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United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re Infineon Technologies AG Securities Litigation NO. C 04-04156 JW

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO DISMISS WITH LEAVE TO AMEND; GRANTING IN PART AND DENYING IN PART DEFENDANTS’ MOTION TO STRIKE

I. INTRODUCTION

Plaintiffs¹ bring this putative securities fraud class action against Infineon Technologies AG (“Infineon”) and certain of Infineon’s senior officers and directors² (collectively, “Defendants”), alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) and Securities and Exchange Commission Rule 10b-5. Plaintiffs allege that Defendants engaged in securities fraud by participating in an illegal price-fixing conspiracy involving Dynamic Random Access Memory (“DRAM”), and then manipulating the price of

¹ Named Plaintiffs are Reinhard Schroeder (“Schroeder”), Graziella Peano (“Peano”), Lawrence D. Sheriff and Charter Township of Clinton Police & Fire Retirement System (“Charter Township”). (Fourth Amended Complaint for Violations of the Federal Securities Laws ¶ 11, hereafter, “FAC,” Docket Item No. 322.)

² Named Defendants are Infineon, Infineon North America, Ulrich Schumacher, Peter J. Fischl, Heinrich Florian and T. Rudd Corwin. (FAC ¶¶ 13-18.)

1 Infineon stock by making misrepresentations about the impact of the artificially inflated DRAM
2 prices on Infineon's corporate value.

3 Presently before the Court are Defendants' Motion to Dismiss the Fourth Amended
4 Complaint in Part³ and Defendants' Motion to Strike Portions of the Fourth Amended Complaint.⁴
5 The Court finds it appropriate to take the Motions under submission without oral argument. See
6 Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS in part and DENIES in
7 part Defendants' Motion to Dismiss and Motion to Strike.

8 II. BACKGROUND

9 A detailed outline of the facts and allegations in this case may be found in the Court's prior
10 Orders.⁵ The Court reviews the relevant procedural history for the purposes of these Motions.

11 This action was originally filed on September 30, 2004. (See Docket Item No. 1.) On May
12 22, 2006, the Court granted in part and denied in part Defendants' Motions to Dismiss the
13 Complaint with leave to amend. (May 22, 2006 Order, Docket Item No. 90.) On July 17, 2007,
14 Plaintiffs filed a Third Amended Complaint which alleged three Causes of Action: (1) Violation of §
15 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, against all
16 Defendants for issuing false or misleading statements about revenue, earnings, DRAM prices, and
17 competition; (2) Violation of § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), against all Defendants
18 for control person liability; and (3) Violation of § 20A of the Exchange Act, 15 U.S.C. § 78t-1, for
19 alleged contemporaneous insider trading.⁶ On January 25, 2008, the Court dismissed Plaintiffs' §
20

21 ³ (hereafter, "Motion to Dismiss," Docket Item No. 327.)

22 ⁴ (hereafter, "Motion to Strike," Docket Item No. 326.)

23 ⁵ (See March 6, 2009 Order Denying Defendants' Motion for Partial Summary Judgment,
24 Granting Plaintiffs' Motion for Joinder, and Granting Plaintiffs' Motion for Class Certification,
25 hereafter, "March 6 Order," Docket Item No. 280; August 13, 2008 Order Denying Defendants'
26 Motion for Summary Judgment, hereafter, "August 13 Order," Docket Item No. 234; January 25,
2008 Order Granting in Part and Denying in Part Defendants' Motions to Dismiss, hereafter,
"January 25 Order," Docket Item No. 199.)

27 ⁶ (See Third Amended Complaint for Violation of the Federal Securities Laws, Docket Item
28 No. 159.)

1 20A claim against all Defendants, and Plaintiffs' claims against Defendants Heinrich Florian and T.
2 Rudd Corwin, with prejudice. (See January 25 Order.) On August 13, 2008, the Court denied
3 Defendants' Motion for Summary Judgment. (See August 13 Order.) On March 6, 2009, the Court
4 denied Defendants' Motion for Partial Summary Judgment and granted Plaintiffs' Motion for Class
5 Certification and Plaintiffs' Motion for Joinder. (See March 6 Order.) On March 19, 2009,
6 Defendants appealed the Court's March 6 Order granting class certification to the Ninth Circuit.
7 (See Docket Item No. 284.) On August 23, 2010, the Ninth Circuit vacated the Court's March 6
8 Order granting class certification and remanded the case for further proceedings in light of the
9 Supreme Court's decision in Morrison v. National Australia Bank Ltd.⁷ (See Docket Item No. 304.)
10 On October 27, 2010, the Court granted Plaintiffs leave to file a Fourth Amended Complaint.⁸ The
11 Court ordered that Plaintiffs' Fourth Amended Complaint "shall be consistent with the Supreme
12 Court's decision in Morrison." (Id. at 3.) On November 8, 2010, Plaintiffs filed a Fourth Amended
13 Complaint. (See Docket Item No. 322.)

14 Presently before the Court are Defendants' Motions to Dismiss in part and to Strike portions
15 of the Fourth Amended Complaint.

16 III. STANDARDS

17 A. Motion to Dismiss

18 Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against
19 a defendant for failure to state a claim upon which relief may be granted against that defendant.
20 Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient
21 facts alleged under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
22 (9th Cir. 1990); Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-534 (9th Cir. 1984).
23 For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the
24 complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v.

25 ⁷ 130 S. Ct. 2869 (2010).

26 ⁸ (See Order Granting Plaintiffs' Motion for Leave to File Fourth Amended Complaint,
27 Docket Item No. 321.)

1 City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved
2 in favor of the pleading. Walling v. Beverly Enters., 476 F.2d 393, 396 (9th Cir. 1973).

3 However, mere conclusions couched in factual allegations are not sufficient to state a cause
4 of action. Papasan v. Allain, 478 U.S. 265, 286 (1986); see also, McGlinchy v. Shell Chem. Co.,
5 845 F.2d 802, 810 (9th Cir. 1988). The complaint must plead “enough facts to state a claim for
6 relief that is plausible on its face.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).
7 Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by
8 amendment. Lopez v. Smith, 203 F.3d 1122, 1129 (9th Cir. 2000).

9 Claims brought under Section 10(b) of the Exchange Act and Rule 10b-5 must meet the
10 particularity requirements of Federal Rule of Civil Procedure 9(b). In re Daou Sys., Inc. Sec. Litig.,
11 411 F.3d 1006, 1014 (9th Cir. 2005). Rule 9(b) requires that “[i]n all averments of fraud or mistake,
12 the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P.
13 9(b).

14 Moreover, claims brought under Section 10(b) and Rule 10b-5 must also meet the stringent
15 pleading standards of the Private Securities Litigation Reform Act of 1995 (“PSLRA”). The PSLRA
16 amends the Exchange Act to require that a private securities fraud litigation complaint “plead with
17 particularity both falsity and scienter.” In re Daou, 411 F.3d at 1014. Specifically, a complaint
18 alleging securities fraud must “specify each statement alleged to have been misleading, the reason or
19 reasons why the statement is misleading, and if an allegation regarding the statement or omission is
20 made on information and belief, the complaint shall state with particularity all facts on which that
21 belief is formed.” 15 U.S.C. § 78u-4(b)(1); In re Cutera Sec. Litig., 610 F.3d 1103, 1107 (9th Cir.
22 2010).

23 **B. Motion to Strike**

24 Pursuant to Federal Rule of Civil Procedure 12(f), “the court may order stricken from any
25 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”
26 The Ninth Circuit has held that “[t]he function of a 12(f) motion to strike is to avoid the expenditure
27 of time and money that must arise from litigating spurious issues by dispensing with those issues
28

1 prior to trial.” Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev’d on other
2 grounds, Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994). It is appropriate for a district court to grant
3 a motion to strike where allegations create serious risk of prejudice to defendants, delay, and
4 confusion of issues. Id. at 1528.

5 **IV. DISCUSSION**

6 **A. Motion to Dismiss**

7 Defendants move to dismiss the Fourth Amended Complaint in part on the grounds that: (1)
8 under Morrison, all claims asserted on behalf of purchasers of Infineon ordinary shares on the
9 Frankfurt Stock Exchange must be dismissed; and (2) all claims based on the Fourth Amended
10 Complaint’s “False Statement Number 1” must be dismissed for failing to specify the time, place
11 and author of each statement alleged to be false. The Court examines each ground in turn.

12 **1. Effect of Morrison on Claims**

13 At issue is whether Plaintiffs are entitled to state claims on behalf of purchasers of Infineon
14 ordinary shares who purchased those shares on the Frankfurt Stock Exchange.

15 The “focus of the Exchange Act is . . . upon purchases and sales of securities in the United
16 States.” Morrison, 130 S. Ct. at 2884. Section 10(b) of the Exchange Act does not apply
17 extraterritorially; rather, it applies only to “transactions in securities listed on domestic exchanges”
18 and “domestic transactions in other securities.” Id. at 2883-84. Thus, a securities transaction must
19 occur on a domestic exchange to trigger application of § 10(b) of the Exchange Act. In re Alstom
20 SA Sec. Litig., 2010 WL 3718863, at *3 (S.D.N.Y. Sept. 14, 2010).

21 Here, Plaintiffs allege that “Infineon’s ordinary shares were listed and registered on the [New
22 York Stock Exchange], and actively traded on the Frankfurt Stock Exchange.” (FAC ¶ 127.) In its
23 March 6 Order, which was issued prior to the Supreme Court’s decision in Morrison, the Court
24 certified a Class including investors who purchased Infineon securities on the Frankfurt Stock

1 Exchange.⁹ (March 6 Order at 20.) Under the Supreme Court’s holding in Morrison, § 10(b) of the
 2 Exchange Act does not apply to transactions on foreign stock exchanges. 130 S. Ct. at 2883-84.
 3 Thus, Plaintiffs cannot state claims on behalf of individuals who purchased Infineon shares on the
 4 Frankfurt Stock Exchange.

5 Plaintiffs’ reliance on the fact that Infineon shares were “listed and registered” on the New
 6 York Stock Exchange to overcome Morrison is misplaced.¹⁰ In Morrison, the defendant had
 7 American Depositary Receipts which were listed on the New York Stock Exchange, though the
 8 defendant’s ordinary shares were only traded on foreign securities exchanges. 130 S. Ct. at 2875.
 9 Regardless of the fact that the defendant in Morrison had securities listed on the New York Stock
 10 Exchange, the Supreme Court held that the plaintiffs in Morrison were unable to state a claim for
 11 relief under § 10(b), because that section of the Exchange Act focuses only on securities transactions
 12 that take place in the United States. Id. at 2884-88. Here, Plaintiffs allege that Infineon has
 13 American Depositary Shares which are listed and actively traded on the New York Stock Exchange,
 14 and that Infineon has ordinary shares which are listed and registered on the New York Stock
 15 Exchange, but which are “actively traded” only on the Frankfurt Stock Exchange.¹¹ (FAC
 16

17 ⁹ Of the Infineon AG securities traded on both the New York Stock Exchange and Frankfurt
 18 Stock Exchange during the Class Period, 92% were traded on the Frankfurt Stock Exchange.
 19 (Declaration of Jennifer Gould in Support of Defendants’ Motion for Judgment on the Pleadings as
 20 to Reinhard Schroeder and All Other “Foreign Purchasers” or, in the Alternative, to Dismiss for
 21 Lack of Subject Matter Jurisdiction ¶ 24, Ex. 22, Docket Item No. 236.) Lead Plaintiff Schroeder is
 22 a German citizen who purchased Infineon AG common shares on the Frankfurt Stock Exchange.
 23 (Declaration of Mark D. Gursky in Support of Defendants’ Opposition to Plaintiffs’ Motion for
 24 Class Certification, Ex. A at 12:11-13:18, 134:24-135:6, D46, Docket Item No. 257.) Lead Plaintiff
 25 Peano is an Italian citizen who purchased Infineon AG common shares on the Frankfurt Stock
 26 Exchange. (Id., Ex. B at 10:10-11:12, 73:3-73:17, 81:19-82:17, 92:9-92:19.)

27 ¹⁰ (See Plaintiffs’ Opposition to Defendants’ Motion to Dismiss Fourth Amended Complaint
 28 at 5-7, hereafter, “Opp’n,” Docket Item No. 329.)

29 ¹¹ Plaintiffs use the terms “American Depositary Shares” and “American Depositary
 30 Receipts” interchangeably. (See Opp’n at 5 n.5.) American Depositary Receipts (“ADRs”) are
 31 negotiable certificates which evidence an interest in securities of a foreign issuer. (See 1 Edward F.
 32 Greene et al., U.S. Regulation of the International Securities and Derivatives Markets 2-19 (9th ed.
 33 2009).) ADRs are usually issued by a U.S. commercial bank (the “Depository”) with whose foreign
 34 correspondent the underlying shares have been deposited. (Id.) An ADR holder generally can
 35 exchange ADRs for the underlying shares at any time, and similarly, additional shares generally can

1 ¶ 127.) Given Morrison's holding that § 10(b) only applies to securities transactions that take place
 2 on domestic exchanges, these allegations are insufficient to state a claim under § 10(b). In re
 3 Alstom, 2010 WL 3718863, at *3.¹²

4 Accordingly, the Court GRANTS Defendants' Motion to Dismiss with respect to all claims
 5 asserted on behalf of individuals who purchased Infineon ordinary shares on the Frankfurt Stock
 6 Exchange with prejudice.

7 2. False Statement Number 1

8 At issue is whether the portions of the Fourth Amended Complaint which rely on "False
 9 Statement Number 1" should be dismissed for failing to state a claim with the necessary
 10 particularity.

11 Claims brought under Section 10(b) of the Exchange Act and Rule 10b-5 must meet the
 12 particularity requirements of Federal Rule of Civil Procedure 9(b), which requires that any averment
 13 of fraud must state with particularity the circumstances constituting fraud. In re Daou, 411 F.3d at
 14 1014. Under the heightened pleading standards imposed by the Private Securities Litigation Reform
 15 Act, a complaint must specify each statement alleged to be misleading along with the reason or
 16 reasons why the statement is misleading. In re Cutera, 610 F.3d at 1107.

17 Here, Plaintiffs allege as follows:

18 False Statement 1. (Misleading by Omission) From July 1, 1999 to June 15, 2002,
 19 Infineon and Infineon North America and their employees caused deceptive and misleading
 20 DRAM prices to be published, which were circulated throughout the market. (FAC ¶ 64.)

21 _____
 22 be deposited against issuance of additional ADRs. (Id.)

23 ¹² After Morrison, a number of district courts have considered allegations similar to those
 24 advanced here by Plaintiffs. These courts have held that Morrison bars plaintiffs from stating claims
 25 under § 10(b) for transactions that take place on foreign stock exchanges, even if the transactions
 26 involved securities that are "listed" in the United States. See, e.g., In re Alstom, 2010 WL 3718863,
 27 at *3 (holding that Morrison dictates that "transactions themselves must occur on a domestic
 28 exchange to trigger application of § 10(b)," regardless of where a security is "listed"); In re Royal
Bank of Scotland Group PLC Sec. Litig., 2011 U.S. Dist. LEXIS 3974, at *22 (S.D.N.Y. Jan. 11,
 2011) (stating that the "idea that a foreign company is subject to U.S. Securities laws everywhere it
 conducts foreign transactions merely because it has 'listed' some securities in the United States is
 simply contrary to the spirit of Morrison"); Stackhouse v. Toyota Motor Co., 2010 WL 3377409, at
 *1 (C.D. Cal. 2010) (finding that Morrison bars claims under § 10(b) where the "actual transaction
 takes place on the foreign exchange").

1 Based on the allegations above, the Court finds that False Statement Number 1 does not
2 specify each statement alleged to be misleading or explain the reason why any statement is
3 misleading. Instead, it identifies a time period of nearly three years and alleges that Defendants
4 “caused deceptive and misleading DRAM prices to be published” during that period. Because the
5 Fourth Amended Complaint does not specify any particular allegedly misleading statement in
6 relation to False Statement Number 1, or explain why any particular statement is misleading, it fails
7 to state a claim with the necessary particularity.

8 Accordingly, the Court GRANTS Defendants’ Motion to Dismiss those portions of the
9 Fourth Amended Complaint that rely on False Statement Number 1, with leave to amend with
10 particularity as required by Rule 9(b).

11 **B. Motion to Strike**

12 Defendants move to strike from the Fourth Amended Complaint the following: (1) all
13 references to Heinrich Florian and T. Rudd Corwin as Defendants,¹³ because the Court has already
14 dismissed all claims against them with prejudice; (2) all references to Charter Township as a
15 Plaintiff,¹⁴ because the Court has ordered Charter Township excluded from the class for lack of
16 standing; (3) all references to a claim arising under Section 20A of the Exchange Act,¹⁵ because the
17 Court has dismissed that claim with prejudice; (4) allegations of stock prices and losses before June
18 19, 2002, because the Court has already ruled that Plaintiffs fail to allege loss causation prior to that
19 date; and (5) allegations relating to the claim that Defendants violated Rule 10b-5(a) and (c) by
20 engaging in a scheme to inflate securities prices, because the Court has stated that this claim is “in
21 essence” the same as another of Plaintiffs’ theories, and would thus “only serve to confuse the
22 issues.” (Motion to Strike at 5-8.) The Court considers each of these in turn.

23 ¹³ Such references include the identification of Florian and Corwin as “Defendants” in the
24 Parties section of the Fourth Amended Complaint, and a reference to “defendants Infineon, Florian,
25 and Corwin.” (FAC ¶¶ 17-19, 27.)

26 ¹⁴ Such references include the identification of Charter Township as a “Lead Plaintiff” in the
27 Parties section of the Fourth Amended Complaint. (FAC ¶ 11.)

28 ¹⁵ (See FAC ¶¶ 8, 152-53.)

1 With respect to whether the Court should strike the first four items, the Court finds good
2 cause to strike these allegations from the Fourth Amended Complaint because: (1) In its January 25,
3 2008 Order, the Court dismissed Plaintiffs' claims against Florian and Corwin and any Section 20A
4 claim as to all Defendants with prejudice;¹⁶ and (2) In its March 6, 2009 Order, the Court excluded
5 Plaintiff Charter Township from the class, because the Court found that Charter Township lacked
6 standing.¹⁷ The Court also held that "Plaintiffs' only viable theory of loss causation . . . exclude[s]
7 investors who sold their stock before June 19, 2002."¹⁸ For that reason, the Court certified a Class
8 which was limited to investors who "sold their securities after June 18, 2002." (*Id.*) Thus,
9 references to Florian and Corwin as "Defendants," to Charter Township as a "Plaintiff," to the
10 dismissed Section 20A claim, and to losses prior to June 19, 2002 would create a serious risk of
11 confusion. *See Fogerty*, 984 F.2d at 1528. Accordingly, these allegations are ordered stricken from
12 the Fourth Amended Complaint.

13 The issue becomes whether the Court should strike allegations that Defendants violated Rule
14 10b-5(a) and (c) by engaging in a scheme to inflate Infineon's securities prices. Defendants contend
15 that these allegations are "immaterial and impertinent," because the Court has already determined
16 that they are "in essence" the same as Plaintiffs' "loss causation theory" which the Court found was
17 inadequate to allege loss causation. (*Id.*) Whether Plaintiffs can adequately plead loss causation
18 depends on whether they can show, *inter alia*, a causal link between the drop in stock price and the
19 truth becoming known about the misleading representations. (January 25 Order at 6.) In its January
20 25 Order, the Court identified two separate theories used by Plaintiffs to allege this causal link. (*Id.*
21 at 8.) Under the first theory, Plaintiffs alleged that investors suffered losses when DRAM prices
22 declined due to a weakening of Defendants' price-fixing scheme. (*Id.* at 9.) Thus, the Court found
23 that this theory failed to allege a loss caused by the truth becoming known about activities that the

24
25 ¹⁶ (January 25 Order at 16.)

26 ¹⁷ (March 6 Order at 12.)

27 ¹⁸ (March 6 Order at 20.)

1 fraud had concealed. (Id.) Under the second theory, Plaintiffs alleged that revelations about the
2 Department of Justice’s investigation of Infineon caused stock prices to drop. (Id. at 10-11.) The
3 Court found that this theory directly alleged that investors suffered losses when the truth became
4 known regarding Infineon’s involvement in the price-fixing conspiracy. (Id. at 11.) Thus, the Court
5 found that this theory adequately alleged loss causation. (Id.)

6 With regard to the Rule 10b-5(a) and (c) allegations at issue here, the Court stated that the
7 first theory—which alleged that investors suffered losses when DRAM prices declined due to a
8 weakening of Defendants’ price-fixing scheme, and which the Court found inadequate to allege loss
9 causation—was “in essence” the “loss causation allegation corresponding with Plaintiffs’ scheme
10 claim under 10b-5(a) and (c).” (January 25 Order at 9 n.6.) However, the Court did not hold that
11 Plaintiffs had failed to state a claim under 10b-5(a) and (c). Also, the Court did not state that
12 Plaintiffs’ inadequate loss causation theory was the *only* way Plaintiffs could state their 10b-5(a) and
13 (c) claim. Because the Court has not rejected Plaintiffs’ Rule 10b-5(a) and (c) allegations, it would
14 be inappropriate to strike them from the Fourth Amended Complaint.

15 Accordingly, the Court DENIES Defendants’ Motion to Strike the Rule 10b-5(a) and (c)
16 allegations.

17 V. CONCLUSION

18 The Court GRANTS in part and DENIES in part Defendants’ Motions to Dismiss and to
19 Strike as follows:

- 20 (1) The Court GRANTS Defendants’ Motion to Dismiss with prejudice, with respect to
21 all claims asserted on behalf of individuals who purchased Infineon ordinary shares
22 on the Frankfurt Stock Exchange;
- 23 (2) The Court GRANTS Defendants’ Motion to Dismiss those portions of the Fourth
24 Amended Complaint that rely on False Statement Number 1, with leave to amend;
- 25 (3) The Court GRANTS Defendants’ Motion to Strike all references to Florian and
26 Corwin as Defendants; all references to Charter Township as a Plaintiff; the Third
27


1 Claim for Relief, stating a claim under Section 20A of the Exchange Act; and all
2 allegations of losses prior to June 19, 2002; and

3 (4) The Court DENIES Defendants' Motion to Strike all allegations that Defendants
4 violated Rule 10b-5(a) and (c).

5 Any Amended Complaint shall be filed on or before **April 18, 2011** and shall be consistent
6 with the terms of this Order.

7 On **April 18, 2011 at 10 a.m.**, the Court will conduct a Case Management Conference. On
8 or before **April 8, 2011**, the parties shall file a Joint Case Management Statement. The Statement
9 shall include, *inter alia*, a good faith proposed schedule as to how this 2004 case should proceed.

10
11
12 Dated: March 17, 2011



JAMES WARE
United States District Chief Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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16 **Dated: March 17, 2011**

Richard W. Wieking, Clerk

17 **By: /s/ JW Chambers**
18 **Elizabeth Garcia**
19 **Courtroom Deputy**