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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOSEPH CURRY, et al.,  
Plaintiffs,  
v.  
YELP INC., et al.,  
Defendants.

Case No. 14-cv-03547-JST

**ORDER GRANTING MOTION TO  
DISMISS CONSOLIDATED CLASS  
ACTION COMPLAINT**

Re: ECF No. 34

This is a securities action brought against Yelp Inc., its Co-founder and Chief Executive Jeremy Stoppelman, its Chief Financial Officer Robert Krolik, and its Chief Operating Officer Geoffrey Donaker (collectively, “Defendants”). Plaintiffs allege that Defendants made material misrepresentations about the authenticity of reviews hosted on Yelp’s website, and about whether Yelp manipulated reviews in favor of businesses that advertised with Yelp. Defendants have moved to dismiss the Complaint for failure to state a claim pursuant to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4. This matter came for a hearing on April 16, 2014.

Because the Consolidated Class Action Complaint fails to satisfy the requirements for a securities fraud claim, the Court will grant the motion to dismiss with leave to amend.

**I. Background**

**A. Allegations of the Complaint**

Yelp, Inc. is a company founded in 2004 that “describes itself generally as an online networking platform that connects people with great local businesses” by hosting user-generated reviews. Complaint, ECF No. 33 at ¶ 2. Yelp generates revenue from selling advertising on its website and mobile application. *Id.* at ¶ 3.

This putative class action is brought on behalf of “all persons who purchased or otherwise

1 acquired the common stock of Yelp from October 29, 2013, through April 3, 2014, inclusive.”  
2 (“The class period”) ECF No. 33 at ¶ 1. Plaintiffs allege that Defendants made false and  
3 misleading statements regarding Yelp’s advertising practices and financial condition, causing  
4 Yelp’s stock to trade at artificially-inflated prices during the class period. Id. at ¶ 6.

5 Plaintiffs allege that the misrepresentations began with Yelp’s October 29, 2013 press  
6 release announcing the company’s financial results for the Third Quarter of 2013 and the  
7 Prospectus and Registration Statement released the same day. These materials stated that Yelp  
8 “saw another quarter of strong momentum thanks to the high-quality, authentic content  
9 contributed by Yelpers around the world” and that Yelp “contributors provide rich, firsthand  
10 information about local businesses, such as reviews, ratings and photos.” Id. at ¶ 7. The  
11 Registration Statement acknowledged that “[t]he media has previously reported allegations that we  
12 manipulate our reviews, rankings and rating in favor of our advertisers and against non-  
13 advertisers. These allegations, though untrue, could adversely affect our reputation and brand.”  
14 Id. at ¶ 8.

15 Although Defendants disclosed both before and during the class period that Yelp actively  
16 curated and controlled the presentation of reviews on its website, Defendants consistently denied  
17 manipulating businesses’ reviews in exchange for payment. Id. at ¶ 32. For instance, Yelp touted  
18 its use of recommendation software to curate reviews in order to ensure the authenticity, quality,  
19 and integrity of the reviews hosted on the website. Id. Vince Sollitto, Yelp’s VP of  
20 Communications and Public Affairs, stated that Yelp employed algorithms as a “very aggressive  
21 means of filtering out attempts to game the system, fakes and shells.” Id. Yelp also admitted that  
22 it controlled reviews and content through the assistance of community managers, paid employees  
23 of Yelp who would generate content by writing reviews of local businesses. Id.

24 Plaintiffs allege that Defendants’ statements regarding the authentic and firsthand nature of  
25 its reviews were false and misleading because Defendants “knew, or recklessly disregarded and  
26 failed to disclose” that “reviews, including anonymous reviews, appearing on the Company’s  
27 website were not all ‘authentic’ or ‘first-hand’ reviews.” Id. at ¶ 46. Plaintiffs allege that Yelp  
28 “hosted a substantial amount of fraudulent reviews from reviewers Yelp knew did not have first-

1 hand experience with the business being reviewed and/or for which Yelp had credible evidence  
2 that the reviews were false.” Id. Despite Yelp’s claims that it used effective algorithms and  
3 filtering software to ensure the authenticity of reviews, Plaintiffs allege that unreliable or fake  
4 reviews of non-advertising businesses were frequently not screened or removed, in some cases  
5 even after businesses submitted evidence of the falsity of those reviews to Yelp. Id.

6 Plaintiffs allege that the inclusion of unreliable and inauthentic reviews was in some cases  
7 not the result of mere oversight, but was Yelp’s calculated business strategy designed to  
8 shakedown non-advertising businesses for payment. Id. According to the Complaint, Yelp’s  
9 statements denying previously-reported media allegations that Yelp manipulated its reviews in  
10 favor of advertisers and against non-advertisers were knowingly false. Id. Plaintiffs claim that  
11 Yelp employees in fact commonly attempted to coerce businesses into buying advertising in  
12 exchange for offers to remove fake or inauthentic negative reviews. Id. Although Yelp  
13 maintained that businesses that purchased advertising would be merely paying to promote  
14 themselves, “the truth was that in many instances unless local businesses purchased advertising,  
15 Yelp would often filter legitimate, authentic, first-hand reviews” of those businesses. Id.

16 Plaintiffs state that the truth about Yelp’s manipulation of reviews in favor of advertisers  
17 and against non-advertisers was revealed by an April 2, 2014 Wall Street Journal article that  
18 detailed the results of a FOIA request served on the FTC regarding customer complaints about  
19 Yelp. Id. at ¶ 82. In response to the Wall Street Journal’s inquiry, the FTC released 2,046  
20 consumer complaints filed with the FTC between 2008 and March 4, 2014. See  
21 [https://www.ftc.gov/system/files/attachments/frequently-requested-records/yelp-foia-2014-](https://www.ftc.gov/system/files/attachments/frequently-requested-records/yelp-foia-2014-00610.pdf)  
22 [00610.pdf](https://www.ftc.gov/system/files/attachments/frequently-requested-records/yelp-foia-2014-00610.pdf). As a result of the Wall Street Journal article, Plaintiffs allege that the market became  
23 aware of “new facts concerning the volume and the apparent corroborative nature of business  
24 owner complaints of Yelp’s extortion-like tactics and thus Yelp’s operations and financial  
25 condition.” ECF No. 33 at ¶ 82. Plaintiffs claim that the article’s publication caused a decline in  
26 Yelp’s stock, which, after closing at \$80.18 on April 1, 2014, fell to \$75.63 by the close of April  
27 2, 2014. Id. at ¶ 83. On April 3, 2014, the stock price fell further to \$70.61 by close, before  
28 falling to \$65.76 by the close of April 4, 2014. Id. at ¶¶ 87, 89.

1 Plaintiffs allege that the article and the complaints cited therein were particularly damaging  
2 to Yelp's revenue prospects because they called into question the veracity of Yelp's denials of  
3 previous media reports alleging that Yelp manipulated reviews of businesses in connection with  
4 advertising. Id. at ¶ 83. Plaintiffs point to several news reports from this period linking the  
5 decline in Yelp stock to the Wall Street Journal article, including an April 3, 2014 SunTrust  
6 Robinson Humphrey report titled "Yelp Shares Drop On FTC Complaints Disclosure." Id. at ¶ 85.

7 Plaintiffs plead that "[b]etween November 14, 2013, and March 10, 2014, many of the  
8 Company's executive officers and directors," including Defendants Stoppelman, Krolik, and  
9 Donaker, "suspiciously sold more than 1.1 million shares of their Yelp stock at artificially inflated  
10 prices as high as \$98.18 per share for insider trading proceed in excess of \$81.5 million." Id. at ¶  
11 63. Plaintiffs contend that these sales indicate that Defendants and other insiders knew that Yelp's  
12 stock was overvalued as a result of the alleged misrepresentations and therefore support an  
13 inference of scienter.

#### 14 **B. Procedural History**

15 On August 6, 2014, Plaintiff Joseph Curry filed a "Complaint for Violations of the Federal  
16 Securities Laws" against Defendants. ECF No. 1. Later that month, Plaintiff Mary Adams filed a  
17 similar complaint against Yelp in a separate action, 14-cv-03832, which also alleged violations of  
18 the federal securities laws and concerned the same class period as the Curry action. This Court  
19 subsequently ordered the Adams and Curry actions related. ECF No. 17.

20 After the cases were related, two potential lead plaintiffs— an individual named Dru L. Pio  
21 and the City of Miami Fire Fighters' and Police Officers' Retirement Trust ("the Trust")— filed  
22 motions asking the Court to consolidate the two cases pursuant to Federal Rule of Civil Procedure  
23 42(a). ECF Nos. 19, 21. Both motions also requested that the Court appoint the party who filed  
24 that motion as lead counsel under 15 U.S.C. §78u-4(a)(3)(B)(v). Id.

25 The Court ordered the actions consolidated. ECF No. 30. The Court appointed the Trust  
26 the lead plaintiff, as the Trust had alleged the greatest financial stake in the outcome of the case,  
27 pleading approximately \$372,000 in losses in light of the decline in Yelp stock, and otherwise  
28 satisfied the requirements of Federal Rule of Civil Procedure 23. Id. at 2-4. The Trust

1 subsequently filed a Consolidated Class Action Complaint (“the Complaint”) for Violations of the  
2 Federal Securities Laws. ECF No. 33.

3 Defendants subsequently filed the present Motion to Dismiss the Complaint. ECF No. 34.

### 4 **C. Jurisdiction**

5 Because this action arises under the Securities Exchange Act of 1934, the Court has  
6 jurisdiction pursuant to 28 U.S.C. § 1331.

## 7 **II. Defendants’ Requests for Judicial Notice**

8 Pursuant to Federal Rule of Evidence 201, Defendants ask the Court to take judicial notice  
9 of several different categories of documents attached to their motion. ECF No. 37. The Plaintiffs  
10 have partially opposed this request as to certain categories of documents. ECF No. 41.

### 11 **A. Legal Standard**

12 “[A] district court may not consider any material beyond the pleadings in ruling on a Rule  
13 12(b)(6) motion.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n. 19  
14 (9th Cir. 1990). Federal Rule of Civil Procedure 12(d) provides: “If, on a motion under Rule  
15 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the  
16 motion must be treated as one for summary judgment under Rule 56.” However, courts may  
17 properly take judicial notice of material attached to the complaint. See Lee v. City of Los  
18 Angeles, 250 F.3d 668, 688–69 (9th Cir. 2001); Branch v. Tunnell, 14 F.3d 449, 454 (9th Cir.  
19 1994), rev’d on other grounds by Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002).  
20 If the documents are not attached to the complaint, they may be considered if their authenticity is  
21 not contested and the complaint “necessarily relies on them.” Lee, 250 F.3d at 688. This has  
22 become known as the “incorporation by reference” doctrine. Knievel v. ESPN, 393 F.3d 1068,  
23 1076 (9th Cir. 2005).

24 In addition, a Court may take judicial notice of matters in the public record. Federal Rule  
25 of Evidence 201(b) provides: a “judicially noticed fact must be one not subject to reasonable  
26 dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court;  
27 or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot  
28 reasonably be questioned.” In contrast, a fact “subject to reasonable dispute” may not be

1 considered. Lee, 250 F.3d at 689 (quoting Fed. R. Evid. 201(b)).

2 At the motion to dismiss stage, “[t]he court has complete discretion to determine whether  
3 or not to accept any material beyond the pleadings that is offered in conjunction with a Rule  
4 12(b)(6) motion.” Nat’l Agr. Chemicals Ass’n v. Rominger, 500 F. Supp. 465, 472 (E.D. Cal.  
5 1980) (quoting 5 Wright & Miller, Federal Practice & Procedure, § 678 (1969)).

6 **B. Form 4 Filings of Defendants and Other Yelp Insiders**

7 Plaintiffs do not object to the Defendants’ request that the Court take judicial notice of  
8 Exhibits H, J, L, N, P, and R to the Serota Declaration, ECF No. 35, which are Form 4  
9 submissions that were filed with the SEC by individual Defendants and other Yelp insiders that  
10 detail sales and holdings of their securities. The Court will take judicial notice of the Form 4  
11 filings as their authenticity is not contested and the complaint necessarily relies on alleged insider  
12 sales to support an inference of scienter. See In re Copper Mountain Sec. Litig., 311 F. Supp. 2d  
13 857, 863 (N.D. Cal. 2004).

14 Defendants have submitted as Exhibits I, K, M, O, Q, and S to the Serota Declaration  
15 summaries, prepared by Defendants’ counsel, of the information contained in the Form 4 filings.  
16 Plaintiffs opposed the Court’s taking judicial notice of these documents, however Defendants  
17 subsequently explained in their reply brief that they do not seek judicial notice of the Form 4  
18 summaries, but only the Form 4 filings themselves. ECF No. 43 at 3. Therefore, the Court will  
19 not take judicial notice of these summaries.

20 **C. Various Other SEC Forms**

21 Plaintiffs do not object to Exhibits A through G to the Serota Declaration. Plaintiffs do not  
22 contest the authenticity of these forms and the complaint references and relies on certain of these  
23 documents. Therefore, the Court will grant judicial notice of these documents.

24 **D. The FTC Documents**

25 The Plaintiffs’ object to Defendants’ request for judicial notice of four FTC documents.  
26 Two of the documents are letters from Dione J. Stearns, Assistant General Counsel to the FTC,  
27 responding to FOIA requests seeking complaints filed against Yelp. The other two documents are  
28 copies of the complaints against Yelp disclosed by the FTC pursuant to the same FOIA requests.

1 Plaintiffs quote and cite to the complaints submitted to the FTC at length in their complaint  
2 and the complaints are properly incorporated by reference. Although Plaintiffs note that these  
3 documents were not submitted as Exhibits, they do not explain why this failure should result in the  
4 Court refusing to take judicial notice of properly noticeable documents. Courts may notice  
5 publicly available documents even where those documents are not part of the judicial record. See,  
6 e.g., Northstar Fin. Advisors Inc. v. Schwab Investments, 779 F.3d 1036, 1043 (9th Cir. 2015).

### 7 **E. Media Articles**

8 Exhibits T through Y are media articles of which the Defendants ask the Court to take  
9 judicial notice. Plaintiffs acknowledge that Exhibit T, an April 3, 2014 SunTrust Robinson  
10 Humphrey article, is incorporated by reference in the complaint and can be judicially noticed, but  
11 asks the Court not to notice that Exhibit for the truth of the matters asserted therein. ECF No. 41  
12 at 4. Defendants acknowledge that they do not offer the Exhibit for the truth of the matter  
13 asserted, but rather as evidence of information available to the public. The Court will take judicial  
14 notice of Exhibit T for this purpose.

15 Exhibits U-Y are media articles that are not incorporated by reference in the complaint.  
16 Plaintiffs note that only Exhibit X was published during the class period. Plaintiffs argue that the  
17 other Exhibits in this group, whose publication predated the class period, go toward Defendants’  
18 truth-on-the-market defense, which they assert is not properly raised at the motion to dismiss  
19 stage. Plaintiffs have not disputed that the copies of the articles provided in the Exhibits are  
20 authentic. The Court will take notice of these exhibits, as Defendants do not seek to introduce the  
21 Exhibits for the truth of the statements made therein, but rather to demonstrate “that the market  
22 was aware of the information” contained therein prior to the class period. See Heliotrope Gen.,  
23 Inc. v. Ford Motor Co., 189 F.3d 971, 981 (9th Cir. 1999) (noticing such documents at the  
24 judgment on the pleadings stage).

### 25 **III. Legal Standard**

26 On a motion to dismiss, courts accept the material facts alleged in the complaint, together  
27 with reasonable inferences to be drawn from those facts, as true. Navarro v. Block, 250 F.3d 729,  
28 732 (9th Cir. 2001). However, “the tenet that a court must accept a complaint’s allegations as true



1 is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory  
2 statements." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). To be entitled to the presumption of  
3 truth, a complaint's allegations "must contain sufficient allegations of underlying facts to give fair  
4 notice and to enable the opposing party to defend itself effectively." Starr v. Baca, 652 F.3d 1202,  
5 1216 (9th Cir. 2011).

6 While generally, to survive a motion to dismiss, a plaintiff need only to plead "enough  
7 facts to state a claim to relief that is plausible on its face," see Bell Atlantic Corp. v. Twombly,  
8 550 U.S. 544, 570 (2007), "[s]ecurities fraud class actions must meet the higher, exacting pleading  
9 standards of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act  
10 (PSLRA)." Oregon Pub. Employees Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 604 (9th Cir.  
11 2014). Under the PSLRA, a complaint must "state with particularity facts giving rise to a strong  
12 inference that the defendant acted with the required state of mind" with respect to each alleged  
13 false statement or omission. 15 U.S.C. § 78u-4(b)(2)(A). The PSLRA also requires that "the  
14 complaint shall specify each statement alleged to have been misleading, the reason or reasons why  
15 the statement is misleading, and, if an allegation regarding the statement or omission is made on  
16 information and belief, the complaint shall state with particularity all facts on which that belief is  
17 formed." Id. at § 78u-4(b)(1)(B).

18 The Ninth Circuit has held that under the PSLRA, securities fraud plaintiffs must plead all  
19 the elements of a securities fraud action with particularity, including loss causation. Oregon Pub.  
20 Employees Ret. Fund v. Apollo Grp. Inc., 774 F.3d 598, 605 (9th Cir. 2014). If the complaint  
21 does not satisfy the PSLRA's pleading requirements, the Court must grant a motion to dismiss the  
22 complaint. 15 U.S.C. § 78u-4(b)(3)(A).

#### 23 **IV. Motion to Dismiss**

24 Section 10(b) of the Securities Exchange Act of 1934 prohibits any act or omission  
25 resulting in fraud or deceit in connection with the purchase or sale of any security. To state a  
26 claim for violation of section 10(b), a plaintiff must plead: (1) a material misrepresentation or  
27 omission made by the defendant; (2) scienter; (3) a connection between the misrepresentation or  
28 omission and the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss



1 causation. See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148, 157 (2008).

2 Defendants move to dismiss the complaint, which they argue fails to properly plead the  
3 elements of materially false statements, loss causation, or scienter.

4 **A. Materially False Statements**

5 Defendants contend that Plaintiffs have failed to allege any actionable statements by  
6 Defendants. For statements to be actionable under the PSLRA, they must be both false or  
7 misleading *and* material. A statement or omission is misleading under the PSLRA and Section  
8 10(b) of the Exchange Act “if it would give a reasonable investor the impression of a state of  
9 affairs that differs in a material way from the one that actually exists.” Berson v. Applied Signal  
10 Tech., Inc., 527 F.3d 982, 985 (9th Cir. 2008) (internal quotations and citation omitted). A false  
11 or misleading statement or omission is material if there is a “substantial likelihood that the  
12 disclosure of the omitted fact would have been viewed by the reasonable investor as having  
13 significantly altered the ‘total mix’ of information made available.” TSC Indus., Inc. v. Northway,  
14 Inc., 425 U.S. 438, 449 (1976).

15 **i. Statements Touting the “Authentic” and “First-Hand” Nature of**  
16 **Reviews**

17 First, Plaintiffs have pled that statements made by Defendants and other Yelp executives  
18 touting the “authentic” and “first-hand” nature of the reviews hosted on its website were materially  
19 false or misleading. ECF No. 33 at ¶¶ 7-9. Despite these representations, Plaintiffs argue that  
20 many reviews hosted on Yelp’s website were in fact false or unreliable, as demonstrated by the  
21 consumer complaints submitted to the FTC. ECF No. 39 at 6-7. Furthermore, Plaintiffs allege  
22 that the FTC complaints revealed to the market that Yelp frequently failed to respond to  
23 businesses’ complaints that customer reviews were inauthentic or inaccurate, despite purporting to  
24 have sophisticated mechanisms in place to screen reviews for authenticity. Id. at 8.

25 Defendants respond that “Yelp does not and has not claimed that every review ever posted  
26 on its sites are authentic, high-quality, or otherwise uniformly reliable.” ECF No. 34 at 6.  
27 Defendants reason that the allegedly false statements merely reflected Yelp’s general confidence  
28 in the strength of the reviews hosted on its website. Defendants also point to statements made by

1 Yelp in its SEC Form S-1 Registration Statement— a document that Plaintiffs allege contained  
2 false statements— acknowledging that Yelp could not “guarantee the effective or adequacy” of  
3 efforts to screen unreliable or biased reviews. ECF No. 35-1 at 16.

4 The Court agrees with Defendants that the statements about the quality and authenticity of  
5 the reviews hosted on the website were not materially false or misleading. First, Defendants’  
6 statements would not have deceived a reasonable investor into believing that *all* of the reviews  
7 hosted on the Yelp website at a given moment in time were authentic and reliable. Yelp’s  
8 business model is widely understood to depend on user-generated business reviews. A reasonable  
9 investor would have understood that Yelp did not guarantee that no user would ever post an  
10 inauthentic or unreliable review to Yelp’s website.

11 This common-sense understanding of what it means for a website to host user-generated  
12 content was supplemented by Yelp’s own public statements, which acknowledged that Yelp could  
13 not “guarantee the effectiveness or adequacy” of its screening mechanisms.<sup>1</sup> SEC Form S-1  
14 Registration Statement, ECF No. 35-1 at 16. Yelp’s public admissions that it employed  
15 algorithms to screen unreliable reviews informed reasonable investors that some of the user-  
16 generated reviews posted to the Yelp website were not credible and required screening. In In re  
17 Lululemon Sec. Litig., Judge Forrest of the Southern District of New York held that lululemon’s  
18 statements regarding the “high quality” of its products compared to others in the industry were not  
19 rendered actionably false by the company’s subsequent recall of products that were found to have  
20 quality issues. No. 13 CIV. 4596 KBF, 2014 WL 1569500 (S.D.N.Y. Apr. 18, 2014). Judge  
21 Forrest reasoned that, even prior to the recall, lululemon’s website when read in context “implied[d]  
22 that such defects occur and with enough regularity to have an established policy as to how they are  
23

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24 <sup>1</sup> Plaintiffs argue that the Court should not consider what it characterizes as Defendants’ “truth-on-  
25 the-market defense” at the motion to dismiss stage. See ECF No. 39 at 14-15 (citing Amgen Inc.  
26 v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1204, 185 L. Ed. 2d 308 (2013)). But  
27 Defendants’ admissions that Yelp could not guarantee the effectiveness of its screening  
28 mechanisms were made in the same Registration Statement that Plaintiffs allege was materially  
false or misleading. Therefore, the Court considers these statements not to assess whether the  
market was generally aware of the truth and thus not affected by the allegedly false statement, but  
rather to resolve whether Yelp’s statements were even false.

1 handled, with actions ranging from sales in outlet stores to total removal from all shelves into the  
2 recycle bin.” Id. Similarly, Yelp’s disclosure that it employed various methods to screen  
3 unreliable reviews from the website informed investors that, although Yelp prided itself on  
4 authentic reviews, it continued to combat the posting of unreliable and inauthentic reviews.

5 To the extent that Plaintiffs allege that Defendants’ statements that Yelp actively sought to  
6 screen “attempts to game the system, fakes and shills” and ensure their quality and authenticity  
7 and were also false, id. at ¶ 32, the Complaint also fails to allege falsity. Plaintiffs rely on the  
8 2,046 complaints released by the FTC in response to an inquiry by The Wall Street Journal,  
9 certain of which claimed that, although businesses reported the existence of false reviews to Yelp,  
10 those reviews nonetheless remained prominent on Yelp’s website. ECF No. 33 at ¶ 42. Again,  
11 Yelp acknowledged in its Registration Statement that it could not “guarantee the effectiveness or  
12 adequacy” of its screening efforts. ECF No. 35-1 at 16. Customer complaints indicating that  
13 some unreliable reviews remained on the Yelp website after business owners had reported them to  
14 Yelp do not establish that Yelp was making no efforts to screen or filter inauthentic reviews.

15 The information that reviews hosted on the Yelp website “were not all authentic or first-  
16 hand,” ECF No. 33 at ¶ 46, and that Yelp in some instances allowed reviews to remain prominent  
17 on its website even after business owners contested their authenticity, ECF No. 39 at 8, did not  
18 significantly altered the “total mix” of information available to the market. S.E.C. v. Todd, 642  
19 F.3d 1207, 1215 (9th Cir. 2011) (quoting Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)).  
20 Therefore, Plaintiffs have not pled with particularity that Yelp’s statements about the authenticity  
21 of the reviews hosted on its website or Yelp’s attempts to screen unreliable reviews were  
22 materially false.

23 **ii. Statements Denying Manipulation of Reviews in Favor of Advertisers**  
24 **and Against Non-Advertisers**

25 Plaintiffs also allege that Defendants’ statements denying that Yelp manipulated reviews in  
26 favor of advertising businesses and against non-advertising businesses were false and material.  
27 Plaintiffs point to the statement made on Yelp’s website and in Yelp’s Registration Statement that  
28 “there is zero relationship between the timing of when a review gets recommended and when a

1 business decides to— or declines to— advertise.” ECF No. 33 at ¶¶ 43, 60. In those same sources,  
 2 Yelp also stated that “[o]ur recommendation software treats advertisers and non-advertisers  
 3 exactly the same.” ¶¶ 40, 43, 59, 60. Again, Plaintiffs allege that the customer complaints  
 4 released by the FOIA request The Wall Street Journal filed with the FTC revealed that these  
 5 statements were false, as in those complaints “several business owners report[ed] being  
 6 specifically told that Yelp would remove bad reviews for a fee.” ECF No. 39 at 9.

7 Defendants respond that “[a]llegations concerning Yelp’s advertising sales practice,  
 8 despite their lack of credibility,” have been present in the marketplace since before the beginning  
 9 of the class period. ECF No. 34 at 12. Yelp’s Registration Statement acknowledged that  
 10 “[n]egative publicity could adversely affect our reputation and brand,” specifically noting previous  
 11 media reports of allegations that Yelp “manipulates [] reviews, rankings and ratings in favor of our  
 12 advertisers and against non-advertisers.” ECF No. 35-1 at 16. Elsewhere in the Registration  
 13 Statement, Yelp disclosed that “various businesses have sued us alleging that we manipulate Yelp  
 14 reviews in order to coerce them and other businesses to pay for Yelp advertising (one such suit  
 15 was voluntarily dismissed and two others were conciliated and recently dismissed with prejudice,  
 16 although the plaintiffs are seeking an appeal).” Id. at 22.<sup>2</sup> Therefore, Defendants argue that a  
 17 reasonable investor during the class period already would have been aware of the allegations  
 18 disclosed in the FTC complaints.<sup>3</sup>

19 \_\_\_\_\_  
 20 <sup>2</sup> Defendants direct the Court to the complaint filed in this District in 2010 in Levitt v. Yelp! Inc.,  
 21 wherein business owners alleged “that Yelp extorted or attempted to extort advertising payments  
 22 from them by manipulating user reviews and penning negative reviews of their businesses.” See  
 23 Levitt v. Yelp! Inc., 765 F.3d 1123, 1126 (9th Cir. 2014). The District Court dismissed the  
 24 complaint for failure to state a claim for violation of California's Unfair Competition Law  
 (“UCL”), civil extortion, or attempted civil extortion. Levitt v. Yelp! Inc., No. C-10-1321 EMC,  
 2011 WL 5079526, at \*1 (N.D. Cal. Oct. 26, 2011) The Ninth Circuit affirmed in full. Levitt, 765  
 F.3d 1123.

25 <sup>3</sup> As the Court observed in footnote 3, the Court need not resolve the question of whether a “truth-  
 26 on-the-market” defense is properly considered at the motion to dismiss stage. Yelp disclosed the  
 27 existence of persistent allegations that Yelp manipulated reviews in favor of advertisers in its  
 Registration Statement. Because this disclosure existed within the four corners of a statement that  
 Plaintiffs allege was false or misleading, the Court need not analyze whether the truth was  
 28 “transmitted to the public with a degree of intensity and credibility sufficient to effectively  
 counterbalance any misleading impression created by insider's one-sided representations.”

1 The Court agrees that the disclosure of the FTC complaints did not alter the “total mix” of  
2 information available to the market. S.E.C. v. Todd, 642 F.3d 1207, 1215 (9th Cir. 2011) (quoting  
3 Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988)). This is because nothing in the FTC  
4 complaints establishes that Yelp’s statements denying manipulating reviews in favor of advertisers  
5 were false. Following the FTC’s release of the complaints, the market continued to hear two  
6 competing claims regarding Yelp’s manipulation of reviews. Some in the media continued to  
7 claim that Yelp manipulates “reviews, rankings and ratings in favor of our advertisers and against  
8 non-advertisers”— just as they had before the beginning of the class period, as acknowledged in  
9 Yelp’s Registration Statement. ECF No. 33 at ¶ 8. But Yelp also continued to deny such  
10 practices— just as it had prior to the beginning of the class period, as conveyed in Yelp’s  
11 Registration Statement. The release of the FTC complaints therefore does not establish that  
12 Defendants made materially false statements when they denied manipulating reviews.

13 Plaintiffs claim that “the specific and corroborative nature of the thousands of previously  
14 unreleased complaints to the FTC exposed for the first time defendants’ false statements tied to  
15 their extortionate business practices.” ECF No. 39 at 24. But the existence of these complaints  
16 does not conclusively establish that Yelp manipulated reviews in favor of advertisers or against  
17 non-advertisers.

18 First, Plaintiffs have not pointed the Court to any case holding that customer complaints  
19 alleging a state of affairs contrary to a defendant’s representations independently suffice to  
20 establish the falsity of those representations. In contrast, Defendants direct the Court to In re  
21 Netflix, Inc. Sec. Litig., wherein Judge Smith of this District concluded that Plaintiffs could not  
22 rely on customer complaints to establish the falsity of statements made by Defendant Netflix  
23 regarding improvements to its service. No. C04-2978 FMS, 2005 WL 1562858, at \*7 (N.D. Cal.  
24 June 28, 2005). Plaintiffs alleged that Netflix had falsely claimed improvements to its service had

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27 Provenz v. Miller, 102 F.3d 1478, 1493 (9th Cir. 1996). Yelp’s representations were not one-  
28 sided. Yelp acknowledged the existence of the allegations. Any investor who read the  
Registration Statement was aware that some business owners alleged Yelp manipulated reviews in  
favor of advertising businesses and against non-advertising businesses.

1 made Netflix more profitable. To establish the falsity of the statements, Plaintiffs attempted to  
2 point to customer complaints about service quality, which they argued demonstrated that Netflix  
3 “was aware that its service was much worse than represented and was leading to customer  
4 defections.” Id. Judge Smith held that the customer complaints did not demonstrate the falsity of  
5 Netflix’s representations, as “every large company can expect to have some customer complaints,  
6 and the existence of such complaints fails to render Netflix’s statements about its service false.”

7 Id.

8 The Court agrees with Netflix’s conclusion that customer complaints generally do not, on  
9 their own, establish the veracity of the allegations contained therein and the falsity of a  
10 defendant’s representations to the contrary. Even if the Court were to accept the premise that, in  
11 some cases, a high volume of strongly corroborative customer complaints could establish the  
12 falsity of a statement that a securities defendant continued to maintain was truthful, the Court  
13 concludes the complaints in this instance are not of such a high volume or strongly corroborative  
14 nature. The FTC complaints span a period of six years and, as argued by Defendants, represent a  
15 small fraction of the total number of businesses reviewed on Yelp.

16 Moreover, even as presented by Plaintiffs in the Complaint, the complaints submitted to  
17 the FTC are not strongly corroborative of one another, as they do not paint a uniform picture of  
18 Yelp’s allegedly extortionate practices. Some complaints merely claim that a Yelp user filed a  
19 false negative review of a business, but do not allege that Yelp took any action. See, e.g., ECF  
20 No. 33 ¶ 46(a)(i) (stating “[s]omeone on Yelp filed a false negative review.”). Other complaints  
21 claim that a Yelp user filed a false negative review of a business, the business contacted Yelp with  
22 evidence that the review was false, and Yelp insinuated it would remove the post for a fee. See,  
23 e.g., id. at ¶ 46(a)(ii) (“We have contacted them numerous times regarding the fictitious posting on  
24 our business. Nothing has been done at this time, but they have indicated for a fee unfavorable  
25 postings can be removed.”). Still other complaints state that a Yelp user filed a false negative  
26 review of a business, the business contacted Yelp with evidence that the review was false, and,  
27 although Yelp refused to take action to remove the review, it also never offered to do so for a fee.  
28 See, e.g., id. at ¶ 46(a)(iv) (alleging “[t]he negative reviews are not verified customers and contain



1 lies and defamations. We have evidence supporting our claim of these false reviews. We  
 2 contacted Yelp to see if they could remove the false reviews and restore our real reviews. They  
 3 refused.”) and ¶ 46(a)(vi) (“I have offered to provide Yelp with documentation from the police  
 4 which will show that [the statements contained in the reviews] are false . . . . Yelp has responded  
 5 that they would not consider any ‘evidence’ submitted.”).

6 Perhaps most suggestive of the manipulative practices denied by Yelp are those 25 FTC  
 7 complaints identified by the Complaint that were made by businesses alleging that, after declining  
 8 to advertise with Yelp, the prominence of negative reviews of their business drastically increased  
 9 and positive reviews were filtered or removed. See ECF No. 33 at ¶¶ 46(c)(i)-(xxvi). But even  
 10 these complaints, when considered in the full context of Yelp’s business, do not establish that  
 11 Yelp engaged in large-scale manipulation of customer reviews. Defendants note that 18 of these  
 12 25 customer complaints do not even allege “that Yelp ever told the business owner that purchasing  
 13 advertising would influence the filtering of reviews.” ECF No. 34 at 9. Instead, in these 18  
 14 complaints, business owners drew their own inferences about Yelp’s manipulation of reviews  
 15 based upon what they regarded as suspiciously-timed manipulations of the reviews for their  
 16 business. See, e.g., ¶ 46(c)(i) (“YELP solicited us to pay for one of their services. We declined  
 17 and the next day, 5 of our 5star reviews were eliminated . . . This is NOT coincidence. This is  
 18 extortion.”); ¶ 46 (c)(vi) (“When I declined to pay, the very next day 100% of my 4 and 5 star  
 19 Yelp reviews were filtered”); ¶ 46(c)(xix) (“In January of this year, as I was nearing the end of my  
 20 advertising contract with Yelp, Yelp filtered all of the positive reviews for my business. I believe  
 21 they did this in order to coerce me into renewing the contract with them”); ¶ 46(c)(xxv) (“Yelp  
 22 filters out legitimate 5 star reviews while simultaneously leaving less favorable reviews posted on  
 23 our page. We continually receive emails and calls from yelp asking us to advertise on their site  
 24 and the natural implication is that if we advertise with them our reviews will stop being filtered.”).

25 While some of the customer complaints do contain allegations that a Yelp representative  
 26 directly told a business that Yelp would manipulate reviews in exchange for a fee, the Complaint  
 27 identifies only a handful of such complaints out of the 2,046 released by the FTC. See, e.g., ¶  
 28 46(c)(xvi) (“[W]e got a call the next day from Yelp saying there was a lot of activity on our



1 account and we needed to advertise with them and they could bump up our 5 star reviews so  
2 people could view them and they would bump down the lower ratings and hide them. Again it  
3 was \$1,0000[sic]/ month.”), ¶ 46(c)(xxi) (“Chris from Yelp explained to me that by giving his  
4 seemingly transparent company money (about \$399) every month we could hide any bad reviews  
5 of our restaurant and bolster any good reviews.”), ¶ 46(c)(xxiii) (“Within 1 or 2 days of that bad  
6 review going up, Yelp called me for the 1st time from their sales office to try & sell me  
7 advertising. When I told them I could not afford it, they said ‘We can make your rating increase  
8 & take away that one star review for you, if you advertise with us.’”).

9 Again, the fact that some businesses made allegations that Yelp manipulated reviews was  
10 disclosed by Yelp before the beginning of the class period in the Registration Statement. For  
11 Yelp’s denials of these allegations to be materially false, the market must have been exposed to  
12 information that powerfully demonstrates Defendants’ denials are not credible, altering the “total  
13 mix” of information. Assuming a high number of strongly corroborative customer complaints  
14 could in some instances powerfully demonstrate falsity, the FTC complaints do not meet that  
15 threshold. Only a small number of the FTC complaints allege that a Yelp representative told a  
16 business that reviews could be manipulated for payment. The overwhelming majority of the FTC  
17 complaints do not allege this. The existence of a small number of customer complaints does not  
18 establish the veracity of the allegations contained therein. See Netflix, 2005 WL 1562858, at \*7.

19 This is not to say the events alleged in any of the FTC complaints did not occur. But a  
20 reasonable investor during the class period was aware that some businesses maintained that Yelp  
21 tried to coerce businesses into advertising by manipulating reviews. To this day, Yelp continues  
22 to deny manipulating reviews in this manner, just as it did during the class period. The FTC  
23 complaints do not make liars out of Defendants, because they do not meaningfully alter the “total  
24 mix” of information available to the marketplace on the issue of whether Yelp manipulates  
25 reviews of businesses in connection with advertising.

### 26 **iii. Forecasted Growth**

27 Plaintiffs also allege that Yelp’s statements regarding future business prospects were false  
28 or misleading, as “Defendants failed to disclose that the Company’s future revenue in fact relied

1 upon a business practice that involved deliberately leaving prominent fake and negative reviews,  
2 while filtering authentic positive reviews, in order to use each as leverage to sell advertising.”  
3 ECF No. 39 at 13. Optimistic statements about a company’s prospects can be actionable “if not  
4 genuinely and reasonably believed, or if the speaker is aware of undisclosed facts that tend  
5 seriously to undermine the statement's accuracy.” Cooper v. Pickett, 137 F.3d 616, 629 (9th Cir.  
6 1997). Short of such awareness, these statements generally are not actionable, as “[t]he statement,  
7 ‘the storm is passing and it will be sunny tomorrow,’ when in fact it continues to snow the next  
8 day, may be bad forecasting, but it is not necessarily a lie.” Ronconi v. Larkin, 253 F.3d 423, 433  
9 (9th Cir. 2001). Because the Complaint does not establish that Defendants made false statements  
10 relating to filtering of reviews in connection with advertising, Plaintiffs have not pled with  
11 particularity that Defendants’ optimism about the company’s prospects was undermined by  
12 undisclosed facts of which they were aware.

13 **B. Loss Causation**

14 Defendants also argue that Plaintiffs have failed to plead loss causation, as at most the FTC  
15 complaints disclosed the risk or potential for fraudulent conduct. ECF No. 34 at 14-16. Plaintiffs  
16 argue that they have sufficiently alleged loss causation, as “[n]umerous analysts opined that Yelp’s  
17 sudden and significant stock price drop was directly attributed to what was disclosed in the April  
18 2, 2014 article.” ECF No. 39 at 23.

19 “To prove loss causation, the Plaintiffs must demonstrate a causal connection between the  
20 deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the  
21 Plaintiffs.” Oregon Pub. Employees Ret. Fund, 774 F.3d at 608 (internal quotations and citations  
22 omitted). “The plaintiff must plausibly allege that the defendant’s fraud was revealed to the  
23 market and caused the resulting losses.” Loos v. Immersion Corp., 762 F.3d 880, 887 (9th Cir.  
24 2014) (internal quotations and citations omitted).

25 Because the Court has concluded that the FTC complaints do not establish the falsity of  
26 Defendant’s representations, the Court also finds that the release of the FTC complaints did not  
27 reveal any fraudulent practices to the market. In the absence of a false representation, there can be  
28 no revelation of falsity to the market. In Loos, the Ninth Circuit held that a complaint’s

1 allegations of a “precipitous decline” in stock price on the heels of a company’s announcement of  
2 an internal investigation did not sufficiently establish loss causation. 762 F.3d at 882. Agreeing  
3 with the Eleventh Circuit’s decision in Meyer v. Greene, 710 F.3d 1189 (11th Cir. 2013), the Loos  
4 court reasoned that the announcement of an investigation standing alone “does not ‘reveal’  
5 fraudulent practice to the market,” as “at the moment an investigation is announced, the market  
6 cannot possibly know what the investigation will ultimately reveal.” Id. at 890. “[A]ny decline in  
7 a corporation’s share price following the announcement of an investigation can only be attributed  
8 to market speculation about whether fraud has occurred.” Id. The court allowed that in some  
9 circumstances, the announcement of an investigation could form the basis for a viable loss  
10 causation theory, such as if it were accompanied by “an express disclosure of actual wrongdoing.”  
11 Id. at 890 n. 3.

12 The FTC complaints in this case likewise did not reveal any fraud to the market. As the  
13 Court discussed above, the FTC complaints merely added more voices to the chorus accusing Yelp  
14 of manipulating reviews to encourage businesses to advertise. These voices were not sufficiently  
15 numerous or corroborative to establish the veracity of the accusations they contained. Like the  
16 announcement of an internal investigation in Loos, the complaints were not conclusive proof of  
17 any wrongdoing by Yelp. Because Plaintiffs have not shown the allegations contained in the FTC  
18 complaints are true, they also cannot show that Yelp’s “share price fell significantly after the truth  
19 became known.” Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005).

20 When asked at the hearing on this motion for authority showing that the facts of the  
21 present case demonstrate loss causation, Plaintiffs offered Judge Conti’s recent decision in  
22 Nathanson v. Polycom, Inc., No. 13-3476 SC, 2015 WL 1517777, at \*1 (N.D. Cal. Apr. 3, 2015).  
23 In that case, defendant Polycom’s CEO had claimed “reimbursements for numerous extravagant  
24 personal expenses with no legitimate business purpose.” Id. After an investigation by Polycom’s  
25 Audit Committee revealed these irregularities, Polycom announced their findings in a press  
26 release, but denied that the CEO’s wrongfully-claimed expenses had had any material impact on  
27 Polycom’s prior financial statements. Id. Following this release, Polycom’s stock declined by 15  
28 percent. Id. Polycom argued that the press release did not constitute a corrective disclosure

1 sufficient to establish loss causation because the release had denied that the expense submissions  
2 had caused Polycom “to overstate its operating expenses through the class period.” Id. at \*13.  
3 The court concluded that Plaintiffs could nevertheless state a claim for loss causation as no  
4 “outright admission of fraud” was required and the press release had revealed new information to  
5 the marketplace. Id. (citing Loos, 762 F.3d at 888–89).

6 Nathanson provides no assistance to Plaintiffs. Unlike the announcement of improperly  
7 claimed reimbursements in Nathanson, which revealed damaging new information to the  
8 marketplace, The Wall Street Journal’s publication of the customer complaints did not reveal any  
9 new information. And Yelp itself did not make any corrective disclosure or reveal any previously-  
10 unknown information to the marketplace in the wake of the release of the customer complaints.  
11 Again, Yelp continues to deny manipulation of its reviews in connection with advertising. It does  
12 not help the Plaintiffs that Yelp’s stock fell in the days following the publication of an article  
13 concerning the FTC complaints in The Wall Street Journal. The decline in Yelp’s stock, like the  
14 decline in Loos, is attributable to “market speculation about whether fraud has occurred,” which  
15 simply “cannot form the basis of a viable loss causation theory.” Loos, 762 F.3d at 890.

### 16 C. **Scienter**

17 Finally, Defendants argue that Plaintiffs have also failed to allege that they acted with the  
18 required state of mind to deceive, manipulate, or defraud. Plaintiffs argue that Defendants “knew  
19 or were deliberately reckless in not knowing that their statements were false,” as businesses  
20 contacted Yelp regarding false reviews and Defendants admitted the authenticity of reviews were  
21 crucial to Yelp’s success. ECF No. 39 at 16. Plaintiffs also contend that the Complaint “alleges  
22 highly unusual and suspicious stock sales by defendants Stoppelman, Krolik and Donaker, in  
23 addition to other insiders, in terms of: (i) amount and percentage of shares they sold; (ii) the  
24 timing of the sales; and (iii) the inconsistency with past sales history.” Id. at 19.

25 The PSLRA’s heightened scienter standard requires that plaintiffs “state with particularity  
26 facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15  
27 U.S.C. § 78u-4(b)(2). The required state of mind is a “mental state embracing intent to deceive,  
28 manipulate, or defraud.” Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193–94 n. 12 (1976).

1 Deliberate or conscious recklessness constitutes intentional conduct sufficient to satisfy the  
 2 scienter requirement. “[R]eckless conduct may be defined as a highly unreasonable omission,  
 3 involving not merely simple, or even inexcusable negligence, but an extreme departure from the  
 4 standards of ordinary care, and which presents a danger of misleading buyers or sellers that is  
 5 either known to the defendant or is so obvious that the actor must have been aware of it.” In re  
 6 Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999). “[T]he ultimate question is  
 7 whether the defendant knew his or her statements were false, or was consciously reckless as to  
 8 their truth or falsity.” Gebhart v. SEC, 595 F.3d 1034, 1042 (9th Cir. 2010).

9 The “strong inference” required by the PSLRA “must be more than merely ‘reasonable’ or  
 10 ‘permissible’ — it must be cogent and compelling, thus strong in light of other explanations.”  
 11 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 324 (2007). “A court must compare  
 12 the malicious and innocent inferences cognizable from the facts pled in the complaint, and only  
 13 allow the complaint to survive a motion to dismiss if the malicious inference is at least as  
 14 compelling as any opposing innocent inference.” Zucco Partners, 552 F.3d at 991. In evaluating  
 15 whether a complaint satisfies the “strong inference” requirement, courts must consider the  
 16 allegations and other relevant material holistically, not “scrutinized in isolation.” In re VeriFone  
 17 Holdings, 704 F.3d at 701.

#### 18 **i. Allegations Regarding Defendants’ Role in the Company**

19 First, Plaintiffs allege that Defendants’ scienter can be inferred from their “position of  
 20 authority in the Company” and “access to information contradicting their statements.” ECF No.  
 21 39 at 17. Plaintiffs also seek to invoke the “core operations inference” to allege Defendants must  
 22 have been aware of Yelp’s practices relating to manipulation of advertising, as Defendants  
 23 repeatedly made statements concerning the importance of authentic reviews to Yelp’s brand.  
 24 Defendants argue in response that Plaintiffs present “conclusory allegations about the presumed  
 25 knowledge” of Defendants that are insufficient to plead scienter. ECF No. 42 at 11.

26 “As a general matter, ‘corporate management’s general awareness of the day-to-day  
 27 workings of the company’s business does not establish scienter—at least absent some additional  
 28 allegation of specific information conveyed to management and related to the fraud’ or other

1 allegations supporting scienter.” S. Ferry LP, No. 2, 542 F.3d at 784-85 (quoting Metzler Inv.  
2 GmbH v. Corinthian Colleges, Inc., 534 F.3d 1068, 1087 (9th Cir.2008)). Under the “core  
3 operations inference,” plaintiffs may plead scienter with less particularity “in rare circumstances  
4 where the nature of the relevant fact is of such prominence that it would be absurd to suggest that  
5 management was without knowledge of the matter.” S. Ferry LP, No. 2, 542 F.3d at 786 (internal  
6 quotations and citations omitted).

7 Plaintiffs point to the Ninth Circuit’s decision in in re Daou Systems, which held that  
8 “specific admissions from top executives that they are involved in every detail of the company and  
9 that they monitored portions of the company’s database are factors in favor of inferring scienter.”  
10 411 F.3d 1006, 1022 (9th Cir. 2005). Daou concerned allegations that defendants who “personally  
11 directed [the company’s] recognition of revenue, financial reporting and public statements” had  
12 systematically violated the generally accepted accounting principles (GAAP) in order to inflate the  
13 price of the company’s stock. Id. at 1022.

14 While it stands to reason that the chief accounting executives of a company would be  
15 aware of that company’s systematic violations of the GAAP, it is less self-evident that Yelp’s  
16 chief executives necessarily knew of the veracity of complaints made by individual local business  
17 owners who contacted Yelp and offered evidence that reviews of their business were not credible  
18 or were being manipulated by Yelp employees because they had declined to advertise. Plaintiffs  
19 allege that “Yelp top executives assured investors that they maintained and monitored every  
20 review and created much of the review content themselves, as it was a critical part of the  
21 Company’s business,” supporting an inference of scienter. ECF No. 39 at 18. But Defendants  
22 never indicated that they personally monitored the authenticity of reviews in their capacity as Yelp  
23 executives. Instead, they touted the strength of their “proprietary automated recommendation  
24 software.” ECF No. 33 at ¶ 59.

25 Again, it is beyond dispute that Defendants were aware of– and acknowledged publicly–  
26 the existence of allegations that Yelp manipulated reviews in connection with advertising. But  
27 Plaintiffs allege that, beyond awareness that such allegations existed, Defendants also knew that  
28 the allegations were true. Defendants never indicated they were personally involved in ensuring

1 the authenticity of Yelp’s reviews and disclaimed their ability to ensure the “adequacy” of their  
 2 filtering algorithm. Assuming the truth of Plaintiffs’ allegations for the moment, it is not “absurd  
 3 to suggest” under S. Ferry LP, No. 2, 542 F.3d at 786, that, although aware that some businesses  
 4 had complained about the manipulation of their reviews, Defendants were unaware that, in certain  
 5 cases, the reviews of businesses that refused to advertise had in fact been manipulated by someone  
 6 at Yelp. It also it not “absurd to suggest” that those Yelp representatives who allegedly offered to  
 7 manipulate reviews in exchange for advertising payments did so without Defendants knowledge or  
 8 approval. Therefore, an inference of scienter is not justified based on Defendants’ role in the  
 9 company or the core operations inference.

10 **ii. Allegations Regarding Unusual Insider Sales**

11 The Plaintiffs have identified eight Yelp insiders, including Defendants Donaker, Krolik,  
 12 and Stoppelman, whom they allege engaged in unusual trading between November 14, 2013 and  
 13 March 10, 2014, supporting an inference of scienter. ECF No. 33 at ¶ 63. Plaintiffs claim that  
 14 these insiders traded their Yelp stock at artificially inflated prices “at the same time defendants  
 15 issued false and misleading statements.” Id.

16 In order to establish a sufficiently “strong inference” of scienter based on circumstantial  
 17 evidence of insider trading, the Ninth Circuit requires plaintiffs to allege “unusual” or “suspicious”  
 18 stock sales “dramatically out of line with prior trading practices *at times calculated to maximize*  
 19 *the personal benefit from undisclosed inside information.*” Ronconi, 253 F.3d 435 (emphasis in  
 20 original) (internal quotations and citations omitted). In assessing whether insider sales qualify as  
 21 unusual or suspicious, courts look to “(1) the amount and percentage of shares sold by insiders; (2)  
 22 the timing of the sales; and (3) whether the sales were consistent with the insider’s prior trading  
 23 history.” Id. Plaintiffs “must allege sufficient context of insider trading for [courts] to determine  
 24 whether the level of trading is dramatically out of line with prior trading practices.” Id. at 436-37  
 25 (internal quotations and citations omitted).

26 Plaintiffs have not provided any context for the sales described in the Complaint and the  
 27 Court thus cannot conclude that the sales were suspicious. The only information Plaintiffs have  
 28 provided relating to insider sales in the Complaint is a single chart summarizing eight insider’s



1 sales between November 2013 and March 2014 by shares and proceeds. The Court has no basis  
2 on which to conclude that there exists a strong inference that these sales were out of line with prior  
3 trading practices because the Complaint does not allege any information regarding the insider's  
4 prior trading practices.

5 Plaintiffs allege that because Yelp went public in March 2012, there is "virtually no trading  
6 history to allege except for the massive short sales shortly before and during the Class Period."  
7 ECF No. 39 at 20. Thus, Plaintiffs argue that requiring them to show unusual or suspicious sales  
8 would ask them to "allege the impossible." Id. But it is Plaintiffs' burden to plead scienter with  
9 particularity should they wish to pursue a securities claim against Defendants. Insider sales are  
10 just one method of establishing scienter by reference to circumstantial evidence. Thus, although a  
11 lack of trading history due to a recent IPO may foreclose a plaintiff from one avenue of pleading  
12 scienter, it does not necessarily doom their complaint. Regardless of whether this makes the  
13 Plaintiffs' task more difficult, the Court cannot infer from a vacuum of information about trading  
14 history that the trades in question are unusual, as information about trading history is "necessary to  
15 determine whether the sales during the Class Period were 'out of line with' historical practices."  
16 Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc., 759 F.3d 1051, 1064 (9th Cir. 2014).

17 To defeat Plaintiffs' claims of unusual trading activity, Defendants also ask the Court to  
18 take judicial notice of facts derived from the SEC Form 4 filings, which they argue demonstrate  
19 that "the stock sales alleged in the Complaint were consistent with— not out of line with— prior  
20 trading by the insiders." ECF No. 34 at 21. Defendants further argue that the sales in question  
21 were made pursuant to 10b5-1 trading plans, negating any inference of scienter. The Court need  
22 not reach these arguments, as Plaintiffs have not met their burden of pleading with particularity  
23 facts from which the Court can draw an inference of scienter that is "cogent and compelling."  
24 Tellabs, 551 U.S. at 324.

25 **D. Plaintiffs' Derivative Section 20(a) Claim**

26 Section 20(a) of the Exchange Act, which forms the basis of Plaintiffs' second cause of  
27 action, extends liability to persons who directly or indirectly control a violator of the securities  
28 laws. 15 U.S.C. § 78t(a). A claim under section 20(a) can only survive if the underlying predicate

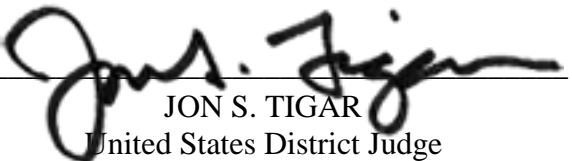
1 Exchange Act violation also survives. See Howard v. Everex Sys., Inc., 228 F.3d 1057, 1065 (9th  
2 Cir. 2000). Because the Court dismisses Plaintiffs' Exchange Act claim, Plaintiffs' second cause  
3 of action must also be dismissed.

4 **IV. Conclusion**

5 Plaintiffs fail to plead with particularity material false or misleading statements, loss  
6 causation, or scienter and therefore Plaintiffs have not stated a claim for relief under the Exchange  
7 Act, either under section 10(b) or 20(a). The Court hereby dismisses the Consolidated Class  
8 Action Complaint. Plaintiff may amend the complaint in a manner consistent with the terms of  
9 this Order within 30 days from the date of this Order.

10 IT IS SO ORDERED.

11 Dated: April 21, 2015

12   
13 JON S. TIGAR  
14 United States District Judge

United States District Court  
Northern District of California

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