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 11

12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA  
 14

15 In re ALPHABET, INC. SECURITIES )  
 LITIGATION )

Master File No.: 4:18-CV-06245-JSW

16 ) CLASS ACTION  
 17 )

18 This Document Relates To: )  
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ALL ACTIONS.

**DEFENDANTS' REQUEST FOR  
 JUDICIAL NOTICE AND NOTICE  
 OF INCORPORATION BY  
 REFERENCE IN SUPPORT OF  
 MOTION TO DISMISS  
 CONSOLIDATED AMENDED  
 COMPLAINT FOR VIOLATION OF  
 THE FEDERAL SECURITIES  
 LAWS**

**Hearing Date: August 23, 2019  
 Hearing Time: 9:00 a.m.  
 Courtroom: 5**

1 Defendants Alphabet Inc. (“Alphabet” or the “Company”), Google LLC, Lawrence E.  
2 Page, Sundar Pichai, Keith P. Enright, and John Kent Walker, Jr. (collectively “Defendants”)  
3 hereby request that the Court consider four documents incorporated by reference in Plaintiff’s  
4 Consolidated Amended Complaint for Violation of the Federal Securities Laws (“Complaint” or  
5 “¶”) and judicially notice excerpts from one of those documents submitted in support of  
6 Defendants’ Motion to Dismiss the Consolidated Amended Complaint for Violation of the  
7 Federal Securities Laws. True and correct copies of the documents described herein are attached  
8 as exhibits to the accompanying Declaration of Cheryl W. Fong (“Fong Declaration”).

### 9 SUMMARY OF ARGUMENT

10 The Supreme Court has acknowledged that in connection with a motion to dismiss a  
11 securities fraud action:

12 [C]ourts must consider the complaint in its entirety, as well as other sources courts  
13 ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular,  
14 documents incorporated into the complaint by reference, and matters of which a court  
may take judicial notice.

15 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Here, Plaintiff  
16 repeatedly quotes from and refers to four documents throughout the Complaint, namely a news  
17 article, a Company blog post, and the Company’s Forms 10-K from 2017 and 2018. It is well  
18 established that such documents are deemed to be “part of” the Complaint “for purposes of  
19 evaluating a motion to dismiss.” *See, e.g., Philco Invs., Ltd. v. Martin*, No. C 10-02785 CRB,  
20 2011 U.S. Dist. LEXIS 114314, at \*22 n.9 (N.D. Cal. Oct. 4, 2011). Accordingly, Defendants  
21 attach the entirety of these four documents for the Court to consider in connection with their  
22 motion to dismiss the Complaint.

23 Plus, Defendants additionally ask the Court to take judicial notice of excerpts of one of  
24 those documents—namely, the portion of the Company’s 2018 Form 10-K where it states its  
25 revenues and net income for that year. It is routine for courts to take judicial notice of the fact  
26 that a company made certain disclosures in its filings with the Securities and Exchange  
27 Commission (“SEC”) when hearing a motion to dismiss a securities fraud complaint like the one  
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1 here. *Metzler Inv. GMBH v. Corinthian Colls. Inc.*, 540 F.3d 1049, 1064 n.7 (9th Cir. 2008)  
2 (citing *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006)).

### 3 ARGUMENT

#### 4 I. THE COURT SHOULD CONSIDER THE FULL TEXT OF DOCUMENTS 5 INCORPORATED BY REFERENCE INTO THE COMPLAINT.

6 Defendants request that the Court consider four documents that the Complaint quotes and  
7 relies on and thereby incorporates by reference. The Ninth Circuit recently reiterated that on a  
8 motion to dismiss, the Court is permitted to consider a document “if the plaintiff refers  
9 extensively to the document or the document forms the basis of the plaintiff’s claim.” *Khoja v.*  
10 *Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002 (9th Cir. 2018) (quoting *United States v.*  
11 *Ritchie*, 342 F.3d 903, 907 (9th Cir. 2003)),<sup>1</sup> *petition for cert. docketed*, No. 18-1010 (U.S. Feb.  
12 4, 2019). Documents incorporated by reference are treated “as though they are part of the  
13 complaint itself.” *Orexigen*, 899 F.3d at 1002; *see also Philco Invs.*, 2011 U.S. Dist. LEXIS  
14 114314, at \*22 n.9 (securities class action may “treat that document as part of the pleading for  
15 purposes of evaluating a motion to dismiss”) (citation omitted).

16 The Court may consider the full text of such documents, even where the complaint only  
17 quotes or relies upon selected portions. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4  
18 (9th Cir. 1996). Consideration by district courts of the full text of documents, “including  
19 portions which were not mentioned in the complaint[...is appropriate in the context of a motion  
20 to dismiss.” *Id.*; *see, e.g., Northstar Fin. Advisors, Inc. v. Schwab Invs.*, 779 F.3d 1036, 1043  
21 (9th Cir. 2015) (considering “entire content” of various SEC filings incorporated by reference);  
22 *In re SunPower Corp. Sec. Litig.*, No. 16-cv-04710-RS, 2018 U.S. Dist. LEXIS 173777, at \*11  
23 n.2 (N.D. Cal. Oct. 9, 2018) (following *Orexigen*, documents referenced in the complaint itself  
24 “explicitly as the ground for [defendant’s] false statements and scienter...are appropriately

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27 <sup>1</sup> *See In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014) (affirming  
28 dismissal and reviewing documents incorporated by reference and matters properly subject to  
judicial notice).

1 incorporated by reference”).<sup>2</sup> The purpose of this doctrine is to prevent plaintiffs from “selecting  
2 only portions of documents that support their claims, while omitting portions of those very  
3 documents that weaken—or doom—their claims.” *Orexigen*, 899 F.3d at 1002.

4 Notably, the Court “need not accept as true Plaintiffs’ allegations...that are contradicted  
5 by” incorporated materials. *Philco*, 2011 U.S. Dist. LEXIS 114314, at \*22 n.9; *In re Tesla*  
6 *Motors, Inc. Sec. Litig.*, 75 F. Supp. 3d 1034, 1046 (N.D. Cal. 2014) (rejecting “conclusory  
7 allegations which are contradicted by documents referred to in the complaint”) (citation omitted).  
8 Where facts and inferences drawn from such materials conflict with plaintiff’s allegations, the  
9 court may consider this discrepancy in evaluating the complaint. *See, e.g., Paddock v.*  
10 *DreamWorks Animation SKG, Inc.*, No. CV 14-06053 SJO (Ex), 2015 U.S. Dist. LEXIS 188956,  
11 at \*14 n.4 (C.D. Cal. Apr. 1, 2015) (dismissing a securities class action suit; that plaintiffs  
12 misconstrued allegedly false statements was “evident after an examination of the full statements  
13 made”), *aff’d sub nom. Roofers Local No. 149 Pension Fund v. DreamWorks Animation SKG,*  
14 *Inc.*, 677 F. App’x 376 (9th Cir. 2017).

15 Here, Defendants request that the Court consider the full text of the following four  
16 documents that are incorporated by reference in the Complaint and therefore properly deemed to  
17 be part of the complaint:

18 (1) ***The Wall Street Journal’s News Article***. The news article, “Google Exposed User  
19 Data, Feared Repercussions of Disclosing to Public,” published by The Wall Street Journal on  
20 October 8, 2018, lies at the heart of the Complaint. In particular, Plaintiff repeatedly cites to this  
21 article as the primary source for the purported “revelation” of the truth about the Google+ bug,  
22 which is at the center of Plaintiff’s allegations regarding the Company’s purported failure to  
23 disclose the bug. The Complaint refers to and quotes from the article at paragraphs 57-59, 63,  
24 and 66. Consideration of the full text of this article is entirely appropriate given the extent to  
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26 <sup>2</sup> *See Copeland v. Lane*, No. 5:11-cv-01058 EJD, 2012 U.S. Dist. LEXIS 146815, at \*33 n.2  
27 (N.D. Cal. Oct. 10, 2012) (considering proxy statements incorporated by reference in § 14(a)  
28 action); *Okla. Firefighters Pension & Ret. Sys. & Okla. Law Enf’t Ret. Sys. v. IXIA*, No. CV 13-  
08440 MMM (SHx), 2015 U.S. Dist. LEXIS 52776, at \*52 (C.D. Cal. Apr. 14, 2015)  
(considering proxy statements and other SEC filings incorporated by reference).

1 which Plaintiff relies on excerpts from the article to form its claims. *Orexigen*, 899 F.3d at 1002;  
2 *Northstar*, 779 F.3d at 1043. Moreover, the full and complete article directly contradicts some of  
3 Plaintiffs' allegations. For example, Plaintiff repeatedly describes the bug as a "breach" in its  
4 Complaint (*see, e.g.*, Complaint ¶¶ 2, 38, 41), but ignores the fact that the article specifically  
5 retracted its use of the term breach to describe the bug. *See* Defs.' Motion To Dismiss at 4, 12-  
6 13. Such contradictions further support the Court's consideration of the entirety of the article.  
7 *Philco*, 2011 U.S. Dist. LEXIS 114314, at \*22 n.9; *In re Tesla Motors*, 75 F. Supp. 3d at 1046.  
8 (A true and correct copy of The Wall Street Journal article is attached as Exhibit 1 to the Fount  
9 Declaration).

10 (2) ***The Company Blog Post.*** The blog post, "Project Strobe: Protecting Your Data,  
11 Improving Our Third-party APIs, and Sunsetting Consumer Google+," published on Google's  
12 Blog on October 8, 2018, is also integral to Plaintiff's Complaint. Plaintiff repeatedly references  
13 portions of this blog post in the Complaint, specifically at paragraphs 58, 63, 73, and 76, to  
14 provide additional context and information regarding Alphabet's disclosure of the Google+ bug.  
15 Plaintiff further alleges that portions of the blog post support Plaintiff's allegations of scienter.  
16 Consideration of the full text of the blog post is therefore appropriate, considering the extent  
17 Plaintiff relies on it to provide context and form the basis of its claims. *Orexigen*, 899 F.3d at  
18 1002; *Northstar*, 779 F.3d at 1043. (A true and correct copy of the Blog Post is attached as  
19 Exhibit 2 to the Fount Declaration).

20 (3) ***The 2017 Form 10-K.*** Alphabet's Form 10-K for the year ending December 31,  
21 2017, filed with the SEC on February 6, 2018, is a central document forming the basis for  
22 Plaintiff's fraud claims. In particular, Plaintiff's allegations of fraud center on alleged false and  
23 misleading statements in the Company's risk factor language in this Form 10-K. Plaintiff thus  
24 references and/or quotes this document repeatedly in the Complaint at paragraphs 27, 49, 50, and  
25 references other Company SEC filings that incorporated the 2017 10-K's risk factors by  
26 reference, paragraphs 43, 49, 56, 72. Because this 10-K "forms the basis of the plaintiff's claim,"  
27 it is appropriate for the Court to consider the full text of this document through the doctrine of  
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1 incorporation by reference. *Orexigen*, 899 F.3d at 1002. (A true and correct copy of Alphabet’s  
2 2017 Form 10-K is attached as Exhibit 3 to the Found Declaration).

3 (4) ***The 2018 Form 10-K.*** Alphabet’s Form 10-K for the year ending December 31,  
4 2018, filed with the Securities Exchange Commission on February 5, 2019, is referenced in the  
5 Complaint at paragraph 72. As with the 2017 Form 10-K, Plaintiff references the 2018 Form 10-  
6 K in the context of its allegations regarding false and misleading statements in Alphabet’s risk  
7 factor language, Plaintiff cites the 2018 Form 10-K in particular as a comparison to the central  
8 2017 Form 10-K, to highlight changes to the Company relevant risk factor language. Although  
9 the complaint quotes only a portion of the 2018 Form 10-K, because it too relates to Plaintiff’s  
10 central allegations, it is appropriate for the Court to consider the full text of this document  
11 through the doctrine of incorporation by reference. *Orexigen*, 899 F.3d at 1002 (citation  
12 omitted). (A true and correct copy of Alphabet’s 2018 Form 10-K is attached as Exhibit 4 to the  
13 Found Declaration).

## 14 **II. THE COURT SHOULD TAKE JUDICIAL NOTICE OF EXCERPTS FROM** 15 **GOOGLE’S SEC FILING.**

16 Pursuant to Federal Rule of Evidence 201, Alphabet also requests that the Court take  
17 judicial notice of the fact that the Company disclosed its annual revenue and income, as shown in  
18 excerpts from its 2018 Form 10-K. Courts take judicial notice of information “not subject to  
19 reasonable dispute because it: (1) is generally known within the trial court’s territorial  
20 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot  
21 reasonably be questioned.” Fed. R. Evid. 201(b); *see Orexigen*, 899 F.3d at 999; Fed. R. Evid.  
22 201(c)(2) (“the court...must take judicial notice if a party requests it and the court is supplied  
23 with the necessary information.”). The Court may consider such facts “at any stage of the  
24 proceeding” (Fed. R. Evid. 201(d)), “even if they are not referenced in the pleading, so long as  
25 they meet the requirements for judicial notice set forth in Federal Rule of Evidence 201.”  
26 *Cement Masons & Plasterers Joint Pension Tr. v. Equinix, Inc.*, No. 11-01016 SC, 2012 U.S.  
27 Dist. LEXIS 28094, at \*25-26 n.5 (N.D. Cal. Mar. 2, 2012).

1 Courts routinely take judicial notice of filings with the SEC in the context of motions to  
2 dismiss. *Metzler*, 540 F.3d at 1064 n.7; *Biotechnology Value Fund, L.P. v. Celera Corp.*, 12 F.  
3 Supp. 3d 1194, 1199 (N.D. Cal. 2013) (taking judicial notice of documents filed with SEC).<sup>3</sup>  
4 This is particularly apt when—as here—the Court is evaluating such filings not for the truth of  
5 the matters therein, but merely for the purpose of assessing a company’s public representations  
6 on a matter. *Wochos v. Tesla, Inc.*, No. 17-cv-05828-CRB, 2018 U.S. Dist. LEXIS 145696, at  
7 \*5-6 (N.D. Cal. Aug. 24, 2018) (taking judicial notice of SEC filings following *Orexigen* not for  
8 “the truth of any of the facts asserted” but for the “purpose of determining what representations  
9 Tesla made”; “Given that Tesla publicly filed these [SEC forms] their accuracy cannot  
10 reasonably be questioned, and they are therefore appropriate subjects of judicial notice.”), *appeal*  
11 *docketed*, No. 19-15672 (9th Cir. Apr. 8, 2019).

12 Accordingly, Defendants request that the Court take judicial notice of excerpts from the  
13 Company’s 2018 Form 10-K filed with the SEC on February 5, 2019—in particular, the portion  
14 of the 2018 Form 10-K where Alphabet discloses its revenues and net income for the year (at  
15 pages 26 & 47 of Exhibit 4 attached to the Founq Declaration). Defendants submit these  
16 excerpts simply to show Alphabet disclosed revenues of \$136.8 billion and net income of \$30.7  
17 billion for the year ended December 31, 2018. That Alphabet made these disclosures is not  
18 subject to reasonable dispute, and be accurately and readily determined from a source (i.e. filings  
19 with the SEC) whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b); *Wochos*,  
20 2018 U.S. Dist. LEXIS 145696, at \*5. Accordingly, these excerpts are properly subject to  
21 judicial notice. See *Orexigen*, 899 F.3d at 999; *Biotechnology Value Fund*, 12 F. Supp. 3d at  
22 1199.

### 23 CONCLUSION

24 For the foregoing reasons, Defendants respectfully request that the Court consider and  
25 notice the above-referenced documents in connection with their motion to dismiss.

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27 <sup>3</sup> See also *Weller v. Scout Analytics, Inc.*, 230 F. Supp. 3d 1085, 1089 n.1, 1094 n.5 (N.D.  
28 Cal. 2017).

1 Dated: May 31, 2019

Respectfully submitted,

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WILSON SONSINI GOODRICH & ROSATI  
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By: /s/ Boris Feldman  
Boris Feldman

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