

**FOR PUBLICATION**

**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.*

No. 22-15077

D.C. No. 5:18-cv-  
01725-EJD

OPINION

Appeal from the United States District Court  
for the Northern District of California  
Edward J. Davila, District Judge, Presiding

Argued and Submitted February 8, 2023  
San Francisco, California

Filed October 18, 2023

Before: M. Margaret McKeown, Jay S. Bybee, and Patrick  
J. Bumatay, Circuit Judges.

Opinion by Judge McKeown;  
Partial Concurrence and Partial Dissent by Judge Bumatay

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### **SUMMARY\***

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#### **Securities Exchange Act of 1934**

The panel affirmed in part and reversed in part the district court’s judgment dismissing under Fed. R. Civ. P. 12(b)(6) for failure to state a claim a Third Amended Complaint in which purchasers of Facebook common stock between February 3, 2017, and July 25, 2018, (“the shareholders”) allege that Facebook and its executives violated Sections 10(b), 20(a), and 20A of the Securities Exchange Act of 1934 and Rule 10b-5 of the Exchange Act’s implementing regulations by making materially misleading statements and omissions regarding (1) the risk of improper access to Facebook users’ data, (2) Facebook’s internal investigation into British political consulting firm Cambridge Analytica, and (3) the control Facebook users have over their data.

In March 2018, news broke that Cambridge Analytica improperly harvested personal data from millions of

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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.

unwitting Facebook users and retained copies of the data beyond Facebook's control. In the months that followed, the public learned that Facebook had known of Cambridge Analytica's misconduct for over two years and failed to inform affected users, and that Facebook surreptitiously allowed certain whitelisted third-party apps to access users' Facebook friend data without the users' friends' consent. Facebook and its executives made various statements before and after the news announcements assuring users that they fully controlled their data on Facebook and that no third party would access the data without their consent. In the wake of the Cambridge Analytica and whitelisting scandals, Facebook's stock price suffered two significant drops totaling more than \$200 billion in market capitalization.

The panel considered whether, under the heightened standard of the Private Securities Litigation Reform Act, the shareholders (1) adequately pleaded falsity as to the challenged risk statements, (2) adequately pleaded scienter as to the Cambridge Analytica investigation statements, and (3) adequately pleaded loss causation as to the user control statements.

First, the panel held that the shareholders adequately pleaded falsity as to the statements warning that misuse of Facebook users' data could harm Facebook's business, reputation, and competitive position and the district court erred by dismissing the complaint as to those statements. The panel wrote that, as in *In re Alphabet Sec. Litig.*, 1 F.4th 687 (9th Cir. 2021), the shareholders here adequately pleaded falsity as to statements in a 2016 Form 10-K filing with the SEC in which Facebook represented the risk of third parties improperly accessing and using Facebook users' data as purely hypothetical. The panel held

that the district court correctly dismissed the challenged statements regarding the risk of security breaches and the risk of the public not perceiving Facebook’s products to be “useful, reliable, and trustworthy”; those statements do not relate to the misuse of Facebook user data by Cambridge Analytica, and the shareholders do not allege that those risks had materialized at the time of the 2016 10-K such that they were false or materially misleading. The panel left to the district court on remand whether the shareholders can satisfy the other elements of the claims with respect to risk statements.

Second, the panel agreed with the district court that the shareholders failed to plead scienter as to Cambridge Analytica investigation statements, including ones made by a Facebook spokesperson to journalists in March 2017 that Facebook’s internal investigation into Cambridge Analytica had “not uncovered anything that suggest[ed] wrongdoing” related to Cambridge Analytica’s work on the Brexit and Trump campaigns. The panel wrote that the shareholders pleaded only that the spokesperson should have known that Facebook’s investigation had uncovered misconduct, not that the spokesperson actually knew of any misconduct or even that there was a strong inference of an “intent to deceive, manipulate, or defraud.”

Third, as to Facebook’s user control statements:

The panel affirmed the dismissal as to statements related to Facebook’s goals of transparency and control—statements that were not false when they were made. The panel also affirmed the dismissal of a standalone claim relating to the June 2018 whitelisting revelation, given that the revelation was unaccompanied by a stock price drop.

The panel held that the shareholders adequately pleaded loss causation as to Facebook’s statements—made before the March 16, 2018, stock price drop—assuring users that they control their content and information on the platform. The panel wrote that the shareholders adequately pleaded that the March 2018 revelation about Cambridge Analytica was the first time Facebook investors were alerted that Facebook users did not have complete control over their own data, and also adequately pleaded that Facebook did not make public statements about the Cambridge Analytica issue between 2015 and 2018.

The panel held that the shareholders adequately pleaded that the Cambridge Analytica and whitelisting revelations, not any other factor, caused the July 2018 stock drop. The panel therefore reversed the district court’s dismissal of claims as to Facebook’s statements regarding data control that predated the June 3, 2018, whitelisting revelation.

The panel remanded for further proceedings.

Judge Bumatay concurred in part and dissented in part. He joined the majority in holding that the shareholders failed to sufficiently allege a falsity in Facebook’s Cambridge Analytica investigation statements. He also joined the majority in holding that the shareholders did allege a falsity and loss from the user control statements—but only as those statements relate to Facebook’s practice of “whitelisting.” He disagreed with the majority on two fundamental points. In his view, the shareholders failed to sufficiently allege that Facebook’s risk factor statements in its public filings were fraudulent, and didn’t show that Facebook’s user control statements were false based on the Cambridge Analytica revelations.

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