

**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

ORDER AND  
AMENDED  
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  
Amended December 4, 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 Fraud

The panel filed (1) an order denying a petition for panel rehearing and a petition for rehearing en banc; and (2) an amended opinion affirming in part and reversing in part the district court's dismissal of a securities fraud action against Facebook, Inc., and three of its executives, and remanding for further proceedings.

Cambridge Analytica improperly harvested personal data from millions of unwitting Facebook users and retained copies of the data beyond Facebook's control. Facebook had known of Cambridge Analytica's misconduct for over two years and failed to inform affected users, and Facebook surreptitiously allowed certain whitelisted third-party apps to access users' Facebook friend data without the users' friends' consent.

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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.

Facebook shareholders filed suit, alleging that the defendants violated Sections 10(b), 20(a), and 20A of the Securities Exchange Act of 1934 and Rule 10b-5 by making materially misleading statements and omissions regarding the risk of improper access to Facebook users' data, Facebook's internal investigation into Cambridge Analytica, and the control Facebook users had over their data.

The panel held that, under the heightened standard of the Private Securities Litigation Reform Act, the shareholders adequately pleaded falsity as to the some of the challenged risk statements. The panel followed *In re Alphabet Sec. Litig.*, 1 F.4th 687 (9th Cir. 2021), which held that falsity allegations were sufficient to survive a motion to dismiss when the complaint plausibly alleged that a company's SEC filings warned that risks "could" occur when, in fact, those risks had already materialized. The panel concluded 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 concluded, however, 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." The panel left to the district court on remand whether the shareholders could satisfy the other elements of the claims with respect to risk statements.

The panel held that the shareholders did not adequately plead facts giving rise to a strong inference of scienter as to the Cambridge Analytica investigation statements, and the panel affirmed the district court's dismissal as to these statements.

The panel held that the shareholders adequately pleaded loss causation as to some of the user control statements. The panel affirmed the dismissal of the statements related to Facebook’s goals of transparency and control, and a June 2018 whitelisting revelation as a standalone claim. The panel reversed the dismissal as to other statements related to Facebook stock price drops.

Concurring in part and dissenting in part, Judge Bumatay 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 they did not show that Facebook’s user control statements were false based on the Cambridge Analytica revelations.

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### COUNSEL

Tom Goldstein (argued) and Erica O. Evans, Goldstein & Russell PC, Bethesda, Maryland; Kevin K. Russell, Goldstein Russell & Woofter LLC, Washington, D.C.; John C. Browne and Jeremy P. Robinson, Bernstein Litowitz Berger & Grossman LLP, New York, New York; Joseph D. Daley, Danielle S. Myers, and Darren J. Robbins, Robbins Geller Rudman & Dowd LLP, San Diego, California; Jason C. Davis, Robbins Geller Rudman & Dowd LLP, San Francisco, California; Kathleen Foley, Munger Tolles &

Olson LLP, Washington, D.C.; Jeremy A. Lieberman, Pomerantz LLP, New York, New York; Jennifer Pafiti, Pomerantz LLP, Los Angeles, California; for Plaintiffs-Appellants.

Joshua S. Lipshutz (argued), Katherine M. Meeks, and Trenton J. Van Oss, Gibson Dunn & Crutcher LLP, Washington, D.C.; Brian M. Lutz and Michael J. Kahn, Gibson Dunn & Crutcher LLP, San Francisco, California; Orin S. Snyder, Gibson Dunn & Crutcher LLP, New York, New York; Paul J. Collins, Gibson Dunn & Crutcher LLP, Palo Alto, California; for Defendants-Appellees.

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## ORDER

An Amended Opinion is being filed simultaneously with this Order.

The panel voted to deny the petition for panel rehearing. Judges McKeown and Bybee recommended denial of the petition for rehearing en banc, and Judge Bumatay voted to grant the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellees' petition for panel rehearing and rehearing en banc, Dkt. No. 50, is **DENIED**.

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