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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re FASTLY, INC. SECURITIES
LITIGATION.

Case No. 20-cv-06024-PJH

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

Re: Dkt. No. 70

Defendants' motion to dismiss lead plaintiff's consolidated complaint came on for hearing before this court on November 4, 2021. Plaintiff appeared through his counsel, Laurie L. Largent. Defendants appeared through their counsel, Jessica Valenzuela Santamaria and Brett H. De Jarnette. Having read the papers filed by the parties and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS defendants' motion, for the following reasons.

I. BACKGROUND

This is a putative class action involving allegations of securities fraud. Defendant Fastly, Inc. ("Fastly") is an "edge" cloud platform that enables companies to deliver digital content to users from Fastly's servers rather than their own. Compl. ¶ 2. Traditionally, websites and digital applications rely on one centralized server to process data for users all over the world, resulting in lag times and poor user experiences. Dkt. 70-6 at 4. Fastly solves this problem by locating data centers close to end users (the "edge"), which increases internet speed, security, and reliability of digital content for a better user experience. Compl. ¶ 2; Dkt. 70-6 at 5. Defendant Joshua Bixby is Fastly's CEO.

1 Defendant Adriel Lares was Fastly’s CFO during the putative class period. Plaintiff
2 Andrew Zenoff was appointed lead plaintiff by the court on February 10, 2021, replacing
3 the originally named plaintiff, Marcos Betancourt. Dkt. 61. He earlier presented evidence
4 that he lost \$105,848 due to defendants’ alleged misconduct. Dkt. 42 at 6.

5 **A. About Fastly’s Business**

6 Fastly earns revenue based on how much internet traffic its nearly 2,000
7 customers route through its content delivery network (“CDN”). Compl. ¶¶ 10, 66, 115.
8 During the Class Period, Fastly had nearly 300 enterprise customers—those generating
9 over \$100,000 a year in revenue. Compl. ¶ 69. Most customers have no commitment to
10 use Fastly’s platform and can reduce or terminate usage at any time and for any reason.
11 Compl. ¶ 66. As a result, customer usage can fluctuate in any given quarter for any
12 number of reasons. Compl. ¶ 66. Fastly does not know how much traffic a customer will
13 route through its platform until the traffic has traveled through its CDN. See Ex. 5 at 20,
14 64 (Dkt. 70-6 at 12, 36); Ex. 8 at 47-50 (Dkt. 70-9 at 16-19); Ex. 16 at 35 (Dkt. 70-17 at
15 11). Further, Fastly’s customers are not obligated to route all traffic through Fastly’s
16 platform; rather, customers often utilize two or more competing CDNs. Id.

17 **B. Fastly Announces Strong First Quarter 2020 Results**

18 Fastly reported strong performance in the first quarter of 2020 as an
19 unprecedented global pandemic forced people to stay at home, increasing general
20 internet traffic. Compl. ¶¶ 53, 56. On May 6, 2020, the first day of the Class Period,
21 Fastly’s CEO, Joshua Bixby, published a shareholder letter reporting first quarter results.
22 Bixby reported that the company generated \$63 million in revenue that quarter,
23 exceeding its projected range of \$58-60 million, and representing a 38% increase over
24 the first quarter of 2019. Compl. ¶ 53; Ex. 6 at 6 (Dkt. 70-7 at 7). Bixby attributed
25 Fastly’s revenue growth to adoption of its platform by new customers, and expansion and
26 increased spending by existing customers across all geographies, which were “bolstered
27 by increased internet traffic from social distancing measures.” Compl. ¶¶ 53, 56. Bixby
28 expected increased traffic attributed to the COVID-19 pandemic to “continue into Q2 and

1 future periods.” Compl. ¶ 56. Based on its optimism, Fastly increased its full-year
2 revenue guidance for 2020 from \$255-265 million to \$280-290 million. Compl. ¶¶ 53, 55;
3 Ex. 6 at 16 (Dkt. 70-7 at 17). It also estimated \$70-72 million in revenues for the second
4 quarter. Ex. 6 at 17 (Dkt. 70-7 at 18).

5 That same day, Fastly held a conference call with investment analysts to further
6 discuss its first quarter results. One analyst asked whether Fastly’s second quarter
7 revenue guidance incorporated “assumptions for bad debt or contract repricings.” Compl.
8 ¶ 59. Adriel Lares, Fastly’s then-CFO, responded that Fastly’s enterprise customers
9 “seem to be in good shape” and “we’re not seeing anything at least concerning from a
10 sort of the Q2 perspective.” Compl. ¶ 59.

11 **C. Fastly Warns Investors About Risks to Its Business and Customer**
12 **Usage**

13 Despite its optimism, Fastly repeatedly warned investors of the risks associated
14 with its usage-based model. Before the start of the Class Period, Fastly filed its Form 10-
15 K with the Securities and Exchange Commission (“SEC”), warning investors that
16 customers could reduce usage at any time and for any reason. Specifically, Fastly
17 warned:

18 Because our customers’ minimum usage commitments for our
19 platform are relatively low compared to their expected usage, it
20 can be easy for certain customers to reallocate usage or switch
21 from our platform to an alternative platform altogether. In
addition, even if our customers expand their usage of our
platform, we cannot guarantee that they will maintain those
usage levels for any meaningful period of time.

22 Fastly similarly cautioned:

23 Our usage and revenue may decline or fluctuate as a result of
24 a number of factors, including customer budget constraints,
25 customer satisfaction, changes in our customers’ underlying
26 businesses, changes in the type and size of our customers,
pricing changes, competitive conditions, the acquisition of our
customers by other companies, and general economic
conditions.

27 Ex. 5 at 20 (Dkt. 70-6 at 12). Fastly also disclosed that regulatory scrutiny of international
28 customers, specifically those in China, could impact its revenue. Ex. 5 at 27 (Dkt. 70-6 at

1 18). These customers represented almost 30% of its revenues:

2 If the U.S. government prohibits our current or potential
3 customers from doing business with us, whether through policy,
4 regulations or laws, we could face direct liability or our delivery
5 of content by our platform may be blocked. For example, the
6 U.S. government has expressed concerns about the ability of
7 companies operating in China to do business in the U.S. or with
8 U.S. companies, and 29% of our total revenue was generated
9 from customers outside of the United States for the year ended
10 December 31, 2019. As a result, we could lose the ability to
11 contract with current or potential customers, which could harm
12 our business and reputation.

13 Id. Fastly reiterated these warnings in its Forms 10-Q filed with the SEC during the Class
14 Period. See e.g., Ex. 8 at 47, 55 (Dkt. 70-9 at 16, 24).

15 **D. The Trump Administration’s Chatter About Regulating Chinese Trade**

16 Consistent with Fastly’s risk disclosures that the U.S. government had expressed
17 concerns about business with China, President Trump hinted at regulating trade with
18 China since taking office. Ex. 1 at 2 (Dkt. 70-2 at 3). For example, in 2019, amidst what
19 media dubbed a “spiraling trade war,” Trump unsuccessfully “ordered” through a Twitter
20 post that U.S. companies cease trade with China. Id. He also considered prohibiting all
21 Chinese companies from listing on U.S. stock exchanges. Ex. 2 at 1 (Dkt. 70-3 at 2).
22 This chatter intensified through early 2020 in the face of political tension surrounding the
23 U.S. presidential election and Trump’s blaming of China for the COVID-19 pandemic.
24 One of many companies caught in the crossfire was TikTok, a video streaming
25 application owned by Chinese technology company ByteDance. Ex. 3 at 1 (Dkt. 70-4 at
26 2). From January 2018 through June 2020, as it became the social media application du
27 jour for young people, TikTok’s monthly U.S. users grew to nearly 80 million. Ex. 11 at 2
28 (Dkt. 70-12 at 3).

29 In November 2019, the Committee on Foreign Investment (“CFIUS”) began
30 investigating TikTok for potential national security risks. Ex. 3 at 1 (Dkt. 70-4 at 2).
31 CFIUS investigations are routine and rarely result in government action. See Ex. 9 at 4
32 Dkt. 70-10 at 14). For example, from 2010 to 2019, out of 810 CFIUS investigations, only
33 five (0.6%) resulted in presidential action. Id. Even an article cited in the complaint

1 opined that, despite the CFIUS investigation, TikTok would “most likely” be allowed to
2 continue operating in the U.S. Ex. 4 at 2 (Dkt. 70-5 at 3). TikTok repeatedly denied any
3 influence by foreign governments, stating: “TikTok is led by an American CEO, with
4 hundreds of employees and key leaders across safety, security, product, and public
5 policy here in the U.S. We have no higher priority than promoting a safe and secure app
6 experience for our users . . . We have never provided user data to the Chinese
7 government, nor would we do so if asked.” Ex. 10 at 1 (Dkt. 70-11 at 2). Nonetheless, to
8 ensure “cyber awareness,” some branches of the U.S. military restricted the use of
9 TikTok on government-issued devices. Compl. ¶¶ 23-25. The Department of Defense
10 similarly “urged Pentagon employees to uninstall the app . . .” on government-issued
11 devices. Id.

12 After Fastly reported first quarter results in May 2020, the U.S. government’s
13 attention on TikTok dramatically intensified. In June 2020, TikTok users reportedly
14 sabotaged a President Trump campaign rally in Oklahoma, where 20,000 people
15 attended despite a purported one million RSVPs. Ex. 11 at 3 (Dkt. 70-12 at 4). That
16 ostensibly drew President’s Trump ire, as a few weeks later, then-Secretary of State Mike
17 Pompeo told Fox News that the Trump administration was “looking at” a ban of TikTok in
18 the U.S. Compl. ¶ 27. And on August 3, 2020, President Trump, for the first time, said
19 he planned to ban TikTok unless a U.S. company acquired it. Ex. 11 at 1-2 (Dkt. 70-12 at
20 2-3).

21 **E. Fastly Discloses TikTok as a Customer When Reporting Q2 Results**

22 Given the mounting concern and increased scrutiny of TikTok since Fastly had
23 reported its first quarter earnings in May, when it announced second quarter results on
24 August 5, Fastly disclosed that TikTok had been its largest customer during Q2 (13% of
25 revenue) and for the first half of 2020 (12% of revenue). Compl. ¶ 74. Although Fastly
26 was not required to disclose its largest customer mid-year, Bixby explained that Fastly
27 “chose to do this voluntarily. And we did it because we think it’s information that we want
28 to be really transparent with our investors and make sure everyone knows exactly where

1 we're at." Ex. 17 at 11 (Dkt. 70-18 at 13). Bixby similarly warned that, "any ban of the
2 TikTok app by the U.S. would create uncertainty around our ability to support this
3 customer" and "would have an impact on our business." Ex. 13 at 5 (Dkt. 70-14 at 7).
4 And while Fastly expressed a belief that it was "in a position to backfill the majority of this
5 traffic in case [TikTok is] no longer able to operate in the U.S." (Ex. 13 at 5 (Dkt. 70-14 at
6 7)), Bixby was clear, when asked about the ability to backfill, that he "wouldn't want to . . .
7 say that that's something we can totally guarantee." Ex. 18 at 10 (Dkt. 70-19 at 12).

8 The company also reported that Q2 results were better than anticipated, with \$75
9 million in revenues, exceeding its projection of \$70-72 million. Ex. 6 at 16; Ex. 12 at 6
10 (Dkt. 70-7 at 17; Dkt. 70-13 at 7). Fastly also reported an increase in its customer base
11 from 1,837 to 1,951, with enterprise customers increasing from 297 to 304. Ex. 12 at 7
12 (Dkt. 70-13 at 8). Bixby explained "[t]hese results were driven primarily by continued
13 strong fundamentals of our core business, which were further enhanced by elevated
14 traffic levels across the internet and our platform as people continued to stay home." Id.

15 Fastly remained optimistic about its business: "[d]espite the economic uncertainty,
16 we remain confident in the demand for our mission-critical services and the continued
17 momentum of our business for the remainder of 2020 and the years to come." Ex. 12 at 7
18 (Dkt. 70-13 at 8). Fastly cautioned investors that its projections and beliefs about future
19 performance "may not materialize, and actual results in future periods are subject to risks
20 and uncertainties that could cause actual results to differ materially from those projected."
21 Ex. 12 at 18; Ex. 13 at 4 (Dkt. 70-13 at 19; Dkt. 70-14 at 6). Lares also made clear that
22 Fastly's guidance assumed TikTok's usage would be "status quo." Compl. ¶ 77.

23 On August 6, 2020, the day after Fastly disclosed to investors that TikTok was a
24 customer, President Trump issued an Executive Order (the "Order") purporting to ban
25 any transaction between U.S. companies and ByteDance, to be effective 45 days later.
26 Ex. 15 at 1-2 (Dkt. 70-16 at 2-3); Ex. 14 (questioning whether President Trump had "legal
27 authority to ban the apps") (Dkt. 70-15). Fastly filed its Form 10-Q for Q2 2020 the next
28 day and included specific risk factors addressing the potential impact of this Order:

1 The loss of one or more key customers or a reduction in usage
2 by any major customers would reduce our revenues. For
3 example, we cannot be certain what actions the U.S. or another
4 country's government may take with respect to certain of our
5 customers that operate in China, target China as a market, or
6 have strong business ties to China. ByteDance, the operator of
7 the TikTok application, operates in and has strong business ties
8 to China and is our top customer, accounting for 13% and 12%
9 of revenue for the three and six months ended June 30, 2020,
10 respectively. On August 6, 2020, President Trump issued an
11 executive order banning transactions with ByteDance, effective
12 45 days after the execution of the order. The TikTok application
13 has also been the subject of bans in other countries. While we
14 are still assessing the impact of these bans, the ban of the
15 TikTok application by the U.S. government, and any other
16 governments, creates uncertainty around our ability to support
17 ByteDance. The loss of this customer's traffic could have a
18 negative impact on our business.

19 Compl. ¶ 83. Following these disclosures, Fastly's stock dropped from \$108.92 to \$89.64
20 per share. Compl. ¶ 136.

21 **F. Fastly Misses Third Quarter Revenue Guidance**

22 On October 14, 2020, the last day of the Class Period, and two weeks before
23 Fastly was scheduled to announce its third-quarter results, it issued a press release
24 projecting lower revenues for Q3 than it had previously anticipated: \$70-71 million,
25 compared to \$73.5-75.5 million. Compl. ¶ 98. Fastly also withdrew its prior revenue
26 guidance for 2020. Ex. 19 at 1 (Dkt. 70-20 at 2). It attributed its changed expectations to
27 two factors. First, "[due] to the impacts of the uncertain geopolitical environment, usage
28 of Fastly's platform by [TikTok] did not meet expectations." Compl. ¶ 98. Second,
"[d]uring the latter part of the third quarter, a few customers had lower usage than Fastly
had estimated." Compl. ¶ 98. Following this announcement, Fastly's stock dropped from
\$123.18 to \$89.70 per share. Compl. ¶ 140. Fastly later reported third-quarter revenue
of \$71 million on October 28, 2020. Compl. ¶ 107.

G. Fastly Reports Strong 2020 Revenue and TikTok's Ban Is Enjoined

Fastly recovered from its Q3 revenue miss and reported \$291 million revenues for
2020. Ex. 24 at 17 (Dkt. 70-25 at 18). This fell within the \$290-300 million guidance
range given on August 5 that was withdrawn on October 14.

1 In late 2020, the U.S. District Court for the Eastern District of Pennsylvania
2 enjoined the U.S. from banning TikTok. Marland v. Trump, 2020 WL 6381397 (E.D. Pa.
3 Oct. 30, 2020). The U.S. District Court for the District of Columbia then barred the
4 removal of TikTok from U.S. app stores, finding that such removal may “likely exceed” the
5 bounds of the law. TikTok Inc. v. Trump, 490 F. Supp. 3d 73, 80 (D.D.C. 2020).

6 **H. This Litigation**

7 This action was initiated by plaintiff Marcos Betancourt on August 27, 2020.
8 Dkt. 1. Thereafter, another case was related to this one: Rami Habib v. Fastly, Inc., et al.
9 (4:20-cv-06454-JST). Dkt. 27. The cases were consolidated by the court pursuant to
10 stipulation. Dkt. 53. Following briefing for appointment of lead plaintiff in the
11 consolidated action, the court appointed Andrew Zenoff as lead plaintiff and Robbins
12 Geller Rudman & Down LLP as lead counsel. Dkt. 61.

13 On April 12, 2021, lead plaintiff filed the complaint now at issue, seeking to
14 represent individuals who acquired Fastly stock between May 6 and October 14, 2020
15 (the “Class Period”). Dkt. 68. The complaint alleges that Fastly, Bixby, and Lares
16 (together, “defendants”), violated Section 10(b) of the Securities Exchange Act of 1934
17 (15 U.S.C. §§ 78j(b)) and SEC Rule 10b-5 (17 CFR § 240.10b-5). Specifically, plaintiff
18 claims that various statements by defendants in May 2020 about Fastly’s revenue
19 growth, enterprise customers, and demand for its platform were misleading because the
20 company did not disclose that TikTok was a customer (the “May Statements”). Compl.
21 ¶ 3. Plaintiff also claims that after Fastly disclosed TikTok as a customer in August 2020,
22 defendants continued to mislead investors about the company’s ability to backfill lost
23 TikTok traffic (the “August Statements”). Compl. ¶ 5. The complaint asserts claims
24 under Section 20(a) against Bixby and Lares as alleged “control persons” of Fastly.

25 Defendants now ask the court to dismiss the consolidated complaint in its entirety
26 and with prejudice. Defendants additionally request judicial notice of several documents.

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1 **II. REQUEST FOR JUDICIAL NOTICE**

2 In connection with their motion to dismiss, defendants request judicial notice of
3 Fastly’s filings with the Securities and Exchange Commission (“SEC”), transcripts of
4 earnings calls and investor presentations, an analyst report, published articles, and
5 information on a U.S. government website.

6 **A. Unopposed Exhibits**

7 Plaintiff does not object to the court taking judicial notice of Exhibits 1 and 2, which
8 are public articles. These two documents are referenced in defendants’ recounting of the
9 facts as context for the Trump Administrations’ public statements regarding trade with
10 China.

- 11 • Exhibit 1: Zeke Miller, Powerful, Obscure Law Is Basis For Trump ‘Order’ On
12 Trade, Associated Press, August 25, 2019, [https://apnews.com/article/asia-pacific-](https://apnews.com/article/asia-pacific-donald-trump-ap-top-news-france-international-news-be18b8619cde4658a418dda4f416968a)
13 [donald-trump-ap-top-news-france-international-news-](https://apnews.com/article/asia-pacific-donald-trump-ap-top-news-france-international-news-be18b8619cde4658a418dda4f416968a)
14 [be18b8619cde4658a418dda4f416968a](https://apnews.com/article/asia-pacific-donald-trump-ap-top-news-france-international-news-be18b8619cde4658a418dda4f416968a) (last visited 11/23/2021).
- 15 • Exhibit 2: Ana Rapoport and Ana Swanson, White House Weighs Blocking
16 Chinese Companies From U.S. Exchanges, The New York Times, September 27,
17 2019, [https://www.nytimes.com/2019/09/27/us/politics/trump-china-stock-](https://www.nytimes.com/2019/09/27/us/politics/trump-china-stock-exchange.html)
18 [exchange.html](https://www.nytimes.com/2019/09/27/us/politics/trump-china-stock-exchange.html) (last visited 11/23/2021).

19 The court grants defendants’ unopposed request for notice of these documents.
20 They are considered for the context of their dates and the timing of the statements by the
21 U.S. government, not necessarily for the truth of their contents.

22 **B. Incorporation by Reference**

23 “Although generally the scope of review on a motion to dismiss for failure to state a
24 claim is limited to the Complaint, a court may consider evidence on which the complaint
25 necessarily relies if: (1) the complaint refers to the document; (2) the document is central
26 to the plaintiffs’ claim; and (3) no party questions the authenticity of the copy attached to
27 the 12(b)(6) motion.” Daniels-Hall v. Nat’l Educ. Ass’n, 629 F.3d 992, 998 (9th Cir. 2010)
28 (internal quotation marks and citations omitted). The court may “treat such a document

1 as ‘part of the complaint, and thus may assume that its contents are true for purposes of
2 a motion to dismiss under Rule 12(b)(6).” Marder v. Lopez, 450 F.3d 445, 448 (9th Cir.
3 2006) (quoting United States v. Ritchie, 342 F.3d 903, 908 (9th Cir. 2003)).

4 Here, defendants request the court to consider Exhibits 3-8 and 10-23
5 incorporated in the complaint by reference. Plaintiff does not object to incorporation by
6 reference of Exhibits 3-8 and 10-23 for the limited purpose of identifying the contents of
7 those documents; however, plaintiff urges the court to reject defendants’ efforts to have
8 the court resolve issues of fact based these documents as it would be improper at this
9 pleading stage. Defendant counters that the court may consider the documents
10 incorporated by reference in order to resolve factual disputes and plaintiff fails to identify
11 any well-pled allegations that are improperly disputed. Defendants offer, “the
12 incorporation by reference doctrine is designed ‘to prevent plaintiffs from highlighting only
13 the portions of certain documents that support their claims, while omitting portions of
14 those documents that weaken their claims.” Jones v. Micron Tech. Inc., 400 F. Supp. 3d
15 897, 905 (N.D. Cal. 2019). Defendants have the better argument. The following exhibits
16 are those that the court considers incorporated by reference.

- 17 • Exhibit 3: Tony Romm and Drew Harwell, Marco Rubio Seeks U.S. Government
18 Probe Of TikTok Over Chinese Censorship Concerns, The Washington Post,
19 October 9, 2019. This article is referenced in the complaint at ¶ 18.
- 20 • Exhibit 4: Geoffrey Gertz, Is TikTok A Threat To National Security?, The
21 Washington Post, November 11, 2019. This article is referenced in the complaint
22 at ¶ 21.
- 23 • Exhibit 5: copy of excerpts of Fastly’s Annual Report for the year ended December
24 31, 2019, filed with the Securities and Exchange Commission (“SEC”) on Form 10-
25 K on March 4, 2020. This Form 10-K is referenced in the complaint at ¶¶ 12, 114,
26 136, and 151.
- 27 • Exhibit 6: press release and shareholder letter attached to and filed with the SEC
28 on Form 8-K on May 6, 2020. This Form 8-K is referenced in the complaint at ¶¶

- 1 52-56.
- 2 • Exhibit 7: transcript of Fastly’s earnings call for the first fiscal quarter of 2020 on
- 3 May 6, 2020. This transcript is referenced in the complaint at ¶¶ 57-61.
- 4 • Exhibit 8: copy of excerpts of Fastly’s Quarterly Report for the quarter ended
- 5 March 31, 2020, filed with the SEC on Form 10-Q on May 8, 2020. This Form 10-
- 6 Q is referenced in the complaint at ¶¶ 33-34, 63-69, 124.
- 7 • Exhibit 10: Timothy Bella, Pompeo Says U.S. ‘Certainly Looking At’ Banning
- 8 TikTok And Other Chinese Apps, The Washington Post, July 7, 2020. This article
- 9 is referenced in the complaint at ¶ 27.
- 10 • Exhibit 11: Naeem Aslam, Trump Says He’s Considering a Ban on TikTok in the
- 11 U.S., Yahoo! Finance, July 8, 2020. This article is referenced in the complaint at ¶
- 12 29.
- 13 • Exhibit 12: press release and shareholder letter attached to and filed with the SEC
- 14 on Form 8-K on August 5, 2020. This Form 8-K is referenced in the complaint at
- 15 ¶¶ 79, 116.
- 16 • Exhibit 13: transcript of Fastly’s earnings call for the second fiscal quarter of 2020
- 17 on August 5, 2020. This transcript is referenced in the complaint at ¶¶ 5, 35, 38,
- 18 73-79, 117, and 136.
- 19 • Exhibit 14: Tali Arbel, Trump Bans Dealings With Chinese Owners Of TikTok,
- 20 Wechat, Associated Press, August 6, 2020. This article is referenced in the
- 21 complaint at ¶ 29.
- 22 • Exhibit 15: Exec. Order No. 13,942, 85 FR 48637 (2020). This Executive Order,
- 23 signed August 6, 2020, and titled “Addressing the Treat Posed by TikTok, and
- 24 Taking Additional Steps to Address the National Emergency With Respect to the
- 25 Information and Communications Technology and Services Supply Chain” is
- 26 referenced in the complaint at ¶ 29, 36, and 138.
- 27 • Exhibit 16: excerpts of Fastly’s Quarterly Report for the period ended June 30,
- 28 2020, filed with the SEC on Form 10-Q, on August 7, 2020. This Form 10-Q is

- 1 referenced in the complaint at ¶¶ 83-89, 114-15.
- 2 • Exhibit 17: transcript of Fastly’s presentation at the Oppenheimer 23rd Annual
3 Technology, Internet & Communications Conference on August 11, 2020. This
4 transcript is referenced in the complaint at ¶¶ 91-92.
- 5 • Exhibit 18: transcript of Fastly’s presentation at the KeyBanc Capital Markets
6 Future Of Technology Series on August 12, 2020. This transcript is referenced in
7 the complaint at ¶¶ 93-95.
- 8 • Exhibit 19: press release attached to and filed with the SEC on Form 8-K on
9 October 14, 2020, titled Fastly Provides Preliminary Third Quarter Revenue
10 Results. This press release is referenced in complaint at ¶¶ 41, 97-98, 140.
- 11 • Exhibit 20: copy of excerpts from Fastly’s Registration Statement, on Form S-3,
12 filed with the SEC on October 15, 2020. This Form S-3 is referenced in the
13 complaint at ¶ 106.
- 14 • Exhibit 21: report published by Piper Sandler on October 22, 2020, titled
15 Downgrading To UW: Challenging Dynamics A Tough “Byte” To Swallow. This
16 report is referenced in complaint at ¶¶ 104-05, 114, and 141.
- 17 • Exhibit 22: press release and shareholder letter attached to and filed with the SEC
18 on Form 8-K on October 28, 2020. This Form 8-K is referenced in the complaint at
19 ¶¶ 107-08. 25.
- 20 • Exhibit 23: Dan Rayburn, An Update On TikTok’s DIY CDN Strategy And The
21 Impact On Third-Party CDNs, Seeking Alpha, February 10, 2021. This article is
22 referenced in the complaint at ¶¶ 38, 113.

23 The court grants the request for incorporation by reference given that plaintiff does not
24 object, the documents were referenced in the complaint, and plaintiff does not dispute
25 their authenticity.

26 **C. Opposed Exhibits**

27 Defendants additionally request that the court take judicial notice of Exhibits 9, 24,
28 25, and 26 because they will aid the court in ruling on the motion. Defendants request

1 judicial notice of SEC reports that are not referenced in the FAC. “The court may
2 judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally
3 known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily
4 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R.
5 Evid. 201(b). District courts regularly take judicial notice of SEC filings in the context of
6 securities litigation. See Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049,
7 1064 n.7 (9th Cir. 2008).

- 8 • Exhibit 9: copy of excerpts of a report issued by the Committee on Foreign
9 Investment in the United States to Congress in July 2020, titled Committee on
10 Foreign Investment in the United States Annual Report to Congress for Report
11 Period: CY 2019.

12 Plaintiff objects to defendants’ submission of the CFIUS report for the premise that
13 CFIUS investigations are routine and rarely result in government action. Plaintiff
14 contends the conclusions drawn from the report are improper, where it is not as clear as
15 defendants pose, it says nothing of the “routine” nature of CFIUS investigations
16 defendants attempt to draw, and it does not give any information on the facts underlying
17 the disposition of any particular case. Defendants counter that the document from a
18 government source is clearly reliable, and the data is accurate. Defendants highlight
19 plaintiff’s lack of authority preventing notice of this report, and they describe, “Plaintiff fails
20 to explain how conducting nearly 100 investigations a year is not ‘routine’ or how
21 presidential action is not ‘rare,’ when it happens only 0.6% of the time.” Dkt. 79 at 6.
22 This dispute goes to the merits, not whether this document is the proper subject of
23 judicial notice. The court grants defendants’ request to take judicial notice of Exhibit 9,
24 excerpts from the CFIUS report, because it is not subject to reasonable dispute.

- 25 • Exhibit 24: press release and shareholder letter attached to Fastly’s Form 8-K filed
26 with the SEC on February 17, 2021.

27 Plaintiff objects to defendants’ use of Exhibit 24 for purposes of challenging the
28 allegations of falsity regarding defendants’ third quarter 2020 and fiscal year 2020

1 guidance statements. Defendants find plaintiff’s argument “absurd,” advancing that “The
2 Supreme Court requires the Court to consider judicially noticeable facts in determining
3 whether the complaint adequately pleads a securities fraud claim.” Dkt. 79 at 7 (citing
4 Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)). The court agrees
5 with defendants. The SEC-filed document is not subject to reasonable dispute, and it is
6 relevant to establish Fastly’s reported revenues as well as consideration of whether
7 defendants misled investors. The court grants defendants’ request to take judicial notice
8 of Exhibit 24.

- 9 • Exhibit 25 is a compilation of copies of all Form 4 Statements of Changes in
10 Beneficial Ownership for Joshua Bixby, filed with the SEC between May 6, 2020
11 and October 14, 2020.
- 12 • Exhibit 26 is a compilation of copies of all Form 4 Statements of Changes in
13 Beneficial Ownership for Adriel Lares, filed with the SEC between May 6, 2020
14 and October 14, 2020.

15 Plaintiff objects to defendants’ use of Exhibits 25 and 26 to show that Bixby and
16 Lares’ stock sales were planned and made pursuant to Rule 10b5-1 trading plans.
17 Plaintiff argues that the issue of whether the sales were made pursuant to a Rule 10b5-1
18 plan is a factual determination and an affirmative defense, inappropriate at the pleading
19 stage. In re UTStarcom, Inc. Sec. Litig., 617 F. Supp. 2d 964, 976 n.16 (N.D. Cal. 2009)
20 (“[A]lthough evidence of the nondiscretionary nature of Defendants’ sales may ultimately
21 provide the basis of an affirmative defense at a later stage of the litigation, it suffices that,
22 at the pleading stage, Plaintiffs have alleged significant and suspiciously timed securities
23 sales.”); In re Apple Inc. Sec. Litig., 2020 WL 2857397, at *22 n.13 (N.D. Cal. June 2,
24 2020) (“the use of the 10b5-1 plan is an affirmative defense that does not rebut well-pled
25 allegations of scienter”). Plaintiff also takes issue with defendants’ offering of Form 4s
26 instead of the 10b5-1 plans themselves. Defendants note that plaintiff does not dispute
27 that the Form 4s demonstrate that Bixby and Lares’ sales were made pursuant to 10b5-1
28 plans. And defendants additionally note that courts regularly look at Form 4s showing

1 stock purchases pursuant to 10b5-1 plans. See, e.g., Wietschner v. Monterey Pasta Co.,
2 294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003) (granting judicial notice of Form 4s that
3 were “integral to the stock sale allegations made in the Complaint”); Park v. GoPro, Inc.,
4 2019 WL 1231175, at *7 (N.D. Cal. Mar. 15, 2019) (taking judicial notice of exhibits “for
5 the purposes of showing that [defendants] had nondiscretionary 10b5-1 stock sales
6 plans”).

7 Though couched as an argument against judicial notice, plaintiff’s argument is one
8 regarding the sufficiency of his scienter pleading, considered more in depth below.
9 Plaintiff’s argument does not preclude judicial notice of the Form 4s. The court grants
10 defendants’ request to take judicial notice of Exhibits 25 and 26, noting that defendants’
11 sales pursuant to 10b5-1 plans are not determinative on the issue of whether Bixby and
12 Lares’ sales were improper insider trades.

13 **III. DISCUSSION**

14 **A. Motion to Dismiss Legal Standards**

15 **1. Standard Under Rule 12(b)(6)**

16 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the
17 legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, 349 F.3d 1191,
18 1199-1200 (9th Cir. 2003). Under Federal Rule of Civil Procedure 8, which requires that
19 a complaint include a “short and plain statement of the claim showing that the pleader is
20 entitled to relief,” a complaint may be dismissed under Rule 12(b)(6) if the plaintiff fails to
21 state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable
22 legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013).

23 While the court accepts as true the factual allegations in the complaint, legally
24 conclusory statements not supported by actual factual allegations need not be accepted.
25 Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The complaint must proffer sufficient
26 facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly,
27 550 U.S. 544, 555, 558-59 (2007).

28 “A claim has facial plausibility when the plaintiff pleads factual content that allows

1 the court to draw the reasonable inference that the defendant is liable for the misconduct
2 alleged.” Iqbal, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not
3 permit the court to infer more than the mere possibility of misconduct, the complaint has
4 alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’ ” Id. at 679
5 (quoting Fed. R. Civ. P. 8(a)(2)). Where dismissal is warranted, it is generally without
6 prejudice, unless it is clear the complaint cannot be saved by any amendment. Sparling
7 v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

8 **2. Pleading Standard for Securities Fraud**

9 Securities’ fraud claims under § 10(b) of the Securities Exchange Act of 1934, and
10 Securities Exchange Commission Rule 10b-5 promulgated thereunder must “meet the
11 higher, [more] exacting pleading standards of Federal Rule of Civil Procedure 9(b) and
12 the Private Securities Litigation Reform Act (PSLRA).” Or. Pub. Emp. Ret. Fund v. Apollo
13 Group Inc., 774 F.3d 598, 603-04 (9th Cir. 2014). Under Rule 9(b), claims alleging fraud
14 are subject to a heightened pleading requirement—that a party “state with particularity
15 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). And private
16 securities fraud complaints are subject to the “more exacting pleading requirements” of
17 the PSLRA, which require that both falsity and scienter be pled with particularity. Zucco
18 Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009).

19 To state a claim for securities fraud under § 10(b) and Rule 10b-5, a plaintiff must
20 allege particularized facts showing (1) a material misrepresentation or omission of fact;
21 (2) made with scienter; (3) a connection with the purchase or sale of a security; (4)
22 reliance or “transaction causation;” (5) economic loss; and (6) loss causation (causal
23 connection between the material misrepresentation and the loss). Dura Pharms., Inc. v.
24 Broudo, 544 U.S. 336, 341-42 (2005); see also Matrixx Initiatives, Inc. v. Siracusano, 563
25 U.S. 27, 37-38 (2011). In order to properly allege falsity, “a securities fraud complaint
26 must . . . specify each statement alleged to have been misleading, [and] the reason or
27 reasons why the statement is misleading.” In re Rigel Pharm., Inc. Sec. Litig., 697 F.3d
28 869, 877 (9th Cir. 2012) (internal quotation marks and alteration omitted). In addition, in

1 order to “adequately plead scienter under the PSLRA, the complaint must state with
2 particularity facts giving rise to a strong inference that the defendant acted with the
3 required state of mind.” Id. (internal quotation marks omitted).

4 **B. Analysis**

5 Plaintiff alleges two causes of action: (1) violations of Section 10(b) of the
6 Exchange Act and SEC Rule 10b-5 promulgated thereunder (against all defendants), and
7 (2) violations of Section 20(a) of the Exchange Act (against the individual defendants).

8 “To plead a claim under section 10(b) and Rule 10b-5, Plaintiffs must allege: (1) a
9 material misrepresentation or omission; (2) scienter; (3) a connection between the
10 misrepresentation or omission and the purchase or sale of a security; (4) reliance;
11 (5) economic loss; and (6) loss causation.” Apollo Group, 774 F.3d at 603.

12 Defendants do not argue that plaintiff failed to allege the following four elements:
13 (1) the connection between the misrepresentations or omissions and the purchase or
14 sale of a security, (2) reliance, (3) economic loss, or (4) loss causation. This order
15 therefore does not address these elements. Defendants contend that plaintiff failed to
16 allege (1) material misrepresentations or omissions and (2) scienter. Both elements are
17 discussed in turn below.

18 The parties initially discuss the adequacy of plaintiff’s pleading from a visual
19 perspective—whether plaintiff’s reproduction of defendants’ statements and use of bold
20 and italic font reflects the challenged portions of the statements to the reader.
21 Defendants’ points are well taken. Plaintiff’s complaint relies heavily on bold and italic
22 font without sufficient explanation of the meaning of such emphasis. It is difficult to
23 understand which portions of defendants’ statements plaintiff challenges as a result,
24 especially where at least some of the emphasized text is not contested as false, such as
25 “[w]e generated \$63 million in revenue.” Compl. ¶¶ 53, 54, 63. This practice diminishes
26 the particularity of plaintiff’s pleading, but this need not serve as the basis for dismissal of
27 the complaint. The complaint is dismissed on the merits, as discussed more fully below.
28

1 **1. Material misrepresentations or omissions**

2 **a. Whether defendants’ statements were false when made**

3 Falsity is adequately alleged “when a plaintiff points to [the] defendant’s
4 statements that directly contradict what the defendant knew at that time.” Khoja, 899
5 F.3d at 1008 (citing In re Atossa Genetics Inc. Sec. Litig., 868 F.3d 784, 794-96 (9th Cir.
6 2017)). To plead falsity, a plaintiff must “specify each statement alleged to have been
7 misleading” and the “reasons why the statement is misleading.” 15 U.S.C. § 78u-
8 4(b)(1)(B); Zucco, 552 F.3d at 990-91. A statement is misleading “if it would give a
9 reasonable investor the impression of a state of affairs that differs in a material way from
10 the one that actually exists.” Retail Wholesale & Dep’t Store Union Local 338 Ret. Fund
11 v. Hewlett-Packard Co., 845 F.3d 1268, 1275 (9th Cir. 2017) (internal quotation marks
12 omitted). Similarly, “an omission is material ‘when there is a substantial likelihood that
13 the disclosure of the omitted fact would have been viewed by the reasonable investor as
14 having significantly altered the total mix of information available.’” Markette v. XOMA
15 Corp., No. 15-cv-03425-HSG, 2017 WL 4310759, at *7 (N.D. Cal. Sept. 28, 2017)
16 (quoting Matrixx, 563 U.S. at 38). But omissions are actionable only where they “make
17 the actual statements misleading”: it is not sufficient that an investor “consider the omitted
18 information significant.” Id. at *7 (internal quotation marks omitted).

19 Both parties discuss separately the representations made by defendants in
20 (1) May and June 2020 and (2) August 2020, so that division is replicated here.

21 **i. May and June 2020 Statements**

22 Plaintiff specifies in his opposition brief the following representations he alleges
23 were false when made:

24 “On May 6, 2020 and June 2, 2020, Defendants touted (1) the
25 strength of Fastly’s enterprise customers, including their “good
26 shape,” “stability,” ability to “continue to thrive,” the “limited”
27 credit risk exposure they posed, and the fact that they didn’t
28 present “anything major” or “concerning” (¶¶53-54, 57, 59-60,
69); (2) the “stronger demand” for Fastly’s platform, including
enterprise customers’ “usage expansion” (¶¶54, 58, 61); and
(3) its enterprise customers driving revenue growth and
“continued strong business fundamentals” (¶¶53-54, 69, 71).

1 Dkt. 73 at 16. The statements were false, plaintiff argues, because they conceal the
2 difficulty TikTok faced at the time, with TikTok facing reportedly increased scrutiny from
3 the U.S. government. However, the omission of TikTok as a customer is not actionable
4 where it did not “affirmatively create an impression of a state of affairs that differs in a
5 material way from the one that actually exists.” Brody v. Transitional Hosps. Corp., 280
6 F.3d 997, 1006 (9th Cir. 2002). Defendants did not represent at any point that TikTok
7 was not a Fastly customer. Defendants disclosed the very risk plaintiff alleges they
8 concealed: that possible U.S. bans on Chinese companies “posed a material risk to
9 Fastly’s revenues.” Compl. ¶ 3. Fastly noted even before the class period that nearly
10 30% of its revenue was at risk because of the U.S. government’s expressed concerns
11 regarding Chinese businesses. See Fastly 2019 Form 10-K (Dkt. 70-6 at 18). Nothing at
12 the time suggested that TikTok would be singled out by the Trump Administration, not
13 even the stale and routine CFIUS investigation referenced by plaintiff. Therefore, plaintiff
14 fails to plead the falsity of the May and June 2020 statements.

15 **ii. August 2020 Statements**

16 Plaintiff specifies in his opposition brief the following representations he alleges
17 were false when made:

18 On August 5, 6 and 11, 2020, over five weeks into 3Q20,
19 Defendants reassured investors that (1) they are assuming
20 “status quo” with regard to TikTok and are seeing “strong
21 growth” for 3Q20 (¶¶76-79, 91, 93, 95); and that (2) they “are
22 in a position to backfill the majority of [lost] traffic” in case of a
23 TikTok ban “on a short notice” (¶¶74-75, 81, 92, 94). In truth,
24 (1) TikTok had already started shifting traffic away from Fastly
25 five weeks prior; (2) other Fastly enterprise customers had
26 begun lowering their usage at the beginning of 3Q20; and (3)
27 Fastly had already turned down many potential customers
28 during the first half of 2020 because of the constraints TikTok’s
growing usage had put on Fastly’s platform. ¶¶80, 82, 90, 96,
98, 101-105, 111-113, 141. Moreover, because any lost TikTok
revenue would be very substantial (Fastly relied on TikTok for
13% of its revenues by 2Q20), at the time these statements
were made, there was a substantial risk that Fastly could not
quickly backfill the loss of TikTok revenue as promised and
Defendants therefore had no reasonable basis to expect to
meet the 3Q20 and FY 2020 guidance given.

Dkt. 73 at 21.

1 The first representation, that defendants assumed “status quo” with regard to
2 TikTok, is fairly read in context as a truthful disclosure—business had not yet been cut off
3 with the Chinese company, and Fastly did not yet have a reason to restrict or terminate
4 traffic from its customer. Plaintiff fails to plead a specific allegation of what defendants
5 knew at the time they made that representation, so there is accordingly no
6 misrepresentation on that point. Moreover, Bixby warned that status quo traffic from
7 TikTok could not be guaranteed. Dkt 70-19 at 11.

8 While plaintiff posits that other Fastly enterprise customers had begun lowering
9 their usage at the beginning of 3Q20, defendants emphasized the unpredictable nature of
10 revenues based on customers’ usage, as well as the unpredictable Internet traffic
11 patterns created by the Covid-19 pandemic. See “Risks Related to our Business and
12 Industry,” Dkt. 70-17 at 17-35. Plaintiff attacks the August statements for the failure to
13 disclose that TikTok had begun transitioning its traffic away from Fastly, but at no point
14 does plaintiff establish that this was known to defendants or when it became known to
15 them. Plaintiff does not establish that this unsupported allegation signaled a trend rather
16 than a mere blip in Fastly’s dynamic and unpredictable revenues, based on customers’
17 uncommitted use of Fastly’s CDN services. The media plaintiff cites regarding TikTok’s
18 diversification of its traffic are thin on specifics and provide no information regarding a
19 specific reduction in TikTok’s use of Fastly’s services. As defendants state, “Plaintiff’s
20 reliance on unsupported hindsight speculation does not plead a misleading omission.”
21 Dkt. 70 at 27; see also Welgus v. TriNet Grp. Inc., 2017 WL 6466264, at *11 (N.D. Cal.
22 Dec. 18, 2017). And while plaintiff also alleges that the August statements were
23 misleading because Fastly failed to disclose a risk that the company would not be able to
24 backfill lost TikTok business, plaintiff fails to offer any particular fact to support that
25 defendants did not genuinely believe they could make up the lost business. Plaintiff’s
26 suggestions that other companies shifted their traffic away from Fastly and that TikTok
27 put constraints on Fastly’s business are similarly unsupported by any particular facts.
28 Therefore, plaintiff fails to plead the falsity of the August 2020 statements.

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b. Whether the Safe Harbor applies to shield the challenged statements

The PSLRA carves out a safe harbor from liability for statements that are identified as “forward-looking” and are “accompanied by meaningful cautionary statements.” 15 U.S.C. § 78u-5(c)(1)(A)(i). A forward-looking statement is “any statement regarding (1) financial projections, (2) plans and objectives of management for future operations, (3) future economic performance, or (4) the assumptions ‘underlying or related to’ any of these issues.” No. 84 Employer-Teamster Joint Council Pension Trust Fund, 320 F.3d at 936. “[I]f a forward-looking statement is identified as such and accompanied by meaningful cautionary statements, then the state of mind of the individual making the statement is irrelevant, and the statement is not actionable regardless of the plaintiff’s showing of scienter.” Cutera, 610 F.3d at 1112. Alternatively, if a forward-looking statement is not identified as such or is unaccompanied by meaningful cautionary statements, then the statement is actionable only if the plaintiff proves that the forward-looking statement “was made with actual knowledge by that person that the statement was false or misleading.” 15 U.S.C. § 78u-5(c)(1)(B); see Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc., 759 F.3d 1051, 1058 (9th Cir. 2014). Statements, for example, touting contemporary status of a sales pipeline despite defendant corporate officers’ awareness of negative trends in the pipeline are not forward-looking and are not protected by the safe harbor. Intuitive Surgical, 759 F.3d at 1143-44.

Defendant identifies the following statements challenged by plaintiff as forward looking:

- Bixby’s May 6 statement that “we raised guidance for the full-year 2020.” (Compl. ¶¶ 53, 56);
- Bixby’s statement that 2020 guidance was based on “expected ‘continued customer expansion’ due to increased internet traffic from social distancing measures [] to continue into Q2 and future periods” and as a result, Defendants “remain optimistic about the demand for our mission-critical

- 1 services” (Compl. ¶56);
- 2 • Lares’ statement that Q2 guidance was based on his observation that
- 3 enterprise customers “seem to be in good shape” and that he was “not
- 4 seeing anything concerning from a sort of the Q2 perspective” (Compl.
- 5 ¶ 59; Ex. 7 at 11);
- 6 • Lares’ August 5 statement: “For the third quarter, we expect revenue in the
- 7 range of \$73.5 million to \$75 million . . . For the full year 2020, we increased
- 8 our revenue guidance range to \$290 million to \$300 million” (Compl. ¶ 76);
- 9 and
- 10 • Defendants’ statements that the guidance provided on August 5 assumed
- 11 that TikTok’s usage would remain “status quo” and that “we believe we are
- 12 in a position to backfill the majority of [any lost TikTok] traffic” (Compl.
- 13 ¶¶ 74, 77, 93).

14 Plaintiff resists the application of the safe harbor to these statements, suggesting

15 that they describe present conditions. However, these statements regarding future

16 operations and economic opportunities are forward-looking on their face. See 15 U.S.C.

17 § 78u5(i) (forward-looking statements include any statement regarding “future economic

18 performance” and the assumptions underlying those); see also In re Solarcity Corp. Sec.

19 Litig., 274 F. Supp. 3d 972, 990 (N.D. Cal. 2017); (finding statements concerning future

20 operations and economic opportunities forward-looking).

21 Contrary to plaintiff’s argument that the statements were not accompanied by

22 meaningful cautionary language, the cautionary language used by defendants is almost

23 identical to language approved by the Ninth Circuit in instances in which forward-looking

24 statements were immunized by the PSLRA safe harbor. See, e.g., Intuitive Surgical, 759

25 F.3d at 1059-60 (approving cautionary language in earnings call that warned that

26 comments may contain forward-looking statements, that such statements may differ

27 based on “certain risks and uncertainties,” and referring investors to “the company’s

28 [SEC] filings”); Cutera, 610 F.3d at 1112 (approving cautionary language at beginning of

1 quarterly earnings call that the conversation would contain forward-looking statements
2 “concerning future financial performance and guidance,” and that “Cutera’s ability to
3 continue increasing sales performance worldwide could cause variance in the results.”).
4 Defendants enumerate a plethora of specific risks, including those underlying plaintiff’s
5 theory of fraud; for example, they warn Fastly “cannot guarantee [] usage levels” and any
6 “U.S. government prohibit[ion of] our current or potential customers from doing business
7 with us [could cause] our delivery of content by our platform [to] be blocked.” Ex. 5 at 20,
8 27 (Dkt. 70-6 at 12, 18). These risk disclosures reach beyond mere boilerplate and
9 specifically warn against the very allegations advanced by plaintiff here. Defendants’
10 cautionary language is therefore sufficient to bring the forward-looking statements into
11 the PSLRA safe harbor.

12 More substantially, all the statements fall within the second prong of the safe
13 harbor—plaintiff fails to establish they were “made with actual knowledge” of their falsity.
14 The general averments plaintiff makes regarding defendants’ knowledge of the risks
15 faced by TikTok, along with the vague and speculative media reports identified in
16 support, are insufficient to establish at any point that defendants had actual knowledge
17 that TikTok would be banned by the U.S. government or how such a ban would take
18 shape to impact Fastly’s business.

19 **c. Whether the statements are non-actionable statements of**
20 **historical performance**

21 Defendants’ growth projections, restating “[a]ccurately reported historical
22 information,” are non-actionable. Irving Firemen’s Relief & Ret. Fund v. Uber Techs.,
23 2018 WL 4181954, at *5 (N.D. Cal. Aug. 31, 2018).

24 Defendant highlights the following statements from the May call:

- 25 • Bixby: “We generated \$63 million in revenue, up 38% year-over-year, and
26 increased our enterprise customer count to 297 from 288 in the previous quarter”
27 (Compl. ¶ 53);
28 • Bixby: “These results were primarily driven by continued strong business

- 1 fundamentals and further adoption of our edge cloud platform by enterprise
2 organizations across multiple verticals and geographies.” (Compl. ¶ 53);
- 3 • Bixby: “We continued to drive expansion within our customer base with a DBNER5
4 of 133% . . .” (Compl. ¶ 53);
 - 5 • Bixby: “For the first quarter, average enterprise customer spend increased to
6 \$642,000 from \$607,001 in the previous quarter” (Compl. ¶ 57); and
 - 7 • Fastly: “We currently receive a substantial portion of our revenues from a limited
8 number of customers. For the trailing 12 months ended March 31, 2020, our top
9 ten customers accounted for approximately 31% of our revenue.” (Compl. ¶ 63).

10 Plaintiff contests that these statements go beyond the mere recounting of historical
11 results. He argues that where defendants touted enterprise customers as a positive
12 driver of these results, they had an obligation to disclose that TikTok, as the most
13 significant enterprise customer, was potentially facing a U.S. ban. Plaintiff’s assessment
14 is incorrect—these statements merely describe historical information that is non-
15 actionable. But further, plaintiff’s attempt to connect these statements to the potential
16 TikTok ban finds little support in the record. Plaintiff largely fails to establish with any
17 level of certainty that defendants knew TikTok could potentially be banned in the U.S.
18 and when they knew it. Therefore, absent more specific allegations that defendants
19 specifically knew the likelihood of a ban of TikTok within the U.S., these historical
20 statements are not actionable and do not support plaintiff’s claim for securities fraud.

21 **d. Whether the statements amount to non-actionable**
22 **corporate puffery**

23 Plaintiffs challenge many statements in defendants’ public reporting that
24 defendants argue constituted statements of corporate optimism. Multiple courts have
25 held that statements of corporate puffery are not actionable. See, e.g., Cutera, 610 F.3d
26 at 1111 (defendants’ statement that “we believe our employee relations are good” was
27 not actionable, even though many employees were leaving the company, because
28 “[w]hen valuing corporations . . . investors do not rely on vague statements of optimism

1 like ‘good,’ ‘well-regarded,’ or other feel good monikers”). Courts in this district regularly
2 find statements of corporate puffery to be non-actionable statements in the securities
3 fraud context. See, e.g., City of Royal Oak Retirement System v. Juniper Networks, Inc.,
4 880 F. Supp. 2d 1045, 1064 (N.D. Cal. 2012) (statements that company has “strong
5 demand metrics and good momentum,” and “our demand indicators are strong, our
6 product portfolio is robust” were non-actionable statements of mere corporate optimism);
7 In re Fusion-io, Inc., 2015 WL 661869, at *15 (statements that “we are well positioned to
8 capture a significant share of the opportunity from enterprise to hyperscale over the next
9 few years” and “we exited fiscal 2013 with a significantly more diversified customer and
10 product base, which we believe provides a sound basis for business expansion going
11 forward” were non-actionable).

12 However, broadly optimistic statements, taken in context, may still form a basis for
13 a securities fraud claim when those statements “address specific aspects of a company’s
14 operation that the speaker knows to be performing poorly.” See Quality Systems, 865
15 F.3d at 1143; see also Warshaw v. Xoma Corp., 74 F.3d 955, 959 (9th Cir. 1996) (telling
16 investors FDA approval was “going fine” when the company knew approval would never
17 come was materially misleading); Fecht v. Price Co., 70 F.3d 1078, 1081 (9th Cir. 1995)
18 (saying the company “anticipates a continuation of its accelerated expansion schedule”
19 when the expansion already failed was misleading).

20 Plaintiff argues in substantial part, “Since Defendants identified ‘customer demand’
21 and ‘enterprise customers’ as key factors critical to Fastly’s success (¶¶64-65, 116), they
22 cannot later claim that concrete statements such as that they were seeing ‘stronger
23 demand’ and that their enterprise customers ‘seem to be in good shape’ have no
24 meaning to investors.” Dkt. 73 at 26. Plaintiff’s claim relies on the departure of TikTok
25 from the Fastly CDN and TikTok’s potential ban from the U.S. as facts contrasting the
26 “good shape” suggested by defendants. But such statements are different than those
27 found misleading in Quality Systems. See 865 F.3d at 1143 (reassuring investors that
28 “‘everything [was] going fine’” with FDA approval when the company knew FDA approval

1 would never come was materially misleading). Compared to the knowingly false
 2 statements at issue in that case, plaintiff does not establish that defendants here knew
 3 that TikTok was not in “good shape” at the time of those statements. Even in context,
 4 defendants’ statements were not misleading because unlike Quality Systems, the
 5 allegedly concealed facts had not yet transpired. The statements generally referring to a
 6 number of customers are not actionable because they are vague assessments that
 7 “represent the ‘feel good’ speak that characterizes ‘non-actionable puffing.’” Intuitive
 8 Surgical, 759 F.3d at 1060 (citing Cutera, 610 F.3d at 1111). Plaintiff fails to plead their
 9 falsity.

10 **2. Scierter**

11 A complaint must “state with particularity facts giving rise to a strong inference that
 12 the defendant acted” with scierter. See 15 U.S.C. § 78u-4(b)(2)(A); Tellabs, 551 U.S. at
 13 321. Scierter is “a mental state embracing intent to deceive, manipulate, or defraud.”
 14 Tellabs, 551 U.S. at 308; see also Metzler, 540 F.3d at 1061. To demonstrate scierter, a
 15 complaint must allege that the defendants made “false or misleading statements either
 16 intentionally or with deliberate recklessness.” See Zucco, 552 F.3d at 991; Ronconi v.
 17 Larkin, 253 F.3d 423, 432 (9th Cir. 2001). In addition to the particularity considered
 18 necessary for falsity, discussed above, “The Supreme Court has emphasized that courts
 19 ‘must review all the allegations holistically’ when determining whether scierter has been
 20 sufficiently pled. The relevant inquiry is ‘whether all of the facts alleged, taken
 21 collectively, give rise to a strong inference of scierter, not whether any individual
 22 allegation, scrutinized in isolation, meets that standard.’” Reese v. Malone, 747 F.3d
 23 557, 569 (9th Cir. 2014) (citing Tellabs, 551 U.S. at 323).

24 **a. Whether the complaint establishes that defendants had**
 25 **“direct knowledge” of the falsity of their statements**

26 Plaintiff points to the following allegations to contend that the defendants knew
 27 facts “suggesting the statements were inaccurate or misleadingly incomplete” in May and
 28 June 2020. In re Immune Response Sec. Litig., 375 F. Supp. 2d 983, 1022 (S.D. Cal.

1 2005). First, defendants allegedly knew TikTok had become Fastly’s largest customer,
2 representing over 10% of the company’s revenues. Compl. ¶¶ 32-33, 68. Second,
3 defendants allegedly also knew the U.S. government was taking action against TikTok
4 due to the fear that it posed a national security threat. Compl. ¶¶ 118-120; see also ¶¶
5 17-18, 22-31. On this point, plaintiff highlights the investigation of CFIUS into TikTok as a
6 national security threat and the U.S. Military’s ban of TikTok on government-issued
7 devices. Compl. ¶¶ 62, 70, 72. And on these bases, plaintiff avers “the disclosure of
8 TikTok as Fastly’s single largest customer was material to investors’ understanding of the
9 Company’s business risk as a whole because of the escalating problems and increasing
10 U.S. bans TikTok was facing just a few months before the Class Period.” Dkt. 73 at 29.
11 On these points, plaintiff ignores the express disclosures defendants made in May,
12 including this particular caution:

13 If the U.S. government prohibits our current or potential
14 customers from doing business with us, whether through policy,
15 regulations or laws, we could face direct liability or our delivery
16 of content by our platform may be blocked. For example, in the
17 current environment of economic trade negotiations and
18 tensions between the Chinese and U.S. governments, the U.S.
 government has expressed concerns about the ability of
 companies operating in China to do business in the U.S. or with
 U.S. companies. As a result, we could lose the ability to
 contract with current or potential customers, which could harm
 our business.

19 Ex. 8, Fastly Form 10-Q, May 8, 2020, at 55 (Dkt 70-9 at 24). Contrary to the omission
20 plaintiff seeks to emphasize throughout, defendants disclosed the risk faced. Plaintiff’s
21 claim of the known falsity of not disclosing TikTok as a customer is additionally weakened
22 by his own failure to specify the information defendants had and when. Plaintiff fails to
23 establish that defendants knew of serious risks associated with TikTok being Fastly’s
24 largest customer in May 2020 where he does not allege that defendants “saw specific
25 reports,” nor does he plead “references to specific reports and their contents,” which
26 informed them that their statements were false. In re Solarcity Corp. Sec. Litig., 274 F.
27 Supp. 3d, 972, 1012 (N.D. Cal. 2017). The complaint does not establish that defendants
28 had actual knowledge of the falsity of their statements in May 2020.

1 Plaintiff points next to the following allegations to contend that the defendants
2 knew the false and misleading nature of their August 2020 statements. First, that
3 defendants knew, but failed to disclose, that TikTok was already removing traffic from
4 Fastly's platform to non-U.S. CDNs and was accelerating its own CDN deployment
5 because of the bans it was facing in the U.S. Compl. ¶¶ 80, 82, 90, 96. Second, that
6 defendants knew it would be difficult, if not impossible, to backfill the traffic TikTok was
7 removing from Fastly's platform because Fastly had a limited pool of customers that
8 could match TikTok's usage. Compl. ¶¶ 80, 82, 90, 96.

9 On this set of statements/omissions as well, plaintiff does not allege that
10 defendants saw specific reports, that they had specific knowledge of TikTok's activities,
11 or that they knew that they could not backfill any lost business from a TikTok shut down.
12 Defendants' statements were forward-looking, and plaintiff therefore must establish that
13 defendants knew they could "never" meet the projections they laid out. See Tesla, 985
14 F.3d at 1192. Plaintiff does not allege with particularity that defendants knew TikTok's
15 usage would not remain "status quo" (¶ 77), and plaintiff does not allege that defendants
16 knew Fastly was not in a position to "backfill the majority of [any lost TikTok] traffic" (¶¶
17 74; 81). Plaintiff's own description acknowledges that defendants knew it "would be
18 difficult, if not impossible, to backfill" lost TikTok business. Dkt. 73 at 30. These
19 allegations are insufficient to demonstrate that defendants knew the statements were
20 false when made, and they do not support a finding of scienter.

21 **b. Whether the "core operations" inference supports finding**
22 **scienter**

23 Under the core operations doctrine, a court can infer scienter if the fraud is based
24 on facts "critical to a business's core operations," such that the company's key officers
25 would know of those facts. S. Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 783-84 (9th Cir.
26 2008) (internal quotation marks omitted). Courts applying the core operations doctrine
27 have required plaintiffs to plead "details about the defendants' access to information
28 within the company" related to the fraud. Id. at 785. In Nursing Home Pension Fund,

1 Local 144 v. Oracle Corp., 380 F.3d 1226 (9th Cir. 2004), the plaintiffs relied on the core
2 operations doctrine to demonstrate a CEO’s scienter as to false statements regarding the
3 company’s sales, where the CEO stated that: “All of our information is on one database.
4 We know exactly how much we have sold in the last hour around the world.” Id. at 1231.
5 However, finding scienter under the core operations doctrine “is not easy,” and requires
6 “either specific admissions by one or more corporate executives of detailed involvement
7 in the minutia of a company’s operations, such as data monitoring, or witness accounts
8 demonstrating that executives had actual involvement in creating false reports.” Intuitive
9 Surgical, 759 F.3d at 1062; see also Zucco, 552 F.3d at 1000 (finding “allegations that
10 senior management . . . closely reviewed the accounting numbers generated . . . each
11 quarter . . . and that top executives had several meetings in which they discussed
12 quarterly inventory numbers” insufficient to establish scienter).

13 Here, plaintiff fails to identify facts supporting the core operations inference. First,
14 there are no specific admissions by Bixby or Lares of detailed involvement in the minutia
15 of the company’s operations. Bixby’s statement that he would “continue to monitor the []
16 situation” is insufficient to raise a strong inference of scienter where it is not accompanied
17 by any specific allegations of what Bixby found out after making that statement. Compl. ¶
18 117. Plaintiff relies on media reports to show defendants’ knowledge of the risk of a
19 TikTok ban and fails to make “detailed and specific allegations about management’s
20 exposure to factual information within the company.” S. Ferry LP, No. 2, 542 F.3d at 784-
21 85. There are simply not enough specific allegations regarding what was known inside
22 the company and when to support this rare inference of scienter. Id. at 784 (“Where a
23 complaint relies on allegations that management had an important role in the company
24 but does not contain additional detailed allegations about the defendants’ actual
25 exposure to information, it will usually fall short of the PSLRA standard.”). Second, in
26 contrast to Intuitive Surgical, there are no witness accounts demonstrating that Bixby or
27 Lares were involved in creating false reports. See 759 F.3d at 1062. Plaintiff’s pleading
28 falls short of the core operations inference and does not support a finding of scienter.

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c. Whether allegations regarding defendants’ motives support a finding of scienter

Plaintiff alleges defendants were motivated to mislead investors on two bases: (1) the insider trading of Bixby and Lares, and (2) the public stock offering to fundraise for an acquisition of Signal Science. For both reasons, plaintiff contends, defendants were motivated to conceal the company’s reliance on TikTok to keep Fastly’s stock price artificially inflated.

“Although ‘unusual’ or ‘suspicious’ stock sales by corporate insiders may constitute circumstantial evidence of scienter, insider trading is suspicious only when it is ‘dramatically out of line with prior trading practices at times calculated to maximize the personal benefit from undisclosed inside information.’” Zucco Partners, LLC, 552 F.3d at 1005 (quoting Silicon Graphics, 183 F.3d at 986). Courts must consider three factors to determine if stock sales constitute circumstantial evidence of scienter: “(1) the amount and percentage of shares sold by insiders; (2) the timing of the sales; and (3) whether the sales were consistent with the insider’s prior trading history.” Id. at 1005.

Here, plaintiff alleges that “Bixby sold 276,030 shares of his personally held shares of Fastly stock, about 34% of his total holdings in Fastly, for proceeds of \$18,140,479. In the 161 days immediately preceding the Class Period, by contrast, Bixby sold just 110,000 shares for approximately \$2.3 million. Thus, Bixby sold about 2.5 times as many shares during the Class Period than in his prior trading.” Compl. ¶ 130. Plaintiff alleges “Lares sold 57,682 shares of his personally-held shares of Fastly stock, almost 9% of his total Fastly holdings, for proceeds of \$3,983,103. In the 161 days immediately preceding the Class Period, by contrast, Lares sold just 25,000 shares for \$536,730. Thus, Lares sold about 2.3 times as many shares during the Class Period than in his prior trading.” Compl. ¶ 131. These stock sales, particularly in light of the percentage comparison for the 161-day period preceding the class period, are clearly more but not dramatically out of line with the officers’ prior trading practices. Moreover, these sales do not appear to be calculated to maximize the personal benefit from undisclosed inside information where

1 Bixby and Lares were in less control of the timing of the sales.

2 Defendants' stock sales were all made to either satisfy tax obligations or according
3 to a 10b5-1 plan. Exs. 25 and 24 (Dkt. 70-26 and 70-27). See Curry v. Yelp. Inc., 875
4 F.3d 1219, 1226 n.2 (9th Cir. 2017) (explaining "stock sales made pursuant to a Rule
5 10b5-1 plan . . . allows for stock sales over a predetermined period without concern for
6 the market."); Metzler Inv. GMBH v. Corinthian Colleges, 540 F.3d 1049, 1067 n.11 (9th
7 Cir. 2008) ("Sales according to pre-determined plans may rebut [] an inference of
8 scienter.") (internal citations omitted). While plaintiff argues at length that the 10b5-1
9 plans are not determinative on the issue of scienter, the timing of these planned sales is
10 relevant to the second prong of the assessment described above. Defendants did not
11 have immediate control over these planned sales, so these sales, made without concern
12 for the market, cut against a finding of scienter. The court finds that defendants' stock
13 sales do not support a strong inference of scienter.

14 Plaintiff argues that scienter should be inferred because defendants were
15 motivated to maintain the Fastly stock price artificially high to maximize returns from a
16 stock offering and to support acquisition of another company. Dkt. 73 at 31. The Ninth
17 Circuit has generally rejected motive allegations to support scienter where they are
18 premised on "routine corporate objectives such as the desire to obtain good financing
19 and expand." Webb v. Solarcity Corp., 884 F.3d 844, 856 (9th Cir. 2018); see also In re
20 Rigel Pharms., Inc. Sec. Litig., 697 F.3d 869, 884 (9th Cir. 2012) ("allegations of routine
21 corporate objectives such as the desire to obtain good financing and expand are not,
22 without more, sufficient to allege scienter; to hold otherwise would support a finding of
23 scienter for any company that seeks to enhance its business prospects."). Plaintiff's
24 allegations fall short where they fail to reach past defendants' routine expansion
25 objectives. Defendants' shared motivation to raise capital does not support a
26 determination of scienter.

27 **d. Whether the allegations of scienter fail holistically**

28 The court must also "consider the complaint in its entirety" to determine if "all of

1 the facts alleged, taken collectively, give rise to a strong inference of scienter” that is “at
2 least as compelling as an alternative innocent explanation.” Tellabs, 551 U.S. at 322-23;
3 Zucco, 552 F.3d at 1006.

4 Here, the facts do not give rise to an inference of scienter that is at least as
5 compelling as the inference of an honest mistake. See Tellabs, 551 U.S. at 314. At no
6 point in his pleading does plaintiff establish that defendants knew their representations to
7 investors were false. At the beginning of the Class Period, Fastly identified and shared
8 the risks that could cause the company to lose business. These risk disclosures included
9 that the U.S. government could pass laws impacting Fastly’s substantial revenues from
10 international customers, especially those in China. Plaintiff fails to allege a single fact
11 suggesting either Bixby or Lares believed there was any real risk President Trump would
12 ban TikTok prior to August. When the regulatory situation changed in August, Fastly
13 disclosed TikTok as a significant customer. Plaintiff fails to establish that defendants
14 knew they could not backfill lost TikTok business as they opined in August. Defendants
15 subsequently announced their expectation that Fastly would miss its earlier revenue
16 projections and withdrew its 2020 guidance, before its third quarter results were finalized
17 and before it was obligated to so announce. As defendants offer, “Fastly consistently
18 went to the market with information as it became aware, and **sooner** than required.” Dkt.
19 70 at 33. Plaintiff’s theory of scienter relies on defendants’ withholding of key information
20 regarding the risks faced by and posed by TikTok, but plaintiff does not establish that
21 plaintiffs ever had that information. Therefore, there are insufficient allegations to support
22 a finding of scienter.

23 3. Second Cause of Action – § 20

24 Congress established liability in § 20(a) for “[e]very person who, directly or
25 indirectly, controls any person liable” for violations of the securities laws. 15 U.S.C. §
26 78t(a). To establish a prima facie case under § 20(a), a plaintiff must prove: (1) “a
27 primary violation of federal securities law;” and (2) “that the defendant exercised actual
28 power or control over the primary violator.” Howard v. Everex Sys., Inc., 228 F.3d 1057,

1 1065 (9th Cir. 2000).

2 Because plaintiff has failed to plead a primary securities law violation, plaintiff has
3 also failed to plead a violation of § 20(a). See Cutera, 610 F.3d at 1113 n.6 (holding that
4 § 20(a) claim was properly dismissed because § 10(b) claim had already been
5 dismissed).

6 **IV. CONCLUSION**

7 For the foregoing reasons, including plaintiff's failure to plead the falsity of
8 defendants' representations or scienter, the court rules as follows. The court GRANTS
9 defendants' request for judicial notice as detailed above. The court GRANTS defendants'
10 motion to dismiss plaintiff's amended complaint with leave to amend. Plaintiff shall have
11 28 days from the date of this order to file a second amended complaint to cure the
12 deficiencies noted in this order. No new claims or parties may be added without leave of
13 court or the agreement of all parties. Upon the filing of any amended complaint, plaintiff
14 must also file a redline clearly demarcating its changes from the existing complaint.

15 **IT IS SO ORDERED.**

16 Dated: November 28, 2021

17 /s/ Phyllis J. Hamilton
18 PHYLLIS J. HAMILTON
19 United States District Judge
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