

No. 17-

IN THE
Supreme Court of the United States

MAGUIRE FINANCIAL, LP, ON BEHALF OF ITSELF
AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

POWERSECURE INTERNATIONAL, INC.
AND SIDNEY HINTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit apply an erroneous standard for alleging scienter under Section 10(b) of the Securities Exchange Act of 1934 that directly conflicts with the standard this Court established in *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007), by requiring that the inference of scienter be more compelling than any opposing inference of non-culpability one could draw from the facts alleged?

PARTIES TO THE PROCEEDING

Petitioner is Maguire Financial, LP (“Maguire”), on behalf of itself and all others similarly situated, plaintiff and appellant below.

Respondents are PowerSecure International, Inc. and Sidney Hinton, defendants and appellees below. Christopher T. Hutter, who had been named as a defendant, is no longer a party to this action.

RULE 29.6 DISCLOSURE

Maguire has no parent corporation and no publicly held corporation owns ten percent (10%) or more of Maguire's units.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, dated November 15, 2017, is reported at 876 F.3d 541 and is reprinted in the Appendix to the Petition (“App.”) at 1a-19a. The order of the District Court, dated September 15, 2015, is reported at 2015 U.S. Dist. LEXIS 122692, and is reprinted at App. 20a-54a. The order of the District Court, dated September 13, 2016, is reported at 2016 U.S. Dist. LEXIS 124465 and is reprinted at App. 55a-70a. The denial of rehearing of the Court of Appeals is reprinted at App. 71a-72a.

JURISDICTION

The Court of Appeals issued its decision on November 15, 2017, App. 1a, and denied a petition for rehearing or rehearing en banc on December 12, 2017, App. 71a-72a. The Court’s jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

The question presented by this petition involves the following statutes and regulations:

1. Section 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §78j(b), which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

. . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

2. Securities and Exchange Commission Rule 10b-5, 17 C.F.R. §240.10b-5, which provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

3. 15 U.S.C. §78u-4(b)(2)(A), from the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), which provides:

(b) Requirements for securities fraud actions.

...

(2) Required state of mind.

(A) In general. Except as provided in subparagraph (B), in any private action arising under this title [15 U.S.C. §§ 78a *et seq.*] in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

STATEMENT OF THE CASE

The United States Court of Appeals for the Fourth Circuit (the “Fourth Circuit”) violated the controlling legal standard this Court set forth in *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007) (“*Tellabs*”), for alleging scienter under §10(b) of the Exchange Act and Rule 10b-5 and satisfying the PSLRA’s demand that,

based on the facts alleged, the complaint avers a “strong inference” that the defendant acted with the required state of mind. *See* 15 U.S.C. §78u-4(b)(2)(A). The Fourth Circuit disregarded this Court’s explicit direction in *Tellabs* that a plaintiff meets the PSLRA pleading requirement where the inference of scienter is “at least as” strong as any opposing inference. *See Tellabs*, 551 U.S. at 324, 326.

By violating the unambiguous pleading standard established by this Court, the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court’s supervisory power and has decided an important federal question in a way that conflicts with the relevant decision of this Court. *See* Sup. Ct. R. 10(a), (c).

The material facts are few.

1. Based in North Carolina, PowerSecure provides utility and energy technologies to electric utilities and their customers. Am. Compl. ¶8. At all times, PowerSecure’s business depended on large contracts with a small number of customers. *Id.* at ¶9.

2. With thirty years of experience in the energy industry, during the Class Period, Sidney Hinton was PowerSecure’s CEO, President, and a member of its Board of Directors, and PowerSecure’s chief public spokesperson. Am. Compl. ¶¶12-13. In a September 30, 2013 letter to the SEC, PowerSecure described Hinton as “our chief operating decision maker,” who “makes all final decisions with respect to the allocation of resources”; “operat[es] the day-to-day business in direct contact with individual sales leaders, product and service leaders,

operations leaders and function leaders”; is “regularly provided” information about the Company’s business and performance; and “manages our business through information he receives from direct interactions with these direct reports.” *Id.* at ¶¶39-41.

3. Three months before the Class Period, on May 8, 2013, Hinton assured securities analysts with regard to PowerSecure’s expiring three-year contract with Florida Power & Light (“FP&L”), the largest electric utility in Florida: “[I]t’s renewal time But it’s an opportunity we are bullish on. We can’t say for sure we are getting it but it looks really good sitting here today.” Am. Compl. ¶¶2, 18. Then, on August 7, 2013, the first day of the Class Period, during the Company conference call with securities analysts to discuss second quarter 2013 results, Hinton stated:

We signaled to you on our last conference call in June that we expected good things, and then ***we were blessed to announce securing a \$49 million three-year contract renewal***, both the ***renewal*** and expansion with one of the largest investor [owned] utilities in the country, and that business is now reflected in our backlog.

Id. at ¶20 (emphasis added). Although Hinton did not name the utility customer at that time, it was FP&L. *Id.* at ¶¶2, 18. The District Court found this statement to be materially misleading. App. 36A-37A, 44A-45A.

4. In truth, but wholly unknown to the public at the time, PowerSecure’s expiring contract with FP&L had not been “renewed” as Respondents falsely reported to

the market. Rather, PowerSecure had lost the contract for the West Palm Beach location on Florida's east coast it had been servicing for three years and, instead, had been awarded a totally new contract to service a completely different location some 125 miles away in the Ft. Myers area, on Florida's west coast. Am. Compl. at ¶¶21-23. As a result, PowerSecure lost its investment in its infrastructure at the original contract site, including the crews it had assembled and trained, and was forced, at great expense, to relocate its operations and hire and train new crews at the new site. As the District Court concluded, had Respondents revealed that the new contract was for a distant location and was not a "renewal," which implied the same location as the expiring contract, investors would have understood that starting over in a distant location would require PowerSecure to incur substantial start-up costs, which would, and ultimately did, have a negative impact on PowerSecure's bottom line. *See* App. 36a-37a, 66a.

5. As the Fourth Circuit took note: "Investment analysts reacted positively to Hinton's announcement, and the next day PowerSecure's common stock rose more than 10% to close at \$17.71 per share." App. 4a. While Hinton no doubt was acutely aware of the strong market reaction, he did not correct his misleading use of the word "renewal."

6. Minimizing the import of Hinton's misstatement concerning the new FP&L contract, the Fourth Circuit speculated that if Hinton wanted to deceive investors he would not have "briefly and ambiguously characterize[d] it as a 'renewal and expansion' once." App. 15a. However, the Fourth Circuit ignored that PowerSecure also used the words "renewed" and "renewal" to describe the

FP&L contract at least three times in SEC filings and a PowerSecure press release. Am. Compl. ¶19 (June 6, 2013 press release with headline announcing “renewal” of contract); Affidavit of John C. Roberts Jr. in Support of Defendants’ Motion to Dismiss Consolidated Complaint, filed Feb. 26, 2015, Ex. 17 (June 6, 2013 SEC Form 8-K reporting “renewed” contract and attaching June 6, 2013 press release); Affidavit of John C. Roberts Jr. in Support of Defendants’ Motion to Dismiss Amended Complaint, filed Nov. 23, 2015, Ex. 4 (SEC Form 10-Q, filed Aug. 7, 2013, reporting “renewed” contract). In sum, undisputed evidence clearly shows that Hinton did not make his false statement by accident.

7. While its share price was inflated by Respondents’ false representations that the FP&L contract had been “renewed,” PowerSecure raised more than \$34 million from selling 2.3 million shares of its common stock in a public offering on August 16, 2013 (the “Offering”). Am. Compl. ¶25. At the same time, Hinton personally made \$3.2 million from selling 200,000 of his PowerSecure shares at the same price as the Offering. In addition, Hinton used approximately \$2.5 million of his artificially-inflated PowerSecure stock to fund his divorce settlement, thereby substantially reducing the cost to him of satisfying his financial obligations to his ex-wife. *Id.* at ¶¶25, 48.

8. On May 7, 2014, the end of the Class Period, PowerSecure surprised the market by reporting a first quarter 2014 net loss of almost \$4.3 million, as compared to net income of \$4.412 million for the entire year 2013 – caused by a 34% increase in the cost of sales and a 39% increase in operating expenses. Contrary to Respondents’ previous representations that PowerSecure

had secured a “three-year contract renewal” with “one of the largest” investor-owned utilities in the country, FP&L, Hinton revealed that, in fact, FP&L had not renewed its existing contract for the Palm Beach area, but rather PowerSecure had lost that contract. He stated that what he previously had characterized as a “renewal” actually was “like having a contract in California, that serve[s] . . . San Francisco and you win a damn contract in Los Angeles.” Respondents attributed the poor first quarter results, in part, to the substantial start-up costs of the new FP&L contract. Am. Compl. ¶¶27-31. The next day, PowerSecure’s stock price plunged more than 62%, wiping out more than \$250 million of the Company’s market value. *Id.* at ¶¶2, 32. Petitioner and other investors who had purchased PowerSecure’s publicly-traded securities during the Class Period suffered substantial damages.

This consolidated securities class action was commenced on May 22, 2014 in the United States District Court for the Eastern District of North Carolina (the “District Court”). Following the appointment of Petitioner Maguire Financial, LP (“Petitioner”) as lead plaintiff pursuant to the PSLRA, on December 19, 2014, Petitioner filed its Consolidated Class Action Complaint for Violations of the Federal Securities Laws (the “Consolidated Complaint”). On September 15, 2015, the District Court dismissed all but one of the misstatements alleged in the Consolidated Complaint as immaterial expressions of optimism, forward-looking statements protected by the PSLRA statutory safe harbor, or not false or rendered misleading because of inadequate disclosure.

The District Court ruled that Hinton’s representation that PowerSecure had secured “a \$49 million three-year contract *renewal*” (emphasis added) “with one of the

largest investor [owned] utilities in the country” *was* materially misleading. The District Court held:

Although defendants argue that there is little real difference between a renewal with the same customer and a new contract with the same customer . . . given the relatively small number of contracts that PowerSecure worked on . . . ***a reasonable investor might find the distinction between the two as having 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.*** . . . Thus, plaintiffs sufficiently alleged that this statement was materially misleading.

App. 37a (emphasis added). Thus, the District Court recognized that the difference between a “renewed” contract to continue servicing the same area and an entirely new contract to service a different area 125 miles away, with its attendant inefficiencies and start-up costs, would have been understood by and was material to a reasonable investor. The Fourth Circuit did not question the District Court’s finding and it accepted Petitioner’s allegations that Hinton “knew” his reference to a “renewal” was false. App. 12a.

Yet, although the District Court found that Respondents’ statements regarding the FP&L contract were materially misleading, it dismissed Petitioner’s Consolidated Complaint on the basis that Petitioner had failed to state with particularity facts giving rise to a strong inference that Respondents acted with scienter, as

the PSLRA requires, *see* 15 U.S.C. §78u-4(b)(2)(A). The District Court gave Petitioner leave to replead.

On October 16, 2015, Petitioner filed its Amended Consolidated Class Action Complaint for Violations of the Federal Securities Laws (“Amended Complaint” or “Am. Complt.”), which is the operative pleading. The Amended Complaint focused entirely on Hinton’s August 7, 2013 misrepresentation to the market that PowerSecure had “renewed” its contract with FP&L, which the District Court had ruled Petitioner sufficiently alleged to be materially misleading.

On Respondents’ motion to dismiss the Amended Complaint, the District Court expressly “decline[d] to revisit its earlier holding that plaintiffs sufficiently alleged that defendants’ August 7, 2013 statement amounted to a material misrepresentation” and “limit[ed] its analysis” to whether the Amended Complaint sufficiently alleged scienter. App. 60a. Relying, in substantial part, on the reasons set forth in its previous opinion, the District Court again held that Petitioner had not sufficiently pleaded scienter. Thus, on September 14, 2016, after briefing but no oral argument, the District Court granted Respondents’ motion to dismiss and dismissed the Amended Complaint with prejudice.

Petitioner filed a timely notice of appeal on October 7, 2016. On November 15, 2017, following briefing and oral argument, the Fourth Circuit panel affirmed the judgment of the District Court dismissing the Amended Complaint. *Maguire Fin., LP v. PowerSecure Int’l Inc.*, 876 F.3d 541 (4th Cir. 2017). Notwithstanding that the Fourth Circuit found that Petitioner “alleges facts that

permit the inference that Hinton *knew* his statement was false,” App. 12a (emphasis added), and that it was “*just as likely*” that Hinton *did know* the details of the new contract and the substantial costs PowerSecure would be forced to incur, App. 17a (emphasis added), it improperly concluded Petitioner had not adequately alleged scienter.

On December 12, 2017, without opinion, the Fourth Circuit denied Petitioner’s petition for rehearing or rehearing en banc. App. 71a-72a.

REASONS FOR GRANTING THE PETITION

Section 10(b) of the Exchange Act requires:

[I]n any private action arising under this title in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title, state with particularity facts giving rise to a strong inference that the defendants acted with the required state of mind.

15 U.S.C. §78u-4(b)(2)(A).

This Court has made it clear that to satisfy this pleading requirement, a complaint need only plead sufficient facts for “a reasonable person [to] deem the inference of scienter cogent and *at least as* compelling as any opposing inference one could draw from the facts alleged.” *Tellabs*, 551 U.S. at 324 (emphasis added). This Court directed in *Tellabs* that “the reviewing court must

ask: When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter ***at least as*** strong as any opposing inference?” *Id.* at 326 (emphasis added). *Accord id.* at 314, 328. Thus, if the facts drawn from the allegations of the complaint that support scienter and those that oppose such an inference are in “equipoise,” *id.* at 331 (Scalia, concurring), plaintiff will have satisfied the scienter pleading requirements of the PSLRA.

In light of Petitioner’s detailed allegations regarding Hinton’s central, active role in managing PowerSecure’s business day-to-day, the Fourth Circuit held: “It is conceivable that Hinton was involved in negotiating the minutiae of the second contract such that he would be aware of the costs associated with hiring and training low-level workers.” App. 17a (emphasis added). However, clearly and directly defying *Tellabs*’ mandate, the Fourth Circuit then held scienter was not sufficiently alleged because:

[I]t is ***just as likely*** that in practice Hinton did not personally learn those specific details about the agreement, that he believed the cost of establishing a presence in Ft. Myers would not be substantial, or that he believed any cost increase would be offset by savings from winding down operations in West Palm Beach.

Id. (emphasis added).

The Fourth Circuit’s holding flatly violates the clear and unambiguous standard this Court established in *Tellabs* that a “strong inference” of scienter is one that is “cogent and ***at least as*** compelling as any opposing

inference one could draw from the facts alleged.” 551 U.S. at 324 (emphasis added). Based on the Fourth Circuit’s own determinations that Hinton “knew” his statement that the FP&L contract had been “renewed” was false, App. 12a, and that it was “*just as likely*,” App. 17a (emphasis added) that Hinton was aware of the substantial costs of hiring and training new work crews, *Tellabs* mandates a finding that scienter is adequately pled and dismissal of the Amended Complaint should have been reversed.

As this Court repeatedly has recognized, the fair and effective operation of the federal securities laws is of vital national importance. *See, e.g., Tellabs*, 551 U.S. at 320 n.4 (private securities litigation is “crucial to the integrity of domestic capital markets”); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006) (“The magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.”). This Court also has recognized that “[s]etting a uniform pleading standard for §10(b) actions was among Congress’ objectives when it enacted the PSLRA.” *Tellabs*, 551 U.S. at 320. And, in *Tellabs*, this Court set a uniform standard for pleading a “strong inference” of scienter.

This Court should not allow the Fourth Circuit to deviate from the single, unambiguous standard it has set for pleading claims under §10(b). This Court should exercise its supervisory power and grant review to enforce the uniform pleading standard it established in *Tellabs* and to ensure compliance with its rulings. A summary reversal is warranted. *See, e.g., Spears v. United States*, 555 U.S. 261 (2009) (granting petition for certiorari and summarily reversing judgment of Court of Appeals).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 12, 2018

APPENDIX

1a

**APPENDIX A — OPINION OF THE UNITED
STATES COURT OF APPEALS FOR THE FOURTH
CIRCUIT, FILED NOVEMBER 15, 2017**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2163

MAGUIRE FINANCIAL, LP,

Movant-Appellant,

and

LEONARD ASH, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiff,

and

CLAY LESLIE; PAUL E. MOORE,

Movants,

v.

POWERSECURE INTERNATIONAL, INC.;
SIDNEY HINTON,

Defendants-Appellees,

2a

Appendix A

and

CHRISTOPHER T. HUTTER,

Defendant.

Appeal from the United States District Court for the
Eastern District of North Carolina, at Greenville.
James C. Dever III, Chief District Judge.
(4:14-cv-00092-D)

September 15, 2017, Argued
November 15, 2017, Decided

Before WILKINSON, DUNCAN, and THACKER,
Circuit Judges

DUNCAN, Circuit Judge:

Plaintiff-Appellant Maguire Financial, LP (“Maguire Financial”) appeals the district court’s dismissal of its amended complaint in this securities fraud class action. Maguire Financial argues that the district court erred in holding that a statement by the CEO of PowerSecure International, Inc. (“PowerSecure”), to securities analysts that the company had secured a “contract renewal” could not form the basis for liability under § 10(b) of the Securities Exchange Act of 1934 (the “Exchange Act”), *see* 15 U.S.C. § 78j(b), and Rule 10b-5, *see* 17 C.F.R. § 240.10b-5, because the amended complaint failed to adequately allege scienter. For the reasons that follow, we affirm.

3a

Appendix A

I.

A.

PowerSecure provides utility and energy technologies to electric utilities and their customers.¹ Sidney Hinton, PowerSecure’s president and CEO, has three decades of experience in the energy industry. Hinton certified PowerSecure’s financial reports and signed its annual and quarterly SEC filings.

PowerSecure has three operating segments: Interactive Distributed Generation (“DG”), Energy Efficiency (“EE”), and Utility Infrastructure (“UI”). Its UI products and services include transmission and distribution system construction and maintenance, installation of advanced metering and efficient lighting, and emergency storm restoration. The UI segment generated 41% of PowerSecure’s 2013 revenue. During the class period, Florida Power & Light (“FP&L”) was the largest electric utility in Florida and had a three-year contract with PowerSecure for the West Palm Beach area that was soon to expire. FP&L’s contract accounted for approximately 10% of PowerSecure’s UI revenue and about 4.1% of its total revenue.

PowerSecure issued a press release on June 6, 2013, announcing that it had “added approximately \$75 million to its revenue backlog, including approximately \$49

1. Because this appeal follows a motion to dismiss, we recite the facts as alleged by Appellant. *Partington v. Am. Int’l Speciality Lines Ins. Co.*, 443 F.3d 334, 336 n.1 (4th Cir. 2006).

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million from a renewed and expanded three year utility infrastructure (UI) award to serve one of the nation's largest investor owned utilities (IOUs)." J.A. 412. On August 7, 2013, Hinton stated during a conference call and live webcast for securities analysts and investors that PowerSecure was "blessed to announce securing a \$49 million three-year contract renewal, both the renewal and expansion with one of the largest investor [owned] utilities in the country." J.A. 412. Investment analysts reacted positively to the announcement, and the next day PowerSecure's common stock rose more than 10% to close at \$17.71 per share.

On August 16, 2013, PowerSecure sold 2.3 million shares at \$16 per share, and Hinton sold 200,000 shares from his personal holdings at the same price. Hinton also transferred to his wife approximately \$2.5 million of his PowerSecure stock in December 2013 and February 2014 as part of a divorce settlement.

On May 7, 2014, PowerSecure surprised the market by reporting a first quarter loss of almost \$4.3 million as its cost of sales increased 34% and operating expenses grew by 39%. Hinton stated on a conference call with analysts that same day that FP&L had "changed the geographies we were serving" from West Palm Beach to Ft. Myers and that "we probably underestimated the negativity [and] the complexity of basically starting from scratch in a new territory." J.A. 417-18. Since it was not feasible for PowerSecure's employees in West Palm Beach to commute 125 miles to Ft. Myers to fulfill the new contract, they left the company to work for other contractors. Consequently,

Appendix A

PowerSecure had to hire and train new workers in Ft. Myers at significant expense. Although the new contract offered PowerSecure more work, its higher costs reduced short-term profitability. The next day, numerous analysts slashed their ratings and price targets for PowerSecure, and its stock price fell more than 62%.

B.

On May 22, 2014, Leonard C. Ash filed a securities class action suit against PowerSecure, Hinton, and Christopher T. Hutter (PowerSecure's Chief Financial Officer). On October 10, 2014, the district court granted a motion to consolidate Ash's case with two other cases and named Maguire Financial as lead plaintiff. On December 29, 2014, the plaintiffs filed a consolidated securities class action suit. It alleged that PowerSecure's share price was artificially inflated after Hinton's August 7, 2013, statement that PowerSecure had obtained a "contract renewal," because PowerSecure knew then that its West Palm Beach contract had not been extended, and it had instead been awarded a less profitable contract in Ft. Myers.

Maguire Financial sought to impose liability based on twenty-six allegedly materially false or misleading statements made by defendants. On September 15, 2015, the district court granted PowerSecure's motion to dismiss. The district court concluded that twenty-five of the statements were not materially false or misleading. The twenty-sixth statement was that of Hinton on August 7, 2013, noting that the company was "blessed to announce

Appendix A

securing a \$49 million three-year contract renewal, both the renewal and expansion with one of the largest investor [owned] utilities in the country.” The district court found that Maguire Financial had adequately alleged that the twenty-sixth statement was materially misleading, but that the complaint failed to adequately plead scienter. It therefore granted leave to amend.

The amended complaint sought to impose liability based only on Hinton’s August 7, 2013, statement.² On September 14, 2016, the district court granted PowerSecure’s motion to dismiss the amended complaint, finding that Maguire Financial again failed to adequately plead scienter. It concluded that neither the allegation that Hinton had made a material misrepresentation nor a holistic view of the facts were sufficient. This appeal followed.

II.

We review de novo the district court’s dismissal for failure to state a claim. *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 181 (4th Cir. 2009).

The Exchange Act ensures that companies disclose to investors the information needed to make informed investment decisions. *See Taylor v. First Union Corp. of S.C.*, 857 F.2d 240, 246 (4th Cir. 1988). Maguire Financial’s claims arise under § 10(b) of the Exchange Act, which makes it unlawful “[t]o use or employ, in connection with

2. The amended complaint did not name Hutter as a defendant.

Appendix A

the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.” 15 U.S.C. § 78j(b). Section 10(b) is implemented by Rule 10b-5, which makes it unlawful “[t]o employ any device, scheme or artifice to defraud[;] [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading, or[;] [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” 17 C.F.R. § 240.10b-5. Section 10(b) provides an implied private right of action, and the plaintiff in such an action “must prove (1) 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.” *Stoneridge Inv. Partners v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008).

Ordinarily, a plaintiff need only make “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). However, Rule 9(b) creates an exception to this liberal pleading standard and requires that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). This heightened pleading requirement serves to protect defendants’ reputations from baseless accusations, eliminate meritless suits brought only to extract a settlement, discourage fishing expeditions, and provide defendants with enough

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information about a plaintiff's allegations to mount a defense. *Pub. Emples. Ret. Ass'n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 311 (4th Cir. 2009).

“[T]he inconsistent application and interpretation of Rule 9(b) and other abuses in securities cases prompted Congress to enact the PSLRA [Private Securities Litigation Reform Act].” *Teachers’ Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 171 (4th Cir. 2007). While “meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions,” these actions, “if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007). The PSLRA was enacted by Congress “[a]s a check against abusive litigation by private parties,” *id.*, lest every rosy corporate prognostication generate potential liability.

The PSLRA clarifies the heightened pleading standard that applies to securities fraud actions. It requires that the complaint in a private securities fraud action “shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). The PSLRA does not define “a strong inference.” However, the Supreme Court instructs courts to “accept all factual allegations in the complaint as true[;]” “consider the complaint in its entirety, as well as other sources courts

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ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss[;]” and “in determining whether the pleaded facts give rise to a ‘strong’ inference of scienter, . . . take into account plausible opposing inferences.” *Tellabs*, 551 U.S. at 322-23.

To establish scienter, the “required state of mind” in a § 10(b) action, a plaintiff must prove that the “defendant acted with ‘a mental state embracing intent to deceive, manipulate, or defraud.’” *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 884 (4th Cir. 2014) (quoting *Tellabs*, 551 U.S. at 319). However, “[a]t the pleading stage, alleging either intentional or severely reckless conduct is sufficient.” *Id.* Recklessness is “an act so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff.” *Ottmann v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 343 (4th Cir. 2003) (quoting *Phillips v. LCI Int’l, Inc.*, 190 F.3d 609, 621 (4th Cir. 1999)). “Such ‘severe recklessness’ is, in essence, ‘a slightly lesser species of intentional misconduct.’” *Id.* at 344 (quoting *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 408 (5th Cir. 2001)). The court must determine “whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.” *Tellabs*, 551 U.S. at 323. To survive a motion to dismiss in a § 10(b) complaint, “the inference of scienter must be more than merely ‘reasonable’ or ‘permissible’--it must be cogent and compelling, thus strong in light of other explanations.” *Id.* at 324.

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Our task is straightforward. We “must analyze the factual allegations raised by the plaintiffs, as well as other evidence in the record, and determine what plausible inferences we can draw from them.” *Pub. Emples. Ret.*, 551 F.3d at 312. To survive a motion to dismiss, the facts alleged must give rise to a strong inference that Hinton intentionally or recklessly deceived, manipulated, or defrauded investors. Reversal is appropriate “only if we find the inference that [the defendants] acted with scienter ‘at least as compelling’ as the inference that the defendants lacked the required mental state.” *Id.*

We conclude that Maguire Financial has not adequately alleged scienter as required by § 10(b) of the Exchange Act, Rule 10b-5, and the PSLRA. Accordingly, we affirm the district court’s dismissal of the amended complaint.

III.

Maguire Financial’s amended complaint alleges that “Hinton was privy to confidential and proprietary information concerning PowerSecure” and that “it is impossible that Hinton did not know the contract was **not** a renewal but, instead, was an entirely new contract for a different geographic area” that would require the company to hire and train new workers “at considerable expense.” J.A. 409, 423. It also alleged that Hinton and the company had various motives to inflate PowerSecure’s stock price, and that these motivations, combined with Hinton’s knowledge that he was misspeaking, satisfy the scienter requirement. J.A. 426-28.

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Like the district court, we find the allegations of scienter inadequate. First, we must reject Appellant's theory that an inference that Hinton knew his statement was false is sufficient to show that Hinton acted intentionally or recklessly to deceive, manipulate, or defraud. Second, we conclude that upon a holistic evaluation of all the facts in the amended complaint, the inference of scienter is neither "cogent and compelling, [nor] strong in light of other explanations." *See Tellabs*, 551 U.S. at 324. Accordingly, we affirm.

A.

First, an inference that Hinton may have known his statement was false does not alone satisfy the scienter requirement. Maguire Financial argues that "[i]t strains credulity to suggest that a highly experienced senior executive in such a pivotal position did not know whether a crucially important contract with a crucially important customer had been renewed or not," and "it makes no sense that Hinton's misrepresentation that the FP&L contract was a 'renewal,' rather than a new contract, could have been just negligent. Given the nature of the information, Hinton either knew the truth or knew that he did not. In either case, he acted with the requisite scienter." Appellant's Br. at 27, 32. We disagree.

As the district court correctly concluded, Appellant's argument fuses an inference that Hinton knew enough to realize that his characterization was technically incorrect with an inference that he intended it to deceive. Yet scienter and knowledge with respect to misrepresentation

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are distinct components of the requisite analytical framework. To conflate the two, as Appellant would have us do, would read the scienter element out of the analysis in contravention of the PSLRA's exacting pleading standard. An inference that an executive had enough knowledge to be aware that he was making an inaccurate statement might support an inference that he made a material misrepresentation but does not necessarily suggest an intent to mislead. A statement might be misleading if, at the time it is made, the speaker believes it to be false. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1319, 191 L. Ed. 2d 253 (2015). The material misrepresentation inquiry focuses on the reasonable investor's view of a factual statement, while the scienter inquiry focuses on the defendant's mental state. *Matrixx Initiatives v. Siracusano*, 563 U.S. 27, 38-39, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011); *Tellabs, Inc.*, 551 U.S. at 319, 324; *Longman v. Food Lion, Inc.*, 197 F.3d 675, 682 (4th Cir. 1999). A reasonable investor might well expect a seasoned executive like Hinton to know the difference between a contract renewal and expansion and intend to make the distinction, but an investor's view of a statement is not itself evidence of the speaker's state of mind.

A plaintiff may not stack inference upon inference to satisfy the PSLRA's pleading standard. A securities fraud plaintiff must "state with particularity *facts* giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (emphasis added). Appellant alleges facts that permit an inference that Hinton knew his statement was false, and then asks

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us to *infer from that inference* that Hinton acted with scienter. We decline to do so because stacking inference upon inference in this manner violates the statute's mandate that the strong inference of scienter be supported by facts, not other inferences.

The facts presented here highlight the reason for cabining misrepresentation and scienter within their respective domains. The PSLRA reflects Congress's determination that liability for securities fraud should not be predicated solely on an overly optimistic view of a future which may, in fact, encounter harsh economic realities down the road. Maguire Financial must show that Hinton affirmatively sought to advance or calculatedly sought to obscure that reality. The inference that Hinton may have knowingly misspoke alone does not do so.

Having concluded that Appellant cannot rely on having sufficiently pled a material misrepresentation to satisfy the scienter requirement, we now turn to a consideration of whether the complaint as a whole adequately alleges scienter.

B.

We now analyze “whether the allegations in the complaint, viewed in their totality and in light of all the evidence in the record, allow us to draw a strong inference, at least as compelling as any opposing inference, that the . . . defendants either knowingly or recklessly defrauded investors.” *See Pub. Emples. Ret.*, 551 F.3d at 313. “[T]he scienter inquiry necessarily involves consideration

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of the facts and of the nature of the alleged omissions or misleading statements within the context of the statements that a defendant affirmatively made.” *Zak v. Chelsea Therapeutics Int’l, Ltd.*, 780 F.3d 597, 611 (4th Cir. 2015). Reversal is appropriate if the facts alleged strongly support the inference that the company “intentionally or recklessly misled investors.” *See id.* at 610. For the reasons that follow, we conclude that they do not.

We have found that facts support a strong inference of scienter when a plaintiff identified “numerous allegedly misleading statements and omissions by the defendants that were not caused by the use of imprecise language or the execution of a legitimate business decision.” *Id.* This is not such a case. Appellant asks us to find intent to deceive investors in an executive’s use of a single *possibly ambiguous* word on a live analyst call that purportedly mischaracterized an agreement that had historically accounted for approximately 4.1% of the company’s annual revenue. This we cannot do. First, the statement does not support an inference that Hinton intended to deceive investors into thinking that PowerSecure would continue to serve West Palm Beach or otherwise maintain its existing profitability. Second, the statement itself embraces the possibility that the new contract was not a renewal on identical terms. Finally, the insider stock sales Appellant identifies were neither unusual nor suspicious. Accordingly, the facts alleged do not make the inference of scienter “more than merely ‘reasonable’ or ‘permissible,’” “cogent and compelling,” or “strong in light of other explanations.” *See Tellabs*, 551 U.S. at 324.

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1.

Viewed in the context of all the relevant facts, Hinton's statement provides little evidence of scienter because it does not suggest that PowerSecure would continue to serve West Palm Beach. Hinton never specified that the West Palm Beach contract had been extended or that PowerSecure would continue to serve West Palm Beach. He provided no details about the new contract or the geography that it would cover. His characterization of the new agreement as a "contract renewal" informed investors that PowerSecure would continue its relationship with FP&L. If Hinton wanted to deceive investors, we would expect that he would discuss the new contract at length, in greater detail, or multiple times, not that he would briefly and ambiguously characterize it as a "renewal and expansion" once.

The amended complaint's failure to identify a single fact that shows that Hinton knew on August 7, 2013, that the new contract would be less profitable is a serious deficiency. Hinton would have no reason to convince investors that the second contract would continue to serve West Palm Beach unless he believed that the market would react negatively to a contract in Ft. Myers. Maguire Financial demands that we infer that the company knew that a Ft. Myers contract would be more expensive because "it is impossible that Hinton did not know the contract . . . would require the Company to hire and train new workers . . . at considerable expense." J.A. 423. But this is far from intuitive, and the only fact in the amended complaint that addresses the company's

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cost projections undermines that inference. In the excerpt from Hinton's May 7, 2014, conference call quoted in the amended complaint, Hinton admits that "we probably underestimated the negativity [and] the complexity of basically starting from scratch in a new territory." J.A. 418.

That the Ft. Myers contract eventually did reduce PowerSecure's profitability is not evidence that the risk of diminished profitability was known beforehand. The amended complaint does not allege that PowerSecure had previously incurred additional costs from serving an existing customer in a new location and therefore had reason to know that the Ft. Myers contract would be particularly costly. Nor does it allege that this was common knowledge in the industry and therefore would have been obvious to the company. These "omissions and ambiguities count against inferring scienter, for plaintiffs must 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *See Tellabs*, 551 U.S. at 326 (quoting 15 U.S.C. § 78u-4(b)(2)). We are reluctant to infer that Hinton knew in advance that the contract would be less profitable given the fact that the FP&L contract historically accounted for only 4.1% of the company's annual revenue and without facts to suggest that anyone should have known of this risk.

Even if someone at PowerSecure believed that a contract for Ft. Myers would cause the company to incur additional costs, no fact alleged suggests that Hinton was this person. The amended complaint alleges that

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PowerSecure advertised that Hinton operated “the day-to-day business in direct contact with individual sales leaders” and was regularly given information about the company’s performance. J.A. 424-25. It is conceivable that Hinton was involved in negotiating the minutiae of the second contract such that he would be aware of the costs associated with hiring and training low-level workers. But it is just as likely that in practice Hinton did not personally learn those specific details about the agreement, that he believed the cost of establishing a presence in Ft. Myers would not be substantial, or that he believed any cost increase would be offset by savings from winding down operations in West Palm Beach. Thus, we find no evidence in Hinton’s statement to support the conclusion that he intended to mislead investors listening to the August 7, 2013, call into believing that PowerSecure would continue to serve West Palm Beach.

2.

Second, Hinton’s statement provides little evidence of scienter because a contract renewal need not be on the same terms as the prior agreement and can include replacement of the old contract with a different one. *Renewal*, *Black’s Law Dictionary* (10th ed. 2014). Indeed, Hinton’s statement suggested that the “renewal” would not be on identical terms, and thus the statement does not demonstrate an intent to deceive.

Hinton’s description of the contract as a “renewal and expansion,” following the June 6, 2013, announcement of a “renewed and expanded” award, undermines the inference

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that he used the phrase “contract renewal” in the same sentence to mislead investors into believing that the new contract was merely an extension of the original or to hide the possibility of future cost increases from investors. An expanded contract must be on different terms than the original, and by its very nature carries a risk that costs may rise due to inefficiencies in fulfilling the expansion. Even without additional context, Hinton’s statement disclosed the possibility that PowerSecure’s renewed contract might include a change of location or other terms.

3.

Third, the stock sales described in the amended complaint do not meaningfully strengthen the inference of scienter. Insider trading can support an inference of scienter “if the timing and amount of a defendant’s trading were ‘unusual or suspicious.’” *Teachers’ Ret.*, 477 F.3d at 184. Here, PowerSecure sold 2.3 million shares and Hinton sold 200,000 shares on August 16, 2013, and Hinton transferred a total of \$2.5 million of his shares to his wife in December 2013 and February 2014. Appellant argues that these transactions show that Hinton and the company had a motive to defraud investors. We disagree.

Maguire Financial contends that the PowerSecure share sales at an inflated price generated proceeds used to acquire other companies and to defray the costs of the new FP&L contract. Perhaps so. But a company’s ongoing need for, and use of, revenue is scarcely sufficient, standing alone, to suggest impropriety. *See Ottmann*, 353 F.3d at 352 (generalized motive to pursue acquisitions insufficient

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to satisfy pleading requirement). Yet Maguire Financial points to neither anything more nor identifies any specific unusual need.

Nor does Hinton's stock sale make the inference of scienter "strong in light of other explanations." *See Tellabs*, 551 U.S. at 324. He did not sell his shares when their value was highest. And Hinton's transfer of shares to his wife occurred some months after the August 7, 2013, statement in connection with their impending divorce. These facts do not approach those that would support a strong inference of scienter.

IV.

For the foregoing reasons, we conclude that Maguire Financial's amended complaint fails to adequately allege scienter. Accordingly, the judgment of the district court is

AFFIRMED.

**APPENDIX B — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NORTH CAROLINA, EASTERN
DIVISION, FILED SEPTEMBER 15, 2015**

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NORTH CAROLINA,
EASTERN DIVISION

No. 4:14-CV-92-D

LEONARD C. ASH, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiffs,

v.

POWERSECURE INTERNATIONAL, INC.,
SIDNEY HINTON, AND CHRISTOPHER
T. NUTTER,

Defendants.

September 15, 2015, Decided;
September 15, 2015, Filed

ORDER

On May 22, 2014, plaintiff Leonard C. Ash filed a securities class action suit against PowerSecure International, Inc. (“PowerSecure”), Sidney Hinton, and Christopher T. Hutter (collectively, “defendants”) [D.E.

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1]. On October 10, 2014, the court granted a motion to consolidate this case with two other cases and named Maguire Financial, LP, as lead plaintiff. [D.E. 22]. On December 29, 2014, plaintiffs filed a consolidated securities class action suit against defendants [D.E. 30]. On February 26, 2015, 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]. On April 30, 2015, plaintiffs responded in opposition to the motion to dismiss [D.E. 47] and the motion for judicial notice [D.E. 48]. On June 4, 2015, defendants replied [D.E. 49-50]. As explained below, the court grants defendant's motion for judicial notice and motion to dismiss the complaint.

I.

PowerSecure provides “utility and energy technologies to electric utilities and their industrial, institutional, and commercial customers.” Compl. [D.E. 30] ¶ 3. Defendant Hinton is and was the president and chief executive officer (“CEO”) of PowerSecure during the proposed class period of August 8, 2013, to May 7, 2014. *Id.* ¶¶ 1, 21. Defendant Hutter was PowerSecure's chief financial officer (“CFO”) during the proposed class period. *Id.* ¶¶ 1, 22. PowerSecure has three operating segments: interactive distributed generation (“DG”), energy efficiency (“EE”), and utility infrastructure (“UI”). *Id.* ¶ 3. PowerSecure's DG systems “provide a highly dependable

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backup power supply during power outages, and provide a more efficient and environmentally friendly source of power during high cost periods of peak power demand.” *Id.* PowerSecure’s UI “products and services include transmission and distribution system construction and maintenance, installation of advanced metering and efficient lighting, and emergency storm restoration.” *Id.* The DG and UI 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 of PowerSecure’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 “encountering significant operational issues and inefficiencies” 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. *Id.* ¶ 10. Specifically, plaintiffs allege that defendants made materially false or misleading statements or omissions on August 7, 2013, November 6, 2013, March 10, 2014, and April 30, 2014, as well as failing to disclose known trends in violation of SEC regulations. *See, e.g., id.* ¶¶ 29, 40-41, 50-51, 59, 61.

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A.

On August 7, 2013, PowerSecure filed a Form 10-Q for the second quarter of 2013 and issued a press release that stated, in part, “Our 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 customers.” *Id.* ¶ 29. The press release quoted Hinton as saying, “PowerSecure has never been in a stronger position for long term success.” *Id.* On a conference call that same day, Hinton made several comments about PowerSecure’s business, including “our prospects for this business for continued growth look very, very good,” and “we have got our foot on the gas to ensure our continued success in the second half of this year and in 2014 and in 2015 and beyond.” *Id.* ¶¶ 30-31. In discussing PowerSecure’s UI segment, Hinton added, among other comments, that the 133% year-over-year growth” just tells you how strong the business is for us and our prospects for this business, for continued growth look very, very good,” that PowerSecure had “secure[d] a \$49 million three-year contract renewal,” and that “the same drivers for this business that we have seen over the past few quarters remain strong.” *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 “experiencing significant and financially draining operational inefficiencies and other problems that inevitably would have a negative impact on revenues and profits.” *See, e.g., id.* ¶¶ 29, 32, 34, 36.

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On August 8, 2013, the price of PowerSecure shares rose more than 10% and closed at \$17.71 per share. *Id.* ¶ 37. On August 16, 2013, PowerSecure sold 2.3 million shares of its common stock in a public offering at a price of \$16 per share. *Id.* ¶ 38. On August 16, 2013, Hinton sold 200,000 shares of PowerSecure common stock in a public offering at a price of \$16 per share. *Id.* On August 21, 2013, the PowerSecure offering and the Hinton offering each closed. *Id.*

B.

On November 6, 2013, PowerSecure announced its third-quarter results for 2013 and issued a press release that stated, “[W]e 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 partner.” *See Id.*, ¶ 40.¹ After explaining that PowerSecure expected these inefficiencies to affect results for the next two quarters, the press release noted that “[o]perating margin as a percentage of revenue increased 6.2 percentage points to 7.3 percent in 3Q 2013. . . .” *Id.* PowerSecure also issued another press release that stated, “Now that the utility has formally selected PowerSecure for this role, specific volumes of work will be determined in the coming quarters. The [C]ompany estimates that in 2014 and 2015 it could be asked to double its work volumes and could realize \$25-\$35 million of revenue annually

1. The complaint states that PowerSecure released its third-quarter 2014 results on this day, but this appears to be an error. [D.E. 37-8, 37-21].

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...” *Id.* ¶ 42 (alteration in original).

On a conference call that same day, Hinton commented that “[o]ur third quarter results continued our tremendous momentum in 2013,” “our new order flow has been strong,” and “[t]he continued progression of our backlog positions us very strongly for continued growth.” *Id.* ¶ 43. In speaking of the UI segment, Hinton also highlighted “a 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 PowerSecure has ever won.” *Id.* ¶ 45. Hinton further stated that “we currently estimate that in 2014 and 2015 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 relationship.” *Id.*

Plaintiffs allege that these statements were materially false or misleading because defendants “were only guessing as to the amount of work that might be assigned if the [UI] contract was awarded to PowerSecure,” 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 “actively seek out larger business opportunities while neglecting [PowerSecure’s] smaller projects.” *Id.* ¶¶ 41-43, 46-48.

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

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C.

On March 10, 2014, PowerSecure released its fourth-quarter and full-year financial results for 2013 and held a conference call to discuss the results. *Id.* ¶ 50. On that conference call, Hinton again discussed the utility company referenced in the November 6, 2013 conference call, stating, “We 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 realize.” *Id.* Hinton added that “we have visibility into what we believe will be another very good year in 2014 for our utility infrastructure business.” *Id.*

Plaintiffs allege that these statements were materially false or misleading because defendants had “no reasonable basis that the described relationship with the new customer would yield \$25 million to \$35 million of revenue annually” and they failed to disclose that PowerSecure’s work backlog was unsustainable. *Id.* ¶ 51-53.

On March 11, 2014, the price of PowerSecure 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.* ¶ 54.

D.

“On or about April 30, 2014, PowerSecure disseminated to its shareholders its 2013 Annual Report, which contained

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a signed letter from Defendant Hinton to PowerSecure shareholders, dated April 2014.” *Id.* ¶ 59. The signed letter stated that “Our 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 2014 for our utility infrastructure business.” *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.* ¶ 60.

E.

On 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 39%, and revenue from the DO segment decreased 17%. *Id.* In a conference call that same day in which defendants Hinton and Hutter explained the financial results, Hinton stated in part that “we 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 wrong.” *Id.* ¶ 80-81.

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On May 8, 2014, the price of PowerSecure common stock dropped from \$18.60 to \$7.00, a decrease of more than 62%, on “extraordinary trading volume of over 10 million shares.” *See id.* ¶ 84.

On May 22, 2014, the named plaintiff filed suit against defendants. [D.E. 1]. On October 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]. On 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 notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007); *see In re PEC Sols., Inc. Sec. Litig.*, 418 F.3d 379, 388 n.7, 125 Fed. Appx. 490 (4th Cir. 2005) (“[W]e are not strictly limited to the four corners 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 judgment.”); *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

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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 Pharms., 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.10 (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 plaintiff's allegations necessarily rely." (quotation omitted)); *cf. Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) ("Courts may take 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 true.") (quotation omitted).

Defendants submitted 21 exhibits. *See* [D.E. 37-3-37-23]. Plaintiffs challenge six of these exhibits as unincorporated documents and, as for the incorporated documents, they challenge the "improper use of any of these Exhibits . . . as evidence of the truth of their contents." [D.E. 48] 3-4 (challenging exhibits 10, 11, 16, 17, 20, 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 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908

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

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(9th Cir. 2003). 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, 20, and 21, and—in light of the allegations contained in the complaint—the Roth Capital Partners analyst reports in exhibits 10 and 11 are the proper subject of judicial notice. *Cf. Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 616 (4th Cir. 1999) (reviewing a proxy statement); *Kramer*, 937 F.2d at 774. Moreover, the court rejects plaintiffs' reliance on *Zak v. Chelsea Therapeutics International, Ltd.*, 780 F.3d 597 (4th Cir. 2015), 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. 780 F.3d at 607-08. The Fourth Circuit reversed, noting that "[a]lthough plaintiffs asserting securities fraud claims frequently bolster allegations regarding scienter by asserting unusual sales of stock by individuals accused of committing securities fraud, the plaintiffs in the present case did not include this type of allegation in their complaint." *Id.* at 607. Thus, "because 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' allegations." *Id.* Here, in contrast, plaintiffs specifically alleged that Hinton and PowerSecure sold stock during the class period and that these sales, which

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were “unusual and suspicious in timing and amount” for Hinton, are evidence of scienter. *See* Compl. [D.E. 30] ¶¶ 98-101. 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); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013); *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). The court need not accept a complaint’s conclusions of law. *See Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 555; *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009). As for a complaint’s factual sufficiency, a party must plead “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “[N]aked assertions of wrongdoing” cannot “cross the line between possibility and plausibility of entitlement to relief.” *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quotation omitted); *see Vitol, S.A.*, 708 F.3d at 543. “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 556 U.S. at 678. A plaintiff armed with nothing more than “labels and conclusions” or a “formulaic recitation of the elements of a

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cause of action” cannot proceed. *Twombly*, 550 U.S. at 555 & n.3; *Vitol, S.A.*, 708 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 U.S. at 679.

To survive a Rule 12(b)(6) motion to dismiss a fraud claim, a plaintiff generally must “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). The pleading standard is even higher for alleged violations of section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), codified at 15 U.S.C. § 78j(b), or Rule 10b-5, *see* 17 C.F.R. 240.10b-5, which the Securities Exchange Commission (“SEC”) promulgated under the authority of section 10(b). *See* 15 U.S.C. § 78u-4(b); *Tellabs*, 551 U.S. at 313-14; *Matrix Capital Mgmt. Fund. LP v. BearingPoint, Inc.*, 576 F.3d 172, 181-82 (4th Cir. 2009); *Teachers’ Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 172 (4th Cir. 2007).

To establish liability under section 10(b) and Rule 10b-5, a plaintiff must prove six elements: “(1) 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*, 563 U.S. 27, 131 S. Ct. 1309, 1317, 179 L. Ed. 2d 398 (2011) (quotation omitted); *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008); *Matrix*

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Capital, 576 F.3d at 181; *see also Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005).

The Private Securities Litigation Reform Act (“PSLRA”) also added a safe harbor for certain forward-looking statements. Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, 109 Stat. 737, 749-50 (codified at 15 U.S.C. § 78u-5). This safe harbor precludes liability for allegedly material misrepresentations under certain circumstances, including if (1) the forward-looking statement is “identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement;” (2) the forward-looking statement is immaterial; or (3) the plaintiff fails to prove that the forward-looking statement “if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading.” 15 U.S.C. § 78u-5(c) (1). A forward-looking statement includes “a statement containing a projection of revenues, income . . . , earnings . . . per share, . . . or other financial items,” “a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services of the issuer,” and “a statement of future economic performance.” 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] 9-10. The court addresses each in turn.

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A.

As for the first element, a plaintiff must “specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading.” 15 U.S.C. § 78u-4(b)(1); *see Matrixx Initiatives*, 131 S. Ct. at 1318 n.4. The statement must be “misleading as to a material fact.” *Matrixx Initiatives*, 131 S. Ct. at 1318 (emphasis omitted); *Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S. Ct. 978, 99 L. Ed. 2d 194 (1988). A statement is material if “there 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 available.” *Matrixx Initiatives*, 131 S. Ct. at 1318 (quotation omitted). Section 10(b) and Rule 10b-5 “decidedly do *not* prohibit *any* misrepresentation—no matter how willful, objectionable, or flatly false—of immaterial facts, even if it induces reactions from investors that, in hindsight or otherwise, might make the misrepresentation appear material.” *Greenhouse*, 392 F.3d at 656. Immaterial statements include “soft” or “puffing” statements because “the market price of a share is not inflated by vague statements predicting growth.” *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993); *see City of Monroe Emps.’ Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005) (collecting cases and finding “loosely optimistic statements insufficiently specific” and “too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision”); *Howard v. Haddad*, 962 F.2d 328, 331 (4th Cir. 1992) (finding the alleged misstatements immaterial because

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“[a]t most they amounted to ‘puffery’”). “[P]rojections of future performance not worded as guarantees are generally not actionable under the federal securities laws.” *Raab*, 4 F.3d at 290 (quotation omitted).

Furthermore, “[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5.” *Basic*, 485 U.S. at 239 n.17. “Rule 10b-5 imposes such a duty to disclose only when silence would make other statements misleading or false.” *Taylor v. First Union Corp. of S.C.*, 857 F.2d 240, 243-44 (4th Cir. 1988); see *Matrixx Initiatives*, 131 S. Ct. at 1321 (“Disclosure is required under these provisions only when necessary to make statements made, in the light of the circumstances under which they were made, not misleading.” (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, PowerSecure’s shift in strategy toward fewer, larger, and more profitable opportunities, and operational inefficiencies driven by a contract with a new UI customer, and that, absent such disclosure, 26 statements that defendants made on August 7, 2013, November 6, 2013, March 10, 2014, and April 30, 2014, were materially false or misleading. The court addresses the statements in chronological order.

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1.

On August 7, 2013, 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 of “mere expressions of optimism from company spokesmen” that are not actionable under the federal securities laws. *Raab*, 4 F.3d at 290. For example, a reasonable investor would not rely on Hinton’s statements that PowerSecure was seeing “continued momentum . . . across our business,” that “PowerSecure has never been in a stronger position for long term success,” or that “we have got our foot on the gas to ensure our continued success in the second half of this year and in 2014 and in 2015 and beyond” as guarantees of future performance. Compl. [D.E. 30] ¶¶ 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 “we 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 country.” Compl. [D.E. 30] ¶ 33; *cf.* App. [D.E. 37-2] 1 (statement 6). Plaintiffs argue that this was misleading because the contract was not a renewal but “a new contract in a new, distant location from an existing customer” and that “[a]s a result of this relocation,

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. *See* App. [D.E. 37-2].

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PowerSecure was forced to hire and train new workers at great expense and essentially start over.” Compl. [D.E. 30] ¶ 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. Supp. Mot. Dismiss [D.E. 36] 18, given the relatively small number of contracts that PowerSecure worked on, *see* Compl. [D.E. 30] ¶ 5, a reasonable investor might find the distinction between the two as having 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 represents a present or historical fact. *See* 15 U.S.C. § 78u-5(i)(1) (definition of a forward-looking statement). Thus, plaintiffs sufficiently allege that this statement was materially misleading.

2.

On November 6, 2013, defendants made 12 statements that plaintiffs claim are materially false or misleading. *See* App. [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. 30] ¶¶ 43, 45; *cf.* App. [D.E. 37-2] 3-4 (statements 13, 15, 18, 20, 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,

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filed with a Form 8-K that Hutter signed, that PowerSecure “estimates that in 2014 and 2015 it could be asked to double its work volumes and could realize \$25-\$35 million of revenue annually from this expanded relationship.” Compl. [D.E. 30] 42; (D.E. 37-21] 14; *cf.* App. [37-2] 2 (statement 12). This statement falls into the heartland of a forward-looking statement. *See, e.g., Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 943 (6th Cir. 2009) (holding a statement about “growth outlook” immaterial because it “call[ed] attention to its [own] predictive character”); *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 242 (3d Cir. 2004) (“Any reasonable reading of this statement, would make one skeptical about the recovery of the full [dollar amount estimated by management].”). The statement was identified as forward looking and accompanied by sufficiently meaningful cautionary language that warned investors of the very risk that was later realized. *See* [D.E. 37-21] 4, 11 (noting that the statements are “not guarantees” and referring the reader to PowerSecure’s Form 10-K); *Institutional Inv’rs Grp. v. Avaya, Inc.*, 564 F.3d 242, 257-58 (3d Cir. 2009); *Harris v. Ivax Corp.*, 182 F.3d 799, 807 (11th Cir. 1999) (“[W]hen 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 reward.”). On that day’s conference call, Hinton repeated that “we currently estimate that in 2014 and 2015 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 relationship.” Compl. [D.E.

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30] ¶ 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. *See* [D.E. 37-17] 2; [D.E. 37-9] 10; [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, PowerSecure disclosed the negative effect of operational inefficiencies “related to the advanced deployment of crews in anticipation of being selected for a significant long-term revenue opportunity with a major new utility partner,” predicted “some continued inefficiencies,” and discussed changes in operating margins. Compl. [D.E. 30] ¶ 40; [D.E. 37-21] 8; *cf.* App. [D.E. 37-2] 2 (statements 10-11). Thus, defendants disclosed and discussed the very issue that later contributed to the negative financial results of which plaintiffs now complain.

Plaintiffs allege that three more November 6, 2013 statements are misleading because defendants had no reasonable basis for estimating that PowerSecure could realize \$25 to \$35 million in annual revenues from a new UI customer. *See, e.g.*, Compl. [D.E. 30] ¶¶ 44, 46; [D.E. 37-15] 13; *cf.* App. [D.E. 37-2] (statements 14, 16, 19). For this argument, which plaintiffs repeat throughout the complaint, *see, e.g.*, Compl. [D.E. 30] ¶¶ 42, 48, 51, 53, plaintiffs rely on a May 7, 2014 statement in which Hinton said, speaking of that new UI customer, “They’re 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* wrong.” [D.E.

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37-15] 13 (emphasis added). Plaintiffs’ 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 (“A failed venture, standing alone, does not permit a reasonable inference of fraud.”); *Raab*, 4 F.3d at 290 (finding “[p]redictions of future growth” immaterial because such predictions “will almost always prove to be wrong in hindsight” and are “simply the company’s best guess as to how the future will play out”). Moreover, plaintiffs’ allegations ignore the context of the complete November 6, 2013 conference call, in which Hinton stated, “I want to be clear though, *we do not currently have the \$25 million to \$35 million of annual opportunity in our revenue backlog*. The \$240 million does not include that. We will add that to the backlog as we see specific volumes start to firm up.” Compl. [D.E. 30] ¶ 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 “firm up.” Thus, they were not materially misleading.

3.

On March 10, 2014, defendants made four statements that plaintiffs allege are materially misleading.⁴ The first statement, in which Hinton discussed the new UI contract and reiterated his earlier prediction of \$25 to \$35 million in annual revenues, is not materially misleading. Compl.

4. Defendants are not liable for statements made by investment analysts. *See Janus Capital Grp. v. First Derivative Traders*, 564 U.S. 135, 131 S. Ct. 2296, 2302-03, 180 L. Ed. 2d 166 (2011); *In re aaiPharma Inc. Sec. Litig.*, 521 F. Supp. 2d 507, 510 (E.D.N.C. 2007).

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[D.E. 30] ¶ 50; [D.E. 37-6] 4-5; *cf.* App. [D.E. 37-2] 4 (statement 22). Plaintiffs’ claim that this statement had no reasonable basis because it was a “guess” is incorrect as a matter of law. *See Raab*, 4 F.3d at 290; *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 “our backlog implies continued growth” call attention to their own predictive character and are not materially misleading. *See* Compl. [D.E. 30] ¶ 53; [D.E. 37-6] 8; *Omnicare*, 583 F.3d at 943; *cf.* App. [D.E. 37-2] 5 (statements 24-25). Finally, Hutter’s statement that defendants “expect[ed] 2014 gross margins to continue to be in the mid to high 20 percent” 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 289-90; Compl. [D.E. 30] ¶ 53; [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.

On April 30, 2014, Hinton signed a letter in which he stated, in part, that “With 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 2014 for our utility infrastructure business.” Compl. [D.E. 30] ¶ 59-60; *cf.* App. [D.E. 37-2] 5 (statement 26). This statement amounts to puffery and is immaterial as a matter of law. *See Raab*, 4 F.3d at 289-90.

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5.

Plaintiffs also allege that defendants violated section 10(b) and Rule 10b-5 when they “failed to disclose known trends” in violation of Item 303 of SEC Regulation S-K. Compl. [D.E. 30] ¶ 61. Item 303 requires companies to describe, in certain SEC filings, “any 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 operations.” 17 C.F.R. § 229.303(a)(3)(ii). Plaintiffs allege that defendants had an “affirmative duty to disclose known trends or uncertainties” and that they failed to do so thereby violating the federal securities laws. Compl. [D.E. 30] ¶¶ 63-67.

Item 303 does not create a private right of action. *See Oran v. Stafford*, 226 F.3d 275, 287 (3d Cir. 2000) (Alito, J.). Plaintiffs’ argument relies on the implicit claim that a violation of Item 303 amounts to a per se violation of section 10(b) and Rule 10b-5. The Fourth Circuit has not ruled on this issue.

In *Oran*, the Third Circuit considered whether Item 303 imposed on the defendant an “affirmative obligation to disclose,” under section 10(b) and Rule 10b-5, several studies linking the defendant’s drugs to heart-valve defects. *See Oran*, 226 F.3d at 279, 287. As then-Judge Alito noted in his opinion for the Third Circuit, Item 303’s “disclosure obligations extend considerably beyond those required by Rule 10b-5.” *Id.* at 288. The *Oran* court reasoned that, because the materiality standards under

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Rule 10b-5 and Item 303 differed significantly, a duty to disclose under Rule 10b-5 “must be separately shown.” *Id.* The Oran court concluded that because “plaintiffs have failed to plead any actionable misrepresentation or omission under . . . Rule [10b-5], SK-303 cannot provide a basis for liability.” *Id.*; *see also In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1054-56 (9th Cir. 2014) (“In sum, we hold that Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5. Such a duty to disclose must be separately shown. . . .”); *Shah v. GenVec, Inc.*, No. 8:12-cv-341-DKC, 2013 U.S. Dist. LEXIS 134997, 2013 WL 5348133, at *15 n.16 (D. Md. Sept. 20, 2013) (unpublished); *Iron Workers Local 16 Pension Fund v. Hilb Rogal & Hobbs Co.*, 432 F. Supp. 2d 571, 583 (E.D. Va. 2006).

In opposition to this analysis, plaintiffs cite *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), and argue that the *NVIDIA* court misread *Oran*. In *Stratte-McClure*, the Second Circuit held that “Item 303’s affirmative duty to disclose in Form 10-Qs can serve as the basis for a securities fraud claim under Section 10(b).” 776 F.3d at 101. The *Stratte-McClure* court concluded that *Oran* was not contrary because of then-Judge Alito’s statement that “a violation of SK-303’s reporting requirement does not *automatically* give rise to a *material* omission under Rule 10b-5.” *Id.* at 103 (quoting *Oran*, 226 F.3d at 288). Thus, the *Stratte-McClure* court reasoned, *Oran* suggested that an Item 303 violation *could* give rise to a material Rule 10b-5 omission “so long as the omission is material under *Basic*, and the other elements of Rule 10b-5 have been established.” *Id.* at 103-04.

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This court finds *Oran*'s reasoning, and *NVIDIA*'s interpretation of *Oran*, persuasive. When then-Judge Alito's statement that "a violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5" is placed in full context of the discussion, including the significant differences in materiality standards under the two rules, it is apparent that *Oran* required a plaintiff to independently show a duty to disclose under Rule 10b-5 standards. *See Oran*, 226 F.3d at 287-88. Item 303 is not a magic black box in which inadequate allegations under Rule 10b-5 are transformed, by means of broader and different SEC regulations, into adequate allegations under Rule 10b-5. *See* Exchange Act Release No. 34-26831, 54 Fed. Reg. 22,427,22,430 n.27 (May 24, 1989) ("[Item 303] 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 303 requires disclosure. The probability/magnitude test for materiality approved by the Supreme Court in *Basic* . . . is inapposite to Item 303 disclosure."). A plaintiff cannot seek to bring an action under Rule 10b-5 in the guise of an Item 303 violation when the same underlying alleged omissions are not sufficient to state a Rule 10b-5 violation. *Compare* Compl. [D.E. 30] ¶¶ 34, 36, 41, with Compl. [D.E. 30] ¶ 63. Rather, as then-Judge Alito properly concluded in *Oran*, "[s]uch a duty to disclose must be separately shown." *Oran*, 226 F.3d at 288. Thus, plaintiffs' allegation that defendants violated Item 303 fails to state a claim.

In sum, plaintiffs sufficiently allege one material misrepresentation: Hinton's August 7, 2013 statement that PowerSecure had secured a \$49 million three-year

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contract renewal when the contract was in a different geographic area and would require the hiring and training of new workers. *See* Compl. [D.E. 30] ¶ 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 “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A). The required state of mind is scienter, or “a mental state embracing intent to deceive, manipulate, or defraud.” *Tellabs*, 551 U.S. at 319 (quotation omitted). A strong inference is one that is “more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Id.* at 314. “This standard requires courts to take into account plausible opposing inferences.” *Matrixx Initiatives*, 131 S. Ct. at 1324 (quotation omitted); *see Tellabs*, 551 U.S. at 323-24 (“To 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 plaintiff.” (quotation omitted)). In comparing alternative inferences, the court considers all allegations holistically. *Matrixx Initiatives*, 131 S. Ct. at 1324; *Tellabs*, 551 U.S. at 323.

The Fourth Circuit has held that, in addition to intentional misconduct, “pleading recklessness is sufficient to satisfy the scienter requirement.” *Matrix Capital*, 576 F.3d at 181; *see Cozzarelli*, 549 F.3d at 623;

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cf. Matrixx Initiatives, 131 S. Ct. at 1323-24 (assuming without deciding that recklessness may establish scienter). In the context of section 10(b), a reckless act is one “so 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 it.” *Matrix Capital*, 576 F.3d at 181 (quotation omitted); *see Zak*, 780 F.3d at 613 (“[T]he recklessness necessary to support a finding of scienter must be ‘severe.’”); *Pub. Emps.’ Ret. Ass’n of Colo. v. Deloitte & Touche LLP*, 551 F.3d 305, 313 (4th Cir. 2009); *Cozzarelli*, 549 F.3d at 623. The scienter requirement is not met if “the inference that defendants acted innocently, or even negligently, [is] more compelling than the inference that they acted with the requisite scienter.” *Pub. Emps. Ret. Ass’n*, 551 F.3d at 313; *see Zak*, 780 F.3d at 613 (noting that the scienter requirement “prevents section 10(b) from devolving into a penalty for business decisions that, in hindsight, appear questionable”).

Plaintiffs 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 UI segment; (2) a confidential witness (CW1) alleges that “problems affecting the Company’s UI business significantly predated the May 2014 disclosures”; and (3) PowerSecure and Hinton had pecuniary motives to deliberately mislead the public. *See* Compl. [D.E. 30] ¶¶ 86-101.

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Viewing the single alleged material misrepresentation regarding whether a UI contract was new or renewed, plaintiffs' complaint fails to adequately plead scienter and therefore fails to state a claim under section 10(b) and Rule 10b-5. *See Matrix Capital*, 576 F.3d at 187 (determining whether defendants acted with scienter "with respect to those [misstated or misleading] statements"). 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 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 "most senior executive officers . . . responsible for overseeing [PowerSecure's] business and operations day-to-day," Compl. [D.E. 30] ¶ 87, most of the allegations center on Hinton's role as CEO. *See id.* ¶¶ 87-90. The complaint alleges that Hinton managed a "matrix organization," had "numerous direct reports including multiple sales leaders, product leaders, operations leaders and functional leaders," and operated "the day-to-day business in direct contact with individual sales leaders." *Id.* ¶ 88 (quotation omitted). Plaintiffs do not, however, state any facts showing that defendants actually knew of the alleged problems in the UI segment. *Cf. City of Roseville Emps.' Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1119

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(E.D. Wash. 2013).⁵ Rather, they rely on the testimony of CW1, a former “Senior Vice President of Sales in the UI group, from late 2011 through January 2014.” Compl. [D.E. 30] ¶ 92. According to CW1, problems with the UI group started as early as May 2013, when PowerSecure had to “shut the two or three offices it had been operating in the area of West Palm Beach, Florida” and start over in Ft. Meyers, Florida, after gaining a new contract with Florida Power & Light Company (“FP&L”). *Id.* ¶ 93. Thus, plaintiffs’ complaint relies on the combination of CW1’s allegations of problems existing as far back as May 2013 and Hinton’s and Rutter’s positions as PowerSecure’s senior executive officers to create the inference that both defendants actually knew about the problems in the UI segment.

CW1’s allegations are fatally undermined in at least two ways. First, the complaint does not allege that CW1 had personal knowledge of the FP&L contract or the Texas-based Oncor project. *See id.* ¶¶ 93-94. Rather, the complaint only alleges that CW1 was “*in a position* at the Company to have personal knowledge” and lists CW1’s job title. *Id.* ¶ 92 (emphasis added). This conclusory allegation does not establish personal knowledge of CW1’s subsequent statements, particularly when that knowledge is not corroborated by other evidence. *See Zucco Partners,*

5. The complaint lacks the “detailed allegations establishing the defendants’ actual exposure” sufficient to base knowledge on the “core operations” doctrine. *See Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 890 (4th Cir. 2014); *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d 833, 843-44 (N.D. Cal. 2000); *cf.* Compl. [D.E. 30] ¶ 87 (alleging that “the matters at issue here . . . were at the core of the Company’s business and were critical to its overall performance and prospects”).

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LLC v. Digimarc Corp., 552 F.3d 981, 995-96 (9th Cir. 2009); *In re Trex Co. Sec. Litig.*, 454 F. Supp. 2d 560, 573 (W.D. Va. 2006) (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. *See, e.g., Zucco Partners, LLC*, 552 F.3d at 995-96; *Pipefitters Local No. 636 Defined Benefit Plan v. Tekelec*, No. 5:11-CV-4-D, 2013 U.S. Dist. LEXIS 40042, 2013 WL 1192004, at *12 (E.D.N.C. Mar. 22, 2013) (unpublished); *City of Pontiac Gen. Emps.' Ret. Sys. v. Stryker Corp.*, 865 F. Supp. 2d 811, 834 n.9 (W.D. Mich. 2012); *In re Trex Co.*, 454 F. Supp. 2d at 573.

Finally, plaintiffs' allegations of the pecuniary motives of PowerSecure and Hinton do not support a strong inference of scienter. As for PowerSecure, the August 16, 2013 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 (“[A] strong inference of fraud does not arise merely from seeking capital to support a risky venture.”); Compl. [D.E. 30] ¶ 98 (alleging that PowerSecure received \$34.4 million in “needed funds”). The October 8, 2013 acquisition of Encari, LLC is somewhat more probative of pecuniary motive, although the complaint alleges only that there was “*potential* additional earn-out consideration” that would be half-financed by PowerSecure common stock, without detailing the conditions under which PowerSecure would actually pay, whereas the primary payment was a *cash* payment of \$4.8 million. Compl. [D.E. 30] ¶ 99 (emphasis added).

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As for Hinton, plaintiffs allege that he effectively made three stock sales during the class period: 200,000 shares on August 16, 2013; 138,770 shares on December 19, 2013, pursuant to a separation agreement for his pending divorce; and 10,000 shares on February 4, 2014, also pursuant to his pending divorce. Compl. [D.E. 30] ¶ 100. The latter two sales do not raise an inference of scienter because they were made pursuant to a “final division of marital assets in conjunction with the Reporting Person’s pending divorce.” [D.E. 37-22] 7, 9; *see Teachers’ Ret. Sys.*, 477 F.3d at 184 (“[I]nsider 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. 2001) (“Insider 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 information.” (quotation and alterations omitted)); *In re Integrated Elec. Servs.*, No. 4:04-CV-3342, 2006 U.S. Dist. LEXIS 1425, at *4-6 (S.D. Tex. Jan. 10, 2006) (unpublished). As for the first sale, Hinton offered for sale 200,000 shares on August 16, 2013, or roughly 32% of his then-current holdings, and the sale closed on August 21, 2013. Compl. [D.E. 30] ¶ 100; *see* [D.E. 37-22] 3. Plaintiffs allege that this sale was out of line with prior trading practices. Compl. [D.E. 30] ¶ 101. 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

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a new contract;⁶ (2) the amount of the offering, which was roughly 32% of his then-current holdings, was offset less than four months later with his December 5, 2013 receipt of 275,000 shares (albeit restricted shares), followed by an April 7, 2014 receipt of an additional 17,015 restricted shares, resulting in a net positive change (excluding the shares sold as part of the divorce agreement), [D.E. 37-22] 5, 11; and (3) the failure of Hutter, his alleged coconspirator, to sell any PowerSecure shares. *See, e.g., Cozzarelli*, 549 F.3d at 627-28 (declining to find a strong inference of scienter where defendants “sold 13%, 12%, and 3% of their holdings” and “the total holdings of each defendant increased” while the defendants allegedly failed to adequately disclose information regarding an ongoing medical study); *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1067 (9th Cir. 2008) (declining to find scienter where a defendant sold 37% of his shares because “[w]e typically require larger sales amounts[—]and corroborative sales by other defendants—to allow insider trading to support scienter”); *Ronconi*, 253 F.3d at 436 (“One 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

6. Again, the court declines to credit, for lack of personal knowledge, CW1’s allegation that “problems affecting the Company’s UI business significantly pre-dated the May 2014 disclosures, as far back as the beginning of the Class Period.” Compl. [D.E. 30] ¶92. Furthermore, even if credited, CW1’s allegation that “the UI group stopped growing in the third and fourth quarters of 2013” is not probative of Hinton’s knowledge of any alleged operational inefficiencies or other problems as of the August 7, 2013 statement, just over one month into the third quarter. *See id.* ¶ 94.

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with the inference that the favorable characterizations of the company's affairs were known to be false when made." (citation omitted)); *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 540 (3d Cir. 1999), *abrogation on other grounds recognized by Institutional Inv'rs Grp. v. Avaya, Inc.*, 564 F.3d 242, 276 (3d Cir. 2009); *In re Dot Hill Sys. Corp. Sec. Litig.*, 594 F. Supp. 2d 1150, 1161 (S.D. Cal. 2008) ("The insider trading allegations are problematic because the insider sales . . . preceded the vast majority of the alleged misrepresentations.")⁷ 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 "state with particularity facts giving rise to a strong inference" 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

7. Plaintiffs attempt to distinguish *Metzler* by citing the court's reasoning that the defendant "sold in a manner consistent with their pre-Class Period sales." Pls.' Mem. Opp'n Mot. Dismiss [D.E. 47] 45 n.42; *see Metzler*, 540 F.3d at 1067. That reasoning, however, was in addition to the court's independent rationale that larger sales amounts were required to "allow insider trading to support scienter." *Metzler*, 540 F.3d at 1067. 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 not dispositive, not whether the court can use the lack of allegations in weighing competing inferences. *See* Pls. Mem. Opp'n Mot. Dismiss [D.E. 47] 46.

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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*, 780 F.3d at 613 (the scienter requirement “prevents section 10(b) from devolving into a penalty for business decisions that, in hindsight, look questionable”). Thus, looking at all allegations, plaintiffs have failed to adequately plead scienter.

Here, plaintiffs have failed to “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 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 20(a) and 20(b) of the Exchange Act by Hinton and Hutter. Compl. [D.E. 30] ¶¶ 125-32. In light of the disposition of plaintiffs’ section 10(b) and Rule 10b-5 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* Pls.’ Mem. Opp’n Mot. Dismiss. [D.E. 47] 16 n.7.

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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 October 16, 2015. Defendants shall have until November 23, 2015, to file any renewed motion to dismiss.

SO ORDERED. This 15 day of September 2015.

/s/ James C. Dever III
JAMES C. DEVER III
Chief United States District Judge

**APPENDIX C — ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NORTH CAROLINA, EASTERN
DIVISION, FILED SEPTEMBER 13, 2016**

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:14-CV-92-D

LEONARD C. ASH, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs,

v.

POWERSECURE INTERNATIONAL, INC.,
SIDNEY HINTON, AND CHRISTOPHER
T. NUTTER,

Defendants.

September 13, 2016, Decided
September 13, 2016, Filed

ORDER

On May 22, 2014, plaintiff Leonard C. Ash filed a securities class action suit against PowerSecure International, Inc. (“PowerSecure”), Sidney Hinton (“Hinton”), and Christopher T. Huffer (“Hutter”) [D.E.

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1]. On October 10, 2014, the court granted a motion to consolidate this case with two other cases and named Maguire Financial, LP, as lead plaintiff [D.E. 22]. On December 29, 2014, plaintiffs filed a consolidated securities class action suit [D.E. 30]. On February 26, 2015, the defendants named in the original complaint moved to dismiss the complaint for failure to state a claim upon which relief can be granted [D.E. 35]. On September 15, 2015, this court granted defendants' motion to dismiss, dismissed without prejudice plaintiffs' complaint, and allowed plaintiffs to file an amended complaint. *See* [D.E. 52].

On October 16, 2015, plaintiffs filed an amended complaint against PowerSecure and Hinton (collectively, "defendants") [D.E. 53]. On November 23, 2015, defendants moved to dismiss the amended complaint [D.E. 54] and filed a supporting memorandum [D.E. 55] and numerous exhibits [D.E. 56-1 through D.E. 56-16]. Defendants also submitted various materials and asked the court to take judicial notice of or to incorporate by reference these materials in considering defendants' motion to dismiss [D.E. 57]. On January 13, 2016, plaintiffs responded in opposition to defendants' motions [D.E. 62 through D.E. 63]. On February 5, 2016, defendants replied [D.E. 66 through D.E. 67]. As explained below, the court grants defendants' motion to dismiss and denies as moot defendants' motion for judicial notice.

I.

PowerSecure "provides utility and energy technologies to electric utilities and their customers." Am. Compl.

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[D.E. 53] ¶ 8. Defendant Hinton is the president and chief executive officer (“CEO”) of PowerSecure and served in those roles during the proposed class period of August 7, 2013, to May 7, 2014. *Id.* ¶¶ 11, 14. PowerSecure has three operating segments: interactive distributed generation (“DG”), energy efficiency (“EE”), and utility infrastructure (“UI”). *Id.* ¶ 8. PowerSecure’s UI products and services include transmission and distribution system construction and maintenance, installation of advanced metering and efficient lighting, and emergency storm restoration.” *Id.* In 2013, the UI segment alone generated 41% of PowerSecure’s revenues. *Id.*

Plaintiffs’ amended complaint involves a single representation defendants made regarding PowerSecure’s relationship with Florida Power & Light (“FP&L”). During the class period, FP&L was the “largest electric utility in Florida” and had held a three-year contract with PowerSecure that was set to expire. See *id.* ¶¶ 2, 21. In 2013, FP&L’s contract represented roughly 10% of PowerSecure’s UI revenues, or 4.1% of PowerSecure’s overall business portfolio. See *id.* ¶¶ 30. FP&L’s expiring contract with PowerSecure involved the West Palm Beach, Florida, area. See *id.* ¶¶ 23, 30.

On August 7, 2013, the first day of the class period, Hinton (on behalf of PowerSecure) stated during a “conference call and live webcast for securities analysts and investors” that PowerSecure was “blessed to announce securing a \$49 million three-year contract renewal” with FP&L. *Id.* ¶ 20 (quotation omitted). Though Hinton characterized the contract with FP&L as a “renewal,” it involved an entirely new geographic area than did

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the expired contract. *See id.* ¶¶ 21-23; [D.E. 52] 13-14. As a result, this new contract introduced inefficiencies into PowerSecure’s UI operations. Because the new contract covered work for FP&L in Fort Meyers, Florida, PowerSecure ultimately “had to shut’ the offices it had operated during the duration of the previous contract in West Palm Beach, Florida. Am. Compl. ¶¶ 22-23, 30. PowerSecure’s West Palm Beach employees “jumped ship and went to work for another contractor,” and PowerSecure “was forced to hire and train new workers at great expense.” *Id.* ¶¶ 22-23, 30.

According to plaintiffs, the market reacted positively to Hinton and PowerSecure’s August 7, 2013 statement regarding the FP&L contract. Specifically, plaintiffs allege that Hinton’s August 7, 2013 statement regarding the FP&L renewal caused PowerSecure’s common stock to “r[ise] \$1.74 per share, more than 10%, to close at \$17.71 per share” the following day. *Id.* ¶ 24. Numerous securities analysts issued “extremely positive” ratings for PowerSecure. *See id.* ¶ 26. On August 16, 2013, plaintiffs allege that PowerSecure took advantage of the positive reaction to the August 7, 2013 statement and sold 2.3 million shares at \$16 per share, raising “\$34.4 million in net proceeds.” *Id.* ¶ 25. That same day, Hinton “sold 200,000 shares of PowerSecure common stock from his personal holdings . . . at the same price and on the same terms as the Company Offering, which yielded him \$3.2 million in proceeds.” *Id.*

On May 7, 2014, despite analysts’ and the market’s expectations, PowerSecure reported losses of almost \$4.3

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million for the first quarter of 2014. *Id.* ¶ 27. That same day, Hinton discussed openly in a conference call that FP&L had “changed the geographies [PowerSecure was] serving” in its new contract and that inefficiencies resulting out of the new contract contributed to PowerSecure’s difficulties in the first quarter. *See id.* ¶ 30. On May 8, 2014, numerous analysts “slashed their ratings and price targets” for PowerSecure, and PowerSecure’s shares “plunged more than 62% from the \$18.60 closing price on May 7 . . . to close at just \$7.00 on May 8.” *Id.* ¶¶ 31-32.

Plaintiffs claim that “the market price of PowerSecure securities was artificially inflated during the Class Period” due to defendants’ August 7, 2013, statement regarding the FP&L contract. *See id.* ¶ 68. As a result, plaintiffs claim that they purchased “securities during the Class Period at artificially high prices and were damaged after the truth regarding the Company finally was revealed.” *Id.* Plaintiffs believe that defendants “engaged and participated in a continuous course of conduct to conceal and misrepresent adverse material information about the business, operations, performance, and prospects of PowerSecure.” *Id.* ¶ 65. Accordingly, plaintiffs allege that defendants violated section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”), codified at 15 U.S.C. section 78j(b), as well as Rule 10b-5, 17 C.F.R. section 240.10b-5. *See id.* ¶¶ 62-72.

The court’s order of September 15, 2015, discusses the law applicable to plaintiffs’ claim under section 10(b) of the Exchange Act and Rule 10b-5 and defendants’ motion to dismiss under Rule 12(b)(6). *See* [D.E. 52] 9-27. The

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court will not repeat that discussion and applies the law discussed in the order of September 15, 2015. Additionally, the court declines to revisit its earlier holding that plaintiffs sufficiently alleged that defendants' August 7, 2013 statement amounted to a material misrepresentation. *See id.* 13-14. Accordingly, the court limits its analysis in this order to whether plaintiffs' amended complaint plausibly alleges scienter under section 10(b) of the Exchange Act.

II.

To plead a claim under section 10(b) of the Exchange Act, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). The required state of mind is scienter, or "a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) (quotation omitted). A strong inference is one that is "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Id.* at 314. "This standard requires courts to take into account plausible opposing inferences." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48, 131 S. Ct. 1309, 179 L. Ed. 2d 398 (2011) (quotation omitted); *see Tellabs*, 551 U.S. at 323-24 ("To 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 defendants' conduct, as well as inferences favoring the

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plaintiff.” (quotation omitted)). In comparing alternative inferences, the court considers all allegations holistically. *See Matrixx Initiatives*, 563 U.S. at 48-49; *Tellabs*, 551 U.S. at 323-24.

The Fourth Circuit has held that, in addition to intentional misconduct, “[p]leading recklessness is sufficient to satisfy the scienter requirement.” *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 181 (4th Cir. 2009); *see Cozzarelli v. Inspire Pharms., Inc.*, 549 F.3d 618, 623 (4th Cir. 2008); *cf. Matrixx Initiatives*, 563 U.S. at 48 (assuming without deciding that recklessness may establish scienter). In the context of section 10(b), a reckless act is one “so 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 it.” *Matrix Capital*, 576 F.3d at 181 (quotation omitted); *see Zak v. Chelsea Therapeutics Int’l, Ltd.*, 780 F.3d 597, 613 (4th Cir. 2015) (“[T]he recklessness necessary to support a finding of scienter must be ‘severe.’”); *Pub. Emps.’ Ret. Ass’n v. Deloitte & Touche LLP*, 551 F.3d 305, 313 (4th Cir. 2009); *Cozzarelli*, 549 F.3d at 623. The scienter requirement is not met if “the inference that defendants acted innocently, or even negligently, [is] more compelling than the inference that they acted with the requisite scienter.” *Pub. Emps.’ Ret. Ass’n*, 551 F.3d at 313; *see Zak*, 780 F.3d at 613 (noting that the scienter requirement “prevents section 10(b) from devolving into a penalty for business decisions that, in hindsight, appear questionable”).

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Plaintiffs' initial complaint made three broad allegations concerning scienter: (1) as CEO, Hinton had access to information about the day-to-day affairs of the company and therefore knew about the difficulties facing PowerSecure's UI segment; (2) a confidential witness (CW1) alleged that "problems affecting the Company's UI business significantly pre-dated the May 2014 disclosures"; and, (3) PowerSecure and Hinton had pecuniary motives to deliberately mislead the public. *See* Compl. [D.E. 30] ¶¶ 86-101. On September 15, 2015, the court held that plaintiffs' complaint "fail[ed] to adequately plead scienter and therefore fail[ed] to state a claim under section 10(b) and Rule 10b-5." [D.E. 52] 21. Alternatively, the court held that the allegations in the original complaint and other reviewable documents, when reviewed holistically, failed to state with particularity facts giving rise to a strong inference of scienter. *Id.* 21-26.

Plaintiffs' amended complaint raises largely the same allegations regarding scienter as in their initial complaint. *Compare* Compl. ¶¶ 86-101, *with* Am. Compl. ¶¶ 34-49. Accordingly, the court adopts its analysis from the order of September 15, 2015, and, unless otherwise noted, holds that plaintiffs have failed to state a claim even when viewing the unchanged allegations holistically and in conjunction with the new allegations in the amended complaint. Nonetheless, plaintiffs' amended complaint contains new allegations that merit some discussion.

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Plaintiffs' amended complaint raises the following new allegations regarding defendants' incentive to commit securities fraud: (1) that, having already stated that PowerSecure would obtain a contract renewal from FP&L before the class period, Hinton was "likely" hesitant to "concede to the market that . . . the customer did not renew the Company's contract"; (2) that PowerSecure had a pecuniary incentive to defraud the market, as the "money raised from the public" due to the alleged misstatement "provided PowerSecure with additional cash" to defray the costs resulting from FP&L's new contract in a different geographic area; and, (3) that Hinton had incentive to defraud the market in order to realize "considerable savings . . . by transferring shares at an artificially inflated price to his wife" as part of Hinton's divorce settlement. *See* Am. Compl. ¶¶ 37, 45, 49. Additionally, plaintiffs argue that because the court's order of September 15, 2015, found that plaintiffs had sufficiently pleaded that the August 7, 2013 statement was a material misrepresentation, Hinton "certainly . . . knew" that this statement was false. *See id.* ¶ 36.

1.

As for plaintiffs' claim that Hinton possessed an incentive to defraud the market to avoid "conced[ing] to the market that, in fact, the customer did not renew the Company's contract," the court holds that this assertion is conclusory regarding Hinton's knowledge and fails to support a strong inference of scienter. *Cf. id.* ¶ 37. The amended complaint does not state specifically *why* Hinton would hesitate to correct his earlier statements to the

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public. *See id.*¹ Insofar as the amended complaint suggests that Hinton did so to “save face,” the mere “preservation of reputation” does not “constitute a cognizable motive for fraud” under the Exchange Act. *In re Moody’s Corp. Sec. Litigation*, 599 F. Supp. 2d 493, 515 (S.D.N.Y. 2009); *see Rombach v. Chang*, 355 F.3d 164, 177 (2d Cir. 2004); *Varjabedian v. Emulex Corp.*, 152 F. Supp. 3d 1226, 1238-39 (C.D. Cal. 2016) (collecting cases). Accordingly, this allegation, even when viewed holistically and in conjunction with the remainder of the amended complaint, does not aid in curing the defects identified in this court’s order of September 15, 2015.

2.

As for plaintiffs’ claim that defendants had incentive to defraud the market in order to raise funds to offset the costs of the new contract with FP&L, plaintiffs raised a similar claim in their initial complaint. *See* Compl. ¶ 98 (“[T]he Company sold 2.3 million shares of its common stock to the public at \$16 per share, a price that was artificially inflated as a result of Defendants’ deceptive statements and omissions, yielding the Company \$34.4 million in needed funds. Thus, Defendants had an obvious

1. The complaint alleges that, on May 8, 2013, three months before the class period began, PowerSecure stated through Hinton that it was “renewal time” with “a utility we are already serving.” Am. Compl. ¶ 18. Additionally, on June 6, 2013, PowerSecure announced through a press release that it had secured a “renewed and expanded three year utility infrastructure (UI) award to serve one of the nation’s largest investor owned utilities (IOUs).” *Id.* ¶ 19 (emphasis omitted).

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motive to defraud the market.”). Although slightly more specific than the allegations in the initial complaint regarding the proposed rationale for allegedly committing fraud, this allegation fails for the reasons outlined in this court’s order of September 15, 2015. *See* [D.E. 52] 23-24; *Cozzarelli*, 549 F.3d at 627 (“[A] strong inference of fraud does not arise merely from seeking capital to support a risky venture.”). Accordingly, this allegation, even when viewed holistically and in conjunction with the remainder of the amended complaint, does not aid in curing the defects identified in this court’s order of September 15, 2015.

3.

As for plaintiffs’ slightly more specific allegation regarding Hinton’s divorce settlement, this allegation fails to support a strong inference of scienter. This court’s order of September 15, 2015, noted that Hinton transferred “138,770 shares on December 19, 2013, pursuant to a separation agreement for his pending divorce[] and 10,000 shares on February 4, 2014, also pursuant to his pending divorce.” [D.E. 52] 4. However, the court also held that these “two sales [did] not raise an inference of scienter because they were made pursuant to a final division of marital assets in conjunction with the Reporting Person’s pending divorce.” *Id.* (quotation omitted).

The court adopts the conclusion it reached in its order of September 15, 2015, regarding these sales and finds that plaintiffs’ expanded allegation that Hinton obtained “considerable savings... by transferring shares at an

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artificially inflated price to his wife” is not sufficient to support a strong inference of scienter. *See* [D.E. 52] 24; *Teachers’ Ret. Sys. v. Hunter*, 477 F.3d 162, 184 (4th Cir. 2007); *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001). Plaintiffs have failed to plead sufficient facts to negate other, more likely inferences regarding these sales, including that Hinton transferred his shares due to an agreement or court order requiring a transfer on those dates or that Hinton’s ex-wife requested the transfer on those dates. Accordingly, this allegation, even when viewed holistically and in conjunction with the remainder of the amended complaint, does not aid in curing the defects identified in this court’s order of September 15, 2015.

4.

Finally, plaintiffs argue that the court’s order of September 15, 2015, necessitates a holding that plaintiffs have sufficiently pleaded scienter. *See* Am. Compl. ¶ 36; [D.E. 62] 1 (“Defendants’ scienter is undeniable: the Court already has found it was material and misleading to represent the new FP&L contract [as] a renewal”). As discussed, this court’s order of September 15, 2015, held that plaintiffs had sufficiently pleaded that Hinton’s August 7, 2013 statement “was materially misleading.” [D.E. 52] 13. In making this determination, the court stated that “a reasonable investor might find the distinction between [a renewal of an existing contract and the signing of a new contract] as having significantly altered the total mix of information.” *Id.* 13-14. However, this court’s order then stated explicitly that plaintiffs had failed to sufficiently allege scienter. *See id.* 21-26.

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Plaintiffs posit that, because a reasonable investor would find the difference between a contract renewal and a new contract material, “Hinton, the CEO and President of PowerSecure since 2007 with vast experience in the utility and power generation business,” must “certainly” have known of this difference when he made the August 7, 2013, statement. Am. Compl. 136. Plaintiffs concede that they “certainly [are] aware of the Court’s prior ruling with respect to scienter.” [D.E. 62] 20. However, they claim that “the inference of scienter is not only strong, it is inescapable” in light of a sufficiently-pleaded materially misleading statement. *See id.*

It is odd that plaintiffs read an order holding that they failed to sufficiently plead scienter to “inescapably” require a holding that plaintiffs sufficiently pleaded scienter. In any event, the court rejects plaintiffs’ reading. As defendants persuasively note, the material misrepresentation and scienter requirements of the Exchange Act serve separate and distinct purposes. *See* [D.E. 66] 14-15; *Matrixx Initiatives*, 563 U.S. at 43-44 (holding that the material misrepresentation requirement is objective and focuses on the reaction a reasonable investor would have to the statement); *Tellabs, Inc.*, 551 U.S. at 319 (holding that scienter asks whether a reasonable person would deem the inference that the defendant had a “mental state embracing intent to deceive, manipulate, or defraud” at least as likely as any alternate inference) (quotations omitted)); *Zak*, 780 F.3d at 613 (noting that the scienter requirement “prevents section 10(b) from devolving into a penalty for business decisions that, in hindsight, appear questionable”). To suggest that sufficiently pleading a

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material misrepresentation automatically pleads scienter would read scienter out of the Exchange Act and would conflict with the statute and binding precedent.

Plaintiffs clarify in their opposition to defendants' motion to dismiss that they do not "contend . . . that an inference of scienter automatically is established every time a material misstatement is properly pled." [D.E. 62] 27. Instead, they argue that "Hinton's, and thus the Company's, scienter is obvious," presumably due to the nature of the misrepresentation. *Id.*

The court acknowledges that a material misrepresentation may be so obvious as to render any competing inference regarding a defendant's scienter equally as reasonable or less reasonable than the inference supporting scienter. *See Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 987-89 (9th Cir. 2008). However, the court's order of September 15, 2015, necessarily rejected this possibility as to defendants' August 7, 2013 statement. *See* [D.E. 52] 21-26; *see also Tellabs, Inc.*, 551 U.S. at 319; *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1344-46 (10th Cir. 2012). Here, the court again holds that plaintiffs' sufficiently pleaded material-misrepresentation allegation does not alone sufficiently plead scienter.

Additionally, plaintiffs attempt to invoke the core-operations doctrine to support this argument. *See* Am. Compl. ¶¶ 35-36, 38-43 ("At all relevant times, Defendant Hinton was the most senior executive officer at the Company . . . and was responsible for overseeing its business and operations day-to-day. The matters here at

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issue concerned one of the Company's two most important business segments."); [D.E. 62] 28-30. The court, however, rejects the applicability of the core-operations doctrine for the reasons described in its order of September 15, 2015. *See* [D.E. 52] 22 n.5; *see also Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 890 (4th Cir. 2014); *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785-86 (9th Cir. 2008) (holding that the core-operations doctrine applies only "in rare circumstances[,] where the nature of the relevant fact is of such prominence that it would be 'absurd' to suggest that management was without knowledge of the matter"). Accordingly, the court holds that the plaintiffs have not sufficiently pleaded scienter.

Plaintiffs have failed to "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2) (A). Thus, the court grants defendants' motion to dismiss plaintiffs' claim under section 10(b) of the Exchange Act and Rule 10b-5.

B.

Plaintiffs also allege that Hinton violated sections 20(a) and 20(b) of the Exchange Act. Am. Compl. ¶¶ 73-79. In light of the disposition of plaintiffs' section 10(b) and Rule 10b-5 claim, the court dismisses these counts and the complaint as a whole. *See, e.g., Cozzarelli*, 549 F.3d at 628.

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C.

As for defendants' motion for judicial notice and notice of incorporation by reference [D.E. 57], the court has not relied on these documents. Accordingly, the court denies the motion as moot.

III.

In sum, the court GRANTS defendants' motion to dismiss [D.E. 54] and DISMISSES plaintiffs' amended complaint. Additionally, the court DENIES AS MOOT defendants' motion for judicial notice and notice of incorporation by reference [D.E. 57].

SO ORDERED. This 13 day of September 2016.

/s/ James C. Dever
JAMES C. DEVER III
Chief United States District Judge

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**APPENDIX D — DENIAL OF REHEARING
OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT, FILED
DECEMBER 12, 2017**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-2163
(4:14-cv-00092-D)

MAGUIRE FINANCIAL, LP,

Movant-Appellant,

and

LEONARD ASH, INDIVIDUALLY AND ON
BEHALF OF ALL OTHERS SIMILARLY
SITUATED,

Plaintiff,

and

CLAY LESLIE; PAUL E. MOORE,

Movants,

v.

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Appendix D

POWERSECURE INTERNATIONAL, INC.;
SIDNEY HINTON,

Defendants-Appellees,

and

CHRISTOPHER T. HUTTER,

Defendant.

ORDER

The court denies the petition for rehearing and rehearing *en banc*. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing *en banc*.

Entered at the direction of the panel: Judge Wilkinson,
Judge Duncan, and Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk