

THE HONORABLE JOHN C. COUGHENOUR

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re Zillow Group, Inc.  
Securities Litigation

CASE NO. C17-1387-JCC

ORDER

This matter comes before the Court on Defendants’ motion to dismiss the second consolidated amended complaint (hereinafter “second amended complaint”) (Dkt. No. 50). Having thoroughly considered the parties’ briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES Defendants’ motion for the reasons explained herein.

**I. BACKGROUND**

The Court has provided a detailed description of this case in a prior order, which it will refer to as relevant to this motion. (*See* Dkt. No. 46.) Plaintiffs filed this putative class action against Zillow Group, Inc., (“Zillow”) on behalf of purchasers of Zillow securities,<sup>1</sup> alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (“Exchange Act”)

---

<sup>1</sup>The alleged class includes all persons, excluding Defendants, who acquired or purchased Zillow securities from November 17, 2014 to August 8, 2017. (Dkt. No. 47 at 2.)

1 and violation of the Securities and Exchange Commission Rule 10b-5.<sup>2</sup> (*Id.* at 1-2.) Plaintiffs  
2 also name as defendants Spencer Rascoff and Kathleen Phillips (collectively with Zillow,  
3 “Defendants”), who were Zillow’s Chief Executive Officer and Chief Financial Officer/Chief  
4 Legal Officer respectively, during the relevant class period. (*Id.* at 2.)

5 The thrust of Plaintiffs’ claims is that Zillow’s “co-marketing program” was designed to  
6 allow participating real estate agents to refer mortgage business to participating lenders in  
7 violation of Section 8(a) of the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C.  
8 §§ 2601, 2607. (*Id.* at 8.) Plaintiffs assert that Defendants made a series of misleading statements  
9 regarding Zillow’s legal compliance by failing to disclose the co-marketing program’s alleged  
10 illegality, particularly after the Consumer Financial Protection Bureau (“CFPB”) launched an  
11 investigation into the program. (*Id.*) Plaintiffs allege that Defendants’ misrepresentations about  
12 Zillow’s legal compliance caused them to purchase the company’s stock at artificially inflated  
13 prices. (*Id.* at 4.)

14 Defendants moved to dismiss Plaintiffs’ consolidated amended complaint (Dkt. No. 35)  
15 for failure to state a claim upon which relief can be granted. (Dkt. No. 36.) On October 2, 2018,  
16 the Court granted Defendants’ motion, and dismissed Plaintiffs’ Exchange Act claims without  
17 prejudice and with leave to amend. (Dkt. No. 46.) In its order, the Court wrote:

18 [I]f Plaintiffs choose to file a second amended complaint, they must assert  
19 particularized facts that demonstrate that Zillow designed the co-marketing  
20 program to violate RESPA, and that Zillow was instructing and encouraging third-  
21 parties to commit such violations. Plaintiffs must additionally allege with  
22 particularity that Defendants made material false or misleading statements  
regarding the co-marketing program’s compliance with RESPA, that Defendants’  
statements evinced a strong inference of scienter, and that such statements caused  
the loss alleged by Plaintiffs.

23 (*Id.* at 32.) On November 16, 2018, Plaintiffs timely filed their second amended complaint. (Dkt.  
24 No. 47.) Plaintiffs again allege that the co-marketing program was designed to violate RESPA

---

25  
26 <sup>2</sup> The Court previously dismissed Plaintiffs’ claims under the Securities Act of 1933  
without leave to amend. (Dkt. No. 46 at 2.)

1 and Defendants made false statements regarding Zillow’s legal compliance. (*Id.* at 3–5.)  
2 Plaintiffs also allege, for the first time, that Defendants violated the Consumer Financial  
3 Protection Act (“CFPA”), 12 U.S.C. § 5336, by providing “substantial assistance” to co-  
4 marketing participants who were violating RESPA. (*Id.* at 24–26.) Plaintiffs assert that these  
5 alleged CFPA violations provide a separate basis for the Court to conclude that Defendants made  
6 misleading statements. (*Id.* at 35–40.)

7 On December 17, 2018, Defendants filed a motion to dismiss the second amended  
8 complaint for failure to state a claim upon which relief can be granted. (Dkt. No. 50.) Defendants  
9 assert that Plaintiffs have failed to correct the deficiencies identified by the Court in its prior  
10 order dismissing the amended complaint—specifically, that Plaintiffs have failed to allege  
11 “particularized facts demonstrating that Zillow designed its business to violate the law,  
12 encouraged third parties to violate the law, made false or misleading statements about the  
13 Company’s compliance with the law, and caused the losses alleged.” (*Id.* at 6.)

## 14 **II. DISCUSSION**

### 15 **A. Legal Standard for Motion to Dismiss Securities Fraud Claim**

16 To state a claim for securities fraud under Section 10(b) and Rule 10b–5, a plaintiff must  
17 allege: “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a  
18 connection between the misrepresentation or omission and the purchase or sale of a security; (4)  
19 reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”

20 *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1057 (9th Cir. 2014)  
21 (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014)).

22 Normally, to survive a motion to dismiss, a complaint must contain sufficient factual  
23 matter, accepted as true, to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*,  
24 556 U.S. 662, 677–78 (2009). Complaints alleging securities fraud claims under Section 10(b)  
25 and Rule 10b–5 must additionally satisfy the dual pleading requirements of Federal Rule of Civil  
26 Procedure 9(b) and the Private Securities Litigation Reform Act (“PSLRA”). *WPP Luxembourg*

1 *Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1047 (9th Cir. 2011) (citing *Zucco*  
2 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009)). Rule 9(b) requires that  
3 complaints alleging fraud or mistake must “state with particularity the circumstances constituting  
4 fraud or mistake.” Fed. R. Civ. P. 9(b). This standard requires that a complaint allege the “who,  
5 what, when, where, and how” of the fraud. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106  
6 (9th Cir. 2003).

7 Pursuant to the PSLRA, a complaint alleging securities fraud must “specify each  
8 statement alleged to have been misleading, the reason or reasons why the statement is  
9 misleading, and if an allegation regarding the statement or omission is made on information and  
10 belief, the complaint shall state with particularity all facts on which the belief is formed.” 15  
11 U.S.C. § 78u-4(b)(1). In addition, the complaint must “state with particularity facts giving rise to  
12 a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-  
13 4(b)(2). While the facts supporting a securities fraud claim must be stated with particularity, the  
14 Court must accept as true all well-pleaded allegations and draw all reasonable inferences from  
15 those allegations in the light most favorable to the plaintiff. *See Khoja v. Orexigen Therapeutics,*  
16 *Inc.*, 899 F.3d 988, 1008 (9th Cir. 2018).

#### 17 **B. Plaintiffs’ Exchange Act Claims**

18 Before the Court can analyze the statements that Plaintiffs allege were materially  
19 misleading, it must first assess Plaintiffs’ allegations regarding Zillow’s RESPA and CFPA  
20 violations. If the second amended complaint lacks particularized facts regarding these alleged  
21 violations, then many of Defendants’ statements could neither have been misleading nor made  
22 with the requisite scienter. *See* 15 U.S.C. § 78u-4(b)(1)–(2) (stating that plaintiffs must allege  
23 with specificity “the reason or reasons why the statement is misleading,” and facts “giving rise to  
24 a strong inference that the defendant acted with the requisite state of mind.”); (*see also* Dkt. No.  
25 46 at 8–16.)

26 //

1           1.       RESPA Allegations

2           RESPA Section 8(a) prohibits giving or accepting “any fee, kickback, or thing of value  
3 pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part  
4 of a real estate settlement service involving a federally related mortgage loan shall be referred to  
5 any person.” 12 U.S.C. § 2607(a). “Courts commonly find a violation of § 2607(a) when (1) a  
6 payment or thing of value was exchanged, (2) pursuant to an agreement to refer settlement  
7 business, and (3) there was an actual referral.” *Edwards v. First Am. Corp.*, 798 F.3d 1172, 1178  
8 (9th Cir. 2015). “An agreement or understanding for the referral of business incident to or part of  
9 a settlement service need not be written or verbalized but may be established by a practice,  
10 pattern or course of conduct.” 12 C.F.R. § 1024.14(e). A referral includes “any oral or written  
11 action directed to a person which has the effect of affirmatively influencing the selection by any  
12 person of a provider of a settlement service” such as a mortgage lender. 12 C.F.R.  
13 § 1024.14(f)(1).

14           Notwithstanding the law’s prohibition on paying for referrals, RESPA Section 8(c)  
15 contains a safe harbor provision that permits “[a] payment to any person of a bona fide salary or  
16 compensation or other payment for goods or facilities actually furnished or for services actually  
17 performed.” 12 U.S.C. § 2607(c); 12 C.F.R. § 1024.14(g)(iv). The Ninth Circuit has interpreted  
18 the safe harbor to apply (1) where “goods or facilities were actually furnished or services were  
19 actually performed for the compensation paid” and, (2) “the payments are reasonably related to  
20 the value of the goods or facilities that were actually furnished or services that were actually  
21 performed.” *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003); *see also PHH Corp.*  
22 *v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 40 (D.C. Cir. 2016) (holding that RESPA’s safe  
23 harbor prohibits “payments for referrals,” but not “bona fide payments for services.”). For the  
24 safe harbor to apply, the payments in question “must be commensurate with the amount normally  
25 charged for similar services in similar transactions in similar markets.” *Schuetz v. Banc One*  
26 *Mortg. Corp.*, 292 F.3d 1004, 1011 (9th Cir. 2002).

1 The Court previously rejected both of Plaintiffs' theories that the co-marketing program  
2 violated RESPA Section 8(a). (Dkt. No. 46 at 10–16.) First, the Court ruled that Plaintiffs failed  
3 to allege particularized facts demonstrating that Defendants designed the co-marketing program  
4 to allow real estate agents to make illegal referrals to lenders in exchange for the lenders paying  
5 a portion of the agents' advertising costs to Zillow or that such referrals were occurring. (*Id.* at  
6 10–12.) Second, the Court ruled that Plaintiffs failed to allege particularized facts demonstrating  
7 that the co-marketing program was designed to allow participating lenders to pay more than fair  
8 market value for the advertising services they received, such that the Court could reasonably  
9 infer that the program fell outside RESPA's safe harbor provision. (*Id.* at 12–14.) The second  
10 amended complaint includes new allegations regarding both theories of RESPA liability, which  
11 the Court examines in turn.

12 *a. Allegations Regarding Illegal Referrals*

13 Plaintiffs assert that the purpose of the co-marketing program was “to enable lenders to  
14 obtain referrals in exchange for payments to [Zillow].” (Dkt. No. 51 at 7.) The second amended  
15 complaint alleges that “Zillow designed the program with the understanding that agents  
16 would . . . use it to violate RESPA by making illegal referrals to lenders.” (Dkt. No. 47 at 4.)  
17 Plaintiffs further allege that “Zillow actively monitored and encouraged lenders and agents to  
18 violate RESPA, contacting agents to make sure they are making referrals.” (*Id.*) In support of  
19 these allegations, Plaintiffs offer statements from two anonymous witnesses (hereinafter “AW1”  
20 and “AW2”) both of whom worked for Zillow during the class period. (*Id.* at 16–18, 23–25.)

21 AW1 was a regional sales manager who was responsible for overseeing a team of sales  
22 representatives tasked with upselling and cross-selling to existing co-marketing customers. (*Id.* at  
23 16.) AW1 states that co-marketing lenders received fewer leads than their co-marketing agents  
24 but continued to participate in the program because “lenders expected real estate agents to refer  
25 business.” (*Id.* at 16–17.) She further stated that she did not believe “lenders recoup[ed]  
26 advertising costs through leads from the Zillow site but through the referral relationship forged

1 with the real estate agent.” (*Id.* at 17.) AW1 also stated that she was personally aware of real  
2 estate agents providing their co-marketing lenders with access to their Zillow accounts so that the  
3 lender could obtain the agent’s leads in cases where prospective homebuyers had opted out of  
4 giving their contact information to the lender. (*Id.*)

5 AW2 was a sales and operations trainer, who began working for Zillow after it merged  
6 with Trulia. (*Id.*) AW2 was responsible for training employees on the co-marketing program,  
7 “including how to talk to real estate agents about the program and the ‘operations behind it.’”  
8 (*Id.*) AW2 stated that “[e]very agent and lender knew that the Co-Marketing program was for the  
9 lender to get leads and referrals,” and that “everyone knew that the lenders paid the agents for  
10 leads and referrals.” (*Id.*) Although AW2 stated that she trained Zillow’s sales representatives to  
11 present the co-marketing program as an opportunity for agents and lenders to get more exposure  
12 to potential customers, she reiterated that “it was understood that lenders were paying for  
13 referrals.” (*Id.* at 17–18.)

14 In support of her statements that co-marketing lenders were participating in the program  
15 to receive referrals, AW2 states that Zillow trained its sales representatives to “track the number  
16 of referrals lenders received from the Co-Marketing program.” (*Id.* at 18.) She further explained  
17 that each quarter, sales representatives contacted every real estate agent customer to conduct a  
18 business assessment, at which time they would ask the agents “how much they did in lender  
19 referrals.” (*Id.*) AW2 describes one instance where a co-marketing agent wanted to cancel its  
20 advertising account “because the lender [didn’t] want to pay anymore.” (*Id.*) According to AW2,  
21 that lender had been paying “100% of the co-marketing costs for approximately 2 ½ years.” (*Id.*)  
22 Whenever AW2 spoke to Zillow about potential concerns with the co-marketing program, she  
23 was “reminded not to ask questions.” (*Id.*)

24 A securities fraud complaint “relying on statements from confidential witnesses must  
25 pass two hurdles to satisfy the PSLRA pleading requirements.” *Zucco Partners*, 552 F.3d at 995.  
26 First, the confidential witness must be described “with sufficient particularity to support the

1 probability that a person in the position occupied by the source would possess the information  
2 alleged.” *In re Daou Sys., Inc.*, 411 F.3d 1006, 1015 (9th Cir. 2005). Second, the complaint must  
3 include “adequate corroborating details” of the confidential witness’ statements. *Id.*

4         The second amended complaint contains sufficient facts regarding AW1 and AW2 to  
5 credit their statements. Both held positions at Zillow that provided them with working  
6 knowledge of the co-marketing program. (Dkt. No. 47 at 16–17.) As a sales manager, AW1 had  
7 direct contact with co-marketing agents and lenders, putting her in a position to understand how  
8 Zillow’s customers used the program. (*Id.* at 16.) As a sales and operations trainer, AW2 had  
9 personal knowledge of how Zillow implemented the co-marketing program as well as how the  
10 company trained its employees about presenting the program to agents and lenders. (*Id.* at 17.)  
11 AW2 also dealt directly with agents when she handled “escalated” calls and was therefore  
12 familiar with how Zillow communicated with its customers about the program. (*Id.* at 18.)

13         The second amended complaint also contains adequate corroborating details of the  
14 anonymous witnesses’ statements. Both anonymous witnesses describe how Zillow made  
15 changes to the co-marketing program in the beginning of 2017 during the CFPB’s investigation.  
16 (*Id.* at 17, 23, 27.) Their statements are corroborated by Zillow’s disclosure of the investigation  
17 in May 2017, and subsequent disclosure in August 2017 that the CFPB had invited Zillow to  
18 discuss a possible settlement regarding alleged RESPA violations and intended to pursue further  
19 action if a settlement was not reached. (*Id.* at 43–44.) The Court has previously ruled that the  
20 “consistent and interlocking nature” of anonymous witness testimony “bolsters the evidence’s  
21 reliability and credibility.” *S. Ferry LP No. 2 v. Killinger*, 399 F. Supp. 2d 1121, 1140 (W.D.  
22 Wash. 2005). Here, AW1 and AW2 offer consistent and interlocking testimony about how  
23 Zillow altered the co-marketing program during the CFPB’s investigation. (Dkt. No. 47 at 17,  
24 23, 27.) The anonymous witnesses also offer consistent testimony regarding how agents and  
25 lenders used the co-marketing program to provide mortgage referrals in exchange for advertising  
26 payments. (*Id.* at 16–18.)



1 The anonymous witnesses' statements regarding referrals are further corroborated by  
2 Plaintiffs' allegation that in a 2017 consent judgment with the CFPB, a mortgage originator  
3 admitted to using a co-marketing arrangement on a "third-party" website to pay real estate agents  
4 for referrals. (*Id.* at 19.) While the consent judgment did not identify the third-party, Plaintiffs  
5 have alleged particularized facts that, accepted as true, allow the Court to reasonably infer that it  
6 was Zillow. (*Id.*) ("The website as described in the consent judgment mirrors Zillow's premier  
7 agent product and no other website that operated during the relevant time frame."); (*see also* Dkt.  
8 No. 52 at 1) (declaration of Plaintiffs' attorney stating basis for allegations regarding consent  
9 judgment).<sup>3</sup>

10 The anonymous witnesses' statements are further corroborated by the co-marketing  
11 program's design. The second amended complaint alleges that Zillow provided agents with a list  
12 of every user who generated a lead even when they declined to have their contact information  
13 sent to the co-marketing lender. (Dkt. No. 47 at 10.) This feature could allow agents to connect  
14 the customer with their partnering lender—either by providing the lender with a lead it would not  
15 have otherwise received or by referring the customer directly to the lender. Viewed in the light  
16 most favorable to Plaintiffs, that feature of the co-marketing program tends to corroborate AW1  
17 and AW2's testimony that agents and lenders were engaging in a pay-for-referral arrangement.<sup>4</sup>

18 Based on the anonymous witnesses' statements, as well as the other allegations in the  
19 second amended complaint, the Court can draw a reasonable inference that Zillow designed the  
20 co-marketing program to allow agents to provide referrals to lenders in violation of RESPA, and

---

21 <sup>3</sup> Such an inference is appropriate under the PSLRA's pleading standard, which requires  
22 that "if an allegation regarding the statement or omission is made on information and belief, the  
23 complaint shall state with particularity all facts on which the belief is formed." 15 U.S.C. § 78u-  
24 4(b)(1). Here, the second amended complaint states with particularity the facts underlying  
25 Plaintiffs' belief that the "third-party website" involved in the consent judgment was Zillow's.  
26 (Dkt. No. 47 at 19.)

<sup>4</sup> As explained in greater detail below, this feature also bolsters Plaintiffs' theory for why  
co-marketing lenders were willing to pay more than fair market value for the advertising they  
received from Zillow. *See infra* Part II.B.2.

1 that such referrals were occurring. The second amended complaint contains particularized facts  
2 alleging that there was an understanding between Zillow and the co-marketing participants, that  
3 in exchange for lenders paying a portion of agents' advertising costs, lenders would receive  
4 mortgage referrals from their partnering agents. That arrangement—although not ostensibly  
5 based on an oral or written agreement—is evinced by participating agents allegedly providing,  
6 and Zillow allegedly tracking, referrals to participating lenders. (*Id.* at 17–18.) Those allegations  
7 are sufficient to support an “agreement or understanding for the referral of business” based on a  
8 “pattern or course of conduct” in violation of RESPA. *See Edwards*, 798 F.3d at 1178; 12 C.F.R.  
9 § 1024.14(e). Further, the second amended complaint plausibly alleges that RESPA violations  
10 were occurring, based on the anonymous witnesses' testimony regarding how participants were  
11 using the co-marketing program and the structure of the program itself.

12 Defendants' arguments to the contrary are unavailing. Defendants assert that the Court  
13 should disregard the anonymous witnesses' statements because they are either contradicted by  
14 other information in the second amended complaint or not specific enough to demonstrate that  
15 the co-marketing program violated RESPA. (Dkt. No. 50 at 12–13.) Defendants point out that  
16 AW1's description of how lenders received leads through the co-marketing program is not  
17 consistent with how the process is described elsewhere in the second amended complaint. (Dkt.  
18 No. 47 at 10, 16.) However, AW1's description of how lenders received leads does not  
19 undermine the fact that lenders received significantly less leads than their co-marketing agents—  
20 a fact that Defendants do not dispute, and which supports both anonymous witnesses' testimony  
21 that lenders participated in the co-marketing program because they valued both leads and  
22 referrals. (*Id.* at 15, 17–18.)

23 Defendants assert that AW2 “muddles key concepts” and conflates “leads” with  
24 “referrals.” (Dkt. No. 50 at 13.) That is not an accurate characterization of AW2's statements.  
25 AW2, and the second amended complaint, draw a plain distinction between leads—Zillow's  
26 provision of a prospective homebuyer's contact information to an agent, lender, or both—with

1 referrals—an agent’s affirmative recommendation of a co-marketing lender to a prospective  
2 homebuyer or an agent’s provision of a lead that a lender would not otherwise receive. (Dkt. No.  
3 47 at 10–18.) AW2 distinguishes the two concepts when stating that lenders used the co-  
4 marketing program to get “leads and referrals,” and that “lenders paid the agents for leads and  
5 referrals.” (*Id.* at 17.)

6 Indeed, in support of her statement that “every agent and every lender knew that the Co-  
7 Marketing program was for the lender to get leads and referrals,” AW2 states that Zillow  
8 representatives were trained to track the number of referrals lenders received from the co-  
9 marketing program and inquire as to “how much [agents] did in lender referrals.” (*Id.* at 18.) In  
10 response to those allegations, Defendants merely argue that it “is far from clear what AW2 may  
11 have meant by ‘did in lender referrals.’” (Dkt. No. 53 at 7.) What is clear, however, is the legal  
12 standard that the Court must apply at the motion to dismiss stage—that all well-pleaded  
13 allegations be accepted as true and viewed in the light most favorable to Plaintiffs. *See Khoja*,  
14 899 F.3d at 1008. The Court cannot ignore AW2’s allegations regarding Zillow’s practice of  
15 tracking referrals or view them in a way that is unfavorable to Plaintiffs’ RESPA theory.

16 Finally, Defendants assert that Plaintiffs have failed to allege a specific instance of a co-  
17 marketing agent referring mortgage business to its partnering lender. (Dkt. No. 50 at 12.) In its  
18 prior order, the Court noted that Plaintiffs had failed to allege that a specific co-market agent had  
19 provided a referral to a specific lender in exchange for the lender paying the agent’s advertising  
20 costs to Zillow. (Dkt. No. 46 at 13.) The second amended complaint addresses that deficiency in  
21 at least two ways. First, Plaintiffs have alleged that a specific mortgage originator admitted to  
22 making mortgage referrals to lenders while using what the Court can reasonably infer was  
23 Zillow’s co-marketing program. *See supra* Part II.B.1.a. Second, even if Plaintiffs did not offer a  
24 specific example of a co-marketing agent making illegal referrals, they offer other particularized  
25 facts that allow the Court to infer that such referrals were occurring. Such an inference is  
26 supported by the anonymous witnesses’ testimony regarding why agents and lenders participated

1 in the co-marketing program and Zillow’s tracking of referrals, as well as the structure of the  
2 program. *Id.*

3 *b. Allegations Regarding Fair Market Value of Co-Marketing Services*

4 The second amended complaint again alleges that the co-marketing program was not  
5 protected by RESPA’s safe harbor “because it permitted lenders to pay a greater share of the  
6 marketing budget than is justified by the number of leads provided by the program.” (Dkt. No.  
7 47 at 19.) Plaintiffs explain that while Zillow’s official policy allowed individual lenders to pay  
8 up to 50% of an agent’s advertising spend, lenders only received approximately 40% of the  
9 agent’s leads.<sup>5</sup> (*Id.*) And in cases where multiple lenders were working with a single agent,  
10 lenders would receive much fewer leads.<sup>6</sup> (*Id.*) Because Zillow charges agents each time a user  
11 views a listing, and not when a customer generates a lead, Plaintiffs assert that lenders were  
12 paying more than fair market value for co-marketing advertising—a premium that Plaintiffs  
13 allege is attributable to the referrals lenders were receiving from agents. (*Id.*; Dkt. No. 51 at 16.)

14 The second amended complaint contains several new factual allegations that describe  
15 how the co-marketing program’s pricing “was drastically more expensive for lenders than  
16 comparable product offerings by Zillow.” (*Id.* at 20.) Plaintiffs allege that Zillow offered a  
17 program that sold leads directly to mortgage lenders without the co-marketing feature. (*Id.*)  
18 According to the second amended complaint, lenders who advertised with Zillow could purchase  
19 customer leads for approximately \$2.38 per lead. (*Id.*) By contrast, lenders who paid 50% of an  
20 agent’s advertising costs through the co-marketing program were paying approximately \$37.50

---

21 <sup>5</sup> The co-marketing program originally allowed an individual lender to pay up to 50% of  
22 an agent’s total advertising costs, and up to five lenders to collectively pay 90% of an agent’s  
23 costs. (Dkt. No. 47 at 14.) In the beginning of 2017, Zillow changed the rules to allow multiple  
24 lenders to collectively pay no more than 50% of an agent’s advertising costs. (*Id.* at 27.); *see*  
*infra* Part II.B.3.b.

25 <sup>6</sup> When multiple lenders co-market with a single agent, each lender is randomly shown on  
26 the agent’s listings in accordance with the lender’s pro-rata contribution of the agent’s overall  
advertising spend. (Dkt. No. 47 at 14.) Therefore, a lender’s receipt of leads is directly correlated  
with the percentage of an agent’s advertising the lender pays to Zillow.

1 for the leads they received.<sup>7</sup> (*Id.*) Plaintiffs argue that this price difference is especially  
2 anomalous because the leads Zillow sells directly to lenders are generated from prospective  
3 homebuyers who are actively searching for a mortgage lender, whereas the leads generated from  
4 the co-marketing program are more likely from homebuyers who are contacting a real estate  
5 agent about a listing and simply failed to un-check the box that forwards their contact  
6 information to the lender. (*Id.* at 20–21; Dkt. No. 51 at 16.)

7 Plaintiffs additionally allege that the price of co-marketing advertising did not bear a  
8 rational relationship to its actual market value because the price was based on different criteria  
9 than other advertising Zillow sold directly to lenders. (Dkt. No. 47 at 16.) For example, the price  
10 of co-marketing advertising was based on the demand in a given zip code, whereas the direct-to-  
11 lender advertising was priced according to a prospective homebuyers’ “credit rating, loan  
12 amount, and loan type.” (*Id.*) Plaintiffs assert that these variations in pricing further demonstrate  
13 that co-marketing advertising fell outside RESPA’s safe harbor, which requires that payments for  
14 mortgage-related services “must be commensurate with the amount normally charged for similar  
15 services in similar transactions in similar markets.” *See Schuetz*, 292 F.3d at 1011.

16 The second amended complaint also describes how, in practice, the co-marketing  
17 program allowed lenders to evade the 50% cap that Zillow officially placed on advertising  
18 payments. (*Id.*) AW2 stated that, notwithstanding the 50% cap, it “was possible for a lender to  
19 make a payment of up to 90% of co-marketing costs through the Zillow website.” (*Id.* at 23.) As  
20 previously mentioned, AW2 was personally aware of one co-marketing lender who paid “100%  
21 of the co-marketing costs for approximately 2 ½ years.” (*Id.* at 18.) Although AW2 would train  
22 Zillow sales representatives about the 50% cap, sales representatives would still “tell agents that  
23

---

24 <sup>7</sup> The Court accepts as true these well-pleaded allegations, which are based on the  
25 percentage of leads co-marketing lenders receive on average, in comparison to the percentage of  
26 advertising they paid, as well as publicly available information estimating the price of purchasing  
leads directly from Zillow. (Dkt. No. 47 at 19–20.) These particularized facts allow the Court to  
infer that co-marketing leads cost significantly more than leads purchased directly from Zillow.

1 the lender could pay up to 90%.” (*Id.*) When AW2 reported to her superiors that practice might  
2 violate RESPA, she was told that the company had “bigger issues to deal with.” (*Id.*)

3 The second amended complaint corroborates AW2’s statements about co-marketing  
4 overpayments with allegations from a 2015 wrongful termination lawsuit filed against Zillow, in  
5 which two former employees were allegedly fired after reporting similar violations to Zillow’s  
6 upper management. (*Id.* at 22) (citing *Boehler v. Zillow, Inc.*, Case No. 14-CV-01844-DOC,  
7 2015 WL 12743688 (C.D. Cal. 2015)). In *Boehler*, the plaintiffs reported several instances in  
8 which co-marketing lenders provided Zillow with a single credit card to bill both the lenders’  
9 and agents’ portion of advertising costs. (Dkt. No. 47 at 22.) The plaintiffs believed that such a  
10 practice violated RESPA by allowing individual lenders to evade the 50% cap on payments of an  
11 agent’s advertising costs. (*Id.*) The plaintiffs were fired for allegedly identifying these and other  
12 suspected violations to various Zillow executives, including Rascoff.<sup>8</sup> (*Id.* at 22–23.) The  
13 allegations in *Boehler* corroborate AW2’s description of how, in practice, lenders could use the  
14 co-marketing program to pay more than 50% of an agent’s advertising costs.

15 Based on the above allegations, the Court can draw a reasonable inference that Zillow  
16 designed the co-marketing program to allow lenders to pay more than fair market value for the  
17 advertising they received and therefore fell outside RESPA’s safe harbor provision. The second  
18 amended complaint contains particularized facts demonstrating that Zillow allowed lenders to  
19 pay more for co-marketing advertising than for similar advertising products Zillow sold to  
20 lenders. Further, Plaintiffs have alleged that lenders were not only paying more than 50% of an  
21 agent’s advertising costs, but that Zillow, through its design of the program and inaction in  
22 enforcing the spending cap, was allowing the practice to occur. The Court can reasonably infer  
23 that lenders were paying more for co-marketing advertising than was “commensurate with the  
24

---

25 <sup>8</sup> *Boehler* allegedly sent an email to Rascoff that identified four separate instances where  
26 a single credit card was supplied both for an agent and a co-marketing lender. (Dkt. No. 47 at  
22.)

1 amount normally charged for similar services in similar transactions in similar markets.” *See*  
2 *Schuetz*, 292 F.3d at 1001. Such an inference is especially warranted when considering that the  
3 second amended complaint has plausibly alleged that lenders and agents were using the co-  
4 marketing program to make referrals in violation of RESPA Section 8(a). *See supra* Part II.B.1.a.

5 Defendants have not persuaded the Court otherwise. Defendants challenge Plaintiffs’  
6 method for calculating the price or value that lenders place on leads. (Dkt. No. 50 at 14.) As an  
7 initial matter, Defendants argue that Plaintiffs incorrectly assume that lenders only valued leads,  
8 without taking into consideration other benefits offered by co-marketing advertising such as  
9 lenders appearing next to agents on their listing. (*Id.*) In its prior order, the Court acknowledged  
10 that Plaintiffs’ theory of fair market value did not account for benefits co-marketing lenders  
11 received other than leads. (*See* Dkt. No. 46 at 14.)

12 Viewed in the light most favorable to Plaintiffs, the second amended complaint alleges  
13 facts that allow the Court to infer that co-marketing lenders primarily valued leads and referrals.  
14 Zillow emphasized the importance of leads when marketing the program to agents and lenders  
15 (Dkt. No. 47 at 15, 21.) In a 2016 webinar targeted at co-marketing agents, Zillow  
16 representatives suggested that agents should initially ask lenders to pay 30% of their advertising  
17 costs, but could increase that amount once the lender gets “a taste for the contacts and how it all  
18 works.” (*Id.* at 15–16.) The Court can infer that the term “contacts” was a reference to the leads  
19 lenders would receive, and ostensibly value, by paying more of an agent’s advertising costs.

20 The program was also designed in ways that increased the amount of leads and referrals  
21 lenders would receive—prospective homebuyers had to “opt-out” of generating a lead, and  
22 Zillow informed agents of those who opted-out so that they could still provide the information to  
23 lenders. (*Id.* at 10, 15.) As previously mentioned, both anonymous witnesses described how  
24 lenders participated in the co-marketing program to receive leads and referrals. (Dkt. No. 47 at  
25 17–18) (AW1: noting that agents “provided access to their Zillow accounts to lenders to access  
26 leads.”) (AW2: “Everyone knew that the lenders paid the agents for leads and referrals.”). The

1 anonymous witnesses' statements are supported by the way Zillow promoted the program to  
2 agents and by the program's design, which funneled leads to lenders and put agents in a positions  
3 to provide lenders with referrals.

4 Defendants also assert that "[t]here is no basis to conclude from Plaintiffs' allegations  
5 what the fair market value of co-marketing is for any given lender in any given market at any  
6 given time; that is a matter that Zillow leaves to the lenders and real estate agents to determine  
7 for themselves." (*Id.*) The Court disagrees with Defendants' characterization of fair market  
8 value. First, it fails to address the allegedly unexplained differences in pricing that Zillow placed  
9 on co-marketing versus non-co-marketing advertising products. As the Court has explained  
10 above, Plaintiffs have plausibly alleged facts that suggest the price difference could be attributed  
11 to co-marketing lenders receiving referrals from agents. *See supra* Part II.B.1.b.

12 Second, it is inaccurate to say, as Defendants do, that Zillow left the determination of the  
13 fair market value of co-marketing advertising entirely up to agents and lenders. Zillow expressly  
14 capped the amount that individual lenders could pay for co-marketing advertising. (Dkt. No. 47  
15 at 15.) In the 2016 webinar, Zillow representatives suggested that between 30–50% of an agent's  
16 advertising costs was the appropriate amount for lenders to pay. (*Id.* at 15–16.) It is reasonable to  
17 infer that the cap was in place to ensure that lenders were not paying more than the market value  
18 of the advertising services they were receiving in return—lest Zillow, and its co-marketing  
19 customers, come under regulatory scrutiny.<sup>9</sup>

20 Finally, Defendants fail to address the second amended complaint's numerous allegations  
21 that lenders were able to pay more than 50% of an individual agent's advertising costs and were  
22 doing just that. AW2 stated that Zillow sales representatives would regularly inform agents that  
23 lenders "could pay up to 90% of co-marketing costs through the Zillow website." (*Id.* at 23.)  
24

---

25 <sup>9</sup> In drawing this inference the Court also considers the allegation that several large  
26 lenders refused to pay more than 31% of an agent's advertising spend because that is what they  
viewed as fair market value of co-marketing advertising. (Dkt. No. 47 at 15.)



1 AW2 was personally aware of a lender paying 100% of an agent's co-marketing costs, and the  
2 *Boehler* lawsuit contained similar allegations of lenders being able to evade the spending cap.  
3 *See supra* Part II.B.1.b.

4 Taken together, the allegations contained in the second amended complaint allow the  
5 Court to draw a reasonable inference that the co-marketing program allowed lenders to pay more  
6 than fair market value for the advertising Zillow provided in return. The foregoing allegations  
7 also satisfy the Court's prior order that Plaintiffs "assert particularized facts that demonstrate that  
8 Zillow designed the co-marketing program to violate RESPA, and that Zillow was instructing  
9 and encouraging third-parties to commit such violations." (Dkt. No. 46 at 32.)

## 10 2. CFPA Violations

11 For the first time in the second amended complaint, Plaintiffs allege that Zillow  
12 "substantially assisted" co-marketing agents and lenders in committing RESPA violations, which  
13 represent "abusive practices" as defined by, and in violation of, the CFPA. (Dkt. No. 47 at 24–  
14 25.) The CFPA empowers the CFPB to undertake enforcement actions to prevent covered  
15 persons from committing or engaging in "an unfair, deceptive, or abusive act or practice under  
16 Federal law in connection with any transaction with a consumer for a consumer financial product  
17 or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(a). The  
18 statute allows the CFPB to promulgate rules "identifying as unlawful unfair, deceptive, or  
19 abusive acts or practices in connection with any transaction with a consumer for a consumer  
20 financial product or service, or the offering of a consumer financial product or service." 12  
21 U.S.C. § 5531(b). The CFPB may not declare an act or practice "abusive" unless it:

22 (1) materially interferes with the ability of a consumer to understand a term or  
23 condition of a consumer financial product or service; or

24 (2) takes unreasonable advantage of–

25 (A) a lack of understanding on the part of the consumer of the material risks,  
costs, or conditions of the product or service;

26 (B) the inability of the consumer to protect the interests of the consumer in  
selecting or using a consumer financial product or service; or

1 (C) the reasonable reliance by the consumer on a covered person to act in the  
2 interests of the consumer.

3 12 U.S.C. § 5531(d). In addition to imposing criminal liability on primary violators, the CFPA  
4 makes it unlawful for “any person to knowingly or recklessly provide substantial assistance to a  
5 covered person or service provider in violation of the provisions of section 5531 of this title, or  
6 any rule or order issued thereunder . . . .” 12 U.S.C. § 5536(a)(3).

7 Plaintiffs’ CFPA theory is twofold. First, they assert that violations of RESPA Section  
8 8(a), represent “abusive practices” as defined by Section 5531(d). (Dkt. No. 51 at 18.) They  
9 argue that co-marketing agents and lenders were therefore committing “abusive practices” by  
10 exchanging mortgage referrals for the payment of advertising costs, and by paying above fair  
11 market value for the advertising lenders received from Zillow. (*Id.* at 18–19; Dkt. No. 47 at 24–  
12 25.); *see supra* Part II.B.1. Second, Plaintiffs assert that Defendants knowingly or recklessly  
13 provided substantial assistance to agents and lenders to violate RESPA, by designing the co-  
14 marketing program to facilitate and encourage such violations. (Dkt. No. 47 at 25); *see supra*  
15 Part II.B.1. Plaintiffs’ CFPA theory is grounded on the same facts as its RESPA theories.

16 Neither the CFPA, nor a rule or regulation promulgated by the CFPB, state that a  
17 violation of RESPA Section 8(a) represents a *per se* “abusive practice” under Section 5531.  
18 Plaintiffs do not assert, and the Court is not aware of any court that has ruled that RESPA  
19 violations represent an abusive practice under the CFPA. Plaintiffs instead assert that “the Court  
20 should read § 5531 in the context of abusive practices that other statutes establish,” and note that  
21 one of RESPA’s purposes is to “eliminate abusive practices such as kickbacks, referral fees, and  
22 unearned fees.” (Dkt. No. 51 at 19) (quoting *Schuetz*, 292 F.3d at 1008). The Court declines to  
23 make such a ruling.

24 The Court has held that the second amended complaint plausibly alleges that Zillow  
25 violated RESPA by designing the co-marketing program to allow agents to illegally refer  
26 mortgage business to lenders in exchange for paying advertising costs, by encouraging such  
referrals, and by allowing lenders to pay above fair market value for the advertising they

1 received in return. *See supra* Part II.B.2. Considering that ruling—and the fact that this is not a  
2 CFPB enforcement action, but a private securities action—the Court rejects Plaintiffs’ CFPB  
3 theory of liability, to the extent such alleged violations would establish that Defendants made  
4 material misleading statements in support of Plaintiffs’ Exchange Act Claims.<sup>10</sup>

### 5 3. Misleading Statements

6 A statement or omission is misleading under the PSLRA and Section 10(b) of the  
7 Exchange Act “if it would give a reasonable investor the impression of a state of affairs that  
8 differs in a material way from the one that actually exists.” *Berson v. Applied Signal Tech., Inc.*,  
9 527 F.3d 982, 985 (9th Cir. 2008) (internal quotation marks and citation omitted). A false or  
10 misleading statement or omission is material if there is a “substantial likelihood that the  
11 disclosure of the omitted fact would have been viewed by the reasonable investor as having  
12 significantly altered the ‘total mix’ of information made available.” *TSC Indus., Inc. v.*  
13 *Northway, Inc.*, 426 U.S. 438, 449 (1976). To plead materiality, a complaint’s allegations must  
14 “suffice to raise a reasonable expectation that discovery will reveal evidence satisfying the  
15 materiality requirement, and to allow the court to draw the reasonable inference that the  
16 defendant is liable.” *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 794 (9th Cir. 2017).

17 The Ninth Circuit recently clarified the standard for pleading the falsity of opinion  
18 statements. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*,  
19 856 F.3d 605, 615 (9th Cir. 2017) (discussing *Omnicare, Inc. v. Laborers Dist. Council Const.*  
20 *Indus. Pension Fund*, 135 S. Ct. 1318, 1323–32 (2015)). It explained that three different  
21 standards can apply depending on the theory of falsity:

22 First, when a plaintiff relies on a theory of material misrepresentation, the plaintiff  
23 must allege both that “the speaker did not hold the belief she professed” and that  
24 the belief is objectively untrue. Second, when a plaintiff relies on a theory that a  
25 statement of fact contained within an opinion statement is materially misleading,  
the plaintiff must allege that “the supporting fact the speaker supplied is untrue.”

26 <sup>10</sup> This ruling is made without prejudice to Plaintiffs reasserting the theory at a later stage  
of the litigation.

1 Third, when a plaintiff relies on a theory of omission, the plaintiff must allege “facts  
2 going to the basis for the issuer’s opinion . . . whose omission makes the opinion  
3 statement misleading to a reasonable person reading the statement fairly and in  
4 context.”

5 *Align Tech*, 856 F.3d at 615–16.

6 Having determined that the second amended complaint plausibly alleges that Zillow  
7 designed the co-marketing program to allow agents and lenders to violate RESPA Section 8(a)  
8 and encouraged such violations, the Court now turns to the specific statements Plaintiffs assert  
9 were materially misleading. The statements can generally be classified as (1) Zillow’s publicly-  
10 filed statements regarding its general legal compliance, and (2) Phillips’ and Rascoff’s  
11 statements regarding the co-marketing program and the CFPB’s investigation of it. (*See* Dkt. No.  
12 47 at 29–45.)

13 *a. Zillow’s Statements Regarding General Legal Compliance*

14 On February 18, 2014, Zillow filed a Form 10-K (“2013 10-K”) with the SEC in which it  
15 stated the following regarding the company’s compliance with government regulations:

16 [T]he real estate agents, mortgage brokers, banks, property managers, rental agents  
17 and some of our other customers and advertisers on our mobile applications and  
18 websites are subject to various state and federal laws and regulations relating to real  
19 estate, rentals and mortgages. While we do not believe that we are currently subject  
20 to these regulations, we intend to ensure that any content created by Zillow is  
21 consistent with them by obtaining assurances of compliance from our advertisers  
22 and customers for their activities through, and the content they provide on, our  
23 mobile applications and websites.

24 (*Id.* at 29.) The 2013 10-K was incorporated by reference in Zillow’s initial registration  
25 statement that was signed by Defendants Rascoff and Phillips. (*Id.*) The initial registration  
26 statement also included the merger agreement between Zillow and Trulia. (*Id.* at 29–30.) The  
27 merger agreement included the following warranty: “[n]either Zillow nor any Zillow Subsidiary  
28 is in conflict with, or in default, breach or violation of, (a) any Law applicable to Zillow or any  
29 Zillow Subsidiary . . . .” (*Id.* at 30.)

30 On February 17, 2015, Zillow filed a Form 10-K (“2014 10-K”) that included nearly  
31 identical language as the 2013 10-K regarding the company’s compliance with government

1 regulations. (*Id.*) Acknowledging that its customers were subject to various state and federal laws  
2 and regulations, Zillow stated that “[w]e endeavor to ensure that any content created by Zillow is  
3 consistent with them by obtaining assurances of compliance from our advertisers and customers  
4 for their activities through, and the content they provide on, our mobile applications and  
5 websites.” (*Id.* at 31.)<sup>11</sup> In February of 2016 and 2017, Zillow filed a Form 10-K (“2015 10-K”  
6 and “2016 10-K” respectively) that were signed by Rascoff and Phillips and contained identical  
7 language as the 2014 10-K about the company’s efforts of legal compliance with the laws and  
8 regulations to which its customers are subject. (*Id.* at 35.)<sup>12</sup>

9 Plaintiffs allege that Defendants’ statements regarding Zillow’s legal compliance—that it  
10 “intended” or “endeavored” to ensure compliance “by obtaining assurances of compliance” from  
11 its customers—were misleading “for failing to disclose that Zillow’s co-marketing program was  
12 designed to allow real estate agents and lenders to violate RESPA.” (*Id.* at 29–30) As previously  
13 discussed, Plaintiffs assert that the co-marketing program violated RESPA “by allowing lenders  
14 to pay in excess of fair market value for co-marketing services . . . [and] by facilitating and  
15 encouraging coordination between lenders and real estate agents for the purpose of agents  
16 making personal referrals of customers to the lenders in exchange for money.” (*Id.* at 30.)

17 The Court characterizes Zillow’s general legal compliance statements as opinions  
18 supported by embedded facts. Zillow’s statements that it intended or endeavored to comply with  
19 relevant laws and regulations express a belief that the company was following the law. (Dkt. No.  
20 47 at 29); *see Omnicare*, 135 S. Ct. at 1325 (stating that an opinion is “a belief[,] a view, or a  
21

---

22 <sup>11</sup> Plaintiffs additionally allege that the following documents contained misleading  
23 statements because they incorporated the statements contained in the 2014 10-K by reference: a  
24 February 2015 Form S-8, an April 2015 Form S-3, an August 17, 2015 Form S-8 Registration  
Statement, and an August 21, 2015 Form S-8 Registration Statement. (Dkt. No. 47 at 32–33.)

25 <sup>12</sup> Plaintiffs additionally allege that the following documents contained misleading  
26 statements because they incorporated the statements contained in 2015 10-K and 2016 10-K by  
reference: a March 2016 Form S-8, an August 2016 Form S-8, and a February 2017 Form S-8.  
(Dkt. No. 47 at 36.)

1 sentiment which the mind forms of persons or things” (internal quotation marks omitted).  
2 However, Zillow’s opinion that it was endeavoring to comply with the law was based on the  
3 factual assertion that it was “obtaining assurances of compliance from our advertisers and  
4 customers for their activities through, and the content they provide on, our mobile applications  
5 and websites.” (*Id.*) That statement is not one of belief, but rather expresses that Zillow was  
6 taking affirmative action to ensure compliance. *See Omnicare*, 135 S. Ct. at 1325 (stating that “a  
7 fact is a thing done or existing or [a]n actual happening.” (internal quotation marks omitted)).

8 Plaintiffs have alleged particularized facts demonstrating that Defendants’ legal  
9 compliance statements were materially misleading under the omission theory described in *Align*  
10 *Tech.*, 856 F.3d at 610. As explained above, the second amended complaint plausibly alleges that  
11 Defendants designed the co-marketing program to allow agents and lenders to exchange  
12 payments for referrals in violation of RESPA, and that Zillow was encouraging this practice. *See*  
13 *supra* Part II.B.1. Plaintiffs also allege particularized facts demonstrating that the co-marketing  
14 program was designed to allow lenders to pay above fair market value for the advertising  
15 services they received from Zillow. *See supra* Part II.B.2.

16 Defendants’ omission of such facts—for example, Zillow inquiring about and tracking  
17 agent’s referrals, or that the co-marketing program allowed lenders to pay more than the fair  
18 market value for advertising—make their opinion about its general legal compliance materially  
19 misleading. The omission of such facts was material because it would have been viewed by a  
20 reasonable investor “as having significantly altered the ‘total mix’ of information made  
21 available,” regarding Zillow’s stock. *See TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. at 449. A  
22 reasonable person would have viewed the omissions as misleading because the omitted facts tend  
23 to suggest Zillow did not actually intend or endeavor to comply with laws and regulations such  
24 as RESPA.

25 Defendants have repeatedly stated that any opinions regarding the company’s legal  
26 compliance cannot be viewed as misleading because Zillow was not providing any referrals to

1 lenders such that it could have violated RESPA. (Dkt. No. 50 at 11–12.) As the Court has  
2 explained, however, the second amended complaint has adequately pled that the co-marketing  
3 program did not comply with RESPA. *See supra* Part II.B.1–2. And even if Zillow were not a  
4 primary RESPA violator, its omissions regarding the co-marketing program allowing lenders to  
5 pay more than fair market value for advertising was materially misleading when considered in  
6 the context of the company’s assertion that it was “obtaining assurances of compliance from our  
7 advertisers and customers for their activities through, and the content they provide on, our  
8 mobile applications and websites.” (Dkt. No. 47 at 29, 31, 35.)

9 Unlike the allegations contain in the amended complaint, Plaintiffs have now alleged  
10 particularized facts demonstrating that Zillow designed the co-marketing program in a way that  
11 violated RESPA and that such violations were occurring. *Cf. In re LifeLock, Inc. Sec. Litig.*, 690  
12 F. App’x 947, 951–52 (9th Cir. 2017) (holding that a corporate defendant’s statement that it  
13 “endeavored” to comply with an FTC order was not misleading where the complaint lacked  
14 particularized facts to show that the defendants knew that a certain practice violated the order).  
15 Therefore, Plaintiffs have plausibly alleged that Defendants’ statements regarding Zillow’s legal  
16 compliance were materially misleading.<sup>13</sup>

17 b. *Phillips’ Statements Regarding the Co-Marketing Program*

18 Plaintiffs allege that Phillips made several misleading statements when discussing the co-  
19 marketing program and the CFPB’s inquiry into it. (Dkt. No. 47 at 33–43.) As a general matter,  
20 federal securities laws do not require corporations to disclose the initiation of a government  
21 investigation. *See Basic v. Levinson*, 485 U.S. 224, 234 (1988) (“Silence, absent a duty to  
22 disclose, is not misleading under Rule 10b–5.”); *Metzler*, 540 F.3d at 1071; *In re Lions Gate*  
23 *Entm’t Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016) (“[A] government investigation,  
24 without more, does not trigger a generalized duty to disclose.”) While there is no general duty to  
25

26 <sup>13</sup> The Court’s ruling applies to all of Zillow’s publicly-filed written statements that Plaintiffs allege were materially misleading. (*See* Dkt. No. 47 at 22–33.)

1 disclose investigations, corporations have “a duty to disclose material facts that are necessary to  
2 make disclosed statements, whether mandatory or volunteered, not misleading.” *Hanon v.*  
3 *Dataproducts Corp.*, 976 F.2d 497, 504 (9th Cir. 1992). Failure to disclose an investigation can  
4 be actionable if the corporation makes “some affirmative statement or omission . . . that  
5 suggested it was not under any regulatory scrutiny.” *Metzler*, 540 F.3d at 1071.

6 During a November 3, 2015 conference call with investors, Phillips was involved in the  
7 following exchange with an analyst:

8 **Analyst:** Can you just give us a sense for how much the mortgage co-advertising  
9 is contributing to agent revenue? And kind of what penetration is? Where you think  
10 it can go? And is the RESPA or CFPB kind of investigations into this is – is this  
11 something that should be a concern? Or something that you think is not really an  
12 issue?

13 **Phillips:** Co-marketing with lenders and agents is a very small part of our business,  
14 a small contributor to ARPA revenue. Importantly though, we are not seeing  
15 lenders depart from this program notwithstanding all of the discussions in the  
16 marketplace about the CFPB and the CFPB’s recent pronouncements and actions.  
17 I can assure you that we work diligently to comply with all of the rules put forth by  
18 government agencies and of course, we monitor the CFPB and the things that they  
19 are saying and doing to make sure that we remain in compliance and to make sure  
20 that we understand how their activities relate to our business.

21 (Dkt. No. 47 at 33.) On February 2, 2017, Phillips said on a conference call that “we believe our  
22 co-marketing program has, and continues, to allow agents and lenders to comply with the law  
23 while using our product.” (*Id.* at 38.) In response to a question about whether agents and lenders  
24 had changed their behavior regarding use of the co-marketing program, Phillips stated:

25 [W]e haven’t observed anything specific, but I can tell you that real estate agents  
26 and lenders are pretty keenly aware of the restrictions that are placed upon their co-  
marketing efforts through RESPA and other regulatory regimes. So they are intent  
on complying and pay close attention to their own behavior, monitoring themselves.  
We think though the way that we have put this product together enabled agents and  
lenders to participate in full compliance with the law.

(*Id.*) On May 4, 2017, following Zillow’s disclosure of the CFPB’s investigation into the co-  
marketing program, Phillips again stated on a conference call that “we believe our co-marketing



1 program has, and continues to, allow agents and lenders to comply with the law while using our  
2 product.” (*Id.* at 42.) She went on to say “[w]e think though that the way we have put this  
3 product together enabled agents and lenders to participate in full compliance with the law.” (*Id.*  
4 at 42–43.)

5 Plaintiffs allege that Phillips’ statements in November 2015 and February 2017 were  
6 misleading “for failing to disclose that the CFPB had issued a civil investigative demand  
7 attempting to determine whether the co-marketing program violated RESPA.” (*Id.* at 34.)  
8 Plaintiffs support that allegation by asserting that Zillow received a subpoena from the CFPB on  
9 April 1, 2015, that was “in connection with an investigation by the CFPB into potential  
10 violations of RESPA related to Zillow’s co-marketing program.” (*Id.* at 27.)

11 In its prior order, the Court ruled that Phillips’ statement “was not misleading because it  
12 was neither an affirmative statement nor omission that suggested Zillow was not under  
13 regulatory scrutiny.” (Dkt. No. 46 at 19.) The second amended complaint does not include any  
14 additional facts that would lead the Court to change its conclusion. However, Plaintiffs also  
15 allege that Phillips’ statements were materially misleading for failing to disclose that the co-  
16 marketing program was designed to facilitate RESPA violations and for failing to disclose that  
17 Zillow had changed the program in response to the CFPB’s investigation. (Dkt. No. 47 at 34.) On  
18 this score, the Court agrees that the statements were materially misleading.

19 Phillips’ statement to analysts that “I can assure you that we work diligently to comply  
20 with all of the rules put forth by government agencies,” was materially misleading for the same  
21 reasons Zillow’s general statements of legal compliance were misleading. *See supra* Part  
22 II.B.3.a. Similarly, Phillips’ statements in February and May 2017 that “we think though that the  
23 way we have put this product together enabled agents and lenders to participate in full  
24 compliance with the law,” were misleading because she omitted that Zillow designed the co-  
25 marketing program to allow agents and lenders to violate RESPA and the company was  
26 encouraging such violations. *Id.*

1 Phillips' statements regarding legal compliance were also misleading for failing to  
2 disclose that Zillow had altered the co-marketing program in the midst of the CFPB's  
3 investigation. Plaintiffs allege that in the beginning of 2017, Zillow lowered the percentage of an  
4 agent's advertising costs lenders could collectively contribute and concealed the change from the  
5 public by not updating its website. (*Id.* at 27–28.) Both anonymous witnesses stated that in the  
6 beginning of 2017, Zillow began instructing its employees to change the way it presented the co-  
7 marketing program to customers. (*Id.* at 17, 27–28.) AW2 states that, “following Zillow’s receipt  
8 of a letter from the CFPB,” she was responsible for training sales reps on “new messaging to  
9 agents regarding the Co-Marketing program.” (*Id.* at 17.) AW2 began training employees to  
10 “pitch co-marketing to real estate agents by explaining to them that the program was an  
11 opportunity for the agent with a relationship with a lender for them to get more exposure.” (*Id.* at  
12 17–18.) AW1 stated that in the beginning of 2017 she and other sales representatives were  
13 “instructed to explain to agents that Zillow was capping total lender contributions at 50% of total  
14 advertising costs.” (*Id.* at 27.) She stated that this caused confusion with customers because the  
15 change “was not reflected on Zillow’s website,” and was different than “what [she] was  
16 providing to agents.” (*Id.* at 28.)

17 In its prior order, the Court ruled that Plaintiffs had not pled particularized facts  
18 demonstrating that the change to the co-marketing program was done in response to the CFPB's  
19 investigation. (Dkt. No. 46 at 22.) The Court noted that “[w]hile the confidential witness states  
20 that she believes the changes were implemented in response to a government investigation,  
21 neither she, nor the amended complaint, contain particularized facts that demonstrate the co-  
22 marketing program was altered to ‘remedy RESPA violations identified by the CFPB.’” (*Id.*)<sup>14</sup>  
23 The second amended complaint cures that deficiency, because it has plausibly alleged that the  
24 co-marketing program violated RESPA by allowing lenders to pay above fair market value for  
25 the advertising Zillow provided. *See supra* Part II.B.2 Considering those new allegations, the

26 <sup>14</sup> The amended complaint did not include AW2's allegations.

1 Court can reasonably infer that the change Zillow implemented—capping collective lender  
2 contributions at 50% of an agent’s advertising spend—was an attempt to limit lenders from  
3 paying more than fair market value for co-marketing advertising. *See supra* Part II.B.2.

4 Plaintiffs have plausibly alleged that Phillips’ statement in 2017 that Zillow believed it  
5 had put the co-marketing program together in a way “that enabled agents and lenders to  
6 participate in full compliance with the law,” was materially misleading for omitting that Zillow  
7 had altered the program. (Dkt. No. 47 at 38–43.) A reasonable person would find that opinion  
8 misleading if Phillips had disclosed that Zillow had recently made changes to the co-marketing  
9 program to bring it into compliance with RESPA. As explained above, Plaintiffs have plausibly  
10 alleged that Phillips’ statements made in February 2017 and May 2017 regarding Zillow’s legal  
11 compliance were materially misleading.

12 c. *Rascoff’s Statements Regarding the Co-Marketing Program*

13 Plaintiffs allege that Rascoff made misleading statements in May 2017 during an  
14 interview on an internet-based television channel. (*Id.* at 40–41.) During the interview, he said  
15 the following about the co-marketing program:

16 [T]wo years ago the CFPB started asking us questions about [the co-marketing  
17 program] and we’ve been talking with them literally for two years. We think the  
18 way we’ve constructed the program is completely compliant and allows agents and  
19 lenders to stay within the confines of the laws that govern this, but we’re still talking  
20 to the CFPB about it so we’ll see.

21 (*Id.* at 40.) Rascoff was then asked, “if it’s a case where you had to alter the co-marketing  
22 program how much of an impact would it be on the company?” Rascoff responded that “it’s  
23 really hard to speculate hypothetically because we have no idea whether this ends up being  
24 blessed or not. It could have no impact or it could have an impact.” (*Id.*)

25 As with Phillips’ statements, Plaintiffs allege that Rascoff’s statements were materially  
26 misleading for failing to disclose that the co-marketing program was designed to facilitate  
RESPA violations and for failing to disclose that Zillow had changed the program in response to  
the CFPB’s investigation. (*Id.* at 40.) The Court agrees. Rascoff’s statement that “[w]e think the

1 way we've constructed the program is completely compliant and allows agents and lenders to  
2 stay within the confines of the laws that govern this," was materially misleading because it  
3 omitted that Zillow designed the co-marketing program to allow agents and lenders to violate  
4 RESPA, and that the company was encouraging such violations. *See supra* Part II.B.3.b. It was  
5 also misleading for omitting that Zillow had recently altered the co-marketing program to bring it  
6 into compliance with RESPA in response to the CFPB's inquiry. *See supra* Part II.B.3.c.  
7 Rascoff's response to a question about altering the co-marketing program was also materially  
8 misleading for omitting that Zillow had already altered the program in response to the CFPB's  
9 inquiry. *Id.* Therefore, the second amended complaint plausibly alleges that Rascoff's statements  
10 in May 2017 were materially misleading.

### 11 3. Scienter

12 In the context of a securities fraud claim, scienter is a mental state that is characterized by  
13 an intent "to deceive, manipulate, or defraud." *Metzler*, 540 F.3d at 1065–66 (citation omitted).  
14 In the Ninth Circuit, scienter requires that a defendant make the false or misleading statement  
15 "intentionally or with deliberate recklessness." *Zucco Partners*, 552 F.3d at 995.

16 To adequately plead scienter, the PSLRA requires that plaintiffs "state with particularity  
17 facts giving rise to a strong inference that the defendant acted with the required state of mind."  
18 15 U.S.C. § 78u–4(b)(2). A "strong inference" of scienter must be "more than merely plausible  
19 or reasonable—it must be cogent and at least as compelling as any opposing inference of  
20 nonfraudulent intent." *WPP Luxembourg*, 655 F.3d at 1051–52 (citing *Tellabs, Inc. v. Makor*  
21 *Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007)). Additionally, a court must consider whether  
22 "all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether  
23 any individual allegation, scrutinized in isolation, meets that standard." *Tellabs, Inc.*, 551 U.S. at  
24 322–23. The Ninth Circuit has established the following two-step inquiry to determine whether a  
25 securities fraud complaint pleads a strong inference of scienter:

26 [F]irst, we will determine whether any of the plaintiff's allegations, standing alone,

1 are sufficient to create a strong inference of scienter; second, if no individual  
2 allegations are sufficient, we will conduct a “holistic” review of the same  
3 allegations to determine whether the insufficient allegations combine to create a  
4 strong inference of intentional conduct or deliberate recklessness.

5 *Zucco Partners*, 552 F.3d at 992. When assessing whether a plaintiff has adequately pled a  
6 strong inference of scienter, courts must consider “all reasonable inferences to be drawn from the  
7 allegations, including inferences unfavorable to the plaintiffs.” *In re Daou Sys., Inc.*, 411 F.3d at  
8 1022 (quoting *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002)).

9 The Court begins its scienter analysis by evaluating the allegations Plaintiffs assert are  
10 indicative of Rascoff and Phillips’ scienter. After assessing those allegations individually, the  
11 Court will holistically review Plaintiffs’ allegations to determine whether they allow the Court to  
12 draw a strong inference that Defendants’ misleading statements were intentional or made with  
13 deliberate recklessness.

14 *a. Individual Allegations Regarding Rascoff’s Scienter*

15 Plaintiffs again allege that Rascoff’s scienter can be inferred “from his participation in  
16 investor conference calls where Defendants made false exculpatory statements, and his thorough  
17 preparations for those conference calls.” (*Id.* at 45–46.) Plaintiffs describe in detail how Rascoff  
18 thoroughly prepared for the relevant conference calls: that he reviewed emails provided to him  
19 from each of Zillow’s departments and that he spent several days prior to the calls preparing his  
20 remarks. (*Id.* at 39–40.) Given his preparation, Plaintiffs assert that Rascoff’s statements on the  
21 calls “could not have been innocently made.” (*Id.* at 39.) The Court previously declined to draw  
22 an inference of scienter from this conduct because, viewed on its own, Rascoff’s preparation for  
23 conference calls allows the Court to draw an equally cogent inference that Rascoff wanted to  
24 ensure that what he and other Zillow executives said was accurate, not misleading. (*See* Dkt. No.  
25 46 at 24.); *see also In re Daou Sys., Inc.*, 411 F.3d at 1006 (finding that the Court must consider  
26 “all reasonable inferences to be drawn from the allegations, including inferences unfavorable to

1 the plaintiffs”).<sup>15</sup> The second amended complaint does not include any additional allegations  
2 regarding Rascoff’s preparation for conference calls that would change the Court’s ruling. (*See*  
3 Dkt. No. 47 at 46–47.)

4 Plaintiffs allege that Rascoff’s scienter can also be inferred from his awareness of the  
5 *Boehler* lawsuit prior to the beginning of the class period. (*Id.* at 47.) The Court previously  
6 rejected this scienter theory, emphasizing that the *Boehler* allegations were too vague and  
7 unrelated to Plaintiffs’ claims to infer Rascoff’s scienter. (Dkt. No. 46 at 24.) Although the  
8 second amended complaint contains more specific information regarding the claims alleged in  
9 *Boehler*, they still fall short of demonstrating that Rascoff’s subsequent statements evidenced a  
10 strong inference of scienter. (*Compare* Dkt. No. 35 at 38–39, *with* Dkt. No. 47 at 22–23.)

11 As discussed above, the plaintiffs in *Boehler* asserted that, among other things, a few  
12 lenders were paying above the 50% cap on co-marketing advertising by having Zillow charge a  
13 single credit card for both the lender and agent’s portion of the cost. (*Id.* at 22–23, 46.) Plaintiffs  
14 state that Rascoff received an email about these allegations, which demonstrates he was on  
15 notice that “the co-marketing program was used to evade RESPA.” (*Id.* at 46.) Plaintiffs  
16 characterize the *Boehler* allegations as “red flags,” that other courts have found sufficient to infer  
17 scienter. (Dkt. No. 51 at 24) (citing *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d  
18 1089, 1102 (9th Cir. 2011)).

19 While Rascoff’s knowledge of the *Boehler* lawsuit certainly indicates that he was aware  
20 of how the co-marketing program operated, it does not support a strong inference of scienter  
21 regarding his statements made in May 2017. The relevant allegations in *Boehler* are different  
22 than the Plaintiffs’ core allegations in this lawsuit—that co-marketing agents were making illegal  
23 referrals to lenders in exchange for the lenders paying above fair market value for advertising  
24 services. (*See generally* Dkt. No. 47.) Moreover, Rascoff’s knowledge of a few instances in 2013

---

25  
26 <sup>15</sup> Plaintiffs do not allege that Rascoff made misleading statements on the relevant  
conference calls, but during an unrelated television interview. (Dkt. No. 47 at 46–47.)

1 of lenders allegedly paying more than the 50% cap for co-marketing advertising does not allow  
2 for a cogent inference that Rascoff was deliberately reckless in 2017 when expressing an opinion  
3 about the program's legal compliance in lieu of the CFPB's investigation. The link between the  
4 *Boehler* allegations and Rascoff's statements is simply not strong enough, by itself, to draw a  
5 strong inference of scienter.

6 Finally, Plaintiffs allege that Rascoff's scienter can be inferred from the several  
7 misleading statements that he made during the May 2017 interview. (*Id.* at 47.) Plaintiffs assert  
8 that Rascoff's statements were intended to be misleading because the co-marketing program did  
9 not provide Zillow with a "small" amount of revenue, the program was not compliant with  
10 RESPA, and Zillow had already altered the program in response to the CFPB's investigation.  
11 (*Id.*) Plaintiffs assert that the co-marketing program did not provide a small amount of revenue  
12 based on a 2017 independent analysis that concluded 10% of Zillow's revenue had exposure to  
13 the co-marketing program. (*Id.* at 43.)

14 Essentially, Plaintiffs argue that if Rascoff made several misleading statements in one  
15 interview, then the Court can infer that each statement was made with the intent to deceive.  
16 While the Court has ruled that Rascoff's statements regarding the co-marketing program were  
17 materially misleading, it does not necessarily follow that they were also made with the requisite  
18 scienter. The Court does not find that Rascoff's statements, even when considered together,  
19 demonstrate that they were made with an intent to deceive. For those reasons, none of the above  
20 allegations, taken individually, support a strong inference of Rascoff's scienter.

21 *b. Individual Allegations Regarding Phillips' Scienter*

22 Plaintiffs assert that Phillips' scienter can be inferred from: (1) her preparation for and  
23 false statements made during several conference calls during the class period; (2) her dual  
24 position as Zillow's Chief Financial Officer and Chief Legal Officer and (3) her role in  
25 performing due diligence with respect to Zillow's merger with Trulia. (Dkt. No. 47 at 47–50.) As  
26 with Plaintiffs' allegations against Rascoff, the Court concludes that Phillips' preparation for

1 conference calls and her statements during those calls do not demonstrate a strong inference of  
2 scienter. *See supra* Part II.C.3.a.

3 Plaintiffs allege that Phillips' scienter can be inferred from her position as Zillow's CFO  
4 and CLO. (Dkt. No. 47 at 48.) Plaintiffs specifically assert that the Court can infer that "Phillips  
5 knew, or was reckless in not knowing, that the Program violated the law based on her role in the  
6 Company and her exposure to the workings of the Program due to the CFPB's regulatory  
7 inquiry." (Dkt. No. 51 at 22.) Plaintiffs similarly allege that because Phillips "was responsible for  
8 conducting due diligence on the merger with Trulia with respect to legal matters, [she was]  
9 therefore responsible for ensuring the truth of Zillow, Inc.'s representation that none of Zillow's  
10 operations were in breach or violation of any applicable laws." (Dkt. No. 47 at 48.) The second  
11 amended complaint contains the testimony of a purported expert in merger and acquisition  
12 transactions, who asserts that a corporate officer in Phillips' position "would have conferred  
13 closely with compliance personnel and department heads in analyzing Zillow's compliance with,  
14 and legal exposure to, any rules, regulations and laws, including RESPA." (*Id.* at 49–50.)

15 The Court concludes that none of the allegations regarding Phillips' position in Zillow,  
16 by itself, demonstrate that her statements were made with a strong inference of scienter.  
17 However, as explained in the following section, the Court again considers these allegations as  
18 part of its holistic review regarding Defendants' scienter.

19 *c. Scienter Allegations Viewed Holistically*

20 In its prior order, the Court ruled that the allegations contained in the amended complaint,  
21 taken collectively, did not support a strong inference of scienter. (Dkt. No. 46 at 28.) That  
22 conclusion rested heavily on the Court's determination that Plaintiffs had failed to allege  
23 particularized facts to support their theory that Zillow designed the co-marketing program in a  
24 way that allowed agents and lenders to violate RESPA and that the company was encouraging  
25 such violations. (*Id.* at 28.) In the absence of such facts, the Court concluded that Defendants'  
26 statements were not materially misleading and supported an opposite inference than the one



1 Plaintiffs argued was indicative of their scienter —that “Defendants believed the co-marketing  
2 program did not violate RESPA.” (*Id.*)

3 As the Court has now explained in close detail, the second amended complaint contains  
4 particularized facts that plausibly allege Zillow designed the co-marketing program in a way that  
5 violated RESPA and that Zillow was encouraging such violations. *See supra* Part II.B.1–2.  
6 Having made that finding, the Court now concludes that the allegations in the second amended  
7 complaint, viewed holistically, support a strong inference that both Rascoff and Phillips were  
8 deliberately reckless in making the statements that the Court has identified as materially  
9 misleading.

10 In reaching this conclusion, the Court relies on the so-called “core operations” inference  
11 to establish scienter. *See S. Ferry LP No. 2 v. Killinger*, 687 F. Supp. 2d 1248, 1254 (W.D.  
12 Wash. 2009). “Under the core operations theory, it is reasonable to conclude that high-ranking  
13 corporate officers have knowledge of the critical core operations of their companies.” *Id.* The  
14 Court has previously held that scienter can be inferred where a corporate officer states that he or  
15 she knew about or was monitoring the subject of the misleading statements. *Id.* at 1258–59.  
16 “Allegations that rely on the core-operations inference are among the allegations that may be  
17 considered in the complete PSLRA analysis.” *South Ferry*, 542 F.3d at 784.

18 The second amended complaint alleges particularized facts demonstrating that the co-  
19 marketing program was part of Zillow’s core operations and that Rascoff and Phillips made  
20 various statements displaying their familiarity with the program. Zillow’s primary source of  
21 revenue is selling advertising to real estate agents, with the co-marketing program being one of  
22 its products. (Dkt. No. 47 at 9.) In November 2015, Phillips stated that “co-marketing with  
23 lenders and agents is a very small part of our business, a small part of [Average Revenue Per  
24 Account].” (*Id.* at 26.) In May 2017, Phillips reiterated that “we don’t break out the amount of  
25 the revenue that comes from co-marketing efforts, but we have said and it continues to be the  
26 case that it’s a small portion of overall revenue.” (*Id.* at 38.) Later that month, while discussing

1 the CFPB’s investigation into the co-marketing program, Rascoff said “We haven’t disclosed the  
2 amount of revenue [from co-marketing], we’ve said its small, but we haven’t disclosed it, and  
3 you know, it’s an ongoing conversation.” (*Id.* at 40.) In contrast to these statements, an May  
4 2017 independent financial analysis suggested that “in excess of 10% of Zillow’s revenue was  
5 exposed to illegal co-marketing, and that revenues from co-marketing are highly profitable.” (*Id.*  
6 at 43.)

7 Phillips and Rascoff also made numerous statements displaying their familiarity with  
8 how the co-marketing program was designed and operated. As the CFPB began increasing  
9 enforcement actions in 2015, Phillips stated that “we are not seeing lenders depart from [the co-  
10 marketing program] notwithstanding the CFPB and the CFPB’s recent pronouncements and  
11 actions,” and that Zillow “monitor[ed] the CFPB and the things that they are saying and doing to  
12 make sure that we remain in compliance and to make sure that we understand how their activities  
13 relate to our business.” (*Id.* at 34.) In February 2017, Phillips stated that “[w]e think though that  
14 the way we have put [the co-marketing program] together enabled agents and lenders to  
15 participate in full compliance with the law.” (*Id.* at 38.) Acknowledging the CFPB’s two-year  
16 investigation into the co-marketing program, Rascoff stated that “[w]e think the way we’ve  
17 constructed the program is completely compliant and allows agents and lenders to stay within the  
18 confines of the law that govern this.” (*Id.* at 40.)

19 Given that Phillips and Rascoff were familiar with how the co-marketing program “was  
20 put together” and “structured,” the Court can reasonably infer that they would have been aware  
21 of those aspects of the co-marketing program that Plaintiffs have plausibly alleged violated  
22 RESPA. For example, both Phillips and Rascoff must have known that Zillow was instructing  
23 employees to track the amount of business co-marketing agents “did in lender referrals,” or that  
24 individual lenders could use the program to pay more than the 50% cap on advertising. *See supra*  
25 Part II.B.1–2. Given that Phillips and Rascoff were “monitor[ing] the CFPB and the things that  
26 they are saying and doing,” the Court can reasonably infer that they would have been aware of

1 January 2017 consent judgment that suggested the co-marketing program was being used to  
2 violate RESPA and familiar with the CFPB's investigation of Zillow's co-marketing program.  
3 *See supra* Part II.B.2. Such inferences seem particularly appropriate when also considering the  
4 other allegations Plaintiffs have alleged in support of Defendants' scienter: that Rascoff was  
5 aware of RESPA violations involving the co-marketing program, that Phillips performed detailed  
6 due diligence regarding the company's legal compliance before its merger with Trulia, and that  
7 Zillow altered the co-marketing program in the midst of the CFPB's investigation, but did not  
8 make the changes public. *See supra* Part II.B.3.b.

9 Viewing these allegations holistically, the Court can infer that Phillips and Rascoff were  
10 at least deliberately reckless in continuing to make statements that the co-marketing program was  
11 legally compliant. When considering the new allegations contained in the second amended  
12 complaint, this inference is cogent and at least as strong as the competing innocent inference that  
13 the Court previously found. (*See* Dkt. No. 46 at 29–30.)

14 4. Loss Causation

15 “Broadly speaking, loss causation refers to the causal relationship between a material  
16 misrepresentation and the economic loss suffered by an investor.” *Loos v. Immersion Corp.*, 762  
17 F.3d 880, 887 (9th Cir. 2014) (citation omitted). To successfully plead loss causation, a plaintiff  
18 must plausibly allege that the decline in the defendant's share price was proximately caused by a  
19 revelation of fraudulent activity rather than by changing market conditions, changing investor  
20 expectations, or other unrelated factors. *Metzler*, 540 F.3d at 1062. Put another way, the plaintiff  
21 must plausibly allege that the defendant's fraud was “revealed to the market and caused the  
22 resulting losses.” *Id.* at 1063.

23 In its prior order, the Court stated that “if Plaintiffs amend their complaint and  
24 successfully plead that Defendants made a material misleading statement regarding the co-  
25 marketing program's compliance with RESPA, then they could plausibly allege that Zillow's  
26 August 2017 statements represented a ‘corrective disclosure’ that would support loss causation.”

1 (Dkt. No. 46 at 31) (citing *Metzler*, 540 F.3d at 1063–64). Plaintiffs have done just that. The  
2 second amended complaint plausibly alleges that Defendants made material misleading  
3 statements with the requisite scienter that caused Plaintiffs’ losses. This is particularly true of  
4 Defendants’ statements made in May 2017. Notwithstanding Defendants’ objections, the Court  
5 finds that the second amended complaint adequately pleads loss causation.

6           5.       Control Person Liability

7           Section 20(a) of the Exchange Act makes certain “controlling” individuals also liable for  
8 violations of Section 10(b) and its underlying regulations. *See* 15 U.S.C. § 78t(a). “A defendant  
9 employee of a corporation who has violated the securities laws will be jointly and severally  
10 liable to the plaintiff, as long as the plaintiff demonstrates ‘a primary violation of federal  
11 securities law’ and that ‘the defendant exercised actual power or control over the primary  
12 violator.’” *No. 84 Emp’r–Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp.*,  
13 320 F.3d 920, 945 (9th Cir. 2003) (citation and internal quotation marks omitted). “Section 20(a)  
14 claims may be dismissed summarily, however, if a plaintiff fails to adequately plead a primary  
15 violation of section 10(b).” *See In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993).

16           As noted above, Plaintiffs have plausibly alleged a Section 10(b) violation against Zillow.  
17 The second amended complaint contains sufficient allegations regarding Rascoff and Phillips’  
18 corporate positions to demonstrate that they exercised actual power or control over Zillow.  
19 Therefore, Plaintiffs have plausibly alleged a violation of Section 20(a) against Rascoff and  
20 Phillips.

21 **III. CONCLUSION**

22           For the foregoing reasons, Defendants’ motion to dismiss (Dkt. No. 50) is DENIED.

23           //

24           //

25           //

26           //

1 DATED this 19th day of April 2019.

2  
3  
4 

5 John C. Coughenour  
6 UNITED STATES DISTRICT JUDGE  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26