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No. 23-CV-550

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DISTRICT OF COLUMBIA,
APPELLANT,

V.

FACEBOOK, INC.,
APPELLEE.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

# REDACTED REPLY BRIEF FOR APPELLANT THE DISTRICT OF COLUMBIA

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## INTRODUCTION

The District's evidence showed that Facebook made misleading statements and omissions giving its users a false sense of security, while quietly funneling their data to millions of third-party applications. That practice predictably led to misuse, such as when Cambridge Analytica wrongfully obtained information about 87 million people. Facebook's misconduct violated several provisions of the Consumer Protection Procedures Act ("CPPA"), and the District should have been permitted to present its evidence to a jury.

This Court recently corrected many of the same errors that drove the dismissal here in a suit challenging Coca-Cola's statements about environmental sustainability. *See Earth Island Inst. v. Coca-Cola Co.*, No. 22-CV-895, 2024 WL 3976560 (D.C. Aug. 29, 2024). *Earth Island* reaffirmed that the CPPA's protection "extends beyond literal falsehoods" to include "[v]ague and ambiguous statements" designed to "distract consumers" from a company's true practices. *Id.* at *6, *9. And it reminded courts that whether conduct would be misleading to a reasonable consumer is ultimately a question to be resolved by the trier of fact. *Id.* at *8.

Facebook takes great pains to paint a different picture of how consumers might have understood its privacy-related statements, but that cannot carry the day at summary judgment. A reasonable consumer could have understood the evidence in the District's favor, so the case must proceed to trial. This Court should reverse.

## ARGUMENT

### I. The Trial Court Erred In Granting Summary Judgment To Facebook.

#### A. A reasonable consumer could find Facebook's statements misleading and material.

Viewing the evidence in the District's favor, a jury could conclude that Facebook's representations were materially misleading with respect to friend sharing, its enforcement efforts, and the Cambridge Analytica data leak. District Br. 23-35. Although Facebook offers a competing interpretation of its representations, none of its evidence makes the statements truthful as a matter of law.

1. *Friend sharing*. Facebook users could have been misled about friend sharing by Facebook's privacy settings, which purported to give users the ability to restrict the sharing of their data to "Friends Only" while still pushing the data out to unknown third parties. District Br. 7-8. That confusion could have been compounded by misleading messages in Facebook's policies that compared friend sharing to email and failed to inform users about the practice's full scope. District Br. 6-7. [redacted] District Br. 10-11. Looking at all this information "in combination," users could have misunderstood Facebook's true data-sharing practices. *Earth Island*, 2024 WL 3976560, at *1.

Facebook attempts to rebut this evidence by pointing to a handful of vague sentences sprinkled across multiple policy documents, but these statements only

illustrate the potential for confusion. Facebook primarily relies on two sentences from its Data Use Policy (repeated in the Help Center) that compare friend sharing to email. Facebook Br. 21. This comparison could easily mislead. Likening friend sharing to email implies that the friend must take an active step to "re-share" information to a particular third party—like forwarding an email or telling someone about its contents. In reality, friend sharing happened automatically, invisibly, and by default whenever any friend downloaded any third-party application. The difference is obvious: A friend accidentally forwarding a private email to a third party might be an embarrassing mistake, but a third party gaining access to *every* email ever sent to that friend is a major breach of privacy. As another court analyzing these disclosures observed, "social media users can have their privacy invaded if sensitive information meant only for a few dozen friends is shared more widely." *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 402 F. Supp. 3d 767, 783 (N.D. Cal. 2019).

None of Facebook's other statements absolve it of liability. Language in the App Settings page that friends "can bring [information] with them," like the email analogy, does not clearly disclose that data *will* move outside of the Facebook system automatically. JA 2495, 2520. Although Facebook told users that they could "[e]dit your settings to control what's shared with apps, games, and websites by you and others you share with," JA 2516, at least initially the only way to restrict applications

was to turn off Platform completely, something that most users did not understand and that Facebook actively discouraged. District Br. 8. And this statement falsely implies mutuality—that information would be shared only if *both* friends elected to use the application. District Br. 7, 26, 39 n.5.

Facebook selectively quotes (at 22-23) from an analysis of California contract law in *In re Facebook, Inc.*, 402 F. Supp. 3d 767, to argue that no reasonable consumer could have been misled by its disclosures, but that ruling in fact counsels the opposite. Although the court concluded that California law meant that a subset of Facebook users must "be deemed to have agreed to the language quoted," it recognized that, "in reality, virtually no one 'consented' in a layperson's sense to Facebook's dissemination of this information to app developers" because "it would have been difficult to isolate and understand the pertinent language among all of Facebook's complicated disclosures." *Id.* at 792. The CPPA is focused on realities, not legal formalisms. Facebook's effort to "mask" its true practices by burying key language in difficult-to-find places is part of what makes its practices unlawful. *Earth Island*, 2024 WL 3976560, at *1.

2. *Enforcement*. Users also could have misunderstood the level of protection provided by Facebook's data-protection policies against third party applications. Facebook assured users that it would require applications to respect user privacy, that it could "audit" applications for compliance, that applications were

not "allowed" to use data outside of the user experience, and that applications could not sell data to others. District Br. 28-30. It made all these statements even though it lacked the ability or resources to back up these assurances—[redacted]—and failed to exercise what limited enforcement powers it possessed.

Facebook raises three responses to the District's evidence, but none is persuasive. *First*, Facebook asserts that the argument about its capabilities was not raised below, which is incorrect. Facebook Br. 25-26. The District has consistently argued that Facebook's representations regarding enforcement did not align with its "actual oversight capabilities and practices," making them misleading. JA 618 (summary judgment brief); *see, e.g.*, JA 81 (complaint alleging that Facebook failed to implement "reasonable oversight of third-party applications consistent with its representations"). There is nothing new about the District's argument that part of what made Facebook's representations misleading was that it lacked the enforcement capabilities that it touted to users.

*Second*, Facebook asserts that "much of the evidence the District cites is from outside the relevant time period, November 1, 2013 through April 9, 2018." Facebook Br. 29 n.5. This arbitrary time limitation is pure invention. Facebook appears to have created the concept of the "relevant time period" based on the date that Aleksandr Kogan launched his application, but nothing in the District's

complaint or proof is cabined to conduct after that date.[1] Facebook's earlier representations to users and enforcement practices are plainly relevant to whether reasonable consumers were misled into using Facebook's service before Kogan launched his application and harvested their data.

*Third*, Facebook mischaracterizes the District's suit as challenging practices that were merely "'unsatisfactory' or 'insufficient,'" rather than materially misleading. Facebook Br. 26. In particular, Facebook asserts that it never guaranteed that it would enforce its policies and prominently disclaimed any responsibility for misconduct by third parties. But even "aspirational" statements can violate the CPPA if they misrepresent the company's true intentions or if the business fails to take "any serious steps toward putting those goals within reach." *Earth Island*, 2024 WL 3976560, at *7, *10. Here, the District offered substantial evidence that Facebook told consumers it had strong enforcement practices but in fact lacked the "present intent" to engage in robust enforcement or even "the infrastructure necessary to facilitate it." *Id.* at *7 n.1, *10-11.

A few examples illustrate the problem. Facebook told users that it could "analyze" and "audit" applications for safety, could "limit" applications' access to

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[1] No statute of limitations applies to CPPA claims brought by the District. D.C. Code § 12-301; *see New 3145 Deauville, L.L.C. v. First Am. Title Ins. Co.*, 881 A.2d 624, 629 (D.C. 2005).

data, and could "require" applications to delete user data in the event of misuse. JA 2190. In truth, Facebook had little power to do any of those things. [redacted] JA 4494-95, 4989-91. [redacted] JA 804, 4496-97, 4505-06, 4910, 4919. [redacted] JA 4172, 4493. And even when applications misused data, Facebook turned a blind eye. District Br. 10.[2]

Facebook also told users that, "If an application asks permission from someone else to access your information, the application will be allowed to use that information only in connection with the person that gave the permission and no one

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[2] Facebook asserts (at 8-9) [redacted] but this figure is of little value. The only supporting evidence for this number comes from a declaration of one of Facebook's lawyers, [redacted] JA 374. That hardly suggests a robust enforcement practice. Regardless, faced with competing evidence [redacted] District Br. 30, the factual dispute should have been left to the jury.

else." JA 2220. Elsewhere in the same disclosure, Facebook used the word "allow" to mean permitting passage through a technological barrier to access. JA 2233 ("[W]e allow anyone with your contact information . . . to find you through the Facebook search bar . . . ."); JA 2234 ("If someone clicks on a link to another person's timeline, they'll only see the things that they are allowed to see."). Thus, it is entirely "plausible" that a consumer could interpret Facebook's disclosure to mean that there was "a technological block" to "physically prevent app developers from being able to 'see' friend information outside the context of their interactions with users." *In re Facebook*, 402 F. Supp. 3d at 794. And although not necessary to prove the point, Dr. Schaub's "mental model" analysis further explains why this interpretation is likely: because a user interacts with a third-party application only through Facebook, the user is likely to perceive the application "as operating within the context of Facebook" and thus subject to its control. JA 1549-50.

These examples are part of a broader pattern of Facebook overstating its enforcement practices to lull consumers into thinking their data was secure so they would use Facebook's service. [redacted] District Br. 4, 8-9, 16, 24-25, 34. It told users that they controlled their own information, when that information was really controlled by their friends and unknown third parties. District Br. 25 n.4. In short, a reasonable consumer could have believed

that Facebook would protect their data from misuse by third parties, when in reality it did not. *See Earth Island*, 2024 WL 3976560, at *11.

3. *Cambridge Analytica*. The District showed that Facebook knew about the Cambridge Analytica data leak long before anyone else but waited for years to tell affected users, a critical omission that could have deceived users into thinking their data was safer than it was. Facebook was first put on notice when Kogan launched his application in 2013 and [redacted] JA 5023-24. It was further put on notice in [redacted]. JA 4533-43, 5059-60. And that notice became inescapable when Facebook confirmed in December 2015 [redacted]. JA 3184-86. Although Facebook asked Kogan to delete the data, it took no steps to ensure compliance or to notify affected users. Only once the full scope of the leak became public knowledge in 2018 did Facebook take the steps it should have taken years earlier. District Br. 31-32.

Facebook attempts to shift the blame for its omissions back onto its users, but its efforts are unavailing. Facebook contends (at 30) that users should have known about the potential for data misuse because Facebook prominently disclaimed any responsibility for third parties' actions. Setting aside whether Facebook can unilaterally disclaim responsibility for the highly predictable acts of developers it

invited to collect user data, there is a major difference between notice of the potential for misuse and notice of actual misuse. That much is clear from the public's overwhelming and negative response to news of the Cambridge Analytica leak once it became public in 2018. Facebook's CEO Mark Zuckerberg testified that users "certainly did not expect" this type of incident. District Br. 16.

Facebook makes a similar point in arguing (at 30) that it did not need to notify affected users because the Cambridge Analytica leak was well publicized in the press starting in December 2015. But this ignores the evidence that Facebook knew (or at least suspected) that data had been misused before December 2015. And it again downplays the distinction between knowing that someone's data has potentially been misused and knowing that one's own data has in fact been misused. As Facebook itself acknowledges, [redacted] JA 333 [redacted] JA 334. The Ninth Circuit has already concluded that Facebook's failure to notify users about Cambridge Analytica was misleading. *See In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 957 (9th Cir. 2023), *cert. granted in part sub nom. Facebook, Inc. v. Amalgamated Bank*, 144 S. Ct. 2629 (2024).

4. *Materiality.* The District also marshalled evidence that consumers could have found these misrepresentations and omissions material, including Facebook's own analyses of user behavior, Zuckerberg's testimony, and the public's reaction to the Cambridge Analytica revelations. District Br. 33-35. This Court relied on similar materiality evidence in *Earth Island*. In that case, "surveys demonstrating that a significant portion of consumers care deeply about environmental issues, with roughly half of them expressing some desire to conduct business with 'environmentally conscious' businesses," was enough to make Coca-Cola's claims about sustainability material. 2024 WL 3976560, at *6.

Neither of Facebook's arguments against materiality is persuasive. *First*, Facebook contends (at 35-36) that the District's expert Dr. Schaub "opined that most users would not have turned off Platform" if they had accurate disclosures, making Facebook's misstatements and omissions immaterial. That is opposite of what Dr. Schaub testified. In the quoted deposition pages, [redacted] JA 3032-33. But a few pages earlier, [redacted] JA 3029-31. In any event, the District did not

need to prove that users would have taken any particular steps to prove materiality. All it needed to show was that a reasonable person "would find that information important in determining a course of action." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013) (cleaned up).

*Second*, Facebook contends (at 37-38) that some of the District's evidence is too general to show that the particular misrepresentations and omissions at issue here were material. But the Court has refused to endorse that logic, most recently in *Earth Island*. In rejecting Coca-Cola's argument that its sustainability statements were immaterial, the Court observed that "the concerted efforts that companies like Coca-Cola make to cultivate an image of being environmentally friendly strongly suggests that even their vague assurances have a real impact on consumers." 2024 WL 3976560, at *7. So long as "consumers care about" the issues being discussed, "the statements are 'material.'" *Id.* at *6. Here, the District presented ample evidence—some from Facebook's own surveys and studies—showing that users care deeply about data privacy issues. District Br. 4, 10-11, 34-35.

### B. Facebook's arguments in defense of the Superior Court's judgment are unavailing.

In granting summary judgment to Facebook, the trial court ignored genuine disputes of material fact, misapplied critical CPPA provisions, and used the wrong burden of proof. District Br. 36-44. Facebook attempts to paper over these reversible legal errors, but its efforts are unpersuasive.

*First*, Facebook refuses to acknowledge, much less defend, the Superior Court's complete deference to Facebook's version of the facts at summary judgment. This is not a case where the trial court carefully examined the competing evidence and concluded that a particular dispute was "immaterial" or insufficiently "genuine." *Cf.* Facebook Br. 31. Rather, the trial court's ruling simply does not address the District's evidence *at all*. That is an abdication of the court's duty to "conduct an independent review of the record" and "construe it in the light most favorable to the non-moving party." *Saucier*, 64 A.3d at 437.

Facebook dismisses the District's factual disputes as immaterial, Facebook Br. 31-32, but its reasoning is unpersuasive. It is material whether ordinary users could "easily" navigate Facebook's privacy tools, since that is how users could find Facebook's statements about friend sharing and theoretically restrict access to third-party applications. It is also material whether Facebook actually used its enforcement powers to monitor third-party applications for compliance with its policies, since one of the District's central contentions is that it did not do so consistent with its representations to users.

*Second*, the Superior Court misunderstood how the CPPA applies to misleading disclosures and omissions. For example, in discussing Facebook's representations about enforcement, the court stated that "[t]he accurate disclosures, which dictated how Facebook *may* proceed, as a matter of law, cannot mislead

users." JA 1040-41. This Court has rejected that very reasoning. Even statements about what Facebook "may" or "wants" to do "can be reasonably interpreted to be a representation about [Facebook's] present intent to act as stated," making them actionable under the CPPA. *Earth Island*, 2024 WL 3976560, at *10 (cleaned up). A consumer could reasonably understand Facebook's statements about what enforcement it "may" take to mean Facebook (1) has the capability to pursue such enforcement and (2) actually intends to enforce its policies using those tools.

Likewise, the Superior Court dismissed the District's omission theory by concluding that the CPPA did not impose on Facebook a "statutory duty to act." JA 1041; *see also* JA 1042 ("The District has failed to plausibly plead any duty or authority that would require greater disclosures or further regulation of the privacy settings."); JA 1043 ("The CPPA never mentions or alludes to an affirmative duty to disclose data misuse."). That too was error, since the CPPA does not require a plaintiff to prove a "duty to disclose information." *Saucier*, 64 A.3d at 444. Facebook tries (at 33-34) to rewrite these repeated references to statutory duty to mean something else, but this Court can read them for itself. And to answer the trial court's question about what Facebook "could have conceivably done" to make its disclosures not misleading, JA 1042, the answer is simple: it could have clearly disclosed friend sharing, it could have accurately described its enforcement practices, and it could have told affected users once it learned about Cambridge

Analytica. The District offered expert testimony about what Facebook could have done to improve its disclosures, but the Superior Court impermissibly excluded that evidence. *See infra* pp. 16-20.

*Third*, Facebook's arguments about the burden of proof fail to persuade. This Court has never squarely addressed what burden of proof applies in an unintentional CPPA case like this one, but nothing in the CPPA's text suggests it should be anything but the default preponderance standard. The logic of applying a heightened clear-and-convincing standard to claims of intentional misrepresentation—which sound in fraud and can trigger punitive damages—does not carry over to claims of unintentional misrepresentation. District Br. 41-44. Facebook offers no response to any of this reasoning. Instead, its only support is a single sentence of boilerplate from *Frankeny v. District Hospital Partners, LP*, 225 A.3d 999, 1005 (D.C. 2020). But, as the District explained in its opening brief (at 43-44), *Frankeny* cannot support the weight Facebook places on it. The issue of the burden of proof was never raised in that case, and it was unnecessary to the decision.

## II. Excluding The District's Expert Was An Abuse Of Discretion.

Independent of its summary judgment ruling, the Superior Court abused its discretion in excluding the entirety of Dr. Schaub's testimony. The court's ruling lacks any cogent explanation, pointing only to the District's "opposition" and the non-existent "reasons stated . . . in open Court," JA 961, which alone mandates

reversal. District Br. 44-45. Facebook attempts to resuscitate the ruling by recasting a handful of the trial court's oral comments as findings and asserting that the decision should be read to incorporate the reasoning of Facebook's motion. *See* Facebook Br. 38, 48. But even giving the order that charitable rewrite, it does not provide a valid basis for the complete exclusion of Dr. Schaub's testimony. Facebook does not dispute that Dr. Schaub is qualified as an expert, and its arguments as to relevance, sufficiency of the evidence, and application of his principles and methods are all unpersuasive.

As to relevance, Facebook offers two critiques, neither of which has merit and neither of which was mentioned by the trial court at the hearing, where it indicated that the test for admissibility was whether Dr. Schaub's testimony was necessary, not whether it was relevant. *See* JA 928. *First*, Facebook attacks Dr. Schaub for not directly opining on the ultimate issue: whether a reasonable consumer would have found Facebook's disclosures materially misleading. Facebook Br. 46-47. But an expert does not have to answer the case's ultimate question for his testimony to clear the low bar for relevance. District Br. 46-47. And Dr. Schaub's acknowledgment that his opinions have limitations does not render those opinions inadmissible. *Second*, Facebook claims it is irrelevant for Dr. Schaub to identify easy steps Facebook could have taken to make its disclosures truthful. Facebook Br. 47-48. That is wrong, particularly when the trial court opined that it could not "conceiv[e]"

of any improvements Facebook could have made to its disclosures. JA 1042. At trial, Facebook "will be free to offer evidence that actual consumers had a different understanding" of its disclosures or "that some significant portion of consumers . . . would have found omitted material . . . immaterial," but those are not reasons to exclude the District's expert as irrelevant. *In re JUUL Labs, Inc.*, 609 F. Supp. 3d 942, 1009-10 (N.D. Cal. 2022).

Regarding the sufficiency of the evidence that Dr. Schaub analyzed, Facebook accuses him of "cherry-pick[ing]" information. Facebook Br. 44-45. This is a departure from Facebook's arguments below—where it accused him of including *too much* information in his readability analyses, JA 154-55, an argument the trial court appeared to reject, JA 949—and it lacks merit. Dr. Schaub reviewed all the relevant policies and user interfaces, and Facebook has never identified any additional disclosure that Dr. Schaub should have considered. District Br. 47. For the first time on appeal, Facebook contends that Dr. Schaub should have examined language from the Help Center, Facebook Br. 45, but this language is the same as the language that Dr. Schaub analyzed. *Compare* JA 258, *with, e.g.*, JA 1510. Facebook fails to identify any specific information about Facebook's enforcement practices that Dr. Schaub should have considered, but even if it had, this is a topic for cross examination, not a ground for exclusion.

Facebook's primary criticism of Dr. Schaub's methodology is that he did not

conduct a consumer survey. Facebook Br. 39-43. But Dr. Schaub explained why it would be "impossible" to reconstruct consumer perceptions from before Cambridge Analytica became a worldwide scandal. JA 2054-55. In any event, many courts examining similar claims have held that an expert can opine on consumer perceptions without conducting a survey. *See* District Br. 49. The cases cited by Facebook do not persuade otherwise. The proffered experts in *Yeti* were hunting and fishing writers whose only testimony was "that YETI's coolers are popular." *Yeti Coolers, LLC v. RTIC Coolers, LLC*, No. 1:15-CV-597, 2017 WL 404553, at *2 (W.D. Tex. Jan. 27, 2017). In refusing to allow the individuals to provide even *lay* testimony on that subject, the court noted in dicta the need for "scientific" methods to analyze consumer perception; it said nothing about surveys. *Id.* Similarly, *FTC v. Washington Data Resources*, No. 8:09-CV-2309, 2011 WL 2669661, at *2 (M.D. Fla. July 7, 2011), did not say that survey evidence was required. It excluded an expert who applied no "scientific or technical knowledge or method" and relied entirely on an incomplete set of marketing materials and one witness's "unsupported deposition testimony." *Id.* Finally, *First Health Group Corp. v. United Payors & United Providers, Inc.*, 95 F. Supp. 2d 845 (N.D. Ill. 2000), was not addressing the admissibility of expert testimony; it was a summary judgment ruling. The court made clear that "[a] survey is not critical," and that other forms of evidence, like "consumer data, market research or evidence of diverted

sales," may be sufficient to prove a Lanham Act claim. *Id.* at 848-49.

Facebook also criticizes Dr. Schaub's application of his content analysis methodology because he did not develop a codebook, but this critique lacks merit. Facebook Br. 42-43. As Dr. Schaub explained in his report, the purpose of a codebook is to standardize the approach of multiple researchers when analyzing disclosures made across companies—which is not what he was doing here. District Br. 50. He identified peer-reviewed research supporting the type of content analysis he performed in this case, JA 2079-2115, and that analysis was not flawed for failing to take steps used only in a different kind of study.

At bottom, Facebook mischaracterizes Dr. Schaub's analysis as nothing but a subjective interpretation "backed only by his own *ipse dixit*." Facebook Br. 3. A close read of his expert report shows why this is wrong. For example, one of Dr. Schaub's opinions is that Facebook's disclosures were difficult to read and buried critical information in places consumers were unlikely to find it. JA 1534-41. That conclusion was based on concrete evidence: three types of readability tests that analyzed the level of reading comprehension necessary to read the documents, JA 1534-38, published studies showing that Facebook's policies were longer than those of its peers, JA 1538-40, and research showing that users were unlikely to read certain critical information because it was included in sections that appeared targeted at other audiences or to be addressing unrelated topics, JA 1540-41. Facebook fails

to meaningfully attack any of this evidence, and the Superior Court acknowledged that it did "not understand[] [Facebook's] complaint about the readability portion of his analysis," JA 948, yet it excluded all of his testimony anyway.

Another opinion Dr. Schaub shared was his "mental model" approach: that users' understanding of how their data is used is informed primarily by their experience using the service. That conclusion was derived from multiple studies of consumer behavior. JA 1549. In other words, because a Facebook user interacts with a third-party application only through Facebook, it is likely that the user would perceive the application "as operating within the context of Facebook," and thus not appreciate the application's ability to extract data for its own purposes. JA 1550-51. Dr. Schaub's analysis thus gives the jury important "surrounding context" to understand why disclosures might be misleading to an ordinary consumer, which this Court has already identified as critical to CPPA claims. *Earth Island*, 2024 WL 3976560, at *2. The Superior Court's perfunctory decision to exclude all that testimony as unscientific was an abuse of discretion.

## CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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September 2024

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