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 14 WageWorks, Inc.

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 OAKLAND DIVISION

18 IN RE WAGeworks, INC.
 19 SECURITIES LITIGATION

) CASE NO.: 4:18-CV-01523-JSW
)
) **DEFENDANT WAGeworks,**
) **INC.'S REQUEST FOR JUDICIAL**
) **NOTICE AND NOTICE OF**
) **INCORPORATION IN SUPPORT**
) **OF MOTION TO DISMISS**
) **CONSOLIDATED AMENDED**
) **CLASS ACTION COMPLAINT FOR**
) **VIOLATION OF THE FEDERAL**
) **SECURITIES LAWS**

) Hearing Date: November 22, 2019
) Hearing Time: 9:00 a.m.
) Courtroom: 5, 2d floor
) Judge: Hon. Jeffrey S. White

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1 Defendant WageWorks, Inc. (“WageWorks” or the “Company”) hereby requests that the
2 Court consider four documents incorporated by reference in Plaintiffs’ Consolidated Amended
3 Complaint for Violation of the Federal Securities Law (“CAC”) and judicially notice three
4 documents, submitted in support of Defendant WageWorks’ Motion to Dismiss the Consolidated
5 Amended Complaint for Violation of the Federal Securities Laws. True and correct copies of the
6 documents described herein are attached as exhibits to the accompanying Declaration of Betty
7 Chang Rowe (“Rowe Declaration”).

8 ARGUMENT

9 The Supreme Court has directed that a court, in ruling on a motion to dismiss a securities
10 fraud complaint, “must consider the complaint in its entirety, as well as . . . documents
11 incorporated into the complaint by reference, and matters of which a court may take judicial
12 notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Here, the CAC
13 extensively refers to, and Plaintiffs’ claims are based on, the contract between WageWorks and
14 the United States Office of Personnel Management (the “OPM Contract”) and its Modification.
15 The CAC also quotes from and/or refers to the Company’s 2017 Form 10-K and Prospectus
16 Supplement, both filed with the Securities and Exchange Commission (“SEC”). Accordingly,
17 under the doctrine of incorporation by reference, WageWorks attaches the entirety of these four
18 documents for the Court to consider in connection with WageWorks’ motion to dismiss the
19 CAC. WageWorks also asks the Court to take judicial notice of a table of the Company’s
20 historical stock prices from May 5, 2016 (a day before the beginning of the Class Period) to
21 March 18, 2019 (the date of the 2017 Form 10-K), an excerpt from the Company’s 2018 Form
22 10-K, and a court order from a related legal proceeding.

23 I. THE COURT SHOULD CONSIDER THE FULL TEXT OF DOCUMENTS 24 INCORPORATED BY REFERENCE INTO THE CAC

25 The Ninth Circuit recently reaffirmed that on a motion to dismiss, the Court is permitted
26 to consider a document “if the plaintiff refers extensively to the document or the document forms
27 the basis of the plaintiff’s claim.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th
28 Cir. 2018) (quoting *U.S. v. Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)); *see also Northstar Fin.*

1 *Advisors v. Schwab Invs.*, 779 F.3d 1038, 1043 (9th Cir. 2015) (“We may consider materials
2 incorporated into the complaint”). The term “extensively” “should, ordinarily at least, mean
3 more than once.” *Orexigen*, 899 F.3d at 1003.

4 Under this “incorporation by reference” doctrine, the incorporated documents are treated
5 “as though they are part of the complaint itself.” *Id.* at 1002. The Court may consider the full
6 text of incorporated documents, “including portions which were not mentioned in the
7 complaints.” *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996); *see also*
8 *Northstar*, 779 F.3d at 1043 (considering “entire content” of various SEC filings incorporated by
9 reference). The doctrine is “designed to prevent artful pleading by plaintiffs.” *Orexigen*, 899
10 F.3d at 1003. In other words, it “prevents plaintiffs from selecting only portions of documents
11 that support their claims, while omitting portions of those very documents that weaken – or
12 doom – their claims.” *Id.* at 1002 (citation omitted).

13 The court generally “may assume [an incorporated document’s] contents are true for
14 purposes of a motion to dismiss.” *Id.* at 1003 (alteration in original) (quoting *Marder v. Lopez*,
15 450 F.3d 445, 448 (9th Cir. 2006)); *see also In re NVIDIA Corp. Sec. Litig.*, 768 F. 3d 1046,
16 1057-58 n.10 (9th Cir. 2014) (“Once a document is deemed incorporated by reference, the entire
17 document is assumed to be true for purposes of a motion to dismiss, and both parties – and the
18 Court – are free to refer to any of its contents”) (citation omitted). And, to the extent an
19 incorporated document contradicts a plaintiff’s conclusory allegations, the Court need not accept
20 those allegations as true. *Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-96 (9th Cir.
21 1998) (courts “are not required to accept as true conclusory allegations which are contradicted by
22 documents referred to in the complaint”); *Biotechnology Value Fund, L.P. v. Celera Corp.*, 12 F.
23 Supp. 3d 1194, 1201 (N.D. Cal. 2013) (refusing to find scienter based on a “central allegation”
24 that was contradicted by an email incorporated by reference); *Philco Invs., Ltd. v. Martin*, 2011
25 WL 4595247, at *7 n.9 (N.D. Cal. Oct. 4, 2011) (not accepting as true Plaintiffs’ allegations that
26 are contradicted by conference call transcript).

27 **The OPM Contract and Modification.** The 125-page CAC is riddled with references to
28 the OPM Contract and Modification. Specifically, the CAC refers to the OPM Contract –

1 oftentimes multiple times – at paragraphs 5, 6, 7, 13, 14, 19, 20, 52, 53, 54, 55, 58, 59, 60, 61,
 2 62, 65, 66, 69, 70, 72, 73, 75, 77, 78, 81, 82, 83, 84, 85, 86, 87, 88, 90, 92, 95, 102(e), 102(f),
 3 105, 110, 119, 121, 122, 123, 125, 130(d), 134, 135, 138, 140, 146, 153, 155, 159, 161, 162, 163,
 4 164, 165, 169, 172, 178, 179, 182, 185, 211, 217, 236 and 283. The CAC refers to the
 5 Modification at paragraphs 6, 72, 73, 77, 81, 86, 88, 122, 130, 138, 143, 163 and 172. There can
 6 be no doubt that the OPM Contract and Modification – cited in no fewer than 69 and 13
 7 paragraphs, respectively – are referred to “extensively” in the CAC. *See Orexigen*, 899 F.3d at
 8 1003. Accordingly, Plaintiffs have explicitly incorporated both documents into the CAC by
 9 reference. *See id.*; *see also In re Intel Corp. Sec. Litig.*, 2019 WL 1427660, at *6 (N.D. Cal.
 10 Mar. 29, 2019) (holding that document cited in two paragraphs of the complaint satisfied
 11 “extensively” requirement and “are incorporated by reference”).

12 Even if these contractual documents were not referred to the CAC, they still would be
 13 incorporated by reference because they form the basis of Plaintiffs’ claims. The gravamen of the
 14 CAC is that certain of WageWorks’s financial statements were false and misleading because
 15 they improperly included revenue to which the Company was not entitled under the OPM
 16 Contract, as modified. *See, e.g.*, CAC ¶ 5 (“Pursuant to their fraudulent scheme, they improperly
 17 recognized revenue . . . that the Company had not earned and for which it was not entitled to be
 18 paid. This revenue was improperly attributed to a key customer . . . under the terms of a key
 19 contract (‘OPM Contract’ or ‘Contract’); *id.* ¶ 6 (WageWorks was not entitled to be paid . . .
 20 under the March 1, 2016 OPM Contract, as modified”). Indeed, the Contract and Modification
 21 provide the primary basis for Plaintiffs’ allegations of misrepresentations¹ as well as scienter.²
 22

23 ¹ *See, e.g.*, CAC ¶ 81 (“The financial results included revenue that the . . . Defendants
 24 improperly recognized in the third quarter of 2016, despite the language of the OPM Contract
 25 and MOD 0001.”); *id.* ¶102(f) (“As a consequence of its improper revenue associated with the
 OPM Contract in the second and third quarters of 2016, WageWork’s reported financial results
 [for those quarters], and full-year 2016 were materially false and misleading”).

26 ² *See, e.g.*, CAC ¶ 163 (“Given the critical importance of such a key contract . . . a strong
 27 inference arises that Jackson, in particular, and Callan knew the true revenue WageWorks was
 28 entitled to under the OPM Contract . . . and that the Company was falsely reporting revenue to
 the market . . . with regard to OPM Contract administration and related costs”).

1 Accordingly, the Contract and Modification are incorporated by reference and deemed
 2 part of the CAC, and the Court should consider the full text of these agreements in adjudicating
 3 the Company's motion to dismiss. *See Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th
 4 Cir. 2010) (holding that a Billing Agreement was incorporated by reference where plaintiff's
 5 allegations suggest it "is integral to" the complaint even though complaint did not refer to it);
 6 *Marder*, 450 F.3d at 448-49 (considering a Release signed by plaintiff because it "is central to
 7 her claim" as well as a licensing agreement referenced in the complaint); *Parrino v. FHP, Inc.*,
 8 146 F.3d 699, 706 (9th Cir. 1998) (considering insurance coverage plan where plaintiff's claim
 9 about insurance coverage was based on plan contents) (superseded by statute on other grounds);
 10 *Int'l AudioText Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) ("Although
 11 the amended complaint . . . does not incorporate the Agreement, it relies heavily upon its terms
 12 and effect; therefore, the Agreement is 'integral' to the complaint, and we consider its terms").
 13 A true and correct copy of the OPM Contract and Modification, as believed to have been
 14 obtained by Plaintiffs,³ are attached as Exhibits A and C, respectively, to the Rowe Declaration.

15 **The 2017 Form 10-K.** WageWorks' Form 10-K for the year ended December 31, 2017,
 16 filed with the SEC on March 18, 2019, is referenced in the CAC at paragraphs 11, 12, 18, 20,
 17 131, 132, 134, 137, 140, 152, 154, 155 and 166. Plaintiffs thus have referred to the 2017 Form
 18 10-K explicitly and "extensively" in their pleading. *See Orexigen*, 899 F.3d at 1003; *Intel Corp.*,
 19 2019 WL 1427660, at *6. The 2017 Form 10-K also forms a basis of Plaintiffs' claims.
 20 Plaintiffs quotes from and/or cites to the 2017 Form 10-K for, among other things, WageWorks'
 21 alleged "acknowledgement" or "admission" of wrongdoing (CAC ¶¶ 18, 20, 152, 154-55), as a
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23
 24 ³ Defendant understands that the attached copies were released to Plaintiffs by the United
 25 States Civilian Board of Contract Appeals ("CBCA") pursuant to their counsel's request under
 26 the Freedom of Information Act. *See Order on Proceedings, WageWorks, Inc. v. Office of*
 27 *Personnel Management*, (CBCA Nos. 6027, 6224, March 22, 2019) (requesting parties' response
 28 to "a request from Sam M. Ward, Esq. of Barrack Rodos & Bacine . . . for copies of all
 documents and pleadings filed in these cases") (hereinafter, "the FOIA Order"). The CBCA is
 presiding over WageWorks' ongoing lawsuit against OPM for payment of the very revenue at
 the center of this action. A true and correct copy of the FOIA Order is attached as Exhibit G to
 the Rowe Declaration. As discussed below, WageWorks requests that the Court take judicial
 notice of this Order. *See Section II, supra.*

1 comparison to the allegedly false 2016 financial results (*id.* ¶¶ 102(e), 103-105), and in
 2 connection with alleged corrective disclosures for loss causation. *Id.* ¶¶ 132-33, 140. It
 3 therefore is appropriate for the Court to consider the full text of this document through the
 4 doctrine of incorporation. *See In re Silicon Graphics, Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th
 5 Cir. 1999) (holding that district court properly considered SEC filings under incorporation by
 6 reference doctrine because their contents were alleged in the complaint) (superseded by statute
 7 on other grounds by 15 U.S.C. § 78u-4(b)(2)(A)). A true and correct copy of WageWorks' 2017
 8 Form 10-K is attached as Exhibit B to the Rowe Declaration.

9 **Prospectus Supplement.** The CAC also extensively refers to WageWorks' Prospectus
 10 Supplement for its Secondary Offering, filed with the SEC on June 20, 2017, specifically at
 11 paragraphs 24, 114 and 115 and generally as part of the "Offering Documents" at footnote 5 and
 12 at paragraphs 25, 38, 39, 42, 116, 118, 246, 281, 282, 283, 284, 285, 286, 287, 289, 291, 292,
 13 293, 294, 295, 296, 297, 300, 302 and 303. *See Orexigen*, 899 F.3d at 1003; *Intel Corp.*, 2019
 14 WL 1427660, at *6. Plaintiffs claim the Prospectus Supplement, as part of the Offering
 15 Documents, was false and misleading because it incorporated by reference certain of
 16 WageWorks' allegedly false and misleading financial statements. *See, e.g.*, CAC ¶¶ 24, 114,
 17 115, 294. That document is central to Plaintiffs' claim under Section 11 of the Securities Act of
 18 1933 (CAC ¶¶ 281-88) and therefore, its entire contents should be considered under the doctrine
 19 of incorporation by reference. *See Northstar*, 779 F.3d at 1043 (considering registration
 20 statement and prospectus, "all of these documents are referred to in the complaint"); *Silicon*
 21 *Graphics*, 183 F.3d at 986. A true and correct copy of the Prospectus Supplement is attached as
 22 Exhibit D to the Rowe Declaration.

23 For the foregoing reasons, the Court should consider the entire text of the OPM Contract,
 24 the Modification, the 2017 Form 10-K, and the Prospectus Supplement under the doctrine of
 25 incorporation by reference.⁴

26 _____
 27 ⁴ To the extent these documents contain information that is generally known or that can be
 28 accurately and readily determined from sources whose accuracy cannot reasonably be
 questioned, such documents are properly subject to judicial notice. *See* Section II, *infra*. But
 because these documents are incorporated by reference, the Court need not reach that analysis.

(continued...)

1 **II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF WAGeworks' STOCK**
 2 **PRICE HISTORY, SEC FILINGS AND THE FOIA ORDER**

3 Pursuant to Federal Rule of Evidence 201, courts take judicial notice of information “not
 4 subject to reasonable dispute.” *Ritchie*, 342 F.3d at 909 (quoting Fed. R. Evid. 201(b)). Facts
 5 are not subject to reasonable dispute if they are either “generally known” (Fed. R. Evid.
 6 201(b)(1)) or “can be accurately and readily determined from sources whose accuracy cannot
 7 reasonably be questioned.” Rule 201(b)(2); *see also Ritchie*, 342 F.3d at 909. The Court may
 8 consider such facts “at any stage of the proceeding” (Fed. R. Evid. 201(d)), “even if they are not
 9 referenced in the pleading, so long as they meet the requirements for judicial notice set forth in
 10 Federal Rule of Evidence 201.” *Cement Masons & Plasterers Joint Pension Tr. v. Equinix, Inc.*,
 11 2012 WL 685344, at *8 n.5 (N.D. Cal. Mar. 2, 2012).

12 **WageWorks Stock Price History.** “Because publically traded companies historical
 13 stock prices can be readily ascertained and those prices are not subject to reasonable dispute,
 14 courts *routinely* take judicial notice of them.” *Okla. Firefighters Pension & Ret. Sys. v. Ixia*, 50
 15 F. Supp. 3d 1328, 1349 (C.D. Cal. 2014) (emphasis added) (taking judicial notice of “data
 16 concerning Ixia’s share price”).⁵ Likewise, the prices of WageWorks publicly traded stock “can
 17 be readily ascertained” and “are not subject to reasonable dispute.” Therefore, the Court may
 18 take judicial notice of a table of WageWorks’ historical common stock prices from May 5, 2016
 19 (one day prior to the beginning of the Class Period) through March 18, 2019 (the date of the
 20 2017 Form 10-K), and in particular, the stock prices on March 1, 2018, March 2, 2018, March
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 23 (...continued from previous page)

24 *See In re Sunpower Corp. Sec. Litig.*, 2018 WL 4904904, *3 n.2 (N.D. Cal. Oct. 9, 2018)
 (“Because the remaining exhibits are incorporated by reference, the court does not consider here
 whether they are appropriate for judicial notice.”).

25 ⁵ *See also Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir.
 26 2008) (holding that district court’s judicial notice of Corinthian’s reported stock price history
 “was proper”); *Wanca v. Super Micro Computer, Inc.*, 2018 WL 3145649, at *4 (N.D. Cal. Jun.
 27 27, 2018) (taking judicial notice of “a chart exhibiting historical prices of Super Micro’s
 28 common stock”); *Karpov v. Insight Enter., Inc.*, 2010 WL 4867634, at *2 (D. Ariz. Nov. 16,
 2010) (taking judicial notice of “the chart of Insight’s stock price”).

1 15, 2019 and March 18, 2019.⁶ A true and correct copy of a table of WageWorks’ historical
2 common stock prices during this time period, as sourced from Yahoo! Finance, is attached as
3 Exhibit E to the Rowe Declaration.

4 **The 2018 Form 10-K.** Courts also routinely take judicial notice of filings with the SEC
5 in the context of motions to dismiss. *See, e.g., Metzler*, 540 F.3d at 1064 n.7 (holding that
6 district court’s judicial notice of “a number of Corinthian’s SEC filings . . . was proper”);
7 *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006) (on review of a Rule 12(b)(6)
8 dismissal, court “may consider . . . any matter subject to judicial notice, such as SEC filings”);
9 *Wanca*, 2018 WL 3145649, at *4 (taking judicial notice of SEC filings from 2014 and 2015);
10 *Ixia*, 50 F. Supp. 3d at 1349 (“Courts can consider securities offerings and corporate disclosure
11 documents that are publicly available.”). “Judicial notice is appropriate for SEC filings . . . as
12 they are ‘capable of accurate and ready determination by resort to sources whose accuracy
13 cannot be reasonably questioned.’” *In re Network Assoc. Inc. II Sec. Litig.* 2003 WL 24051280,
14 at *1 n.3 (N.D. Cal. Mar. 25, 2003) (citing Fed. R. Evid. 201(b)). When taking judicial notice,
15 “[a] court must also consider – and identify – which fact or facts it is noticing.” *Orexigen*, 899
16 F.3d at 999.

17 Here, WageWorks’ 2018 Form 10-K is a public record filed with the SEC. An excerpt
18 shows WageWorks’ disclosure of the findings from the Special Committee investigation. The
19 Court may take judicial notice of these findings, not for its truth, but for the fact that WageWorks
20 disclosed the Special Committee investigation findings and the substance of the disclosed
21 findings. *See Wanca*, 2018 WL 3145649, at *4 (taking judicial notice of “the fact the [SEC
22 filings] impart particular information”). That WageWorks made this disclosure is not subject to
23 reasonable dispute, and can be accurately and readily determined from a source whose accuracy
24 cannot reasonably be questioned (i.e., filings with the SEC). Fed. R. Evid. 201(b). Accordingly,
25 this excerpt is properly subject to judicial notice. *See, e.g., Biotechnology Value Fund*, 12 F.

26 _____
27 ⁶ To the extent the CAC selectively refers to certain of WageWorks’ stock prices during this
28 time period (*See, e.g., CAC* ¶¶ 9, 12, 17, 23, 48, 62, 69, 71, 106, 133, 136, 142, 150, 193), the
Court may also consider those prices under the doctrine of incorporation by reference.

1 Supp. 3d at 1199 (granting defendant’s request for judicial notice “as to documents that were
2 publicly filed with the SEC”). A true and correct copy of the excerpt from the WageWorks 2018
3 Form 10-K is attached as Exhibit F to the Rowe Declaration.

4 **The FOIA Order.** “Court orders and filings are proper subject of judicial notice.”
5 *Armstead v. City of Los Angeles*, 66 F. Supp. 3d, 1254, 1261 (C.D. Cal. 2014), *aff’d Alvarado v.*
6 *City of Los Angeles*, 720 Fed. App’x 889 (9th Cir. 2018). Thus, a court “may take notice of
7 proceedings in other courts, both within and without the federal judicial system, if those
8 proceedings have a direct relation to matters at issue.” *U.S. v. Black*, 482 F.3d 1035, 1041 (9th
9 Cir. 2007); *see also Reyn’s Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir.
10 2006) (taking judicial notice of pleadings, memoranda and other court filings). Here, the FOIA
11 Order was issued by a federal court and therefore, is a proper subject for judicial notice. *See,*
12 *e.g., Armstead*, 66 F. Supp. 3d at 1262 (“Because each of the documents the City seeks to have
13 the court notice is a court filing, the court grants the City’s request for judicial notice.”).

14 CONCLUSION

15 For the foregoing reasons, Defendant WageWorks respectfully requests that the Court
16 consider and notice the above-referenced documents in connection with its motion to dismiss the
17 CAC.

18 Dated: July 26, 2019

Respectfully submitted,

19 WILSON SONSINI GOODRICH & ROSATI
20 Professional Corporation

21 /s/ Ignacio E. Salceda

22 Ignacio E. Salceda