus the historic levels [of] 70%.” (*Id.* at 6 (emphasis added).)  
8 Lang explained that the new stores were underperforming in large part because 40% were  
9 located in California, Arizona, Nevada, and Florida, which had become particularly “difficult  
10 operating environments.” (*Id.* at 2.) He explained, however, that stores in those markets had  
11 been extremely productive for the Company in the past and “were doing very well through  
12 back to school,” so he expressed confidence that the sales at these new stores would eventually  
13 return to more historic levels. (*Id.*) Plaintiffs cherry-pick Lang’s statements and try to  
14 characterize them as evidence that the newly opened stores were performing at only 60% of  
15 mature stores *throughout the entire Class Period* and that the operating environments in these  
16 core markets were “difficult” throughout this entire period as well. (*See* Am. Compl. ¶ 110  
17 (“[D]efendants knew there was no reasonable basis for the [May 23, 2007] guidance because  
18 . . . they knew . . . sales from stores opened in 2007 were just 60% of sales at mature stores  
19 . . . ; 30% of the Company’s stores were located in California, Arizona, Nevada, and Florida—  
20 markets with difficult operating environments due to the slowing economy; [and] 40% of the  
21 50 stores opened in 2007 were located in these reeling markets.”).) Yet Lang’s statements  
22 clearly were describing the state of affairs *in March of 2008*, not during the class period;  
23 indeed, he specifically stated that the now-depressed markets had been “doing very well  
24 through back to school” (presumably sometime in September 2007). Plaintiffs fail to allege any  
25 facts—other than the blanket, overbroad, and unreliable assertions of its confidential  
26

1 witnesses—for inferring that the problems the Company faced at the end of the fiscal year also  
2 affected it during in the early stages of the Class Period.

### 3 4 5 6 **3. Evidence that the Problems Were Worsening**

7 As described above, in order to be even remotely credible, Plaintiffs' theory of the  
8 fraud must somehow account for the Company's better-than-projected earnings in the first two  
9 quarters. (*See* 5/23/07 Q1 2007 Conference Call 1–2 (Dkt. No. 44-4); 8/22/07 Q2 2007  
10 Conference Call 1 (Dkt. No. 44-6).) Therefore, even if the Court accepted Plaintiffs'  
11 unsupported allegations that the Company faced large operational problems during the Class  
12 Period, that would still not suggest that Defendants' projections were misleading or raise the  
13 requisite strong inference of scienter. Instead, Plaintiffs must plead with particularity facts  
14 demonstrating not only that the Company faced problems, but also that Defendants *knew* these  
15 problems would *worsen* over the course of the fiscal year.

16 Only one of Plaintiffs' allegations even arguably attempts to raise such an inference.  
17 Specifically, Plaintiffs claim that the stores that had opened in 2006 were underperforming as  
18 compared to the older stores; therefore, Defendants knew that comparable-store sales growth  
19 would decrease over the course of the year as these underperforming stores entered the  
20 comparable-store sales base (i.e., stores open more than one year). (Am. Compl. ¶ 6 (Dkt. No.  
21 35 at 3).) This could arguably explain how Defendants' projected earnings for the year might  
22 be unreasonable even though the Company consistently outperformed its projected  
23 comparable-store sales growth through mid-October. (*See* 5/23/07 Q1 2007 Conference Call 1–  
24 2 (Dkt. No. 44-4); 8/22/07 Q2 2007 Conference Call 1 (Dkt. No. 44-6); 11/29/07 Q3 2007  
25 Conference Call 1 (Dkt. No. 44-15); 11/7/07 Oct. 2007 Conference Call 1 (Dkt. No. 44-11).)

1 Plaintiffs' allegations are unsuccessful, however, because they have failed to plead with  
2 sufficient particularity any facts to suggest that the Company's 2006 stores were actually  
3 growing more slowly than its older stores had been growing when they were first incorporated  
4 into the comparable-store sales base. On March 13, 2008, Lang explained that new stores  
5 historically generated 70% of mature store sales in their first year, and stated the "first full year  
6 of sales [for the stores opened in 2005 and 2006] came in at about 70% of our mature store  
7 volumes." (3/13/08 Q4 2007 Conference Call 2, 6 (Dkt. No. 44-21).) Plaintiffs somewhat  
8 mysteriously interpret this statement as a concession that "sales from the 62 stores opened in  
9 2006 were *less* than 70% of sales at mature stores." (*Id.*) This appears to be nothing but a  
10 blatant misrepresentation of Lang's statement, which clearly does not support the inference  
11 that Plaintiffs would draw.

12 Plaintiffs also note that several of the stores opened in 2006 were in "non-core" markets  
13 (i.e., markets where Zumiez had not already established a presence). (Am. Compl. ¶ 85 (Dkt.  
14 No. 35).) On March 13, 2008, Brooks explained that these stores typically take three years  
15 before they perform at their "peak level" (3/13/08 Q4 2007 Conference Call 7 (Dkt. No. 44-  
16 21)), so Plaintiffs claim that Defendants knew the 2006 stores would underperform as  
17 compared to the previous years (Am. Compl. ¶ 85 (Dkt. No. 35)). However, while the  
18 Complaint alleges how many of the 2006 and 2007 stores were in "non-core" markets, it fails  
19 to allege the percentage of stores in prior years that were in "non-core" markets. As a result,  
20 Plaintiffs' allegation fails to raise any inference that the 2006 stores would be expected to  
21 perform any worse than prior years.

22 Finally, even if the Complaint had successfully alleged that the 2006 stores were  
23 underperforming relative to their predecessors, it would only marginally support Plaintiffs'  
24 claims. That fact could explain why the various problems that Plaintiffs have alleged did not  
25 initially result in lower comparable-store sales growth (because the 2006 stores were not yet  
26 considered "comparable stores"); however, it would not explain why these problems did not

1 negatively impact the Company's *earnings*. As described above, Zumiez soundly beat its  
2 earnings projections in both the first and second quarter (*see* 5/23/07 Q1 2007 Conference Call  
3 1–2 (Dkt. No. 44-4); 8/22/07 Q2 2007 Conference Call 1 (Dkt. No. 44-6)), so it is difficult to  
4 see how the Company's initial projections lacked any reasonable basis.

#### 5 6 7 8 **4. Evidence that the Alleged Problems Were Not Considered**

9 Finally, even if Plaintiffs had successfully pled facts to support their allegations that the  
10 Company was suffering from serious problems during the Class Period that would have had a  
11 foreseeable negative effect on earnings in the later part of the year, nothing in the Complaint  
12 suggests that Defendants did not take such problems into account when generating the  
13 Company's projections. When viewed in comparison to its past performance, Zumiez's  
14 guidance for the 2007 fiscal year appears quite conservative. (*See* Am. Compl. ¶ 100 (Dkt. No.  
15 35 at 34).) The Company projected earnings per share to grow at 30%, whereas it had grown  
16 64.7%, 67.8%, and 55.3% in 2004, 2005, and 2006, respectively. (*Id.*) Therefore, even if  
17 Defendants had foreseen certain problems that could have negatively affected the late-year  
18 earnings, nothing suggests that they did not factor those considerations into their calculations.

19 Plaintiffs allege that Defendants knew the Company could meet its initial projections  
20 only if the new stores opened in 2006 and 2007 exceeded 70%–75% of net sales at the  
21 “mature” stores. (*Id.* ¶ 4.) Indeed, the Complaint specifically alleges that on November 7, 2007,  
22 “defendants revealed *for the first time* that the \$0.97–\$0.99 guidance for 2007 diluted [earnings  
23 per share] assumed an improvement in new store productivity (i.e., net sales) above historical  
24 70%–75% run rates . . . .” (*Id.* ¶ 13 (emphasis in original).) The Court has thoroughly reviewed  
25 the Company's public statements on November 7, 2007, and they do not appear to contain any  
26 such revelation. (*See, e.g.*, 11/7/07 Oct. 2007 Conference Call (Dkt. No. 44-11).) Instead,

1 Plaintiffs appear to be relying on the statements of two *analysts*, who allegedly claimed that the  
2 Company's forecasting model called for new store productivity above the historical 70% rate.  
3 (Am. Compl. ¶ 79 (Dkt. No. 35 at 24–25).) The Complaint does not quote these analysts  
4 directly, nor does it allege any facts to suggest the basis for their beliefs. The Court finds that  
5 this unsupported assertion does not come close to the level of particularity required by the  
6 PSLRA. 15 U.S.C. § 74u-4(b)(1); *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001).

7 \* \* \*

8 In sum, Plaintiffs allege that Defendants had no reasonable basis for making their  
9 various forward-looking earnings projections from March 14, 2007, until November 29, 2007,  
10 in light of various alleged problems within the Company that made such projections  
11 unattainable. (*See* Response 5 (Dkt. No. 47).) However, the Complaint fails to sufficiently  
12 plead facts to suggest: (1) that such problems actually existed on a scale sufficient to affect the  
13 Company; (2) that they actually existed during the Class Period; (3) that they were likely to  
14 negatively affect late-year earnings despite strong early-year reported earnings; or (4) that they  
15 were not considered by Defendants when formulating the Company's projections.  
16 Accordingly, the Court finds that Plaintiffs have completely failed to raise a "strong inference"  
17 that Defendants knowingly made false or misleading earnings projections. *See Vantive*, 283  
18 F.3d at 1085.

19 **B. Non-Forward-Looking Statements about Current Performance**

20 Plaintiffs also challenge two statements that could arguably be viewed as assertions  
21 regarding current business performance, rather than forward-looking statements: (1) Brooks's  
22 October 18, 2007, statement that the Company was "on track" to grow earnings by at least  
23 30%, and (2) Brooks's November 29, 2007, statement that the Company's month-to-date  
24 comparable-store sales growth were in line with its fourth quarter projections. To the extent  
25 that these statements are not forward-looking, they are actionable if Plaintiffs allege specific  
26

1 facts sufficient to raise a strong inference that Brooks made the statements with deliberate  
2 recklessness to investors. *Id.*

3 **1. 10/18/07 Statement that Zumiez was “On Track” for 30% Growth**

4 In challenging Brooks’s mid-October statement that the Company was “on track again  
5 to grow earnings of at least 30% this year,” Plaintiffs restate many of the same allegations they  
6 used to challenge the earnings projections, arguing again that problems within the Company  
7 undermined any reasonable basis for the 30% growth prediction. (Am. Compl. ¶ 125–30 (Dkt.  
8 No. 35 at 43–45).) The Court finds these allegations insufficiently pled for the same reasons  
9 they were insufficiently pled as to the earnings projections.

10 The Complaint further alleges that Brooks must have known that the Company was not  
11 on track to grow earnings by 30% because, three weeks later, on November 7, the Company  
12 revised its guidance downward to project only 26% to 29% growth for the fiscal year. (*See*  
13 11/7/07 Oct. 2007 Conference Call (Dkt. No. 44-11) (announcing expected “full-year fiscal  
14 2007 earnings per diluted share to be in the range of \$0.92 to \$0.94, compared to fiscal 2006  
15 earnings of \$0.73 per diluted share.”).) The Complaint alleges that Defendants “knew by  
16 October 18, 2007, that comparable-store sales growth had declined in the first three weeks of  
17 October,” citing the Company’s reported figures. (Am. Compl. ¶ 131 (Dkt No. 131).) Yet these  
18 exact figures undermine any suggestion of wrongdoing. As Plaintiffs allege, comparable-store  
19 sales growth declined consistently over the four-week period ending October 30, 2007, from  
20 7.1% to 6.9% to 5.4% to 1.1%. (*Id.*) On October 18, Brooks would have only had the data from  
21 the first two weeks, and, although the comparable-store sales growth was lower than it had  
22 been in the earlier part of the year, it was still well within the “mid-single digit” range that the  
23 Company had first projected in March when it announced 30% expected growth in earnings  
24 per share. (*See* 3/14/07 Q4 2006 Conference Call 2 (Dkt. No. 44-2).) In contrast, by November  
25 7, the Company would have seen not only the weak 1.1% growth in the last week of October,  
26 but also a similarly disappointing 2.4% growth in the first week of November. (*See* 12/5/07

1 Nov. 2007 Conference Call 1 (Dkt. No. 44-17).) Given the drop-off in earnings growth  
2 between October 18 and November 7, it is unsurprising that the Company took a more  
3 conservative outlook on the later date. Therefore, the Court finds that the close timing between  
4 these two statements does not raise a strong inference that Brooks's statement on October 18  
5 was made with deliberate recklessness to investors. *See Vantive*, 283 F.3d at 1085.

6  
7  
8 **2. 11/29/07 Statement that November Month-to-Date Comparable-Store  
Sales Growth was in the "Upper Single-Digits"**

9  
10 Plaintiffs also challenge Brooks's statement regarding the November month-to-date  
11 comparable-store sales growth, again using Zumiez's own reported earnings to suggest that the  
12 statement could not have been true. The Complaint alleges that the Company could not have  
13 been tracking "upper single-digit" growth on November 29, 2007, when the Company ended  
14 up reporting only 5.6% growth for the four-week period ending December 1. (Am. Compl. ¶  
15 150–51 (Dkt. No. 35 at 51–52).)

16 Zumiez reported that comparable-store sales grew as compared to the previous year  
17 2.4% in the first week of November, 4.2% in the second week, 11.9% in the third  
18 (Thanksgiving) week, and 2.1% in the fourth week. (*Id.* ¶ 151.) On November 29, 2007,  
19 Defendants would have had the data from the first three weeks and from the beginning of the  
20 last week. Plaintiffs claim that given the growth rates in the first three weeks, the Company  
21 would have needed double-digit growth in the final week to achieve "upper single-digit"  
22 growth for the month overall. (Response 19–20 (Dkt. No. 47).) In making this allegation,  
23 however, Plaintiffs misunderstand that growth over the course of a month is a *weighted*  
24 average of the weekly growth rates—10% growth in a week that had very high sales the  
25 previous year will contribute much more to the monthly growth rate than would 10% growth in  
26 a lower-volume week. (*See* Mot. 23 (Dkt. No. 42).) Without any facts alleging the relative

1 sales volumes of each of the weeks in November, one cannot evaluate how strong an inference  
2 to draw from the first three weeks of data. Accordingly, the Court finds that Plaintiffs have  
3 failed to plead with particularity grounds for inferring that the November 29 statement was  
4 false or misleading.

5       Indeed, common knowledge strongly suggests that the weeks before and after  
6 Thanksgiving weekend would have much higher sales volumes than the first two weeks of the  
7 month, so the monthly growth rate would in fact be heavily influenced by the growth at the end  
8 of the month. Given that the Company reported comparable-store sales growth in the “mid-  
9 teens” over Thanksgiving weekend, (*see* Am. Compl. ¶ 142 (Dkt. No. 35 at 49)), it seems quite  
10 likely that the Company was in fact tracking “upper single-digit” growth when Brooks made  
11 the statement, only to have the growth rate drop after the poor performance in the last week of  
12 the month. Plaintiffs have failed to state with particularity facts giving rise to a strong inference  
13 (i.e., an inference at least as strong as any opposing inference) that Brooks’s statement was  
14 made with deliberate recklessness to investors. *Tellabs*, 127 S. Ct. at 2511; *Vantive*, 283 F.3d  
15 at 1085.

### 16       **C.     Stock Sales**

17       Finally, Plaintiffs allege that certain stock trades by Individual Defendants are  
18 indicative that their statements were false and misleading and part of a fraud to deceive the  
19 shareholders. (*See* Am. Compl. ¶ 11 (Dkt. No. 35 at 5).) The Ninth Circuit allows stock sales to  
20 be used as circumstantial evidence of falsity or scienter, but only when such sales are  
21 “unusual” or “suspicious.” *Ronconi*, 253 F.3d at 435. “Insider trading is suspicious only when  
22 it is dramatically out of line *with prior trading practices* at times calculated to maximize the  
23 personal benefit from undisclosed inside information.” *Silicon Graphics*, 183 F.3d at 986  
24 (emphasis added) (internal quotation omitted). “Among the relevant factors to consider are:  
25 (1) the amount and *percentage of shares* sold by insiders; (2) the timing of the sales; and (3)  
26

1 whether the sales were consistent with the insider's *prior trading history*." *Id.* (emphasis  
2 added).

3 Here, the Complaint utterly fails to allege any facts about the Defendants "prior trading  
4 history" and hence makes no attempt whatsoever to demonstrate that trades were "dramatically  
5 out of line with prior trading practices." (*See* Am. Compl. ¶¶ 122–23 (Dkt. No. 35 at 42).) The  
6 Complaint similarly makes no allegations as to the percentage of shares sold. (*Id.*) The Ninth  
7 Circuit has recently made clear that without an "allegation . . . that . . . stock sales, though  
8 significant, are inconsistent with . . . usual trading patterns, no inference of scienter can be  
9 gleaned from [the] stock sale assertions." *Zucco*, 552 F.3d 1006. Accordingly, the Court gleans  
10 no inferences from Plaintiffs' stock sale assertions.

#### 11 **E. Plaintiffs' Allegations as a Collective**

12 The Supreme Court and the Ninth Circuit have both emphasized that a court must  
13 "'consider the complaint in its entirety' to determine whether 'all of the facts alleged, taken  
14 collectively, give rise to a strong inference of scienter.'" *Id.* (*quoting Tellabs*, 127 S. Ct. at  
15 2509). Considering all of the facts alleged as a collective, the Court finds that the Complaint  
16 fails to raise a strong inference that Defendants made false or misleading statements with  
17 actual knowledge or deliberate recklessness; indeed, it fails by quite a large margin. In their  
18 sixty-four-page Complaint, Plaintiffs make numerous allegations of problems within the  
19 Company. Most of the allegations are vague, overbroad, and based on the statements of  
20 confidential witnesses who would have no reason to possess such information. But even if the  
21 allegations were true, and the Company was faced with significant problems, "[m]uch of any  
22 business consists of having problems and dealing with them." *Ronconi*, 253 F.3d at 430. As in  
23 *Ronconi*, "[t]here is nothing in [Plaintiffs' alleged] problems . . . that suggests intentional or  
24 deliberately reckless falsity or deception in the [Company's] statements." *Id.* Accordingly,  
25 Defendants' motion to dismiss must be granted.

#### 26 **F. Futility of Amendment**

1 In the alternative, Plaintiffs request leave to amend the Complaint. Although “leave to  
2 amend is to be freely granted when justice so requires,” *Lipton v. Pathogenesis Corp.*, 284 F.3d  
3 1027, 1038 (9th Cir. 2002) (*citing* FED. R. CIV. P. 15(a)), leave may be denied when  
4 amendment would be futile. *Zucco*, 552 F.3d at 1007; *Lipton*, 284 F.3d at 1039; *Silicon*  
5 *Graphics*, 183 F.3d at 991.

6 The Court finds that, in this case, amendment would be futile. The Complaint has  
7 previously been amended, and Plaintiffs have alleged no facts beyond the Complaint that  
8 would further support an inference that Defendants made false or misleading statements with  
9 the requisite scienter. As the Court has described in detail, the Complaint is flawed on every  
10 level, reflecting a fundamentally misguided theory of the case. Indeed, this action appears to be  
11 the very sort of “fishing expedition” that the PSLRA was designed to deter. *See Silicon*  
12 *Graphics*, 183 F.3d at 998. Having failed to suggest *any* reasonable inference of wrongdoing  
13 on the part of Defendants, the Court finds that it would frustrate the purpose of the PSLRA to  
14 grant Plaintiffs leave to amend. *See Tellabs*, 127 S. Ct. at 2504 (“Private securities fraud  
15 actions . . . , if not adequately contained, can be employed abusively to impose substantial  
16 costs on companies and individuals whose conduct conforms to the law.”).

### 17 **III. CONCLUSION**

18 For the foregoing reasons, Defendants’ Motion to Dismiss (Dkt. No. 42) is GRANTED.  
19 The Consolidated Amended Complaint (Dkt. No. 35) is DISMISSED with prejudice.

20 SO ORDERED this 30th day of March, 2009.

21  
22  
23 

24 John C. Coughenour  
25 United States District Judge  
26