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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

**IN RE COOPER SECURITIES
LITIGATION**

Case No.: SACV06-00169-CJC(RNBx)

**ORDER DENYING IN SUBSTANTIAL
PART MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

This case is a securities litigation involving the Cooper Companies (“Cooper”), a contact lens company, its individual officers and investors. Plaintiffs allege that both before and after Cooper acquired Ocular Sciences, Inc. (“Ocular”) in January of 2005, Cooper’s officers made several false statements to conceal problems that would affect its stock price. Plaintiffs allege that three categories of statements were false, namely, (1)

1 statements concerning Ocular's inventory strategy; (2) statements concerning Ocular and
2 Cooper's sales force integration; and (3) statements concerning the threat to Cooper's
3 business by Silicone Hydrogel lenses produced by competitors. Both Cooper and the
4 individual officers move for summary judgment as to all claims. For the following
5 reasons, the motion is DENIED in substantial part.¹

6
7 **BACKGROUND**

8
9 Cooper develops, manufactures and markets healthcare products through two
10 subsidiaries, CooperSurgical and CooperVision. (Pl.'s Corrected Response to Def.'s
11 Stmt of Uncontroverted Facts ("Resp. UF") No. 1.) CooperVision, which is the
12 subsidiary at issue in this matter, is responsible for developing, manufacturing and
13 marketing contact lenses. (Resp. UF No. 2.)

14
15 In 2004-05, which is the current class period, there were essentially two major
16 segments dominating the contact lens market. (Resp. UF No. 3.) The first was a
17 spherical segment and the second a specialty segment. (Resp. UF No. 3.) As noted by
18 Defendants, the market was divided into three geographic regions: the United States,
19 Europe and Asia/Japan. This litigation involves competition in the spherical market in
20 the United States. In 2004, there were several major competitors in the spherical market
21 offering varied products: Bausch & Lomb ("B&L"), CIBA Vision ("CIBA"), Johnson &
22 Johnson, CooperVision and Ocular Sciences. (Resp. UF No. 13.)

23
24 In 1999, B&L launched PureVision, a silicone hydrogel lens that was marketed as
25 a continuous-wear lens that could be worn continuously for 30 days and 30 nights.

26
27
28 ¹ Having read and considered the papers presented by the parties, the Court finds this matter
appropriate for disposition without a hearing. *See* FED. R. CIV. P. 78; LOCAL RULE 7-15.
Accordingly, the hearing set for March 8, 2010 at 1:30 p.m. is hereby vacated and off calendar.

1 (Resp. UF No. 18.) Silicone hydrogel has a higher DK – or oxygen permeability – than
2 standard hydrogel lenses. (Resp. UF No. 19.) Also in 1999, CIBA launched Focus Night
3 & Day, which was also a continuous wear lens made out of silicone hydrogel. (Resp. UF
4 No. 23.) As B&L and CIBA were marketing the silicone hydrogel lenses, Cooper
5 acquired the Proclear line of lenses, a non-silicone hydrogel lens, in 2002. (Resp. UF No.
6 26.) The Proclear lens is the only lens with FDA approval for the claim that the lens
7 “may provide improved comfort for contact lens wearers who experience mild discomfort
8 or symptoms relating to dryness during lens wear.” (Resp. UF No. 27.) Johnson &
9 Johnson also competed in the U.S. spherical market with three products: Acuvue,
10 Acuvue II and Acuvue Advance. Johnson & Johnson launched Advance in
11 approximately December 2003, which was the first silicone hydrogel lens marketed for
12 daily wear. (Resp. UF No. 29.) In contrast, Ocular competed in the spherical market
13 with Biomedics 55, a non-silicone lens, which was launched at some point prior to the
14 class period. (Resp. UF Nos. 15 and 16.) Ocular also developed a premium lens called
15 Biomedics Premier in early 2004, which Defendants assert was marketed as a
16 replacement to the Biomedics 55. (Def. Mem. In Support of Cooper Companies at 4.)
17

18 On May 4, 2004, Ocular held a conference call in which Ocular’s Chairman, John
19 Fruth, stated that “[w]e give up the upside of inventory build in the market place, and
20 we’re feeling a little bit of that right now as customers are taking their inventories down.”
21 (Resp. UF 47.) Additionally, on May 10, 2004, Ocular filed its quarterly 10-Q with the
22 SEC. (Resp. UF 48.) Ocular stated that a decrease in U.S. sales was “primarily due to a
23 continued decline in sales of our conventional reusable product line and lower sales of
24 disposable spheres as we believe customers began reducing their inventories in advance
25 of our second quarter launch of a new sphere product.” (Resp. UF No. 48.)
26

27 On July 28, 2004, the Cooper Board of Directors approved a proposed merger with
28 Ocular. (Resp. UF No. 52.) Cooper released a press release the same day announcing the

1 proposed merger. (Resp. UF No. 54.) Also that same day, Ocular issued a press release
2 that stated: “The Company’s growth rate in 2004 is based upon the experience in the
3 second quarter with customers managing down their existing inventories in advance of
4 the aspheric Biomedics 55 Premier launch.” (Resp. UF No. 53.) On July 29, 2004,
5 Cooper and Ocular hosted a joint conference call to discuss the merger. (Resp. UF 55.)
6 Toward the end of the call, Ted Huber, an industry analyst with Wachovia, asked John
7 Fruth the following question:

8
9 John, I’m less familiar with your guys kind of pipeline and forecast, but one
10 thing I did pick up, just looking at the numbers, was you grew about 5%
11 constant currency in the first half of this year, and the consensus revenue
12 estimates for you all, for Ocular, for ’05 and ’06, and I think in this guidance
13 here, as well, you’re giving us, it’s kind of more in the 10%, 11% range.
14 Can you just characterize where that acceleration comes from in the
15 business?

16
17 Mr. Fruth responded as follows:

18 Well, I think that if you look at where Ocular is today, we’ve got a pipeline
19 of products that are just coming. We mentioned some of them in Japan. We
20 just launched the Aspheric weekly disposable in the U.S. It’s getting great
21 reception. A multifocal coming, as well as another two-week disposable
22 product; the U.S., we are just starting to launch daily disposables; and we
23 got the silicone hydrogel coming next year. So the growth side of it is
24 coming from a new product pipeline that gives us a real opportunity to
25 participate in new markets as well.

26
27 After Mr. Fruth finished his answer, Cooper’s President and CEO, A. Thomas Bender,
28 added his thoughts:

29 I can answer it even another way. If you look at Ocular’s performance, I
30 think you’ll flash on very quickly that their international business is growing
31 very well. A lot of that is Japan as well as in Europe. Where they’re getting
32 hurt is in the U.S., as we see that. But remember what Ocular used to be –
33 Ocular was a commodity disposable [sphere] business, and there’s no doubt

1 we're kicking their butt a little bit and Advantage was, you know, Acuvue
2 Advantage was hurting them a little bit, and they were a little slow, and
3 they've done very well with their new specialty products, but what they
4 really did in the last six months, I think, has been very smart, and that is they
5 moved their new product, which is – it's a premier-designed [sphere]. It's
6 not what I would call a commodity, and what they're trying to do is move
7 those patients that are on the old Bio Medics product into this better product.
8 To do that effectively, they took a step back, and it's hurt their sales this
9 year, because they sure as hell didn't have a 5% constant currency last year.
10 With the strategy that they said they would do so they wouldn't have a lot of
11 overlap inventory. So what they did is they allowed that inventory of the old
12 product to decline as they built this new product in. So we looked at that
13 pretty strongly, too, to make sure we didn't have a hurt hunter, here –
14 somebody's lost a leg. They haven't lost a leg, it was part of their strategy.

15 (Resp. UF No. 56, 58-59.)

16 On August 6, 2004, Ocular filed its quarterly Form 10-Q for the second quarter.
17 (Resp. UF No. 63.) Ocular attributed a .3% second quarter increase, and a 1.5% first-half
18 decrease, in U.S. Sales to, in part, "lower sales of disposable spheres as we believe
19 customers are reducing their inventories of our older sphere product as a result of our
20 launch of our new sphere product." (Resp. UF No. 63.) On September 30, 2004,
21 Ocular's CEO, Steven Fanning, spoke at a UBS Global Life Sciences Conference. (Resp.
22 UF No. 64.) As to replacing Biomedics 55 with Biomedics Premier, Mr. Fanning noted:
23 "We're in the process in the second and third quarter in the U.S. of launching this
24 product. We are replacing our spherical product, our original spherical product, with this
25 product. Consequently, many of our retailers are basically taking down their inventories
26 to prepare for this launch. We did that in the second quarter with many retailers." (Resp.
27 UF No. 64.) On November 9, 2004, Ocular filed its form 10-Q for the quarter ending
28 September 30, 2004. Ocular reported that "U.S. sales were \$36.0 million and \$100.7
million for the three and nine months ended September 30, 2004, a 1.1% increase and
0.6% decrease over the same periods last year, respectively. These results are primarily
due to a continued decline in the sales of our conventional reusable product line and

1 lower sales of disposable spheres as we believe customers are reducing their inventories
2 of our older sphere product as a result of our launch of our new sphere product, offset by
3 growth in sales of disposable toric lenses.” (Resp. UF No. 65.)
4

5 On December 13, 2004, Cooper hosted a quarterly conference call for the fourth
6 quarter. (Resp. UF No. 69.) Mr. Bender had the following exchange with a business
7 analyst:
8

9 Q: On the market, certainly Bausch did put up a weaker US number and
10 Ocular did as well, but relatively Ocular actually grew faster than they had I
believe in 3Q than they had earlier in the year.

11 A: That’s right.

12 Q: So they didn’t actually – you could actually argue that they did better in
13 Q3 than the first part of the year, so there’s no impact on the weather. And
14 Bausch did have a tough comp relative to the first half of the year. And J&J
was weak, but they were still up 13 percent. Was J&J mostly all price (ph)
then?

15 A: . . . As far as Ocular is concerned, remember Ocular in the first 2
16 quarters of this year purposely held back on distribution of their Biomedics
17 so they could manage their inventories down. So that was a little bit
manipulating too. So again, I’m not trying to make excuses. A fact is a fact
18

19 Mr. Bender was also asked to comment on the import of new hydrogel technologies. He
20 responded with the following statement:
21

22 [S]ilicon hydrogel is a nice feature story. It is much like our Proclear line in
23 1 way in that they do address a definite need, and that need is there are
24 patients who have developed or will develop what we call afternoon dryness
25 after they have worn lenses for a period of time . . . And Proclear has been a
26 product that has certainly fit that need. The silicones are somewhat
positioned in the same place

27 I believe it’s going to be a niche product line. They’re not going to – there
28 are those that will disagree with me. We’ll see where they go. But they’re

1 not going to replace the traditional products that have been used in the
2 market. They are going to find a niche . . .

3 But we are doing very well, as you can see, with the numbers we've thrown
4 out with Proclear, because we believe Proclear and the silicones basically
5 will compete in the same market.

6
7 (Resp. UF No 70-71, A Bender Decl., Ex. 12 at 268-69, 271-72.)

8
9 The merger between Cooper and Ocular closed on January 6, 2005. (Resp. UF No.
10 68.) On March 9, 2005, Cooper hosted an earnings call to discuss its first fiscal quarter
11 results. (Resp. UF No. 82.) Robert Weiss, Cooper's COO, stated that as far as the
12 Cooper and Ocular merger was concerned: "The U.S. sales force has been fully
13 integrated, and had its national sales meeting in early February, so we're really going to
14 see the benefits from that point forward." (Bender Decl., Ex. 14 at 295.) Mr. Bender
15 also stated that "[t]he integration of the sales teams in Australia, Canada was quicker than
16 we thought. The U.S. went beautifully well. No glitches." (Bender Decl., Ex. 14 at
17 297.) With respect to the competition from silicone hydrogel products, Mr. Bender
18 stated: "And of course, I think all of you know Proclear competes head-to-head with the
19 latest hype on the silicone hydrogel products. So we're not only holding our own, but we
20 think we're doing very, very well against the silicon hydrogel products that are being
21 marketed for daily wear." (Bender Decl., Ex. 14 at 293.) He also stated: "Is it a real
22 competitor to Proclear – does it really – does it have an advantage over Proclear – the
23 Proclear material as a daily wear lens? And I'm going to tell you no." (Bender Decl.,
24 Ex. 14 at 298.) Mr. Bender also stated that silicone hydrogel "is a niche. The continuous
25 wear market is not going to go away, but it certainly isn't a growth market . . . It's a
26 specialty segment of the market. It fits our overall strategy, and we're going after it. On
27 the other hand, we believe Proclear – and you can see results we've had this quarter for
28 gosh sakes. We're doing very well against the daily silicon products." (Bender Decl.,

1 Ex. 14 at 298.) Finally, Mr. Bender stated: “I – you know, I get a little emotional on it,
2 because I think it’s a hype. It’s just hype all over again, and it makes a lot of sense for
3 continuous wear, high DK. I’m sorry. Makes no sense.” (Bender Decl., Ex. 14 at 303.)
4

5 On May 2, 2005, Health Products Research² data was released. Subsequently, on
6 May 5, 2005, Cooper issued a press release that lowered revenue estimates for the second
7 quarter. (Resp. UF No. 122.) Specifically the release stated:

8
9 CooperVision revenue estimates for the second quarter have been reduced
10 from a range of \$195 million to \$198 million to a range of \$186 million to
11 \$188 million. The reduction results primarily from continuing sales force
12 integration, territory realignment and training disruptions following the
13 January 2005 acquisition of Ocular Sciences, Inc. and from continuing high
14 inventory levels of Ocular Science’s spherical contact lenses in trade
15 channels in the United States that developed during the nine months prior to
16 the close of the acquisition.

17
18 Commenting on the revised CooperVision second quarter revenue guidance,
19 A. Thomas Bender, Cooper’s chairman and chief executive officer noted,
20 “The first quarter contact lens industry market research data that measures
21 patient visits to contact lens fitters, shows that following the acquisition,
22 combined CooperVision/Ocular Sciences product lines actually gained
23 market share in the disposable sphere category from the fourth quarter of
24 2004. This is the same category that the new silicone hydrogel lenses have
25 entered over the past 12 to 15 months.

26
27 “This supports the case for the drag of high trade inventories on revenue
28 rather than a slow down in the prescribing of our lenses, and also indicates
that silicone hydrogel lenses are competing largely among themselves for
market share in this category.

² HPR is a third-party organization that collects data from eye-care professionals about which lenses they are fitting. Cooper alleges that it relies on HPR data to measure end user demand for its products. (Cooper Mem. Summary Judgment at 5 n.2.)

1 (Bender Decl., Ex. 19 at 392.) Additionally on May 5, 2005, UBS Investment Research
2 issued a report that stated that recently released HPR data was “in line with results from
3 our survey that growth in SH [silicone hydrogel] is not necessarily a function of share
4 gains . . . Cooper is not losing significant Proclear business to silicone hydrogel.”
5 (Bender Decl., Ex. 26 at 447-48.)

6
7 On June 7, 2005, Cooper held its quarterly earnings call to report its second fiscal
8 quarter financial results. Mr. Bender stated that “[w]e are monitoring using Health
9 Products Research data on a monthly basis, any change in our market share, based on
10 these silicone products. At this point, I must tell you, I don’t see any impact of the
11 silicone products on our core product in this category which is, of course, our Proclear
12 product.” (Bender Decl., Ex. 23 at 417.)

13
14 Around August of 2005, Johnson & Johnson launched the Acuvue Oasys as an
15 upgrade to Acuvue Advance. (Resp. UF No. 37.) On November 21, 2005, Cooper
16 issued a press release revising guidance for the fourth fiscal quarter of 2005. (Resp. UF
17 No. 134.) In the press release, Mr. Bender stated: “Our core contact lens business –
18 single-use lenses and specialty lenses including our Proclear line – showed 20% growth
19 worldwide through October. This business accounts for about 60% of CooperVision’s
20 worldwide revenue. Our new product pipeline is robust, but new competitive silicone
21 hydrogel entries have hurt our two-week spherical lens business in the United States this
22 year. Our *Proclear* sphere, which competes in this monthly spherical lens category, has
23 been extremely successful, but it has not been able to fully contain the decline in the
24 growth of our two-week *Biomedics* spherical product line.” (Resp. UF No. 135.)
25 Following this press release, Cooper’s stock price dropped.

26
27 **LEGAL STANDARD**

1 Summary judgment is proper if the evidence before the Court “show[s] that there is
2 no genuine issue as to any material fact and that the movant is entitled to judgment as a
3 matter of law.” FED. R. CIV. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317,
4 322 (1986). A factual issue is “genuine” when there is sufficient evidence such that a
5 reasonable trier of fact could resolve the issue in the non-movant’s favor, and an issue is
6 “material” when its resolution might affect the outcome of the suit under the governing
7 law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears
8 the initial burden of demonstrating either that there are no genuine material issues or that
9 the opposing party lacks sufficient evidence to carry its burden of persuasion at trial.
10 *Celotex Corp. v. Catrett*, 477 U.S. at 325; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
11 *Ass’n*, 809 F.2d 626, 630-31 (9th Cir. 1987). Once this burden has been met, the party
12 resisting the motion “must set forth specific facts showing that there is a genuine issue for
13 trial.” *Anderson*, 477 U.S. at 256. In considering a motion for summary judgment, the
14 court must examine all the evidence in the light most favorable to the non moving party.
15 *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The court does not make
16 credibility determinations, nor does it weigh conflicting evidence. *Eastman Kodak Co. v.*
17 *Image Tech. Servs., Inc.*, 504 U.S. 451, 456 (1992).

18 19 ANALYSIS

20
21 In order to state a claim for securities fraud under Section 10(b) of the Securities
22 Exchange Act of 1934, a party must prove: “(1) a material misrepresentation or omission
23 by the defendant; (2) scienter; (3) a connection between the misrepresentation or
24 omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or
25 omission; (5) economic loss; and (6) loss causation.” *Stoneridge Inv. Partners, LLC v.*
26 *Scientific-Atlanta, Inc.*, 552 U.S. 148, 156-57 (2008). Defendants leverage three
27 principle challenges to the statements that Plaintiffs allege violated Section 10(b).
28 Defendants argue that Plaintiffs have not produced evidence of loss causation as to

1 statements made on December 13, 2004 and March 9, 2005, that Plaintiffs have not
2 produced evidence of falsity or materiality as to any of the statements, and that Plaintiffs
3 have failed to produce any evidence of scienter as to any of the statements alleged to be
4 false or misleading.

5
6 Plaintiffs bear the burden of proving that Defendants' statements were false or
7 misleading. A material statement of fact is false if it is contradicted by true facts. *In re*
8 *McKesson HBOC, Inc.*, 126 F. Supp. 2d 1248, 1265 (N.D. Cal. 2000). In contrast, "[a]
9 projection or statement of belief is a 'factual' misstatement actionable under § 10(b) if (1)
10 the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3)
11 the speaker is aware of undisclosed facts tending to seriously undermine the statement's
12 accuracy." *Kaplan v. Rose*, 49 F.3d 1363 (9th Cir. 1994); *In re Apollo Group Inc. Sec.*
13 *Litig.*, 509 F. Supp. 2d 837, 844 (D. Ariz. 2007); *In re 2TheMart.com, Inc. Sec. Litig.*,
14 114 F. Supp. 2d 955, 961 (C.D. Cal. 2000).

15
16 Plaintiffs also bear the burden of proving that the statements were material to
17 investors. Generally, materiality is established by "showing that a reasonable shareholder
18 would consider the misrepresentation or omission important, because it altered the total
19 mix of available information." *Provenz v. Miller*, 102 F.3d 1478, 1489 (9th Cir. 1996).
20 "Whether an omission is 'material' is a determination that 'requires delicate assessments
21 of the inferences a 'reasonable shareholder' would draw from a given set of facts and the
22 significance of those inferences to him, and these assessments are peculiarly ones for the
23 trier of fact.'" *Provenz*, 102 F.3d at 1489 (quoting *Fecht v. Price*, 70 F.3d 1078, 1080
24 (9th Cir. 1995)). However, "[i]f the disclosure of certain information has no effect on
25 stock prices, it follows that the information disclosed was immaterial as a matter of law."
26 *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1330 (3d Cir. 2002).

1 Plaintiffs will also need to demonstrate that the statements at issue were made with
2 scienter. Plaintiffs will need to demonstrate that the defendants had “ ‘a mental state
3 embracing an intent to deceive, manipulate or defraud.’” *Provenz*, 102 F.3d at 1490
4 (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1424 (9th Cir. 1994)).
5 Plaintiffs will be able to establish scienter by proving “either actual knowledge or
6 recklessness.” *Id.* Scienter should *only* be resolved at summary judgment “where ‘there
7 is no rational basis in the record for concluding that any of the challenged statements was
8 made with the requisite scienter.’” *Provenz*, 102 F.3d at 1490 (internal quotation
9 omitted).

10
11 Finally, Plaintiffs will need to prove loss causation. In order to demonstrate loss
12 causation, a plaintiff must establish: (1) artificial inflation caused by a misrepresentation;
13 (2) a “relevant truth” that was disclosed to the market as to that misrepresentation; and
14 (3) a significant stock decline caused by the revelation of that truth. *Dura*
15 *Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342-47 (2005); *Metzler Inv. GMBH v.*
16 *Corinthian Colls., Inc.*, 540 F.3d 1049, 1063 (9th Cir. 2008). As Defendants only
17 challenge loss causation as to a limited number of statements, the Court will address that
18 element first, and then will subsequently address the statements based on category.

19 20 **1. Loss Causation**

21
22 As a preliminary matter, Defendants challenge Plaintiffs’ ability to prove loss
23 causation as to Mr. Bender’s statements made on the December 13, 2004 conference call
24 and to Mr. Weiss’s and Mr. Bender’s statements made on the March 9, 2005 conference
25 call. Both parties submitted reports of economic experts concerning the degree of
26 inflation caused by all of the alleged misstatements. The experts agree that the December
27 13, 2004 and March 9, 2005 statements did not increase inflation that may have already
28

1 been incorporated into Cooper's stock price. Feinstein Report, Ex. 3; Kleidon Rebuttal
2 Report ¶¶ 16-36.³

3 According to Plaintiffs' expert, Dr. Feinstein, the December 13, 2004 and the
4 March 9, 2005 statements maintained the inflation present in the stock price because
5 these conference calls afforded Mr. Bender and Mr. Weiss the opportunity to tell the
6 truth, and they allegedly continued to lie. (Alvarez Decl., Ex. 12 at 161:25-162:18.) Dr.
7 Feinstein conceded that the statements did not add additional inflation to the stock price,
8 and Dr. Feinstein's chart attached to his expert report reflects no change in inflation on
9 either December 13, 2004 or March 9, 2005 or immediately before or after those dates.
10 (Feinstein Report, Ex. 3.) Defendants argue that this makes the statements not actionable
11 as a matter of law. The Court disagrees.

12
13 Dr. Feinstein claims that instead of telling the truth, Defendants continued
14 "doubling-down" the alibi for why Ocular's growth was slow. (Alvarez Decl., Ex. 12 at
15 162:5.) Instead of revealing a relevant truth, Mr. Bender's alleged falsehoods "propped
16 up" the stock price. (Alvarez Decl., Ex. 12 at 163:9-11.) Additionally, Dr. Feinstein
17 stated that "if the truth had been told, then [the stock price] would have fallen . . ."
18 (Alvarez Decl., Ex. 12 at 221: 3-4.) Though Defendants' expert disagrees with Plaintiffs'
19 expert, it is disputed as to whether the statements caused artificial inflation to continue to
20 be incorporated into the stock price, as opposed to revealing the truth, which allegedly
21 would have caused the stock price to fall. Accordingly, there are disputed issues of fact
22 as to whether Plaintiffs can establish loss causation.

23 24 **2. Inventory Statements**

25 26 **Falsity, Materiality and Scienter**

27
28 ³ Defendants leverage several evidentiary objections to evidence that the Court has relied on in
this order. These objections are OVERRULED.

1
2 Defendants assert that Plaintiffs cannot demonstrate either falsity, materiality or
3 scienter for any of the statements concerning product inventory. The Court disagrees. As
4 a preliminary matter, there is a dispute concerning what, exactly, Mr. Bender meant when
5 he stated on July 29, 2004 that Ocular “allowed that inventory of the old product to
6 decline as they built this new product in. So we looked at that pretty strongly, too, to
7 make sure we didn’t have a hurt hunter here.” What Mr. Bender meant is an issue of fact.
8 Additionally, assuming Mr. Bender meant to suggest that Cooper had actually
9 investigated Ocular’s implementation of its inventory strategy, there are disputed issues
10 of fact as to whether Cooper actually investigated this. In deposition, Mr. Bender
11 testified that he did not personally investigate Ocular’s inventory strategy and relied on
12 the due diligence team headed by Mr. Fryling to verify that the strategy was in fact being
13 executed. (Alvarez Decl., Ex. 10 at 65:10-66:8, 80:6-81, 91:24-92:3, 108:12-125:8.) In
14 contrast, Mr. Fryling testified that he did not recall personally verifying that the strategy
15 was being executed. (Alvarez Decl., Ex. 7 at 191:3-194:19, 195:9-208:16.) Plaintiffs
16 have also provided evidence that Ocular may actually have been building up inventory of
17 Biomedics 55, and not reducing it as Mr. Bender suggested in his July and December
18 2004 statements. For example, Steve Neil, Cooper’s CFO, issued a report dated June 23,
19 2005, re: 2004 Inventory Valuation, in which he stated that “customers did not convert as
20 much business away from Biomedics 55 lens, resulting in the need to carry inventories of
21 both products.” (Alvarez Decl., Ex. 87 at COO 06241127-28.) While Defendants assert
22 that this simply means that customers were carrying inventories of both products, a
23 reasonable juror might conclude that this meant that Ocular continued to build Biomedics
24 55 inventory excessively, which would contradict Mr. Bender’s statements that Ocular
25 had leveled off Biomedics 55 distribution. These conflicts persuade the Court that there
26 is a dispute of material fact as to whether Mr. Bender’s inventory statements were false or
27 misleading and would be material to an investor. This is also sufficient to create a
28 dispute as to whether the statements were made with scienter.

1
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3
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5 **3. Sales Force Integration Statements**

6 **Falsity, Materiality and Scienter**
7

8
9 Plaintiffs contend that Mr. Weiss's and Mr. Bender's March 9, 2005 statements
10 that the integration of Cooper and Ocular's sales forces "went beautifully well" and that
11 the sales forces were "fully integrated" were false or misleading and material. (Opp. at
12 36.) Defendants assert that Mr. Bender's statement that the integration of the sales forces
13 had gone "beautifully well" is not actionable because it is immaterial as a matter of law
14 as it is "not capable of objective verification" and "lack[s] a standard against which a
15 reasonable investor could expect [it] to be pegged." *In re Impac Mortgs.*, 554 F. Supp.
16 2d 1083, 1096 (C.D. Cal. 2008). The Court disagrees. Mr. Bender was speaking in the
17 past tense, i.e., he stated that the integration of the U.S. sales force *went* beautifully well,
18 and a reasonable juror could conclude that Mr. Bender meant to convey that the
19 integration had been successfully completed. Accordingly, this statement is capable of
20 objective verification and is therefore actionable.

21
22 Plaintiffs present evidence to demonstrate that as of February 2005, reports from
23 sales managers in the field included phrases like "[w]orking for two separate companies –
24 very cumbersome," and "we need to get the two organizations on the same sheet of music
25 ASAP!" (Alvarez Decl., Ex. 18 at 05371601 and 05371629.)⁴ Additionally, Cooper
26

27
28 ⁴ Defendants object to Exhibit 18 on hearsay and lack of foundation grounds. Defendants have
also filed a motion in limine to exclude all evidence and argument suggesting, stating, implying
or inferring that any statement in Cooper's field sales reports is actually true. This objection

1 stated on May 5, 2005 that Cooper's revision in guidance was due in part to "continuing
2 sales force integration," (Alvarez Decl., Ex. 75), which appears to conflict with Cooper's
3 original representations that the sales forces were fully integrated as of March 9, 2005.
4 Though the top executives declare that the integration was complete, this appears to
5 conflict with the reports submitted by the employees who were on-the-ground. This is
6 sufficient to create a dispute of material fact as to whether the sales forces integration
7 statements were false or misleading and whether this information would have been
8 material to an investor. Additionally, Mr. Bender acknowledged that he received and
9 would "scan through some" of the sales reports. (Alvarez Decl., Ex. 10 at 134:12-135:4.)
10 Mr. Weiss and Mr. Bender claim that Mr. McLean told them that the sales forces were
11 fully integrated, which they argue negates scienter. (SUF 73, 78.) But Plaintiffs contend
12 that Mr. Bender and Mr. Weiss received the Field Sales Reports after Mr. McLean made
13 his report to them, but before they made their March 9, 2005 statements. This is
14 sufficient to create a dispute of material fact as to whether the statements were made with
15 scienter.

16 **4. Silicone Hydrogel Statements**

17
18 Finally, Plaintiffs contend that the statements made concerning competition from
19 silicone hydrogel lenses were false or misleading and would have been material to an
20 investor. The Court agrees that there are issues of material fact as to whether some of
21 Mr. Bender's statements concerning the threat that silicone hydrogel lenses posed to
22 Cooper's business were false or misleading and material.
23

24 **a. Falsity and Materiality**

25 **i. December 13, 2004 and March 9, 2005 Statements**

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27
28 **OVERRULED.** The Field Sales Reports are both admissions by a party opponent and business records. FED. R. EVID. 801 (d)(2)(A) and arguably 803(6).

1
2 Defendants argue that the term “niche” is not actionable because it is not capable
3 of objective verification and lacks a standard against which a reasonable investor could
4 expect it to be pegged. *Impac*, 554 F. Supp. 2d at 1096. “Statements that fall within
5 [this] rule tend to use terms that are not measurable and not tethered to facts that a
6 reasonable person would deem important to a securities investment decision.” *In re*
7 *Cornerstone Propane Partners, L.P. Sec. Litig.*, 355 F. Supp. 2d 1069, 1087 (N.D. Cal.
8 2005); *In re Splash Technology Holdings, Inc. Sec. Litig.*, 160 F. Supp. 2d 1059, 1076-77
9 (N.D. Cal. 2001). The Court agrees. The term ‘niche’ is comparable to corporate phrases
10 of optimism like “very well” and “strong,” which are both vague and imprecise ways of
11 describing a product’s import or performance. Similarly here, Mr. Bender’s statement
12 that silicone hydrogel would be a “niche” product is too vague to be measurable and is
13 therefore immaterial as a matter of law.

14
15 Defendants also argue that Mr. Bender’s statement on March 9, 2005 that “we
16 think we’re doing very, very well against the silicon hydrogel products” and “[w]e’re
17 doing very well” against silicone hydrogel lenses are not actionable. The Court does not
18 agree. While it is true that courts have previously held that statements like, “doing very
19 well” are “nothing more than “ ‘puffing,’ which reasonable investors know do not
20 guarantee future success,” *In re Syntex Corp. Sec. Litig.*, 855 F. Supp. 1086, 1095 (N.D.
21 Cal. 1994), Mr. Bender’s statement must be taken in context. Mr. Bender was making
22 specific statements about Proclear’s competition with silicone hydrogel products and
23 stated that Proclear was doing very, very well against silicone hydrogel. If, in fact,
24 Proclear was doing very poorly against silicone hydrogel lenses, then the statement could
25 be false. Additionally, Plaintiffs have presented evidence that Cooper acknowledged in
26 internal documents that it was “out of play” and in the long run “could be at a major
27 disadvantage” because it did not have a silicone hydrogel lens. (Alvarez Decl., Ex. 63 at
28 COO 00017922.) Another internal memorandum stated that one of the reasons for a

1 February 2005 revenue shortfall was that “[p]roduct performance has been impacted by
2 significant declines in the harvest line and spheres impacted by silicon hydrogel (siho)
3 noise.” (Alvarez Decl., Ex. 37 at COO 05016264.) This is sufficient to create a dispute
4 of material fact as to whether the statement was false or misleading.

5
6 **ii. May 5, 2005 Statement**

7
8 In the May 5, 2005 press release, Cooper announced that it was revising revenue
9 guidance for the second quarter. (Bender Decl., Ex. 19.) Mr. Bender was quoted as
10 saying that “[t]he first quarter contact lens industry market research data that measures
11 patient visits to contact lens fitters shows that following the acquisition, combined
12 CooperVision/Ocular Sciences product lines actually gained market share in the
13 disposable sphere category from fourth quarter of 2004. This is the same category that
14 the new silicone hydrogel lenses have entered over the past 12 to 15 months. This . . .
15 indicates that silicone hydrogel lenses are competing largely among themselves for
16 market share [in the disposable sphere] category.” (Bender Decl., Ex. 19.) Plaintiffs
17 contend that Mr. Bender’s statement that “silicone hydrogel lenses are competing largely
18 among themselves for market share” was false or misleading and material. Not
19 surprisingly, Defendants argue that Plaintiffs have no evidence to support this
20 proposition.

21
22 Following the release of the HPR data on May 2, 2005, to which Mr. Bender
23 referred in the press release, Cooper’s stock price declined. (Meng Decl., Ex. 39 at ¶¶
24 25-26, Ex. 4.) Cooper stated that the resulting revenue guidance revision announced on
25 May 5, 2005, was due to “continuing sales force integration, territory realignment and
26 training disruptions following the January 2005 acquisition of Ocular Sciences, Inc. and
27 from continuing high inventory levels of Ocular Science’s spherical contact lenses in
28 trade channels in the United States that developed during the nine months prior to the

1 close of the acquisition.” (Alvarez Decl., Ex. 75 at COO 03014640.) Plaintiffs have
2 produced evidence that Cooper knew but was attempting to conceal the fact that its
3 lowered revenue estimates were also due to competition from silicone hydrogel lenses.
4 Plaintiffs have provided evidence that following the release of the HPR data, Mr. Bender
5 communicated with the Senior Director of Marketing, Michael Menard to request
6 “additional insight on the HPR data.” (Alvarez Decl., Ex. 5 at 231:19-232:1.) Mr.
7 Menard testified that Mr. Bender was “looking for some further information on two-week
8 disposable categories.” (Alvarez Decl., Ex. 5 at 234:5-11.) Mr. Bender was also looking
9 for information about “[g]eneral market conditions,” and Plaintiffs have provided
10 evidence of Mr. Menard’s analysis. In an email to Mr. Bender, dated May 3, 2005, Mr.
11 Menard stated that “OSI 2 week share for private labels in Mass an[d] high volume retail
12 is eroding so quickly it is tough to get a real fix on the rate of decline. The new news
13 brought by Advance and O2 Optix in the 2 week ca[t]egory was long overdue as seen in
14 the vol of 2 week fits increasing faster than the entire market. The OSI aspheric was 12
15 to 18 mos too late into the market.” (Alvarez Decl., Ex. 46.) Mr. Menard also indicated
16 that “SIOH introductions have increased new fit activity for 2 week.” (Alvarez Decl., Ex.
17 47.) Plaintiffs also produced evidence that on May 3, 2005, Norris Battin, Cooper’s Vice
18 President of Investor Relations, wrote in response to the question: “I notice your stock
19 has broken below \$60. What’s going on??,” “Main issues is silicone hydrogel
20 competition; some other smaller things, too.” (Alvarez Decl., Ex. 62.)

21
22 In addition, Plaintiffs have presented emails between Mr. Fryling and other Cooper
23 officers, pre-dating the May 2005 conference call, in which he appeared to be strategizing
24 about how to prevent Cooper from losing market share to silicone lenses. (Alvarez Decl.,
25 Ex. 50.) He proposed “a Pepsi challenge against the 2 week silicone lenses. We could
26 identify those chains where we are loosing [sic] the most amount of hydro gel business.”
27 (Alvarez Decl., Ex. 50.) Some of the emails also reflect concerns that Ciba Vision was
28 launching a new product and aiming “to kill Biomedics 55,” and Mr. Fryling’s response

1 was that this news reconfirmed their “strategy to put as much focus as possible on
2 Proclear until we can obtain our own silicone product.” (Alvarez Decl., Ex. 57.)
3 Plaintiffs also produced Mr. Weiss’s personal notes, dated March 23, 2005, in which he
4 wrote: “Biomedics Spheres being beat up with SIHO.” (Alvarez Decl., Ex. 72 at COO
5 00018079, Ex. 9 at 333:25-224:25.) This evidence is sufficient to create a dispute of
6 material fact as to whether Cooper’s representations on May 5, 2005 concerning silicone
7 hydrogel competition were false or misleading and material.

8
9 **iii. June 7, 2005 Statement**

10
11 During Cooper’s regular quarterly earnings call to report second quarter financial
12 results on June 7, 2005, Mr. Bender stated that he did not “see any impact of the silicone
13 products on our core product in this category which is, of course, our Proclear product.”
14 Defendants argue that the term “impact” is not “capable of objective verification” and is
15 therefore not actionable. *Impac*, 554 F. Supp. 2d at 1096. While this is a closer call, Mr.
16 Bender did state that he did not see *any* impact of silicone products on the Proclear
17 product. It is possible to determine whether there was any impact of the silicone products
18 on Proclear, which would enable a reasonable juror to determine whether Mr. Bender’s
19 statement was either false or misleading and material.

20
21 Additionally, Plaintiffs provided an internal memorandum prepared by Vice
22 President of U.S. Marketing, Tom Shone, sent to Mr. Bender in an email dated June 3,
23 2005, which stated that “recent product entries by J&J (Acuvue Advance) and Ciba (O2
24 Optix) have made premium materials available in the 2 week market (2 wk SIOH).
25 These moves have put serious pressure on our core 2 week hydrogel business.” (Alvarez
26 Decl., Ex. 33, 83.) The memo also stated that “[a]ttempts to position Proclear
27 Compatibles more aggressively against 2 week SIOH have been met with marginal
28 acceptance,” and “our attempts to compete directly against 2wk SIOH products will be

1 met with limited success.” (Alvarez Decl., Ex. 33 at COO 04727796.) The “March 2005
2 highlights” memorandum also stated that there were three current US issues challenging
3 the team, the first of which was “[m]aintaining current share position in the disposable
4 sphere category due to the increased competitive pressure relating to silicon hydrogel
5 products.” (Alvarez Decl., Ex. 127 at COO 00194554, Ex. 83.) The memo also stated
6 that the “U.S. organization is under intense competitive pressure, especially as it relates
7 to our sphere portfolio. The market noise around silicon hydrogel products is extremely
8 high.” (Alvarez Decl., Ex. 127 at COO 0019554.) Plaintiffs have also provided
9 memoranda from field representatives dated between April 2004 and May 2005 that
10 appear to document the recurring theme that Cooper desperately needed a silicone
11 hydrogel product if it hoped to continue to compete effectively in the spherical market.
12 (Alvarez Decl., Exs. 14-21, 110, 113.) This evidence is sufficient to create a dispute of
13 material fact as to whether Mr. Bender’s statement was false or misleading and whether it
14 was material.

15 16 **b. Scierter**

17
18 Defendants also argue that Plaintiffs are unable to establish that statements
19 concerning silicone hydrogel competition were made with scierter. Defendants submit
20 declarations from Mr. Bender, Mr. Weiss and Mr. Fryling in which they state that they
21 “genuinely believed” these statements when they were made. As noted previously,
22 Plaintiffs have provided internal documents that suggest that Defendants either knew or
23 were reckless in not knowing that Cooper’s market share was potentially declining due to
24 competition from silicone hydrogel products. Ex. 39, Ex. 42, Ex. 48, Ex. 46-47, Ex. 33.
25 This evidence is sufficient to create a dispute of material fact as to whether the statements
26 concerning silicone hydrogel were made with scierter.

27 **5. Weiss and Fryling Liability for Statements Made by Others**

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i. **Section 10(b)**

Mr. Weiss argues that regardless of his liability for his statement concerning sales force integration, he cannot be held liable for any remaining statements because Plaintiffs cannot demonstrate either that he personally wrote the words or had substantial participation or intricate involvement in their preparation. Similarly, Mr. Fryling asserts that since he did not say any of the statements that Plaintiffs currently allege are false, he cannot be held liable for any of the allegedly false statements. The Ninth Circuit has held that in order to state a §10(b) violation, Plaintiffs must prove, with respect to at least one of the challenged statements, that a Defendant either (1) personally spoke or wrote the words, or (2) had “substantial participation or intricate involvement in the preparation” of them. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1061 n.5 (9th Cir. 2000).

There are issues of fact as to whether either Mr. Fryling or Mr. Weiss had substantial participation or intricate involvement in preparing the allegedly false statements. Mr. Fryling testified that he met with Mr. Bender and Mr. Weiss to help them prepare for investor conference calls. (Alvarez Decl., Ex. 7 at 156:7-157:4.) Plaintiffs also point to Mr. Bender’s testimony, in which he stated that he used feedback from Mr. Fryling when he made his inventory statements. (Alvarez Decl., Ex. 10 at 64:7-12, 114:11-16, 123:10-24.) Mr. Bender reported that both Mr. Weiss and all of CooperVision management reviewed the May 5, 2005 press release. (Alvarez Decl., Ex. 10 at 174:10-176:12.) Mr. Battin testified that press releases from the Cooper Companies were reviewed by management. (Alvarez Decl., Ex 8 at 29:8-13.) This is sufficient to create a dispute of fact as to whether either Mr. Weiss or Mr. Fryling had substantial participation or intricate involvement in the false statements.

1
2 ii. **Section 20(a)**

3
4 Defendants also assert that Mr. Weiss and Mr. Fryling are not liable as a control
5 person under § 20(a) of the Securities Exchange Act. In order to prove liability under §
6 20(a), Plaintiffs must prove: (1) a primary violation of the federal securities laws; and (2)
7 that the Defendant, whether directly or indirectly, exercised actual power or control over
8 the primary violator. *Paracor Fin., Inc. v. GE Capital Corp.*, 96 F.3d 1151, 1161 (9th
9 Cir. 1996). Whether a Defendant is a “controlling person ‘is an intensely factual
10 question,’ involving scrutiny of the defendant’s participation in the day-to-day affairs of
11 the corporation and the defendant’s power to control corporate actions.” *Kaplan*, 49
12 F.3d at 1382 (citing *Arthur Children’s Trust v. Keim*, 994 F.2d 1390, 1396-97 (9th Cir.
13 1993)). The Ninth Circuit has acknowledged that the “SEC has defined ‘control’ to
14 mean: ‘[T]he possession, direct or indirect, of the power to direct or cause the direction of
15 the management and policies of a person, whether through ownership of voting securities,
16 by contract, or otherwise.’” 17 C.F.R. § 230.405; *Howard v. Everex Sys., Inc.*, 228 F.3d
17 1057, 1065 n.9 (9th Cir. 2000). Good faith is an affirmative defense to a § 20(a) claim.
18 *Id.* As the Court has already found that there are disputed issues as to whether there was
19 a primary § 10(b) violation, the only remaining question is whether there is a material
20 issue as to whether either Mr. Fryling or Mr. Weiss exercised actual power or control
21 over the primary violator.

22 **1. Mr. Fryling**

23
24 Mr. Fryling was not an officer of Cooper. (Fryling Decl. ¶ 7.) Rather, he was
25 COO of Cooper’s subsidiary, CooperVision, from October of 2003 to January of 2005, at
26 which point he became the President of CooperVision. (Fryling Decl. ¶ 3.) It is
27 undisputed that Mr. Fryling reported to Mr. Bender before January of 2005. (Fryling
28 Decl. ¶ 5.) It also is undisputed that Mr. Fryling reported to Mr. Weiss starting around

1 January of 2005. (Fryling Decl. ¶ 5; Weiss Decl. ¶ 5.) It is difficult to understand how
2 Mr. Fryling could have exercised actual power and control over Cooper's officers when
3 he was an officer of Cooper's subsidiary, CooperVision. *Middlesex Retirement Sys. v.*
4 *Quest Software Inc.*, 527 F. Supp. 2d 1164 (C.D. Cal. 2007). In *Middlesex*, the Court
5 determined that Plaintiffs had insufficiently pled control person liability against a Vice
6 President where the other § 10(b) Defendants held positions of Vice President or higher.
7 *Id.* at 1194. This situation is similar.

8
9 As evidence that Mr. Fryling exercised actual power or control, Plaintiffs point to
10 Mr. Bender's testimony that Mr. Fryling was involved in the decision to purchase Ocular
11 and managed due diligence in connection with the merger. (Alvarez Decl., Ex. 10 at
12 64:7-12, 114:11-6.) What Plaintiffs fail to confront, however, is that Mr. Fryling stated
13 in his sworn declaration that he put together a plan and team for due diligence at Mr.
14 Bender's direction. (Fryling Decl. ¶ 10.) Plaintiffs also point to the fact that Mr. Fryling
15 testified that he would provide management reports on CooperVision business to Mr.
16 Bender and Mr. Weiss to help them prepare for the conference calls, and Mr. Bender and
17 Mr. Weiss would follow up with questions. (Alvarez Decl., Ex. 7 at 156:13-157:4.)
18 While Mr. Fryling clearly had input, this evidence is not sufficient to demonstrate that he
19 exercised actual power or control over Cooper policy or management or over Mr. Bender
20 or Mr. Weiss. Accordingly, Defendants' summary judgment motion is GRANTED as to
21 Mr. Fryling's § 20(a) liability.

22 23 **2. Mr. Weiss**

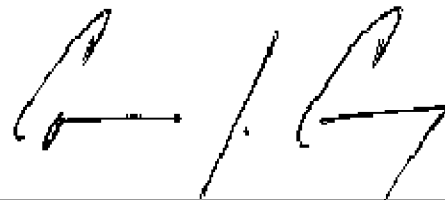
24
25 It is undisputed that Mr. Weiss was Cooper's COO during the class period. Mr.
26 Fryling testified that both Mr. Bender and Mr. Weiss were included on all emails where
27 management was "trying to understand what was going on with the business," and Mr.
28 Weiss had continuing access to Field Sales Reports. (Alvarez Decl., Ex. 7 at 259:12-17;

1 89:16-17.) Mr. Bender also shared his analysis of HPR data with Mr. Weiss. (Alvarez
2 Decl., Ex. 10 at 58:5-25.) This evidence is sufficient to create a dispute of material fact
3 as to whether Mr. Weiss exercised actual power and control over the day-to-day Cooper
4 activities, and accordingly, whether he can be held liable as a control person.
5

6 **CONCLUSION**
7

8 For the foregoing reasons, Defendants' motion for summary judgment is DENIED
9 in substantial part.
10

11
12 DATED: March 4, 2010



13
14 CORMAC J. CARNEY
15 UNITED STATES DISTRICT JUDGE
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