ALAN BECK (HI Bar No. 9145)
Attorney at Law
4780 Governor Drive
San Diego, California 92122
Telephone: (619) 971-0414
Email: ngord2000@yahoo.com

Attorney for Plaintiff-Appellant George K. Young

UNITED STATE COURT OF APPEALS

NINTH CIRCUIT

GEORGE K. YOUNG JR., Plaintiff, vs. STATE OF HAWAII ET. AL.; Defendants.	No. 12-17808 CASE No. 12-00336 HG BMK NOTICE OF SUPPLEMENTAL AUTHORITY

Notice of Supplemental Authority

COMES NOW THE PLAINTIFF-APPELLANT, George K. Young Jr., submits this Notice of Supplemental Authority to support his argument regarding the HRS's bans on types of protected arms.. The Ninth Circuit has held that new arguments within a reply brief are allowed. "We agree with the Seventh Circuit, which held that "[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without

giving the [non-]movant an opportunity to respond." *Black v. TIC Inv. Corp*., 900 F.2d 112, 116 (7th Cir.1990)." *Provenz v. Miller*, 102 F. 3d 1478 Ninth Cir, (1996) (attached). The same should apply here to any new arguments made in this or any other notice since the filing of Mr. Young's Opening Brief as Defendant's have not suffered any hardship as his brief was filed early and this notice is filed prior to the original due date of March 25th. 2013 and the filing date of the Answering Brief was unchanged by this early filing. Mr. Young attaches HRS 134-2, HRS 134-1, HRS 134-25 and HRS 134-4. As already presented HRS 134-8 maintains a complete ban on assault pistols, short barrel shotguns and rifles. Hawaii's complete ban on these types of handguns fails strict scrutiny. The features that make assault pistols banned only apply to handguns. Rifles with these features are legal to own. Any public safety argument fails because Defendants allow ownership of rifles to have these features and *Heller* observed that the handgun is "the quintessential self-defense weapon," 554 U.S. at 629, Mr. Young sees no compelling reason for a complete ban on a type of class of protected arms. The same rationale applies to HRS 134-8's ban on pistol magazines greater than 10 rounds. Any argument showing the dangerousness of these features and magazines in general fails because Defendants must have a compelling reason that applies to handguns only and must be the most narrowly tailored reason possible to ban these

types of protected arms. Accordingly HRS 134-8's complete ban on types of protected arms must be struck down.

Respectfully submitted this 21st day of March, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

CERTIFICATE OF SERVICE

On this, the 21st day of March, 2013, I served the foregoing pleading by electronically filing it with the Court's CM/ECF system, which generated a Notice of Filing and effects service upon counsel for all parties in the case. I declare under penalty of perjury that the foregoing is true and correct.
Executed this the 21st day of March, 2013

s/ Alan Beck
Alan Beck (HI Bar No. 9145)

PART I. [OLD] GENERAL REGULATIONS

§§134-1 to 18 [OLD] REPEALED. L 1988, c 275, §4.

PART I. GENERAL REGULATIONS

§134-1 Definitions. As used in this chapter, unless the context indicates otherwise:

"Acquire" means gain ownership of.

"Antique pistol or revolver" means any pistol or revolver manufactured before 1899 and any replica thereof if it either is not designed or redesigned for using rimfire or conventional centerfire fixed ammunition or is designed or redesigned to use rimfire or conventional centerfire fixed ammunition that is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

"Assault pistol" means a semiautomatic pistol which accepts a detachable magazine and which has two or more of the following characteristics:

(1) An ammunition magazine which attaches to the pistol outside of the pistol grip;

(2) A threaded barrel capable of accepting a barrel extender, flash suppressor, forward hand grip, or silencer;

(3) A shroud which is attached to or partially or completely encircles the barrel and which permits the shooter to hold the firearm with the second hand without being burned;

(4) A manufactured weight of fifty ounces or more when the pistol is unloaded;

(5) A centerfire pistol with an overall length of twelve inches or more; or

(6) It is a semiautomatic version of an automatic firearm;

but does not include a firearm with a barrel sixteen or more inches in length, an antique pistol as defined in this section or a curio or relic as those terms are used in 18 United States Code §921(16) or 27 Code of Federal Regulations 178.11.

"Automatic firearm" means any firearm that shoots, is designed to shoot, or can be readily modified to shoot automatically more than one shot, without a manual reloading, by a single function of the trigger. This term shall also include the frame or receiver of any such firearm, any part designed and intended solely and exclusively, or any combination of parts designed and intended, for use in converting a firearm into an automatic firearm, and any combination of parts from which an automatic firearm can be assembled if the parts are in the possession or under the control of a single person.

"Chief of police" means the chief of police of the counties of Hawaii, Maui, Kauai, or the city and county of Honolulu.

"Crime of violence" means any offense, as defined in title 37, that involves injury or threat of injury to the person of another.

"Electric gun" means any portable device that is electrically operated to project a missile or electromotive force. It does not include any electric livestock prod used in animal husbandry and any automatic external defibrillator used in emergency medical situations.

"Firearm" means any weapon, for which the operating force is an explosive, including but not limited to pistols, revolvers, rifles, shotguns, automatic firearms, noxious gas projectors, mortars, bombs, and cannon.

"Firearm loaded with ammunition" and "loaded firearm" means a firearm with ammunition present within the firing chamber, revolving cylinder, or within a magazine which is inserted in a firearm.

"Fugitive from justice" means any person (1) who has fled from any state, territory, the District of Columbia, or possession of the United States, to avoid prosecution for a felony or to avoid giving testimony in any criminal

proceeding or (2) who has fled from any country other than the United States and is avoiding lawful extradition back to that country.

"Pistol" or "revolver" means any firearm of any shape with a barrel less than sixteen inches in length and capable of discharging loaded ammunition or any noxious gas.

"Public highway" shall have the same meaning as defined in section 264-1(a).

"Semiautomatic" means the mode of operation by which a firearm uses the energy of the explosive in a fixed cartridge to extract a fired cartridge and chamber a fresh cartridge with each single pull of a trigger. [L 1988, c 275, pt of §2 and am c 271, §2; am L 1989, c 263, §§2, 3; am L 1990, c 195, §1; am L 1992, c 286, §1; am L 1994, c 204, §2; am L 2001, c 252, §2]

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§134-2 Permits to acquire. (a) No person shall acquire the ownership of a firearm, whether usable or unusable, serviceable or unserviceable, modern or antique, registered under prior law or by a prior owner or unregistered, either by purchase, gift, inheritance, bequest, or in any other manner, whether procured in the State or imported by mail, express, freight, or otherwise, until the person has first procured from the chief of police of the county of the person's place of business or, if there is no place of business, the person's residence or, if there is neither place of business nor residence, the person's place of sojourn, a permit to acquire the ownership of a firearm as prescribed in this section. When title to any firearm is acquired by inheritance or bequest, the foregoing permit shall be obtained before taking possession of a firearm; provided that upon presentation of a copy of the death certificate of the owner making the bequest, any heir or legatee may transfer the inherited or bequested firearm directly to a dealer licensed under section 134-31 or licensed by the United States Department of Justice without complying with the requirements of this section.

(b) The permit application form shall include the applicant's name, address, sex, height, weight, date of birth, place of birth, country of citizenship, social security number, alien or admission number, and information regarding the applicant's mental health history and shall require the fingerprinting and photographing of the applicant by the police department of the county of registration; provided that where fingerprints and photograph are already on file with the department, these may be waived.

(c) An applicant for a permit shall sign a waiver at the time of application, allowing the chief of police of the county issuing the permit access to any records that have a bearing on the mental health of the applicant. The permit application form and the waiver form shall be prescribed by the attorney general and shall be uniform throughout the State.

(d) The chief of police of the respective counties may issue permits to

acquire firearms to citizens of the United States of the age of twenty-one years or more, or duly accredited official representatives of foreign nations, or duly commissioned law enforcement officers of the State who are aliens; provided that any law enforcement officer who is the owner of a firearm and who is an alien shall transfer ownership of the firearm within forty-eight hours after termination of employment from a law enforcement agency. The chief of police of each county may issue permits to aliens of the age of eighteen years or more for use of rifles and shotguns for a period not exceeding sixty days, upon a showing that the alien has first procured a hunting license under chapter 183D, part II. The chief of police of each county may issue permits to aliens of the age of twenty-one years or more for use of firearms for a period not exceeding six months, upon a showing that the alien is in training for a specific organized sport-shooting contest to be held within the permit period. The attorney general shall adopt rules, pursuant to chapter 91, as to what constitutes sufficient evidence that an alien is in training for a sport-shooting contest. Notwithstanding any provision of the law to the contrary and upon joint application, the chief of police may issue permits to acquire firearms jointly to spouses who otherwise qualify to obtain permits under this section.

(e) The permit application form shall be signed by the applicant and by the issuing authority. One copy of the permit shall be retained by the issuing authority as a permanent official record. Except for sales to dealers licensed under section 134-31, or dealers licensed by the United States Department of Justice, or law enforcement officers, or where a license is granted under section 134-9, or where any firearm is registered pursuant to section 134-3(a), no permit shall be issued to an applicant earlier than fourteen calendar days after the date of the application; provided that a permit shall be issued or the application denied before the twentieth day from the date of application. Permits issued to acquire any pistol or revolver shall be void unless used within ten days after the date of issue. Permits to acquire a pistol or

revolver shall require a separate application and permit for each transaction. Permits issued to acquire any rifle or shotgun shall entitle the permittee to make subsequent purchases of rifles or shotguns for a period of one year from the date of issue without a separate application and permit for each acquisition, subject to the disqualifications under section 134-7 and subject to revocation under section 134-13; provided that if a permittee is arrested for committing a felony or any crime of violence or for the illegal sale of any drug, the permit shall be impounded and shall be surrendered to the issuing authority. The issuing authority shall perform an inquiry on an applicant who is a citizen of the United States by using the National Instant Criminal Background Check System before any determination to issue a permit or to deny an application is made. If the applicant is not a citizen of the United States and may be eligible to acquire a firearm under this chapter, the issuing authority shall perform an inquiry on the applicant, by using the National Instant Criminal Background Check System, to include a check of the Immigration and Customs Enforcement databases, before any determination to issue a permit or to deny an application is made.

(f) In all cases where a pistol or revolver is acquired from another person within the State, the permit shall be signed in ink by the person to whom title to the pistol or revolver is transferred and shall be delivered to the person who is transferring title to the firearm, who shall verify that the person to whom the firearm is to be transferred is the person named in the permit and enter on the permit in the space provided the following information: name of the person to whom the title to the firearm was transferred; names of the manufacturer and importer; model; type of action; caliber or gauge; and serial number as applicable. The person who is transferring title to the firearm shall sign the permit in ink and cause the permit to be delivered or sent by registered mail to the issuing authority within forty-eight hours after transferring the firearm.

In all cases where receipt of a firearm is had by mail, express, freight, or otherwise from sources without the State, the person to whom the permit has been issued shall make the prescribed entries on the permit, sign the permit in ink, and cause the permit to be delivered or sent by registered mail to the issuing authority within forty-eight hours after taking possession of the firearm.

In all cases where a rifle or shotgun is acquired from another person within the State, the person who is transferring title to the rifle or shotgun shall submit, within forty-eight hours after transferring the firearm, to the authority which issued the permit to acquire, the following information, in writing: name of the person who transferred the firearm, name of the person to whom the title to the firearm was transferred; names of the manufacturer and importer; model; type of action; caliber or gauge; and serial number as applicable.

(g) Effective July 1, 1995, no person shall be issued a permit under this section for the acquisition of a pistol or revolver unless the person, at any time prior to the issuance of the permit, has completed:

(1) An approved hunter education course as authorized under section 183D-28;

(2) A firearms safety or training course or class available to the general public offered by a law enforcement agency of the State or of any county;

(3) A firearms safety or training course offered to law enforcement officers, security guards, investigators, deputy sheriffs, or any division or subdivision of law enforcement or security enforcement by a state or county law enforcement agency; or

(4) A firearms training or safety course or class conducted by a state certified or National Rifle Association certified firearms instructor or a certified military firearms instructor that provides, at a minimum, a total of at least two hours of firing training at a firing range and a total of at least four hours of classroom instruction, which may

include a video, that focuses on:

(A) The safe use, handling, and storage of firearms and firearm safety in the home; and
(B) Education on the firearm laws of the State.

An affidavit signed by the certified firearms instructor who conducted or taught the course, providing the name, address, and phone number of the instructor and attesting to the successful completion of the course by the applicant shall constitute evidence of certified successful completion under this paragraph.

(h) No person shall sell, give, lend, or deliver into the possession of another any firearm except in accordance with this chapter.

(i) No fee shall be charged for permits, or applications for permits, under this section, except for a single fee chargeable by and payable to the issuing county, for individuals applying for their first permit, in an amount equal to the fee actually charged by the Federal Bureau of Investigation to the issuing police department for a fingerprint check in connection with that application or permit. In the case of a joint application, the fee provided for in this section may be charged to each person to whom no previous permit has been issued. [L 1988, c 275, pt of §2; am L 1992, c 287, §2; am L 1994, c 204, §3; am L 1995, c 11, §1; am L 1996, c 200, §§2, 3; am L 1997, c 53, §2 and c 278, §1; am L 2006, c 27, §1; am L 2007, c 9, §6]

[§134-25] Place to keep pistol or revolver; penalty. (a) Except as provided in sections 134-5 and 134-9, all firearms shall be confined to the possessor's place of business, residence, or sojourn; provided that it shall be lawful to carry unloaded firearms in an enclosed container from the place of purchase to the purchaser's place of business, residence, or sojourn, or between these places upon change of place of business, residence, or sojourn, or between these places and the following:

(1) A place of repair;

(2) A target range;

(3) A licensed dealer's place of business;

(4) An organized, scheduled firearms show or exhibit;

(5) A place of formal hunter or firearm use training or instruction; or

(6) A police station.

"Enclosed container" means a rigidly constructed receptacle, or a commercially manufactured gun case, or the equivalent thereof that completely encloses the firearm.

(b) Any person violating this section by carrying or possessing a loaded or unloaded pistol or revolver shall be guilty of a class B felony. [L 2006, c 66, pt of §1]

§134-4 Transfer, possession of firearms. (a) No transfer of any rifle having a barrel length of sixteen inches or over or any shotgun having a barrel length of eighteen inches or over, whether usable or unusable, serviceable or unserviceable, modern or antique, registered under prior law or by a prior owner, or unregistered shall be made to any person under the age of eighteen years, except as provided by section 134-5.

(b) No person shall possess any firearm that is owned by another, regardless of whether the owner has consented to possession of the firearm, without a permit from the chief of police of the appropriate county, except as provided in subsection (c) and section 134-5.

(c) Any lawfully acquired rifle or shotgun may be lent to an adult for use within the State for a period not to exceed fifteen days without a permit; provided that where the rifle or shotgun is to be used outside of the State, the loan may be for a period not to exceed seventy-five days.

(d) No person shall knowingly lend a firearm to any person who is prohibited from ownership or possession of a firearm under section 134-7.

(e) After July 1, 1992, no person shall bring or cause to be brought into the State an assault pistol. No assault pistol may be sold or transferred on or after July 1, 1992, to anyone within the State other than to a dealer licensed under section 134-32 or the chief of police of any county except that any person who obtains title by bequest or intestate succession to an assault pistol registered within the State shall, within ninety days, render the weapon permanently inoperable, sell or transfer the weapon to a licensed dealer or the chief of police of any county, or remove the weapon from the State. [L 1988, c 275, pt of §2; am L 1992, c 286, §2]

Case Notes

Where defendant's conviction and sentence under §708-840 was an included

offense under §134-6(a) and defendant's convictions under both §708-840 and subsection (a) violated §701-109(1)(a), defendant's conviction and sentence under §708-840 reversed. 91 H. 33, 979 P.2d 1059.

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United States Court of Appeals,Ninth Circuit.

PROVENZ v. MILLER MIPS

Diane PROVENZ; Ahikim Eizenberg, Plaintiffs-Appellants, v. Robert C. MILLER; Charles M. Boesenberg; David G. Ludvigson; Stephen R. Bennion; William D. Jobe; MIPS Computer Systems, Inc., Defendants-Appellees.

Nos. 95-15839, 95-16819.

Argued and Submitted June 11, 1996. -- September 11, 1996

Before GOODWIN, PREGERSON, and KOZINSKI, Circuit Judges.

Jonathan K. Levine, Kaplan, Kilsheimer & Fox, New York City, and Patrick J. Coughlin, Milberg, Weiss,

Bershad, Hynes & Lerach, San Diego, CA, for Plaintiffs-Appellants.Steven M. Schatz, Wilson, Sonsini, Goodrich & Rosati, Palo Alto, CA, for Defendants-Appellees.

Plaintiffs Diane Provenz and Ahikim Eizenberg, on behalf of themselves and all other similarly situated purchasers of stock of MIPS Computer Systems, Inc. (MIPS), appeal the district court's grant of summary judgment in favor of all defendants. Plaintiffs brought this action against MIPS and MIPS' officers and directors, Charles M. Boesenberg, Robert C. Miller, David G. Ludvigson, Stephen R. Bennion, and William D. Jobe, under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240.10b-5. The plaintiffs also appeal the district court's order awarding costs to defendants. The district court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

BACKGROUND

The plaintiffs brought this securities fraud case as a class action. The class period runs from January 31, 1991, through October 9, 1991. Plaintiffs allege that, during the class period, the value of MIPS' stock was artificially inflated because defendants recognized revenue before the revenue was earned and failed to disclose to the market information about MIPS' products and forecasts. At the beginning of the class period, MIPS' stock traded at about $11 a share. At the high end of the class period, MIPS' stock traded at $20 5/8 a share. On October 10, 1991, the day that plaintiffs allege the fraudulently withheld information about MIPS' business and prospects entered the market, the price of the MIPS' stock declined to about $9 a share.

On June 27, 1994, the district court granted defendants' motion for summary judgment. The district court held that there was insufficient evidence to hold defendants liable for securities fraud based on scienter. The district court also awarded defendants their costs. This appeal followed.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir.1995), cert. denied, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996). A court must view the evidence in the light most favorable to the non-moving party and draw any reasonable inferences in the non-moving party's favor. Id. Summary judgment is proper only if no genuine issue of material fact exists and only if the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Where material factual

disputes exist, the court must allow a jury to resolve the factual disputes. Chesebrough-Ponds, Inc. v. Faberge, Co., 974 F.2d 1156, 1161 (9th Cir.1992).

ANALYSIS

I. Procedural Issues

As a preliminary matter, we must resolve two procedural issues. First, after defendants filed their reply brief but before the hearing, plaintiffs filed a motion to strike the "new" evidence contained in defendants' reply. The plaintiffs also filed a supplemental declaration that rebutted defendants' "new" evidence. The district court denied plaintiffs' motion to strike the defendants' "new" evidence and also refused to consider plaintiffs' supplemental declaration.

We believe the district court erred in not considering plaintiffs' supplemental declaration. In Marshall v. Gates, 44 F.3d 722, 723-725 (9th Cir.1995), we noted that Fed.R.Civ.P. 56(c) states, in relevant part, that a "party prior to the day of hearing may serve opposing affidavits." Although we interpreted this language as allowing a district court to adopt local rules that set time limits for a non-moving party to follow in opposing a motion for summary judgment, our holding in Marshall does not mean that defendants in this case may submit "new" evidence in their reply without affording plaintiffs an opportunity to respond. Such a result would be unfair.

We agree with the Seventh Circuit, which held that "[w]here new evidence is presented in a reply to a motion for summary judgment, the district court should not consider the new evidence without giving the [non-]movant an opportunity to respond." Black v. TIC Inv. Corp., 900 F.2d 112, 116 (7th Cir.1990). Thus, in resolving this appeal, we have considered both the evidence submitted by defendants in their reply and the evidence submitted by plaintiffs in their supplemental declaration.

As to the second procedural issue we must resolve, plaintiffs contend that the district court abused its discretion in denying plaintiffs' motion for reconsideration that was based on allegedly newly discovered evidence. In their motion, plaintiffs submitted a declaration of a MIPS ex-employee. It appears, however, that plaintiffs learned about this employee well before plaintiffs filed their opposition. In these circumstances, we cannot say that the district court abused its discretion in denying plaintiffs' motion for reconsideration.

II. The Merits

To prevail on their securities fraud claims under § 10(b) and Rule 10b-5, plaintiffs must prove: (1) that

defendants made a false statement or failed to disclose information that rendered another statement misleading; (2) that such statement or omission was material; (3) that plaintiffs relied on the statement or omission; and (4) that defendants acted with scienter or an intent to defraud. Monroe v. Hughes, 31 F.3d 772, 776 (9th Cir.1994); In re Apple Computer Securities Litigation, 886 F.2d 1109, 1113 (9th Cir.1989), cert. denied, 496 U.S. 943, 110 S.Ct. 3229, 110 L.Ed.2d 676 (1990).

A. The Alleged False and Misleading Statements

In a securities fraud case, summary judgment is improper if a plaintiff "shows a genuine issue of fact with regard to a particular statement by the company or its insiders." In re Worlds of Wonder Securities Litigation ("WOW"), 35 F.3d 1407, 1412 (9th Cir.1994) (quotations and citations omitted), cert. denied, 516 U.S. 868, 116 S.Ct. 185, 133 L.Ed.2d 123 (1995) and 516 U.S. 909, 116 S.Ct. 277, 133 L.Ed.2d 197 (1995). As we have explained, "[l]iability depend[s] on the plaintiffs' success in demonstrating that one of the statements made by the company was actually false or misleading." In Re Convergent Technologies Securities Litigation, 948 F.2d 507, 512 (9th Cir.1991). Thus, to determine whether summary judgment was proper in this case, we must examine each false or misleading statement allegedly made by defendants.

1. Defendant's Income Recognition Practices

Plaintiffs allege that during the class period in question defendants made false statements in MIPS' quarterly income statements when they recognized revenue before it was earned. According to plaintiffs, under Generally Accepted Accounting Principles (GAAP) and MIPS' own policies, defendants could not recognize income until a binding agreement existed, until deliverables [1] were shipped, and until material contingencies were satisfied. When revenue can be recognized is what is at issue in this case.

Although defendants maintain that during the class period at issue no specific GAAP rules existed governing revenue recognition for technology licensing agreements, defendants do not appear to dispute plaintiffs' contentions that, under GAAP, revenue must be earned before it can be recognized. Defendants concede that, under GAAP, the earnings process must be substantially completed and an exchange must have occurred before revenue can be recognized. MIPS' own policy, which was in existence during the class period, states that "technology revenue is recognized upon the completion of contract requirements."

That contract requirements had to be completed before revenue could be recognized as "earned"

makes perfect sense given the way that MIPS and its customers structured their deals and given the fact that intellectual property was involved. The purchase orders that were signed by customers contained various contingencies, including the approval of foreign governments and the receipt of deliverables. In some instances, the terms of the licensing agreements had not yet been negotiated or finalized when customers signed the purchase orders. Although the signed purchase orders stated that the licensing fee was nonrecoverable, normally no money exchanged hands until after customers received the deliverables. As a result, MIPS had a policy of not shipping any deliverables until a binding agreement existed. Finally, the technology that customers purchased was not completed or "taped out" until March 1991. Before that date, and until MIPS' customers received the actual technology, MIPS customers had received nothing they could use.

Defendants, however, contend, and the district court agreed, that the bulk of MIPS' technology was transferred during the sales process. As the district court explained:

The manner by which MIPS recognized revenue appears to have basically been consistent with its own written policy on the subject and GAAP The evidence indicates that while in some instances partial deliverables remained unshipped after revenue was recognized, the bulk of the terms of the technology transfers (i.e. transfer of sufficient technology to allow the purchaser to begin RISC utilization, payment and acceptances of nonrecoverable fees, etc.) had been substantially satisfied.

(Emphasis added.)

The evidence, however, is not so clear and tells a more complicated story. We have combed through the record and are unable to determine what exactly was transferred to customers during the sales process. The technology, although licensed, had not yet been completed. If any technology was transferred during the sales process, such transfers would have been inconsistent with MIPS' policy of not transferring any technology until a binding contract had been executed. Thus, we find that plaintiffs have raised genuine issues of material fact as to whether technology transfers in fact occurred during the sales process and whether such transfers were sufficient under GAAP to support the recognition of revenue. Further, looking at the evidence in the light most favorable to plaintiffs, it appears that, in the transactions described below, defendants recognized revenue before binding agreements existed and before contract requirements were completed.

a. The Fourth Quarter for 1990

Plaintiffs contend that, in the fourth quarter of 1990, defendants recognized nearly $3 million in

revenue from transactions with Sony, NEC, Control Data, Convex, and Olivetti. According to plaintiffs, had defendants not recognized this revenue, MIPS would have reported a $2,576,000 loss rather than the $546,000 loss, that was actually reported.[2]

i. Sony

In the fourth quarter of 1990, defendants recognized $1 million in revenue from Sony based on a letter from Sony stating that it was exercising an option to purchase a license. The letter, however, stated that Sony was "agree[ing] to discuss, in good faith, the details and schedule associated with the above option during the first quarter of 1991." The discussions over the licensing agreement appear to have taken place after the income was recognized. An agreement was executed in April 1991 and provided that Sony's obligation to pay was conditioned on its receipt of all deliverables. In May 1991, Sony still had not received all deliverables.

ii. NEC

In the fourth quarter of 1990, defendants recorded $250,000 in revenue from NEC based on a signed purchase order. That purchase order contained various contingencies, none of which had been satisfied when the revenue was recognized. In addition, plaintiffs provided evidence that suggests the actual agreement may have been finalized sometime in April 1991.

iii. Control Data

In the fourth quarter of 1990, defendants recognized $250,000 in revenue from Control Data. Plaintiffs provided evidence that suggests material terms of the licensing agreement were still being negotiated when defendants recognized the revenue.

iv. Olivetti

In the fourth quarter of 1990, defendants recognized $950,000 in revenue from Olivetti. According to defendants, a binding agreement in the form of a signed letter of intent existed when the revenue was recognized. However, plaintiffs have provided documentary evidence that suggests that a binding agreement may not have been executed until after the fourth quarter ended and that Olivetti may have signed a backdated agreement. It also appears that the deliverables were not shipped until February 19, 1991.

v. Convex

In the fourth quarter of 1990, defendants recognized $450,000 in revenue from Convex based upon a December 28, 1990 agreement, which gave Convex the right to cancel and receive a full refund if MIPS failed to tape out the R4000 by December 31, 1991. There is evidence in the record that suggests the R4000 microprocessor was behind schedule. In addition, the deliverables had not yet been shipped when the revenue was recognized.

b. The First Quarter of 1991

According to plaintiffs, in the first quarter of 1991, defendants recognized $8 million in revenue from NKK, NEC, and Wang, which had not yet been earned.[3] As a result, MIPS reported a $624,000 profit for the quarter. Had defendants not recognized the alleged unearned revenue, MIPS would have recorded a loss of more than $4.3 million.

i. NKK

In the first quarter of 1991, defendants recognized $5 million in revenue from NKK based upon an agreement which was subject to approval from the Japanese government. In addition, plaintiffs contend that this agreement was subject to another material contingency, which was set out in a "side letter," which stated that MIPS was required to ship deliverables by December 31, 1991. Defendants recognized the revenue before the deliverables were shipped and before the Japanese government provided its approval of the agreement.

ii. NEC

In the first quarter of 1991, defendants recognized $2.25 million in revenue from NEC based on a purchase order for the extension of an existing licensing agreement. The purchase order, however, indicated that NEC could not formally enter into an agreement at that time. Apparently, the parties may not have reached an agreement until June 26, 1991. The June 26, 1991 agreement provided that it was not effective until executed and the Japanese government's approval obtained.

c. The Second Quarter for 1991

According to plaintiffs, in the second quarter of 1991, defendants improperly recognized $4.5 million revenue from Daewoo, NEC, and Tandem.

i. NEC

In the second quarter of 1991, defendants recognized $2 million in revenue from NEC based upon a purchase order for a joint venture with NEC called the Advanced Computing Environment ("ACE") initiative. Plaintiffs, however, provided evidence that suggests that at the time the revenue was recognized, NEC and MIPS were just beginning to negotiate the terms of the licensing agreement. In fact, as will be discussed below, ACE had not yet been announced. Thus, there is a question as to whether ACE in fact existed when the revenue was recognized.

ii. Daewoo

In the second quarter of 1991, defendants recognized $2 million in revenue from Daewoo based on an "agreement" which required the Korean government's approval before it could be considered binding. Plaintiffs' evidence shows that when the income was recognized, the terms of the licensing agreement were still being negotiated, and the Korean government had not yet approved the agreement. In fact, the approval was not obtained until the third quarter of 1991, and only after the Korean government sought various changes to the licensing agreement.

iii. Tandem

In the second quarter of 1991, defendants recognized $600,000 in revenue from Tandem. Plaintiffs contend that a licensing agreement with Tandem was not binding when signed on June 30, 1991, because the agreement had not been finalized. Plaintiffs provided evidence that suggests drafts of the agreement were circulated as late as August and September 1991. An agreement was executed on October 1, 1991. In addition, it appears that Tandem did not execute a purchase order until November 6, 1991.

2. The Restructuring Reserve

Plaintiffs contend that MIPS' failure to record a restructuring charge of $25.5 million before June 30, 1991 violated GAAP. Plaintiffs' experts assert that defendants should have recorded the restructuring by the end of the second quarter of 1991, because at that time defendants knew a restructuring was necessary. In April 1991, MIPS and twenty other companies announced the formation of ACE, the Advanced Computing Environment initiative.

MIPS, however, waited until the third quarter of 1991 to record the restructuring charge. Apparently, defendants waited until then because MIPS had not yet made a formal decision to redirect its new product development around ACE. MIPS made this decision at the end of the second quarter of 1991.

At that time, MIPS warned that a restructuring in the third quarter would be "significant" and would cause "a loss position for the third quarter and for total year 1991."

We fail to see why waiting to record the restructuring charge until the third quarter was unreasonable.

In reviewing the whole record, we find nothing that suggests this accounting decision violated GAAP or any of MIPS' policies. Thus, we hold that the defendants' decision to record the restructuring in the third quarter rather than the second quarter is not actionable as a false or misleading statement.

3. Defendants' Forecasts

Plaintiffs contend that defendants' forecasts for the second and third quarters of 1991 were false or misleading. The district court rejected plaintiffs' contentions. The district court explained:

Plaintiffs have pulled isolated statements out of context. The overall effect of defendants' statements was cautionary and could not be said to have misled the market. As one analyst wrote in June 1990, "MIPS has a complex business model that is still in the process of maturing This is not a stock for the fainthearted."

By this explanation, the district court is alluding to the "bespeaks caution" doctrine and the "truth-on-the-market" doctrine, both of which have been developed by the courts as affirmative defenses to immunize defendants from liability for false and misleading statements. See WOW, 35 F.3d at 1413-1415. Before we consider these defenses, we must first determine whether defendants' forecasts are actionable as false or misleading statements.

A projection is a "factual" misstatement "if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement's accuracy." Kaplan v. Rose, 49 F.3d 1363, 1375 (9th Cir.1994) (citing In re Wells Fargo Securities Litigation, 12 F.3d 922, 930 (9th Cir.1993) (emphasis added), cert. denied, 513 U.S. 917, 115 S.Ct. 295, 130 L.Ed.2d 209 (1994)). In this case, plaintiffs focus on various statements made during conference calls with analysts.

a. The 1991 Second Quarter Projections

In an April 25, 1991 conference call with market analysts, defendant Ludvigson, MIPS' chief financial officer ("CFO"), stated that MIPS expected technology revenues "to decline slightly from the Q1 levels" but expected "higher technology revenue performance for the total year." Although Ludvigson cautioned that he "would be hesitant to put a total number on it," he suggested that MIPS' earnings for

the second quarter would be similar to the $624,000 earnings reported for the first quarter. Specifically, Ludvigson stated that his "expectations for Q2 would be bottom line about Q1."

Plaintiffs' claim that these statements were false and misleading is based on a MIPS internal spread sheet which predicted a loss of 17 cents per share. The spread sheet was dated April 17, 1991, eight days before the conference call. The spread sheet showed that MIPS' internal forecasts projected a loss of $4,000,000 for the second quarter.

The district court, however, did not think that the internal spreadsheet raised a triable issue of material fact. As the district court explained:

Plaintiffs ignore all of the other documents and testimony that put the spread sheet in context. The spreadsheet was the starting point for the discussion at the April 22-23 quarterly business review, not the quarterly forecast. The entire purpose of the quarterly business review was to develop a forecast for the quarter, known as the "QBR commitment." The QBR commitment is consistent with the general guidance given during the April 25 conference call, was distributed shortly thereafter, and was presented to the board on May 15, as a second quarter forecast. There is no evidence that the spreadsheet was other than a preliminary worksheet and, as such, was not something that should have been disclosed to the public. Nor does it suggest, given the way it was prepared, that defendants were hiding adverse facts.

The district court is partially correct. There is no duty to disclose internal forecasts to the public. As this court has explained, "[i]t is just good general business practice to make projections for internal corporate use." Convergent Technologies, 948 F.2d at 516 (quoting Vaughn v. Teledyne, Inc., 628 F.2d 1214, 1221 (9th Cir.1980)). But we also have recognized that a company has a duty to disclose to the public internal forecasts that "[a]re made with reasonable certainty." Convergent Technologies, 948 F.2d at 516. We further have recognized that a company has a duty to disclose the financial data and other material information upon which an internal forecast is based. See In re VeriFone Securities Litigation, 11 F.3d 865, 869 (9th Cir.1993) ("[a]bsent allegations that [the issuer] withheld financial data or other existing facts from which forecasts are typically derived, the alleged omissions are not of material, actual facts").

In this case, Ludvigson predicted a profit when MIPS had information that the company would suffer a loss. We found no evidence in the record that the defendants disclosed to analysts the financial information upon which the internal forecast was based. Further, according to the deposition testimony of MIPS' employees, the internal forecast represented "the best, most accurate

representation as of the time it was prepared of what the company's financial results would be for the prospective quarter." Based on this evidence, we find that plaintiffs have raised a genuine issue of material fact as to whether defendants' projections for the second quarter made during the April 25, 1991 conference call were false or misleading.

b. The 1991 Third Quarter Projections

In a July 30, 1991 press release, MIPS announced that it was going to take a "significant" restructuring charge in the third quarter. In a conference call with market analysts that same day, Ludvigson said that "the restructuring charge would be significant enough to put [MIPS] in a loss position for the third quarter and for total year 1991." Ludvigson, however, represented that, without the restructuring charge, the loss of revenue for the third quarter would be small.

Plaintiffs contend that these statements were misleading because defendants knew that there would be a huge loss without the restructuring charge. In fact, only five days before the conference call, at the MIPS' Board of Directors meeting, defendants predicted a loss of more than $4.3 million without the restructuring charge.

The district court, however, rejected plaintiffs' evidence and found "that MIPS' forecasts were not inconsistent with the financial information they had concerning product and service revenue." Though not inconsistent, we believe that a jury could reasonably find that defendants' representation that the loss would be "small" without the restructuring charge was false or misleading given that the defendants were projecting a $3 million loss without the restructuring charge.

4. Defendants' Omissions About the R6000 Line

Plaintiffs also allege that defendants failed to disclose that MIPS was having serious technical problems with its R6000 line. The district court, however, did not find defendants' failure to disclose this information to be misleading because the defendants had already disclosed that MIPS was having problems with its supplier. Defendants identified sourcing and cost problems with the R6000 line in their SEC Form 10-K and 10Q filings.

But a jury may find that such disclosures were not sufficient. As we have explained:

There is a difference between knowing that any product-in-development may run into a few snags, and knowing that a particular product has already developed problems so significant as to require months of delay.

Convergent Technologies, 948 F.2d at 515, n. 2 (citing Apple Computer, 886 F.2d at 1113-1114).

Here, plaintiffs have provided evidence suggesting the R6000 line was experiencing more than simply supply problems. The R6000 line was plagued with delays and performance problems so severe that MIPS was losing orders and constantly cutting sales forecasts. Defendants, however, continued to represent to analysts that there was "pretty significant demand" and that shipment levels would increase in the third quarter of 1991. Based on this evidence, we believe that a jury could reasonably find that defendants' statements about the R6000 line were false or misleading.

B. Reliance

Plaintiffs contend that defendants' alleged false and misleading statements defrauded the market by causing the price of MIPS' stock to be overvalued during the class period in question. Thus, plaintiffs' case is based on a "fraud on the market" theory. This court has recognized that where a "fraud on the market" is alleged, plaintiffs are not required to "show that they themselves actually relied on any particular misrepresentation or omission." Convergent Technologies, 948 F.2d at 512, n. 2 (citing Apple Computer, 886 F.2d at 1113-1114). To show reliance, plaintiffs simply must "show that they relied on the integrity of the price of the stock as established by the market, which in turn is influenced by information or the lack of it." Id. Thus, in a "fraud on the market" case, "[a]n investor's reliance on the market is equivalent to reliance upon statements made to the market, or the nondisclosure of material information." Id. Defendants do not dispute plaintiffs' allegations of reliance.

C. Materiality

In "a fraud on the market" case, a plaintiff must still establish that the false or misleading statements are material. Materiality is established by "showing that a reasonable shareholder would consider the misrepresentation or omission important, because it altered the total mix of available information." Kaplan, 49 F.3d at 1381 (quotations and citations omitted).

Defendants do not appear to dispute that the alleged false and misleading statements were material. Nor do we think that defendants can establish that the alleged false and misleading statements were not material as a matter of law. As we recently stated: "Whether an omission is 'material' is a determination that 'requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.' " Fecht v. Price, 70 F.3d 1078, 1080 (9th Cir.1995) (quoting TSC

Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450, 96 S.Ct. 2126, 2133, 48 L.Ed.2d 757 (1976). Thus, only if materiality is "so obvious that reasonable minds [could] not differ" is summary judgment appropriate. Id. at 1081 (quotations and citations omitted). Based on the evidence in this case, we believe that a jury could reasonably find that defendants' allegedly false and misleading statements were material and affected the total mix of information upon which a reasonable investor would have relied.

D. Scienter

Generally, scienter should not be resolved by summary judgment. As we have explained:

Cases where intent is a primary issue generally are inappropriate for summary judgment unless all reasonable inferences that could be drawn from the evidence defeat the plaintiff's claim However, in opposing a motion for summary judgment the plaintiff must present significant probative evidence relevant to the issue of intent, e.g. the time, place or nature of the alleged fraudulent activities; mere conclusionary allegations are insufficient to require the motion for summary judgment be denied.

Vaughn, 628 F.2d at 1220 (emphasis added). Thus, summary judgment on the scienter issue is appropriate only where "there is no rational basis in the record for concluding that any of the challenged statements was made with requisite scienter." In re Software Toolworks, 38 F.3d 1078, 1088 (9th Cir.1994) (quotations and citations omitted).

To establish scienter, plaintiffs must show that defendants had " 'a mental state embracing an intent to deceive, manipulate, or defraud.' " WOW, 35 F.3d at 1424 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 194 n. 12, 96 S.Ct. 1375, 1381 n. 12, 47 L.Ed.2d 668 (1976)). Plaintiffs can "establish scienter by proving either actual knowledge or recklessness." Software Toolworks, 38 F.3d at 1088. As we have explained, "reckless" conduct involves " 'not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.' " Id. (quoting Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-1569 (9th Cir.1990) (en banc), cert. denied, 499 U.S. 976, 111 S.Ct. 1621, 113 L.Ed.2d 719 (1991)).

Scienter can be established by direct or circumstantial evidence. See WOW, 35 F.3d at 1425. Plaintiffs in this case do not have any direct evidence that defendants acted with scienter. Rather, plaintiffs contend that defendants' allegedly false and misleading statements, combined with the evidence of insider trading, is sufficient to raise a reasonable inference of scienter.

The district court, however, disagreed and held that summary judgment in favor of defendants was appropriate here because plaintiffs' evidence was insufficient to establish scienter. As the district court explained:

If plaintiffs' [sic] papers are stripped of their harsh rhetoric they illustrate, at most, a difference of opinion as to when revenue should have been recognized. The facts do not justify a reasonable inference of fraudulent intent.

Further, according to the district court, defendants' good faith is evidenced by the fact that defendants allowed their accountant to audit MIPS' revenue recognition practices in January 1991 and January 1992. Both audits found that MIPS' accounting practices complied with GAAP. In addition, as the district court noted, MIPS regularly consulted with their accountant each quarter to confirm that transactions were completed or sufficiently completed to allow the recognition of revenue. Thus, the district court found that MIPS' reliance on outside auditors was inconsistent with an intent to defraud.

At first glance, the district court appears to be correct. As we recently stated, " '[t]he mere publication of inaccurate accounting figures, or a failure to follow GAAP, without more, does not establish scienter.' " Software Toolworks, 38 F.3d at 1089 (quoting WOW, 35 F.3d at 1426). But here defendants appear to have violated MIPS' own policies when recognizing revenue for certain transactions.

In addition, we agree with plaintiffs that the district court was wrong in resolving the factual disputes which exist as to the underlying transactions. Not only have plaintiffs provided documentary evidence that suggests that defendants may have recognized revenue before it was earned, they also provided expert testimony in support of their contentions. This evidence is sufficient to overcome summary judgment.

"As a general rule, summary judgment is inappropriate where an expert's testimony supports the non-moving party's case." WOW, 35 F.3d at 1425 (citing Apple Computer, 886 F.2d at 1116). Here, plaintiffs' two experts have explained in great detail how defendants' recognition of revenue for various transactions violated GAAP and MIPS' own internal policy for recognizing revenue. See In re GlenFed, Inc. Securities Litigation, 42 F.3d 1541, 1549 (9th Cir.1994) (stating that under Rule 9(b) a plaintiff must "explain[ ] why the difference is not merely the difference between two permissible judgments").

Defendants, however, assert that our WOW decision compels an affirmance in this case. In WOW, the

court held that plaintiffs' expert testimony was insufficient to raise a reasonable inference of scienter. 35 F.3d at 1425-1426. As the court explained, "[a]n expert's conclusory allegations that a defendant acted with scienter are insufficient to defeat summary judgment where the record clearly rebuts any inference of bad faith." Id. at 1426.

But WOW is distinguishable. In WOW, defendants provided unrebutted evidence showing that their accountants had full knowledge of the disputed transactions. 35 F.3d at 1426. Here, there is evidence suggesting defendants failed to disclose material information to their accountant. If it is true that defendants withheld material information from their accountants, defendants will not be able to rely on their accountant's advice as proof of good faith. See C.E. Carlson, Inc. v. SEC, 859 F.2d 1429, 1436 (10th Cir.1988) (stating that full disclosure to professional must be established to support the defense of reliance on expert opinion).

Plaintiffs also point to defendants' stock sales during the class period as evidence of defendants' bad faith. We have held that "[i]nsider trading in suspicious amounts or at suspicious times is probative of scienter." Apple Computer, 886 F.2d at 1117. We, however, also have recognized that "credible and wholly innocent explanations for stock sales, ranging from long-standing programs of periodic divestment, to the need to free cash to meet matured tax liabilities, [if] unrebutted are sufficient to defeat any inference of bad faith." Id. (emphasis added).

According to plaintiffs, the individual defendants and other corporate insiders sold over $8.8 million of their individual holdings during the class period. The district court, however, found that "neither the time nor the amount of the sales support a finding of scienter and are consistent with defendants' innocent explanations." We agree that this observation applies to some defendants but not as to other defendants.

The district court incorrectly concluded that the sales of stock by Miller and Boesenberg did not support a finding of scienter. There is evidence that Miller, MIPS' chairman and CEO, and Boesenberg, MIPS' president, traded their stock in large amounts at sensitive times. Miller sold about 20% of his stock for $1,340,000. Boesenberg sold about 90,000 shares during the class period-almost six times more stock than he had sold during the twelve months preceding the class period-for $1,479,650. Both Miller and Boesenberg sold their stock shortly after the April 25, 1991 conference call but before the $4 million loss and the restructuring charge were disclosed to the public.

However, we believe the district court was correct in granting summary judgment in favor of defendants Bennion and Jobe. Bennion, MIPS' vice president and treasurer, and Jobe, MIPS' president

of the technology group, provided uncontroverted evidence that they sold their shares innocent reasons. Apparently, Bennion sold some shares to purchase a new home and sold the remainder of his stock when he resigned. Jobe also sold his shares to buy a new home. Jobe sold more stock before the class period than during it.

Whether defendant Ludvigson, MIPS' CFO, was entitled to summary judgment presents a more difficult question. Although Ludvigson sold only 3,265 shares during the class period, Ludvigson made many of the allegedly false and misleading statements to the analysts during the April 25, 1991 and July 31, 1991 conference calls. In addition, Ludvigson was personally involved in and approved each decision to record revenue for the licensing agreements entered into during the class period. Thus, even though we find that Ludvigson's stock sales were too minimal to suggest insider trading, we still believe a genuine issue of material fact exists as to whether Ludvigson acted with scienter. See Software Toolworks, 38 F.3d at 1089 (holding that evidence that defendants participated in the drafting of documents containing false projections and that defendants knew or should have known of alleged fraud in quarterly financial statements was sufficient to defeat summary judgment on scienter issue).

E. Causation

Defendants assert that the district court's grant of summary judgment can be affirmed on a separate ground, namely that plaintiffs failed to establish "loss causation" or proximate cause. The district court rejected the "loss causation" defense in this case. We agree with that decision.

"Loss causation" is a defense for which defendants have a "heavy" burden of proof. WOW, 35 F.3d at 1422. To establish a "loss causation" defense at the summary judgment stage, the defendants must prove, as a matter of law, that the depreciation of the value of MIPS' stock resulted from factors other than the alleged false and misleading statements. WOW, 35 F.3d at 1422. Defendants have not provided enough evidence to establish as a matter of law that they are entitled to a "loss causation" defense.

Plaintiffs can establish "loss causation" by simply alleging that the false and misleading statements " 'touch[ ] upon the reasons for the investment's decline in value.' " Id. (quoting McGonigle, 968 F.2d at 821). Plaintiffs allege that the stock price was overvalued during the class period because defendants recognized revenue before it was earned and because defendants failed to disclose material information about MIPS. Plaintiffs correctly allege that soon after this information was disclosed, the price of the stock fell. Plaintiffs introduced expert testimony to establish that MIPS' revenue recognition practices "touched upon" the alleged overvalued price of the stock and that the public

disclosures of the company also "caused upon the full price of the MIPS stock. Given the record before us, we believe the district court was correct in refusing to grant summary judgment on the "loss causation" defense.

F. Affirmative Defenses

The district court found that defendants' cautionary statements undercut an inference of scienter. As the district court explained: "A review of the analysts statements on MIPS through the class period show that the outlook for MIPS reflected in the market was far from overly optimistic." But as suggested above, the district court appears to have merged the "bespeaks caution" doctrine with the "truth-on-the-market" doctrine. These doctrines represent distinct affirmative defenses. In this appeal, the defendants argue that these doctrines provide separate grounds for affirming the district court's grant of summary judgment. We disagree.

1. The "Truth-on-the-Market" Defense

In a "fraud on the market" case "an omission is materially misleading only if the information has not already entered the market." Convergent Technologies, 948 F.2d at 513 (citing Apple Computer, 886 F.2d at 1114). As we have explained, "[i]f the market has become aware of the allegedly concealed information, 'the facts allegedly omitted by the defendant would already be reflected in the stock's price' and the market 'will not be misled.' " Id. However, before the "truth-on-the-market" defense can be applied, the defendants must prove that the information that was withheld or misrepresented was " 'transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by insider's one-sided representations.' " Kaplan, 49 F.3d at 1376 (quoting Apple, 886 F.2d at 1116).

The defendants bear a heavy burden of proof. Summary judgment is proper only if they show that "no rational jury could find" that the market was misled. Kaplan, 49 F.3d at 1376. If "the evidence presents a sufficient disagreement to require submission to the jury," summary judgment should be denied. Id.

Here, defendants claim that information about the risky nature of MIPS' stock entered the market. In support of their position, defendants submitted 31 analyst reports and articles. According to defendants' evidence, as early as October 1990, one analyst rated the stock as "SELL." Another analyst, on February 13, 1991, recommended that MIPS be "avoid[ed]" because "technology revenues are only partially predictable."

We do not think that these reports "effectively counterbalance[d]" defendants' false and misleading statements. Kaplan, 49 F.3d at 1376. There is no mention in the reports of defendants' allegedly improper revenue recognition practices, negative forecasts, or sales decline with the R6000 line. Most of the analysts link MIPS' riskiness with the "unusual" business model [4] adopted by MIPS and the unsuccessfulness of alliances like ACE. In these circumstances, we cannot say as a matter of law that defendants have established the "truth-on-the-market" defense.

2. The "Bespeaks Caution" Defense

In granting summary judgment in this case, the district court also held that the "overall effect of defendants' [April 25 and July 31, 1991] statements was cautionary and could not be said to have misled the market." We disagree.

Summary judgment based on the "bespeaks caution" doctrine is only appropriate "when reasonable minds could not disagree as to whether the mix of information in the document is misleading." Fecht, 70 F.3d at 1082 (emphasis added). As we have explained:

The bespeaks caution doctrine provides a mechanism by which a court can rule as a matter of law (typically in a motion to dismiss for failure to state a cause of action or a motion for summary judgment) that defendants' forward looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud.

WOW, 35 F.3d at 1413 (quotations and citations omitted).

But as we have recognized, the "bespeaks caution" doctrine is not new but a reformulation of two fundamental concepts in securities fraud law: reliance and materiality. WOW, 35 F.3d at 1414. "To put it another way, the 'bespeaks caution' doctrine reflects the unremarkable proposition that statements must be analyzed in context." Id. (citations and quotations omitted).

Thus, to determine whether the "bespeaks caution" doctrine immunizes defendants' allegedly false and misleading statements, we must analyze what, if any, cautionary statements defendants made. The cautionary statements must be "precise" and "directly address[ ] the [defendants'] future projections." WOW, 35 F.3d at 1414 (quotations and citations omitted). "Blanket warnings that securities involve a high degree of risk [are] insufficient to ward against a federal securities fraud claim." Id.

In this case, the alleged cautionary statements appear to be general to trigger the "bespeaks caution" doctrine. For example, when MIPS reported its loss in the fourth quarter of 1990, MIPS warned that it "lacked visibility and [was] living in an uncertain economic environment so [it was] approaching the next six months with a very conservative outlook and conservative management posture." MIPS predicted that its technology licensing fees would "remain fairly flat on a year to year basis." MIPS, however, did not disclose to the market that it was recognizing revenue before the terms of certain contracts had been negotiated, before the deliverables were shipped, and before certain contingencies were satisfied. In fact, the opposite is true. Defendants represented in its Form 10-K that "technology revenue is recognized upon the completion of contract requirements."

Defendants also contend that Ludvigson made cautionary statements during the April 25 and July 31, 1991 conference calls. Ludvigson's statements, however, were too general to trigger the "bespeaks caution" doctrine. Ludvigson simply stated that second quarter technology revenue was expected to "decline," that gross margin would be "flat to slightly down," and that technology revenue for 1991 "looked a lot like last year" but "he would be hesitant to put a total number on loss of revenue." Although these statements referred to MIPS' projections, there is no evidence that defendants disclosed the information that was relied upon to arrive at the internal forecast of a $4 million loss. If anything, Ludvigson's "cautionary" statements led the analysts to believe that the second quarter earnings would be similar to the first quarter earnings.

III. Costs

The plaintiffs also appeal the district court's order awarding costs to defendants. Because we have reversed in part the district court's grant of summary judgment, we find that plaintiffs' appeal of the district court's order awarding costs is now moot.

CONCLUSION

As set forth above, we affirm the grant of summary judgment in favor of defendants Bennion and Jobe and reverse the grant of summary judgment in favor of defendants MIPS, Boesenberg, Miller, and Ludvigson. Because of this ruling, we find plaintiff's appeal of the district court's award of costs to be moot. Each side shall bear its own costs on appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

FOOTNOTES

1. "Deliverables" include the computer tape containing programs and databases as well as the documents and manuals describing the technology.

2. Defendants reported a total revenue of $43.1 million for the fourth quarter.

3. Apparently, for the first quarter of 1991, MIPS recognized about $43 million in total revenue.

4. Under its business model, MIPS designs work stations for its microprocessors and licenses its microprocessor design to larger corporations, who develop their own computer products and workstations that compete with MIPS.

PREGERSON, Circuit Judge: