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5 IN THE UNITED STATES DISTRICT COURT  
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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8 IN RE PIVOTAL SECURITIES  
9 LITIGATION  
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Master File No. 3:19-cv-03589-CRB

**ORDER GRANTING MOTION TO  
DISMISS**

13 This consolidated class action alleges violations of the Securities Act of 1933 (“the  
14 Securities Act”) and the Securities Exchange Act of 1934 (the “Exchange Act”) against  
15 Pivotal Software, Inc. (“Pivotal”). Purchasers of Pivotal’s securities argue that they are  
16 entitled to damages caused by Pivotal’s alleged false and misleading statements about its  
17 financial and business condition. Pending before this Court is Pivotal’s motion to dismiss  
18 Plaintiffs’ Consolidated Amended Class Action Complaint (“CAC”). Because Plaintiffs  
19 fail to plausibly allege that any statement was false or misleading, and for other reasons  
20 explained below, the Court GRANTS Pivotal’s motion to dismiss.

21 **I. BACKGROUND**

22 **A. Parties**

23 Defendant Pivotal is a San Francisco-based information technology and software  
24 company founded in 2013. CAC (dkt. 75) ¶ 4. Pivotal provides a cloud-native application  
25 platform, Pivotal Cloud Foundry (“PCF”), and strategic services. Id. Pivotal’s platform  
26 enables software developers to accelerate and streamline their processes for modernizing  
27 cloud-based applications. Id. Pivotal’s consulting services assist companies in developing

28 software and adapting to cloud computing. Id. ¶ 21. Pivotal generates most of its revenue

from the sale of time-based PCF subscriptions. Id. ¶ 5; MTD (dkt. 80) at 1. Pivotal’s flagship product is Pivotal Application Service (“PAS”), and in February 2018, Pivotal made its new product, Pivotal Container Service (“PKS”) commercially available. CAC ¶ 5; MTD at 1. PKS allows customers to “more easily deploy and operate Kubernetes,” an open-source system designed for managing containerized workloads and services. CAC ¶ 5.

At all relevant times, Defendant Robert Mee (“Mee”) served as Pivotal’s Chief Executive Officer, and Defendant Cynthia Gaylor (“Gaylor”) served as Pivotal’s Chief Financial Officer. Id. ¶ 32. Defendants Mee and Gaylor possessed the power and authority to control the contents of Pivotal’s Securities and Exchange Commission (“SEC”) filings, press releases, and other market communications. Id. ¶ 35.

Defendants Paul Martiz, Egon Durban, William Green, Marcy Klevorn, Khozema Shipchandler, and Michael S. Dell each signed the Registration Statement, solicited the investing public to purchase securities issued pursuant thereto, hired and assisted the underwriters, and planned and contributed to the initial public offering (“IPO”) and Registration Statement. Id. ¶¶ 36–43.

Defendants Morgan Stanley & Co. LLC; Goldman Sachs & Co. LLC; Citigroup Global Markets Inc.; Merrill Lynch, Pierce, Fenner & Smith Inc.; Barclays Capital Inc.; Credit Suisse Securities (USA) LLC; RBC Capital Markets, LLC; UBS Securities LLC; Wells Fargo Securities LLC; KeyBanc Capital Markets Inc.; William Blair & Company, L.L.C.; Mischler Financial Group, Inc.; Samuel A. Ramirez & Co., Inc.; Siebert Cisneros Shank & Co., LLC; and Williams Capital Group, L.P. (“Underwriter Defendants”) are financial services companies that acted as underwriters for Pivotal’s IPO, helping to draft the Registration Statement and solicit investors to purchase securities issued pursuant thereto.<sup>1</sup> Id. ¶¶ 44–59. Representatives for the Underwriter Defendants allegedly

1. The Underwriter Defendants have moved to join Pivotal’s motion to dismiss the CAC, and Pivotal’s reply to the opposition. See generally Mot. for Joinder (dkt. 88); Notice of Joinder (dkt.

1 conducted a “due diligence” investigation into Pivotal’s operations and financial prospects,  
2 met with Pivotal executives for “drafting sessions,” and caused the Registration Statement  
3 to be filed with the SEC. Id. ¶ 59.

4 The Plaintiff class consists of all persons and entities, other than the defendants,  
5 who purchased or otherwise acquired (1) Pivotal’s common stock traceable to the  
6 registration statement and prospectus issued in connection with Pivotal’s April 2018 IPO,  
7 and/or (2) Pivotal securities between April 20, 2018 and June 4, 2019 (the “Class Period”).  
8 Id. ¶ 3. The Lead Plaintiffs in this matter are the Oklahoma City Employee Retirement  
9 System and the Police Retirement System of St. Louis (“Plaintiffs”). Id. ¶ 1.

#### 10 **B. Factual Background**

11 On December 15, 2017, Pivotal filed a confidential draft registration statement on  
12 Form S-1. Id. ¶ 75. On or about April 18, 2018, Pivotal filed a final amendment to the  
13 registration statement, which registered over 37 million shares of Pivotal common stock  
14 for public sale. Id. ¶ 79. The SEC declared the registration statement effective on April  
15 19, 2018. Id. On or about April 20, 2018, Pivotal filed the final prospectus for the IPO.  
16 Id. ¶ 80.

17 On April 24, 2018, Pivotal completed the IPO, which, upon the Underwriter  
18 Defendants exercising their full over-allotment option to purchase additional shares, issued  
19 a total of 42,550,000 shares priced to the public at \$15 per share and generated more than  
20 \$638 million for Pivotal. Id. ¶ 81. Pivotal’s 200-page registration statement included an  
21 overview of its products, business operations, financial results, and almost forty pages of  
22 risk disclosures. MTD at 1 (citing Webb Decl. Ex. 1 at 16–50). The registration statement  
23 promoted Pivotal’s “leading” and “turnkey cloud-native platform,” claiming it  
24 “combine[d] the latest innovations from open-source projects . . . .” and integrated PCF  
25 with Kubernetes. CAC ¶ 8. The registration statement also emphasized “the Company’s  
26 sales and customer success model.” Id. The CAC alleges that the registration statement  
27 and prospectus made false and/or misleading statements regarding Pivotal’s business for  
28

1 failing to disclose material information. Id. ¶¶ 9, 148–62.

2 During the Class Period, Pivotal “repeatedly touted the superiority and adoption of  
3 its products.” Id. ¶ 15. The CAC alleges that statements made during the Class Period  
4 were materially false and/or misleading because Pivotal Defendants failed to disclose  
5 “among other things, that Pivotal was facing major problems with its sales execution and a  
6 complex technology landscape resulting in lengthening sales cycles and diminished  
7 growth, as well as the industry’s sentiment [having] shifted away from Pivotal’s principal  
8 product, which was incompatible with Kubernetes, the industry-standard platform.” Id. ¶  
9 16. These purportedly misleading statements were made in connection with a January  
10 2019 conference and Pivotal’s quarterly earnings reports and calls on four dates:  
11 June 12, 2018, September 12, 2018, December 11, 2018, and March 14, 2019. Id. ¶¶ 227–  
12 33, 239–48, 254–59, 264–66, 268–80.

13 On June 4, 2019, Pivotal reported its financial results for the first quarter of fiscal  
14 year 2020. CAC ¶ 18. Defendant Mee advised investors that Pivotal “closed fewer deals  
15 than . . . expected in Q1 due to sales execution and a complex technology landscape that is  
16 lengthening [Pivotal’s] sales cycle.” Id. Pivotal lowered its going-forward fiscal year  
17 2020 revenue guidance from \$798–806 million to \$756–767 million. Id. ¶ 19; MTD at 3.  
18 The next day, Pivotal’s stock price fell \$7.65 per share, or more than 40 percent, from  
19 \$18.54 per share to \$10.89 per share. Id. ¶ 20. Following the news, analysts called the  
20 quarter a “train wreck” and characterized Pivotal’s operating results as “disastrous” and a  
21 “cause for concern.” Id. ¶ 21. On August 22, 2019, Pivotal announced a proposed merger  
22 with VMware at \$15 per share; the merger closed at the end of 2019. Id. ¶ 21; MTD at 3.

### 23 C. Procedural Background

24 In November 2019, this Court consolidated three related securities class actions  
25 against Pivotal, and appointed Oklahoma as Lead Plaintiff. See generally Order Granting  
26 Consolidation and Appointing Lead Plaintiff and Lead Counsel (dkt. 63).

27 Plaintiffs subsequently filed the CAC on February 11, 2020. See generally CAC.

On March 27, 2020, Pivotal filed a motion to dismiss the CAC, see generally MTD, a declaration in support of the motion that attached twenty-one documents, some of which were incorporated in the CAC by reference, see generally Webb Decl. (dkt. 81), and a request for the Court to consider these documents and to take judicial notice of Pivotal's SEC filings. See generally Request for Judicial Notice (dkt. 83). Plaintiffs oppose Pivotal's motion to dismiss. See generally Opp'n (dkt. 90). Pivotal filed a reply to Plaintiffs' opposition. See generally Reply (dkt. 91). The Court also held a motion hearing on July 17, 2020. See Motion Hearing (dkt. 95).

## II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b). Dismissal may be based on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019). The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986) (citation omitted); see Clegg v. Cult Awareness Network, 18 F.3d 752, 754–55 (9th Cir. 1994). Rather, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 697 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. When evaluating a motion to dismiss, the Court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). "Courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." Tellabs, Inc. v. Makor

James & Dickie, Ltd., 551 U.S. 208, 222 (2007).



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