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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ARGUMENT

By late 2015, Facebook had confirmed that it had transferred the private data of about 30 million users to Cambridge Analytica without the users' consent. Likely foreseeing the backlash it would face if it publicly acknowledged this breach of trust, Facebook tried to deflect attention with promises to look into the matter, presumably hoping the controversy would blow over and the problem would not recur. Thus, rather than disclose the breach in its 10-K filings, Facebook treated the prospect as merely hypothetical. Rather than admit what had happened, Facebook later claimed through a spokesperson that its investigation had not uncovered anything that "suggests wrongdoing with respect to Cambridge Analytica's work on the Leave and Trump campaigns," omitting that Facebook had confirmed wrongdoing for the Cruz campaign. 2-ER-266. And throughout, Facebook's leadership repeatedly represented to the public that users could control whether their private data was shared with third parties, knowing that this was proven untrue by Cambridge Analytica's acquisition of tens of millions of users' data and by Facebook's ongoing policy of sharing user data with certain "whitelisted" partners without user consent.

Instead of blowing over, the scandal blew up, taking with it billions of dollars invested by shareholders who purchased stock at inflated prices maintained by Facebook's knowingly or recklessly false and misleading statements. Facebook nonetheless insists that the law offers the injured no remedy. Its principal argument, making repeated appearances throughout its brief, is that the public long knew, but did not care, that Cambridge Analytica had wrongfully *obtained* private user data and used it for the Cruz campaign, but nevertheless later exploded in anger when it discovered that the company had used the same data *again* for the Trump and Brexit campaigns. At the appropriate time, Facebook can try to persuade a jury of that facially implausible story, but it has no basis in the Complaint and is no grounds for dismissal at this early stage.

Facebook's other arguments fare no better, depending on mischaracterizations of the Complaint and Plaintiffs' arguments and a misconstruction of the governing law.

I. The District Court Improperly Dismissed The Risk-Statement Claims.

The district court held that Facebook's 10-K risk statements were not misleading because they warned only of the prospect of harm to Facebook's business, which had not yet occurred because "Cambridge Analytica's misuse of user data [was a] matter[] of public knowledge." 1-ER-57. Tellingly, Facebook spends much of its brief raising a series of alternative grounds for affirmance, only some of which it raised below and none of which has any merit. Br. 25-28, 33-36. When Facebook gets around to defending the district court's reasoning, it offers nothing persuasive.

A. Facebook's Truth-On-The-Market Defense Is Meritless.

Start with the district court's actual holding. Facebook reiterates the district court's assertion that the risk statements could not have been misleading because the public already knew from a *Guardian* story about the Cruz campaign that Cambridge Analytica had misappropriated private user data. Br. 28-29.[1] This is a classic truth-on-the-market

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[1] Facebook is correct (Br. 23-24) that Plaintiffs do not press any "continued-misuse" theory regarding the risk statements on appeal.

defense requiring Facebook to "prove" that the truth 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). "The truth-on-the-market defense is intensely fact-specific and is rarely an appropriate basis for dismissing a § 10(b) complaint." *Ganino v. Citizens Utils. Co*., 228 F.3d 154, 167 (2d Cir. 2000).

As the opening brief explained, Facebook has not come close to carrying its "heavy burden" here. *Provenz*, 102 F.3d at 1493. Although the 2015 *Guardian* article *alleged* that Cambridge Analytica was using Facebook data without user consent, those who obtained and used the data (Kogan and the Cruz campaign) denied the allegation, Cambridge Analytica declined to comment, and Facebook said only that it would look into the matter and take "swift action" against Kogan and Cambridge Analytica if it found the allegations substantiated. 2-ER-279. Facebook then took no public action against either party until March 2018 when it publicly acknowledged for the first time that it had confirmed the *Guardian* story. Opening Br. 36-37. That the public did not consider the

matter resolved before then is confirmed by the fact that as late as February 2017, reporters continued to ask Facebook for updates on its investigation. 2-ER-262. Rather than confirm the misappropriation, Facebook misleadingly referred reporters to Cambridge Analytica's (false) public statements that it did not "use data from Facebook" and "does not obtain data from Facebook profiles or Facebook likes." *Ibid*.

Facebook nonetheless argues that the public already knew the answer to the reporters' question. But its reasons for that assertion do not withstand scrutiny. Facebook says the initial allegations were made in a reputable source and repeated by others. Br. 28-29. However, the problem is not the stories' source, but their content, which included unequivocal denials by those directly involved and Facebook's refusal to say anything other than that it would investigate the allegations.[2] *Cf. Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 271-72 (2d Cir. 2020) (upholding district court's rejection of similar claim that market knew the truth, given the defendants' "denials and rebuttals"

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[2] Facebook does not claim that any of the follow-on articles addressed the matter with any greater detail or credibility than the initial December 2015 *Guardian* article. Br. 28-29.

reported in some articles), *vacated and remanded on other grounds*, 141 S. Ct. 1951 .[3]

Facebook says the company "*did* take action by banning Kogan . . . and obtaining deletion certifications." Br. 30. But the *public* did not know that—those actions were secret. *See* 2-ER-219-20, 285-86. And Facebook took no meaningful action against Cambridge Analytica even in private. Instead, within months of discovering the breach, Facebook was working cheek by jowl with the offender targeting lucrative ads for the Trump campaign. 2-ER-269.

Moreover, Facebook went beyond silence, misleadingly responding to reporters' questions about the status of its investigation by referring them to Cambridge Analytica's false denials of wrongdoing. Opening Br. 36-37. Facebook says that it did so because it believed that Cambridge Analytica had deleted the data. Br. 30. But the question is not whether those referrals, or its silence about its earlier findings, constituted

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[3] *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), assumes that the market was aware of the content of the reports, not that investors are clairvoyants who can divine truth from controverted claims and equivocal evidence. *Contra* Facebook Br. 29.

actionable fraud. *Contra ibid*. It is whether those actions and inactions contributed to the public uncertainty, thereby undermining Facebook's truth-on-the-market defense. Surely, they did.

Finally, Facebook's assertion that the market already knew the truth is impossible "to square with the [substantial] price drop" that followed Facebook's March 2018 admission to Cambridge Analytica's supposedly well-known misappropriation of user data, *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595, 613 (7th Cir. 2020), as well as the initiation of a multitude of government investigations. Facebook says the market was reacting solely to the news that Cambridge Analytica had retained the data and used it again. Br. 30. But Facebook cannot plausibly claim that this was the *only* part of the revelation the public was reacting to, as if users did not care *at all* that Cambridge Analytica had originally misappropriated the data and misused it for the Cruz campaign, but cared *enormously* that Cambridge Analytica had kept the data and used it for Brexit and Trump.

In fact, the Complaint amply alleges that the media and analysts treated confirmation of the original misappropriation as a new revelation. *See, e.g.*, 2-ER-287 (*New York Times* article stating 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-289 (analyst report observing negative public reaction "after the revelation of the data extraction by Cambridge Analytica"); *see also* 3-ER-402-04 (similar). The coverage also made clear that a principal source of the public outrage was the realization that Facebook had allowed private data to fall into Cambridge Analytica's hands in the first place. *See* 2-ER-152 (Complaint ¶23); 3-ER-402-07 (Complaint ¶¶693, 696, 700, 703). For example, news sources and stock analysts questioned "why Facebook did not disclose Kogan's violations to the more than 50 million users who were affected when the company first learned about it in 2015," 2-ER-288 (CNN story), a question that would make little sense if everyone had known about Kogan's violations for years.[4]

Likewise, the government investigations that followed the March disclosures were focused in substantial part on Cambridge Analytica's initial acquisition of the private data, not solely on its use of the data for

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[4] *See also* 2-ER-287 (same, quoting other media and analyst reports).

Trump and Brexit. *See, e.g.*, 2-ER-287, 292. The SEC's 2019 complaint, for example, alleged that Facebook's risk disclosures were misleading for failure to disclose the "improper transfer of data to Cambridge." 1-SER-107. It is fanciful for Facebook to suggest the SEC, Congress, and other investigators had been aware of the initial misappropriation years earlier, but had not cared. Again, Facebook may seek to convince a jury of this implausible proposition, but it cannot prevail over the well-pled facts of the Complaint at this stage.

B. The Risk Statements Were Misleading Even If Facebook Had Not Yet Suffered Business Harm.

Facebook also argues that it had no obligation to disclose Cambridge Analytica's misappropriation in its 10-Ks because the "'risk . . . warned of'" was the risk of business harm, and Facebook "had no reason to believe any such risk had materialized or would materialize." Br. 31 (citation omitted). But the premise that the 10-Ks only warned of the risk of business harm is plainly false. The filings warned of two distinct risks—improper disclosure of private user data *and* the possibility that any such disclosure could harm Facebook's business. *See* Facebook Br. 69-71 (reproducing risk statements). *In re Alphabet, Inc. Securities Litigation* held that when a 10-K warns of both kinds of risks,

treating the prospect of a privacy breach as merely hypothetical when one has already occurred is misleading, even if no business harm has yet occurred. 1 F.4th 687 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 1227 (2022); *see* Opening Br. 39-42.

Facebook acknowledges that after *Alphabet*, an event "concealed from the public" may "be actionable" if it "still carries the potential for harm upon publication." Br. 32 n.10. But it argues that *Alphabet*'s rule does not apply here because the market "already knew of the initial data misuse for the Cruz campaign (and did not react)." Br. 31. Facebook thus declines to defend the district court's decision to the extent it held that a company may treat a privacy breach as a hypothetical risk so long no business harm had yet occurred, even if the public was unaware of the incident. All that is left is just a reprise of the truth-on-the-market defense, which fails for the reasons already discussed.

C. Defendants' Alternative Grounds For Affirmance Fail.

Facebook also raises several grounds for affirmance the district court did not address. This Court generally does not resolve such arguments in the first instance. *See, e.g.*, *Oliver v. Davis*, 25 F.4th 1228, 1237 (9th Cir. 2022). Regardless, none has any merit.

1. The Risk Statements Were On-Point And Misleading.

Facebook argues that its risk statements were not misleading because they dealt exclusively with "hacking," "cyber-attacks," and the like, not the kind of improper disclosure of user data that occurred here. Br. 26 (quoting 2-SER-235-56). Facebook further argues that even if the Cambridge Analytica incident counted as a form of hacking, Facebook adequately disclosed the incident by stating that hacking has "occurred on our systems in the past." Br. 27 (quoting 2-SER-235-56). The district court did not address either argument because Facebook did not raise them in any of its three motions to dismiss. *See* 1-ER-56-59; Doc. 145 at 9-14; Doc. 126 at 12-14; Doc. 93 at 19-20. Accordingly, the contentions should be deemed forfeit. *See Holder v. Holder*, 305 F.3d 854, 867 (9th Cir. 2002). They are also meritless.

a. The 10-Ks treat security breaches and improper access or disclosure as distinct risks and warn of both. This is apparent from the plain language of the documents. For example, the heading states: "*Security breaches* and *improper access to or disclosure* of our data or user data, *or* other hacking and phishing attacks on our systems, could harm our reputation and adversely affect our business." 2-SER-235 (Statement

22) (emphasis added). Statement 23 then warns that "[a]ny 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." *Ibid.* (emphasis added). Statements 24 and 25 likewise treat protecting user data as broader than simply preventing cyberattacks. *See* 2-SER-236 (Statement 25) ("Although we have developed systems and processes that are designed to protect our data and user data, to *prevent data loss,* and to prevent or detect *security breaches*, we cannot assure you that such measures will provide absolute security.") (emphasis added); *ibid.* (Statement 24) (warning that if "third parties or developers fail to adopt or adhere to adequate *data security practices,* or in the *event a breach* of their networks, our data or our users' data may be improperly accessed, used, or disclosed") (emphasis added).

This is consistent with other uncharged statements, such as the warning that Facebook could be sued "in connection with any *security breaches* or *improper disclosure* of data." 2-SER-236 (emphasis added). And the warnings make clear that improper disclosure of user data can arise not only from hacking, but also through "technical malfunctions,"

"employee, contractor, or vendor error or malfeasance," "government surveillance," and "other threats that evolve." *Ibid.*

This is hardly surprising. After all, consumers would not care *why* Facebook disclosed their private data to third parties without their permission, only that it *was* disclosed. Nor does Facebook identify any place else in its warnings that address the prospect of developers misappropriating user data with different language.

b. Facebook further argues that it adequately disclosed the Cambridge Analytica event by stating that "computer malware, viruses, social engineering (predominantly spear phishing attacks), and general hacking" had "occurred on our systems in the past." Br. 26-27 (quoting 2-SER-235-36). But this case involved improper access and disclosure, not hacking, a point Facebook itself has stressed in the past. *See* 2-ER-286. Moreover, even if the Cambridge Analytica incident qualified as a hacking event, simply stating that "general hacking" had "occurred in the past" would be just as misleading as treating it as a hypothetical prospect when the hacking had not only "occurred" but had successfully obtained the private information of tens of millions of users. *See*, *e.g.*, *Provenz*, 102 F.3d at 1488-89 (disclosing that company was "having problems with its

suppliers" insufficient where product "was plagued with delays and performance problems so severe that [company] was losing orders and constantly cutting sales forecasts").

2. *The Complaint Adequately Alleges Scienter, Reliance, and Loss Causation.*

Facebook's other alternative grounds for affirmance are equally meritless.

Scienter. Facebook says that even though consumers and investors allegedly knew about Cambridge Analytica's misappropriation since 2015, the Executive Defendants and others in charge of Facebook's SEC filings did not. Br. 34-35 & n.11. Beyond being completely implausible on its face, that claim is directly contradicted by the Complaint, which expressly alleges that Zuckerberg and Sandberg knew the truth as early as 2015, citing their own public admissions. *See* 3-ER-390 (citing Zuckerberg Facebook post and *Wired* interview); *ibid*. (citing Sandberg television interview).

Instead of grappling with allegations in this case, Facebook points to the SEC's complaint. *See* Br. 34 (citing 1-SER-106-07). But Facebook cannot seek dismissal based on allegations in some other litigation. Although the Complaint refers at times to certain allegations in the SEC

complaint, it does not incorporate the SEC's complaint wholesale, much less these specific allegations. Moreover, the cited passages in the SEC complaint were simply criticizing Facebook's formal process for evaluating what should be put in 10-K disclosures. Br. 34. Even if that process "failed to bring" the Cambridge Analytica incident "to the attention of the individuals with primary responsibility for drafting and approving those reports," *ibid*. (quoting 1-SER-106 (¶40)), that does not mean that the Company's top officials failed to learn of the incident through other means. Indeed, they admitted as much. *See supra* 14.

Reliance. Facebook's reliance argument is entirely derivative of its truth-on-the-market defense, *see* Br. 35-36, and fails for the same reasons. *See supra* 3-9.

Loss Causation. Facebook says "Plaintiffs' own allegations disclaim" any causal connection between the risk statements and "the stock drops in 2018" because the Complaint supposedly alleges "that the stock drops in 2018 . . . were a reaction to Cambridge Analytica's retention and continued misuse of user data." Br. 36 (emphasis omitted). But as discussed, the Complaint amply alleges that the reaction was due in

substantial part to the revelation that Cambridge Analytica had misappropriated the data in the first place. *See supra* 8.

II. The District Court Improperly Dismissed The Investigation-Statement Claims.

The opening brief explained that the district court erred in dismissing the investigation-statement claims for lack of scienter because it overlooked Plaintiff's allegations that the spokesperson who made the statements knew that they were false or recklessly disregarded the truth. Opening Br. 63-64. Facebook does not contest that Plaintiffs raised this argument or that the district court failed to address it. It also does not dispute that the spokesperson's scienter is imputed to the company. *See* Opening Br. 64-65. Instead, Facebook argues that the statements were not false or misleading and that the Complaint does not adequately allege the spokesperson's scienter. Neither is correct.

A. The Complaint Adequately Alleges Falsity.

Facebook's argument on falsity rests on the premise that to "plead falsity for Facebook's 2017 statement about what its investigation had revealed about continued misuse of data, plaintiffs must plead with particularity that Facebook *discovered* Cambridge Analytica lied about destroying the data and in fact continued to use it." Br. 37 (emphasis

altered). That is incorrect. The challenged statement represented that Facebook's "investigation to date has not uncovered *anything* that *suggests* wrongdoing with respect to Cambridge Analytica's work on the Leave [i.e., Brexit] and Trump campaigns." 2-ER-266 (emphasis added). That statement was false and misleading even if the investigation had not conclusively determined that wrongdoing had occurred.

This Court's decision in *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167 (9th Cir. 2009), *aff'd*, 563 U.S. 27 (2011), illustrates the point. There, a company responded to public reports that its nasal spray was unsafe by asserting in a press statement that the allegations "are completely unfounded and misleading." *Id*. at 1182 (internal quotation marks omitted). To decide whether this statement was knowingly or recklessly false, this Court did not ask whether the company had conclusively determined that the drug was unsafe. Indeed, the evidence of its safety was far from conclusive at the time. *Id*. at 1178-80. Nonetheless, this Court held that the statement was knowingly false because the company officials "knew that the statements" alleging the drug was unsafe "were not 'completely unfounded and misleading,'" given that the defendants knew about one presentation on the subject to a

scientific conference, a conversation between a company official and a doctor reporting anecdotal evidence of a problem, and the filing of "several lawsuits" alleging injuries from the product. *Id.* at 1182. In affirming that decision, the Supreme Court likewise held that the Complaint stated a claim because "Matrixx had *evidence* of a biological link between Zicam's key ingredient and anosmia" and lacked a study "disprov[ing] that link." 563 U.S. at 47 (emphasis added).

Plaintiffs thus were required only to plausibly plead with particularity that Facebook had some material evidence of wrongdoing, not that the evidence was conclusive or that Facebook had discovered the truth. The Complaint easily satisfies that standard. *See* Opening Br. 67-69.

Start with the evidence that Cambridge Analytica had initially obtained the Facebook user data in clear violation of Facebook rules and then lied about it, falsely insisting that it never received any raw user data, only personality scores based on that data. Opening Br. 16-17, 67-68. Facebook seems not to contest that if investigators were aware of Cambridge Analytica's duplicity, that would be evidence that the company had kept and continued to use that raw user data for the Trump

and Leave campaigns rather than having created a new database from other sources in record time. And Facebook acknowledges that all its investigators would have had to do to discover this duplicity is compare Cambridge Analytica's and Kogan's certifications. *See* Br. 38.

Facebook nonetheless claims it is "rank speculation" that its investigators actually "compared and contrasted" the certifications. Br. 38. That is highly implausible. The investigators were obviously focused on the question of precisely what data Kogan had transferred to Nix and his company. They specifically asked Kogan to detail the "Specific Data Points Shared." 2-ER-213. A few days after receiving Kogan's certification, they asked Cambridge Analytica's CEO Nix to provide a second, more-detailed certification that would have would have confirmed whether his Company had received the raw data as Kogan reported. 2-ER-219-20. Perhaps it is *possible* that, despite this, Facebook's investigators somehow failed to notice the discrepancy in the certifications. Facebook Br. 38. Perhaps they also thought it completely innocent that Nix refused to provide the more-detailed certification. 2-ER-220. But that mere possibility is no basis for dismissal. Plaintiffs are entitled to the benefit of all plausible inferences arising from their

detailed factual allegations. *See Tellabs, Inc. v. Makro Issues & Rts., Ltd.*, 551 U.S. 308, 313-14 (2007). And the Complaint's inference of investigative competence is far more plausible than Facebook's claims of gross ineptitude.

The opening brief also explained that investigators knew that it had taken more than a year to create the initial database for Cruz and that Cambridge Analytica disavowed creating a new model for the Trump campaign. Opening Br. 67-68. Given this, the fact that Cambridge Analytica nonetheless was publicly using the same psychogenic techniques for Trump five months later was significant evidence that rather than having created a new database from scratch, Cambridge Analytica was using its old database containing misappropriated Facebook data. *Ibid*. Facebook's only response is to pretend that this argument is based on the appearance of a logo on a slide rather than the substance of the presentation and subsequent press reports that its

investigators admittedly reviewed. Facebook Br. 40; *see* Opening Br. 18, 67-68; 2-ER-238-49.[5]

Finally, the investigation statements were also misleading because they implied that Facebook had no evidence that Cambridge Analytica had engaged in any relevant wrongdoing at all. *See* Opening Br. 66. Facebook counters that its statement was carefully worded to address only wrongdoing in the Brexit and Trump campaigns. Br. 41. But a "statement that is literally true can be misleading and thus actionable under the securities laws." *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 692 (9th Cir. 2011) (citation omitted). As Facebook recognizes, the question is whether the statement "create[s] an impression of a state of affairs that differs in a material way from the one that actually exists." Br. 25 (citation omitted). Here, reasonable investors would not have

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[5] Facebook also claims that the user IDs Cambridge Analytica used to target ads were "publicly available." Br. 40. But Facebook cites nothing in the Complaint to support that factual claim. Instead, it cites an aside in a footnote in the district court opinion, which mischaracterizes a passage in Plaintiffs' opposition *disputing* Facebook's claim that the IDs were publicly available. *See* Br. 40 (citing 1-ER-11 & n.1 (citing 1-SER-20 (responding to Doc. 145 at 17))); *see also* 1-SER-21 & n.6 (explaining IDs could not be obtained without violating Facebook policies against "scraping" user data).

understood the reference to the Trump and Brexit campaigns as leaving open the possibility that Facebook knew Cambridge Analytica had misappropriated tens of millions of users' private data for some other candidate. This is particularly so where Facebook had not yet revealed the conclusions of its investigation into the Cruz campaign and where using purloined data for Cruz would have been significant evidence that Cambridge Analytica had engaged in similar wrongdoing for others. Opening Br. 66.

B. The Complaint Adequately Alleges Scienter.

As noted, the district court did not decide whether the Complaint adequately alleges the spokesperson acted with scienter. Facebook argues that the scienter allegations are insufficient, Br. 43-45, but its reasons are unconvincing.

The Court will reach scienter only if it has already decided that the investigation statements were misleading because there *was* evidence of wrongdoing. But if that is so, why did Facebook's spokesperson nonetheless repeatedly claim the opposite in formal press statements? It is hardly speculation to infer that if the spokesperson had conducted even a modest inquiry, he would have discovered that there was at least some

material evidence of wrongdoing. And if the spokesperson was aware of even a portion of this evidence, then the statements were at least recklessly false. Opening Br. 72-74.

On the other hand, if Facebook's spokesperson had conducted no inquiry, or only a cursory one, then the statement would still be intentionally or recklessly misleading because it would falsely imply that the statement was the product of a meaningful inquiry. *See* Opening Br. 74.

Facebook responds that investigators may have failed to "communicate[] their discoveries" to the spokesperson. Br. 43. But the possibility that the spokesperson conducted a meaningful inquiry, yet failed to learn *any* of what investigators discovered, is less compelling than the alternative explanation in the Complaint. The spokesperson did not simply "mention[]" the investigation. *Ibid.* (emphasis omitted). He purported to describe what "evidence" Facebook had uncovered, in the course of an official statement released to multiple press outlets over the course of several days. In similar circumstances, this Court held that the possibility a company spokesperson did not have access to information

was "directly contradicted by the fact that she specifically addressed it in her statement." *Reese v. Malone*, 747 F.3d 557, 572 (9th Cir. 2014).

Facebook attempts to distinguish *Reese* on the ground that the truth in that case was revealed in reports the spokesperson "had every reason to review." Br. 43 (quoting *Reese*, 747 F.3d at 571). But Facebook's spokesperson also had every reason to conduct a meaningful inquiry before making formal representations to the press on behalf of the Company (including because failing to do so could make any statement actionably misleading, *see supra* 23). Moreover, like the official in *Reese*, Facebook's spokesperson had easy access to the truth—all he had to do was ask those involved in the investigation. *See Reese*, 747 F.3d at 572 ("The most direct way to show . . . that the party making [a] statement knew that it was false is via contemporaneous reports or data, *available to the party*, which contradict the statement.") (citation omitted).

Facebook says the *Reese* spokesperson had a motive to lie. Br. 44. But even if that were a determinative factor, *but see* 747 F.3d at 571 (treating motive as "one factor in examining the totality of circumstances"), a spokesperson's job is to represent the Company's

interests. And Facebook had an enormous incentive to continue to mislead the public about what Cambridge Analytica had done in order to avoid the kind of backlash that eventually occurred when the truth came out.

Facebook argues this all amounts to nothing more than allegations of negligence. Br. 45. To the contrary, Plaintiffs' entire point is that it is implausible that a spokesperson for the largest social media company in the world would issue an official statement expressly addressing findings of an investigation based on a slipshod inquiry into what the investigation had found. That is why the Complaint's allegations of knowing or reckless conduct is more compelling than the alternative inference of mere negligence and why the district court erred in dismissing these allegations for lack of scienter.

III. The District Court Improperly Dismissed The User-Control Statement Claims.

Facebook's defense of the district court's dismissal of the user-control claims fails as well.

There can be little dispute that claiming that users controlled their private data, when the opposite was true, maintained an artificial inflation in the stock price. Had investors known the truth that third

parties had obtained the private information of millions of users without their consent, the market would have reacted by devaluing the company's stock price, as it did when that basic truth was revealed in March 2018. *See, e.g.*, *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 255 (2d Cir. 2016) ("The best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed[.]") (citation omitted). Facebook nonetheless tries to take advantage of the fact that its knowingly false statements were so broad and unqualified that they were misleading for multiple related reasons, and of the happenstance of the order in which those reasons were revealed to the market. Those arguments should be rejected.

A. The District Court Erred In Refusing To Consider The Market's March 2018 Reaction.

The opening brief explained that Plaintiffs were injured by Facebook's false and misleading user-control statements in March 2018 when the truth concealed by the misstatements—that users did *not* control access to their private data—was revealed and its stock price plummeted. Opening Br. 46-56. Facebook offers no convincing response.

1. Like the district court, Facebook views it as dispositive that the market did not react in June 2018 when it was revealed *again* that users

lacked control over their private data through articles about Facebook's whitelisting practices. Br. 48. But Facebook ultimately acknowledges that under *Lloyd v. CVB Financial Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016), a market's failure to react to a corrective disclosure does not preclude a finding of loss causation if the market previously reacted to a disclosure of the "same essential facts." Br. 52 (internal quotation marks omitted). The dispute on appeal, thus, comes down to whether the March and June disclosures concerned the "same essential facts." They did.

For the reasons already discussed, Facebook cannot deny that the public reaction to the March disclosure was driven significantly by public reaction to the disclosure that users could not control who had access to their private Facebook data. *See supra* 7-9. Facebook also cannot seriously deny that the June whitelisting disclosures likewise revealed that users were not in control of which third parties had access to their private data. Instead, Facebook complains that this framing views the "same essential facts" of the two disclosures at too high a level of generality. Br. 52; *see id*. 59. But the Complaint simply accepts the level of generality Facebook elected to use to reassure users. Facebook's objection might have some force if the Executive Defendants had insisted

only that they engaged in no whitelisting. But they elected to make expansive claims, knowing them to be false, and are justly held responsible for the harm investors suffered when markets believed them.

In any event, there is no merit in Facebook's contention that there are "obvious differences between the March and June disclosures" that explain the different market reactions. Br. 51. Facebook says the public reacted violently to the March disclosures because they revealed *illicitly* obtained user data being used for *political* advertising, whereas the June stories revealed that Facebook was *intentionally* sharing private data with other companies for *commercial* purposes. Br. 50-51.

Perhaps Facebook could convince a jury of that. But that's not the question here. The question is whether the Complaint's explanation is plausible and pleaded with particularity. *See Tellabs*, 551 U.S. at 313-14. And here, the Complaint more than plausibly explains that consumers care about their control over private data, not the identity of the third parties obtaining that data without their consent or whether that data was used for political advertising or some other commercial purpose. Zuckerberg himself proclaimed that "the No. 1 thing that people care about is privacy and the handling of their data," full stop. 2-ER-148

(citation omitted). The media reports from March further demonstrate that the market was responding to the revealed lack of user control, not the identity of the third party that obtained the data, or the uses to which that data was put. *See supra* 7-9. The June coverage likewise treated the whitelisting disclosures as a continuation of the already-revealed lack of user control. *See* 3-ER-407-08.

Given this, the Complaint's explanation for the lack of a June response—that consumers and markets had by then fully internalized that Facebook was not allowing users to control who saw their private information, 3-ER-407—is entirely plausible and adequately substantiated for this stage in the litigation.

2. Facebook also objects that treating the March disclosures as corrective of the knowingly false user-control statements allows Plaintiffs to "mix and match allegations of falsity, scienter, and loss causation." Br. 53-54, 57. Not so. Every element of Plaintiffs' claim is aligned. The Complaint alleges that the user-control statements were false and that Facebook made those same statements with scienter. The Complaint further alleges that Plaintiffs were injured by that same set of knowingly false statements because they maintained an artificial inflation in the

stock price that was released when the truth concealed by the misstatements became known to the market in March 2018.[6]

To be sure, the March and June reports revealed different respects in which the knowingly false statements were untrue. But as Plaintiffs' hypothetical in the opening brief illustrates, it makes no sense to immunize a knowing lie simply because it is so broad it can be disproven in multiple ways and because of the happenstance of the order of the disclosures disproving the falsehood. Opening Br. 49-50 (giving example of baby powder containing multiple carcinogens).[7] Facebook tries to offer a counter hypothetical, insisting that there would be no liability if a company claimed that its food was "safe" and "healthy," knowing it wasn't healthy because it contained a lot of sugar, and the market reacted to

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[6] Facebook notes (Br. 54) that the post-March user-control statements cannot have caused the injuries suffered from the March stock correction. But the statements were capable of muting the market response to the March disclosures, and therefore maintaining inflation that was eventually released in July. *See* Opening Br. 56-62; *infra* 33-36.

[7] Facebook remarkably claims that there would be no liability in the hypothetical because the loss would not be foreseeable. Br. 59. But it is entirely foreseeable that lying to consumers about the safety of a product will artificially maintain inflation in a stock price, thereby injuring investors who purchase shares before the truth becomes known.

news that the food also contained a carcinogen. Br. 59-60. But that is only because the defendant made two distinct claims—that the food was "safe" and that it was "healthy." The fact that the "healthy" claim was knowingly false would not make the company liable for the "safe" claim if the defendant had no reason to doubt the product's safety. On the other hand, if the defendant knew the product was unsafe because it contained a carcinogen, it should not avoid liability simply because the product contained multiple carcinogens and the public learned the truth in stages rather than all at once. *See* Opening Br. 49-50.

Likewise, nothing in law or logic immunizes Facebook from liability simply because it chose to make sweeping false statements about user control or because the falsity of those statements was first disclosed through stories about Cambridge Analytica rather than whitelisting.

3. Facebook also argues that the March reports were not corrective because "they did not address Facebook's present policies." Br. 55. Facebook did not press this argument below, and the district court did not address it. *See* 1-ER-14-15; 1-ER-81-82; Doc. 145 at 21-34; Doc. 126 at 26-34. This forfeit argument also has no merit.

To start, Facebook's premise—that it made unspecified "improvements" to its policies between the time of the Cambridge Analytica breach and the 2017-2018 user-control statements—has no foundation in the Complaint. Instead, Facebook's only citation (Br. 55) is to a passage in a news article simply reporting Facebook's self-serving response to the Cambridge Analytica allegations, which Facebook misleadingly portrays as the paper "recogniz[ing]" the truth of Facebook's claimed policy improvements. *See* 1-SER-177-78.

Second, Facebook did not tell users that although they lacked control in the past, they would have it in the future. It said, for example, "Our apps *have long been focused* on giving people transparency and control," "You own all of the content and information you post on Facebook, and you can control how it is shared," and "No one is going to get your data that shouldn't have it." 1-ER-24-25 (emphasis altered). Even if some statements were literally addressing only the state of users' ability to prevent *future* disclosures, the statements would still be exceedingly misleading if (as was true) Facebook knew that private user information was presently in the hands of developers and device makers without user consent. If a bank told its customers "you have complete

control over transfers of your money," that statement would be revealed as misleading by news that some customers' money was presently sitting in someone else's bank account, even if the transfer had occurred before the statement was made or under some allegedly different set of policies.

B. The District Court Erred In Refusing To Consider The Market's July 2018 Reaction.

The district court further erred in disregarding the market effects of Facebook's July announcement of the economic damage inflicted by consumers' loss of confidence in their ability to control access to their private data.

As the opening brief explained, the Complaint cites abundant evidence that the market reaction to the July earnings call was due at least in part to investors' realization that the fallout from the user-control revelations was more serious than the market had initially estimated. *See* Opening Br. 58-59. *Contra* Facebook Br. 62. Facebook cannot seriously deny that if this is true, Plaintiffs' further injuries in July were directly caused by the misstatements. The line of causation is direct and entirely foreseeable.

Facebook instead argues that despite this causal connection, the law categorically denies Plaintiffs any recovery for such an injury. Br.

60-61. But it points to nothing in the language of the Securities Exchange Act imposing that limitation. And the only case it cites, *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010), held nothing of the sort. What *Oracle* "reject[ed]" was the claim that plaintiffs can simply show that they were injured by an "earnings miss" without connecting that injury "to the fraudulent acts themselves." *Id*. at 392. The Court then held that the plaintiffs' theory in the case before it was "unsupported by the record" because the "overwhelming evidence produced during discovery indicates the market understood Oracle's earnings miss to be the result of several deals lost in the final weeks of the quarter," not because of anything to do with the subject of the fraud (defective software). *Id.* at 392-93. In this case, by contrast, the Complaint explains in detail how the earnings miss was directly caused by the fraud, not some unrelated development. *See supra* 33.

As the opening brief explained (at 60-62), this case is far closer to the facts in *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049 (9th Cir. 2008). There, the Court treated an earnings announcement as the relevant corrective disclosure because that was the first time the market had a concrete measure of the extent of harm caused by a

misrepresentation that had previously been revealed as misleading by a government letter. *See* Opening Br. 60-62.

Facebook tries to distinguish *Gilead* by arguing the initial disclosure "did not contain enough information to significantly undermine" Gilead's misleading statements. Br. 61-62 (quoting 536 F.3d at 1058). But the defendant's earnings projection was allegedly misleading because it failed to disclose that the marketing strategy upon which the projection was based was illegal. 536 F.3d at 1052. The FDA letter completely disclosed that illegality and, hence, that the projection was misleading. *Id*. at 1053. What the market couldn't figure out was the likely economic fallout, because investors could only guess about the extent to which demand for the drug was driven by illegal off-label marketing. *See id*. at 1058 (warning letter "would not necessarily trigger a market reaction because it did not contain enough information to significantly undermine Gilead's July 2003 pronouncements *concerning demand* for Viread") (emphasis added). On Facebook's view, the warning letter "remove[d] the taint of misinformation," and "the law le[ft] investors to their own judgment about how to factor the new information

into the price of [the] security." Br. 61. If that were so, *Gilead* would have come out differently.

IV. If This Court Finds Reversible Error, The Section 20A And 20(a) Claims Should Be Reinstated.

The district court dismissed Plaintiffs' Section 20A and 20(a) claims solely for lack of primary liability. 1-ER-16. Given this, it should go without saying that if the primary liability claims are reinstated, the Section 20A and 20(a) claims should be as well. *Contra* Facebook Br. 63. Even if this self-evident point should have been made more expressly in the opening brief, this Court is not compelled to preclude the district court from revisiting the issue on remand, particularly where Facebook was not prejudiced by Plaintiffs' failure to state the obvious. *See, e.g.*, *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1013 (9th Cir. 2007); Facebook Br. 63 (arguing only that claims should be dismissed for lack of primary liability); Doc. 145 at 35 (motion to dismiss) (same).

CONCLUSION

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

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Respectfully submitted,

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