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13	UNITED STATES DISTRICT COURT	
14	NORTHERN DISTRICT OF CALIFORNIA	
15		1
16		LEAD CASE NO. 4:18-CV-01792-HSG
17	IN RE FACEBOOK, INC. DERIVATIVE PRIVACY LITIGATION	ASSOCIATED CASES: NOS. 4:18-CV-01834-
		HSG, 4:18-CV-01893-HSG, 4:18-CV-01929-
18		
	This Document Relates To:	HSG, 4:18-CV-02011-HSG
19	This Document Relates To: ALL ACTIONS	HSG, 4:18-CV-02011-HSG <b>DEFENDANTS' PARTIAL OPPOSITION</b>
19 20		HSG, 4:18-CV-02011-HSG  DEFENDANTS' PARTIAL OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF
		HSG, 4:18-CV-02011-HSG  DEFENDANTS' PARTIAL OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
20		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
20 21		HSG, 4:18-CV-02011-HSG  DEFENDANTS' PARTIAL OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO
<ul><li>20</li><li>21</li><li>22</li></ul>		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.
<ul><li>20</li><li>21</li><li>22</li><li>23</li></ul>		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
<ul><li>20</li><li>21</li><li>22</li><li>23</li><li>24</li></ul>		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
<ul><li>20</li><li>21</li><li>22</li><li>23</li><li>24</li><li>25</li></ul>		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.



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

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

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

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



over two pages trying to justify why the absence of those dates from the FAC does not doom Plaintiffs' insider trading claim); *see also* Pl's RJN at 4 (admitting that Plaintiffs seek to use Exhibits 1-11 to show the dates on which "Facebook repurchased shares"). This is improper. This "Court cannot consider ... more detailed facts in [Plaintiffs'] opposition[] beyond those included" in the FAC "as they relate to the dates of Defendants' conduct." *Magney v. Cty. of Humboldt*, 2018 WL 1156817, at \*4 & n.6 (N.D. Cal. Mar. 5, 2018) (Gilliam, J.); *see also In re Am. Apparel, Inc. S'holder Deriv. Litig.*, 2012 WL 9506072, at \*37 (C.D. Cal. July 31, 2012) (denying judicial notice of facts concerning the timing of stock purchases because those details were omitted from the complaint, and doing otherwise would be noticing "the contents of documents outside the complaint for the truth of the matters stated therein"); *In re Accuray, Inc. S'holder Deriv. Litig.*, 757 F. Supp. 2d 919, 926 (N.D. Cal. 2010) (same). By attempting to add allegations to their pleading in this fashion, Plaintiffs are essentially conceding that their insider trading allegations are inadequate.<sup>1</sup>

Plaintiffs cannot attempt to cure the deficiencies in their pleading by inserting new allegations through an improper request for judicial notice in opposition to Defendants' motion to dismiss. But even if they could, that *still* would not rectify the errors with Plaintiffs' insider trading claims, which are independently deficient because Plaintiffs (1) fail to adequately plead that the Individual Defendants' sales are suspicious in light of their trading history, and (2) cannot overcome the fact that the Individual Defendants made those trades pursuant to Rule 10b5-1 trading plans established *before* the alleged misstatements. *See* Individual Def's Reply Mem. at 15; Dkt. 145 at 24-25 & n.8.

This Court should deny Plaintiffs' request for judicial notice of Exhibits 1-11 for the purpose of proving the dates on which Facebook executed share repurchases.

Dated: May 26, 2020 GIBSON, DUNN & CRUTCHER LLP

By: /s/ Orin Snyder
Orin Snyder

Plaintiffs do not request that the Court deem these excerpts of SEC filings incorporated by reference into the FAC, nor would doing so be proper in this context. The incorporation by reference doctrine exists to "prevent[] plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." Khoja v. Orexigen Therapeutics, Inc., 899 F.3d 988, 1002 (9th Cir. 2018) (emphasis added), cert. denied sub nom. Hagan v. Khoja, 139 S. Ct. 2615 (2019).



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