APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 2:21-cv-1197

ILIA KOLOMINSKY, *Individually and On Behalf of All Others Similarly Situated,*

Plaintiff,

v.

ROOT, INC., *et al.*,

Defendants.

Judge Michael H. Watson

Magistrate Judge Vascura

OPINION AND ORDER

Defendants Root, Inc. ("Root"), Alexander Timm, Daniel Rosenthal, Megan Binkley, Christopher Olsen, Doug Ulman, Elliot Geidt, Jerri DeVard, Larry Hilsheimer, Luis von Ahn, Nancy Kramer, Nick Shalek, and Scott Maw (collectively, the "Root Defendants"), jointly with Goldman Sachs & Co. LLC, Morgan Stanley & Co. LLC, Barclays Capital Inc., and Wells Fargo Securities, LLC's (the "Underwriter Defendants"; together with the Root Defendants, "Defendants") move to dismiss the Amended Complaint. ECF No. 57. For the reasons below, the Court **GRANTS** Defendants' motion.

I. BACKGROUND

A. Factual Background

Plumbers Local #290 Pension Trust Fund ("Plaintiff") brings this putative class action on behalf of all who purchased Root's Class A common stock traceable to the Registration Statement issued in connection with Root's initial public offering ("IPO") between October 28, 2020 (the date of the IPO) and August 12, 2021.

Root, a Columbus-based holding company founded in 2015, operates a technology company that "seeks to disrupt the traditional automobile insurance model by pricing and quoting insurance through a mobile phone app and using the app to collect driving data from Root's customers." Am. Compl. ¶¶ 4, 23, ECF No. 37. Through this model, Root believes it is better able to screen risky drivers compared to traditional automobile insurers like GEICO, Allstate, and Progressive. *Id.* Defendant Alexander Timm co-founded Root and served as Root's CEO and as a member of Root's board of directors (the "Board"); Defendant Daniel Rosenthal was Root's Chief Financial Officer at the time of the IPO, as well as a director on the Board; Defendant Megan Binkley was Root's Chief Accounting Officer at the time of the IPO; Defendants Christopher Olsen, Doug Ulman, Elliot Geidt, Jerri DeVard, Larry Hilsheimer, Luis von Ahn, Nancy Kramer, Nick Shalek, and Scott Maw were all directors on the Board at the time of the IPO. *Id.* ¶¶ 24, 27-37. Defendants Goldman Sachs & Co. LLC, Morgan Stanley & Co. LLC, Barclays Capital Inc., and Wells Fargo Securities, LLC served as underwriters and co-lead book running managers of the IPO. *Id.* ¶ 39.

On October 28, 2020, Root executed its IPO, and Root Class A common stock began trading on the

NASDAQ. *Id.* ¶ 60. Leading up to its IPO, Root filed a Registration Statement with the SEC, becoming effective on October 27, 2020. *Id.* ¶¶ 53-57.

Much of this case revolves around the language of the Registration Statement and certain public statements (and omissions) made by the Root Defendants preceding the IPO. Particularly important to Root, and central to this case, is Root's customer acquisition cost ("CAC"), which reflects the average cost of acquiring a new customer. *Id.* ¶¶ 73, 75-79, 106. CAC is a critical performance metric for newer companies like Root because it measures how well a company can improve its profitability as it continues to grow. *Id.* ¶ 75. A company's CAC is also critical to investors.

As articulated in the Registration Statement, Root's purportedly low CAC compared to traditional automobile insurance companies provided Root with a competitive advantage. *Id.* ¶¶ 79. Examples from the Registration Statement include:

- Within digital marketing we use data science models to dynamically bid on the basis of expected lifetime value. Over time we believe the ongoing data we accumulate through growth will fuel a pricing advantage for target customers, driving improved conversion ***and a cost of acquisition advantage in all channels.***
- Engaging our customers and prospective customers directly through the mobile device gives us access to an underutilized distribution channel, mobile, through which many incumbents have historically had difficulty profitably acquiring customers. Through our hyper-targeted, data-driven and ever-improving performance marketing capabilities, ***we have been able to acquire***

customers for below the average cost of doing so through each of the direct and agent-based channels.

- The efficiency of our customer acquisition strategy has resulted in a cost of acquisition advantage versus direct and agent channels. While our customer acquisition costs can vary by channel mix, by state or due to seasonality, over the period from August 2018 to August 2020 our average customer acquisition cost was $332. In the near term, as we expand our licensed footprint to 50 states, we will invest in our national brand, which will increase awareness, build credibility and support all four of our distribution channels.

Id. ¶¶ 106 (alteration in original).

But Root's CAC as of the IPO was higher—and would continue to be higher—than the $332 average disclosed in the Registration Statement. This cost increase was allegedly triggered by Root's planned nationwide expansion (at the time of the IPO, Root was licensed to sell insurance in 36 states). *Id.* ¶¶ 89-91; Registration Statement at 2, ECF No. 57-2. As alleged, Root's "increased marketing expenditures had caused Root's customer acquisition cost as of the IPO to be virtually the same as those of the traditional insurers that the Registration Statement stated the Company had a competitive advantage over in terms of customer acquisition costs." Am. Compl. at ¶ 91, ECF No. 31. Thus, Root's elevated CAC signaled the loss of its competitive advantage. *Id.* ¶ 107.

This nationwide marketing rollout began prior to the IPO, but Root allegedly did not disclose its increased marketing expenditures until after the IPO. *Id.*

¶¶ 93-94. Defendants Timm and Rosenthal did, however, participate in a "roadshow" (i.e., a series of meetings with prospective investors) prior to the IPO in which Defendant Timm discussed Root's focus on "becoming a national brand" and explained that, as part of those efforts, Root was "experimenting" with "some brand campaigns." *Id.* ¶ 124. Mr. Timm then noted that there was a "recent spike" in CAC arising "from some of this experimentation on brand." *Id.*

In addition to Defendant Timm's comments, Root's Registration Statement also indicated Root's intention to expand nationwide:

- [W]e intend to increase our presence in digital and traditional channel media and launch a national advertising campaign to build our brand awareness.
- We will continue to aggressively invest in domestic growth by becoming active in more states while creating brand awareness through a national marketing campaign.
- In the near term, as we expand our licensed footprint to 50 states, we will invest in our national brand, which will increase awareness, build credibility and support all four of our distribution channels.
- We are licensed in 36 states, of which we are currently active in 30 states, and our goal is to be licensed in all 50 states by early 2021.
- [W]e will incur additional expenses to support our growth[.]
- Our expansion within the United States and any future international expansion strategy

will subject us to additional costs and risks, and our plans may not be successful.

Registration Statement at 2, 9, 22, 28, 83, 120, ECF No. 57-2.

Along with the above representations, the Registration Statement included the following risk disclosures:

- You should not rely on forward-looking statements as predictions of future events. We have based the forward-looking statements contained in this prospectus primarily on our current expectations and projections about future events and trends that we believe may affect our business, financial condition and operating results.
- The marketing of our insurance products depends on our ability to cultivate and maintain cost-effective and otherwise satisfactory relationships with digital app stores, in particular, those operated by Google and Apple. As we grow, we may struggle to maintain cost-effective marketing strategies, and our customer acquisition costs could rise substantially.
- Our ability to attract new customers will depend on a number of factors, including the pricing of our products, offerings of our competitors, our ability to expand into new markets, and the effectiveness of our marketing efforts.
- We may lose existing customers or fail to acquire new customers.
- Our expansion into new markets may place us in unfamiliar competitive environments and involve various risks.

- [D]ue to other factors beyond our control, we may be unable to attract new customers rapidly and cost-effectively.

Id. at 22, 26-27, 65, 83, ECF No. 57-2.

Investors began learning of Root's increased marketing expenditures in late November 2020, when analysts reported that Root's CAC had risen above $500 as of the IPO and that Root's "heavy customer acquisition costs will result in elevated cash burn and net losses through 2023." *Id.* ¶¶ 94-95, 130-33. On December 1, 2020, in Root's first financial report as a publicly traded company, Defendant Rosenthal confirmed that Root's CAC for the third fiscal quarter, which closed prior to the IPO, was "elevated" due to "amplified brand spend" and would remain elevated "for the next two quarters." *Id.* ¶¶ 96. In Root's second financial report, Defendant Timm stated that Root "still ha[s] much work to do in the quarters and years ahead, particularly around . . . managing customer acquisition costs." *Id.* ¶ 97. Then on August 12, 2021, in a letter addressed to shareholders, Root stated that it had to reduce Root's profitability guidance for 2021 because Root needed "to take active steps to reduce our customer acquisition costs." *Id.* ¶¶ 100-01.

As of the IPO, Root's Class A common stock sold for $27.00 per share, resulting in over $600 million in net proceeds for Root and achieving a valuation for the company of approximately $6.7 billion. *Id.* ¶¶ 3, 143. Less than five months later, the stock traded at $12.00 per share. *Id.* ¶ 144. And, on November 18, 2021, a little more than a year after the IPO, Root's Class A common stock closed at just $4.43 per share. *Id.* ¶ 145.

B. Procedural Background

On November 19, 2021, Plaintiff filed its Amended Complaint. ECF No. 31. The Amended Complaint alleges violations of the Securities Act and the Exchange Act. *Id.* ¶ 2. More precisely, Plaintiff alleges: (1) violations of Section 11 of the Securities Act, against all Defendants, based on allegedly misleading statements about customer acquisition costs in the Registration Statement (Count I); (2) violations of Section 12(a)(2) of the Securities Act, against Root, Mr. Timm, Mr. Rosenthal and the Underwriter Defendants, based on the same allegedly misleading statements in the Registration Statement as well as Mr. Timm's roadshow statements (Count II); (3) violations of Section 15 of the Securities Act, against the Root Defendants (Count III); (4) violations of Section 10(b) of the Exchange Act, against Root, Mr. Timm, and Mr. Rosenthal (Count IV); and (5) violations of Section 20(a) of the Exchange Act, against Mr. Timm and Mr. Rosenthal (Count V). *Id.* at ¶¶ 758-73, ¶¶ 153-222. All claims are premised on purported pre-IPO misstatements and omissions concerning Root's customer acquisition costs.

On May 20, 2022, Defendants jointly move to dismiss Plaintiff's Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). ECF No. 57. Plaintiff filed its opposition, ECF No. 58, to which Defendants jointly replied, ECF No. 60. This matter is fully briefed and ripe for review.

II. STANDARD OF REVIEW

A. 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of actions that fail to state a claim upon which relief can be granted. While Rule 8(a)(2)

requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Ashcroft v. lqbal,* 556 U.S. 662, 697 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (clarifying plausibility standard articulated in *Twombly).* Further, "[a]lthough for purposes of a motion to dismiss [a court] must take all of the factual allegations in the complaint as true, [it is] not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678 (quoting *Twombly,* 550 U.S. at 555) (internal quotations omitted).

B. Pleading Securities Fraud

Regarding Plaintiff's claims sounding in fraud, Plaintiff must also satisfy Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that "in any complaint averring fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Yuhasz v. Brush Wellman, Inc.,* 341 F.3d 559, 563 (6th Cir. 2003) (quoting Fed. R. Civ. P. 9(b)). The requirement "reflects the rulemakers' additional understanding that, in cases involving fraud and mistake, a more specific form of notice is necessary to permit a defendant to draft a responsive pleading." *United States ex rel. SNAPP, Inc. v. Ford Motor* Co., 532 F.3d 496, 504 (6th Cir. 2008) (internal quotation marks omitted). The Sixth Circuit has explained that to satisfy Rule 9(b), a plaintiff must at a minimum "allege the time, place, and content of the alleged misrepresentation" as well

as "the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Bennett v. MIS Corp.,* 607 F.3d 1076, 1100 (6th Cir. 2010) (internal citations omitted). Plaintiffs may plead fraud based "upon information and belief," but the complaint "must set forth a factual basis for such belief, and the allowance of this exception must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." *Sanderson v. HCA-The Healthcare* Co., 447 F.3d 873, 878 (6th Cir. 2006) (internal quotation marks omitted).

In its analysis, the Court will address which claims sound in fraud and, therefore, must satisfy the more stringent requirements of Rule 9(b).

III. ANALYSIS

Defendants move to dismiss all of Plaintiff's claims. First, they assert that the Court should dismiss Plaintiff's claims brought under Section 11 of the Securities Act of 1933 (Count I) because Plaintiff fails to allege any actionable misstatement or omission in the Registration Statement. Mot. to Dismiss 12-29, ECF No. 57 Second, Defendants argue that Plaintiff's Section 12 claim (Count II), which largely relies on the same alleged misstatements and omissions as Plaintiff's Section 11 claim, should likewise be dismissed for the same reasons as Plaintiff's Section 11 claim. *Id.* at 30-32. Third, Defendants assert that the Court should dismiss Plaintiff's claims under Section 10(b) of the Securities Act (Count IV) because Plaintiff has not pleaded a materially false or misleading statement or omission attributable to any Defendant or, in the alternative, has not properly pleaded scienter. *Id.* at 33-36. Finally, Defendants argue that Plaintiff's control-person claims under Section 15 of the Securities Act (Count III) and Section 20 of the Exchange Act (Count

V) should be dismissed because Plaintiff fails to plead predicate violations of the Securities Act or Exchange Act. *Id.* at 36. The Court will address each argument in turn.

A. Plaintiff's Claims under Sections 11 and 12(a)(2)

1. Pleading Standard

The Court will begin by addressing the threshold issue of whether the Rule 8(a) pleading standard or the more demanding Rule 9(b) standard applies to Plaintiff's Sections 11 and 12(a)(2) claims. Plaintiff is correct that the Rule 8(a) plausibility pleading standard applies in the absence of allegations of fraud. *In re EveryWare Global, Inc. Secs. Litig.,* 175 F. Supp. 3d 837, 869 (S.D. Ohio Mar. 30, 2016) (citations omitted). But where a claim sounds in fraud, Plaintiff must satisfy Rule 9(b)'s heightened pleading requirements. *Ind. State Dist. Council of Laborers v. Omnicare, Inc.,* 583 F.3d 935, 948 (6th Cir. 2009).

Here, Plaintiff contends that Rule 8(a) applies because the only mention of fraud in the Amended Complaint consists of express statements *disavowing* any fraud. ECF No. 58 at 9-11. Defendants, however, assert that Plaintiff's disavowals are inadequate to trigger Rule 8(a) given that the crux of Plaintiff's Sections 11 and 12(a)(2) claims are that Defendants concealed or misconstrued facts in order to boost the price of its Class A common stock leading up to the IPO. ECF No. 57 at 11-12.

The Court agrees with Defendants. Plaintiff's "blanket disavowal in the complaint that the claims do not allege fraud . . . is insufficient to rescue them from the requirements of Rule 9(b)." *Local 295/Local 851 IBT Emplr. Grp. Pension Trust & Welfare Fund v. Fifth*

Third Bancorp, 731 F. Supp. 2d 689, 709 (S.D. Ohio Aug. 10, 2010). The language used in Plaintiff's Amended Complaint—its "wording and imputations"—is "classically associated with fraud." *Rombach v. Chang,* 355 F.3d 164, 172 (2d Cir. 2004). For example, Plaintiff alleges that: Mr. Timm's roadshow statements were "misleading;" the Registration Statement contained "materially false and misleading statements and omissions"; the Registration Statement was "inaccurate and misleading" and "untrue"; and Defendants operated a "fraudulent scheme." Am. Compl. at ¶¶ 11, 105-123, 155, 187, ECF No. 31. Given that the gravamen of Plaintiff's Amended Complaint sounds in fraud, "Plaintiffs cannot so facilely put the fraud genie back in the bottle." *Local* 295, 731 F. Supp. 2d at 709 (quoting *In re Alstom SA Sec. Litig.,* 406 F. Supp. 2d 402, 410 (S.D.N.Y. 2005)). Accordingly, Plaintiff's Section 11 and Section 12(a)(2) claims are subject to the particularity requirements of Rule 9(b).

2. Defendants' Allegedly False or Misleading Statements and Omissions

Because Plaintiff's Sections 11 and 12 claims largely rest on the same purported false and misleading statements and omissions, with the exception of Defendants Timm and Rosenthal's roadshow statements, which apply solely to the Section 12 claim, the Court will consider the parties' arguments regarding these claims together. *See* Am. Compl. ¶¶ 153-176, ECF No. 31.

"Claims under sections 11 and 12(a)(2) are . . . Securities Act siblings with roughly parallel elements." *Sohol v. Yan,* No. 1:15-cv-393, 2016 U.S. Dist. LEXIS 56049, *19 (N.D. Ohio Apr. 27, 2016) (quoting *In re Morgan Stanley Info. Fund Sec. Litig.,* 592 F.3d 347, 359 (2d Cir. 2010)). "So long as a plaintiff establishes one of the three bases for liability under these

provisions—(1) a material misrepresentation; (2) a material omission in contravention of an affirmative legal disclosure obligation; or (3) a material omission of information that is necessary to prevent existing disclosures from being misleading—then . . . the general rule is that an issuer's liability . . . is absolute." *Id.* (quoting *Litwin v. Blackstone* Group, L.P., 634 F.3d 706, 715-16 (2d Cir. 2011)); *see also* 15 U.S.C. §§ 77k(a), 77l(a)(2). Whether a misleading statement or omission is material "depends on the significance the reasonable investor would place on the withheld . . . information." *Benzon v. Morgan Stanley Distribs.,* 420 F.3d 598, 609 (6th Cir. 2005) (quoting *Helwig v. Vencor, Inc.,* 251 F.3d 540, 555 (6th Cir. 2001) *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rts., Ltd.,* 551 U.S. 308 (2007)). In making this determination, "the critical question is whether they would have 'significantly altered the total mix of information made available." *Id.* (quoting *Helwig,* 251 F.3d at 563).

A plaintiff may also support a Section 11 claim where the defendant fails to comply with certain SEC disclosure requirements. Under Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii), a registrant must "[d]escribe any known trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations." Item 105 requires that a prospectus include "a discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a). And Rule 408(a) of Regulation C provides that "[i]n addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in

light of the circumstances under which they are made, not misleading." 17 C.F.R. § 230.408(a).

a. Alleged Misstatements in the Registration Statement

The Court will begin by addressing each alleged misstatement contained it the Registration Statement, with the understanding that Plaintiff has used bold and italicized typeface to highlight the actionable portion of the statement, beginning with the following:

> Within digital marketing we use data science models to dynamically bid on the basis of expected lifetime value. Over time we believe the ongoing data we accumulate through growth will fuel a pricing advantage for target customers, driving improved conversion and ***a cost of acquisition advantage in all channels***.

Am. Compl. ¶ 106, ECF No. 31. Plaintiff asserts that this statement is actionable because, by highlighting Root's CAC, Defendants had a duty to speak fully and truthfully. That is, Defendants should have disclosed that Root's CAC had increased significantly as of the IPO and that it would remain elevated thereafter, thereby negatively impacting Root's financial performance and eliminating Root's competitive advantage. *Id.* ¶ 107.

The Court finds this statement unactionable because of the "bespeaks caution" doctrine. As an initial matter, the Court must address the continued viability of the "bespeaks caution" doctrine. The Private Securities Litigation Reform Act ("PLSRA") contains the "Safe Harbor" provisions which, like the "bespeaks caution" doctrine, protect securities-litigation defendants who make certain forward-looking statements. 17 U.S.C.

§§ 77z-2, 78u-5. The Safe Harbor provision is a codification of the judicially-created "bespeaks caution" doctrine and largely overlaps with the same. *In re BioMarin Pharm. Inc. Sec. Litig.,* No. 3:20-CV-06719-WHO, 2022 WL 597037, at *4 (N.D. Cal. Feb. 28, 2022) ("[T]he bespeaks caution doctrine was codified into statute as the PSLRA's safe harbor."); *In re Energy Recovery Inc. Sec. Litig.,* No. 15-CV-00265-EMC, 2016 WL 324150, at *16 (N.D. Cal. Jan. 27, 2016) ("The bespeaks caution doctrine provides for immunity in essentially the same circumstances as does the safe harbor provision."). There are some important differences, however; relevant here, the Safe Harbor provisions expressly exclude statements "made in connection with an initial public offering" from its protection. 17 U.S.C. §§ 77z-2(b), 78u-5(b).

It is not at all clear whether the "bespeaks caution" doctrine survived its codification in the PSLRA. As a general rule, "Congress is understood to legislate against a background of common-law adjudicatory principles" and courts "may take it as given that Congress has legislated with an expectation that the principle[s] will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino,* 501 U.S. 104, 108 (1991). Such evidence of congressional purpose, however, need not be "clear and manifest," nor need Congress "affirmatively proscribe the common-law doctrine at issue." *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 316-17 (1981); *United States v. Texas,* 507 U.S. 529, 534, (1993) (internal quotation marks and citations omitted).

Instead, courts "start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law." *City of Milwaukee,* 451 U.S. at 317.

This assumption is especially strong with rules that "Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625-26 (1978). In short, when "Congress addresses a question previously governed by a decision rested on federal common law," courts "have no authority to substitute [their] views for those expressed by Congress in a duly enacted statute." *City of Milwaukee,* 451 U.S. at 314; *Mobil Oil Corp,* 436 U.S. at 625-26.

Given these principles, if the Court were considering the continued viability of the "bespeaks caution" doctrine in a vacuum, it might conclude that the Safe Harbor provisions abrogate the "bespeaks caution" doctrine. That is, Congress has specifically addressed a question (whether certain forward-looking statements are actionable in securities litigation) that was previously governed by federal common law (the "bespeaks caution" doctrine). Thus, the reasoning would go, federal courts no longer have authority to use their common law as a substitute for the statutory Safe Harbor provisions. In addition, using the "bespeaks caution" doctrine in cases expressly excluded from the Safe Harbor provisions (like this one) severely undercuts Congress's desire to not protect forward-looking statements in those excluded situations.

This Court is not considering the issue in a vacuum, however. Federal courts across the country have decided that the "bespeaks caution" doctrine survived its codification as the safe-harbor provisions in its entirety. *See, e.g., Kurtzman v. Compaq Computer Corp.,* No. CIV.A. 99-1011, 2002 WL 32442832, at *22 (S.D. Tex. Mar. 30, 2002) ("The bespeaks caution, doctrine . . . developed prior to the PSLRA and survives today." (internal citation omitted); *Gavish v. Revlon, Inc.,* No. 00 CIV. 7291 (SHS), 2004 WL 2210269, at *21

(S.D.N.Y. Sept. 30, 2004) ("The PSLRA's safe harbor was modeled in part after, but not meant to displace, the judicial bespeaks caution doctrine." (cleaned up)). Against this backdrop, this Court will also apply the "bespeaks caution" doctrine here.

Under the "bespeaks caution" doctrine, Defendants are excused from liability for "projections, statements of plans and objectives, and estimates of future economic performance" so long as the statement is identified as "forward-looking" and is accompanied by "meaningful cautionary statements." *Helwig,* 251 F.3d at 547; *see also In re Humana, Inc. Sec. Litig.,* No. 3:08CV-162, 2009 U.S. Dist. LEXIS 53535, *34 (W.D. Ky. June 15, 2009) (noting that meaningful cautionary language "must convey substantive factors that realistically could cause results to differ materially from those projected in the forward-looking statements").

Both elements are met here. First, the statement here is forward-looking because it expressly reflects Defendants' expectation that ongoing data accumulation *"will fuel"* a CAC advantage *"over time."* Second, alongside this statement was meaningful cautionary language, such as "[y]ou should not rely on forward-looking statements as predictions of future events," Root "may struggle to maintain cost effective marketing strategies, and our customer acquisition costs could rise substantially," and Root's "ability to attract new customers will depend on a number of factors, including . . . our ability to expand into new markets, and the effectiveness of our marketing efforts." Registration Statement at 27, 65, 83, ECF No. 57-2. Further, the Registration Statement disclosed that Root's expansion "into new markets" would "subject [Root] to additional costs and risks, and [Root's] plans may not be successful." *Id.* at 13. This is not mere boiler-

plate language. Rather, the Registration Statement's cautionary language was tailored specifically to Root, addressed substantive factors that could affect projections—i.e., Root's planned nationwide advertising campaign—and therefore was sufficiently "meaningful." Accordingly, this statement from the Registration Statement does not give rise to liability under Sections 11 or 12(a)(2).

Next, Plaintiff takes issue with this statement from the Registration Statement:

> Engaging our customers and prospective customers directly through the mobile device gives us access to an underutilized distribution channel, mobile, through which many incumbents have historically had difficulty profitably acquiring customers. Through our hyper-targeted, data-driven and ever-improving performance marketing capabilities, ***we have been able to acquire customers for below the average cost of doing so through each of the direct and agent-based channels.***

Am. Compl. ¶ 106, ECF No. 31. Like the previous statement, Plaintiff takes the position that Defendants' reference to its low CAC triggers a duty to disclose that Root's CAC had increased substantially as of the IPO and would continue at an elevated level thereafter. *Id.* ¶ 107. This elevated CAC, in turn, knocks out Root's competitive advantage over traditional automobile insurers. *Id.*

The Court finds that this statement, which concerns Root's past performance, does not give rise to liability under the Securities Act. It is axiomatic that "a violation of federal securities law cannot be premised

upon a company's disclosure of accurate historical data." *In re Sofamor Danek Group,* 123 F.3d 394, 401 n.3 (6th Cir. 1997); *see also In re Ford Motor Co. Sec. Litig.,* 381 F.3d 563, 570 (6th Cir. 2004) ("[T]he disclosure of accurate historical data does not become misleading even if . . . [the company might predict] less favorable results . . . in the future.") (quoting *In re Sofamor,* 123 F.3d at 401 n.3). Here, the challenged statement simply states an undisputed fact: Root, *in the past,* has had a below-average CAC through each of its channels in comparison to traditional insurers. Plaintiff asserts that this language created a duty to disclose that Root no longer maintained a CAC advantage in the near or long term. But there is no "duty to update" statements about past performance, so long as those statements "referred only to past events or conditions and did not imply anything about future circumstances." *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scot. Grp.,* 783 F.3d 383, 390 (2d Cir. 2015). This statement falls within the category of statements referenced in *IBEW Local* and therefore is not actionable.

Like the previous two statements, Plaintiff asserts that the following statement from the Registration Statement required Defendants to disclose that Root's CAC had increased significantly leading up to the IPO, resulting in the loss of its competitive advantage:

> Mobile is the fastest growing retail channel in the United States, as customers spend less time in front of computers and utilize smart phones for more convenient shopping. We therefore designed a mobile-directed customer acquisition strategy, ***delivering customer acquisition costs below the average cost***

> ***of doing so through each of the direct and agent channels[.]***

Am. Compl. ¶ 106, ECF No. 31.

This statement fails to be actionable for the same reason the prior statement was unactionable—namely, the statement relates to Root's past performance and concerns facts that neither party disputes. The statement unambiguously provides that Root *"designed"* a mobile-centric customer generating strategy that was "delivering" CAC superior to the average CAC associated with "direct and agent channels." This statement was true as of the IPO, and Plaintiff does not allege otherwise. As such, it does not give rise to liability under the Securities Act.

Plaintiff also challenges this statement contained in the Registration Statement:

> **The efficiency of our customer acquisition strategy has resulted in a cost of acquisition advantage versus direct and agent channels.** While our customer acquisition costs can vary by channel mix, by state or due to seasonality, over the period from August 2018 to August 2020 our average customer acquisition cost was $332. In the near term, as we expand our licensed footprint to 50 states, we will invest in our national brand, which will increase awareness, build credibility and support all four of our distribution channels.

Id. Plaintiff does not challenge the accuracy of Root's historical CAC average of $332 for the period between August 2018 and August 2020; instead, Plaintiff argues that this representation of Root's CAC advantage created a duty to disclose that there was no CAC

advantage in the near or long term because of Root's planned national expansion.

But this statement does not give rise to such a duty. Defendants do not have a duty to update accurate information unless, without the update, the facts actually disclosed would be rendered misleading—and this statement, which is expressly limited to a 24-month period, is not misleading. Indeed, accurate information, such as the information here, "is not rendered misleading by a failure to disclose conditions that might render future results less favorable." *City of Pontiac Gen. Emples. Ret. Sys. v. Stryker Corp.,* 865 F. Supp. 2d 811, 823 (W.D. Mich. Mar. 30, 2012); *McDonald v. Kinder-Morgan, Inc.,* 287 F.3d 992, 998 (10th Cir. 2002) ("It is well-established that the accurate reporting of historic successes does not give rise to a duty to further disclose contingencies that might alter the revenue picture in the future."). That Plaintiff would have liked the Registration Statement to have disclosed Root's CAC for the period following August 2020 does not create an affirmative duty to do so. *See Walker v. L Brands, Inc.,* No. 2:19-CV-3186, 2020 WL 6118467, at *17 (S.D. Ohio Oct. 16, 2020) ("[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact." (quoting *In re Time Warner, Inc. Sec. Litig.,* 9 F.3d 259, 267 (2d Cir. 1993)). Finally, the Registration Statement explicitly warned investors against relying on Root's past performance when setting expectations for the future. Registration Statement at 76, ECF No. 57-2 ("[O]ur historical results are not necessarily indicative of the results that may be expected for any period in the future."). The Court therefore finds that this challenged statement is not actionable.

The next challenged statements concern Root's planned national advertising campaign:

> Our long-term growth will depend, in large part, on our continued ability to attract new customers to our platform. We intend to continue to drive new customer growth by leveraging our differentiated consumer experience and our telematics-based pricing. Additionally, our proprietary dataset will continue to scale as we grow, enabling us to enhance our predictive models that will further improve pricing and attract potential new customers. We will also continue to target attractive potential customer segments through our digital marketing channels and strategic partnerships. ***Similarly, we intend to increase our presence in digital and traditional channel media and launch a national advertising campaign to build our brand awareness.***
>
> * * *
>
> In the near term, ***as we expand our licensed footprint to 50 states, we will invest in our national brand,*** which will increase awareness, build credibility and support all four of our distribution channels. Furthermore, we continue to invest in the technology and data science behind our distribution with A/B tests, dynamic bidding models, and rapid updates and iterations, supporting differentiated cost of customer acquisition over the long term.

Am. Compl. ¶ 108, ECF No. 31.

According to Plaintiff, by discussing Root's national advertising efforts, Defendants had a duty to disclose that Root's planned expansion throughout the United States had already caused Root's CAC to significantly increase as of the IPO and would remain elevated thereafter, thereby negatively influencing Root's financial outlook. *Id.* ¶ 109. The Court disagrees. These are accurate, forward-looking statements protected by the bespeaks caution doctrine. *See Helwig,* 251 F.3d at 547. First, these statements unequivocally address Root's future plans: "Our *long-term* growth," *"[w]e intend* to continue," "our proprietary data set *will continue* to scale," "we *will* also continue to target," "we *intend* to increase our presence," "we *will* invest in our national brand." Second, the Registration Statement accompanied these forward-looking statements with meaningful cautionary language. Registration Statement, ECF No. 57-2 at 83 ("Our ability to attract new customers will depend on a number of factors, including . . . the effectiveness of our marketing efforts"), at 22 ([W]e will incur additional expenses to support our growth"; "We may lose existing customers or fail to acquire new customers"), at 27 ("As we grow, we may struggle to maintain cost-effective marketing strategies, and our customer acquisition costs could rise substantially."). Thus, these forward-looking statements accompanied by meaningful cautionary language, which Plaintiff does not allege to be inaccurate, did not impose on Defendants a duty to disclose additional information.[1]

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[1] Plaintiff's assertion that, as of the IPO, a long-term increase in Root's CAC had already materialized is particularly weak. In making this argument, Plaintiff relies almost exclusively on *post*-IPO disclosures about CAC levels *after* the IPO. ECF No. 58 at 25-27. The lone pre-IPO allegation indicating an increase in CAC is Defendant Timm's statement acknowledging a "recent spike" in CAC attributed to marketing experimentation. Am. Compl. ¶ 124,

Outside of the bespeaks caution doctrine, these statements would remain unactionable because the Registration Statement warned investors of the risk that increased marketing expenditures could result in an increase to Root's CAC. The Registration Statement disclosed Root's planned "national marketing campaign," noted that Root "will incur additional expenses to support our growth," and warned investors that, as Root grows, "it may struggle to maintain-cost effective marketing strategies, and our customer acquisition costs could rise substantially." *Id.* at 9, 22, 27, 83. "[W]hen a registration statement warns of the exact risk that later materialized," as is the case here, "a [s]ection 11 claim will not lie as a matter of law." *In re ProShares Trust Sec. Litig.,* 728 F.3d 96, 102 (2d Cir. 2013). As such, the Court finds these challenged statements unactionable.

The final statement Plaintiff challenges from the Registration Statement is contained within the section titled "Risk Factors," and it provides: "As we grow, we ***may*** struggle to maintain cost-effective marketing strategies, and our customer acquisition costs ***could*** rise substantially." Am. Compl. ¶ 110, ECF No. 31 (emphasis in original). Plaintiff contends that this statement was materially false because Root's CAC "had significantly increased as of the IPO, and would remain elevated thereafter, thereby negatively impacting

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ECF No. 31. Plaintiff's Amended Complaint, however, fails to adequately allege that a single month's increase in CAC resulted in a material increase to Root's long-term average CAC. Moreover, because Root's public statements leading up to the IPO appear to have been consistent with its data, Defendants "need not present an overly gloomy or cautious picture of current performance and future prospects." *Albert Fadem Trust v. Am. Elec. Power Co.,* 334 F. Supp. 2d 985, 1026 (S.D. Ohio Sept. 10, 2004) (citation omitted).

Root's operations and financial performance, because Root had substantially boosted its marketing expenditures as part of the Company's expansion throughout the United States." *Id.* ¶ 111. In other words, Plaintiff argues that this statement gives rise to liability because the "hypothetical risk" described in the statement "had already materialized as of the IPO." *Id.*

The Court finds the above statement unactionable. This statement, like several of the previously challenged statements, is a forward-looking statement concerning Root's future CAC. As Root grows, Root certainly could struggle to maintain cost-effective marketing strategies and its CAC could increase substantially—but this prediction about Root's future could not have materialized as of the IPO. Moreover, this statement is a risk factor, and Plaintiff has not shown how its allegations support that this risk factor itself is false. *See Zeid v. Kimberley,* 930 F. Supp. 431, 437 (N.D. Cal. 1996) ("Defendants' warnings regarding potential adverse factors are not actionable as a matter of law" where plaintiffs were asserting that defendants should have stated that certain adverse factors "are" affecting rather than "may" affect the financial statements.).

In making its argument that the "hypothetical risk" had already materialized, thus rendering the challenged statement false or misleading, Plaintiff relies on *In re Facebook, Inc., IPO Sec. & Deriv. Litig.,* 986 F. Supp. 2d 487 (S.D.N.Y. 2013) and *Galestan v. OneMain Holdings, Inc.,* 348 F. Supp. 3d 282 (S.D.N.Y. 2018). Although those cases are factually similar to this case, the Court ultimately declines to follow these out-of-circuit cases.

In sum, Plaintiff has failed to allege that the challenged statement is false or misleading. The Court

instead finds that the statement is forward-looking and accompanied by meaningful cautionary language, and therefore fails to be actionable under the Securities Act.

b. Roadshow Statements

The Court next addresses the alleged misstatements and omissions arising from Root's roadshow, which pertain to Plaintiff's claim under Section 12(a)(2). Plaintiff asserts that Defendant Timm misled prospective investors when he stated:

> On slide 19 you'll also see we do believe that becoming a national brand is important and we do believe we can do that in a very differentiated way that is not gimmicky. So really Root is based on fairness. What you see here, on the left side of slide 19, is a bit of a taste for our brand. *Judge me by the way I drive, not my job. Age is just a number. Phillip isn't. Root's all about you.* Those are some brand campaigns that ***we're going to be experimenting with***. We don't believe we will ever be at the level of brand spend of a Geico or Progressive. We think we'll always be more performance oriented, but we also believe that there still is value to becoming a recognized brand and so ***we will intelligently experiment with the brand channel.***

Am. Compl. ¶ 124, ECF No. 31. Plaintiff contends that these bolded statements were inaccurate statements of material fact because Root's increased CAC was not caused by "marketing experimentation," but rather by a "sustained increase in marketing expenditures as part of the Company's expansion throughout the United States that was set to continue as Root became

a publicly-traded company and thereafter had increased, and would cause to remain elevated, Root's customer acquisition costs beyond those incurred by traditional insurers." *Id.* ¶ 125. Plaintiff also argues that Root's mention of its CAC triggered a duty to speak fully and truthfully regarding those costs. *Id.*

The Court disagrees. The above statement is protected under the bespeaks caution doctrine—that is, the statement is forward-looking and accompanied by meaningful cautionary language. *See Hetwig,* 251 F.3d at 547. First, these statements are forward-looking; they refer to Root's intention to experiment with brand campaigns in connection with *"becoming* a national brand" and that Root *"will* intelligently experiment with the brand channel." Am. Compl. ¶ 124, ECF No. 31 (emphasis added). Moreover, Root included a page in the Registration Statement titled "**SPECIAL NOTE REGARDING FORWARD-LOOKING STATEMENTS**," which specifically identifies statements concerning Root's "ability to maintain and enhance our brand and reputation," and its "ability to maintain . . . marketing efficiency" as forward-looking. Registration Statement at 64, ECF No. 57-2. This challenged statement, addressing matters identified as forward-looking and prefaced as Root's thoughts and beliefs, puts a reasonable investor on notice that Root is making a forward-looking statement. *See Slayton v. Am. Express* Co., 604 F.3d 758, 769 (2d Cir. 2010) (concurring with the SEC in that "[t]he use of linguistic cues like 'we expect' or 'we believe,' when combined with an explanatory description of the company's intention to thereby designate a statement as forward-looking, generally should be sufficient to put the reader on notice that the company is making a forward-looking statement").

Second, these statements are accompanied by meaningful cautionary language in the Registration Statement. Plaintiff, however, argues that cautionary language within the Registration Statement cannot immunize representations made *outside* of the Registration Statement, such as Defendant Timm's roadshow statements. ECF No. 58 at 38. Plaintiff, however, does not cite to any binding caselaw for this proposition, and the case it does cite undermines its own position. In *P. Stolz Family P'ship L.P. v. Daum,* the Second Circuit affirmed the district court's dismissal of several Section 12(a)(2) claims pursuant to the bespeaks caution doctrine. 355 F.3d 92 (2d Cir. 2004). At issue were defendants' oral representations that it purportedly had hired an investment bank to do a $30 million financing and to subsequently take the company public, which would raise an additional $50 to $100 million. *Id.* at 97. After finding that several of the 12(a)(2) allegations rested on forward-looking statements, the Second Circuit turned to Defendants' prospectus and subscription agreement in search of meaningful cautionary language. *Id.* at 98. The documents contained such language, prompting the Second Circuit to hold that "[a]ny *oral* representations concerning a sought-after $30 million or a future IPO (as opposed to the existence of an agreement to try to plan an IPO) were neutralized by [the prospectus and subscription agreement's] cautionary statements." *Id.* (emphasis added). Thus, in light of the Second Circuit's application of the bespeaks caution doctrine in *P. Stolz,* and in the absence of any binding caselaw to the contrary, the Court will consider Defendant Timm's roadshow statements alongside the statements contained in the Registration Statement.

The Court reiterates its earlier conclusion that the Registration Statement contains meaningful cautionary

language that precisely addressed the risks that Plaintiff alleges. The Registration Statement cautioned that Root "may struggle to maintain cost effective marketing strategies, and our customer acquisition costs could rise substantially," and Root's "ability to attract new customers will depend on a number of factors, including . . . our ability to expand into new markets, and the effectiveness of our marketing efforts." Registration Statement at 27, 83, ECF No. 57-2. Root also explicitly warned investors that they "should not rely on forward-looking statements as predictions of future events. *Id.* at 65. Additionally, the Registration Statement disclosed that Root's expansion "into new markets," would "subject [Root] to additional costs and risks, and [Root's] plans may not be successful." *Id.* at 13. To be sure, vague disclaimers of general risks do not remove the threat of liability. *Lockhart v. Garzella,* No. 3:19CV-00405, 2022 WL 1046766, at *11 (S.D. Ohio Apr. 7, 2022).

But these warnings are company-specific and "based on a realistic description of the risks applicable to the particular circumstances," and are therefore protected under the bespeaks caution doctrine. *See id.* Accordingly, Defendant Timm's statement does not give rise to Section 12(a)(2) liability.

Plaintiff also takes issue with the following statement from the roadshow:

> And you can see the results on the right-side of the page. Our customer acquisition cost has maintained well below the direct average and so we really are more competitive. ***You see the recent spike? That is from some of this experimentation on brand that you see over here on the left side of the page***. And again, we're constantly testing new

> marketing channels and ***we'll continue to do that short term***. But we believe -- and we've seen long term -- that ***we do have the ability to keep our customer acquisition costs much lower than our competitors***.

Am. Compl. ¶¶ 124, 127, ECF No. 31. Plaintiff asserts that Defendant Timm's reference to the "recent spike" in CAC, coupled with the plan to continue experimenting on brand in the "short term," were inaccurate statements of material fact because Root's sustained increase in marketing expenditures had caused the increase to its CAC, and such increase would remain in place, thereby eliminating Root's competitive advantage. *Id.* ¶ 126. Plaintiff also argues that Defendant Timm's statement that Root has "the ability to keep our customer acquisition costs much lower than our competitors" was an inaccurate statement of material fact because, by September 2020, Root had lost its competitive advantage over traditional insurers in terms of CAC. *Id.* ¶ 128.

The Court finds the challenged statement to be unactionable. Beginning with the "recent spike" statement, this statement does not give rise to liability under Section 12(a)(2) because it is an accurate statement that is not misleading. Defendant Timm directly attributed the increase in CAC to "experimentation on brand" in connection with "becoming a national brand"—i.e., Root's planned national marketing campaign. *Id.* ¶ 124. Given that Defendant Timm unambiguously stated that the spike in costs was a consequence of Root "becoming a national brand," Plaintiff's attempt to characterize the statement as false falls short.

Plaintiff also insists that Defendant Timm's labeling of the experimentation as "short term" was an

inaccurate statement of material fact because the marketing campaign was "set to continue long-term." Resp. 35-36, ECF No. 58. But Plaintiff offers no facts supporting that, at the time Defendant Timm made the statement, the marketing experimentation would be long-term. At best, Defendant Timm's statement indicated that, so long as Root was experimenting with "becoming a national brand," Root's elevated CAC could persist—but this understanding does not automatically mean that Defendant Timm's statement was inaccurate *when made.*

Plaintiff next argues that Defendant Timm's statement concerning Root's "ability to keep our customer acquisition costs much lower than our competitors" is actionable. It is not. This statement is mere corporate puffery that is unactionable as a matter of law. *In re Ford Motor* Co. *Sec. Litig.,* 381 F.3d 563, 570-71 (6th Cir. 2004) ("Courts everywhere 'have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace - loosely optimistic statements that are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available.") (citation omitted); *see also In re Envision Healthcare Corp. Sec. Litig.,* No. 3:17-CV-01112, 2019 WL 6168254, at *9 (M.D. Tenn. Nov. 19, 2019) ("Vague predictions of positive future results cannot engender reasonable reliance by investors."). Defendant Timm's statement, when read in context, speaks to his long-term belief that Root can maintain CAC lower than its competitors: "But we believe -- and we've seen long term -- that we do have the ability to keep our customer acquisition costs much lower than our competitors." This is vague puffery by an executive

that is immaterial as a matter of law. *See, e.g., Gregory v. ProNAi Therapeutics Inc.,* 297 F. Supp. 3d 372, 399 (S.D.N.Y. 2018) (statement that nature of company's business gave it "competitive advantages" was puffery); *Okla. Firefighters Pension & Ret. Sys. v. Xerox Corp.,* 300 F. Supp. 3d 551, 569 (S.D.N.Y. 2018) (company's belief in its "competitive advantage" was puffery); *In re Cybershop.com Sec. Litig.,* 189 F. Supp. 2d 214, 232 (D.N.J. 2002) (characterizing defendants' statement that new business relationship "will . . . driv[e] [its] top line growth and increas[e] margins by lowering [its] customer acquisition costs" as "puffery").

For the reasons stated above, the Court finds that Defendant Timm's roadshow statements do not engender Section 12(a)(2) liability.

c. Alleged Omissions

The Amended Complaint also sets forth certain material omissions that Plaintiff argues Defendants had a duty to disclose:

> Defendants failed to disclose that Root's customer acquisition costs had significantly increased as of the IPO, and would remain elevated thereafter, thereby negatively impacting Root's operations and financial performance, because Root had substantially boosted its marketing expenditures as part of the Company's expansion throughout the United States. Furthermore, Root's elevated customer acquisition costs meant the Company possessed no competitive advantage on this basis over traditional insurers, thereby negatively impacting Root's financial operations and performance. Accordingly, these statements omitted material information from investors in Root Class A common stock in or traceable

> to the IPO, thereby rendering these statements materially incomplete and misleading.

Am. Compl. ¶¶ 107, 126, 129, ECF No. 31.

While the Court has largely addressed Plaintiff's arguments pertaining to these alleged omissions in other sections of this Opinion and Order, the Court will briefly do so again here. First, the Court begins by noting that Root did not have a duty to disclose Root's September 2020 "spike" in CAC. This is so despite having disclosed its CAC average for the period between August 2018 and August 2020 because this disclosure was both accurate and not misleading. *See* Section III.A.b.i. Moreover, Plaintiff fails to allege that a one-month increase in CAC meant that, at the time of the IPO, Root's long-term average CAC had materially increased. *See* Section III.A.b.i n.2. Second, notwithstanding the absence of a duty to update its CAC, Root nevertheless did so when Defendant Timm disclosed to investors that Root had experienced a "recent spike" to its CAC in connection with its national marketing campaign. *See* Section III.A.b.ii.

Third, the Registration Statement also warned investors that Root was engaging in a national marketing campaign that could result in elevated CAC in the long term. *See* Section III.A.b.i.

Fourth, concerning Root's alleged loss of its competitive advantage, Plaintiff fails to allege any facts suggesting that Root no longer had a competitive CAC as compared to other channels as of the IPO. What is alleged speaks exclusively to Root's short-term increase in its *own* CAC due to the nationwide marketing campaign; the Amended Complaint is silent as to whether this elevated CAC eliminated Root's advantage as to *other* channels as of the IPO. Put differently, the Amended

Complaint places Root's fluctuating CAC in a vacuum, which is insufficient to allege that it no longer possessed a competitive advantage vis-à-vis other channels in the insurance industry.

Fifth, also with respect to Root's alleged loss of its competitive advantage as of the IPO, Plaintiff fails to allege any facts that Root's short-term increase in CAC meant that it could not, *in the long term,* maintain competitively low CAC. Given the absence of any factual allegations indicating that Root's future predictions were incorrect or that Root should have made a differing prediction leading up to the IPO, coupled with the forward-looking and puffery nature of such a prospective assessment, Root had no obligation to disclose that it no longer possessed a competitive advantage that was negatively impacting Root's financial operations and performance. *See* Sections III.A.b.i–ii.

All told, Plaintiff's alleged omissions do not subject Defendants to liability under the Securities Act because, to the extent Defendants did not already disclose any alleged omission, Defendants had no duty to do so. And to the extent Plaintiff argues that Defendants should have disclosed the loss of their competitive advantage, Plaintiff fails to allege sufficient facts demonstrating this loss as of the IPO or that Defendants could not, in the long term, sustain a competitively low CAC.

3. Defendants' allegedly false or misleading statements and omissions do not give rise to liability under Sections 11 and 12(a)(2)

Considering the Court's findings in Section III.A.b., the Court holds that the allegedly false or misleading statements and omissions identified in the Amended

Complaint are not actionable under the Securities Act. This is so even when considering the SEC disclosure requirements, which Plaintiff also asserts impose Section 11 liability on Defendants. Beginning with Item 303, which requires disclosure "where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations,"[2] the Registration Statement complied with Item 303 because the Registration Statement disclosed Root's planned nationwide marketing campaign. *See* Registration Statement at 2, 9, 22, 28, 83, 120, ECF No. 57-2. Nor did the Registration Statement run afoul of Item 105 because the Registration Statement disclosed specific risks associated with Root's CAC, the potential increase in costs, and other "significant factors that make [the securities] speculative or risky." *See* Registration Statement at 22, 26-27, 65, 83, ECF No. 57-2; *see also* 17 CFR § 229.105(a). And the Registration Statement complied with Rule 408 because no additional information was necessary to make the issued statements not misleading. *See* 17 CFR § 230.408(a). Accordingly, the Court dismisses Counts I (Section 11 claim) and II (Section 12(a)(2) claim) of the Amended Complaint.

B. Securities Exchange Act Claims: 10(b) and Rule 10b-5

Plaintiff also brings claims under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. These claims rely on the same alleged misstatements and omissions as Plaintiff's Sections 11 and 12(a)(2) claims. Section 10(b), in relevant part, provides:

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[2] *Ind. Pub. Ret. Sys. v. SAIC, Inc.,* 818 F.3d 85, 94 (2d Cir. 2016); *see also* 17 C.F.R. § 229.303(a).

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

The SEC regulation promulgated under Section 10(b) states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in

> connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. Thus, a defendant may be liable under Rule 10b-5(b) under a misrepresentation theory and under Rule 10b-5(a) and (c) where it participates in an allegedly fraudulent scheme. *See Benzon,* 420 F.3d at 610.

Regarding the applicable pleading standard for Section 10(b) claims, because they sound in fraud, a plaintiff's pleadings must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Omnicare, Inc.,* 583 F.3d at 942. Heightening the pleadings even further is the PSLRA, which requires a plaintiff to specify any alleged misstatements or omissions, identify the "reason or reasons why the statement is misleading" and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* at 943; *see also* 15 U.S.C. §§ 78u-4(B)(1)—(2).

Here, Plaintiff's Amended Complaint does not make clear exactly which of Rule 10b-5's categories it claims Defendants violated. *See* Am. Compl. ¶¶ 215-19, ECF No. 31. Given this ambiguity, Defendants' Joint Motion to Dismiss challenged Plaintiff's Section 10(b) claims in their entirety, though focusing largely on Plaintiff's presumed Rule 10b-5(b) misrepresentation claim. Plaintiff has since clarified in its opposition papers that the Amended Complaint alleges violations of both Rule 10b-5(b) and 10b-5(a) and (c). ECF No. 58 at 40-41. Assuming, without deciding, that such a clarification at this stage is permissible, the Court will assess Plaintiff's claims under each category.

1. Plaintiff's claim under SEC Rule 10b-5(b)

Section 10(b) and Rule 10b-5 "prohibit fraudulent, material misstatements or omissions in connection with the sale or purchase of a security." *Zaluski v United Am. Healthcare Corp.,* 527 F.3d 564, 570 (6th Cir. 2008) (quoting *PR Diamonds, Inc. v. Chandler,* 364 F.3d 671, 681 (6th Cir. 2004). To state a claim under Section 10(b) and Rule 10b-5(b), Plaintiff must allege: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Ohio Pub. Empls. Ret. Sys. v. Fed. Home Loan Mortg. Corp.,* 830 F.3d 376, 383-84 (6th Cir. 2016) (quotation omitted). "The test for whether a statement is materially misleading under Section 10(b) and Section 11 is whether the defendants' representations, taken together and in context, would have misled a reasonable investor." *Albert Fadem Trust,* 334 F. Supp. 2d at 1019 (quoting *Rombach,* 355 F.3d at 172 n.7).

Here, as discussed with respect to Plaintiff's Sections 11 and 12(a)(2) claims, Plaintiff fails to allege an actionable misstatement or omission by Defendants, thus failing to plead the first element of a Rule 10b-5(b) claim. This is fatal.[3] *See generally, Norfolk County Ret. Sys. v. Tempur-Pedic Intl, Inc.,* 22 F. Supp. 3d 669

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[3] This conclusion—that Plaintiff has failed to allege any material misstatements or omission by Defendants—also precludes a finding of the second required element: scienter. *See Phillips v. Triad Guar., Inc.,* No. 1:09CV71, 2012 WL 259951, at *6 (M.D.N.C. Jan. 27, 2012) ("If there were no false statements, there can be no scienter.") (citing *Teachers' Ret. Sys. v. Hunter,* 477 F.3d 162, 184 (4th Cir. 2007)).

(E.D. Ky. May 23, 2014) (dismissing claim under Section 10(b) and Rule 10b-5 where class failed to allege any actionable misstatements or omissions). Accordingly, the Court dismisses Plaintiff's Rule 10b-5(b) claim.

2. Plaintiff's claim under SEC Rule 10b-5(a) and (c)

Plaintiff also alleges scheme liability under SEC Rule 10b-5(a) and (c).[4] At the outset, the Court notes that the Sixth Circuit has not defined the elements of scheme liability, though it has explained that such claims "encompass conduct beyond disclosure violations." *Benzon,* 420 F.3d at 610. Turning to "the two circuit courts that traditionally see the most securities cases, the Second and Ninth Circuits,"[5] they have concluded that "[a] defendant may only be liable as part of a fraudulent scheme based upon misrepresentations and omissions under Rules 10b-5(a) or (c) when the scheme also encompasses conduct beyond those misrepresentations or omissions." *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.,* 655 F.3d 1039, 1057 (9th Cir. 2011); *Lentell v. Merrill Lynch & Co.,* 396 F.3d 161, 177 (2d Cir. 2005) ("[W]here the sole basis for

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[4] Plaintiff asserts that Defendants waived any challenge to Plaintiff's scheme liability claim by not explicitly seeking its dismissal. The Court disagrees. Defendants' Joint Motion to Dismiss unambiguously sought dismissal of Plaintiff's Section 10(b) claims, which necessarily encompassed Plaintiff's scheme liability claim under Rule 10b-5(a) and (c). Moreover, in seeking dismissal of Plaintiff's Section 10(b) claims, Defendants' Joint Motion to Dismiss presented arguments that directly pertain to the scheme liability claim. As such, the Court finds Plaintiff's scheme liability claim sufficiently briefed and ripe for review.

[5] Nicholas Fortune Schanbaum, *Scheme Liability: Rule 10b-5(a) and Secondary Actor Liability after Central Bank,* 26 REV. LITIG. 183, 197 (Winter 2007).

such claims is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-5(a) and (c)[1"); *see also Public Pension Fund Group v. KV Pharm.,* 679 F.3d 972, 987 (8th Cir. 2012) ("We join the Second and Ninth Circuits in recognizing a scheme liability claim must be based on conduct beyond misrepresentations or omissions actionable under Rule 10b-5(b).").

The Second Circuit has articulated the pleading standards governing scheme liability claims: "To state a scheme liability claim, a plaintiff must show: "(1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance." *Plumber & Steamfitters Local 773 Pension Fund v. Danske Bank A/S,* 11 F.4th 90, 105 (2d Cir. 2021) (citing *In re Mindbody, Inc. Sec. Litig.,* 489 F. Supp. 3d 188, 216 (S.D.N.Y. 2020)).

Here, the Amended Complaint specifically addresses Defendants' scheme in just four of its 222 paragraphs:

> Root and Timm and Rosenthal knew and/or recklessly disregarded the false and misleading nature of the information which they caused to be disseminated to the investing public. The *fraudulent scheme* described herein could not have been perpetrated during the Class Period without the knowledge and complicity or, at least, the reckless disregard of the personnel at the highest levels of the Company, including Timm and Rosenthal.
>
> [. . .]
>
> As set forth elsewhere herein in detail, Timm and Rosenthal, by virtue of their receipt of information reflecting the true facts regarding

> Root, their control over, and/or receipt and/or modification of Root's allegedly materially misleading statements and/or their association with the Company that made them privy to confidential proprietary information concerning Root, participated in the *fraudulent scheme* alleged herein.
>
> [. . .]
>
> As detailed herein, Root and Timm and Rosenthal engaged in a scheme to deceive the market and a course of conduct that artificially inflated the price of Root Class A common stock and operated as a fraud or deceit on Class Period purchasers of Root Class A common stock. When the prior misrepresentations and fraudulent conduct of Root and Timm and Rosenthal were disclosed and became apparent to the market, the trading price of Root Class A common stock fell precipitously as the artificial inflation was removed.
>
> [. . .]
>
> Root and Timm and Rosenthal: (i) employed devices, *schemes,* and artifices to defraud; (ii) made untrue statements of material fact and/or omitted to state material facts necessary to make the statements not misleading; and (iii) *engaged in acts, practices, and a course of business which operated as a fraud and deceit upon the purchasers of Root Class A common stock during the Class Period.*

Am. Compl., ¶¶ 187, 194, 198, 217, ECF No. 37 (emphasis added).

In the Court's view, the scheme alleged in the Amended Complaint consisted of the same series of statements and alleged omissions discussed with regard to Plaintiff's other claims. That is, these purported misstatements and omissions served to deceive the market in order to artificially balloon the price of Root's Class A common stock, thereby defrauding purchasers. In other words, there is no meaningful distinction between Plaintiff's misrepresentation theory under 10b-5(b) and its scheme liability theory under 10b-5(a) and (c). This suggests that Plaintiff has failed to adequately allege a separate scheme liability claim. *See WPP,* 655 F.3d at 1057; *Lentell,* 396 F.3d at 177.

In any event, Defendants' Joint Motion to Dismiss does not challenge the adequacy of the Amended Complaint's allegations concerning Defendants' "deceptive or manipulative act[s]" or the extent to which Defendants acted "in furtherance of the alleged scheme to defraud." Instead, Defendants' Joint Motion to Dismiss argues that Defendants lacked the requisite intent—*i.e.*, scienter—to prevail on its Section 10(b) and Rule 10b-5 claims. Mot. 33-36, ECF No. 57.

The PSLRA mandates that a plaintiff pleads facts "giving rise to a strong inference that the defendant acted with the requisite state of mind" in violating the securities laws." 15 U.S.C. § 78u-4(b)(2)(A). "To decide if a plaintiff adequately pleaded a strong inference of scienter, we use a three-part test to determine the sufficiency of a plaintiff's scienter allegations." *City of Taylor Gen. Emps Ret. Sys. v. Astec Indus.,* 29 F.4th 802, 812 (6th Cir. 2022) (citing *Dougherty v. Esperion Therapeutics, Inc.,* 905 F.3d 971, 979 (6th Cir. 2018)). "First, we must accept all factual allegations in the complaint as true." *Id.* (quoting *Tellabs, Inc.,* 551 U.S. at 322). Next, the Court reviews the allegations

holistically "to determine whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter." *Dougherty,* 905 F.3d at 979 (quoting *Tellabs, Inc.,* 551 U.S. at 322-23). Finally, "we 'must take into account plausible opposing inferences' and decide whether 'a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* (quoting *Tellabs, Inc.,* 551 U.S. at 323-24).

In evaluating the sufficiency of securities fraud pleadings regarding scienter, courts consider the allegations against the backdrop of a non-exhaustive list of factors: (1) insider trading at a suspicious time or in an unusual amount; (2) divergence between internal reports and external statements on the same subject; (3) closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information; (4) evidence of bribery by a top company official; (5) existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit; (6) disregard of the most current factual information before making statements; (7) disclosure of accounting information in such a way that its negative implications could only be understood by someone with a high degree of sophistication; (8) the personal interest of certain directors in not informing disinterested directors of an impending sale of stock; and (9) the self-interested motivation of defendants in the form of saving their salaries or jobs. *Helwig,* 251 F.3d at 552; *see also Omnicare,* 769 F.3d at 484 (applying the *Helwig* factors).

The Court holds that the Amended Complaint fails to allege enough facts to create a strong inference of scienter to support Plaintiff's scheme liability claim.

Plaintiff's opposition to Defendants' Joint Motion to Dismiss lists multiple facts that purportedly establish a strong inference of scienter. Resp. 44, ECF No. 58. The Court will discuss each fact in turn, keeping in mind the holistic approach required for such an inquiry.

First, Plaintiff argues that Defendants understood but disregarded "the most current factual information" about Root's CAC leading up to and as of the IPO. *Id.* First, this argument falls short because Plaintiff fails to identify what particular factual information Defendants disregarded. *See In re The Goodyear Tire & Rubber Co.,* 436 F. Supp. 2d 873, 902 (N.D. Ohio Mar. 22, 2006). While Plaintiff references "adverse facts" concerning Root's CAC, the specific "adverse facts" remain unclear. But even if the Court assumes these "adverse facts" refer to Root's increased CAC in September 2020, Defendants still did not disregard this information. As stated in the Amended Complaint, Defendant Timm disclosed to investors the September spike in Root's CAC. Am. Compl. ¶ 124, ECF No. 31.

Second, to the extent Plaintiff argues that Defendants intended to deceive investors by failing to disclose a long-term loss in Root's CAC advantage, this argument likewise fails. Plaintiff has alleged facts indicating that Defendants Timm and Rosenthal were aware of the September 2020 increase in CAC, but there are no factual allegations suggesting that they knew the September 2020 increase was the beginning of a long-term elevation in CAC. Thus, this weighs against finding a strong inference of scienter. *See Lachman v. Revlon, Inc.,* 487 F. Supp. 3d 111, 134, 137 (E.D.N.Y. 2020) (where defendants stated that they "expect[ed] continued improvement going forward," and plaintiffs failed to plead "that company executives did not expect continued improvement . . . going forward," court found

scienter lacking given absence of allegations that defendants "had knowledge of facts or access to information that contradicted their public statements").

Plaintiff also argues that Defendants Timm and Rosenthal, given their executive roles with Root and their participation in the roadshow, must have known the future of Root's CAC. But simply being in a high-level role with a company is insufficient to give rise to a finding of scienter. *See, e.g., Pittman v. Unum Grp.,* 861 F. App'x 51, 55 (6th Cir. 2021) ("[T]he fact that executives are intimately familiar with a core component of their business does little to suggest fraudulent intent. So this is not a scienter-bolstering fact."); *PR Diamonds, Inc,* 364 F.3d at 688 ("Contrary to Plaintiffs' assertions, fraudulent intent cannot be inferred merely from the Individual Defendants' positions in the Company and alleged access to information . . . . [T]he Complaint must allege specific facts or circumstances suggestive of their knowledge.").

Plaintiff also argues that the "closeness in time of the alleged misstatements and omissions made on October 28, 2020 and Root's disclosures of contrary information beginning on December 1, 2020" supports a strong inference of scienter. ECF No. 58 at 44. This *Helwig* factor raises an inference of scienter so long as the later-disclosed information is "inconsistent" with the allegedly fraudulent statements or omissions. *Helwig,* 251 F.3d at 552. Here, however, the information disclosed subsequent to the IPO is largely consistent with the alleged misstatements and omissions. Plaintiff cites to several analyst reports indicating an increase in CAC during the last quarter of 2020 and 2021 and identifying the reason for the increase as Root's national advertising campaign. Resp. 47, ECF No. 58; *see also* Am. Compl. ¶¶ 130-38, ECF No. 31. But

these reports are congruent with Defendant Timm's disclosure that the September 2020 spike in CAC was due to Root's experimentation with becoming a national brand.

Plaintiff does identify a report from February 25, 2021 indicating that Root "still ha[s] much work to do in the quarters and years ahead, particularly around . . . managing customer acquisition costs." Resp. 47, ECF No. 58. This suggests that Root's elevated CAC has become a long-term concern; however, given the nearly four-month gap between the IPO and this report, the Court does not find this extended period of time to be probative of scienter. *See Doshi v. Gen. Cable Corp.,* 823 F.3d 1032, 1042 (6th Cir. 2016) (stating that an 86-day gap did not allow a scienter inference). Thus, this *Helwig* factor favors rejecting a scienter inference.

Plaintiff has also failed to establish the ninth *Helwig* factor—that Defendants Timm and Rosenthal possessed the "self-interested motivation . . . of saving their salaries or jobs." *Helwig,* 251 F.3d at 552. Under this factor, Plaintiff argues that an inference of scienter is warranted because the Defendants substantially increased the size of the IPO before the IPO, in order to "make it as lucrative as possible," and "the IPO generated an enormous amount of wealth for Root and the Company's executives and directors," "instantly ma[king] Defendant Timm a multimillionaire." ECF No. 58 at 48-49. However, the mere fact that Defendants stood to profit from the success of the IPO is insufficient to support an inference of scienter. Sixth Circuit precedent provides that "general allegations of 'an executive's desire to protect his position within a company or increase his compensation' do not comprise a motive for fraud, because such a desire is shared by all corporate officers." *Dougherty v. Esperion*

Therapeutics, Inc., 905 F.3d 971, 981-82 (6th Cir. 2018) (quoting *PR Diamonds,* 364 F.3d at 690). Indeed, "such a generalized motive, one which could be imputed to any publicly-owned, for-profit endeavor, is not sufficiently concrete for purposes of inferring scienter." *Chill v. GE,* 101 F.3d 263, 268 (2d Cir. 1996). Thus, given that the nucleus of Plaintiff's argument is Defendants' "generalized motive" to have a successful IPO, the Court finds that the ninth *Helwig* factor does not support an inference of scienter.[6]

Plaintiff premises its final scienter argument on Defendant Timm's "failure during the roadshow to disclose the true reason for the spike in CAC as of the IPO, while falsely stating that Root had the 'ability to keep [its] customer acquisition costs much lower than [its] competitors.'" Resp. 49, ECF No. 58. This argument does not raise a strong inference of scienter. The Court has already held that: (1) Defendant Timm's roadshow statements are unactionable and (2) the Amended Complaint pleads no facts suggesting that Defendant Timrr expected a long-term increase in Root's CAC requiring such disclosure as of the IPO. *See* Section III.A.b.ii.

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[6] Even if these allegations did support a finding of scienter, they would be insufficient, standing alone, to support a strong inference. *See In re Cardinal Health, Inc. Sec. Litigs.,* 426 F. Supp. 2d 688, 737 (S.D. Ohio Apr. 12, 2004) (collecting cases holding that "the magnitude of a defendant's compensation package, *together with other factors,* may provide a heightened showing of motive to commit fraud") (emphasis added). Because the Court finds that none of the other *Helwig* factors raise an inference of scienter, a different conclusion concerning the ninth *Helwig* factor would not disturb the Court's ultimate conclusion that the Amended Complaint does not raise a strong inference of scienter.

In sum, nothing in the Amended Complaint, taken collectively and taken as true, gives rise to a strong inference that Defendants acted with scienter. Indeed, nothing in the Amended Complaint would lead a reasonable person to "deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs Inc.,* 551 U.S. at 323-24. Put differently, the Amended Complaint fails to plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." See 15 U.S.C. § 78u-4(b)(2). The Amended Complaint therefore fails to state a scheme liability claim under Section 10(b) and SEC Rule 10b-5(a) and (c).

C. Sections 15 and 20(a): Control Person Liability

Plaintiff also asserts claims against the Root Defendants as "controlling persons" under Section 15(a) of the Securities Act (Count III) and Section 20(a) of the Exchange Act (Count V). Am. Compl. ¶¶ 177-84, 220-22, ECF No. 31.

Section 15 of the Securities Act, codified at 15 U.S.C. § 77o, attaches liability to "[e]very person who, by or through stock ownership, agency, or otherwise, . . . controls any person liable under section 11 or 12, shall also be liable jointly and severally to the same extent as such controlled person."

Section 20(a) similarly attaches liability to "[e]very person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder . . . , unless the controlling person acted in good faith and did not . . . induce the . . . violation or cause of action." 15 U.S.C. § 78t.

Both Sections 15 and 20(a) require a primary violation of Section 10(b), 11 or 12. Given the Court's rulings above finding no such primary violations, Plaintiff has failed to allege the prima facie elements for control person liability pursuant to both Section 15 and Section 20(a). Consequently, the Court dismisses Counts III and V of the Amended Complaint. *See Local 295,* 731 F. Supp. 2d at 715-15, 728 (dismissing Section 15 and Section 20(a) claims where plaintiffs failed to allege a primary securities law violation).

IV. CONCLUSION

For the reasons stated herein, the Court **GRANTS** Defendants' Joint Motion to Dismiss with prejudice. ECF No. 57. Accordingly, Plaintiff's Amended Complaint is **DISMISSED with prejudice**, and the Clerk is **DIRECTED** to close the case.

IT IS SO ORDERED.

/s/ Michael H. Atson
MICHAEL H. ATSON, JUDGE
UNITED STATES DISTRICT COURT

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Case No. 2:21-cv-1197

ILIA KOLOMINSKY, *Individually and on Behalf of All Others Similarly Situated*,

vs.

ROOT, INC., *et al.*,

Judge Michael H. Watson

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[X] **Decision by Court.** This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant to the March 31, 2023 Opinion and Order: the Court GRANTS Defendants' Joint Motion to Dismiss with prejudice.

Date: March 31, 2023

Richard Nagel, Clerk

s/ Jennifer Kacsor
By Jennifer Kacsor/Courtroom Deputy

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3392

ILIA KOLOMINSKY, *et al.*,

Plaintiffs,

PLUMBERS LOCAL 290 PENSION TRUST FUND, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ROOT, INC.; ALEXANDER TIMM; DANIEL ROSENTHAL; MEGAN BINKLEY; CHRISTOPHER OLSEN; DOUG ULMAN; ELLIOT GEIDT; JERRI DEVARD; LARRY HILSHEIMER; LUIS VON AHN; NANCY KRAMER; NICK SHALEK; SCOTT MAW; BARCLAYS CAPITAL INC.; GOLDMAN SACHS & COMPANY, LLC; MORGAN STANLEY & COMPANY, LLC; WELLS FARGO SECURITIES, LLC,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:21-cv-01197—Michael H. Watson,
District Judge.

Argued: January 31, 2024

Decided and Filed: April 29, 2024

Before: BATCHELDER, CLAY, and DAVIS, Circuit Judges.

COUNSEL

ARGUED: Steven F. Hubachek, ROBBINS, GELLER, RUDMAN & DOWD, LLP, San Diego, California, for Appellant. Michael P. Addis, CRAVATH, SWAINE & MOORE, LLP, New York, New York, for Appellees. **ON BRIEF:** Steven F. Hubachek, ROBBINS, GELLER, RUDMAN & DOWD, LLP, San Diego, California, Michael G. Capeci, ROBBINS GELLER RUDMAN & DOWD LLP, Melville, New York, Joseph F. Murray, MURRAY MURPHY MOUL + BASIL LLP, Columbus, Ohio, for Appellant. Michael P. Addis, J. Wesley Earnhardt, CRAVATH, SWAINE & MOORE, LLP, New York, New York, William D. Kloss, Jr., VORYS, SATER, SEYMOUR AND PEASE LLP, Columbus, Ohio, Sharon L. Nelles, Andrew J. Finn, SULLIVAN & CROMWELL LLP, New York, New York, Gregory Harrison, Kelly E. Pitcher, DINSMORE & SHOHL LLP, Cincinnati, Ohio, for Appellees.

BATCHELDER, J., delivered the opinion of the court in which DAVIS, J., joined in full, and CLAY, J., joined in part and in the judgment. CLAY, J. (pp. 15–19), delivered a separate opinion concurring in part and in the judgment.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Plumber's Local 290 Pension Trust Fund (Plumber's Local), on behalf of the individual plaintiffs and all others similarly situated in this case, appeals the district court's dismissal of its complaint for failure to state a claim. We **AFFIRM**.

I. Background and Procedural History

Root, Inc. (Root), a technology company seeking to disrupt the traditional car insurance market, attracted investors such as Plumber's Local with its purportedly low customer-acquisition cost (CAC).[1] Plumber's Local invested in Root around the time that Root filed its Registration Statement with the SEC and made its initial public offering (IPO).

From August 2018 to August 2020, Root's average CAC was $332. According to Plumber's Local, traditional car insurance companies' CAC is between $500 and $800. Root, therefore, had a competitive advantage. As a result, at Root's IPO, its Class A stock sold for $27.00 per share—the price at which Plumber's Local invested. But, thereafter, Root's Class A stock price decreased because its CAC increased, ending Root's competitive CAC advantage. At the time of the IPO, Root was licensed to sell in 36 states, but it had plans to expand to all 50 states by the beginning of 2021. Allegedly, the increase in CAC was caused by Root's nationwide expansion.

In its complaint, Plumber's Local pled one unified set of facts raising five claims for violations of the Securities Acts of 1933 (1933 Act) and 1934 (1934 Act), involving Sections 10(b), 11, 12(a)(2), and 15 and another for violating Rule 10b-5. The district court dismissed all of the claims with prejudice for failure to

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[1] CAC is a simple calculation, measuring the cost of acquiring new customers. CFI Team, *Customer Acquisition Cost (CAC)*, Corp. Fin. Inst., https://corporatefinanceinstitute.com/resources/accounting/customer-acquisition-cost-cac/ (last visited Apr. 25, 2024). It is considered a critical performance metric for newer companies because it measures the ability of new companies to improve their profitability as they grow. *Id.*

state a claim for relief. *See Kolominsky v. Root, Inc.*, 667 F. Supp. 3d 685, 715 (S.D. Ohio 2023). The three claims that survive to appeal involve allegedly false and misleading statements or omissions about Root's CAC and warnings in Root's Registration Statement. Those claims implicate Sections 11, 12(a)(2), and 15 of the 1933 Act.

The three relevant statements are:

- Mobile is the fastest growing retail channel in the United States, as customers spend less time in front of computers and utilize smart phones for more convenient shopping. We therefore designed a mobile-directed customer acquisition strategy, *delivering customer acquisition costs below the average cost of doing so through each of the direct and agent channels*. (hereinafter Statement One).
- *The efficiency of our customer acquisition strategy has resulted in a cost acquisition advantage versus direct and agent channels*. While our customer acquisition costs can vary by channel mix, by state or due to seasonality, over the period from August 2018 to August 2020 our average customer acquisition cost was $332. In the near term, as we expand our licensed footprint to 50 states, we will invest in our national brand, which will increase awareness, build credibility and support all four of our distribution channels. (hereinafter Statement Two).
- As we grow, we *may* struggle to maintain cost-effective marketing strategies, and our customer acquisition costs *could* rise substantially. (hereinafter Statement Three).

According to Plumber's Local's complaint, these statements were misleading and/or omitted material facts about Root's CAC.[2] Plumber's Local argued that Root had a duty to update investors regarding Root's CAC because at the time of the IPO, the CAC was, in fact, higher than its historic average. Moreover, in Plumber's Local's view, any apparent warning regarding Root's CAC was misleading because the CAC increase had already occurred. Plumber's Local also alleged that Root's sale of 5% (around 14 million shares of Class A stock) of its company to Carvana, for $9.00 per share, was evidence that Root was in worse financial condition than it had represented.

The district court concluded that Plumber's Local's Sections 11 and 12(a)(2) claims both sounded in fraud even though Plumber's Local disclaimed that it was pleading fraud, so the heightened Fed. R. Civ. P. 9(b) pleading standard applied. *Id.* at 697. In relation to the statements before us, the district court found that the statements were not actionable because the first two were based on past performance or historical data, and the third was based on forward-looking projections. *Id.* at 701–02, 703–04. No statement was false or misleading. *Id.* Therefore, the challenged statements could not give rise to 1933 Act liability under Sections 11 or 12(a)(2). *Id.* at 708–09. Because Plumber's Local failed to plead a primary violation for either Sections 11 or 12(a)(2), the district court also dismissed the Section 15 control-person claim. *Id.* at 715.

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[2] Defendants Alexander Timm, Root's CEO, and Daniel Rosenthal, Root's CFO, made statements at a "roadshow," which the plaintiffs also alleged were misleading. Any arguments based on the roadshow statements have been abandoned on appeal.

II. Legal Standard

We review de novo a district court's dismissal of a complaint for failure to state a claim. *Int'l Outdoor, Inc. v. City of Troy*, 77 F.4th 432, 438 (6th Cir. 2023). Dismissal is proper when the complaint fails to state a claim for which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

To defeat a motion to dismiss, plaintiffs must "state a claim to relief that is plausible on its face," requiring more than labels, conclusions, and a formulaic recitation of the elements of a cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). Plausibility is not akin to probability; plausibility means that there is more than a sheer possibility that a defendant acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausibly pled facts are taken as true. *Id.* But when a complaint pleads facts "merely consistent with a defendant's liability," it is insufficient to state a claim for relief. *Id.* (citation and internal quotation marks omitted).

III. Discussion

On appeal, Plumber's Local argues that the district court erred by applying the 9(b) pleading standard to its claims and that it erred by concluding that the challenged statements were not false or misleading. Finding no error, we affirm. We take each argument in turn.

a. Claims that Sound in Fraud

Fraud is not an element of Sections 11 and 12(a)(2) of the 1933 Act. *See* 15 U.S.C. § 77k, 77l. However, we apply the Rule 9(b) pleading standard to claims that sound in fraud. *See Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 583 F.3d 935, 948 (6th Cir. 2009)

(listing and agreeing with circuit courts that apply the 9(b) pleading standard to 1933 Act Section 11 claims, sounding in fraud); *see also Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (explaining that claims which sound in fraud are premised on a unified course of fraudulent conduct); *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004) ("We hold that the heightened pleading standard of Rule 9(b) applies to Section 11 and Section 12(a)(2) claims insofar as the claims are premised on allegations of fraud."). In other words, when fraud pleadings under Section 10(b) of the 1934 Act employ the same facts as a 1933 Act Section 11 claim or 12(a)(2) claim, we can assume that the complaint sounds in fraud. *Rubke*, 551 F.3d at 1161; *see also Frank v. Dana Corp.*, 547 F.3d 564, 569–70 (6th Cir. 2008) ("Securities fraud claims arising under Section 10(b), as with any fraud claim, must satisfy the particularity pleading requirements of Rule 9(b).").

Of course, when a 1933 Act plaintiff brings a Section 11 or 12(a)(2) claim that does *not* rely on one unified course of fraudulent conduct but, rather, carefully distinguishes the fraud claims from other claims, then we apply the Rule 8(a) pleading standard to those non-fraud claims. *In re EveryWare Global, Inc. Secs. Litig.*, 175 F. Supp. 3d 837, 869–70 (S.D. Ohio 2016), *aff'd*, 849 F.3d 325, 328 (6th Cir. 2017); *see also In re Suprema Specialities, Inc. Sec. Litig.*, 438 F.3d 256, 272–73 (3d Cir. 2006) (explaining that fraud allegations will not "contaminate" a Section 11 or 12(a)(2) claim when the "pleading makes for a clear conceptual separation in the complaint between claims sounding in negligence and those sounding in fraud"); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1104 (9th Cir. 2003) ("In other cases . . . a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege some fraudulent and some non-

fraudulent conduct. In such cases, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements.").[3]

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[3] For utter clarity, if a Section 11 or 12(a)(2) claim that is pled alongside a Section 10(b) or Rule 10b-5 claim is based upon facts which sound in negligence (*not* fraud), then the claim which sounds in negligence will face the Rule 8(a) pleading standard. *See In re Suprema Specialties*, 438 F.3d at 272–73. Notably, here, the plaintiff brought claims that rely on one set of facts, which demonstrate a unified course of fraudulent conduct. Hence, we are not dealing with a plaintiff who separated fraud claims from other claims by alleging some fraudulent and some non-fraudulent conduct.

Even if we agree with *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 315 (8th Cir. 1997), which essentially endorses the ability to plead both fraud and non-fraud securities claims under the same unified set of facts, we are bound by our precedent in *Omnicare, Inc.*, which agrees with the majority of circuits that securities claims that are grounded in a unified course of fraudulent conduct are claims that sound in fraud and face Rule 9(b) at the pleadings stage. *See* 583 F.3d at 948 (including a "*But see*" citation to *In re NationsMart*, 130 F.3d at 315, to show that this circuit does not follow the Eighth Circuit approach); *see also* The Bluebook: A Uniform System of Citation, B1.2, at 5 & R. 1.2(c), at 63 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020). Another panel agreed and stated that "although § 11 claims do not require pleading scienter, Rule 9(b) pleading standards still apply to § 11 claims that sound in fraud." *See Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498, 502 (6th Cir. 2013), *vacated on other grounds by Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund.*, 575 U.S. 175 (2015). Nothing in our precedent—nor the Supreme Court's—permits pleading in the alternative in settings such as this. We agree with the Supreme Court that "the 1934 Act and the 1933 Act prohibit some of the same conduct." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (citation and internal quotation marks omitted). Plaintiffs may, indeed, bring a claim that encompasses both fraud and non-fraud securities claims. But when the com-

Here, the plaintiffs presented a 1934 Act Section 10(b) fraud claim and a 10b-5 fraud claim along with 1933 Act Sections 11 and 12(a)(2) claims that were all grounded in *one* fraudulent course of conduct relying on *one* set of facts, alleging that Root made materially false and misleading statements and omissions. Therefore, their complaint sounds in fraud, and the 9(b) pleading standard applies.

Pleading fraud requires more than a short and plain statement requesting relief. *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 384 (6th Cir. 2016). These pleadings must be pled with particularity, *id.*, meaning that the pleadings "must state . . . the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). We require plaintiffs pleading under Rule 9(b) to "allege the time, place, and content of the alleged misrepresentation" and "the fraudulent scheme; the [defendant's] fraudulent intent . . .; and the [resulting] injury . . . ." *Bennett v. MIS Corp.*, 607 F.3d 1076, 1100 (6th Cir. 2010) (citation omitted).

Moreover, a party's disclaimer that it is not pleading fraud will not defeat our application of Rule 9(b), particularly when a securities fraud claim and the Sections 11 and 12(a)(2) claims rely on the same set of facts, as is true here. *See Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498, 502–03 (6th Cir. 2013), *vacated on other grounds by Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund.*, 575 U.S. 175 (2015); *see also Cal. Pub. Emps. Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160 (3d Cir. 2004) (explaining that when "a core theory of fraud permeates the entire . . . [c]omplaint" a "disavowment of fraud"

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plaint relies on one unified course of fraudulent conduct, it will face the Rule 9(b) pleading standard.

will not be enough to avoid Rule 9(b)); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 402, 410 (S.D.N.Y. 2005). Plumber's Local's fraud disclaimer will not defeat the assumption that the pleadings in this action sound in fraud. The 9(b) standard applies. Plumber's Local's claims meet that standard, but the complaint fails to state a claim for relief for the reasons outlined below.

b. Root's Statements/Disclosures were not Fraudulent or Misleading

The 1933 Act creates federal disclosure requirements, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 572 (1995), and requires companies to make "full and fair disclosure[s] of information" connected to a public offering. *Pinter v. Dahl*, 486 U.S. 622, 646 (1988). Sections 11 and 12 of the 1933 Act are neighbors and contain parallel provisions regarding misleading statements or omissions related to public offerings. *See Gustafson*, 513 U.S. at 572. Section 11 deals with misleading statements in a company's Registration Statement, 15 U.S.C. § 77k, while Section 12 deals with misleading statements in any prospectus or other statement. 15 U.S.C. § 77l. In relevant part, Section 11 reads,

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . [may] sue.

15 U.S.C. § 77k(a) (listing who can be sued for a false or misleading registration statement). To establish a claim under Section 12, plaintiffs must allege that the defendant used a prospectus to sell a security that

"include[d] an untrue statement of a material fact or omit[ted] . . . a material fact necessary . . . , in light of the circumstances under which [the statements] were made." 15 U.S.C. § 77l(a)(2).

The district court properly concluded that the Plumber's Local's Sections 11 and 12 claims rested on the same statements. *Kolominsky*, 667 F. Supp. 3d at 697–98. So, it dealt with both claims under the same framework. *Id.* Sections 11 and 12 impose "absolute liability on the issuer of a registration statement [or prospectus for Section 12] if: (1) the statement contained an untrue statement of a material fact, (2) the statement omitted to state a material fact required to be stated therein, or (3) the omitted information was necessary to make the statements therein not misleading."[4] *Set Capital LLC v. Credit Suisse Grp. AG*,

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[4] The Securities Exchange Commission's Items and Rules gave rise to this framework. Under Item 303, a company must "[d]escribe any known trends or uncertainties that . . . are reasonably likely to have a material . . . unfavorable impact on . . . revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(2)(ii). "The discussion and analysis must focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." 17 C.F.R. § 229.303(a). Item 105 creates a similar duty: to disclose the most significant or "material [risk] factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229.105(a). Risk factors that are not "reasonably likely to be material under Item 303" are not material factors that render an offering speculative or risky under Item 105. *Hutchison v. Deutshe Bank Sec. Inc.*, 647 F.3d 479, 484 n.4 (2d Cir. 2011) (internal quotation omitted) (referencing Item 503(c), which was relocated to Item 105); *see also* FAST Act Modernization and Simplification of Regulation S-K, 84 Fed. Reg. 12,674, 12,688–89 (Apr. 2, 2019) (codified at 17 C.F.R. § 229.105). One more relevant rule—Rule 408—"requires the disclosure of *material* information necessary to make other state-

996 F.3d 64, 84 (2d Cir. 2021) (internal quotations omitted); *see also Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715–16 (2d Cir. 2011).

But the ultimate inquiry depends on what a reasonable investor would conclude about a statement or prospectus. *See Benzon v. Morgan Stanley Distribs.*, 420 F.3d 598, 609 (6th Cir. 2005); *Rombach*, 355 F.3d at 172 n.7. This in turn depends on materiality, and "[t]he question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Indus. v. Northway*, 426 U.S. 438, 445 (1976). Therefore, "to be actionable, a misrepresentation or omission must pertain to material information that the defendant had a duty to disclose." *Benzon*, 420 F.3d at 608 (citation omitted).

Plumber's Local argues that Root's statements regarding its CAC were misleading to the reasonable investor. We disagree. Of the three challenged statements on appeal, two are protected statements of past or historical performance, and the third is protected by the "Bespeaks Caution" doctrine.

i. Historical Statements of Past Performance

"The disclosure of accurate historical data does not become misleading even if less favorable results might

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ments not misleading." *In re AT&T/DirecTV Now Sec. Litig.*, 480 F. Supp. 3d 507, 536 n.29 (S.D.N.Y. 2020); *see also* 17 C.F.R. § 230.408(a). This requires the court to make a holistic inquiry regarding whether there is "a substantial likelihood" that disclosing omitted information would have altered what a "reasonable investor" thought based on the "total mix" of available information. *DeMaria v. Andersen*, 318 F.3d 170, 180 (2d Cir. 2003) (quoting *TSC Indus., Inc.*, 426 U.S. at 449).

be predictable by the company in the future." *In re Sofamor Danek Grp.*, 123 F.3d 394, 401 n.3 (6th Cir. 1997); *see also In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004); *Plumber & Steamfitters Loc. 773 Pension Fund, Boston Ret. Sys. v. Danske Bank A/S*, 11 F.4th 90, 98–99 (2d Cir. 2021). Moreover, there is no duty to update historically accurate past-performance data so long as the data is not used to imply anything about the future. *IBEW Local Union No. 58 Pension Tr. Fund & Annuity Fund v. Royal Bank of Scot. Grp.*, 783 F.3d 383, 390 (2d Cir. 2015). Here, Statements One and Two are historical statements of past performance, and a reasonable investor would understand as much.

1. Statement One

Statement One refers to Root's customer acquisition strategy, which Root claimed was "delivering customer acquisition costs below the average cost of doing so through [traditional] channels." Plumber's Local argues that this statement was misleading because Root's CAC was not below average when it issued its Registration Statement. In other words, Plumber's Local argues that Root had a duty to update this historical statement because its CAC was higher than what was stated in the Registration Statement.[5]

Root disclosed objectively verifiable data about its CAC that was historically accurate. Root had no duty

[5] Focusing on the last part of the second sentence of Statement One, Plumber's Local also argues that the district court should not have construed that statement as an historical statement. This grammatical argument is incorrect. The first clause of the sentence says that Root designed (past tense) a customer acquisition strategy. The rest of that sentence simply describes that already-created strategy.

to update it even if less favorable results might have been predictable. *In re Sofamor*, 123 F.3d at 401 n.3; *see also In re Nokia Oyj Sec. Litig.*, 423 F. Supp. 2d 364, 395 (S.D.N.Y. 2006) ("Defendants may not be held liable under the securities laws for accurate reports of past successes, even if present circumstances are less rosy.") (citation omitted). Furthermore, Statement One was not used to imply that Root's CAC would remain low. Root "designed" a mobile-directed customer acquisition strategy that had been "delivering" a below-average CAC. Read in context, this statement does not promise that Root would continue producing a low CAC. *See IBEW Local Union No. 58*, 783 F.3d at 390 (explaining that there is no duty to update historically accurate data and that the defendant's statements should be read in context).

Plumber's Local also argues that the Carvana sale shows that Root misled investors because Root knew its CAC was higher than $332 at the time of the IPO. But the sale of stock to Carvana is a valid business strategy. Companies are not required to explain why they engage in certain valid business strategies over others. *In re Canandaigua Sec. Litig.*, 944 F. Supp. 1202, 1208–09, 1210–11 (S.D.N.Y. 1996). The same reasoning applies to how Root advertised/marketed itself. *See Lopez v. CTPartners Exec. Search Inc.*, 173 F. Supp. 3d 12, 34 (S.D.N.Y. 2016) (explaining that marketing strategy need not be disclosed by a company).

Statement One is not a statement that will bring about liability for Root. It was about past performance in a way that did not predict the future, and no other surrounding circumstance prompted a duty to update. The district court did not err, and this statement is not actionable.

2. Statement Two

Statement Two refers to Root's "customer acquisition strategy" which "resulted in a cost acquisition advantage versus direct and agent channels [in the car insurance industry]." The district court concluded that, in context, Statement Two referred to the August 2018 to August 2020 time frame and that it was an accurate statement of historical performance. *Kolominsky*, 667 F. Supp. 3d at 701–02. The district court further explained that in the Registration Statement, Root stated, "[O]ur historical results are not necessarily indicative of the results that may be expected for any period in the future." *Id.* at 702 (alteration in original) (citation omitted).

Largely for the same reasons that apply to Statement One, Statement Two is a statement about past performance that does not predict the future, and a reasonable investor would understand that. The "has resulted" language directly refers to the 24-month time frame in which Root did experience a CAC average of $332, i.e., the statement is historical and accurate. *See In re Ford Motor Co.*, 381 F.3d at 570; *see also McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002). Statement Two did not predict the future. *See IBEW Local Union No. 58*, 783 F.3d at 390. In fact, Root warned that historically accurate data may not be indicative of future results. The district court did not err, and this statement is not actionable.

ii. The "Bespeaks Caution" Doctrine

Statement Three is found in Root's Registration Statement in the section titled "Risk Factors," and it provides: "As we grow, we ***may*** struggle to maintain cost-effective marketing strategies, and our customer acquisition costs ***could*** rise substantially." The district

court concluded that this statement was not actionable because it was a forward-looking statement labeled as a risk factor.[6] *Kolominsky*, 667 F. Supp. 3d at 703–04.

Before us, both parties presume that the Bespeaks Caution doctrine applied to this forward-looking statement. Plumber's Local argues that the doctrine will not shield Root from liability because the risk that Root warned of had already occurred, i.e., the warning was a sham. Root argues the opposite: its warning was accompanied by meaningfully cautionary language, and a reasonable investor would understand the warning. Like the parties and the district court, we agree that this statement is forward-looking and that we must analyze it through the Bespeaks Caution doctrine as opposed to our above analysis of statements of past performance or historical data. *See P. Stolz Family Partnership L.P. v. Daum*, 355 F.3d 92, 96–97 (2d Cir. 2004); *see also id.* at 97 ("Historical or present fact—knowledge within the grasp of the offeror—is a different matter. Such facts exist and are known; they are not unforeseen or contingent.").

Therefore, we now expressly hold that the Bespeaks Caution doctrine survived the codification of the PSLRA, and we join the majority of circuits in so holding. *See Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 141 (1st Cir. 2021) (explaining that disclosures which "specifically identify the risk" are not actionable statements after the codification of the PSLRA); *Rombach*, 355 F.3d at 168, 173–74 (applying the Bespeaks Caution doctrine to a secondary public offering alongside the PSLRA's safe harbor provision); *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 273, 279

[6] Statement Three is not covered by the PSLRA's safe-harbor provision. *See* 15 U.S.C. § 78u-5(b)(2)(B).

(3d Cir. 2004) (applying the Bespeaks Caution doctrine to a plaintiff's Sections 11 and 12(a)(2) claims); *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 209, 214–15 n.11 (5th Cir. 2004) (explaining that—in a case after the codification of the PSLRA involving a prospectus connected to an initial public offering—the Bespeaks Caution doctrine, "as a general matter," protects "an offering document's forecasts, opinions or projections [that] are accompanied by meaningful cautionary statements"); *Parnes v. Gateway 2000*, 122 F.3d 539, 548–49 (8th Cir. 1997) (applying the Bespeaks Caution doctrine to a plaintiff's Sections 11 and 12(a)(2) claims); *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1401–02, 1408–09 (9th Cir. 1996) (applying the Bespeaks Caution doctrine to a prospectus—and statements made—in connection to an initial public offering after the codification of the PSLRA); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1120–21, 1122–23 (10th Cir. 1997) (adopting the Bespeaks Caution and applying it to forward-looking, cautionary statements associated with a defendant-company's registration statement); *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 767–68 (11th Cir. 2007) (demonstrating that the Bespeaks Caution doctrine survived the PSLRA's codification by applying it to offering documents in a case that did not involve the PSLRA's safe-harbor provision); *see also In re GoHealth, Inc. Sec. Litig.*, 2022 WL 1016389, at *5 (N.D. Ill. Apr. 5, 2022) (explaining that the Bespeaks Caution doctrine applies to registration statements and analyzing whether the registration statement bespoke caution).[7]

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[7] Although not dispositive on the matter, Congress did "not intend for the safe harbor provisions [of the PSLRA] to replace the judicial 'bespeaks caution' doctrine or to foreclose further development of that doctrine by the courts." Statement of Man-

The Bespeaks Caution doctrine addresses "situations in which optimistic projections are coupled with cautionary language," affecting the materiality and reasonableness of relying on forward-looking statements. *In re Stac*, 89 F.3d at 1408 ("To put it another way, the 'bespeaks caution' doctrine reflects the unremarkable proposition that statements must be analyzed in context."). The doctrine shields companies such as Root from liability when they make statements that are forward-looking and accompanied by meaningful cautionary language. *Rombach*, 355 F.3d at 173–74; *see also Helwig v. Vencor, Inc.*, 251 F.3d 540, 559 (6th Cir. 2001), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308 (2007); *P. Stolz Family Partnership*, 355 F.3d at 98 (explaining that the Bespeaks Caution doctrine protected the defendant company from liability when its statements "sufficiently caution[ed]" prospective investors about future financing); *EP Medsystems, Inc. v. Echocath, Inc.*, 235 F.3d 865, 874 (3d Cir. 2000) (collecting cases that hold that the Bespeaks Caution doctrine applies to forward-looking, cautionary statements). Statements "that as a whole" provide "a sobering picture of" a company's "financial condition and future plans" are protected by the doctrine. *Rombach*, 355 F.3d at 176. In other words, "[c]ertain alleged misrepresentations . . . are immaterial as a matter of law because it cannot be said that any reasonable investor could consider them important in light of adequate cautionary language." *Halperin v. eBanker USA.COM, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002); *see also Shaw v. Digital Equip. Corp.*, 82 F.3d

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agers, "Securities Litigation Reform," H.R. Conf. Rep. No. 104-369, at 46 (1995). Moreover, the text of the PSLRA's safe harbor provision does *not* contain language suggesting that it supplanted the Bespeaks Caution doctrine. *See* 15 U.S.C. § 78u-5(c).

1194, 1213 (1st Cir. 1996) ("[I]f a statement is couched in or accompanied by prominent cautionary language that clearly disclaims or discounts the drawing of a particular inference, any claim that the statement was materially misleading because it gave rise to that very inference may fail as a matter of law.").

In sum, we join our sister circuits that hold when companies such as Root make forward-looking statements contained in a registration statement or in connection with an initial public offering, the Bespeaks Caution doctrine will shield those companies from liability when the forward-looking statements are accompanied by meaningfully cautionary language so that a reasonable investor would understand the statements. *Cf. In re Adams Golf*, 381 F.3d at 279 ("[M]eaningfully cautionary statements can render the alleged omissions or misrepresentations of forward-looking statements immaterial as a matter of law."); *EP Medsystems*, 235 F.3d at 876–77 n.5 (explaining that a prospectus connected to an initial public offering contained "numerous cautionary warnings"); *Grossman*, 120 F.3d at 1121–23 (explaining that the Bespeaks Caution doctrine applies to forward-looking statements contained in a registration statement).

Statement Three is a cautionary statement, is labeled a risk factor, and is forward-looking. It falls squarely within the Bespeaks Caution doctrine's protection. *Cf. Parnes*, 122 F.3d at 548. Plumber's Local's argument that Root should have said its marketing strategy *was* affecting Root's CAC, instead of saying that it *could*, fails. *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. Aug. 20, 2015) (quoting *In re FBR, Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 362 (S.D.N.Y. 2008) ("[C]autionary statements are 'not actionable to the extent plaintiffs contend defendants

should have disclosed risk factors 'are' affecting financial results rather than 'may' affect financial results.'") (citations omitted)); *Zeid v. Kimberley*, 930 F. Supp. 431, 437 (N.D. Cal. 1996) (explaining that a fraud-based claim cannot be founded on boilerplate warnings and disclaimers when there is no evidence that the warnings were not false themselves). Statement Three is not a sham warning, and a reasonable investor would understand as much. The district court did not err.

c. Control Person Liability

For a control person to be liable under Section 15 of the 1933 Act, the person whom he controlled must be liable for a violation of Section 11 or 12. 15 U.S.C. § 77o; *see also Local 295/Local 851 IBT Emplr. Grp. Pension Tr. & Welfare Fund v. Fifth Third Bancorp*, 731 F. Supp. 2d 689, 714–15 (S.D. Ohio 2010) (citing *J & R Mktg., SEP v. Gen. Motors Corp*., 549 F.3d 384, 398 (6th Cir. 2008)). Because there is no primary violation of either Section 11 or 12(a)(2), there is no control-person liability in this matter.

CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's motion to dismiss.

CONCURRENCE / DISSENT

CLAY, Circuit Judge, dissenting in part and concurring in the judgment. I agree with the majority opinion that Plaintiffs in this matter have failed to state a claim because the alleged misstatements are, for the reasons stated by the majority, not actionable under the securities laws. However, I would not subject Plaintiffs' entire complaint to the heightened Rule 9(b) standard reserved for allegations of fraud. Rather, because Plaintiffs have alleged violations of Sections 11 and 12 of the 1933 Securities Act, based on a theory of negligence and sufficiently separated from their fraud allegations, I would apply the typical Rule 8 standard to these claims. I join in the outcome in this case because I believe Plaintiffs have failed to state a claim under that standard.[1] But I write separately to explain my concern that the majority's approach could unnecessarily dissuade securities litigants from bringing every claim that the securities laws permit (or result in the dismissal of such claims), contradicting both the purpose of the securities laws and reasoning from the Supreme Court.

As the majority explains, Sections 11 and 12 of the Securities Act of 1933 give rise to liability for misstatements—and, importantly, do not contain fraud as an element but may be pleaded based on a theory of negligence. Section 10(b) of the Securities Act of 1934, meanwhile, is a "catchall antifraud provision" that requires the plaintiff to allege that the defendant

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[1] Because the majority and I share the view that Plaintiffs satisfy Rule 9(b) but still fail to state a cognizable claim, the majority could have decided not to reach the issue of when a violation of the securities laws predicated on a theory of negligence trigger Rule 9(b), but rather could've saved that issue for another case in which resolution of this issue would've been dispositive.

acted with the "intent to deceive, manipulate, or defraud." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). When such claims are pleaded together, as happens often and as occurred in this case, the Courts of Appeals are split on the question of whether and when the Rule 9(b) pleading standard applies to claims that can be pleaded with mere negligence. *See, e.g.*, *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004) (applying Rule 9(b) to negligence claims where they rely on the "same course of conduct" as a Section 10(b) claim); *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 272–73 (3d Cir. 2006) (holding that Securities Act claims that allege negligence and are pleaded separately from Section 10(b) claims will not trigger the Rule 9(b) standard); *In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 314 (8th Cir. 1997) (establishing a categorical rule that claims brought under Section 11 or 12 face the Rule 8 standard because those causes of action do not include fraud or mistake as an element).

We have already weighed in on this issue, holding that "although § 11 claims do not require pleading of scienter, Rule 9(b) pleading standards still apply to § 11 claims that sound in fraud." *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 502 (6th Cir. 2013), *vacated on other grounds by Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015). However, *Omnicare* offered little guidance as to what in a complaint indicates that a claim "sounds in fraud." Perhaps in an attempt to provide such guidance, the majority holds that a complaint "sounds in fraud" when Section 10(b) claims "employ the same facts as a 1933 Act Section 11 claim or 12(a)(2) claim." Maj. Op. at 5. The majority then applies this standard to the instant case, concluding

that, because Plaintiffs' claims "were all grounded in *one* fraudulent course of conduct" and "rely[] on *one* set of facts," Rule 9(b) should apply. *Id.* at 6. But this formulation is the majority's, not our precedent's. Contrary to the majority's claim that we are "bound by our precedent," our case law has never required that negligence claims that rely on the same set of facts as fraud claims face Rule 9(b). Rather, *Omnicare* merely noted that the negligence claims in that case "sounded in fraud," thus triggering Rule 9(b) with no mention of a "unified course of fraudulent conduct." 719 F.3d at 502–03. I therefore part ways with the majority for two reasons.

First, the majority adopts a categorical approach that will subject almost every negligence claim under Sections 11 or 12 to a heightened pleading standard when pleaded alongside fraud claims under Section 10(b). Like many plaintiffs who combine multiple allegations, securities litigants often rely on the same set of facts to allege violations of different securities laws based on different theories of liability. *See Huddleston*, 459 U.S. at 383 ("[I]t is hardly a novel proposition that the Securities Exchange Act and the Securities Act prohibit some of the same conduct." (citation omitted)). The majority's standard would require plaintiffs who rely on the same set of facts to face an unnecessary heightened pleading rule for their negligence claims just because they seek full vindication of their rights under the securities laws. And the majority's holding is particularly perplexing given that even courts that profess to apply Rule 9(b) to allegations of negligence do so in a piecemeal manner. *See In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.3 (9th Cir. 1996) ("[T]he scienter requirement of Rule 9(b) does not apply to Section 11 claims, as such claims may be based on negligent or innocent misstatements

or omissions."). Such a dissonant result is not required by either our precedent, that of the Supreme Court, or the securities laws.

The majority attempts to mitigate the potential harm of its standard by stating that "when a 1933 Act plaintiff brings a Section 11 or 12(a)(2) claim that does *not* rely on one unified course of fraudulent conduct but, rather, carefully distinguishes the fraud claims from other claims, then we apply the Rule 8(a) pleading standard to those non-fraud claims." Maj. Op. at 5. But this is a Band-Aid on a bullet hole, and an illusory one at that. Plaintiffs' attempts to "carefully distinguish" their claims in this case were rebuffed by the majority. Plaintiffs' complaint specifically alleged negligence with their negligence claims and fraud with their fraud claims, raised the claims in separate counts of the complaint, and disavowed any allegations of fraud with their Section 11 and 12 claims. In my view, this is plenty to "carefully distinguish" Plaintiffs' negligence claims from their fraud claims such that the fraud claims need not "contaminate" the entire complaint. *See Suprema Specialties*, 438 F.3d at 272–73.

Second, the majority's approach is likely to discourage securities plaintiffs from bringing claims under both Sections 11 and 12 and Section 10(b), out of fear that their negligence claims will be forced to meet an unnecessary and more stringent standard. Applying Rule 9(b) even when plaintiffs, as in this case, diligently differentiate their fraud claims from their negligence claims "would effectively preclude plaintiffs from filing suit under Section 11 and Section 12(a)(2) as well as Section 10(b)(5)." *Id.* at 273. Much like the Third Circuit, I find that "[t]here is no suggestion that Congress intended such an incongruous approach." *Id.* And I believe this standard contradicts the Supreme

Court's reasoning in *Huddleston* which, as discussed above, explicitly blessed the securities laws assigning liability for overlapping conduct. *Huddleston*, 459 U.S. at 383. Contrary to *Huddleston*'s instruction that courts should construe the securities laws "not technically and restrictively, but flexibly to effectuate [their] remedial purposes," *id.* at 386–87, the majority's newly-fashioned rule will undoubtedly lead some plaintiffs to shed some potentially meritorious claims so as to avoid triggering the demanding Rule 9(b) standard.

Even worse, as a result of the majority's holding, more meritorious negligence claims under Section 11 and 12 will be dismissed under a standard that they would never have to meet were they alleged on their own. We need not apply Rule 9(b) so broadly as to foreclose vindication of the securities laws, which Congress enacted to better protect consumers and the integrity of the financial system as a whole. *Id.* at 383. But courts that apply Rule 9(b) even to claims of negligence, just because they rely on the same set of facts as a 10(b) claim, frequently dismiss the negligence claims for failure to meet Rule 9(b)'s specificity requirements. *See, e.g., California Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 172 (3d Cir. 2004) (Sloviter, J., dissenting) (protesting that the majority dismissed a possibly meritorious Section 11 claim for failure to meet the Rule 9(b) standard and stating that he would have given leave to amend). Doing so undermines, without justification, the very goals that the securities laws were meant to advance. Rule 9(b) is meant to ensure "that a defendant is provided with at least the minimum degree of detail necessary to begin a competent defense." *U.S. ex rel. SNAPP, Inc. v. Ford Motor Co.*, 532 F.3d 496, 504 (6th Cir. 2008). In this case and many others, no one has claimed that

securities defendants do not have proper notice of the allegedly illegal conduct. Again, given *Huddleston*'s endorsement of Sections 11 and 10(b) criminalizing the same conduct, and given that the law generally allows plaintiffs to allege many causes of action—with different elements, based on the same set of facts—it seems needless to require plaintiffs to either allege their claims as completely separate actions (which a district court would likely consolidate), shed one of their claims, or risk dismissal of their entire action if the pleadings fail to meet Rule 9(b).

It should be noted that some circuits have observed that the remedy for a failure to satisfy Rule 9(b) need not be the harsh sting of dismissal. If a plaintiff fails to allege fraud with sufficient particularity, courts have the power to strip the allegations of fraud from the claim and evaluate whether a claim has been stated. *See In re NationsMart Corp. Sec. Litig.*, 130 F.3d 309, 315 (8th Cir. 1997) ("The only consequence of a holding that Rule 9(b) is violated with respect to a § 11 claim would be that any allegations of fraud would be stripped from the claim . . . . The allegations of innocent or negligent misrepresentation, which are at the heart of a § 11 claim, would survive.); *Lone Star Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001) ("Where averments of fraud are made in a claim in which fraud is not an element, an inadequate averment of fraud does not mean that no claim has been stated. The proper route is to disregard averments of fraud not meeting Rule 9(b)'s standard and then ask whether a claim has been stated."); *Yess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003) ("[I]n a case where fraud is not an essential element of a claim, only allegations ('averments') of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b). Allegations of non-

fraudulent conduct need satisfy only the ordinary notice pleading standards of Rule 8(a).”). Hopefully, a future panel of this Court, or the Supreme Court, can clarify the law along the lines described here, so that the majority’s untenable views are not sustained.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 23-3392

ILIA KOLOMINSKY, *et al.*,

Plaintiffs,

PLUMBERS LOCAL 290 PENSION TRUST FUND,
individually and on behalf of all
others similarly situated,

Plaintiff-Appellant,

v.

ROOT, INC.; ALEXANDER TIMM; DANIEL ROSENTHAL;
MEGAN BINKLEY; CHRISTOPHER OLSEN; DOUG ULMAN;
ELLIOT GEIDT; JERRI DEVARD; LARRY HILSHEIMER;
LUIS VON AHN; NANCY KRAMER; NICK SHALEK;
SCOTT MAW; BARCLAYS CAPITAL INC.; GOLDMAN SACHS
& COMPANY, LLC; MORGAN STANLEY & COMPANY,
LLC; WELLS FARGO SECURITIES, LLC,

Defendants-Appellees.

Before: BATCHELDER, CLAY, and DAVIS,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Southern District of Ohio at Columbus.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens
Kelly L. Stephens, Clerk

APPENDIX E

Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures
(Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

15 U.S.C. § 77k
Alternatively cites as Securities Act § 11

Effective: November 3, 1998
Currentness

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue–

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to

become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof–

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted (A) he had resigned from or had

taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and (B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that (A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and (B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert, (i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such

part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or (ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and (C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and (D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: *Provided*, That if the defendant proves that any portion or all of such damages represents other than the depreciation in

value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) shall be jointly and severally liable, and every

person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)(A) The liability of an outside director under subsection (e) shall be determined in accordance with section 78u-4(f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures
(Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

15 U.S.C. § 77l
Alternatively cites as Securities Act § 12

Effective: December 21, 2000
Currentness

§ 77l. Civil liabilities arising in connection with prospectuses and communications

(a) In general

Any person who–

(1) offers or sells a security in violation of section 77e of this title, or

(2) offers or sells a security (whether or not exempted by the provisions of section 77c of this title, other than paragraphs (2) and (14) of subsection (a) of said section), by the use of any means or instruments of transportation or communication in interstate commerce or of the mails, by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission,

shall be liable, subject to subsection (b), to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such

security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

(b) Loss causation

In an action described in subsection (a)(2), if the person who offered or sold such security proves that any portion or all of the amount recoverable under subsection (a)(2) represents other than the depreciation in value of the subject security resulting from such part of the prospectus or oral communication, with respect to which the liability of that person is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statement not misleading, then such portion or amount, as the case may be, shall not be recoverable.

Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures
(Refs & Annos)
Subchapter I. Domestic Securities (Refs & Annos)

15 U.S.C. § 77o
Alternatively cites as Securities Act § 15

Effective: July 22, 2010
Currentness

§ 77o. Liability of controlling persons

(a) Controlling persons

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

(b) Prosecution of persons who aid and abet violations

For purposes of any action brought by the Commission under subparagraph (b) or (d) of section 77t of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this subchapter, or of any rule or regulation issued under this subchapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.