No. 22-15077

United States Court of Appeals for the Ninth Circuit

IN RE FACEBOOK, INC. SECURITIES LITIGATION

AMALGAMATED BANK, LEAD PLAINTIFF; PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI; JAMES KACOURIS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

FACEBOOK, INC., MARK ZUCKERBERG; SHERYL SANDBERG; DAVID M. WEHNER,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California, No. 5:18-cv-01725-EJD (Honorable Edward J. Davila)

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel for Plaintiffs-Appellants Amalgamated Bank and Public Employees' Retirement System of Mississippi, certify that neither entity has a parent corporation, and no publicly held corporation holds 10 percent or more of either entity's stock.

May 23, 2022

/s/ Kevin K. Russell
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JURISDICTIONAL STATEMENT

The district court entered final judgment on December 20, 2021. 1-ER-2. Plaintiffs filed a timely notice of appeal on January 17, 2022. 3-ER-475-77; Fed. R. App. P. 4(a). The district court had jurisdiction under 28 U.S.C. § 1331, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court properly dismissed Plaintiffs' claims regarding Defendants' risk statements for failure to adequately plead falsity.

2. Whether the district court properly dismissed Plaintiffs' claims regarding Defendants' user-control statements for failure to adequately plead loss causation.

3. Whether the district court properly dismissed Plaintiffs' claims regarding Defendants' statements about Facebook's investigation into the Cambridge Analytica data breach for failure to adequately plead scienter and falsity.

STATEMENT REGARDING STATUTORY ADDENDUM

The addendum includes excerpts of the relevant statutory provisions.

STATEMENT OF THE CASE

I. Introduction

In July 2019, Facebook agreed to pay $5.1 billion in civil penalties to settle charges by the Federal Trade Commission and the Securities and Exchange Commission that it had misled Facebook users and investors over the privacy and security of user data on its platform. The FTC charges arose from Facebook's secret sharing of user data with companies ranging from Amazon to Tinder in exchange for advertising revenue or access to the other companies' user data. The FTC alleged that this reciprocal "whitelisting" policy was inconsistent with Facebook's repeated representations that its users could control whether their data is shared with third parties and in violation of a consent decree Facebook

had signed with the agency after having been caught misleading users about their privacy controls nearly a decade earlier. [1]

The SEC charges arose from the Cambridge Analytica scandal. In 2018, media reports revealed that the data mining company had acquired the private Facebook data of tens of millions of Americans and used it to target political advertising during the 2016 presidential campaign. In response to the stories, Facebook acknowledged that it had known about the data misuse since 2015 but had kept its findings secret, electing instead to simply ask Cambridge Analytica to delete the data, without doing anything meaningful to ensure that it had. The SEC charged that starting in 2016, Facebook had misled investors by treating the prospect of such data misuse as a mere hypothetical risk in its SEC filings and by reinforcing the deception by telling the public that Facebook had "not uncovered anything that suggests wrongdoing" in an investigation of Cambridge Analytica's work on the Trump campaign. 2-ER-316 (quoting SEC complaint).

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[1] Because this appeal arises from a motion to dismiss, the facts are presented as alleged in the Third Amended Complaint, 2-ER-133 – 3-ER-474.

When the truth about Cambridge Analytica and the whitelisting practices became public, consumers were outraged. Many joined the "#deleteFacebook" campaign urging people to leave the platform, and user engagement fell dramatically. So did Facebook's stock price, first in March 2018 when the Cambridge Analytica scandal broke and again after Facebook's July 2018 earnings call revealed the financial consequences of user disillusionment with the platform in the aftermath of the Cambridge Analytica and whitelisting disclosures. These disclosures wiped out tens of billions of dollars in shareholder value, resulting in the then-largest single-day market capitalization decline in U.S. history.

Although Facebook agreed to pay record-setting fines for this misconduct, it persuaded the district court in this securities fraud case that it had, in fact, done nothing actionably wrong. The court's dismissal of this action on the pleadings was erroneous, premised on a misconstruction of the Complaint and the governing law. This Court should reverse the judgment and allow this case to proceed to discovery.

II. Factual Background

A. Facebook's Business Model Premised On Monetizing User Data

Facebook is the world's largest social media company, with its namesake social networking platform boasting billions of users. Those users post a wide range of personal information about themselves on the site, including their names, gender, age, marital status, phone number, location, as well as the user's photographs, videos, and posts. Users also reveal much about themselves by the posts and videos they view, as well as their reactions to them, such as when a user "likes" a friend's post or an organization's Facebook page. 2-ER-144.

While users can choose the "friends" able to view their pages and their posts, Facebook itself intensely monitors users' activities, compiling vast amounts of information about them. Facebook uses the information to sell targeted advertising to private companies and political organizations, earning the Company approximately $50 billion in 2018. 2-ER-158. Because Facebook's business model depends on persuading users to join and engage with its platform, Facebook encourages third parties to develop applications for its customers to use while on Facebook—*e.g.*, games like Candy Crush and Farmville. 2-ER-158-59.

Facebook has long understood that people's willingness to trust the Company with their private data depends in significant part on users believing that they have control over the way their data is shared. 2-ER-159-60. But Facebook has a history of disregarding privacy concerns and misleading user about their control over their private information.

In late 2011, for example, the Federal Trade Commission announced that Facebook had agreed to settle "charges that it deceived consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public." 2-ER-161 (quoting FTC press release). In particular, the FTC discovered that when Facebook customers used a third-party app—for example, to play an online game – Facebook gave the app developer "access [to] nearly all of users' personal data – data the apps didn't need." *Ibid*. Even more, Facebook allowed app developers access not only to the data of the person using the app ("user data"), but also to the data of *all that person's friends* ("user friends' data"). 2-ER-163. In response, Facebook agreed to a 20-year consent decree which, among other things, required Facebook to obtain "consumers' express consent before their information is shared beyond the privacy settings they have established." 2-ER-161-62.

B. The User-Control Statements And Whitelisting

1. After the FTC settlement, Facebook's user agreement stated that Facebook would share user friends' data only if the initial user consented. 1-ER-20. But few were aware that in deciding to play a game they were consenting to share not only their own private data with the developer, but also the private data of their friends. As more and more users became aware of this practice, and user complaints mounted, Facebook finally relented. In April 2014, CEO Mark Zuckerberg publicly announced that Facebook would stop sharing user friends' data with third parties, representing that "everyone has to choose to share their own data with an app themselves." 2-ER-171.

In the years that followed, including during the Class Period (February 3, 2017 to July 25, 2018), Zuckerberg and the Company's COO, Sheryl Sandberg, repeatedly assured users that "you have complete control over who sees your content," "you are controlling who you share with," and "you have control over everything you put on the service." 1-ER-53. And consistent with the consent decree, they assured users that "they could control the sharing of their content and information via privacy and applications settings." 1-ER-54.

2. Facebook's public representations about users' control over their private data were knowingly false or misleading in two related respects.

First, as the district court noted, internal Facebook documents "demonstrate that Defendants Zuckerberg and Sandberg were the original architects of Facebook's 'full reciprocity' business model, in which Facebook gave access to user data and user friend data to certain whitelisted parties who, in a reciprocal exchange, would give Facebook data, ad revenues, or access to new users." 1-ER-77; *see* 2-ER-163-65. Whitelisted companies included device makers (like Apple and Amazon), firms with connections to the Chinese and Russian governments (Huawei and Mail.Ru Group), and many others, including Tinder, Hot or Not, Netflix, Airbnb, and Spotify. 2-ER-144, 167-68, 275; 3-ER-325.

Second, and relatedly, users lacked control over their private data because when Facebook shared user information with other companies, it "had limited control over the data once it 'left' Facebook's servers," leading to the prospect that information would make its way into the hands of third parties without user consent. 1-ER-53. Moreover, it was not just the whitelisted companies that were able to take private user data off Facebook's servers. For example, even after announcing an end

to third-party access to user friends' data in April 2014, Facebook continued to provide such access for another year to apps that had been approved before the announcement. 2-ER-171-72 (citing FTC Complaint). Among the apps initially grandfathered, and then later whitelisted, was a personality quiz developed by Cambridge University researcher Aleksandr Kogan, who used the app to collect the private information of tens of millions of unwitting Facebook users, which he then sold to a company called Cambridge Analytica. 2-ER-176, 185.

C. Cambridge Analytica And The Cruz Campaign

In December 2015, *The Guardian*, a British newspaper, reported that the presidential primary campaign of Senator Ted Cruz was working with the then-little-known Cambridge Analytica. 2-ER-194-95. *The Guardian* claimed that the company had developed a massive database of American voters, classifying each based on a score for five personality traits: openness to experience, conscientiousness, extraversion, agreeableness, and neuroticism (the "OCEAN scale"). *Ibid*.; 2-ER-169. The article further alleged that Cambridge Analytica had obtained the voter data for its "psychographic" modeling from researcher Kogan who had gotten the information when users agreed to take an on-line

personality quiz, thereby giving Kogan access to their Facebook profiles as well as data from their "unwitting friends." 2-ER-180, 194.

The allegations called into question Facebook's promises of user control over their data. The Cruz campaign, however, denied that it was misusing private Facebook data, stating that it understood that "all the information is acquired legally and ethically with permission of the users." 2-ER-195. Kogan likewise insisted that his company had "full permission to use the data and user contribution for any purpose." *Ibid.*

Facebook neither confirmed nor denied the allegations. Instead, it released a statement saying it was "carefully investigating this situation." 2-ER-195. Facebook promised to "take swift action against companies" it found "misusing [users'] information [in] direct violation of" Facebook's policies, "*including banning those companies from Facebook* and requiring them to destroy all improperly collected data.'" *Ibid.* (quoting article) (emphasis added).

D. The Risk Statements

For the next year, Facebook said nothing further about the results of its investigation. It made no announcement about its findings, and for all the public could see, it took no action against Cambridge Analytica or

Kogan, suggesting that it had found the allegations unsubstantiated. 2-ER-269. Indeed, in February 2017, Facebook responded to reporters' questions about the status of its Cambridge Analytica investigation by referring them to Cambridge Analytica's statement that it "does not use data from Facebook" and "does not obtain data from Facebook profiles or Facebook likes." 2-ER-262 (quoting SEC Complaint).

At the same time, in periodic disclosures filed with the SEC, Facebook continued to treat the prospect of third parties like Cambridge Analytica gaining access to private data without user permission as a mere *hypothetical* risk, not as a problem already compromising the privacy of tens of millions of Facebook users. 2-ER-278; 1-ER-28-29 (collecting statements).

E. The Cambridge Analytica Investigation Statements

The status of Facebook's investigation into allegations about Cambridge Analytica took on new urgency in early March 2017, when *The Guardian* reported that in late 2016, Cambridge Analytica had employed its psychographic voter targeting for the "Leave" side of the Brexit campaign and for Donald Trump in the recently completed U.S. election. 2-ER-265-66.

In response to the story, and follow-on reporting from others, Facebook released official statements through its corporate spokesperson, claiming: "Our investigation to date has not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work on the Leave and Trump campaigns." 2-ER-266; *see also* 2-ER-268-69; 3-ER-346-47. The carefully worded statements did not say whether Facebook had substantiated the claims regarding Cambridge Analytica's work on the Cruz campaign. But Facebook continued to take no public action against Cambridge Analytica or Kogan or otherwise indicate that it had identified any problem with the company's efforts on behalf of that campaign either. 2-ER-280.

F. What Facebook Knew And The Public Did Not

In fact, despite its public denials and silence, Facebook had almost immediately confirmed the initial allegations about the Cruz campaign and amassed considerable evidence that Cambridge Analytica had used the same data for the Trump campaign.

1. Facebook's Confirmation Of The Cruz Allegations

Facebook had been aware of, and concerned about, Cambridge Analytica since at least September 2015. 2-ER-188. That month, an

internal email from Facebook's political team in Washington D.C. warned that Cambridge Analytica—which the email called a "sketchy (to say the least) data modeling company"—was "aggressive[ly]" "scraping" data in connection with the upcoming presidential election. *Ibid*. (quoting email). The team was sufficiently concerned that it asked for help "investigat[ing] what Cambridge specifically is actually doing." *Ibid*. (quoting email).

Facebook was also familiar with Kogan. Indeed, in November 2015, Facebook had hired Kogan to spend a week teaching Facebook employees about the "lessons I learned from working on this dataset that we had collected for Cambridge Analytica," the data set Kogan later admitted was based on private Facebook information collected through his quiz app. 2-ER-190-92.

In the days after *The Guardian* article on the Cruz campaign, Facebook learned that in May 2014 its reviewers had rejected a quiz app Kogan had submitted because it was requesting access to significant private information from users, including their birthdates and "likes," that was entirely unnecessary for the app's purposes. 2-ER-174-75. But Facebook nonetheless had allowed Kogan to continue to operate an earlier version of the app under its grandfathering policy and, later, as a

whitelisted application. 2-ER-175-76. Using the app, Kogan and his contractors had collected a massive trove of personal data about each person who took the quiz and their friends, including each user's name, gender, location, birthdate, page likes, friends list, and each friend's name, gender, location, birthdate, and likes. 2-ER-184, 210-11; *see also* 2-ER-175-76.

Facebook's internal investigation ultimately confirmed that Kogan's quiz had been administered to more than 250,000 users, leading Facebook to transfer data on more than 30 million identifiable users to Kogan's company, the vast majority of whom were simply friends with someone who had taken the quiz. 2-ER-202-04 & n.173. At one point, in July 2014, so much data was being transferred to Kogan that Facebook "throttled" the app, slowing the data transfers. 2-ER-181-82, 201-02.

On December 18, 2015—a week after *The Guardian* article was published—Facebook executive Allison Hendrix wrote to Cambridge Analytica's Chief Data Officer. 2-ER-203. Her email confirmed that Cambridge Analytica had admitted "receiv[ing] personality score data from Dr. Kogan that was derived from Facebook data, and that those scores were assigned to individuals included in lists that you maintained."

2-ER-204. Hendrix stated that in so doing, it was "clear that [Facebook's] policies have been violated." *Ibid.* "Because that data was improperly derived from data obtained from the Facebook Platform, and then transferred to Cambridge Analytica in violation of our terms," the email continued, "we need you to take any and all steps necessary to completely and thoroughly delete that information as well as any data derived from such data, and to provide us with confirmation of the same." *Ibid.* Cambridge Analytica emailed Facebook a month later, on January 18, 2016, stating that it would delete the personality score data. *Ibid.* But as CEO Zuckerberg would later admit, Facebook made no effort to verify that claim. 2-ER-216. And, in fact, the claim was false, as Facebook soon began to learn.

2. Facebook's Evidence That Cambridge Analytica Retained And Continued To Use Private Facebook User Data

Facebook continued to privately investigate the Cambridge Analytica data breach during summer 2016, eventually negotiating a confidential settlement with Kogan in June. 2-ER-219-20. That continued investigation revealed substantial evidence that Cambridge Analytica's claim to have deleted the Facebook data was false.

When first confronted with *The Guardian* allegations, Cambridge Analytica denied receiving any actual Facebook user data, insisting that it had merely been given personality scores *based* on that data. *See, e.g.*, 2-ER-294 (quoting Zuckerberg stating in interview: "We got those certifications, and Cambridge Analytica had actually told us that they actually hadn't received raw Facebook data at all. It was some kind of derivative data, but they had deleted it and weren't making any use of it.") (brackets omitted); 2-ER-204 (Facebook official memorializing conversation with Cambridge Analytica's Chief Data Officer: "You have told us that you received *personality score data* from Dr. Kogan that was *derived* from Facebook data") (emphasis added). But Facebook soon learned this claim was false. As part of its confidential settlement with Kogan in June 2016, Facebook required the researcher to identify every entity with whom he had shared data. 2-ER-210 n.194, 219-20. Kogan reported that he had shared both derivative *and raw* user data, including "likes," with Cambridge Analytica's CEO, Alexander Nix. 2-ER-212-13.

That revelation called into question Cambridge Analytica's veracity and suggested that even if it had, as requested, "deleted what derivative data it had," 2-ER-295 (internal quotation marks omitted), it had

retained the *raw* user data for continued use going forward. Around the same time, when Nix was asked to file the more detailed disclosure and certification Kogan had signed, he refused. 2-ER-220.

Facebook, however, took no action in response. By that point, Cambridge Analytica had pivoted from the Cruz primary campaign to the Trump general election effort. 2-ER-225. And Facebook was undertaking a massive initiative—with Defendants Zuckerberg and Sandberg's direct involvement—to obtain tens of millions of dollars in advertising from the Trump campaign. 2-ER-204-06, 208-10. As part of this effort, Facebook had assigned a team to work exclusively with the Trump organization, including three political advertising employees embedded within the campaign itself. 2-ER-225. The Facebook embeds worked hand-in-hand with Cambridge Analytica employees to provide the campaign $85 million dollars' worth of targeted advertising to Facebook users based on Cambridge Analytica's psychographic modeling. 2-ER-225-27, 243-44.

Those embedded employees, and others on the Facebook team investigating the Cambridge Analytica allegations, soon had substantial reason to believe that Cambridge Analytica was using the

misappropriated Facebook data for its voter targeting. For one thing, the embeds could see that Cambridge Analytica was still using the same kind of psychographic classification of voters, using the same personality categories as before. 2-ER-228-30. Moreover, Cambridge Analytica admitted to still using the OCEAN methodology in a September presentation describing the company's system and in an October *Washington Post* interview, both of which were seen by Facebook investigators. 2-ER-238-41, 249.

This raised the obvious question—where did Cambridge Analytica get its voter personality data from? It had taken Cambridge Analytica at least a year to collect the Facebook data it used for the Cruz campaign and incorporate it into the psychographic model. 2-ER-231. And although Cambridge Analytica claimed to have deleted that data in January, Facebook knew the company was back in business in June, doing the same thing it had done for Cruz, now for the Trump campaign. *Ibid.*

The answer to that question was staring Facebook's embeds right in the face. They could see that when Cambridge Analytica targeted voters for advertising, it did not simply identify them by general

demographic characteristics, or even by name, but by the voter's Facebook-specific user identification number. 2-ER-229.

G. The Public Gradually Learns The Truth

For the rest of 2017 and into early 2018, Facebook said nothing further about its investigation into Cambridge Analytica. However, the Defendants continued to reassure users that "when you share on Facebook . . . no one is going to get your data that shouldn't have it" because "you are controlling who you share with." 2-ER-271 (statement of Defendant Sandberg) (brackets omitted); *see also* 3-ER-334-37. And Defendants continued to list third-party access and misuse of user data as a mere hypothetical risk in Facebook's SEC filings. 3-ER-341.

The truth, however, was very different and was finally revealed in news reports, and by Facebook itself, on March 16 and 17, 2018. 2-ER-285-87. By that time, investigators at *The Guardian* and *The New York Times* had confirmed not only the initial reporting about Facebook data being misappropriated for use in the Cruz campaign, but had documented that Cambridge Analytica had continued to use the same data in support of the Brexit Leave and Trump campaigns. *See* 2-ER-151, 287. The *Times* noted that the "full scale of the data leak involving

Americans has not been previously disclosed – and Facebook, until now, has not acknowledged it." 2-ER-287.

Asked for comment on the forthcoming articles, Facebook preemptively disclosed the news on its website, stating that "[i]n 2015, we learned that Kogan lied to us and violated our Platform Policies by passing data to . . . Cambridge Analytica." 2-ER-285 (alterations omitted). Facebook offered no explanation for why it had kept its findings secret for more than two years, why it had not publicly suspended Kogan or Cambridge Analytica from its platform, or why it had not taken any action to inform affected users. 2-ER-286. Instead, the post simply stated that Facebook had "demanded certification from Kogan and all parties he had given data to that the information had been destroyed," which, it said, Kogan and Cambridge Analytica had provided. 2-ER-285.

Facebook further acknowledged the new reports that the deletion certifications were false and announced that it was doing what it had promised to do more than two years earlier if it had found a violation of its policies—namely, suspending Cambridge Analytica from its platform. 2-ER-285.

Finally, Facebook implicitly acknowledged that the disclosures belied the Company's repeated representations about user control. Facebook touted reforms that, it said, had given "people the tools to control their experience," recounting that "[i]n 2014, after hearing feedback from the Facebook community, we made an update to ensure that each person decides what information they want to share about themselves, including their friend list." 3-ER-335; *see also* 3-ER-402. Facebook did not, however, disclose that it had suspended that requirement for pre-existing apps until May of 2015, and then whitelisted Kogan's app for a time after that, which had allowed Kogan to collect the data of tens of millions of users.

H. The Market Reaction To The Truth About Users' Lack Of Control Over Their Private Data

Although Facebook's specific whitelisting practices were revealed later, the March 2018 reporting and Facebook's preemptive statement made clear enough that Facebook's prior claims about user control were false. *See, e.g.*, 3-ER-405-06 (compiling media reports questioning "what does [Facebook] share with others and what can users do to regain control of their information") (alteration in original); *ibid*. (technology professor quoted as stating "There really is only one way to make sure data we

create on a daily basis remains entirely private . . . 'Leave Facebook'") (alteration in original). Indeed, in the days after the initial stories, additional reports emerged showing that "app developers routinely practiced data harvesting using the Facebook platform, and, as a result, data from hundreds of millions of users was at risk of being exploited through tactics similar to Cambridge Analytica's." 2-ER-403-04 (citing further report from *The Guardian*); *see also* 2-ER-405 (collecting other media reports).

Just how strongly users would react to the news, and how that reaction would affect Facebook's business, was unknown at the time. *See* 3-ER-403 (market commentor identifying "negative impact to user growth and engagement" as among the "current unknowns around FB shares"). Likewise, investors could only estimate how much Facebook would have to spend to implement the privacy and data security measures needed to restore user confidence. But it was clear the fallout would be significant. *See, e.g.*, 2-ER-289-90 (noting movement to encourage users to delete their Facebook accounts, using the hashtag "#deleteFacebook").

It is no surprise, then, that Facebook's stock price plummeted in the immediate aftermath of the March 2018 disclosures and continued to fall as consumer reaction to the news mounted, dropping nearly 18% in one week. 2-ER-290. On April 26, 2018, Facebook's stock rebounded to some degree after the Company reported in its first quarter earnings call that the damage to user engagement on Facebook had been modest thus far. 3-ER-407.

On June 3, 2018, *The New York Times* published an article describing Facebook's ongoing whitelisting policy that allowed "phone and other device makers access to vast amounts of its users' personal information," including from users' friends. 2-ER-272-73 (quoting article). The article did not trigger a significant sell-off of Facebook stock. 3-ER-407. This was not because the market was indifferent to whether third parties had access to Facebook user's private data without their consent. That much was clear from the market's reaction in March when it learned the same truth—that users lacked control over their data—through the Cambridge Analytica scandal. The market did not react again in June because it had already priced-in its assessment of how consumers would react to that truth back in March. 3-ER-407-08.

The first quarter earnings report had covered only a few weeks of data on consumers' reaction to the scandals. Facebook's earnings report for its second quarter, issued in late July 2018, gave investors a much clearer basis for assessing the impact of the disclosures on user engagement and, ultimately, Facebook's bottom line. The July earnings report revealed "dramatically lowered user engagement, substantially decreased advertising revenue and earnings, and reduced growth expectations going forward." 3-ER-409. Aware that they had previously underestimated the impact of the earlier corrective disclosures, investors reevaluated Facebook's value, bringing Facebook shares down nearly 19% and wiping out approximately $100 billion in shareholder wealth, the largest one-day drop in U.S. history. 3-ER-409. Abundant press and analyst coverage made clear that the decline in user engagement arising from reduced expectations of privacy and the costs of measures to reinstate user confidence in the platform played an outsized role in the decline. *See* 3-ER-411-18.

III. Procedural History

Plaintiffs subsequently brought this action on behalf of investors, alleging violations of the federal securities laws. In addition to suing

Facebook itself, Plaintiffs brought claims against CEO Zuckerberg, COO Sandberg, and CFO David Wehner (collectively the "Executive Defendants"). As relevant to this appeal, the Complaint alleged that Defendants had made knowingly or recklessly false or misleading statements regarding user control over their data,[2] the risk of third-party misappropriation and misuse of user data,[3] and Facebook's investigation into Cambridge Analytica.[4] After twice dismissing without prejudice and allowing plaintiffs to amend, the court dismissed the Third Amended Complaint with prejudice in December 2021. 1-ER-16.

Risk Statements. The district court dismissed Plaintiffs' claims regarding Facebook's risk statements in its SEC filings for failing to adequately allege falsity. 1-ER-57-59. The court acknowledged the established rule that it is misleading to identify an occurrence as a

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[2] The district court's decision dismissing the Second Amended Complaint lists and numbers all of the challenged statements. 1-ER-24-41. Using that numbering system, the relevant user-control statements at issue in this appeal are Statements 1-5 and 7-21.

[3] Statements 22-26.

[4] Statements 27-29.

hypothetical risk when the risk has already materialized. 1-ER-56. And the court did not dispute that at the time Facebook warned investors in 2017 and 2018 that its business could be harmed by third parties obtaining and misusing private user data, Facebook knew (but had not yet publicly acknowledged) that this misuse had already occurred through Cambridge Analytica's acquisition of private user data from Kogan in 2015. But the court held that the statements were not misleading as a matter of law because "Plaintiffs do not allege that, at the time the risk disclosure was made, the Cambridge Analytica scandal was harming Facebook's reputation, business, or competitive position." 1-ER-57.

The court also opined that the risk statements could not be misleading because at the time they were made, investors purportedly knew that the "risk of data misuse and loss had already been realized," seemingly referring to the initial reporting on the Cruz campaign, in which the campaign and Kogan denied wrongdoing and Facebook itself merely promised to look into the matter. 1-ER-58; *see also* 1-ER-57 (same).

User-Control Statements. The court held that "Plaintiffs had pled falsity, scienter, materiality, and reliance" with respect to the user-control statements. 1-ER-14. Those statements were false, the court held, because although Facebook had represented in April 2014 that it would "shut-off third party access to user-friend data to ensure that 'everyone has to choose to share their own data with an app themselves,'" it had continued to allow "new-whitelisted app developers . . . to access user data and users' friends' data in contravention of the April 2014 announcement." 1-ER-53. The statements were made with scienter, the court held, because internal Facebook documents "show that Defendants Zuckerberg and Sandberg were actively involved in the whitelisting process" and, indeed, were the "original architects" of the practice. 1-ER-77.

However, the court dismissed the user-control claims because it believed Plaintiffs had not sufficiently alleged that the false statements had caused them any loss. The court recognized that Facebook's price had fallen dramatically in response to the Cambridge Analytica stories in March 2018 and again when Facebook reported dramatically lower user engagement, reduced revenues, and higher costs arising from the

scandal in its earnings report in July. But the court refused to consider the March reaction because it had held that the user-control statements were knowingly false only because of Defendants' awareness of Facebook's whitelisting practice, which was not revealed until June. 1-ER-15. The court then refused to consider the market reaction to the July earnings report because it came a month after the whitelisting disclosures. *Ibid.*

Investigation Statements. Finally, the court dismissed for lack of scienter the claims arising from Facebook's official statements claiming that its investigation "had not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work on the Brexit and Trump campaigns." 1-ER-8, 14 (brackets omitted). The court acknowledged the Complaint's detailed allegations regarding the evidence of wrongdoing uncovered by Facebook's investigation into the scandal. 1-ER-13. But it found that "Plaintiffs have failed to connect Executive Defendants to the investigation into Cambridge Analytica or show that Executive Defendants knew that Cambridge Analytica continued to use the misappropriated data." 1-ER-13. The court did not, however, address the scienter of the spokesperson who made the

statements and who purported to know what evidence the investigation had uncovered.

STANDARD OF REVIEW

This Court reviews a dismissal of a complaint for failure to state a claim de novo. *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1205 (9th Cir. 2016).

SUMMARY OF ARGUMENT

I. The district court erred in dismissing the claims regarding Defendants' risk statements. It is well established that "[r]isk disclosures that speak entirely of as-yet unrealized risks and contingencies and do not alert the reader that some of these risks may already have come to fruition can mislead reasonable investors." *In re Alphabet, Inc., Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021) (cleaned up), *cert. denied*, 142 S. Ct. 1227 (2022). And here, at the time the statements were made, Defendants knew, but did not disclose, that Cambridge Analytica had acquired the private data of millions of Facebook users.

The district court nonetheless dismissed because it thought the market already knew the truth. But that is not correct. Although a newspaper story in 2015 had alleged that Cambridge Analytica was using

Facebook user data for the Cruz campaign, the campaign and Kogan had denied that the data had been obtained without user consent, and Facebook had only promised to look into the allegations. Facebook subsequently took no public action against Cambridge Analytica or Kogan, suggesting it had found the allegation unsubstantiated, and even went so far as to refer reporters to Cambridge Analytica's denials of wrongdoing. The public's and the market's strong reaction to the later disclosure that Cambridge Analytica was using the same data for the Trump campaign further belies any suggestion that investors already knew private user data was being misused by the Cruz campaign, but simply had not cared.

Nor does it matter that the statements had warned both that data might be misused and that, if it was, Facebook's business might suffer. The district court misconstrued the law when it held that the risk statement could not be false unless *both* risks had materialized by the time the statements were made.

II. The Complaint also adequately alleges that Defendants' user-control statements caused Plaintiffs' financial injury. The district court recognized that these statements were knowingly false. It further did

not doubt that the knowingly false statements had maintained an artificial inflation in Facebook's stock, as investors valued the company on the false belief that Facebook was allowing users to control their private data. Nor did the court dispute that the March 2018 Cambridge Analytica disclosures had revealed that the user-control statements were false. And the Complaint more than plausibly alleges that the March stock decline was due at least in part to investors revaluing the company based on their predictions about how consumers would react to the news that they could not, in fact, control third-party access to their private data.

The court nonetheless refused to consider the March 2018 market drop because it had found scienter for the user-control statements only because of whitelisting. But the court's premise was incorrect—the user-control statements were *not* knowingly false only because of whitelisting. And in any event, even if the premise were correct, the legal conclusion is wrong. Even if the user-control statements were false for multiple reasons, some known to the Executive Defendants and others not, it is sufficient that the March 2018 Cambridge Analytica disclosures revealed the relevant truth concealed by the false statement (*i.e.*, the users did not

control their private data) and that the market reaction to the revelation of that truth proximately caused Plaintiffs' financial injuries.

The court also wrongly refused to consider the losses caused by the market's reaction to the July 2018 earnings report, which quantified the damage Facebook suffered once users became aware—through both the Cambridge Analytica and the whitelisting disclosures—that they were not in control of their private data. That it took some time for investors to realize the full scope of the harm is understandable and no basis for concluding that Facebook's knowing falsehoods did not injure Plaintiffs at all.

III. The district court further erred in dismissing the investigation-statement claims against corporate Defendant Facebook. Although the court believed that the Complaint did not adequately allege that the individual Executive Defendants knew that the statements were false, under established principles of agency law, Facebook is liable for the knowingly or reckless false or misleading official statements of its spokesperson. And here, the Complaint provides ample specific and plausible allegations that the investigation statements were false or

misleading and that the speaker was at least deliberately reckless with the truth.

ARGUMENT

I. The Complaint Adequately Alleges That Defendants' Hypothetical Risk Statements Were Misleading.

Throughout the class period, Facebook's SEC filings repeatedly warned investors of the potential for third parties acquiring and misusing Facebook user data. Often, the statement expressly noted that if this happened, the Company could suffer damage. *See, e.g.*, 1-ER-28 (Statement 23: "Any failure to prevent or mitigate security breaches and improper access to or disclosure of our data or user data *could* result in the loss or misuse of such data, which could harm our business and reputation and diminish our competitive position."). Other times the consequences for the Company were left unmentioned. *See ibid.* (Statement 24: "We provide limited information to . . . third parties based on the scope of services provided to us. However, *if* these third parties or developers fail to adopt or adhere to adequate data security practices . . . our data or our users' data *may be* improperly accessed, used, or disclosed.") (alterations in original). In every instance, the prospect of improper access or misuse was cast as a hypothetical risk, even though

by the time the statements were made, Facebook's internal investigation had determined that Cambridge Analytica had already accessed and misused the private data of tens of millions of users on behalf of the Cruz campaign.

The district court did not contest that "risk disclosures that 'speak entirely of as-yet unrealized risks and contingencies' and do not 'alert the reader that some of these risks may already have come to fruition' can mislead reasonable investors." *In re Alphabet, Inc., Sec. Litig.*, 1 F.4th 687, 703 (9th Cir. 2021) (cleaned up) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985-87 (9th Cir. 2008)), *cert. denied*, 142 S. Ct. 1227 (2022); *see also id*. at 703-704 (collecting authorities); *see* 1-ER-47. And the court did not dispute that telling investors that there was a risk of disclosure or misuse of user data, when Facebook knew that Cambridge Analytica had already done so at a massive scale, could be misleading under this standard. *See* 1-ER-47. But the court nonetheless held that the statements were not actionable in this case for two reasons, neither of which withstands scrutiny.

A. The District Court Wrongly Assumed That The Market Already Knew The Truth.

The district court first found that none of the risk factor statements was misleading because at the "time these risk disclosures were made in February 2017, both Kogan's and Cambridge Analytica's misuse of user data were matters of public knowledge (with no alleged harm to Facebook's business, reputation, or competition positions)." 1-ER-57; *see also* 1-ER-58 (same). That assertion has no foundation in the Complaint and inappropriately resolves a factual dispute on the basis of the pleadings.

A defendant can avoid liability for lying to investors on the ground that they already knew the truth, only if the defendant sustains a "heavy burden" of proving "that the information that was withheld or misrepresented was transmitted to the public with a degree of intensity and credibility sufficient to effectively counterbalance any misleading impression created by [the defendant's] one-sided representations." *Provenz v. Miller*, 102 F.3d 1478, 1492-93 (9th Cir. 1996) (internal quotation marks omitted).

Here, the only support the district court offered for its assumption that the public knew that Facebook users lacked control over their

private data (and that markets didn't care), was the 2015 article about the Cruz campaign. 1-ER-58. That citation is insufficient to carry Facebook's heavy burden, particularly at the pleading stage. As noted earlier, the article reported that those with the most direct access to the truth had denied the allegations or declined to confirm them. The Cruz campaign emphatically insisted that Cambridge Analytica had obtained the data with user consent. 2-ER-195. Kogan likewise denied any wrongdoing. 2-ER-194-95. Cambridge Analytica refused to comment, and Facebook merely said that it would look into the matter. 2-ER-195-96.

In the coming weeks and months, Facebook's public conduct strongly suggested that it had found the allegations unfounded. Although it had vowed to take "swift action . . . including banning . . . from Facebook" any company found in violation of its privacy policies, Facebook took no public action against Kogan or Cambridge Analytica. 2-ER-279, 285-86. It furthermore continued to represent in its SEC reports that misuse of user data was merely a theoretical risk. 3-ER-340-41. In February 2017, the same month Facebook made its first risk statement of the class period, Facebook referred reporters to Cambridge

Analytica's statement that it "does not use data from Facebook." 2-ER-262; *see* 3-ER-340-41. And a month later, a Facebook spokesperson repeatedly represented that Facebook's investigation "to date has not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work on the [Brexit] and Trump campaigns," 2-ER-266, leaving out that the investigation *had* found wrongdoing with respect to the Cruz campaign, *see* 2-ER-285-86.

Finally, the stark reaction to the March 2018 disclosures—by investors, the public, and government officials—belies any suggestion that the public had known for years that Facebook had allowed millions of users' private data to be improperly accessed and used by Cambridge Analytica, but simply had not cared. *See, e.g.*, 3-ER-402-03 (2018 *Los Angeles Times* article stating that "Facebook 'bushwhacked' the public" with its false promises of user control); *see also* 2-ER-288-90; *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 613 (7th Cir. 2020) (argument that market already knew the truth "is difficult . . . to square with the 10 percent price drop" that followed disclosure of the allegedly already-known information).

The most sensible explanation is that public had assumed that Facebook found *The Guardian*'s allegations to be unfounded and reacted strongly when Facebook finally confirmed the truth in March 2018 in response to more detailed and credible reporting. Facebook may have a different explanation to offer, but the district court was not empowered to resolve that factual dispute on a motion to dismiss. *See, e.g.*, *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008).

B. The Risk Statements Were Misleading Regardless Of Whether Facebook Had Yet Suffered The Consequences Of The Concealed Data Breach.

Most of the risk statements warned of two related risks: (1) the possibility of improper data access and misuse, and (2) the prospect that such access and misuse would harm the Company. 1-ER-57. The court held that these compound risk statements were not false or misleading because even if the risk of access and misuse had already materialized, "Plaintiffs do not allege that, at the time the risk disclosure was made, the Cambridge Analytica scandal was harming Facebook's reputation, business, or competitive position." *Ibid.* That reasoning makes no sense and is irreconcilable with this Court's recent precedent.

Alphabet arose from similar SEC risk statements by the parent company of Google. Alphabet had stated, for example, that "'[i]f our security measures are breached resulting in the improper use and disclosure of user data' then Alphabet's 'products and services may be perceived as not being secure, users and customers may curtail or stop using our products and services, and we may incur significant legal and financial exposure.'" 1 F.4th 687 at 694-95. As in this case, Alphabet identified this abstract risk without disclosing that it had—through an investigation prompted by the Cambridge Analytica scandal—"discovered a software glitch in the Google+ social network that had existed since 2015" and had exposed private user information to third-party developers. *Id*. at 695.

Like Facebook here, Google decided not to disclose those findings to the public, while continuing to list the prospect of improper data disclosure as a theoretical risk. 1 F.4th at 696. And as in this case, the district court in *Alphabet* found that the risk factor statements were not materially false. *Id*. at 698. This Court, however, reversed, explaining that "Alphabet's warning in each Form 10-Q of risks that 'could' or 'may'

occur is misleading to a reasonable investor when Alphabet knew that those risks had materialized." *Id*. at 704.

As here, the *Alphabet* defendants responded that the statements were not materially misleading because it "had already remediated" the problem (there, by fixing the software glitch, here, by asking Cambridge Analytica to delete the misappropriated data). *See* 1 F.4th at 704. But this Court rejected that argument, explaining that because "Google's business model is based on trust, the material implications of a bug that improperly exposed user data for three years were not eliminated merely by plugging the hole in Google+'s security." *Ibid*. Among other things, the existence of the flaw "would have wide-ranging effects, including erosion of consumer confidence and increased regulatory scrutiny." *Ibid*. The "swift stock price decline" that followed the eventual public disclosure of the problem showed as much. *Id*. at 705.

Alphabet also raised a version of the argument accepted by the district court below, claiming that the omissions made no difference because, at the time the disclosures were made, the bug had not had the ill effects on the company mentioned in the risk statements. To the contrary, "Alphabet's revenue increased" during the periods covered by

the reports in which the misleading risk statements were made. 1 F.4th at 704. This Court disagreed, explaining that "a cybersecurity incident may be material even if it does not . . . have an immediate financial impact on the company." *Ibid*. "Because cybersecurity incidents may cause a range of substantial costs and harms, reasonable investors would likely find omissions regarding significant cybersecurity incidents material to their decisionmaking" precisely because the harm that had not *yet* occurred could be coming down the pike. *Id*. at 704-05. "[F]or instance," this Court explained, public revelation of Google's cybersecurity incident "resulted in a swift stock price decline, legislative scrutiny, and public reaction, all of which support the allegation that the Privacy Bug was material *even absent* a release of sensitive information *or revenue decline*." *Id*. at 705 (emphasis added).

The district court's decision in this case cannot be reconciled with *Alphabet*. The court below held that a risk factor statement like Facebook's and Alphabet's, which notes the possibility of both a breach of user privacy *and* the likely business consequences, is not misleading unless both the breach and its consequences had materialized by the time the statement was made. Yet this Court found Alphabet's risk factor

statements materially misleading even though the security flaw in that case had not even resulted in the disclosure of private information, much less injury to Alphabet's business, at the time they were made.

Alphabet is surely correct.[5] A compound statement need not be false or misleading in its entirety in order to be actionable. To hold otherwise would create a template for allowing egregious knowing fraud—a company could avoid liability for falsely implying that a risk had not yet materialized simply by adding "and if it does, our company's business may suffer." Often, the deception would be self-immunizing—so long as the company successfully kept the truth from the public (including by misleadingly listing the risk as merely hypothetical) it would be free to continue to mislead without consequence.

Finally, none of this matters because both parts of Facebook's statement were misleading when made anyway. Knowing that Cambridge Analytica had acquired and misused the data of millions of

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[5] The Third Circuit's *Williams v. Globus Medical, Inc.*, 869 F.3d 235 (3d Cir. 2017), did not establish a contrary rule, but instead turned on the court's reading of the specific risk disclosure in that case. *See id.* at 242. *Contra* 1-ER-57.

Facebook customers, it was only a matter of time before the Company would face its users' wrath and suffer the business consequences it had listed as only theoretical possibilities (as actually happened when the truth came out and Facebook faced government investigations, declining user engagement, and massive stock declines). Saying that those harms *might* occur, when Facebook knew it was very likely that they would, was misleading. *See, e.g.*, *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1010 (9th Cir. 2018) (telling investors that data "might change" is misleading when the speaker know the data was "likely to change").

II. The Complaint Adequately Alleges That Defendants' Knowingly False User-Control Statements Caused Plaintiffs' Losses.

The district court found that the user-control statements were knowingly misleading, but nonetheless dismissed Plaintiffs' claims based on those statements for failure to allege loss causation. *See* 1-ER-15 & n.3 (adhering to reasoning in 1-ER-81-83). That was error, too.

Loss causation refers to proof that "the defendant's fraud caused an economic loss." *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 338 (2005). "This inquiry requires no more than the familiar test for proximate cause." *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753 (9th

Cir. 2018) (per curiam). One common way to allege loss causation is show that "when the relevant truth about the fraud began to leak out, it caused the price of stock to depreciate and thereby proximately cause[d] the plaintiff's economic loss." *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016) (internal quotation marks omitted). "To be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but it must at least relate back to the misrepresentation and not to some other negative information about the company." *Ibid*. The "ultimate issue" is "whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Ibid*.

In this case, the Complaint alleges that Defendants' fraudulent user-control statements caused Plaintiffs' economic loss when the falsity of those statements was revealed by the March 2018 reporting on the Cambridge Analytica scandal and, again, when Facebook's July 2018 earnings report revealed the unexpectedly severe damage that the scandal, and the intervening revelation of Facebook's whitelisting policy, had inflicted on the Company. 3-ER-401, 409.

The district court rejected both theories. The court did not question that the March 2018 Cambridge Analytica disclosures had revealed the

"relevant truth" obscured by Facebook's false and misleading user-control statement—that users lacked control over their data was amply illustrated by the revelation that an outside company had acquired and misused tens of millions of users' private information. But the court refused to consider the market reaction to the March 2018 disclosures because it had earlier decided the Complaint failed to adequately plead that the Executive Defendants knew that Cambridge Analytica had retained that user data after having promised to delete it in 2016. 1-ER-14. Instead, the court had found the user-control statements were knowingly false only because of the Executive Defendants' awareness of Facebook's whitelisting policy. 1-ER-15. The court reasoned that this scienter ruling limited Plaintiffs to proving loss causation by showing a price decline in the aftermath of the whitelisting reporting, which came several months after the Cambridge Analytica disclosures had sent Facebook's stock into a tailspin. *Ibid*. And because there was no statistically significant additional drop in the immediate aftermath of the June 2018 whitelisting articles, the court reasoned that the fraudulent user-control assurances had caused Plaintiffs no harm. *Ibid*. The court recognized that Facebook's stock price had fallen dramatically a month

later in July 2018, in response to detailed information about how the scandals had affected user engagement and Facebook's bottom line. But it held that the reaction was too late to have been caused by the privacy scandals. *Ibid*.

This reasoning was incorrect. Plaintiffs suffered losses proximately caused by the knowingly false user-control statements in both March and July 2018.

A. The District Court Erred In Refusing To Consider The Market Reaction To The March 2018 Cambridge Analytica Corrective Disclosures.

The district court's disregard of the market reaction to the March 2018 Cambridge Analytica disclosures was incorrect for multiple reasons.

First, the court's premise (1-ER-15) that the user-control statements were knowingly false only because of whitelisting was wrong. For one thing, the court was mistaken in finding that Defendant Facebook was unaware of the evidence showing that Cambridge Analytica had retained the Facebook data, even if the Executive Defendants were unaware of the truth. *See infra* § III.

In addition, even if Defendants had no reason to believe that Cambridge Analytica's deletion certifications were false, the user-control

statements were nonetheless knowingly or recklessly false or misleading because Defendants knew that Cambridge Analytica had obtained private data without user consent from tens of millions of users in 2015. And as the district court rightly observed, that episode had shown that "Facebook had limited control over the data once it 'left' Facebook's servers." 1-ER-53. Continuing to nonetheless claim that users had "complete control over" "who you share with," *ibid*., was knowingly or recklessly false and misleading. Given this, it was appropriate for Plaintiffs to allege loss causation based on the market's reaction in March 2018 when Facebook admitted, for the first time, what it had known for years—that user data had been misused in the Cruz campaign. *See* 3-ER-402-07 (cataloging public responses linking March 2018 market reaction to revelations about lack of user control over private data).

Second, even if Defendants had known nothing about Cambridge Analytica at all—even if the statements were knowingly false or misleading only because of the whitelisting—the decision would still be wrong. The loss causation question is "whether the defendant's *misstatement*, as opposed to some other fact, foreseeably caused the plaintiff's loss." *Lloyd*, 811 F.3d at 1210 (emphasis added). That is, the

question is whether a knowingly false *statement* caused the injury, not whether a particular *disclosure* did. Here, the district court did not dispute that Defendants' knowingly false user-control statements had maintained an artificial inflation in the stock price. Moreover, the court seemingly recognized that the falsity of those claims was revealed by the March 2018 disclosures no less than by the June disclosures specific to whitelisting—both made clear that users did *not* control their data. *See* 1-ER-54. The two sets of reports may have revealed different *reasons* why users lacked that control, but both revealed the "relevant truth" concealed by the knowingly false user-control statements. *Lloyd*, 811 F.3d at 1210.

In narrowly focusing on the whitelisting revelations, the district court contravened the principle that "to be corrective, a disclosure need not precisely mirror the earlier misrepresentation." *In re BofI Holding, Inc. Sec. Litig.*, 977 F.3d 781, 790 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 2021 (internal quotation marks omitted). "It is enough if the disclosure reveals new facts that, taken as true, render some aspect of the defendant's prior statements false or misleading." *Ibid*. Here, the Cambridge Analytica reports revealed that "some aspect" of the user-

control statements was false and misleading by showing that the core claim—that users had control of their data—was untrue.

The district court seemingly thought a different rule applied in this case because it had found that the only reason the statements were *knowingly* false was because Defendants were aware of Facebook's whitelisting practices. But even if the user-control statements were untrue for multiple reasons, some known and others purportedly unknown to Defendants, the statements were still knowingly false and still caused Plaintiffs' losses. That is all that is required for loss causation.

Consider a hypothetical: suppose a company denies that its baby powder contains carcinogens, knowing this is untrue because the powder contains small amounts of asbestos. Unknown to the company, however, the powder also contains another carcinogen, say benzene. If news broke that the powder contained benzene, and the company's stock price plummeted because the market feared that parents would not buy baby powder with a known carcinogen in it, would the company be liable for the resulting losses suffered by its shareholders? The answer has to be yes. The statement that the powder contained no carcinogens was

knowingly false. That false claim would have maintained an artificial inflation in the stock. That inflation would have dissipated when the market realized the "relevant truth" concealed by the misstatement—that the product contained carcinogens. It should be no defense that the relevant truth was disclosed in a way that may have been unexpected to the defendant, or because of the fortuity that the public learned about the benzene before it found out about the asbestos.

After all, scienter and loss causation are two separate elements. *Cf. Nuveen Mun. High Income Bond Opp. Fund v. City of Alameda*, 730 F.3d 1111, 1120 (9th Cir. 2012) ("[L]oss causation . . . may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss."). Scienter is required to protect defendants from liability for innocent mistakes. *See Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019) (the "purpose of scienter" is to "help[] to separate wrongful from innocent acts"). But once that threshold is passed, responsibility for the harm caused by investors' reliance on a knowingly false statement is properly placed on the defendant.

In this case, the "relevant truth" Defendants' knowing misrepresentations concealed was that users lacked control of their

private data. There is no basis in the Complaint for believing that it made any difference to users whether they had lost control over their data because Facebook was directly giving it to whitelisted companies like Amazon or because Facebook was failing to prevent app developers like Kogan from handing the data over to companies like Cambridge Analytica. Perhaps aware of this, Facebook chose to broadly reassure consumers that they had complete control over their data, a claim covering both scenarios. Defendants could have told users they have complete control over their data, except to the extent that Facebook elects to override their privacy settings and provide that information to whitelisted firms. But they chose to make the more sweeping statement, knowing it was untrue.

Having chosen to make broad knowingly false statements, Defendants are responsible for the harm caused when the market believed them. A defendant cannot avoid responsibility for such harms simply because the statement was even *more* false than the defendant initially understood.

B. The Market's Failure To React Again To The June 2018 Whitelisting Disclosures Does Not Defeat Loss Causation.

The district court also thought it significant that the market did not react in June 2018 when media reports identified whitelisting as another reason why users lacked control over their data. 1-ER-15. Not so. When the relevant truth is revealed in different ways at different times, the fact that the market does not react to each disclosure is perfectly understandable and does not preclude loss causation.

This Court's decision in *Lloyd* illustrates the point. There, a lender (CVB) learned that its largest customer (Garrett) was likely to default on a major loan. 811 F.3d at 1202. It nonetheless stated in SEC filings that "there was no basis for 'serious doubt' about Garrett's ability to repay." *Ibid*. When the SEC subsequently issued a subpoena, "analysts noted the probable relationship between the subpoena and CVB's loans to Garrett," and CVB's share price fell 22%. *Ibid*. A month later, "CVB wrote down $34 million in loans to Garrett and placed the remaining $48 million in its non-performing category." *Ibid*. The stock price "dropped only slightly" then quickly rose back to its pre-announcement level and stayed there. *Id*. at 1205.

This Court held that the lack of a significant reaction to the second disclosure did not preclude a finding of loss causation. 811 F.3d at 1210-11. The Court explained that the complaint plausibly alleged that both disclosures "related to CVB's alleged misstatements about Garrett's ability to repay" and that the second "disclosure's minimal effect on CVB's stock prices indicates that the earlier 22% drop reflected, at least in part, the market's concerns about the Garrett loans." *Ibid*.

The same is true here. The March and June disclosures both related to the same knowingly false statements, revealing that Facebook's users did not, in fact, have control over who sees their Facebook data. And, as in *Lloyd*, the Complaint plausibly alleges that the lack of a significant market reaction of the second disclosure "indicates that the earlier . . . drop reflected, at least in part, the market's concerns" about the lack of user control revealed by the first disclosure. 811 F.3d at 1211; *see* 3-ER-407. Indeed, at the time of the first reports, Sandy Parakilas, a former Facebook official responsible for privacy issues, had told *The Guardian* that the revelations showed that "'numerous companies' had likely gained control of 'hundreds of millions' of Facebook users' data" and estimated "that a 'majority of Facebook users' could have

had their data harvested by app developers without their knowledge." 3-ER-407; 2-ER-159. Other sources made the same point. *See* 3-ER-403-04. Investors could reasonably believe that the June revelation showing an additional set of whitelisted companies also had improper access to private data could hardly make matters any worse. And given this, investors could reasonably decide that the recent large correction in March 2018 had already appropriately accounted for the likely effects of consumer dissatisfaction with Facebook's privacy practices, particularly given the difficulty in estimating how the revealed lack of consumer control would affect Facebook's bottom line.

The Complaint also plausibly alleges that Facebook's own communications played a role in muting the response. The Company's first quarter earnings call two months earlier had suggested that the fallout might not be as severe as the market had first predicted. 2-ER-297-99; 3-ER-368-70. And when the whitelisting allegations emerged, Facebook responded by publicly "downplaying to the market the significance of its whitelisting arrangements," claiming that it "controlled the whitelisting arrangements tightly" and "falsely insist[ing] that data

was not shared without user consent." 3-ER-408-09 (brackets and internal quotation marks omitted).

The district court's decision might be more defensible if the court had identified some other, more plausible explanation for why the market failed to react to the whitelisting disclosures. But it didn't, and none is apparent. Often, the market's failure to respond to a corrective disclosure suggests that the misstatement was immaterial to investors. But here, the district court found that the user-control statements *were* material, which was obviously correct. *See, e.g.*, 2-ER-148 (Zuckerberg acknowledging that "the No. 1 thing that people care about is privacy and the handling of their data").

So if the user-control statements were material, and the whitelisting disclosures showed those statements to be false, why did the market fail to react to the June 2018 whitelisting revelations? The only plausible explanation anyone has offered is the one set forth in the Complaint: by the time of the whitelisting disclosures, the market had already priced in the predicted consequences of consumers having learned that they could not control their data on Facebook.

That being so, there should be little doubt that if the whitelisting disclosures had come first, the market would have reacted and loss causation would be established. Nothing in law or logic justifies shielding Defendants from liability simply because of the happenstance of the order in which the public learned the various reasons why the user-control statements were false.

C. The District Court Wrongly Disregarded The Market Reaction To Facebook's July 2018 Earnings Report.

The Complaint also adequately pleads loss causation based on the market reaction to Facebook's July 2018 earnings report.

The market's initial reaction to the corrective disclosures necessarily entailed a difficult attempt to estimate how users would react to the revelations and how that reaction would translate into reduced revenue or increased costs for Facebook. The July earnings call was the first time for investors to check their estimates against hard data from the Company covering a full quarter of user reaction. 3-ER-409. That data showed that the fallout had been more severe than investors predicted. 3-ER-409-10. When the market reacted to the better information, the remaining artificial inflation in the stock price

maintained by Defendants' false user-control statements finally dissipated, causing Plaintiffs' financial injuries. 3-ER-410-11.[6]

The district court rejected these allegations on the ground that Plaintiffs had failed to establish "a connection between the revelation of Facebook's whitelisting practice and a stock-drop," pointing in particular to the one-month delay between the whitelisting disclosure and the July price reduction. 1-ER-15. That reasoning is incorrect for three reasons.

First, as discussed above, the district court erred in focusing exclusively on the connection between the July price drop and whitelisting, rather than asking whether the market was reacting to the broader revelation that the user-control statements were false.

Second, the Complaint amply alleges that the financial injury inflicted by the July price drop was caused by Defendants' false user-control statements even if those statements were knowingly false only because of whitelisting.

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[6] Accordingly, this is not a case of the market "merely reacting to reports of the defendant's poor financial health generally." *Loos v. Immersion Corp.*, 762 F.3d 880, 887-88 (9th Cir. 2014) (citation omitted). Rather, the market reacted to additional information about the extent of the financial damage inflicted by a previously disclosed fraud.

The Complaint provides abundant evidence that this drop was caused by investors' belief that consumer concern over lack of control over their private data was costing the Company in lost revenue from reduced user engagement and through the added expense of measures Facebook was implementing to reassure worried users. *See* 3-ER-409-18. The Complaint then links this consumer reaction to the Cambridge Analytica scandal, *see ibid.*, as well as to the whitelisting disclosures, *see, e.g.*, 3-ER-407-08 (quoting AP article casting the whitelisting revelations as adding to "continuing anxiety about the information users give up – and to whom – when they use Facebook."); 3-ER-408 (quoting another AP article as describing whitelisting revelation as "rais[ing] concerns similar to those in Facebook's recent Cambridge Analytica scandal"); 3-ER-408 (CNN Business report stated that whitelisting "may only add fuel to the fire"); 3-ER-408 (*USA Today* article treated whitelisting report as part of "a series of revelations on Facebook's data sharing practices"); 3-ER-408 (Axios story stated that revelation "reinforces" the picture of the Company arising from the Cambridge Analytica scandal); *see also* 3-ER-418-19 (Plaintiffs' loss causation expert concluded that each corrective disclosure revealed information "to the market concerning," among other

things, "the extent and scope of Facebook's data privacy issues, and the lack of user control over data provided to Facebook"); 3-ER-419 (expert found that the July decline was "proximately caused by the revelation of the truth concerning Defendants' alleged misrepresentations and/or omissions.").

Indeed, the district court initially acknowledged that it "*could* find that the whitelisting practices affected the stock prices following the 2Q18 Earnings Release." 1-ER-81 (emphasis added). But it dismissed the Second Amended Complaint because "it is *unclear* if this is the ultimate reason for the drop." 1-ER-81-82 (citing other potential reasons) (emphasis added). Loss causation is not defeated, however, simply because it may be "unclear" whether other factors account for some—or even all—of the price drop. *Contra* 1-ER-81. For one thing, loss causation is established so long as *any* part of the price reduction was caused by the false statement. *See In re BofI*, 977 F.3d at 790; *Lloyds*, 811 F.3d 1210; *see also Nuveen*, 730 F.3d at 1119 (revelation of fraud need only be a "substantial factor in causing a decline in the security's price") (citation omitted). For another, there is no "probability requirement" at the pleading stage, *Gilead*, 536 F.3d at 1057 (quoting *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 556 (2007)), much less a requirement that Plaintiffs demonstrate that causation is "clear," 1-ER-81. So "long as the plaintiff alleges facts to support a theory that is not facially implausible, the court's skepticism is best reserved for later stages of the proceedings." *Gilead*, 536 F.3d at 1057.

Third, that the market reaction came a month after the whitelisting disclosures, and several months after the Cambridge Analytica scandal broke, is not disqualifying either. Although delay is a relevant consideration, this Court has repeatedly "rejected a bright-line rule requiring an immediate market reaction." *Irving Firemen's Relief & Ret. Fund v. Uber Techs., Inc.*, 998 F.3d 397, 407 (9th Cir. 2021) (internal quotation marks omitted). "That a stock price drop comes immediately *after* the revelation of a fraud can help rule out alternative causes. But that sequence is not a condition of loss causation." *First Solar*, 881 F.3d at 754 (internal citation omitted). So long as a complaint alleges a plausible explanation for it, delay is no obstacle to alleging loss causation.

For example, in *Gilead*, a drug maker issued a press release forecasting stronger-than-expected sales of a medication. 536 F.3d at 1052. The release was misleading because the company knew that this

success depended on marketing practices that violated federal law. *Ibid*. A few weeks later, the FDA issued the company a public warning, noting the marketing violations. *Id.* at 1052-53. Investors did not react to the letter because they "could not foresee the letter's impact on [the drug's] sales." *Id*. at 1053. However, *three months later*, the share price fell after the company announced in an earnings call that the drug's "sales fell significantly below expectations." *Id*. at 1054. Analysts ascribed the lower sales to "lower end-user demand" which, "in turn, is expressly alleged to have been caused by the Warning Letter" to which the market initially failed to respond. *Id*. at 1058.

The district court in *Gilead* found it unreasonable to infer that the FDA's corrective disclosure "*caused* a price drop *three months later*." 536 F.3d at 1057. But this Court concluded that the complaint adequately alleged that the "drop in stock price was plausibly caused by the Warning Letter" despite the delay. *Id*. at 1058. The Court explained that the effect on stock prices was complex and indirect, depending on how physicians would react to the letter, how that reaction would affect demand for the drug, and how that decrease in demand would affect Gilead's revenue and, therefore, value as a company. *Ibid*. "It is not unreasonable," the

Court held, to allege that "the public failed to appreciate [the warning letter's] significance" and only reacted once the financial effects of the disclosure were reported. *Ibid*. For that reason, the Court treated the earnings announcement, rather than the warning letter, as the relevant corrective disclosure, and explained that "[i]n this light, the market *did* react immediately to the corrective disclosure" when prices fell in response to the earnings report. *Ibid*. (emphasis added).

This case is not materially different. Assessing Facebook's true value in light of the revealed truth about consumer control depended on complex assessments of how consumers would react to the disclosure and how that reaction would affect revenues, costs, and ultimately the Company's value. "It is not unreasonable" that the market "failed to appreciate [the disclosures'] significance" in full until Facebook provided hard data revealing the actual effects. *Gilead*, 536 F.3d at 1058. Seen in the same light as the earnings report in *Gilead*, it is reasonable to treat the earnings report here as its own form of corrective disclosure, and the market's quick reaction to it as sufficient proof of loss causation.

III. The Complaint Adequately Alleges That Facebook Made Fraudulent Statements About Its Cambridge Analytica Investigation.

Finally, the district court erred in dismissing Plaintiffs' claims regarding Facebook's false assertion that "[o]ur investigation to date has not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work on the [Brexit] and Trump campaigns." 2-ER-265-66, 268-69; 3-ER-346-47. In its final order, the court dismissed those claims for lack of scienter, reasoning that "Plaintiffs have not shown that Executive Defendants acted with knowledge or deliberate recklessness in certifying that Facebook had not uncovered any wrongdoing." 1-ER-13. In an earlier order, the court also suggested that the statements were not false or misleading. *See* 1-ER-60. Neither is correct.

A. Facebook Is Liable For The Knowingly Or Recklessly False Or Misleading Statements Of Its Official Spokesperson.

Regardless of what the Executive Defendants may have known, the spokesperson who actually made the investigation statements knew, or recklessly disregarded, that they were false. *See* 2-ER-265 (Complaint § K.1 heading: "The March 4 and 5, 2017 Statements Were Materially

False and Misleading, as Facebook's 'Spokesperson' Knew in the Most Direct Way"); 2-ER-147, 266-67, 269.[7] And, as Plaintiffs explained below, the spokesperson's knowing or reckless misstatements are attributable to corporate Defendant Facebook, Inc., under established principles of agency law. *See* Dkt. 153 at 6 (citing *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 476 (9th Cir. 2015)).

To the extent the district thought otherwise, *see* 1-ER-13, it was wrong. A "corporation is responsible for a corporate officer's fraud committed 'within the scope of his employment' or 'for a misleading statement made by an employee or other agent who has actual or apparent authority." *ChinaCast* 809 F.3d at 475 (citation omitted); *see also Alphabet*, 1 F.4th at 705 (same). A spokesperson issuing an official statement on behalf of a company is obviously an "employee . . . who has actual or apparent authority" to speak for the firm. And the district court cited no authority requiring Plaintiffs to name the speaker as an

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[7] Plaintiffs continue to believe that the district court's ruling on the Executive Defendants' scienter is incorrect, but for the reasons given in this section, this Court need not review that determination in order to reverse the district court's dismissal of the investigation-statement claims.

individual defendant in order to pursue claims against the speaker's employer.[8]

The question, then, is whether the Complaint adequately alleges that the statements were false or misleading, and whether the spokesperson who made them did so with knowledge, or in deliberately reckless disregard, of their false or misleading nature. The Complaint adequately alleges both.

B. The Spokesperson's Statements Were False And Misleading.

In its second dismissal order, the district court acknowledged that the Complaint "includes voluminous allegations which tend to show that Facebook's investigation revealed wrongdoing by Kogan and Cambridge Analytica." 1-ER-60. But it nonetheless dismissed the claims because

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[8] The district court found it "[p]roblematic[]," 1-ER-13, that the spokesperson was not an individual defendant, citing *Glazer Capital Management, LP v. Magistri*, 549 F.3d 736 (9th Cir. 2008). But there, the Court simply expressed skepticism about the theory of "collective scienter," while nonetheless affirming it is sufficient "to plead scienter with respect to those individuals who actually made the false statements." *Id*. at 744-45.

the Complaint "fails to connect that wrongdoing to either the Brexit or Trump campaign." *Ibid*. That is incorrect.

To start, the court gave an excessively narrow, defendant-favoring interpretation of the challenged statements. To be sure, most of the reported denials stated that Facebook had "not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work *on the [Brexit] and Trump campaigns.*" 1-ER-59 (emphasis added; brackets in original). *But see* 2-ER-269 (article in the *Intercept* omitted that qualification). But an investor could reasonably be misled by the statement into thinking that Facebook had not found any wrongdoing at all. After all, Facebook had promised to investigate Cambridge Analytica's involvement in the Cruz campaign, and to suspend it from the platform if the investigation uncovered wrongdoing. These statements were the first time Facebook had publicly announced anything about its investigation. In that context, readers would have expected that if Facebook had found that Cambridge Analytica had been using purloined user data for Cruz, it would have said so, particularly because that would count as at least some evidence "that suggests wrongdoing" in the Trump campaign as well. 2-ER-266.

Regardless, even if confined to evidence of wrongdoing in the Trump or Brexit campaigns, the statement was false and misleading because the Complaint plausibly alleges that the investigation had turned up ample evidence that Cambridge Analytica was still using private Facebook data for Trump.

To start, Facebook had previously found that Cambridge Analytica knowingly used misappropriated user data on the Cruz campaign, casting doubt on the firm's honesty and trustworthiness. Moreover, within six months, Facebook investigators had learned that Cambridge Analytica had lied about the nature and extent of the data it had received from Kogan, casting further doubt on the veracity of its claim to have deleted the user data it had. 2-ER-203-04, 249, 295. And when asked to provide a more detailed deletion certification, Nix, Cambridge Analytica's CEO, refused. 2-ER-220.

In addition, it took more than a year to collect the original Facebook data and turn it into a model, even with Kogan downloading the data so fast that Facebook had sometimes throttled his connection. 2-ER-181-82, 201-02, 231. Yet, less than five months after claiming to have deleted that database, Cambridge Analytica was working for the Trump

campaign, openly promoting that it was using the same psychographic methods it had employed for Cruz, including the same OCEAN-based model. 2-ER-240-41. Facebook employees embedded in the Trump campaign could see firsthand that this was true. 2-ER-228-29.

How did Cambridge Analytica so quickly obtain a replacement data set? It wasn't because the firm had created a new model for Trump—Nix publicly disclaimed "build[ing] specific psychographic models for the Trump Campaign." 2-ER-232. Yet Nix simultaneously claimed that the system he was using had been built by "having hundreds and hundreds of thousands [of] Americans undertake [a] survey," exactly how Kogan had obtained Facebook user data for the original model. 2-ER-244. Moreover, a *Washington Post* article, based on an interview with Nix and reviewed by Facebook investigators, stated that the model "combined psychological tests with 'likes' on 'social-media sites.'" 2-ER-247 (quoting article).

But most tellingly of all, in placing advertisements for the Trump campaign, Cambridge Analytica was not simply describing targeted voters using generic demographic descriptors (*e.g.*, white women over 40); it was identifying particular individuals. 2-ER-228-29. And it wasn't

identifying those users by name and expecting Facebook to match the name with a user in its system; Cambridge Analytica was identifying voters using "Facebook user identification numbers (called 'Facebook User IDs" or "UIDs") that were unique to each psychographic target" and specific to Facebook's platform. 2-ER-229. That Cambridge Analytica knew the Facebook-specific user IDs of millions of Facebook users "revealed that the company's database rested on data that Cambridge Analytica had previously harvested from Facebook itself." *Ibid.*

Given all this, Facebook would have been pressing credulity even if it had hedged its public statements by saying something like "our investigation to date has not found *conclusive* evidence of wrongdoing in Cambridge Analytica's work on the Trump campaign." But it was manifestly false—and at the very least, misleading—for Facebook's spokesperson to say that the investigation "has not uncovered *anything* that *suggests* wronging." 2-ER-266 (emphasis added).

C. The Complaint Adequately Alleges That Facebook's Spokesperson Either Knew, Or Recklessly Disregarded, The Truth.

That leaves the question whether the Complaint adequately alleges the Facebook spokesperson's scienter. Although the district court did not decide this question, the answer is clear.

A securities fraud complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). "To qualify as 'strong' . . . an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007). But the "inference that the defendant acted with scienter need not be irrefutable . . . or even the 'most plausible of competing inferences." *Id.* at 324 (citation omitted). Instead, a "complaint will survive . . . if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Ibid.*

To establish scienter, the Complaint had to "allege that the defendants made false or misleading statements either intentionally or

with deliberate recklessness." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir. 2009) (citation omitted). "Deliberate recklessness means that the reckless conduct 'reflects some degree of intentional or conscious misconduct.'" *Reese v. Malone*, 747 F.3d 557, 569 (9th Cir. 2014) (citation omitted), *overruled on other grounds by City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cir. 2017). In the context of omissions, the Court has required "a highly unreasonable omission, involving . . . an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Hollinger v. Titan Cap. Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc) (citation omitted).

The Court applied these principles to a case much like this one in *Reese v. Malone*. There, a company official, Maureen Johnson, made multiple misleading statements to the press about the state of corrosion in an oil pipeline. This Court found a strong inference of scienter given that (1) if Johnson had reviewed relevant internal reports, she would have known her statements were misleading, 747 F.3d at 571; and

(2) Johnson "had every reason to review" those reports given she was in charge of the relevant facilities and speaking to the press on the company's behalf. *Ibid.*; *see also id.* at 567, 570.

This Court acknowledged that "it is possible that Johnson misunderstood the data or did not, despite her position, have access to it," but it concluded that "such a scenario is unlikely under these circumstances." 747 F.3d at 571-72 (emphasis omitted). Among other things, "the inference that Johnson did not have access" to the internal data "is directly contradicted by the fact that she specifically addressed it in her statement." *Id.* at 572. Because she "addressed corrosion rate data specifically," it was "unlikely that she was not aware of it or the concerning aspects of the company's findings." *Ibid.* In other words, "Johnson bridged the scienter gap herself by referencing the data directly." *Ibid.* (cleaned up). By "making a detailed factual statement, contradicting important data to which she had access, a strong inference arises that she knowingly misled the public as to its clear meaning." *Ibid.*

The same rationale applies here. For the reasons already discussed, if Facebook's spokesperson had inquired into the findings of the internal investigation, it is implausible that he did not discover that there was at

least *some* evidence of wrongdoing. *See* 747 F.3d at 572 ("The most direct way to show both that a statement was false when made and that the party making the statement knew that it was false is via contemporaneous reports or data, *available to the party*, which contradict the statement.") (citation omitted).[9] Moreover, Defendants cannot claim that the spokesperson was unfamiliar with what the investigation had found—the spokesperson "bridged the scienter gap" himself "by referencing the [evidence] directly" in purporting to describe what the investigation had uncovered. *Ibid.* (cleaned up).

Thus, there is every reason to believe that the statement was knowingly false or misleading. But at the very least, it was deliberately reckless. If the spokesperson failed to inquire about the evidence uncovered by the investigation before purporting to describe it to the press, that would have been "an extreme departure from the standards of ordinary care" that "presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must

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[9] *See also City of Dearborn Heights Act 345 Police & Fire Ret. Sys.*, 856 F.3d at 620; *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628-29 (9th Cir. 1994).

have been aware of it.'" *Hollinger*, 914 F.2d at 1569 (citation omitted). Indeed, claiming the investigation had not found "anything" that even "suggests wrongdoing," 2-ER-266, would be knowingly misleading if the speaker had not meaningfully inquired into the full scope of the investigation and the evidence. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188 (2015) (saying "We believe our conduct is lawful" implies that the speaker made "some meaningful legal inquiry," an implication that is knowingly misleading if untrue).

Moreover, even a cursory inquiry would have shown that further investigation was required before making such a sweeping claim. And it would have taken but a modest effort—picking up the phone and talking to those who had conducted the investigation or had been embedded in the campaign—to discover there was significant evidence of wrongdoing. "An actor is deliberately reckless if he had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although he could have done so without extraordinary effort." *Reese*, 747 F.3d at 569 (cleaned up).

Perhaps it is *conceivable* that the spokesperson conducted a sufficient inquiry but was misinformed by investigators or misunderstood what they said. But as in *Reese*, that inference is not more plausible than the Complaint's allegation of scienter. This was no off-the-cuff statement made to a reporter in an elevator. It was a formal statement in response to news reports, repeated at least three times over the course of three weeks. Facebook cannot plausibly claim that such statements are not thoroughly vetted before made.

In this case, "all of the facts alleged, taken collectively, give rise to a strong inference of scienter." *Tellabs*, 551 U.S. at 323 (emphasis omitted).

CONCLUSION

For the foregoing reasons, the district court's order should be reversed.

May 23, 2022

Respectfully submitted,

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/s/ Kevin K. Russell
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Counsel for Plaintiffs-Appellants

ADDENDUM

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15 U.S.C. § 78j(b)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

* * *

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

* * *

[1] So in original. Probably should be followed by a comma.

15 U.S.C. § 78u-4(b)(2)

§ 78u-4. Private securities litigation

* * *

(b) Requirements for securities fraud actions

* * *

(2) Required state of mind

(A) In general

Except as provided in subparagraph (B), in any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(B) Exception

In the case of an action for money damages brought against a credit rating agency or a controlling person under this chapter, it shall be sufficient, for purposes of pleading any required state of mind in relation to such action, that the complaint state with particularity facts giving rise to a strong inference that the credit rating agency knowingly or recklessly failed—

(i) to conduct a reasonable investigation of the rated security with respect to the factual elements relied upon by its own methodology for evaluating credit risk; or

(ii) to obtain reasonable verification of such factual elements (which verification may be based on a sampling technique that does not amount to an audit) from other sources that the credit

rating agency considered to be competent and that were independent of the issuer and underwriter.

* * *