

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2014

(Argued: May 15, 2015

Decided: November 3, 2016)

Docket No. 14-3800-cv

ROBERT LOWINGER,

Plaintiff-Appellant,

THOMAS E. NELSON, individually and on behalf of all others similarly situated, ROCK SOUTHWARD, derivatively on behalf of himself and all others similarly situated, AVATAR SECURITIES, LLC, MEREDITH BAILEY, on behalf of themselves and all others similarly situated, DMITRI BOUGAKOV, on behalf of themselves and all others similarly situated, RYAN CEFALU, on behalf of themselves and all others similarly situated, LORRAIN CHIN, FIRST NEW YORK SECURITIES L.L.C., ATISH GANDHI, on behalf of themselves and all others similarly situated, PHILLIP GOLDBERG, on behalf of themselves and all others similarly situated, ERIC HAMRICK, on behalf of themselves and all others similarly situated, STEVE JARVIS, JOE JOHNSON, on behalf of themselves and all others similarly situated, NUHKET KAYAHAN, on behalf of themselves and all others similarly situated, DAVID KENTON, on behalf of themselves and all others similarly situated, DENNIS KUHN, on behalf of themselves and all others similarly situated, BENJAMIN LEVINE, on behalf of themselves and all others similarly situated, KATHERINE LOIACONO, on behalf of themselves and all others similarly situated, CRYSTAL MCMAHON, on behalf of themselves and all others similarly situated, GEORGE MICHALITSIANOS, on behalf of themselves and all others similarly situated, RANDY TERESA MIELKE, on behalf of themselves and all others similarly situated, JACINTO RIVERA, on behalf of themselves and all others similarly situated, FAISAL SAMI, on behalf of themselves and all others similarly situated, SANJEEV SHARMA, on behalf of themselves and all others similarly situated, COLIN SUZMAN, on behalf of themselves and all others similarly situated, T3 TRADING GROUP, LLC, VIJAY AKKARAJU, ALEXIS ALEXANDER, as custodian for Chloe Sophie Alexander, BRIAN ROFFE PROFIT SHARING PLAN, individually and on behalf of all others

1 similarly situated, JOSE GALVAN, MARY GALVAN, ROBERT HERPST,
2 individually and on behalf of all others similarly situated,
3 SANJAY ISRANI, on behalf of themselves and all others similarly
4 situated, KBC ASSET MANAGEMENT N.V., and the EMPLOYEES'
5 RETIREMENT SYSTEM OF THE GOVERNMENT OF THE VIRGIN ISLANDS
6 (Collectively, the INSTITUTIONAL INVESTORS), DOUGLAS M. LIGHTMAN,
7 individually and on behalf of all others similarly situated,
8 DENNIS PALKON, individually and on behalf of all others similarly
9 situated, RICK POND, JACOB SALZMANN, individually and on behalf
10 of all others similarly situated, MICHAEL SPATZ, MAREN TWINING,
11 individually and on behalf of all others similarly situated,
12 GOLDRICH COUSINS P.C. 401(k) PROFIT SHARING PLAN & TRUST, IRVING
13 S. BRAUN, individually, EDWARD CHILDS, derivately on behalf of
14 himself and all others similarly situated, KATHY REICHENBAUM,
15 individually and on behalf of all others similarly situated, JUN
16 YAN, on behalf of herself and all others similarly situated,
17 ELBITA ALFONSO, VICKY JONES, PHYLLIS PETERSON, JERRY RAYBORN, on
18 behalf of themselves and all others similarly situated, EDWARD
19 VERNOFF, JUSTIN F. LAZARD, on behalf of himself and all others
20 similarly situated, SYLVIA GREGORCYZK, on behalf of herself and
21 all others similarly situated, PETER BRINCKERHOFF, GARRETT
22 GARRISON, DAVID GOLDBER, individually and on behalf of all others
23 similarly situated, KEVIN HYMS, individually and on behalf of all
24 others similarly situated, RICHARD P. EANNARINO, individually and
25 on behalf of all others similarly situated, PETER MAMULA,
26 individually and on behalf of all others similarly situated,
27 KHODAYAR AMIN, on behalf of himself and all others similarly
28 situated, ELLIOT LEITNER, individually and on behalf of all
29 others similarly situated, BARBARA STEINMAN, on behalf of herself
30 and all others similarly situated, HOWARD SAVITT, on behalf of
31 himself and all others similarly situated, CHAD RODERICK, EUGENE
32 STRICKER, individually and on behalf of all others similarly
33 situated, STEVE SEXTON, individually and on behalf of all others
34 similarly situated, KEITH WISE, individually and on behalf of all
35 others similarly situated, JONATHAN R. SIMON, JAMES CHANG,
36 individually and on behalf of all others similarly situated,
37 SAMEER ANSARI, individually and on behalf of all others similarly
38 situated, DARRYL LAZAR, individually and on behalf of all others
39 similarly situated, MICHAEL LIEBER, individually and on behalf of
40 other similarly situated, THOMAS J. AHRENDTSEN, AARON M. LEVINE,
41 individually and on behalf of all others similarly situated,
42 KAREN CUKER, individually and on behalf of all others similarly
43 situated, BRIAN GRALNICK, individually and on behalf of all
44 others similarly situated, JENNIFER STOKES, individually and on
45 behalf of all others similarly situated, VERNON R. DeMOIS, Jr.,
46 individually and on behalf of all others similarly situated, HAL
47 HUBUSCHMAN, derivately on behalf of Facebook, Inc., EDWARD
48 SHIERRY, individually and on behalf of all others similarly

1 situated, JANIS FLEMING, WILLIAM COLE, derivatively on behalf of
2 Facebook, Inc., STEVE GRIFFIS, HOLLY McCONNAUGHEY, derivatively
3 on behalf of Facebook Inc., GAYE JONES, derivatively on behalf of
4 Facebook Inc., LIDIA LEVY, on behalf of herself and all others
5 similarly situated,
6

7 Plaintiffs,
8

9 v.
10

11 MORGAN STANLEY & CO. LLC, J.P. MORGAN SECURITIES LLC, GOLDMAN
12 SACHS & CO., and FACEBOOK, INC., a Delaware corporation,
13

14 Defendants-Appellees,
15

16 BARCLAYS CAPITAL INC., MERRILL LYNCH, PIERCE, FENNER & SMITH
17 INCORPORATED, ERSKINE B. BOWLES, JAMES W. BREYER, DAVID SPILLANE,
18 DAVID A. EBERSMAN, ALLEN & COMPANY LLC, BMO CAPITAL MARKETS
19 CORP., BLAYLOCK ROBERT VAN LLC, DONALD E. GRAHAM, C.L. KING &
20 ASSOCIATES, INC., REED HASTINGS, CABRERA CAPITAL MARKETS, LLC,
21 CASTLEOAK SECURITIES, L.P., PETER A. THIEL, CITIGROUP GLOBAL
22 MARKET, INC., MARK E. ZUCKERBERG, COWEN AND COMPANY, LLC, CREDIT
23 SUISSE SECURITES (USA) LLC, SHERYL K. SANDBERG, DEUTSCHE BANK
24 SECURITIES INC., CIPORA HERMAN, E TRADE SECURITIES LLC, ITAU BBA
25 USA SECURITIES, INC., LAZARD CAPITAL MARKETS LLC, LEBENTHAL &
26 CO., LLC, LOOP CAPITAL MARKETS LLC, M.R. BEAL & COMPANY,
27 MACQUARIE CAPITAL (USA) INC., MURIEL SIEBERT & CO., INC.,
28 OPPENHEIMER & CO., INCORPORATED, PACIFIC CREST SECURITIES LLC,
29 PIPER JAFFRAY & CO., RBC CAPITAL MARKETS, LLC, RAYMOND JAMES &
30 ASSOCIATES, INC., SAMUEL A. RAMIREZ & COMPANY, INC., STIFEL,
31 NICOLAUS & COMPANY, INC., THE WILLIAMS CAPITAL GROUP, L.P., WELLS
32 FARGO SECURITIES, LLC, WILLIAM BLAIR & COMPANY, L.L.C., NASDAQOMX
33 GROUP, INCORPORATED, LAWRENCE CORNECK, individually and on behalf
34 of all others similarly situated, JILL D. SIMON, CITIGROUP GLOBAL
35 MARKETS INC., ALLEN & FACEBOOK (sic) LLC, WILLIAM BLAIR &
36 FACEBOOK (sic) LLC, M.R. BEAL & FACEBOOK (sic) INCORPORATED,
37 COWEN AND FACEBOOK (sic) LLC, STIFEL NICHOLAS & FACEBOOK (sic)
38 INCORPORATED, SAMUEL A. RAMIREZ & FACEBOOK (sic) INC, KEVIN
39 HICKS, individually and on behalf of all others similarly
40 situated, LINH LUU, individually and on behalf of all others
41 similarly situated, HARVEY LAPIN, individually and on behalf of
42 all others similarly situated, KING & ASSOCIATES, INC., DAVID E.
43 (sic) EBERSMAN, NICK E. TRAN, THE NASDAQ STOCK MARKET L.L.C., a
44 Foreign Limited Liability Company, NASDAQ STOCK MARKET,

1 INCORPORATED, NASDAQ OMX GROUP, INCORPORATED, UMA M. SWAMINATHAN,
2 ROBERT GREIFELD, ANNA M. EWING, MARC L. ANDREESSEN,

3
4 Defendants.*

5
6
7 - - - - -
8
9 B e f o r e: WINTER, LOHIER, and CARNEY, Circuit Judges.

10
11 Appeal from a grant by the United States District Court for
12 the Southern District of New York (Robert W. Sweet, Judge) of a
13 Rule 12(b)(6) motion dismissing appellant's complaint. The
14 principal issue is whether standard lock-up agreements in an IPO
15 between lead underwriters and certain pre-IPO shareholders are
16 alone sufficient to render those parties a "group" under Section
17 13(d) and subject to Section 16(b) disgorgement under the
18 Securities Exchange Act of 1934. We hold that they are not. We,
19 therefore, affirm.

20 JEFFREY S. ABRAHAM (Mitchell M.Z.
21 Twersky & Philip T. Taylor on the
22 brief), Abraham, Fruchter &
23 Twersky, LLP, New York, NY, for
24 Plaintiff-Appellant.

25
26 JAMES P. ROUHANDEH (Charles S.
27 Duggan & Andrew Ditchfield on the
28 brief), Davis Polk & Wardwell LLP,
29 New York, NY, for Defendants-
30 Appellees Lead Underwriters.

31
32 Andrew B. Clubok, Kirkland & Ellis
33 LLP, New York, NY, for Defendant-
34 Appellee Facebook, Inc.
35

* The Clerk is directed to amend the caption as above.

1 Michael A. Conley, John W. Avery,
2 Nicholas J. Bronni, Securities and
3 Exchange Commission, Washington,
4 DC, for Amicus Curiae Securities
5 and Exchange Commission.
6

7 WINTER, Circuit Judge:

8 Robert Lowinger appeals from Judge Sweet's dismissal of his
9 complaint pursuant to Fed. R. Civ. P. 12(b)(6). The complaint
10 asserted claims under the Securities Exchange Act of 1934, 15
11 U.S.C. § 78p(b), against, inter alia, appellees Goldman Sachs &
12 Co., Morgan Stanley & Co., LLC, and J.P. Morgan Securities LLC
13 (collectively "Lead Underwriters"). It sought to hold them
14 liable under Section 16(b) for disgorgement of short-swing
15 profits received in connection with their sales and purchases of
16 shares in the course of Facebook, Inc.'s initial public offering
17 ("IPO").

18 Section 16(b) requires a "beneficial owner" of ten percent
19 or more of an issuer's stock to disgorge all profits realized
20 from short sales or purchases of that security within a six-month
21 period. See 15 U.S.C. § 78p(b). The Lead Underwriters alone did
22 not meet the ten-percent threshold. However, "beneficial owner,"
23 as defined in Section 13(d) of the Exchange Act, includes
24 "groups." Appellant contends that the Lead Underwriters and
25 certain pre-IPO shareholders together formed a group under
26 Section 13(d).
27

The group was allegedly formed by lock-up agreements between the Lead Underwriters and pre-IPO Shareholders ("Shareholders"). The lock-up agreements prevented the Shareholders from selling their stock for a specified period of time except as permitted by the Lead Underwriters. The district court dismissed the complaint on the grounds that the lock-up agreements alone did not render the Lead Underwriters beneficial owners of the aggregated shares held by the Shareholders under Section 13(d). Because we agree that this standard form lock-up agreement is insufficient, on its own, to establish a group under Section 13(d), we affirm.

BACKGROUND

Upon review of a dismissal of a complaint under Fed. R. Civ. P. 12(b)(6), the facts, and inferences to be drawn from those facts, are viewed in the light most favorable to the plaintiff. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

This appeal arises from the May 18, 2012 IPO by Facebook, Inc. ("Facebook"). The offering was underwritten by a syndicate of thirty-three financial firms (collectively, "Underwriters"), including the three Lead Underwriters. Goldman was a Lead Underwriter, and some Goldman subsidiaries owned Facebook shares. As part of the IPO process, each of the Shareholders (who, in the aggregate, owned more than ten percent of Facebook's common stock) entered into lock-up agreements with the Lead Underwriters

1 in order to "induce the Underwriters that may participate in the
2 Public Offering to continue their efforts in connection with the
3 Public Offering." J. App'x at 73. Appellant makes no claim that
4 these lock-up agreements departed from standard underwriting
5 practices.

6 The lock-up agreements generally provided that the
7 Shareholders would not sell or otherwise dispose of Facebook
8 stock for periods ranging from 91 days to 211 days after the date
9 of the Prospectus without the consent of Morgan Stanley as agent
10 for the Lead Underwriters. The agreements were disclosed in
11 Facebook's Prospectus and Registration Statement.¹

12 As is common in IPOs, the Registration Statement and
13 Prospectus alerted investors that the Underwriters might
14 "over-allot," i.e., sell more than the 421 million shares
15 earmarked for the IPO. Permitting such sales allows underwriters
16 to stabilize fluctuating share prices during an offering by
17 increasing the supply of shares after the offering price has been
18 determined. This ensures (and assures investors) that the entire
19 underwritten amount is sold. Underwriters generally hedge this
20 extra allotment by establishing a short position on oversold
21 shares while simultaneously holding the shares long.

¹ We may consider Facebook's Registration Statement and Prospectus as documents integral to the complaint. See Chambers, 282 F.3d at 152-53; see also San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., Inc., 75 F.3d 801, 808-09 (2d Cir. 1996).

1 Underwriters are thus protected against upward or downward
2 movements in the stock's price. The Facebook IPO permitted the
3 Underwriters to cover this short position either by purchasing
4 the requisite additional shares directly from Facebook and the
5 Shareholders at a fixed price (per the terms of a so-called
6 "over-allotment option," or "Green Shoe"), or by purchasing
7 shares directly from the open market once secondary trading had
8 commenced.²

9 Because of their role in the IPO, the Lead Underwriters were
10 necessarily granted access to nonpublic financial information
11 concerning Facebook. In March and April 2012, Facebook shared
12 its internal forecasts with the Lead Underwriters for both the
13 second quarter of 2012 and for fiscal year 2012. These forecasts
14 estimated revenue between \$1.1 and \$1.2 billion and approximately
15 \$5 billion, respectively. That information was "incorporated
16 into materials used by the Underwriters to market the Facebook
17 IPO to investors in a road show commenced on May 7, 2012." J.
18 App'x at 20.

² Facebook's Registration Statement disclosed that "the underwriters may engage in transactions that stabilize, maintain or otherwise affect the price of the Class A common stock." J. App'x at 43. This gave leeway to the IPO underwriters by allowing them to "sell more shares than they are obligated to purchase under the underwriting agreement, creating a short position" that they could cover by exercising a Green Shoe option or "by purchasing shares in the open market." Such open-market purchases "may raise or maintain the market price of the Class A common stock above independent market levels or prevent or retard a decline in the market price of the common stock."

1 That same day, May 7, however, the complaint alleges,
2 Facebook revised its revenue estimates downward for the second
3 quarter to the low end of the \$1.1 to \$1.2 billion range and
4 projected the 2012 fiscal year estimate to be 3% to 3.5% lower
5 than the previously forecasted \$5 billion. Facebook shared those
6 concerns with Morgan Stanley. On May 9, Facebook amended its
7 Registration Statement to advise potential investors of its
8 revised estimates.

9 On May 17 and 18, 2012, the Underwriters sold 484,418,657
10 shares of Facebook common stock to the public at prices ranging
11 from \$38.00 to \$42.05 per share. Facebook received \$37.582 for
12 each share sold and the Underwriters received discounts and
13 commissions amounting to \$0.418 per share. Over 310 million of
14 these shares were sold by the Lead Underwriters, which generated
15 \$129,000,000 in discounts and commissions for appellees.

16 Stating that the amendment to the Registration Statement did
17 not adequately disclose the revised estimates, the complaint
18 alleges that only after trading closed on May 18, 2012, did the
19 investors become aware that the Underwriters had already cut
20 their estimates for Facebook ahead of the IPO.³ On May 21, the
21 first trading day thereafter, Facebook's stock price declined to

³ Because this appeal raises only a claim under Section 16, which imposes a strict-liability rule, as discussed infra, the adequacy of disclosure and the misuse of material, nonpublic information are not before us.

1 "\$34.03 on extremely high volume reflecting a decline of more
2 than 10%" from the IPO price. J. App'x at 25. On May 22, 2012,
3 a report by Reuters further divulged that the revised projections
4 had been revealed by the Underwriters to select clients in a
5 manner that avoided a general and direct disclosure of the
6 relevant material information. The decline continued and on May
7 22, Facebook's stock closed at \$31 per share -- 18.42% below the
8 IPO price -- on high trading volume.

9 During that period, the Underwriters declined to exercise
10 their Green Shoe option to cover their short positions, choosing
11 instead to purchase the over-allotted shares directly on the
12 secondary market, at prices lower than the Green Shoe fixed price
13 of \$38.00 per share. As a result, the Underwriters "made a
14 profit of about \$100 million with the bulk of that profit [having
15 been] made on" May 21. J. App'x at 26 (internal citation and
16 quotation marks omitted).

17 On September 12, 2012, appellant, a Facebook shareholder,
18 made a demand on Facebook that it compel J.P. Morgan, Morgan
19 Stanley, and Goldman to disgorge their profits -- as explained
20 infra, calculated under Section 16(b) by subtracting the sales
21 prices of May 17 from the purchase prices during the following
22 four days. Facebook declined to bring suit, and appellant filed

1 his complaint on June 12, 2013.⁴

2 On May 2, 2014, the district court granted appellees' motion
3 to dismiss the complaint. It held that because appellant's
4 Section 13(d) group allegation was based entirely on the lock-up
5 agreements, it was insufficient to state a claim under Section
6 16(b). The district court noted that "[b]ecause lock-up
7 agreements are standard industry practice," they are, without
8 more, "insufficient to establish a Section 16(b) group." In re
9 Facebook, Inc., IPO Sec. & Derivative Litig., 986 F. Supp. 2d
10 544, 553 (S.D.N.Y. 2014). The district court declined to reach
11 the alternative argument that the Underwriters' transactions were
12 exempt under SEC Rule 16a-7 as part of a good faith
13 underwriting.⁵
14

⁴ The Facebook IPO has spawned multiple lawsuits that have been consolidated in the district court. See In re Facebook, Inc., IPO Sec. & Derivative Litig., 922 F. Supp. 2d 475, 477 (S.D.N.Y. 2013). Only the Section 16 issues are before us.

⁵ With regard to the Rule 16a-7 issue, the court stated, "Whether, if beneficial owners, the Lead Underwriters would be exempt from Section 16 liability under Rule 16a-7 presents certain complex and unprecedented issues, for instance, whether Defendants' creation of informational disparities accompanied by unusually high levels of short selling, though compliant with the letter of the law, may still be 'indecent' or 'dishonest' for purposes of determining 'good faith.' The Court declines to reach these issues at this time, because even if the Lead Underwriters are not exempt under the statute, they lack the prerequisite 'beneficial owner' status for Section 16 to apply." In re Facebook, Inc., 986 F. Supp. at 554 (internal citations omitted). In view of our disposition of this matter, we also do not address this Rule 16a-7 issue.

1 This appeal followed. We solicited, and received, the views
2 of the SEC, as amicus curiae, relevant to the disposition of this
3 appeal.

4 DISCUSSION

5 We review de novo a district court's dismissal of a
6 complaint pursuant to Rule 12(b)(6). See Chambers, 282 F.3d at
7 152. To survive dismissal, a complaint must plead "enough facts
8 to state a claim to relief that is plausible on its face." Bell
9 Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

10 Section 16(a) of the Exchange Act provides that any
11 director, officer, or "beneficial owner of more than 10 percent
12 of" a firm's securities, commonly called "statutory insiders,"
13 must report to the SEC the amount owned and must disclose changes
14 in ownership. 15 U.S.C. § 78p(a). Section 16(b), intended to
15 prevent the defined insiders from profiting from short-swing
16 variations in share price, imposes a strict-liability rule for
17 disgorgement of profits. It states:

18 For the purpose of preventing the unfair use
19 of information which may have been obtained
20 by such beneficial owner . . . by reason of
21 his relationship to the issuer, any profit
22 realized by him from any purchase and sale
23 . . . of any equity security of such issuer
24 . . . within any period of less than six
25 months . . . shall inure to and be
26 recoverable by the issuer, irrespective of
27 any intention on the part of such beneficial
28 owner . . . in entering into such
29 transaction.
30

1 15 U.S.C. § 78p(b). A disgorgement action may be brought by the
2 issuer or on behalf of the issuer by a security holder, like
3 appellant. Because Section 16(b) operates regardless of intent
4 and calculates "profits" in an automatic and non-intuitive way,⁶
5 we have cautioned that Section 16(b) is a "blunt instrument" to
6 be confined within "narrowly drawn limits." Magma Power Co. v.
7 Dow Chem. Co., 136 F.3d 316, 321 (2d Cir. 1998) (internal
8 quotation marks omitted).

9 To state a claim, the complaint here must allege facts
10 demonstrating that appellees were at relevant times statutory
11 insiders, i.e., as pertinent here, beneficial owners of more than
12 ten percent of Facebook's stock. Congress did not explicitly
13 define the term "beneficial owner," see Levy v. Southbrook Int'l
14 Invs., Ltd., 263 F.3d 10, 14 (2d Cir. 2001), but the SEC has
15 adopted Exchange Act Rule 16a-1, defining beneficial owner to
16 mean "any person who is deemed a beneficial owner pursuant to
17 Section 13(d) of the [Exchange] Act and the rules thereunder,"

⁶Section 16(b), long recognized by this court as a "crude,"
"arbitrary," and "Draconian" mechanism for curbing insider trading, see Blau
v. Lamb, 363 F.2d 507, 515 (2d Cir. 1966), is especially so with respect to
calculating the amount of "profit realized" from short-swing trading, see
Smolowe v. Delendo Corp., 136 F.2d 231, 239 (2d Cir. 1943) (setting forth the
general procedure for calculating disgorgement under Section 16(b)). Under
the established method of calculating disgorgeable "profit" for Section 16(b)
purposes, an individual may be charged with a Section 16(b) "profit" even when
his or her relevant trading actually resulted in a substantial financial loss.
See Feder v. Frost, 220 F.3d 29, 32 (2d Cir. 2000); Adler v. Klawans, 267 F.2d
840, 847-48 (2d Cir. 1959). For example, imagine a statutory insider who
purchases 100 shares at \$100 per share on January 1, sells 100 shares at \$50
per share on February 1, purchases 100 shares at \$150 per share on March 1,
and sells 100 shares for \$125 per share on April 1. This trader has lost
\$7,500 in real terms, but he has a profit of \$2,500 for Section 16(b)
purposes. See Smolowe, 136 F.2d at 239.

1 17 C.F.R. § 240 16a-1(a); see also Ownership Reports and Trading
2 by Officers, Directors and Principal Security Holders, Exchange
3 Act Release No. 34-28869, 56 Fed. Reg. 7242, 7244 (Feb. 21,
4 1991). Section 13(d) requires any person acquiring beneficial
5 ownership of five percent or more of a corporation's common stock
6 to disclose certain information. See 15 U.S.C. § 78m(d).
7 Section 13(d)'s purpose is to compel disclosure of certain events
8 that may portend changes in corporate control. Wellman v
9 Dickinson, 682 F.2d 355, 365 (2d Cir. 1982).

10 Exchange Act Rule 13d-3(a) describes a beneficial owner as
11 "any person who, directly or indirectly, through any contract,
12 arrangement, understanding, relationship, or otherwise has or
13 shares: (1) Voting power . . . ; and/or, (2) Investment power
14 which includes the power to dispose, or to direct the disposition
15 of, such security." 17 C.F.R. § 240.13d-3(a). Additionally,
16 according to Section 13(d)(3), "[w]hen two or more persons act as
17 a partnership, limited partnership, syndicate, or other group for
18 the purpose of acquiring, holding, or disposing of securities of
19 an issuer, such syndicate or group shall be deemed a 'person' for
20 the purposes of this subsection." 15 U.S.C. § 78m(d)(3); see
21 also 17 C.F.R. § 240.16a-1(a)(1). Ultimately, according to
22 Exchange Act Rule 13d-5(b)(1), "[w]hen two or more persons agree
23 to act together for the purpose of acquiring, holding, voting or
24 disposing of equity securities of an issuer, the group formed

1 thereby shall be deemed to have acquired beneficial ownership,
2 for purposes of section [] 13(d) . . . of all equity securities
3 of that issuer beneficially owned by any such persons." 17
4 C.F.R. § 240.13d-5(b)(1). This Rule tracks the language of
5 Section 13(d), except for its addition of "voting" to the acts
6 that trigger a "group" finding.

7 It is agreed that the Underwriters themselves did not hold
8 ten percent of Facebook's stock. Rather, appellant alleges that
9 the Underwriters were members of a group that in the aggregate
10 held ten percent of Facebook shares. This group was allegedly
11 formed by the lock-up agreements between the Lead Underwriters
12 and Shareholders, which prevented the Shareholders from selling
13 ("disposing," in statutory language) their pre-IPO shares of
14 Facebook stock for a specified period of time after the IPO
15 without the Lead Underwriters' consent.

16 A plain language argument suggests application of Section
17 13(d), but we have explicitly avoided holding that such an
18 agreement, without more, forms a group under Section 13(d).
19 Rather, we have stated only that a lock-up agreement "may bear
20 upon" the question of whether a group exists or that evidence of
21 coordination in acquiring, holding, or disposing of securities
22 may demonstrate the existence of a group. Morales v. Quintel
23 Entm't, Inc., 249 F.3d 115, 127 (2d Cir. 2001); see also CSX
24 Corp. v. Children's Inv. Fund Mgmt. (UK) LLP, 654 F.3d 276, 283

1 (2d Cir. 2011) (noting that the "touchstone" of the court's
2 finding of a group is that "the members combined in furtherance
3 of a common objective" to acquire, hold, vote or dispose of
4 securities) (internal quotation marks omitted).

5 Our reluctance to recognize the existence of a "group,"
6 notwithstanding a contractual arrangement explicitly limiting the
7 disposal of shares, reflects the fact that lock-up agreements,
8 rather than being agreements "to act together," are generally
9 one-way streets keeping certain shareholders out of the IPO
10 market for a specified period of time or without compliance with
11 other restrictions, as discussed immediately below.

12 However, we cannot avoid a larger, legitimate concern
13 emphasized in the SEC's amicus brief over applying Section 13(d)
14 literally in the context of standard lock-up agreements. As the
15 brief notes, a lock-up agreement is common, Brief of the SEC as
16 Amicus Curiae, at 19 (citing NYSE/NASD IPO Advisory Comm., Report
17 & Recommendations of a committee convened by the NYSE, Inc. &
18 NASD at the request of the U.S. Securities and Exchange
19 Commission (May 2003), at p.16, available at
20 <http://www.finra.org/sites/default/files/Industry/p010373.pdf>),
21 even essential, to the typical IPO, and some other public
22 offerings as well, id. at 19-22. Such an agreement assures
23 potential buyers of securities in the IPO "that shares owned [by
24 pre-IPO shareholders of the issuer will not] enter the public

1 market too soon after the offering." Initial Public Offerings:
2 Lockup Agreements, Fast Answers, U.S. Securities & Exchange
3 Commission, available at <http://www.sec.gov/answers/lockup.htm>
4 (last visited Oct. 17, 2016); see also In re Facebook, Inc., 986
5 F. Supp. 2d at 553. These assurances lead investors reasonably
6 to expect an orderly market free of the danger of large sales of
7 pre-owned shares depressing the share price before the pricing of
8 the newly offered shares has settled in the market.

9 Applying Section 16(b) to underwriters engaged in lock-up
10 agreements as facilitators of a public offering would impair the
11 market for public offerings by complicating the role of
12 underwriters -- adding tens of millions of dollars in legal
13 exposure to the underwriters' costs. As parties to lock-up
14 agreements, the underwriters are not acting as investors seeking
15 to buy low and sell high. Rather, they are conduits for the
16 distribution of securities in an offering to the public in which
17 their participation begins and ends with the offering. A central
18 role of the standard lock-up agreement is to limit the investment
19 decisions of large shareholders in order to bring about an
20 orderly, and successful, offering.

21 Public offerings are heavily regulated. See, e.g., In re
22 Public Offering Fee Antitrust Litig., 98-cv-7890 (LLM), 2003 WL
23 21496795, at *2 (S.D.N.Y. June 27, 2003); David A. Westenberg,
24 Initial Public Offerings: A Practical Guide to Going Public,

1 § 18:12 (1st ed. 2011). Among the most heavily regulated are
2 IPOs. See Adoption of Integrated Disclosure System, Securities
3 Act Release No. 33-6383, 47 Fed. Reg. 11380 (Mar. 16, 1982).
4 Disclosure to the public of relevant facts is extensive and, in
5 this case, included all of the pertinent facts asserted in the
6 complaint. IPOs contemplate the sharing of confidential
7 financial information with underwriters, agreements between
8 underwriters and large pre-IPO shareholders limiting disposal of
9 their shares, and trading by underwriters in the course of the
10 offering. Far from being nefarious, these actions benefit
11 existing shareholders and new public investors. For example, one
12 purpose of the regulation of public offerings is to enhance
13 relatively accurate pricing of the offering's shares by
14 disclosure before sales of an offering to the public are allowed.
15 See 15 U.S.C. § 77h. Achieving that purpose requires assurances
16 of control over the disposition of blocs of shares owned by large
17 pre-IPO investors, and lock-up agreements provide that control.
18 (One effect of a lock-up agreement in an IPO is to prevent pre-
19 IPO insiders from using nonpublic information to trade in a
20 nascent public market.) The purpose also requires stabilization
21 efforts by underwriters, as discussed above. Lock-up agreements
22 are, therefore, essential to the regulation of public offerings.

23 As amicus, the SEC advises us that ordinary lock-up
24 agreements do not implicate the purposes of Section 13(d) and its

1 definition of a "group." Section 13(d) is intended to alert
2 investors about possible changes in control and provide
3 information about possible parties to those changes. See, e.g.,
4 Brief of the SEC, Amicus Curiae, Morales v. Quintel Entm't, Inc.,
5 249 F.3d 115 (2d Cir. 2001), at 20-21 ("There is no doubt that
6 the purpose of Section 13(d) is to require disclosure of
7 information by persons who have acquired a substantial interest,
8 or increased their interest in equity securities of a company by
9 a substantial amount . . . so that investors might assess the
10 potential for changes in corporate control and adequately
11 evaluate the company's worth.") (internal quotation marks
12 omitted). To that end, the beneficial ownership rule seeks to
13 "prevent a group of persons who seek to pool their voting or
14 other interests . . . from evading" Section 13(d)'s disclosure
15 requirements. Wellman, 682 F.2d at 366 (quoting S. Rep. No. 550,
16 90th Cong., 1st Sess. 8 (1967)).

17 While appellant is correct that both the Underwriters and
18 Shareholders hoped to profit from the IPO -- the Underwriters
19 profiting according to the underwriting agreement and the
20 Shareholders profiting from a newly established public market for
21 their shares -- this common objective creates no need for
22 information about potential changes in control beyond that
23 inherent in a public offering. Using Section 13(d) to create a
24 "group" subject to Section 16(b) would impose large damages on

1 transitory conduits of a public offering of shares. This
2 imposition of damages would have nothing to do with the allaying
3 of concerns about changes in control but would greatly raise the
4 costs, and reduce the number, of IPOs.

5 To be sure, our analysis applies only to standard lock-up
6 agreements like those at issue here. As the SEC's amicus brief
7 states, "[a]typical language in the lock-up agreement, or other
8 facts and circumstances outside of the lock-up agreement," may
9 trigger a Section 13(d) "group" finding. Brief of the SEC as
10 Amicus Curiae, at 22. Our cases, discussed supra, have clearly
11 indicated that coordination between underwriters and the other
12 parties to a lock-up agreement with implications for control
13 changes beyond those inherent in an IPO might trigger such a
14 finding. But no facts alleged in this matter, in the petition
15 for reconsideration in the district court, or in the request to
16 amend persuade us that such a trigger exists.⁷

17 We, therefore, affirm.

⁷ Appellant also advances an argument based on the fact that Goldman subsidiaries owned some pre-IPO Facebook shares. The substance of appellant's argument is rendered rather murky by issues related to how it was raised in the district court. Goldman's subsidiaries' ownership of pre-IPO Facebook shares was disclosed in the documents filed with the SEC that accompanied the IPO and its underwriting. J. App'x at 106. These documents were before the district court on the motion to dismiss, but appellant raised the stock ownership issues as relevant only in its motion for reconsideration in the district court. It comes before us as a claim of error by that court either in its decision on the merits or in the court's declining to allow the complaint to be amended. We hold that these allegations do not render the lock-up agreements here as atypical in a way pertinent to our refusal to apply Section 13(d). No facts that might be alleged by plaintiff suggest, whether the lock-up agreements covered the Goldman shares or not, any implications regarding control changes as contemplated by Section 13(d) as is fully explained in the text.