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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**

15
16 IN RE FACEBOOK, INC. DERIVATIVE
17 PRIVACY LITIGATION

18 This Document Relates To:
19 ALL ACTIONS

LEAD CASE NO. 4:18-CV-01792-HSG

ASSOCIATED CASES: NOS. 4:18-CV-01834-
HSG, 4:18-CV-01893-HSG, 4:18-CV-01929-
HSG, 4:18-CV-02011-HSG

**DEFENDANTS' PARTIAL OPPOSITION
TO PLAINTIFFS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS**

Hearing:

Date: June 25, 2020
Time: 2:00 P.M.
Location: Courtroom 2, 4th Floor
Judge: Hon. Haywood S. Gilliam, Jr.

Date First Action Filed: March 22, 2018

1 Defendants oppose Plaintiffs' request for judicial notice ("RJN") of excerpts of Facebook's
2 SEC filings (Plaintiffs' Exhibits 1-11), which Plaintiffs seek in an improper attempt to cure their
3 deficient insider trading allegations. Defendants do not oppose Plaintiffs' RJN with respect to
4 Plaintiffs' Exhibits 12-14.

5 "In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond a
6 complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion
7 to dismiss," or "take into account additional facts asserted" in an opposing memorandum, because
8 "such memoranda do not constitute pleadings under Rule 7(a)." *Schneider v. California Dep't of Corr.*,
9 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (citation omitted). Plaintiffs therefore cannot attempt to correct
10 pleading deficiencies by submitting new "allegations made in an opposition to a motion to dismiss."
11 *Sheski v. Shopify (USA) Inc.*, 2020 WL 2474421, at *4 n.2 (N.D. Cal. May 13, 2020) (Gilliam, J.). This
12 Court has repeatedly refused to allow plaintiffs to avoid dismissal by seeking judicial notice of new
13 facts in opposition papers. *See Motha v. Time Warner Cable Inc.*, 2016 WL 7034039, at *2 & n.1
14 (N.D. Cal. Dec. 2, 2016) (Gilliam, J.) (declining plaintiff's request to take judicial notice of "documents
15 related to facts not raised in the operative complaint"); *Parsons v. Alameda Cty. Sheriff Dep't*, 2016
16 WL 1258590, at *6 (N.D. Cal. Mar. 31, 2016) (Gilliam, J.) (disregarding "additional claims regarding
17 the specifics" of the alleged misconduct, raised for the first time in plaintiff's opposition).

18 Although SEC filings ordinarily are subject to judicial notice because their accuracy can be
19 "readily determined" from reliable sources (*see* Reply ISO Def's RJN at 3), Plaintiffs here seek judicial
20 notice of Exhibits 1-11 in an improper attempt to insert additional, new allegations that appear nowhere
21 in the First Amended Consolidated Shareholder Derivative Complaint ("FAC"). Under these
22 circumstances, judicial notice of Facebook's SEC filings is inappropriate.

23 As the Individual Defendants pointed out in their Motion to Dismiss, Plaintiffs do not even try
24 to allege contemporaneous trading for their Section 10(b) insider trading claim, in part because they
25 failed to allege the specific dates on which Facebook repurchased shares. Dkt. 145 at 24-25. Plaintiffs
26 now try to correct that deficiency by seeking judicial notice of 11 Facebook SEC filings that purport to
27 list the dates and volume of Facebook's share repurchases. *See* Pl's Opp. at 22-24 (citing Exhibits 1-
28 11 in an attempt to describe the dates on which Facebook made share repurchases, and then spending

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