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Proposed Class*

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

IN RE SVB FINANCIAL GROUP  
SECURITIES LITIGATION

Master File No. 3:23-cv-01097-JD

Consolidated Case Nos. 3:23-cv-01173-JD;  
3:23-cv-01228-JD; 3:23-cv-01697-JD; 3:23-  
cv-01962-JD

**PLAINTIFFS' MEMORANDUM OF LAW  
IN OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS CLAIMS UNDER  
THE SECURITIES ACT OF 1933**

CLASS ACTION

Date: August 1, 2024  
Time: 10:00 a.m.  
Courtroom: 11, 19<sup>th</sup> Floor  
Judge: Hon. James Donato

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<b>ABBREVIATION</b>	<b>DEFINITION</b>
Bank or SVB	Silicon Valley Bank Financial Group
Board	SVB's Board of Directors
Burr	Elizabeth Burr, former member of SVB's Board
Clendening	John Clendening, former member of SVB's Board
Defendants or Securities Act Defendants	Collectively, the Executive Defendants, Director Defendants, the Underwriter Defendants, and KPMG
Dunbar	Roger Dunbar, former member of SVB's Board
Fed or Federal Reserve	Collectively, the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of San Francisco
GAAP	Generally Accepted Accounting Principles
HTM	Held-to-maturity
KPMG	KPMG LLP, SVB's registered auditing firm from 1994 until the Bank collapsed
MRA	Matters Requiring Attention
MRIA	Matters Requiring Immediate Attention
Offerings or Offering Documents	Collectively, the February 2021 Offerings, March 2021 Offering, May 2021 Offerings, August 2021 Offering, October 2021 Offerings, and April 2022 Offerings
Plaintiffs	Norges Bank and Sjunde AP-Fonden and additional plaintiffs Asbestos Workers Philadelphia Welfare and Pension Fund and Heat & Frost Insulators Local 12 Funds
PSLRA	Private Securities Litigation Reform Act of 1995, 15 U.S. Code § 78u-4
Rule(s)	Federal Rule(s) of Civil Procedure
SEC	U.S. Securities and Exchange Commission
SOX	Sarbanes-Oxley Act of 2002

\*Any terms not contained in this chart have the same meaning ascribed to them in the Complaint.

1 **I. INTRODUCTION**

2 Part II of the Complaint alleges violations of the Securities Act, which imposes stringent  
3 liability on underwriters and signatories of registration statements for public offerings that contain  
4 untrue statements of fact or material omissions. These claims impose a “relatively minimal burden  
5 on a plaintiff” at the pleading stage, with no requirement to plead scienter, reliance, or causation  
6 and such defendants bearing the affirmative burden at trial to establish due diligence. *Herman &*  
7 *MacLean v. Huddleston*, 459 U.S. 375, 382 (1982).<sup>1</sup> The Complaint far exceeds this minimal  
8 burden and alleges in detail the basis for claims under the Securities Act.

9 In 2021 and 2022, SVB and its executives, directors, and underwriters completed nearly a  
10 dozen public offerings of SVB securities, collecting more than \$8 billion. In May 2023—less than  
11 a year after the final Offering—SVB failed and filed for bankruptcy. This case arises from  
12 misstatements and omissions in the Offering Documents about the controls that SVB purportedly  
13 had in place to manage its key risks, the failure of which the Federal Reserve has concluded were  
14 “linked directly” to SVB’s ultimate collapse. The Complaint, supported by numerous credible  
15 corroborating sources—including a nearly-unprecedented trove of supervisory materials released  
16 by the Federal Reserve and more than a dozen former SVB employees—amply states a claim under  
17 the Securities Act and documents SVB’s long-standing control deficiencies that existed (and were  
18 even communicated to many of the Securities Act Defendants).

19 ***First***, the Offering Documents assured investors that SVB “ha[d] implemented a risk  
20 management framework to identify and manage” its risk exposure and otherwise had risk  
21 management controls commensurate with the Bank’s size and profile. Contrary to SVB’s  
22 representations, its risk management framework did ***not*** “identify and manage [SVB’s] risk  
23 exposure” and was ***not*** “designed to manage the types of risk to which [SVB was] subject.” As the  
24 Federal Reserve found, SVB’s risk management framework was “not effective” and “miss[ed]

25  
26 <sup>1</sup> References to (i) “Complaint,” “¶,” and “§” are to the Consolidated Amended Class Action  
27 Complaint (Dkt. 88); (ii) “Mot.” are to Defendants’ Motion to Dismiss (Dkt. 125); and (iii) “RJN  
28 Opp.” are to Plaintiffs’ Opposition to Defendants’ Request for Judicial Notice, filed concurrently  
herewith. Unless otherwise indicated, emphasis is added, and internal citations, alterations, and  
quotations are omitted.

1 several elements,” threatening the Bank’s “prospects for remaining safe and sound.”

2       **Second**, the Offering Documents highlighted to investors the supposed controls over  
3 “interest rate risk,” which was SVB’s self-identified “primary” market risk. The Offering  
4 Documents touted that SVB utilized various “quantitative models,” which were purportedly  
5 “periodically reviewed and recalibrated” to ensure accuracy and effectiveness. In fact, as the  
6 Federal Reserve found, these models were “not reliable,” assumptions were “not appropriately  
7 identified,” and “risk limits” had not been updated for years. These weaknesses “prevent[ed] firm  
8 management and the board of directors from making informed capital planning decisions.”

9       **Third**, the Offering Documents represented that SVB “routinely conduct[ed] liquidity  
10 stress testing as part of our liquidity management practices.” In truth, SVB’s “stress testing” was  
11 ineffective, and SVB’s other liquidity risk controls suffered from various “shortcomings.”

12       **Fourth**, the Offering Documents represented that SVB could determine that it had the  
13 “positive intent” and “ability” to hold to maturity tens of billions of dollars in long-duration  
14 investment securities. The Offering Documents thus accounted for these securities under a highly  
15 restrictive exception that did not reflect their fair value. But in reality, SVB did not—and could  
16 not—amass the evidence that was necessary under GAAP to use that exception, due to SVB’s  
17 control weaknesses. As a result, SVB’s financial statements were materially untrue.

18       **Finally**, the Offering Documents made numerous other representations and omissions  
19 concerning the supposed effectiveness of SVB’s internal controls, and assured investors that SVB  
20 had disclosed all of the information required by SEC regulations. In truth, as the Federal Reserve  
21 told SVB, “deficiencies in [SVB’s] processes and reporting negatively affected its ability to  
22 provide timely, independent assurance that the Firm’s risk management, governance and internal  
23 controls were operating effectively.” As a result of these and other deficiencies, SVB’s internal  
24 controls were ineffective and SVB’s financial statements violated GAAP.

25       In their motion to dismiss, the Securities Act Defendants ask the Court to excuse them from  
26 liability as a matter of law and before any discovery. But Defendants’ arguments are built on false  
27 premises. For example, Defendants wrongly argue that the entire Complaint pleads “fraud by  
28 hindsight,” but the allegations extensively cite and quote contemporaneous supervisory reports

1 issued by the Federal Reserve. These include dozens of supervisory directives sent to numerous  
2 Securities Act Defendants that repeatedly informed them of SVB’s pervasive control weaknesses.  
3 While certain Securities Act Defendants claim they did not receive these letters, the Complaint  
4 amply pleads that all Securities Act Defendants had access to the same information underpinning  
5 the Federal Reserve’s findings. In all events, these protests amount to nothing more than a  
6 premature (and baseless) “due diligence” defense not applicable at the pleading stage.

7 Defendants also impermissibly dispute the Complaint’s factual allegations, including by  
8 cherry-picking out-of-context snippets of regulatory letters and pointing to materials outside the  
9 Complaint. *See* RJN Opp. In so doing, they ignore the Federal Reserve’s core findings, as well as  
10 the Ninth Circuit’s admonition that “it is improper to assume the truth of an incorporated document  
11 if such assumptions only serve to dispute facts stated in a well-pleaded complaint” because doing  
12 so contravenes the “prohibition against resolving factual disputes at the pleading stage.” *Khoja v.*  
13 *Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018)). Even if the Federal Reserve  
14 happened to give SVB a passing mark in a certain instance, that in no way excused Defendants  
15 from their own obligations—which they failed to satisfy—to find and accurately report the truth  
16 at the time of the Offerings. Indeed, while Defendants now conveniently attempt to attribute SVB’s  
17 demise solely to a “bank run,” the Federal Reserve concluded SVB’s collapse was “linked directly”  
18 to the rampant failures in SVB’s risk management, interest rate risk, and liquidity at issue.

19 Defendants also assert that the Offering Documents sufficiently disclosed all relevant risks.  
20 However, the Offering Documents did *not* disclose the rampant and well-documented control  
21 failures that existed. Defendants’ retort that they supposedly could not disclose supervisory  
22 findings is a red herring. The claims are not that the supervisory reports should have been  
23 disclosed, but rather that the key issues and warnings raised in those reports contradicted numerous  
24 assurances Defendants included in the Offering Documents. As the Ninth Circuit has repeatedly  
25 held, “once defendants chose to tout positive information to the market, they were bound to do so  
26 in a manner that wouldn’t mislead investors, including disclosing adverse information that cuts  
27 against the positive information.” *Schueneman v. Arena Pharms., Inc.*, 840 F.3d 698, 705-06 (9th  
28 Cir. 2016). Defendants also press strained arguments that the false statements are mere “puffery”

1 or cured by boilerplate risk warnings; however, these fact-intensive contentions disregard the  
2 allegations of the Complaint and cannot be resolved in their favor at this stage of the litigation.

3 The Securities Act Defendants' motion to dismiss should be denied.

4 **II. STATEMENT OF ISSUES TO BE DECIDED**

5 Whether the Complaint states a claim under the Securities Act.

6 **III. STATEMENT OF FACTS**

7 The Securities Act Defendants conducted eleven public offerings of SVB securities  
8 throughout 2021 and 2022, raising \$8 billion. ¶¶405. They completed these Offerings pursuant to a  
9 registration statement and prospectuses that contained virtually identical untrue statements and  
10 material omissions regarding the strength of the Bank's balance sheet and its controls over risk  
11 management, liquidity, and interest rate risk. ¶¶379-403. These representations were material to  
12 investors, particularly because SVB had just experienced unprecedented growth that increased the  
13 Bank's risk exposure and required enhanced risk management capabilities. ¶¶502-07. For the  
14 Offerings to succeed, it was imperative that the Offering Documents assure investors that the Bank  
15 maintained a healthy balance sheet and had robust internal controls in place. ¶405. The Offering  
16 Documents misrepresented these very issues.

17 ***Risk Management Controls.*** The Offering Documents misrepresented SVB's risk  
18 management controls, including e.g., that SVB "***ha[d] implemented a risk management***  
19 ***framework to identify and manage***" the Bank's "risk exposure" and that the Bank employed  
20 "various processes, systems, and strategies" designed to "***manage the types of risk to which we***  
21 ***are subject.***" ¶¶420-27; *see also* Dkt. 88-2 (Statement Nos. 1-4).

22 The truth was far different. Each of SVB's "three lines of defense," suffered from critical  
23 weaknesses. ¶¶466-90. The purported controls for the Bank's "First Line of Defense" were  
24 "inconsistent" and failed to account for risks impacting the Bank's performance. ¶¶467, 469. The  
25 Bank's Second Line of Defense—which was responsible for independently evaluating the First  
26 Line—suffered from severe deficiencies such that SVB had "no clear mechanism . . . to . . .  
27 challenge" the First Line. ¶¶467, 470-71. Indeed, the Federal Reserve ***and*** SVB ultimately  
28 concluded that the Bank's Chief Risk Officer at the time of the Offerings—who was responsible

1 for overseeing the Second Line of Defense—lacked the experience to oversee the Bank’s risk, with  
2 the Bank effectively having no Chief Risk Officer. ¶¶500-01. Finally, the “Third Line of Defense”  
3 was altogether broken: it did not perform adequate audits and could not reliably assess the  
4 effectiveness of SVB’s risk controls. ¶¶467, 472-87. Additionally, as the Federal Reserve  
5 concluded, SVB’s Board—which included many Securities Act Defendants—failed its required  
6 oversight over all lines of defense, including by failing to “hold senior management accountable”  
7 for “risk management weaknesses.” ¶¶488-90.

8 **Risk Models.** The Offering Documents assured that SVB employed robust risk models,  
9 stating, e.g., that SVB “*relied] on quantitative models to measure risks . . . to help manage*  
10 *certain aspects of our business* and to assist with certain business decisions, including ...  
11 estimating the effects of changing interest rates and other market measures on our financial  
12 condition and results of operations, and managing risk.” ¶¶428-29; Dkt. 88-2 (Statement Nos. 5-  
13 6).

14 In truth, the Bank’s risk models suffered from significant weaknesses, including that SVB  
15 lacked a sufficient model to “estimat[e] the effects of changing interest rates.” ¶¶508-12, 515-22.  
16 Moreover, even when SVB’s risk models predicted that “higher interest rates could have a  
17 devastating impact on the bank’s future earnings,” SVB’s executives simply “*changed the model’s*  
18 *assumptions*” to portray the false picture that rising interest rates would have only a “minimal  
19 impact” on the Bank. ¶¶519-21. These and other existing and known weaknesses subjected SVB  
20 to critical supervisory findings. The Bank’s employees and consultants warned about these same  
21 weaknesses, telling the Bank’s executives that “SVB was unable to generate real time or even  
22 weekly updates about what was happening to its securities portfolio.” ¶525.

23 **Interest Rate Risk Controls.** The Offering Documents highlighted how SVB supposedly  
24 “managed” and “monitored” its interest rate risk, which the Bank identified as its “primary market  
25 risk.” For example, they claimed that SVB “*dynamic[ally] assess[ed] interest rate sensitivity*”  
26 *using “a variety of interest rate scenarios, balance sheet forecasts and business strategies.”*  
27 ¶¶432-33. They further claimed that the Bank’s interest rate risk models were “based on historical  
28 balance and rate observations” and that SVB “*periodically reviewed and recalibrated*” those

1 models and assumptions “to ensure that they are representative of our understanding of existing  
2 behaviors.” ¶¶434-35; *see also* Dkt. 88-2 (Statement Nos. 7-9).

3 In reality, SVB’s risk models applied unrealistic economic conditions that did not  
4 appropriately assess the impact of changing interest rates. ¶¶516-18. Further, notwithstanding its  
5 exponential growth, SVB did not update its interest rate risk limits and instead doctored its models  
6 with “counterintuitive modeling assumptions.” ¶¶519-21. The Federal Reserve directly  
7 communicated these concerns, as did the Bank’s employees and consultants; nonetheless, SVB  
8 inexplicably failed to conduct a single internal audit to assess its interest rate risk. ¶¶523-26.

9 ***Liquidity Risk Controls.*** The Offering Documents also touted the Bank’s controls over  
10 liquidity risk. They assured investors that SVB “regularly assess[ed] the amount and likelihood of  
11 projected funding requirements through a review of [various] factors.” ¶¶436-38. They further  
12 described SVB’s purported “liquidity management process,” telling investors that SVB “***routinely***  
13 ***conduct[s] liquidity stress testing as part of our liquidity management practices.***” *Id.*; *see also*  
14 Dkt. 88-2 (Statement No. 10).

15 In truth, SVB’s liquidity risk management suffered from critical deficiencies. SVB set  
16 “inadequate” liquidity limits, and its tests did “not sufficiently stress [SVB]’s liquidity exposures.”  
17 ¶¶534, 539. Meanwhile, SVB’s “contingency funding plan” used to assess the Bank’s available  
18 liquidity in stress scenarios failed to: (i) project the Bank’s expected funding needs; (ii) account  
19 for how providers of contingency funds “would behave under stress”; (iii) identify SVB’s available  
20 contingency funds with accuracy; and (iv) tailor “early warning indicators” to SVB’s “liquidity  
21 risk profile.” ¶¶545-46. As a result, the Federal Reserve directly told SVB that it “was doing a bad  
22 job of ensuring that it would have enough easy-to-tap cash on hand in the event of trouble,” and  
23 the Bank’s employees corroborated the regulators’ conclusions. ¶¶533-35, 541-43, 549-50, 611.

24 ***“HTM” Securities.*** The Offering Documents further assured investors that SVB properly  
25 classified and accounted for tens-of-billions of dollars of long duration securities as held-to-  
26 maturity (“HTM”) securities. *See* Dkt. 88-2 (Statement Nos. 11-13). Although accounting  
27 standards typically require banks to recognize and report a security at “fair value” (i.e., its current  
28 market price), a “highly restrictive” exception under GAAP allows accounting for a security “at

1 cost” (i.e., its original purchase price) if and only if the entity has both the intent and the ability to  
2 hold the security to maturity. ¶¶562-63. Critically, to qualify for this narrow exception, a bank  
3 must have sufficient controls in place, and draw evidence from those controls, to allow it to reliably  
4 determine whether it can hold every such security to maturity. ¶¶555-61.

5 SVB lacked the ability to satisfy this demanding evidentiary showing required by GAAP.  
6 As a result, the Offering Documents misclassified tens-of-billions of dollars of investment  
7 securities as HTM and misrepresented that SVB’s financial statements complied with GAAP.  
8 ¶562. Former SVB employees explained that the Bank did not have *any* internal controls even to  
9 assess whether it could hold its HTM securities to maturity, and employees were *never even asked*  
10 to make such an assessment. ¶564. These misclassifications misled investors as to SVB’s balance  
11 sheet strength, affirmatively represented to investors that the fair value was *irrelevant* to SVB, and  
12 that changes in fair value did *not* impact SVB’s balance sheet. *See, e.g.*, ¶¶448, 557. Indeed, by  
13 the time of the final Offerings in April 2022, properly classifying these securities would have  
14 forced SVB to recognize nearly \$7 billion in losses. ¶¶552, 562-63; *see also* §XV.E.

15 *Certifications of Financials and Controls.* The Offering Documents also included  
16 certifications as to the accuracy and completeness of SVB’s financial statements and the existence  
17 of effective internal controls. Dkt. 88-2 (Statement Nos. 14-18). Contrary to these certifications,  
18 SVB’s internal controls were ineffective and its financials lacked the information required by  
19 Regulation S-K, with the Federal Reserve concluding that the “deficiencies in [SVB’s] processes  
20 and reporting negatively affected its ability to provide timely, independent assurance that the  
21 Firm’s risk management, governance and internal controls were operating effectively.” ¶473.

22 \* \* \*

23 In March 2023—less than a year after the final Offering—SVB collapsed, which the  
24 Federal Reserve concluded was “linked directly” to the rampant failures in SVB’s risk  
25 management, interest rate risk, and liquidity discussed above. ¶465. In fact, shortly after the final  
26 Offering in 2022, the Federal Reserve privately told SVB that it would institute an enforcement  
27 action “to hold [the Bank’s] board and executive management accountable for addressing the root  
28 cause deficiencies contributing to ineffective governance and risk management.” ¶531. The

1 enforcement action was driven by the Federal Reserve’s “supervisory assessments of [the Bank]  
 2 in 2020, 2021, and 2022”—i.e. during the times of the Offerings—which “identified significant  
 3 deficiencies in [SVB’s] oversight by [its] boards of directors and senior management and [its] risk  
 4 management program, . . . liquidity risk management program, and internal audit program.” ¶608.

#### 5 **IV. ARGUMENT**

6 On a motion to dismiss, the Court “must . . . accept all factual allegations . . . as true” and  
 7 in the light most favorable to the plaintiff. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308,  
 8 322 (2007). A district court “ruling on a motion to dismiss is not sitting as a trier of fact,” and “so  
 9 long as the plaintiff alleges facts to support a theory that is not facially implausible, the court’s  
 10 skepticism is best reserved for later stages of the proceedings.” *In re Gilead Scis. Sec. Litig.*, 536  
 11 F.3d 1049, 1057 (9th Cir. 2008). “[A] court should assume [the allegations’] veracity and then  
 12 determine whether they plausibly give rise to an entitlement to relief.” *In re Alphabet, Inc. Sec.*  
 13 *Litig.*, 1 F.4th 687, 698 (9th Cir. 2021).

14 Scienter is not an element of a Section 11 claim, regardless of whether the Complaint  
 15 “sound[s] in fraud” or Rule 9(b) applies. *See Brown v. China Integrated Energy, Inc.*, 2013 WL  
 16 12124124, at \*12 (C.D. Cal. Apr. 22, 2013). Moreover, at most, “Rule 9(b) applies only to those  
 17 defendants also accused in the underlying fraud.” *In re Wa. Mut., Inc. Sec., Deriv. & ERISA Litig.*,  
 18 259 F.R.D. 490, 504 (W.D. Wash. 2009); *Flynn v. Sientra, Inc.*, 2016 WL 3360676, at \*17 (C.D.  
 19 Cal. June 9, 2016) (claim against underwriter defendants “need only meet the standards imposed  
 20 by Rule 8”). In any event, the Complaint readily suffices whether evaluated under Rule 8 or 9(b).<sup>2</sup>

#### 21 **A. THE COMPLAINT ADEQUATELY ALLEGES CLAIMS UNDER** 22 **SECTION 11 OF THE SECURITIES ACT**

23 As the Ninth Circuit has explained, Section 11 “places a relatively minimal burden on a  
 24

25 <sup>2</sup> Courts routinely refuse to apply Rule 9(b) in connection with complaints such as this one, which  
 26 (i) disclaims allegations of fraud as to each Securities Act Defendant (¶¶370, 649); (ii) separates  
 27 the Securities Act and Exchange Act claims; (iii) involves a distinct theory of liability against  
 28 largely different defendants (¶¶369-723); and (iv) does not incorporate by reference the Exchange  
 Act allegations. Defendants’ cited cases are easily distinguished. *See* Mot. at 10 (citing *In re Eargo,*  
*Inc. Sec. Litig.*, 656 F. Supp. 3d 928, 938 (N.D. Cal. 2023) (plaintiffs “expressly incorporate[d]  
 and reallege[d]” Exchange Act allegations).

1 plaintiff [and] [t]he section was designed to assure compliance with the disclosure provisions of  
 2 the Act by imposing a stringent standard of liability on the parties who play a direct role in a  
 3 registered offering.” *Hildes v. Arthur Andersen LLP*, 734 F.3d 854, 859 (9th Cir. 2013) (quoting  
 4 *Huddleston*, 459 U.S. at 382 (internal footnote omitted)). As long as “a plaintiff purchased a  
 5 security issued pursuant to a registration statement, he need only show a material misstatement or  
 6 omission to establish his *prima facie* case.” *Id.* The Complaint more than satisfies this standard.

7 **1. The Offering Documents Contained Actionable False and Misleading**  
 8 **Material Statements and Omissions**

9 “Section 11 . . . creates two ways” for a plaintiff to state a claim: “one focusing on what  
 10 the statement says and the other on what it leaves out.” *Omnicare, Inc. v. Laborers Dist. Council*  
 11 *Constr. Indus. Pension Fund*, 575 U.S. 175, 179 (2015).<sup>3</sup> A statement or omission is misleading  
 12 “if it would give a reasonable investor the ‘impression of a state of affairs that differs in a material  
 13 way from the one that actually exists.’” *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985  
 14 (9th Cir. 2008). “Generally, whether a public statement is misleading, or whether adverse facts  
 15 were adequately disclosed is a mixed question to be decided by the trier of fact.” *Baker v. SeaWorld*  
 16 *Ent., Inc.*, 423 F. Supp. 3d 878, 936 (S.D. Cal. 2019). “[O]nly if ‘reasonable minds’ could not  
 17 disagree that the challenged statements were not misleading should the district court dismiss under  
 18 12(b)(6).” *Warshaw v. Xoma Corp.*, 74 F.3d 955, 959 (9th Cir. 1996).

19 **a. Risk Management (Statement Nos. 1-4)**

20 During the Offerings, SVB was experiencing massive growth, and investors sought  
 21 assurance that SVB had put in place the controls to manage that growth. In turn, Defendants  
 22 repeatedly reassured investors that they had created and implemented a risk management  
 23 framework “*to identify and manage our risk exposure*,” and that this framework was “*designed*  
 24 *to manage the types of risk to which*” SVB was subject. ¶¶420-21. Defendants further touted the  
 25 importance of risk management and assured investors that risk management was “*focused on*” and  
 26

27 <sup>3</sup> Defendants raise no challenges particular to the Section 12(a)(2) claims, and “[t]he ‘misstatement  
 28 or omission’ requirement under Section 12(a)(2) is materially identical to that under Section 11.”  
*Crews v. Rivian Auto., Inc.*, 2023 WL 4361098, at \*16 (C.D. Cal. July 3, 2023).

1 “*carried out*” by SVB’s Board, with the Bank’s “*risk*, compliance, legal, finance, and *internal*  
2 *audit functions*” working together to “*identify and manage risks applicable*” to SVB and to  
3 “*enhance*” SVB’s “*control environment.*” ¶¶424-27. Defendants buttressed these statements with  
4 hypothetical risk “warnings” representing that SVB’s risk management framework *was* effective,  
5 claiming that “*if*” SVB’s risk management were ineffective, then SVB “*could*” become subject to  
6 regulatory action. ¶¶422-23. *See also* Dkt. 88-2 (Statement Nos. 1-4).

7 These statements were untrue and omitted material facts. SVB’s “risk management  
8 framework” did *not* “identify and manage [SVB’s] risk exposure” and was *not* “designed to  
9 manage the types of risk to which [SVB is] subject.” SVB’s risk management framework “lack[ed]  
10 needed traction,” and its risk management program was “*not effective*” and “*missing several*  
11 *elements of a sound . . . risk management program,*” with “material financial weaknesses in  
12 practices or capabilities” that presented a “significant risk” and *threatened “the Firm’s prospects*  
13 *for remaining safe and sound.*” ¶466. Contrary to the claims in the Offering Documents: (i) each  
14 of SVB’s three lines of defense suffered from “thematic, root cause deficiencies” (e.g., ¶¶466-90);  
15 (ii) SVB’s officers and directors responsible for overseeing risk management suffered from  
16 “fundamental weaknesses” in their oversight (e.g., ¶¶495-501); (iii) SVB did not set appropriate  
17 risk limits when evaluating its risk profile (e.g., ¶¶491-94); (iv) SVB failed to maintain appropriate  
18 controls as it grew leading up to the Offerings (e.g., ¶¶502-07); and (v) SVB used woefully  
19 unreliable risk models that raised a “safety and soundness concern” (e.g., ¶¶508-12).

20 Courts routinely find similar misstatements concerning a bank’s risk management  
21 actionable. *See, e.g., In re Countrywide Fin. Corp. Deriv. Litig.*, 554 F. Supp. 2d 1044, 1054, 1072  
22 (C.D. Cal. 2008) (statements that defendant “actively managed credit risk” and was “actively  
23 monitoring the delinquency and default experience” actionable); *Karimi v. Deutsche Bank*  
24 *Aktiengesellschaft*, 607 F. Supp. 3d 381, 387-90, 393 (S.D.N.Y. 2022) (statements that defendant  
25 “developed and implemented” various “measures to identify, manage and control” risk  
26 actionable); *In re MF Glob. Holdings Ltd. Sec. Litig.*, 982 F. Supp. 2d 277, 317 (S.D.N.Y. 2013)  
27 (statements that internal controls were “robust,” “effective,” “adequately,” “comprehensive,” and  
28 “designed to monitor, evaluate, and manage the risks [MF Global] assume[d]” actionable); *see*

1 *also In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 949 (9th Cir. 2023) (risk warnings actionable  
2 if presented “as purely hypothetical when that exact risk had already transpired”).

3 Defendants’ arguments to escape liability—before any discovery has even occurred—fail.  
4 **First**, Defendants assert (Mot. at 12) that the Complaint relies “almost entirely” on hindsight from  
5 supervisory reports issued after the Offerings. Not so. Numerous Federal Reserve reports cited in  
6 the Complaint were issued *before or contemporaneously with the Offerings*.<sup>4</sup> Plaintiffs are  
7 entitled to the “reasonable inference that no changes had been made in the interim.” *In re Bofl*  
8  *Holding, Inc. Sec. Litig.*, 2017 WL 2257980, at \*11-12 (S.D. Cal. May 23, 2017). Plus, as to those  
9 post-Offerings reports, the Complaint details how they described deficiencies in SVB’s systems  
10 and controls *as of the time of the Offerings*. See, e.g., ¶¶510-11 (2019 FRB Letter commenting  
11 that SVB management “may rely on stress testing results that do not accurately reflect the risk  
12 appetite”), ¶¶538, 674 (FRB Letter from shortly after the first Offering concluding that “SVB’s  
13 liquidity stress test time horizons do not currently provide short term insight” and that SVB failed  
14 to “fully implement[] the [lines of defense risk management] framework”).<sup>5</sup> Unlike in Defendants’  
15 cases, SVB’s control weaknesses existed *at the time of the Offerings* and were known to many of  
16 the Defendants (and subject to due diligence from the others) *contemporaneously with the*  
17  *Offerings*. See Mot. at 12 (citing *C.D.T.S. v. UBS AG*, 2013 WL 6576031, at \*4 (S.D.N.Y. Dec.  
18 13, 2013) (unlike here, *no* reports cited in complaint from before or contemporaneous with  
19 offerings); *In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, 2012 WL 3826261, at \*8 (S.D.N.Y.  
20 Sept. 4, 2012) (plaintiff “fail[ed] to cite *any* contemporaneous support”).

21 **Second**, Defendants incorrectly argue (Mot. at 13) that the Offering Documents adequately  
22 disclosed the relevant risks, through statements in them such as “there is no assurance that our risk  
23 management framework . . . will be effective under all circumstances or that it will adequately  
24 identify, manage or mitigate any risk or loss.” But Defendants’ purported “disclosures” (see, e.g.,  
25

26 <sup>4</sup> See, e.g., ¶¶466 & n.411, 510-11, 529, 538.

27 <sup>5</sup> To the extent Defendants make the same argument (Mot. at 8, 9, 11-12) as to other categories of  
28 misstatements, that argument fails because the Complaint details how the Federal Reserve’s  
reports discussed deficiencies in those other controls at the time of the Offerings. See *supra* at 11  
n.4; see also ¶¶466 & n.412, 512, 515, 530, 605.

1 Mot. at 12-13) spoke in exclusively hypothetical truisms, such as SVB “could suffer unexpected  
2 losses” *if* its “risk management framework is not effective,” *as if* there were no specific  
3 deficiencies in SVB’s risk management framework and *as if* the risks were being appropriately  
4 managed and mitigated. These disclosures never informed investors that the contingency of an  
5 ineffective risk management framework *already existed*. Likewise, Defendants’ assertions that  
6 SVB’s risk models “may not capture or fully express the risks [SVB] face[s]” (*id.*) gave the false  
7 impression that with respect to risks that were foreseeable, the risk models *were* accurate, reliable,  
8 and updated to model and mitigate such risks. These “risk warnings” too were themselves  
9 misleading and, accordingly, do not absolve Defendants of liability. *See Facebook*, 87 F.4th at  
10 949; *Karimi*, 607 F. Supp. 3d at 396 (“disclaimers that the [b]ank might fail to implement its  
11 policies cannot sufficiently cure the misinformation conveyed by descriptions of policies and  
12 procedures”); *see also SeaWorld*, 423 F. Supp. 3d at 936 (“Generally, whether a public statement  
13 is misleading, or whether adverse facts were adequately disclosed is a mixed question to be decided  
14 by the trier of fact.”).

15 The cases Defendants cite are inapposite. For example, *In re Citigroup Sec. Litig.*, 2023  
16 WL 2632258, at \*19 (S.D.N.Y. Mar. 24, 2023) (Mot. at 12) undermines Defendants’ argument.  
17 That court credited Citigroup’s warning that it may face “increased risk” of regulatory action from  
18 noncompliance with risk management requirements where there *was no indication* at Citigroup  
19 that its controls were ineffective when the warning was made (and would not be for another five  
20 years). *Id.* By contrast, the “warnings” here misled about a hypothetical future “risk” of ineffective  
21 controls when, in fact, the controls *already* were ineffective. *See* §§XV.A-B. Likewise, the risk  
22 warning in *Yaroni v. Pintec Tech. Holdings Ltd.* (Mot. at 13-14) was found inactionable because  
23 management had *affirmatively disclosed* that it had “*not* completed an assessment of the  
24 effectiveness of [its] internal control[s].” 600 F. Supp. 3d 385, 398-99 (S.D.N.Y. 2022). SVB made  
25 no comparable disclosure; to the contrary, the Offering Documents repeatedly *affirmed* the  
26 effectiveness of its internal control environment.<sup>6</sup>

27 \_\_\_\_\_  
28 <sup>6</sup> Defendants’ other cases are equally unpersuasive. Similar to *Yaroni*, the defendant in *Chen v.*

1 **Third**, Defendants’ argument that certain statements are mere “puffery” raises, at most, a  
 2 “mixed question of law and fact that ordinarily is best resolved by juries and therefore typically  
 3 not a matter for Rule 12(b)(6) dismissal.” *S.E.C. v. Leslie*, 2008 WL 3876169, at \*6 (N.D. Cal.  
 4 Aug. 19, 2008). Dismissal on “puffery” grounds is appropriate only as to statements that are “so  
 5 obviously unimportant to a reasonable investor that reasonable minds could not differ on the  
 6 question of their unimportance,” considering the “context in which the statements were made.”  
 7 *Mulligan v. Impax Lab’ys, Inc.*, 36 F. Supp. 3d 942, 966-67 (N.D. Cal. 2014). “[E]ven ‘general  
 8 statements of optimism, when taken in context, may form a basis for a securities fraud claim’ when  
 9 those statements address specific aspects of a company’s operation that the speaker knows to be  
 10 performing poorly.” *In re Quality Sys., Inc. Sec. Litig.*, 865 F.3d 1130, 1143-44 (9th Cir. 2017).

11 Particularly given the market’s focus on SVB’s risk management—including because of  
 12 its exponential growth, rising interest rates, and uninsured deposits—the Bank’s misstatements  
 13 about its controls go well beyond “puffery.” *See, e.g., Karimi*, 607 F. Supp. 3d at 387-90;  
 14 *Vancouver Alumni Asset Holdings Inc. v. Daimler AG*, 2017 WL 2378369, at \*13 (C.D. Cal. May  
 15 31, 2017) (given “the alleged importance” of clean diesel vehicles to auto company’s business, it  
 16 was “plausible that a reasonable investor would view [the] failure to live up to this environmentally  
 17 friendly claim as significantly altering the ‘total mix’ of information available”).<sup>7</sup>

18  
 19 *Missfresh Ltd.* explicitly “diclos[ed] one weakness in its internal controls” and even “candidly  
 20 acknowledge[ed] that it had not conducted a comprehensive assessment of those controls.” 2023  
 21 WL 7289750, at \*12 (S.D.N.Y. Nov. 6, 2023). SVB made no such disclosures in this case. *See*  
 22 *also, e.g., In re Restoration Robotics, Inc. Sec. Litig.*, 417 F. Supp. 3d 1242, 1257-58 (N.D. Cal.  
 23 2019) (simply that statements “must be read in [] context”); *Lomingkit v. Apollo Educ. Grp. Inc.*,  
 24 2017 WL 633148, at \*22 (D. Ariz. Feb. 16, 2017) (unlike here, plaintiffs “provide[d] no allegation  
 25 specifying why any particular statement is false”).

26 <sup>7</sup> By contrast, the cases relied on by Defendants had no comparable context. *See Cement &*  
 27 *Concrete Workers Dist. Council Pension Fund v. Hewlett Packard Co.*, 964 F. Supp. 2d 1128,  
 28 1139 (N.D. Cal. 2013) (statements in standard business conduct brochures); *In re JPMorgan Chase*  
*Deriv. Litig.*, 2014 WL 5430487, at \*22-23 (E.D. Cal. Oct. 23, 2014) (complaint merely alleged  
 that statements were misleading because “[defendant] later faced litigation and liability for failures  
 in financial discipline”); *In re Constellation Energy Grp., Inc. Sec. Litig.*, 738 F. Supp. 2d 614,  
 631 (D. Md. 2010) (company “miscalculated its downgrade collateral requirements” on just “one  
 occasion”); *Lomingkit*, 2017 WL 633148, at \*23 (statement describing “variety of systems” was  
 too vague and other “expressions of support” found inactionable); *Berg v. Velocity Fin., Inc.*, 2021



1 month, Section 11 imposes liability for “pure omissions.” *See Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 144 S. Ct. 885, 891 (2024). Moreover, the Offering Documents touted SVB’s risk controls as effective, requiring them to “disclos[e] adverse information that cuts against the positive information” to avoid misleading investors as to their undisclosed deficiencies. *Arena Pharms.*, 840 F.3d at 705-06; *see also, e.g., Todd v. STAAR Surgical Co.*, 2016 WL 6699284, at \*10 (C.D. Cal. Apr. 12, 2016) (literally true statements that created false “impression” that there would be no serious impediments to FDA approval of medical device where regulator had “observed multiple violations of its regulations that could delay” the sale of the device found actionable). Defendants’ cited cases are inapposite. Mot. at 19. For example, unlike in *In re Dropbox Sec. Litig.*—in which the defendants “regularly disclosed” information needed to calculate the alleged omissions—SVB’s investors had no way to determine that SVB’s risk controls were ineffective. 2020 WL 6161502, at \*6 (N.D. Cal. Oct. 21, 2020).<sup>9</sup>

13 ***Fifth***, Defendants erroneously attempt to justify their omissions (Mot. at 19) by stating *ipse dixit* that it is “typical” for banks “to have numerous outstanding MRAs and MRIAs at any given time.” This factual assertion is both improper and, in any event, incomplete, as it says nothing about the severity of the MRIAs and MRAs other banks were subject to, or how long they were open. Defendants again attempt to rely on the decision in *Citigroup* (Mot. at 20), but in that case there were *no* specific allegations of risk management deficiencies contemporaneous with defendants’ statements. By contrast, the Complaint alleges in detail numerous existing failures in SVB’s risk management controls that conflicted with the Offering Documents’ concurrent assurances. Nor is there any basis for Defendants’ assertion (Mot. at 20) that the challenged omissions are improperly “reverse-engineered” from “regulatory observations in the post-Offerings time period.” As detailed in the Complaint, most of the Federal Reserve’s reports at

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25 <sup>9</sup> Defendants’ other cases likewise are inapt. For example, the quoted portion of *ECA, Loc. 134 IBEW Joint Pension Tr. of Chicago v. JP Morgan Chase Co.* concerned puffery, not failure to disclose material information that made other statements misleading. 553 F.3d 187, 206 (2d Cir. 2009). *See also In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 880 n.8 (9th Cir. 2012) (analyzing Section 10(b) claim, rather than Section 11, which imposes liability for pure omissions); *In re Progenity, Inc. Sec. Litig.*, 2021 WL 3929708, at \*5 (S.D. Cal. Sept. 1, 2021) (statutory deadline for defendant to disclose challenged information had not lapsed).

1 issue preceded or were contemporaneous with the Offerings, and even those issued after the  
2 Offerings described SVB’s controls *as of the time* of the Offerings. *See supra* at 11 nn.4-5.

3 **b. Risk Models (Statement Nos. 5-6)**

4 Defendants further assured investors that SVB “*relied] on quantitative models to measure*  
5 *risks and to estimate certain financial values*” and “*assist with certain business decisions,*”  
6 including “*estimating the effects of changing interest rates.*” ¶¶428-29. Once again, Defendants  
7 issued merely hypothetical “warnings” telling the market only that those models “*may* not be  
8 effective or fully reliable.” *Id.*; *see also* Dkt. 88-2 (Statement Nos. 5-6).

9 These statements were false, misleading, and omitted material facts because SVB’s risk  
10 models *were* incapable of performing the tasks that Defendants claimed. The Bank’s models  
11 suffered from significant weakness that posed “safety and soundness concern[s]” and “prevent[ed]  
12 firm management and the board of directors from making informed capital planning decisions.”  
13 *See* ¶¶508-12. For instance, SVB did not have effective models or controls in place to “*estimat[e]*  
14 *the effects of changing interest rates.*” ¶¶508-12, 515-22. SVB did not put in place any effective  
15 monitoring program for each model, and instead made unfounded assumptions. ¶¶508-12.  
16 Additionally, when SVB’s models breached their risk limits, rather than adjusting SVB’s risk  
17 profile, SVB instead just doctored the models to hide the impact of increasing interest rates on the  
18 Bank. ¶¶519-21. As a result, SVB was subject to numerous regulatory consequences including  
19 various MRIs and MRAs from the Bank’s regulators. ¶¶508-12; *see also* §§XV.A-C.

20 Courts routinely find these sorts of statements actionable because they create a misleading  
21 impression that the defendant could assess and manage the risks to which it was exposed, when,  
22 in truth, the company’s “models were incapable of evaluating the risks presented.” *In re Am. Int’l*  
23 *Grp., Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 530 (S.D.N.Y. 2010) (defendants “materially  
24 misled the market” by expressing confidence in ability to assess risks); *see also, e.g., In re Bear*  
25 *Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 489-90, 494 (S.D.N.Y.  
26 2011) (statements that company “regularly evaluate[d] and enhance[d]” risk models actionable  
27 when models had not been “properly updated” to predict specific risks); *Primavera*  
28 *Familienstiftung v. Askin*, 173 F.R.D. 115, 124 (S.D.N.Y. 1997) (statements describing

1 “sophisticated, proprietary, quantitative analytical methods to model the behavior of highly  
2 esoteric CMO derivatives” actionable where defendants “did not know the duration of their  
3 portfolios and had ‘no way of finding out’”).

4 Defendants wrongly argue (Mot. at 15-16) that these statements were mere “puffery”—  
5 i.e., corporate fluff. Defendants are wrong. Indeed, one of the very cases cited by Defendants  
6 confirms that their argument fails: in *Kalin v. Semper Midas Fund, Ltd.*, cited by Defendants (Mot.  
7 at 16), the court specifically discussed a similar statement as made in the Offering Documents  
8 here—that the defendant “engage[d] in rigorous qualitative and quantitative analysis, including  
9 but not limited to: . . . rigorous cash flow modeling, scenario analysis and stress testing.” 2021 WL  
10 5906053, at \*5 (N.D. Cal. Dec. 14, 2021) (dismissing on other grounds). In that case, the court  
11 found that defendants’ risk model statements in offering documents were “specific factual  
12 assertion[s] which could be established or disproved,” (*id.*): similar to statements including  
13 whether SVB’s “quantitative” models could “measure risks,” “estimate certain financial values,”  
14 “assist with certain business decisions,” and “estimate[e] the effects of changing interest rates.”  
15 Compare ¶¶508-12, 515-22, with *In re Upstart Holdings, Inc. Sec. Litig.*, 2023 WL 6379810, at  
16 \*13 (S.D. Ohio Sept. 29, 2023) (statement that model had been “refined and updated” inactionable  
17 where allegations were “simply that the AI model was not able to adapt ‘dynamically’”).

18 **c. Interest Rate Risk Controls (Statement Nos. 7-9)**

19 Defendants also made numerous representations to investors concerning SVB’s interest  
20 rate risk controls, including SVB’s ability to monitor interest rate risk. For example, the Offering  
21 Documents assured investors that interest rate risk—which SVB recognized as the single-biggest  
22 risk facing the Bank—was “*managed*” by SVB’s Asset/Liability Committee (“ALCO”), that  
23 SVB’s interest rate risk metrics were “*monitored on an ongoing basis*,” and that “*interest rate*  
24 *risk [was] managed*” through various “*strategies*.” ¶¶430-31. In addition, Defendants made  
25 specific representations concerning a simulation model that was designed to assess interest rate  
26 risk, telling investors that the “*simulation model provides a dynamic assessment of interest rate*  
27 *sensitivity*” and that they “*review[ed] [the] interest rate risk position and sensitivity to market*  
28 *interest rates regularly*.” ¶¶432-33. Finally, Defendants represented to the market that SVB’s

1 interest rate risk models were “*based on historical balance and rate observations*” and that, to  
2 ensure their accuracy, both the models and the assumptions underlying the models were  
3 “*periodically reviewed and recalibrated as needed to ensure that they are representative of our*  
4 *understanding of existing behaviors.*” ¶¶434-35. *See also* Dkt. 88-2 (Statement Nos. 7-9).

5 These statements were false, misleading, and omitted material facts because SVB did not  
6 have the controls necessary to assess how the Bank’s investment portfolio would respond to  
7 increases in interest rates. ¶¶515-18, 522, 525-26. The simulations and models that SVB used  
8 were, as the Federal Reserve found, “not reliable” and “directionally inconsistent” with SVB’s  
9 financial performance, further exacerbating the deficiencies in SVB’s interest rate risk controls.  
10 ¶¶515-17. Those models were not even able to perform necessary sensitivity analyses and used  
11 only “the most basic” interest rate risk measurements. *Id.* Moreover, contrary to Defendants’  
12 statements that relevant metrics were “monitored on an ongoing basis,” SVB’s risk limits for its  
13 interest rate risk models had not been reviewed for years before the Offerings, and when SVB  
14 breached its models’ limits (¶518), SVB’s executives changed the model to minimize the effect of  
15 increased interest rates on SVB, “rather than managing the actual risks” (e.g., ¶¶519-21).

16 Courts routinely find actionable misstatements, such as those here, concerning a bank’s  
17 monitoring of its business and risks. *See, e.g., Countrywide*, 554 F. Supp. 2d at 1054, 1072  
18 (statements that defendant was “actively monitoring the delinquency and default experience”  
19 actionable); *Karimi*, 607 F. Supp. 3d at 387-88, 393 (statements that risk management included  
20 “regular reviews” and “ongoing monitoring and regular review of all existing business  
21 relationships” actionable). Defendants’ arguments to the contrary fail.

22 **First**, Defendants contend (Mot. at 16) that these statements were “puffery.” This argument  
23 again improperly disregards the context of Defendants’ misstatements, including that the Offering  
24 Documents identified interest rate risk as the Bank’s “primary market risk.” ¶513; *Impax Lab ’ys*,  
25 36 F. Supp. 3d at 966 (“[T]he Court may not assess the statements . . . in a vacuum, ‘plucking the  
26 statements out of their context to determine whether the words, taken *per se*, are sufficiently vague  
27 so as to constitute puffery.”). Defendants’ cited cases involve markedly different contexts. *See*  
28 Mot. at 16 (citing *Kalin*, 2021 WL 5906053, at \*5 (unlike here, plaintiff “concede[d]” that the

1 alleged omission was “disclosed to some extent”).

2 **Second**, Defendants argue (Mot. at 17) that these statements “merely describ[e] what  
3 [SVB’s] systems were at the time of each of the Offerings.” But the Offering Documents’  
4 statements regarding SVB’s implementation and use of interest rate controls contradicted the truth.  
5 As the Federal Reserve found, SVB’s interest rate risk controls were “not reliable,” were  
6 “directionally inconsistent with SVB’s financial performance,” and had not been reviewed or  
7 updated for years. ¶¶515-18, 522, 525-26.

8 **Third**, Defendants also wrongly contend (Mot. at 17) that the interest rate risk control  
9 statements are not actionable because the Complaint does not allege that a group other than ALCO  
10 “managed” their interest rate risk. This argument again ignores the Complaint, which alleges that  
11 interest rate risk was not “managed” by *any* group at SVB; nor did *any* group at SVB “monitor[]”  
12 “[r]elevant metrics and guidelines” “on an ongoing basis.” Compare ¶¶513-26, with *JPMorgan*  
13 *Chase*, 2014 WL 5430487, at \*22 (unlike here, statement that board was “responsible for the  
14 oversight of management” not actionable where plaintiffs conceded that defendant’s board *did*  
15 manage the bank’s business).

16 **d. Liquidity and Liquidity Management (Statement No. 10)**

17 Defendants also specifically represented to investors that SVB maintained effective  
18 controls and oversight over its liquidity, including representations that SVB “*regularly assess[ed]*”  
19 its funding requirements based on “present and forecasted market and economic conditions,” and  
20 further that SVB’s ALCO “*provide[d] oversight to the liquidity management process.*” ¶¶436-38.  
21 Defendants further assured that SVB “*routinely conduct[ed] liquidity stress testing*” as “part of  
22 [SVB’s] liquidity management practices.” ¶¶436-38. *See also* Dkt. 88-2 (Statement No. 10).

23 These statements were false, misleading, and omitted material facts that were required to  
24 offset the positive impression made from touting SVB’s liquidity controls to investors. SVB’s  
25 liquidity and liquidity risk management practices suffered from foundational shortcomings in the  
26 “key elements” necessary for SVB’s “longer term financial resiliency” and failed to keep pace  
27 with SVB’s liquidity risk profile. ¶¶528-31, 544-47. Defendants’ statements were also untrue and  
28 omitted material facts due to deficiencies—identified by both the Federal Reserve and SVB’s own

1 employees—in the Bank’s liquidity risk monitoring, limits framework, risk models, stress testing,  
2 contingency funding plan, and overall governance and oversight. *See* ¶¶528-50.

3 Courts have repeatedly held misstatements such as these actionable. *See, e.g., MF Glob.,*  
4 982 F. Supp. 2d at 317-18 (statements about “capital and liquidity management” and that company  
5 had a “strong” liquidity actionable, where complaint alleged that company faced “substantial strain  
6 on its capital and liquidity”).

7 Defendants’ argument that the liquidity control statements were “puffery” fail for the same  
8 reasons discussed *supra* at 13-14, 18. SVB did not “merely describ[e] . . . [SVB’s] systems,” (Mot.  
9 at 17) but falsely assured investors that it “regularly assess[ed] . . . projected funding requirements”  
10 and “routinely conduct[ed] liquidity stress testing.” ¶¶528-43. Defendants’ contention (Mot. at 17)  
11 that these statements are not actionable because no “other body” other than ALCO is alleged to  
12 have managed SVB’s liquidity again mischaracterizes the Complaint, which alleges—based on  
13 Federal Reserve findings and other evidence—that *no one* at SVB actually “provid[ed] oversight  
14 to the liquidity management process,” as stated in the Offering Documents. ¶¶527-50.

15 **e. HTM Classification and Accounting (Statement Nos. 11-13)**

16 The Offering Documents also improperly represented that SVB had the “*positive intent*  
17 *and ability*” to hold tens-of-billions of dollars in long duration investment securities, including that  
18 SVB had assessed “*future liquidity needs and sources of funding*” when “assessing the ability to  
19 hold these securities to maturity.” ¶¶439-43. *See also* Dkt. 88-2 (Statement Nos. 11-13). Based on  
20 these representations, the Offering Documents improperly classified these securities under the  
21 “highly restrictive” HTM classification, and thus the financial statements accounted for these  
22 securities at cost, *not* at fair value—as is ordinarily the case. This impacted SVB’s financial  
23 metrics, including comprehensive income and capital ratios. ¶557.

24 These statements were false, misleading, and omitted material facts. In truth, SVB could  
25 *not* determine that it had the positive intent and ability to hold each of those securities to maturity  
26 because there were *no* internal controls to assess the ability to hold to maturity (*see* ¶¶562-70),  
27 SVB could *not* reliably assess its future liquidity needs (*see supra* at 19-20), and SVB could *not*  
28 reliably assess its needs in response to interest rate changes (*see supra* at 18-19).

1 SVB’s misclassification of its securities as “HTM” and its representation that it had the  
2 positive intent and ability to hold those securities to maturity are actionable. *See, e.g., In re New*  
3 *Century*, 588 F. Supp. 2d 1206, 1214, 1226, 1239 (C.D. Cal. 2008) (sustaining Section 11 claims  
4 based on failure to properly value RMBS securities and record reserves); *In re RAIT Fin. Trust*  
5 *Sec. Litig.*, 2008 WL 5378164, at \*7, 10 (E.D. Pa. 2008) (sustaining Section 11 claims based on  
6 failure to properly value assets and record loan loss reserves). Defendants’ arguments fail.

7 **First**, Defendants argue (Mot. at 23) that GAAP did not impose any requirement that they  
8 “reliably” establish the positive intent and ability to hold its securities to maturity. Said another  
9 way, Defendants’ argument is that this Court should rule as a matter of law that **unreliable**  
10 determinations suffice under GAAP. Unsurprisingly, Defendants cite no caselaw supporting their  
11 position. *Cf. Bear Stearns*, 763 F. Supp. 2d at 491-92 (company used “flawed models that would  
12 produce unreliable and skewed results” in violation of GAAP such that “the results produced by  
13 those models and reported to investors are actionable misstatements”).

14 **Second**, Defendants’ argument (Mot. at 23) that the accounting rules did not require SVB  
15 to anticipate “extremely remote disaster scenarios” is a strawman. Plaintiffs do not allege—nor do  
16 they need to—that GAAP required SVB to anticipate a bank run. The Complaint amply alleges  
17 that (i) Defendants were required to collect specific evidence to assess the requisite intent and  
18 ability for the narrow exception for HTM securities, and (ii) they did not have the evidence needed  
19 to make that determination. ¶¶562-70. Therefore, SVB’s financial statements violated GAAP.

20 Once again, Defendants attempt to confuse the issues (Mot. at 23) by pointing to SVB’s  
21 disclosure of the HTM securities’ “fair value.” But contrary to Defendants’ assertions, the  
22 Complaint **never** alleges (nor need it) that the fair value of the HTM securities was “hidden.”  
23 Rather, SVB’s financial statements violated GAAP by improperly classifying tens of billions of  
24 dollars of investment securities as “HTM” and by failing **to account** for changes in fair value when  
25 presenting SVB’s financial performance. ¶557. By misclassifying the securities as HTM, the  
26 Offering Documents affirmatively represented to investors that the fair value was **irrelevant** to  
27 SVB, and that changes in fair value did **not** impact SVB’s balance sheet. ¶557.

28 **Third**, Defendants wrongly argue (Mot. at 23) that the Complaint does not allege “how a

1 company must evaluate whether it can hold securities to maturity.” But Plaintiffs include detailed  
 2 allegations—including accounting guidance from SVB’s auditor KPMG—specifically describing  
 3 the showing required for HTM classification. *See, e.g.*, ¶¶562-70. Plaintiffs also include detailed  
 4 allegations about SVB’s inability to gauge its ability to hold its HTM securities to maturity due to  
 5 deficiencies in SVB’s liquidity and interest rate risk controls. *See supra* at 18-20.

6 ***Fourth***, Defendants attempt (Mot. at 24) to recast SVB’s financial misstatements as a mere  
 7 “mismanagement claim.” But SVB did not simply “reach[] the wrong conclusion.” Rather, using  
 8 ***no*** reliable evidence, Defendants made actionable misrepresentations. “[T]his is neither a case  
 9 second-guessing decisions by management nor one alleging ‘fraud by hindsight’; rather, the  
 10 shareholders have specifically identified facts omitted by [the Defendants.]” *Wells Fargo*, 12 F.3d  
 11 at 927.<sup>10</sup>

12 ***Fifth***, Defendants wrongly characterize (Mot. at 24) the HTM misclassification as a mere  
 13 subjective opinion. SVB’s GAAP violations are actionable statements of fact. *See, e.g., In re Daou*  
 14 *Sys., Inc.*, 411 F.3d 1006, 1020 (9th Cir. 2005). The deficiencies in SVB’s controls necessarily  
 15 made its HTM classifications inappropriate under GAAP, including because SVB lacked controls  
 16 to (i) assess whether SVB could in fact hold its HTM securities to maturity, (ii) assess SVB’s “need  
 17 for liquidity,” and (iii) manage SVB’s exposure to interest rate changes. *See* §§XV.C-E; ¶¶516-  
 18 26, 564-68, 586-89. Even assuming SVB’s HTM classifications were opinions, they are ***still***  
 19 misleading because any purported “opinion” that SVB could hold the securities to maturity did not  
 20 “fairly align[] with the information in [its] possession.” *Omnicare*, 575 U.S. at 189.

21 ***Sixth***, GAAP did not require—and Plaintiffs do not allege that Defendants needed—a  
 22 “crystal ball.” *See* Mot. at 24. Rather, the HTM representations were untrue when made because  
 23 they lacked an evidentiary basis at that time for the HTM classification. Defendants’ suggestion  
 24 that the Complaint needed to allege “at what point in time and at what levels SVB could no longer  
 25

26 \_\_\_\_\_  
 27 <sup>10</sup> Neither of Defendants’ cases (Mot. at 24) holds that a company can misstate its financial results  
 28 this way. *See Polycom*, 87 F. Supp. at 966 (internal controls not ineffective simply because one  
 person stole from company); *In re Software Publ’g. Sec. Litig.*, 1994 WL 261365, at \*7 (N.D. Cal.  
 Feb. 2, 1994) (historical results were ***accurately*** stated).

1 hold the securities to maturity” (Mot. at 25) thus misses the point. Nor can Defendants hide behind  
 2 their purported “risk warnings” that SVB “used various models and processes, as well as the risk  
 3 associated with its models” (*id.* at 24) because—for the reasons described above—those  
 4 hypothetical “risk warnings” were, *themselves*, false and misleading. *Supra* at 11-12.

5 **f. Internal Controls (Statement Nos. 14-16)**

6 The Offering Documents also falsely certified that SVB’s disclosure controls and internal  
 7 controls over financial reporting were “effective.” ¶¶444-56. In truth, SVB’s internal controls were  
 8 ineffective and could not provide reasonable assurance that material information required to be  
 9 disclosed by SVB was collected, communicated, and properly disclosed to investors. SVB lacked  
 10 effective controls over liquidity risk management (*see* ¶¶548-50), interest rate risk management  
 11 (*see* ¶¶525-26), and to determine how SVB’s investment portfolio would respond to increased  
 12 interest rates (*see* ¶¶515-18, 525-26). As the Federal Reserve told SVB, these and other  
 13 deficiencies “negatively affected its ability to provide timely, independent assurance” that SVB’s  
 14 “internal controls were operating effectively.” *See* ¶¶472-87; *see generally* §§XV.A-E.

15 Defendants’ statements to investors about SVB’s internal controls, which were “directly at  
 16 odds with [defendant’s] alleged conduct,” are actionable. *In re Goldman Sachs Grp., Inc. Sec.*  
 17 *Litig.*, 2014 WL 2815571, at \*5 (S.D.N.Y. June 23, 2014). Courts routinely sustain misstatements  
 18 concerning a company’s internal controls, and Defendants’ arguments fail. To start, Defendants  
 19 incorrectly make the factual assertion (Mot. at 17-18) that Plaintiffs “cannot” “state a claim based  
 20 on” SVB’s SOX certifications because those were limited to “financial” controls, which—  
 21 according to Defendants—are “different from the controls” at issue. But Defendants’ self-serving  
 22 assertions cannot be credited at this stage and, in any event, are wrong: the controls are *not*  
 23 mutually exclusive. In fact, the deficient controls at issue here “directly impacted the accuracy of  
 24 SVB’s financial reporting.” ¶528; *see also, e.g.*, ¶¶448, 508-12, 515-27, 528-51; *supra* at 20-23.

25 Additionally, Defendants wrongly assert (Mot. at 18) that the SOX certifications cannot  
 26 support Section 11 claims because the certifications were “personal certifications of the CEO and  
 27 CFO.” This assertion—which they do not support with *any* legal authority—ignores Section 11’s  
 28 “expansive . . . virtually absolute liability” for misstatements in the Offering Documents. *Hildes*,

1 734 F.3d at 860. It also ignores that SVB’s CEO and the CFO *are* named Securities Act  
 2 Defendants, further undermining Defendants’ contention (Mot. at 18) that the SOX certification  
 3 were not “made by Securities Act Defendants.” Nor is there any legal requirement that the CEO  
 4 and CFO subjectively disbelieve the certifications—in fact the opposite is true.

5 **g. Failure to Disclose Information Required by Regulation S-K**  
 6 **(Statement Nos. 17-18)**

7 In failing to disclose the control deficiencies described above, *supra* at 23-24, the Offering  
 8 Documents also omitted the impacts of such deficiencies on SVB’s liquidity and interest rate risk.  
 9 *See* Dkt. 88-2 (Statement Nos. 17-18). These omissions of information required by Regulation S-  
 10 K are actionable. *See, e.g., Macquarie*, 144 S.Ct. at 891 (“Congress imposed liability for pure  
 11 omissions in §11(a) of the Securities Act of 1933.”); *Correa v. Liberty Oilfield Servs., Inc.*, 548 F.  
 12 Supp. 3d 1069, 1082-83 (D. Colo. 2021) (Item 303 omissions actionable because industry trend  
 13 statements were the “result of the material omissions about the present, not the future”).

14 Each of Defendants’ arguments in response fails. *First*, Defendants’ self-serving assertion  
 15 (Mot. at 21) that they were prohibited from disclosing “the content of the letters [SVB] received  
 16 from the Regulators” is irrelevant, even if true. Plaintiffs nowhere allege that Defendants should  
 17 have disclosed the actual Federal Reserve communications; rather, they were required to disclose  
 18 SVB’s significant control weaknesses—which existed irrespective of the Federal Reserve’s  
 19 findings. *See supra* at 8-24. Numerous other sources corroborate these facts, including more than  
 20 a dozen credible former SVB employees and subsequent public reporting. *See, e.g.*, ¶¶525-26.  
 21 Meanwhile, the Underwriter Defendants’ self-serving factual assertion that they supposedly never  
 22 received the Federal Reserve’s letters (Mot. at 8) cannot be credited at this stage and, in any event,  
 23 is irrelevant in light of their access to the *same information* underlying the regulators’  
 24 conclusions—including SVB’s employees, records, policies, and reports. ¶¶620-24.

25 *Second*, Defendants urge (Mot. at 21) the Court to rule as a matter of law that these control  
 26 failures were so “trivial” as to excuse them from compliance with their Regulation S-K disclosure  
 27 obligations. The argument is preposterous: these control failures concern the very failings that the  
 28 Federal Reserve concluded were “directly linked” to SVB’s collapse. ¶644.

1 **Third**, Defendants incorrectly contend (Mot. at 22) that Plaintiffs have not established the  
 2 “knowledge” purportedly required to demonstrate a violation of Item 303. But the Complaint  
 3 specifically alleges how the information was communicated to Securities Act Defendants or  
 4 otherwise available to them. ¶¶633-34, 640. Moreover, unlike the *Citigroup* case (Mot. at 22),  
 5 Plaintiffs “identif[y] what specific matters were contained in the [reports] or what the [regulators]  
 6 discussed with [defendants.]” 2023 WL 2632258, at \*17. Defendants’ other cited cases are  
 7 likewise inapposite. *Restoration Robotics*, 417 F. Supp. 3d at 1264 (defendants “did not know of  
 8 problems” forming basis of Item 303 claim); *In re Pivotal Sec. Litig.*, 2020 WL 4193384, at \*8  
 9 (N.D. Cal. July 21, 2020) (no allegations regarding knowledge).

10 **Finally**, Defendants assert (Mot. at 22-23) that they satisfied Item 305 based on a passing  
 11 reference to “[s]ensitivity analysis” in the Offering Documents. But Defendants’ passing reference  
 12 to a “sensitivity analysis” omitted material facts—including e.g. that SVB’s use of models were  
 13 “not reliable” and “directionally inconsistent” with SVB’s financial performance. ¶573. Such  
 14 omissions concerned present and historical facts and are *not* protected under the PSLRA safe  
 15 harbor. *See Mulderrig v. Amyris, Inc.*, 492 F. Supp. 3d 999, 1021 n.15 (N.D. Cal. 2020).

## 16 **2. Defendants’ Arguments As To Certain Directors Fail**

17 Finally, Defendants contend (Mot. at 25) that certain directors should be excused from  
 18 liability based on their board memberships. These arguments fail. Defendants Clendening and  
 19 Dunbar signed the relevant Registration Statement, and 15 U.S.C. § 77k(a) “provid[es] for liability  
 20 on behalf of those *who signed the relevant registration statement*[.]” Mot. at 25. Resigning from  
 21 a board does not insulate a director from liability, and Defendants offer no legal support otherwise.  
 22 *See Brown*, 2013 WL 12124124, \*12 (C.D. Cal. Apr. 22, 2013). Meanwhile, Defendant Burr is  
 23 liable for Offerings conducted while she *was* on the Board, which she joined in 2021.<sup>11</sup> ¶394.

## 24 **V. CONCLUSION**

25 The Securities Act Defendants’ motion should be denied. If the Court grants any part,  
 26 Plaintiffs respectfully request leave to amend under Rule 15. *See Daou*, 411 F.3d at 1013.

27  
 28 <sup>11</sup> Defendants’ only challenge (Mot. at 25) to the Section 15 claim is that the Complaint does not  
 plead an underlying violation, which fails. *See supra* at 8-25.

1 Dated: May 3, 2024

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28 <sup>12</sup> In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories.