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14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **OAKLAND DIVISION**

17
18 IN RE ROBINHOOD ORDER FLOW
LITIGATION

Master File 4:20-cv-09328-YGR

19 **DEFENDANTS' NOTICE OF MOTION**
AND MOTION TO DISMISS
20 **CONSOLIDATED AMENDED**
COMPLAINT; MEMORANDUM OF
21 **POINTS AND AUTHORITIES IN**
SUPPORT THEREOF

22 Date: October 19, 2021
23 Time: 2:00 p.m.
24 Judge: Hon. Yvonne Gonzalez Rogers
Ctrm: 1, 4th Floor

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Desai v. Deutsche Bank Sec. Ltd.,
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Diaz v. N. Dynasty Mins. Ltd.,
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Fleming v. Charles Schwab Corp.,
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In re Citigroup Auction Rate Sec. Litig.,
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In re Kalobios Pharms., Inc. Sec. Litig.,
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In re Nektar Therapeutics,
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In re Peerless Sys., Corp. Sec. Litig.,
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In re Rigel Pharms., Inc. Sec. Litig.,
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13 *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*,
 14 547 U.S. 71 (2006) 21

15 *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,
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17 *Northstar Fin. Advisors, Inc. v. Schwab Invs.*,
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19 *Rayner v. E*TRADE Fin. Corp.*,
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Tellabs, Inc. v. Makor Issues & Rts., Ltd.,
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1 *Xiaojiao Lu v. Align Tech., Inc.*,
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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on October 19, 2021, at 2:00 p.m., or as soon thereafter as
3 this matter may be heard, in Courtroom 1, Fourth Floor, of the United States Courthouse, 1301
4 Clay Street, Oakland, CA 94612, before the Honorable Yvonne Gonzalez Rogers, United States
5 District Judge, Defendants Robinhood Financial LLC (“Robinhood Financial”), Robinhood
6 Markets, Inc. (“Robinhood Markets”), and Robinhood Securities, LLC (“Robinhood Securities”)
7 (collectively, “Robinhood” or “Defendants”) shall and hereby do move the Court to dismiss the
8 Consolidated Amended Complaint (“CAC”) filed by Lead Plaintiff Ji Kwon (“Plaintiff”) without
9 leave to amend pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b), the Private
10 Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4, and the Securities
11 Litigation Uniform Standards Act of 1998 (“SLUSA”), Pub. L. No. 105-353, 12 Stat. 3227.
12 Defendants’ motion is based on this Notice of Motion, the accompanying Memorandum of Points
13 and Authorities and all pleadings and papers filed in this matter and upon such other matters as
14 may be presented to the Court at the time of hearing or otherwise.

15 **STATEMENT OF RELIEF SOUGHT**

16 Robinhood seeks an order dismissing the CAC in its entirety with prejudice.
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants submit this memorandum in support of their motion to dismiss the CAC for
3 failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6) and 9(b) and the
4 PSLRA, and as precluded by SLUSA.

5 **STATEMENT OF ISSUES TO BE DECIDED**

6 Whether the CAC should be dismissed for failure to state a claim under Section 10(b) of
7 the Securities Exchange Act of 1934 and whether Plaintiff’s state law claims are precluded by
8 SLUSA.

9 **PRELIMINARY STATEMENT**

10 Robinhood is a broker-dealer that offers retail customers the ability to invest, commission-
11 free, through a self-directed trading platform.¹ Customers place trades through Robinhood’s
12 website or smartphone applications, which are then routed to other broker-dealers, known as
13 market makers, for execution. Robinhood receives payment from these other firms in exchange
14 for routing orders to them – a legal, regulated, and common practice throughout the investment
15 industry known as “payment for order flow.” This suit is a misguided attempt to turn this
16 unremarkable payment stream into a violation of the federal securities laws by alleging, despite
17 extensive disclosures, that Robinhood failed to disclose it, and by asserting, without any
18 particularized supporting allegations, the existence of an ill-defined “scheme.”

19 The thrust of the CAC is that Robinhood’s order routing practices and receipt of payment
20 for order flow violated the “duty of best execution,” which requires broker-dealers to seek the
21 most favorable execution terms reasonably available under the circumstances. Plaintiff’s theory is
22 that, unbeknownst to customers, Robinhood negotiated higher payment for order flow rates than
23 other retail broker-dealers, which allegedly caused customers to receive inferior trade execution
24 prices compared to what they might have obtained from Robinhood’s competitors. Plaintiff’s vain
25 attempt to cram its best-execution theory into a fraud paradigm is the central flaw of the CAC,
26 which should be dismissed in its entirety.

27
28 ¹ Robinhood Markets, the parent of Robinhood Financial and Robinhood Securities, is not a
broker-dealer. Robinhood Financial serves as an introducing broker while Robinhood Securities
serves as a clearing broker. (CAC ¶ 21.)

1 First, Plaintiff’s securities fraud claim should be dismissed because he does not allege any
2 of its core elements: an actionable misstatement or omission, particularized facts giving rise to a
3 strong inference of scienter (*i.e.*, an intent to defraud), or reliance.

4 None of the alleged misrepresentations or omissions identified in the CAC are actionable.
5 Robinhood’s description of its platform as commission-free is true and Plaintiff admits that
6 payment for order flow was disclosed on Robinhood’s website as a source of revenue throughout
7 the class period. Plaintiff complains only about *where* on Robinhood’s website payment for order
8 flow was disclosed, not *whether* it was disclosed. Furthermore, Robinhood’s customer agreement
9 has a section devoted to payment for order flow and Plaintiff received thousands of trade
10 confirmations stating that Robinhood could receive payment for order flow in connection with his
11 trades. Robinhood’s statement comparing its execution quality to that of other broker-dealers also
12 is not actionable because it was limited to two metrics, the veracity of which are undisputed.

13 Plaintiff fails to allege particularized facts giving rise to a “strong inference” of scienter as
14 required by the PSLRA – *i.e.*, that Defendants knowingly made false statements or acted with
15 reckless disregard for the truth – because Robinhood’s alleged motive to obtain payment for order
16 flow is the type of generic profit motive that is insufficient to establish scienter. Although
17 Plaintiff alleges broadly that “senior Robinhood personnel” were aware of internal analyses
18 showing that Robinhood’s execution quality lagged behind other brokerages, Plaintiff fails to
19 identify that “personnel” or offer any particularized facts about the alleged analyses. Plaintiff’s
20 allegations suggest – at worst – mismanagement, which is insufficient to state a claim for fraud.

21 Plaintiff fails to plead reliance because he does not allege that he knew of, or read, any of
22 the allegedly false statements giving rise to this action. Instead, Plaintiff claims that he relied on
23 Robinhood’s “promises to offer commission free trading at best execution compared to
24 competitors.” Robinhood never made any such promises. Significantly, despite claiming that he
25 would have used a different brokerage had he known that Robinhood received payment for order
26 flow, Plaintiff continued to use Robinhood’s platform after payment for order flow was
27 specifically identified as a source of revenue in an FAQ on Robinhood’s website – the very place
28 Plaintiff claims it should have been disclosed all along. No presumption of reliance is available to

1 save Plaintiff’s securities fraud claim. The fraud-on-the-market doctrine is inapplicable because
2 none of Robinhood’s alleged misstatements affected the market price of any of the securities in
3 which Plaintiff traded. Likewise, the presumption of reliance available in certain omissions cases
4 under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), is inapplicable
5 because Plaintiff primarily asserts misrepresentation rather than omission claims.

6 *Second*, Plaintiff’s claim that Robinhood engaged in a “scheme” to mislead customers
7 about its receipt of payment for order flow and compliance with the duty of best execution is
8 entirely conclusory and unsupported by factual allegations evidencing the existence of the
9 purported scheme. Plaintiff’s attempt to allege scienter and reliance in connection with this
10 supposed scheme are deficient for the reasons discussed above, in addition to the fact that the
11 Supreme Court and Ninth Circuit have held that plaintiffs cannot rely on a presumption of reliance
12 in cases like this, where the alleged fraudulent scheme was not disclosed to the public.

13 *Third*, Plaintiff’s state law claims must be dismissed because they are precluded by the
14 Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), which bars plaintiffs from
15 bringing securities fraud class actions based on state law. The Ninth Circuit – along with every
16 other Court of Appeals to have addressed the issue – has held that state law class actions premised
17 on breaches of the duty of best execution involving fraud or nondisclosure are barred by SLUSA.
18 That standard is easily met here because the substance of each of Plaintiff’s state law claims is that
19 Robinhood allegedly made false statements and engaged in deceptive conduct in connection with
20 its breach of the duty of best execution.

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STATEMENT OF FACTS²

I. THE PARTIES.

Robinhood offers customers the ability to invest, commission-free, in stocks, ETFs, and options through a self-directed trading platform, both on its website and through smartphone applications. (CAC ¶ 21.) Robinhood Financial is a registered broker-dealer with the Securities and Exchange Commission (“SEC”). (CAC ¶ 21.) It acts as an introducing broker and has a clearing arrangement with Robinhood Securities. (CAC ¶ 21.) When customers open accounts with Robinhood, they enter into a customer agreement with Robinhood Financial and Robinhood Securities. (CAC ¶ 21.) Plaintiff’s only allegation about Robinhood Markets is that it is a Delaware corporation with its principal place of business in California. (CAC ¶ 20.)

II. PAYMENT FOR ORDER FLOW.

Rather than sending customer orders to buy or sell securities directly to national exchanges like the New York Stock Exchange, Robinhood, like other retail broker-dealers, routes orders to other broker-dealers (known as “principal trading firms” or “electronic market makers”) to either execute those orders or route them to other market centers for execution. (CAC ¶ 24.) These market makers profit from executing large volumes of retail buy and sell orders either by taking the other side of customer orders and exiting the positions at a profit or by routing the orders to other market centers. (CAC ¶ 25.) To secure a guaranteed supply of liquidity in their markets, market makers offer payments to retail broker-dealers in exchange for the retail firms routing their customers’ orders to the market makers. (CAC ¶¶ 26-27.) These payments are known as “payment for order flow” or “PFOF.” (CAC ¶ 27.) SEC rules expressly permit the receipt of such payments as long as they are disclosed in quarterly reports filed pursuant to 17 C.F.R. § 242.606

² Allegations from the CAC are assumed to be true for purposes of this motion, except where those allegations contradict the contents of regulatory filings and other documents cited in the CAC. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (“The court may treat . . . a document [referenced in the complaint] as part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6).”). As discussed further in the Request for Judicial Notice, Defendants request that the Court take judicial notice of the documents attached as exhibits to the accompanying Declaration of Brandon Fetzer, which are referred to herein as “Exs. A-T.”

1 (“Rule 606”). (CAC ¶ 29.)³ There is no allegation that Robinhood failed to fully and accurately
 2 report its PFOF in its Rule 606 filings, which Plaintiff acknowledges are posted on Robinhood’s
 3 website. (CAC ¶ 72.)

4 Principal trading firms may also offer retail broker-dealers “price improvement” on
 5 customer executions in exchange for routing customer orders to them. (CAC ¶ 30.) Price
 6 improvement occurs when a customer order executes at a price that is superior to the best available
 7 quotation then appearing on the public quotation feed, known as the National Best Bid and Offer
 8 (“NBBO”). (CAC ¶¶ 30-31.) In these circumstances, the principal trading firm executes a buy
 9 order at a price lower than the lowest prevailing offer or executes a sell order at a price higher than
 10 the highest prevailing bid. (CAC ¶ 30.)

11 **III. THE DUTY OF BEST EXECUTION.**

12 A broker-dealer has a duty to seek to obtain best execution of customer orders at the most
 13 favorable terms reasonably available under the circumstances. *See Newton v. Merrill Lynch,*
 14 *Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 173 (3d Cir. 2001). In other words, the duty “requires
 15 brokers to use reasonable diligence to ascertain the trading venue that will secure the most
 16 favorable price possible for the customer.” *Lim v. Charles Schwab & Co., Inc.*, Nos. 15-CV-
 17 02074 & 15-cv-02945, 2015 WL 7996475, at *1 (N.D. Cal. Dec. 7, 2015), *aff’d sub nom. Fleming*
 18 *v. Charles Schwab Corp.*, 878 F.3d 1146 (9th Cir. 2017). Determining what prices are reasonably
 19 available “in any particular situation may require a factual inquiry into all of the surrounding
 20 circumstances.” *Newton*, 259 F.3d at 187 (internal quotations omitted). FINRA Rule 5310 directs
 21 broker-dealers to consider multiple factors, including the “character of the market for the security”
 22 and the “size and type of transaction.”

23 A broker-dealer is required to evaluate the quality of executions it obtains for its

24 ³ Rule 606 of Regulation NMS requires broker-dealers to make publicly available quarterly
 25 reports that disclose, among other things, “the identity of the top ten venues to which they routed
 26 orders for execution and the material aspects of their relationship with each of those venues,
 27 including any arrangement for payment for order flow or profit sharing.” Sec. & Exch. Comm’n,
 28 Div. of Trading & Markets, *Certain Issues Affecting Customers in the Current Equity Market*
Structure (Jan. 26, 2016), at 8. Its counterpart, Rule 607 of Regulation NMS, requires broker-
 dealers to make certain disclosures to customers upon the opening of a new account and annually
 thereafter, including their policies about PFOF. *See id.*

1 customers' orders, consider the best reasonably available terms from competing market centers,
 2 and where material differences exist between the price improvement opportunities offered by
 3 market centers, take those differences into account in deciding where to route orders.⁴ At the same
 4 time, brokers are not held "to an absolute requirement of achieving the most favorable price" on
 5 an order or to achieve a certain level of execution quality,⁵ nor are they required to match the
 6 execution quality metrics of other broker-dealers. Importantly, "a broker-dealer does not violate
 7 its best execution obligation solely because it receives payment for order flow."⁶

8 **IV. ROBINHOOD'S COMPLIANCE WITH THE DUTY OF BEST EXECUTION.**

9 Robinhood initially relied on another broker-dealer to provide both clearing and order
 10 execution, but started routing customer orders directly to principal trading firms in the first half of
 11 2016. (CAC ¶¶ 49-50.) Robinhood allegedly negotiated a PFOF rate with these trading firms that
 12 was higher than the rate the firms paid to other retail brokerages. (CAC ¶¶ 51-54.) Around this
 13 same time, Robinhood created a "Best Execution Committee" to monitor the speed and price at
 14 which orders were being executed. (CAC ¶ 56.) Plaintiff alleges that this committee failed to
 15 conduct sufficient reviews to ensure that Robinhood was satisfying its best execution obligations.

16 In October 2018, unidentified "Robinhood personnel" allegedly learned that Robinhood's
 17 execution quality metrics lagged behind that of its competitors, and by March 2019, Robinhood
 18 allegedly conducted further analyses that revealed that the percentage of orders receiving price
 19 improvement and the amount of that price improvement was less than what was available at other
 20 brokerages. (CAC ¶¶ 61-62, 76-80.) Certain unidentified "senior Robinhood personnel" were
 21 allegedly aware of these analyses. (CAC ¶¶ 62, 78.) Robinhood allegedly breached its duty of
 22 best execution by not benchmarking its execution quality against that of competitors. (CAC ¶ 63.)

24 ⁴ Order Execution Obligations, Exchange Act Release No. 37619A, 1996 WL 506154, at
 *51-53 (Sept. 6, 1996).

25 ⁵ See Payment for Order Flow, Exchange Act Release No. 34-33026, 1993 WL 403286, at
 *4 (Oct. 6, 1993) (internal citation and quotation marks omitted).

26 ⁶ Disclosure of Order Execution and Routing Practices, Exchange Act Release No. 34-
 43590, 2000 WL 1721163, at *12 (Nov. 17, 2000); see also Proposed Amendments to Rule 610 of
 27 Regulation NMS, Exchange Act Release No. 34-61902, 2010 WL 1500563, at *16 (Apr. 14,
 28 2010) (noting that PFOF is "not necessarily inconsistent with a broker's duty of best execution, so
 long as appropriate measures are taken to ensure that that duty is, in fact, met").

1 **V. ROBINHOOD’S STATEMENTS ABOUT PAYMENT FOR ORDER FLOW AND**
 2 **EXECUTION QUALITY.**

3 **A. Payment for Order Flow.**

4 Robinhood consistently disclosed its receipt of PFOF on its website. In 2014, before its
 5 launch, Robinhood published an FAQ that disclosed that it anticipated receiving PFOF in response
 6 to the question, “How does Robinhood make money?” (CAC ¶ 41.) In December 2014, the
 7 reference to PFOF was moved to a new FAQ, which was deleted sometime in 2016. (CAC ¶ 64.)
 8 In October 2018, PFOF was again added to the list of revenue sources appearing on the “How
 9 Robinhood Makes Money” FAQ. (CAC ¶ 74.) Throughout this time, Robinhood disclosed its
 10 receipt of PFOF in its Rule 606 reports, which were published on its website and specifically listed
 11 the venues to which Robinhood routed orders and the payments Robinhood received in return.
 12 (CAC ¶ 72.) For example, Robinhood Financial’s Q1 2018 Rule 606 report disclosed that
 13 “Robinhood received payment from Wolverine Securities, LLC for directing order flow to this
 14 venue” and that the payments “averaged less than \$0.00026 per dollar of executed trade value.”
 15 (Ex. A at 3.)

16 In addition to its website, Robinhood disclosed its receipt of PFOF in its customer
 17 agreements and trade confirmations. (CAC ¶¶ 72-73.) Robinhood’s customer agreements have
 18 always included a paragraph titled “Equity Orders and Payment for Order Flow,” which disclosed
 19 PFOF as a potential source of revenue. (CAC ¶ 73.) In relevant part, this paragraph stated:

20 ‘Payment for order flow’ includes, among other things, any monetary payment,
 21 service, property, or other benefit that results in remuneration, compensation, or
 22 consideration to a broker-dealer from any broker-dealer in return for directing
 23 orders. [Robinhood] transmit[s] customer orders for execution to various
 24 exchanges or market centers based on a number of factors . . . [that] are designed to
 25 result in favorable transaction processing for customers. The nature and source of
 26 any payments and/or credits received by [Robinhood] in connection with any
 27 specific transactions will be furnished upon written request.

28 (Ex. B § 24.)

Furthermore, since Robinhood’s inception, trade confirmations sent to customers have
 disclosed Robinhood’s receipt of PFOF. From the beginning of the class period through
 November 2018, Robinhood utilized Apex Clearing Corporation (“Apex”) as its clearing broker

1 and the Apex trade confirmations stated:

2 Apex receives remuneration for directing orders to particular broker/dealers or
3 market centers for execution. Such remuneration is considered compensation to the
4 firm. The source and nature in connection with your transaction may be disclosed
5 upon written request. Your Introducing Broker, that clears trades through Apex,
6 may share in such payments or may directly receive payment for order flow for
7 certain transactions. Details may be furnished upon written request.

8 (Ex. C.) From November 2018 (when Robinhood began self-clearing) through the end of the class
9 period, Robinhood's trade confirmations stated:

10 RHS may receive remuneration for directing orders to particular broker-dealers or
11 market centers for execution. Such remuneration is considered compensation to the
12 firm. The source and nature in connection with your transactions are available
13 upon written request. RHF, when clearing through RHS, may share in such
14 payments or may directly receive payment for order flow for certain transactions.
15 Details are available upon written request.

16 (Ex. D.)

17 Robinhood's receipt of PFOF as a source of revenue was repeatedly referenced in
18 numerous publications since its founding, including in *The New York Times* and CNBC. A few
19 examples include:

- 20 • "In addition to cash balances, the company makes money from 'payment for order
21 flow,' which refers to the money it receives for selling its orders to market makers
22 to be executed" (Ex. E);
- 23 • "Among competitors, Robinhood offers a unique business model. The company
24 gives away free trades of both stocks and cryptocurrencies to its customers, taking
25 a loss on transaction fees. The app then collects interest on escrowed cash and
26 sells trades to market makers" (Ex. F); and
- 27 • "The company generates revenue by taking a tiny fraction of a cent per dollar
28 from each trade order as well as collecting interest on customer deposits" (Ex. G).

29 **B. Execution Quality.**

30 In October 2018, Robinhood added an FAQ to its website concerning its order execution
31 quality. Under the heading, "What is the execution quality for orders on Robinhood," the FAQ
32 stated:

33 Reg NMS ensures your order gets executed at the national best bid and offer, or
34 better, at the time of execution. Our execution quality and speed matches or beats
35 what's found at other major brokerages. Even when measured at the time of
36 routing, our customers' orders get executed at the NBBO or better. By way of
37 example, in August 2018, 99.12% of our customers' marketable orders were
38 executed at the the [sic] national best bid and offer or better with an execution
39 speed of 0.08 seconds from routing to execution (for S&P 500 stocks, during

1 market hours).

2 (CAC ¶ 75.) This statement was removed from the website in June 2019. (CAC ¶ 81.)

3 **VI. PLAINTIFF’S CLAIMS.**

4 Plaintiff asserts a claim under Section 10(b) of the Securities Exchange Act of 1934 and
5 SEC Rule 10b-5, in addition to various state law claims, including negligent misrepresentation and
6 violations of California’s Consumer Legal Remedies Act (“CLRA”), the Unfair Competition Law
7 (“UCL”), and the False Advertising Law (“FAL”), based on alleged misrepresentations and
8 deceptive conduct relating to Robinhood’s adherence to the duty of best execution and its receipt
9 of PFOF.

10 **ARGUMENT**

11 **I. PLAINTIFF FAILS TO STATE A CLAIM UNDER SECTION 10(b) AND RULE**
12 **10b-5(b).**

13 Plaintiff’s Section 10(b) and Rule 10b-5 claim should be dismissed to the extent it is based
14 on alleged misstatements and omissions because he fails to plead with particularity (i) an
15 actionable misstatement or omission, (ii) facts giving rise to a strong inference of scienter, and (iii)
16 reliance. *See Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 157 (2008); 15
17 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b).

18 Rule 9(b) and the PSLRA impose “heightened pleading requirements” that securities fraud
19 plaintiffs must meet to survive a motion to dismiss. *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d
20 869, 876 (9th Cir. 2012). Under the PSLRA, Plaintiff must plead “particularized allegations of the
21 circumstances constituting fraud,” and “additional specific pleading requirements, including
22 [those] requiring plaintiffs to state with particularity both the facts constituting the alleged
23 violation and the facts evidencing scienter.” *Id.*

24 The Court “need not . . . accept as true allegations that contradict matters properly subject
25 to judicial notice or by exhibit.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
26 2001). “Nor is the court required to accept as true allegations that are merely conclusory,
27 unwarranted deductions of fact, or unreasonable inferences.” *Id.*

28

1 **A. Plaintiff Fails to Plead an Actionable Misstatement or Omission.**⁷

2 **1. Robinhood Did Not Misrepresent the Commission-Free Nature of Its**
3 **Trading Platform.**

4 Plaintiff’s Section 10(b) claim is premised on the untenable assertion that Robinhood did
5 not live up to its “promise to provide” commission-free trading. (CAC ¶ 93.) Robinhood’s
6 description of its trading platform as commission-free was not false or misleading because
7 Robinhood does not charge commissions. Its receipt of PFOF does not change that fact. As an
8 initial matter, Plaintiff does not – and cannot – allege that he was charged a commission on any of
9 the trades he placed through Robinhood. Unlike other brokerages, which have historically
10 charged a commission of \$5 or more per order *and* received PFOF, Robinhood has never charged
11 customers commissions to place orders on its platform. (CAC ¶ 79.) With respect to PFOF, those
12 payments do not constitute commissions because they are made by principal trading firms – not
13 customers – in exchange for Robinhood’s agreeing to route orders to those firms. (CAC ¶ 28.)

14 **2. Robinhood Repeatedly Disclosed Its Receipt of Payment for Order**
15 **Flow as a Revenue Source.**

16 Robinhood’s alleged failure to disclose PFOF as a source of revenue in one particular
17 location on its website cannot serve as the basis for a Section 10(b) claim because – as Plaintiff
18 concedes – Robinhood disclosed that fact through various means, including on other parts of its
19 website, in its customer agreement, and in each trade confirmation sent to customers. *See*
20 *McGovney v. Aerohive Networks, Inc.*, No. 18-cv-00435, 2019 WL 8137143, at *11 (N.D. Cal.
21 Aug. 7, 2019) (dismissing Section 10(b) claim because the defendant “disclosed exactly” what the
22 plaintiff alleged it had omitted). Robinhood’s receipt of PFOF was also widely reported by
23 various mainstream news sources.

24 *First*, Robinhood disclosed PFOF as a source of revenue on its website. From December
25 2014 to 2016 and again from September or October 2018 to present, PFOF was listed in an FAQ

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27 ⁷ Although Plaintiff was required under Section 13 of the Court’s Standing Order in Civil
28 Cases to file a chart specifically identifying each statement alleged to have been false or
misleading, Plaintiff has not done so and thus Defendants’ interpretation of the alleged
misstatements giving rise to this action is based on the CAC.

1 concerning Robinhood’s sources of revenue. (CAC ¶¶ 45-46, 64, 74.) Plaintiff also admits that
2 throughout the class period, Robinhood’s receipt of PFOF was disclosed in Rule 606 reports –
3 posted on Robinhood’s website – which specifically identified the principal trading firms to which
4 Robinhood routed orders and the PFOF Robinhood received in return. (CAC ¶ 72.) For example,
5 for the first quarter of 2018, Robinhood identified Apex Clearing Corporation, Citadel Execution
6 Services, Two Sigma Securities, LLC, and Wolverine Securities, LLC as entities to which it
7 routed orders, and for the latter three disclosed that “[p]ayments received averaged less than
8 \$0.00026 per dollar of executed trade value for order flow.” (Ex. A at 3.)

9 *Second*, Robinhood’s customer agreement and trade confirmations disclosed the receipt of
10 PFOF. (CAC ¶ 73.) From inception, Robinhood’s customer agreement has included a section
11 devoted to PFOF – “Equity Orders and Payment for Order Flow” – that allowed customers to seek
12 information about “the nature and source of any payments and/or credits” received by Robinhood
13 in connection with its order routing practices. (Ex. B.) Trade confirmations sent to customers also
14 disclosed PFOF. From November 2015 to November 2018, the trade confirmations sent to
15 customers by Apex, which cleared trades on behalf of Robinhood, stated that Apex “receives
16 remuneration for directing orders to particular broker/dealers or market centers for execution” and
17 that Robinhood Financial “may share in such payments or may directly receive payment for order
18 flow.” (Ex. C.) Since December 2018, trade confirmations have included similar language, but
19 substituted Robinhood Securities for Apex. (Ex. D.)

20 *Third*, numerous publications have confirmed Robinhood’s receipt of PFOF since at least
21 2013. For example, in December 2013, *TechCrunch*, a leading technology start-up media outlet
22 stated: “Robinhood will also earn money from what’s called ‘payment for order flow.’
23 Essentially, stock exchanges want lots of stock trading volume so people can always find a buyer
24 or seller, so they’re willing to pay a little to get trades executed on their exchange versus another.”
25 (Ex. H.) Similarly, in a February 2014 interview with CNBC, one of Robinhood’s founders stated
26 that “Robinhood has several monetization revenue streams on day one. Those include margin
27
28

1 lending, payment for order flow, and interest on cash balances.”⁸ Around that same time,
2 *TechCrunch* again noted that Robinhood planned to receive “payment for order flow where stock
3 exchanges pay the startup to bring its trading volume to their marketplaces.” (Ex. I.) Press
4 coverage continued through 2014 and 2015. (*See, e.g.*, Exs. J-K.) And in April 2016, an article
5 quoted one of Robinhood’s founders as saying that Robinhood “receive[s] a small amount per
6 trade from security dealers who buy and sell stocks – known as market makers – to bring
7 customers together.” (Ex. L.) In February 2017, in connection with an interview with the
8 founders, *The New York Times* noted that, “[i]n addition to cash balances, [Robinhood] makes
9 money from ‘payment for order flow,’ which refers to the money it receives for selling its orders
10 to market makers to be executed.” (Ex. E.) Robinhood’s founders continued to discuss PFOF
11 with various media outlets throughout the spring of 2017, and articles in *The Wall Street Journal*,
12 the *San Francisco Business Times*, *TechCrunch*, and *Reuters* (among many others) published
13 around that time explicitly mention PFOF as a source of Robinhood’s revenue. (Exs. M-P.)

14 Media reports referring to Robinhood’s receipt of PFOF continued throughout 2018,
15 including articles in *The Wall Street Journal* and *Business Insider*. These articles described PFOF
16 as “selling client trades to market makers” (Ex. Q) and “selling order flow to stock exchanges
17 looking to secure more liquidity for their traders,” (Ex. R) and identified PFOF as one of
18 Robinhood’s “three main monetization streams” (Ex. S) and “[i]ts other main way of pulling in
19 cash” (Ex. T).

20 The law is clear that publicly available information “cannot be a material omission under
21 federal securities laws.” *Sanchez v. IXYS Corp.*, No. 17-cv-06441, 2018 WL 4787070, at *3 (N.D.
22 Cal. Oct. 2, 2018) (dismissing Section 10(b) claim because the analyst reports serving as basis for
23 claim were publicly available on Bloomberg and thus “already included in the total mix of
24 information considered by shareholders”); *see also Tadros v. Celladon Corp.*, 738 F. App’x 448,
25 448-49 (9th Cir. 2018) (rejecting omission claim where omitted facts were disclosed “in a publicly
26 accessible journal article”); *In re Kalobios Pharms., Inc. Sec. Litig.*, 258 F. Supp. 3d 999, 1004,

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28 ⁸ *Buy Stocks with \$0 Commission*, CNBC (Feb. 27, 2014),
<https://www.cnbc.com/video/2014/02/27/buy-stocks-with-0-commission.html>.

1 1009-10 (N.D. Cal. 2017) (dismissing Section 10(b) claim where the allegedly omitted facts were
 2 reported by “credible and mainstream sources like the New York Times, Forbes and Newsweek”).

3 **3. Robinhood’s Limited Comparison of Two Execution Quality Metrics to**
 4 **Other Brokerages Was Not False or Misleading.**

5 The statement in the FAQ comparing Robinhood’s execution quality to other brokerages
 6 was not false or misleading because the comparison was limited to the percentage of trades
 7 executed at the NBBO and execution speed, and the CAC lacks any allegations suggesting that
 8 Robinhood did not compare favorably to other brokerages on those two metrics. (CAC ¶ 75.)
 9 And, contrary to Plaintiff’s suggestion, the statement does not mention “price improvement.”
 10 (CAC ¶ 76.)

11 **B. Plaintiff Fails to Plead Scienter.**

12 Plaintiff fails to satisfy the PSLRA’s requirement that he “state with particularity facts
 13 giving rise to a strong inference that the defendant acted with the required state of mind,” 15
 14 U.S.C. § 78u-4(b)(2)(A) – *i.e.*, that Defendants “made false or misleading statements either
 15 intentionally or with deliberate recklessness.” *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d
 16 981, 991 (9th Cir. 2009) (internal quotations omitted). To qualify as “strong,” the inference of
 17 scienter “must be more than merely plausible or reasonable – it must be cogent and at least as
 18 compelling as any opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor Issues &*
 19 *Rts., Ltd.*, 551 U.S. 308, 314 (2007). Courts are directed to engage in a comparative analysis and
 20 “must consider, not only inferences urged by the plaintiff . . . but also competing inferences
 21 rationally drawn from the facts alleged.” *Id.*

22 To plead scienter, therefore, “the complaint must contain allegations of specific
 23 contemporaneous statements or conditions that demonstrate the intentional or the deliberately
 24 reckless false or misleading nature of the statements when made.” *Xiaojiao Lu v. Align Tech.,*
 25 *Inc.*, 417 F. Supp. 3d 1266, 1279 (N.D. Cal. 2019) (internal quotations omitted). Pleading
 26 “deliberate recklessness” requires specific factual allegations showing “a highly unreasonable
 27 omission, involving . . . an extreme departure from the standards of ordinary care, and which
 28 presents a danger of misleading buyers or sellers that is either known to the defendant or is so

1 obvious that the actor must have been aware of it.” *Zucco Partners*, 552 F.3d at 991.

2 Plaintiff’s allegations pertaining to scienter are conclusory and fall far short of meeting the
3 PSLRA’s heightened pleading standard. Plaintiff’s attempt to establish scienter based on the
4 assertion that “senior Robinhood personnel” and “senior management” were allegedly aware of
5 certain internal analyses suggesting that Robinhood’s execution quality lagged behind other
6 brokerages is insufficient to avoid dismissal because the CAC fails to identify the personnel at
7 issue or anything at all about these purported analyses. (CAC ¶¶ 62, 76, 78, 118-19.) *See Jackson*
8 *v. Abernathy*, 960 F.3d 94, 99 (2d Cir. 2020) (generalized allegations about warnings made to
9 “unidentified senior executives” are not “sufficiently particularized to raise a strong inference of
10 scienter against any individual, must less one whose knowledge may be imputed” to the
11 company); *Kaplan v. Charlier*, 426 F. App’x 547, 549 (9th Cir. 2011) (general allegation that
12 “management knew about the problems” insufficient to state a claim because complaint lacked
13 “any facts to back up this conclusory statement”); *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027,
14 1035-36 (9th Cir. 2002) (dismissing claim where plaintiffs failed to state the source of information
15 regarding the reports, how they learned of them, who drafted them, or which officers received
16 them); *Diaz v. N. Dynasty Mins. Ltd.*, No. 17-CV-1241, 2019 WL 1873291, at *4 (C.D. Cal. Feb.
17 22, 2019), *aff’d sub nom. Nozak v. N. Dynasty Mins. Ltd.*, 804 F. App’x 732 (9th Cir. 2020)
18 (complaints relying on the existence of “internal reports” must contain “at least some specifics
19 from those reports as well as such facts as may indicate their reliability”) (internal quotations
20 omitted); *In re Peerless Sys., Corp. Sec. Litig.*, 182 F. Supp. 2d 982, 994 (S.D. Cal. 2002) (holding
21 that allegations pertaining to scienter were deficient because the complaint lacked “allegations
22 identifying specific conversations, Board meetings, or reports” where adverse information was
23 disclosed).

24 Plaintiff’s allegations about Robinhood’s alleged failure to disclose its receipt of payment
25 for order flow and the allegedly higher-than-normal rate of such payments similarly do not
26 establish a strong inference of scienter. As a starting point, Plaintiff’s claim that Robinhood
27 intentionally or recklessly failed to disclose its receipt of PFOF makes no sense in light of the
28 varied ways in which Robinhood’s receipt of PFOF was disclosed, precluding any inference of

1 scienter. It is also legally insufficient because the “pursuit of PFOF is the type of generic profit
2 motive that is insufficient to establish scienter,” *Schwab v. E*Trade Fin. Corp.*, 285 F. Supp. 3d
3 745, 758 (S.D.N.Y. 2018), *aff’d*, 752 F. App’x 56 (2d Cir. 2018), and Plaintiff appears to be
4 asking for an inference of scienter from the mere fact of an alleged omission, which does not
5 satisfy the PSLRA.

6 Furthermore, the receipt of higher PFOF rates than other brokerages does not support an
7 inference of scienter with regard to execution quality because PFOF does not cause poor execution
8 quality. (CAC ¶¶ 52-55.) Order execution is not merely a dynamic between the customer (who
9 receives price improvement) and the broker-dealer (who receives PFOF). Market makers also
10 play a critical role in the process. Robinhood receiving less PFOF would not necessarily mean
11 greater price improvement for customers because the market maker could simply choose to keep
12 that additional portion of the spread as profit for itself. (See CAC ¶ 58 (alleging only that “high
13 payment for order flow rates *could* lead to less price improvement”) (emphasis added).)

14 Robinhood’s alleged failure to conduct regular and rigorous reviews of its compliance with
15 the duty of best execution also is insufficient to establish a strong inference of scienter because
16 those alleged failures suggest at most corporate mismanagement, not fraud. *Santa Fe Indus., Inc.*
17 *v. Green*, 430 U.S. 462, 479 (1977) (“Congress by § 10(b) did not seek to regulate transactions
18 which constitute no more than internal corporate mismanagement.”).

19 **C. Plaintiff Fails to Plead Reliance.**

20 Unlike traditional securities fraud cases where plaintiffs may rest on a presumption that
21 they relied on false or misleading statements under the fraud-on-the-market theory (also known as
22 the *Basic* presumption) or *Affiliated Ute* (available in certain omissions cases), Plaintiff cannot
23 rely on either presumption to establish reliance here. He must affirmatively allege that he read and
24 relied on the statements allegedly giving rise to this action, which he fails to do.

25 Plaintiff cannot invoke the fraud-on-the-market presumption because Plaintiff’s claims “do
26 not involve an omission or misrepresentation that affected the value of a security in an efficient
27 market.” *Newton*, 259 F.3d at 175 (rejecting application of fraud-on-the-market doctrine in
28 lawsuit asserting breach of duty of best execution); *see also Schwab*, 285 F. Supp. 3d at 753

1 (explaining that the fraud-on-the-market presumption applies “where the plaintiff transacted in the
 2 stock of a company that made material misrepresentations to the public and whose stock is traded
 3 on an efficient market”). Plaintiff’s allegation that stock prices were “presumably impacted by
 4 Defendants’ fraudulent information” is conclusory and speculative. (CAC ¶ 124.) Robinhood did
 5 not make any false statements about any particular security, and its alleged failure to abide by the
 6 duty of best execution did not impact the stock price of any security. The failure to obtain best
 7 execution may mean that a particular customer’s trade was not executed at the best price
 8 reasonably available in the market, but the price of the security is unaffected.

9 Plaintiff cannot rely on the presumption of reliance created by *Affiliated Ute* because
 10 Plaintiff primarily asserts “misrepresentation claims rather than omission claims.” *Schwab*, 285 F.
 11 Supp. 3d at 753; *see also Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999) (holding that
 12 *Affiliated Ute* presumption “should not be applied to cases that allege both misstatements and
 13 omissions” unless the case can be characterized as “one that primarily alleges omissions”); *George*
 14 *v. Cal. Infrastructure & Econ. Dev. Bank*, No. 09-CV-01610, 2010 WL 2383520, at *6 (E.D. Cal.
 15 June 10, 2010) (declining to apply *Affiliated Ute* presumption in case alleging both “affirmative
 16 misrepresentations and omissions”). Indeed, Plaintiff claims that he relied on Robinhood’s
 17 allegedly false “promises to offer commission free trading at best execution compared to the
 18 offerings of Defendants’ competitors” in choosing to use Robinhood’s trading platform – a
 19 statement that can only be characterized as an affirmative misrepresentation. (CAC ¶ 94.)
 20 Furthermore, Robinhood’s supposed failure to disclose the alleged falsity of its representations
 21 about execution quality and sources of revenue “does not transform a misrepresentation case into
 22 an omission case and allow a plaintiff to seek refuge in the *Affiliated Ute* presumption.” *Schwab*,
 23 285 F. Supp. 3d at 753.⁹

24
 25 ⁹ *Crago v. Charles Schwab & Co., Inc.* is not to the contrary. No. 16-CV-03938, 2017 WL
 26 6550507, at *1 (N.D. Cal. Dec. 5, 2017). In *Crago*, the court initially dismissed the plaintiffs’
 27 complaint, which related to the defendants’ representations that they complied with the duty of
 28 best execution, for failing to plead reliance, but subsequently determined that plaintiffs could rely
 on the *Affiliated Ute* presumption because the “distinction between what constitutes an omission
 as opposed to a misrepresentation” is “often ‘illusory.’” *Id.* at *8. *Crago*’s holding has no
 application here because Plaintiff’s claims are undeniably premised primarily on affirmative
 misrepresentations.

1 Without the benefit of these presumptions, Plaintiff had to plead direct reliance on the
 2 misstatements allegedly giving rise to this action, but he has not done so. As an initial matter,
 3 Robinhood never promised “commission free trading at best execution compared to the offerings
 4 of [its] competitors.” (CAC ¶ 94.) To the extent that this allegation is intended to refer to
 5 Robinhood’s statement that its execution quality and speed matched or beat what was available at
 6 other brokerages, it is inadequate because Plaintiff does not specifically allege that he read and
 7 relied on that statement. *See Schwab*, 285 F. Supp. 3d at 753 (dismissing claims based on alleged
 8 failure to abide by duty of best execution because the plaintiff failed “to allege that he actually
 9 read, or was otherwise aware of, E*TRADE’s representations regarding its best execution
 10 methodology”); *In re Van Wagoner Funds, Inc. Sec. Litig.*, 382 F. Supp. 2d 1173, 1187 (N.D. Cal.
 11 2004) (reliance not pled with particularity where the plaintiffs made “no specific allegations that
 12 they read the annual reports or registration statements” giving rise to suit). Moreover, to the extent
 13 Plaintiff claims he would have used a different broker-dealer had he known about Robinhood’s
 14 receipt of PFOF, that contention is completely undermined by the fact that Plaintiff continued to
 15 use Robinhood’s trading platform even after PFOF was added to Robinhood’s source of revenue
 16 FAQ in October 2018. (CAC ¶¶ 74 (alleging PFOF disclosed in FAQ in October 2018), 83
 17 (alleging Plaintiff used Robinhood to place trades from 2017 through 2019).)

18 **II. PLAINTIFF FAILS TO STATE A CLAIM UNDER RULE 10b-5(a) OR 10b-5(c).**

19 Plaintiff’s Section 10(b) and Rule 10b-5 claim should be dismissed to the extent it is based
 20 on violations of Rule 10b-5(a) or (c) – the “fraudulent scheme” prongs of Rule 10b-5 – because he
 21 fails to allege (i) that Robinhood “committed a deceptive or manipulative act in furtherance of the
 22 alleged scheme,” (ii) scienter, and (iii) reliance. *In re Nektar Therapeutics*, No. 18-CV-06607,
 23 2020 WL 3962004, at *13 (N.D. Cal. July 13, 2020); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5.

24 Plaintiff’s claim that Robinhood engaged in a scheme to mislead customers about the
 25 commission-free nature of its trading platform and to obtain PFOF at the expense of price
 26 improvement and the duty of best execution is unsupported by any facts. Plaintiff fails to plead
 27 with particularity “the time, place, and manner of each act of fraud, plus the role of each defendant
 28 in each scheme.” *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 405 (9th

1 Cir. 1991); *see also In re Citigroup Auction Rate Sec. Litig.*, 700 F. Supp. 2d 294, 304 (S.D.N.Y.
2 2009) (dismissing claims under Rule 10b-5(a) and (c) because the complaint failed to “include
3 specific allegations as to which Defendants performed what manipulative acts at what times and
4 with what effect”). Nowhere in the CAC does Plaintiff identify any of the individuals allegedly
5 involved in the scheme or the roles they allegedly played. Although a scheme to disseminate false
6 or misleading statements may serve as the basis of a claim under Rule 10b-5(a) or (c) in some
7 cases, for the reasons discussed above, Plaintiff has failed to allege an actionable misstatement or
8 omission. Robinhood repeatedly disclosed its receipt of PFOF throughout the class period, and its
9 only statement about execution quality was cabined to two metrics, the veracity of which Plaintiff
10 does not challenge.

11 Plaintiff fails to allege scienter and reliance for the same reasons as discussed above, in
12 addition to the fact that the presumptions of reliance described above are not available in cases like
13 this, where the existence of the alleged fraudulent scheme is not disclosed to the public. *See*
14 *Stoneridge*, 552 U.S. at 159 (holding that plaintiffs cannot rely on the *Basic* presumption in
15 fraudulent scheme cases because the deceptive acts are not “communicated to the public” and thus
16 there is no fraudulent information “reflected in the market price of the security”); *Desai v.*
17 *Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 941 (9th Cir. 2009) (holding that *Affiliated Ute*
18 presumption is inapplicable “in a case involving some omissions, but also misrepresentations and
19 secret manipulation”). By their very nature, fraudulent schemes must usually “remain undisclosed
20 to the general public” to succeed and the nondisclosure of that scheme does not turn every Rule
21 10b-5(a) and (c) claim into an omissions case. *See Desai*, 573 F.3d at 941.¹⁰

22 **III. PLAINTIFF’S STATE LAW CLAIMS ARE PRECLUDED BY SLUSA.**

23 Plaintiff’s state law claims are precluded by SLUSA, as this is a covered class action based
24 on allegations that Robinhood made misrepresentations and employed deceptive conduct in
25 connection with the purchase or sale of covered securities. *Northstar Fin. Advisors, Inc. v.*

26 ¹⁰ Although *Newton* held that it was appropriate to presume reliance under *Affiliated Ute*
27 because the “defendants allegedly failed to disclose their trade execution practice,” that holding is
28 in direct conflict with *Stoneridge* and *Desai* because the plaintiff’s claim was based on the
existence of a scheme to defraud that had not been disclosed to the public. *Newton*, 259 F.3d at
177.

1 *Schwab Invs.*, 904 F.3d 821, 828 (9th Cir. 2018) (“SLUSA bars a plaintiff class from bringing
 2 (1) a covered class action (2) based on state law claims (3) alleging that the defendants made a
 3 misrepresentation or omission or employed any manipulative or deceptive device (4) in connection
 4 with the purchase or sale of (5) a covered security.”); *see also* 15 U.S.C. § 78bb(f)(1).

5 The Ninth Circuit has determined that breaches of the duty of best execution involving
 6 fraud or nondisclosure are subject to the SLUSA bar, as has every other Court of Appeals to have
 7 addressed the issue. *See Fleming v. Charles Schwab Corp.*, 878 F.3d 1146, 1154 (9th Cir. 2017)
 8 (SLUSA “bars best execution claims to the extent that a best execution violation is based on fraud
 9 or nondisclosure”) (internal quotations omitted); *see also Rayner v. E*TRADE Fin. Corp.*, 899
 10 F.3d 117, 121 (2d Cir. 2018) (“best execution claims alleging misrepresentations or omissions”
 11 are subject to SLUSA preclusion); *Zola v. TD Ameritrade, Inc.*, 889 F.3d 920, 923-26 (8th Cir.
 12 2018) (same); *Kurz v. Fidelity Mgmt. & Rsch. Co.*, 556 F.3d 639, 641-42 (7th Cir. 2009) (rejecting
 13 plaintiff’s argument that SLUSA did not permit removal of suit filed in state court alleging
 14 violation of duty of best execution as “frivolous” and concluding that plaintiff “had a federal
 15 securities claim, or he had nothing”).

16 **A. This Case Is a Covered Class Action.**

17 This case is a “covered class action” under 15 U.S.C. § 78bb(f)(5)(B) because (i) damages
 18 are sought on behalf of more than 50 persons or prospective class members, and Plaintiff alleges
 19 that questions of law or fact common to those persons or members of the prospective class,
 20 without reference to issues of individualized reliance on an alleged misstatement or omission,
 21 predominate over any questions affecting only individual persons or members, and (ii) Plaintiff
 22 seeks to recover damages on a representative basis on behalf of himself and other unnamed parties
 23 similarly situated, and Plaintiff alleges that questions of law or fact common to those persons or
 24 members of the prospective class predominate over any questions affecting only individual
 25 persons or members. (CAC ¶¶ 100-01.)

26 **B. Plaintiff Asserts Claims Based on State Statutory and Common Law.**

27 Plaintiff’s claims are based on state statutory and common law, specifically: (i) violations
 28 of the CLRA; (ii) violations of the UCL; (iii) violations of the FAL; (iv) negligent

1 misrepresentation; (v) breach of the implied covenant of good faith and fair dealing; and
 2 (vi) breach of fiduciary duty. (CAC ¶¶ 128-188.)

3 **C. Plaintiff’s Claims Are Based on Alleged Misrepresentations or Omissions in**
 4 **Connection with the Purchase or Sale of Covered Securities.**

5 Regardless of the names assigned to Plaintiff’s state law claims, they are precluded
 6 because the gravamen of each one is that Robinhood allegedly made false statements and engaged
 7 in deceptive conduct in connection with its breach of the duty of best execution. *See Fleming*, 878
 8 F.3d at 1154 (SLUSA applies when “[t]he gravamen of each of Plaintiffs’ complaints, no matter
 9 how legally characterized, is that defendants intentionally breached a duty of ‘best execution’”);
 10 *Rayner*, 899 F.3d at 120 (holding that substance governs over form when determining whether
 11 plaintiffs’ allegations fall within SLUSA). Plaintiff alleges, among other things, that:

- 12 • Defendants “explicitly and/or implicitly represented that their securities were
 13 bought and sold on behalf of clients at best execution, while Defendants knew
 they were not” (CAC ¶ 136);
- 14 • Defendants falsely represented “that all Robinhood trades are ‘commission-free’”
 15 and “that their order execution quality matched or beat their competitors,”
 16 “despite Defendants knowing they were receiving most of their income through
 backdoor payment for order flow – the costs of which were passed onto
 17 consumers – and despite the fact that Robinhood’s order execution quality was
 substantially worse than its competitors” (CAC ¶¶ 149-50);
- 18 • Robinhood “prominently featured unlimited ‘commission-free’ trading, while
 19 knowingly refusing to disclose backend fees that uniformly caused substandard
 execution quality to its millions of customers” (CAC ¶ 166);
- 20 • Defendants “intentionally concealed their payment for order flow demands from
 21 consumers, including how Robinhood’s payment for order flow plan, practice, and
 22 scheme affected the execution quality of orders” (CAC ¶ 172);
- 23 • Defendants “unfairly interfered with Plaintiff’s and Class members’ rights to
 24 receive the full benefits of their trades . . . by . . . failing to provide adequate trade
 25 execution quality by prioritizing profits through payment for order flow at the
 expense of their customers” (CAC ¶ 182); and
- Defendants “breached their fiduciary duties to Plaintiff and the Class by . . .
 failing to provide adequate trade execution quality by prioritizing profits through
 payment for order flow at the expense of their customers” (CAC ¶ 187).

26 That Plaintiff alleges some causes of action whose elements do not technically include
 27 manipulative conduct is of no moment. *See Fleming*, 878 F.3d at 1154 (holding that UCL, breach
 28 of fiduciary duty, and unjust enrichment claims premised on breach of duty of best execution were

