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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JONATHAN DAVIS and ROEI AZAR, on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

YELP INC., JEREMY STOPPELMAN, LANNY BAKER, and JED NACHMAN,

Defendants.

Case No. 3:18-cv-00400-EMC

CLASS ACTION

DEFENDANTS YELP INC., JEREMY STOPPELMAN, LANNY BAKER, AND JED NACHMAN'S NOTICE OF MOTION, MOTION FOR SUMMARY JUDGMENT, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: August 26, 2021
Time: 1:30 PM
Place: Courtroom 5 - 17th Floor
Judge: Hon. Edward M. Chen
Trial Date: February 7, 2022

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NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 26, 2021 of the above-entitled Court, Defendants Yelp Inc., Jeremy Stoppelman, Lanny Baker, and Jed Nachman (collectively, "Defendants") will and hereby do move for summary judgment with regard to Plaintiffs' Section 10(b), Rule 10b-5, and Section 20(a) claims against all Defendants. Defendants' motion is made pursuant to Federal Rule of Civil Procedure 56 and is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Aaron Miner in support of the motion, the materials cited therein, the pleadings and papers on file in this matter, oral argument, and other materials and arguments as may be presented.

STATEMENT OF RELIEF SOUGHT

Defendants seek an order dismissing all causes of action for alleged violations of Section 20(a) and 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder.

STATEMENT OF ISSUES TO BE DECIDED

Whether the Court should grant summary judgment in favor of Defendants in light of Plaintiffs' inability to establish that Defendants made any false or misleading statements during the Class Period, or that they acted at any time with the requisite scienter to establish liability under the securities laws.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs claim that Yelp and three of its top executives, Messrs. Stoppelman, Baker, and Nachman, committed securities fraud and deceived investors by making five statements between February 9 and March 1, 2017 (the "Statements" or "Statements at Issue"). Plaintiffs' central theory is that Yelp's executives knew, but failed to disclose, that Yelp had experienced revenue churn significant enough to negatively impact Yelp's business outlook that had been announced on February 9. But to reach a jury in a securities fraud case, Plaintiffs must be able to provide significant, probative evidence that Yelp and its executives (i) made false or misleading statements with (ii) the requisite scienter; namely, intentionally or with deliberate recklessness. Following sweeping discovery—

including over 70,000 documents produced from Yelp's records and testimony from over a dozen current and former Yelp employees, including each of the executives who made the Statements—the undisputed facts show Plaintiffs cannot meet their burdens on either element. Instead, the undisputed facts demonstrate that the Statements were consistent with Defendants' then-understanding of the state of affairs at Yelp, including the internal revenue forecasts they had at the time they made the statements.

At the outset of this action, the Court held that the First Amended Complaint[1] did not state a claim with regards to nine of the fourteen statements Plaintiffs alleged were misleading either because they were forward-looking, and therefore immunized by the PSLRA safe harbor provisions, or because they could not constitute material omissions.[2] The Court allowed the case to proceed ***only*** with respect to the remaining five Statements because of Plaintiffs' allegation that Defendants knew, but concealed, from investors that Yelp had experienced higher-than-expected churn in the first quarter of 2017 by the time the Statements were made.

The undisputed material facts show that Plaintiffs' allegation is wrong.

First, Plaintiffs cannot prove that the Statements were false or misleading. At the time Defendants made the Statements, the allegedly omitted facts: (i) were not known by Defendants, and (ii) would have contradicted Defendants' contemporaneous understanding of the state of affairs at Yelp.

Second, Plaintiffs cannot demonstrate that Defendants acted with the requisite scienter (that is, intentionally or deliberately recklessly) to sustain their securities fraud claims. Not only are Plaintiffs unable to show that Defendants made any false or misleading statement, but the good faith of the individual Defendants is further reflected in the fact that two of the three defendants did not sell a single share of their Yelp stock during the Class Period, and the third sold stock pursuant to a 10b5-1 plan which had been initiated and entered into months prior to the allegedly misleading statements identified in Plaintiffs' Complaint.

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[1] Docket No. 29 ("Compl." or "Complaint").

[2] Docket. No. 43 ("Motion to Dismiss Order") at 13-14, 16-18, 23-26 (dismissing statements quoted in Complaint at ¶¶ 75, 77, 79, 85, 89, 93, 95, 97, 99).

The Court should grant Defendants' motion for summary judgment.

II. STATEMENT OF UNDISPUTED FACTS

A. Yelp's Business.

Yelp is an online platform that provides a free forum for members of the public to access and submit reviews, photos, and other consumer information about local businesses. Yelp also provides local businesses with a variety of free and paid services that help them to interact with consumers. Yelp generates revenue from the sale of advertising and other paid products to local businesses. Since going public in 2012, Yelp's reported revenue has grown steadily, including during the class period. Yelp reported annual 2016 net revenue of $713.1 million, up from $549.7 million in 2015.[3] Additionally, Yelp reported Q4 2016 net revenue of $194.8 million and Q1 2017 net revenue of $197.3 million, each of which reflected over 24% growth year over year.[4] Yelp ultimately reported annual 2017 net revenue of $846.8, which included 20% year over year revenue growth for Yelp's local advertising business.[5]

B. Yelp's Internal Revenue Forecasts and External Business Outlook.

At all relevant times to Plaintiffs' claims, Yelp prepared different kinds of full-year revenue financial projections, including an internal local revenue forecast that was updated on a monthly basis and an external business outlook that was updated and communicated to investors on a quarterly basis as part of Yelp's quarter-end earnings announcements.[6]

The monthly internal forecast was prepared by Yelp's Financial Planning and Analysis ("FP&A") team and distributed once a month to a group of Yelp's executives, including Messrs.

[3] Declaration of Aaron Miner in Support of Defendants' Motion for Summary Judgment ("Miner Decl.") Ex. 1 (Yelp Q4 2016 Form 8-K) at 5. Yelp's fiscal year follows the calendar year. Unless otherwise specified, all citations to Exhibits refer to exhibits to the Miner Declaration.

[4] *Compare id.* at 5 and Ex. 2 (Yelp Q1 2017 8-K) at 4.

[5] This excluded Yelp's transactional businesses like Eat24, a food delivery business that Yelp sold in 2017, and Nowait (a restaurant waitlist service) and Yelp Wifi, businesses Yelp acquired in 2017. Ex. 3 (Yelp Q4 2017 8-K) at 4-5.

[6] Yelp also prepared an internal financial plan on an annual basis. Ex. 4 (Rajagopalan Dep. at 21:16-22:8, 174:4-9, 22-25); Ex. 5 (Dean 30(b)(6) Dep.) at 49:18-50:8; 51:18-25, 102:22-103:7.

Stoppelman, Baker, and Nachman.[7] The local revenue forecast included three major components: head count, production, and revenue churn.[8]

Yelp defined the revenue churn metric as: "lost revenue which comes from the form of cancellations or downgrades . . . . [p]lus our new revenue, from the existing book[,] which is upgrades, divided by the denominator, which is our monthly managed revenue. It's expressed as a percentage."[9] To express revenue churn[10] graphically, it would appear as follows:

$$\frac{Lost\ Revenue[cancellations + downgrades] + New\ Revenue[upgrades]}{Monthly\ Managed\ Revenue}$$

Each month, Yelp adjusted its full-year internal forecast based on actual results for revenue churn and the other metrics that had been vetted and verified from the previous month.[11] Yelp did not begin the process of updating the internal forecast with a given month's actual results until that month had concluded and its actual performance metrics had been gathered and confirmed.[12] This meant that, during the relevant time period, the Defendant executives did not receive a particular month's updated internal forecast until at least one to two weeks into the following month.[13]

The external business outlook provided to investors in connection with Yelp's quarterly earnings announcements projected both net revenue and adjusted EBITDA for the full year. Yelp used its internal forecast in preparing the external business outlook provided to investors.[14] The first earnings and outlook release during the Class Period was on February 9, 2017, and the second was on May 9, 2017. At the start of investor calls and analyst presentations in which it presented earnings and business outlook, Yelp informed participants that certain statements made by Defendants would

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[7] Ex. 5 (Dean 30(b)(6) Dep.) at 49:18-50:8; 51:18-25; Ex. 4 (Rajagopalan Dep.) at 21:16-22:8.

[8] Ex. 5 (Dean 30(b)(6) Dep.) 31:13-32:3.

[9] Ex. 6 (Sullivan 30(b)(6) Dep.) at 21:11-19. Yelp's "monthly managed revenue" was the "amount of revenue" the Company "expect[ed] to build that month from [its existing] customers." *Id.* at 27:16-20.

[10] Yelp also tracked other forms of churn, which were not an input into the revenue forecast. For example, Yelp tracked account churn, which was measured by contract volume instead of revenue. *Id.* 32:2-4.

[11] Ex. 4 (Rajagopalan Dep.) at 21:5-21, 24:17-22, 36:3-38:5, 218:3-223:16; Ex. 5 (Dean 30(b)(6) Dep.) at 49:18-50:8, 105:7-23.

[12] Ex. 5 (Dean 30(b)(6) Dep.) at 105:7-23.

[13] *Id.*

[14] Ex. 5 (Dean 30(b)(6) Dep.) at 98:24-99:4.

be "forward-looking," and "involve a number of risks and uncertainties that could cause actual results to differ materially."[15]

During the first quarter of 2017, including on the dates the Statements were made and until mid-March 2017, the internal forecasts distributed to Yelp's executives were consistent with the business outlook provided to investors on February 9, 2017.[16]

C. Yelp's Efforts to Improve Advertiser Retention.

As disclosed in its annual Form 10-K filings, Yelp regularly experienced retention issues with small and medium-sized local business advertisers, which have historically had high failure rates.[17] Accordingly, Yelp continuously analyzed ways in which it could improve retention and reduce churn among its local advertisers.[18] For many years, Yelp used the term "Down with Churn" or "DWC" to refer generally to ongoing and continuous efforts to reduce churn among its local advertisers.[19] Yelp's Account Management (also known as "Customer Success") department was one of the groups responsible for reducing churn and was also involved in DWC efforts.[20] This department was broadly responsible for "[a]nything related to a client after [Yelp sold] . . . an advertising package to them," including "upsell[ing] existing clients," "onboarding" new advertisers, and "manag[ing] cancellations."[21]

In July and August 2016, Kayti Sullivan, who had recently been promoted from a sales director role to head of the Account Management department, initiated a series of analyses to

[15] *See, e.g.*, Ex. 7 (2016 Q4 Earnings Call, 2/9/2017) at 3.

[16] A demonstrative chart identifying the internal forecasts distributed to Yelp's executives and business outlook provided to investors is attached hereto as Appendix A.

[17] Ex. 8 (Yelp FY 2015 Form 10-K) at 19; Ex. 9 (Yelp FY 2016 Form 10-K) at 19. *See also* OFFICE OF ADVOCACY, U.S. SMALL BUS. ADMIN., FREQUENTLY ASKED QUESTIONS (2020), https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf.(noting that "[f]rom 1994-2018, an average of 67.6% of new employer establishments survived at least two years," average 5-year survival rate was 48.8%, average 10-year survival rate was 33.6, and 15-year survival rate was 25.7%).

[18] Ex. 10 (Nachman Dep.) at 111:14-21; Ex. 11 (Stoppelman Dep.) at 199:4-6; Ex. 12 (Ehman Dep.) at 112:18-20; Ex. 13 (Halprin Dep.) at 23:19-24:11; Ex. 6 (Sullivan 30(b)(6) Dep.) at 41:12-42:7, 70:2-5; Ex. 14 (Sullivan 3/11/2020 Dep.) at 193:6-13.

[19] Ex. 6 (Sullivan 30(b)(6) Dep.) at 41:12-42:7, 69:25-70:5.

[20] *Id.* at 42:15-21.

[21] *Id.* at 14:12-15:11.

investigate ways to improve the efficiency of the department, including ways to reduce churn.[22] At the time, Yelp's customers were contractually required to give Yelp 30-days' notice of an intent to cancel their advertising relationship. An analysis by Yelp's Business Operations & Strategy department ("Biz Ops") showed that if an Account Manager "got in touch with a client within 24 hours of their cancellation request. [Yelp] almost double[d] the likelihood that [Yelp] could change their minds."[23] This would "recover" the cancellation request and result in the account remaining at Yelp instead of churning out.[24]

Based on these Biz Ops analyses, Yelp established a Recovery Team that was implemented in February 2017. This new Recovery Team consisted of account managers whose sole job was to "get in touch immediately with clients who were requesting to cancel. To walk them through the value of the advertising program in hopes to change their minds about cancelling."[25] Between February and May 2017, Yelp increased the size of the Recovery Team because it saw "success in the ability to reverse more accounts."[26]

D. Yelp's "Down with Churn" Investigation into Churn in the Second Half of 2016.

In December 2016, Yelp initiated a cross departmental "DWC" team, which held a series of meetings to identify the reasons for elevated churn in the second half of 2016 among Yelp's local advertisers as compared to the first half of the year. By February 8, 2017, the DWC team had concluded that several one-time, non-recurring events had caused elevated revenue churn among Yelp's local advertisers in late 2016. These included: (1) exacerbated seasonality during Q4 2016 due to the 2016 presidential elections, which led account managers and sales representatives to be less productive than usual; and (2) cancellations due to advertisers who did not update their credit cards after the end of the Costco/Amex relationship.[27]

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[22] *Id.* at 9:14-25; Ex. 14 (Sullivan 3/11/2020 Dep.) at 15:17-16:16.

[23] Ex. 6 (Sullivan 30(b)(6) Dep.) at 76:15-77:1.

[24] Ex. 12 (Ehman Dep.) at 75:24-77:7.

[25] Ex. 6 (Sullivan 30(b)(6) Dep.) at 76:3-11.

[26] *Id.* at 83:14-18.

[27] Ex. 15 (Yelp-Az0228945) at 950 (Defs.' Ex. 16); Ex. 16 (Dean 2/13/2020 Dep.) at 236:24-238:12; Ex. 12 (Ehman Dep.) at 258:19-266:2. As applied to Yelp's advertisers, seasonality referred both to "external seasonality," meaning that some advertisers might be more likely to pause or cancel during

Concurrently with these internal findings concerning late 2016 churn, Yelp experienced lower than expected revenue churn (i.e., better churn results for Yelp) for the month of January 2017, beating its own internal churn forecasts for that month.[28] Thus, at the time Defendants made the Statements at Issue, from February 9 through March 1, those Statements were wholly consistent with and supported by Yelp's internal forecast and findings concerning late 2016 revenue churn.

E. Yelp's Q4 Earnings Announcement.

On February 9, 2017, Yelp released earnings results for the fourth quarter and full year 2016.[29] Yelp reported net revenue of $731.1 million in 2016, an increase from $549.7 million in 2015.[30] Yelp also reported adjusted EBITDA for the full year 2016 of $120.1 million, up from $69.1 million from the prior year. Yelp further announced that it grew local revenue by 39% during 2016.[31] In addition to these results, Yelp provided its business outlook for the full year and first quarter of 2017.[32] That business outlook projected net revenues for the first quarter 2017 to be in the range $195 - $199 million and adjusted EBITDA to be in the range $25 - $28 million. For full year 2017, Yelp projected net revenues to be in the range of $880 - $900 million and adjusted EBITDA to be in the range of $150 - $165 million.[33] Yelp's business outlook for full year net revenue reported in its February 9, 2017 8-K press release was consistent with Yelp's internal forecasts, which, as established above, took into account January's better-than-expected revenue churn actuals (as well as Yelp's 2016 performance).[34]

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certain times of the year, such as the holiday season in December, and "internal seasonality," which referred to "account managers go[ing] on more PTO," such that Yelp's "ability to staff up critical functions like a recovery or reversal team or answering phone calls to get cancel requests . . . were lower staffed." *Id.* at 264:23-265:24.

[28] Ex. 17 (Yelp-Az0004917) at 4937 (Defs' Ex. 12); Ex. 18 (Yelp-Az0003351 (Plf.'s Ex. 249)); Ex. 4 (Rajagopalan Dep.) at 216:13-218:1.

[29] Ex. 1 (Yelp Q4 2016 Form 8-K).

[30] *Id.* at 5.

[31] *Id.*

[32] *Id.* at 7.

[33] *Id.* at 7.

[34] *See,* Appendix A; Ex. 4 (Rajagopalan Dep.) at 220:24-221:11.

In February and March 2017, Yelp's executives Jeremy Stoppelman, Lanny Baker, and Jed Nachman participated in investor calls and analyst presentations regarding Yelp's Q4 2016 earnings and its business outlook. These calls and presentations included: (i) an earnings call conducted on February 9, 2017, in which Messrs. Stoppelman, Baker, and Nachman participated; (ii) a February 14, 2017, presentation given to analysts at Goldman Sachs' 2017 Technology and Internet Conference, in which Messrs. Stoppelman and Baker participated; and (iii) a March 1, 2017 presentation given to analysts at Morgan Stanley's 2017 Technology, Media & Telecom Conference in which Messrs. Baker and Nachman participated. Each of the Statements at Issue was made during these calls and presentations in response to questions from analysts.[35]

At the time of each of those Statements, Messrs. Stoppelman, Baker, and Nachman did not have internal forecasts or any other data that contradicted the business outlook provided to investors on February 9, 2017.[36]

F. Yelp's March 15, 2017 Revised Internal Revenue Forecast.

On March 15, 2017—weeks after the Statements at Issue—Yelp's executives, including Messrs. Stoppelman, Baker, and Nachman, received an updated internal forecast that showed that February 2017 actual revenue churn was higher than Yelp had forecast and, as a result, Yelp was lowering its full-year internal revenue forecast from $903.1 million to $891.1 million (which was still within the range of the public-facing February 9 business outlook), and lowering its full-year adjusted EBITDA forecast from $156.3 million to $142.1 million (below the range of the February 9 business outlook).[37] These updated internal forecasts were provided to Yelp's Board of Directors as part of the materials distributed in advance of their regularly scheduled meeting on March 16, 2017.[38] That Board meeting included a presentation from Kayti Sullivan on revenue churn.[39] Shortly after that Board meeting, on March 24, 2017, Jeremy Stoppelman convened a new working group to diagnose the new

[35] For ease of reference, a demonstrative chart identifying the Statements and the paragraph of the Complaint in which they are quoted is appended hereto as Appendix B.

[36] *See* Appendix A.

[37] Ex. 19 (Yelp-Az0004248) at 4251, 4259.

[38] Ex. 20 (Yelp-Az0004218) at 4236.

[39] Ex. 21 (Yelp-Az0003718) at 3742-3761.

churn issues Yelp now understood it was facing.[40] After experiencing higher than expected churn in February and March, Yelp ultimately improved revenue churn in April 2017, which was below forecast.[41]

G. Yelp's Release of Q1 2017 Financial Results in May 2017 and Revision to Business Outlook.

On May 9, 2017, Yelp released its earnings for the first quarter of the year.[42] Yelp announced that its actual revenue and adjusted EBITDA had met its business outlook, issued on February 9, for the first quarter of 2017.[43] Yelp also announced that it was decreasing its business outlook for the full year 2017 due to higher than anticipated revenue churn during the first quarter of 2017. The revised business outlook for net revenue for the full year 2017 reported in Yelp's May 9, 2017 8-K press release was consistent with Yelp's latest internal forecasts, finalized only a few days earlier, for full year 2017 net revenue. For example, Yelp's internal forecast as of May 5, projected that full year revenue for FY 2017 would be $876.2 million,[44] while Yelp's May 9 press release reported that Yelp's revised business outlook for full year 2017 net revenue was $850-865 million.[45] Yelp ultimately reported actual full-year 2017 revenue of $846.8 million and adjusted EBITDA of $156.6 million.[46]

H. Plaintiffs' Claims Against Yelp.

Plaintiffs allege that the Statements at Issue were false and misleading because, at the time they were made, Defendants purportedly knew but failed to disclose that Yelp "was experiencing [a] material number [of] contract terminations" in January and February 2017 "among a cohort of less

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[40] Ex. 22 (Yelp-Az0003633).

[41] Ex. 23 (Yelp-Az0003924) at 3932.

[42] Ex. 2 (Yelp Q1 2017 Form 8-K); Ex. 24 (Yelp Q1 2017 Earnings Call, 5/9/2017).

[43] Yelp's first quarter 2017 adjusted EBITDA was $29.3 million, up from $13 million over the same period in 2016, and greater than the business outlook of $25 to $28 million provided to investors on February 9, 2017. Yelp's first quarter 2017 revenue was $197.3, within the business outlook of $195 to $199 million. Ex. 2 (Yelp Q1 2017 Form 8-K) at 5; Ex. 1 (Yelp Q4 2016 Form 8-K) at 7.

[44] Ex. 23 (Yelp-Az0003924) at 3927, 3964.

[45] Ex. 2 (Yelp Q1 2017 Form 8-K) at 6.

[46] The lower revenue number reflected the sale of Eat24, Yelp's food delivery business, to Grubhub in mid-2017. Ex. 3 (Yelp Q4 2017 Form 8-K) at 4-5.

engaged advertisers added in 1Q '16" during the CPM to CPC transition "who saw less ROI." Compl. ¶¶82, 84, 88, 92, 100.

In ruling on Defendants' Motion to Dismiss, the Court held that Plaintiffs' allegations were sufficient to plausibly suggest that the Statements were misleading for the following reasons:

a. Defendants' "indicat[ion] that Yelp's local advertising model was at its core and sustainable," and "attribut[ion] of the 'modest slowdown in the fourth quarter to 'the election' and vacation time,' rather than any kind of systemic problem with the local advertising program as a whole," "would have been inconsistent with any awareness Defendants had . . . that local advertisers were dropping out of the program in high numbers due to engagement issues with Yelp's CPC platform." Motion to Dismiss Order at 19-20.

b. Defendants' suggestion that its "local advertising model" was "fairly proven," while "omitting any mention of the churn issues that would significantly and negatively impact revenue." Motion to Dismiss Order at 22-23.

c. Defendants' statements which "paint[ed] a promising picture wherein increased investment in Yelp's advertising program would lead to revenue growth based on past results, without disclosing the risk that growth could be limited by the sensitivity of the CPC model to low user engagement, and indeed that the touted 'acceleration in revenue growth in 2016' was already showing signs of being short-lived." Motion to Dismiss Order at 25-26.

As discussed more fully in section III, the facts elicited through discovery in this case demonstrate that Plaintiffs' allegations are wrong, and that the Statements were consistent with Defendants' contemporaneous understanding of the state of affairs at Yelp.

III. LEGAL STANDARD

Rule 56 instructs this Court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute is genuine only if there is sufficient evidence 'such that a reasonable jury could return a verdict for the nonmoving party,' and a fact is material only if it might affect the outcome of the case." *Nat. Res. Def. Council v. Pruitt*, 2017 WL 5900127, at *2 (N.D. Cal. Nov. 30, 2017) (citation omitted).

At summary judgment, it is sufficient for Defendants—who do not bear the burden of proof at trial—to either "negat[e] an essential element" of Plaintiffs' claims *or* to show that Plaintiffs "do[] not have enough evidence of an[y] essential element" of their claims. *See Pruitt*, 2017 WL 5900127, at *2 (citing *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000)). Under Section 10(b) and Rule 10b-5, Plaintiffs "must prove six elements: '(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.'" *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051-52 (9th Cir. 2014) (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008)). Plaintiffs must do more than sow "doubt" as to whether there are material facts in dispute; instead, they must "designate specific facts showing that there is a genuine issue for trial." *In re Synergy Acceptance Corp.*, 2015 WL 6085304, at *6 (N.D. Cal. Oct. 16, 2015) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)); *see also Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) ("A mere scintilla of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the non-moving party must introduce some significant probative evidence tending to support the complaint.") (citation and internal quotation marks omitted).

As this Court pointed out in its ruling on the Motion to Dismiss, "Plaintiffs' claims in this case are premised on alleged omissions." Motion to Dismiss Order at 16 (citing FAC ¶¶ 74, 88, 94, 98 (alleging that Defendants' statements were false or misleading because they "failed to disclose" information)). "To be actionable under the securities laws, an omission must . . . affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). An omission is material when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988).

Summary judgment is also warranted where there is no plausible inference that Defendants acted with scienter. *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1238 (S.D. Cal. 2010). In ruling on the existence of scienter, Courts grant summary judgment where Defendants marshal "substantial, if not overwhelming evidence, that Defendants acted in good faith." *Id.*; *see also Miller v. Pezzani (In re Worlds of Wonder Sec. Litig.)*, 35 F.3d 1407, 1425 (9th Cir. 1994) ("speculative inferences" of fraud conclusively rebutted by evidence of good faith). "[T]he plaintiff must present significant probative evidence relevant to the issue of intent, e.g., the time, place, or nature of the alleged fraudulent activities; mere conclusory allegations are insufficient to require that the motion for summary judgment be denied." *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1220 (9th Cir. 1980).

The undisputed material facts establish that the omissions alleged by Plaintiff at paragraphs 82, 84, 88, 92, and 100 of the complaint were either (i) not known by Defendants as of February 9 or 14, or March 1, 2017, and (ii) would have been contradicted by Defendants' then-understanding of Yelp's performance. Plaintiffs cannot establish that the Statements were inconsistent with Defendants' contemporaneous understanding of the state of affairs at Yelp. As a result, Plaintiffs cannot meet their burden of proof to show that these were material omissions actionable under Section 10(b) and Rule 10b-5 thereunder. Therefore, the Court should grant summary judgment for Defendants.

IV. ARGUMENT

A. Plaintiffs Cannot Establish That the Statements at Issue Were False or Misleading.

1. Defendants' Statements Were Accurate and Consistent with the Company's Then-Understanding of Revenue Churn Trends.

The core of Plaintiffs' theory of this case—and the reason why the Court permitted this case to proceed past the pleadings stage—is that each of the Statements at Issue is actionable because Defendants knew, but failed to disclose, that Yelp "was experiencing [a] material number [of] contract terminations" in January and February 2017 "among a cohort of less engaged advertisers added in 1Q '16" during the cost-per-impression ("CPM") to cost-per-click ("CPC") transition "who saw less ROI." Compl. ¶¶ 82, 84, 88, 92, 100. The undisputed facts in this case show that Plaintiffs are wrong and summary judgment must be granted for Defendants.

It is undisputed that Yelp experienced ***lower*-**than-forecast revenue churn in January 2017 among its local advertisers.[47] Because Yelp updated its forecasts with monthly actuals after a month closed,[48] January was the last month for which Defendants had actual revenue churn information when each of the Statements at Issue were made.[49] Accordingly, although, February 2017 revenue churn exceeded Yelp's forecast, Defendants did not know the actual February revenue churn numbers until after that month had closed.[50] Defendants also did not know what impact, if any, elevated churn in February 2017 would have on Yelp's internal full-year 2017 revenue forecast until mid-March 2017, when the updated forecast incorporating February actuals was completed and first distributed.[51] That updated internal forecast showed that Yelp's projections for full-year 2017 adjusted EBITDA had been reduced to $142.1 million, below the business outlook given to investors on February 9, while full-year revenue for the year was projected to be $891.1 million, still in-line with that outlook.[52]

There is also no evidence that Yelp had reached any conclusions about the cause of the higher-than-expected revenue churn in February 2017 when the Statements at Issue were made, which makes sense given the month had not closed yet. Contrary to Plaintiffs' theory of "systemic issues," Yelp had most recently concluded that previous elevated revenue churn during the second half of 2016 relative to the first half of the year was "driven by a few one-off events" and observed that January 2017 retention improved and "returned to [first half of] '16 levels."[53] Indeed, there is no evidence that the elevated churn Yelp experienced beginning in February 2017 was indicative of any systemic issues with the advertising program as a whole, at the time or even with the benefit of hindsight:

[47] Ex. 17 (Yelp-Az0004917) at 4937 (Defs.' Ex. 12); Ex. 18 (Yelp-Az0003351 (Plf.'s Ex. 249)); Ex. 4 (Rajagopalan Dep.) at 216:13-218:1.

[48] Ex. 5 (Dean 30(b)(6) Dep.) at 49:18-50:8; Ex. 16 (Dean 2/13/20 Dep.) at 86:11-21; Ex. 4 (Rajagopalan Dep.) at 21:5-21, 24:17-22, 36:3-38:5, 218:3-223:16.

[49] *See* Ex. 10 (Nachman Dep.) at 39:25-40:7. Both Nachman and Baker testified about the importance of having complete month-end information in assessing Yelp's performance. *See id.* at 231:3-232:3; Ex. 25 (Baker Dep.) at 184:17-185:9.

[50] *See id.*; *see also* Ex. 10 (Nachman Dep.) at 230:16-18.

[51] Ex. 19 (Yelp-Az0004248) at 4251, 4259.

[52] *Id.* at Yelp-Az0004251.

[53] Ex. 15 (Yelp-Az0228945) at 950 (Defs.' Ex. 16); Ex. 12 (Ehman Dep.) at 258:19-266:2; Ex. 16 (Dean 2/13/2020 Dep.) at 236:24-238:12.

Yelp's first quarter 2017 financial performance met its business outlook,[54] and the Company eventually reported 20% growth in its advertising revenue for full year 2017.[55]

Yelp's better-than-forecasted January 2017 revenue churn and Company conclusions about churn that occurred in the second half of 2016 demonstrate that Plaintiffs cannot possibly meet their burden of proving that Defendants "affirmatively create[d] an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]." *Brody*, 280 F.3d at 1006. Messrs. Stoppelman, Nachman, and Baker each testified that their Statements were based on their then-understanding of the state of Yelp's business.[56] Simply put, there is no evidence that, as of the date of the Statements, Defendants knew, but failed to disclose, that "local advertisers were dropping out" of Yelp's advertising "program in high numbers due to engagement issues with Yelp's CPC platform." *See* Motion to Dismiss Order at 19-20. In fact, after an internal analysis of the issue, Yelp's DWC team concluded that elevated churn in the second half of 2016 was caused by one-time issues, including seasonal factors exacerbated by the presidential election, a conclusion that was supported by better-than-expected advertiser retention in January 2017.[57] There is also no evidence that Defendants knew the Company was experiencing "churn issues that would significantly and negatively impact revenue," *see* Motion to Dismiss Order at 22-23, because they did not receive the updated forecast showing the full-year revenue impact of February 2017 churn until mid-March – weeks after the final Statement at Issue.[58] Moreover, Yelp's actual performance in the first quarter of 2017 was consistent with the business outlook projections given to investors on February 9.[59]

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[54] Ex. 1 (Yelp Q4 2016 Form 8-K) at 7; Ex. 2 (Yelp Q1 2017 Form 8-K) at 5.

[55] Ex. 3 (Yelp Q4 2017 Form 8-K) at 4-5.

[56] Ex. 26 (Stoppelman's Responses to RFAs) at Response to RFA No. 1; Ex. 27 (Stoppelman's Responses to ROGs) at Response to ROG No. 1; Ex. 11 (Stoppelman Dep.) at 88:9-90:25; Ex. 28 (Nachman's Responses to RFAs) at Response to RFA No. 1; Ex. 29 (Nachman's Responses to ROGs,) at Response to ROG No. 1; Ex. 10 (Nachman Dep.) at 243:3-11; Ex. 30 (Baker' Responses to RFAs), at Response to RFA No. 1; Ex. 31 (Baker's Responses to ROGs) at ROG No. 1.

[57] Moreover, there is no evidence that Yelp ever regularly tracked "engagement" or "ROI" among its local advertisers. *See* Ex. 6 (Sullivan 30(b)(6) Dep.) at 74:7-12; 74:24-75:8.

[58] *See* Appendix A.

[59] Ex. 2 (Yelp Q1 2017 Form 8-K) at 5; Ex. 1 (Yelp Q4 2016 Form 8-K) at 7.

2. There Is No Evidence That Defendants' Statements Were False or Misleading.

In light of the information Defendants had about revenue churn at the date of each of the Statements, Plaintiffs cannot establish falsity. Plaintiffs' other theories concerning why the Statements at Issue were false or misleading are similarly refuted by the undisputed facts.

Plaintiffs allege that Defendants knew but failed to disclose that Yelp had "implemented a team to improve engagement and retention amongst" the cohort of less engaged advertisers. Compl. ¶ 88. But there is no evidence that Yelp's decision to implement the Recovery Team had anything to do with elevated churn either in the second half of 2016 or in the first quarter of 2017. Rather, it is undisputed that Yelp came up with the idea of the "Recovery Team" in 2016 and implemented that initiative in February 2017 to "get in touch immediately with clients who were requesting to cancel."[60] Yelp established this team after an analysis in 2016 – part of comprehensive review of the Account Management team initiated by its new department head that also resulted in other improvements – revealed that, if Yelp got "in touch with a client within 24 hours of their cancellation request[, Yelp] almost double[d] the likelihood that [Yelp] could change their minds."[61]

Plaintiffs allege that Defendants knew but failed to disclose that Yelp's "2017 guidance" had not accounted for the "material number of contract terminations" among advertisers in this cohort. Compl. ¶¶ 92, 100. This theory of liability fails because Yelp's "2017 guidance" did account for contract terminations: Yelp's business outlook provided to investors took into account the actual revenue churn that Yelp had experienced in 2016.[62] Moreover, at the time of the Statements at Issue, Yelp's internal revenue forecasts were in line with the business outlook provided to investors on February 9, 2017 and did not deviate from that outlook until April 2017.[63]

Plaintiffs allege that one Statement was misleading because Defendants knew but failed to disclose that Yelp's "growth in advertising revenue in 2016 was due in part to . . . its sales force

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[60] Ex. 6 (Sullivan 30(b)(6) Dep.) at 76:3-11.

[61] *Id.* at 76:15-77:1; *see also* Ex. 12 (Ehman Dep.) at 250:6-252:13.

[62] Ex. 4 (Rajagopalan Dep.) at 220:15-221:19.

[63] *See* Appendix A.

signing up" less-engaged advertisers who cancelled in the first quarter of 2017. Compl. ¶ 88. But as established above, there is no evidence that Defendants had diagnosed a slowdown in revenue attributable to cancellations by less engaged advertisers. To the contrary, Defendants' actual diagnosis for elevated revenue churn in the second half of 2016 pointed to other causes. And, in any event, there is no evidence that Yelp regularly tracked engagement or ROI among its local advertisers.[64]

B. Plaintiffs Cannot Meet Their Burden of Establishing Defendants' Scienter.

Because the undisputed facts show that Plaintiffs cannot establish that any of the Statements at Issue were false or misleading, Plaintiffs also cannot establish that Defendants acted with scienter. *See In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1216 (S.D. Cal. 2010) (noting that courts "may analyze falsity and scienter together . . . because they generally depend upon the same set of facts). Even if the Court were to conclude that Plaintiffs could meet their burden of showing a material issue of fact as to whether Defendants' statements were misleading (which they cannot), Plaintiffs claims would still fail because there is no evidence that Defendants acted with scienter. *Id.* at 1238. When an omission is at issue, as in this case, the plaintiff must show "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *In re Solarcity Corp. Sec. Litig.*, 274 F. Supp. 3d 972, 1008 (N.D. Cal. 2017) (citing *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009)). Further, stock sales made "according to pre-determined plans may rebut an inference of scienter." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1067 n. 11 (9th Cir. 2008) (internal quotations omitted) (citing *In re Worlds of Wonder Sec. Litig.*, 35 F.3d at 1427-29). As an initial matter, there is no evidence suggesting that Defendants did not act in good faith when making the five Statements: Messrs. Stoppelman, Nachman, and Baker each testified that their communications with investors were based on their good faith and complete understanding of Yelp's business at that time.[65]

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[64] *See* Ex. 6 (Sullivan 30(b)(6) Dep.) at 74:7-12; 74:24-75:8.

[65] *E.g.*, Ex. 11 (Stoppelman Dep.) at 88:13-19, 89:10-24, 90:16-91:15; Ex. 10 (Nachman Dep.) at 235:16-22, 236:25-237:15; Ex. 25 (Baker Dep.) at 29:17-30:5.

In the Motion to Dismiss Order, this Court held that Class Plaintiffs' allegations were sufficient to survive dismissal on scienter because of: (1) Defendants' *ex post* statements about revenue churn issues experienced in the first quarter of 2017; (2) Mr. Stoppelman's stock sales during the class period; and (3) the "core operations" doctrine in light of the importance of local advertising to Yelp's business model and "return on investment" metrics that Yelp purportedly tracked. Motion to Dismiss Order at 27-35. The undisputed facts refute each of these bases of scienter. As discussed above, Defendants' *ex post* statements about revenue churn and the core operations theory cannot possibly support scienter in light of Defendants' understanding at the time they made the Statements at Issue that churn in the second half of 2016 were driven by one-time operational factors and that January 2017 revenue churn was lower than expected.

As to the stock sales, neither Defendants Lanny Baker or Jed Nachman made any stock trades during the relevant period. It is also undisputed that each of Mr. Stoppelman's 10b5-1 stock sale plans were adopted well before each of the statements at issue. Mr. Stoppelman initiated the process to adopt an amendment to his trading plan to make three sales of 250,000 shares on November 29, 2016--nearly three months before the first statement at issue was made.[66] The amendment to the plan was then executed and entered into on December 6, 2016, over two months before the first statement at issue.[67] There is no evidence that Mr. Stoppelman tried to influence Yelp's forecasts or guidance, or caused the forecasts or guidance to be higher than what had been determined by Yelp's FP&A department.[68] Therefore, despite Plaintiffs' allegations to the contrary, Mr. Stoppelman's trades pursuant to his pre-determined plan should rebut any inference of *scienter* in this matter. *Metzler*, 540 F.3d at 1067 n. 11.

[66] Ex. 32 (Yelp-Az0417679 (Plf.'s Ex. 256)).

[67] Ex. 33 (Yelp-Az0416045).

[68] *See, e.g.*, Ex. 4 (Rajagopalan Dep.) at 221:12-19, 223:6-16.

V. CONCLUSION

For each of the reasons set forth above, Defendants respectfully request that the Court grant their motion for summary judgment.[69]

Dated: May 21, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

By: /s/ *Aaron F. Miner*
Aaron F. Miner
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Attorneys for Defendants Yelp Inc., Jeremy Stoppelman, Lanny Baker, and Jed Nachman

[69] Plaintiffs' Rule 20(a) claims fail because they are entirely derivative of their 10(b) and 10b5 claims. *In re Netflix, Inc., Sec. Litig.*, 923 F. Supp. 2d 1214, 1226 (N.D. Cal. 2013) ("Absent an underlying violation of the Exchange Act, there can be no control person liability under Section 20(a)").

Appendix A

External Business Outlook and Internal Forecasts for Full Year 2017 Revenue and Adjusted EBITDA
Between January and May 2017

	Full Year 2017 Revenue		Full Year 2017 Adjusted EBITDA	
Date	**Business Outlook**	**Internal Forecast**	**Business Outlook**	**Internal Forecast**
1/13/2017[1]		$ 892.1 M		
2/9/2017 Earnings[2]	**$ 880-900 M**		**$ 150-165 M**	
2/17/2017[3]		$ 903.1 M		$ 156.3 M
3/15/2017[4]		$ 891.1 M		$ 142.1 M
4/25/2017[5]		$ 876.1 M		$ 131.0 M
5/5/2017[6]		$ 876.2 M		
5/9/2017 Earnings[7]	**$ 850-865 M**		**$ 130-140 M**	

[1] Ex. 34 (Yelp-Az0004362) at Yelp-Az0004365.

[2] Ex. 1 (Yelp Q4 2016 Form 8-K) at 7.

[3] Ex. 17 (Yelp-Az0004917) at Yelp-Az0004950.

[4] Ex. 19 (Yelp-Az0004248) at Yelp-Az0004254.

[5] Ex. 35 (Yelp-Az0235981) at Yelp-Az0235983.

[6] Ex. 23 (Yelp-Az0003924) at Yelp-Az0003964.

[7] Ex. 2 (Yelp Q1 2017 Form 8-K) at 6.

Appendix B

Statements at Issue

Complaint Paragraph	Date of Statement	Statement at Issue
81	February 9, 2017	**Robert Jason Sanderson**: "I'd like to ask a question about the local active accounts. It's a metric that -- reporting metric that a lot of people focus on. I think, personally, it's losing a little bit of meaning, as you have different vectors of the national account level versus the low end of self-service level. But how should we be thinking about that metric going forward as you are sort of pushing agendas that's sort of -- either end of that spectrum of account type? And then the second part, the international -- the shutdown of marketing and sales efforts internationally, how many of that affected the local active account metrics this quarter?" **Jed Nachman**: "Yes, I can take that one Rob. This is Jed. So on the local accounts side, certainly, we are happy with the revenue side of the equation in Q4. You can look at things like an accelerating national business, self-serve being up 100% year-over-year. If I were to point to a weakness and a slowness, it's potentially around kind of the local sales force in the fourth quarter, and particularly -- it was a modest slowdown that, quite frankly, we think the election and a period around the election both from an output and productivity perspective form the sales force and that kind of bled into vacation time It's not something we're super concerned about kind of coming into 2017. We feel like the fundamentals are in place and really strong, but -- and then there are some other factors that contribute to that as well. Certainly, national and self-serve have different dynamics as it relates to local advertising accounts."[1]
83	February 9, 2017	**Stanislav Nikolaev Velikov**: "We're seeing that repeat rates keeps increasing. Actually, it looks like it hit an all-time high. But still from those local advertisers that do not seem to have a good relationship with Yelp, what do you hear as the most common reason for that?" **Jed Nachman**: "I can take that one, on the repeat rate. Obviously review rate [sic] is a mix of folks who have advertised with us in the past and that's at an all-time high right now. And while, we're really encouraged by our kind of strong embedded client base and that's really a kind of healthy number to understand that those folks are coming back. It's a double-edged sword because we also think that making sure that we get enough new clients into the pipeline is really an important initiative for the company. And so we're not alarmed in any way about kind of where we are on the repeat ***rate side***, but you'd love to see, again, adding the number of local advertising accounts. Even if we were up in the 7,000,

[1] Ex. 7 (2/9/2017 Yelp Q4 2016 Earnings Call Transcript) at 9.

Complaint Paragraph	Date of Statement	Statement at Issue
		8,000, 10,00 range, based on the opportunity that we actually have in this marketplace with millions of businesses that have claimed their presence on Yelp, we think we're still in the very early stages. And we got to look at both sides of the coin here and making sure that we're driving new business and taking advantage of kind of the existing client base that has very nice trends behind it."[2]
87	February 14, 2017	**Heath Terry**: "So last year, you saw really strong growth in local advertising revenue, essentially matching with no deceleration what you saw in '15. What was behind that? What steps were you able to take to improve monetization at that level?" **Jeremy Stoppelman**: "I think, really it was just about focusing on the core. And that's why the message that was delivered to the teams at the start of the year was, 'Hey, there's nothing fundamentally wrong with our business. We just need to execute even better' And so we really did that, and I think it paid off. There was also some really nice wins on the self-serve side. And so we were able to get more advertisers in the door without ever talking to a salesperson. And I think that proved to be a really nice leverage point as well."[3]
91	February 14, 2017	**Unknown Analyst**: "So just wanted to tie -- the EBITDA flow-through was really high especially in the second half. But when you guided for EBITDA in 2017, the leverage there was below what many of us were kind of expecting. Just wondering, where were -- you touched on this a little bit, but where we're investing, why it's so important for the revenue growth, and then why sales and marketing has to grow above or -- at or above the revenue growth?" **Lanny Baker**: "Yes. Well, I think the decision to invest in performance marketing I just described a minute ago is really one that has been brewing for, I mean arguably 10 years . . . . On the sales side, I think we continue to want to grow our local sales team and expand that at a double-digit clip this year. That's a fairly proven model that we are -- we feel we're pretty good at operating. We like the returns in that business. They tend to be predictable over time . . . . There's a set of sales investments around strengthening and broadening our go-to market."[4]

[2] *Id.* at 10-11.

[3] Ex. 36 (2/14/2017 Goldman Sachs Presentation Transcript) at 7-8.

[4] *Id.* at 9.

Complaint Paragraph	Date of Statement	Statement at Issue
99	March 1, 2017	**<u>Brian Thomas Nowak</u>**: "[T]he tough question I get around the guidance for 2017, the incremental margins you guided to, I think 18% to 24%, that's quite a bit lower than the 50%-plus you were doing in the second half of last year. A couple things. One, can you just talk about the main areas of investment spending where you see pressuring the margins this year? And then how -- what type of a conservative cushion or buffer you'd like to kind of put in there for that spend?" **<u>Defendant Baker</u>**: "I think that from a margin perspective, we're trying to do a couple of really important things this year. We are really dedicated to advancing the transactional capabilities, functionalities, flows and experiences within our product for both consumers and for businesses . . . . And we're building a brand-new capability that Yelp hasn't had around performance marketing . . . . I would say that you really can't draw a real bright line between acceleration that we saw in 2016 and our marketing spending. I don't think they're totally unrelated. The ease with which a salesman operates or the growth we've had in users, maybe some of that came from the brand work that we had done. Now here we sit at 2017 looking forward at a product portfolio that is becoming…more transactional. [E]very time we add these transactional experiences, our consumers love it because it helps them conveniently get to where they wanted to go, connect them to a great local business . . . . And so our marketing dynamic is starting to get more involved around building -- bringing customers back and bringing customers into and bringing them throughout the Yelp experience for all of these transactional elements. . . . The other area where we are making big investments is on the product side . . . . making room to acquire a company like Nowait and then really integrate that in -- throughout all of our restaurants and build that out across the whole slate of our business. So it's really about making product and marketing investments at aa heartier clip than we made in the second half of last year. Second half of last year in which 50% of the revenue growth dropped into the bottom line gives some indication of the margin and leverage that's inherent in the business. But the revenue opportunity that sits out there with 3 million claimed businesses and only 140,000 paid advertisers really merits the investment activity . . . on the product and marketing side that we're making this year. Those things kind of seesaw back and forth. Last year there was an acceleration of revenue growth in 2016 and an acceleration of investment activity in 2017. And I think that's all part of the long-term plan."[5]

[5] Ex. 37 (3/1/2017 Morgan Stanley Presentation Transcript) at 7-9

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2021, the within document was filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to the registered attorneys of record in this case.

/s/ *Aaron F. Miner*
AARON F. MINER