No. _____

In the Supreme Court of the United States

ON24, INC., ET AL., PETITIONERS

v.

LEADERSEL INNOTECH ESG

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DAVID J. WIENER
ANNA ERICKSON WHITE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

ALEXANDRA M. AVVOCATO
MORRISON & FOERSTER LLP
250 West 55th Street
New York, NY 10019

BRIAN R. MATSUI
Counsel of Record
MORRISON & FOERSTER LLP
2100 L Street NW, Suite 900
Washington, DC 20037
(202) 887-8784
BMatsui@mofo.com

LAUREN PARDEE RUBEN
MORRISON & FOERSTER LLP
370 17th Street
Denver, CO 80202

Counsel for ON24, Inc.

(additional counsel listed on inside cover)

JUNE 2026

THOMAS M. PETERSON
CHARLENE S. SHIMADA
KEVIN M. PAPAY
MORGAN, LEWIS & BOCKIUS LLP
600 Montgomery Street
Suite 2300
San Francisco, CA 94111
(415) 442-1000
thomas.peterson@morganlewis.com

Counsel for Goldman Sachs & Co. LLC; J.P. Morgan Securities LLC; KeyBanc Capital Markets Inc.; Robert W. Baird & Co. Incorporated; Canaccord Genuity LLC; Needham & Company, LLC; Piper Sandler & Co.; and William Blair & Company L.L.C.

QUESTIONS PRESENTED

Section 11(a) of the Securities Act of 1933 imposes liability when a registration statement "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). This petition presents three important and recurring legal questions regarding the "omissions" clause of the statute:

1. Whether an issuer violates Section 11(a)'s misleading-omissions prong by describing unmaterialized risks as hypothetical.

2. Whether an issuer violates Section 11(a)'s misleading-omissions prong whenever it omits information related to a disclosed fact regardless of whether the omission renders an affirmative statement misleading.

3. Whether an issuer violates Item 303 of Regulation S-K—and thus the prong of Section 11(a) prohibiting the omission of required statements—by failing to disclose immaterial facts as "known trends or uncertainties" that are reasonably likely to have a material impact on financial results.

PARTIES TO THE PROCEEDINGS

Petitioners (Defendants-Appellees) are ON24, Inc.; Sharat Sharan; Steven Vattuone; Denise Persson; Holger Staude; Dominique Trempont; Barry Zwarenstein; Irwin Federman; Goldman Sachs & Co. LLC; J.P. Morgan Securities LLC; Key-Banc Capital Markets Inc.; Robert W. Baird & Co. Incorporated; Canaccord Genuity LLC; Needham & Company, LLC; Piper Sandler & Co.; and William Blair & Company L.L.C.

Respondent (Plaintiff-Appellant) is Leadersel Innotech ESG.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court, undersigned counsel for petitioners certify the corporate disclosure statements set forth in the appendix. *See* Pet. App. 77a–79a.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (N.D. Cal.):

In re ON24, Inc. Securities Litigation, No. 4:21-cv-08578-YGR (Mar. 5, 2024)

United States Court of Appeals (9th Cir.):

In re ON24, Inc. Securities Litigation, No. 24-2204 (Jan. 7, 2026)

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PETITION FOR WRIT OF CERTIORARI

This petition raises an important, overarching, and recurring issue: do the securities laws require companies to predict the future in their risk disclosures or face liability? The Ninth Circuit's answer—alone among the circuits—is yes.

In February 2021, during the height of the COVID-19 pandemic—before stay-at-home restrictions were lifted and vaccines were widely available—ON24 held its initial public offering (IPO). A digital experience platform that enables virtual meetings and events, ON24 saw significant growth and new customers during the pandemic when employees were required to work from home. ON24 prominently disclosed to investors that its "recent revenue growth has been significantly impacted by an increasing demand for [its] platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures." And ON24's risk disclosures to investors expressly warned that "[a]s the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline." Those risk disclosures even more specifically explained, "[i]f fewer new enrollments or renewals occur as the impact of COVID-19 lessens, our cash and deferred revenue as of future dates may decrease."

The Ninth Circuit nonetheless held that these disclosures were misleading for not saying more. In the court's view, ON24 had to disclose that a possibly single-digit number of customers (out of almost 2000) had declined to renew before the IPO and that other customers had suggested they might not renew in the

future because their subscriptions were a COVID-related expense. The Ninth Circuit reached this conclusion even though plaintiff had conceded that those pre-IPO non-renewals had not affected ON24's business and that the potential harm that ON24 had warned of in its risk disclosures—actual widespread non-renewals if the effects of COVID-19 lessened—had not yet occurred. In other words, based on what ON24 knew at that time, ON24 had to predict that the pandemic and related restrictions would end shortly after February 2021 and that a material number of its customers would cancel their contracts when they came up for renewal.

The Ninth Circuit's holding squarely conflicts with the First, Third, and Tenth Circuits, which hold that risk disclosures are not misleading when they describe potential harms as hypothetical unless the warned-of harm has already occurred or is virtually certain to occur. Just two years ago, this Court recognized the importance of this conflict when it granted certiorari in *Facebook, Inc. v. Amalgamated Bank*, 144 S. Ct. 2629 (2024). Though the *Facebook* petition was ultimately dismissed as improvidently granted, 604 U.S. 4 (2024), the split persists—and here, unlike in *Facebook*, no factual complications impede the Court's review.

What's more, the decision below warrants review for another reason: it squarely raises the two questions presented in *Robinhood Markets, Inc. v. Sodha*, No. 25-944 (U.S. Feb. 5, 2026), a pending petition in which the Court has called for the views of the Solicitor General. First, the Ninth Circuit's ruling requires disclosure of all information related to a disclosed fact—including immaterial information—regardless

of whether any omission renders an affirmative statement misleading. That rule contravenes the text of the securities laws, this Court's decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024), and the holdings of other circuits. And second, the Ninth Circuit held that immaterial, isolated incidents must be disclosed under Item 303 of Regulation S-K as "known trends or uncertainties"—a position equally at odds with the regulation's text and other circuits' decisions. The Court should grant certiorari or at least hold this petition pending its decision in *Robinhood*.

OPINIONS BELOW

The Ninth Circuit's decision (Pet. App. 1a–8a) is not reported but is available at 2026 WL 45259. The Northern District of California's order (Pet. App. 9a–34a) is not reported but is available at 2024 WL 979951. The Ninth Circuit's order denying panel rehearing and rehearing en banc (Pet. App. 76a) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on January 7, 2026. Petitioners' petition for panel rehearing and rehearing en banc was denied on March 9, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The relevant provisions of 15 U.S.C. § 77k (Section 11 of the Securities Act of 1933), and 17 C.F.R. § 229.303 (Item 303 of Regulation S-K), are reproduced in the appendix at Pet. App. 80a–93a.

STATEMENT OF THE CASE

A. Legal Background

1. The Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.*, together "form the backbone of American securities law." *Slack Techs., LLC v. Pirani*, 598 U.S. 759, 762 (2023).

The 1933 Act is "focused primarily on the regulation of new offerings." *Ibid.* (internal quotation marks omitted). It requires a company intending to publicly offer securities to register them with the SEC and to "prepare a registration statement that includes detailed information about the firm's business and financial health so prospective buyers may fairly assess whether to invest." *Ibid.* "The law imposes strict liability on issuing companies when their registration statements contain material misstatements or misleading omissions." *Ibid.* (citing 15 U.S.C. § 77k).

The 1934 Act "sweeps more broadly." *Id.* at 763. "Among other things, it requires publicly traded companies to provide ongoing disclosures and regulates trading on secondary markets." *Ibid.* The law's "main liability provision sweeps more broadly too," allowing "suits in connection with the purchase or sale of 'any security,' whether registered or not." *Ibid.* (quoting 15 U.S.C. § 78j(b)). "But to prevail under this provision, a plaintiff must prove that any material misleading statement or omission was made with scienter, i.e., with intent to deceive, manipulate, or defraud." *Ibid.* (internal quotation marks omitted).

Notwithstanding these differences, both statutes make material misrepresentations and misleading

omissions unlawful. Section 11(a) of the 1933 Act, for its part, creates a private right of action for any purchaser of a security if "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." 15 U.S.C. § 77k(a).

Section 10(b) of the 1934 Act, meanwhile, makes it unlawful to employ, in connection with the purchase or sale of any security, "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). Under that provision, the SEC has promulgated Rule 10b–5, which makes it unlawful, in connection with the purchase or sale of any security, "[t]o 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 light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5.

Accordingly, both Section 11(a) of the 1933 Act and Rule 10b–5 impose liability for the omission of material information that is necessary to prevent affirmative statements from misleading investors. Courts applying these parallel provisions have interpreted them consistently. *See, e.g.*, *Sodha v. Golubowski*, 154 F.4th 1019, 1033 n.3 (9th Cir. 2025).

2. Section 11(a) also imposes affirmative disclosure obligations. Item 303 of Regulation S-K sets forth one such requirement. It requires issuers to disclose "any known trends or uncertainties that have had or that are reasonably likely to have a material

favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(b)(2)(ii). But these affirmative disclosure requirements also strike a balance: overdisclosure can "bury the shareholders in an avalanche of trivial information," a state of affairs "that is hardly conducive to informed decisionmaking." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 448–449 (1976). The securities laws accordingly "do[] not require the disclosure of all information a potential investor might take into account when making his decision." *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1163 (9th Cir. 2009).

B. Factual Background

1. During the relevant period, ON24 offered a cloud-based digital experience platform that helped businesses transition from traditional marketing to scalable, digital-based approaches. ER-23 (¶3); 1-SER-46–47.[1] ON24's customers used the platform to host interactive webinars and virtual events. 1-SER-46. ON24 generated revenue through selling subscriptions, almost all of which were annual contracts billed in advance. ER-35 (¶¶63–64).

In 2019, ON24's revenue grew at a robust rate of about 8%. *See* 1-SER-57. And that rate of growth accelerated in 2020 as the COVID-19 pandemic began and many businesses turned to ON24 as a remote solution to their marketing needs. ER-23 (¶7). During the first three quarters of 2020, ON24's revenue

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[1] Citations to "ER" and "SER" are to the Excerpts of Record filed in the Court of Appeals. Citations to "C.A. Dkt." are to the docket in the Court of Appeals.

increased 59% as compared to the prior year. ER-23 (¶7). While plaintiff later alleged that this growth came from "atypical" customers—i.e., smaller businesses that signed one-year subscriptions with no intent to renew and a handful of businesses that signed six-month contracts—the documents plaintiff cites show that ON24's 2020 growth came from both new and existing customers, including an increasing number of large companies. *See* C.A. Dkt. 29 at 5–6, 34.

ON24 recognized that the COVID-19 pandemic created uncertainty as to whether new customers would renew their subscriptions. *Id.* at 6. Like many sales-based companies, ON24 employees sought to mitigate those risks by identifying accounts at risk of non-renewal (or "churn") and discussing potential ways to retain customers. *Ibid.*

2. ON24 conducted its IPO on February 3, 2021, Pet. App. 10a, when the pandemic remained at its height with remote work, closed schools, and limited vaccines. ON24 prominently disclosed to investors the role the pandemic had played in its recent success, explaining that its "recent revenue growth has been significantly impacted by an increasing demand for [its] platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures." ER-63 (¶181).

ON24 then provided extensive risk disclosures that included the following warnings:

- "As the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline. If these new customers elect not to continue

their subscription as the impact of COVID-19 lessens, our business, financial condition and results of operations would be harmed." ER-63 (¶181).

- "[O]ur revenue and revenue growth rate may decline in future periods compared to 2020 as the impact of COVID-19 lessens. . . . If fewer new enrollments or renewals occur as the impact of COVID-19 lessens, our cash and deferred revenue as of future dates may decrease." ER-63–64 (¶182).
- "Failure to attract new customers or retain, expand the usage of, and upsell our products to existing customers would harm our business and growth prospects. . . . Renewals of subscriptions may decline or fluctuate because of several factors, such as dissatisfaction with our solutions or support, a customer no longer having a need for our solutions or the perception that competitive products provide better or less expensive options." ER-64 (¶183).

Alongside those disclosures, ON24 optimistically described its customer base as "highly engaged and loyal." ER-57 (¶175). It also provided prior revenue statistics and explained that its revenue growth "reflects our success in acquiring new customers and expanding subscriptions with existing customers, which was occurring prior to the COVID-19 pandemic

and has accelerated in 2020 partly in response to the COVID-19 pandemic." ER-59 (¶177).[2]

3. ON24's growth continued after the IPO. *See* C.A. Dkt. 29 at 8. By the end of 2021, ON24's year-over-year revenue had increased by 30%, and its subscription revenue specifically increased by 43%. 2-SER-384. Yet ON24's 2021 growth just missed the even higher expectations that analysts had set—expectations that were not provided anywhere in ON24's offering documents—and ON24's stock price fell. ER-29 (¶¶26–27).

C. Procedural Background

1. Lead plaintiff Leadersel Innotech ESG brought this putative class action against ON24, its executives, and the underwriters of its IPO under Section 11 of the Securities Act of 1933 and regulations issued thereunder. ER-66, ER-80–83.[3] Plaintiff alleged that at the onset of the pandemic in March 2020, ON24 began receiving an influx of "atypical" customers, most of whom obtained one-year contracts, with a few obtaining six-month contracts. ER-24 (¶9), ER-

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[2] In 2020, ON24's revenue from existing customers increased, as did the percentage of customers with multi-year contracts and customers contributing at least $100,000 in annual recurring revenue, which were generally large organizations. ER-23–24 (¶7), ER-37 (¶¶71–72); 1-SER-47, 1-SER-59, 1-SER-69, 1-SER-106, 1-SER-108–109, 1-SER-111–112.

[3] Plaintiff also alleged a control person liability claim against each of the individual defendants under Section 15 of the Securities Act, 15 U.S.C. § 77o. ER-83–84.

53 (¶160). As relevant here, plaintiff alleged that at the time of the February 2021 IPO, ON24 knew that (1) a small handful of the six-month contracts had not renewed and (2) an unspecified number of new customers had expressed a future intent not to renew their subscriptions because those subscriptions were a COVID-related expense. *See* Pet. App. 26a–27a; ER-24 (¶10), ER-53 (¶161), ER-59–61 (¶178). Plaintiff also asserted that significant non-renewal had started *before* the IPO—but plaintiff's accounts of that were vague, internally contradictory, and at odds with plaintiff's theory that atypical contracts started in March 2020, meaning they would not have been up for renewal at the time of the IPO. Pet. App. 26a–30a.

In plaintiff's view, this meant that ON24 knew for a fact that material non-renewal would occur after the IPO, and ON24 therefore acted misleadingly by describing future material non-renewal as a *risk* rather than a *certainty*. ER-24 (¶10), ER-59–61 (¶178). On that theory, plaintiff challenged five statements as misleading: (1) ON24's description of its customer base as "highly engaged and loyal"; (2) ON24's recounting of past "acceleration in revenue growth rate due to the COVID-19 pandemic"; (3) ON24's warning of "a potential reduction in product demand post-pandemic"; (4) ON24's warning of "a potential decline in the revenue growth rate post-pandemic"; and (5) ON24's warning of "the possibility that subscription renewals and upselling may decline in the future." Pet. App. 5a.[4]

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[4] Plaintiff challenged additional statements that are no longer at issue. *See* Pet. App. 40a–51a.

2. The district court dismissed the complaint. It concluded that the heart of plaintiff's case was that ON24 faced material customer non-renewals before the IPO. But plaintiff's allegations at most "reflect[ed] a 'risk' of churn" (i.e., customer non-renewal) because, under plaintiff's own theory of the case, "the atypical, COVID-driven customer influx did not start until March 2020." Pet. App. 27a. And "[a]side from the 'handful' of customers who signed six-month contracts, the great majority of these atypical customers then would not have come up for renewal until *after* the February 2021 IPO." Pet. App. 27a. The district court also concluded that plaintiff's allegations of pre-IPO non-renewal were fatally vague and internally inconsistent. Pet. App. 23a–29a.

In any event, the district court ruled that ON24's "detailed disclosures warn[e]d of the very risks that plaintiff claim[ed] ON24 failed to disclose." Pet. App. 31a. They "adequately disclosed that, as COVID cooled, their customer acquisition and rate of growth might cool as well." Pet. App. 32a. Nothing more was needed to adequately warn of future contingent events.

3. Plaintiff appealed to the Ninth Circuit. After briefing and oral argument, the Ninth Circuit vacated submission pending its ruling in *Robinhood* (*Sodha*, 154 F.4th 1019).[5] *See* C.A. Dkt. 50.

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[5] The case caption was "*Sodha v. Golubowski*" in the Ninth Circuit, *see* 154 F.4th 1019, and is "*Robinhood Markets, Inc. v. Sodha*" in this Court, *see* No. 25-944.

After the Ninth Circuit ruled in *Robinhood*, the Court of Appeals ordered supplemental briefing. *See* C.A. Dkt. 55. Following that supplemental briefing on the *Robinhood* decision's effect on this matter, the Ninth Circuit reversed in relevant part, holding that the five statements at issue were misleading. *See* Pet. App. 5a–7a.[6] Citing its prior precedent, the Court of Appeals explained that "'[r]isk disclosures that speak entirely of as-yet-unrealized risks and contingencies and do not alert the reader that some of these risks may already have come to fruition can mislead reasonable investors.'" Pet. App. 6a (quoting *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021)). Based on that precedent, the court ruled that risks can come to fruition even *before* the warned-of event has occurred. According to the Ninth Circuit, plaintiff's complaint plausibly alleged that, before the IPO, atypical customers had informed ON24 of their intent not to renew and that some "atypical customer churn" had started to occur. Pet. App. 6a–7a. Based on those allegations, the court concluded that plaintiff had "sufficiently allege[d] that ON24 knew that the risk of material churn and downselling had started to come to fruition before the IPO yet disclosed only that those risks *may* occur." Pet. App. 6a (emphasis in original).

In reaching this conclusion, the Ninth Circuit did not—and could not—hold that plaintiff had plausibly alleged that ON24 had experienced *material* non-renewals before the IPO. As plaintiff conceded, no

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[6] The Ninth Circuit affirmed the dismissal of one statement of forward-looking opinion that is not at issue here. *See* Pet. App. 4a–5a.

significant pre-IPO contract expirations had occurred before ON24's IPO—to the extent there were any such expirations at all. *See* C.A. Dkt. 56 at 12 (acknowledging that ON24's new customers "were still within their initial contract periods during the months following the IPO" such that ON24's "revenues remained temporarily elevated"). Instead, the Court of Appeals based its conclusion on an allegation regarding a mere handful of six-month contracts that were not renewed before the IPO. *See* Pet. App. 7a (discussing "ON24 leadership's knowledge of churn with six-month contracts leading up to the IPO"). The referenced contracts were only a few within a group of 25 to 30, a tiny fraction of ON24's customers. *See* Pet. App. 26a–27a.

The Ninth Circuit thus held that ON24 was required to disclose that the *risk* of "material churn" the company warned of had started to come to fruition based solely on an immaterial number of pre-IPO nonrenewals; an unspecified number of customers' statements about what they planned to do months in the future depending on how the pandemic played out; and ON24's knowledge of that information. Pet. App. 6a–7a.

The Ninth Circuit also reversed the dismissal of plaintiff's Item 303 claim for essentially the same reasons. Pet. App. 7a–8a. It held that the complaint sufficiently alleged that ON24 had failed to disclose known trends that were reasonably likely to have a material unfavorable impact—here, "the change in customer profiles that occurred before the IPO, ON24 leadership's knowledge of several customers' intent not to renew or intent to downsell, and ON24

leadership's knowledge of churn with six-month contracts leading up to the IPO." Pet. App. 7a.

4. ON24 filed a petition for panel rehearing and/or rehearing en banc, which was denied on March 9, 2026. Pet. App. 76a.

REASONS FOR GRANTING REVIEW

The Ninth Circuit's precedent imposes expansive disclosure requirements that far exceed those in any other circuit. Those disclosure obligations create unworkable requirements for public companies, forcing them to inundate investors with a flood of irrelevant and speculative information. This division in the courts of appeals will make the Ninth Circuit the preferred forum for plaintiffs alleging fraud-by-hindsight after a stock drop. The Court should grant review to bring the Ninth Circuit back in line with the text and purpose of the securities laws, this Court's precedent, and the decisions of other circuit courts.

I. THE COURT SHOULD AGAIN GRANT REVIEW TO RESOLVE A CIRCUIT SPLIT ON WHAT RISK DISCLOSURES REQUIRE

The Ninth Circuit's decision conflicts with three other circuits on the question of whether risk disclosures are misleading when they describe risks as hypothetical because they have not yet materialized. The First, Third, and Tenth Circuits say no; the Ninth Circuit says yes. This Court recently tried to resolve this division by granting certiorari in *Facebook* but dismissed the petition as improvidently granted. This case presents the same legal conflict but with facts that allow for a clean resolution of the question presented.

A. The First, Third, and Tenth Circuits hold that risk disclosures are not misleading when they describe as hypothetical risks that have not yet occurred and are not certain to occur

The Ninth Circuit's outlier position on risk disclosures conflicts with that of three other circuits.[7]

The First Circuit has explained that "[i]f [a] company did not know with certainty that a risk would materialize, it is not necessarily liable for characterizing that risk as a 'future risk.'" *Karth v. Keryx Biopharmaceuticals, Inc.*, 6 F.4th 123, 138 (1st Cir. 2021) (quotation marks and alterations omitted). In *Karth*, plaintiff alleged that several disclosures "were misleading because each characterized the risk of a supply interruption as hypothetical when, according to [plaintiff], that disruption was actively occurring." *Ibid.* The First Circuit rejected that argument because plaintiff had not sufficiently alleged "that a supply interruption was happening or was even close

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[7] While those courts considered claims under Rule 10b–5, the relevant text of Rule 10b–5 is virtually identical to the text of Section 11(a) at issue here. *Compare* 17 C.F.R. § 240.10b–5 (making it unlawful "to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading"), *with* 15 U.S.C. § 77k(a) (making it unlawful to "omit[] to state a material fact . . . necessary to make the statements [in a registration statement] not misleading"). Thus, courts rely on cases interpreting Rule 10b–5 when interpreting the analogous text of Section 11. *See, e.g.*, *Sodha*, 154 F.4th at 1033 n.3.

to a 'near certainty.'" *Ibid.* While a key manufacturer was experiencing certain difficulties, plaintiff had not sufficiently alleged that those problems "would *necessarily* yield an uncorrectable supply interruption." *Id.* at 139 (emphasis added). The securities laws "do[] not require a company to be omniscient," the First Circuit explained, "even if the company looks foolish in hindsight for not properly predicting whatever harm befell it." *Id.* at 138.

The Third Circuit is in accord. In *Williams v. Globus Medical, Inc.*, 869 F.3d 235 (3d Cir. 2017), the Third Circuit dismissed a challenge to risk disclosures that "warned that the loss of an independent distributor could have a negative impact on sales." *Id.* at 241. The Third Circuit rejected plaintiffs' argument that the disclosure misleadingly "omitted to warn" that the company "had *in fact* lost an independent distributor." *Ibid.* (emphasis in original). "The risk actually warned of," the Third Circuit explained, was "the risk of adverse effects on sales—not simply the loss of independent distributors generally." *Id.* at 242. And that risk "only materialized" if "sales were adversely affected." *Ibid.* Thus, absent allegations that the company "was already experiencing an adverse financial impact at the time of the risk disclosures" or that such an impact "was inevitable," plaintiffs' claim failed. *Id.* at 243.

Similarly, the Tenth Circuit has held that risk disclosures are misleading only when the risk has materialized or is virtually certain to do so. In *Indiana Public Retirement System v. Pluralsight, Inc.*, 45 F.4th 1236 (10th Cir. 2022), for instance, defendants had warned in risk disclosures that the company's business could be harmed if it failed to hire sufficient

sales representatives. *Id.* at 1254. Plaintiffs alleged that those disclosures were misleading because defendants knew the company had already "fallen behind its sales ramp capacity plan and would struggle to maintain its billings growth." *Id.* at 1255. The Tenth Circuit rejected that argument because "nothing in the complaint support[ed] the inference that [d]efendants knew [the company] was so far behind in its sales ramp capacity plan that it was virtually certain to cause harm to the business"—the risk warned of. *Id.* at 1256–1257.

Accordingly, in the First, Third, and Tenth Circuits, if a risk has not yet occurred or is not virtually certain to occur, it has not materialized, and disclosures describing that risk as hypothetical are thus not misleading as a matter of law. Had this case been decided in those circuits, plaintiff's case could not have proceeded. ON24's risk disclosures accurately warned of risks that *might* occur, as it was not virtually certain when the pandemic would end and that a material number of ON24's customers would not renew their agreements post-IPO.

B. The Ninth Circuit holds that risks have materialized even when they have not yet occurred, and that disclosures describing those risks as hypothetical are thus misleading

Unlike those circuits requiring the warned-of harm to have actually occurred or be virtually certain to occur for a risk warning to be misleading, the Ninth Circuit requires companies' risk disclosures to predict the future. Relying on its prior precedent, *Alphabet*, 1 F.4th 687, the Ninth Circuit held that ON24's risk

disclosures—where ON24 expressly warned that a material number of customers may not renew their contracts if COVID-19 restrictions lessened—were plausibly misleading because they did not reveal that this risk had already started to come to fruition. Pet. App. 6a–7a.

None of plaintiff's allegations demonstrate that ON24's revenue and revenue growth rate were already declining or would certainly decline, or that a material number of new customers had already declined to renew or would certainly do so. Instead, the Ninth Circuit relied on ON24's failure to disclose immaterial instances of pre-IPO non-renewals and an unspecified number of customers stating their then-future-intention not to renew their contracts—intentions that necessarily assumed the pandemic would end shortly after February 2021. Pet. App. 6a. Those past events do not establish that the risk warned of—material non-renewal that would harm ON24's business—had already occurred or would certainly occur. Indeed, the warned-of risk did not, in fact, materialize: ON24's subscription growth continued after the IPO. By the end of 2021, ON24's year-over-year revenue had increased by 30%, and its subscription revenue specifically increased by 43%. 2 SER-384.

The Ninth Circuit's decision thus turns the concept of risk materialization on its head: a warned-of risk has materialized even if it has not occurred and is not certain to occur. That reasoning replaces the understandable and bright-line rule used by all other circuits with a rule that demands speculation, at best, and false certainty, at worst. The upshot of the Ninth Circuit's holding appears to be that once a company becomes aware of the *possibility* of a material adverse

event, it must disclose that event as a certainty. That rule poses enormous risks for issuers by exposing them to liability for inaccurately predicting unknowables like the course of global events (e.g., the duration of the COVID-19 pandemic) or the future actions of third parties (e.g., the decisions of individual customers to renew or to cancel subscriptions based on the outcome of such global events). The resulting speculative, overstated risk disclosures will harm not just issuers but investors, contrary to the purpose of the securities laws.

This Court recognized the importance of this issue when it granted the petition for a writ of certiorari in *Facebook*, another decision from the Ninth Circuit presenting the same conflict. Unlike there, however, the facts here permit clean resolution of the question presented.

In *Facebook*, the Ninth Circuit—also relying on its decision in *Alphabet*, 1 F.4th 687—held that warnings can be materially misleading even when the warned-of business harm has not yet materialized. *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 948–950 (9th Cir. 2023). The case involved news that "Cambridge Analytica, a British political consulting firm, improperly harvested personal data from millions of unwitting Facebook users and retained copies of the data beyond Facebook's control." *Id.* at 941. The news emerged piecemeal over time as "Facebook and its executives made various statements before and after the news announcements." *Ibid.*

Shareholders brought suit under Section 10(b) and Rule 10b–5 alleging, as relevant here, that "although Facebook knew Cambridge Analytica had

improperly accessed and used Facebook users' data, Facebook represented in its 2016 Form 10-K that only the hypothetical risk of improper third-party misuse of Facebook users' data could harm Facebook's business, reputation, and competitive position." *Id.* at 948.

The Ninth Circuit allowed the suit to proceed, holding—as it did in the decision below—that circuit law "does not require harm to have materialized for a statement to be materially misleading." *Id.* at 949. Disclosing a risk as a hypothetical one that *may* occur, the Ninth Circuit reasoned, was misleading even though "Facebook did not know whether its reputation was already harmed." *Id.* at 950.

This Court granted Facebook's petition for a writ of certiorari, but oral argument brought out disputes about the underlying facts and the scope of the Ninth Circuit's decision that complicated the Court's review. For example, as highlighted by the dueling majority and dissenting opinions in the Ninth Circuit, confusion existed regarding whether the warned-of risk was the risk of a data breach, which had already materialized, or the risk of harm to the business, which had not. *Compare* 87 F.4th at 949 (majority opinion) ("[T]he problem is that Facebook represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired."), *with id.* at 959 (Bumatay, J., concurring in part and dissenting in part) ("[A] careful reading of the 10-K statements shows that these risk factor statements warn about harm to Facebook's 'business' and 'reputation' that 'could' materialize based on improper access to Facebook users' data—

not about the occurrence or non-occurrence of data breaches.").

Additionally, because some news about the Cambridge Analytica breach had been published in 2015 before Facebook's 2016 risk disclosures, there was a dispute about whether the facts Facebook failed to disclose were already public knowledge such that their disclosure or lack thereof would not have been material. *Compare* 87 F.4th at 950 (majority opinion) ("Notably, although the dissent seemingly perceives it otherwise, the extent of Cambridge Analytica's misconduct was not yet public when Facebook filed its 2016 10-K."), *with id.* at 959 (Bumatay, J., concurring in part and dissenting in part) ("[M]uch about the Cambridge Analytica scandal was already public.").

This case is not burdened with either complication. Plaintiff conceded that no significant pre-IPO non-renewals occurred before the IPO, and the Ninth Circuit did not—and could not—hold those few non-renewals were material. And there is no question as to what the relevant risk warned of here is: the risk of material non-renewal that would harm the company's financials. The Ninth Circuit thus went even further here than it did in *Facebook*. The *Facebook* majority (though not the dissent) had some basis to conclude that the risk *had* materialized, though the business harm had not yet occurred. Here, by contrast, the risk indisputably *had not materialized* because neither material churn nor business harm occurred before the IPO.

This case thus squarely presents the question whether describing unmaterialized risks as

hypothetical constitutes a misleading omission under the securities laws.

II. THE NINTH CIRCUIT'S LIMITLESS DISCLOSURE RULE VIOLATES TEXT AND PRECEDENT

Review also should be granted because this case implicates the first question presented in the *Robinhood* petition: whether it violates Section 11(a) to omit past information "that investors may consider material, without an inquiry into whether the omission rendered any affirmative statement misleading." *Robinhood* Pet. I. The Ninth Circuit recognized the connection between this case and *Robinhood*. It vacated submission of this case pending its *Robinhood* decision and ordered supplemental briefing to address the effect of that decision. As in *Robinhood*, the Ninth Circuit here held that plaintiff had sufficiently alleged a Section 11(a) violation even though it failed to show that the alleged omissions were material and rendered a statement made misleading. That result cannot be squared with the text of Section 11(a), this Court's decision in *Macquarie*, 601 U.S. 257, or the decisions of other circuits. This Court recently called for the views of the Solicitor General ("CVSG") on the questions presented in the *Robinhood* petition. At the very least, therefore, this petition should be held pending the Court's resolution of that petition.

A. Absent a legal duty to disclose, an omission is actionable only if it is material and misleading

Under the plain text of the securities laws, an omission must be *both* "material" *and* "misleading" to be actionable. Section 11(a) imposes liability

whenever a registration statement "omit[s] to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Rule 10b–5 likewise makes it unlawful "to omit to state a material fact necessary in order to make the statements made . . . not misleading." 17 C.F.R. § 240.10b–5.[8]

This Court recently confirmed that both elements are required. In *Macquarie*, 601 U.S. 257, the question was "whether the failure to disclose information required by Item 303 can support a private action under Rule 10b–5(b), even if the failure does not render any 'statements made' misleading." *Id.* at 260. The Court held that it cannot because "[p]ure omissions are not actionable under Rule 10b–5(b)." *Ibid.*

The Court explained that Rule 10b–5 "do[es] not create an affirmative duty to disclose any and all material information." *Id.* at 264. Rather, the Rule "prohibits omitting material facts necessary to make the 'statements made . . . not misleading.'" *Ibid.* "Logically and by its plain text, the Rule requires identifying affirmative assertions (i.e., 'statements made') before determining if other facts are needed to make those statements 'not misleading.'" *Ibid.*

Accordingly, the omission of material information is not sufficient to state a claim under Rule 10b–5 or, by extension, the misleading-omissions prong of Section 11(a). An omission is actionable only

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[8] The duty to disclose legally required information under Section 11(a) is addressed separately below. *See infra* pp. 26–29.

if it is both material and necessary to correct a misleading impression created by other statements.

Courts of appeals across the country have thus properly treated the materiality and misrepresentation inquiries as distinct requirements under Section 11(a). *See, e.g.*, *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1190 (11th Cir. 2002) (rejecting claim that "issuers have a duty to disclose . . . *all* information material to the offering" because that rule would "render superfluous that section's qualifying language 'required to be stated therein or necessary to make the statements therein not misleading'"); *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 212 n.6 (5th Cir. 2004) (agreeing there is "no duty to disclose in the prospectus all information material to the offering, but only that material information necessary to make the statements in the prospectus not misleading" (citing *Oxford Asset Mgmt*, 297 F.3d at 1190)); *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3rd Cir. 2004) ("A determination that information missing . . . is material does not end our analysis" because "[w]e must also decide whether . . . the omission made the statement misleading.").

B. The Ninth Circuit's decision conflicts with the statutory text and overwhelming precedent

The Ninth Circuit in *Robinhood*, however, effectively eliminated the need for an affirmative misrepresentation, holding that "the inquiries as to duty and materiality coalesce[d]." *Sodha*, 154 F.4th at 1034. The first question presented in the *Robinhood* petition challenges the effective elimination of the misrepresentation requirement by asking

"[w]hether an issuer violates Section 11(a)'s misleading-omissions prong by failing to disclose interim financial data that investors may consider material, *without an inquiry into whether the omission rendered any affirmative statement misleading*." *Robinhood* Pet. I (emphasis added). The Solicitor General will soon offer his views on that question in response to the Court's CVSG.

Here, the Ninth Circuit sidestepped *both* the materiality and misleading requirements. It held that ON24 was required to disclose a handful of pre-IPO non-renewals and some customers' intent not to renew based on their predictions of how the COVID-19 pandemic would play out. Pet. App. 6a–7a. Yet those facts were immaterial to the statements ON24 actually made. *See supra* pp. 12–13, 18–19. If Section 11(a) does not require disclosure of all *material* information, it certainly cannot require disclosure of *immaterial* information.

Moreover, even assuming those facts were material, their omission did not render misleading the challenged statements ON24 made about its customers and financial performance. Nothing in ON24's offering documents suggested that zero customers had failed to renew their subscriptions or that zero customers had expressed their intentions not to renew. Accordingly, the omission of immaterial non-renewal information and customer speculation about their future plans did not render any of ON24's affirmative statements misleading—particularly in light of ON24's warnings that recovery from the COVID-19 pandemic could trigger a material number of non-renewals that would hurt the company's business. The Ninth Circuit's ruling thus ignores the

plain language of Section 11(a) and turns this Court's instructions on disclosure upside down.

The overlap between this petition and the *Robinhood* petition underscores the systemic importance of the issue and the need for this Court's guidance. At minimum, the Court should hold this case pending *Robinhood*.

III. THE NINTH CIRCUIT'S EXPANSION OF THE DISCLOSURE OBLIGATION UNDER ITEM 303 WARRANTS REVIEW

The second question presented in the *Robinhood* petition asks the Court to clarify what disclosures are required under Item 303. *Robinhood* Pet. I. In both *Robinhood* and this case, the Ninth Circuit overlooked the regulation's textual limits and imposed far broader disclosure obligations than those imposed by other circuits. The Court should either grant both petitions or hold this one pending *Robinhood*.

Item 303—which applies not just to IPOs, but to all annual and quarterly reports for public companies—requires issuers to provide a "discussion and analysis" of "material information" relevant to assessing the "financial condition and results of operations" of the company. 17 C.F.R. § 229.303(a). As relevant here, Subsection (b) requires the registrant to "[d]escribe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." *Id.* § 229.303(b)(2)(ii). This means that a "disclosure duty exists where a trend, demand, commitment, event or uncertainty is *both* (1) presently known to management and (2) reasonably likely to have

material effects on the registrant's financial condition or results of operation." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). Conversely, no disclosure is required "[i]f management determines that" a "known trend, demand, commitment, event or uncertainty" is "not reasonably likely to occur" or if management "determines that a material effect on the registrant's financial condition . . . is not reasonably likely to occur" as a result of that trend. Management's Discussion and Analysis of Financial Condition and Results of Operations, 54 Fed. Reg. 22427, 22430 (May 24, 1989).

The text of Item 303 includes several built-in limitations. First, it specifies that only "material" information must be disclosed. Second, the word "trend" "require[s] an assessment of whether an observed pattern accurately reflects persistent [business] conditions." *Oxford Asset Mgmt.*, 297 F.3d at 1191. Third, the "obvious focus" of Item 303 "is on preventing the latest reported results from *misleading* potential investors, thereby promoting a more accurate picture of the registrant's future prospects." *Id.* at 1192 (emphasis added).

The Fifth and Eleventh Circuits have adhered to these limitations in interpreting Item 303. In *Kapps*, 379 F.3d 207, the Fifth Circuit held that Item 303 did not require disclosure of a "60% decrease in the price of natural gas during the months before the prospectus was issued." *Id.* at 218. Disclosure was not required, the Fifth Circuit explained, because the price decline was not yet a trend; the decline had not yet significantly affected the company's gross revenue; and the company had highlighted the volatility of natural gas prices in its prospectus. *Id.* at 217–221.

Likewise, in *Oxford Asset Management*, 297 F.3d 1182, the Eleventh Circuit held that Item 303 did not require the company to disclose that prescription sales were not on track to meet projections. *Id.* at 1189–1192. The Eleventh Circuit explained that the company's initial sales data did not necessarily constitute a trend and that the new data did not render the previously reported results misleading. *Ibid.*

Unlike those courts, the Ninth Circuit recognized *none* of Item 303's textual limitations. As noted, it required the disclosure of *immaterial* information—an inconsequential number of pre-IPO non-renewals and customers' predictions of their future actions based on global uncertainties. And the court did not analyze whether those non-renewals reflected a "trend" with respect to either quantity or temporal duration. *Contra Kapps*, 379 F.3d at 218 ("[A]t the time of the IPO, it was not unreasonable to consider the decline in natural gas prices as not yet constituting a trend, having not significantly impacted [the company's] gross revenue."); *Nguyen v. MaxPoint Interactive, Inc.*, 234 F. Supp. 3d 540, 546 (S.D.N.Y. 2017) ("[E]vents occurring within a two month period of time do not establish a 'trend' for purposes of the disclosures required by Item 303."). Nor did it consider the fact that revenue continued to rise in the year after the IPO, which shows that the trend was actually one of continued growth. *See supra* pp. 9, 18.

The result is a boundless disclosure obligation under Item 303 that cannot be squared with the general rule that companies have no "obligation to disclose the results of a quarter in progress." *Nguyen*, 234 F. Supp. 3d at 546; *see also, e.g.*, *Glassman v. Computervision Corp.*, 90 F.3d 617, 632 (1st Cir. 1996)

("[W]e reject any bright-line rule that an issuer engaging in a public offering is obligated to disclose interim operating results for the quarter in progress whenever it perceives the possibility that the quarter's results may disappoint the market.").

By calling for the views of the Solicitor General in *Robinhood*, the Court recognized the importance of this question. The Court should either grant review to clarify the limits of Item 303's disclosure obligations or hold this petition pending its resolution of the *Robinhood* petition.

IV. THE QUESTIONS PRESENTED ARE RECURRING AND EXCEPTIONALLY IMPORTANT

The Ninth Circuit's decision effectively holds that ON24 is liable for failing to predict, with certainty, during the height of the COVID-19 pandemic lockdowns, how the course of the pandemic, government restrictions on in-person gatherings, and idiosyncratic customer responses would play out and affect the company's business. That reasoning can, and likely will, be weaponized by investors alleging, with 20-20 hindsight, that companies should have been able to predict the future.

Under the Ninth Circuit's decision, issuers must predict that a material adverse event *will* occur—not just that it *may* occur—based on immaterial past events and speculation over third-party future actions, or else be charged with misleading its investors. That rule will compel issuers to predict the worst-case scenario, thus distorting the market—and exposing issuers to charges of speculation about third parties' future actions. And it will drive issuers to "bury the

shareholders in an avalanche of trivial information" in hopes of avoiding liability. *TSC Indus.,* 426 U.S. at 448–449. All of that will drastically reduce the usefulness of risk disclosures, an outcome that harms the very investors the securities laws are designed to protect. The Ninth Circuit's approach is also at odds with the SEC's recent efforts to streamline disclosures for investors.[9]

The Court recognized the importance of these issues when it granted the *Facebook* petition, and the Court's CVSG in the *Robinhood* petition reinforces the need for this Court's intervention. The Court should grant this petition to clarify the scope of issuers' disclosure obligations under the securities laws.

CONCLUSION

The petition should be granted.

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[9] *See, e.g.*, Semiannual Reporting, 91 Fed. Reg. 24968 (proposed May 7, 2026) (to be codified at 17 C.F.R. §§ 200, 210, 229, 230, 232, 239, 240 249, 260); Enhancement of Emerging Growth Company Accommodations and Simplification of Filer Status for Reporting Companies, 91 Fed. Reg. 30086 (proposed May 21, 2026) (to be codified at 17 C.F.R. §§ 210, 229, 230, 232, 239, 240, 249).

Respectfully submitted,

BRIAN R. MATSUI
Counsel of Record
MORRISON & FOERSTER LLP
2100 L Street NW, Suite 900
Washington, DC 20037
(202) 887-8784
BMatsui@mofo.com

DAVID J. WIENER
ANNA ERICKSON WHITE
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

LAUREN PARDEE RUBEN
MORRISON & FOERSTER LLP
370 17th Street
Denver, CO 80202

ALEXANDRA M. AVVOCATO
MORRISON & FOERSTER LLP
250 West 55th Street
New York, NY 10019

Counsel for ON24, Inc.

THOMAS M. PETERSON
CHARLENE S. SHIMADA
KEVIN M. PAPAY
MORGAN, LEWIS & BOCKIUS LLP
600 Montgomery Street
Suite 2300
San Francisco, CA 94111
(415) 442-1000
thomas.peterson@morganlewis.com

Counsel for Goldman Sachs & Co. LLC; J.P. Morgan Securities LLC; KeyBanc Capital Markets Inc.; Robert W. Baird & Co. Incorporated; Canaccord Genuity LLC; Needham & Company, LLC; Piper Sandler & Co.; and William Blair & Company L.L.C.

JUNE 2026

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: ON24, INC. SECURITIES LITIGATION LEADERSEL INNOTECH ESG, *Plaintiff-Appellant*, v. ON24, INC.; SHARAT SHARAN; STEVEN VATTUONE; DENISE PERSSON; HOLDGER STAUDE; DOMINIQUE TREMPONT; BARRY ZWARENSTEIN; GOLDMAN SACHS & CO. LLC; J.P. MORGAN SECURITIES LLC; KEYBANC CAPITAL MARKETS INC.; ROBERT W. BAIRD & CO. INCORPORATED; CANACCORD GENUITY LLC; NEEDHAM & COMPANY, LLC; PIPER SANDLER & CO.; WILLIAM BLAIR & COMPANY, L.L.C.; IRWIN FEDERMAN, *Defendants-Appellees*.	No. 24-2204 D.C. No. 4:21-cv-08578-YGR MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California

Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted March 4, 2025
Submission Vacated August 26, 2025
Resubmitted January 5, 2026
Pasadena, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Before: MURGIA, Chief Judge, and SANCHEZ and H.A. THOMAS, Circuit Judges.

Leadersel Innotech ESG ("Leadersel") brings this class action on behalf of all persons and entities who purchased or otherwise acquired Defendant ON24, Inc.[1] ("ON24") publicly traded common stock pursuant to the public offering documents issued in connection with ON24's initial public offering ("IPO").[2] Leadersel alleges that the public offering documents contained six materially misleading statements. These statements allegedly omitted facts related to ON24's material churn—the rate at which customers discontinue their relationship with the business—that occurred in advance of the IPO and the change in ON24's customer base. Leadersel offers two distinct theories of liability related to the alleged omissions: (1) a primary violation of Section 11 of the Securities Act of 1933, and (2) a violation of Item 303 of Securities and Exchange Commission ("SEC") Regulation S-K.[3] Leadersel also alleges that the

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[1] ON24 is a company that offers an online platform to businesses to generate revenue through interactive webinars, virtual events, and multimedia content experiences.

[2] Defendants are the following: ON24, Inc.; Sharat Sharan, Steven Vattuone, Irwin Federman, Denise Persson, Holger Staude, Dominique Trempont, and Barry Zwarenstein (together, "Individual Defendants"); and Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, KeyBanc Capital Markets Inc., Robert W. Baird & Co. Incorporated, Canaccord Genuity LLC, Needham & Company, LLC, Piper Sandler & Co., and William Blair & Company, L.L.C. (together, "Underwriter Defendants").

[3] After publication of the Court's decision in *Sodha v. Golubowski*, 154 F.4th 1019 (9th Cir. 2025), Leadersel withdrew its 17 C.F.R. § 229.105 ("Item 105") claim.

individually named defendants—officers and directors of ON24—are liable under Section 15 for directing and controlling ON24 when these alleged Section 11 violations occurred. The district court dismissed the complaint with prejudice. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part and reverse in part and remand.

We review the district court's order dismissing the complaint de novo. *Friedman v. AARP, Inc.*, 855 F.3d 1047, 1051 (9th Cir. 2017). "Review is limited to the contents of the complaint . . . [and a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (citation omitted). We may affirm on any ground supported by the record. *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013).

1. We affirm the district court's dismissal of claims that are based on Statement 3. "[S]ection 11 of the 1933 Securities Act creates a private remedy for any purchaser of a security if '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.'" *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005) (quoting 15 U.S.C. § 77k(a)), *abrogated on other grounds by Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27 (2011). Statement 3, describing ON24's belief that it had the opportunity to achieve significant future growth is a forward-looking opinion that would not have misled a reasonable investor. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186, 189–

90 (2015) (holding that "opinions sometimes rest on a weighing of competing facts[,]" and "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong").

2. We reverse the district court's dismissal of Section 11 claims based on the remaining five statements: Statement 1, describing a "highly engaged and loyal customer base"; Statement 2, recognizing acceleration in revenue growth rate due to the COVID-19 pandemic; Statement 4, describing a potential reduction in product demand post-pandemic; Statement 5, describing a potential decline in the revenue growth rate post-pandemic; and Statement 6, describing the possibility that subscription renewals and upselling may decline in the future.

To allege a Section 11 claim, a plaintiff must show "(1) that the registration statement contained an omission or misrepresentation, and (2) that the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment." *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (internal quotations and citation omitted). "Section 11 does not require the disclosure of all information a potential investor might take into account when making his decision." *Id.* at 1163. However, at the pleading stage, "Section 11 places a relatively minimal burden on a plaintiff[:] . . . he need only show a material misstatement or omission to establish his prima facie case." *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 859 (9th Cir. 2013) (internal quotations and citation omitted). Because Leadersel's Section 11 claim does not "sound in fraud," it must only meet Rule 8(a)'s

ordinary notice pleading requirements. *Daou*, 411 F.3d at 1027.

Construing the allegations in the light most favorable to Leadersel, the complaint contains plausible allegations, corroborated by confidential witnesses[4], that, during the COVID-19 pandemic, atypical customers engaged ON24 for short-term subscriptions of one-year or less and informed ON24 of their intent to either downsell—downgrade to a cheaper subscription—or not renew these short-term subscriptions. The complaint contains plausible allegations that ON24 systematically tracked its data regarding customer churn risk and actual churn occurrences. The complaint also contains plausible allegations that atypical customer churn and downsell began to occur prior to the 2021 IPO and continued thereafter when ON24 failed to meet its projected mid-year revenue goals within months after the IPO. Accordingly, Leadersel sufficiently alleges that ON24 knew that the risk of material churn and downselling had started to come to fruition before the IPO yet disclosed only that those risks *may* occur. "Risk disclosures that speak entirely of as-yet-unrealized risks and contingencies and do not alert the reader that some of these risks may already have come to fruition can mislead reasonable investors." *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985–87 (9th Cir. 2008) (internal quotations and alterations omitted)). Leadersel's allegations, if taken as true, are consistent with Leadersel's theory that the change in

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[4] Leadersel relies on the statements of eight former ON24 employees to substantiate its allegations.

customer base negatively impacted ON24's future growth rate and that the change should have been specifically disclosed to potential stockholders.[5] As such, Leadersel adequately pled its Section 11 claim.

3. We also reverse the district court's dismissal of Leadersel's alleged 17 C.F.R. § 229.303 ("Item 303") violation. Item 303 requires the registrant to "'[d]escribe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.'" *Sodha*, 154 F.4th at 1037 (alteration in original) (quoting 17 C.F.R. § 229.303(b)(2)(ii)). "Item 303 'specifies its own standard for disclosure—*i.e.*, reasonably likely to have a material effect' and requires more disclosure than the materiality test typically used in securities law." *Id.* at 1041 (quoting *In re NVIDIA Corp. Secs. Litig.*, 768 F.3d 1046, 1055 (9th Cir. 2014)).

Leadersel alleges that ON24 violated Item 303 because the risk disclosures did not disclose the change in customer profiles that occurred before the IPO, ON24 leadership's knowledge of several customers' intent not to renew or intent to downsell, and ON24 leadership's knowledge of churn with six-month contracts leading up to the IPO. Leadersel

[5] The district court erred by improperly relying on judicially noticed revenue and ARR data to dispute Leadersel's plausible theory of liability. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1003 (9th Cir. 2018) (explaining that it is improper for a district court "to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint").

further alleges that ON24's leadership methodically tracked this information in ON24's Salesforce software and held meetings with ON24 management regarding customers' churn risk leading up to the IPO. These allegations are sufficient at this stage to allege a violation of Item 303. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1297 (9th Cir. 1998) (holding that when future impacts are reasonably likely to occur, "they cease to be optional forecasts and instead become present knowledge subject to the duty of disclosure").

4. Because we reverse, in part, the district court's dismissal of Plaintiffs' Section 11 claims, we also reverse the dismissal of the derivative Section 15 claim. *See In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 886 (9th Cir. 2012) (explaining that a Section 15 claim requires an underlying primary violation of securities law).

AFFIRMED in part, **REVERSED** in part, **AND REMANDED**. The parties shall bear their own costs on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE ON24, INC. SECURITIES LITIGATION	**Case No.:** 4:21-cv-8578-YGR **ORDER GRANTING THE MOTION TO DISMISS WITH PREJUDICE** **ORDER GRANTING THE MOTION FOR JOINDER** Re: Dkt. Nos. 105 and 106

Pending before the Court is defendants'[1] Motion to Dismiss the First Amended Consolidated Class Action Complaint ("FACCAC").[2] (Dkt. No. 105.) The FACCAC alleges violations of the Securities Act of 1933 in connection with the initial public offering ("IPO") of ON24. The Court had previously granted

[1] Defendants are: ON24, Inc. ("Corporate Defendant"), Sharat Sharan, Steven Vattuone, Irwin Federman, Denise Persson, Holger Staude, Dominique Trempont, Barry Zwarenstein (together, "Individual Defendants"), and Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, KeyBanc Capital Markets Inc., Robert W. Baird & Co. Incorporated, Canaccord Genuity LLC, Needham & Company, LLC, Piper Sandler & Co., and William Blair & Company, L.L.C.'s (together, "Underwriter Defendants").

[2] Underwriter Defendants once again filed a Motion for Joinder. (Dkt. No. 106.) That motion is **GRANTED**.

defendants' motion to dismiss in large part because plaintiff's confidential witnesses did not provide a sufficient factual foundation for its theory that demand for ON24's products declined to the point that withholding that information materially misled investors.[3] (Dkt. No. 96, "Previous Order.") Defendants argue that plaintiff's FACCAC is still fatally conclusory. The Court agrees.

Having carefully considered the papers submitted and the argument presented at the February 6, 2024, hearing, and for the reasons set forth below, the Court **GRANTS** defendants' motion to dismiss **WITH PREJUDICE**.

I. BACKGROUND

The Court assumes the parties' familiarity with the background in this case, which was detailed in its Previous Order. (Dkt. No. 96.) In its FACCAC, plaintiff adds the following allegations:

In the nine months leading up to September 30, 2020, ON24's revenue increased by 59%. (FACCAC ¶ 7.) Its customer based increased from 1,241 customers as of December 31, 2018, to 1,918 customers by the end of September of 2020. ON24's Annual Recurring Revenue ("ARR") grew similarly, from $61.2 million at the end of 2018 to $138.9 million by September 30, 2020. On February 3, 2021, ON24 conducted its IPO.

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[3] The Court had also previously granted defendants' request for judicial notice of the same exhibits they attach now to the motion to dismiss. For the reasons previously stated, judicial notice of these exhibits remains appropriate on the same grounds. (*See* Dkt. No. 96.)

(*Id.*) It focused "heavily" on these September 30, 2020, results in doing so. (*Id.* ¶ 8.)

Unbeknownst to investors, however, in the three quarters preceding the IPO, ON24 changed its business model from focusing on acquiring long-term, "enterprise" customers to short-term, small- to medium-sized business ("SMB") customers. (*Id.* ¶ 9.) Acquired mostly from March 2020 to July 2020, these new customers were "atypical" or "COVID" customers who signed up for one-year or less contracts. (*Id.* ¶¶ 9, 14.)

The FACCAC expands on the testimony of one confidential witness and includes testimony from three new ones as follows:

1. **Confidential Witness Two ("CW2"):** CW2 had managed 100 to 150 accounts in 2020. (*Id.* ¶ 97.) In the first nine months of 2020, ON24 gained an influx of new, COVID-era customers which took place in March to May of 2020 and then again in June and July of 2020. (*Id.* ¶ 103.) In fact, CW2 claims he received three to five new contracts "a day" during 2020 because ON24 was "signing on anyone." (*Id.* ¶ 104.) He stated, however, that ON24 faced high churn, or turnover, from these customers and that there were "instances" of 40–50% churn amongst his customers. (*Id.* ¶ 14.) CW2 clarified that these "instances" were specific to new, COVID-era clients. (*Id.*) CW2 then "recalled that 80% of new customers acquired after the COVID pandemic (beginning in March 2020) told him six

months in advance that they would not be renewing their contracts" because their contract with ON24 was "simply a COVID related expense." (*Id.* ¶ 16.) Later, CW2 states that he saw a "churn risk" of $70,000 to $100,000, which represented "several contracts a month." (*Id.* ¶ 104.) When CW2 realized that customers were unlikely to renew, he marked them as "DNR" or "do not renew" in Salesforce. (*Id.* ¶ 106.) According to CW2, 40–50% of customers signed on during 2020 were marked "DNR." (*Id.* ¶ 107.) CEO Sharan was aware of these churn risks and directed his employees "to stop talking about churn and anything negative in general" in the lead up to the IPO. (*Id.* ¶ 109.)

2. **Confidential Witness Six ("CW6"):** CW6 was a Senior Enterprise Customer Success Manager from the spring of 2020 until after ON24's IPO. (*Id.* ¶ 149.) CW6 noted that ON24 took on "'a lot of COVID" or "atypical, smaller customers," in April, May, and June 2020. (*Id.* ¶ 150.) CEO Sharan would attend the sales and client success meetings and had a habit of "dressing people down" at them. (*Id.* ¶ 151.) CW6 and his team would "consistently" send reports up to the C-Level Executives, including CEO Sharan, about customer "Health Scores," which were color-coded charts of customers' strength of engagement. (*Id.* ¶ 152.) According to CW6, "he became aware a customer may churn as early as six months in

advance." (*Id.* ¶ 153.) When churn was a risk for a customer, he sent up these Health Scores to executives. (*Id.*) CW6 noted that the company implemented new processes to determine when a customer was at risk of churning and then new "ways to keep the customer on board, such as adjusting pricing." (*Id.* ¶ 154.) Depending on the size of the customers, CW6 noted, there might be a specific conversation on "how to retain their business." (*Id.*)

3. **Confidential Witness Seven ("CW7"):** CW7 was a Customer Success Manager for years prior to the IPO and until 2022. (*Id.* ¶ 156.) According to CW7, "in the early stages of COVID, [ON24] was signing 'a ton' of short-term event-based deals with subscriptions of one-year or less that were different than the typical deal ON24 signed with customers." (*Id.* ¶ 158.) CW7 explained that "these customers churned at a 'super high rate,'" or a churn of "upwards of 80%." (*Id.* ¶ 19.) CW7 also states these customers had "a high probability of churn as early as one month after they had signed their initial contract." (*Id.*) As an example, CW7 states that out of 80–100 accounts he had in 2020, 25–30 did not renew their subscription with ON24. (*Id.*) Separately, however, CW7 stated that in 2021 20% of his customers had been marked "for high churn risk." (*Id.* ¶ 160.) CW7 explained that he knew these customers had a high probability of churning not because his customers told

him but because he would see that a customer "had only used the platform once after several months, a fact which to him was indicative of high likelihood of churn." (*Id.* ¶ 160.) Though most customers signed up during the COVID influx had one-year contracts that would be due in 2021, "there were a handful of six-month deals." (*Id.* ¶ 161.) CW7 recalled instances CEO Sharan attended sales and client success meetings and poured through the high risk and high probability of churn accounts. (*Id.* ¶ 162.) Finally, CW7 stated, looking at the projections for the first two quarters of 2021, the "high risk of churn was looming." (*Id.* ¶ 163.)

4. **Confidential Witness 8 ("CW8"):** CW8 was a Senior Customer Success Manager "responsible for churn." (*Id.* ¶ 20.) He explained that, out of approximately 137 customers, he estimated in 2020 that 43% of his accounts "were going to churn or downsell." (*Id.* ¶ 168.) He also recalled that, during 2020, "50% of new accounts that were up for renewal were likely to churn." (*Id.* ¶ 168.) He then stated that, looking ahead to 2021, he estimated that "he would have a 30% renewal rate." (*Id.* ¶ 170.) CW8 recalled an unspecified number of "instances where a Company signed and then wished to cancel their contract after only a few months." (*Id.* ¶ 169.) This chance of churn was known to CEO Sharan, who CW8 recalled stating that these atypical

> customers were not "ideal" but were a "revenue generator." (*Id.* ¶ 22.) CEO Sharan was closely involved, attending meetings that would last close to four hours and where CEO Sharan would discuss even low value accounts to determine how to deal with potential churn. (*Id.* ¶ 165.) CW8 felt that CEO Sharan would "hammer" or "belittle" the customer success managers once the customers signed on in 2020. (*Id.* ¶ 168.)

The FACCAC challenges the following six statements from the Offering Documents, all of which plaintiff challenged in its original complaint:

Statement 1 (*id.* ¶ 175)[4]:

> ***As of September 30, 2020, we had over 1,900 customers*** in more than 40 countries, including three of the five largest global technology companies, four of the five largest U.S. banks, three of the five largest U.S. banks, three of the five largest global healthcare companies and three of the five largest global industrial and manufacturing companies, in each case measured by 2019 revenue. No single customer contributed more than 5% of our total revenue for the year ended December 31, 2019 or for the nine months ended September 30, 2020. ***We have a highly engaged and loyal customer base that has allowed us to grow***

[4] All emphasis shown, again, originates from the FACCAC. Plaintiff notes it only challenges the emphasized portions of the statements; the rest is provided for context.

> ***our revenue with them over time***, and achieve an NRR of 147% as of September 30, 2020. Our NRR was 107% and 108% as of December 31, 2018 and December 31, 2019, respectively.

Statement 2 (*id.* ¶ 177):

> Key Factors Affecting Our Performance
>
> * * *
>
> Annual Recurring Revenue
>
> We believe that ARR is a key metric to measure our business because it is driven by our ability to acquire new subscription customers and to maintain and expand our relationship with existing subscription contracts as of the measurement date, including existing customers with expired contracts that we expect to be renewed. Our ARR amounts exclude professional services, overages from subscription customers and Legacy revenue. Our ARR was $61.2 million as of December 31, 2018, $63.6 million as of March 31, 2019, $67.2 million as of June 30, 2019, $70.0 million as of September 30, 2019, $76.9 million as of December 31, 2019, $85.9 million as of March 31, 2020, $114.2 million as of June 30, 2020, and $138.9 million as of September 30, 2020. ***Our consistent ARR growth each quarter reflects our success in acquiring new customers and expanding subscriptions with existing customers, which was occurring prior to the COVID-19***

> ***pandemic and has accelerated in 2020 partly in response to the COVID-19 pandemic.***

Statement 3 (*id.* ¶ 179):

> We believe ***we can achieve significant growth by retaining and further penetrating our existing customer base with the addition of new users and new products, and through upsell and cross sell***. Our multi-dimensional land and expand model drives onboarding and allows us to acquire customers via free trials, live demos and continuous engagement with an efficient sales and marketing investment. As we continue to drive more actionable revenue generating marketing insights, we believe that ***we have a significant opportunity to further increase sales among existing customers across different functional and geographic departments within each respective organization.*** Our ability to pursue this opportunity will require us to scale our sales and marketing organizations and otherwise increase our operating expenses, and we may not be successful on the timetable we anticipate, or at all, for any number of reasons, which may cause our results to vary from period to period.

Statement 4: (*id.* ¶ 181):

> ***We may not be able to sustain our recent revenue growth rate in the future.***

> For the year ended December 31, 2019, our revenue increased by 8% as compared to the year ended December 31, 2018. We have experienced significant revenue growth during 2020, with our revenue increasing by 59% for the nine months ended September 30, 2020 as compared to the nine months ended September 30, 2019. ***Our recent revenue growth has been significantly impacted by an increasing demand for our platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures. As the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline. If these new customers elect not to continue their subscriptions as the impact of COVID-19 lessens, our business, financial condition and results of operations would be harmed.***

Statement 5: (*id.* ¶ 182):

> ***Our quarterly results may fluctuate significantly and may not fully reflect the underlying performance of our business.***
>
> Our quarterly results of operations and financial condition may vary significantly in the future, and period-to-period comparisons may not be meaningful. Accordingly, the results of any one quarter should not be relied upon as an indication of future performance. Our quarterly results of

> operations and financial condition may fluctuate as a result of a variety of factors, many of which are outside of our control and may not fully reflect the underlying performance of our business. ***For example, our revenue and revenue growth rate may decline in future periods compared to 2020 as the impact of COVID-19 lessens.*** Further, because we generally invoice our customers at the beginning of the contractual terms of their subscriptions to our solutions, our financial condition reflects deferred revenue that we recognize ratably as revenue over the contractual term. ***If fewer new enrollments or renewals occur as the impact of COVID-19 lessens, our cash and deferred revenue as of future dates may decrease.*** Fluctuation in quarterly results may negatively impact the value of our securities. ***Factors that may cause fluctuations in our quarterly results or operations include:***
>
> - ***Our ability to retain and expand customer usage;***
> - ***Our ability to attract new customers.***

Statement 6: (*id.* ¶ 183):

> ***Failure to attract new customers or retain, expand the usage of, and upsell our products to existing customers would harm our business and growth prospects.***

We derive, and expect to continue to derive, a significant portion of our revenue and cash flows from sales of subscriptions to our products. As such, our business depends on our ability to attract new customers and to maintain and expand our relationships with our existing customers, including by expanding their usage and upselling additional solutions. Our business is largely subscription-based, and customers are not obligated to and may not renew their subscriptions after their existing subscriptions expire. ***As a result, customers may not renew their subscriptions at the same rate, increase their usage of our solutions or purchase subscriptions for additional solutions, if they renew at all. Renewals of subscriptions may decline or fluctuate because of several factors, such as dissatisfaction with our solutions or support, a customer no longer having a need for our solutions or the perception that competitive products provide better or less expensive options.*** In order to grow our business, we must continually add new customers and replace customers who choose not to continue to use our platform. Any decrease in user satisfaction with our solutions or support may result in negative online customer reviews and decreased word-of-mouth referrals, which would harm our brand and our ability to grow.

> ***In addition to striving to attract new customers to our platform, we seek to expand the usage of our solutions by our existing customers by increasing the number of departments, divisions and teams that use our solutions within each of our customers. If we fail to expand the usage of our solutions by existing customers or if customers fail to purchase other solutions from us, our business, financial condition and results of operations would be harmed.***

Again, plaintiff does not allege that these six statements were misleading on their own. Instead, plaintiff argues that the challenged statements were misleading when made because they failed to disclose that:

a. Beginning with the onset of the COVID-19 pandemic in March 2020, the Company's customer base had transitioned from carefully courted, enterprise customers to a growing influx of SMB customers, which historically did not have good retention rates, that entered into short-term and/or single event-based deals with subscriptions of one-year or less (*id.* ¶ 176(a))

b. It was known at the Company prior to the IPO that a material amount of "atypical" or "COVID" customers entered into subscriptions for short-term use or single events and many other customers had expressly informed members of ON24's sales and customer service teams in 2020 that they

were going to downsell or not renew their subscriptions when they came due (*id.* ¶ 176(b))

c. It was known at the Company prior to the IPO that a material amount of services that enterprise customers added during the COVID-19 pandemic were or would be subject to downsell (*id.* ¶ 176(c))

d. Because the Company entered into subscription deals during this time period with terms less than one-year, including six-month subscriptions, atypical subscriptions began to churn prior to the IPO (*id.* ¶ 176(d))

e. The material churn, *e.g.*, lack of loyalty, that had occurred prior to the IPO and was knowingly going to continue and amplify after the IPO was reported prior to the IPO through an indicator in the Company's Salesforce computer program, generated into reports for management, and discussed with management, including Defendant Sharan, at sales meetings and company-wide all hands meetings (*id.* ¶ 176(e))

f. The fact that a material amount of customers were not using the platform or only used it once, e.g., were not highly engaged, was also captured prior to the IPO through the Company's Totango computer program, which tracked every interaction with the Company's customers, and Totango calculated a "Health Score" based on this "use" matrix. The Health Scores like reports

> generated through Salesforce, were discussed with management, including Defendant Sharan, because it indicated that these customers were or would be downselling their subscriptions or not renewing their subscription. (*Id.* ¶ 176(f).)

II. LEGAL FRAMEWORK

The Court incorporates the legal standard from its Previous Order. The legal standards under Fed. R. of Civ. P. 8 and 12(b)(6) are well-known and not in dispute.

III. ANALYSIS

A. SECTION 11

Plaintiff again alleges that the six statements challenged are all misleading for the same reason. During the first nine months of 2020, in response to the COVID-19 pandemic, ON24 changed its business strategy to pursue one-year contracts with atypical customers that it knew by the time of its IPO, in February 2021, would not renew their subscriptions. Because the resulting customer churn was material, plaintiffs argue that defendants violated Section 11 by failing to inform potential investors of this already existing risk. Defendants again respond that plaintiff's Section 11 claim should be dismissed because its theory of the case is: (1) internally inconsistent; (2) belied by ON24's actual customer and revenue metrics at the end of 2021; and (3) sufficiently covered by ON24's risk factors. The Court examines each.

First, under Rule 8's plausibility standard, the FACCAC must "contain adequate factual allegations to plausibly infer" that defendants intentionally

misled its potential investors in the lead up to the IPO. *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 994 (9th Cir. 2014). In *Eclectic Properties*, the Ninth Circuit upheld a dismissal under Rules 8 and 9. *Id.* at 995. Plaintiffs there alleged that defendants sold them property for $30.1 million when the property was in fact only worth $11.1 million. *Id.* at 998. The Ninth Circuit found that plaintiffs there had not pled sufficient factual allegations to demonstrate that defendants had defrauded or misled them for two reasons. *Id.* First, plaintiffs' theory of the case was implausible because it ignored the more innocent explanation that real estate prices are variable, which was especially true when coupled with the fact that "the culminating events that harmed Plaintiffs took place in the midst of a deep national recession that seriously affected the real estate market." *Id.* Second, plaintiffs alleged that defendants had initially bought the disputed property for $20.3 million but then claimed, with no factual support, that its true market value was only $11.1 million. *Id.* at 999. Because plaintiffs' allegations about the value of the real estate were inconsistent, the Ninth Circuit struck them.

So too here. The problem with the FACCAC, to start, is that it is "internally inconsistent" and itself undermines plaintiff's theory of the case, rendering it implausible. *See Orellana v. Mayorkas*, 6 F.4th 1034, 1043 (9th Cir. 2021) (citing *Eclectic Properties*, 751 F.3d at 998). The FACCAC is impermissibly inconsistent or vague on three accounts: the estimates of how many customers churned; when those customers were alleged to have churned; and whether there was actual turnover or just churn risk.

Plaintiff's allegations about how many customers churned in the lead up to the IPO varies wildly. CW2 initially states that 80% of the customers he acquired during the COVID-pandemic told him they would not renew. He then turns around and says that actually 40–50% of his COVID-era customers were a churn risk, half of what he initially claimed. Later, he states that he signed up three to five new contracts a day during the COVID influx, which would mean he was signing up 60–100 customers in a month in 2020. This is despite the fact that he initially states he only had 100–150 customers in 2020. More importantly, of these new customers, CW2 states that only "several" a month were churn risks, rather than the 80% (or even 40–50%) he initially states.

CW7 fares no better. Much like CW2, CW7 initially states that he saw 80% of his atypical, COVID-driven customers churn. He then states that, out of his 80–100 accounts, 25–30 churned, which means that overall he alleges he saw a 30% churn rate, significantly lower than the 80% figure might suggest. Even this turns out to be inconsistent, however, because CW7 later concludes that only 20% of his customers were forecast as a high risk of churn for 2021.

CW8 is initially more specific: he states that exactly 43% of his 137 customers were at a risk for churn. In the very next line, however, he states that it was actually 50% of his customers that would churn. He then concludes his testimony by claiming that, in 2021, he expected that only 30% of his customers would renew, which means that he was expecting a 70% turnover rate.

It is not clear from the FACCAC when ON24 actually experienced this allegedly significant customer churn. CW2 states that he noticed "instances" of 40–50% churn but does not clarify when those instances occurred or how long they lasted. (*Id.* ¶ 103.) He also states that he received an "influx" of atypical, one-year contracts from March to May and then June to July of 2020, which means that these accounts would not be up for renewal until March of 2021 at earliest. (*Id.* ¶ 103.) In other words, these customers would not actually churn until after the February 2021 IPO. Thus, the Court considers ultimately whether a known trend was-then established. CW7 states that 75–80% of his atypical customers churned, without specifying when, but then later states that all of his 2020 contracts would not be renewed until 2021 at earliest and that in 2021 he only expected a 20% churn rate. (*Id.* ¶ 160.) CW8 only worked at ON24 from September 2019 to November 2020, yet suggests that he knew his atypical accounts would not renew in the first quarter of 2021.

Moreover, there is too much inconsistency to demonstrate that ON24 was experiencing actual churn versus a risk of churn in the lead up to the February 2021 IPO. Again, CW2 states that he noticed "instances" of actual churn at some unspecified time but also that 80% of accounts told him they were at a *risk* of churn. CW7 stated that 25–30 of his customers did not renew, again without clarifying when they cancelled their subscriptions, but also that the great majority of accounts were one-year contracts that would not come up until 2021 and only a handful of customers signed up for six-month deals. He later also states that only 20% of his customers were marked as

a churn risk in 2021. Finally, CW8 stated that 43–50% of his accounts were going to churn but also left in late 2020, well before the February 2021 IPO and when these accounts would actually come up for renewal.

As in *Eclectic Properties*, the Court is not required to accept such internally inconsistent and vague allegations, especially when coupled with the fact that subscriptions for the types of digital services ON24 provides are variable and this surge in business occurred for ON24 in the midst of the historic uncertainty surrounding the COVID-19 pandemic. While the Court understands that recollections vary and memories can be imprecise without documents to refresh recollections, the picture painted by plaintiffs' confidential witnesses at best reflects a "risk" of churn. According to the confidential witnesses, churn varied from 20% to 80% of atypical customers. The FACCAC never attempts to estimate the number of atypical customers throughout company, though the confidential witnesses give numbers that range from 25 customers in the year to 60–100 subscribers a month in 2020. It is not clear, from the testimony, that *any* of these customers actually churned in 2020. In fact, most of the confidential witnesses acknowledged that ON24 signed its COVID-driven, atypical customers starting in March to July of 2020. (*Id.* ¶ 22, 103, 176(a).) This is consistent with plaintiff's theory of the case—that the atypical, COVID-driven customer influx did not start until March 2020. (*Id.* ¶ 176(a).) Aside from the "handful" of customers who signed six-month contracts, the great majority of these atypical customers then would not have come up for renewal until *after* the February 2021 IPO.

This renders at least a part of plaintiffs' theory of the case—that by the February 2021 IPO, ON24 was already facing material customer churn—implausible.

Plaintiff initially responds that the confidential witness testimony establishes that 10% of ON24's customer base churned before the IPO. (Citing FAC-CAC ¶¶ 102–03.) The argument is contradicted by plaintiff's own complaint. CW2, in this part of the FACCAC, states that his team represented 25% of ON24's business. (*Id.* ¶ 102.) He then states that he noticed "***instances***" of 40–50% churn "***among his customers***," while clarifying that he signed his one-year, COVID-driven contracts in March of 2020 at earliest. (*Id.* ¶ 103 (emphasis supplied).) Plaintiff multiplies the 40% instances CW2 noticed at some indeterminate time to the 25% of ON24's business his team represented to come up with the claim that 10% of ON24's customers churned pre-IPO. CW2, however, neither states that the 40–50% churn occurred throughout his team (simply within his own customer base), when the 40–50% churn occurred (just that he signed up these one-year contracts starting in March of 2020, which suggests they would not come up until March 2021 at earliest), and how many customers actually churned (only that there were instances of such churn).

Plaintiff then argues that the figures presented by its confidential witnesses are estimates and defendants place too much emphasis on the figures given. As noted above, some inconsistency, especially at the motion to dismiss stage, is not dispositive. Here, however, the level of inconsistency is pervasive and, thus, decisive. It calls into question plaintiff's entire case. Plaintiff's reliance on *Glazer Capital*

Management, L.P. v. Forescout Technologies, Inc., 63 F.4th 747 (9th Cir. 2021) is for that reason inapt. In *Glazer Capital*, defendants took issue with one confidential witness's estimates not because they were internally inconsistent but because they argued that plaintiff had not established his personal knowledge of them. *Id.* at 771. The Ninth Circuit disagreed because, given that confidential witness's title, it was plausible that he would have the requisite knowledge even if his "estimates might not be 100% perfect." *Id.* at 772. *Glazer Capital* says nothing about the type of internal inconsistencies present in the FACCAC.

Second, inconsistencies aside, plaintiff's theory that ON24 was either already experiencing, or knew it would encounter, material customer churn by its February 2021 IPO faces an even bigger hurdle—it is completely contradicted by what actually happened to ON24 in 2021. According to plaintiff, anywhere from 20–80% of the atypical, COVID-driven customers decided not to renew their one-year contracts, sometimes as much as six months in advance. ON24, under this theory, should have seen a noticeable, if not dramatic, decline in customers by the end of 2021 when these contracts came up for renewal. The opposite is true. ON24's customer base grew from 1,994 customers in 2020 to 2,122 customers by the end of 2021. (Dkt. No. 105-7 at 3.) Its ARR increased from $138 million in September 2020 to $171 million by December 2021, a 12% year-over-year increase. (*Id.* at 2.) These hard figures render plaintiff's vague allegations of actual churn or churn risk in the lead up to the February 2021 IPO implausible. They suggest not that ON24 materially misled investors but instead that CEO Sharan's careful, if at times abrasive,

analysis of churn risk served to convince its customers not to cancel their subscriptions after one year. Plaintiff's own complaint is consistent with this more innocent explanation: Several confidential witnesses noted that the CEO closely monitored churn risk to find "potential ways to keep the customer on board" or have a conversation with a customer on "how to retain their business." (FACCAC ¶ 154.)

Plaintiff's reliance on *In re Twitter, Inc. Securities Litig.*, 2020 WL 4187915 (N.D. Cal. Apr. 17, 2020), does not convince otherwise. There, Judge Tigar ruled that, even if Twitter accurately reported its user engagement metrics as they existed during an investors' call, it could not overcome plaintiffs' securities fraud claim because it falsely gave the impression that this trend "has already turned around" when it was in fact negative. *Id.* at *9. Judge Tigar clarified that it did not matter that the numbers Twitter reported at the time were accurate because plaintiffs were specifically challenging Twitter's statement that the "trend has already turned around." *Id.* at *10. By failing to disclose the fact that the actual trend was declining, Twitter's positive spin made otherwise accurate statistics misleading. *Id.* The problem for plaintiff here is that what ON24's 2021 metrics demonstrate is not that they placed a positive spin on a negative trend but rather that plaintiff has spun an implausibly negative story from an incontrovertibly positive trend.

Third, though plaintiff's case is explicitly hinged on the actual churn or churn risk that allegedly existed at the time of the February 2021 IPO, it also implicitly raises the claim that ON24 misled potential investors by promising that ON24's business would not simply grow post-IPO but continue to grow at the

same explosive rate. For example, the FACCAC alleges that, by discussing ON24's success in 2020, defendants misled potential investors. (FACCAC ¶ 178.) None of the challenged statements, however, promise that ON24 would continue to acquire customers or grow its revenue at the same pre-IPO rate. As the Court found in its Previous Order, statements like "we believe we can achieve significant growth by retaining and further penetrating our existing customer base," for example, are not actionable promises without more particularized allegations that the underlying metrics are deceiving. (Previous Order at 16.) Plaintiff concedes that it is not challenging defendants' reported 2021 customer base and revenue. Without such an allegation, these statements do not amount to a promise that ON24 would sustain its 2020 level of growth.

More importantly, defendants' detailed disclosures warn of the very risks that plaintiff claims ON24 failed to disclose. The Risk Factors state:

> *Our recent revenue growth has been significantly impacted by an increasing demand for our platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures. As the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline.*
>
> * * *
>
> *our revenue and revenue growth rate may decline in future periods compared to 2020 as the impact of COVID-19 lessens.*

* * *

Renewals of subscriptions may decline or fluctuate because of several factors, such as dissatisfaction with our solutions or support, a customer no longer having a need for our solutions or the perception that competitive products provide better or less expensive options.

(FACCAC ¶ 181–83.)

Defendants adequately disclosed that, as COVID cooled, their customer acquisition and rate of growth might cool as well. This is precisely what ON24's 2021 metrics demonstrate happened. "Plaintiffs cannot use the benefit of 20-20 hindsight to turn management's business judgment into securities fraud." *Glazier Capital*, 63 F.4th at 782 (quoting *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1419 (9th Cir. 1994)).

As alleged, plaintiff's theory of the case is internally inconsistent, rendered implausible by the uncontroverted reports of ON24's growth post-IPO, and, in any case, covered by ON24's detailed disclosures. Because the Court previously gave plaintiff leave to amend, and plaintiff merely restated many of the same statements without meaningfully engaging with ON24's 2021 metrics and risk disclosures, any further opportunity to amend would be futile. *See In re Fritz Companies Securities Litig.*, 282 F.Supp.2d 1105, 1109 (N.D. Cal. 2003) (finding that it may be appropriate to deny leave to amend where the proposed amendment merely restates the same facts using different language).

For that reason, the motion to dismiss is **GRANTED WITH PREJUDICE.**

B. RISK FACTORS

The Court incorporates its legal analysis about the adequacy of risk factors from its Previous Order. (Previous Order 21–22.) Plaintiff challenges three risk factors, Statement Nos. 4–6. Again, plaintiff's challenge to each of these risk factors is that ON24 knew it faced material customer churn and did not disclose that information to potential investors. Because the plaintiff has not put forth sufficient facts to make that theory plausible, its claims against these risk factors once again fail. For the reasons stated above, further amendment would be futile.

For that reason, the motion to dismiss on this ground is **GRANTED WITH PREJUDICE.**

C. ITEMS 303 AND 305

The Court set out the standard Items 303 and 105 of SEC Regulations S-K in its Previous Order. (Previous Order at 24.) Once again, because plaintiff has not provided sufficient factual support for its claim that ON24 was experiencing significant customer churn or risk of churn, it has not met its burden of demonstrating that ON24 violated its duty to disclose under either Item. This is, again for the reasons stated above, not a defect that can be solved by amendment.

For that reason, the Court **GRANTS** the motion to dismiss as to these Items **WITH PREJUDICE.**

D. SECTION 15

Because plaintiff has not stated a primary claim under Section 11, its Section 15 claim also fails. *In re Wells Fargo Mortgage-Backed Certificates Litig.*, 712 F.Supp.2d 958, 969 (N.D. Cal. 2010) (internal citation

omitted). The Court therefore **GRANTS** the motion to dismiss **WITH PREJUDICE** on this claim.

IV. CONCLUSION

For the reasons stated above, Underwriter Defendants' motion for joinder is **GRANTED.** Defendants' motion to dismiss is **GRANTED WITH PREJUDICE.** Plaintiff has once again failed to put forth a sufficient factual foundation for its central theory of omission—that ON24 knew it faced material customer churn at the time of its IPO and omitted to tell its potential investors. Because plaintiff was previously given leave to amend and has failed to add anything other than internally inconsistent and conclusory facts in support, further amendment would be futile.

This terminates Dkt. Nos. 105 and 106.

The clerk of the court shall close the action.

IT IS SO ORDERED.

Date: March 5, 2024 /s/ Yvonne Gonzalez Rogers
YVONNE GONZALEZ ROGERS
United States District
Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE ON24, INC. SECURITIES LITIGATION	**Case No.:** 4:21-cv-8578-YGR **ORDER GRANTING THE MOTION TO DISMISS** **ORDER GRANTING THE MOTION FOR JOINDER** Re: Dkt. Nos. 83 and 85

Lead plaintiff Leadersel Innotech ESG brings this putative class action against ON24, Inc. ("Corporate Defendant"), Sharat Sharan, Steven Vattuone, Irwin Federman, Denise Persson, Holger Staude, Dominique Trempont, Barry Zwarenstein (together, "Individual Defendants"), and Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, KeyBanc Capital Markets Inc., Robert W. Baird & Co. Incorporated, Canaccord Genuity LLC, Needham & Company, LLC, Piper Sandler & Co., and William Blair & Company, L.L.C (together, "Underwriter Defendants"). Corporate Defendant, Individual Defendants, and Underwriter Defendants are collectively referred to as defendants.

In summary, the Consolidated Class Action Complaint (Dkt. No. 80, "CCAC") alleges violations of the Securities Act of 1933 ("Securities Act") in

connection with the initial public offering ("IPO") of ON24 which is a cloud-based digital experience platform that enables businesses to convert customer engagement into revenue through interactive webinars, virtual events, and multimedia content experiences. (CCAC ¶ 26.) The CCAC challenges thirteen statements made in the registration statement and prospectus issued in advance of ON24's IPO. Plaintiff alleges that defendants did not disclose how a changed business strategy led them to recruit short-term subscribers in the lead-up to the IPO to the detriment of initial investors post-IPO. The CCAC contains strict liability and negligence claims under Section 11 of the Securities Act and violations of Section 15 of the Securities Act and Items 105 and 303 of Regulation S-K of the Securities and Exchange Commission ("SEC").

Defendants move to dismiss on the grounds that (i) none of the statements are materially false or misleading and (ii) without a primary violation of Section 11, the Section 15 claim must also fail. (Dkt. No. 83, "MTD.")[1] In addition, Underwriter Defendants seek

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[1] Defendants have also filed a request for judicial notice and present eight documents in support thereof. (Dkt. No. 84.) For each, defendants request either judicial notice or incorporation of the document by reference. Plaintiff generally does not oppose this request. (Dkt. No. 86, "Opp." at 8.) To the extent the request is granted, the Court does not take judicial notice for the truth asserted within the documents. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018). Judicial notice is appropriate for "adjudicative fact[s]" that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(a)–(b). The request includes notice of eight exhibits: (1) ON24's Registration Statement, filed with the SEC on January 8, 2021, and amended on

to join the motion to dismiss (Dkt. No. 85). Having carefully considered the papers submitted, the pleadings in this action, the argument presented at the March 27, 2023, hearing, and for the reasons set forth below, the Court hereby **GRANTS** both Underwriter Defendants' joinder motion and defendants' motion to dismiss with leave to amend.

I. BACKGROUND

A. FACTUAL BACKGROUND

The CCAC and judicially-noticed documents allege as follows:

ON24 is a corporation headquartered in San Francisco, California that provides a cloud-based digital experience platform for interactive webinars, virtual events, and multimedia content experiences. (CCAC ¶ 26.) Founded in 1998 by co-founder and CEO Sharat Sharan, ON24 helps companies turn customer engagement into revenue by turning end-user data into buying signals and behavioral insights. (*Id.* ¶ 53.) The corporation derives its revenue from subscriptions to its various products. (*Id.* ¶¶ 53, 56.) As a subscription-based company, ON24 must attract new

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January 25, 2021; (2) ON24's Prospectus, filed on February 4, 2021; (3) ON24's March 17, 2021, Form 8-K; (4) ON24's May 12, 2021, Form 8-K; (5) ON24's August 10, 2021, Form 8-K; (6) ON24's November 9, 2021, Form 8-K; (7) ON24's February 28, 2022, Form 8-K; and (8) ON24's March 14, 2022, Form 10-K. Judicial notice of SEC filings is appropriate. *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008). Moreover, the CCAC incorporates by reference Exhibits 1, 2, 6, and 7. *See Khoja,* 899 F.3d at 1002 (holding that a court may consider a document incorporated if the complaint necessarily relies on it and no party questions its authenticity).

customers or upsell existing customers by selling them new subscriptions. (*Id.* ¶ 56.) The subscription agreements are primarily annual and billed in advance. (*Id.* ¶ 57.)

With the onset of the COVID-pandemic and the increased need for cloud-based platforms to conduct virtual meetings, ON24 experienced explosive growth. (*Id.* ¶¶ 7, 59.) ON24 told investors this was "partly in response to the COVID-19 pandemic." (*Id.* ¶ 66.) For example, in the nine months after September 30, 2020, ON24's revenue increased by 59% as compared to the year before. (*Id.* ¶ 60.) Its customer base increased from 760 customers as of December 31, 2015, to over 1,900 customers as of September 30, 2020. (*Id.* ¶ 61.) Annual recurring revenue ("ARR")—which is driven by ON24's ability to acquire new customers and to maintain and expand its relationship with existing ones—grew similarly, with $61.2 million ARR reported as of December 31, 2018, to $138.9 million as of September 30, 2020. (*Id.* ¶ 63.) Finally, during the pandemic ON24's net retention rate ("NRR")—which reflects ON24's recurring revenue from existing customers—also grew. (*Id.* ¶ 64.)

In the three quarters preceding the IPO—the quarters ending on June 30, 2020, September 30, 2020 and December 31, 2020—ON24 changed its business model. (*Id.* ¶ 9.) ON24 began to enroll new customers that were atypical. Many were small- to medium-sized businesses ("SMB") or otherwise atypical customers that wanted to use ON24's platform for one-time events. (*Id.* ¶ 9.) These "quick fixes" still required one-year subscriptions. (*Id.* ¶ 114.)

Five former employees, set out here as confidential witnesses, describe how ON24 started to pursue new customers. (*Id.* ¶ 72.) The employees explain that there were monthly calls, attended regularly by the Individual Defendants, to discuss customer acquisition and retention. (*Id.* ¶¶ 84–85.) One employee "recalled that during the COVID-19 pandemic, ON24 signed up anybody and everybody regardless [of whether] they were considered to be a good customer for the Company." (*Id.* ¶ 88.) Internal pressure "to meet quotas in the face of increased pressure and declining demand" existed. (*Id.* ¶ 113.) Much of this pressure was "centered around" the company going public. (*Id.* ¶ 138.)

Employees were required to track clients' expectation for renewal, a metric internally known as "churn." (*Id.* ¶ 92.) Once the COVID-19 pandemic restrictions began to ease, one employee stated that there was a "dramatic decline in demand." (*Id.* ¶ 98.) Employees noticed high churn among customers because ON24 was a pandemic purchase. (*Id.* ¶ 100.) In this regard, ON24 experienced customer-churn in three ways: clients were using ON24's products only as a temporary solution; customers were not renewing one-time purchases; and customers were electing to "down sell," or remove features from their subscription. (*Id.* ¶ 101.) One employee recalled that customers would tell him as much as six months in advance that they planned to cancel their subscriptions. (*Id.* ¶ 102.) Before the IPO, during the winter of 2020, demand "really dropped off" because of "market saturation" and "uncertainty regarding COVID-19." (*Id.* ¶ 125.) ON24 had already known, before COVID-19 hit, that SMB customers had high churn but the

pandemic "amplified things." (*Id.* ¶ 106.) The concerns with customer turnover were discussed at the monthly meeting with the Individual Defendants. (*Id.* ¶ 103.) Defendant Sharan closely monitored the performance of the sales team. (*Id.* ¶ 141.)

On February 3, 2021, ON24 conducted its IPO, in which it sold 8,560,930 shares of common stock to the public at $50.00 a share. (*Id.* ¶ 67.) The IPO was conducted pursuant to, and the sale of ON24 stock was solicited by, several documents that were filed by ON24 and the Underwriter Defendants with the SEC, including (i) a January 8, 2021, registration statement with a January 25, 2021, amendment, which was declared effective by the SEC on February 2, 2021 (the "Registration Statement") and (ii) a February 4, 2021, final prospectus (the "Prospectus" and, together with the Registration Statement, the "Offering Documents"). (*Id.* ¶ 69.)

B. CHALLENGED STATEMENTS

Plaintiff challenges thirteen statements contained in the Offering Documents as misleading. Specifically, they read:

Statement 1 (*id.* ¶ 144)[2]:

> ***As of September 30, 2020, we had over 1,900 customers*** in more than 40 countries, including three of the five largest global technology companies, four of the five largest U.S. banks, three of the five largest U.S. banks, three of the five largest global

[2] All emphasis shown is original to the CCAC. Plaintiff notes it only challenges the emphasized portions of the statements; the rest is provided for context.

> healthcare companies and three of the five largest global industrial and manufacturing companies, in each case measured by 2019 revenue. No single customer contributed more than 5% of our total revenue for the year ended December 31, 2019 or for the nine months ended September 30, 2020. ***We have a highly engaged and loyal customer base that has allowed us to grow our revenue with them over time***, and achieve an NRR of 147% as of September 30, 2020. Our NRR was 107% and 108% as of December 31, 2018 and December 31, 2019, respectively.

Statement 2 (*id.* ¶ 145):

> ***Growing base of customers across verticals. We have a large and diverse set of customers across a broad set of industries. We have grown our customer base from approximately 760 customers as of December 31, 2015 to over 1,900 customers in more than 40 countries as of September 30, 2020***, including three of the five largest global technology companies, four of the five largest U.S. banks, three of the five largest global industrial manufacturing companies, in each case measured by 2019 revenue. ***We intend to leverage our land and expand model to further penetrate customers across these verticals***.

Statement 3 (*Id.* ¶ 146):

> Key Factors Affecting Our Performance

* * *

Annual Recurring Revenue

We believe that ARR is a key metric to measure our business because it is driven by our ability to acquire new subscription customers and to maintain and expand our relationship with existing subscription contracts as of the measurement date, including existing customers with expired contracts that we expect to be renewed. Our ARR amounts exclude professional services, overages from subscription customers and Legacy revenue. Our ARR was $61.2 million as of December 31, 2018, $63.6 million as of March 31, 2019, $67.2 million as of June 30, 2019, $70.0 million as of September 30, 2019, $76.9 million as of December 31, 2019, $85.9 million as of March 31, 2020, $114.2 million as of June 30, 2020, and $138.9 million as of September 30, 2020. ***Our consistent ARR growth each quarter reflects our success in acquiring new customers and expanding subscriptions with existing customers, which was occurring prior to the COVID-19 pandemic and has accelerated in 2020 partly in response to the COVID-19 pandemic***.

Statement 4 (*id.* ¶ 149):

Our Growth Strategy

We intend to drive the growth of our business and the adoption of our solutions by executing the following strategies:

- Expand within existing customers. We believe we can achieve significant organic growth by expanding penetration of our existing customer base. ***Our land and expand model drives expansion of new subscriptions within our existing customer base by selling subscriptions to additional parts of existing customers' organizations, expanding into new regional divisions and upselling new solutions***. In addition, we are developing new applications for our platform, including partners training and employee recruiting and forms of indirect marketing, such as education, enrollment and benefits programs.

Statement 5 (*id.* ¶ 150):

Businesses today primarily use automated solutions, such as digital advertising and email, for marketing. While these automated solutions reach large numbers of prospective customers, they have generally failed to deepen customer engagement because they were designed with the simple purpose of pushing marketing messages in one direction—from the business to the prospective customer. For businesses to succeed, we believe their sales and

> marketing strategies must evolve from the era of automation to the era of engagement. Our platform provides an innovative way both to scale the digital marketing and deepen prospective customer engagement. We believe ***our opportunity to help businesses convert digital engagement into revenue will continue to grow as industries modernize their sales and marketing processes, which has been accelerated by the COVID-19 pandemic***.

Statement 6 (*id.* ¶ 151):

> The terms of our subscription agreements are primarily annual and, to a lesser extent, multi-year. We bill for the full term in advance or on an annual or monthly basis, depending on the terms of the agreement. We recognize subscription revenue ratably over the term of the subscription period beginning with the date customers are granted access to our platform. Our contracts typically require payments in annual installments. ***We have seen an increase in the proportion of multi-year subscriptions as the number of larger customers has increased***. Customers with multi-year subscription agreements accounted for 21% and 27% of ARR as of December 31, 2018 and September 30, 2020, respectively. See "—Key Business Metrics—Annual Recurring Revenue" for further information regarding how we calculate ARR.

Statement 7 (*id.* ¶ 152):

> ***We intend to continue to focus on the acquisition of new customers with 2,000 or more employees, or Enterprise customers, and to expand the usage of our platform within these larger accounts***. We follow a named account coverage approach with aligned account teams, including sales, account management and customer success. After establishing a customer relationship with a business unit of an Enterprise, we seek to expand to new business units, divisions, departments and geographic regions, as well as increase subscriptions to additional products, which we refer to as "attachments," and expand product use cases.

Statement 8 (*id.* ¶ 153):

> We believe ***we can achieve significant growth by retaining and further penetrating our existing customer base with the addition of new users and new products, and through upsell and cross sell***. Our multi-dimensional land and expand model drives onboarding and allows us to acquire customers via free trials, live demos and continuous engagement with an efficient sales and marketing investment. As we continue to drive more actionable revenue generating marketing insights, we believe that ***we have a significant opportunity to further increase sales among existing customers across different***

> ***functional and geographic departments within each respective organization***. Our ability to pursue this opportunity will require us to scale our sales and marketing organizations and otherwise increase our operating expenses, and we may not be successful on the timetable we anticipate, or at all, for any number of reasons, which may cause our results to vary from period to period.

Statement 9 (*id.* ¶ 157):

> Investing in our common stock involves risks, which are discussed more fully under "Risk Factors." You should carefully consider all the information in the prospectus, including under "Risk Factors," before making an investment decision. ***These risks include, but are not limited to, risks relating to***:
>
> - ***Our ability to sustain our recent growth rate in the future, attract new customers and expand sales to existing customers;***
> - ***Fluctuation in our performance, our history of net losses and expected increases in our expenses;***
> - ***Competition and technological development in our markets and any decline in demand for our solutions or generally in our markets;***

- ***Our ability to expand our sales and marketing capabilities and otherwise manage our growth;***
- ***The impact of the COVID-19 pandemic.***

Statement 10 (*id.* ¶ 158):

> ***We may not be able to sustain our recent revenue growth rate in the future***.
>
> For the year ended December 31, 2019, our revenue increased by 8% as compared to the year ended December 31, 2018. We have experienced significant revenue growth during 2020, with our revenue increasing by 59% for the nine months ended September 30, 2020 as compared to the nine months ended September 30, 2019. ***Our recent revenue growth has been significantly impacted by an increasing demand for our platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures. As the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline. If these new customers elect not to continue their subscriptions as the impact of COVID-19 lessens, our business, financial condition and results of operations would be harmed***.

Statement 11 (*id.* ¶ 159):

> ***Our quarterly results may fluctuate significantly and may not fully reflect the***

underlying performance of our business.

Our quarterly results of operations and financial condition may vary significantly in the future, and period-to-period comparisons may not be meaningful. Accordingly, the results of any one quarter should not be relied upon as an indication of future performance. Our quarterly results of operations and financial condition may fluctuate as a result of a variety of factors, many of which are outside of our control and may not fully reflect the underlying performance of our business. ***For example, our revenue and revenue growth rate may decline in future periods compared to 2020 as the impact of COVID-19 lessens***. Further, because we generally invoice our customers at the beginning of the contractual terms of their subscriptions to our solutions, our financial condition reflects deferred revenue that we recognize ratably as revenue over the contractual term. ***If fewer new enrollments or renewals occur as the impact of COVID-19 lessens, our cash and deferred revenue as of future dates may decrease***. Fluctuation in quarterly results may negatively impact the value of our securities. ***Factors that may cause fluctuations in our quarterly results or operations include***:

- ***Our ability to retain and expand customer usage;***

- ***Our ability to attract new customers***.

Statement 12 (*id.* ¶ 160)

> ***Failure to attract new customers or retain, expand the usage of, and upsell our products to existing customers would harm our business and growth prospects***.
>
> We derive, and expect to continue to derive, a significant portion of our revenue and cash flows from sales of subscriptions to our products. As such, our business depends on our ability to attract new customers and to maintain and expand our relationships with our existing customers, including by expanding their usage and upselling additional solutions. Our business is largely subscription-based, and customers are not obligated to and may not renew their subscriptions after their existing subscriptions expire. ***As a result, customers may not renew their subscriptions at the same rate, increase their usage of our solutions or purchase subscriptions for additional solutions, if they renew at all. Renewals of subscriptions may decline or fluctuate because of several factors, such as dissatisfaction with our solutions or support, a customer no longer having a need for our solutions or the perception that competitive products provide better or less expensive options***. In order to grow our business, we

must continually add new customers and replace customers who choose not to continue to use our platform. Any decrease in user satisfaction with our solutions or support may result in negative online customer reviews and decreased word-of-mouth referrals, which would harm our brand and our ability to grow.

In addition to striving to attract new customers to our platform, we seek to expand the usage of our solutions by our existing customers by increasing the number of departments, divisions and teams that use our solutions within each of our customers. If we fail to expand the usage of our solutions by existing customers or if customers fail to purchase other solutions from us, our business, financial condition and results of operations would be harmed.

Statement 13 (*id.* ¶ 161):

Our results of operations may be adversely impacted by the COVID-19 pandemic.

[T]he economic impacts of COVID-19 have affected and may continue to affect customer and prospective customer spending on technology such as ours, particularly for businesses involving in-person interactions, such as hospitality, manufacturing and professional services businesses. These customers may experience reduced revenue and

> ***revised budgets, which may adversely affect our customers' ability or willingness to purchase subscriptions to our platform, the timing of subscriptions, customer retention, and the value or duration of subscriptions, all of which could adversely affect our operating results.***
>
> * * *
>
> ***Due to our subscription-based business model, the effect of the COVID-19 pandemic may not fully be reflected in our results of operations until future periods. In addition, uncertainty regarding the impact of COVID-19 on our future operating results and financial condition may result in our taking cost-cutting measures, reducing the level of our capital investments and delaying or canceling the implementation of strategic initiatives, any of which may negatively impact our business and reputation. The global macroeconomic effects of the COVID-19 pandemic and related impacts on our customers' business operations and their demand for our solutions may persist for an indefinite period, even after the COVID-19 pandemic has subsided.***

Of the thirteen statements, the first eight were made in the registration statement and the last four in the prospectus.

Importantly, plaintiff does not allege that these statements were misleading in their own right. Instead, plaintiff alleges the challenged statements were misleading when made because they:

> failed to disclose and misrepresented the following significant, then-existing material events, trends, and uncertainties that ON24 had already been facing at the time of the IPO: (i) ON24 signed up new customers for 1-year contracts during the second, third, and fourth quarters of 2020 that planned either to not renew or downsell, a larger-than-typical percentage of which were [SMB] customers, nonideal customers focused on one-time events, and one-time use cases that planned either not to renew or downsell; and (ii) given declining demand and the magnitude of new, 1-year customers that ON24 signed up during the second, third, and fourth quarters of 2020 that were either not renewing or were going to downsell, ON24 already faced material customer churn and downselling at the time of the IPO.

(Id. ¶ 147.)

C. EVENTS FOLLOWING THE IPO

After ON24's IPO, the company reported lower than expected revenues. (*Id.* ¶ 164.) Just six months after the IPO, Sharan admitted that ON24 had experienced "higher-than-expected churn and downsell from customers" signed up during the peak of the COVID-19 pandemic, many of which came from "the first-time renewal cohort." (*Id.* ¶ 165.) This disclosure

caused market analysts to downgrade ON24's stock. (*Id.* ¶ 170.) Analysts at underwriter defendant JP Morgan, for example, lowered the common stock's price target from $85.00 to $32.00 per share. (*Id.*) In its report, JP Morgan explained that the "major issue is the increase in churn and [customer] down-sell that will likely cause the platform revenue to decelerate." (*Id.*) Analysts stressed that the problem was that "[m]anagement's previous guidance had not factored in enough churn from smaller accounts." (*Id.*) One underwriter defendant, Canaccord, downgraded ON24's common stock from "buy" to "hold" because of "elevated churn" from "first-time renewals who had signed up for one-year deals at the height of COVID." (*Id.* ¶ 172.) This was ON24's "largest renewal cohort ever," but Canaccord emphasized that the cohort was mostly made up of clients who were "not normally ON24's target customer." (*Id.* ¶¶ 172–73.) By November 10, 2021, JP Morgan noted that ON24's ARR for the fourth quarter of 2021 was "negatively impacted" by the continued churn of first-time customers acquired during the COVID-19 pandemic in the lead up to ON24's IPO. (*Id.* ¶ 182.) Another underwriter defendant, Piper Sandler, stated that though ON24's ARR had had continued to grow in 2021, "eroding customer renewal rates and contract downsizing over the last two quarters has pressured ARR growth to moderate meaningfully." (*Id.* ¶ 185.) Almost a year after its IPO, Sharan reflected that the "largest challenge in 2021 was the first time renewal cohort." (*Id.* ¶ 191.) More to the point, the CEO said that "churn has been [ON24's] biggest issue." (*Id.* ¶ 194.)

The value of ON24 common stock fell from $50.00 when the company went public to $12.05 at the time the CCAC was filed, a 76% decline. (*Id.* ¶ 204.)

II. LEGAL FRAMEWORK

A. RULE 8

To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The requirement that the court must "accept as true" all allegations in the complaint is "inapplicable to legal conclusions." *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* The parties do not dispute that Fed. R. Civ. P. 8(a) applies.[3] The Court therefore analyzes the complaint under a plausibility, not particularity, standard. Even without Fed. R. Civ. P. 9(b), however, plaintiff must still plead sufficient facts to state a plausible claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

III. ANALYSIS

A. JOINDER

The Underwriter Defendants seek to join ON24 and the Individual Defendants' motion to dismiss.

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[3] Though Section 11 does not have a fraud element, the particularity requirements of Rule 9(b) may still apply to a Section 11 claim that sounds in fraud. *In re Daou Systems, Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005). Here, the CCAC states that "[t]his cause of action does not sound in fraud." (CCAC ¶ 213.) Defendants do not object to this characterization.

(Dkt. No. 85.) Plaintiff does not oppose joinder. The Court therefore **GRANTS** the joinder motion.

B. SECTION 11

Plaintiff alleges that all thirteen statements at issue were materially misleading for the same reason. ON24 failed to disclose that in the three quarters leading up to the IPO, ON24 relaxed its qualification criteria to enroll new, 1-year customers that it knew planned either not to renew or to downsell and, given declining demand and the magnitude of these one-time purchases, ON24 was already facing material customer churn at the time of IPO that inevitably led to investor losses. By omitting this information, plaintiff continues, defendants' risk disclosures did not fulfill Items 303 and 105.

In their motion to dismiss, defendants challenge the sufficiency of plaintiff's Section 11 claim for various reasons, namely, that some of the challenged statements are (1) "expressions of corporate optimism"; (2) forward-looking statements protected by the bespeaks-caution doctrine; and (3) none of the challenged statements were misleading when made. Defendants also generally argue that plaintiff's claims fail because they are made up of legal conclusions instead of well-pled facts. The Court starts with this final argument first. To effectively address the rest, the Court sorts the challenged statements into headings based on defendants' arguments for dismissal.

1. Conclusory Allegations

Defendants argue plaintiff's claims should be dismissed because they consist of legal conclusions

unsupported by factual allegations. Plaintiff responds it sufficiently alleged that ON24 failed to disclose that, at the time of the IPO, ON24 faced material customer churn. In support, plaintiff points to the statements made by its five confidential witnesses.

To state a claim under Section 11, a plaintiff must prove that (1) the Offering Documents contained an omission or misrepresentation, and (2) that the omission or misrepresentation was material, that is, it would have misled a reasonable investor about the nature of his or her investment. *Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009) (cleaned up). Not all adverse events must be disclosed. "Disclosure is required [by the Securities Act] only when necessary to make statements made, in the light of the circumstances under which they were made, not misleading." *Matrixx*, 563 U.S. at 44 (cleaned up). Omissions, therefore, are actionable only when what is omitted renders what is included misleading. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus.*, 575 U.S. 175, 179 (2015) ("Section 11 thus creates two ways to hold issuers liable for the contents of a registration statement—one focusing on what the statement says and the other on what it leaves out.") When "a plaintiff relies on a theory of omission, the plaintiff must allege 'facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.'" *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 616 (9th Cir. 2017) (citing *Omnicare*, 575 U.S. at 1332).

The Court agrees that plaintiff's theory of omission, the crux of why it believes all thirteen

statements are misleading, is not supported by sufficient facts. Plaintiff alleges that (1) the Offering Documents omitted to tell potential investors that ON24 had changed its business strategy to pursue one-time, atypical customers; and (2) this omission was material because the resulting customer churn was material. About customer churn, confidential witnesses say: "that the Company knew a lot of the COVID business was not going to stick" (CCAC ¶ 79); "there were open discussions during meetings and within the Company that the small business cohort did not have good retention rates" (*id.* ¶ 86); "the churn who signed on during the pandemic was a concern from an account management perspective" (*id.* ¶ 96); "Defendant Sharan not only misled investors, but also employees about the sustainability of ON24's performance . . . ON24's success was characterized as a success in itself and not something dependent on the circumstances of the pandemic . . . [an] increase in quotas were instituted despite a dramatic decline in demand once lockdown restrictions had begun to relax" (*id.* ¶ 98); one confidential witness said "there were instances that he would notice 40-50% churn among his customers" (*id.* ¶ 100); another stated that "churn was occurring in several ways . . . this represented a huge downturn" and "customers inform[ed] him as much as six months in advance, during 2020 and 2021, that they were not going to renew their contracts" (*id.* ¶¶ 101–02); "the Company was already aware there was high churn amongst the SMB customers prior to the pandemic, but the pandemic amplified things" (*id.* ¶ 106); "there was a lot of new business in the first few months of the pandemic, which then leveled out shortly before and after the

Company's IPO" (*id.* ¶ 107); "the Company expected more from the sales team despite the declining demand, failing to adjust to the changes from the beginning of the pandemic" (*id.* ¶ 121); "after a lot of early success, things really dropped off and demand declined during November/December 2020" (*id.* ¶ 125); and "when account executives saw what was happening regarding demand . . . [salespersons] informed them that opportunities were no longer coming in like they were previously" (*id.* ¶ 143).

These statements, taken as true, demonstrate that ON24 lost some customers in the lead up to the IPO. They do not establish, however, that ON24 faced material customer churn at the time the statements were made. Twenty-twenty vision does not apply. Even taking all inferences in favor of plaintiff at this stage, none of the confidential witnesses provide a factual foundation for its theory that demand for ON24's products declined to the point that omitting that information materially misled investors at the time. Statements like there was "high churn," a "dramatic decline in demand" and "things really dropped off" are, without some quantification to put them into context, bald allegations. For example, plaintiff does not allege that defendants knew that, out of ON24's 1,900 customers, 40-50% planned to downsell or not renew. Instead, plaintiff alleges that one confidential witness said that there were "instances" where he would notice a "40-50%" churn of *his* customers. It is unclear from the CCAC how many customers this one confidential witness had or how many times he saw this degree of churn. Without more, the Court cannot determine whether the fact that ON24 omitted to tell

investors about customer churn was materially misleading.

Because plaintiff's CCAC hinges on the significance of customer churn, the lack of a factual foundation is fatal. The Court therefore **GRANTS** defendants' motion to dismiss with leave to amend. To avoid unnecessary motions practice, however, the Court addresses the rest of defendants' arguments.

2. Corporate Optimism and Puffery

Defendants argue that Statement Nos. 1, 3, and 8 are nonactionable because they are "no more than subjective expressions of optimism" and puffery. Plaintiff disagrees, asserting that when properly put in context, the statements "conveyed verifiable information about the then-current state of ON24's existing business which was incomplete and misleading in context."

An actionable statement must be "capable of objective verification." *Retail Wholesale & Dep't Store Union Local 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017). "[V]ague, generalized assertions of corporate optimism or statements of 'mere puffing' are not actionable material misrepresentations under federal securities laws because no reasonable investor would rely on such statements." *In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1255 (N.D. Cal. 2019) (cleaned up). "When valuing corporations . . . investors do not rely on vague statements of optimism like 'good,' 'well-regarded,' or other feel-good monikers. This mildly optimistic, subjective assessment hardly amounts to a securities violation." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010).

Statement No. 1. Without more specific allegations, this statement amounts to no more than puffery. Defendants stated that they had "more than 1,900 customers" who are "highly engaged and loyal." (CCAC ¶ 144.) Plaintiff argues that this statement was misleading because it failed to warn investors that a significant number of customers were, in fact, planning to unsubscribe or downsell. The CCAC does not quantify this churn. Alone, this Court has found that descriptive statements like customers are "highly engaged" and "loyal" are not actionable.

In re Nimble Storage, Inc. Securities Litig. is instructive. There, plaintiff alleged that defendants knew they were "not effectively penetrating the enterprise segment but concealed this fact by touting the growth of its enterprise customer base while at the same time relabeling commercial accounts as enterprise accounts." 252 F. Supp. 3d 848, 852 (N.D. Cal. 2017). Defendants stated their customer base had increased by 140 clients throughout the class period. *Id.* Plaintiff presented no particularized evidence that defendants had misrepresented the number of clients. *Id.* Rather, plaintiff alleged that defendants' statement that it added enterprise clients at a "record pace" was misleading. *Id.* This Court found that, absent more particularized allegations that sales data was misreported, such "generally optimistic statements" were not actionable. *Id.* (internal citation omitted). Similarly here, without more particularized allegations, statements like ON24's 1,900 customers are "highly engaged and loyal" are incapable of objective verification.

Statement No. 3. This statement is inactionable for much the same reasons as Statement No. 1.

Defendants state that their "consistent ARR growth each quarter reflects our success in acquiring new customers and expanding subscriptions with existing customers, which was occurring prior to the COVID-19 pandemic and has accelerated in 2020 partly in response to the COVID-19 pandemic." (CCAC ¶ 146.) Judicially-noticed documents demonstrate that this statement is accurate: defendants reported that ARR increased quarter after quarter, including the quarter *after* the IPO. Plaintiff actually acknowledges this growth, pre-IPO, in their CCAC and notes that ON24 said the growth was "partly in response to the COVID-19 pandemic." (*Id.* ¶¶ 63, 66.) Plaintiff argues this metric is misleading but, without more, it is unclear why. Investors can read such numbers and accompanying cautionary language telling them that this was in part due to the COVID-19 pandemic, and judge for themselves the risks. *See In re Nimble Storage*, 252 F. Supp. 3d at 853–54 (noting that, sales and profit data, when accurately reported, are rarely subject to misinterpretation even when accompanied by generally optimistic statements (cleaned up)). This is especially true because, in the risk factors, defendants stressed that subscriptions and revenue could decrease as the impact of the COVID-19 pandemic lessened. (CCAC ¶ 159.)

Statement No. 8. Without more particularized allegations, the Court also finds that Statement No. 8 is inactionable as a subjective, feel-good statement. Defendants state that they "believe they can achieve significant growth by retaining and further penetrating our existing customer base" and they have a "significant opportunity to further increase sales among existing customers." (CCAC ¶ 153.)

Statements like "significant opportunity" and "significant growth" are, as alleged, too vague to be actionable. *See, e.g., Police Retirement Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (N.D. Cal. 2014) (finding that statements like an opportunity is "still very, very large" are corporate puffery). Unless plaintiff can provide further factual foundation for its theory that customer churn was material, such generally optimistic statements appear to be puffery.

Plaintiff's reliance on this Court's decision in *In re Apple Sec. Litig.* is unavailing. There, Apple reported that its new iPhone "got off to a really great start" a few days before it shut down its production line entirely because it was doing so poorly. No. 19-cv-2033-YGR, 2020 WL 2857397, at *15 (N.D. Cal. June 2, 2020). With such evidence in mind, this Court admonished Apple that it could not "affirmatively create a positive impression of an area it knows to be doing poorly." *Id.* Plaintiff does not provide nearly this level of factual support for its claims. This admonishment is therefore inapplicable.

The Court therefore **GRANTS** defendants' motion to dismiss as to Statement Nos. 1, 3 and 8 on the grounds of puffery with leave to amend.

3. Bespeaks Caution Doctrine

Defendants argue that Statement Nos. 2, 5 and 7 are protected by the bespeaks caution doctrine. Plaintiff responds that those three statements "were rendered misleading by omission of historical facts and are, therefore, not protected."

The bespeaks caution doctrine "provides a mechanism by which a court can rule as a matter of law . . . that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *In re Atossa Genetics Inc. Sec. Litig.*, 868 F.3d 784, 798 (9th Cir. 2017) (internal citation and quotations omitted). A dismissal on the pleadings based on the bespeaks caution doctrine is justified only by a "stringent" showing that "reasonable minds could not disagree that the challenged statements were not misleading." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (internal citation and quotations omitted). The bespeaks caution doctrine applies only when "the truth or falsity of the statement cannot be discerned until some point in time after the statement is made." *Mallen v. Alphatec Holdings, Inc.*, 861 F.Supp.2d 1111, 1126 (S.D. Cal. 2012).

Statement No. 2. This statement is forward-looking. Defendants state they have "a large and diverse set of customers across a broad set of industries . . . [and they] intend to leverage [their] land and expand model to further penetrate customers." (CCAC ¶ 145). Phrases, like this one, expressing an "intention" are unactionable as forward-looking because they express a plan to do something in the future. *In re Restortation Robotics Inc.*, 417 F. Supp. 3d at 1256. The truth or falsity of this statement could not be discerned until after IPO. It was also accompanied by meaningful cautions: defendants told potential investors that the failure to "retain, or expand the usage of, and upsell our products to existing customers would

harm our business and growth prospects." (CCAC ¶ 160.)

Statement No. 5. This is also a forward-looking statement protected by adequate cautionary language. Defendants state that they "believe our opportunity to help businesses convert digital engagement into revenue will continue to grow as industries modernize their sales and marketing processes, which has been accelerated by the COVID-19 pandemic." (*Id.* ¶ 150.) The first problem for plaintiff, as stated above, is that statements like we "believe" are generally too vague to be actionable. *See In re Restoration Robotics*, 417 F. Supp. 2d at 1255. Moreover, the Ninth Circuit has found that similar statements, like "we continue to expect . . . to grow," were inactionable because they "plainly project expectations for future growth." *Police Retirement Sys. of St. Louis*, 759 F.3d at 1058. In addition, this projection was couched in cautionary language: defendants noted in the Offering Documents that these were "forward looking statements" and warned customers that, as the impact of the COVID-19 pandemic lessened, demand for their products might also decrease. (CCAC ¶ 159.) The accompanying language is sufficient to put investors on notice that ON24's rosy projections for the future might not materialize.

Statement No. 7. For much the same reasons, the Court finds that Statement No. 7, as alleged, is also purely forward-facing. Defendants state "[w]e intend to continue to focus on the acquisition of new customers with 2,000 or more employees, or Enterprise customers, and to expand the usage of our platform within these larger accounts." (*Id.* ¶ 152.) Plaintiff does not provide sufficient factual

allegations to support its theory that ON24 had, in fact, stopped focusing on the acquisition of Enterprise customers. Given that, defendants were only stating a present expectation for future plans. This was accompanied by meaningfully cautionary language. Again, defendants tell investors that their "recent revenue growth has been significantly impacted by an increasing demand for our platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures. As the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline. If these new customers elect not to continue their subscriptions as the impact of COVID-19 lessens, our business, financial condition and results of operations would be harmed." (*Id.* ¶ 158.)

The Court therefore **GRANTS** the motion to dismiss with leave to amend as to Statement Nos. 2, 5, and 7 on the ground they are protected by the bespeaks caution doctrine.[4]

4. False or Misleading Statements

Defendants argue that none of the statements are actionable because plaintiff has not shown how they could be false or misleading. Plaintiff disagrees. The Court has addressed most statements above and will address Statement Nos. 9–13 below. Here, the

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[4] Plaintiff's reliance on *Livid Holdings* is, at this point, misplaced. In *Livid Holdings*, the Ninth Circuit held that the bespeaks caution doctrine does not extend to "statements of historical facts." 416 F.3d at 948. Because plaintiff has not adequately pled that high customer churned happened, much less that ON24 knew it was happening before IPO, this holding does not apply.

Court analyzes the two remaining statements, Nos. 4 and 6.

Under Section 11, plaintiffs must plead "contemporaneous statements or conditions" showing the "misleading nature of the statements when made." *Ronconi v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001). For an omission to be misleading, "it must affirmatively create an impression of the state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (citation omitted).

Statement No. 4 provides that defendants' "land and expand model drives expansion of new subscriptions within our existing customer base by selling subscriptions to additional parts of existing customers' organizations, expanding into new regional divisions and upselling new solutions." (CCAC ¶ 149.) Plaintiff's theory on why this statement is misleading eludes. On its face, the statement reads like a description of how ON24 upsells its customers. The CCAC itself notes that one of ON24's strategies for growth was upselling customers in this manner. (CCAC ¶ 6.) Even taking all of plaintiff's allegations as true, this description of ON24's land and expand model would not change. Plaintiff has therefore not shown how the alleged omission of ON24's customer churn affirmatively created a state of affairs that differs from the one that actually exists as explained in Statement No. 4.

Statement No. 6. As alleged, plaintiff also fails to show how this statement is false or misleading. Defendants state that they have "seen an increase in the proportion of multi-year subscriptions as the number

of larger customers has increased." (CCAC ¶ 151.) While the statement above contains vague terms like "increase," the next statement (which is unchallenged) contains data, namely: "Customers with multi-year subscription agreements accounted for 21% to 27% of ARR as of December 31, 2018, and September 30, 2020, respectively." (*Id.*) Plaintiff offers no contemporaneous facts that challenge these figures. As stated above, such data, when accurately reported, will rarely give rise to a securities violation. *See In re Nimble Storage*, 252 F. Supp. 3d at 853–54. Instead, plaintiff contends that this statement was misleading because ON24 knew, prior to IPO, that there was high customer churn. Without more, the allegation that the statement necessarily misleads relies on the bald allegations discussed above. Alone, there is no basis to conclude it is misleading.

Plaintiff's reliance on *In re Restoration Robotics* does not persuade. There, Judge Davila held that a company materially misled investors when it told them it had experienced a 34% increase in sales of a certain type of system. 417 F. Supp. 3d at 1261. Though technically accurate, plaintiffs adequately alleged this figure was a "half-truth" because the company had lumped together both domestic and foreign sales without telling investors that those systems sold internationally had not yet been installed and therefore revenue in that area had fallen. *Id.* Plaintiffs succeeded there because they demonstrated that the number of sales was aggregated in such a way as to mislead investors about expected revenue. In other words, because increased sales did not necessarily equate to increased revenues, the court found that plaintiffs had stated a claim.

Plaintiffs here have missed a step. They did not adequately plead that defendants' data was a "half-truth" because they did not show that increased multi-year subscriptions do not necessarily equate to increased revenues. Without that connection, ON24's data point simply reads as on point.

For those reasons, the Court **GRANTS** the motion to dismiss with leave to amend as to Statement Nos. 4 and 6 on the ground that, as alleged, they are not misleading.

5. Risk Factors

Finally, plaintiff challenges the adequacy of various of ON24's risk factors, Statement Nos. 9–13. Plaintiff alleges that were materially misleading because they failed to "warn of significant, then-materialized risks posed by ON24's one-time and event only customers that planned to either not renew or downsell." (CCAC ¶ 156.) Defendants disagree, arguing that the risks factors were abundant and specific and, moreover, the risk of which plaintiff sought warning—the alleged churn of one-time customers who subscribed less than a year before the IPO—did not occur until after the IPO and therefore ON24 could not have disclosed this churn in its Offering Documents.

"Section 11 does not require the disclosure of all information a potential investor might take into account when making [their] decision." *Rubke*, 551 F.3d at 1163. A company is not required to forecast future events or caution about contingencies outside of its control. *In re Stac*, 89 F.3d 1399, 1406–07 (9th Cir. 1996). For that reason, risk factors are materially misleading only if they failed to warn of risks that had

already come to fruition. *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1181 (9th Cir. 2009).

Plaintiff challenges the following risk factors:

- **Statement No. 9:** Defendants warned investors that some of the risks entailed were: (1) their "ability to sustain our recent growth rate in the future, attract new customers and expand sales to existing customers;" (2) "fluctuation in [their] performance"; (3) competition and "any decline in demand for our solutions;" (4) their "ability to expand our sales and marketing capabilities and otherwise manage our growth; (5) "the impact of the COVID-19 pandemic" (CCAC ¶ 157)
- **Statement No. 10:** Defendants warned that they "may not be able to sustain our recent revenue growth rate in the future . . . Our recent revenue growth has been significantly impacted by an increasing demand for our platform and products following the onset of the COVID-19 pandemic and resulting precautionary measures. As the impact of COVID-19 lessens, there may be reduced demand for our platform, and our revenue growth rate may decline. If these new customers elect not to continue their subscriptions as the impact of COVID-19 lessens, our business, financial condition and results of operations would be harmed" (CCAC ¶ 158)
- **Statement No. 11:** "Our quarterly results may fluctuate significantly and may not

fully reflect the underlying performance of our business . . . For example, our revenue and revenue growth rate may decline in future periods compared to 2020 as the impact of COVID-19 lessens . . . If fewer new enrollments or renewals occur as the impact of COVID-19 lessens, our cash and deferred revenue as of future dates may decrease." Defendants warned that factors that might influence fluctuation were their "ability to retain and expand customer usage" and their "ability to attract new customers" (CCAC ¶ 159)

- **Statement No. 12:** "Failure to attract new customers or retain, expand the usage of, and upsell our products to existing customers would harm our business and growth prospects . . . As a result, customers may not renew their subscriptions at the same rate, increase their usage of our solutions or purchase subscriptions for additional solutions, if they renew at all. Renewals of subscriptions may decline or fluctuate because of several factors, such as dissatisfaction with our solutions or support, a customer no longer having a need for our solutions or the perception that competitive products provide better or less expensive options . . . In addition to striving to attract new customers to our platform, we seek to expand the usage of our solutions by our existing customers by increasing the number of departments, divisions and teams that use our solutions within each of

our customers. If we fail to expand the usage of our solutions by existing customers or if customers fail to purchase other solutions from us, our business, financial condition and results of operations would be harmed" (CCAC ¶ 160)

- **Statement No. 13:** "Our results of operations may be adversely impacted by the COVID-19 pandemic . . . [T]he economic impacts of COVID-19 have affected and may continue to affect customer and prospective customer spending on technology such as ours, particularly for businesses involving in-person interactions, such as hospitality, manufacturing and professional services businesses. These customers may experience reduced revenue and revised budgets, which may adversely affect our customers' ability or willingness to purchase subscriptions to our platform, the timing of subscriptions, customer retention, and the value or duration of subscriptions, all of which could adversely affect our operating results . . . Due to our subscription-based business model, the effect of the COVID-19 pandemic may not fully be reflected in our results of operations until future periods . . . The global macroeconomic effects of the COVID-19 pandemic and related impacts on our customers' business operations and their demand for our solutions may persist for an indefinite period, even after the COVID-19 pandemic has subsided" (CCAC ¶ 161)

In short, plaintiff's argument with respect to each of these statements hinges on the allegation that ON24 faced material customer churn. Because plaintiff has not put forth sufficient facts in support of that theory, its claims against these risk-factor statements also fail.

Defendants argue that plaintiff's claims fail for a second reason. Namely, at the time of the IPO, they could not have known that customers who still had time left in their one-year subscription were not going to renew. In other words, even if plaintiff was able to demonstrate there was high churn from customers who subscribed in the three quarters prior to IPO, that churn would not be felt until *post* IPO. Defendants cite to the Ninth Circuit's decision in *In re Stac*, 89 F.3d 1399 (9th Cir. 1996) for support.

In *In re Stac*, plaintiff argued that defendants knew that another company, Microsoft, was developing a competing product and should have disclosed that as a certainty rather than masking it as a contingency. *Id.* at 1406. Because defendants did not do so, the plaintiff there argued that the risk disclosures were misleading. The Ninth Circuit held otherwise, finding that companies are not "required to forecast future events." *Id.* Even if Microsoft had informed defendants that it planned to introduce a competing product, defendants would not have been liable for failing to disclose that information because "they could not have known whether Microsoft would truly do so." *Id.* Defendants argue that, similarly, even if customers attained in the three quarters leading up to IPO had told ON24 that they might not renew their one-year subscription, ON24 could not have truly

known whether they would unsubscribe until after IPO, when their subscription would have run.

Plaintiff does not acknowledge, much less respond, to *In re Stac*. Instead, plaintiff repeats defendants' post-IPO acknowledgement of high customer churn contributing to the falling stock price. While the Court agrees that such statements are circumstantial evidence for plaintiff's claims, they do not make up for the lack of factual allegations prior to the IPO. Plaintiff cannot use these post-IPO statements, work backwards, and arrive at a violation pre-IPO. Rather, plaintiff must allege: first, that there was material customer churn; second, that this material churn existed in the quarters leading up to the IPO; and, third, that defendants knew about it. One confidential witness's statement that an unspecified number of *his* customers informed him "as much as six months in advance" that they were not going to renew their contracts is not sufficient to meet this burden. (CCAC ¶ 102.)

Because the Court dismisses plaintiff's claims for failure to provide sufficient factual foundation, it need not reach defendants' second argument.

For those reasons, the Court **GRANTS** the motion to dismiss as to Statement Nos. 9–13 on the grounds that, as alleged, they are not misleading.

C. ITEMS 303 AND 105

Lastly, defendants argue plaintiff fails to state a claim that they violated either Item 303 or 105 of SEC Regulations S-K.

Item 303 requires offering documents to disclose "any known trends or uncertainties that have had or

that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or incomes from continuing operations." 17 C.F.R. §§ 229.303(a)(3)(iii). A "disclosure duty exists where a trend, demand, commitment, event or uncertainty is both (1) presently known to management and (2) reasonably likely to have a material effect on the registrant's financial condition or results of operation." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998). Similarly, Item 105 requires that issuers "provide under the caption 'Risk Factors' a discussion of the material factors that make an investment in the registrant or offering speculative or risky." 17 C.F.R. § 229105(a).

Plaintiff's Item 303 and 105 claims fail for much the same reason as the rest. Plaintiff has not provided sufficient factual support for its claim that ON24 was experiencing significant customer churn. As alleged, therefore, plaintiffs have not met their burden of showing that ON24 violated its duty to disclose this information under Items 303 and 105.

For those reasons, the Court **GRANTS** the motion to dismiss with leave to amend as to plaintiff's Item 303 and 105 claims.

D. SECTION 15

Because plaintiff has not stated a primary claim under Section 11, its Section 15 claim also fails. *In re Wells Fargo Mortgage-Backed Certificates Litig.*, 712 F.Supp.2d 958, 969 (N.D. Cal. 2010) (internal citation omitted). The Court therefore **GRANTS** the motion to dismiss with leave to amend as to plaintiff's Section 15 claim.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** defendants' Motion for Judicial Notice and Underwriter Defendants' Motion for Joinder. The Court also **GRANTS** defendants' motion to dismiss with leave to amend.

Given comments made by counsel at the hearing, it is not clear whether plaintiff can amend consistent with its Fed. R. of Civ. P. 11 obligations. Thus, within fourteen (14) days of this order, plaintiff shall file a notice indicating whether it can amend. If not, a final order of dismissal shall issue sua sponte. If so, the amended complaint shall be filed within thirty-five (35) days of the order. A response thereto shall be filed twenty-one (21) days thereafter.[5]

This Order terminates Docket Numbers 83 and 85.

IT IS SO ORDERED.

Date: July 7, 2023

/s/ Yvonne Gonzalez Rogers
YVONNE GONZALEZ ROGERS
United States District
Court Judge

[5] Parties are reminded that new arguments cannot be raised in a subsequent motion which could have been raised in the first instance. Further, plaintiff shall provide the Court with a redline version of the changes to CCAC pursuant to the Court's Standing Order.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: ON24, INC. SECURITIES LITIGATION LEADERSEL INNOTECH ESG, *Plaintiff-Appellant*, v. ON24, INC.; et al., *Defendants-Appellees*.	No. 24-2204 D.C. No. 4:21-cv-08578-YGR Northern District of California, Oakland ORDER

Before: MURGIA, Chief Judge, and SANCHEZ and H.A. THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Doc. 67).

APPENDIX E

CORPORATE DISCLOSURE STATEMENT

ON24, Inc. is a wholly owned subsidiary of private entity Cvent Atlanta, LLC, which is a wholly owned subsidiary of private entity Cvent, Inc., which is a wholly owned subsidiary of private entity Cvent Holding Corp., which is a wholly owned subsidiary of private entity Capstone Borrower, Inc., which is a wholly owned subsidiary of private entity Capstone Intermediate, Inc., which is a wholly owned subsidiary of private entity Capstone Topco, Inc., which is a subsidiary of private entity Capstone Topco, L.P. The entities that own 25% or more of Capstone TopCo, LP, attributable to Capstone TopCo, LP's investment in the Class A Common Stock of Capstone TopCo, Inc., are BCP Capstone Aggregator L.P (70.26% direct ownership) and Platinum Falcon B 2018 RSC Limited (29.74% direct ownership). Blackstone Capital Partners VIII L.P. directly owns 65.72% of BCP Capstone Aggregator L.P. The remainder of BCP Capstone Aggregator L.P. is owned by funds affiliated with Blackstone, and no individual investor owns greater than 10%. Blackstone Capital Partners VIII L.P. is ultimately owned by public company Blackstone, Inc. (NYSE: BX). Platinum Falcon B 2018 RSC Limited is a wholly owned subsidiary of the Abu Dhabi Investment Authority (ADIA).

Goldman Sachs & Co. LLC is a wholly owned subsidiary of The Goldman Sachs Group, Inc. (NYSE: GS), except for de minimis non-voting, non-participating interests held by unaffiliated broker-dealers. The Goldman Sachs Group, Inc. is a corporation organized under the laws of Delaware. No other publicly held

company owns 10% or more of Goldman Sachs & Co. LLC's stock.

J.P. Morgan Securities LLC is an indirect, wholly owned subsidiary of JPMorgan Chase & Co. (NYSE: JPM), which is a publicly held corporation. JPMorgan Chase & Co. does not have a parent corporation, and no publicly held corporation owns 10% or more of its stock. However, The Vanguard Group, Inc., an investment advisor which is not a publicly held corporation, has reported that registered investment companies, other pooled investment vehicles, and institutional accounts that it or its subsidiaries sponsor, manage, or advise have aggregate ownership under certain regulation of 10% or more of the stock of JPMorgan Chase & Co.

KeyBanc Capital Markets Inc. is a wholly owned subsidiary of KeyCorp. KeyCorp is a publicly traded company listed on the New York Stock Exchange (NYSE: KEY). The Bank of Nova Scotia, a Canadian-domiciled publicly traded company listed on the Toronto Stock Exchange (TSX: BNS) and the New York Stock Exchange (NYSE: BNS), owns approximately 14.9% of the outstanding common shares of KeyCorp.

Robert W. Baird & Co. Incorporated is wholly owned by Baird Financial Corporation, which, in turn, is wholly owned by Baird Financial Group, Inc. Baird Financial Group, Inc is a privately held corporation with no parent corporation. No publicly held corporation owns 10% or more of Bard Financial Group, Inc.

Canaccord Genuity LLC is wholly owned by Canaccord Adams Delaware Inc., a private company, which is wholly owned by Collins Stewart Inc., a

private company, which is wholly owned by Canaccord Adams Financial Group Inc., a private company, which is wholly owned by Canaccord Genuity Group Inc. (TSX: CF), a Canadian public company.

Needham & Company, LLC is an indirect, wholly owned subsidiary of Needham Group, Inc.

Piper Sandler & Co is a wholly owned subsidiary of Piper Sandler Companies (NYSE: PIPR), which is a publicly traded company that has no parent company. The Vanguard Group, Inc. and BlackRock, Inc. (NYSE: BLK) have reported that they or their clients, including investment companies registered under the Investment Company Act of 1940 and other managed accounts, own greater than 10% of Piper Sandler Companies' outstanding common stock.

William Blair & Company L.L.C. is a wholly owned subsidiary of WBC Holdings, LP. WBC Holdings, LP has no parent corporation, and no publicly held company owns more than 10% of WBC Holdings, LP.

APPENDIX F

United States Code
Title 15. Commerce and Trade
Chapter 2A. Securities and Trust Indentures
Subchapter I. Domestic Securities

15 U.S.C. § 77k

§ 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.

…

APPENDIX G

Code of Federal Regulations
Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 229. Standard Instructions for Filing Forms
Under Securities Act of 1933, Securities Exchange
Act of 1934 and Energy Policy and Conservation Act
of 1975—Regulation S-K
Subpart 229.300. Financial Information

17 C.F.R. § 229.303

§ 229.303. (Item 303) Management's discussion and analysis of financial condition and results of operations

(a) *Objective.* The objective of the discussion and analysis is to provide material information relevant to an assessment of the financial condition and results of operations of the registrant including an evaluation of the amounts and certainty of cash flows from operations and from outside sources. 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. This includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations. The discussion and analysis must be of the financial statements and other statistical data that the registrant believes will enhance a reader's understanding of the registrant's financial condition, cash flows and other changes in financial

condition and results of operations. A discussion and analysis that meets the requirements of this paragraph (a) is expected to better allow investors to view the registrant from management's perspective.

(b) *Full fiscal years.* The discussion of financial condition, changes in financial condition and results of operations must provide information as specified in paragraphs (b)(1) through (3) of this section and such other information that the registrant believes to be necessary to an understanding of its financial condition, changes in financial condition and results of operations. Where the financial statements reflect material changes from period-to-period in one or more line items, including where material changes within a line item offset one another, describe the underlying reasons for these material changes in quantitative and qualitative terms. Where in the registrant's judgment a discussion of segment information and/or of other subdivisions (*e.g.,* geographic areas, product lines) of the registrant's business would be necessary to an understanding of such business, the discussion must focus on each relevant reportable segment and/or other subdivision of the business and on the registrant as a whole.

(1) *Liquidity and capital resources.* Analyze the registrant's ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in the short-term (*i.e.,* the next 12 months from the most recent fiscal period end required to be presented) and separately in the long-term (*i.e.,* beyond the next 12 months). The discussion should analyze material cash requirements from known contractual and other obligations. Such disclosures must specify

the type of obligation and the relevant time period for the related cash requirements. As part of this analysis, provide the information in paragraphs (b)(1)(i) and (ii) of this section.

(i) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way. If a material deficiency is identified, indicate the course of action that the registrant has taken or proposes to take to remedy the deficiency. Also identify and separately describe internal and external sources of liquidity, and briefly discuss any material unused sources of liquid assets.

(ii) Capital resources.

(A) Describe the registrant's material cash requirements, including commitments for capital expenditures, as of the end of the latest fiscal period, the anticipated source of funds needed to satisfy such cash requirements and the general purpose of such requirements.

(B) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources. Indicate any reasonably likely material changes in the mix and relative cost of such resources. The discussion must consider changes among equity, debt, and any off-balance sheet financing arrangements.

(2) *Results of operations.*

(i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. In addition, describe any other significant components of revenues or expenses that, in the registrant's judgment, would be material to an understanding of the registrant's results of operations.

(ii) Describe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that are reasonably likely to cause a material change in the relationship between costs and revenues (such as known or reasonably likely future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship must be disclosed.

(iii) If the statement of comprehensive income presents material changes from period to period in net sales or revenue, if applicable, describe the extent to which such changes are attributable to changes in prices or to changes in the volume or amount of goods or services being sold or to the introduction of new products or services.

(3) *Critical accounting estimates.* Critical accounting estimates are those estimates made in accordance with generally accepted accounting principles that involve a significant level of estimation uncertainty and have had or are reasonably likely to have a material impact on the financial condition or results of operations of the registrant. Provide qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have on financial condition or results of operations to the extent the information is material and reasonably available. This information should include why each critical accounting estimate is subject to uncertainty and, to the extent the information is material and reasonably available, how much each estimate and/or assumption has changed over a relevant period, and the sensitivity of the reported amount to the methods, assumptions and estimates underlying its calculation.

Instructions to paragraph (b):

1. Generally, the discussion must cover the periods covered by the financial statements included in the filing and the registrant may use any presentation that in the registrant's judgment enhances a reader's understanding. A smaller reporting company's discussion must cover the two-year period required in §§ 210.8-01 through 210.8-08 of this chapter (Article 8 of Regulation S-X) and may use any presentation that in the registrant's judgment enhances a reader's understanding. For registrants providing financial

statements covering three years in a filing, discussion about the earliest of the three years may be omitted if such discussion was already included in the registrant's prior filings on EDGAR that required disclosure in compliance with § 229.303 (Item 303 of Regulation S-K), provided that registrants electing not to include a discussion of the earliest year must include a statement that identifies the location in the prior filing where the omitted discussion may be found. An emerging growth company, as defined in § 230.405 of this chapter (Rule 405 of the Securities Act) or § 240.12b-2 of this chapter (Rule 12b-2 of the Exchange Act), may provide the discussion required in paragraph (b) of this section for its two most recent fiscal years if, pursuant to Section 7(a) of the Securities Act of 1933 (15 U.S.C. 77g(a)), it provides audited financial statements for two years in a Securities Act registration statement for the initial public offering of the emerging growth company's common equity securities.

2. If the reasons underlying a material change in one line item in the financial statements also relate to other line items, no repetition of such reasons in the discussion is required and a line-by-line analysis of the financial statements as a whole is neither required nor generally appropriate. Registrants need not recite the amounts of changes from period to period if they are readily computable from the financial statements. The discussion must not merely repeat numerical data contained in the financial statements.

3. Provide the analysis in a format that facilitates easy understanding and that supplements, and does not duplicate, disclosure already provided in the filing. For critical accounting estimates, this disclosure must supplement, but not duplicate, the description of accounting policies or other disclosures in the notes to the financial statements.

4. For the liquidity and capital resources disclosure, discussion of material cash requirements from known contractual obligations may include, for example, lease obligations, purchase obligations, or other liabilities reflected on the registrant's balance sheet. Except where it is otherwise clear from the discussion, the registrant must discuss those balance sheet conditions or income or cash flow items which the registrant believes may be indicators of its liquidity condition.

5. Where financial statements presented or incorporated by reference in the registration statement are required by § 210.4-08(e)(3) of this chapter (Rule 4-08(e)(3) of Regulation S-X) to include disclosure of restrictions on the ability of both consolidated and unconsolidated subsidiaries to transfer funds to the registrant in the form of cash dividends, loans or advances, the discussion of liquidity must include a discussion of the nature and extent of such restrictions and the impact such restrictions have had or are reasonably likely to have on the ability of the parent company to meet its cash obligations.

6. Any forward-looking information supplied is expressly covered by the safe harbor rule for projections. See 17 CFR 230.175 [Rule 175 under the Securities Act], 17 CFR 240.3b-6 [Rule 3b-6 under the Exchange Act], and Securities Act Release No. 6084 (June 25, 1979).

7. All references to the registrant in the discussion and in this section mean the registrant and its subsidiaries consolidated.

8. Discussion of commitments or obligations, including contingent obligations, arising from arrangements with unconsolidated entities or persons that have or are reasonably likely to have a material current or future effect on a registrant's financial condition, changes in financial condition, revenues or expenses, results of operations, liquidity, cash requirements or capital resources must be provided even when the arrangement results in no obligations being reported in the registrant's consolidated balance sheets. Such off-balance sheet arrangements may include: Guarantees; retained or contingent interests in assets transferred; contractual arrangements that support the credit, liquidity or market risk for transferred assets; obligations that arise or could arise from variable interests held in an unconsolidated entity; or obligations related to derivative instruments that are both indexed to and classified in a registrant's own equity under U.S. GAAP.

9. If the registrant is a foreign private issuer, briefly discuss any pertinent governmental economic, fiscal, monetary, or political policies or

factors that have materially affected or could materially affect, directly or indirectly, its operations or investments by United States nationals. The discussion must also consider the impact of hyperinflation if hyperinflation has occurred in any of the periods for which audited financial statements or unaudited interim financial statements are filed. See § 210.3-20(c) of this chapter (Rule 3-20(c) of Regulation S-X) for a discussion of cumulative inflation rates that may trigger the requirement in this instruction 9 to this paragraph (b).

10. If the registrant is a foreign private issuer, the discussion must focus on the primary financial statements presented in the registration statement or report. The foreign private issuer must refer to the reconciliation to United States generally accepted accounting principles and discuss any aspects of the difference between foreign and United States generally accepted accounting principles, not discussed in the reconciliation, that the registrant believes are necessary for an understanding of the financial statements as a whole, if applicable.

11. The term *statement of comprehensive income* is as defined in § 210.1-02 of this chapter (Rule 1-02 of Regulation S-X).

(c) *Interim periods.* If interim period financial statements are included or are required to be included by 17 CFR 210.3 [Article 3 of Regulation S-X], a management's discussion and analysis of the financial condition and results of operations must be provided so as to enable the reader to assess material changes

in financial condition and results of operations between the periods specified in paragraphs (c)(1) and (2) of this section. The discussion and analysis must include a discussion of material changes in those items specifically listed in paragraph (b) of this section.

(1) *Material changes in financial condition.* Discuss any material changes in financial condition from the end of the preceding fiscal year to the date of the most recent interim balance sheet provided. If the interim financial statements include an interim balance sheet as of the corresponding interim date of the preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also must be discussed. If discussions of changes from both the end and the corresponding interim date of the preceding fiscal year are required, the discussions may be combined at the discretion of the registrant.

(2) *Material changes in results of operations.*

(i) Discuss any material changes in the registrant's results of operations with respect to the most recent fiscal year-to-date period for which a statement of comprehensive income is provided and the corresponding year-to-date period of the preceding fiscal year.

(ii) Discuss any material changes in the registrant's results of operations with respect to either the most recent quarter for which a statement of comprehensive income is

provided and the corresponding quarter for the preceding fiscal year or, in the alternative, the most recent quarter for which a statement of comprehensive income is provided and the immediately preceding sequential quarter. If the latter immediately preceding sequential quarter is discussed, then provide in summary form the financial information for that immediately preceding sequential quarter that is subject of the discussion or identify the registrant's prior filings on EDGAR that present such information. If there is a change in the form of presentation from period to period that forms the basis of comparison from previous periods provided pursuant to this paragraph, the registrant must discuss the reasons for changing the basis of comparison and provide both comparisons in the first filing in which the change is made.

Instructions to paragraph (c):

1. If interim financial statements are presented together with financial statements for full fiscal years, the discussion of the interim financial information must be prepared pursuant to this paragraph (c) and the discussion of the full fiscal year's information must be prepared pursuant to paragraph (b) of this section. Such discussions may be combined. Instructions 2, 3, 4, 6, 8, and 11 to paragraph (b) of this section apply to this paragraph (c).

2. The registrant's discussion of material changes in results of operations must identify any significant elements of the registrant's income or loss from continuing operations which do not arise from or are not necessarily representative of the registrant's ongoing business.