

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

**IN RE APPLE INC. SECURITIES  
LITIGATION**

Case No. 4:19-cv-02033-YGR

**ORDER DENYING SUMMARY JUDGMENT**

Dkt. No.: 293

Before the Court is defendants' motion for summary judgment. Defendants<sup>1</sup> move to dismiss plaintiff's Section 10(b) claim for failure to show: (1) that the Challenged Statement (*see, infra*, Section I) was false or misleading, (2) that defendant Tim Cook acted with scienter, or (3) that the Challenged Statement caused plaintiff's losses. Defendants argue that the Section 20(a) claim should be dismissed as to all defendants because it is derivative of the Section 10(b) claim and additionally, as to defendant Luca Maestri, because he did not have control over or induce Cook to make the Challenged Statement and acted in good faith. Based on the briefing and with the benefit of oral argument on May 10, 2023, the Court denies the motion.

**I. BACKGROUND**

The Court assumes the parties' familiarity with the facts of this case and therefore discusses them only as necessary to explain its decision. For ease of reference, the Court includes the question leading to the Challenged Statement made by Cook during Apple's November 1, 2018 call ("the November 1 Call") and the answer containing the Challenged Statement. Wamsi

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<sup>1</sup> Defendants are Apple Inc. ("Apple" or the "Company"), Timothy D. Cook (Chief Executive Officer, or "CEO," of Apple), and Luca Maestri (Chief Financial Officer, or "CFO," of Apple). "Plaintiff" refers to lead plaintiff Norfolk County Council as Administering Authority of the Norfolk Pension Fund.

1 Mohan of Bank of America asked:

2 “Tim, there has been some real deceleration in some of these emerging markets,  
3 partly driven by some concerns around some of the rules the administration is  
4 contemplating and partly driven by things that are more specific to China, for  
5 instance, like some of the regulations around gaming. So can you talk about how  
6 you see the trajectory there for the business and what you think of the initiatives of  
7 some companies like Netflix and Fortnite trying to bypass the App Store around  
8 subscriptions? And I have a follow-up.”

9 Cook responded, in relevant part:

10 “Sure. Great question. Starting with emerging markets. The emerging markets that  
11 we’re seeing pressure in are markets like Turkey, India, Brazil, Russia, these are  
12 markets where currencies have weakened over the recent period. In some cases,  
13 that resulted in us raising prices, and those markets are not growing the way we  
14 would like to see. To give you a perspective in -- at some detail, our business at  
15 India in Q4 was flat. Obviously, we would like to see that be a huge growth. Brazil  
16 was down somewhat compared to the previous year. And so I think -- or at least the  
17 way that I see these is each one of the emerging markets has a bit of a different  
18 story. And I don’t see it as some sort of issue that is common between those for the  
19 most part. **In relation to China specifically, I would not put China in that  
20 category.** Our business in China was very strong last quarter. We grew 16%, which  
21 we’re very happy with. iPhone, in particular, was very strong double-digit growth  
22 there. Our other products category was also stronger, in fact, a bit stronger than  
23 even the company -- overall company number. The App Store in China, we have  
24 seen a slowdown or a moratorium to be more accurate on new game approvals.  
25 There is a new regulatory setup in China, and there’s -- things are not moving the  
26 way they were moving previously. We did see a few games approved recently, but  
27 it's very far below the historic pace. And as you’re probably seeing, some of the  
28 larger companies there that are public have talked about this as they’ve announced  
29 their earnings as well. We don’t know exactly when this will -- the approvals will  
30 sort of return to a normal pace. So I would not want to predict that. I do not view,  
31 just to try -- for avoidance of doubt here, I don’t view that, that issue has anything  
32 to do with the trade-related discussions between the countries. I think that is strictly  
33 a domestic issue in China . . .”

(Dkt. No. 294-3, Cook Decl. Ex. 3, “Call Transcript” at 7.)

## 34 II. JUDICIAL NOTICE

35 The Court first addresses the parties’ requests for judicial notice. (Dkt. No. 293-2; 323-4).  
36 Judicial notice “permits a court to notice an adjudicative fact if it is ‘not subject to reasonable  
37 dispute,’” which means the fact is “‘generally known,’ or ‘can be accurately and readily  
38

1 determined from sources whose accuracy cannot reasonably be questioned.” *Khoja v. Orexigen*  
2 *Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting Fed. R. Evid. 201(b)). A court can,  
3 for example, take notice of a matter of public record. *Id.* Courts have discretion in taking judicial  
4 notice. *Id.*

5 Not every fact within a noticed document is judicially noticeable for its truth. *Id.* Relevant  
6 here, courts may take judicial notice of documents not for the truth of the matter asserted, but for  
7 the purpose of showing that particular information was available to the stock market. *Helitrope*  
8 *Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999) (“We take judicial notice  
9 that the market was aware of the information contained in news articles submitted by the  
10 defendants.”).

#### 11 **A. DEFENDANTS’ REQUEST FOR JUDICIAL NOTICE**

12 Defendants request judicial notice of various publicly available documents including  
13 Security and Exchange Commission (“SEC”) filings, public statements by Apple, news articles,  
14 and analyst reports. (Dkt. No. 293-2.) Plaintiff does not dispute that these documents are  
15 appropriate for judicial notice. The majority of its opposition is directed at defendants’  
16 interpretations of the facts in these documents. Such arguments are not relevant to whether the  
17 documents are judicially noticeable. *See City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr. v.*  
18 *RH, Inc.*, 302 F. Supp. 3d 1028, 1033 n.1 (N.D. Cal. 2018) (“To the extent plaintiffs take issue  
19 with the statements in these documents and defendants’ arguments based thereon, such argument  
20 belongs in plaintiffs’ opposition to defendants’ motion to dismiss and thus does not persuade on  
21 the question of whether judicial notice is proper.”).

22 Plaintiff argues that Exhibit 15 to defendants’ request for judicial notice, an article  
23 published on 9to5Mac.com about iPhone XR, should not be judicially noticed because it is not  
24 cited in defendants’ memorandum in support of summary judgment, rather, it is only cited in the  
25 declaration of Kevan Parekh. Plaintiff provides no authority indicating that a document must be  
26 directly cited in the underlying motion to be judicially noticed. Accordingly, this argument fails.  
27 Second, plaintiff argues that the article “does not appear to be a reliable source for the data cited”  
28

1 and that Parekh's declaration does not confirm that the data is accurate. Again, plaintiff provides  
2 no authority in support of this argument. The Court **GRANTS** judicial notice of this article for the  
3 purpose of determining what information was available to the market.

4 Plaintiff objects to Exhibits 84, 87, 88, and 89 which are news articles that defendants seek  
5 to admit to show "historical stock prices and related publicly available financial information"  
6 regarding Apple. (Dkt. No. 293-2 at 2.) Plaintiff responds that these articles are in fact being  
7 presented as impermissible and irrelevant character evidence to show that defendants are  
8 "admired." (Dkt. No. 323-05 at 4.) In reply, defendants appear to concede that, contrary to their  
9 initial request, they have submitted these articles as evidence of defendants' character, but that  
10 such evidence may be permissible where "'a party is alleged to have committed essentially  
11 criminal acts.'" (Dkt. No. 330 at 2 (quoting *S.E.C. v. Saul*, 1991 WL 218061, at \*2 (N.D. Ill. Oct.  
12 16, 1991)).) Defendants assert that these articles indicate that the market held defendants in high  
13 regard before and after the alleged fraud, undermining plaintiff's allegations. The Court finds  
14 these articles are not relevant or helpful to its analysis and **DENIES** the request for judicial notice  
15 as to those exhibits.

16 Plaintiff opposes judicial notice of Exhibit 92, an article reporting on Chinese gaming  
17 regulations on the basis that the Court cannot take notice of the truth of the facts asserted in the  
18 article (i.e., that China had tightened gaming regulations). Defendants respond that they seek  
19 notice of this document to show what information regarding gaming, and its potential impact on  
20 Apple's performance in China, was available to the market, not the actual truth of that  
21 information. The Court agrees with defendants and **GRANTS** judicial notice of Exhibit 92.

22 Plaintiff opposes judicial notice of Exhibit 86, a news article reporting Apple's market cap  
23 on September 7, 2022 as "in no way relevant to this case." (Dkt. No. 323-5.) Defendants  
24 maintain it shows "Cook has grown Apple's market value by over a trillion dollars during his  
25 tenure as CEO" to the benefit of shareholders, which disproves his intent to defraud shareholders.  
26 Defendants provide no authority in support of their position. This appears to be another attempt to  
27 obtain notice of general and irrelevant character evidence. The Court **DENIES** judicial notice of  
28

1 Exhibit 86.

2 Unless otherwise noted above, defendants' request for judicial notice is **GRANTED**. The  
3 Court affords the noticed documents their proper evidentiary weight.

4 **B. Plaintiff's Request for Judicial Notice**

5 Plaintiff seeks judicial notice of various documents "for the limited purpose of showing  
6 that the information contained . . . was available to the market on the dates of their dissemination."  
7 (Dkt. No. 323-4 at 1.) Defendants oppose judicial notice of Exhibits 63, 94, 124-125, 128, and  
8 130-31. The Court takes plaintiff's failure to file a reply addressing this opposition as a  
9 concession to defendants' arguments. The Court **DENIES** judicial notice of Exhibits 63, 94, 124-  
10 125, 128, and 130-31. It **GRANTS** judicial notice of the remaining documents. Absent another  
11 basis for exclusion, documents in the public record are proper subjects of judicial notice. *Reyn's*  
12 *Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006). The Court affords  
13 them their proper evidentiary weight.

14 **III. LEGAL FRAMEWORK**

15 **A. Summary Judgment**

16 The standard for summary judgment, including its burdens and inferences is well known  
17 and not in dispute.

18 **B. Section 10(B)**

19 Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of "any  
20 manipulative or deceptive device or contrivance" related to the purchase or sale of securities when  
21 the use violates the regulations promulgated by the SEC. 15 U.S.C. § 78j(b). Under the operative  
22 regulation, Rule 10b-5, it is unlawful for any person "[t]o make any untrue statement of fact or to  
23 omit to state a material fact necessary in order to make the statements made, in the light of the  
24 circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

25 "To be viable, a claim brought under § 10(b) and Rule 10b-5 must contain six essential  
26 elements: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a  
27 connection between the misrepresentation or omission and the purchase or sale of a security; (4)

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