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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

CITY OF SUNRISE FIREFIGHTERS'
PENSION FUND, et al.,

 Plaintiffs,

 v.

ORACLE CORPORATION, et al.,

 Defendants.

Case No. [18-cv-04844-BLF](#)

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS WITH LEAVE
TO AMEND**

[Re: ECF 44]

This is a putative class action for securities fraud brought against Oracle Corporation (“Oracle” or “Company”) and its officers Safra A. Catz (“Catz”), Mark Hurd (“Hurd”), Lawrence J. Ellison (“Ellison”) , Thomas Kurian (“Kurian”), Ken Bond (“Bond”), and Steve Miranda (“Miranda”) (“Individual Defendants”), (collectively with Oracle, “Defendants”). Lead Plaintiff, Union Asset Management Holding AG, (“Plaintiff”) has filed a Consolidated [Amended] Class Action Complaint (the “CAC”) alleging that Defendants violated Section 10(b) of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 10b-5, 17 C.F.R. § 240.10b-5. *See* ECF 40 (“CAC”). Plaintiff also asserts that Catz, Hurd, and Ellison are liable for violations of federal securities laws as “control persons” of Oracle, pursuant to Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a). *Id.* Finally, Plaintiff claims Kurian violated Section 20A of the Exchange Act by selling Oracle common stocks. *Id.*

I. BACKGROUND

Oracle develops and markets database software and related technology. CAC ¶ 38. The Individual Defendants are six current or former Oracle executives: Safra A. Catz (co-CEO and a member of Oracle’s Board of Directors); Mark Hurd (co-CEO, a member of Oracle’s Board of Directors, and former co-president); Lawrence J. Ellison (co-founder, former CEO, current Chief

1 Technology Officer, and Chair of the Board of Directors); Thomas Kurian (former President,
2 Product Development); Ken Bond (Senior Vice President of Investor Relations); and Steve Miranda
3 (Executive Vice President of Oracle Applications Product Development). *Id.* ¶¶ 30- 35.

4 Oracle’s business historically focused on selling licenses for its “on-premises” database
5 software and products, which are installed locally, on a licensee’s own computer and maintained on
6 the user’s own infrastructure and platforms. CAC ¶ 38. In contrast, “cloud-based” software allows
7 licensees to store and access data over the internet. *Id.* ¶ 39. According to the CAC, companies
8 such as Amazon, Google, and Microsoft introduced their cloud-based software between 2006 and
9 2010, while “Oracle was stubbornly refusing to acknowledge that customers were increasingly
10 shifting towards cloud technology.” *Id.* ¶¶ 40-41. Oracle’s revenue growth and new software
11 license sales declined between 2013 and 2016. *Id.* ¶ 47. Oracle “belatedly pivoted to the cloud in
12 high gear.” *Id.* ¶ 48.¹ On a March 15, 2016 Earnings Call, Catz announced that Oracle was “making
13 the ‘move to cloud’ which would represent ‘a generational shift in technology that [wa]s the biggest
14 and most important opportunity in [the] Company’s history.’” *Id.*

15 “As a late entrant in the cloud software market,” Oracle had to develop (1) “a cloud product
16 with competitive capabilities” and (2) “an effective sales and marketing strategy for its nascent cloud
17 product.” CAC ¶ 51. To overcome these challenges, the CAC alleges that Oracle engaged in
18 “coercive sales practices.” *See id.* ¶¶ 82-149. Oracle allegedly employed “two tactics to generate
19 artificial cloud revenue,” which Oracle employees coined as “financially engineered deals.” *Id.* ¶¶
20 13, 16.

21 First, Oracle allegedly employed a strategy called “Audit, Bargain, Close.” CAC ¶ 14.
22 Under this strategy, Oracle would first initiate an audit of an on-premises customer for violations of
23 its on-premises software license. *Id.* If it found violations, Oracle would “threaten to impose large
24 penalties unless the customer agreed to purchase a short-term cloud subscription.” *Id.* The CAC

25
26 ¹ The Court notes that it is unclear when Oracle’s allegedly “belated” entry into the Cloud market
27 began. On the one hand, the CAC alleges that as early as 2014, Oracle customers were reporting
28 audit-based Cloud sales. CAC ¶¶ 54-58. On the other hand, the CAC alleges that because Oracle
lacked “competitive cloud-based product offering,” its revenue declined between 2013 and 2016.
Id. ¶ 47.

1 alleges that customers “neither desired nor intended to use” the Cloud products but purchased them
2 to avoid the hefty penalties. *Id.*

3 Second, Oracle allegedly engaged in a tactic known as “attached deal[s].” CAC ¶ 15. Oracle
4 offered its customers “a significant discount” on its on-premises products, provided the customer
5 also purchased a short-term cloud subscription – “even if the customer neither wanted nor intended
6 to use the attached cloud product.” *Id.*

7 The CAC alleges that the “Audit, Bargain, Close” and “Attached” deals (collectively, “Sales
8 Practices”) were not “true sales” of Cloud products but Oracle nonetheless touted them as such—
9 and by doing so, misled investors because the revenues generated by these deals were “artificial and
10 unsustainable.” CAC ¶ 17. According to the CAC, in late 2017, many of the Cloud subscriptions
11 generated through the Sales Practices began to expire and many customers declined to renew their
12 Cloud subscriptions. *Id.* ¶ 18. Consequently, between December 14, 2017 and March 19, 2018,
13 Oracle disclosed that its Cloud revenue growth rate had declined from 58% to 32%. *Id.* ¶ 19. The
14 market reacted and Oracle’s stock price fell from approximately \$50 per share to approximately \$46
15 per share, a decline of nearly 10%. *Id.* ¶ 21. On June 19, 2018, Oracle announced that it would no
16 longer report financial results for its Cloud business separately. *Id.* ¶ 22.

17 Based on these allegations, Lead Plaintiff, Union Asset Management Holding AG²
18 (“Union”), brings this lawsuit on behalf of itself, and other purchasers of Oracle stock between
19 March 15, 2017 and June 19, 2018 (the “Class Period”), alleging that Defendants misrepresented
20 Oracle’s revenue growth within its Cloud segment and the drivers of that growth. *See* CAC ¶¶ 2-
21 12.

22 **A. Confidential Witnesses**

23 The CAC provides statements from nine former Oracle employees regarding the Sales
24 Practices. CAC ¶¶ 37, 87-134.

25 Confidential Witness 1³ (“CW1”) was a Regional Sales Director for Middle East and Africa

26 _____
27 ² Union is the parent holding company of the Union Investment Group. CAC ¶ 28.

28 ³ The CAC refers to Confidential Witnesses as Former Employees or FEs.

1 from February 2009 to March 2018. CAC ¶ 37. CW1 sold Cloud and other Oracle products to
2 customers and attended meetings at which Cloud sales were discussed. *Id.* CW1 stated that at least
3 80% of Middle East and Africa Cloud revenue was generated by “inserting cloud into compliance-
4 based deals” and that it was “crystal clear these [sales] are fake” because “none of these deals are
5 renewed.” *Id.* ¶¶ 87, 106. Further, more than 75% of CW1’s team’s Cloud sales in 2017 were made
6 to customers under threat of license audits, who purchased the product simply to avoid the hefty
7 penalties. *Id.* ¶ 102. In 2018, such sales accounted for 86% of CW1’s team’s revenue. *Id.*

8 CW1 also reported that he (and other sales teams) discussed their “audit-driven cloud deals”
9 with Loic Le Guisquet, who sat on the Oracle Executive Management Committee during the Class
10 Period and reported directly to Hurd. CAC ¶ 112. CW1 explained that, he prepared weekly slides
11 concerning “sales volume and progress” and provided them to Le Guisquet for presentation to Hurd.
12 *Id.* These slides, according to CW1, “would very clearly say” that Oracle’s License Management
13 Services division was engaged in “compliance deals.” *Id.* In addition, CW1 attended meetings in
14 which “executives were instructed to offer customers a 90% discount on on-premises licenses if
15 they purchased \$300,000 worth of cloud subscriptions” and “assure the customer that they did not
16 need to use the product, and that the purchase of cloud products was merely a necessary condition
17 to unlocking the on-premises discount.” *Id.* According to CW1, sales and compliance teams
18 coordinated to “use audits in order to sell unwanted cloud subscriptions.” *Id.* ¶ 89.

19 Confidential Witness 2 (“CW2”) was a Vice President in North America Cloud sales from
20 September 2015 to December 2018, who spoke with customers and sales personnel about sales of
21 Oracle Cloud products. CAC ¶ 37. CW2 stated that “90-95% of the cloud deals [CW]2’s team dealt
22 with had no ‘use cases’ attached to them.” *Id.* ¶ 103⁴. CW2 learned from speaking with customers
23 and sales personnel that “customers neither intended to use nor renew the cloud products.” *Id.* ¶
24 104. CW2 stated, he “saw presentations that went to Hurd’s directs” and “the info they were
25 receiving about deal quality and it was absolutely something that was discussed.” *Id.* ¶ 180.

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28 ⁴ According to the CAC, Oracle generated “use case” for its “legitimate sale[s]” describing the
customer’s needs and the Oracle products or services that would be appropriate to meet those needs.
CAC ¶ 104.

1 Confidential Witness 3 (“CW3”) was a Senior Technology and Cloud Sales Consultant in
2 Southern California from 2012 to March 2017, who supported all of Oracle’s Southern California
3 Cloud sales. CAC ¶ 37. CW3 described an increase in the frequency of Oracle’s audits in fiscal
4 year 2017 and characterized the audit-based sales as “an active practice”. *Id.* ¶ 109.

5 Confidential Witness 4 (“CW4”) was Vice President of Global Sales Engineering, who
6 served as General Manager of Sales Engineering in 2015 and reported to Miranda. CAC ¶ 37. CW4
7 sold the first iterations of Oracle’s Cloud product. *Id.* CW4 also reported on the cooperation of
8 audit and sales divisions in creating the audit-based sales. *Id.* ¶ 90. CW4 stated that most Cloud
9 sales were driven by “extortion” through the audit process and that Oracle knew that customers were
10 not planning on renewing their Cloud subscriptions and “sales leadership often expressly
11 communicated to customers that they could “wash [their] hands” of Cloud products after the contract
12 expired but keep the discounts for on-premises products. *Id.* ¶ 118.

13 Confidential Witness 5 (“CW5”) was a Director of Cloud Customer Success at Oracle from
14 2016 to October 2018 and led the team responsible for Cloud customer success and renewal for
15 Cloud products. CAC ¶ 37. CW5 stated that customers were forced to purchase Cloud products
16 under threat of audits and that that these customers would be “irate” when the customer success
17 team contacted them to ask how they could get them to “deploy and expand their Cloud footprint.”
18 *Id.* ¶ 87. According to CW5, many of the Cloud contracts were called “dead on arrivals” or “DOA⁵,”
19 because when it came time to renew, the customers would refuse. *Id.* ¶ 122. CW5 explained that
20 “Oracle’s renewal rate was 15-20% for certain quarters, and that the percent of DOA customers that
21 did not renew was 90%.” *Id.* ¶ 125.

22 Confidential Witness 6 (“CW6”) was a Channel Sales Representative from October 2010 to
23 January 2018 and worked with authorized resellers to engineer deals with customers in the Northeast
24 Region. CAC ¶ 37. CW6 learned from vendor partners that Oracle customers were “made to
25 purchase products under threats of audit” and that this was a “regular practice.” *Id.* ¶ 92. CW6
26

27 _____
28 ⁵ According to CW5 and CW9, at some point Oracle changed the nomenclature from “dead on
arrival” to “no plan adoption” or “financial deal” because of the connotation that Oracle’s sales
teams were selling products that were not going to be used. CAC ¶ 122.

1 heard from sales representatives that Oracle “would bundle things together and push cloud
2 subscriptions right through” and that customers did not “underst[and] what they were getting in
3 terms of cloud.” *Id.* ¶ 131.

4 Confidential Witness 7 (“CW7”) was a Regional Technology Sales Director at Oracle from
5 February 2013 to October 2018 and was responsible for Oracle’s Cloud business in the Czech
6 Republic, Hungary, and Slovakia. CAC ¶ 37. CW7 stated that 65% of his teams’ Cloud sales were
7 made through engineered sales, including Attached deals. *Id.* ¶ 116. CW7 stated that 90% of
8 customers with Attached deals were not using their Cloud products “throughout 2017 and 2018.”
9 *Id.* ¶ 119.

10 Confidential Witness 8 (“CW8”) was a Cloud Platform Sales Manager at Oracle from March
11 2013 to July 2018 and managed a North America Cloud sales team. CAC ¶ 37. CW8 stated that it
12 was “extremely common to provide very steep discounts to on-premise licenses in exchange for a
13 customer purchasing cloud subscriptions,” estimating that more than 75% of CW8’s Cloud revenue
14 came from Attached deals. *Id.* ¶ 120. Less than 10% of CW8’s clients renewed their Cloud
15 subscriptions at the same level they initially signed up for. *Id.*

16 Confidential Witness 9 (“CW9”) was a Director of Cloud Customer Success and Customer
17 Experience at Oracle from 2016 to 2018, whose team was responsible for customer adoption and
18 expansion of Cloud. CAC ¶ 37. CW9 also described the DOA deals and explained that customers
19 told CW9’s team that they subscribed to the Cloud product in order to get a better deal on another
20 product. *Id.* ¶¶ 122-23. According to CW9, renewals for the Cloud product subscriptions would
21 range from only 15%-25% and that 90% of the accounts that did not renew were DOA. *Id.* ¶ 125.

22 Additionally, CW1 stated that all deals worth more than \$5 million dollars had to be
23 approved by “HQ,” meaning either Hurd or Catz. CAC ¶ 110. CW1 further stated that “he would
24 see Hurd’s and Catz’s names on approvals of ‘compliance’ deals ... and in approval notifications
25 that were released once Hurd or Catz signed off on the deal.” *Id.* Also, according to CW3, all
26 software discounts in excess of 50% had to be approved by Hurd’s office, and “80% of [CW3’s]
27 engineered deals went to Hurd’s office for approval.” CAC ¶ 134.

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B. Other Allegations Regarding Oracle’s Sales Practices

The CAC provides a few examples to corroborate allegations that Oracle engaged in the allegedly coercive Sales Practices.

First, Plaintiff alleges, based on documents obtained by a CBS reporter, that on July 27, 2016 (prior to the Class Period), Oracle initiated an audit of one of its on-premises customers: City of Denver. CAC ¶¶ 93-101. According to the CAC, an Oracle sales manager “pressured Denver to quickly make a deal to resolve the audit, telling Denver that further delay could result in a tripling of its audit penalties from approximately \$3 million to ‘in excess of \$10M.’” *Id.* ¶ 96. On December 22, 2016, Oracle told Denver that it would need to pay an extra \$2 million to “right size” its on-premises licensing, unless it purchased a one-year subscription to Oracle’s Cloud. *Id.* ¶ 99.⁶

Second, CW1 reported that Oracle, at an unspecified time, “attached” \$22 million dollars in “unwanted” Cloud products to a \$120-million-dollars deal with Saudi Telecom Company. CAC ¶ 106. According to the CAC, local government regulations prevented Saudi Telecom Company from using Cloud data centers outside of the country and, at the time of the purchase, there were no in-country Oracle data centers. *Id.* ¶ 107. Saudi Telecom Company, nevertheless, purchased Oracle’s Cloud products for 22 million dollars “effectively purchasing a discount on audit penalties.” *Id.*

Third, on September 11, 2015 (prior to the Class Period), Chilean anti-competition regulators initiated an investigation into alleged anticompetitive conduct by Oracle. CAC ¶¶ 137-46. On March 28, 2018, the Chilean regulators issued a report finding links between audits and sale of Cloud products, which in their opinion constituted an “abuse of a dominant position.” *Id.* ¶ 144. Oracle did not acknowledge any wrongdoing or that it engaged in the underlying practices but nevertheless agreed to implement a series of corrective measures recommended by the Chilean regulators. *Id.* ¶¶ 145-46.

Fourth, several advisory firms—specifically, UpperEdge (April 10, 2018), Gartner (May 23, 2018), and Palisade Compliance (January 2, 2019)—warned of Oracle’s practice to use audits in order to sell Cloud products. CAC ¶¶ 147-49.

⁶ It is unclear from the CAC whether the deal with Denver was finalized or closed.

1 Fifth, Clear Licensing Counsel, a European organization that advocates for the interests of
2 software consumers, sent a letter on January 6, 2015 (prior to the Class Period) to Ellison and
3 Oracle’s Board of Directors, including Hurd and Catz. CAC ¶ 57. The letter (later released publicly)
4 warned Oracle executives of “deep-rooted mistrust of [Oracle’s] core customer base as a result of
5 [Oracle’s] auditing and licensing practices.” *Id.* ¶¶ 58-59.

6 **C. Allegedly False or Misleading Statements**

7 Plaintiff alleges that Defendants made a number of false and misleading statements within
8 the Class Period. *See* CAC ¶¶ 209-74. Primarily, these statements fall into the following categories:

9 **1. Statements related to the cloud-based products’ revenue growth**

10 Some of the alleged misstatements touted the rapid growth of cloud-based revenue. For
11 example:

- 12 • “Our fourth quarter results were very strong as revenue growth and earnings per share
13 both substantially exceeded the high end of guidance. . . . We continue to experience
14 rapid adoption of the Oracle Cloud led by the 75% growth in our SaaS business in
15 Q4. This cloud hyper-growth is expanding our operating margins, and we expect
16 earnings per share growth to accelerate in fiscal 2018.” (CAC ¶ 229, statement by
17 Catz on June 21, 2017).
- 18 • “We sold \$855 million of new annually recurring cloud revenue (ARR) in Q4,
19 putting us over our \$2 billion ARR bookings goal for fiscal year 2017 We also
20 delivered over \$1 billion in quarterly SaaS revenue for the first time. Next year is
21 going to be even better. We expect to sell a lot more than \$2 billion in new cloud
22 ARR in fiscal year 2018.” (CAC ¶ 230, statement by Hurd on June 21, 2017).

23 Plaintiff alleges that these statements were materially false and misleading when made,
24 because Defendants stated that Oracle was experiencing “rapid adoption” of its Cloud products,
25 “hyper-growth” of its Cloud business, and emphasized its large sales figures without disclosing that:
26 “(1) a material portion of Oracle’s cloud revenue was driven by ‘financially engineered deals’ that
27 were based on Oracle’s use of the coercive ‘Audit, Bargain, Close’ and ‘attached’ deal tactics; (2)
28 the revenue produced through these deals was artificial because it did not result from true purchases
of Oracle’s cloud products, but rather resulted from clients purchasing a discount on audit penalties
or on-premises products; and (3) consequently, a material portion of the reported cloud revenue and
revenue growth did not consist of true cloud sales, and was not sustainable.” *Id.* ¶ 231.

1 Another set of the alleged misstatements relate to the sustainability of Cloud revenue growth.

2 For example:

- 3
- 4 • “The sustained hyper-growth in our multi-billion dollar cloud business continues to drive Oracle’s overall revenue and earnings higher and higher . . .” (CAC ¶ 242, statement by Catz).
 - 5
 - 6 • “So this is absolutely not a 1-year phenomena. In fact, what you should see, as this goes on, is we will have less drag from the transition and the base will continue to grow. And so this should really accelerate. And understand that in our PaaS-IaaS business, we’re not even at scale. So as we really scale that up, profitability is going to increase more quickly and revenues will be built on the base of another recurring revenue -- of the recurring revenue business.” (CAC ¶ 236. Statement by Catz, June 21, 2017)
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10 Plaintiff claims that it was misleading for Catz to state that Oracle’s Cloud business was
11 experiencing “sustained hyper-growth” and to emphasize the Company’s Cloud growth was
12 “absolutely not a 1-year phenomena,” while failing to disclose that: “(1) a material portion of
13 Oracle’s cloud revenue was driven by ‘financially engineered deals’ that were based on Oracle’s
14 use of the coercive ‘Audit, Bargain, Close’ and ‘attached’ deal tactics; (2) the revenue produced
15 through these deals was artificial because it did not result from true purchases of Oracle’s cloud
16 products, but rather resulted from clients purchasing a discount on audit penalties or on-premises
17 products; and (3) consequently, a material portion of the reported cloud revenue and revenue growth
18 did not consist of true cloud sales, and was not sustainable.” *Id.* ¶¶ 243, 237.

19 Several of the alleged misstatements relate to Oracle customers’ adoption of Cloud products.

20 For example:

- 21
- 22 • “[a]s we move to cloud, the first thing that we see is we start to address more of the customer spend. The customers are willingly making a choice, where they’re forgoing their traditional multi-vendor strategy, spending money on software, then another vendor for hardware, another for labor and so on to going to a single vendor. And that product provider, in the case it’s Oracle, it does mean a fairly significant uplift in revenue for Oracle.” (CAC ¶ 222, statement by Bond on May 9, 2017).
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 - 25 • “[w]hat do we hear from our customers as far as the reasons why they choose us over competition? First and foremost, across the board, most customers today are moving to SaaS for speed. It’s all about speed of innovation, speed of reaction, speed of either disrupting others in their industry or speed to be avoided in that disruption.” (CAC ¶ 252, statement by Miranda on October 5, 2017).
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1 Plaintiff alleges these statements were materially false and misleading when made because
2 Defendants stated that “customers [] willingly making a choice” to abandon a “multi-vendor
3 strategy” to consolidate with Oracle, or that Oracle’s speed was causing its customers to adopt the
4 Cloud products without disclosing that: “(1) a material portion of Oracle’s cloud revenue was driven
5 by ‘financially engineered deals’ that were based on Oracle’s use of the coercive ‘Audit, Bargain,
6 Close’ and ‘attached’ deal tactics; (2) the revenue produced through these deals was artificial
7 because it did not result from true purchases of Oracle’s cloud products, but rather resulted from
8 clients purchasing a discount on audit penalties or on-premises products; and (3) consequently, a
9 material portion of the reported cloud revenue and revenue growth did not consist of true cloud
10 sales, and was not sustainable.” *Id.* ¶¶ 223, 253.

11 Finally, Plaintiff alleges that Defendants made false or misleading statements about the
12 reasons Cloud revenue growth was decelerating. For example, on December 14, 2017 Ellison
13 responded to an analyst question about the case of Oracle’s revenue slowdown by stating “a lot of
14 customers are waiting for” Oracle’s next generation cloud product, “the Autonomous Database,” a
15 cloud database that uses machine learning to reduce the need for periodic maintenance, “just to
16 become available.” CAC ¶ 264. In Plaintiff’s view, this statement was misleading because “in
17 truth, the deceleration of cloud revenue was caused by the fact that Oracle was finding it increasingly
18 difficult to use the [Sales Practices] to push its cloud products on customers who did not want them”
19 and customers were not renewing the deals “they had previously been pushed into.” *Id.* ¶ 265.

20 **2. Statements related to the allegedly coercive Sales Practices**

21 On May 9, 2017, an analyst asked Bond to “give us some sort of indication as to what
22 percentage of revenue and margin is associated with auditing practices of customers.” CAC ¶ 224.
23 In response, Bond made the following statements:

- 24 - “This is one of those things where – gets talked about a lot. And I think this is one of those
25 things where the story is a lot bigger than the realities.”
- 26 - “And we try to do it as best we can, in as gracious [a] way as we can.”
- 27 - “[o]n the other hand, the key, as we go to cloud, is this conversation is going to go away.”
- 28 - “[A]s we go to cloud, we don’t have to worry about that anymore. Because when you’re in

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the cloud, you basically have a number of users that you’ve signed up for.”

Id. Plaintiff alleges that these statements were materially false and misleading when made, because Bond “den[ied] that Oracle used audits to drive cloud sales, and that Oracle’s audits were not coercive, without disclosing that a material portion of Oracle’s cloud revenue was, in fact, driven by ‘financially engineered deals’ that were based on Oracle’s use of the coercive ‘Audit, Bargain, Close’ tactic.” *Id.* ¶ 225.

As another example, on May 22, 2018, in response to a report by The Information, the Company stated:

- “Oracle, like virtually every other software company, conducts software audits in limited circumstances to ensure that our products are used as licensed. We pride ourselves in providing our existing 400,000 customers a variety of options to move to the cloud when they are ready. Oracle is grateful to its large and growing customer base and has no reason to resort to scare tactics to solicit business. We are disappointed that The Information is presenting inaccurate accounts regarding a handful of customers, based on anonymous sources or competitors who seek to enhance their own consulting services.”

CAC ¶ 273. The CAC alleges that this statement was also misleading because Oracle “den[ied] that Oracle used audits to drive cloud sales, and state that Oracle had ‘no reason to resort to scare tactics to solicit business,’ without disclosing that a material portion of Oracle’s cloud revenue was, in fact, driven by ‘financially engineered deals’ that were based on Oracle’s use of the coercive ‘Audit, Bargain, Close’ tactic.” *Id.* ¶ 274.

The CAC also references a few statements that predate the Class Period. For example:

- On January 14, 2016, an Oracle executive in the United Kingdom (not an Individual Defendant) stated that “Oracle wants companies to move at their own pace to the cloud” and “[i]t would be wrong to force a company to do something that’s against their will.” CAC ¶ 64.
- On July 21, 2016, Bond, responded to a report that Oracle had used “some ugly tactics to sell its cloud and other products the customer didn’t want” and stated “Responding to every rumor is never a productive endeavor.... Only color I can add is that if the conspiracy rumor were true, people would not use the cloud credit and there would be no renewal or revenue growth as a new business would replace cancelled business – not at all what we’re expecting.” CAC ¶ 65.

II. LEGAL STANDARD

A. Rule 12(b)(6)

“A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a

1 claim upon which relief can be granted ‘tests the legal sufficiency of a claim.’” *Conservation Force*
 2 *v. Salazar*, 646 F.3d 1240, 1241–42 (9th Cir. 2011) (quoting *Navarro v. Block*, 250 F.3d 729, 732
 3 (9th Cir. 2001)). When determining whether a claim has been stated, the Court accepts as true all
 4 well-pled factual allegations and construes them in the light most favorable to the plaintiff. *Reese*
 5 *v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011). However, the Court need not
 6 “accept as true allegations that contradict matters properly subject to judicial notice” or “allegations
 7 that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re*
 8 *Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (internal quotation marks and citations
 9 omitted). While a complaint need not contain detailed factual allegations, it “must contain sufficient
 10 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
 11 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
 12 claim is facially plausible when it “allows the court to draw the reasonable inference that the
 13 defendant is liable for the misconduct alleged.” *Id.*

14 **B. Rule 9(b) and the PSLRA**

15 In addition to the pleading standards discussed above, a plaintiff asserting a private securities
 16 fraud action must meet the heightened pleading requirements imposed by Federal Rule of Civil
 17 Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (“PSLRA”). *In re*
 18 *VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 701 (9th Cir. 2012). Rule 9(b) requires a plaintiff
 19 to “state with particularity the circumstances constituting fraud” Fed. R. Civ. P. 9(b); *see also*
 20 *In re VeriFone Holdings*, 704 F.3d at 701. Similarly, the PSLRA requires that “the complaint shall
 21 specify each statement alleged to have been misleading, [and] the reason or reasons why the
 22 statement is misleading” 15 U.S.C. § 78u-4(b)(1)(B). The PSLRA further requires that the
 23 complaint “state with particularity facts giving rise to a strong inference that the defendant acted
 24 with the required state of mind.” *Id.* § 78u-4(b)(2)(A). “To satisfy the requisite state of mind
 25 element, a complaint must allege that the defendant [] made false or misleading statements either
 26 intentionally or with deliberate recklessness.” *In re VeriFone Holdings*, 704 F.3d at 701 (internal
 27 quotation marks and citation omitted) (alteration in original). The scienter allegations must give
 28 rise not only to a plausible inference of scienter, but to an inference of scienter that is “cogent and

1 at least as compelling as any opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor*
2 *Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

3 **III. DISCUSSION**

4 **A. Claim 1 - Section 10(b) and Rule 10b-5**

5 Section 10(b) makes it unlawful “for any person . . . [t]o use or employ, in connection with
6 the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in
7 contravention of such rules and regulations as the Commission may prescribe[.]” 15 U.S.C.A. §
8 78j. Rule 10b-5, promulgated by the SEC under the authority of Section 10(b), in turn makes it
9 unlawful for any person,

10 (a) To employ any device, scheme or artifice to defraud, (b) To make
11 any untrue statement of a material fact or to omit to state a material
12 fact necessary in order to make the statements made, in light of the
13 circumstances under which they were made, not misleading, or (c) To
14 engage in any act, practice, or course of business which operates or
would operate as a fraud or deceit upon any person, in connection
with the purchase or sale of any security.

15 17 C.F.R. § 240.10b-5. To state a securities fraud claim, a plaintiff must plead: “(1) a material
16 misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the
17 misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the
18 misrepresentation or omission; (5) economic loss; and (6) loss causation.” *City of Dearborn Heights*
19 *Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 613 (9th Cir. 2017).

20 **1. Non-actionable statements and omissions**

21 a. Corporate Puffery

22 To adequately plead a material misrepresentation or omission under § 10(b), the PSLRA
23 requires plaintiff to “specify each statement alleged to have been misleading, the reason or reasons
24 why the statement is misleading, and, if an allegation regarding the statement or omission is made
25 on information and belief, the complaint shall state with particularity all facts on which that belief
26 is formed.” 15 U.S.C. § 78u-4(b)(1)(B); *see also In re Tesla Motors, Inc. Sec. Litig.*, 75 F. Supp.
27 3d 1034, 1041–42 (N.D. Cal. 2014). A material misrepresentation differs significantly from
28 corporate puffery. Puffery is an expression of opinion, while a misrepresentation is a knowingly

1 false statement of fact. *Oregon Pub. Emps. Ret. Fund v. Apollo Grp., Inc.*, 774 F.3d 598, 606 (9th
2 Cir. 2014); *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997) (finding that puffery
3 includes statements “not capable of objective verification”). Moreover, the Ninth Circuit has noted
4 that investors do not rely on puffery when making investment decisions. *In re Cutera Sec. Litig.*,
5 610 F.3d 1103, 1111 (9th Cir. 2010). Finally, “mildly optimistic, subjective assessment[s] . . . [do
6 not] amount[] to a securities violation.” *Id.* “The distinguishing characteristics of puffery are
7 vague, highly subjective claims as opposed to specific, detailed factual assertions.” *Stearns v. Select
8 Comfort Retail Corp.*, No. 08-cv-02746 JF, 2009 WL 1635931, at *11 (N.D. Cal. June 5, 2009).

9 Defendants argue that many of the statements identified in the CAC are non-actionable
10 statements of optimism. *See* Mot. at 17 (citing CAC ¶¶ 220, 244, 247, 252, 254, 260). The Court
11 agrees that some of the alleged misstatements amount to nothing more than puffery.

12 Specifically, on May 4, 2017, Kurian stated “[w]e continue to see tremendous growth across
13 our cloud business.” CAC ¶ 220. Because the fact that Oracle’s Cloud business was growing is
14 not in dispute, Kurian’s characterization of that growth is incapable of “objective verification” and
15 thus, non-actionable. *See Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund v. Hewlett-
16 Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017).

17 Additionally, on September 14, 2017, when asked about “momentum in [the] cloud,” Hurd
18 stated:

19 just sort of every aspect of selling in the cloud, I think the company
20 holistically is getting better at. We’re better -- our products are better.
21 Our sales force is better. Our ability to implement is better. Our ability
22 to do all of these things has just continued to improve quarter by
23 quarter by quarter, and it manifests itself in the type of results we’re
24 talking about this afternoon.

25 CAC ¶ 247. Hurd’s description of the Company’s improved (*i.e.*, “better”) products and services is
26 corporate optimism. Similarly, on December 14, 2017, Catz stated: “[c]ustomer adoption of our
27 cloud products and services continues to be very strong, and what we have called our on-premise
28 business remains robust. Bottom line, our transition to the to the (sic) cloud is going well.” *Id.* ¶
261. Catz’s representation of Cloud’s adoption as “very strong,” the Company’s on-premises
business as “robust,” and Cloud transition as “going well” are subjective and unverifiable
assessments and therefore, non-actionable. *See In re Splash Tech. Holdings Inc. Sec. Litig.*, 160 F.

1 Supp. 2d 1059, 1077 (N.D. Cal. 2001) (finding non-actionable the statements using the words
2 “strong,” “robust,” “well positioned,” “solid,” and “improved”).

3 The remaining statements cited by Defendants (CAC ¶¶ 244, 252, 254) can be verified and
4 thus are not corporate puffery.

5 b. Safe Harbor

6 PSLRA’s Safe Harbor precludes liability for forward-looking statements in either of two
7 circumstances: “if they were identified as forward-looking statements and accompanied by
8 meaningful cautionary language,” or “if the investors fail to prove the projections were made with
9 actual knowledge that they were materially false or misleading.” *In re Cutera*, 610 F.3d at 1111–
10 12; 15 U.S.C. § 78u-5(c)(1). A forward-looking statement is “a statement containing a projection
11 of revenues, income (including income loss), earnings (including earnings loss) per share, capital
12 expenditures, dividends, capital structure, or other financial items.” 15 U.S.C. § 78u–5(i)(1)(A).
13 Defendants reference several statements as forward-looking and protected under Safe Harbor. Mot.
14 at 16 (citing CAC ¶¶ 229, 230, 236, 269, 280). The Court agrees that some of the alleged
15 misstatements are protected under Safe Harbor. Specifically, as to the following statements:

- 16
- 17 • “Our fourth quarter results were very strong as revenue growth and earnings per share
18 both substantially exceeded the high end of guidance. . . . We continue to experience
19 rapid adoption of the Oracle Cloud led by the 75% growth in our SaaS business in
20 Q4. This cloud hyper-growth is expanding our operating margins, and we expect
21 earnings per share growth to accelerate in fiscal 2018.” (CAC ¶ 229, statement by
22 Catz on June 21, 2017).
 - 23 • “We sold \$855 million of new annually recurring cloud revenue (ARR) in Q4,
24 putting us over our \$2 billion ARR bookings goal for fiscal year 2017 We also
25 delivered over \$1 billion in quarterly SaaS revenue for the first time. Next year is
26 going to be even better. We expect to sell a lot more than \$2 billion in new cloud
27 ARR in fiscal year 2018.” (CAC ¶ 230, statement by Hurd on June 21, 2017).
 - 28 • “the combination of faster sales and higher renewal rates should dramatically
increase our growth rate in our SaaS business.” (CAC ¶ 269, statement by Ellison
on March 19, 2018).
 - Cloud revenues are “expected to grow 19% to 23% in USD, 17% to 21% in constant
currency.” (CAC ¶¶ 159, 280, statement by Catz on March 19, 2018).

absent a challenge to the accuracy of the financial reporting included in the statements, the forward-

1 looking portions of the statements (*e.g.*, CAC ¶¶ 229 (“we expect earnings per share growth to
2 accelerate”), 230 (“we expect to sell a lot more”)) are non-actionable under the Safe Harbor.

3 In addition, Defendants point to cautionary language such as “we cannot be certain that our
4 customers will renew our cloud-based contract.” ECF 45-8 at 15; *see also* ECF 45-15 at 15
5 (“customers may not purchase or subscribe to our software, hardware or cloud offerings or renew
6 software support, hardware support or cloud subscriptions contracts.”). Plaintiff does not dispute
7 that these cautionary statements were disclosed to investors but instead argues that they were
8 insufficient because they didn’t warn of Oracle’s “financially engineered deals” and cite to cases
9 disregarding “boilerplate” and “vague” statements. Opp’n at 15. The Court agrees with Defendants
10 that Oracle’s warnings were specific and on-point with respect to Plaintiff’s allegations (*i.e.*,
11 Oracle’s customers declining to renew their Cloud subscriptions) and thus, the above-mentioned
12 challenged statements are protected by Safe Harbor.

13 Further, in the Company’s June 21, 2017 earnings call, Catz was asked:

14 You just reiterated the fiscal ’18 double-digit earnings growth. And I
15 guess, I think what’s becoming more relevant is, do we think about
16 this as a 1-year phenom bouncing off of the fiscal transition? Or how
17 can we really be thinking about earnings growth beyond fiscal ’18
18 into ’19 and ’20?

19 CAC ¶ 236. Catz responded:

20 So this is absolutely not a 1-year phenomena. In fact, what you should
21 see, as this goes on, is we will have less drag from the transition and
22 the base will continue to grow. And so this should really accelerate.
23 And understand that in our PaaS-IaaS business, we’re not even at
24 scale. So as we really scale that up, profitability is going to increase
25 more quickly and revenues will be built on the base of another
26 recurring revenue -- of the recurring revenue business.

27 *Id.* Defendants argue that Catz’s statement is “a forward-looking statement on its face” and
28 therefore protected by Safe Harbor. Mot. at 18. Plaintiff responds that this statement was
misleading because it omitted that “Oracle relied upon unsustainable sales practices to artificially
inflate the cloud growth metrics.” Opp’n at 14. The Court agrees with Defendants that in the context
of the specific question Catz was answering (*i.e.*, “Or how can we really be thinking about earnings
growth beyond fiscal ’18 into ’19 and ’20?”), this was a forward-looking statement and therefore

1 protected by the Safe Harbor.

2 Plaintiff further argues that even if Catz’s statement was forward-looking, it “would still not
3 be protected by the PSLRA’s safe harbor” because “Catz knew that Oracle’s cloud revenue was
4 generated by financially engineered deals, and as such, the cloud growth was unsustainable.” Opp’n
5 at 15. This argument fails because Plaintiff’s allegations in effect call on Oracle to predict future
6 sales (*i.e.*, sustained growth) and such allegations do not state a claim under the securities laws. *In*
7 *re Verifone Sec. Litig.*, 784 F. Supp. 1471, 1485 (N.D. Cal. 1992), *aff’d sub nom. In re VeriFone*
8 *Sec. Litig.*, 11 F.3d 865 (9th Cir. 1993) (finding no claim when defendants failed to disclose that
9 sales were “atypically large and that the future would not be as bright as the past” or that the
10 company’s sales were “boosted” by large one-time sales which would not recur in future quarters).
11 Moreover, it is undisputed that Oracle’s Cloud revenue, in fact, continued to grow by double
12 digits—albeit more slowly—during the Class Period after Catz made the statement. *See* CAC ¶ 159
13 (“On March 19, 2018, Oracle issued its third quarter 2018 financial results, disclosing that the
14 Company’s cloud growth had slowed even more significantly to only 32%.”).

15 2. Falsity

16 Viewing the CAC allegations in the light most favorable to Plaintiff for purposes of ruling
17 on the present motion to dismiss, the Court assumes that Oracle engaged in the alleged Sales
18 Practices.⁷ With that in mind, the Court must now determine, whether the CAC specifies the reason
19 or reasons why the alleged misstatements are false or misleading. *See* 15 U.S.C. § 78u-4(b)(1). In
20 the Ninth Circuit, plaintiffs may establish falsity in three ways: “if (1) the statement is not actually
21 believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed
22 facts tending seriously to undermine the statement’s accuracy.” *Align Tech., Inc.*, 856 F.3d at 616.
23 In order to plead falsity, a plaintiff must plead “specific facts indicating why” each statement at
24 issue was false. *Metzler Inv. GMBH*, 540 F.3d at 1070; *Ronconi v. Larkin*, 253 F.3d 423, 430 (9th

25
26 ⁷ The Court notes, however, that the described “Attached deals” appear to be nothing more than
27 offering a discount to an existing customer, if they agree to try the Company’s new Cloud products.
28 *See* CAC ¶ 15. The Court is not persuaded – and Plaintiff has not provided any authority to support
– that there is anything improper with such a routine sales tactic. Securities laws’ purpose is not to
police customer discounts.

1 Cir. 2001) (to be actionable, a statement must be false “at [the] time by the people who made them”).
 2 “A litany of alleged false statements, unaccompanied by the pleading of specific facts indicating
 3 why those statements were false, does not meet this standard.” *Metzler*, 540 F.3d at 1070.

4 a. Cloud Revenue Growth

5 Plaintiff alleges that the statements touting Oracle’s Cloud revenue “hypergrowth” were
 6 misleading because Defendants failed to disclose that “Oracle’s cloud revenue growth was driven
 7 in significant part by artificial transactions, in which customers were not truly purchasing cloud
 8 product, but rather were purchasing discounts on on-premises products or relief from audit penalties
 9 related to on-premises products.” Opp’n at 8; *see also e.g.*, CAC ¶¶ 213-215, 229-231. Defendants,
 10 on the other hand, assert that the statements regarding Cloud revenue growth are not false or
 11 misleading because “Oracle sold real products for real money to real customers and reported real,
 12 audited results.” Mot. at 10. Defendants further assert—and Plaintiff does not dispute—that Oracle
 13 met or exceeded its revenue projections every fiscal quarter of the Class Period as shown in the table
 14 reproduced below:

TABLE 1 ¹	4Q17 ⁵	1Q18	2Q18	3Q18	4Q18
Actual Cloud Revenue ² (in millions)	\$1,411	\$1,492	\$1,528	\$1,571	\$1,700
Projected Cloud Growth (year over year) ³	69%-73%	48%-52%	39%-43%	21%-25%	17%-21%
Actual Cloud Growth (year over year) ⁴	75%	51%	39%	22%	20%
¹ All figures are reported in constant currency. (<i>See</i> Ex. 8 at 5 n.1.) ² Revenues are non-GAAP reported figures. (Exs. 8 at 6; 9 at 5; 10 at 5; 11 at 5; 6 at 5.) ³ (Exs. 1 at 6; 2 at 6; 3 at 5; 4 at 6; 5 at 5.) ⁴ (Exs. 2 at 5; 3 at 5; 4 at 5; 11 at 5.) ⁵ For 4Q17 only, growth rates are for SaaS and PaaS only (a majority of Cloud revenue).					

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22 Mot. at 3.

23 According to Plaintiff, once Defendants chose to tout the growth in Cloud sales, they were
 24 “obligated to share information that diminished the weight of those results, including that those
 25 results were driven by coerced and artificial sales, and did not represent true customer demand.”
 26 Opp’n at 8 (citing *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1014-1015 (9th Cir. 2018))
 27 (internal quotes omitted).
 28

i. Omission of Oracle's Sales Practices

Oracle's concededly accurate financial reporting and projections is a tough hurdle for Plaintiff to overcome. In order to be actionable, an omission must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists. *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 65 F. Supp. 3d 840, 855 (N.D. Cal. 2014), *aff'd*, 856 F.3d 605 (9th Cir. 2017). Oracle's financials during the Class Period are consistent with the Defendants' statements on Cloud growth and with the state of affairs at Oracle: (1) revenues from Cloud sales were growing, (2) the growth was expected to slow down, and (3) the growth eventually slowed down at the same rate Oracle predicted and disclosed to its investors. *See* CAC ¶ 159 ("Oracle admitted that it expected additional deceleration of the Company's cloud business, with Catz telling investors on the Company's earnings call that cloud revenues are 'expected to grow 19% to 23% in USD, 17% to 21% in constant currency.'").

Put differently, "a duty to provide information exists only where statements were made which were misleading in light of the context surrounding the statements." *Retail Wholesale*, 845 F.3d at 1278. Thus, when Defendants discussed Oracle's Cloud revenue growth *generally* and absent an affirmative representation by Defendants regarding Oracle's allegedly coercive Sales Practices or attribution of Cloud revenue to other factors (both alleged by Plaintiff and discussed below), they had no duty to disclose the Sales Practices. *See Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (rejecting allegations that a press release was misleading for failure to disclose a possible merger because it did not "affirmatively intimate[] that no merger was imminent," but instead "neither stated nor implied anything regarding a merger"); *Metzler*, 540 F.3d at 1071 (concluding that defendant was not required to immediately disclose government investigations into its business practices absent "some affirmative statement or omission by [defendant] that suggested it was *not* under any regulatory scrutiny). In sum, Defendants were not under an independent obligation to disclose their Sales Practices.

ii. Oracle's Cloud sales

Defendants challenge Plaintiff's characterization of Oracle's Cloud sales as "fake," "illusory," "artificial." Mot. at 9; *see also* CAC ¶¶ 1, 82, 87, 115. According to the CAC, Oracle's

1 Cloud sales were “illusory” because they were driven by “improper and extortionate tactics to coerce
2 customers to buy short-term cloud subscriptions they did not want and did not renew.” *Id.* ¶ 82.
3 The Court disagrees with Plaintiff’s characterization. Short-term subscriptions are not “fake”
4 sales—they are short-term subscriptions. Plaintiff has not alleged that Oracle’s financial reports are
5 false or that Defendants made false or misleading representations regarding Oracle’s sales renewal
6 rates.

7 The Court agrees with Defendants that *Metzler* is instructive. 540 F.3d 1049. In *Metzler*,
8 plaintiffs had alleged that “any positive financial statement released by the company created the
9 decidedly false impression among investors” that company’s success was due to “legitimate
10 business means that could be expected to continue,” when, in reality, the company’s financial
11 performance was “materially driven” by fraudulent practices. *Id.* at 1057. The Ninth Circuit
12 explained that “this Circuit has consistently held that the PSLRA’s falsity requirement is not
13 satisfied by conclusory allegations that a company’s class period statements regarding its financial
14 well-being are *per se* false based on the plaintiff’s allegations of fraud generally.” *Id.* at 1070.
15 Instead, plaintiffs must sufficiently allege facts that demonstrate the falsity of the company’s
16 characterizations of its financial health and business practices during the class period. *Id.* at 1070-
17 71. Similarly, here, Plaintiff’s allegations of coercive Sales Practices do not render Oracle’s
18 financial reporting of its Cloud sales *per se* false or misleading. Plaintiff has failed to allege specific
19 facts that demonstrate the falsity of Defendants’ statements regarding Oracle’s Cloud revenue
20 growth – because that revenue was, in fact, growing throughout the Class Period as predicted.

21 *In re Redback Networks, Inc. Sec. Litig.* is also on point. No. C 03-5642JF(HRL), 2007 WL
22 4259464, at *3 (N.D. Cal. Dec. 4, 2007), *aff’d*, 329 F. App’x 715 (9th Cir. 2009). The *Redback*
23 plaintiffs had characterized defendants’ sales as “improper” and “illegitimate” and result of bribery
24 and *quid pro quo* arrangements. *Id.* at *1. The court, nonetheless, dismissed the claims because
25 defendants had (just like Oracle) “sold real products for real money” and “revenues were accurately
26 reported.” *Id.* at *3. Plaintiff argues that *Redback* is distinguishable because *Redback* was a “pure
27 omission case based on stated financials.” Opp’n at 16. The Court disagrees because virtually all
28 stated *reasons* for falsity in the CAC are Oracle’s “failure to disclose” its Sales Practices – which

1 makes this case also “an omissions case.” See CAC ¶¶ 211, 215, 219, 221, 223, 226, 228, 231, 235,
2 237, 241, 243, 246, 248, 251, 253, 255, 257, 262.

3 Plaintiff cites to *S.E.C. v. Todd* in support of their argument that the Cloud growth statements
4 are actionable. 642 F.3d 1207, 1217 (9th Cir. 2011). Plaintiff’s reliance on *Todd* is misplaced. In
5 *Todd*, unlike here, the parties had presented evidence (to a jury) regarding the propriety of the
6 defendants’ accounting system and its compliance with Generally Accepted Accounting Principles
7 (“GAAP”) related to an “unusual” transaction. *Id.* at 1216-17. The Ninth Circuit found that “there
8 was evidence to support a finding that booking the transaction as revenue was ... materially
9 misleading to investors” because several witnesses testified that the revenue from the transaction at
10 issue should not have been booked as revenue. *Id.* at 1217. No allegations of accounting
11 impropriety have been made in the CAC.

12 Similarly, other cases cited by Plaintiff involve allegations of accounting errors that are not
13 present in the CAC. In *Police & Fire Ret. Sys. of the City of Detroit v. Crane*, defendants compared
14 their revenue numbers from one quarter to another and “passed this off as an apples-to-apples
15 comparison,” when in reality, the company’s numbers were “the product of a significant change” in
16 how (and when) the revenue from contracts was recognized. 87 F. Supp. 3d 1075, 1082 (N.D. Cal.
17 2015). Similarly, in *Murphy v. Precision Castparts Corp.*, the company “worked aggressively to
18 ‘pull in’ future sales, by persuading customers to accept early delivery of product that would
19 ordinarily ship in a future quarter.” No. 3:16-CV-00521-SB, 2017 WL 3084274, at *2 (D. Or. June
20 27, 2017), report and recommendation adopted sub nom. *Murphy v. Precision Castparts Corp.*, No.
21 3:16-CV-00521-SB, 2017 WL 3610523 (D. Or. Aug. 22, 2017). As a result, the company was able
22 to report higher sales and meet earnings targets in its current quarter, at the expense of future sales.
23 *Id.* In contrast, the CAC does not challenge that Oracle sold, delivered, and received revenue for its
24 one-year Cloud subscriptions in each quarter of the Class Period. The CAC alleges that Oracle
25 customers declined to **renew** their Cloud subscriptions – not that the sales were not reported in the
26 quarter they were made.

27 *In re Questcor* is also inapposite. No. SA CV 12-01623 DMG, 2013 WL 5486762 (C.D. Cal.
28 Oct. 1, 2013). There, plaintiffs alleged that defendants “mischaracterized the nature and results of

1 scientific tests” related to a drug in order to create the impression that the drug was a “successful
 2 and medically necessary method” of treating certain illnesses. *Id.* at *11-12. The court first found
 3 that plaintiffs had adequately alleged that defendants made misleading statements about the
 4 scientific basis for the drug. *Id.* at *12. Based on that finding, the court concluded that ***to the extent***
 5 plaintiffs’ allegation related to the misleading nature of the scientific reports are properly pled “so
 6 too were its statements about the company’s financial success arising out of [the drug’s] sales.” *Id.*
 7 *14 (emphasis added). Similarly, in *Orexigen*, the company touted a drug’s promising heart benefit
 8 when defendants had learned, and failed to disclose, new information that diminished the weight of
 9 a clinical study’s earlier results. 899 F.3d at 1014-15. There no similar allegations in the CAC.

10 iii. CW allegations

11 Defendants also argue the CW allegations are “vague, conclusory, and lacking in specific
 12 time references.” Mot. at 10-13. Plaintiff responds that the CAC “specifies the time as to which
 13 each former employee’s report pertains” and the CWs provide “detailed accounts.” Opp’n at 10-
 14 11. The Court notes two deficiencies with CW statements in the CAC.

15 First, the CW statements lack in particularity as to time. CW accounts must be
 16 “contemporaneous” with the alleged misstatements. *In re Fusion-io, Inc. Sec. Litig.*, No. 13-CV-
 17 05368-LHK, 2015 WL 661869, at *18 (N.D. Cal. Feb. 12, 2015). This is crucial because “statement
 18 or omission must be shown to have been false or misleading *when made.*” *In re Stac Elecs.*, 89 F.3d
 19 at 1404. Here, several CWs’ employment with Oracle ended before the Class Period started or
 20 shortly thereafter. *See e.g.*, CAC ¶ 37 (CW3 worked at Oracle until March 2017; CW4’s reports are
 21 limited to 2015; CW6 was a channels sales representative until January 2018). Pre-Class Period
 22 CW accounts can support and corroborate other statements regarding Oracle’s Sale Practices. *See*
 23 *In re BofI Holding, Inc. Sec. Litig.*, No. 315CV02324GPCKSC, 2017 WL 2257980, at *8 n.6 (S.D.
 24 Cal. May 23, 2017) (finding pre-class period allegation “relevant insofar as they corroborate the
 25 allegations of other CWs and tend to indicate that [defendant] was engaged in a pattern of
 26 misconduct”). However, statements from employees who left Oracle before the alleged
 27 misstatements were made cannot substitute for reports during the Class Period, required to establish
 28 each statement was false ***when made.***

1 Moreover, some of the CWs who were employed at Oracle during all or the majority of the
2 Class Period, report on events within the Class Period *generally* without tying those reports to each
3 alleged misstatement. For example, CW3 generally describes an increased frequency of Oracle’s
4 audits in fiscal year 2017. CAC ¶ 109. CW2, CW5, CW8, and CW9 provide no specific dates for
5 their reports. *See e.g., id.* ¶ 103. Generally alleging wrongdoing during the CW’s employment at
6 the Company does not provide the particularity required under PSLRA. In short, CW reports must
7 be specific in their time references to support that *each alleged misstatement* was false *when made*.

8 Second, the CW allegations do not provide enough facts to establish the materiality of
9 Oracle’s Sales Practices. Plaintiff argues that the CAC “features the accounts of nine former Oracle
10 executives from across the globe who consistently recounted these [Sales Practices].” Opp’n at 4.
11 The Court agrees with Plaintiff that the CW statements provide a plausible picture of the wide-
12 spread nature of Oracle’s Sales Practices in various regions. But the CW statements are limited to
13 each CW’s “team” and the CAC fails to otherwise allege that those “teams” had a significant impact
14 on Oracle’s overall revenue. *See Apollo*, 774 F.3d at 609 (Plaintiff “must show with particularity”
15 how the company’s practices “affected the company’s financial statements and whether they were
16 material in light of the company’s overall financial position.”).

17 For example, CW1 (a regional sales director for Middle East and Africa) states that that more
18 than 75% of the Cloud sales in 2017 and 86% of Cloud Sales in in 2018 in *CW1’s team* were tied
19 to audits. CAC ¶ 102. Similarly, CW3 reports that 90% of Cloud revenue *CW3’s territory* was
20 generated through Attached deals. *Id.* ¶ 117. CW2 reported that 90-95% of the Cloud deals *CW2’s*
21 *team* dealt with had no “use cases” attached to them. *Id.* ¶ 103. PSLRA demands more particularity.
22 Plaintiff argues that it does not have access to “Oracle’s books and records,” and thus is not required
23 “to plead at this stage the precise amount of overall revenue affected by Oracle’s improper sales
24 practices.” Opp’n at 11. Fair enough. But the CWs, who Plaintiff alleges were sales executives in
25 various regions, should have been able to provide more detail on how large each of their teams’
26 respective overall sales volumes were during the Class Period. For example, CW1, who reports that
27 75% of the Cloud sales in 2017 in CW1’s team were tied to audits, should have also provided the
28 overall sales volumes for that team in 2017—effectively answering the question: 75% of what?

1 In short, the CW accounts must provide additional facts to establish that the revenue
2 generated through the allegedly coercive Sales Practices constituted a material portion of Oracle’s
3 Cloud revenue at the time each alleged misstatement was made.

4 iv. Sustainability of Cloud revenue growth

5 The CAC alleges that Defendants mischaracterized Oracle’s Cloud revenue growth as
6 “sustained.” Opp’n at 13-14. For example, on September 14, 2017, the Company announced its
7 first fiscal quarter 2018 results, in which total Cloud revenue was up 51% to \$1.5 billion. CAC ¶
8 242. On the same day, Catz told the investors: “The sustained hyper-growth in our multi-billion
9 dollar cloud business continues to drive Oracle’s overall revenue and earnings higher and higher . .
10 .” *Id.* Plaintiff does not allege that the revenue or growth reporting were false. Instead, it asserts
11 that Catz’s statement was misleading because “a material portion of the reported cloud revenue and
12 revenue growth did not consist of true cloud sales, and was not sustainable.” CAC ¶ 243.

13 Defendants argue that “Oracle routinely provided Cloud revenue growth guidance—all of
14 which was met or exceeded during the class period, including the last quarter when Oracle achieved
15 20% Cloud revenue growth, just as predicted.” Mot. at 13. The Court agrees that because Oracle’s
16 Cloud revenue concededly grew as projected, the CAC allegations do not support the conclusion
17 that Oracle’s Cloud sales were “unsustainable” as Plaintiff claims. *See* Opp’n at 14.

18 Plaintiff discounts Oracle’s growth guidance during the Class Period as “nonsensical”
19 because, according to Plaintiff, “Defendants used coercive sales tactics to reach the guidance. And
20 when Oracle’s improper sales practices failed, Oracle ceased reporting cloud guidance to obfuscate
21 the truth.” Opp’n at 14 (citing CAC ¶ 171). The CAC challenges Oracle’s stated reasons for the
22 change in Cloud revenue reporting by providing several analysts’ statements describing a general
23 skepticism of those reasons. CAC ¶¶ 170-76. But the cited analyst statements appear to be
24 conclusory opinions of those individuals or organizations and mostly speculative. In fact, Plaintiff
25 does not specifically allege that Oracle’s stated reasons were false or misleading. *See* CAC ¶¶ 209-
26 74 (“DEFENDANTS’ MATERIALLY FALSE AND MISLEADING STATEMENTS AND
27 OMISSIONS”). It appears, however, that Plaintiff might be able to augment its factual allegations
28 to support its claim that Oracle’s professed reasons for the change in its reporting of Cloud revenues

1 were misleading. In short, the CAC’s factual allegations do not support Plaintiff’s claim that
2 Oracle’s Cloud revenue growth was unsustainable.

3 v. Drivers of Cloud revenue growth

4 The CAC alleges that Defendants made false or misleading statements describing the reasons
5 for which Oracle’s customers chose its Cloud products over the competition – for example: cost and
6 innovation (CAC ¶ 254), speed, breadth of solutions, global reach, and security (*id.* ¶ 252). Plaintiff
7 argues that when listing the “drivers” of Oracle’s Cloud revenues, Defendants “failed to disclose
8 that Oracle’s coercive sales practices were, in reality, a material driver of cloud revenue growth.”
9 Opp’n at 13. As discussed above, companies do not have an independent duty to disclose their sales
10 tactics. Nevertheless, once Defendants made statements about the drivers of Cloud revenue growth,
11 the investors would have been interested to know that “a material driver” of Cloud Sales was
12 Oracle’s Sales Practices. *See In re LendingClub Sec. Litig.*, 254 F. Supp. 3d 1107, 1118 (N.D. Cal.
13 2017) (“[I]nvestors would also have been interested to know that millions of dollars of loans were
14 not the result of organic matches in the marketplace reflecting participants’ trust in LendingClub’s
15 purportedly neutral platform, but were inflated artificially through self-dealing disguised as real
16 transactions.”).

17 That said, the “materiality” of Oracle’s Sales Practices should have been alleged with more
18 specificity. First, the CAC relies on CW statements to establish the materiality of Cloud revenue
19 generated through Sales Practices. As discussed above, the CW accounts must provide more facts
20 regarding the timing of their reports and the volume of sales generated in each of their respective
21 teams.

22 Second, Plaintiff points to “the corroborating reports of regulators and industry participants
23 that such practices were common.” Opp’n at 12. But as Plaintiff admits, those reports (even if
24 relevant and credible) are outside of the Class Period. Plaintiff claims that these reports are relevant
25 because “they corroborate the allegations of fraud during the Class Period.” Opp’n at 12. That may
26 be true to the extent that Plaintiff relies on the reports to corroborate the existence or even prevalence
27 of the Sales Practices. But Plaintiff may not use reports related to pre-Class Period sales to show
28 that a material portion of Oracle’s accurately-reported Cloud revenue during the Class Period was

1 tied to the Sales Practices.

2 Third, contrary to Plaintiff’s assertion, the decline in Oracle’s Cloud revenue growth (from
3 58% to 21%) does not “give[] a numerical indication of the severe extent to which these practices
4 impacted Oracle’s overall cloud revenue growth.” *See* Opp’n at 12. This “numerical indication”
5 is concededly consistent with what Oracle predicted and disclosed to its investors and thus, was not
6 misleading.

7 Fourth, the Court is not persuaded that Oracle’s decision to change its reporting of Cloud
8 revenue can establish the materiality of Sales Practices in Oracle’s overall revenue. *See* Opp’n at
9 12. “There are many potential reasons why a company might cease to report a metric and those
10 reasons may have no relation to the prior falsity of that metric.” *In re SolarCity Corp. Sec. Litig.*,
11 274 F. Supp. 3d 972, 1002 (N.D. Cal. 2017). In fact, the CAC provides for one such reason in this
12 case: it was hard to distinguish Cloud revenue from more traditional on-premises revenue. *See* CAC
13 ¶ 171.

14 b. Deceleration of Cloud Revenue Growth

15 Plaintiff challenges Defendants’ explanation for the deceleration in the Company’s Cloud
16 revenue growth. Opp’n 15-16. Defendants stated that Cloud revenue growth was decelerating
17 because (1) customers were waiting for Oracle’s next generation Cloud product, known as the
18 “Autonomous Database” and (2) Oracle’s “Bring Your Own License” or BYOL program allowed
19 its customers to purchase software licenses that could flexibly be used in whatever medium the
20 customer chose, either Cloud or on-premises. *See* CAC ¶¶ 264, 270. For example, Ellison
21 explained: “With BYOL, when someone brings their database to the cloud, some of that database -
22 - some of that revenue goes into license and someone -- some of that revenue goes into cloud.
23 Without BYOL, if we didn’t have BYOL and someone -- an Oracle customer went to the cloud,
24 100% of the revenue would go to the cloud. So there’s no question, BYOL has lowered our cloud
25 revenue and increased our license revenue.” *Id.* ¶ 271. Plaintiff argues that these statements were
26 false because “in truth, Oracle’s cloud revenues declined because customers refused to renew short-
27 term subscriptions that had been forced on them.” Opp’n at 15.

28 Defendants argue that “Plaintiff does not plead any contrary facts about the Autonomous

1 Database, BYOL, or Oracle’s market share, nor does Plaintiff identify any customers who were then
2 ‘moving off’ Oracle.” Mot. at 15. The Court agrees that the factual allegations in the CAC do not
3 paint the picture that Plaintiff describes. See reply at 8, ECF 49. The gist of the CAC allegations is
4 that (1) Oracle engaged in aggressive sales tactics, (2) sold short-term (one-year) subscriptions to
5 Cloud products that its customers did not want, (3) by the end of the Class Period, customers
6 declined to renew those subscriptions, and (4) as a result, Oracle’s Cloud sales revenue growth
7 decelerated. See CAC ¶¶ 2, 18, 119-121. The CAC alleges that the Sales Practices started in 2014.
8 *Id.* ¶ 54. Many of the allegations regarding the Sales Practices predate the Class Period by years:
9 the investigation by the Chilean regulator started in 2015 (*id.* ¶ 137), audit of the City of Denver
10 took place in 2016 (*id.* ¶ 93), Clear Licensing Counsel warned Oracle in 2014 (*id.* ¶ 181), and CW4’s
11 report pertains to 2015 (*id.* ¶ 87). Based on the facts alleged in the CAC, Oracle’s Cloud revenue
12 deceleration should have decelerated earlier than June 2018. Instead, the Cloud sales kept growing
13 throughout the Class Period. Moreover, the CAC does not identify any Oracle customers who
14 declined to renew their Cloud subscriptions after one year. It appears, however, that additional facts
15 might be alleged to support Plaintiff’s claim that Oracle’s professed reasons for deceleration of its
16 Cloud revenue were misleading.

17 c. Sales Practices

18 Plaintiff claims that Defendants “falsely denied that Oracle was using financially engineered
19 deals to generate artificial cloud revenue.” Opp’n at 7. Plaintiff points to two statements in this
20 category, made during the Class Period. First, on May 9, 2017, an analyst asked Bond to “give us
21 some sort of indication as to what percentage of revenue and margin is associated with auditing
22 practices of customers.” CAC ¶ 224. Bond responded that “I think this is one of those things where
23 the story is a lot bigger than the realities” and “we try to do it as best we can, in as gracious [a] way
24 as we can” and followed by “as we go to cloud, we don’t have to worry about that anymore. Because
25 when you’re in the cloud, you basically have a number of users that you’ve signed up for.” *Id.*
26 According to Plaintiff, “Defendants’ denials and statements minimizing Oracle’s use of these tactics
27 were false or, at minimum, misleading.” Opp’n at 7.

28 The Court is not persuaded that Bond “deni[ed]” the existence of Sales Practices. If

1 anything, by stating that “the story is a lot bigger than the realities,” he admitted that the practices
2 do happen. *See* CAC ¶ 224. The cases Plaintiff cites are inapposite because they address *denial* of
3 material facts, which is not present here. For example, in *Lloyd v. CVB Fin. Corp.*, the Ninth Circuit
4 found actionable, a statement that “there was no basis for ‘serious doubts’” about a loan repayment,
5 when in fact, the company had known for two months that its largest borrower was unable to pay.
6 811 F.3d 1200, 1209 (9th Cir. 2016). Bond’s statement, however, would be misleading for
7 downplaying the Sales Practice *if* Plaintiff had alleged sufficient facts to show that the revenue
8 generated by those tactics was material to Oracle *at the time* Bond made the statement. As discussed
9 above, Plaintiff must plead the materiality of the Sales Practices with more specificity.

10 Second, the CAC alleges that on May 22, 2018, in response to an article by The Information
11 about Oracle’s Sale Practices, Oracle stated:

12 Oracle, like virtually every other software company, conducts
13 software audits in limited circumstances to ensure that our products
14 are used as licensed. We pride ourselves in providing our existing
15 400,000 customers a variety of options to move to the cloud when
16 they are ready. Oracle is grateful to its large and growing customer
17 base and has no reason to resort to scare tactics to solicit business. We
18 are disappointed that The Information is presenting inaccurate
19 accounts regarding a handful of customers, based on anonymous
20 sources or competitors who seek to enhance their own consulting
21 services.

22 CAC ¶ 273. According to Plaintiff, this statement was “false and misleading” because Oracle
23 “den[ied] that Oracle used audits to drive cloud sales,” without disclosing that its revenue was driven
24 by Sales Practices. CAC ¶ 274. Again, Plaintiff must allege with specificity that at the time Oracle
25 released this statement, a material number of its Cloud sales were driven by the Sales Practices.

26 Plaintiff points to two pre-Class Period statements to boast its claims: (1) on January 14,
27 2016 an Oracle executive (not an Individual Defendant) stated “[i]t would be wrong to force a
28 company to do something that’s against their will” and (2) on July 21, 2016, Bond referred to
Oracle’s use of “ugly tactics” in selling Cloud products as “conspiracy rumors” that do not warrant
a response. CAC ¶¶ 64-65. The Court agrees that statements made before or after the Class Period,
although not actionable on their own, may be relevant to the extent that “they shed light on the truth

1 or falsity of Class Period statements.” *Shenwick v. Twitter, Inc.*, 282 F. Supp. 3d 1115, 1134 (N.D.
2 Cal. 2017) (citation omitted). In any event, the two alleged misstatements within the Class Period
3 (CAC ¶¶ 224, 273) are not false or misleading, unless Plaintiff alleges with particularity that the
4 Sales Practices were material to Oracle’s Cloud revenue at the time the statements were made.

5 ***

6 In sum, the CAC has failed to sufficiently plead that the alleged misstatements were false or
7 misleading when made.

8 3. Scienter

9 Defendants next challenge the sufficiency of the allegations with respect to scienter.
10 Scienter is “a mental state embracing intent to deceive, manipulate, or defraud.” *Tellabs*, 551 U.S.
11 at 319 (internal quotation marks omitted). A complaint must “state with particularity facts giving
12 rise to a strong inference that the defendant acted” with scienter. *See* 15 U.S.C. § 78u–4(b)(2)(A);
13 *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1061 (9th Cir. 2014). A court
14 should deny a motion to dismiss “only if a reasonable person would deem the inference of scienter
15 cogent and at least as compelling as any opposing inference one could draw from the facts alleged”
16 in the complaint. *See Tellabs*, 551 U.S. at 324. Plaintiff must “plead with particularity facts that
17 give rise to a ‘strong’—i.e., a powerful or cogent—inference.” *Id.* at 323. To demonstrate scienter,
18 defendants must have contemporaneously made “false or misleading statements either intentionally
19 or with deliberate recklessness.” *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991
20 (9th Cir. 2009), as amended (Feb. 10, 2009) (internal quotation marks omitted). “[M]ere
21 recklessness or a motive to commit fraud and opportunity to do so” is not enough. *Reese*, 747 F.3d
22 at 569. Rather, a plaintiff must show “a highly unreasonable omission” and “an extreme departure
23 from the standards of ordinary care” that “presents a danger of misleading buyers or sellers that is
24 either known to the defendant or is so obvious that the actor must have been aware of it.” *See Zucco*
25 *Partners*, 552 F.3d at 991 (internal quotation omitted). Courts must “assess all the allegations
26 holistically,” not “scrutinize each allegation in isolation.” *Tellabs*, 551 U.S. at 326.

27 a. Confidential Witnesses

28 “[A] complaint relying on statements from confidential witnesses must pass two hurdles to

1 satisfy the PSLRA pleading requirements. First, the confidential witnesses whose statements are
2 introduced to establish scienter must be described with sufficient particularity to establish their
3 reliability and personal knowledge. Second, those statements which are reported by confidential
4 witnesses with sufficient reliability and personal knowledge must themselves be indicative of
5 scienter.” *Zucco Partners*, 552 F.3d at 995 (citations omitted).

6 As an initial matter, Defendants noted and Plaintiff did not contest, that the CWs offer no
7 allegations as to Ellison, Kurian, Bond, or Miranda, and therefore, the CW statements provide no
8 basis from which their scienter may be inferred. *See* Mot. at 19; *see generally* Opp’n. Thus, the
9 CWs’ allegations of knowledge are limited to Catz and Hurd.

10 Defendants assert that the CW allegations do not support an inference of scienter. First,
11 Defendants challenge the CWs’ reliability because none of the CWs alleges any direct contact with
12 Hurd or Catz and therefore their allegations are not based on personal knowledge. *See* Mot. at 19-
13 20. Second, Defendants argue that the CW allegations themselves are not indicative of scienter
14 because they fail “to link any Defendant’s state of mind to a point in time.” *Id.* at 20. Plaintiff
15 responds that CWs provide relevant facts such as: (1) Hurd and Catz “personally approved” Cloud
16 deals worth over \$5 million and any deal where a discount in excess of 50% was offered on software,
17 (2) CW1 personally prepared presentations for Hurd that “would very clearly say that [License
18 Management Services] was engaged” on Cloud deals and that “they were compliance deals,” and
19 (3) CW2 described presentations prepared for Hurd “that went to Hurd’s directs” and showed “90-
20 95% of the Company’s cloud deals were not driven by customer need.” Opp’n 18-19.

21 The Court agrees with Defendants that because the CWs did not have any direct contact with
22 Hurd or Catz, some of their reports cannot provide reliable insight into the Individual Defendants’
23 states of mind. *See Oklahoma Police Pension & Ret. Sys. v. LifeLock, Inc.*, No. 17-16895, 2019 WL
24 3020946, at *2 (9th Cir. July 10, 2019) (“Under the PSLRA, a complaint must state with
25 particularity facts giving rise to a strong inference that each defendant acted with scienter.”). For
26 example, CW1 prepared presentations “for Hurd’s consumption.” CAC ¶ 180. CW2 saw
27 “presentations going to Hurd’s direct reports.” *Id.* ¶ 180. CW9 “understood” that customer-related
28 information “would be summarized and presented at a higher level.” *Id.* ¶ 127. The CWs lack

1 personal knowledge as to whether Catz or Hurd read or heard of the internal information and
2 presentations—and therefore cannot be relied upon to establish scienter. *Bao v. Solarcity Corp.*,
3 No. 14-CV-01435-BLF, 2016 WL 4192177, at *11 (N.D. Cal. Aug. 9, 2016), *aff'd sub nom. Webb*
4 *v. Solarcity Corp.*, 884 F.3d 844 (9th Cir. 2018). In other words, “merely speculative” awareness
5 of Individual Defendants’ knowledge is not enough. *See Bao*, 2016 WL 4192177, at *11.

6 Some of the CWs did, however, have personal knowledge that Hurd or Catz approved large
7 sales tied to Oracle’s Sales Practices. CW1 stated that all deals worth more than \$5 million had to
8 be approved by “HQ,” meaning Hurd or Catz and states that he/she would see “Hurd’s and Catz’s
9 names on approvals.” CAC ¶ 110. CW1 explained that “the sequencing of [Oracle’s approval
10 system’s] reports showed that [License Management Services] was engaged with the sales team and
11 the client.” CAC ¶ 110. Similarly, CW3 reported that all software discounts in excess of 50% had
12 to be approved by Hurd’s office. *Id.* ¶ 134. CW3 further stated that he personally had audit-based
13 Cloud deals “clearly marked as such,” that were approved by Hurd’s office. *Id.* ¶ 111. But these
14 CW allegations are not sufficient because (1) they do not establish *when* Hurd or Catz approved the
15 deals, (2) *how* Hurd or Catz would have known—based on these deal approvals—that Sales
16 Practices generated a material portion of Cloud revenues. As Defendants note, the allegations
17 “reveal little about the approval process [and] nothing about any particular deals (timing, amounts,
18 customer names)[.]” Reply at 12. It is unclear from the CW statements how or at what level of
19 detail Catz or Hurd reviewed the deals they approved. More specific facts must be pled to support
20 a strong inference of scienter as to what Catz or Hurd knew at the time they made the alleged
21 misstatements. The inference of scienter must be “cogent and at least as compelling as any opposing
22 inference of nonfraudulent intent.” *Tellabs*, 551 U.S. at 314.

23 b. Change in Oracle’s Reporting System

24 Plaintiff argues that “Oracle’s efforts to obscure its declining cloud revenue growth by
25 radically changing the way it reported its cloud results further supports an inference of scienter.”
26 Opp’n at 21. Defendants, on the other hand, claim that there was “nothing nefarious” about Oracle’s
27 change in reporting and that the Company explained its reasons for changing its Cloud revenue
28 reporting at the same time it announced the change. Mot. at 23. In its June 19, 2018 Earnings Call,

1 Oracle explained that its BYOL program “resulted in large database contracts where some licenses
2 were to be deployed on premise, while others were to be used in the Cloud” making Oracle’s new
3 license revenue a combination of Cloud licenses and on-premises licenses. *See* Mot. at 23 (citing
4 ECF 45-6 at 4).

5 Plaintiff takes issue with Defendants’ reference to Oracle’s explanation as “self-serving” and
6 “improper application of judicial notice.” Opp’n at 23-24. The Court disagrees. Incorporation-by-
7 reference “is a judicially created doctrine that treats certain documents as though they are part of the
8 complaint itself.” *Orexigen*, 899 F.3d at 1002. “The doctrine prevents plaintiffs from selecting
9 only portions of documents that support their claims, while omitting portions of those very
10 documents that weaken—or doom—their claims.” *Id.* Defendants may seek to invoke the
11 incorporation-by-reference doctrine “if the plaintiff refers extensively to the document or the
12 document forms the basis of the plaintiff’s claim.” *Id.*

13 Here, the CAC references the June 19, 2018 Earnings Call repeatedly to allege that Oracle
14 changed its Cloud revenue financial reporting “to shield its flagging cloud revenues from public
15 view.” CAC ¶ 22; *see also id.* ¶¶ 169, 192, 286. Plaintiff’s reference to the documents is both
16 extensive and a basis for Plaintiff’s claims of falsity and scienter. Therefore, Defendants can
17 properly seek to incorporate the entire document. “[T]he incorporation-by-reference doctrine is
18 designed to prevent artful pleading by plaintiffs” – which is exactly what Plaintiff attempts to do
19 here. *See Orexigen*, 899 F.3d at 1003. Because Plaintiff has relied on the June 19, 2018 Earnings
20 Call as basis for its claims, it may not exclude Defendants from incorporating their reasons for the
21 change in Oracle’s financial reporting, stated in the same document.

22 That said, the Court does not assume that Oracle’s stated reasons for change in its financial
23 reporting are true—only that the Company provided a reason. In fact, Oracle’s stated reason is
24 referenced in the CAC. *See* CAC ¶ 171 (“it was hard to distinguish cloud revenue from more
25 traditional on-premises revenue”). Scienter allegations must give rise not only to a plausible
26 inference of scienter, but to an inference of scienter that is “cogent and at least as compelling as any
27 opposing inference of nonfraudulent intent.” *Tellabs*, 551 U.S. at 314. The CAC has not established
28 that the inference of scienter (*i.e.*, Oracle changed its financial reporting to hide its declining Cloud

1 revenue) is “at least as compelling” as that the reason the Company provided.

2 c. Core Operations Doctrine

3 The “core operations” doctrine allows the knowledge of certain facts that are critical to a
4 business’s “core operations” to be attributed to a company’s key officers. *Webb v. Solarcity Corp.*,
5 884 F.3d 844, 854 (9th Cir. 2018). “Allegations that rely on the core-operations inference are among
6 the allegations that may be considered in the complete PSLRA analysis.” *S. Ferry LP, No. 2 v.*
7 *Killinger*, 542 F.3d 776, 784 (9th Cir. 2008). “[C]orporate management’s general awareness of the
8 day-to-day workings of the company’s business does not establish scienter—at least absent some
9 additional allegation of specific information conveyed to management and related to the fraud.”
10 *Metzler*, 540 F.3d at 1068. On the other hand, “specific allegations that defendants actually did
11 monitor the data that were the subject of the allegedly false statements . . . is sufficient under the
12 PSLRA.” *S. Ferry*, 542 F.3d at 785.

13 “Allegations regarding management’s role in a company may be relevant and help to satisfy
14 the PSLRA scienter requirement in three circumstances. First, the allegations may be used in any
15 form along with other allegations that, when read together, raise an inference of scienter that is
16 cogent and compelling, thus strong in light of other explanations. . . . Second, such allegations may
17 independently satisfy the PSLRA where they are particular and suggest that defendants had actual
18 access to the disputed information. . . . Finally, such allegations may conceivably satisfy the PSLRA
19 standard in a more bare form, without accompanying particularized allegations, in rare
20 circumstances where the nature of the relevant fact is of such prominence that it would be absurd to
21 suggest that management was without knowledge of the matter.” *S. Ferry*, 542 F.3d at 785–86.
22 “Proof under this theory is not easy.” *Police Ret. Sys. of St. Louis*, 759 F.3d at 1062. A plaintiff
23 must produce either (1) “specific admissions by one or more corporate executives of detailed
24 involvement in the minutia of a company’s operations, such as data monitoring,” or (2) “witness
25 accounts demonstrating that executives had actual involvement in creating false reports.” *Id.*
26 (rejecting scienter under the core operations doctrine when plaintiffs pointed to “the impressions of
27 witnesses who lacked direct access to the executives but claim that the executives were involved
28 with [the company’s] day-to-day operations” and were familiar with the contents of the certain

1 reports).

2 Plaintiff argues Oracle’s “move to cloud” was “the biggest and most important opportunity”
3 in its history, and the subject of greatest importance to the market. Opp’n at 22-23 (citing CAC ¶¶
4 196-97). For that reason, in Plaintiff’s view, “[t]he inference is strong that Defendants knew, or
5 were deliberately reckless in not knowing, that the sales of the most important segment of Oracle’s
6 business were driven by engineered deals.” Opp’n at 22. It may be true that moving to Cloud was
7 a significant milestone for Oracle, but that fact does not make every piece of information within the
8 Company related to its Cloud business critical to the business’s core operations. As discussed, the
9 CAC allegations are not sufficient to show that the revenue generated by Sales Practices were
10 material. Thus, it is not “absurd” to suggest that the Individual Defendants were not aware of such
11 materiality—especially in light of the Company’s accurate reporting and projecting of its Cloud
12 sales revenue growth. Moreover, as discussed, none of the CWs had access to the Individual
13 Defendants to know about their involvement in sales reporting. The core operations doctrine is not
14 sufficiently pled.

15 d. Kurian’s Stock Sales

16 During the Class Period, Kurian exercised his options and sold nearly 4 million shares for
17 “over \$191 million in gross proceeds.” CAC ¶ 200. Plaintiff argues Kurian’s stock sales further
18 bolster the scienter inference as to him. Opp’n at 23. “While suspicious stock sales by corporate
19 insiders may constitute circumstantial evidence of scienter, such sales only give rise to an inference
20 of scienter when they are dramatically out of line with prior trading practices at times calculated to
21 maximize the personal benefit from undisclosed inside information.” *Metzler*, 540 F.3d at 1066–67
22 (internal citation omitted). Courts consider three factors in this inquiry: “(1) the amount and
23 percentage of the shares sold; (2) the timing of the sales; and (3) whether the sales were consistent
24 with the insider’s trading history.” *Id.* at 1067. The Ninth Circuit “typically require[s] larger sales
25 amounts-and corroborative sales by other defendants—to allow insider trading to support scienter.”
26 *Id.*

27 The Court is not persuaded that Kurian’s stock sales were suspicious. Defendants claim that
28 Kurian’s stock sales resulted in \$53.7 million in net proceeds, not the \$191.8 million alleged by

1 Plaintiff. Mot. at 22. Plaintiff does not dispute this but argues that Kurian sold at least one-third of
2 his holdings, which according to Plaintiff is “unusual.” Opp’n at 23. The Ninth Circuit has found
3 similar amounts insufficient to establish scienter. *See Metzler*, 540 F.3d at 1067 (sale of 37% of
4 total stock holdings did not establish scienter); *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970,
5 987 (9th Cir. 1999), as amended (Aug. 4, 1999) (sale of 43.6 and 75.3 percent of executive’ holdings
6 failed to give rise to a strong inference of scienter) (superceded by statute on other grounds). Neither
7 is the timing of Kurian’s stock sales suspicious. Kurian sold stocks throughout the Class Period,
8 before and after the alleged deceleration of the Cloud revenue growth. For example, Kurian’s
9 biggest sale occurred on January 18, 2018, *after* Oracle reported a slow-down on December 14,
10 2017. *See* CAC ¶ 201; 258 (“on December 14, 2017, ... Oracle reported slowing cloud growth in
11 the second quarter of 2018 that missed market expectations, and provided guidance for the further
12 slowing of cloud growth that also fell below market expectations ...”). Kurian continued to sell
13 stocks after the second slow-down report on March 19, 2018. *See* CAC ¶¶ 201; 280.

14 The inference of scienter is further weakened by the fact that none of the other Individual
15 Defendants are alleged to have sold Oracle stocks during the Class Period. “One insider’s well
16 timed sales do not support the ‘strong inference’ required by the statute where the rest of the equally
17 knowledgeable insiders act in a way inconsistent with the inference that the favorable
18 characterizations of the company’s affairs were known to be false when made.” *Ronconi*, 253 F.3d
19 at 436. Here, only one of the six Individual Defendants is alleged to have sold stocks during the
20 Class Period – not enough to establish a strong inference of scienter.

21 e. Plaintiff’s Remaining Arguments

22 Plaintiff argues that scienter can be inferred because Defendants were confronted with news
23 articles and other outside reports regarding Sale Practices. Opp’n at 19-20 (citing CAC ¶¶ 60-63,
24 59-59, 135-47). Plaintiff also relies on CW statements in alleging that “Oracle’s use of engineered
25 deals was widespread and well-known within the Company.” Opp’n at 20-21 (citing CAC ¶¶ 37,
26 87-134).

27 Plaintiff’s allegations are insufficient because at best, they show that Individual Defendants
28 were aware that the Sales Practices existed. That is not enough. The crux of the CAC is that despite

1 Oracle’s accurate financial, Defendants misled investors regarding Oracle’s revenue growth, its
2 drivers, and the reasons for its deceleration by failing to disclose the Sales Practices. Thus, to
3 establish that Defendants intentionally misled investors when they made statements about Cloud
4 revenue growth, it is not enough to allege that Individual Defendants were aware that the Sales
5 Practices were taking place. Plaintiff must also allege with particularity that *each Individual*
6 *Defendant* knew that a material portion of the Company’s Cloud revenue was tied to those practices
7 – enough to make the nondisclosure of those practices a material omission. *See Tellabs*, 551 U.S.
8 at 314; *see also See Zucco Partners*, 552 F.3d at 998 (finding “generalized claims about corporate
9 knowledge” such as “[defendant] had to have known” or “project managers *knew*” are not sufficient
10 to create a strong inference of scienter, because “they fail to establish that the witness reporting them
11 has reliable personal knowledge of the defendants’ mental state.”); *Knollenberg v. Harmonic, Inc.*,
12 152 F. App’x 674, 681–82 (9th Cir. 2005) (“The allegation that [a fact] was ‘common knowledge’
13 ... does not comport with the PSLRA’s requirement that plaintiff alleges the required state of mind
14 as to each Defendant who made an allegedly misleading statement and is therefore insufficient.”).

15 Plaintiff’s allegations are not “at least as compelling as [the] opposing inference of
16 nonfraudulent intent” – that the Individual Defendants were accurately (and with understandable
17 enthusiasm) reporting Oracle’s Cloud revenue growth.

18 f. Holistic Review

19 After having determined that none of Plaintiff’s allegations, standing alone, is sufficient to
20 create a strong inference of scienter, the Court now considers the allegations holistically. *See In re*
21 *VeriFone*, 704 F.3d at 702–03; *Zucco Partners*, 552 F.3d at 992. The Court finds that taken together,
22 the facts do not evince such fraudulent intent or deliberate recklessness as to make the inference of
23 scienter cogent. *Tellabs*, 551 U.S. at 323. Indeed, as the foregoing demonstrates, Plaintiff’s reliance
24 on CWs, outside reports, Oracle’s change in financial reporting, Kurian’s stock sales, and the core
25 operations doctrine are unpersuasive. Particularly, the CAC fails to allege any direct knowledge of
26 any Individual Defendants’ state of mind. “The bar set by *Tellabs* is not easy to satisfy” because it
27 requires Plaintiff to plead an inference of scienter that is “cogent and at least as compelling as any
28 opposing inference one could draw from the facts alleged.” *Webb*, 884 F.3d at 855 (citing *Tellabs*,

1 551 U.S. at 324.). Plaintiff has failed to do so here.

2 Furthermore, there are no allegations of motive to commit fraud. The Ninth Circuit has
3 “recognized that a lack of stock sales can detract from a scienter finding.” *Webb*, 884 F.3d at 856.
4 Except for Kurian, none of the Individual Defendants is alleged to have sold any stocks. And most
5 importantly, throughout the Class Period, Oracle accurately reported its Cloud sales, which
6 continued to grow, consistent with the rate Oracle projected – these facts do not support a “strong
7 inference of scienter” on behalf of Individual Defendants.

8 ***

9 In sum, the CAC has failed to plead facts creating a strong inference of scienter that is cogent
10 and at least as compelling as the alternative explanation, as required by the PSLRA. Accordingly,
11 the Court GRANTS Defendants’ motion to dismiss for failure to state a claim under section 10(b)
12 or Rule 10b-5 WITH LEAVE TO AMEND.

13 **B. Claims 2 and 3 - Sections 20(a) and 20A**

14 Section 20(a) of the Exchange Act extends liability for 10(b) violations to those who are
15 “controlling persons” of the alleged violations. *Hollinger v. Titan Capital Corp.*, 914 F.2d 1564,
16 1572 (9th Cir. 1990)). To succeed on a claim under Section 20(a), a plaintiff must prove: (1) a
17 primary violation of federal securities laws and (2) that the defendant exercised “actual power or
18 control” over the primary violator.” *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir.
19 2000). The SEC has defined “control” as “the power to direct or cause the direction of the
20 management and policies of a person, whether through ownership of voting securities, by contract,
21 or otherwise.” 17 C.F.R. § 230.405. Section 20A allows recovery against any person who violates
22 the Exchange Act by trading securities “while in possession of material, nonpublic information.”
23 15 U.S.C.A. § 78t-1.

24 “[T]o prevail on their claims for violations of § 20(a) and § 20A, plaintiffs must first allege
25 a violation of § 10(b) or Rule 10b 5.” *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1033 n.15 (9th
26 Cir. 2002). Because Plaintiff has failed to state a claim for a primary violation of the Exchange Act,
27 it likewise has failed to state a claim for violation of Section 20(a) or Section 20A. Thus, the Court
28 GRANTS Defendants’ motion to dismiss Plaintiff’s claims under sections 20(a) and 20A WITH

1 LEAVE TO AMEND.

2 **IV. JUDICIAL NOTICE**

3 Defendants request that this Court consider Exhibits 1 to 21 (ECF 45-1 to 45-21) because
4 they are properly subject to judicial notice. Mot. at 7. Exhibits 1 to 14 (ECF 45-1 to 45-14) and 16
5 to 20 (ECF 45-16 to ECF 45-20) are incorporated in the CAC by reference. Exhibits 15 (ECF 45-
6 15) and 21 (ECF-21) are SEC filings and public stock price information.

7 While the scope of review on a motion to dismiss is generally limited to the contents of the
8 complaint, under Fed. R. Evid. 201(b), courts may take judicial notice of facts that are “not subject
9 to reasonable dispute.” Courts have taken judicial notice of documents on which complaints
10 necessarily rely, *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001), publicly available
11 financial documents such as SEC filings, *Metzler*, 540 F.3d at 1064 n.7, and publicly available
12 articles or other news releases of which the market was aware, *Heliotrope Gen., Inc. v. Ford Motor*
13 *Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999).

14 Plaintiff does not oppose the request or dispute the authenticity of the documents but notes
15 that “[t]he Court should decline Defendants’ invitation to improperly accept the truth of their
16 exhibits’ contents to resolve disputed facts in their favor.” Opp’n at 23-24. The Court agrees that
17 it would be improper to take notice of facts that might reasonably be disputed, or to draw inferences
18 from such documents. *U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (taking
19 judicial notice of reports referred to in complaint for their “existence,” but holding “we may not, on
20 the basis of these reports, draw inferences or take notice of facts that might reasonably be disputed”);
21 *Lee*, 250 F.3d at 688. The Court takes judicial notice of Exhibits 1-21 and considers these documents
22 for the sole purpose of determining what representations Oracle made to the market. The Court
23 does not take notice of the truth of any of the facts asserted in these documents.

24 **V. ORDER**

25 To successfully state a claim, Plaintiff must plead with particularity what statements
26 were made, when they were made, why they were false at the time they were made, and how the
27 Defendant who made the statement acted with scienter at the time the statements were made.
28 Because Plaintiff fails to adequately plead that Defendants made any false or misleading statements

1 and that they did so with scienter, the motion to dismiss is GRANTED WITH LEAVE TO AMEND.

2 Any amended complaint shall be filed **on or before February 17, 2020**. The Court requests
3 that the chambers copy of any amended complaint be a redlined version, in color. Failure to meet
4 the deadline to file an amended complaint or failure to cure the deficiencies identified in this Order
5 will result in a dismissal of Plaintiff's claims with prejudice.

6 For the amended complaint, pursuant to the PSLRA and the Federal Rules of Civil
7 Procedure, and for the sake of clarity and efficient case management, Plaintiff is directed to set out
8 in chart form their securities fraud allegations under the following headings on a numbered,
9 statement-by-statement basis: (1) the speaker(s), date(s) and medium; (2) the false and misleading
10 statements; (3) the reasons why the statements were false and misleading when made; and (4) the
11 facts giving rise to a strong inference of scienter. The chart may be attached to or contained in the
12 amended complaint, but in any event will be deemed to be a part of the amended complaint.

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IT IS SO ORDERED.

Dated: December 17, 2019



BETH LABSON FREEMAN
United States District Judge