

May 17, 2024

VIA ELECTRONIC FILING

Mr. Scott S. Harris, Clerk
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: Response to Notice of Supplemental Authority
Facebook, Inc. v. Amalgamated Bank, No. 23-980

Dear Mr. Harris,

Respondents submit this response to petitioners' notice of supplemental authority submitted on May 17, 2024.

Facebook has asked this Court to decide whether “risk disclosures” are “false and misleading when they do not disclose that a risk has materialized in the past, even if that past event presents no known risk of ongoing or future business harm.” Pet. i. In attempting to substantiate a circuit conflict on that question, Facebook has argued that the Sixth Circuit holds that risk disclosures in SEC filings are categorically incapable of misleading investors regarding past events. Pet. 18-19. The only authority the petition cited for that position was the non-precedential decision in *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 491 (6th Cir. 2015). Pet. 18-19.

In its recent letter, Facebook implies that the Sixth Circuit adopted its supposed categorical rule as binding circuit precedent by citing to *Bondali* in its recent published decision in *Kolominsky v. Root, Inc.*, — F.4th —, 2024 WL 1854474, at *8 (6th Cir. Apr. 29, 2024).¹ However, *Kolominsky* did not hold that risk statements are incapable of being false or misleading about past events. Instead, it held that even if such statements are false or misleading, they may nonetheless be protected by the “bespeaks caution” doctrine, and cited *Bondali* for that proposition. See *Kolominsky*, *supra* at *8 (“Statement Three is a cautionary statement, is labeled a risk factor, and is forward-looking. It falls squarely within the Bespeaks Caution doctrine’s

¹ The decision was issued two weeks before Facebook filed its cert. reply brief.

protection.”) (citing *Bondali*, 620 F. App’x at 491). Whether a statement is false or misleading (the question Facebook asks this Court to decide) is different from whether a statement is protected by the bespeaks caution doctrine. *See ibid.* (explaining that the “Bespeaks Caution doctrine addresses situations in which optimistic projections are coupled with cautionary language, affecting the *materiality* and *reasonableness of relying* on forward-looking statements.”) (internal quotation marks and citation omitted, emphasis added).

There would have been no point in the panel’s extensive discussion of the bespeaks-caution doctrine if, as Facebook claims, the panel had embraced *Bondali* on the understanding that it categorically precluded liability for *any* risk statement, even those that did not meet the prerequisites for the bespeaks-caution defense (*e.g.*, the inclusion of adequate cautionary language). Facebook raised no bespeaks-caution defense in the Ninth Circuit and does not ask the Court to decide any question regarding the doctrine.

Finally, even if *Kolominsky* had not treated *Bondali* as a bespeaks-caution decision, *Bondali* adopted no categorical rule and held open liability for statements like those at issue in this case, as the opposition explained. *See* BIO 17-18.

Sincerely,

/s/ Kevin K. Russell
Counsel for Respondents

cc: Joshua S. Lipshutz
Counsel for Petitioners