

FOR PUBLICATION

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

IN RE ALPHABET, INC. SECURITIES  
LITIGATION,

STATE OF RHODE ISLAND, Office of  
the Rhode Island Treasurer on behalf  
of the Employees' Retirement  
System of Rhode Island; Lead  
Plaintiff, Individually and On Behalf  
of All Others Similarly Situated,  
*Plaintiff-Appellant,*

v.

ALPHABET, INC.; LAWRENCE E.  
PAGE; SUNDAR PICHAI; RUTH M.  
PORAT; GOOGLE LLC; KEITH P.  
ENRIGHT; JOHN KENT WALKER, JR.,  
*Defendants-Appellees.*

No. 20-15638

D.C. No.  
4:18-cv-06245-  
JSW

OPINION

Appeal from the United States District Court  
for the Northern District of California  
Jeffrey S. White, District Judge, Presiding

Argued and Submitted February 4, 2021  
San Francisco, California

Filed June 16, 2021

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Before: Sidney R. Thomas, Chief Judge, and Sandra S. Ikuta and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Ikuta

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**SUMMARY\***

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**Securities Fraud**

The panel affirmed in part and reversed in part the district court's dismissal of a securities fraud action for failure to state a claim, vacated the district court's judgment, and remanded for further proceedings.

The State of Rhode Island filed a private securities fraud action under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 against Google LLC, its holding company Alphabet, Inc., and individual defendants. The consolidated amended complaint alleged that defendants omitted to disclose security problems with the Google+ social network. The complaint referred to the cybersecurity problems as the "Three-Year Bug" and the "Privacy Bug." The district court granted defendants' motion to dismiss on the grounds that Rhode Island failed to adequately allege a materially misleading misrepresentation or omission and that Rhode Island failed to adequately allege scienter.

The panel held that the complaint adequately alleged that two statements made by Alphabet in its quarterly reports filed

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

with the SEC on Form 10-Q omitted material facts necessary to make the statements not misleading. Applying an objective materiality standard to the 10-Qs, the panel held that Rhode Island's complaint plausibly alleged the materiality of the costs and consequences associated with the Privacy Bug, and its public disclosure, and how Alphabet's decision to omit information about the Privacy Bug in its 10-Qs significantly altered the total mix of information available for decisionmaking by a reasonable investor.

The panel next addressed whether the complaint adequately alleged scienter for the materially misleading omissions from the 10-Q statements. The panel held that the complaint was required to plausibly allege, with the particularity required by the Private Securities Litigation Reform Act, that the maker of the statements knew about the security vulnerabilities and intentionally or recklessly did not disclose them. The panel concluded that the complaint's specific allegations, taken as a whole, raised a strong inference that defendant Lawrence Page, and therefore Alphabet, knew about the Three-Year Bug, the Privacy Bug, and a Privacy Bug Memo, and that Alphabet intentionally did not disclose this information in its 10-Q statements.

The panel further held that Rhode Island adequately alleged falsity, materiality, and scienter for the 10-Q statements. The panel therefore reversed the district court's holdings to the contrary. The panel also reversed the district court's dismissal of the complaint's § 20(a) control-person claims based on the 10-Q statements.

As to ten additional statements identified in the complaint, the panel concluded that the complaint did not plausibly allege that these remaining statements were

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misleading material misrepresentations. The panel therefore affirmed the district court's dismissal of claims based on these statements.

Rhode Island argued on appeal that the district court erred in dismissing its "scheme liability claim" under Rule 10b-5(a) and (c) when it dismissed the complaint in its entirety without addressing those claims. The panel held that because Alphabet's motion to dismiss did not target Rhode Island's Rule 10b-5(a) and (c) claims, Rhode Island did not waive those claims by failing to address them in opposition to the motion to dismiss. Reversing, the panel held that the district court erred in sua sponte dismissing the Rule 10b-5(a) and (c) claims when Alphabet had not targeted them in its motion to dismiss.

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**COUNSEL**

Jason A. Forge (argued), Michael Albert, J. Marco Janoski Gray, and Ting H. Liu, Robbins Geller Rudman & Dowd LLP, San Diego, California, for Plaintiff-Appellant.

Ignacio E. Salceda (argued), Benjamin M. Crosson, Cheryl W. Fong, Stephen B. Strain, and Emily Peterson, Wilson Sonsini Goodrich & Rosati, Palo Alto, California; Gideon A. Schor, Wilson Sonsini Goodrich & Rosati, New York, New York; for Defendants-Appellees.

**OPINION**

IKUTA, Circuit Judge:

In March 2018, amid the furor caused by news that Cambridge Analytica improperly harvested user data from Facebook’s social network, Google discovered that a security glitch in its Google+ social network had left the private data of some hundreds of thousands of users (according to Google’s estimate) exposed to third-party developers for three years and that Google+ was plagued by multiple other security vulnerabilities. Warned by its legal and policy staff that disclosure of these issues would result in immediate regulatory and governmental scrutiny, Google and its holding company, Alphabet, chose to conceal this discovery, made generic statements about how cybersecurity risks could affect their business, and stated that there had been no material changes to Alphabet’s risk factors since 2017. This appeal raises the question whether, for purposes of a private securities fraud action, the complaint adequately alleged that Google, Alphabet, and individual defendants made materially misleading statements by omitting to disclose these security problems and that the defendants did so with sufficient scienter, meaning with an intent to deceive, manipulate, or defraud.

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At the motion to dismiss stage, we start with the facts plausibly alleged in the complaint, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice. *See Ashcroft v. Iqbal*, 556 U.S. 662,

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