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10
 11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION
 14

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16 ANTON BIELOUSOV, Individually and on
 Behalf of All Others Similarly Situated,

17 Plaintiff,

18 v.

19 GOPRO, INC. and NICHOLAS D.
 20 WOODMAN,

21 Defendants.

Case No.: 4:16-cv-06654-CW

CLASS ACTION

**DEFENDANTS' NOTICE OF MOTION
 AND MOTION TO DISMISS
 AMENDED CLASS ACTION
 COMPLAINT AND MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: June 27, 2017
 Time: 2:30 p.m.
 Judge: The Hon. Claudia Wilken

Date Action Filed: November 16, 2016

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 28 DEFENDANTS' NOTICE OF MOTION AND
 MOTION TO DISMISS AMENDED
 COMPLAINT

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD: PLEASE TAKE NOTICE that on June 27, 2017 at 2:30 p.m., or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Claudia Wilken, Defendants GoPro, Inc. (“GoPro” or the “Company”), Nicholas Woodman, Anthony Bates, and Brian McGee (“Individual Defendants” and, together with GoPro, “Defendants”) will, and hereby do, move to dismiss with prejudice Lead Plaintiff Troy Larkin’s (“Plaintiff”) Amended Class Action Complaint (Dkt. No. 51) (“Amended Complaint” or “AC”). Defendants move pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6) and the Private Securities Litigation Reform Act of 1995 (“PSLRA”), on the grounds that the AC fails to state a claim under Section 10(b) and 20(a) of the Securities Exchange Act of 1934 (“1934 Act”). The motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities; Defendants’ Request for Judicial Notice; the Declaration of Vincent Barredo In Support of Defendants’ Motion to Dismiss (“Barredo Decl.”) and exhibits thereto (“Ex.”);¹ the [Proposed] Order; the pleadings and records on file; the argument on counsel; and such other matters as may be presented to the Court.

ISSUES TO BE DECIDED

1. Should Plaintiff’s Section 10(b) claim be dismissed because Plaintiff fails to plead particularized facts demonstrating any actionable misstatement or omission, because Plaintiff fails to plead particularized facts creating a strong inference of scienter, and because Plaintiff fails to plead loss causation?

2. Should Plaintiff’s Section 20(a) claim be dismissed because Plaintiff fails to plead an underlying violation of Section 10(b)?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On November 3, 2016, GoPro announced that it had experienced production issues with its recently-launched new line of HERO5 cameras and its first-ever drone, Karma. The Company

¹ All referenced exhibits in the Memorandum of Points and Authorities are attached to the Barredo Decl.

1 reduced guidance based on those issues and the likely impact on Q4 revenues. The following
 2 week, and just two weeks after Karma’s launch, the Company announced that it was voluntarily
 3 recalling Karma due to power failures in a small number of drones. Based on these candidly self-
 4 reported events, Plaintiff attempts to bring a classic fraud-by-hindsight case. The problem is,
 5 Plaintiff cannot identify any actionable misstatement, or facts showing anything GoPro said was
 6 knowingly false or misleading. All Plaintiff has is the disappointing announcements.

7 The PSLRA was adopted specifically to reject such speculative claims at the outset.
 8 Under the PSLRA and Rule 9(b), a plaintiff must meet a “higher, exacting pleading standing” and
 9 allege *particularized contemporaneous* facts to demonstrate that the challenged statements were
 10 false when made and that each defendant acted with the intent to deceive. *Oregon Pub. Emps.*
 11 *Ret. Fund v. Apollo Group, Inc.*, 774 F.3d 598, 603 (9th Cir. 2014). Plaintiff here not only fails to
 12 meet this burden, he fails to put forth a single particularized fact—not one witness, not one
 13 document, not one piece of data, not one internal report, and not one internal communication or
 14 email—to demonstrate that any of the challenged statements were false or misleading, much less
 15 that could satisfy the stringent scienter requirement. Not one. Instead, Plaintiff relies exclusively
 16 on hindsight, speculation, and the sort of rote allegations that courts routinely reject as
 17 insufficient to state a claim.

18 *First*, Plaintiff challenges the September 19, 2016 statements that GoPro was “on track” to
 19 meet its guidance and the November 3 revised guidance as false and misleading because he
 20 claims that alleged product shortages made it impossible to meet that guidance. AC ¶¶ 6-7, 96-
 21 97. But both these statements fall squarely within the PSLRA’s safe harbor and were
 22 accompanied by meaningful cautionary language, including that GoPro might:

- 23 • “underestimate or overestimate forecast sales in a future period,”
- 24 • “be unable to meet customer, retailer, or distributor demand for our products,” or
- 25 • “experience operational difficulties with our manufacturers.”

26 Ex. A at 15, 21 (2015 Form 10-K). Even if these statements were not protected by the first prong
 27 of the safe harbor, they are still not actionable because Plaintiff has not pled particularized facts

1 supporting its claim that any Defendant *knew* GoPro could not meet its guidance at the time of the
2 statements. Indeed, that theory is also fundamentally inconsistent with the fact that GoPro
3 *lowered* its guidance in light of the production issues, and expressly cautioned that the production
4 issues were expected to have “a *negative impact* on results for the second half of the year” and
5 that “*we anticipate difficulty catching up to meet forecasted demand during the fourth quarter.*”
6 AC ¶¶ 108-109 (emphasis added).

7 *Second*, Plaintiff’s theory that admittedly true statements that Karma was available on
8 October 23, 2016 were rendered false and misleading because Karma was supposedly not *readily*
9 available, is equally deficient. Nothing in the undeniably true statements that Karma went on sale
10 on October 23 could be read as a guarantee of the volume that would be available or that
11 everyone who wanted a drone could purchase one on that date. And, the uncontested fact that at
12 least 2,500 drones were sold in the first two weeks after launch confirms – rather than undermines
13 – that these statements are not actionable.

14 *Third*, Plaintiff’s claims that accurate statements about Karma’s capabilities – *e.g.*, that it
15 could fly or could capture footage in the air were false and misleading merely because Karma was
16 later recalled is pure fraud by hindsight. Accurate descriptions of Karma’s features are not a
17 guarantee that Karma would *never* experience performance issues, and nothing about a later recall
18 made those statements false or misleading. Underscoring the point, GoPro expressly cautioned
19 investors of “the risk that new products may have quality or other defects in the early stages of
20 production,” among other things. Ex. A at 12. These are also precisely the kind of soft
21 statements of corporate optimism or “puffery” that courts have consistently held are not
22 actionable as a matter of law.

23 These deficiencies alone justify dismissal, but there are two independent, additional
24 reasons why Plaintiff’s claims fail. *First*, Plaintiff does not allege any coherent theory of scienter
25 or offer specific facts suggesting that any Defendant knowingly or recklessly made a false or
26 misleading statement. Instead, Plaintiff relies on rote allegations that courts routinely find
27 deficient, especially where, as here, Plaintiff fails to identify any specific information received by
28

1 any of the Defendants that contradicted any of their public statements. Moreover, the lack of any
 2 plausible motive or suspicious stock sales affirmatively negates any inference of scienter.
 3 *Second*, Plaintiff fails to plead loss causation as the AC does not, and cannot, sufficiently allege
 4 that a “revelation of fraudulent activity” caused GoPro’s stock to decline.

5 In short, Plaintiff comes nowhere near satisfying its burden of pleading *particularized*
 6 *facts* to show that any of Defendants’ challenged statements were false or misleading when made,
 7 or that would support a “strong inference” of scienter, or that the challenged statements were the
 8 proximate cause of GoPro’s stock drop, all of which is required under the PSLRA.

9 **II. STATEMENT OF FACTS**

10 **A. The Defendants**

11 GoPro is a publicly traded Delaware corporation headquartered in San Mateo,
 12 California. AC ¶ 28. It creates and sells innovative mountable and wearable cameras, drones,
 13 and accessories. *Id.* Defendant Nicholas Woodman founded GoPro in 2004 and serves as the
 14 Company’s Chief Executive Officer and Chairman. *Id.* ¶ 29. Defendant Anthony Bates served as
 15 GoPro’s President from June 2014 until December 2016. *Id.* ¶ 31. Defendant Brian McGee has
 16 been GoPro’s Chief Financial Officer since March 2016. *Id.* ¶ 30.

17 **B. The HERO5 and Karma Launch**

18 In May 2015, GoPro announced that it was developing a quad-copter or drone named
 19 “Karma.” GoPro expended significant resources developing Karma to add features that would
 20 differentiate it from other drones. Ex. B at 4-6 (Q1 2016 Earnings Call Transcript).

21 On September 19, 2016, GoPro held a press event to demonstrate the Karma and the
 22 HERO5 cameras to the public. GoPro also announced that the HERO5 line would be available
 23 for sale on October 2, 2016 and that Karma would be available for sale on October 23, 2016. Ex.
 24 D (Sept. 19, 2016 Press Release).

25 On November 3, 2016, GoPro announced its Q3 revenue of \$240 million, up 9% from Q2.
 26 Ex. H at 3 (Q3 2016 Earnings Transcript). The Company also disclosed that although it had
 27 shipped slightly over one million cameras in Q3, it was lowering its 2016 revenue expectations
 28

1 because it had discovered a production issue that resulted in lower-than-expected launch volumes
 2 for both HERO5 Black and Karma. *Id.* Although GoPro dedicated significant resources to
 3 resolving the issue, it cautioned that it expected the production issues to have a negative impact
 4 on the second half of the year and that there would be difficulty in meeting forecasted demand for
 5 Q4. *Id.* In addition, GoPro cautioned of the risks associated with new product launches,
 6 including the risks associated with forecasting demand, risks related to the “availability of
 7 products in appropriate quantities to meet anticipated demand,” risks with “production ramp-up
 8 issues,” and the “risk that new products may have quality or other defects in the early stages of
 9 introduction.” Ex. I at 31 (Q3 2016 Form 10-Q).

10 On November 8, 2016, GoPro announced that it had decided to recall the approximately
 11 2,500 drones purchased by consumers since October 23, 2016. Ex. J (Nov. 8, 2016 Press
 12 Release). GoPro explained that a “very small number of Karma owners have reported incidents
 13 of power failure during operation. We have moved quickly to recall all units of Karma and
 14 provide a full refund while we investigate the issue.” *Id.* GoPro emphasized that safety is its top
 15 priority and that it was working in close coordination with both the U.S. Consumer Product
 16 Safety Commission and Federal Aviation Administration. *Id.* GoPro provided consumers with
 17 full refunds. *Id.* On February 1, 2017, GoPro announced that Karma was back on sale. Ex. L at
 18 3 (Q4 2016 Earnings Call Transcript). The following day, February 2, 2017, GoPro announced
 19 its Q4 results of \$540.6 million, the second highest quarterly revenue in GoPro’s history. *Id.*

20 **C. Procedural History, Parties, and Claims**

21 On November 16, 2016, plaintiff Anton Bielousov filed a purported class action complaint
 22 and on February 6, 2017, the Court appointed Troy Larkin as lead plaintiff for a putative class of
 23 purchasers of GoPro stock (“Plaintiff”). (Dkt. No. 47). On March 14, 2017, Plaintiff filed the
 24 AC, alleging that Defendants made various false or misleading statements between September 19,
 25 2016 and November 8, 2016 about GoPro’s HERO5 camera, Karma drone, and revenue guidance
 26 and asserting claims under Sections 10(b) and 20(a) of the 1934 Act. *See* AC ¶¶ 1, 94-120.

1 **III. APPLICABLE PLEADING STANDARDS**

2 A motion to dismiss “tests the legal sufficiency of a claim.” *Navarro v. Block*, 250 F.3d
3 729, 732 (9th Cir. 2001). The Court examines the well-pleaded factual allegations, and any
4 materials referenced in the pleading or subject to judicial notice, and “determine[s] whether they
5 plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

6 In asserting claims for securities fraud under Section 10(b), a plaintiff “must meet the
7 higher, exacting pleading standards” of Rule 9(b) and the PSLRA. *Oregon Pub.*, 774 F.3d at 603;
8 *see Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009).² The PSLRA
9 imposes stringent pleading requirements that are designed to “filter out the unfounded [suits]
10 early enough to avoid huge litigation expenses.” *Ronconi v. Larkin*, 253 F.3d 423, 428 (9th Cir.
11 2001).

12 Among other things, the PSLRA requires plaintiffs to identify “each statement alleged to
13 have been misleading, [and] the reason or reasons why [it] is misleading” including specific
14 contemporaneous facts showing that the challenged statements were false when made. *Metzler*
15 *Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1071-72 (9th Cir. 2008).

16 Plaintiff must also establish a “strong inference” that each alleged misstatement was made
17 with scienter (15 U.S.C. § 78u-4(b)(2)(A)), “the nefarious mental state necessary to constitute
18 securities fraud.” *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 391 (9th Cir.
19 2002). Plaintiff must plead facts showing that defendants intentionally made false statements or
20 acted with deliberate recklessness tantamount to actual intent. *In re Silicon Graphics, Inc. Sec.*
21 *Litig.*, 183 F.3d 970, 976-77 (9th Cir. 1999); *Oregon Pub.*, 774 F.3d at 608. Scienter must be
22 established as to *each* defendant (*Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736, 743, 745
23 (9th Cir. 2008)) and the necessary strong inference “must be more than merely plausible or
24 reasonable – it must be cogent and at least as compelling as any opposing inference of
25 nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

26 _____
27 ² A Section 10(b) claim requires: (1) a material misrepresentation or omission; (2) scienter; (3)
28 purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. *Stoneridge*
Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008).

1 The PSLRA also creates a two-pronged “safe harbor” protecting forward-looking
 2 statements. Statements – such as earnings guidance – are not actionable if identified as forward-
 3 looking and “accompanied by meaningful cautionary” language. Even absent such language, to
 4 encourage companies to provide guidance and other prospective information, the PSLRA requires
 5 plaintiffs to plead specific facts showing a speaker had *actual knowledge* that a forward-looking
 6 statement was false when made. *See* 15 U.S.C. § 78u-5(c)(1)(A)(i); *In re Cutera Sec. Litig.*, 610
 7 F.3d 1103, 1108 (9th Cir. 2010). If the first prong of the safe harbor applies, a statement is not
 8 actionable irrespective of the speaker’s state of mind. *Id.* at 1112.

9 The PSLRA thus changes the way in which pleadings are analyzed and represents a
 10 “deviation from the usually lenient requirements of federal rules pleading.” *Ronconi*, 253 F.3d at
 11 437. “In few other areas are motions to dismiss ... so powerful.” *Id.*

12 **IV. PLAINTIFF FAILS TO STATE A SECTION 10(B) CLAIM**

13 **A. GoPro’s Forward-Looking Guidance Is Not Actionable**

14 **1. The September 19 “On Track” Statement Is Not Actionable**

15 Plaintiff argues that the September 19, 2016 statement “[w]e believe we’re still on track to
 16 make” guidance for 2016 was false and misleading because GoPro’s allegedly “limited available
 17 supply of Karma drones and HERO5 cameras” made it impossible to meet that guidance. AC
 18 ¶¶ 96-97. As a threshold matter, that forward-looking statement about guidance falls squarely
 19 within the protection of the PSLRA’s safe harbor. *See Xu v. Chinacache Int’l Holdings, Ltd.*,
 20 2016 WL 4370030, at *7 (C.D. Cal. Aug. 15, 2016) (defendant’s statement that the company was
 21 “on track” is subject to the safe harbor); *see also Police Ret. Sys. of St. Louis v. Intuitive Surgical,*
 22 *Inc.*, 759 F.3d 1051, 1058 (9th Cir. 2014) (“growth and revenue projections” are “forward-
 23 looking on their face”); *Cutera*, 610 F.3d at 1111 (earnings projection is “by definition a forward-
 24 looking statement”).³

25 _____
 26 ³ In addition, courts have repeatedly dismissed statements such as “we believe we’re still on
 27 track” as non-actionable, soft, unquantifiable statements of corporate optimism. *See Melot v.*
 28 *JAKKS Pacific, Inc.*, 2016 WL 6902093, at *19 (C.D. Cal. Nov. 18, 2016) (“the use of words and
 phrases such as ‘growing,’ ‘showing strong momentum,’ ‘off to a positive start,’ ‘off to a good
 start,’ and ‘off to a solid start[]’ . . . are ‘feel good monikers’ that are not actionable”); *In re*

1 At the outset of the September 19 call, GoPro expressly stated that the financial
 2 projections discussed on the call were forward-looking statements, “are not guarantees of future
 3 performance” and “are based on assumptions as of today.” Ex. C at 2 (Sept. 19, 2016 Investor
 4 Day Transcript). GoPro also specifically pointed investors to the “risk factors” section of its 2015
 5 Form 10-K, as well as the Company’s other periodic reports filed with the SEC. *Id.* The Ninth
 6 Circuit has expressly held that such language is sufficient to trigger the safe harbor. *See Intuitive*
 7 *Surgical*, 759 F.3d at 1059-60 (statement informing investors that “risks and uncertainties are
 8 described in detail in the company’s [SEC] filings” sufficient) (alteration in original).

9 Plaintiff’s suggestion that the “risk factors” described in GoPro’s 2015 Form 10-K did not
 10 adequately warn investors or were themselves “false and/or misleading” (AC ¶¶ 100-101),
 11 overlooks the actual disclosures and the law. Even the isolated statements cited in the AC plainly
 12 caution investors of specific factors that could affect GoPro’s ability to accurately forecast future
 13 results, manage product demand, and introduce new products. *See id.* ¶ 100.

14 The other disclosures in GoPro’s 2015 Form 10-K, which Plaintiff deliberately ignores,
 15 described additional specific risks relating to the very factors that Plaintiff claims caused GoPro
 16 to miss its guidance, including:

- 17 • ***“If we fail to effectively manage new product introductions and transitions in the***
 18 ***future, including our next generation capture devices, drones, and content-management***
software solutions, our revenue and profitability will be materially affected.”
- 19 • ***“In addition, our drones and related product offerings present new and difficult***
 20 ***technology challenges, and we may be subject to claims if users experience failures or***
other quality issues.”
- 21 • ***“Additionally, we anticipate introducing our drone product in 2016 and we have no***
 22 ***historical experience related to warranty claims for this product. . . .we could incur***
 23 ***significant costs to correct any defects, warranty claims or other problems, including***
costs related to product recalls.”
- 24 • ***“No assurance can be given that we will not incur additional charges in future periods***
 25 ***related to our inventory management or that we will not underestimate or overestimate***
 26 ***forecast sales in a future period . . . If we do not accurately forecast customer demand for***
our products, we may in future periods be unable to meet customer, retailer, or
distributor demand for our products, or may be required to incur higher costs to secure
the necessary production capacity and components, and our business and operating results

27 *Fusion-io, Inc. Sec. Litig.*, 2015 WL 661869, at *14-15 (N.D. Cal. Feb. 12, 2015) (statements
 28 lauding “momentum” non-actionable puffery).

1 could be adversely affected.”

- 2 • “We cannot be certain that we will not experience *operational difficulties with our*
 3 *manufacturers, including reductions in the availability of production capacity . . .*
insufficient quality control, failures to meet production deadlines . . .”

4 Ex. A at 11-13, 15, 20, 21 (emphasis added).

5 Plaintiff’s assertion that these robust disclosures were ineffective because they did not
 6 *also* include language from the risk factors in the November 4, 2016 Form 10-Q misses the
 7 point.⁴ AC ¶¶ 87, 101. The statutory safe harbor does not require prescience or that every
 8 possible permutation of risk be disclosed; rather, it requires only that cautionary statements
 9 identify “important factors that could cause actual results to differ materially from those in the
 10 forward-looking statement.” 15 U.S.C. § 78u-5(c)(1)(A)(i); *Cement Masons & Plasterers Joint*
 11 *Pension Trust v. Equinix, Inc.*, 2012 WL 685344, at *5 (N.D. Cal. Mar. 2, 2012) (cautionary
 12 language “need not have warned of the exact risk that caused the company to miss its forecast”);
 13 *In re Nuvelo, Inc. Sec. Litig.*, 2008 WL 5114325, at *16 (N.D. Cal. Dec. 4, 2008) (“[T]he law
 14 does not require specification of the particular factor that ultimately renders the forward-looking
 15 statement incorrect.”). Because GoPro’s financial guidance was accompanied by meaningful
 16 cautionary language, Plaintiff’s claim is barred by the “first prong” of the PLSRA’s safe harbor.
 17 *See Cutera*, 610 F.3d at 1108, 1112-13 (no claim when guidance references meaningful
 18 cautionary language); *Emp’r Teamsters Local. Nos. 175 & 505 Pension Fund v. The Clorox Co.*,
 19 353 F.3d 1125, 1132-33 (9th Cir. 2004) (cautionary language sufficient to invoke the safe
 20 harbor); *Union Asset Mgmt. Holding AG v. Sandisk Corp.*, 2016 WL 406283, at *3 (N.D. Cal. Jan

21 _____
 22 ⁴ Plaintiff argues that the risk disclosures should also have warned that the success of new product
 23 introductions also depends on “the availability of products in appropriate quantities to meet
 24 anticipated demand,” “the management of risks associated with new product production ramp-up
 25 issues,” and that “failure to complete product transitions effectively” could lead to a “deficit of
 26 inventory.” AC ¶ 101. This argument is baseless. The risk factors in the 2015 Form 10-K GoPro
 27 did expressly caution of the risks related to meeting demand, production issues with new
 28 products, and product defects, among other things. Nothing more was required and nothing in
 GoPro’s robust risk disclosures in the 2015 Form 10-K were rendered false or misleading by
 failing to disclose additional detail. *See In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857,
 882 (N.D. Cal. 2004) (“PSLRA does not require a listing of *all* factors that might make the results
 different from those forecasted. Instead, the warning must only mention *important* factors of
 similar significance to those actually realized.”).

1 22, 2016) (dismissing claims based on guidance where accompanied by meaningful cautionary
2 language).

3 Even if GoPro’s financial guidance was not protected by the first prong of the PSLRA’s
4 safe harbor, it would still be non-actionable under the second prong, because Plaintiff does not
5 plead any particularized facts to support its claim that there were known production or supply
6 issues on September 19, much less that any Defendant was aware of any such issues. 15 U.S.C.
7 § 78u-5(c)(1)(B). Instead, Plaintiff relies on the November 3 disclosure regarding production
8 issues and pure speculation. AC ¶¶ 81, 84-85, 97. It is black-letter law, however, that a
9 company’s announcement of negative news “does not turn [an] earlier, cheerier statement into a
10 falsehood.” *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 847 (9th Cir. 2003); *Fialkov v.*
11 *Microsoft Corp.*, 72 F. Supp. 3d 1220, 1230 (W.D. Wash. 2014) (“Standing alone, the fact that
12 Microsoft reduced the retail price of the Surface RT in July 2013 does not make its positive
13 statements about the product months earlier actionably misleading.”); *In re Silicon Storage Tech.,*
14 *Inc.*, 2006 WL 648683, at *7 (N.D. Cal. Mar. 10, 2006) (complaint failed to allege falsity where
15 plaintiffs alleged, “in essence, that because SST wrote down its inventory in December 2004, the
16 statements about inventory made prior to that time must have been false”).⁵

17 Nor does Plaintiff’s speculation as to what GoPro’s inventory and supply monitoring
18 systems supposedly “would have revealed,” (AC ¶ 97) come close to pleading *particularized*
19 *facts* demonstrating how or why the alleged statements were false when made. Piecing one’s way
20 back through the AC, Plaintiff’s allegations amount to a description of the NetSuite ERP,
21 generally, and the unremarkable fact that GoPro – like any company – tracked inventory. *See id.*
22 ¶¶ 33-47, 97. Nowhere, however, does Plaintiff allege what any report said, what the inventory
23 levels were, or how supply compared to projected demand or GoPro’s guidance. Such allegations

24 _____
25 ⁵ *See also Zerger v. Midway Games, Inc.*, 2009 WL 3380653, at *7 (N.D. Ill. Oct. 19, 2009)
26 (rejecting allegations that events in October 2005 could show falsity of statements made in
27 August 2005); *In re First Chicago Corp. Sec. Litig.*, 769 F. Supp. 1444, 1454 (N.D. Ill. 1991)
28 (“Mere temporal proximity between statements stressing the strengths of a corporation and
touting its successes and announcements of poor economic performance and depressed earnings
does not give rise to an inference that the earlier statements were false . . .”).

1 are plainly deficient. *See In re Leapfrog Enter., Inc. Sec. Litig.*, 200 F. Supp. 3d 987, 1004 (N.D.
 2 Cal. 2016) (dismissing claim where plaintiffs fail to allege current inventory levels, specific
 3 evidence, or reports at the time to the statements to demonstrate falsity); *see also In re Autodesk,*
 4 *Inc. Sec. Litig.*, 132 F. Supp. 2d 833, 844 (N.D. Cal. 2000) (under Ninth Circuit law, allowing
 5 plaintiffs “to go forward with a case based on general allegations of ‘negative internal reports’
 6 would expose virtually all public companies to potential litigation.”) (citations omitted); *Lipton*
 7 *v. Pathogenesis Corp.*, 284 F.3d 1027, 1036 (9th Cir. 2002) (same).⁶

8 2. **GoPro’s November 3 Forward-Looking Revised Financial Guidance Is** 9 **Not Actionable**

10 Plaintiff alleges that the November 3, 2016 revised guidance for Q4 2016 and fiscal year
 11 2016 was false and misleading because it failed to disclose that: 1) GoPro had “at most 2500
 12 drones available for sale” and such guidance was therefore “not attainable;” and 2) GoPro “was
 13 aware of reports of Karma crashes that put it on alert of a design defect.” *See* AC ¶¶ 108-110.
 14 Here, again, Plaintiff has not alleged the requisite facts to support his theory, and the challenged
 15 guidance is not actionable because it falls squarely within the PSLRA’s safe harbor for forward-
 16 looking statements.

17 The November 3 press release and earnings call both clearly identified the statements as
 18 forward-looking, advised of the risks associated with the entry into the drone market and the risks
 19 related to inventory, and specifically pointed investors to the “risk factors” section of its 2015
 20 Form 10-K and the Form 10-Q for Q3 2016. *See* Ex. G (Nov. 3, 2016 Form 8-K attaching Press
 21 Release); Ex. H at 2. Those robust risk disclosures further cautioned of the risks that inventory
 22 might be insufficient to meet demand, and that the Karma drone might be subject to recall, among
 23 other things. *See* Ex. A at 11-29; Ex. I at 30-32; Sec. IV.A.1., *supra*. Moreover, the very
 24 statements that Plaintiff points to as misleading for failing to disclose the “limited available
 25 supply of Karma drones,” themselves caution that “we experienced production issues that resulted

26 ⁶ While that failure is fatal, it is not surprising – Plaintiff concedes that “during September
 27 [GoPro] globally shipped several hundred thousands of units of [its] HERO 5 cameras,” which
 28 exceeded the volume of the HERO4 cameras shipped during that product’s launch (which was
 itself one of the most successful launches in GoPro’s history). AC ¶ 109.

1 in lower-than-expected launch volumes for HERO5 Black and Karma” and “we anticipate
 2 difficulty catching up to meet forecasted demand during the fourth quarter.” Ex. H at 3-4; *see*
 3 *Leapfrog*, 200 F. Supp. 3d at 1003 (rejecting falsity allegations where “public
 4 acknowledgements” of problems put alleged misstatements “in context”); *Jasin v. Vivus, Inc.*,
 5 2016 WL 1570164, at *18 (N.D. Cal. Apr. 19, 2016) (cautionary language not misleading where
 6 plaintiff failed to allege warnings were baseless or wrong); *see also Omnicare, Inc. v. Laborers*
 7 *Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1332 (2015). Such warnings
 8 brought the Company’s Q4 and 2016 guidance projection well within the safety of the “first
 9 prong” of the PSLRA safe harbor. *See Cutera*, 610 F.3d at 1108, 1112-13; *The Clorox Co.*, 353
 10 F.3d at 1132-33; *Sandisk Corp.*, 2016 WL 406283, at *3.

11 Even if Plaintiff’s claim were not barred under the first prong of the safe harbor, it would
 12 still fail because Plaintiff does not allege any particularized facts to support the theory that the
 13 revised guidance was unachievable when issued. *See In re Rigel Pharms. Inc. Sec. Litig.*, 697
 14 F.3d 869, 876-77 (9th Cir. 2012); *Metzler*, 540 F.3d at 1071-72. *First*, Plaintiff’s claim that the
 15 guidance was unattainable because GoPro lacked sufficient supplies of Karma is fundamentally
 16 inconsistent that the fact that GoPro *lowered* its guidance on November 3 *because* of the
 17 production issues, while cautioning that it might not be able to ramp up production in time to
 18 meet the Q4 demand. *In re Violin Memory Sec. Litig.*, 2014 WL 5525946, at *15 (N.D. Cal. Oct.
 19 31, 2014) (statements were not rendered misleading by allegedly omitted facts regarding product
 20 where risk disclosures sufficiently warned investors about product’s risks); *Jasin*, 2016 WL
 21 1570164, at *18. Likewise, Plaintiff’s claim that the approximately 2,500 drones sold in the two
 22 weeks following Karma’s release, represented the complete supply of drones available for the
 23 entire 12-weeks of Q4 is fundamentally inconsistent with the fact that GoPro continued to ramp-
 24 up production following the launch. *See* AC ¶ 124; *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp.
 25 2d 1148, 1173 (C.D. Cal. 2007) (allegation that company ordered insufficient inventory to meet
 26 projection is insufficient to demonstrate that projections were false and misleading).

27 Plaintiff also does not allege a single fact to establish that GoPro was aware of a design
 28

1 defect that rendered its guidance unattainable. While Plaintiff alleges that a handful of drone
 2 owners complained on YouTube or GoPro’s support hub regarding defects with their drones (AC
 3 ¶¶ 78-79), Plaintiff fails to allege that any of the Defendants were aware of the complaints or
 4 explain how such complaints rendered the forward-looking guidance unattainable. *See Wilson v.*
 5 *Hewlett-Packard Co.*, 668 F.3d 1136, 1147–48 (9th Cir. 2012) (holding that customer complaints
 6 did not support inference that defendant was aware of the defect); *In re NVIDIA Corp. Sec. Litig.*,
 7 2010 WL 4117561, at *5 (N.D. Cal. Oct. 10, 2010) (allegation that company received complaints
 8 regarding its product from its two major original equipment manufacturers insufficient to “create
 9 a strong inference that the [c]ompany knew, or was deliberately reckless in ignoring” the
 10 product’s problems); *see also In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 566, 578 (S.D.N.Y.
 11 2014), *aff’d*, 604 F. App’x 62 (2d Cir. 2015) (“statements of goals or beliefs” regarding quality
 12 made after customer complaints and recall are not false and misleading); *Copper Mountain*, 311
 13 F. Supp. 2d at 867 (dismissing claim where, while business may have hit sizeable bumps in the
 14 road, the allegations contain little to show that defendants knew of these bumps but did not
 15 disclose them).⁷

16 The fact that GoPro later recalled Karma does not change the analysis. *See Lululemon*, 14
 17 F. Supp. 3 at 580 (allegations that company received complaints and defendants “acknowledged”
 18 the quality issue earlier, do not contain the kind of “required specific factual allegations (by CWs
 19 or otherwise) that suggest if, when, or how” any makers of the statement knew about the issue or
 20 its magnitude prior to the recall); *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1060 (9th Cir.
 21 2014) (fact that scientists were “able to explain in retrospect” cause of product failures, does not
 22 mean that company knew or should have known earlier).

23 **B. Statements Regarding Karma’s Availability Are Not Actionable**

24 The bulk of Plaintiff’s remaining allegations challenge statements that the Karma drone

25 _____
 26 ⁷ *Cobos v. Ray-Go Wagner, Inc.*, 1994 WL 8719 (9th Cir. Jan. 11, 1994), which Plaintiff cites in
 27 the AC (AC ¶ 68), is not citable pursuant to Local Rules of the United States Court of Appeals for
 28 the Ninth Circuit 36-3 as it is an unpublished opinion filed before January 1, 2007. Even so, it is
 inapplicable here, as it addresses the proper jury instruction for a strict liability design defect
 claim. *Id.* at *1.

1 was available for sale on October 23, 2016 as false and misleading because GoPro allegedly
 2 “lacked sufficient supply of Karma drones to make Karma *readily* available for sale on October
 3 23, 2016 because GoPro had at most 2500 drones available for sale.” *See* AC ¶¶ 94, 98, 104-106
 4 (emphasis added).

5 At the outset, Plaintiff’s claim fails because these statements were in fact accurate –
 6 Karma was available for sale on October 23. AC at ¶ 121; *Int’l Brotherhood of Elec. Workers v.*
 7 *Limited Brands, Inc.*, 788 F. Supp. 2d 609, 633-34 (S.D. Ohio 2011) (statements concerning
 8 distribution center opening not actionable where “Plaintiff does not allege that the new center
 9 never opened or did not actually exist”); *Lululemon*, 14 F. Supp. 3d at 579 (statement that
 10 company worked with third party to inspect and test products not actionable where complaint
 11 fails to allege “facts that indicate that the company did not partner with a third-party”).

12 Faced with this undeniable fact, Plaintiff argues that these true statements were somehow
 13 rendered false and misleading because GoPro lacked adequate supplies to make the Karma drone
 14 “*readily* available” on October 23. AC ¶ 105. But nothing in the challenged statements about
 15 Karma being available for sale could reasonably be read to guarantee the number available, or as
 16 an assurance that the product would not be subject to backorders or to production issues. *See*
 17 *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1007 (9th Cir. 2002) (holding that true
 18 statement regarding expressions of interest from potential acquirers was not misleading for failing
 19 to disclose company had received actual proposals from three different parties); *In re Convergent*
 20 *Techs. Sec. Litig.*, 948 F.2d 507, 512-13 (9th Cir. 1991) (true statement not rendered misleading
 21 by what it allegedly failed to disclose). Moreover, the fact that GoPro sold at least 2,500 drones
 22 in the first two weeks after launch confirms that Karma was available, and devastates Plaintiffs
 23 ability to state a claim.⁸ *See Brody*, 280 F.3d at 1007 (statement not actionable where “inferences

24 _____
 25 ⁸ For the same reasons, Plaintiff’s allegation that Mr. Woodman’s September 19, 2016 statement
 26 that “Karma is initially going to be distributed through select retailers around the world and then
 27 rolling out from there” was false and misleading because “GoPro lacked sufficient supply of
 28 karma drones” to make it available for sale globally, fails. AC ¶¶ 98-99. Further, Mr.
 Woodman’s statement cannot be read as a statement that Karma would launch globally on
 October 23, a point the September 20, 2016 analyst report cited in the AC makes clear. *See* AC ¶
 67; Ex. E at 1 (Sept. 20, 2016 Cowen Report) (“The drone is expected to hit selected retailers in

1 one could draw from that information—were entirely consistent with the more detailed
 2 explanation” plaintiff argued should have been included); *Int’l Brotherhood of Elec. Workers*,
 3 788 F. Supp. 2d at 633-34; *Lululemon*, 14 F. Supp. 3d at 579.⁹

4 **C. Statements Regarding Karma’s Drone’s Capabilities Are Not Actionable**

5 Plaintiff’s claim that September 19 and October 3, 2016 statements about Karma’s ability
 6 to fly were false and misleading because Karma allegedly suffered from an “obvious design
 7 defect” and GoPro “failed to conduct adequate quality control testing of Karma” likewise fails.
 8 AC ¶¶ 114-120.

9 As an initial matter, it is undoubtedly true that Karma could in fact fly and there is no
 10 allegation that it could not. *See Int’l Brotherhood of Elec. Workers*, 788 F. Supp. 2d at 633-34.
 11 Further, nothing in the statements that the Karma has a flight time of “18 minutes” or can
 12 “capture footage in the air,” can be read as an guarantee that Karma will be free from product
 13 defects or other performance issues. *See Brody*, 280 F.3d at 1007; *Lululemon*, 14 F. Supp. 3d at
 14 579. To the contrary, GoPro expressly cautioned investors of the risks associated with Karma,
 15 including risks related to quality controls and product defects. *See Ex. A* at 11-29; *Ex. I* at 30-32;
 16 *Sec. IV.A.1., supra. Lululemon*, 14 F. Supp. 3d at 577-78 (statements that quality is the “highest
 17 in the industry” not actionable in light of risk disclosures that defects may occur because read “in
 18 context, it is unreasonable to read these statements on the company’s website regarding product
 19 quality as guarantees of no product defects”); *see also Violin Memory*, 2014 WL 5525946, at *15
 20 (statement was not actionable given risk disclosures regarding likelihood that defects might be
 21 discovered).

22 _____
 23 October, with a full roll out later.”).

24 ⁹ Plaintiff’s claim that Mr. Woodman’s October 3, 2016 statement that he expects a “post-holiday
 25 up-tick in the amount of stories being *sold*” ends where it begins. Heard in context, Mr.
 26 Woodman said: “I think the proof will be quite evident in the fabulous stories that we see people
 27 share and then I think after Christmas we can expect a very nice post-holiday uptick in the
 28 amount of stories being *shared* as everybody opens their GoPros and shares their experiences
 now with this easy solution.” *Ex. F* (Oct. 3, 2016 CNBC Woodman Interview Video). In any
 event, such statements are inactionable as mere puffery. *See, e.g., Brodsky v. Yahoo! Inc.*, 592 F.
 Supp. 2d 1192, 1200 (N.D. Cal. 2008) (“well positioned to succeed” inactionable as vague
 assertion of corporate optimism).

1 Equally devastating, Plaintiff does not allege a single fact to establish that the Karma
 2 drone “suffered from an obvious design defect” or that GoPro conducted inadequate testing,
 3 much less that any defendant was aware of such purported facts. Indeed, the AC does not even
 4 purport to describe what testing GoPro conducted or failed to conduct. Nor does it purport to
 5 explain how the design defect was “obvious.” Instead, Plaintiff relies on the recall itself and
 6 after-the-fact commentary and complaints, all of which post-date the statements, in no way
 7 indicate what was known at the time of the statements or by whom, and are pure fraud-by-
 8 hindsight. *Lululemon*, 14 F. Supp. 3d at 580 (product recall did not render earlier statements
 9 concerning product false or misleading); *NVIDIA*, 2010 WL 4117561, at *8-9 (existence of
 10 product defect did not render earlier related statements false or misleading); *Greenberg v. Cooper*
 11 *Co., Inc.*, 2013 WL 2403648, at *12-13 (N.D. Cal. May 31, 2013) (that company expanded
 12 product recall did not render earlier statements concerning product issues false or misleading); *In*
 13 *re Read-Rite Corp. Sec. Litig.*, 335 F.3d at 847; *Zerger*, 2009 WL 3380653, at *7.¹⁰

14 The challenged statements are also the type of “corporate optimism” and “puffery” that is
 15 not actionable as a matter of law. *In re Apple Comput., Inc. Sec. Litig.*, 243 F. Supp. 2d 1012,
 16 1025 (N.D. Cal. 2002) (“General statements of optimism and ‘puffing’ about a company or
 17 product are not actionable.”); *Kelly v. Elec. Arts, Inc.*, 71 F. Supp. 3d 1061, 1070 (N.D. Cal.
 18 2014) (statements that product was in a “much better state” and had been “largely been de-risked”
 19 are “non-actionable vague expression of corporate optimism and puffery upon which no
 20 reasonable investor would rely”); *see also Brodsky*, 592 F. Supp. 2d at 1200.

21 **D. Plaintiff Fails to Allege Facts Raising a Strong Inference of Scienter**

22 To avoid dismissal, Plaintiff must plead “with particularity both the facts constituting the
 23 alleged violation, and the facts evidencing scienter, *i.e.*, the defendants’ intention to deceive,
 24 manipulate or defraud.” *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1032 (9th Cir.

25
 26 ¹⁰ Plaintiff’s suggestion that GoPro had a duty to “correct or update” the statements is contrary to
 27 well-established law. *See In re Yahoo! Inc. Sec. Litig.*, 2012 WL 3282819, at *13 (N.D. Cal.
 28 Aug. 10, 2012) (no general duty to correct or update statements), *aff’d*, 611 F. App’x 387 (9th
 Cir. 2015).

1 2016) (internal quotation omitted). As an initial matter, GoPro’s thorough risk disclosures *negate*
 2 any inference of scienter. *See* Ex. A at 11-29; Ex. I at 30-32; Sec. IV.A.1., *supra*; *Jasin*, 2016
 3 WL 1570164, at *22. Even setting that aside, nowhere in the AC are there allegations identifying
 4 specific, contemporaneous documents or reports purporting to contradict any challenged public
 5 statement, nor are there allegations based on confidential witnesses, concerning internal meetings
 6 or discussions, or otherwise connecting any of the allegedly omitted information to Defendants.
 7 Rather, Plaintiff’s scienter allegations consist entirely of the most generic assertions and theories
 8 that courts reject as insufficient to establish the “strong inference” of scienter required by the
 9 PSLRA. These generic assertions—coupled with the absence of any purported motive or
 10 suspicious stock sales—plainly fall short of the “strong inference” required by the PSLRA.

11 **1. Plaintiff’s Allegations Concerning Defendants’ Purported Awareness**
 12 **of the Allegedly Omitted Information Fail**

13 Plaintiff’s attempt to allege that Defendants had access to and possession of “adverse
 14 material facts” is comprised of the allegation that GoPro utilizes an enterprise resource planning
 15 system, NetSuite, and Individual Defendants had general access to the Company’s commercial
 16 information. *See, e.g.*, AC ¶¶ 12, 41. Noticeably absent, however, is any mention of specific data
 17 or reports, any description of what that information showed, or any allegation of actual access to
 18 such information. Instead, Plaintiff resorts to rote speculation of what he thinks the information
 19 “would” show, going so far as to suggest that GoPro’s “senior executives” had access to adverse
 20 reports because NetSuite’s promotional video on YouTube stated that it could be used “by
 21 various members of an organization, including ‘senior executives.’” *Id.* ¶¶ 41, 97. The law is
 22 clear: such allegations do not come close to establishing scienter. *See Leapfrog*, 200 F. Supp. 3d
 23 at 1004 (dismissing claim where plaintiffs “fail to ‘cite any specific report, to mention any dates
 24 or contents of reports, or to allege their sources of information about any reports’”) (citation
 25 omitted); *In re Autodesk, Inc. Sec. Litig.*, 132 F. Supp. 2d at 840 (same); *Silicon Graphics*, 183
 26 F.3d at 984 (existence of internal reports contradicting positive public statements made by
 27 defendants did not establish inference of deliberate recklessness where plaintiff failed to “state
 28 facts relating to the internal reports, including their contents, who prepared them, which officers

1 reviewed them and from whom she obtained the information”); *Lipton*, 284 F.3d at 1036
 2 (allegations of what plaintiffs “think the data shows” are insufficient without hard numbers or
 3 other specific information); *In re Nike, Inc. Sec. Litig.*, 181 F. Supp. 2d 1160, 1169 (D. Or. 2002)
 4 (“Plaintiffs essentially rely on the fact that if upper managers were doing their jobs properly, they
 5 would have figured out the severity of the situation and the impact on the company finances prior
 6 to making the statements The case law does not allow this stretch.”).¹¹

7 Plaintiff’s effort to allege that Defendants knew about (or deliberately disregarded)
 8 Karma’s alleged “obvious design defect” fails for the same reasons. Once again, there is no
 9 allegation that any of the Individual Defendants were actually aware of any such defect. Instead,
 10 Plaintiff speculates that they must have known because of a handful of customer complaints and
 11 social media posts created after the Karma launch (some of which were posted *after* the recall),
 12 because “adequate testing” would have allegedly revealed the defect, and because Mr. Woodman
 13 owned a drone. *See, e.g.*, AC ¶¶ 78, 79, 136, 137. But nothing in these scattered allegations
 14 provides the particularized who, what, when and where required by the PSLRA. *See Wilson*, 668
 15 F.3d at 1147 (“complaints posted on a manufacturer’s webpage merely establish the fact that
 16 some customers were complaining” and are insufficient to show knowledge of the defect)
 17 (quotation and citation omitted); *Lululemon*, 14 F. Supp. 3d at 581 (“This [theory] frankly makes
 18 little sense. It is not clear how a failure to conduct one particular type of testing as frequently as
 19 lead plaintiff alleges should have been the case leads to an inference of intent to deceive, let alone
 20 the ‘cogent and compelling’ inference required by *Tellabs*”); *NVIDIA*, 2010 WL 4117561, at *5
 21 (allegations that company received “information showing that dozens of computer model lines
 22 from several manufacturers were all suffering from the same problem” are “simply conclusory

23 _____
 24 ¹¹ Plaintiff’s cite to *Reese v. Malone*, 747 F.3d 557, 571-72 (9th Cir. 2014) confirms this point.
 25 *Id.* (finding that defendant acted with scienter where she “would be among the first to know” the
 26 allegedly omitted information; had a “clear motive”; and the information was “objectively
 27 alarming” and contradicted her contemporaneous public statements); *see also In re Amgen Inc.*
 28 *Sec. Litig.*, 2014 WL 12585809, at *10-12 (C.D. Cal. Aug. 4, 2014) (finding that defendant had
 scienter where plaintiff alleged misstatements as to a drug’s safety, and “monitoring and
 presenting the results of” key data showing safety concerns “fell squarely within [defendant’s]
 bailiwick”).

1 statements from which plaintiffs incorrectly attribute knowledge to the [c]ompany.”¹²

2 **2. Plaintiff’s “Core Operations” Allegations Do Not Support a Strong**
 3 **Inference of Scienter**

4 Plaintiff’s related attempt to invoke the “core operations” doctrine does not, and cannot,
 5 save these deficient allegations. The “core operations” doctrine applies only in “narrow”
 6 circumstances where the purported adverse information was “of such prominence that it would be
 7 ‘absurd’ to suggest that management was without knowledge of [it].” *Zucco Partners*, 552 F.3d
 8 at 1000 (quotation omitted). By contrast, the “core operations” doctrine will generally fail where
 9 the complaint alleges “management had an important role in the company” but fails to allege
 10 “specific information conveyed to management and related to the fraud or other allegations
 11 supporting scienter.” *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 784-85 (9th Cir. 2008);
 12 *accord Metzler*, 540 F.3d at 1068 (“management’s general awareness of day-to-day workings of
 13 the company’s business does not establish scienter”).

14 Here, Plaintiff alleges that the Individual Defendants would have had access to
 15 information contradicting public statements by virtue of their positions “as senior level executives
 16 and/or directors.” *See* AC ¶¶ 144-145. Nowhere, however, does Plaintiff allege that any of the
 17 Individual Defendants actually received specific reports or information that would indicate that
 18 GoPro’s financial guidance was unattainable when issued or that any other challenged statement
 19 was false when made. In other words, these are precisely the sort of allegations that fall short of a
 20 “strong inference” of scienter. *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1063 (9th Cir.
 21 2014); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1069 (N.D.
 22 Cal. 2012) (absent allegations of access to specific information, core operations doctrine could
 23 not support strong inference of scienter).

24 **3. Plaintiff’s Remaining Allegations Do Not Support Any Inference of**
 25 **Scienter**

26 ¹² Plaintiff goes a step further to suggest that Defendants somehow knew about the Karma defect
 27 because GoPro “was likely aware of the experience of other drone companies” based on
 28 “Facebook rants” and other social media posts that “littered” the internet. *See* AC ¶ 137. This
 argument is a non-starter. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1407 (9th Cir. 1996)
 (rejecting theory that company should be expected to know details concerning other company).

1 Plaintiff's two remaining scienter allegations are equally deficient. *First*, Plaintiff's
 2 argument that an update to the risk factors in the Form 10-Q filed on November 4, 2016 indicates
 3 that GoPro must have known about the "HERO5 cameras' and Karma drones' supply problems
 4 before they were revealed" (AC ¶ 148) is simply another version of the unmitigated hindsight
 5 pleading that courts consistently reject as insufficient to plead securities fraud. *See Ronconi*, 253
 6 F.3d at 447; *Podraza v. Whiting*, 790 F.3d 828, 841 (8th Cir. 2015) (one week period between
 7 announcement of guidance and guidance revision did not support strong inference of scienter;
 8 proximity allegations "rest on nothing more than hindsight"); *Philco Inv., Ltd. v. Martin*, 2011
 9 WL 500694, at *6 (N.D. Cal. Feb. 9, 2011) (one-week period did not establish scienter).

10 Nor can later more detailed risk disclosures "confirm[]" that earlier statements were false,
 11 much less an intentional or deliberately reckless falsehood. AC ¶ 148. For example, nothing in
 12 the fact that GoPro later discovered production issues and lowered guidance was inconsistent with
 13 the statements regarding Karma's launch date, its capabilities, or the previously issued guidance.
 14 *See Ronconi*, 253 F.3d at 432-33 (rejecting scienter based on alleged hindsight "admissions"
 15 where later statements "concede[d] no intentional or deliberately reckless falsehood or deception
 16 at all"); *In re Cisco Sys. Inc. Sec. Litig.*, 2013 WL 1402788, at *10-*11 (N.D. Cal. Mar. 29, 2013)
 17 (holding same); *Wozniak v. Align Tech., Inc.*, 2011 WL 2269418, at *13 (N.D. Cal. June 8, 2011)
 18 (defendants' later statements did not support scienter where "defendants did not make
 19 'admissions' that were contradictory to or necessarily inconsistent with any [prior] statements").

20 *Second*, Plaintiff's allegation concerning SOX certifications adds "nothing substantial to
 21 the scienter calculus." *Zucco Partners*, 552 F.3d at 1003-04 (SOX "certifications are not enough
 22 to create a strong inference of scienter and do not make . . . otherwise insufficient allegations
 23 more compelling").

24 4. Holistic Review Confirms that Plaintiff Has Failed to Allege Scienter

25 The absence of any plausible motive to defraud further undercuts any inference of
 26 scienter. Plaintiff does not allege that Messrs. Woodman, McGee, Bates or anyone else engaged
 27 in improper or suspicious stock sales or otherwise benefited from a supposed scheme to inflate
 28

1 the stock price.¹³ See *Equinix*, 2012 WL 685344, at *8 (finding allegations of fraud “undercut”
 2 where plaintiffs did not allege that any defendant engaged in improper stock sales); *In re Tibco*
 3 *Software, Inc. Sec. Litig.*, 2006 WL 1469654, at *21 (N.D. Cal. May 25, 2006) (dismissal proper
 4 where, among other things, “Plaintiffs have not even shown that Defendants were *motivated to*
 5 *commit fraud*”). The absence of class period stock sales—let alone, any motive to defraud—
 6 undermines any inference of scienter. *In re Downey Sec. Litig.*, 2009 WL 2767670, at *13 (C.D.
 7 Cal. Aug. 21, 2009); *In re Pixar Sec. Litig.*, 450 F. Supp. 2d 1096, 1105-06 (N.D. Cal. 2006).

8 And, in the absence of sufficient allegations regarding the requisite intent of the Individual
 9 Defendants, Plaintiff cannot impute scienter to the Company itself through its theory of
 10 “collective scienter” or otherwise. See *Nordstrom, Inc. v. Chubb & Son, Inc.*, 54 F.3d 1424, 1436
 11 (9th Cir. 1995) (“[W]e see no way that [plaintiff] could show that the corporation, but not any
 12 individual defendants, had the requisite intent to defraud.”); *In re ChinaCast Educ. Corp. Sec.*
 13 *Litig.*, 809 F.3d 471, 475 (9th Cir. 2015) (same).

14 Viewed alone or holistically, Plaintiff’s scienter allegations fail to create the “strong
 15 inference” of scienter required by the PSLRA. See *Tellabs*, 551 U.S. at 314 (the PSLRA requires
 16 a “holistic” review of all facts, including nonculpable explanations, to determine whether, viewed
 17 as a whole, they support a strong inference of fraud); *Zucco Partners*, 552 F.3d at 1007; *cf.*
 18 *Slayton v. Am. Express Co.*, 604 F.3d 758, 776 (2d Cir. 2010).¹⁴

19 **E. Plaintiff’s Loss Causation Allegations Fail**

20 Plaintiff’s inability to plead loss causation – that a “revelation of fraudulent activity”
 21 proximately caused GoPro’s stock price decline – is an independent basis for dismissal. *Loos v.*
 22 *Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014). Like all other elements of a Section 10(b)

23 _____
 24 ¹³ In fact, *none* of Defendants sold a single share during the purported class period. See Exs. M,
 25 N (Woodman and McGee Forms 4s) (showing only payment of exercise price or tax liability);
 26 *Equinix*, 2012 WL 685344, at *8 n.5 (taking judicial notice of SEC Form 4s on motion to dismiss
 27 where plaintiff did not allege any stock sales during class period).

28 ¹⁴ *Glazer Capital Mgmt.*, 549 F.3d at 745 does not warrant a different conclusion as there too, the
 court rejected the plaintiff’s attempt to plead scienter under a collective theory and held that the
 “PSLRA requires [the plaintiff] to plead scienter with respect to those individuals who actually
 made the false statements.” This case is no exception.

1 claim, loss causation must be pleaded with specificity. *Oregon Pub.*, 774 F.3d at 604-05. Stock
 2 drops can be caused by myriad factors entirely unrelated to fraud. *Dura Pharms., Inc. v. Broudo*,
 3 544 U.S. 336, 343 (2005). Thus, to recover under Section 10(b), the facts must show a “causal
 4 connection between the material misrepresentation and the loss.” *Id.* at 342. *See also Metzler*,
 5 540 F.3d at 1062-63; *Loos*, 762 F.3d at 887-88.

6 Plaintiff identifies three alleged “disclosures” during the class period that he claims
 7 caused the loss. *First*, Plaintiff alleges that stock dropped on October 24, 2016, because “various
 8 reports by analysts and customers surfaced that supplies of HERO5 and Karma were insufficient
 9 to meet demand.” AC ¶¶ 161; 73-76. But “market speculation” alone “cannot form the basis of a
 10 viable loss causation theory.” *Loos*, 762 F.3d at 890. Further, blog posts and reports opining on
 11 already public information “do not constitute disclosure of ‘the truth’ as required for a corrective
 12 disclosure.” *Bonanno v. Cellular Biomedicine Group, Inc.*, 2016 WL 4585753, at *5 (N.D. Cal.
 13 Sept. 2, 2016) (citing *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1209 (9th Cir. 2016)).

14 *Second*, Plaintiff alleges that the stock dropped on November 4, 2016, after GoPro
 15 announced that “it lowered its fourth quarter and 2016 full year revenue guidance and updated its
 16 risk factors.” AC ¶ 162. This loss causation argument proceeds on the precise theory discredited
 17 by the Supreme Court in *Dura* and echoed by the Ninth Circuit in *Oregon Pub.*, *Metzler* and
 18 *Loos*. On November 3, 2016, GoPro lowered its Q4 2016 guidance due to “production issues,”
 19 but said *nothing whatsoever* to suggest *improprieties* in connection with the lowered guidance.
 20 *See Ex. H* at 3-4; *Bonanno*, 2016 WL 4585753, at *3 (“To be corrective, the disclosure must
 21 ‘relate back to the misrepresentation and not to some other negative information about the
 22 company.’”). Plaintiff cannot plausibly plead that the decline in stock price on November 4, 2016
 23 was proximately caused by fraudulent activity rather than some other factor, such as GoPro
 24 lowering its guidance for the next quarter. *See Loos*, 762 F.3d at 887; *see also In re Century*
 25 *Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (rejecting claims “‘merely
 26 consistent’ with [plaintiffs’] favored explanation but . . . also consistent with the alternative
 27 explanation.”).

1 *Third*, Plaintiff alleges that the November 8, 2016 Karma drone recall disclosed “for the
2 first time” that 2,500 Karma drones had been sold. AC ¶ 163. But nothing about the recall spoke
3 to the availability of the Karma drone, or revealed pervasive quality control issues, or that earlier
4 statements were fraudulent. *See* Sec. IV.B., *supra*. Put simply, Plaintiff cannot show that the
5 stock dropped as a result of the revelation of some fraudulent statement or omission, as opposed
6 to the recall itself or some other factor. *See Lululemon*, 14 F. Supp. 3d at 587 (announcement that
7 company was working to “fix the quality issues it was then facing (primarily, the Recall)” did not
8 reveal “pervasive quality control issues or that earlier earnings statements were false); *see also*
9 *Loos*, 762 F.3d at 887; *Metzler*, 540 F.3d at 1062-63; *Bonanno*, 2016 WL 4585753, at *3.

10 Plaintiff’s reliance on an alleged corrective disclosure outside the class period—GoPro’s
11 announcement on February 2, 2017, that it missed its revenue guidance for Q4 and full year
12 2016—is equally unavailing. Plaintiff argues under *CVB*, 811 F.3d at 1210, that this disclosure
13 confirms prior misrepresentations. Not so. Unlike in *CVB* where there was a “bombshell
14 disclosure about [CVB’s] largest borrower” which was directly contrary to CVB’s earlier
15 representation (*id.* at 1202, 1210), GoPro’s February 2, 2017 press release and earnings call
16 revealed GoPro was profitable in Q4 and explained that the failure to meet guidance was due to
17 the effects of production issues, which were previously disclosed, and in no way revealed any
18 “fraud.” *See* Ex. K (Feb. 2, 2017 Form 8-K attaching Press Release); Ex. L at 3; *Rok v. Identiv,*
19 *Inc.*, 2017 WL 35496, at *19-20 (N. D. Cal. Jan. 4, 2017).¹⁵

20
21 ¹⁵ Plaintiff makes one final effort to plead loss causation under a “materialization of the risk”
22 theory. The Ninth Circuit has not adopted the materialization of the risk theory of loss causation.
23 *See Nuveen Mun. High Income Opportunity Fund v. City of Alameda*, 730 F.3d 1111, 1122 n.5
24 (9th Cir. 2013). Regardless, this doctrine “does not provide plaintiffs with a cause of action every
25 time a security fails to meet optimistic expectations.” *Melot*, 2016 WL 6902093, at *26. Plaintiff
26 fails to define the risk or its materialization and instead restates his allegations as to the alleged
27 false and misleading statements. AC ¶ 165. This is plainly insufficient. *See Lattanzio v. Deloitte*
28 *& Touche LLP*, 476 F.3d 147, 157 (2d Cir. 2007) (a plaintiff may not allege that a risk of
misstatement is within a “zone of risk” because otherwise “loss causation as an element of §
10(b) liability would be completely subsumed by the element of misstatement”); *see also Melot*,
2016 WL 6902093, at *26 (allegations that defendants “inaccurately projected future earnings” is
“not sufficient to state a claim under the materialization of the risk doctrine.”).

V. PLAINTIFF FAILS TO STATE A SECTION 20(A) CLAIM

Absent an underlying violation of the 1934 Act, there can be no control person liability under Section 20(a). *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996); *In re Lexar Media, Inc. Sec. Litig.*, 2005 WL 1566534, at *4 (N.D. Cal. July 5, 2005). Because Plaintiff fails to plead a predicate violation of Section 10(b), his control person claim also fails. *See Shurkin v. Golden State Vinters Inc.*, 471 F. Supp. 2d 998, 1027 (N.D. Cal. 2006), *aff'd*, 303 F. App'x 431 (9th Cir. 2008).

VI. DISMISSAL SHOULD BE WITH PREJUDICE

“A district court may dismiss a complaint without leave to amend if amendment would be futile.” *Airs Aromatics, LLC v. Opinion Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595, 600 (9th Cir. 2014) (quotation omitted). Here, because none of Defendants’ challenged statements is actionable, Plaintiff cannot cure his pleading defects by further amendment. Accordingly, the Court should grant the motion to dismiss with prejudice.

Dated: April 13, 2017

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