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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 ROEI AZAR, et al.,
8 Plaintiffs,

9 v.

10 YELP, INC., et al.,
11 Defendants.

Case No. [18-cv-00400-EMC](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS**

Docket No. 31

12
13 Plaintiffs, investors in Yelp stock, bring this putative securities class action against
14 Defendants Yelp, Inc., its CEO Jeremy Stoppelman, CFO Lanny Baker, and COO Jed Nachman
15 (collectively, “Defendants”). The crux of Plaintiffs’ complaint is that Yelp made false and
16 misleading statements regarding its expected revenues for fiscal year 2017, particularly in relation
17 to its advertising program with local businesses. Yelp allegedly touted the program’s strong
18 advertiser retention rate and optimistic growth projections through early 2017, despite knowing
19 that a significant number of the local advertisers were not renewing their contracts. When Yelp
20 made downward adjustments to its projections and disclosed those retention problems in May
21 2017, its stock prices fell. Plaintiffs assert that Defendants’ actions violate Sections 10(b) and
22 20(a) of the Securities Exchange Act, as well as Rule 10b-5 promulgated thereunder.

23 Pending before the Court is Defendants’ motion to dismiss the class action complaint. For
24 the reasons discussed below, the motion is **GRANTED IN PART** and **DENIED IN PART**.

25 **I. FACTUAL AND PROCEDURAL BACKGROUND**

26 Named Plaintiffs Roie Azar and Jonathan Davis filed the operative amended complaint on
27 June 25, 2018, seeking to represent the “class of persons and entities that purchased or acquired
28 Yelp securities between February 10, 2017 and May 9, 2017.” Docket No. 29 (“FAC”) ¶ 1. The

1 complaint alleges that Yelp made materially false and misleading statements regarding its
2 expected 2017 earnings.

3 A. Yelp’s Business and Advertising Model

4 Yelp is an “online platform devoted largely to reviews of businesses.” FAC ¶ 2. It derives
5 revenue from businesses advertising on its platform. *Id.* ¶¶ 3, 19. According to Plaintiffs,
6 advertising from “small and medium sized businesses” accounted for approximately 70% of
7 Yelp’s advertising revenues in 2016. *Id.* ¶ 20. Beginning in 2015, the company started
8 transitioning from charging advertisers on a cost-per-impression (“CPM”) basis, whereby
9 advertisers pay a predetermined fee for every 1,000 ads shown, to a cost-per-click (“CPC”) basis,
10 whereby advertisers pay only if users click on their ads. *Id.* ¶¶ 23–25. While it has benefits, the
11 CPC model has the downside that ads that are not successful at generating clicks are quickly
12 sidelined and stop receiving impressions. *Id.* ¶ 25. This means that ads with high levels of
13 customer engagement perform better in the CPC model because they are more likely to drive
14 clicks, but ads with lower levels of engagement do not perform as well. *Id.*

15 In addition to adopting the CPC model, Yelp made the “local ads business” a “top priority”
16 for 2016. *Id.* ¶ 39. The company increased its sales force substantially going into the year, *id.*
17 ¶ 38, and through the end of the third quarter of 2016 touted its results in the local advertising
18 segment, *id.* ¶¶ 40–45. However, Plaintiffs claim the reality was not so rosy. “A large portion of
19 the local revenue growth was due to businesses attracted to Yelp by various promotional offers”
20 Yelp implemented in 2016. *Id.* ¶ 41. These businesses were encouraged to sign up for year-long
21 advertising contracts. *Id.* ¶ 3. A “significant percentage” of them experienced low engagement
22 with their advertising on Yelp, and “were thus far less likely to remain with Yelp after the
23 expiration of their initial contracts.” *Id.* ¶ 41. Yelp discouraged early contract terminations by
24 imposing hefty fees, but the local advertisers who signed on with Yelp at the beginning of 2016
25 would be able to cancel their contracts in late 2016 and the first quarter of 2017 without being
26 subject to termination fees. *Id.* ¶ 3. Thus, Plaintiffs believe that Yelp created a cohort of local
27 advertisers in 2016 who were likely to cancel their contracts in late 2016 and early 2017.

1 B. Yelp's February and March 2017 Statements

2 On February 9, 2017, Yelp issued a press release announcing its financial results for 2016
3 and its guidance for 2017. *Id.* ¶ 55. The press release reported that Yelp's "local revenue" grew
4 by 39% in 2016, and spoke of "how Yelp has become deeply integrated into consumers' daily
5 habits and increasingly essential to local business owners." *Id.* Yelp also provided its outlook for
6 the year ahead. It predicted net revenue in the range of \$195 million to \$199 million for the first
7 quarter of 2017, and growth of approximately 25% compared to the first quarter of 2016. *Id.* For
8 the full year of 2017, the company predicted net revenue in the range of \$880 million to \$900
9 million, and growth of approximately 25% compared to 2016. *Id.*

10 Yelp held a conference call on the same day with investors, analysts, and the public. *Id.*
11 ¶ 56. On the call, Defendant Nachman discussed the company's "repeat rate," stating that it "is a
12 mix of folks who have advertised with us in the past and that's at an all-time high right now, and
13 while we're really encouraged by our kind of strong, embedded client base and that's a really kind
14 of healthy number to understand that those folks are coming back." *Id.* ¶ 59. Defendant Baker
15 stressed the opportunity for growth in the local advertising market by noting that "we're still pretty
16 small in terms of the long-term opportunity" because "[w]e've got 138,000 advertisers in a market
17 that is 20 million local businesses [a]nd I'd point out, 3.4 million claimed businesses on
18 Yelp." *Id.* ¶ 79.

19 Plaintiffs allege that Defendants made similarly optimistic pronouncements at a February
20 14, 2017 conference, *id.* ¶¶ 87–92; on an annual report filed with the Securities and Exchange
21 Commission ("SEC") on March 1, 2017, *id.* ¶¶ 93–96; and at a March 1, 2017 conference, *id.*
22 ¶¶ 97–102.

23 C. Yelp's May 2017 Statements

24 On May 9, 2017, Yelp issued a press release announcing its financial results for the first
25 quarter of 2017 and revising the revenue guidance it had initially issued in February. *Id.* ¶ 60.
26 The company lowered its revenue projection from a range of \$880–\$900 million to a range of
27 \$850–865 million. *Id.* Yelp's stock price dropped by more than 18% on heavy volume on May
28 10. *Id.* ¶ 61.

1 Also on May 9, 2017, Yelp held a conference call to discuss the press release. *Id.* ¶ 62.
2 During the call, Stoppelman admitted that “we did see a decline in retention that has impacted our
3 outlook,” and explained that “[g]iven the disproportionate impact first quarter performance has on
4 our annual results, we’ve reduced our outlook for the balance of the year.” *Id.* Baker stated that
5 Yelp “experienced weaker than expected revenue retention in our local ad business in the first
6 quarter,” which was “at the upper end of the range we normally see.” *Id.* ¶ 63. Nachman added
7 that the company was “able to tie [the retention issue] back actually to a distinct cohort of
8 advertisers that came on Yelp about a year ago as we’re making the transition from CPM to CPC.”
9 *Id.* ¶ 64. He spoke of how Yelp had “put a team in place to focus on that particular cohort and that
10 particular profile,” reporting that it had been “able to really course-correct in a pretty short period
11 of time and [Yelp] saw progressively better results” in March and April. *Id.* Nachman termed this
12 team the “recovery team. *Id.* ¶ 67.

13 D. Allegations of Fraud

14 Plaintiffs allege that the statements made by Defendants prior to Yelp’s revised guidance
15 on May 9, 2017 were false or misleading because Defendants were already aware when they
16 issued the February 9, 2017 guidance that Yelp was experiencing a higher than anticipated “churn
17 rate”—the rate at which local advertisers were not renewing their contracts—that would
18 disproportionately impact expected revenue for the year. To support their contentions, Plaintiffs
19 point to various aspects of Yelp’s business model. First, the type of advertising contract that Yelp
20 frequently entered into—year-long with hefty early-termination fees—“provided the Company
21 with significant visibility into future revenue growth,” because “it was economically reasonable
22 for customers who wished to stop advertising with Yelp to wait until the termination of their
23 contract term to cancel.” *Id.* ¶¶ 27–28. In fact, “Defendants repeatedly emphasized their ability to
24 accurately predict future revenue.” *Id.* ¶ 28. Second, Yelp reviews a number of “real-time
25 metrics” that provide Defendants with “immediate insights into customer retention trends,
26 including the likelihood of contract terminations.” *Id.* ¶ 32. Defendants “repeatedly indicated that
27 they monitored and were aware of retention rates.” *Id.* ¶ 46. Third, the local advertising program,
28 and the attendant work of tracking engagement and advertisers’ returns from the program, are such

1 “core operations” of Yelp that knowledge of the program metrics “may . . . be imputed to
2 Defendants Stoppelman, Baker, and Nachman.” *Id.* ¶¶ 125–36.

3 Plaintiffs also rely on Defendants’ statements to infer knowledge. First, according to
4 Plaintiffs, Nachman “effectively conceded that the brunt of the problem had occurred before
5 February 2017” when he said on the May 9, 2017 conference call that Yelp “recognized the churn
6 issue about halfway through the [first] quarter” of 2017. *Id.* ¶ 64. Second, Baker acknowledged
7 that “retention has a big impact [on revenue] over the course of the forward 12-month period,”
8 such that weak retention at the beginning of the year affects revenue projections for the rest of the
9 year. *Id.* ¶ 66. Third, on a February 7, 2018 earnings call, Stoppelman explained that the
10 “retention issues that we had in the first quarter of 2017 . . . related to cohort of advertisers we
11 brought on in 2016 . . . who never really established the normal level of engagement with their
12 Yelp advertising program.” *Id.* ¶ 72. He proceeded to claim that Yelp “anticipated that they
13 would churn off and they churned off at the end of the year . . . at a higher rate than we’d
14 anticipated.” *Id.*

15 Finally, Plaintiffs assert that a series of three sales of Yelp shares made by Stoppelman in
16 the period between February 9 and May 9, 2017 were “suspicious in timing and amount” and
17 support an inference of scienter. *Id.* ¶¶ 113–24. “These sales reduced the Stoppelman Trust’s
18 holdings of Yelp common stock by more than 20 percent.” *Id.* ¶ 118.

19 Plaintiffs allege that Defendants’ misconduct led to a “precipitous[.]” drop in the price of
20 Yelp stock and “directly and proximately caused the economic losses suffered by Plaintiffs and the
21 Class.” *Id.* ¶¶ 103–04. They propose a class “consisting of all persons and entities that purchased
22 or acquired Yelp’s securities during the Class Period [February 10, 2017 to May 9, 2017,
23 inclusive] and were damaged thereby.” *Id.* ¶ 145.

24 E. Procedural History

25 Plaintiffs filed this suit in January 2018. *See* Docket No. 1. On April 27, 2018, the Court
26 granted Movant Jonathan Davis’s motion to be appointed interim lead plaintiff and for Glancy
27 Prongay & Murlay LLP and Holzel & Holzel LLC to be appointed interim co-lead counsel under
28 the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 (“PSLRA”). *See* Docket No. 23.

1 Plaintiffs filed their amended class action complaint on June 25, 2018. *See* Docket No. 29.

2 Defendants filed the instant motion to dismiss on August 2, 2018. *See* Docket No. 31 (“Mot.”).

3 **II. REQUESTS FOR JUDICIAL NOTICE**

4 Before reaching the merits, the Court first addresses Defendants’ requests for judicial
5 notice. Defendants ask the Court to take judicial notice of the following categories of documents
6 (attached as exhibits to the Declaration of Gilbert R. Serota, Docket No. 31-2) or to consider them
7 under the doctrine of incorporation by reference.

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9	Exhibit A	Yelp SEC Form 10-K for the year ended 2016	Filed March 1, 2017
10	Exhibit B	Request withdrawn. <i>See</i> Docket No. 38 at 3 n.1.	
11	Exhibit C	Jeremy Stoppelman Form 4 filings submitted to SEC	Filed Feb. 21, 2017 March 7, 2017 March 17, 2017
12	Exhibit D	Yelp SEC Form 10-K for the year ended 2015	Filed Feb. 24, 2016
13	Exhibit E	Yelp SEC Form 10-Q for the quarter ended Sept. 30, 2016	Filed Nov. 8, 2016
14	Exhibit F	Yelp SEC Form 8-K	Filed Feb. 9, 2017
15	Exhibit G	Yelp FQ4 2016 Earnings Call	Held Feb. 9, 2017
16	Exhibit H	Yelp SEC Form 8-K	Filed May 9, 2017
17	Exhibit I	Yelp FQ1 2017 Earnings Call	Held May 9, 2017
18	Exhibit J	Yelp FQ4 2017 Earnings Call	Held Feb. 7, 2018
19	Exhibit K	Yelp Company Conference Presentation at Morgan Stanley Technology, Media & Telecom Conference	Held March 7, 2017
20	Exhibit L	Yelp Company Conference Presentation at Goldman Sachs Technology and Internet Conference	Held Feb. 14, 2017
21	Exhibit M	Report by JPM Securities LLC entitled “Advertiser Churn Results in Lowered Full-Year Guidance, Although Traffic Growth is Accelerating”	Published May 10, 2017
22	Exhibit N	Yahoo! Finance chart showing Yelp’s historical stock prices between Feb. 9, 2017 and May 10, 2017	February 9, 2017 to May 10, 2017
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25 A court may take judicial notice of a fact that is not “subject to reasonable dispute in that it
26 is either (1) generally known within the jurisdiction of the trial court or (2) capable of accurate and
27 ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed.
28 R. Evid. 201(b). Alternatively, under the incorporation-by-reference doctrine, a court may “take

1 into account documents whose contents are alleged in a complaint and whose authenticity no party
2 questions, but which are not physically attached [to] the [plaintiff's] pleading.” *Knievel v. ESPN*,
3 393 F.3d 1068, 1076 (9th Cir. 2005) (quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970,
4 986 (9th Cir. 1999)).

5 Plaintiffs do not object to the introduction of Exhibits A, D, F, and H. *See* Docket No. 35
6 at 1. These Exhibits are all filings Yelp has made with the SEC, and “[c]ourts can consider
7 securities offerings and corporate disclosure documents that are publicly available.” *In re Am.*
8 *Apparel, Inc. S’holder Litig.*, 855 F. Supp. 2d 1043, 1060 (C.D. Cal. 2012) (citing *Metzler Inv.*
9 *GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008)). Furthermore, the
10 doctrine of incorporation by reference allows a court to “properly consider [a document] in its
11 entirety” if the document is referenced in the complaint. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d
12 1046, 1058 n.10 (9th Cir. 2014); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (Courts
13 may take into account “documents whose contents are alleged in a complaint and whose
14 authenticity no party questions, but which are not physically attached to the [plaintiff’s]
15 pleading.”). A court “may treat such a document as part of the complaint, and thus may assume
16 that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States*
17 *v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Here, Plaintiffs expressly relied on Exhibits A, F,
18 and H as sources of allegedly fraudulent statements. *See, e.g.*, FAC ¶¶ 73, 93–96. Accordingly,
19 the Court **GRANTS** judicial notice of Exhibits A, D, F, and H.

20 Plaintiffs also do not object to the introduction of Exhibit N. *See* Docket No. 35 at 1.
21 Exhibit N shows Yelp’s stock prices during the proposed class period. “[S]tock price is public
22 information ‘capable of accurate and ready determination by resort to sources whose accuracy
23 cannot reasonably be questioned’ and are the proper subject of judicial notice in a motion to
24 dismiss.” *In re Finisar Corp. Derivative Litig.*, 542 F. Supp. 2d 980, 990 (N.D. Cal. 2008)
25 (quoting Fed. R. Evid. 201(b)). Accordingly, the Court **GRANTS** judicial notice of Exhibits N.

26 Plaintiffs object to the introduction of Exhibit C, which consists of three separate Form 4
27 filings made by Stoppelman to the SEC to report the sales of his securities during the proposed
28 class period. Plaintiffs rely in part on Stoppelman’s “suspicious” stock sales to argue that

1 Defendants made the allegedly fraudulent statements with scienter. *See* FAC ¶¶ 113–24.
2 Defendants counter that the Forms 4 reflect that Stoppelman’s sales were made pursuant to a Rule
3 10b5-1 plan adopted prior to the alleged fraud, and these Forms 4 reflect that. *See* Docket No. 32
4 at 4. The Supreme Court has specifically instructed that “courts must consider the complaint in its
5 entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions
6 to dismiss, in particular, documents incorporated into the complaint by reference, and matters of
7 which a court may take judicial notice” in determining whether the allegations in a § 10(b) claim
8 “give rise to a strong inference of scienter.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S.
9 308, 322–23. Courts in this circuit have routinely taken judicial notice of Forms 4 to determine
10 whether insider stock sales raise an inference of scienter to support a § 10(b) action. *See, e.g.*,
11 *Curry v. Yelp Inc.*, 875 F.3d 1219, 1226 n.2 (9th Cir. 2017); *City of Royal Oak Ret. Sys. v. Juniper*
12 *Networks, Inc.*, 880 F. Supp. 2d 1045, 1059 (N.D. Cal. 2012); *Wietschner v. Monterey Pasta Co.*,
13 294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003).

14 Plaintiffs counter by citing two cases in which courts have declined to take judicial notice
15 of Forms 4 at the motion to dismiss stage. Those courts reasoned that the relevant SEC regulation
16 recognizes the existence of a prior “contract, instruction, or plan” to sell stocks as an affirmative
17 defense to a suit under § 10(b) and Rule 10b-5, but only where “the plan was ‘entered in good
18 faith.’” *Stocke v. Shuffle Master, Inc.*, 615 F. Supp. 2d 1180, 1193 (D. Nev. 2009) (quoting 17
19 C.F.R. § 240.10b5-1(c)(1)(i)). “Therefore, a 10b5-1 trading plan does not provide an absolute
20 defense to a claim of insider trading. Rather, it requires an additional factual finding of good
21 faith,” which a court cannot make when considering a motion to dismiss. *Id.*; *In re UTStarcom,*
22 *Inc. Sec. Litig.*, 617 F. Supp. 2d 964, 976 n.16 (N.D. Cal. 2009). Although there is some merit to
23 this position, it is out of step with the weight of authority in the Ninth Circuit. “Looking to Forms
24 4 also seems congruent with the requirement that we consider plausible nonculpable explanations
25 for the defendants’ conduct” when assessing scienter. *Alaska Elec. Pension Fund v. Asar*, 898
26 F.3d 648, 658 (5th Cir. 2018) (observing that “district courts are divided on” whether courts “may
27 look to a Form 4 for plausible explanations of potentially suspicious trades at the pleading stage,”
28 but concluding that it is appropriate to “look to publically filed SEC documents implicitly

1 incorporated into a complaint”). Accordingly, given Plaintiffs’ reliance on Stoppelman’s stock
2 sales to plead scienter, the Court **GRANTS** judicial notice of Exhibit C.

3 Exhibits G, I, J, K, and L are transcripts of Defendants’ earnings calls and presentations at
4 two conferences, all of which are referenced in the complaint. Plaintiffs, citing the Ninth Circuit’s
5 recent decision in *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988 (9th Cir. 2018), argue that
6 Defendants’ attempt to introduce these exhibits “exploit the judicial notice procedures to defeat
7 adequately stated claims at the pleading stage,” Docket No. 35 at 1. In *Khoja*, the Ninth Circuit
8 cautioned that the “overuse and improper application of judicial notice and the incorporation-by-
9 reference doctrine . . . can lead to unintended and harmful results,” especially in “SEC fraud
10 matters,” because allowing the “unscrupulous use of extrinsic documents [by defendants] to
11 resolve competing theories against the complaint risks premature dismissals of plausible claims
12 that may turn out to be valid after discovery.” *Khoja*, 899 F.3d at 998. In particular, *Khoja* held
13 that “[i]t is improper to judicially notice a transcript when the substance of the transcript is subject
14 to varying interpretations, and there is a reasonable dispute as to what the [transcript] establishes.”
15 *Id.* at 1000 (citation and internal quotation marks omitted). The court also warned against
16 allowing defendants to use the incorporation-by-reference doctrine to introduce a document that
17 “did not necessarily form the basis of the complaint,” but rather “creates a defense to the well-pled
18 allegations in the complaint.” *Id.* at 1002.

19 Plaintiffs echo *Khoja* in urging the Court to reject the transcripts as being “subject to
20 varying interpretations” and containing facts that are “subject to reasonable dispute.” Docket No.
21 35 at 1–2. But *Khoja* found that an investor call transcript was subject to varying interpretations
22 and therefore improperly noticed because it was internally inconsistent. *See Khoja*, 899 F.3d at
23 1000. Here, in contrast, Plaintiffs have merely made the bare assertion that the transcripts are
24 subject to dispute, without identifying any disputed statement or inconsistency. Moreover,
25 Plaintiffs rely extensively on these transcripts in their complaint to allege that Defendants made
26 fraudulent statements, *see* FAC ¶¶ 75–86 (quoting from February 9, 2017 call), ¶¶ 87–92 (quoting
27 from February 14, 2017 conference), ¶¶ 97–102 (quoting from March 1, 2017 conference), and to
28 allege that Defendants knew the statements to be false at the time they were made, *see id.* ¶¶ 62–

1 69 (quoting from May 9, 2017 call), ¶ 72 (quoting from February 7, 2018 call). Because “the
2 plaintiff refers extensively to the document[s] [and] the document[s] form[] the basis of the
3 plaintiff’s claim,” the Court **GRANTS** judicial notice of Exhibits G, I, J, K, and L. *Khoja*, 899
4 F.3d at 1002 (quoting *Ritchie*, 342 F.3d at 907).

5 Next, Plaintiffs rely on Exhibit M, a report published by a research firm concerning the
6 drop in Yelp’s stock prices after Yelp issued its May 9, 2017 revised guidance, to establish the
7 loss causation element of their § 10(b) claim. *See* FAC ¶ 108. Accordingly, the Court **GRANTS**
8 judicial notice of Exhibit M.

9 Finally, the Court **DECLINES** to take judicial notice of Exhibit E because it is not
10 necessary to this decision.

11 **III. LEGAL STANDARD**

12 In considering a Rule 12(b)(6) motion to dismiss, a court must take all allegations of fact
13 as true and construe them in the light most favorable to the nonmoving party, although
14 “conclusory allegations of law and unwarranted inferences are insufficient to avoid a Rule
15 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). In general, “a
16 complaint need not contain detailed factual allegations . . . it must plead ‘enough facts to state a
17 claim to relief that is plausible on its face’” to survive a motion to dismiss. *Id.*

18 However, “[s]ecurities fraud class actions must meet the higher, more exacting pleading
19 standards of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act
20 (‘PSLRA’).” *Oregon Pub. Employees Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 604 (9th Cir.
21 2014). Rule 9(b) dictates that the “circumstances constituting fraud or mistake shall be stated with
22 particularity.” Fed. R. Civ. Proc. 9(b). It is not enough for a plaintiff merely to identify an
23 allegedly fraudulent statement made by defendants. *In re GlenFed, Inc. Securities Litigation*, 42
24 F.3d 1541, 1548 (9th Cir. 1994) (en banc). Plaintiffs must allege “why the disputed statement was
25 untrue or misleading when made.” *Id.* at 1549. Moreover, “the complaint shall specify each
26 statement alleged to have been misleading, the reason or reasons why the statement is misleading,
27 and, if an allegation regarding the statement or omission is made on information and belief, the
28 complaint shall state with particularity all facts on which that belief is formed.” 15 U.S.C. § 78u–

1 4(b)(1)(B).

2 The PSLRA additionally requires a complaint to “state with particularity facts giving rise
3 to a strong inference that the defendant acted with the required state of mind” with respect to each
4 alleged false statement or omission. 15 U.S.C. § 78u-4(b)(2)(A). Plaintiffs alleging securities
5 fraud must plead all the elements of a securities fraud action with particularity. *Oregon Pub.*
6 *Employees*, 774 F.3d at 605.

7 **IV. RELEVANT STATUTORY AND REGULATORY PROVISIONS**

8 Section 10(b) of the Securities Exchange Act makes it unlawful for any person to
9 use or employ, in connection with the purchase or sale of any
10 security registered on a national securities exchange or any security
11 not so registered . . . any manipulative or deceptive device or
12 contrivance in contravention of such rules and regulations as the
[Securities and Exchange] Commission may prescribe as necessary
or appropriate in the public interest or for the protection of investors.

13 15 U.S.C. § 78j(b).

14 The SEC promulgated Rule 10b-5 to implement Section 10(b) by making it unlawful

- 15 (a) To employ any device, scheme, or artifice to defraud,
- 16 (b) To make any untrue statement of a material fact or to omit to
17 state a material fact necessary in order to make the statements made,
in the light of the circumstances under which they were made, not
18 misleading, or
- 19 (c) To engage in any act, practice, or course of business which
operates or would operate as a fraud or deceit upon any person,
20 in connection with the purchase or sale of any security.

21 17 C.F.R. § 240.10b-5.

22 The PSLRA also erects “an additional barrier at the pleading stage in the form of a safe
23 harbor for ‘forward-looking statements.’” *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir.
24 2010). It provides, in relevant part:

25 [A] person . . . shall not be liable with respect to any forward-
26 looking statement, whether written or oral, if and to the extent that—

27 (A) the forward-looking statement is—

- 28 (i) identified as a forward-looking statement, and is
accompanied by meaningful cautionary statements

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identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or
(ii) immaterial; or

(B) the plaintiff fails to prove that the forward-looking statement—

(i) if made by a natural person, was made with actual knowledge by that person that the statement was false or misleading; or

(ii) if made by a business entity;[,] was—

(I) made by or with the approval of an executive officer of that entity; and

(II) made or approved by such officer with actual knowledge by that officer that the statement was false or misleading.

15 U.S.C. § 78u-5(c)(1). A “forward-looking statement” is defined as “any statement regarding (1) financial projection, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions ‘underlying or related to’ any of these issues.” *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003).

V. DISCUSSION

To prevail on a claim that a defendant “made material misrepresentations or omissions in violation of § 10(b) and Rule 10b-5, [plaintiffs] must prove (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 37–38 (2011). Defendants move for dismissal on the basis that Plaintiffs have failed to sufficiently allege material misrepresentations or omissions by Defendants, scienter, and loss causation. The Court analyzes each element in turn.

A. Material Misrepresentations or Omissions

1. Forward-Looking Statements

A number of Defendants’ challenged statements are immunized by the PSLRA safe harbor provision.

Most notably, Yelp’s February 9, 2017 financial guidance announcing the company’s

1 expected revenue and growth for 2017 is an “earnings projection [that] is by definition a forward-
 2 looking statement.” *In re Cutera*, 610 F.3d at 1111. It was accompanied by meaningful
 3 cautionary language that “identif[ies] important factors that could cause actual results to differ
 4 materially from those in the forward-looking statement.” *Police Ret. Sys. of St. Louis v. Intuitive*
 5 *Surgical, Inc.*, 759 F.3d 1051, 1058 (9th Cir. 2014); *In re Cutera*, 610 F.3d at 1110–11. The press
 6 release expressly notified investors that it “contains, and statements made during the above
 7 referenced conference call will contain, forward-looking statements relating to, among other
 8 things, the future performance of Yelp . . . and involve risks and uncertainties.” Mot., Exh. F at
 9 11. The cautionary language identified an extensive list of “[f]actors” that could cause “Yelp’s
 10 actual results [to] differ materially from those predicted or implied,” including “maintaining and
 11 expanding Yelp’s base of advertisers” and “Yelp’s ability to deal with the increasingly
 12 competitive local search environment.” *Id.* The press release also referred investors to more
 13 detailed discussions of risk factors in Yelp’s most recent Form 10-K Annual Report, which
 14 specifically addressed the additional unpredictability generated by the new CPC advertising
 15 model:

16 These risks and difficulties include our ability to . . . forecast
 17 revenue and adjusted EBITDA accurately, which may be more
 18 difficult as we sell more performance-based advertising, as well as
 appropriately estimate and plan our expenses.

19

20 As our traffic growth rate slows, our success will become
 21 increasingly dependent on our ability to increase levels of user
 22 engagement on our platform. This dependence may increase as the
 23 portion of our revenue derived from performance-based advertising
 increases. If user engagement decreases, our advertisers may stop or
 reduce the amount of advertising on our platform and our results of
 operations would be harmed.

24 Mot., Exh. D at 45. “These warnings identify the very risks that came to fruition here,” *In re*
 25 *Leapfrog Enter., Inc. Sec. Litig.*, 200 F. Supp. 3d 987, 1004 (N.D. Cal. 2016), since it was
 26 allegedly Yelp’s troubles with maintaining its base of local advertisers under the CPC model that
 27 impacted the company’s financial performance.

28 In addition, portions of many of Stoppelman and Baker’s statements on the conference call

1 that followed the February 9, 2017 press release concerned “plans and objectives of management
2 for future operations,” “future economic performance,” and “the assumptions ‘underlying or
3 related to’ them,” and were therefore forward-looking. *No. 84 Employer-Teamster*, 320 F.3d at
4 936; *see Leapfrog*, 200 F. Supp. 3d at 1004 (holding that “multiple statements expressly
5 refer[ring] to what ‘will’ happen in the future” are forwarding-looking “[b]ecause they discuss
6 future plans and expectations”). The relevant portions of the statements are listed below.

- 7 • “Executing well on these priorities set Yelp up for continued growth in 2017 and we’re
8 excited about the potential we see in the year ahead.” FAC ¶ 75.
- 9 • “This operating leverage is . . . a source of investment resources to help drive long-term
10 revenue growth.” FAC ¶ 77.
- 11 • “[W]hen we turn and we look at the opportunity ahead of Yelp . . . we’re still pretty small
12 in terms of long-term opportunity, we believe.” FAC ¶ 79.
- 13 • “So, our long-term prospects for profitability at Yelp are outstanding and . . . it just makes
14 all the sense in the world to continue to invest in our product, our marketing and our sales
15 to get after that.” FAC ¶ 85.

16 Because these forward-looking statements were also accompanied by the meaningful
17 cautionary language in the press release and Yelp’s Form 10-K, they are covered by the safe
18 harbor provision. *See* Mot. Exh. F at 11 (“[S]tatements made during the above referenced
19 conference call will contain, forward-looking statements relating to, among other things, the future
20 performance of Yelp . . . and involve risks and uncertainties.”). As forward-looking statements
21 “identified as such and accompanied by meaningful cautionary statements,” they are “not
22 actionable regardless of the plaintiff’s showing of scienter.” *In re Cutera*, 610 F.3d at 1112.

23 Defendants made one further forward-looking statement relating to Yelp’s plans and
24 objectives for future operations at a subsequent Goldman Sachs conference on February 14, 2017.

- 25 • “The movement from CPM to CPC is all about making the sort of monetization mindset
26 and product mindset at Yelp to be about, hey, it doesn’t matter that we sold it; it has to
27 work for the business. We have to drive the leads for local businesses and CPC is the
28 format to do that.” FAC ¶ 89.

1 This statement was not covered by the cautionary language in the February 9 press release, and
2 Defendants have not pointed to any other cautionary language accompanying it. However, the
3 statement is not misleading because it did not say anything about the performance of the local
4 advertising program; it alerted investors to the transition from CPM to CPC advertising and
5 expressed Defendants' faith that CPC would be the right model to "drive the leads for local
6 businesses" going forward. To be sure, this statement was made on February 14, when
7 Defendants were allegedly already aware of the churn problems surfacing. However, even
8 forward-looking statements unaccompanied by cautionary language are not actionable unless they
9 were "made with actual knowledge ... that [they were] false or misleading." *In re Cutera*, 610
10 F.3d at 1108 (quoting 15 U.S.C. § 78u-5(c)(1)(B)(i) & (ii)(II)). Actual knowledge is a higher
11 standard than the deliberate recklessness standard applied to non-forward-looking statements. A
12 company that makes forecasts knowing that a problem exists is not liable if it could still have
13 believed that the problem was surmountable and the forecast could still be met. *See, e.g., In re*
14 *Syntex Corp. Sec. Litig.*, 95 F.3d 922, 930 (9th Cir. 1996); *In re Connetics Corp. Sec. Litig.*, 542 F.
15 Supp. 2d 996, 1008 (N.D. Cal. 2008); *In re CBT Grp. PLC Sec. Litig.*, No. C-98-21014 RMW,
16 1999 WL 1249287, at *3 (N.D. Cal. July 21, 1999). Plaintiffs here have not alleged that by
17 February 14, 2017, Defendants already had actual knowledge that the CPC model as a whole
18 could not succeed, or that the remedial actions taken by Yelp (*e.g.* the recovery team) could not be
19 effective long-term.

20 Accordingly, Defendants' motion to dismiss is **GRANTED** with respect to the February 9,
21 2017 financial guidance quoted in FAC ¶ 73, the above-quoted portions of their statements on the
22 February 9, 2017 conference call quoted in FAC ¶¶ 75, 77, 79, and 85, and the statement quoted in
23 FAC ¶ 89.

24 2. Non-Forward-Looking Statements

25 The remaining statements cited in the complaint were either non-forwarding looking or
26 "mixed." Mixed statements are those "containing non-forward-looking statements about current
27 and past facts as well as forward-looking statements." *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d
28 1130, 1141 (9th Cir. 2017). The Ninth Circuit recently instructed that "where defendants make

1 mixed statements . . . the non-forward-looking statements are not protected by the safe harbor of
 2 the PSLRA.” *Id.* at 1142. Thus, the Court proceeds to analyze the purely non-forward-looking
 3 statements and the non-forward-looking portions of mixed statements to determine whether they
 4 contained material misrepresentations or omissions under § 10(b).

5 Plaintiffs’ claims in this case are premised on alleged omissions. *See, e.g.*, FAC ¶¶ 74, 88,
 6 94, 98 (alleging that Defendants’ statements were false or misleading because they “failed to
 7 disclose” information). “To be actionable under the securities laws, an omission must . . .
 8 affirmatively create an impression of a state of affairs that differs in a material way from the one
 9 that actually exists.” *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). An
 10 omission is material when there is “a substantial likelihood that the disclosure of the omitted fact
 11 would have been viewed by the reasonable investor as having significantly altered the ‘total mix’
 12 of information made available.” *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988).

13 a. February 9, 2017 Statements

14 i. Inactionable Statements

15 Plaintiffs allege that several statements made by Defendants on the February 9, 2017
 16 conference call about the local advertising program were inconsistent with Yelp’s May 9, 2017
 17 admission that they “recognized the churn issue [in the program] about halfway through the
 18 quarter.” Docket No. 34 (“Opp.”) at 7–8. But a review of those statements shows that they did
 19 not constitute material omissions. Most of the statements made no reference at all to Yelp’s local
 20 advertising program, the retention or churn rates within that program, or the program’s effects on
 21 Yelp’s financial performance.

- 22 • Stoppelman spoke generally about “great results” in “[i]ncreasing awareness and
 23 engagement” in 2016, including expanding the reach of Yelp’s “ad campaigns” among
 24 “consumers on television and online,” “servicing the best content,” and “propel[ling]”
 25 Yelp’s popularity in “Apple’s app store.” FAC ¶ 75. This statement concerned consumer
 26 experiences with Yelp, not advertiser experiences.
- 27 • Baker stated that “[f]or the full year of 2016, 31% of revenue growth flowed through to an
 28 increase in adjusted EBITDA,” and that Yelp’s “incremental profitability was even

1 stronger in the second half of the year.” FAC ¶ 77. This statement simply reported
2 general growth and profitability figures.

- 3 • Baker, in response to a question about margin guidance and “elective investments . . . in
4 product development,” stated “I don’t think there’s anything structurally changing in the
5 business. We had kind of a 30% plus incremental profitability in 2016, which I think is the
6 best in four, five years for the company. And you saw in the second half the incremental
7 profitability north of 50%, even while the revenue has grown pretty well. So, we were in a
8 year in which we were increasing our brand spend in 2016, a year in which we were
9 walking away from brand advertising revenue dollars and showed that kind of leverage.
10 And I think that’s inherent and unchanged in the model.” FAC ¶ 79. This statement
11 discussed general profitability and brand spend figures. It did not speak specifically about
12 anticipated revenues from the local advertising program based on the CPC model.
- 13 • Baker, in response to a question about “margin improvement” and whether Yelp “[c]an . . .
14 still grow like you have been,” responded: “I think that the margin leverage that we saw
15 last year I think gives you a really good representation of sort of the inherent earnings
16 power of the business. And it also gives us, in thinking about the long-term, a great pool
17 of resources to continue to invest. So I think we had a year in which 30% of the revenue
18 went down to the bottom line. We had a second half of the year in which 50% of the
19 revenue went down to the bottom line.” FAC ¶ 85. As above, this statement spoke in
20 general terms about Yelp’s revenue figures, not about revenue generation from CPC
21 advertising.

22
23 Plaintiffs characterize these statements as “materially false and/or misleading” because
24 they “fail[]” to disclose” the contract terminations Yelp was experiencing in January 2017 among
25 the cohort of advertisers added in the first quarter of 2016 and the effects those terminations would
26 have on the revenue projections. *See* FAC ¶¶ 74, 88, 94, 98. However, because these statements
27 made no representations about Yelp’s local advertising program, omitting mention of the churn
28 issues within the program did not “affirmatively create an impression” about the program’s

1 performance that “differ[ed] in a material way from the one that actually exist[ed].” *Brody*, 280
 2 F.3d at 1006. Where a defendant “said nothing about” the subject of the alleged omission, “there
 3 is no duty to disclose, as [§ 10(b)] does not contain a freestanding completeness requirement.” *In*
 4 *re Yahoo! Inc. Sec. Litig.*, No. C 11-02732 CRB, 2012 WL 3282819, at *9 (N.D. Cal. Aug. 10,
 5 2012), *aff’d*, 611 F. App’x 387 (9th Cir. 2015). Therefore, these statements do not violate
 6 securities laws. They were not specific enough to impose a more fulsome duty to disclose the
 7 economics of the CPC model.

8 One other statement tangentially references local advertising, but is so “vague that no
 9 reasonable investor would rely on it when considering the total mix of available information.” *In*
 10 *re Splash Tech. Holdings, Inc. Sec. Litig.*, 160 F. Supp. 2d 1059, 1076 (N.D. Cal. 2001) (citation
 11 and internal quotation marks omitted):

- 12 • We’ve got 138,000 advertisers in a market that is 20 million local businesses. And I’d
 13 point out 3.4 million claims businesses on Yelp. So we’ve got a strong brand, we’ve got a
 14 great product experience for consumers and businesses, and we think it makes sense to
 15 continue investing in that. . . .” FAC ¶ 79.

16 Plaintiffs argue that the claim that “we’ve got a strong brand, we’ve got a great product experience
 17 for consumers and businesses” is misleading. To the contrary, courts in this District have found
 18 that describing “past results” using words such as “strong,” “robust,” and “improved” is “vague
 19 and nonactionable.” *Id.* at 1077. Similarly, “we’ve got a great product experience for consumers
 20 and businesses” rings similar to statements like “consumers love our service.” *In re Netflix, Inc.*
 21 *Sec. Litig.*, No. C04-2978 FMS, 2005 WL 1562858, at *7 (N.D. Cal. June 28, 2005). Such “vague
 22 and amorphous statements do not give rise to liability for securities fraud, since reasonable
 23 investors do not consider such puffery material when making an investment decision.” *Id.*

24 Accordingly, Defendants’ motion to dismiss is **GRANTED** with respect to these portions
 25 of their statements on the February 9, 2017 conference call quoted in FAC ¶¶ 75, 77, 79, and 85.

26 ii. Actionable Statements

27 In contrast, the two remaining February 9, 2017 statements directly addressed local
 28 advertising.

- 1 • In response to a question about “local active accounts,” Nachman stated:

2 If I were to point to a weakness and a slowness, it’s potentially
3 around kind of the local sales force in the fourth quarter [of 2016]
4 and particularly – it was a modest slowdown that, quite frankly, we
5 think the election and a period around the election both from an
6 output and productivity perspective from the sales force and that
7 kind of bled into vacation time. *It’s not something we’re super
8 concerned about kind of coming into 2017 and feel like the
9 fundamentals are in place and really strong.*

10 FAC ¶ 81 (emphasis added).

- 11 • In response to a question about “local advertisers that do not finish their relationship with
12 Yelp,” Nachman stated:

13 Obviously, repeat rate is a mix of folks who have advertised with us
14 in the past and *that’s at an all-time high right now*, and while *we’re
15 really encouraged by our kind of strong, embedded client base and
16 that’s a really kind of healthy number to understand that those folks
17 are coming back*. You know it’s a double-edged sword because we
18 also think that making sure that we get enough new clients into the
19 pipeline is a really important initiative for the company. *And so
20 we’re not alarmed in any way about kind of where we are in the
21 repeat rate side*, but you’d love to see, again, adding the number of
22 local advertising accounts.

23 Even if we were up in the 7,000, 8,000, 10,000 range, based on the
24 opportunity that we actually have in this marketplace with millions
25 of businesses that have claimed their presence on Yelp, we think
26 we’re still in the very early stages and we’ve got to look at both
27 sides of the coin here, making sure that we’re driving new business
28 and *taking advantage of kind of the existing client base that has very
29 nice trends behind it*.

30 FAC ¶ 83 (emphases added).

31 Both of these statements dismissed concerns about the viability of the local advertising program.

32 In reassuring investors that “the fundamentals are in place and really strong” and “we’re not
33 alarmed in any way about kind of where we are in the repeat rate¹ side,” Defendants indicated that
34 Yelp’s local advertising model was sound at its core and sustainable. Indeed, Defendants, by

35 ¹ Defendants assert that this statement does not implicate a duty to disclose any information about
36 Yelp’s churn problems because “the repeat rate does not necessarily correlate to the advertiser
37 retention rate,” but rather “provides an indication of Yelp’s total mix of long-term versus new
38 advertisers.” Docket No. 37 at 8 & n.9. The Court is not persuaded by this distinction. Even if
39 repeat rate is not perfectly correlated with retention rate, advertiser retention indisputably factors
40 into the repeat rate calculation, and the exchange between the analyst and Defendant Nachman in
41 FAC ¶ 83 suggests that the repeat rate is meaningfully impacted by “local advertisers that do not
42 finish their relationship with Yelp.”

1 attributing the “modest slowdown” in the fourth quarter of 2016 to “the election” and “vacation
2 time,” conveyed the impression that these were one-off aberrations rather than any kind of a
3 systemic problem with the local advertising program as a whole. But these statements would have
4 been inconsistent with any awareness Defendants had at this point that local advertisers were
5 dropping out of the program in high numbers due to engagement issues with Yelp’s CPC platform.
6 Thus, if Plaintiffs’ allegations about scienter are true, these statements were misleading, because
7 they characterized retention problems as “as-yet-unrealized risks and contingencies” that were not
8 a cause for concern when in fact “some of these risks may already have come to fruition.” *Berson*
9 *v. Applied Signal Tech., Inc.*, 527 F.3d 982 (9th Cir. 2008) (finding company’s financial filings
10 misleading where they notified investors of a risk that the company might not get paid on certain
11 projects when it had already received stop-work orders on those projects).

12 In *Shenwick v. Twitter, Inc.*, 282 F. Supp. 3d 1115 (N.D. Cal. 2017), the court held that
13 statements similar to the above-quoted ones from FAC ¶¶ 81 and 83 made in a similar context
14 were misleading. There, Twitter, the defendant, described a particular user engagement metric as
15 “one of its ‘major growth drivers,’” and “tied a projected \$500 million in revenue growth to a 3%
16 increase” in that metric, triggering a 6% increase in Twitter’s stock price. *Id.* at 1126. Twitter
17 subsequently acknowledged lower than expected user engagement growth, “but described signs of
18 a rebound” to investors using optimistic language: that the “trend ha[d] already turned around” and
19 that “we’re in a great place there.” *Id.* at 1127 (alteration in original). Twitter attributed the
20 purported turnaround to “a combination of seasonality or return to organic growth and the set of
21 product initiatives [Twitter] created to drive growth.” *Id.* However, “[s]imultaneously, Twitter
22 was experiencing flat or declining [user engagement] trends and other problems with user
23 engagement.” *Id.* at 1137. The *Shenwick* court found Twitter’s statements about rebounding user
24 engagement trends actionable under § 10(b), because “disclosure of the fact that [the relevant
25 metric] was flat or declining during the Class Period would have put investors on alert that . . . the
26 aggressive [growth] projections announced at Analyst Day were unlikely to materialize.” *Id.* at
27 1139.

28 Likewise, here, Defendants’ statements that “we’re not alarmed in any way about kind of

1 where we are in the repeat rate side,” that “the fundamentals are in place and really strong” when
2 it came to local sales, and that “the existing client base . . . has very nice trends behind it” were
3 belied by the troubling churn rates among local advertisers that Defendants allegedly knew about
4 at the time.

5 Defendants’ failure to disclose the churn problems “affirmatively create[d] an impression
6 of a state of affairs that differ[ed] in a material way from the one that actually exist[ed].” *Brody*,
7 280 F.3d at 1006. Moreover, Plaintiffs allege that advertising from “small and medium sized
8 businesses” accounted for approximately 70% of Yelp’s advertising revenues, FAC ¶ 20, and
9 Defendants themselves have acknowledged “the disproportionate impact first quarter performance
10 has on our annual results,” *Id.* ¶ 62. Given the importance of local advertising revenue to Yelp’s
11 financial health, Defendants’ omission was material because there was “a substantial likelihood
12 that the disclosure of the [churn issues] would have been viewed by the reasonable investor as
13 having significantly altered the ‘total mix’ of information made available.” *Basic Inc.*, 485 U.S. at
14 231–32; *see Shenwick*, 282 F. Supp. 3d at 1139 (“In the absence of [user engagement] data,
15 investors interpreted Defendants’ statements as reassurances that the Company had experienced
16 and would continue to experience positive growth and engagement trends.”).

17 Defendants contend that the comments in FAC ¶ 81 are non-actionable puffery. However,
18 even “‘general statements of optimism, when taken in context, may form a basis for a securities
19 fraud claim’ when those statements address specific aspects of a company’s operation that the
20 speaker knows to be performing poorly.” *In re Quality Sys.*, 865 F.3d at 1143 (quoting *Warshaw*
21 *v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996)). Defendants assured investors that “the
22 fundamentals are in place and really strong” in the context of responding to a specific question
23 about the local advertising program that Defendants allegedly knew was performing poorly. That
24 makes the statement actionable.

25 Accordingly, Defendants’ motion to dismiss is **DENIED** with respect to the statements
26 made on the February 9, 2017 conference call quoted in FAC ¶¶ 81 and 83.

27 b. February 14, 2017 Statement

28 Two of the challenged statements made at the February 14, 2017 Goldman Sachs

1 conference also specifically discussed Yelp’s local advertising efforts.

- 2 • In response to a question about the “really strong growth in local advertising revenue” in
3 2016, Stoppelman responded:

4 I think, really, it was just about focusing on the core. And that was
5 the message that was delivered to the teams at the start of the year is,
6 *hey, there’s nothing fundamentally wrong with our business. We
7 just need to execute even better. And so we really did that and I
8 think it paid off.*

7 FAC ¶ 87 (emphasis added).

- 8 • In response to a question about the financial guidance issued on February 9, 2017, Baker
9 stated:

10 On the sales side, we continue to want to grow our local sales team
11 and expand that at a double-digit clip this year. *That’s a fairly
12 proven model that we feel we’re pretty good at operating. We like
13 the returns in that business.* They tend to be predictable over time.

12 FAC ¶ 91 (emphasis added).²

13 Both of these statements expressed confidence in the fundamental soundness of Yelp’s
14 local advertising program. In touting the use of a local sales team to sign up local advertisers as “a
15 fairly proven model” that Yelp is “pretty good at operating” and tends to produce favorable returns
16 that are “predictable over time,” Defendant Baker suggested to investors that the model would
17 continue to reliably generate revenue going forward. Similarly, while FAC ¶ 87 addressed 2016
18 results, Defendant Stoppelman’s pronouncement that Yelp “execute[d] even better” with respect to
19 local advertising and that doing so “paid off” gave the impression that the “strong growth” in the
20 program was sustainable. If Defendants were aware of the systemic retention challenges within
21 the CPC program when they made these statements, their failure to disclose that information runs
22 afoul of § 10(b) for reasons the Ninth Circuit explained in *Berson*, 527 F.3d at 982.

23 In *Berson*, the defendant company reported backlogged work projects it had been
24

25 ² Defendants incorrectly assert that the statement in FAC ¶ 91 is protected by the PSLRA safe
26 harbor. Mot. at 16. While the first part of the statement (“we continue to want to grow our local
27 sales team”) is forward looking, the second part (“[t]hat’s a fairly proven model that we feel we’re
28 pretty good at operating”) is not, since it is about “current and past facts.” And “where defendants
make mixed statements . . . the non-forward-looking statements are not protected by the safe
harbor of the PSLRA.” *In re Quality Sys.*, 865 F.3d at 1142.

1 contracted to perform but had not yet completed as a way of demonstrating to investors it had
 2 sources of future income, even though the company knew that the projects had already been
 3 stopped and would likely be cancelled. *Id.* at 985. The Ninth Circuit ruled that “[h]ad defendants
 4 released no backlog reports, their failure to mention the stop-work orders might not have misled
 5 anyone.” *Id.* at 987. “But once defendants chose to tout the company’s backlog, they were bound
 6 to do so in a manner that wouldn’t mislead investors as to what that backlog consisted of.” *Id.*

7 In this case, once Defendants chose to tout Yelp’s local advertising model as “fairly
 8 proven,” omitting any mention of the churn issues that would likely significantly and negatively
 9 impact revenue “affirmatively create[d] an impression of a state of affairs that differ[ed] in a
 10 material way from the one that actually exist[ed].” *Brody*, 280 F.3d at 1006. Such an omission
 11 was material for the same reasons as detailed with respect to the statements in FAC ¶¶ 81 and 83.
 12 *See* Part V.A.2.a.(ii), *supra*.

13 Accordingly, Defendants’ motion to dismiss is **DENIED** with respect to the statements
 14 made at the February 14, 2017 conference quoted in FAC ¶¶ 87 and 91.

15 c. 2016 Form 10-K Filed on March 1, 2017

16 Plaintiffs allege that statements made in Yelp’s Annual Report for fiscal year 2016, filed in
 17 a Form 10-K on March 1, 2017, are misrepresentations. In particular, Plaintiffs highlight the
 18 following two sections of the report:

- 19 • FAC ¶ 93.

20 *Ability to Attract and Retain Advertisers.* Our revenue growth is
 21 driven by our ability to attract and retain local business that purchase
 22 our advertising products. Our largest sales and marketing expenses
 23 consist of the costs associated with acquiring advertisers. We spent a
 24 majority of our sales and marketing expense for 2016 on initiatives
 25 related to advertiser acquisition and expect to continue to expend
 26 significant amounts to attract additional advertisers. At the same
 27 time, our advertising agreements increasingly provide for
 28 performance-based cost-per-click payment terms, which may make
 it more difficult to forecast advertising revenue accurately. In
 addition, our advertisers typically do not have long-term obligations
 to purchase our products, and their decisions to renew depend on the
 degree of satisfaction with our products as well as a number of
 factors that are outside of our control, including their ability to
 continue their operations and spending levels. The small and
 medium-sized businesses on which we heavily rely often have
 limited advertising budgets and may be disproportionately affected

1 by economic downturns. As a result, a worsening economic outlook
2 would likely cause businesses to decrease investments in
3 advertising, which could adversely affect our revenue.

- 4 • FAC ¶¶ 95.

5 Advertising revenue increased \$173.8 million, or 37%, in 2016
6 compared to 2015, and \$136.0 million, or 41% in 2015 compared to
7 2014. The increase in both periods was primarily due to a
8 significant increase in the number of customers purchasing
9 advertising plans as we expanded our sales force to reach more
10 businesses. The growth in both periods was driven primarily by
11 purchases of cost-per-click advertising.

12 These allegations of the FAC do not state a claim under § 10(b). The Annual Report is
13 exactly that—a report of Yelp’s financial information from the past year. Plaintiffs do not allege
14 that the contents of the report are untrue. Indeed, their complaint affirms that in 2016 Yelp saw “a
15 significant increase in the number of customers purchasing advertising plans as [it] expanded [its]
16 sales force to reach more businesses.” FAC ¶¶ 38–45. Rather, Plaintiffs take issue with the
17 statement because it “failed to disclose” the retention issues manifesting in January and February
18 of 2017. *Id.* ¶ 94. “In other words, [Plaintiffs] fault[] [Yelp] for not providing a more fulsome
19 report.” *Intuitive Surgical*, 759 F.3d at 1061. In *Intuitive Surgical*, an SEC annual report that was
20 factually accurate as to the previous year’s results allegedly failed to disclose known downward
21 trends in product sales. The Ninth Circuit held that the omission was not actionable because it did
22 not “affirmatively create” a misimpression of the company’s financial health. *Id.* As the court
23 explained, “[t]he securities laws do not demand such reporting. Rule 10b–5 prohibits ‘only
24 misleading and untrue statements, not statements that are incomplete.’” *Id.* (emphasis in original)
25 (quoting *Brody*, 280 F.3d at 1006). Similar to *Intuitive Surgical*, Yelp’s Form 10-K statements
26 “accurately reflect the company’s growth in [2016]; they do not purport to speak to any trends in
27 [Yelp]’s growth or revenues.” *Id.* They therefore do not oblige Defendants to disclose additional
28 information regarding Yelp’s projected financial performance in 2017.

Accordingly, Defendants’ motion to dismiss is **GRANTED** with respect to the statements
quoted in FAC ¶¶ 93 and 95.

d. Statements at March 1, 2017 Morgan Stanley Conference

Plaintiffs next allege that Defendants made three false or misleading statements at the

1 March 1, 2017 Morgan Stanley conference. Each is analyzed below.

- 2 • Nachman stated:

3 And then you also look at our existing client base as well. And so
4 from a – really focusing on retention and up-sell and the [ph] LCP
5 group that’s kind of shown that that’s a really – we’ve been purely
6 focused on acquisition for kind of a very long time. And we’ve got a
7 really strong client base that’s recurring and they love our product.
8 And you look at things like [Request-a-Quote] and I know we’ll get
9 into it a little bit, but really promising looking forward.

7 FAC ¶ 97.

8 This statement appears to address Yelp’s client base generally, and Plaintiffs do not allege that it
9 specifically refers to local advertiser retention. Moreover, the comment “we’ve got a really strong
10 client base that’s recurring and they love our product,” like the references to a “strong brand” and
11 a “great product experience for consumers” in FAC ¶ 79, is non-actionable puffery. *See Splash*
12 *Tech. Holdings*, 160 F. Supp. 2d at 1076–77 (statements about company’s “strong demand” and
13 “solid” position are puffery); *In re Netflix*, 2005 WL 1562858, at *7 (statement that “consumers
14 love our service” is puffery).

- 15 • Baker stated,

16 And so our marketing dynamic is starting to get more involved
17 around bringing customers back and bringing customers into and
18 bringing them throughout the Yelp experience for all of these
19 transactional elements.

19 . . .

20 So it’s really about making product and marketing investments at a
21 heartier clip than we made them in the second half of last year.
22 Second half of last year, in which 50% of the revenue growth
23 dropped down to the bottom line, gives an indication of the margin
24 and leverage that’s inherent in the business. *But the revenue*
25 *opportunity that sits out there with 3 million claimed businesses and*
26 *only 140,000 paid advertisers really merits the investment activity*
27 *that would – we think merits the investment activity on the product*
28 *and marketing side that we’re making this year. Little things kind of*
seesaw back and forth. Last year, there was an acceleration in
revenue growth in 2016, an acceleration in investment activity in
2017. And I think that’s all part of the long-term plan.

26 FAC ¶ 99 (emphases added).

27 This statement talks up the “revenue opportunity” from increased advertising that Yelp can expect,
28 and justifies the “investment activity” in attracting advertisers on that basis. It points to the

1 “acceleration in revenue growth in 2016” from advertising as evidence that such investment
 2 activity is merited. This statement is potentially misleading because it paints a promising picture
 3 wherein increased investment in Yelp’s advertising program would lead to revenue growth based
 4 on past results, without disclosing the risk that growth could be limited by the sensitivity of the
 5 CPC model to low user engagement, and indeed that the touted “acceleration in revenue growth in
 6 2016” was already showing signs of being short-lived. Thus, this statement “affirmatively
 7 create[d] an impression of a state of affairs that differ[ed] in a material way from the one that
 8 actually exist[ed].” *Brody*, 280 F.3d at 1006.

- 9 • Baker responded to the question, “Now that you’ve transitioned the monetization to
 10 CPC ads, how sensitive is your revenue growth going forward to the usage of the
 11 platform?” by stating:

12 Well, it’s a lot more sensitive to it than it was in the past. And so in
 13 particularly some high-value categories where the advertisers are
 14 super jazzed to get Yelp leads, there is an ability to drive traffic
 15 there and really have an impact on revenue. So the model is much
 16 more responsive to traffic than it has been in the past. We’re at a
 17 place today where with 24 million monthly active users of the app
 18 and 138,000 advertisers at the end of last quarter, we got a lot more
 19 users and a lot more usage than we do advertiser demand and
 20 interest and budget right now. So the reality is although the model
 21 is more responsive, we’re not at a place where if we had a lot more
 22 usage kind of sprinkled all across Yelp, it probably wouldn’t drive a
 23 big change in the short term in the financial performance.

24 FAC ¶ 101.

25 This statement does not reference the local advertiser program. Its emphasis is the strong user
 26 numbers on the Yelp platform, not advertising performance.

27 Accordingly, Defendants’ motion to dismiss is **GRANTED** with respect to the statements
 28 quoted in FAC ¶¶ 97 and 101, and **DENIED** with respect to the statement quoted in FAC ¶ 99.

29 B. Scienter

30 In sum, Defendants made potentially misleading statements on February 9 (FAC ¶¶ 81 and
 31 83), February 14 (FAC ¶¶ 87 and 91), and March 1 (FAC ¶ 99) of 2017. For the statements to be
 32 actionable, Plaintiffs must additionally establish that Defendants acted with scienter when the
 33 statements were made on those three dates.

1 To adequately plead scienter, the complaint must “state with particularity facts giving rise
2 to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u–
3 4(b)(2)(A). To be “strong,” an inference of scienter “must be more than merely plausible or
4 reasonable—it must be cogent and at least as compelling as any opposing inference of
5 nonfraudulent intent.” *Tellabs*, 551 U.S. at 314. But it “need not be irrefutable, *i.e.*, of the
6 ‘smoking-gun’ genre.” *Id.* at 324. The inference must be that “the defendant[] made false or
7 misleading statements either intentionally or with deliberate recklessness.” *Zucco Partners, LLC*
8 *v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009). “In the securities context, an actor is
9 reckless if he had reasonable grounds to believe material facts existed that were misstated or
10 omitted, but nonetheless failed to obtain and disclose such facts although he could have done so
11 without extraordinary effort.” *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 390 (9th Cir. 2010)
12 (citation omitted).

13 “[W]e conduct a two-part inquiry for scienter: first, we determine whether any of the
14 allegations, standing alone, are sufficient to create a strong inference of scienter; second, if no
15 individual allegation is sufficient, we conduct a ‘holistic’ review of the same allegations to
16 determine whether the insufficient allegations combine to create a strong inference of intentional
17 conduct or deliberate recklessness.” *Curry*, 875 F.3d at 1226 (citation omitted). Here, Plaintiffs
18 base their inferences regarding scienter on statements made by Defendants, Stoppelman’s stock
19 sales, and the core operations doctrine.

20 1. Defendants’ Statements

21 Plaintiffs contend that Defendants made admissions that raise a strong inference that they
22 knew their statements in February and March of 2017 were false or misleading. First, Plaintiffs
23 point to statements in which Defendants touted the predictability in Yelp’s business model and the
24 visibility it provided into future revenues, as well as the metrics that Yelp monitors relating to
25 advertiser retention rates. In most of these statements, Defendants were discussing how they
26 monitored return on investment, rather than advertiser retention rate. *See, e.g.*, FAC ¶¶ 47, 68.
27 But in one, Defendants specifically represented that “we’ll be watching how [local advertisers]
28 renew.” FAC ¶ 48. This prospective statement does not on its own establish that Defendants in

1 fact monitored how local advertisers renewed their contracts, or that such information was
2 available to Defendants in real-time. Nevertheless, it does tend to show that Yelp had plans to
3 monitor advertiser retention rates, and thus can be considered in conjunction with other allegations
4 to support a finding of scienter. *See Local 731 I.B. of T. Excavators & Pavers Pension Tr. Fund v.*
5 *Swanson*, No. CIV.A. 09-799, 2011 WL 2444675, at *12 (D. Del. June 14, 2011) (statements by
6 defendants about how they “closely monitor[ed] why advertisers reduce or cancel their programs”
7 contributed to finding of scienter).

8 Second, Plaintiffs identify statements in which Defendants allude to specific times when
9 they became aware of the churn issues in late 2016 and early 2017.

- 10 • On the February 9, 2017 conference call, Nachman stated:

11 “So on the local account side, certainly, we are happy with the
12 revenue side of the equation in Q4. . . . *If I were to point to a*
13 *weakness and a slowness, it’s potentially around kind of the local*
14 *sales force in the fourth quarter and particularly – it was a modest*
15 *slowdown*

16 FAC ¶ 81 (emphases added).

- 17 • On the May 9, 2017 conference call, Nachman stated:

18 *So we recognized the churn issue about halfway through the quarter*
19 *and we’re able to tie it back actually to a distinct cohort of*
20 *advertisers that came on Yelp about a year ago as we’re making the*
21 *transition from CPM to CPC. . . . It was all hands on deck,*
22 *obviously, at that point, and we put a team in place to focus on that*
23 *particular cohort and that particular profile.*

24 FAC ¶ 64 (emphasis added).

- 25 • On the May 9, 2017 conference call, Nachman also stated:

26 So, specifically as it relates to the retention issue, it was
27 concentrated obviously in a cohort that surfaced around the
28 beginning of last year. . . . *And we addressed this kind of acute*
problem in January and February. We put this recovery team on
higher response rates, put a lot of focus on that particular cohort and
the numbers have kind of spoken for themselves as we’ve gotten
into March and April.

FAC ¶ 67 (emphasis added).

These statements do suggest that Defendants were aware of the retention issues by the time
they made the misleading statements identified in Part V.A.2, *supra*. The first statement shows

1 that by February 9, Defendants already knew that there was at least a “modest slowdown” in the
2 local sales force in the fourth quarter of 2016. Such a slowdown would likely have a negative
3 impact on the retention of local advertisers going into 2017. The third statement explicitly
4 acknowledged “the retention issue” with the local advertising cohort that joined Yelp in early 2016
5 and asserted that Yelp “addressed this . . . problem *in January and February*”—that is, Defendants
6 were already aware of the problem and working to remedy it by January, before they issued the
7 financial guidance on February 9. This conclusion is reinforced by Defendant Nachman’s
8 revelation that the efforts of the “recovery team” Yelp implemented in response to the retention
9 issues was already bearing fruit in “March and April.” The parties debate whether “halfway
10 through the quarter” in the second statement refers to before or after February 9; read in
11 conjunction with the third statement, the term suggests that Defendants recognized the churn issue
12 and were already working to rectify it no later than February 9. In any event, even if “halfway
13 through the quarter” were read in isolation, it would at least encompass the misleading statements
14 made on February 14, which marked almost the exact halfway point of the first quarter of 2017. It
15 would also unquestionably encompass the misleading statement made on March 1.

16 Based on these statements, it is fair to conclude that Defendants “had reasonable grounds
17 to believe material facts [about the churn issues] existed” when they attested to Yelp’s “strong,
18 embedded client base” that was renewing in “healthy number[s]” on February 9, “fairly proven
19 model” for local advertising on February 14, and belief in the value of continuing investments in
20 local advertising on March 1. *In re Oracle Corp.*, 627 F.3d at 390. Defendants “nonetheless
21 failed to . . . disclose such facts although [they] could have done so without extraordinary effort.”
22 *Id.* Accordingly, the inference that Defendants made the misleading statements with deliberate
23 recklessness is “at least as compelling as any opposing inference of nonfraudulent intent.”
24 *Tellabs, Inc.*, 551 U.S. at 314.

25 2. Stock Sales

26 Stock sale allegations cannot raise an inference of scienter unless the sales were
27 “dramatically out of line with prior trading practices at times calculated to maximize the personal
28 benefit from undisclosed inside information.” *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir.

1 2001) (citation omitted). Among the relevant factors for a court to consider are: 1) the amount and
2 percentage of shares sold by insiders; 2) timing of the sales; and 3) whether the sales were
3 consistent with the insider’s prior trading history. *Id.*

4 According to Plaintiffs, Stoppelman made one sale of 263,000 shares of Yelp stock on
5 September 23, 2016. FAC ¶ 116. Between September 29, 2016 and February 7, 2017, he sold
6 Yelp shares in allotments of 13,000 during times the shares traded above \$40, for a total of
7 117,000 shares sold. *Id.* ¶ 117. The 117,000 shares amounted to approximately 3 percent of
8 Stoppelman’s Yelp holdings. *Id.* Stoppelman’s sales then apparently departed from this regular
9 pattern. In the course of the month from February 16 to March 15, 2017—after the issuance of
10 Yelp’s 2017 financial guidance and before the issuance of the revised guidance—he sold 3
11 allotments of 250,000 shares each at an average price of \$34.17. *Id.* ¶ 118. These sales of
12 750,000 total shares amounted to approximately 20 percent of his holdings. *Id.* Stoppelman made
13 no sales between March 16, 2017 and August 4, 2017. *Id.* ¶ 119. Starting from August 4, 2017
14 and continuing until February 20, 2018, he “again began selling allotments of 13,000 share [sic] of
15 common stock at a time for prices always exceeding \$40.” *Id.* ¶ 120. During this period, his sales
16 totaled 390,000 shares that amounted to approximately 13.7 percent of his holdings. *Id.*

17 In Plaintiffs’ view, Stoppelman’s stock sales during the proposed class period
18 “dramatically departed from [the] sales pattern in timing, amount, and price of the previous sales,”
19 and thus “raise[] a strong inference” that he “knew that the Company was experiencing a greater
20 than forecasted level of contract terminations in January and February of 2017, which would
21 impact recurring revenues throughout 2017 and sold these shares to avoid the losses that would
22 have come with selling the shares after the May 9, 2018 corrective disclosure.” *Id.* ¶ 122.

23 Defendants respond by pointing to Stoppelman’s SEC Form 4 filings reporting each of the
24 three allegedly suspicious sales. *See* Mot. at 19. To be sure, stock sales made “according to pre-
25 determined plans may rebut an inference of scienter.” *Metzler Inv. GMBH v. Corinthian Colleges,*
26 *Inc.*, 540 F.3d 1049, 1067 n.11 (9th Cir. 2008) (emphasis added). But all that can be gleaned from
27 the Forms 4 is that Stoppelman’s “[s]hares were sold pursuant to a duly adopted 10b5-1 trading
28 plan.” Mot., Exh. C. Defendants assert that the trading plan was “executed prior to the alleged

1 fraud,” Mot. at 19, but nothing before the Court establishes when precisely the trading plan was
 2 adopted. Defendants have not sought to introduce the actual 10b5-1 plan. SEC regulations
 3 recognize “a written plan for trading securities” as an affirmative defense to insider trading
 4 allegations only if the insider adopted the plan “[b]efore becoming aware of the [material
 5 nonpublic] information.” 17 C.F.R. § 240.10b5-1(c)(1)(i); *see Applestein v. Medivation, Inc.*, No.
 6 C-10-0998 EMC, 2011 WL 3651149, at *7 (N.D. Cal. Aug. 18, 2011) (concluding that the “fact
 7 that the sales were made pursuant to Rule 10b5–1 plans does not preclude a finding of fraud
 8 because, at the time the plans were adopted . . . the individual defendants were allegedly already
 9 aware of the unblinding”).

10 Moreover, the regulations require the trading plan to either “[s]pecif[y] the amount of
 11 securities to be purchased or sold and the price at which and the date on which the securities were
 12 to be purchased or sold,” or to “[i]nclude[] a written formula or algorithm, or computer program,
 13 for determining the amount of securities to be purchased or sold and the price at which and the
 14 date on which the securities were to be purchased or sold.” 17 C.F.R. § 240.10b5-1(c)(1)(i)(B).
 15 Without reviewing Stoppelman’s actual trading plan, the Court cannot determine whether these
 16 requirements were met, and cannot conclude that the plan negates any inference of scienter.

17 Setting aside the 10b5-1 plan, Stoppelman’s stock sales were sufficiently out of line with
 18 his prior trading patterns to lend some support to an inference of scienter, although the support is
 19 not particularly strong because the amount and timing of the sales were not necessarily suspicious.
 20 The amount of his sales during the class period—totaling approximately 20 percent of his Yelp
 21 holdings—is not alone sufficient to infer scienter.³ *See, e.g., Metzler*, 540 F.3d at 1067 (holding
 22 that courts “typically require larger sales amounts . . . to allow insider trading to support scienter,”
 23 and finding no scienter where one defendant “sold only 37% of his total stock holdings during the
 24

25 ³ The two cases Plaintiffs cite inferring scienter from smaller sales of stock are distinguishable. *In*
 26 *re SeeBeyond Techs. Corp. Sec. Litig.*, 266 F. Supp. 2d 1150 (C.D. Cal. 2003) did not find a 7.6%
 27 stock sale suspicious in itself; the court there inferred scienter based on a combination of factors,
 28 including that the defendants “admittedly lied to analysts and investors.” *Id.* at 1169. And the
 scienter finding in *Batwin v. Occam Networks, Inc.*, No. CV 07-2750 CAS (SHX), 2008 WL
 2676364 (C.D. Cal. July 1, 2008) was primarily premised on the defendant’s “significant
 violations” of Generally Accepted Accounting Principles over an extended period of time, and the
 “timing and circumstances” of the stock sale rather than the amount. *Id.* at *13–14.

1 Class Period”); *Ronconi*, 253 F.3d at 435 (holding that defendants’ sales of “only 10 percent and
2 17 percent, respectively, of their total number of shares and options” were “not suspicious in
3 amount”). It does, however, provide some supporting evidence, at least in the absence of rebuttal
4 by the 10b5-1 plan.

5 The timing of the sales does not clearly indicate that they were “calculated to maximize the
6 personal benefit from undisclosed inside information.” *Ronconi*, 253 F.3d at 435. The average
7 price per share of Stoppelman’s three sales was \$34.17, FAC ¶ 118, and Yelp’s share price largely
8 hovered between \$32 and \$35 during the class period, Mot. Exh. N (Yelp historical stock prices).
9 Thus, on the one hand, “the price at which the sale occurred” does not appear to show that
10 Stoppelman “deliberately attempted to seize on artificially high prices.” *Splash Tech. Holdings*,
11 160 F. Supp. 2d at 1084 (citation omitted). And courts have observed that “[o]fficers of publicly
12 traded companies commonly make stock transactions following the public release of quarterly
13 earnings and related financial disclosures.” *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1037
14 (9th Cir. 2002); *In re FVC.COM Sec. Litig.*, 136 F. Supp. 2d 1031, 1040 (N.D. Cal. 2000)
15 (finding that officers’ sale of shares following press release announcing anticipated increase in
16 quarterly revenues is not suspicious).

17 On the other hand, that the share prices were not unusually high when Stoppelman made
18 his sales does not necessarily negate suspicion, because the purpose of withholding unfavorable
19 news from the investors could simply be to keep share prices steady. Further, Stoppelman began
20 selling his shares approximately a week after Yelp issued its financial guidance on February 9,
21 2017, and the temporal proximity between the sales and the release of the optimistic projections
22 could support an inference of scienter. *See In re Intuitive Surgical Sec. Litig.*, 65 F. Supp. 3d 821,
23 839 (N.D. Cal. 2014) (finding that allegations that “Defendants sold their shares at times after
24 [defendant company] learned of information that would adversely affect [its] stock, but before the
25 public learned the information” supported inference of scienter). On balance, the timing of the
26 sales lends mild support for a finding of scienter.

27 However, Stoppelman’s sales during the class period were inconsistent with his prior
28 trading patterns. The magnitude and sale prices of his three sales of 250,000 shares at below \$40

1 per share did not align with his pattern of selling allotments of 13,000 shares when prices were
2 above \$40. *See* FAC ¶ 116. Moreover, although he had also made one substantial sale of 263,000
3 shares less than six months before the class period began, the sales during the class period were
4 significantly greater—750,000 total shares—and took place within the span of a mere month from
5 February 16 to March 15, 2017. These inconsistencies are somewhat mitigated by the fact that
6 Stoppelman was the only defendant alleged to have made suspicious sales, even though Plaintiffs
7 allege the other individual defendants also had knowledge of Yelp’s retention problems. *See*
8 *Metzler*, 540 F.3d at 1067 (“We typically require . . . corroborative sales by other defendants [] to
9 allow insider trading to support scienter”).

10 Based on the above, Stoppelman’s stock sales support, albeit not strongly, an inference of
11 scienter.

12 3. Core Operations

13 The core operations doctrine—the theory that “facts critical to a business’s ‘core
14 operations’ . . . are known to a company’s key officers”—“can be one relevant part of a complaint
15 that raises a strong inference of scienter.” *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 784
16 (9th Cir. 2008). The Ninth Circuit has explained that the doctrine on its own may support a strong
17 inference of scienter in two circumstances: (1) the allegations are particular and suggest that
18 defendants had actual access to the disputed information; (2) the allegations may conceivably
19 satisfy the PSLRA standard in a more bare form, without accompanying particularized allegations,
20 in rare circumstances where the nature of the relevant fact is of such prominence that it would be
21 “absurd” to suggest that management was without knowledge of the matter. *Id.* at 785–86
22 (citations and internal quotation marks omitted).

23 As to the first prong, Plaintiffs have alleged, based on statements made by Defendants at
24 various time, that Yelp carefully monitors advertisers’ returns on investment, which impacts
25 whether they continue advertising with Yelp, and that Yelp said it would track whether the 2016
26 cohort of local advertisers would renew their contracts. *See, e.g.*, FAC ¶¶ 47, 49. Plaintiffs have
27 also alleged that Yelp reviews a number of “real-time metrics” that provides Defendants with
28 “immediate insights into customer retention trends.” *Id.* ¶ 32. However, a careful review of these

1 allegations reveals that none of the metrics was retention rate itself. Instead, these metrics all
2 related to advertisers' "return on investment" from their advertising on Yelp and their
3 "engagement on the platform." *See, e.g.*, FAC ¶¶ 125–26, 128–32. Thus, Plaintiffs are unable to
4 point to any "specific admissions from top executives" that they monitored the local advertiser
5 retention rate in particular. *In re Daou Sys., Inc.*, 411 F.3d 1006, 1022 (9th Cir. 2005). And even
6 if Baker's prospective statement that "we'll be watching how [the local advertisers] renew" tends
7 to show that Defendants did in fact monitor the renewal rate, it does not indicate when Defendants
8 became aware that the churn rate was higher than expected. Thus, although Plaintiffs have
9 included some "details about the defendants' access to information within the company," *South*
10 *Ferry LP*, 542 F.3d at 785, they have not provided enough to meet the high standard of
11 particularity required to show Defendants had access to local advertiser retention data in real-time.

12 However, as to the second prong, Plaintiffs have made sufficient allegations to indicate
13 that the local advertiser program is such a central component of Yelp's operations that Defendants
14 can be presumed to have knowledge of the problems within the program. According to the
15 complaint, the local advertising segment "accounted for approximately 70% of [Yelp's]
16 advertising revenues in 2016," and that advertising revenues in turn accounted for "approximately
17 90%" of Yelp's total revenue. FAC ¶¶ 20, 22. Assuming the truth of these figures, significantly
18 more than half of Yelp's revenue derives from the local advertiser program, enough to suggest that
19 the program's operation is "prominent enough that it would be 'absurd to suggest' that top
20 management was unaware of" the advertiser churn issues. *Berson*, 527 F.3d at 989 (finding it
21 "hard to believe that [the CEO and CFO] would not have known about stop-work orders that
22 allegedly halted tens of millions of dollars of the company's work"); *In re Montage Tech. Grp.*
23 *Ltd. Sec. Litig.*, 78 F. Supp. 3d 1215, 1226 (N.D. Cal. 2015) (making inference of scienter under
24 core operations theory based in part on allegations that defendant company did not disclose that a
25 distributor accounting for 71% of its revenue was in fact owned and controlled by an affiliate of
26 defendant company).

27 Moreover, "viewed holistically, along with other allegations in the complaint," Plaintiffs'
28 core operations allegations are sufficient to raise a strong inference of scienter. *Reese v. Malone*,

1 747 F.3d 557, 575 (9th Cir. 2014), *overruled on other grounds by City of Dearborn Heights Act*
2 *345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017). Although
3 Defendants’ repeated statements about tracking the return on investment for local advertisers fall
4 short of establishing real-time knowledge of retention rates, they suggest that Defendants would
5 have had some awareness of potential retention problems going into the first quarter of 2017 when
6 considered in conjunction with their admission that return on investment is closely correlated with
7 retention. *See* FAC ¶ 68 (Defendant Stoppelman explaining that “the higher ROI fundamentally
8 that [an] engaged advertiser is getting is going to lead to, over the long term, better retention”); *In*
9 *re Wells Fargo & Co. S’holder Derivative Litig.*, 282 F. Supp. 3d 1074, 1101 (N.D. Cal. 2017)
10 (concluding that “it would be ‘absurd’ to suggest that management was without knowledge” of
11 allegedly fraudulent cross-selling practices at Wells Fargo given “the ‘prominence’ of cross-
12 selling in Wells Fargo’s business” and “the close manner in which it was monitored”). The Court
13 finds that these statements, together with Defendants’ statements about recognizing the churn
14 issues and taking corrective action “in January and February” of 2017, raise the inference that
15 Defendants issued the misleading statements on February 9, February 14, and March 1 with
16 scienter “at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs*, 551
17 U.S. at 314.

18 In sum, Defendants’ statements regarding when they became aware of the churn issues,
19 Stoppelman’s stock sales during the proposed class period, and Plaintiffs’ allegations that local
20 advertising is a core operation for Yelp “combine to create a strong inference” of scienter on
21 Defendants’ part in making the allegedly misleading statements. *Curry*, 875 F.3d at 1226.

22 C. Loss Causation

23 “To prove loss causation, the plaintiff must demonstrate a causal connection between the
24 deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the
25 plaintiff.” *Ambassador Hotel Co., Ltd. v. Wei-Chuan Inv.*, 189 F.3d 1017, 1027 (9th Cir. 1999).
26 “A plaintiff is not required to show that a misrepresentation was the *sole* reason for the
27 investment’s decline in value,” but it must set forth facts that “‘if assumed true, are sufficient to
28 provide [the defendant] with some indication that the drop in [defendant’s] stock price was

1 causally related to [the defendant’s] financial misstatement[s].” *In re Daou*, 411 F.3d at 1025–26
2 (citation and internal quotation marks omitted). “So long as the complaint alleges facts that, if
3 taken as true, plausibly establish loss causation, a Rule 12(b)(6) dismissal is inappropriate.” *In re*
4 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008).

5 According to Defendants, Plaintiffs are required to show that their losses were caused by
6 the market responding to revelations of fraudulent conduct. Mot. at 22. For this proposition,
7 Defendants rely on *Metzler*, in which the Ninth Circuit stated that loss causation is adequately pled
8 where a complaint “allege[s] that the market learned of and reacted to [the] fraud, as opposed to
9 merely reacting to reports of the defendant’s poor financial health generally.” 540 F.3d at 1063.
10 If this were the only way to show loss causation, Plaintiffs’ allegations might be problematic. The
11 complaint alleges that once Yelp’s “downgrade to its 2017 guidance was revealed . . . the price of
12 Yelp’s stock declined precipitously,” and that an analyst report published the day after the May 9
13 guidance revision attributed the drop in Yelp’s share prices to “greater advertising churn” than
14 expected. FAC ¶¶ 104, 108. These allegations merely show that the market was reacting to the
15 news that Yelp’s financial performance was worse than previously projected; they do not show
16 that the market became aware that Yelp’s previous statements were *fraudulent* for concealing
17 unfavorable information about advertiser churn rates.

18 But that is not the only way to show loss causation. The Ninth Circuit has explained that it
19 is “well established” that “a plaintiff can satisfy loss causation by showing that ‘the defendant
20 misrepresented or omitted the *very facts* that were a substantial factor in causing the plaintiff’s
21 economic loss.’” *Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.*, 730 F.3d
22 1111, 1120 (9th Cir. 2013) (quoting *McCabe v. Ernst & Young, LLP.*, 494 F.3d 418, 425 (3d Cir.
23 2007)) (emphasis in original); *see also In re Vivendi Universal, S.A. Sec. Litig.*, 634 F. Supp. 2d
24 352, 364 (S.D.N.Y. 2009) (holding that loss causation can be established by an event that
25 “disclose[s] part of the truth that was previously concealed by the fraud,” even if the event does
26 “not identify specific company statements as false or misleading”). For example, loss causation
27 has been found to be sufficiently alleged where a plaintiff purchased security that was “readjusted
28 to a lower, more accurate level following the materialization of the risk” that was previously

1 undisclosed, “causing Plaintiff to lose money.” *Cement & Concrete Workers Dist. Council*
 2 *Pension Fund v. Hewlett Packard Co.*, 964 F. Supp. 2d 1128, 1146 (N.D. Cal. 2013); *see also*
 3 *Thomas v. Magnachip Semiconductor Corp.*, 167 F. Supp. 3d 1029, 1046 (N.D. Cal. 2016) (loss
 4 causation established where “stock steadily declined” as defendant company postponed releasing a
 5 financial report and then released a “restatement of its financial results”).

6 Plaintiffs have adequately alleged loss causation under this approach. First, Defendants’
 7 statements from February 9 and 14 failed to mention the retention problems manifesting in late
 8 2016 and early 2017. *See* Part V.A.2, *supra*. Second, there is no dispute that the revelation of the
 9 retention problems was a substantial factor in causing the drop in Plaintiffs’ Yelp shares.
 10 Defendants concede that it was the “decline in retention that . . . impacted [Yelp’s] outlook.” FAC
 11 ¶ 62. Accordingly, Plaintiffs have “demonstrate[d] a causal connection between [Defendants’
 12 allegedly] deceptive acts . . . and the injury suffered by the” Plaintiffs. *Ambassador Hotel*, 189
 13 F.3d at 1027 (9th Cir. 1999).

14 D. Section 20(a) Claim as to Individual Defendants

15 In addition to their claims under § 10 (b), Plaintiffs allege that Stoppelman, Nachman, and
 16 Baker violated § 20(a) of the Securities Exchange Act in their individual capacities. Section 20(a)
 17 “provides for derivative liability; that is, it ‘makes certain ‘controlling’ individuals also liable for
 18 violations of section 10(b) and its underlying regulations.’” *Westley v. Oclaro, Inc.*, 897 F. Supp.
 19 2d 902, 912 (N.D. Cal. 2012) (citing *Zucco Partners*, 552 F.3d at 990). Because the Court finds
 20 that Plaintiffs have stated a claim for § 10(b) violations with respect to several of Defendants’
 21 statements, the Individual Defendants’ motion to dismiss the § 20(a) claims against them is

22 **DENIED.**

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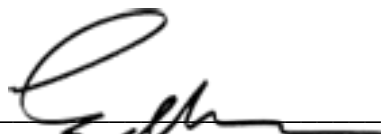
1 **VI. CONCLUSION**

2 For the foregoing reasons, Defendants' motion to dismiss is **DENIED** with respect to the
3 statements quoted in FAC ¶¶ 81, 83, 87, 91, and 99, and **GRANTED** with respect to the other
4 challenged statements.

5 This order disposes of Docket No. 31.

6
7 **IT IS SO ORDERED.**

8
9 Dated: November 27, 2018

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12 _____
13 EDWARD M. CHEN
14 United States District Judge
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United States District Court
Northern District of California