

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTON BIELOUSOV, Individually
and on Behalf of All others
Similarly Situated,

Plaintiff,

v.

GOPRO, INC. and NICHOLAS D.
WOODMAN,

Defendants.

No. 16-cv-06654-CW

ORDER DENYING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT

(Docket Nos. 57, 58, 64)

Defendants GoPro, Inc., Nicholas Woodman, Brian McGee, and Anthony Bates move to dismiss Lead Plaintiff Troy Larkin's Amended Class Action Complaint (1AC).¹ Plaintiff opposed the motion and Defendants filed a reply. The Court held a hearing on June 27, 2017. Having considered the parties' papers and argument, the Court denies the motion to dismiss.²

¹ The caption of the 1AC lists only two Defendants: GoPro and Woodman. The title of a complaint "must name all the parties." Fed. R. Civ. P. 10(a). The allegations in the body of the 1AC make it plain that McGee and Bates also are intended as Defendants, however. 1AC ¶¶ 28-31. Plaintiff must file a second amended complaint naming all Defendants he intends to sue.

² The Court notes that Plaintiff has withdrawn his claims based on statements alleged to have been made on November 3, 2016. Opp. at 4 n.8. The Court does not consider the withdrawn claims in this order.

BACKGROUND

1 The following facts are alleged in the 1AC.

2 GoPro is a publicly traded Delaware corporation
3 headquartered in San Mateo, California. 1AC ¶ 28. It makes and
4 sells mountable and wearable cameras, drones and accessories.
5 Id. ¶¶ 2, 28, 32. Nicholas Woodman is GoPro's founder and chief
6 executive officer. Id. ¶ 29. Brian McGee is the company's chief
7 financial officer. Id. ¶ 30. Anthony Bates is a director of the
8 company and previously served as its president. Id. ¶ 31.

9 On September 19, 2016, GoPro unveiled two new HERO5 model
10 cameras and the Karma® quadcopter drone, which was GoPro's entry
11 into the drone market. Id. ¶¶ 3-4; 64-66; 94. GoPro stated that
12 the Karma drone would be available on October 23, 2016, globally,
13 at select retailers and announced pricing for the drone. Id.
14 ¶¶ 4, 70, 94. McGee told investors that the drone would take
15 GoPro to "new heights" and that the company was on track to meet
16 February 3, 2016 revenue guidance of \$1.35-1.5 billion revenue
17 for 2016. Id. ¶ 6; see also id. ¶¶ 56, 70, 96-101.

18 Plaintiff alleges, however, that these and other statements
19 by Defendants were false and misleading. GoPro was suffering a
20 severe shortage of Karma drones. Id. ¶¶ 7-8, 18, 71-76, 80.
21 There also was a shortage of HERO5 cameras. Id. ¶¶ 81-84. Those
22 drones that were available had an obvious battery latch design
23 defect that led to a product recall on November 8, 2016. Id.
24 ¶¶ 10, 18, 67-69, 78-80, 88-89. As this information became
25 public, GoPro's share price fell from a class period high of
26 \$17.68 per share on October 5, 2016 to close at \$10.41 per share
27 on November 9, 2016. Id. ¶¶ 9, 11, 16, 19-21, 90-93, 160-163.

1 Plaintiff alleges that Defendants knew of the product
2 shortages due to GoPro's use of a cloud-based NetSuite enterprise
3 resource planning system that gave them real-time access to
4 supply chain information. Id. ¶¶ 11-13, 22, 33-47, 61, 63, 135.
5 They were motivated to use the NetSuite system because of
6 previous inventory issues. Id. ¶¶ 13, 50-53. They also were or
7 should have been aware of the design defect because it would have
8 been obvious during adequate product testing and Woodman himself
9 had used the drone extensively. Id. ¶¶ 11, 14, 22, 60.
10 Additionally, GoPro scoured the Internet for videos captured via
11 the company's devices, and thus Defendants likely were aware of
12 user videos of crashing drones that were posted on YouTube. Id.
13 ¶¶ 14, 48-49, 78-79, 137.

14 On November 16, 2016, Plaintiff Anton Bielousov filed the
15 original complaint in this action. On February 6, 2017, the
16 Court appointed Troy Larkin as lead plaintiff for a putative
17 class of purchasers of GoPro stock. On March 14, 2017, Lead
18 Plaintiff Larkin filed the 1AC, alleging that Defendants made
19 various false or misleading statements between September 19, 2016
20 and November 8, 2016 about GoPro's HERO5 camera and Karma drone
21 and misled investors regarding its ability to meet its previous
22 revenue guidance. Plaintiff asserts two claims for violations of
23 the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C.
24 §§ 78a-78l11. The first claim is against all Defendants for
25 violations of § 10(b) of the Exchange Act, 15 U.S.C. § 78j(b),
26 and Rule 10b-5, 17 C.F.R. § 240.10b-5. The second claim is
27 against the individual Defendants only as control persons of
28 GoPro, for violations of § 20(a) of the Exchange Act, 15 U.S.C.

1 § 78t(a).

2 LEGAL STANDARD

3 A complaint must contain a "short and plain statement of the
4 claim showing that the pleader is entitled to relief." Fed. R.
5 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
6 state a claim, dismissal is appropriate only when the complaint
7 does not give the defendant fair notice of a legally cognizable
8 claim and the grounds on which it rests. Bell Atl. Corp. v.
9 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
10 complaint is sufficient to state a claim, the Court takes all
11 material allegations as true and construes them in the light most
12 favorable to the plaintiff. Metzler Inv. GMBH v. Corinthian
13 Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008). However, this
14 principle is inapplicable to legal conclusions; "[t]hreadbare
15 recitals of the elements of a cause of action, supported by mere
16 conclusory statements," are not taken as true. Ashcroft v.
17 Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at
18 555).

19 "In addition to the pleading requirements of Rule 8, there
20 are more demanding pleading requirements for certain causes of
21 action, especially securities fraud." In re Rigel Pharm., Inc.,
22 Sec. Litig, 697 F.3d 869, 876 (9th Cir. 2012). Rule 9(b)
23 provides that in "alleging fraud or mistake, a party must state
24 with particularity the circumstances constituting fraud or
25 mistake." Fed. R. Civ. P. 9(b). The allegations must be
26 "specific enough to give defendants notice of the particular
27 misconduct which is alleged to constitute the fraud charged so
28 that they can defend against the charge and not just deny that

1 they have done anything wrong." Semegen v. Weidner, 780 F.2d
2 727, 731 (9th Cir. 1985). Statements of the time, place and
3 nature of the alleged fraudulent activities are sufficient,
4 provided the plaintiff sets forth "what is false or misleading
5 about a statement, and why it is false." In re GlenFed, Inc.,
6 Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994), superseded by
7 statute on other grounds, Private Securities Litigation Reform
8 Act of 1995 (PSLRA), Pub. L. No. 104-67.

9 In 1995, Congress enacted the PSLRA, which amends the
10 Exchange Act. Under the PSLRA, a plaintiff must "state with
11 particularity both the facts constituting the alleged violation,
12 and the facts evidencing scienter, i.e., the defendant's
13 intention to deceive, manipulate, or defraud." Tellabs, Inc. v.
14 Makor Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) (internal
15 quotation marks omitted).

16 The PSLRA requires that the complaint "specify each
17 statement alleged to have been misleading, the reason or reasons
18 why the statement is misleading, and, if an allegation regarding
19 the statement or omission is made on information and belief, the
20 complaint shall state with particularity all facts on which that
21 belief is formed." 15 U.S.C. § 78u-4(b)(1). "This means that a
22 plaintiff must provide, in great detail, all the relevant facts
23 forming the basis of her belief." In re Silicon Graphics Inc.
24 Sec. Litig., 183 F.3d 970, 985 (9th Cir. 1999), abrogated on
25 other grounds by S. Ferry LP, No. 2 v. Killinger, 542 F.3d 776,
26 784 (9th Cir. 2008). Factual allegations that are not based on a
27 plaintiff's personal knowledge are allegations that are made on
28 information and belief. See id. at 985, 998 n.21. Thus, for

1 example, if a plaintiff's sole basis for an allegation is a
2 statement from a non-plaintiff witness, that allegation is made
3 on information and belief, and the plaintiff must plead all facts
4 on which that belief is based. See id. at 985, 998 n.21. This
5 does not mean, however, that a plaintiff must, for each
6 allegation plead on information and belief, state every fact
7 possessed that is in any way related to the allegation. Id. at
8 999 & n.24.

9 Although Rule 9(b) does not require that scienter be plead
10 with particularity, see Concha v. London, 62 F.3d 1493, 1503 (9th
11 Cir. 1995), the PSLRA does. See 15 U.S.C. § 78u-4(b)(2). The
12 PSLRA provides that "the complaint shall, with respect to each
13 act or omission alleged to violate this chapter, state with
14 particularity facts giving rise to a strong inference that the
15 defendant acted with the required state of mind." 15 U.S.C.
16 § 78u-4(b)(2). The "'required state of mind' in § 78u-4(b)(2)
17 refers to the scienter requirement applicable to the underlying
18 securities fraud claim brought by the plaintiff." Silicon
19 Graphics, 183 F.3d at 975.

20 Section 10(b) of the Exchange Act makes it unlawful for any
21 person to "use or employ, in connection with the purchase or sale
22 of any security . . . any manipulative or deceptive device or
23 contrivance in contravention of such rules and regulations as the
24 [SEC] may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5(b)
25 provides that it is "unlawful for any person, directly or
26 indirectly, . . . to make any untrue statement of a material fact
27 or to omit to state a material fact necessary in order to make
28 the statements made, in the light of the circumstances under

1 which they were made, not misleading[.]” 17 C.F.R. § 240.10b-
2 5(b). The PSLRA thus requires that a plaintiff plead with
3 particularity “facts giving rise to a strong inference that the
4 defendant acted with,” at a minimum, deliberate recklessness.
5 See 15 U.S.C. § 78u-4(b)(2); Silicon Graphics, 183 F.3d at 977.

6 Facts that establish a motive and opportunity, or
7 circumstantial evidence of “simple recklessness,” are not
8 sufficient to create a strong inference of deliberate
9 recklessness. See Silicon Graphics, 183 F.3d at 979. In order
10 to satisfy the heightened pleading requirement of the PSLRA for
11 scienter, a plaintiff “must state specific facts indicating no
12 less than a degree of recklessness that strongly suggests actual
13 intent.” Id. The necessary strong inference must be more than
14 merely reasonable or permissible--it must be cogent and at least
15 as compelling as any opposing inference that a reasonable person
16 could draw from the facts alleged. Tellabs, 551 U.S. at 324. In
17 pleading scienter, a plaintiff “has to provide a narrative of
18 fraud--facts which, if true, substantiate an explanation at least
19 as plausible as a nonfraudulent alternative.” ESG Capital
20 Partners, LP v. Stratos, 828 F.3d 1023, 1035 (9th Cir. 2016).

21 When analyzing the sufficiency of a plaintiff’s scienter
22 allegations, the Court first determines “whether any of the
23 allegations, standing alone, are sufficient to create a strong
24 inference of scienter.” N.M. State Inv. Council v. Ernst & Young
25 LLP, 641 F.3d 1089, 1095 (9th Cir. 2011). If no individual
26 allegation is sufficient, the Court conducts “a ‘holistic’ review
27 of the same allegations to determine whether the insufficient
28 allegations combine to create a strong inference of intentional

1 conduct or deliberate recklessness.” Id.; see also Tellabs,
2 551 U.S. at 326 (“When the allegations are accepted as true and
3 taken collectively, would a reasonable person deem the inference
4 of scienter at least as strong as any opposing inference?”).

5 REQUESTS FOR JUDICIAL NOTICE

6 The Court’s review is limited to the complaint, materials
7 incorporated into the complaint by reference and matters of which
8 the Court may take judicial notice. Metzler Inv. GMBH v.
9 Corinthian Colls., Inc., 540 F.3d 1049, 1061 (9th Cir. 2008).
10 Federal Rule of Evidence 201 allows a court to take judicial
11 notice of a fact “not subject to reasonable dispute because it
12 . . . can be accurately and readily determined from sources whose
13 accuracy cannot reasonably be questioned.” Even where judicial
14 notice is not appropriate, courts may also properly consider
15 documents “whose contents are alleged in a complaint and whose
16 authenticity no party questions, but which are not physically
17 attached to the pleading.” Branch v. Tunnell, 14 F.3d 449, 454
18 (9th Cir. 1994).

19 Both sides filed requests for judicial notice. The Court
20 grants Plaintiff’s unopposed request for judicial notice of
21 various dictionary definitions. The Court also grants
22 Defendants’ request for judicial notice, which Plaintiff opposes
23 in part, of certain Securities and Exchange Commission (SEC)
24 filings, press releases, investor forums, news reports, and
25 earnings call transcripts. To the extent these documents are
26 relied upon in the 1AC, the Court considers them as incorporated
27 by reference. With regard to the other public documents, the
28 Court takes judicial notice of the fact that the statements in

1 those documents were made on the dates specified, but not of the
2 truth of the matters asserted therein.

3 DISCUSSION

4 I. Section 10(b)

5 A. Materially False or Misleading Statements

6 1. "On Track" Statement

7 Plaintiff alleges that on September 19, 2016, McGee held a
8 conference call with investors about the new Karma drone and
9 HERO5 cameras at which he represented that GoPro was still "on
10 track" to make its previously-issued revenue guidance. 1AC ¶ 96.
11 Plaintiff alleges that McGee's statements were false and
12 misleading when made because GoPro was not then "on track" to
13 reach the revenue guidance and McGee either did not believe his
14 stated opinion or his opinion was misleading because he had not
15 checked GoPro's real-time inventory and supply monitoring systems
16 prior to speaking. Id. ¶ 97.

17 Defendants move to dismiss Plaintiff's claims based on this
18 statement, arguing that it falls within the protection of the
19 PSLRA's "safe harbor" protecting forward-looking statements.
20 15 U.S.C. § 78u-5(c)(1). A forward-looking statement is not
21 actionable if it is immaterial, made without actual knowledge
22 that it is false or misleading or is "identified as a forward-
23 looking statement, and is accompanied by meaningful cautionary
24 statements identifying important factors that could cause actual
25 results to differ materially from those in the forward-looking
26 statement." Id.; see also In re Cutera Sec. Litig., 610 F.3d
27 1103, 1108, 1111-13 (9th Cir. 2010) (holding that subsections of
28 safe harbor provision are disjunctive, not conjunctive, and

1 noting that an "earnings projection is by definition a forward-
2 looking statement").

3 In support of their contention that McGee's statement was
4 forward-looking, Defendants point out that at the outset of the
5 September 19, 2016 call, GoPro stated that its financial
6 projections were forward-looking statements based on current
7 assumptions that did not guarantee future performance, and
8 pointed investors to the discussion of risk factors in the
9 company's SEC filings. See Declaration of Vincent Barredo, Ex.
10 C, at 2. Courts have held that language that a company is "on
11 track" to meet a previously-made projection cannot "meaningfully
12 be distinguished from the future projection of which [it was] a
13 part." Xu v. Chinacache Int'l Holdings Ltd., No. 15-cv-7952-CAS,
14 2016 WL 4370030, at *7 (C.D. Cal. Aug. 15, 2016) (quoting Inst'l
15 Inv'rs Grp. v. Avaya, Inc., 564 F.3d 242, 255 (3d Cir. 2009));
16 see also Police Ret. Sys. of St. Louis v. Intuitive Surgical,
17 Inc., No. 10-CV-03451-LHK, 2012 WL 1868874, at *10 (N.D. Cal. May
18 22, 2012) (statement that company was "on track to grow 55% this
19 year" provided "indication of a forward-looking projection").

20 Plaintiff responds that McGee's statement did not fall under
21 the safe harbor provision because he included the phrase "we
22 believe," and therefore his words were a factual statement of his
23 present opinion, not a forward-looking statement of revenue
24 guidance. See Omnicare, Inc. v. Laborers Dist. Council Const.
25 Indus. Pension Fund, 135 S. Ct. 1318, 1326 (2015) ("every such
26 statement explicitly affirms one fact: that the speaker actually
27 holds the stated belief"); see also City of Dearborn Heights Act
28 345 Police & Fire Ret. Sys. v. Align Tech., Inc., 856 F.3d 605,

1 610 (9th Cir. 2017) (holding that Omnicare standards apply to
2 § 10(b) and Rule 10b-5 claims). As such, Plaintiff contends, the
3 statement was either false (if McGee checked database information
4 regarding supply shortages) or misleading (if he failed to check
5 but investors would reasonably have expected him to do so).

6 Under Omnicare, McGee was representing his and GoPro's
7 existing state of mind when he stated, "In addition, we talked
8 about our revenue guidance for 2016, its \$1.35 billion to \$1.5
9 billion. We believe we're still on track to make that as well."
10 This statement of present opinion is not forward-looking, and
11 therefore is not covered by the PSLRA safe harbor provision.

12 2. Statements Regarding Karma's Availability

13 Plaintiff alleges that Defendants made various statements
14 during the class period regarding the availability on October 23,
15 2016 of the Karma drone. 1AC ¶¶ 94, 98, 104, 106, 111.
16 Defendants contend that these statements were neither false nor
17 misleading because the drone was, in fact, available for sale on
18 that date, and Plaintiff alleges that at least 2,500 drones were
19 sold within the first two weeks after the launch date.

20 The first statement alleged to be false or misleading was in
21 a press release announcing the new products. GoPro stated:

22 Karma will be available October 23rd in the following
23 bundles: [1] Karma without a GoPro camera for \$799.99
24 MSRP; [2] Karma bundled with HERO5 Black for \$1099.99
MSRP; [and] [3] Karma bundled with HERO5 Session for
\$999.99 MSRP (available in early 2017).

25 1AC ¶ 94 (alterations in original) (emphasis omitted). Plaintiff
26 alleges that this statement was false or misleading because GoPro
27 had at most 2500 drones, an insufficient supply to make Karma
28 "readily available" for sale. The press release does not,

1 however, say "readily available." Plaintiff has not adequately
2 plead that this statement is false or misleading. The same is
3 true of the similar statement made by Woodman in an October 3,
4 2016 interview. Id. ¶ 104. This analysis also applies to
5 GoPro's October 23, 2016 statement on its Twitter account,
6 "#GoProKarma is here," which did not say that any specific
7 quantity of drones were "here" or readily available for sale.
8 Id. ¶ 106.

9 Plaintiff also alleges, however, that during the September
10 19, 2016 conference call, Woodman stated, "Karma is initially
11 going to be distributed through select retailers around the
12 world, and then rolling out from there." Id. ¶ 98. This
13 statement presents a different question because Woodman referred
14 to availability at multiple retailers around the world.
15 Plaintiff alleges that in fact, Karma was only distributed in the
16 United States online and at a single retailer, Best Buy--and Best
17 Buy did not have sufficient supply for Karma to be truly
18 available even there. Id. ¶¶ 71, 80. Accordingly, Plaintiff has
19 adequately alleged that Woodman's statement was false or
20 misleading.

21 Likewise, Plaintiff alleges that on November 4, 2016, GoPro
22 filed a Form 10-Q with the SEC for the third quarter of 2016,
23 signed by Woodman and McGee, which included the statement, "We
24 began shipping our Karma drone and accessories after quarter-end,
25 which became available online beginning October 23, 2016 and now
26 available at major U.S. retailers." Id. ¶ 111. In this
27 statement, again, GoPro referred to more than one retailer,
28 although only in the United States rather than around the world.

1 On November 8, 2017, only four days later, Defendants recalled
2 "approximately 2,500 Karma drones purchased by consumers since
3 October 23," 2016. Id. ¶ 121. On the same day, an analyst
4 reported that this was "not only a surprise to us, but another
5 ding on management's credibility having just announced both the
6 HERO5 and Karma drone at full production." Id. ¶ 123. Plaintiff
7 has adequately alleged that GoPro's SEC filing stating that Karma
8 was "now available to major U.S. retailers" was false or
9 misleading when made because in reality the drone was available
10 only at Best Buy, in very limited quantity.

11 3. Statements Regarding Karma's Capabilities

12 In the complaint, Plaintiff alleges that Defendants made
13 statements that Karma was capable of flight time of eighteen
14 minutes and could capture "amazingly smooth" aerial footage,
15 which were materially false or misleading because the drone's
16 flight time and recording capabilities were severely limited by a
17 design defect in Karma's battery latch that caused it to lose
18 power mid-flight and crash. 1AC ¶¶ 67-69, 78-80, 114-119.
19 Plaintiff alleges that Defendants must have been aware that the
20 design defect prevented the drone from flying and capturing
21 smooth footage because adequate quality control testing would
22 have detected it, Woodman himself had used the drone extensively,
23 and in the usual course of business GoPro would have viewed user
24 videos of crashing drones on the Internet. Id. ¶¶ 11, 14, 22,
25 48-49, 60, 78-79, 137.

26 Defendants argue that the optimistic statements regarding
27 Karma's flight time and smooth footage are not inherently
28 incompatible with the drone's actual performance, especially in

1 light of the cautionary statements issued by GoPro regarding
2 risks related to quality controls and product defects.
3 Additionally, Defendants argue that the challenged statements are
4 mere "puffery" that is not actionable. The statements, however,
5 are not mere corporate optimism, but objectively verifiable
6 promises of flight time and video quality. Plaintiff has alleged
7 that these statements were false or misleading in light of the
8 experiences of users whose drones crashed before the eighteen-
9 minute mark.

10 B. Scierter

11 Defendants argue that Plaintiff fails to plead scierter
12 because the 1AC lacks any mention of specific data or reports,
13 any non-speculative description of the information that GoPro's
14 internal reporting system showed, or any allegation of who
15 actually accessed that information. The Ninth Circuit has made
16 clear that allegations of negative internal reports, lacking
17 specifics, are insufficient to plead scierter. See, e.g. Lipton
18 v. Pathogenesis Corp., 284 F.3d 1027, 1036 (9th Cir. 2002)
19 (finding insufficient plaintiffs' allegations of "what they think
20 the data shows"); see also In re Leapfrog Enterprise, Inc.
21 Securities Litigation, 200 F. Supp. 3d 987, 1004 (N.D. Cal. 2016)
22 (finding insufficient allegations that the defendant "maintained
23 weekly POS reports regarding LeapPad sales that showed the
24 previous week's sales, as well as year-to-date sales and the
25 inventory levels being held by retailers."); In re Autodesk, Inc.
26 Securities Litigation, 132 F. Supp. 2d 833, 844 (N.D. Cal. 2000)
27 (plaintiff "must do more than allege that these key officers had
28 the requisite knowledge by virtue of their 'hands on' positions,

1 because that would eliminate the necessity for specially pleading
2 scienter, as any corporate officer could be said to possess the
3 requisite knowledge by virtue of his or her position.”)

4 Here, too, however, Plaintiff alleges not only that
5 Defendants had access to a NetSuite enterprise resource planning
6 system with real-time reporting capabilities, but also that
7 Defendants were motivated to use that system due to prior
8 inventory problems. Moreover, GoPro’s executives, including
9 Defendants Woodman and McGee, boasted that GoPro closely tracked
10 its inventory and knew how much inventory was in the channel.
11 See, e.g., 1AC ¶¶ 61, 63, 135. Plaintiff alleges that GoPro had
12 at most 2,500 drones for sale globally on October 23, 2016. Id.
13 ¶¶ 95, 105, 107, 112. In light of the company’s ability to track
14 its inventory, it is plausible to infer that Defendants knew that
15 2,500 drones would be insufficient to make Karma globally
16 available at multiple retailers on the launch date. The
17 inference of scienter is particularly strong, because Defendants,
18 despite the low number of drones alleged to be available, were
19 priming the market for the sale of 100,000 to 150,000 drones
20 during the fourth quarter of 2016. Id. ¶¶ 55, 71.

21 These allegations are bolstered by allegations of
22 circumstantial evidence. These include the timing of corrective
23 statements and updates to risk factors as well as the resignation
24 of Bates as GoPro’s president. Most notably, Woodman and McGee’s
25 Sarbanes-Oxley Act certifications filed with the SEC support
26 their scienter, because those certifications required them to
27 access sufficient reporting information to certify that the
28 information provided did not omit any material facts to make the

1 report not misleading. 1AC ¶ 149.

2 C. Loss Causation

3 Finally, Defendants argue that Plaintiff has not plead loss
4 causation. A securities fraud plaintiff must, at the pleading
5 stage, "allege that the decline in the defendant's stock price
6 was proximately caused by a revelation of fraudulent activity
7 rather than by changing market conditions, changing investor
8 expectations, or other unrelated factors." Loos v. Immersion
9 Corp., 762 F.3d 880, 887 (9th Cir. 2014); see also 15 U.S.C.
10 § 78u-4(b)(4) ("the plaintiff shall have the burden of proving
11 that the act or omission of the defendant alleged to violate this
12 chapter caused the loss for which the plaintiff seeks to recover
13 damages"). Plaintiff must allege that the market learned of and
14 reacted to the "fraud, as opposed to merely reacting to reports
15 of the defendant's poor financial health generally." Id. at 887-
16 88 (quoting Metzler Inv. GMBH v. Corinthian Colleges, Inc.,
17 540 F.3d 1049, 1063 (9th Cir. 2008)).

18 Plaintiff alleges that GoPro's stock dropped in response to
19 reports that supplies of cameras and drones were insufficient to
20 meet demand, that only 2500 drones had been sold and that the
21 drone had a battery latch defect that led to a recall--all facts
22 that belied Defendants' earlier statements. He further alleges
23 that analysts specifically identified the news release regarding
24 the small number of recalled drones to be "another ding on
25 management's credibility" in light of management's recent
26 inaccurate statements. 1AC ¶ 123. Accordingly, Plaintiff has
27 "alleged that a material misrepresentation or omission kept the
28 share price artificially inflated and that as a result of a

1 corrective disclosure, the share price fell.” Greenberg v.
2 Cooper Companies, Inc., No. 11-cv-05697 YGR, 2013 WL 2403648, at
3 *14 (N.D. Cal. May 31, 2013).

4 II. Section 20(a)

5 In the second claim in the 1AC, Plaintiff alleges that the
6 individual Defendants violated § 20(a) of the Exchange Act as
7 control persons of GoPro. Under § 20(a), “a defendant employee
8 of a corporation who has violated the securities laws will be
9 jointly and severally liable to the plaintiff, as long as the
10 plaintiff demonstrates ‘a primary violation of federal securities
11 law’ and that ‘the defendant exercised actual power or control
12 over the primary violator.’” Zucco Partners, LLC v. Digimarc
13 Corp., 552 F.3d 981, 990 (9th Cir. 2009) (quoting No. 84
14 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W.
15 Holding Corp., 320 F.3d 920, 945 (9th Cir. 2003)). Defendants
16 argue that if Plaintiff fails to plead a predicate violation of
17 § 10(b), his control person claim also fails. As discussed
18 above, however, Plaintiff has sufficiently alleged a primary
19 violation of federal securities law under § 10(b) and Rule 10b-5.
20 Accordingly, Plaintiff’s § 20(a) claim may proceed.

21 CONCLUSION

22 For the foregoing reasons, the Court DENIES Defendants’
23 motion to dismiss (Docket No. 57).

24 Within fourteen days after the date of this order, Plaintiff
25 must file a second amended complaint naming all Defendants he

26 ///

27 ///

28 ///

1 intends to sue. No other amendments are permitted except as
2 provided by Federal Rule of Civil Procedure 15.

3 IT IS SO ORDERED.

4

5 Dated: July 26, 2017

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23


24

25

26

27

28



CLAUDIA WILKEN
United States District Judge