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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FIYYAZ PIRANI,
Plaintiff,

v.

SLACK TECHNOLOGIES, INC., *et al.*,
Defendants.

Case No. [19-cv-05857-SI](#)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS AND
GRANTING LEAVE TO AMEND**

Re: Dkt. No. 52

Before the Court is defendants’ motion to dismiss the Amended Class Action Complaint (“ACAC”) filed by lead plaintiff Fiyfaz Pirani. Pursuant to Civil Local Rule 7-1(b) and General Order 72, the Court finds this matter appropriate for resolution without oral argument. Having considered the papers submitted and for good cause shown, the motion is GRANTED in part and DENIED in part, and plaintiff is GRANTED leave to amend. If plaintiff wishes to amend the complaint, he shall do so by **May 6, 2020**.

BACKGROUND

I. The Parties and the Direct Listing

This securities class action is brought by lead plaintiff Fiyfaz Pirani (“plaintiff”) against Slack Technologies, Inc. (“Slack”) and other named defendants. Plaintiff purchased 30,000 shares of Slack’s Class A common stock at \$40/share on June 20, 2019, the first day of Slack’s public listing, and approximately another 220,000 shares at various prices from June 21 to September 9, 2019. Holleman Decl. in Supp. of Mot. to Appoint Lead Pl., Ex. A (Dkt. No. 26-1). Plaintiff brings this case “on behalf of a class consisting of all persons and entities that purchased or otherwise acquired Slack common stock pursuant to and/or traceable to the Offering Materials.” ACAC ¶ 38

1 (Dkt. No. 42).

2 Slack is a San Francisco-based software company “that offers a cloud-based collaboration
3 and productivity platform” for workspace computing. *Id.* ¶ 2. Other named defendants include
4 CEO Stewart Butterfield, CFO Allen Shim, and CAO Brandon Zell; and Board of Directors
5 (“Board”) members Andrew Braccia, Edith Cooper, Sarah Friar, John O’Farrell, Chamath
6 Palihapitiya, and Graham Smith (collectively “Individual Defendants”). *Id.* ¶¶ 19-29.

7 The complaint also names as defendants three venture capital firms: Accel, which appointed
8 defendant Braccia to the Board; Andreessen Horowitz, which appointed defendant O’Farrell to the
9 Board; and Social+Capital, which appointed defendant Palihapitiya to the board (collectively “VC
10 Defendants”). *Id.* ¶¶ 22, 25, 26, 30-33. The VC Defendants “collectively held more than 47% of
11 the Company’s voting power and included 3 members of the Board at the time of the Offering.” *Id.*
12 ¶ 34. They “caused Slack to effectuate the Offering.” *Id.* They also “caused [Slack] to indemnify
13 them from any liabilities arising from the Securities Act [of 1933] and the Securities Exchange Act
14 of 1934” and “to obtain and maintain a directors and officers insurance policy for them.” *Id.* Upon
15 Slack’s listing, the VC Defendants “sold more than 12.5 million shares for gross proceeds of more
16 than \$484 million.” *Id.*

17 Slack’s Class A common stock shares began trading on the New York Stock Exchange
18 (“NYSE”) on June 20, 2019 under the ticker symbol “WORK.” *Id.* ¶ 4. Slack did not take the
19 traditional route of an Initial Public Offering (“IPO”), in which “a company will offer a certain
20 amount of new and/or existing shares to the public . . . [to] help raise additional capital for company
21 operations and expansion.” *Id.* ¶¶ 66-67. Instead, Slack opted for a direct listing: no new shares
22 were issued, but insiders and early investors of the company were able to sell their preexisting shares
23 to the public. *Id.* ¶¶ 66, 69.¹ Because these shares were not subject to a lockup period as in an IPO,
24 they were available for sale immediately upon Slack’s listing. *Id.* ¶ 70.

25 In preparation for the direct listing, Slack filed a Form S-1 resale shelf registration statement
26 (the “Registration Statement”) and a Form 424B4 prospectus (the “Prospectus”) (collectively the
27

28 ¹ The regulatory changes that enabled Slack’s direct listing are discussed in greater detail
infra.

1 “Offering Materials”) with the Securities Exchange Commission (“SEC”). *Id.* ¶¶ 71-75. Slack,
 2 with defendants Butterfield and Shim, also “hosted an ‘investor day’ in New York City to generate
 3 investor interest” on May 13, 2019. *Id.* ¶ 72. The contents of the Offering Materials applied to “up
 4 to 118,429,640” shares offered for resale to the public. *Id.* ¶ 4; *see* Kahn Decl. in Supp. of Mot. to
 5 Dismiss, Ex. A (Dkt. No. 54-1).² The Offering Materials noted that additional shares were available
 6 for resale and exempt from registration pursuant to SEC Rule 144³: “approximately 164,932,646
 7 shares of common stock immediately after [Slack’s] registration.” Kahn Decl. Ex. A at 164; *see*
 8 ACAC ¶ 4.

10 **II. The Offering Materials**

11 Plaintiff alleges that he and other class members suffered losses to the value of their
 12 purchased shares as a result of misstatements or omissions of material facts in the Offering
 13 Materials. *Id.* ¶¶ 11-12. These include statements regarding service outages and Slack’s Service
 14 Level Agreements (“SLAs”) in the case of such outages; competition from Microsoft Teams;
 15 scalability and purported key benefits; and growth and growth strategy. *Id.* ¶ 76.

16 Regarding outages, Slack disclosed that it had “service level commitments to [its] paid
 17 customers” in the event of service disruptions and noted that if Slack failed to meet those
 18 commitments, it “could be obligated to provide credits for future service . . . which could harm [its]
 19 business, results of operations, and financial condition.” *Id.* ¶ 95 (emphasis removed). However,
 20 Slack did not disclose alleged vulnerabilities it was already suffering that “caused severe service
 21 disruptions,” including a failure to meet its uptime guarantee for “7 out of 12 months” in 2018 alone.

22
 23 ² Defendants request judicial notice of several documents, including Exhibit A, which is the
 24 Registration Statement filed with the SEC and incorporated by reference into the ACAC. Dkt. No.
 25 53. Plaintiff does not object except to the extent that defendants rely on the documents for the truth
 26 of the matters asserted. Pl’s Opp’n at 1 n.2. The Court GRANTS defendants’ request for judicial
 notice without “assum[ing] the truth of [the] incorporated document if such assumptions only serve
 to dispute facts stated in a well pleaded complaint.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d
 998, 1003 (9th Cir. 2018).

27 ³ SEC Rule 144 is an administrative rule adopted “to establish specific criteria for
 28 determining whether a person is not engaged in a distribution.” 17 C.F.R. § 230.144. This in turn
 determines whether a securities transaction is exempt, pursuant to Section 4(a)(1) of the Securities
 Act of 1933, from certain registration requirements. 15 U.S.C. § 77d(a)(1).

1 *Id.* ¶ 96. Slack also failed to disclose that its service level commitment was “highly unusual and
2 punitive.” *Id.* “[W]hile most competitors guaranteed uptime of three-nines (99.9%), Slack
3 guaranteed four-nines (99.99%).” *Id.* ¶ 63. Failure to meet that guarantee would require a refund
4 or credit payout of “100 times what the customer would have paid during the downtime as opposed
5 to the actual cost of service lost during the downtime,” automatically and regardless of whether or
6 not specific customers actually experienced the downtime or requested the credit. *Id.*

7 Regarding competition, the Offering Materials identified Microsoft as its primary competitor
8 but stated that “we are uniquely positioned to more rapidly innovate and respond to new
9 technologies and customer requirements than our competitors.” *Id.* ¶¶ 83-84. Defendants allegedly
10 “downplayed the impact” of these competitors, including “the impact . . . Microsoft in particular[]
11 was already having on [Slack’s] expansion into enterprise customers prior to the Offering.” *Id.* The
12 competitor product Microsoft Teams launched in March 2017; in December 2017, defendant
13 Butterfield acknowledged in a *Business Insider* interview that “Microsoft is the main competitor.
14 They’re the third largest company in the world and if they start channeling all their resources against
15 you, that’s a lot to compete with.” *Id.* ¶¶ 52-53. In 2018, when Microsoft Teams introduced a free
16 tier and a feature for adding people outside of an organization, it began “to compete head-to-head
17 with Slack’s freemium model.” *Id.* ¶ 52. That same year, Slack acquired intellectual property from
18 another software company, Atlassian, and announced a close partnership between them. *Id.* ¶¶ 54-
19 55. *PCMag.com* reported: “What went unsaid in both [Slack’s and Atlassian’s] statements is that
20 they’re partnering up to take on an even bigger competitor in Microsoft Teams.” *Id.* ¶ 57.

21 Plaintiff alleges that the Offering Materials touted various “key benefits to users, teams, and
22 organizations” and that Slack built its “technology infrastructure using a distributed and scalable
23 architecture on a global scale,” and that these statements “implied that the Slack App was a market
24 leader with unique advantages over its competitors and that the Company possessed the ability to
25 scale up its services to reach more lucrative enterprise customers.” *Id.* ¶¶ 91-93 (emphasis
26 removed). Slack also stated that it had a “[d]ifferentiated go-to-market strategy,” comprised of a
27 customer engagement model and expansion within larger organizations, and implied this was
28 responsible for “‘rapid[]’ growth . . . high customer engagement . . . [and] revenue growth and

1 decreasing net losses from 2017 through 2019.” *Id.* ¶¶ 77-78. But Slack’s “growth was slowing
2 down in several aspects, including its key metric, [daily active users].” *Id.* ¶ 82.

3 4 **III. Performance After the Direct Listing**

5 On the first day of trading, June 20, 2019, shares began selling at \$38.50. *Id.* ¶ 4. On June
6 28, 2019, Slack experienced a service outage of approximately fifteen hours affecting customers in
7 the United States and Europe; the outage received attention from the media, with reporting by such
8 news outlets as *Newsweek*. *Id.* ¶¶ 99-102. Another large-scale service outage occurred on July 29,
9 affecting customers in the United States, Japan, and Europe. *Id.* ¶ 106. In a conference call on
10 September 4, defendant Butterfield admitted that the outages were caused by “scaling . . . we
11 continue to hit limits that we didn’t realize were built into the system.” *Id.* ¶ 111 (emphasis
12 removed). He also admitted that the uptime guarantee reflected policies that “are outrageously
13 customer-centric,” “exceptionally generous,” and “unusual.” *Id.* ¶¶ 109-112.

14 By July 11, 2019, Microsoft Teams had reached 13 million daily active users, surpassing
15 Slack in this metric. *Id.* ¶ 107. On November 20, 2019, *MarketWatch* reported that “Microsoft
16 Teams, which grew 54% since July to more than 20 million daily active users, is on a trajectory to
17 double Slack’s customer base by early next year as more corporations adopt group chat.” *Id.* ¶ 90.

18 On September 4, 2019, Slack reported second-quarter fiscal 2020 results, including that
19 “[r]evenue was negatively impacted by \$8.2 million of credits related to service level disruption in
20 the quarter”; that “GAAP operating loss was \$363.7 million, or 251% of total revenue, compared to
21 a \$33.7 million . . . or 37% of total revenue” loss in the second quarter of the previous year; and
22 “[n]et cash provided by operations was \$0.3 million, or 0% of total revenue, compared to cash
23 provided by operations of \$1.5 million, or 2% of total revenue, for the second quarter of fiscal year
24 2019.” *Id.* ¶ 108.

25 After the September 4, 2019 earnings announcement, share prices dropped to below \$25,
26 going as low as \$19.53. *Id.* ¶¶ 9-10. At the time this action commenced, the price was \$25.72 per
27 share; at the time the ACAC was filed, the price was \$22. *Id.* ¶¶ 10 & 10 n.2.

28 Plaintiff brings this action under the Securities Act of 1933, asserting claims under Sections

1 11, 12(a)(2), and 15. Defendants move to dismiss all claims under Fed. R. Civ. P. 12(b)(6).

2 3 **LEGAL STANDARD**

4 A complaint must contain “a short and plain statement of the claim showing that the pleader
5 is entitled to relief,” Fed. R. Civ. P. 8(a)(2), and a complaint that fails to do so is subject to dismissal
6 pursuant to Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege
7 “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*,
8 550 U.S. 544, 570 (2007). This “facial plausibility” standard requires the plaintiff to allege facts
9 that add up to “more than a sheer possibility that a Defendant has acted unlawfully.” *Ashcroft v.*
10 *Iqbal*, 556 U.S. 662, 678 (2009). While courts do not require “heightened fact pleading of
11 specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative
12 level.” *Twombly*, 550 U.S. at 544, 555. “A pleading that offers ‘labels and conclusions’ or ‘a
13 formulaic recitation of the elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678 (quoting
14 *Twombly*, 550 U.S. at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid
15 of ‘further factual enhancement.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “While legal
16 conclusions can provide the framework of a complaint, they must be supported by factual
17 allegations.” *Id.*

18 In reviewing a Rule 12(b)(6) motion, a district court must accept as true all facts alleged in
19 the complaint and draw all reasonable inferences in favor of the plaintiff. *See Usher v. City of Los*
20 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, a district court is not required to accept as
21 true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable
22 inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

23 As a general rule, courts may not consider materials beyond the pleadings when ruling on a
24 Rule 12(b)(6) motion. *Lee v. City of Los Angeles*, 250 F.3d 668, 688-89 (9th Cir. 2001). However,
25 the incorporation-by-reference doctrine “permit[s] district courts to consider material outside a
26 complaint” in order to “prevent[] plaintiffs from selecting only portions of documents that support
27 their claims, while omitting portions of those very documents that weaken—or doom—their
28 claims.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998, 1002 (9th Cir. 2018). There are

1 also instances, albeit rare, where the court may review a document when assessing the sufficiency
2 of a claim at the pleading stage. *Id.* at 1002 (citing *Knieval v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.
3 2005) (affirming the incorporation of materials that the complaint did not reference at all because
4 the claim “necessarily depended on them”)).

5 If the Court dismisses the complaint, it must then decide whether to grant leave to amend.
6 The Ninth Circuit has “repeatedly held that a district court should grant leave to amend even if no
7 request to amend the pleading was made, unless it determines that the pleading could not possibly
8 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000)
9 (citations and internal quotation marks omitted).

11 DISCUSSION

12 Defendants argue that plaintiff cannot plead standing under Section 11 because of the case
13 law interpreting that statute holding that a plaintiff’s purchased shares must be traced to the defective
14 registration statement, which is impossible to do here. Defendants further argue that Section 11
15 damages cannot be established in the case of a direct listing, that plaintiff lacks standing under the
16 stricter privity requirement of Section 12, and that failure to state a claim under either Sections 11
17 or 12 necessarily obviates standing under Section 15. Lastly, defendants argue that plaintiff has
18 failed to allege material misstatements or omissions.

19 Plaintiff argues that, because of the unique regulatory framework of Slack’s direct listing,
20 this case “presents a matter of first impression that, if decided in Defendants’ favor, will provide a
21 blueprint for companies to evade liability under Section 11 for filing a misleading registration
22 statement.” Pl.’s Opp’n at 1 (Dkt. No. 63). Plaintiff contends that by structuring the Offering such
23 that registered and unregistered shares became publicly tradeable at the same time, “Defendants
24 attempt to take unfair advantage of the judge-made ‘traceability’ requirement that arose out of cases
25 involving successive offerings in which plaintiffs must show that they bought their shares in the
26 specific offering at issue.” *Id.* at 2. Plaintiff contends that there is only one interpretation of Section
27 11 that makes sense in the context of a direct offering: where a company offers its shares for public
28 trading through a direct listing or otherwise by filing a registration statement as required by the

1 federal securities laws, and non-registered shares also become publicly traded in the same offering,
2 any person who acquires shares – which could be sold on a public exchange only when and because
3 the registration statement was filed – may sue those responsible under Section 11 where the
4 registration statement contains material misstatements and omissions.

5
6 **I. Section 11 Standing**

7 **A. “Such security”**

8 Section 11 of the Securities Act of 1933 (the “Securities Act”) provides a strict liability cause
9 of action for violations of certain registration requirements. The statute reads in relevant part: “In
10 case any part of the registration statement, when such part became effective, contained an untrue
11 statement of a material fact or omitted to state a material fact required to be stated therein or
12 necessary to make the statements therein not misleading, any person acquiring such security . . .
13 may . . . sue . . .” 15 U.S.C. § 77k.

14 The Second Circuit was the first to interpret the phrase “such security.” *See Barnes v.*
15 *Osofsky*, 373 F.2d 269 (2d Cir. 1967). In *Barnes*, shares were issued pursuant to registration
16 statements issued in 1961 and 1963, and purchasers filed shareholder class actions alleging claims
17 under Section 11 that the 1963 registration statement and prospectus contained material
18 misstatements and omissions. The district court approved a settlement limited to purchasers who
19 could establish that they had purchased securities issued under the 1963 registration statement.
20 Objectors to the settlement, who could not trace their purchases to the 1963 registration statement,
21 appealed. Writing for the court, Judge Friendly⁴ found “the difficulty, presented when as here the
22 registration is of shares in addition to those already being traded, is that ‘such’ has no referent.” *Id.*
23 at 271. Judge Friendly weighed two possible readings of the phrase: a narrower reading, “acquiring
24 a security issued pursuant to the registration statement”; and a broader reading, “acquiring a security
25 of the same nature as that issued pursuant to the registration statement.” *Id.* Of the broader reading,

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27 _____
28 ⁴ “Judge Friendly, without a doubt, did more to shape the law of securities regulation than
any judge in the country.” Louis Loss, *In Memoriam: Henry J. Friendly*, 99 Harv. L. Rev. 1722,
1723 (1986).

1 Judge Friendly noted that it “would not be such a violent departure from the words that a court could
2 not properly adopt it if there would good reason for doing so.” *Id.* Judge Friendly adopted the
3 narrower reading after a review of the overall statutory scheme⁵; language from the legislative
4 history⁶; dicta from within the Second Circuit⁷; and a treatise and amicus brief from the SEC. *Id.* at
5 272-73. The Ninth Circuit has followed suit in its interpretation: “Clearly, this limitation [on ‘any
6 person’] only means that the person must have purchased a security issued under that, rather than
7 some other, registration statement.” *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th
8 Cir. 1999) (citing *Barnes*, 373 F.2d 269).

9 This narrower reading became the basis for case law requiring plaintiffs to “trace their shares
10 back to the relevant offering” in order to plead standing under Section 11. *In re Century Aluminum*
11 *Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013). In the Ninth Circuit, this means plaintiffs must
12 either have “purchased shares in the offering made under the misleading registration statement,” or
13 purchased shares in the aftermarket “provided they can trace their shares back to the relevant
14 offering.” *Id.* The difficulty arises when there are multiple registration statements, in which case
15 the plaintiff must prove that the purchased shares were issued under the allegedly false or misleading
16 one, “rather than some other registration statement.” *Id.*; *Hertzberg*, 191 F.3d at 1080. “Courts
17 have long noted that tracing shares in this fashion is ‘often impossible,’ because ‘most trading is
18

19 ⁵ Reasoning that Section 11’s “stringent penalties are to insure full and accurate disclosure
20 through registration,” Judge Friendly observed that “under §§ 2(1) and 6, only individual shares are
21 registered.” *Id.* at 272. By contrast, the antifraud sections 12(2) and 17 “are not limited to the newly
22 registered shares.” *Id.* Furthermore, the damages and liability limitations in sections 11(g) and
23 11(e) suggested that standing should be limited “to purchasers of the registered shares, since
24 otherwise their recovery would be greatly diluted when the new issue was small in relation to the
25 trading in previously outstanding shares.” *Id.*

26 ⁶ The identical House and Senate versions of the statute contained the language, “every
27 person acquiring any securities specified in such statements,” and “any persons acquiring any
28 securities to which such statement relates.” *Id.* (citing S. 875, 73d Cong. § 9 (1st Sess. 1933); H.R.
4314, 73d Cong. §9 (1st Sess. 1933)).

⁷ In *Barnes*, Judge Friendly gave particular weight to Judge Frank’s dictum in *Fischman v.*
Raytheon Mfg. Co., 188 F.2d 783, 786 (2d Cir. 1951) (noting, in the context of holding that proof
of fraud or deceit is not required for Section 11 claim, that a Section 11 claim “may be maintained
only by one who comes within a narrow class of persons i.e. those who purchase securities that are
the direct subject of the prospectus and the registration statement”) because of Judge Frank’s role
as “a leading member of the SEC in its early days.” *Barnes*, 373 F.2d at 273.

1 done through brokers who neither know nor care whether they are getting newly registered or old
 2 shares,' and 'many brokerage houses do not identify specific shares with particular accounts but
 3 instead treat the account as having an undivided interest in the house's position.'" *Century*
 4 *Aluminum*, 729 F.3d at 1107 (quoting *Barnes*, 373 F.2d at 271-72). Nevertheless, courts have
 5 deferred to Congress to amend the statute. *See Century Aluminum*, 729 F.3d at 1107 ("this tracing
 6 requirement is the condition Congress has imposed for granting access to the 'relaxed liability
 7 requirements' § 11 affords"); *Barnes*, 373 F.2d at 273 ("the time may have come for Congress to
 8 reexamine these two remarkable pioneering statutes in the light of thirty years' experience").⁸
 9 Lower courts in this and other jurisdictions have imposed the same requirement where unregistered
 10 shares entered the market following the issue of registered shares; these courts have resolved the
 11 tracing requirement by limiting claims to certain factual circumstances or time periods. *See, e.g.*,
 12 *Lilley v. Charren*, 936 F. Supp. 708, 716 (N.D. Cal. 1996) (granting leave to amend for plaintiffs to
 13 "identify the purchasers of the unregistered shares" that entered market prior to registered shares or
 14 other "specific dates and facts that establish . . . standing"); *In re Initial Pub. Offering Sec. Litig.*,
 15 227 F.R.D. 65, 118-119 (S.D.N.Y. 2004) (cutting off plaintiff class period "at the time when
 16 unregistered shares became tradeable"), *vacated on other grounds by* 471 F.3d 24 (2d Cir. 2006).

17 The precise issue before this Court appears to be one of first impression. This is because
 18 Slack's direct listing on the NYSE is the result of a new regulatory development approved by the
 19 SEC in 2018. *See* Order Granting Accelerated Approval of NYSE Proposed Rule Change Relating
 20 to Listing of Companies, Exchange Act Release No. 34-82627, 83 Fed. Reg. 5650 (Feb. 2, 2018).
 21 The SEC approved changes to the NYSE Listed Company Manual in order to "provide a means for
 22 a category of companies with securities that have not previously been traded on a public market and
 23

24 ⁸ The American Law Institute's model code for comprehensive reform included eliminating
 25 the tracing requirement by giving "a right of action to a person who proves— (1) that, in the case of
 26 an offering statement, he bought a security of a class covered by the offering statement after its
 27 effectiveness; or (2) that, in the case of a registration statement or report, he bought or sold a security
 28 of the registrant after the effectiveness of the registration statement or the filing of the report." Fed.
 Sec. Code § 1704(c)(2) (Am. Law Inst. 1980). In the only amendment to the Securities Act since
 the 1930s, a provision for joint liability was added at § 11(f), but the relevant language discussed
 here remained unchanged. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, §
 201(b), 109 Stat. 737.

1 that are listing only upon effectiveness of a selling shareholder registration statement, without a
 2 related underwritten offering, and without recent trading in a Private Placement Market, to list on
 3 the Exchange.” *Id.* at 5654. Most significantly for this case, the rule change allows a company to
 4 (1) enter the public market for the first time on a major public listing (2) without issuing *new* shares
 5 as in an IPO; but the company is still (3) subject to the registration requirements of the Securities
 6 Act and thus (4) subject to Section 11 liability.⁹ Because no new shares are issued, insiders holding
 7 preexisting shares are not subject to the typical “‘lock-up period’ of 90 to 180 days where they
 8 cannot sell their shares.” ACAC ¶ 70. In other words, shares of Slack common stock became
 9 available for purchase on the NYSE immediately on June 20, 2019, from two simultaneous entry
 10 points: under the Securities Act registration statement and under the SEC Rule 144 exemption from
 11 registration. *See* 17 C.F.R. § 230.144. In a traditional IPO, the registered shares would be sold first,
 12 and the unregistered shares would become available for sale after the lockup period; a plaintiff
 13 pleading Section 11 standing for purchases made *after* the availability of unregistered shares would
 14 likely be unsuccessful because the market would be so diluted as to make tracing “virtually
 15 impossible.” *See In re Initial Pub. Offering Sec. Litig.*, 227 F.R.D. at 118. In a direct listing, the
 16 impossibility of tracing begins on the very first day of listing due to the simultaneous offering of
 17 unregistered and registered shares.

18 Plaintiff argues that to follow the standard tracing analysis here “would eviscerate the rights
 19 afforded by Section 11 and allow companies to eliminate Section 11 liability by releasing non-
 20 registered shares into the market at the same time as registered shares.” Pl.’s Opp’n at 2 (Dkt. No.
 21 63). Defendants acknowledge that “Slack’s direct listing was only the second significant direct
 22 listing ever to take place” and that cases analyzing the tracing requirement have involved successive
 23 rather than simultaneous stock offerings; nevertheless, defendants assert the same principles of
 24 tracing apply. Defs.’ Reply at 4 (Dkt. No. 66).

25 Because this case presents a question of apparent first impression – whether an investor who
 26

27 ⁹ The proposal’s previously withdrawn Amendment No. 2 envisioned no Section 11 liability
 28 whatsoever; the proposed rule “would have allowed a company to list immediately upon
 effectiveness of an Exchange Act [of 1934] registration statement only, without any concurrent IPO
 or Securities Act of 1933 (‘Securities Act’) registration.” *Id.* at 5651 fn.11.

1 purchases a security in a direct listing in which registered and unregistered shares are made publicly
2 tradeable at the same time may bring a Section 11 claim – the Court finds it instructive to return to
3 the statutory text. If the text is ambiguous, the Court “may [also] use canons of construction,
4 legislative history, and the statute’s overall purpose to illuminate Congress’s intent.” *Pac. Coast*
5 *Fed’n of Fishermen’s Ass’ns v. Glaser*, 945 F.3d 1076, 1084 (9th Cir. 2019) (citation omitted). The
6 Court is “guided by the familiar canon of statutory construction that remedial legislation should be
7 construed broadly to effectuate its purposes.” *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *FTC*
8 *v. AT&T Mobility LLC*, 883 F.3d 848, 854 (9th Cir. 2018). “The 1933 and 1934 Acts are remedial
9 legislation, among the central purposes of which is full and fair disclosure relative to the issuance
10 of securities.” *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 480 (9th Cir. 1973) (citing
11 *Tcherepnin*, 389 U.S. at 336); *see also SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) (“These
12 exemptions [from Section 5’s registration requirements] must be narrowly viewed because, as
13 remedial legislation, the Securities Act is entitled to a broad construction.”). The Supreme Court
14 “itself has construed securities law provisions ‘not technically and restrictively, but flexibly to
15 effectuate [their] remedial purposes.’” *Pinter v. Dahl*, 486 U.S. 622, 653 (1988) (quoting *Affiliated*
16 *Ute Citizens v. United States*, 406 U.S. 128, 151 (1972)). The canon, however, “should not be
17 ‘treated . . . as a substitute for a conclusion grounded in the statute’s text and structure.’” *Wadler v.*
18 *Bio-Rad Labs., Inc.*, 916 F.3d 1176, 1187 (9th Cir. 2019) (citation omitted).

19 As discussed above, the phrase “any purchaser acquiring such security” is susceptible of at
20 least two meanings. 15 U.S.C. § 77k. The second, broader meaning—“acquiring a security of the
21 same nature as that issued pursuant to the registration statement”—has yet to be examined. *Barnes*,
22 373 F.2d at 271. Judge Friendly remarked only that it “would not be such a violent departure from
23 the words that a court could not properly adopt it if there were good reason for doing so.” *Id.* Here,
24 the Court finds good reason for doing so.

25 The statutory scheme of the Securities Act provides for remedial penalties (Sections 11, 12,
26 15) where its registration requirements have been violated (Sections 5 through 7). 15 U.S.C. §§ 77k-
27 77l, 77o, 77e-77g. Pursuant to Section 4 and Rule 144, certain transactions are exempted from the
28

1 registration requirement, and those exempt transactions are not subject to the remedial penalties.¹⁰
 2 Ordinarily, as discussed in the tracing cases above, transactions subject to the registration
 3 requirements and those that are exempt from such requirements occur at different time periods. *See,*
 4 *e.g., Lilley*, 936 F. Supp at 715-16 (80,000 unregistered shares entered market prior to IPO and
 5 preferred stock offering). In Slack’s direct listing, however, both types of transactions originated
 6 and occurred simultaneously. Applying the narrower reading of “such security” in the context of
 7 Slack’s direct listing would cause the exemption provision of Section 4 to completely obviate the
 8 remedial penalties of Sections 11, 12 and 15.

9 Moreover, “[c]ourts must interpret a congressional act, if possible, in a manner that gives
 10 each section its due effect without inconsistency or repugnancy.” *In re Sheehan*, 253 F.3d 507, 514
 11 (9th Cir. 2001) (citation omitted). Whereas the narrow reading would cause exemption from
 12 registration to obviate liability for a defective registration, the broader reading makes it “possible to
 13 interpret [Section 11] and [Section 4] without conflict, while giving meaning to both rules, [making
 14 this] the correct interpretation.” *Id.* The Court also finds persuasive that an interpretation need not
 15 be adopted if it would lead to “absurd or futile results . . . plainly at variance with the policy of the
 16 legislation as a whole.” *EEOC v. Commercial Office Prod. Co.*, 486 U.S. 107, 120 (1988) (Marshall,
 17 J.) (plurality opinion) (rejecting an interpretation that would result in “the preclusion of any federal
 18 relief for an entire class of discrimination claims”); *see also Wenger v. Lumisys, Inc.*, 2 F. Supp. 2d
 19 1231, 1242 (N.D. Cal. 1998) (rejecting interpretation of safe harbor provision in Private Litigation
 20 Reform Act where interpretation would lead to absurd results). The elimination of civil liability
 21 under the Securities Act, “among the central purposes of which is full and fair disclosure relative to
 22 the issuance of securities,” would certainly lead to a futile result at variance with the policy of this
 23 remedial legislation. *Glenn W. Turner Enters., Inc.*, 474 F.2d at 480.

24 Therefore, this Court finds that in this unique circumstance—a direct listing in which shares
 25

26 ¹⁰ Section 4(a)(1) exempts from registration certain classes of transactions, including those
 27 “by a person other than an . . . underwriter.” 15 U.S.C. § 77d(a)(1). Section 2(a)(11) defines an
 28 underwriter as “any person who has purchased from the issuer with a view to . . . distribution.” *Id.*
 § 77b(a)(11). And Rule 144, an SEC administrative rule, was adopted “to establish specific criteria
 for determining whether a person is not engaged in a distribution.” 17 C.F.R. § 230.144.

1 registered under the Securities Act become available on the first day simultaneously with shares
2 exempted from registration—the phrase “such security” in Section 11 warrants the broader reading:
3 “acquiring a security of the same nature as that issued pursuant to the registration statement.”
4 *Barnes*, 373 F.2d at 271. Accordingly, the Court DENIES defendants’ motion to dismiss for lack
5 of Section 11 standing.

6
7 **B. “Offered to the public”/Damages**

8 Defendants also contend that plaintiff’s Section 11 claim fails as a matter of law because
9 plaintiff has not and cannot allege an offering price from the direct listing, and therefore cannot
10 establish damages. Defendants argue that a necessary predicate for establishing damages under
11 Section 11 is the existence of a price at which a “security was offered to the public.” 15 U.S.C.
12 § 77k(g); *see also id.* § 77k(e) (damages “shall represent the difference between the amount paid for
13 the security (not exceeding the price at which the security was offered to the public)” and various
14 determinations of the security’s value before, at, or after the time of suit). Defendants argue that
15 unlike an IPO in which the initial offering price is established by the company and the underwriters,
16 here the NYSE established a reference price for Slack’s shares one day prior to the commencement
17 of trading and a designated market maker set the opening trading price without coordination from
18 Slack.¹¹ Defendants argue that because Slack’s direct listing did not involve a public offering price,
19 plaintiff cannot recover damages under Section 11.

20 Plaintiff argues that he is not required to establish damages at the pleadings stage, and that
21

22
23 ¹¹ Because Slack went public with a direct listing and not an IPO, there was a “lack of an
24 initial public offering price.” Kahn Decl. Ex. A at 172. The SEC-approved changes to the NYSE
25 Listed Company Manual included changes to Rule 15(c)(1), which specifies a security’s Reference
26 Price and thus informs pre-opening indications; and Rule 104(a)(2), which provides for the
27 facilitation of openings and reopenings for securities. Order Granting Accelerated Approval of
28 NYSE Proposed Rule Change Relating to Listing of Companies, Exchange Act Release No. 34-
82627, 83 Fed. Reg. 5650, 5652 (Feb. 2, 2018). The rule changes provided an alternative means for
determining the Reference Price in a direct listing without an IPO: “a price determined by the
Exchange in consultation with a financial advisor to the issuer of such security.” *Id.* The rule
changes also required the Designated Market Maker who facilitates openings to consult with the
issuer’s financial advisor, a requirement “based in part on Nasdaq Rule 4120(c)(9), which requires
that a new listing on Nasdaq that is not an IPO have a financial advisor willing to perform the
functions performed by an underwriting in connection with pricing an IPO on Nasdaq.” *Id.* & fn.33.

1 a purported lack of damages is an affirmative defense upon which defendants have a heavy burden.
 2 Plaintiff also asserts that he has adequately alleged an opening public price of \$38.50 on the first
 3 day of trading, and also that under a “value-based Section 11 damages theory” plaintiff “can show,
 4 at a later stage, that the stock’s price at the time of the Offering should have been lower if not for
 5 the omissions and misrepresentations.” Pl.’s Opp’n at 13 (citing *In re Snap Inc. Sec. Litig.*, Case
 6 No. 2:17-cv-03679-SVW-AGR, 2018 WL 2972528, at *8-9 (denying motion to dismiss Section 11
 7 claim and holding that the plaintiff’s argument that “Snap’s actual stock price at IPO overestimated
 8 the true value of the stock at that time because of the alleged material omissions and
 9 misrepresentations . . . is a valid theory of damages”), and *In re Fortune Sys. Sec. Litig.*, 680 F.
 10 Supp. 1360, 1370 (N.D. Cal. 1987) (granting summary judgment in favor of defendants where after
 11 “full and fair discovery” the “plaintiffs have failed to present any evidence indicating that the price
 12 of Fortune stock on June 15 differed at all from its ‘value.’”).

13 “Damages are not an element” of a Section 11 claim. *In re Countrywide Fin. Corp. Sec.*
 14 *Litig.*, 588 F. Supp. 2d 1132, 1168 n.40 (citing *Herman & MacLean v. Huddleston*, 459 U.S. 375,
 15 382 (1983)). Courts have treated Section 11’s damages measure as an affirmative defense. *See id.*
 16 at 1169; *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1258, 1261 (N.D. Cal. 2000).
 17 “For a complaint to be dismissed because the allegations give rise to an affirmative defense ‘the
 18 defense clearly must appear on the face of the pleading.’” *McCalden v. Cal. Library Ass’n*, 955
 19 F.2d 1214, 1219 (9th Cir. 1990) (citation omitted), *superseded by rule on other grounds as*
 20 *recognized in Konarski v. Rankin*, 603 F. App’x 544, 546 (9th Cir. 2015); *see, e.g., In re*
 21 *Broderbund/Learning Co. Sec. Litig.*, 294 F.3d 1201, 1203-04 (9th Cir. 2002) (affirming Rule
 22 12(b)(6) dismissal of Section 11 claim where it was indisputable that all class members profited
 23 from the sale of the relevant securities).

24 The Court concludes that defendants have not met their burden at the pleading stage to show
 25 that plaintiff cannot recover damages as a matter of law. Courts have held that “[a] plaintiff is
 26 required (1) to allege that he purchased the relevant securities; and (2) to allege facts creating the
 27 reasonable inference that the value of the securities on the presumptive damages date – that is, either
 28 the value at the time the plaintiff sold the securities; or the value at the time of suit, if the plaintiff

1 still holds the securities—is *less* than the purchase price.” *In re Countrywide*, 588 F. Supp. 2d at
2 1169-70 (emphasis in original). Plaintiff has done that.

3 Defendants make much of the “Not applicable” answer on the Registration Statement’s
4 cover page, in the table for “Proposed Maximum Offering Price Per Share.” Kahn Decl. Ex. A.
5 They also emphasize the Registration Statement’s explanation that the “opening public price of
6 [Slack shares] on the NYSE will be determined by buy and sell orders collected by the NYSE from
7 various broker-dealers and will be set based on the [Designated Market Maker’s] determination” in
8 consultation with “Morgan Stanley and [Slack’s] other financial advisors” but, “in each case,
9 without coordination with [Slack].” *Id.* at 171. But the same explanation in the Registration
10 Statement describes how a pre-opening indication may be published in anticipation of the opening
11 public price, based on buy-and-sell orders on the NYSE, “[s]imilar to how a security being offered
12 in an underwritten initial public offering would open on the first day of trading.” *Id.* at 172. In the
13 NYSE rule changes as well as in the Slack Registration Statement, the unique direct listing process
14 is accommodated by analogy to the traditional IPO pricing process. Defendants’ reliance on an
15 overly narrow reading of Section 11’s “price at which the security was offered to the public” is thus
16 unavailing. Further, as plaintiff asserts in his opposition, plaintiff may pursue a value-based theory
17 of damages, which is a fact-intensive inquiry that is not appropriate for resolution at the pleadings
18 stage.

19 Accordingly, the Court DENIES defendants’ motion to dismiss for lack of damages under
20 Section 11.

21 22 **II. Section 12(a)(2)**

23 Next, defendants argue that plaintiff cannot plead standing under Section 12(a)(2) because
24 defendants are not statutory sellers within the scope of Section 12. Section 12(a)(2) provides that
25 any person who “offers or sells a security . . . by means of a prospectus or oral communication,
26 which includes an untrue statement of a material fact or omits to state a material fact necessary in
27 order to make the statements, in the light of the circumstances under which they were made, not
28 misleading . . . shall be liable . . . to the person purchasing such security from him.” 15 U.S.C.

1 § 77l(a)(2). In the case of registered shares and exempted shares becoming available simultaneously
 2 on the first day of a direct listing, this Court reads “such security” in accordance with the
 3 construction of Section 11 discussed above. Therefore, the Court rejects defendants’ argument that
 4 Section 12 liability in this case extends only to shares directly traceable to those registered under
 5 the prospectus. That does not end the analysis, however. As both parties indicate, “purchasing . . .
 6 from him” introduces a privity requirement not present in Section 11.

7 The Supreme Court has provided two ways to establish that someone is a statutory “seller”
 8 under Section 12: (1) by directly passing title or (2) by actively soliciting the sale. *See Pinter v.*
 9 *Dahl*, 486 U.S. 622, 642-44 (1988). “Soliciting” does not include “urg[ing] another to make a
 10 securities purchase . . . merely to assist the buyer” or “the giving of gratuitous advice, even strongly
 11 or enthusiastically.” *Id.* at 647. “[L]iability extends only to the person who successfully solicits the
 12 purchase, motivated at least in part by a desire to serve his own financial interests or those of the
 13 securities owner.” *Id.* In rejecting a “substantial factor” test, the Supreme Court emphasized that
 14 liability under Section 12 requires more than “mere participation” because the language of the
 15 statute “focuses on the defendants’ relationship with the plaintiff-purchaser.” *Id.* at 651. The Ninth
 16 Circuit has not yet elaborated on what facts constitute more than “mere participation,” and district
 17 courts have adopted different approaches. *See In re Charles Schwab Corp. Sec. Litig.*, 257 F.R.D.
 18 534, 549-50 (N.D. Cal. 2009) (citing divided lower court cases, and finding sufficient allegations of
 19 signing a registration statement and actively participating in marketing events), *with In re Harmonic,*
 20 *Inc., Sec. Litig.*, No. C 00-2287 PJH, 2006 WL 3591148 at *13 (N.D. Cal. Dec. 11, 2006) (citing
 21 divided lower court cases, and finding insufficient allegations of signing a registration statement or
 22 prospectus).

23 Plaintiff contends that defendants are statutory sellers because:

24 [T]he Individual Defendants signed the Offering Materials (*see, e.g.*, [ACAC] ¶ 20),
 25 actively solicited buyers through the Investor Day (*see, e.g.*, ¶ 72), sold significant
 26 amounts of shares (*see, e.g.*, ¶ 20), and were financially motivated by a desire to
 27 serve their own financial interests (*see, e.g.*, ¶¶ 23, 69-75). Further, Plaintiff also
 adequately alleges privity with his sellers. As opposed to traditional underwritten
 IPOs, this was a direct offering in which Defendants sold Slack shares directly to
 Plaintiff and other purchasers. ¶¶ 69-70.

28 Pl.’s Opp’n at 12.

1
2 Defendants rely on district courts cases holding that signing a registration statement is
3 insufficient to establish solicitation. *See In re Infonet Servs. Corp. Sec. Litig.*, 310 F. Supp. 2d 1080,
4 1101 (C.D. Cal. 2003); *Harmonic*, 2006 WL 3591148, at *10; *Welgus v. TriNet Grp., Inc.*, Case No.
5 15-cv-03625 BLF, 2017 WL 167708, at *19 (N.D. Cal. Jan. 17, 2017). As to participation in
6 marketing activities such as a roadshow presentation, the IPO equivalent of the Investor Day here,
7 some courts have held this is also insufficient. *See Infonet*, 310 F. Supp. 2d at 1101 (even if oral
8 misrepresentations at roadshow presentations were not protected by bespeaks caution doctrine,
9 “Plaintiffs do not allege that Defendants . . . personally or directly solicited any of the named
10 Plaintiffs”); *In re CytRx Corp. Sec. Litig.*, Case No. CV 14-1956-GHK (PJWx), 2015 WL 5031232,
11 at *15 (C.D. Cal. July 13, 2015) (“participation of some directors in a road show . . . is insufficient”);
12 *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP (MANx), 2011 WL
13 4389689, at *9 (C.D. Cal. May 5, 2011) (same).

14 Plaintiff relies primarily on *Charles Schwab*, which also notes the absence of Ninth Circuit
15 guidance and the split in district court opinions. 257 F.R.D. at 549. Finding support in district court
16 cases from within the Ninth, Second, and Seventh Circuits, the court in *Charles Schwab* found that
17 “[a]lthough the act of signing a registration statement, alone, may not always suffice, it is at least
18 suggestive of solicitation activity.” *Id.* & fn.3 (citing, e.g., *In re Nat’l Golf Props., Inc.*, No. CV 02-
19 1383 GHK (RZX), 2003 WL 23018761 (C.D. Cal. 2003); and *In re Portal Software, Inc. Sec. Litig.*,
20 No. C-03-5138 VRW, 2006 WL 2385250, at *4 (N.D. Cal. 2006)); *see also In re Keegan Mgmt.*
21 *Co. Sec. Litig.*, Civ. No. 91-20084 SW, 1991 WL 253003, at *8 (N.D. Cal. Sept. 10, 1991) (“To one
22 who studies corporate filings and news releases before purchasing via a dealer on an impersonal and
23 anonymous market, the corporation, its officers and directors, and other promoters of the stock
24 appear to be the true ‘sellers.’”). Moreover, the plaintiffs in *Charles Schwab* also alleged that
25 “certain defendants were involved in marketing the fund. Whether or not defendants actually
26 solicited plaintiffs’ sales is a factual question which should generally be left to the jury; at this stage
27 plaintiffs need only satisfy Rule 8(a)’s lenient pleading standards.” *Id.* at 550.

28 The Court concludes that plaintiff has alleged enough facts to support an active solicitation

1 theory against the Individual Defendants.¹² Plaintiff alleges that all of the Individual Defendants
 2 signed the Offering Materials, that certain defendants solicited sales at the Investor Day, and that all
 3 of the Individual Defendants were financially motivated to solicit sales. The Court finds *Charles*
 4 *Schwab* involved similar allegations and that Court agrees that the solicitation question is “a factual
 5 question which should generally be left to the jury.” *Id.*

6 Accordingly, the Court DENIES defendants’ motion to dismiss for failing to state a claim
 7 under Section 12.

8 9 **III. Material Misstatement or Omission**

10 To survive a motion to dismiss the Section 11 and Section 12(a)(2) claims, the complaint
 11 must plead that the Offering Materials contained (1) a materially untrue statement or omitted a
 12 material fact (2) required to be stated or (3) necessary to make the statements not misleading. 15
 13 U.S.C. §§ 77k(a), 77l(a)(2). Items 105 and 303 of SEC Regulation S-K require to be stated,
 14 respectively, “a discussion of the most significant factors that make an investment in the registrant
 15 or offering speculative or risky,” and a description of “any known trends or uncertainties that have
 16 had or that the registrant reasonably expects will have a material favorable or unfavorable impact
 17 on net sales or revenues or income from continuing operations.” 17 C.F.R. §§ 229.105,
 18 229.303(3)(a)(ii). Allegations which state a claim under Item 303 also state a claim under Sections
 19 11 and 12(a)(2). *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). For an
 20 omission to be misleading, “it must affirmatively create an impression of a state of affairs that differs
 21 in a material way from the one that actually exists.” *Brody v. Transitional Hosps. Corp.*, 280 F.3d
 22 997, 1006 (9th Cir. 2002) (citation omitted). A misrepresentation or omission is material if “it would
 23 have misled a reasonable investor about the nature of his or her investment.” *In re Daou*, 411 F.3d
 24 at 1027 (citation omitted). “Generally, whether a public statement is misleading, or whether adverse

25
 26 _____
 27 ¹² The parties’ briefing focuses largely on whether the Individual Defendants can be held
 28 liable as statutory sellers under Section 12. It is not clear to the Court how plaintiff contends that
 Slack is a statutory seller. However, to the extent plaintiff contends that Slack sold shares directly
 to plaintiff and the class members, the Court is not persuaded because, *inter alia*, the company did
 not issue new shares in the direct listing. If plaintiff wishes to pursue a Section 12 claim against
 Slack, the amended complaint shall articulate the basis of that claim.

1 facts were adequately disclosed is a mixed question to be decided by the trier of fact.” *SEC v. Todd*,
 2 642 F.3d 1207, 1220 (9th Cir. 2011) (citations and internal quotation marks omitted). “Accordingly,
 3 resolving an issue as a matter of law is only appropriate when the adequacy of the disclosure is ‘so
 4 obvious that reasonable minds [could] not differ.’” *Id.* at 1220-21 (citations omitted).

5 Plaintiff alleges material misrepresentations or omissions in several sets of statements
 6 concerning Slack’s: (A) outages and SLAs, (B) scalable architecture, (C) competition with
 7 Microsoft, (D) key benefits, and (E) growth and growth strategy.¹³

8
 9 **A. Outages and SLAs**

10 Plaintiff alleges that the Offering Materials misled investors regarding known vulnerabilities
 11 related to outages and omitted to inform investors of the highly unusual and punitive SLAs the
 12 company had entered into with many of its customers. Slack disclosed in the Offering Materials
 13 that its

14 continued growth depends, in part, on the ability of existing and potential
 15 organizations on Slack to access Slack 24 hours a day, seven days a week, without
 16 interruption or degradation of performance. We have in the past and may in the
 17 future experience disruptions, data loss, outages, and other performance problems.
 18 We may not be able to maintain the level of service uptime and performance required
 19 by organizations on Slack, especially during peak usage times and as our user traffic
 20 and number of integrations increase. For example, we have experienced intermittent
 21 connectivity issues and product issues in the past, including those that have prevented
 22 many organizations on Slack and their users from accessing Slack for a period of
 23 time.

24 ACAC ¶ 95 (emphasis removed). Slack also disclosed, “We provide service level commitments
 25 under certain of our paid customer contracts. If we fail to meet these contractual commitments, we
 26 could be obligated to provide credits for future service, or face contract termination with refunds of
 27 prepaid amounts related to unused subscriptions, which could harm our business, results of
 28 operations, and financial condition.” *Id.*

Plaintiff contends that these statements were misleading and that they omit information

¹³ The parties’ briefing organizes the alleged misstatements and omissions into five categories, which largely but not entirely align with the organization of the ACAC, which organizes the misstatements and omissions into four categories. The Court’s order follows the parties’ organization of the alleged misstatements and omissions into five separate categories.

1 required by Items 105 and 303 because, *inter alia*, Slack’s reliability problem was not simply
2 hypothetical but a known issue to defendants and the company was automatically paying out
3 significant amounts of service credits regardless of whether customers were affected or requested a
4 refund. Plaintiff alleges that the Offering Materials did not disclose that the SLAs guaranteed an
5 uptime of 99.99%, which is significantly stricter than the 99.9% promised by competitors; moreover,
6 Slack did not disclose that the SLAs provided that failing to meet the guarantee would cost Slack a
7 credit payout multiplier of 100 times what each customer paid, regardless of whether the customer
8 complained or was even affected by the outage. *Id.* ¶¶ 63, 96, 109, 112, 120. Nor did the Offering
9 Materials disclose that during seven out of the twelve months of 2018, Slack had already failed to
10 meet its uptime guarantee. *Id.* ¶ 121. Plaintiff alleges that this information is material because of
11 the significant stock price drop following the September 4, 2019 conference call revealing the
12 policies that Slack admitted were “outrageously customer-centric,” “exceptionally generous,” and
13 not “in line with industry standards.” *Id.* ¶¶ 6, 96, 109, 112; 99-125.

14 The Court finds that plaintiff has plausibly pled that Slack’s disclosures omitted material
15 information as well as violations of Items 105 and 303. Although the disclosures do discuss the
16 existence of Slack’s SLAs, the unusual nature of the SLAs’ terms is an omitted and “significant
17 factor[] that make[s] an investment . . . risky.” *See* 17 C.F.R. § 229.105. And although the question
18 of whether the seven months of outages in 2018 constitute a “trend” is a factual inquiry for a later
19 stage of these proceedings, it is plausibly pled that Slack was aware of those outages at the time of
20 its disclosures, and that future outages would have an “unfavorable impact . . . on revenues” due to
21 the SLA terms. *See* 17 C.F.R. § 229.303(3)(a)(ii).

22 At minimum, the adequacy of Slack’s disclosures is not “so obvious that reasonable minds
23 [could] not differ.” *See SEC v. Todd*, 642 F.3d at 1220-21. The characterization of past outages as
24 “intermittent” is technically true, and Slack “could be obligated to provide credits” per the SLAs;
25 but omitting the considerable frequency of outages as well as their “exceptional[]” consequences
26 out of line with industry standards could plausibly “mis[lead] a reasonable investor about the nature
27 of his or her investment.” *In re Daou*, 411 F.3d at 1027. The nearly 12% drop in stock price to
28 \$27.38 immediately following the September 4 announcement about financial highlights, outages

1 in the quarter, and the unusual uptime commitment—followed by another 8.98% drop to \$24.92 the
2 next trading day—indicate the materiality of this information to investors. *See Backe v. Novatel*
3 *Wireless, Inc.*, 642 F. Supp. 2d 1169, 1183 (S.D. Cal. 2009) (“significance of this information is
4 illustrated by,” *inter alia*, “the market reaction to the alleged disclosures”). That the SLA terms
5 were already publicly available on Slack’s website does not make its omission from the Offering
6 Materials less material. *See Miller v. Thane Int’l, Inc.*, 519 F.3d 879, 887 (9th Cir. 2008)
7 (“Ordinarily, omissions by corporate insiders are not rendered immaterial by the fact that the omitted
8 facts are otherwise available to the public.”).

9 Since the ultimate question of “whether adverse facts were adequately disclosed is a mixed
10 question to be decided by the trier of fact” and there is room for reasonable disagreement here, *see*
11 *SEC v. Todd*, 642 F.3d at 1220-21, the Court finds that plaintiff’s challenge to statements regarding
12 outages and the SLAs is adequate for the pleading stage.

13

14 **B. Scalable Architecture**

15 In a section of the Offering Materials describing Slack’s business, Slack stated that it “built
16 [its] technology infrastructure using a distributed and scalable architecture on a global scale.”
17 ACAC ¶ 92; *see also* Kahn Decl. Ex. A at 124. Plaintiff alleges that this statement was misleading
18 because “Slack was facing difficulty in scaling globally and attaining enterprise customers . . . as
19 evidenced by the Slack App’s widespread downtime.” *Id.* ¶ 94. Plaintiff also alleges that this
20 statement was misleading because in the September 4, 2019 earnings call, defendant Butterfield
21 stated that the June and July 2019 outages were caused by “scaling . . . we continue to hit limits that
22 we didn’t realize were built into the system.” *Id.* ¶ 111.

23 Defendants contend that there is nothing misleading about the statement that Slack “built
24 [its] technology infrastructure using a distributed and scalable architecture,” and they note that the
25 Registration Statement discloses, in the section on risks, that “as we continue to expand . . . we may
26 not be able to scale our technology to accommodate the increased capacity requirements, which may
27 result in interruptions or delays in service.” Kahn Decl. Ex. A at 29. Defendants also note that in
28 the September 4, 2019 call, Butterfield also noted: “We have been successful in scaling . . . between

1 99.9% and 99.99% . . . every quarter and most quarters 99.99%.” Kahn Decl. Ex. D at 14 (Dkt. No.
2 54-4).

3 The Court agrees with defendants that the challenged statement is not misleading. Although
4 plaintiff contends that the 2018 and 2019 outages show that Slack was facing difficulty in scaling
5 globally, that does not make the general statement that Slack “built [its] technology infrastructure
6 using a distributed and scalable architecture,” misleading, particularly when Slack disclosed that as
7 the company grew “we may not be able to scale our technology to accommodate” increased
8 requirements, leading to possible outages. Asserting the existence of a “scalable architecture” is not
9 a representation that there have not been any problems with the infrastructure nor is it a promise that
10 there will not be any future problems with scaling. *Compare In re Quality Sys., Inc. Sec. Litig.*, 865
11 F.3d 1130, 1143-44 (9th Cir. 2017) (finding actionable statements about a pipeline because
12 “Plochocki and the others did not just describe the pipeline in subjective or emotive terms. Rather,
13 they provided a concrete description of the past and present state of the pipeline. They repeatedly
14 reassured investors during the class period that the number and type of prospective sales in the
15 pipeline was unchanged, or even growing, compared to previous quarters.”), *with In re Intel Corp.*
16 *Sec. Litig.*, Case No. 18-cv-00507-YGR, 2019 WL 1427660, at *9-12 (N.D. Cal. Mar. 29, 2019)
17 (holding various statements regarding chip security and performance to be too vague to be
18 actionable). Moreover, the disclosures noted that Slack may be unable to maintain service uptime
19 for exactly the reason stated in the September 4, 2019 call: “especially during peak usage times and
20 as our user traffic and number of integrations increase.” ACAC ¶ 95. The Court therefore GRANTS
21 defendants’ motion to dismiss on this ground.

22

23 **C. Competition with Microsoft**

24 Next, plaintiff challenges statements about the “strength of [Slack’s] market leadership,” and
25 statements that “only vaguely described the existing competition and downplayed the impact the
26 potential competitors may have on [Slack].” *Id.* ¶¶ 80, 83. Plaintiff alleges that Microsoft Teams
27 had already eclipsed Slack as the market leader before the direct listing, and continued to do so after
28 the listing; the pre-listing evidence of this is based on a *PCMag.com* analysis comparing the two

1 companies, and the post-listing evidence is based on a *Vox* article graphing a comparison of the
2 companies' daily active users. *Id.* ¶¶ 57-58, 86-88.

3 The Court finds these allegedly misleading statements immaterial because the competitive
4 advantages of Microsoft were adequately disclosed. The Offering Materials expressly state, "Our
5 primary competitor is currently Microsoft Corporation," and that "we expect competition to
6 intensify in the future." Kahn Decl. Ex. A at 16. The Offering Materials also state that "[m]any of
7 our existing competitors have . . . substantial competitive advantages," and list these advantages in
8 detail, including: "greater brand name recognition and longer operating histories, larger sales and
9 marketing budgets and resources, broader distribution, and established relationships with
10 independent software vendors, partners, and customers, greater customer experience resources,
11 greater resources to make acquisitions, lower labor, and development costs . . ." *Id.* at 17.

12 Moreover, Slack was under no duty to report the data and relative capacity of its competitors.
13 *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1406 (9th Cir. 1996) (rejecting proposition that
14 defendant company "was obliged not only to report on its own product line and marketing plans,
15 but to report on and make predictions regarding *Microsoft's* intentions," even if Microsoft had
16 disclosed those intentions to the company). Although the pleadings plausibly demonstrate that Slack
17 was in fierce competition with Microsoft before the direct listing, and that Slack had data on its own
18 metrics, Slack did not omit material information by failing to include data or comparisons on
19 Microsoft's metrics.

20 The Court therefore GRANTS defendants' motion on this ground.

21
22 **D. Key Benefits**

23 Plaintiff also challenges Slack's "Summary of Key Benefits," which contained such
24 statements as: "People love using Slack and that leads to high levels of engagement"; "Slack
25 increases an organization's 'return on communication'"; "Slack increases the value of existing
26 software investment"; "An organization's archive of data increases in value over time"; "Slack helps
27 achieve organizational agility"; and "Developers are better able to reach and deliver value to their
28

1 customers.” ACAC ¶ 91.¹⁴ Plaintiff alleges that these statements “in combination with other
2 statements in the Offering Materials . . . implied that the Slack App was a market leader with unique
3 advantages over its competitors and that the Company possessed the ability to scale up its services
4 to reach more lucrative enterprise customers.” *Id.* ¶ 92. “However, the statements in [¶ 91] were
5 materially false and/or misleading because: (1) Microsoft Teams had already overtaken Slack as the
6 market leader at the time of the Offering; (2) the Slack App’s reliability was regularly below the
7 promised 99.99% uptime; and (3) Slack was facing difficulty in scaling globally and attaining
8 enterprise customers due to problems in maintaining and expanding its infrastructure as evidenced
9 by the Slack App’s widespread downtime.” *Id.* ¶ 94.

10 Defendants contend that plaintiff fails to plead that these statements are misleading because
11 the statements about Slack’s “key benefits” have nothing to do with the allegedly omitted
12 information about Microsoft Teams, outages, or scalability problems. Defendants also argue that
13 the Registration Statement contained disclosures about these matters in other parts of the document.

14 The Court finds that the statements in the “Key Benefits” section are not actionable. Plaintiff
15 does not allege that any particular statement is false or misleading. For example, one of the seven
16 “key benefits” is:

17 **An organization’s archive of data increases in value over time.** As teams
18 continue to use Slack, they build a valuable resource of widely accessible
19 information. Important messages are surrounded by useful context and users can see
20 how fellow team members created and worked with the information and arrived a
21 decision. New employees can have instant access to the information they need to be
22 effective whenever they join a new team or company. Finally, the content on Slack
23 is available through powerful search and discovery tools, powered by machine
24 learning, which improve through usage.

25 *Id.* ¶ 92. Plaintiff does not allege that there is anything false or misleading about this statement or
26 any of the other statements found in the other six “key benefits.” Instead, plaintiff claims that by
27 touting its “key benefits” Slack “implied that the Slack App was a market leader with unique
28 advantages over its competitors and that the Company possessed the ability to scale up its services
to reach more lucrative enterprise customers,” when in fact the company was experiencing problems

14 These statements are the bolded statements within each bullet point paragraph quoted in Paragraph 91; the Court has not replicated the entirety of Paragraph 91, but the bolded statements are illustrative of the statements in the “Summary of Key Benefits.”

1 due to competition, reliability and infrastructure. *Id.* ¶¶ 92, 94. However, a review of the “Summary
2 of Key Benefits” section does not reveal any explicit or implicit statements about Slack’s market
3 position, competition, the reliability of its technology, or its infrastructure. While the Court has
4 concluded that plaintiff has sufficiently alleged that the risk disclosures omitted material information
5 about the outages and the SLAs, the Court is not persuaded by plaintiff’s contention that Summary
6 of Key Benefits is false or misleading simply because it described, in very general terms, the
7 company’s strengths.

8 Further, the Court notes that most, if not all, of the statements quoted in Paragraph 91 would
9 appear to be inactionable puffery. *See, e.g., id.* ¶ 91 (“People love using Slack and that leads to high
10 levels of engagement. Slack is enterprise software created with an eye for user experience usually
11 associated with consumer products. We believe that the more simple, enjoyable, and intuitive the
12 product is, the more people will want to use it. As a result, teams benefit from the aggregated
13 attention that happens when all members of a team are engaged in a single collaboration tool.”); *see*
14 *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 606 (9th Cir. 2014) (finding various
15 challenged statements to be inactionable puffery).

16 The Court GRANTS defendants’ motion to dismiss on this ground.

17 18 **E. Growth and Growth Strategy**

19 Lastly, plaintiff alleges that the Offering Materials contained materially false or misleading
20 statements about Slack’s “[d]ifferentiated go-to-market strategy” in three subsections of the
21 “Summary” part of the Registration Statement: “Our Business Model,” “What Sets Us Apart,” and
22 “Growth Strategy.” ACAC ¶¶ 77-81. Plaintiff alleges,

23 The statements in ¶¶ 77-81 were materially false and/or misleading and omitted
24 material facts at the time of the Offering because: (1) the Company’s revenue growth
25 was trending downward while marketing expenses were increasing due to increasing
26 competition from Microsoft Teams; (2) the Slack App’s reliability was compromised
27 due to scaling its technology to meet enterprise-level customer needs; (3) the
28 Company’s financials were uniquely vulnerable due to its unique SLA which
included an “exceptionally generous credit payout multiplier” of 100 times the price
paid by the customer during the downtime, which the Company provided whether or
not the customers were actually affected; and, (4) the Company’s growth was
slowing down in several aspects, including its key metric, DAUs.

1 *Id.* ¶ 82.

2 Defendants contend that these statements are not actionable because (1) they consist of
3 optimistic puffery (for example, statements about Slack “offering an exceptional product,” “[t]he
4 strength of our market leadership” and “[c]ustomer love leading to stickiness and organic
5 expansion”, *id.* ¶¶ 79-80); (2) they are forward-looking statements that are not actionable under the
6 “bespeaks caution” doctrine (for example, the statements in “Growth Strategy” such as “we will
7 continue to expand our marketing and sales efforts to reach more users” and “We plan to continue
8 to grow use and users within organizations on Slack by increasing our investments in our direct
9 sales force . . .”, *id.* ¶ 81)¹⁵; (3) the allegedly omitted information is unrelated to Slack’s discussion
10 of its strategy; and (4) the disclosures are not misleading because the information was actually
11 disclosed either in the challenged subsection (e.g., the slowing revenue growth numbers) or
12 elsewhere in the Registration Statement (such as information about increasing sales and marketing
13 expenses and numbers of users).

14 The Court agrees with defendants. As with the “Key Benefits” section, plaintiff does not
15 allege that any particular statements are false or misleading. Instead, plaintiff claims that certain
16 information was omitted, but as defendants note, information about revenue growth, sales and
17 marketing expenses, and numbers of users was disclosed either in the Business Model section or
18 elsewhere in the Registration Statement. To the extent plaintiff challenges statements in the
19 “Growth Strategy” section, plaintiff has not explained how these forward-looking statements are
20 actionable. Finally, although the Court has concluded that plaintiff has stated a claim that the risk
21 disclosures were misleading by omitting information about the outages and unique vulnerabilities
22 posed by the SLAs, the Court is not persuaded that a general summary of “What Sets Us Apart”¹⁶

24 ¹⁵ This section also states, *inter alia*, “We will continue a relentless focus on product design
25 . . . We believe our market remains underpenetrated and we will continue to expand our marketing
26 and sales efforts . . . We plan to continue to grow use and users . . . we believe adoption of [guest
27 accounts and shared channels features] will grow significantly in the coming years . . . We intend to
28 increase investments in marketing . . . We plan to open offices and hire sales and customer
experience people . . .” *Id.*

¹⁶ The “What Sets Us Apart” section contains numerous statements that the Court views as
inactionable puffery, such as “Our development, design, partnerships, customer engagement, and
investments are targeted at realizing the enormity and simplicity of Slack’s mission: to make

1 or even a more specific and factual description of “Our Business Model” is rendered misleading by
2 omitting unrelated information about risks.

3 Accordingly, the Court GRANTS this aspect of defendants’ motion.

4
5 **IV. Section 15 Standing**

6 Section 15 imposes secondary liability upon “[e]very person who . . . controls any person
7 liable under sections 77k [Section 11] or 77l [Section 12].” 15 U.S.C. § 77o. Plaintiff brings this
8 claim against the Individual Defendants and the VC Defendants. Defendants move to dismiss this
9 claim because of a failure to plead both an underlying violation and to adequately plead that the VC
10 Defendants controlled Slack. Since the Court has found that plaintiff states an adequate claim for
11 the underlying violations, only the second issue remains to be resolved.¹⁷

12 Control is defined as “the possession, direct or indirect, of the power to direct or cause the
13 direction of the management and policies of a person, whether through the ownership of voting
14 securities, by contract, or otherwise.” 17 C.F.R. § 230.405; *see Howard v. Everex Sys., Inc.*, 228
15 F.3d 1057, 1065 n.9 (9th Cir. 2000).¹⁸ “Whether [the defendant] is a controlling person is an
16 intensely factual question, involving scrutiny of the defendant’s participation in the day-to-day
17 affairs of the corporation and the defendant’s power to control corporate actions.” *Howard*, 228
18 F.3d at 1065 (citation omitted). “[I]n order to make out a prima facie case, it is not necessary to
19 show actual participation or the exercise of power.” *No. 84 Employer-Teamster Joint Council*

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22 people’s working lives simpler, more pleasant, and more productive”; “People love using Slack and
23 many become advocates for wider use inside of their organizations”; and “As Slack usage increases
24 inside an organization, more value is created for each additional user who might join, as well as for
25 all existing users.” Kahn Decl. Ex. A at 5; ACAC ¶ 80; *see Or. Pub. Emps. Ret. Fund*, 774 F.3d at
26 606 (“Feel good monikers” such as “good” and “well-regarded” are inactionable puffery).

27
28 ¹⁷ The Individual Defendants do not contend that they are not controlling persons.

¹⁸ “[T]he controlling person analysis is the same” for Section 15 claims under the Securities
Act, as for Section 20(a) claims under the Securities Exchange Act. *Hollinger v. Titan Capital
Corp.*, 914 F.2d 1564, 1578 (9th Cir. 1990). Although Securities Exchange Act claims are typically
analyzed under the heightened fraud pleading standard of 9(b), “district courts in the Ninth Circuit
have concluded that because fraud is not a necessary element of a control person claim, the pleading
of such a claim need only meet the requirements of Rule 8(a).” *In re Am. Apparel, Inc. S’holder
Litig.*, 2013 WL 10914316, at *33 n.249 (C.D. Cal. Aug. 8, 2013) (citation omitted).

1 *Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003) (quoting *Howard*,
2 228 F.3d at 1065). “[A]t least some indicia of . . . control is a necessary element of ‘controlling
3 person’ liability.” *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1163 (9th Cir.
4 1996). “[T]raditional indicia” include a prior lending relationship with the accused company,
5 ownership of its stock, and a seat on its Board. *Id.* at 1162.

6 Plaintiff alleges that the three VC Defendants are controlling persons because they: infused
7 capital into Slack before its direct listing; owned respectively 23.8%, 13.2%, and 10.1% of Slack’s
8 supervoting shares at the time of the direct listing; each had a director on the Board, who reviewed
9 and signed the Offering Materials; “caused [Slack] to indemnify them from any liabilities arising
10 from the Securities Act” and “to obtain and maintain a directors and officers insurance policy for
11 them”; “caused Slack to effectuate the Offering” because they “wished to cash in their early
12 investment and stake in [Slack] as soon as possible”; and sold their shares in the direct listing,
13 respectively earning \$329 million, \$116 million, and \$39.6 million. ACAC ¶¶ 22, 25, 26, 30-34,
14 45, 48, 73.

15 As an initial matter, the Court is not persuaded that being a beneficiary of the indemnity and
16 insurance policies is relevant to allegations of control in relation to the violation at issue here,
17 namely misrepresentations or omissions in the Offering Materials. *See Paracor*, 96 F.3d at 1158,
18 1161 (finding “evidence that [defendant lender] had a strong hand in Casablanca’s debenture
19 offering,” on which bridge loan had been conditioned, unrelated to “indicia of control of Casablanca
20 in a broader sense”). Thus, the Court turns to the other control allegations.

21 Defendants identify a line of cases within this district demonstrating that ownership of a
22 minority of shares, a position on the Board, or a combination of both are insufficient to establish
23 control. *See In re Gupta Corp. Sec. Litig.*, 900 F.Supp. 1217, 1243 (N.D. Cal. 1994) (no
24 presumption of control from status as outside director, nor for minority shareholder with agent on
25 Board); *In re Splash Tech. Holdings, Inc. Sec. Litig.*, No. C 99-00109 SBA, 2000 WL 1727405, at
26 *16 (N.D. Cal. Sept. 29. 2000) (no control for one defendant serving on Board, nor for another
27 defendant owning a 20% amount of shares that declined through class period); *O’Sullivan v. Trident*
28 *Microsys., Inc.*, No. C 93-20621 RMW (EAI), 1994 WL 124453, at *19 (N.D. Cal. Jan. 31, 1994)

1 (no facts demonstrating exertion of control through 9.5% stock ownership or through agent placed
2 on Board).¹⁹

3 Plaintiff responds with two lower court cases within this Circuit finding sufficient control
4 allegations comparable to the facts here. *See Thomas v. Magnachip Semiconductor Corp.*, 167 F.
5 Supp. 3d 1029, 1048-49 (N.D. Cal. 2016) (defendant lost majority shareholder status shortly after
6 beginning of class period; placed designees on the Board, who signed the relevant documents; and
7 “used its control of [company] to cash out its investments . . . at enormous profits”); *In re Am.*
8 *Apparel, Inc. S’holder Litig.*, Case No. CV 10-06352 MMM (RCx), 2013 WL 10914316, at *34
9 (C.D. Cal. Aug. 8, 2013) (defendant held 20% ownership stake and designated two Board members
10 who signed relevant report).

11 The Court concludes that plaintiff’s pleading is sufficient under the lenient standard of 8(a).
12 *See In re Glob. Crossing, Ltd. Sec. Litig.*, 2005 WL 2990646, at *8 (S.D.N.Y. Nov. 7, 2005) (under
13 8(a) standard, “even if the specific facts alleged by plaintiffs, taken alone, would not be enough to
14 establish actual control . . . dismissal is improper as long as it is at least plausible that plaintiff could
15 develop some set of facts that would pass muster”) (discussed by *Am. Apparel*, 2013 WL 10914316,
16 at *37 n.262). Here, in addition to the plaintiff’s allegations of the traditional indicia of control,
17 plaintiff also alleges that a direct listing primarily enables the resale of existing shares by insiders
18 and early investors such as the VC Defendants. Plaintiff has alleged that the VC Defendants “caused
19 Slack to effectuate” this unusual listing in order to cash out their shares. The Court concludes that
20 it is plausible that a factual record of control can be developed through discovery here.

21 Accordingly, the Court DENIES defendants’ motion to dismiss for lack of Section 15
22 standing.

23 24 CONCLUSION

25 For the foregoing reasons and for good cause shown, defendants’ motion is GRANTED IN
26

27 ¹⁹ In *Golub v. Gigamon Inc.*, defendants had only a 15.3% ownership stake, and the alleged
28 contractual agreements granted defendants no control over the company. 372 F. Supp. 3d 1033,
1053 (N.D. Cal. 2019). However, the court dismissed the Section 15 claim because there was no
primary violation, and the control analysis is dicta.

1 PART and DENIED IN PART. If plaintiff wishes to amend the complaint, he must do so by **May**
2 **6, 2020.**

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4 **IT IS SO ORDERED.**

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6 Dated: April 21, 2020



SUSAN ILLSTON
United States District Judge

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United States District Court
Northern District of California