2024 SECURITIES LITIGATION YEAR IN REVIEW

Table of Contents

INTRODUCTION

Securities class action case filings remained flat in 2024, with 229 filings equaling the number of new cases filed in 2023.[1] The number of filings in 2024 tied with 2023 for the highest number of filings since 2020.[2] The number of filings was below the 421 cases filed in 2018, the recent peak year for federal securities-suit filings.[3] Suits alleging violations of Rule 10b-5, Section 11, and/or Section 12 of the Securities Act increased for a second year, with 214 new filings that accounted for more than 93% of all filings in 2024.[4]

These numbers were impacted by the continuing decline in class action merger objection lawsuit filings and in cases with Section 11 and/or Section 12 claims without an accompanying Rule 10b-5 claim. In 2024, only five federal merger objection lawsuits were filed, compared with seven filings in 2023. Plaintiffs continue to bring merger objection lawsuits but are increasingly filing them as individual actions rather than class actions. Suits alleging only Section 11 and/or Section 12 claims continued to decline last year to 16 filings, the lowest level of such filings over the past decade and likely mirroring the slowdown in IPO activity in recent years.[5]

As has been the case for the last several years, suits alleging only Rule 10b-5 claims were the majority of all new cases filed in 2024, with 198 filings in 2024, an increase from 183 in 2023.[6] Suits against companies in the technology and technology services and the health care technology and services sectors were the majority of all new cases filed in 2024, comprising 56% of all filings, compared with 41% in 2023.[7] The tumult in the banking sector that resulted in several high-profile bank failures and led to 12 securities fraud suit filings in 2023 subsided in 2024, with no new securities suit filings in the banking sector.[8] There was a surge of filings related to AI in 2024, with 13 filings in 2024 compared with six in 2023.[9] As we discuss in our 2025 Outlook (below), given the rapid developments in the AI-sector and the more frequent releases of new AI models and technologies, we expect the numbers of AI-related suits to increase next year.

Securities lawsuits related to special purpose acquisition companies ("SPACs"), COVID-19, cryptocurrency, and other digital assets totaled 36 filings last year, representing 15.72% of all federal securities class action filings in 2024.[10] We analyze noteworthy developments in each of those sectors in more detail below.

The number of settlements and dismissals of securities cases rose slightly in 2024, with 217 announced class action settlements and dismissals compared with 186 settlements and dismissals in 2023.[11] In 2024, aggregate settlements totaled $3.8 billion, nearly matching the $3.9 billion in 2023.[12] The median settlement value for 2024 was $14 million, roughly in line with the inflation-adjusted median settlement values in 2022 and 2023.[13] Notably, the trend of derivative suit settlements with substantial cash components continued in 2024; the settlements of an opioid-related derivative suit ($123 million) involving Walmart and of the Warner Bros. Discovery derivative suit ($125 million) arising out of Discovery's purchase of AT&T's WarnerMedia business placed among the all-time largest derivative suit settlements.[14]

While there was a $1 billion settlement by Wells Fargo in 2023, there were no settlements of $1 billion or higher in 2024.[15] Settlements in securities class actions included eight mega-settlements of at least $100 million—compared to nine mega settlements in 2023—topped by the $490 million settlement in the Apple case, the $434 million settlement in the Under Armour case (the second-largest settlement ever in the Fourth Circuit), and the $350 million settlement in the Alphabet case.[16] All of the cases on the 2024 top 10 list settled after years of litigation, and some, including the Under Armour case, settled shortly before trial.[17]

Our *2024 Securities Litigation Year in Review* focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts.

In *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, the Supreme Court resolved a circuit split over whether a company's failure to make a disclosure required under Item 303 of SEC Regulation S-K can—by itself—support a private action under Rule 10b-5.[18] In a unanimous opinion, the Court "confirm[ed] what the text plainly provides, that pure omissions are not actionable under Rule 10b-5(b)."[19] "Today, this Court confirms that failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders affirmative statements made misleading."[20]

The Court made clear that Rule 10b-5(b) does apply to "half-truths," because they are "representations that state the truth only so far as it goes, while omitting critical qualifying information," and noted that private parties remain free to bring claims based on Item 303 violations that create misleading half-truths.[21] The Court declined to provide further guidance as to when a statement is misleading as a half-truth, or whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions under a scheme liability theory.[22]

We also analyze the Supreme Court's decision in *Murray v. UBS Securities, LLC*, which resolved a circuit split over whether an employee suing his employer under the anti-retaliation provisions of the Sarbanes-Oxley Act ("SOX") must prove that the employer acted with "retaliatory intent."[23] In a unanimous decision, the Court reversed the Second Circuit and held that to prevail on a SOX whistleblower claim, a plaintiff need not prove "retaliatory intent," a concept that the Court interpreted as "something akin to animus," and need only show that the protected whistleblowing activity was a "contributing factor" in the adverse employment decision.[24]

Instead, the Court explained that the question of intent is to be resolved through the burden-shifting framework applicable to SOX claims. The decision clarifies that while proof of intent is still required to establish a SOX whistleblower claim, adverse employment actions attributable in whole or in part to an employee's protected conduct need not be motivated by animus to be unlawful.

There was continued activity related to forum-selection provisions in 2024. As we discussed in last year's *Review*, a California appellate court declined to enforce a forum-selection clause designating Delaware Chancery Court as the exclusive forum for certain shareholder litigation because it would impermissibly result in an implied waiver of the plaintiff's constitutional right to a jury trial under California law on his fraud-based claims. The court held that the right to a jury trial cannot be waived by contract prior to the commencement of a dispute.[25]

On December 13, 2023, the California Supreme Court granted a petition for review of whether the Court of Appeal correctly held that the action must remain in California despite the contractual forum selection clause in the company's bylaws and certificate of incorporation.[26] Briefing in the case by the parties and several *amicus curiae* were completed last year, with the parties focusing on California precedent and public policy favoring the enforceability of freely negotiated forum selection clauses where the alternative forum is "suitable" and the propriety of considering the effect of applying the law of the chosen forum in considering enforceability.[27] A decision in the case is expected later this year.

The Supreme Court issued several consequential decisions in 2024 in the area of administrative law that will have implications for the SEC, the Commodity Futures Trading Commission ("CFTC"), and other regulatory agencies. In *SEC v. Jarkesy*, the Court issued its much-anticipated decision addressing whether an SEC enforcement action seeking civil penalties could be adjudicated before one of the agency's administrative law judges, rather than in federal court before a jury.[28] The Court concluded that the civil penalties sought by the SEC were designed to punish and deter, not to compensate, and therefore were a prototypical common-law legal remedy, implicating the Seventh Amendment and entitling Jarkesy to a jury trial in federal court.

Jarkesy's impact is not limited to the SEC and has consequences for the more than two dozen agencies that impose penalties through administrative proceedings, only a handful of which have the power (as the SEC has) to prosecute actions in federal court. In the wake of *Jarkesy*, Commissioner Pham of the CFTC issued a statement noting that "administrative proceedings, where the agency is the prosecutor, judge, and jury lack the checks and balances imposed by separation of powers between the executive and judicial branches of government to ensure a fair hearing and due process." She stated that "[t]here's more work to be done at the [CFTC] to ensure that our adjudications and settlements can withstand scrutiny, particularly when they deprive others of property without due process and in violation of the Constitution."[29] Litigants likely will seek to extend *Jarkesy*'s reasoning to other sorts of agency actions by looking for common-law analogues.

On June 28, 2024, the Supreme Court overruled the longstanding *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce.*[30] The *Chevron* doctrine required courts to defer to the interpretations of administrative agencies when resolving the meaning of allegedly ambiguous statutes. In *Loper Bright,* the Court held that federal courts instead should exercise independent judgment in resolving questions of statutory interpretation and in deciding whether an agency acted within its statutory authority.

The impact of *Loper Bright* on pending agency litigation was immediate. In *KalshiEX LLC v. Commodity Futures Trading Commission*, a company filed suit against the CFTC challenging a recent order prohibiting it from listing certain political-event contracts on its regulated derivatives exchange.[31] The event contracts, a type of regulated derivative, related to which political party would control each chamber of the United States Congress following the 2024 election; the contracts were designed to serve a risk-hedging function. The CFTC determined that the contracts involved unlawful activity and gaming, and were contrary to public policy.

On the day the Supreme Court issued *Loper Bright*, Kalshi argued that matters of statutory interpretation at issue in pending summary judgment motions must be resolved by the district court de novo, without deferring to the CFTC's interpretation.[32] On September 12, 2024, the district court granted summary judgment to Kalshi and held that the CFTC's order exceeded its statutory authority. The court noted that while *Chevron* would have governed at the time the case was filed, *Loper Bright* required the court to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. Applying "traditional tools of statutory construction," the court concluded that the CFTC's order exceeded its statutory authority because "Kalshi's contracts do not involve unlawful activity or gaming. They involve elections, which are neither."[33] The D.C. Circuit denied the CFTC's request for a stay pending appeal because the agency had failed to present adequate evidence that it or the public would be irreparably harmed if Kalshi moved forward with offering the event contracts.[34]

We will continue to track how these landmark decisions impact litigation involving the SEC, CFTC, and other federal agencies.

There were several notable decisions relating to proxy firm regulations and shareholder proposals last year. In 2020, the SEC adopted proxy firm regulations targeting firms such as Institutional Shareholder Services ("ISS") and Glass, Lewis & Co., which provide services to investment firms seeking outside advice on how to vote their shares at companies' annual meetings.[35] The proxy firms have been criticized for their outsized impact on the outcome of shareholder votes on the election of board directors and hot-button shareholder proposals related to ESG and other topics.

According to the SEC, the amendments conditioned the availability of two exemptions from certain of the federal proxy rules often used by proxy voting advice businesses on compliance "with tailored and comprehensive conflicts of interest disclosure requirements."[36] In particular, the rules required proxy firms to simultaneously give voting recommendations to their clients and the companies that were the subject of their voting advice. Another requirement directed proxy firms to provide clients with access to the businesses' responses before they voted. These new provisions are commonly referred to as the "notice-and-awareness conditions." The amendments also codified "the Commission's longstanding view that proxy voting advice generally constitutes a solicitation under the proxy rules, and make clear that the failure to disclose material information about proxy voting advice may constitute a potential violation of the antifraud provision of the proxy rules."[37]

In 2022, the SEC adopted amendments to remove the notice-and-awareness conditions and rescinded note (e) to Rule 14a-9, which the 2020 rule added to specify that the failure to disclose material information regarding proxy voting advice, such as a firm's methodology, sources of information, or conflicts of interest, may be misleading within the meaning of Rule 14a-9.[38] Then-Chair Gensler stated, "I am pleased to support these amendments because they address issues concerning the timeliness and independence of proxy voting advice, which would help to protect investors and facilitate shareholder democracy."[39] Notably, the final vote was 3–2 with sharp dissents from Commissioners Peirce and Uveda, who took issue with the change of course so soon after adoption of the notice-and-awareness conditions in 2020.[40]

Three lawsuits followed the adoption of the 2020 proxy rules and the amendments approved in 2022. First, ISS sued the SEC in 2020, arguing that proxy advisory firms do not "solicit" proxies, and challenged the SEC's extension of the rules to proxy voting advice.[41] It also argued that the final rules and related guidance were not in accordance with law or were in excess of the SEC's statutory authority. The SEC argued that proxy advisors solicit proxies by either moving shareholders to vote or by obtaining votes consistent with their advice.

Last year, in a decision issued before the Supreme Court handed down *Loper Bright*, a district judge in Washington applied the *Chevron* doctrine and found that the ordinary meaning of "solicit" in 1934 did not encompass proxy voting advice for a fee and that the legislative history of the Exchange Act did not support the SEC's reading.[42] A key factor in the court's reasoning was that the proxy firms' advice is tailored to their clients' interest, not their own, and they have no financial or governance interest in the outcome of the vote. In February 2024, the court granted summary judgment to ISS, concluding that its position "better reflects the purposes and history of Section 14(a)," and vacated the definitional amendment adopted by the SEC in 2022.[43] Both the SEC and the National Association of Manufacturers appealed the decision to the D.C. Circuit, with a decision likely later this year or in early 2026.[44]

While the ISS lawsuit was pending in Washington, two other lawsuits were filed against the SEC contesting the rollback of the 2020 proxy rules and the validity of the 2022 amendments that culminated in two decisions creating a circuit split. In July 2022, the National Association of Manufacturers filed suit against the SEC seeking to vacate the 2022 amendments, alleging that the SEC's action was a study in capricious agency action in violation of the Administrative Procedures Act. A district court granted summary judgment in favor of the SEC.

Last year, a three-judge panel of the Fifth Circuit reversed, holding that the SEC failed to adequately explain its decision to disregard the prior factual finding that the notice-and-awareness requirements posed little or no risk to the timeliness and independence of proxy voting advice.[45] The panel also held that the SEC failed to justify the 2022 amendments on their own terms because it did not provide a reasonable explanation as to why the risks of the notice-and-awareness requirements were so significant as to justify rescission.

The other case challenging the 2022 amendments was filed by the Business Roundtable and the Tennessee Chamber of Commerce & Industry against the SEC.[46] The suit likewise claimed that the SEC violated the APA when it adopted the 2022 amendments and allowed only 31 days of public comment.[47] The district court granted summary judgment to the SEC. On appeal, a divided panel of the Sixth Circuit ruled 2–1 in favor of the SEC. The majority concluded that the SEC's reliance on "precisely the same record" in 2022 was not arbitrary or capricious because "it explained why its reevaluation of the competing factors was more effective in 2022 than it had been in 2020."[48]

The court also declined to find that the 31-day comment period to be arbitrary or capricious, noting that the APA does not require a particular length of time for a comment period but rather only requires that the comment period be meaningful and held that it was. No party sought e*n banc* review of either decision or brought a petition for certiorari seeking Supreme Court resolution of the circuit split.

Finally, there was a notable case last year in which a novel legal approach was employed by Exxon to address a perennial problem that public companies face during proxy season: shareholder proposals devised by professional activist groups that are interested in changing a company, often to the detriment of overall shareholder value. In 2024, activist investors Arjuna Capital and Follow This submitted a climate-related shareholder proposal to be included in Exxon's 2024 proxy that was similar to proposals soundly rejected by Exxon shareholders in 2022 and 2023.[49] The company asserted that the proposal was subject to the resubmission exclusion under Rule 14a-8. Exxon also asserted that because the proposal sought to impermissibly intrude on its ordinary business operations, it was subject to the ordinary business exclusion of Rule 14a-8.

While the company could have requested a no-action letter from the SEC to keep the proposal off its proxy statement, the process of submitting no-action letters to obtain the SEC staff's guidance on excludability can be problematic, because the guidance changes depending on the administration and is often not in concert with the language of the rules. Instead, Exxon filed suit against the activist investors in early 2024, seeking a declaratory judgment that it could exclude the proposal from its proxy statement under Rule 14a-8(i)(7) and (i)12 of the Exchange Act.[50]

In response, the shareholders withdrew the proposal and promised in a letter to Exxon not to refile the proposal with Exxon at any point in the future. Exxon contended that nothing in the letter would prevent the shareholders from tweaking non-substantive parts of the proposal and "firing away once more."[51] The court agreed with Exxon that the letter did not make absolutely clear that the offending conduct would not recur as required to moot the company's claim under the voluntary-cessation doctrine. "Defendants' pledge is not as sweeping and unequivocal as other stipulations which evaded the [voluntary-cessation] doctrine."[52] Noting that the shareholders were free to enter into a broader stipulation, the court concluded that because it was not "absolutely clear" that Exxon will not face the same or a "substantially similar" proposal later, the defendants failed to prove non-recurrence and denied Ajuna's motion to dismiss.[53]

Thereafter, the defendants made increasingly broader commitments never to resubmit the proposal. Ultimately, the defendants agreed to unconditional and irrevocable covenants to refrain from submitting any proposal to Exxon shareholders relating to climate change that tracked the breadth of covenants that had been found to satisfy the voluntary-cessation doctrine in other cases. Exxon nevertheless asserted that the covenants did not moot its claims because the shareholders could fight on and pointed to Arjuna's devotion to shareholder activism and antipathy to Exxon.

Stating that it "sympathizes with Exxon's predicament" and noting that "[n]othing says 'dedication to the cause' like dropping a proposal at the first hint of litigation," the court nonetheless concluded that the binding nature of the shareholder's covenant met the burden imposed by the voluntary-cessation doctrine because it was unconditional and irrevocable and thus rendered the case moot and dismissed the complaint without prejudice.[54]

There were developments last year in two cases involving Tesla and its CEO Elon Musk arising from his 2018 tweets that he had "funding secured" to take Tesla private. A second tweet stated, "[i]nvestor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote."[55] Investors filed suit claiming $12 billion in losses from the allegedly false tweets. In one of the few securities fraud cases to be resolved at trial, a federal jury in San Francisco returned a verdict in favor of Tesla and Musk after just hours of deliberations. The case was notable because the district judge had previously granted partial summary judgment for the plaintiffs, finding that the evidence showed that no financing was in place at the time of the tweets. The judge had also found that Musk acted recklessly but left the jury to decide whether the tweets were material to the plaintiffs' investment decisions and led to their financial losses.

The investors appealed the district court's denial of their motion for a new trial, arguing that the jury was improperly instructed that they must decide whether Musk knowingly lied in his tweets, which impermissibly heightened their burden at trial and confused the jury. In an unpublished decision, the Ninth Circuit affirmed the jury verdict and found no instructional error warranting a new trial.[56]

While the court acknowledged that the jury did not need to consider knowledge for the scienter element of the Rule 10b-5 claim because the district court had already found that Musk acted with scienter, it noted that knowledge was implicated at another stage of the case. "If it found liability, the jury would have had to apportion liability for damages by deciding whether any defendant knowingly violated the law."[57] The court held that "in retrospect," the sentences about knowledge "might have been better offered elsewhere," but when considered as a whole and not in isolation, the instructions informed the jury of the proper legal standard that scienter could be proven by establishing a defendant's recklessness or knowledge.[58]

The court also held that even if there had been instructional error, it was more probably than not harmless given that in closing arguments, the plaintiffs' attorney directed the jury to assume the element of scienter was met, the defendants' attorney did not discuss the element of scienter at all, and the jury asked no clarifying questions. The court declined to reach the plaintiffs' argument that they were entitled to judgment as a matter of law on the element of materiality based on its conclusion that the district court properly denied the motion for a new trial.

Separately, the Supreme Court declined to hear Musk's attempt to challenge the terms of the agreement he reached with the SEC arising out of the same tweets. The SEC filed a civil action against Tesla and Musk alleging that the tweets were materially false and misleading. In September 2018, Musk agreed to step down as Tesla's chairman and paid a $20 million fine, and the company agreed to pay a $20 million fine, to settle the civil action. The agreement required that a lawyer review some of Musk's social media posts before they were posted.

Musk later challenged the agreement asserting that the limits on his speech were unconstitutional and that he had been effectively coerced to sign it. The SEC responded that Musk had waived his right to assert any challenge to the agreement when he signed it. Both the Southern District of New York and the Second Circuit ruled in favor of the SEC.[59]

COVID-19

Although it has been nearly five years since the start of the COVID-19 pandemic and many financial periods since the end of mandated lockdowns and disrupted supply chains, COVID-related securities suits continued to be filed against companies in 2024. There were 19 COVID-related suits filed last year, more than the 13 filings in 2023 and slightly less than the 20 filings in 2022.[60] While the decline from the 33 pandemic-related filings in 2020 was not surprising as the pandemic receded, the uptick in filings in 2024 and the nature of the claims reflects that the long-term effects of COVID-related supply chain disruption on sales continue to be felt.

After the first wave of cases filed against companies that experienced outbreaks in their facilities, such as cruise ship lines and private prison operators, later cases targeted companies poised to profit from the pandemic, such as diagnostic test and vaccine developers. As the pandemic persisted, plaintiffs increasingly sued companies whose financial results were negatively impacted by the pandemic.

That trend continued in 2024. Last year, only three of the filed cases involved companies directly involved in developing products relating to COVID-19, including vaccines or diagnostic tests, which were alleged to have misrepresented increased inventories, decreased demand, or inability to launch clinical studies.[61] The other suits targeted technology and capital goods companies that were alleged to have benefitted from pandemic-era stimulus programs or increased demand but misrepresented or omitted the extent to which their post-pandemic performance was slowing or excess inventories were growing.[62]

As we discussed in last year's *Review*, the results in COVID-19 securities suits have been decidedly mixed. One high-profile suit against exercise equipment company Peloton exemplified a category of cases against companies whose financial results surged at the outset of the pandemic but whose results later lagged as pandemic conditions changed and lockdowns ended. The Peloton complaint initially alleged that the company misrepresented its ability to sustain its COVID-19 sales boost. The challenged statements included a statement by the former CEO that the company was well-equipped for the 2021 holiday season even as it cut its full-year revenue forecast and reported that 91% of its inventory was unsold.[63] Last year, the court granted the defendants' motion to dismiss an amended complaint with prejudice, finding that the statements on which the plaintiffs relied were forward-looking statements accompanied by meaningful cautionary language and noting that the disclosures sufficiently warned investors of risk of slower future growth.[64]

In contrast, a suit against Talis Biomedical Corporation survived a motion to dismiss. The company is a diagnostic test development company that went public in 2021 and whose stock price soared shortly thereafter when it announced its request for emergency use authorization from the FDA for its COVID-related diagnostic test but declined when it withdrew the request and lengthened its validation testing timeline.

In 2023, the district court found that an amended complaint alleged with specificity that the company's registration statement contained false and misleading statements about the accuracy and reliability of its COVID-19 diagnostic test.[65] In 2024, the court granted the plaintiffs' motion for class certification, and the parties announced their agreement to settle the action for $32.5 million.

Likewise, dental health product supplier Dentsply Sirona failed to obtain dismissal of a suit accusing it of misleading investors about the extent of its pandemic woes. The judge found that investors identified dozens of allegedly misleading or false statements that were actionable, noting "[i]t would be misleading if (as alleged) the company was having trouble getting the materials to make the products, many of the products it did make didn't work, and much of its sales were due to channel stuffing."[66]

A significant settlement in two COVID-related cases was announced in 2024. Emergent BioSolutions announced last year that it agreed to pay $40 million to settle a suit alleging that it misled investors about how prepared it was to handle high-profile deals to manufacture COVID-19 vaccines for two different vaccine developers.[67] The plaintiffs alleged that the company misled them about its readiness to handle contracts to manufacture COVID-19 vaccines after a report that the company had mixed up ingredients for two different vaccines, contaminating as many as $15 million worth of doses of the Johnson & Johnson vaccine. The court allowed the plaintiffs' claim that the company misrepresented its performance and capabilities related to its anti-contamination measures to survive a motion to dismiss.

Biotech company Novavax developed its version of a COVID-19 vaccine and in 2020 entered into an agreement with the Department of Defense to set up production facilities and, upon emergency use approval of the vaccine by the FDA, supply 10 million doses by the end of that year. The company experienced persistent challenges in manufacturing and production, delaying the regulatory timeline for approval. Investors filed a suit alleging that the company misled the public about its ability to meet its regulatory goals for its vaccine, overstated its manufacturing capabilities, and continued to reassure investors that production was on track.[68]

In 2022, the district court denied a motion to dismiss in part, finding that the plaintiffs adequately alleged material omissions as to company statements that it had overcome nearly all of the major challenges to its production and its progress in scaling up its manufacturing on a global basis.[69] In 2024, the parties announced a settlement in which the company agreed to pay $47 million to resolve the suit.

While the SEC's COVID-19 enforcement efforts slowed in 2024, it announced new charges in two cases. It charged the CEO and two others for their roles in an alleged pump and dump scheme in 2021 involving three press releases that allegedly falsely claimed that a Florida company had acquired distribution rights to a COVID-19 instant diagnostic test, received a $28 million purchase order for the tests, and fabricated a bogus purchase order to evidence the nonexistent purchase.[70] The SEC had suspended trading in the company's stock in 2021.

In another case filed last year, the SEC charged the former CEO of a company for falsely claiming that the company was engaged in COVID-related business that it was not.[71] The complaint alleged that the former CEO made numerous false statements in press releases, social media, and SEC filings during the height of the COVID-19 pandemic that the company had developed real-time temperature screening products when he knew it had no such device and could not build one unless it raised additional capital.

The SEC also announced that it obtained final judgment against a California trader who engaged in a "spoofing" scheme by posting online messages repeating a false assertion regarding a company that purportedly had an approved COVID-19 test without also disclosing that he owned a large position in the company stock or his plans to sell the shares while others were buying. The trader created the false impression of high demand for the stock by placing and subsequently canceling several large orders and made approximately $137,000 in profits in six weeks until the SEC temporarily suspended trading in the company's securities.[72]

In another case, the SEC announced final judgment against two entities in connection with a Ponzi-like scheme that involved raising money from investors who purchased more than $17.5 million in promissory notes purportedly to invest in real estate. The companies falsely claimed that the notes were safe and secure when they diverted new investor funds to make Ponzi-like payments to existing investors totaling $4.2 million. When the entities were unable to pay the promised returns, they blamed the economic impact of the COVID-19 pandemic but continued to send investors false account statements showing ever-growing balances from payments never made.[73]

The DOJ has continued its efforts to combat COVID-related fraud in both criminal and civil fraud cases, primarily relating to schemes to wrongfully obtain funds from federal programs enacted to mitigate the financial impact of the pandemic, including the Paycheck Protection Program ("PPP"), Economic Injury Disaster Loan Program, and the Coronavirus Aid, Relief, and Economic Security Act ("CARES"). In 2021, the DOJ established the COVID-19 Fraud Enforcement Task Force ("CFETF") to mobilize a coordinated response to illegal acts aimed at exploiting the government's relief efforts for personal gain. The DOJ established five COVID-19 Fraud Enforcement Strike Forces across six federal districts. In its 2024 Report, the CFETF announced that as of April 2024, criminal charges had been brought against more than 3,500 defendants, and civil enforcement actions resulted in more than 400 civil settlements and judgments and more than $1.4 billion in seizures and forfeitures.[74]

The DOJ continued to bring cases at a steady pace throughout 2024. In October 2024, a sitting Pennsylvania state court judge was indicted on wire and mail fraud charges after allegedly instructing employees at his law firm to file and collect unemployment benefits during the COVID-19 pandemic while at the same time directing and requiring the employees to continue working for the firm.[75] A Massachusetts business owner was indicted for allegedly submitting fraudulent PPP loan applications on behalf of multiple companies he owned and received nearly $7 million in loan proceeds that he used to purchase luxury real estate or transferred out of the country.[76] In another case an Arizona man and his associates were charged with conspiring to carry out a scheme to defraud the Small Business Administration by filing 1,300 fraudulent PPP loan applications seeking $178 million in loan proceeds and ultimately received approximately $105 million in loan proceeds.[77]

The DOJ also continued to announce substantial prison sentences and restitution orders in many COVID-related cases last year involving a wide variety of COVID-related criminal conduct. For example, a former NFL player was sentenced to 16 months in prison for wire fraud stemming from his fraudulent acquisition of a PPP loan during the COVID-19 pandemic.[78] A California woman was sentenced to nine years in prison and ordered to pay more than $1 million in restitution resulting from her conviction for wire fraud and identity theft for filing more than 70 fraudulent unemployment claims seeking benefits under the CARES Act.[79]

SPACs

The headwinds facing SPACs appear to have lessened somewhat in 2024 despite many challenges that remain. A SPAC is an entity formed for the sole purpose of raising capital through an IPO with the objective of finding and acquiring an existing, privately owned business within a specific time frame, typically 18–24 months. If a SPAC does not complete a merger within that time and if the investors do not agree to an extension, the SPAC liquidates and the IPO proceeds are returned to the public shareholders. A SPAC's acquisition of a private company, known as a de-SPAC transaction, requires SPAC shareholder approval and the filing of proxy materials with the SEC.

The popularity of SPACs as an alternative to traditional IPOs took off in 2020 and 2021, at one point eclipsing the number of traditional IPO offerings. But the use of SPACs steadily declined in 2022 and 2023 as a result of challenging market conditions, heightened regulatory scrutiny, and increased liquidations when SPACs failed to find companies to acquire.

There was an uptick in SPAC market activity last year, with 57 SPAC IPOs completed, 78 de-SPAC mergers announced, and 73 de-SPAC mergers closed in 2024.[80] The SPAC market had its best quarter in the fourth quarter of 2024, as the SPAC market saw the pricing of 23 IPOs, raising a total of $3.8 billion—the highest quarterly IPO proceeds in the last two years.[81] Average returns of entities that resulted from de-SPAC transactions continued to underperform again last year—with average returns by de-SPAC companies of -61% compared with -73% in 2023—there were 57 announced SPAC liquidations in 2024, a substantial decrease from the 198 announced liquidations in 2023 and the 144 liquidations in 2022.[82] There have been 402 liquidations since 2020.[83] Those numbers stand in stark contrast with the one announced liquidation in 2021 near the height of SPAC popularity.

Likely reflecting the improving but still challenging circumstances facing the SPAC sector, there were nine SPAC-related securities suit filings in 2024, representing 4% of all 2024 filings, down from the 20 SPAC-related securities suit filings in 2023.[84] The vast majority of the new complaints filed in 2024 alleged that SPAC participants made misleading statements or omissions regarding the prospects or financial health of the target company in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

Last year, for the first time a SPAC-related suit worked its way up to an appellate court. In *In re CCIV/Lucid Motors Securities Litigation*, the Ninth Circuit applied the "purchaser-seller rule" adopted by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores* to hold that an acquiring company's investors (that is, the SPAC's investors) did not have standing to sue under Section 10(b) of the Exchange Act or Rule 10b-5 for alleged misstatements made by the target company before it merged with the SPAC acquiror.[85] A full analysis of the Ninth Circuit's decision can be found below.[86]

In 2024, SPAC-related lawsuits once again had a mixed record of success. A few district courts allowed SPAC-related claims to survive motions to dismiss.[87] For example, in *In re Grab Holdings Ltd. Sec. Litig.*, the court held that the plaintiffs sufficiently pleaded that a series of pre-merger statements in the proxy statement filed by a ride-hailing app company were material and misleading. Noting that "cautionary words about future risk cannot insulate from liability the failure to disclose that the risk has transpired," the court concluded that by putting issues of driver retention and incentive payment amounts in play as part of public statements prior to the de-SPAC transaction, the defendants assumed a duty to tell the whole truth and allowed the claims to proceed.[88] In January 2025, the plaintiffs in *Grab* filed an unopposed motion for preliminary approval of an $80 million settlement of their claims. With most SPACs trading well below their IPO prices, we expect to see continuing securities litigation activity in this space.

In January 2024, the SEC adopted new rules "to enhance disclosures and provide additional investor protection in IPOs by SPACs and in subsequent de-SPAC transactions."[89] The new rules, which took effect on July 1, 2024, require enhanced disclosures about conflicts of interest, SPAC sponsor compensation, and dilution. Among other things, the new rules also require registrants to provide additional information about the target company to help investors make voting and investment decisions in connection with de-SPAC transactions. Whether the new rules will cause a drag on SPAC transactions remains to be seen, particularly in light of the uptick in the SPAC market in late 2024.

The SEC under former Chair Gensler repeatedly expressed skepticism about the risks SPACs present to investors, and it was active in bringing enforcement actions in the SPAC sector. The SEC brought charges targeting SPACs for failing to disclose to investors pre-IPO or pre-merger discussions with potential target companies. For example, the SEC charged Cantor Fitzgerald with causing two SPACs to make misleading statements denying having had contact or substantive discussions with potential merger targets before their IPOs, despite the fact that Cantor Fitzgerald personnel acting on behalf of the SPACs had already commenced negotiations with a small group of potential target companies, including two companies that eventually merged with the SPACs.[90] Cantor Fitzgerald agreed to pay a $6.75 million penalty to settle the charges.

The SEC brought similar charges against the former CEO of SPAC Digital World Acquisition Corporation, alleging false and misleading statements in connection with the company's IPO and its proposed merger with Trump Media & Technology Group Corp.[91] According to the complaint, the CEO signed multiple public filings stating that Digital World did not intend to merge with any specific company, even though he had already had lengthy discussions with representatives of Trump Media about the proposed merger.

In another enforcement action against a SPAC CEO, the SEC charged the former CEO of Romeo Power, Inc., a manufacturer of batteries for electric vehicles, with making misleading statements related to its proposed merger with SPAC RMG Acquisition Corp. The complaint alleged that before the merger closed, the CEO of the target company knew or should have known that a cell shortage had developed and that the company's suppliers were not able to deliver enough cells for the company to meet its previously disclosed revenue projections. The CEO agreed to pay a $150,000 civil penalty and to a three-year officer and director bar to settle the charges.[92]

It remains to be seen how the SEC will view the new SPAC rules under incoming Chair Atkins or whether there will be meaningful changes in enforcement priorities in the SPAC sector. However, it seems likely that the SEC will continue to bring charges in bread-and-butter cases like these involving misleading statements made to investors about proposed mergers.

Finally, as we discussed in last year's *Review*, the Delaware Chancery Court has continued to weigh in on SPAC-related issues, most notably by following its groundbreaking decision in *In re MultiPlan Corp. S'holders Litig*., where it applied traditional fiduciary principles in the SPAC context and allowed fiduciary-duty claims to proceed against the board of directors, the sponsor, and the controlling shareholder of a SPAC.[93]

In the latest SPAC-related decision, Vice Chancellor Glasscock noted "the peculiar incentive structure" of SPACs, "which tend to pit the interests of the creating actors (who have founder shares that have value only if the stockholders approve a merger within a specific time) against the common shareholders" who have redemption rights and the power to stymie any merger, which "intensify the agency problems inherent in the form, considerably."[94] Although the court acknowledged that the "allegations here are not strong, compared with other SPAC cases that have survived motions to dismiss," the court nonetheless denied a motion to dismiss.[95]

The court found that the claims asserted in *Solak v. Mountain Crest Capital LLC* were direct, not derivative and, applying entire fairness review, allowed fiduciary-duty claims to proceed as a result of the alleged conflict of interest of independent directors who received founders shares. The court reasoned that the award of founders shares "created an incentive on the part of [the directors] to support any deal, else their equity become worthless."[96] The decision was notable because it "appears to be the first to deny a motion to dismiss s*olely* on an affirmative statement of investment value in conflict with a failure to also disclose net cash," even as the court acknowledged that "failure to disclose net cash share is not, in itself, a *per se* breach of duty" under Delaware law.[97]

The court explained that in light of a $10 valuation in the proxy and the failure to disclose that the actual amount of cash being placed into the merger was 25% less than disclosed, "it is reasonably conceivable that a stockholder would find the cash per share figure material to the decision whether to redeem or invest in the de-SPACed company" and allowed the case to proceed.[98]

While the defendants successfully obtained dismissal of a suit asserting breach of fiduciary duty and other claims against a SPAC, its CEO, and the sponsor in *In re: Hennessey Capital Acquisition Corp. IV Stockholder Litigation*, that case turned on the fact that the complained-of changes to the post-merger business model of the combined company were based on a study received by the board after the de-SPAC merger closed. Noting that "SPAC lawsuits are ubiquitous in Delaware" and that "[r]emarkably similar complaints accuse SPAC directors of breaching their fiduciary duties based on flaws in years-old proxy statements that became problematic only when the combined company underperformed," Vice Chancellor Will cautioned the plaintiffs that "[p]oor performance is not, however, indicative of a breach of fiduciary duty[,] [c]onflicts are not a cause of action[,] [a]nd pleading requirements exist even when entire fairness applies."[99]

The court dismissed the claims because the company's challenged action was driven by information received after the merger, and not (as in the other SPAC-related cases like *MultiPlan*) where concrete facts about the merger target's prospects were known or knowable by the SPAC but kept from public stockholders. The court explained that "[t]o allow these claims to proceed would only serve to launch 'an extensive, litigious fishing expedition for facts through discovery in the hope of finding something to support them.'"[100]

The Delaware courts' continued application of the entire fairness standard, which has been described as Delaware's most onerous standard of review, suggests that defendants may face an uphill battle in moving to dismiss SPAC-related claims depending on the facts asserted.

CRYPTOCURRENCY

The crypto sector experienced a remarkable resurgence in 2024 despite an active year of enforcement by the SEC and DOJ. The bull market in cryptoassets continued, buoyed by the SEC's approval of spot Bitcoin ETF shares at the start of 2024.[101] Combined with the approval of Ethereum ETFs in 2024, these actions signaled increasing regulatory acceptance of cryptoassets as mainstream investment vehicles.[102] The total crypto market capitalization increased from $1.7 trillion in January to $3.27 trillion by year-end 2024 to reach a historic high, surpassing the previous market capitalization high of $2.8 trillion in 2021.[103]

Perhaps the most substantial boost to the crypto sector was the announced support of the industry by the incoming Trump administration. In the aftermath of the election, there were several developments favorable to the crypto sector. In December 2024, President-elect Trump announced his intention to nominate crypto supporters to key positions in his cabinet, including venture capitalist David Sacks as the AI & Crypto Czar.[104] As a backer of cryptocurrencies and co-founder of an AI-based work chat platform, his position could impact the SEC's role as the current primary regulator of cryptocurrencies.[105]

In January 2025, acting SEC Chair Uyeda announced the launch of a crypto task force dedicated to developing a "comprehensive and clear regulatory framework for crypto assets," to be led by SEC Commissioner Peirce, a vocal skeptic of the SEC's crypto enforcement efforts under the agency's former

Chair Gensler.[106] The press release announcing the new crypto task force expressly criticized the prior approach: "To date, the SEC has relied primarily on enforcement actions to regulate crypto retroactively and reactively, often adopting novel and untested legal interpretations along the way."[107]

Another notable development was the new President's announcement of a so-called "memecoin," branded as $Trump, that surged from its offering price of $10 to a high of $74.59.[108] A separate Trump-linked crypto project also announced that it had completed an initial token sale, raising $300 million, and stated it would look to issue additional tokens.[109]

On January 23, 2025, the White House released a much-anticipated Executive Order relating to digital assets, entitled S*trengthening American Leadership in Digital Financial Technology*, stating the new administration's policy to support "the responsible growth and use of digital assets, blockchain technology, and related technologies" by, among other things, "protecting and promoting the ability of individual citizens and private-sector entities alike to access and use for lawful purposes open public blockchain networks without persecution, including the ability to develop and deploy software, to participate in mining and validating, to transact with other persons without unlawful censorship, and to maintain self-custody of digital assets."[110] Among other things, the Executive Order paves the way for the creation of a national digital stockpile. On the same date, the SEC rescinded Staff Accounting Bulletin 121, which required financial institutions to classify cryptocurrencies as liabilities on their balance sheets, significantly raising the financial risks for banks seeking to offer crypto custody services.[111]

The crypto sector's improved performance occurred in the midst of continued enforcement actions against both individuals and entities in the crypto sector. In 2024, the SEC brought 13 crypto-related enforcement actions, a decline from the 35 crypto-related actions announced in 2023.[112] Despite the lower number of enforcement actions, the SEC reported a record $8.2 billion in crypto-related judgments, the highest ever.[113] Over half of this amount was attributed to the SEC's action against Terraform Labs PTE, Ltd. and its founder Do Kwon. In *SEC v. Terraform Labs PTE, Ltd.*, the Enforcement Division's first-ever crypto-related trial, a jury found the company and Kwon guilty of securities fraud after less than two hours of deliberations, and Terraform and Kwon agreed to pay nearly $4.5 billion in disgorgement, prejudgment interest, and penalties.[114]

Other notable government actions targeting the crypto sector included the sentencing of former Binance CEO Changpeng Zhao to four months in prison after he pleaded guilty to violating federal money-laundering laws. The SEC announced settled charges against BarnBridge DAO for failing to register its offering and sale of structured cryptoassets as securities, and the company agreed to disgorge nearly $1.5 million of proceeds from the sales of its structured cryptoasset securities.[115] The SEC and DOJ announced parallel actions against Xue Lee and Brenda Chunga for their roles in an alleged fraudulent pyramid scheme, Hyperfund, that raised more than $1.7 billion from investors based on claims of high investment returns from supposed crypto-mining operations and association with a *Fortune* 500 company.[116]

Last year also saw the sentencing of Sam Bankman-Fried to 25 years in prison following a jury verdict on securities fraud and other federal charges. The criminal case followed the spectacular collapse of crypto platform FTX in 2022.[117]

The issue of what digital tokens are deemed by the SEC to be a security continued to percolate last year. The SEC announced settled charges against eToro USA LLC, an Israel-based platform for secondary cryptoasset training, in which it alleged that the company operated an unregistered broker and unregistered clearing agency in connection with its trading platform that facilitated the purchase and sale of certain cryptoassets as securities.[118] Citing the SEC's order, the company announced that going forward, the only cryptoassets its U.S. customers can trade on its platform will be Bitcoin, Bitcoin Cash, and Ether but would halt trading in all other cryptoassets after 180 days. It also agreed to pay $1.5 million to settle the charges. The settlement appears to reflect the SEC's conclusion that Bitcoin, Bitcoin Cash, and Ether are not securities subject to SEC regulation but the other digital assets offered on eToro's platform are.

In last year's *Review*, we highlighted the decision in *SEC v. Ripple Labs* and its potential support for secondary cryptoasset trading among retail investors on public crypto exchanges.[119] In *Ripple*, the district court agreed that while Ripple's token was an investment contract subject to federal securities laws under the *Howey* test, the token was "not in and of itself a 'contract, transaction, or scheme'" that would place it under SEC regulatory authority.[120] The SEC filed its Notice of Appeal in October 2024 and, assuming the SEC continues to litigate the case under the new administration, a decision is expected in 2025.[121]

However, in the wake of *Ripple*, crypto firms and other parties in the sector continued to challenge the SEC's assertion that certain cryptoassets as sold are investment contracts and the agency's regulatory authority over those transactions.[122] For example, in April 2024, in anticipation of an SEC enforcement action, Consensys Software Inc. preemptively sued the SEC, seeking a court order to halt the SEC's investigation and attempts to classify Ether, the native token to the Ethereum blockchain, as a security and that its Staking and Swaps programs were not securities violations.[123]

After the lawsuit was filed, the SEC staff concluded the investigation as to Ether and informed the company that it did not intend to recommend enforcement action, suggesting that the SEC was not asserting that Ether was a security. The SEC approved Ethereum ETFs in July 2024 and made explicit that it did not consider Ether to be a security in the eToro settlement discussed above.[124] Consensys had also asserted in its suit against the SEC that it neither acted as a broker nor offers or sells securities through its Swaps and Staking programs, and that any investigation or enforcement action as to those products would exceed the SEC's authority. However, the SEC later charged Consensys for the alleged unregistered offer and sale of securities through MetaMask Staking, and for acting as an unregistered broker in transactions involving liquid staking tokens and staked assets.

While staked tokens are generally locked up and cannot be traded while staked, liquid staking tokens can be bought and sold freely.[125] Consensys operates a MetaMask self-custodial crypto market, which enables users to store their cryptoassets as well as buy, send incoming, and swap tokens. It remains to be seen if the SEC will continue litigating the action under incoming Chair Atkins.

In October 2024, Crypto.com sued the SEC following its receipt of a Wells notice of planned enforcement action.[126] In its complaint, Crypto.com sought to prevent what it alleged to be an unlawful expansion of the SEC's authority into regulating secondary-market sales of certain digital assets.[127] The suit alleged that the SEC had improperly issued a de facto rule that secondary market sales of certain digital assets are so-called cryptoasset securities, without following the necessary administrative procedures. Crypto.com withdrew the lawsuit reflecting the crypto sector's optimism that the incoming administration would likely prove to be more open to the crypto sector.[128]

More recently, on January 13, 2025, the Third Circuit held that the SEC's rejection of Coinbase, Inc.'s request for "rules addressing how and when digital assets qualify as securities subject to existing securities laws" was "conclusory and insufficiently reasoned."[129] Although the court disagreed with Coinbase's contention that the SEC should be required to institute a notice-and-comment rulemaking proceeding, the court remanded the case for the SEC to provide a "sufficiently reasoned disposition" of Coinbase's request.[130]

Filings of crypto-related private securities class actions in 2024 decreased to pre-2020 levels. Plaintiffs filed eight securities suits related to cryptocurrency in federal courts, representing a sharp decline from the 17 securities suits filed in 2023 and the 23 suits filed in 2022.[131] As in years past, many of the claims were predicated on alleged sales of unregistered cryptocurrency assets or unregistered crypto-related products in violation of the Securities Act.[132] Two of last year's lawsuits involved "memecoins," a volatile genre of cryptocurrency based on characters or memes, and the plaintiffs alleged that the defendants leveraged their social media influence or celebrity status to drive up the asset's value to profit before the valuation ultimately plummeted resulting in losses to investors.[133]

Similarly, two other suits alleged scams involving non-fungible tokens ("NFTs"), in which the defendants allegedly sold NFTs to investors with the promise of high returns and other benefits, only to disappear or fail to deliver on their promises.[134]

FALSE AND MISLEADING STATEMENTS

Unanimous Supreme Court Clarifies Pure Omissions in Violation of Item 303 Do Not Give Rise to Private Claims Under Section 10(b)

Under Section 10(b) of the Exchange Act and Rule 10b-5, issuers of registered securities must not make false statements of material fact or omit material facts necessary to make statements made, in light of their circumstances, not misleading.[135] Section 13(a) of the Exchange Act requires issuers to file periodic informational statements, including Management's Discussion and Analysis of Financial Conditions and Results of Operation ("MD&A") disclosures, in which they must provide information required by Item 303 of Regulation S-K.[136] Item 303 requires disclosure of "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[137]

A unanimous Supreme Court addressed whether violations of Item 303 can form the basis for private claims under Section 10(b) of the Exchange Act and Rule 10b-5(b) in *Macquarie Infrastructure Corporation v. Moab Partners, L.P.*[138] The Court's decision clarifies that the failure to disclose information required by Item 303 can support a Section 10(b) and Rule 10b-5(b) claim only if the omission renders other affirmative statements misleading.[139]

The case arose from Macquarie's 2018 announcement disclosing a drop in the amount of storage contracted for use by one of its subsidiaries in part due to the decline in the No. 6 fuel oil market.[140] The subsidiary at issue operates terminals to store bulk liquid commodities, including No. 6 fuel oil, which is a byproduct of the refining process with a typical sulfur content around 3%.[141] Two years earlier, in 2016, the United Nations' International Maritime Organization had adopted a regulation that capped the sulfur content of fuel oil used in shipping at 0.5% by 2020.[142] Between 2016 and 2018, Macquarie had not made any disclosure regarding this regulation.[143] The 2018 disclosure caused Macquarie's stock price to drop by 41%.[144]

Plaintiff Moab Partners sued Macquarie under Section 10(b) and Rule 10b-5(b), alleging that Macquarie's failure to disclose the extent to which its subsidiary's storage capacity was devoted to No. 6 fuel oil and the impact of the looming international ban rendered its public statements false and misleading.[145] Macquarie moved to dismiss.[146] It argued that its alleged violation of Item 303 was a pure omission, and that Moab Partners had failed to identify any statements that were rendered misleading by the omission.[147] In the absence of an allegedly misleading affirmative statement, Macquarie argued Moab Partners' Section 10(b) and Rule 10b-5(b) claims must be dismissed.[148]

The district court granted the motion to dismiss.[149] As we discussed in last year's *Review*, Moab Partners appealed to the Second Circuit, which reversed the district court's decision.[150] The Second Circuit reasoned—contrary to the Ninth Circuit—that Macquarie's alleged violation of Item 303 could sustain Moab's Section 10(b) and Rule 10b-5(b) claims.[151] The Supreme Court granted certiorari to resolve the circuit split.[152]

The Supreme Court pointed to the difference between pure omissions, where a company fails to make any disclosure, and half-truths, where a company fails to disclose all material facts concerning a topic.[153] The Court noted that Rule 10b-5(b) covers half-truths, because half-truths are "representations that state the truth only so far as it goes, while omitting critical qualifying information."[154] Rule 10b-5(b) does not impose an affirmative duty to disclose any and all material information.[155] Therefore, the rule requires disclosure only where it is necessary to prevent other statements from becoming misleading.[156]

The Supreme Court noted that, unlike Section 10(b), Section 11(a) of the Securities Act of 1933 imposes liability for pure omissions by expressly prohibiting any registration statement that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[157] Section 10(b) and Rule 10b-5(b) do not contain any comparable language.[158] As a result, the Court reasoned that the failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim only if the omission renders other affirmative statements misleading.[159]

The Supreme Court rejected Moab Partners' argument that a plaintiff does not need to plead any statements rendered misleading by a pure omission because reasonable investors know that Item 303 requires an MD&A to disclose all known trends and uncertainties.[160] The Court noted that such an argument fails for three reasons: (1) it would require the Court to ignore the "statements made" language in Rule 10b-5(b); (2) it would shift the focus of Rule 10b-5(b) and Section 10(b) from fraud to disclosure; and (3) it would render Section 11(a)'s pure omission clause superfluous by making every omission of a fact "required to be stated" also a misleading half-truth.[161]

The Supreme Court also rejected Moab Partners' argument that its ruling would allow broad immunity for companies that make pure omissions.[162] The Court observed that private parties remain free to bring claims based on Item 303 violations that create misleading half-truths, and that the SEC remains free to prosecute violations of Item 303.[163]

Supreme Court Dismisses Facebook Petition Following Oral Argument as "Improvidently Granted"

In *Facebook, Inc. v. Amalgamated Bank*, the Supreme Court granted certiorari to consider whether a risk disclosure in the "Risk Factors" section of a Form 10-K filing is false or misleading when it does not disclose that the warned-of risk has materialized in the past, even if the past event presents no known risk of ongoing or future business harm.[164]

In *In Re Facebook, Inc. Securities Litigation*, a divided panel of the Ninth Circuit revived securities fraud claims challenging Facebook's disclosures about Cambridge Analytica's misuse of Facebook user data.[165] The majority held that the plaintiffs adequately pleaded falsity as to statements in the company's Form 10-K risk disclosures because "Facebook represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk already had transpired."[166]

The dissent stated that none of the alleged risk factor statements were false or misleading, because although Facebook may have known of improper third-party misuse of Facebook users' data at the time it made the statements, the plaintiffs did not allege that Facebook knew that those breaches would lead to immediate harm to its business. According to the dissent, "if it was 'unknown' whether the breach led to reputational or business harm, it's hard to see how the risk factor statements were untrue."[167]

In Facebook's certiorari petition, the question presented was whether a risk disclosure required by Item 105 is false or misleading when it does not disclose that the warned-of risk has materialized in the past, even if the past event presents no known risk of ongoing or future business harm.[168] The company argued that the Court should reverse the Ninth Circuit because Item 105 requires the disclosure of "a possibility of *future* harm," that risk disclosures are "inherently forward-looking," and typically signal that, if some triggering event were to occur, business harm "could" or "may" result.[169]

It also requested the Court to resolve a circuit split, noting that six circuits require risk factors to be disclosed only if the complaint alleges that the company knew that the warned-of harm to its business has materialized or is imminent, while the Sixth Circuit does not require any risk factor disclosures of past events because risk disclosures "are inherently *prospective* in nature."[170] Facebook asserted that the Ninth Circuit had adopted an "extreme, outlier" position that would result in "overwarning" in risk factor disclosures that would be less useful to investors as they would be overwhelmed with irrelevant information about past instances with no current relevance.[171]

A number of parties filed *amicus curiae* briefs in support of Facebook arguing that risk disclosure claims have contributed to a wave of meritless securities fraud suits and that the Ninth Circuit's approach would impose heavy compliance burdens because "the only way for a company to comply with the Ninth Circuit's rule is to disclose every incident that conceivably *could* lead to a warned-of harm."[172] The federal government filed an *amicus curiae* brief supporting the plaintiffs below and requesting to participate in oral argument.[173] The government argued that in the securities context, a forward-looking statement of risk can be misleading insofar as it implies that the relevant risk has not already come to fruition. "The antifraud provisions of the securities laws prohibit half-truths, not just flat-out lies, and there is no exception to that principle for risk-factor statements."[174]

Oral argument in the Supreme Court occurred on November 6, 2024, during which the Justices posed a range of hypothetical scenarios but appeared to struggle with determining the precise circumstances when a company must disclose that a past event could cause future damage to its business. Several Justices questioned whether the Court should have agreed to hear the case, and just a few weeks later, on November 22, 2024, the Court dismissed the petition as improvidently granted.[175]

Ninth Circuit Affirms Dismissal of Securities Fraud Claims Against Biopharmaceutical Company, Holding Announcement of COVID-19 "Cure" Not False When Considered in Context

In *In re Sorrento Therapeutics, Inc. Securities Litigation*, the Ninth Circuit affirmed dismissal of a securities fraud suit that alleged the defendants falsely represented that Sorrento

Therapeutics had discovered a “cure” for COVID-19 to boost the company’s stock price and improve its allegedly “dire” financial situation.[176] The decision is a reminder that context matters when courts evaluate alleged misstatements related to early-phase biopharmaceuticals: “[M]any initially promising discoveries do not survive the testing required for [U.S. Food and Drug Administration (“FDA”)] approval; failure to survive testing is hardly evidence that the developer’s initial enthusiasm was unwarranted or inherently false at the time.”[177]

The court likewise explained that, in the absence of suspicious insider trading, there were plausible innocent explanations for the challenged statements.[178] “Indeed, in the spring of 2020, the possibility of a cure for COVID-19 generated many innocent explanations for Defendants’ statements and the market’s reaction to those statements.”[179]

The complaint focused on statements by the company and senior executives in a press release and two news articles on May 15, 2020, at the height of the COVID-19 pandemic, announcing a promising development of a COVID-19 antibody.[180] The press release stated that the antibody “demonstrated 100% inhibition of SARS-CoV2-virus infection in an *in vitro* virus infection experiment at a very low antibody concentration.”[181] The first article stated that Sorrento had partnered with Mount Sinai Healthcare System to develop an antibody cocktail, that the antibody was likely to be the first antibody in the cocktail, and that Sorrento could provide up to 200,000 doses per month.[182] The second article stated, among other things, that “if the Phase 1 trial starts by the beginning of July, they will know within a week or two whether the antibody is having an effect.”[183] The company’s stock price rose after the initial announcements, but within a week, several articles questioned the importance of the development, and Sorrento’s stock price dropped.[184]

Following the stock drop, a shareholder filed a securities fraud suit against the company, its chief executive officer, and its vice president. The crux of the complaint was that the defendants misled investors by falsely claiming to have developed a cure for COVID-19. In its pleadings, the plaintiff emphasized the defendants’ statements such as, “We want to emphasize there is a cure. There is a solution that works 100 percent,” and, “[I]f we have the neutralizing antibody in your body, you don’t need the social distancing. You can open up a society without fear.”[185]

In April 2022, the district court rejected the plaintiff’s argument that the defendants had misled investors, and granted the defendants’ motion to dismiss.[186] The district court concluded that the assertion of a “100 percent” solution and “cure” was “a statement of corporate optimism”—”puffery”—that “cannot state an actionable material misstatement of fact under federal securities law.”[187] The district court noted that the defendants’ alleged misstatements were coupled with explanations elsewhere that made clear that the antibody was still under development: namely, that the antibody was found during a preclinical trial, the company expected to have enough material to start a phase 1 clinical trial within two months, and “quick approval” by the FDA would make the antibody treatment available within months.[188] Reviewing the alleged misstatements in context, the district court found that the plaintiff had not pleaded the existence of false or misleading statements.[189]

The district court also determined that the plaintiff had failed to establish a strong inference of scienter.[190] The plaintiff asserted scienter based on allegations that the defendants had a financial opportunity presented by the pandemic, access to and knowledge of real-time antibody data, and other financial considerations like a need to eliminate high-interest debt.[191] But the district court was not persuaded, finding that generalized financial motivations did not raise a strong inference of scienter, the plaintiff had alleged no contemporaneous statements by the defendants showing their knowledge of purported falsity, and the announcement of the antibody was contemporaneous with disclosures that the antibody treatment remained in preclinical stages.[192]

On appeal, a unanimous panel of the Ninth Circuit affirmed.[193] The court held that, in context, the defendants’ representations were not false, and the plaintiff’s pleadings did not give rise to a strong inference of scienter.[194] As to falsity, the court concluded that “[w]hile Defendants’ enthusiasm for [the antibody] might have been overblown, in context, their statements were not materially misleading.”[195] The court explained that “[a] fair reading of the press release and the articles reveals there was no promise of an immediate 100% cure,” also noting that all of the articles at issue revealed that the antibody’s development was only at the lab testing stage.[196] The court explained that the plaintiff had failed to show “that a reasonable person reading the articles would think that Defendants were representing that [the antibody], without further testing, was an immediate cure for COVID-19.”[197]

Finally, as to scienter, the Ninth Circuit concluded that even if the defendants' statements could be construed as misleading, the plaintiff had not pleaded any facts giving rise to the requisite strong inference that the defendants intended to manipulate the price of its stock through promotion of the antibody.[198] The plaintiff argued that it had adequately alleged scienter through a combination of facts that included the individual defendants' management roles, their access to testing data, the "blatant falsity" of the defendants' statements, and the company's "dire financial situation."[199] But the court explained there was no indication that the individual defendants' roles gave them access to information that was not mentioned in the challenged press release or articles; the defendants' initial assertions, read in context, did not promise an immediate 100% cure to COVID-19; and, although the company benefited from the market's initial response to the announcement of the antibody, "Sorrento had taken steps to meet its 'dire financial situation' well before the announcements of [the antibody]."[200] The court also noted the lack of suspicious stock sales or purchases by the company or insiders in connection with the one-week bump in the price of the company's stock, further undermining any inference of scienter.[201]

First Circuit Affirms Dismissal of Securities Suit Against 3D Printer Company

In *Zhou v. Desktop Metal, Inc.*, a unanimous panel of the First Circuit affirmed dismissal of a securities suit against a company that manufactured 3D printing technologies that it sold to dental offices for 3D printing of dentures and teeth.[202] The complaint alleged that the company illegally manufactured its signature products at an unregulated facility in violation of FDA regulations.

Noting that it decides Section 10(b) cases on a statement-by-statement basis, and considering the immediate context of each statement, the court concluded that the district court correctly determined that the complaint failed to plead any materially false or misleading statement or omission. The court explained that while the plaintiff plausibly alleged corporate mismanagement and harm to the defendant's customers, "not all claims of wrongdoing by a company make out a viable claim that the company has committed securities fraud."[203] The court also upheld dismissal of the plaintiff's scheme liability claim because the plaintiff addressed the claim in a "skeletal way, at best" in her response to the defendants' motion to dismiss in the district court and thus failed to preserve the claim for appeal.[204]

Desktop Metal specializes in 3D printing. In 2021, it acquired EnvisionTEC, Inc., a company specializing in 3D printing solutions for medical, dental, and industrial markets, and hired EnvisionTEC's CEO to run it as a wholly owned subsidiary. The complaint focused on disclosures about products manufactured by EnvisionTEC: proprietary resins used for 3D printing of dentures and teeth, known as Flexcera Smile and Flexcera Base, and the PCA 4000 curing box, which used light to harden dental products. The complaint alleged that the defendants instructed staff to manufacture Flexcera at facilities not registered with the FDA and to conceal that unlawful activity by repackaging the Flexcera with false labels in violation of the FDA's establishment registration and labeling requirements.

The complaint also alleged that the defendants marketed the PCA 4000 curing box for use with Flexcera even though it had not been certified by the FDA for that use, and that the company's application for FDA clearance of Flexcera had relied on results based on products cured with another device, not the PCA 4000.

The complaint alleged that internal whistleblowers emailed high-level executives with concerns about the production and bottling of non-FDA complaint resin. In response, the company publicly announced it had hired a third party to conduct an independent investigation of its manufacturing and product compliance practices and separately disclosed that the CEO of EnvisionTEC had resigned. Desktop's stock price declined by 10% after these announcements.

A week later, the company announced that it had notified the FDA about its compliance issues with Flexcera resin and the PCA 4000 and its stock fell again, by 15%. Desktop ultimately issued two recalls, one for the Flexcera Smile resin and one for PCA 4000 units sold to non-industrial users. The plaintiffs filed suit, alleging that the defendants made multiple false or misleading statements or omissions in violation of Section 10(b) of the Exchange Act and Rule 10b-5 and scheme liability claims under Rule 10b-5(a) and (c). The district court dismissed the complaint for failure to state a claim.

On appeal, the First Circuit affirmed. The court concluded that the plaintiff had not plausibly alleged that statements on Desktop's website describing Flexcera Base and Flexcera Smile as FDA-cleared medical devices were either false or misleading given that the complaint acknowledged that Flexcera had been cleared by the FDA in May 2021 and the plaintiff did not allege that the website statements were published before that date.

The court also held that the plaintiff failed to explain how the company's failure to disclose that Flexcera was being produced in a facility not registered with the FDA rendered the website statements "so incomplete as to mislead."[205] The court held that the plaintiff had "not connected the dots in her complaint to explain why the omission would render defendants' accurate statement about [FDA] clearance misleading, as required by the PSLRA."[206] The court agreed with the district court that Desktop's statement that failure to comply with FDA regulations would have an adverse impact on its business and reputation was best understood as a cautionary statement, which disclaimed full compliance rather than promised it. The court also held that the plaintiff did not sufficiently plead that a Desktop executive's statement about "adding capacity to meet the robust demand" for Flexcera was rendered misleading by failing to disclose that EnvisionTEC was producing some of the product at an unregistered facility.[207]

Noting that when making a voluntary disclosure, a company that reveals one fact is not required to "reveal all others that, too, would be interesting, market-wise," the court explained that a company is required only to reveal the facts necessary to make the existing statement "so incomplete as to mislead." *Id*. The court further held that even if the complaint plausibly alleged corporate mismanagement and harm to the company's customers related to Flexcera, not all claims of wrongdoing by a company make out a viable claim that the company has committed securities fraud.

The court also rejected the plaintiff's claim that statements related to the PCA 4000 were actionable misstatements. The statements included an investor presentation that described the benefits of Flexcera as "more resistant" to fracture and water on a slide that included a picture of the PCA 4000 as well as statements in an interview that Flexcera could be used with EnvisionTEC printers to produce eight sets of dentures in two hours. The other challenged statements were posted on Desktop's website stating that Flexcera was compatible with all of the company's products.

The First Circuit agreed with the district court that none of the statements suggested that the PCA 4000 was actually responsible for achieving or optimizing Flexcera's touted qualities and that there was no plausible connection between the speed at which EnvisionTEC printers could produce dentures made with Flexcera and the PCA 4000, which is a curing unit, not a printer. The court also concluded that the complaint did not allege that the company claimed Flexcera was compatible with all of its products.

The court also rejected the plaintiff's argument that all of the statements were misleading because they failed to mention the company's undisclosed sales practice of pushing the untested PCA 4000 on customers for curing Flexcera resin. "[The plaintiff] makes no argument that defendants' questionable sales strategy pushing the PCA 4000 was within the scope of the [challenged] statements."[208] Finally, the court concluded that "a laundry list of statements defendants made about the qualities of Flexcera generally," referring to its superior aesthetics, strength, and flexibility, were not actionable because they had no connection to the PCA 4000.[209]

The court also held that the plaintiff failed to preserve her scheme liability claim because she failed to make any argument about the claim in opposing the motion to dismiss in the district court. Noting that "[i]t is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal," the court explained that parties cannot merely mention a possible argument "in the most skeletal way" to the district court to preserve a claim for appeal.[210] The court rejected the plaintiff's argument that she was not required to address the claim because the defendants failed to do so in their motion to dismiss, which clearly requested dismissal of all claims. "In the normal course, a court would expect such an argument to feature prominently in the opposition to a motion to dismiss. And the burden was on [plaintiff] to set out this argument in her responsive brief."[211]

The court likewise rejected the argument that the district court violated the party presentation principle by dismissing her entire complaint given that dismissal was granted only after the defendants requested that exact relief. The court easily dispatched the plaintiff's argument that when faced with a motion to dismiss, the district court had the obligation to comb through all 200 pages of the complaint for any plausible legal theory and assess whether the defendants adequately assessed each theory regardless of whether the plaintiff raised it in her brief. “This would be unworkable to say the least – we require parties to make their argument squarely and distinctly to the district court precisely because ‘[o]verburdened trial judges cannot be expected to be mind readers.’”[212]

Second Circuit Revives Securities Fraud Claims Against Outside Auditor in Amended Decision; Vacates Dismissal of Securities Act Claims Against Company, Officers, Directors, and Underwriters

In *New England Carpenters Guaranteed Annuity and Pension Funds v. AmTrust Financial Services, Inc.*, the Second Circuit reversed course in a securities suit arising from restatements related to improper revenue recognition and bonus expense accounting.[213] The court agreed with the district court that the audit opinion of outside auditor BDO contained potentially actionable misstatements of opinion because it was plausible that the partner who signed the audit opinion disbelieved the statement that the audit was conducted in accordance with Public Company Accounting Oversight Board (“PCAOB”) standards.

However, the court disagreed with the lower court’s finding that the alleged misstatements were not material, noting that the allegedly false certification subjected investors to the risk that the financial statements were unreliable. Addressing the issue of scienter, the court also allowed the Section 10(b) and Rule 10b-5 claims against the auditor to stand, holding that the plaintiffs did not rely on “mere accounting irregularities” but rather alleged that BDO consciously covered up its misrepresentation that the audit complied with PCAOB standards.[214]

In contrast, the court concluded that the complaint did not adequately plead scienter based on the AmTrust defendants’ motive and opportunity to commit fraud. The court also vacated dismissal of the Securities Act claims against the company and certain officers and directors based on the company’s past recognition of revenue for extended warranty contracts using the time-of-sale approach, as well as its practice of recording discretionary bonuses as expenses when they were paid rather than when earned. The court also revived Section 11 and 12 claims against underwriters in connection with two offerings that incorporated by reference the erroneous financial reports.

The decision is notable because securities fraud claims against outside auditors seldom are sustained. In addition, the court, which had previously issued a decision affirming dismissal of all claims, changed course on materiality after the SEC and other *amici curiae* urged reconsideration of its holding that the complaint did not adequately allege that the misstatements in BDO’s audit opinion were material and failed to allege any link between the auditor’s misstatements and the specific errors in the company’s SEC filings.[215] In its amended decision, the court concluded instead that “[t]he absence of BDO’s certification would have been significant, for without it, BDO could not have issued an unqualified opinion, which then would have alerted investors to potential problems in the company’s financial [results].”[216]

The complaint alleged AmTrust made a number of acquisitions that fueled the explosive growth of its property and casualty insurance business, including Warrantech, a company that provided extended service plans (“ESPs”) and other warranty programs. Before the acquisition, the SEC had investigated Warrantech’s practice of recognizing the full amount of revenue it received from ESPs and other service contracts at the time the contracts were entered into and services commenced. The SEC instructed the company to recognize revenue on a straight-line basis over the life of the contracts, and Warrantech publicly announced it would comply with that guidance and revise its revenue recognition practices.

For unclear reasons, AmTrust reverted back to the original time-of-sale accounting after the acquisition. The complaint alleged that from 2012 through 2016, the price of AmTrust stock skyrocketed. As early as 2013, however, financial commentators and analysts began speculating about the company’s financial practices, suggesting that AmTrust may have used accounting gimmicks to inflate its earnings and net equity. In 2015 and 2016, the company filed registration statements incorporating by reference its annual and quarterly financial reports.

In 2017, AmTrust issued a restatement, revealing that its income and earnings had been significantly overstated since 2012. The restatement identified two accounting errors: the mistaken upfront recognition of revenue on certain ESP and warranty contracts instead of recognizing the revenue on a straight-line basis over the life of the contract, and the erroneous accrual of discretionary employee bonus expenses in the year paid rather than in the year earned. In 2017, a *Wall Street Journal* article disclosed that BDO had failed to complete the necessary audit work before issuing its 2016 audit opinion and described how BDO had covered up its incomplete work. The plaintiffs filed suit alleging that the company, its officers and directors, its former auditor, and the underwriters of the public offerings misstated the company's financial condition and results in violation of Sections 11, 12, and 15 of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5.

On reconsideration, the Second Circuit once again agreed with the district court that the plaintiffs had adequately alleged that the audit opinion contained potentially actionable misstatements of opinion because it was plausible that the partner who signed the audit opinion disbelieved the statement that the audit was conducted in accordance with PCAOB standards. The court pointed to several key facts in the complaint, including that the engagement partner and another partner at the audit firm failed to complete the necessary checks and audit work papers before issuing the audit opinion, signed several audit work papers without reviewing them, and failed to verify that all necessary audit work had been performed.

The court also noted that the complaint alleged that the SEC found that both audit partners had violated PCAOB standards. The court concluded that the plaintiffs had adequately alleged that the audit opinion contained potentially actionable misstatements of opinion because the statement that BDO believed that its audit work provided a reasonable basis for its opinion "would lead a reasonable investor to conclude that BDO had conducted 'some meaningful inquiry'" when in fact it had not.[217]

The court changed its materiality analysis on reconsideration and disagreed with the district court that the alleged misstatements in the audit opinion were not material. It also reconsidered its prior holding that the standardized language in the audit certification was so general that a reasonable investor would not rely on it and that the plaintiffs did not adequately plead a link between BDO's misstatements and the specific errors in AmTrust's financial statements. The SEC had urged the court to reconsider its materiality analysis because "[t]hat audit certifications use a standardized form prescribed by the PCAOB does not render them less meaningful. Instead, the form language imports greater meaning by providing a clear and consistent signal permitting investors to quickly classify the associated investment risk."[218]

The SEC also argued that the court's concern about the plaintiffs' failure to allege a link between the misstatements and specific errors in the financial statements was misplaced because "[a] false certification concealing a deficient audit has independent significance: it eliminates the basis for investors' reliance on the auditor and subjects investors to increased (and hidden) risk."[219] The court adopted this reasoning in its amended opinion, holding that "BDO's certifications . . . succinctly conveyed to investors that AmTrust's audited financial statements were reliable" and "[t]he absence of BDO's certification would have been significant" because its absence would have alerted investors to potential problems in the company's financial reports.[220] Because the false certification subjected investors to the risk that AmTrust's financial statements were unreliable, the court held that the plaintiffs were not required to allege a link between the false certification and specific errors in the financial statements to establish materiality.

The court vacated the dismissal of the Section 11 and 12 claims against the company and certain officers and directors, concluding that statements about the company's accounting for ESP and warranty contract revenue were actionable statements of opinion. As a preliminary matter, the court held that the district court's determination that the financial statements reflected the exercise of subjective judgment that were non-actionable statements of opinion was based on prior circuit precedent and did not reflect the court's more recent guidance in *Abramson v. Newlink Genetics Corp*.[221]

In *Abramson*, the Second Circuit recognized that the Supreme Court in *Omnicare* unequivocally "rejected the proposition that there can be no liability based on a statement of opinion unless the speaker disbelieved the opinion at the time it was made."[222] *Abramson* further recognized that *Omnicare* expanded the scope of issuer liability for statements of opinion by pointing out that a statement of opinion, even if believed, may nonetheless be actionable if it contains a factual misstatement or is rendered misleading by the omission of material facts.[223] In the context of a securities transaction, "a reasonable investor expects that opinion statements 'rest on some meaningful ... inquiry,' [that] fairly align with the information in the issuer's possession at the time, and do not reflect baseless, off-the-cuff judgments."[224]

Although the restatement acknowledged that the time-of-sale approach to revenue recognition from the ESP and warranty contracts resulted in material misstatements of income and revenue, on appeal AmTrust argued that its initial representations related to administrative services for ESP and warranty contracts were statements of opinion, not fact, because its determination of when to recognize the revenue was a subjective judgment call. Noting that "no one disputes that GAAP permits time-of-sale recognition only if some historical evidence justified doing so," the court concluded that "the alleged absence of such evidence, if accepted as true, means that AmTrust's representations about the warranty contract revenue reported in its historical consolidated financial statements misled investors to conclude that the company was aware of some historical evidence in support of recognizing the revenue on a non-straight-line basis, when in (alleged) fact it was not."[225] Accordingly, the court concluded the statements were actionable under Section 11 and vacated dismissal of claims based on them.

The court also vacated the dismissal of the Section 11 and 12 claims relating to the company's practice of expensing certain discretionary bonuses in the year paid rather than in the year earned. "Although multiple accounting standards may have been relevant to determining when to expense a bonus, all of the standards in play here support the position that the bonuses should have been expensed in the year they were earned, not the year they were paid."[226]

The court explained that while the accounting standards, together or alone, are subject to misreading, misinterpretation, or misapplication, that does not necessarily mean that they entail an exercise of subjective judgment. According to the court, even if they were statements of opinion because determining whether it was probable that the corporate officers would exercise their discretion to pay the bonuses at a future time is a matter of subjective judgment, "the statements are nonetheless actionable because the [c]omplaint adequately alleges that it was improbable that the earned bonuses would not be paid."[227] Accepting that allegation as true "makes it quite plausible that the AmTrust [d]efendants did not base the company's statements of probability on a 'meaningful inquiry' that their statements did not 'fairly align[] with the information in the issuer's possession at the time,'" and thus there was no basis for AmTrust to state that the bonuses should be expensed in the year they were paid rather than earned.[228]

In contrast, the court affirmed the dismissal of Section 11 claims against the AmTrust executives based on their SOX certifications relating to the accuracy of the company's financial reporting, its conformity with GAAP, and the effectiveness of its disclosure controls and procedures as non-actionable statements of opinion. The court noted that the certifications stated that they were based on the knowledge of each officer and that there was no allegation in the complaint that they were not based on the officers' knowledge or that the officers did not believe what they certified. The court also explained that the fact that the company later reversed course and acknowledged a failure of internal controls in its restatement "does not mean that the original certified opinions were disingenuous" because a genuinely held opinion that turned out to be wrong is not necessarily actionable under *Omnicare*.[229]

The court also vacated the dismissal of the Section 11 and 12 claims against the underwriter defendants. The court rejected the underwriters' argument that the plaintiffs lacked standing to assert Section 12 claims because they failed to specifically identify which underwriter sold the security at issue in order to have standing to sue that underwriter.

Acknowledging that it was a question of first impression in the Second Circuit, the court concluded that the plaintiffs adequately established standing under Section 12(a)(2) by alleging that they purchased securities pursuant to the pertinent offering documents or in the relevant offerings underwritten by the defendants. It also noted that the plaintiffs brought the claims on their own behalf and on behalf of other members of the class who purchased AmTrust common stock in the relevant offering prospectuses. On the merits, the court vacated the dismissal of the claims against the underwriters for the same reasons it vacated the dismissal of the claims against the company and certain officers and directors based on the historical misstatements about revenue recognition of the ESP and warranty contracts and the bonus accrual accounting.

The court rendered a split decision on the sufficiency of the plaintiffs' Exchange Act fraud claims against the AmTrust defendants and former auditor. The court agreed with the district court's dismissal of the Section 10(b) and Rule 10b-5 claims as to the AmTrust defendants, concluding that the complaint did not adequately allege scienter based on those defendants' motive and opportunity to commit fraud.

The court rejected the argument that the defendants' financial incentives to keep the share prices high and to fuel the company's acquisition strategy raised an inference of scienter, noting that the desire to sustain "the appearance of corporate profitability" is not the kind of incentive or motivation that raises an inference of scienter.[230] The court also concluded that alleged stock sales by some of the defendants during the class period did not establish a motive given the plaintiffs' acknowledgment that some of the significant sales began several months before the class period, a fact that rendered the sales during the class period less unusual.

The court also rejected the argument that the AmTrust defendants acted with scienter because of the magnitude of the restatement and the length of time it took for AmTrust to acknowledge its significant accounting errors. The court also declined to credit the allegation that AmTrust must have known or recklessly disregarded the SEC's prior advice to Warrantech that its time-of-sale accounting approach was improper, noting that its return to the time-of-sale accounting after the acquisition was more plausibly explained by changes to the relevant accounting principles.

In stark contrast with its ruling on the fraud claims against the AmTrust defendants, the court concluded that BDO acted recklessly in conducting the audit and issuing the audit opinion. It pointed to the detailed allegations that the BDO partners and managers knew the audit did not comply with PCAOB standards and consciously concealed their own noncompliance as supporting a strong inference of scienter.

Finally, the court reversed the district court's ruling that the plaintiffs failed to allege loss causation based on the three-year gap between BDO's completion of the audit work and the article in *The Wall Street Journal*. Noting that the article was the first time that the problems with BDO's audit were publicly disclosed and that it revealed specific deficiencies that rendered the audit opinion misleading, the court held that there was a "'clean match' between the misleading audit opinion and the subsequent disclosure."[231] The court also noted that "even after cleaning up their auditing paperwork," BDO still failed to correct the paperwork to reflect the dates the work was actually completed or to document their assessment of the omitted procedures after issuing the audit opinion, and thus the disclosure of the deficiencies in the audit revealed the continuing falsity of the certification.[232]

Ninth Circuit Addresses Pleading of Falsity Where Alleged Misstatements Use Terms of Art

In *In re Cloudera, Inc.*, the Ninth Circuit affirmed the dismissal of a securities-fraud class suit, holding that where a plaintiff's theory of falsity is based on the defendants' use of terms such as "cloud-native," "native public cloud services," and "hybrid cloud" that lack a plain or ordinary meaning, the plaintiff must plead sufficient facts to establish that at the time of the challenged statement, the term had the "distinctive, and false, meaning" the plaintiffs attribute to it.[233] The decision is a reminder that in securities suits arising in the context of new or fast-evolving technologies, an essential part of pleading falsity is providing factual allegations about the meaning of technical terms used in the challenged statements.

Cloudera was a data management and analytics software company that offered products that used the cloud, "that is, they [did] not operate locally, but instead on remote servers that customers can access through the internet."[234] The complaint alleged that the plaintiffs purchased Cloudera stock after its initial public offering in 2017 and before an earnings call in 2019, in which the company announced negative quarterly earnings, followed by a 40% stock price decline. The complaint alleged that Cloudera and its officers misled investors by professing to offer buzz-generating features like "original cloud native architecture" and a "cloud-native platform" while its actual products failed to match these descriptions in violation of Sections 11(a), 12(a)(2), and 15 of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b-5.[235] "[T]he precise meaning of terms related to the 'cloud' is at the heart of the parties' dispute."[236]

The district court dismissed the initial complaint for failure to state a claim because it failed to explain what these cloud-related words meant at the time Cloudera issued the challenged statements.[237] "Without a contemporaneous definition or explanation for what 'cloud-native' technology meant . . . , the Court has no basis to find that Plaintiffs have adequately pled that Cloudera Defendants' statements were false."[238] The district court granted leave to amend, advising that a second amended complaint "must explain what 'cloud native' meant when [the] Cloudera Defendants made their allegedly false statements and why [their] statements touting Cloudera's cloud-native technology and architecture were false when made."[239] The district court expressly warned that failure to cure the deficiencies would result in dismissal with prejudice.

The second amended complaint challenged 42 statements made during the relevant period. Twenty-four of the alleged misstatements pertained to Cloudera's "cloud-native" products, and while the new pleading offered definitions of cloud-related terms, the district court found that the "same problem" it had previously identified persisted in the amended complaint; namely, that the complaint pleaded "no evidentiary facts to support such additional assertion, whether from . . . knowledgeable witness[es], any . . . documents that used the term 'cloud native' or 'cloud architecture,' or any other source."[240] The district court dismissed the claims based on the other alleged misstatements for a variety of reasons not relevant to this summary.[241]

On appeal, the Ninth Circuit addressed the statements relating to the cloud capabilities of Cloudera's products and whether the plaintiffs pleaded their falsity with the particularity required by Rule 9(b) and the PSLRA.[242] The court highlighted illustrative examples of the challenged statements, including, "Cloudera offers the leading cloud-native software platform for machine learning and advanced analytics" and the claim that a particular Cloudera product "delivers the speed, convenience, elasticity and ease-of-use expected in native public cloud services."[243] Agreeing with the district court, the Ninth Circuit held that the complaint failed to adequately define any of these cloud terms.[244] The court concluded that "[i]t is impossible to evaluate the truth or falsity of those statements without understanding" what these phrases meant at the time they were made and held that no such understanding could be found in the complaint.[245]

The court rejected the plaintiffs' argument that throughout the class period, the term "cloud-native" was understood by reasonable investors to mean a software product with "specific core material attributes such as the use of containers, seamless scalability, ease-of-use, and security and elasticity" as insufficient to establish falsity with the required particularity.[246] The court also rejected the plaintiffs' "different" approach on appeal, where they argued for the first time that "[n]o expert supported definition is truly necessary to plead and understand the terms 'cloud' and 'native,' whether separately or together" because "the terms can be understood using their 'commonly-accepted definitions' and 'plain meaning.'"[247]

Noting that "[i]t is not obvious that the plain meaning of the terms today would be the same as their meaning in 2017 and 2018 when the challenged statements were made" and that "cloud computing is a 'fast-evolving market,'" the court explained that "experts in cloud computing acknowledge that the meaning of the term 'cloud' is, well, cloudy."[248] The court concluded that the relevant cloud-related terms in the challenged statements lack a plain or ordinary meaning, and the plaintiffs failed to "plead facts" supporting their definition of those terms.[249]

The court noted that the complaint's deficiencies echoed those identified by the Ninth Circuit in *Wochos v. Tesla Inc.*, in which the plaintiffs alleged that Tesla, its CEO Elon Musk, and a former CFO misled investors about Tesla's manufacturing process and where their theory of falsity relied on a specialized meaning of the terms in the challenged statements.[250] In *Wochos*, the plaintiffs alleged that when Tesla said it had "started the installation of Model 3 manufacturing equipment, that statement would have been understood to mean that Tesla had installed *automated* equipment."[251] The Ninth Circuit affirmed the dismissal of the *Wochos* complaint because "such an assertion was insufficient to satisfy the heightened pleading standards [for falsity] applicable to a securities-fraud action."[252] Noting that the complaint in *Wochos* "relied on a specialized meaning of some of the terms in the [challenged] statements," the court held that when "a plaintiff claims that the words used in a statement have some special or nuanced meaning that differs from what the literal words suggest, the plaintiff must plead facts that will support this crucial premise."[253]

Finally, the Ninth Circuit also affirmed denial of leave to amend, noting that the district court "offered a detailed explanation of the complaint's deficiencies and how to correct them," but the plaintiff failed to cure them and did not explain how a further amended complaint could do so.[254]

SCIENTER

Plaintiffs "Cannot Amalgamate a Series of Sketchy Brushstrokes and Call It a Van Gogh": First Circuit Affirms Dismissal on Scienter Grounds

In *Quinones v. Frequency Therapeutics, Inc.*, the First Circuit affirmed dismissal of a securities suit brought by investors in a pharmaceutical company who alleged that company executives made false or misleading statements related to a clinical trial for the company's key product, a hearing loss treatment.[255] The complaint alleged that company executives misrepresented the experimental validity of the clinical trial and falsely claimed that "all subjects" in the clinical trial had "meaningful word recognition deficits" as required by the trial's participation criteria to bolster the clinical trial's validity.[256]

The court agreed with the district court's conclusion that the complaint failed to adequately allege that the defendants made the alleged false statements with the requisite scienter required by the Private Securities Litigation Reform Act ("PSLRA").[257] The court rejected each of the plaintiffs' scienter theories, including their "totality of . . . evidence" theory and held that "plaintiffs cannot amalgamate a series of sketchy brushstrokes and call it a van Gogh."[258]

The decision highlights the challenge facing Section 10(b) plaintiffs who have adequately alleged a false statement but still failed to plead facts giving rise to a strong inference that defendants intended to deceive or created such a high risk of being deceptive and that such inference is cogent and at least as compelling as any opposing inference one could draw from the factual allegations. The decision is also a reminder that allegations of suspicious insider trading against one defendant may not give rise to a scienter inference if other defendants did not also trade. In the court's words, "even unusual sales by one insider do not give rise to a strong inference of scienter when other insiders ha[ve] not engaged in suspicious sales during the class period."[259]

Frequency Therapeutics, Inc. was a public biotechnology start-up that tried to develop a treatment called FX-322 for individuals suffering from severe sensorineural hearing loss ("SNHL").[260] After announcing promising safety and efficacy results in the first phase of a FX-322 clinical trial, Frequency announced the launch of a Phase 2a trial in October 2019 with a wider study population to evaluate the efficacy of the drug as a treatment for SNHL.[261] To guard against the possibility of bias in the Phase 2a trial, one of the criteria for admission was that all participants had some form of hearing loss as measured by their score on a word-recognition test.[262]

The Phase 2a trial ran from September 2020 to December 2020, with study participants receiving weekly injections of either FX-322 or a placebo.[263] The Phase 2a trial did not produce statistically significant results, and on March 23, 2021, the company announced that the study was "unlikely to deliver results that could support the efficacy of FX-322."[264] After the announcement, the company's share price dropped 78%.[265]

Investors filed a class action suit alleging violations of Section 10(b) and Section 20(a) of the Securities Exchange Act based on 14 public statements that allegedly included misleading or false statements that the trial was conducted on an unbiased and appropriate sample population—specifically, that all participants had "meaningful word recognition deficits."[266] The complaint alleged that by the time the company completed its Phase 2a recruitment in September 2020, at least some study participants were fraudulent enrollees.

The district court agreed that two of the alleged statements touting the study design and representing that all of the study participants "have meaningful word recognition deficits" could be found to be materially false, misleading, incomplete, or inaccurate, but dismissed the plaintiffs' claims for failure to plead facts to support a strong inference of scienter.[267]

On appeal, the First Circuit agreed that the plaintiffs had failed to adequately plead scienter for the two allegedly false or misleading statements and affirmed the district court's dismissal of the complaint.[268] The court easily rejected each of plaintiffs' theories of scienter.

First, the court rejected the plaintiffs' claim that the company's chief development officer recklessly ignored alleged statements from clinicians that the Phase 2a trial might be infected with bias because certain participants reported not being able to hear certain sounds at the beginning of the study but at the end of the study reported that they could hear the same sounds.[269] The court explained that this theory failed because plaintiffs did not allege when the information, derived from a confidential witness, was conveyed to the executive, nor did they explain why reports of improved hearing would be a concern unless the individuals making the report were in the placebo group.[270] "So the minimal allegations in the complaint do not allow us to fault anyone for seeing the initial Phase 2a trial data and thinking that participants with improved hearing were in the treatment group."[271]

The court likewise dismissed the argument that an executive "must have known about (or recklessly disregarded)" a forum post on Tinnitus Talk, an online forum for people with tinnitus, revealing the clinical trial's word-recognition criteria for participants before the study began and before he made an alleged false statement about the study on a Tinnitus Talk podcast in July 2022.[272] "Merely alleging that a person went on a podcast associated with a website does not by itself generate a strong inference that the person reviewed prior posts on that website" and noting that "[a]s our case law makes clear, fraud cannot be established by hindsight."[273]

Second, the court explained that the plaintiffs' scienter theory based on the chief executive officer's stock sales failed because the plaintiffs did not also allege that the executive who purportedly had "knowledge of the study's flaws" (the chief development officer) had sold company stock during the relevant period.[274] The court also pointed to the fact that the chief executive officer had not reduced his overall investment in the company.[275] "When a defendant keeps the vast majority of their holdings, the strength of the insider trading allegations drifts towards the marginal end,"[276] and "'while . . . insider trading may be probative of scienter,' it is not sufficient to establish an inference of scienter on its own."[277]

Third, the court was not persuaded by the plaintiffs' scienter theory based on the "core operations" doctrine—that because FX-322 was the company's core product, "defendants must have known about the problems with the Phase 2a study population."[278] While the court acknowledged that the importance of FX-322 to the company made it reasonable to think that senior management paid attention to what they were told about the study the results, "that importance provide[d] no sufficient basis for determining when and what senior management were told, at least within the narrow timeframes" at issue in the case.[279]

Finally, the court disagreed that the district court had failed to consider whether all of the alleged facts, taken collectively, gave rise to a strong inference of scienter as required by the Supreme Court's decision in *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*[280] Plaintiffs argued that, even if not sufficient individually, all of the other "evidence" alleged in the complaint showed that the company executives must have known about the flaws in the Phase 2a trial.[281]

The court acknowledged that while each "individual fact about scienter may provide only a brushstroke, . . . our obligation [is] to consider the resulting portrait," but "[v]iewing the complaint in its totality, we do not conclude that it meets the standard" required by the PSLRA that an inference of scienter must be "cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[282]

Seventh Circuit Affirms Dismissal of Rule 10b-5 Claims and Holds Plaintiff Failed to Clear High Bar to Meet Scienter Requirement

In *Appvion, Inc. v. Buth, et al.*, the Seventh Circuit addressed a plaintiff's burden to plead scienter with the particularity required by the PSLRA when bringing a claim under Rule 10b-5.[283] The court affirmed dismissal of Rule 10b-5 claims against defendants who allegedly falsely represented the value of Appvion stock in a case arising from the sale of Appvion to an ESOP. All of the claims stemmed from the 2001 sale of Appvion, Inc., a struggling Wisconsin-based paper company, to its employees through an ESOP transaction that was financed by the employees' retirement savings.

After the sale closed, Appvion formed an ESOP Administrative Committee ("ESOP Committee") comprising officers of Appvion, which was responsible for selecting a trustee. The trustee was responsible for holding the plan participants' shares of the company and for recalculating the fair market value of Appvion twice a year to facilitate sales and purchases of shares by employees. Reliance Trust Company became the trustee in 2013. The trustee was required to hire an independent appraiser to calculate the fair market value of the company and the stock price.

In 2004, investment bank Stout Risius Ross was retained as the independent appraiser by the trustee. The ESOP Committee ultimately reviewed and approved the stock price set by the trustee based on the valuations provided by the independent appraiser, reported it to the plan participants, and used it to approve purchases and sales of Appvion's shares.

Appvion ultimately declared bankruptcy in 2017. Following the filing, a new ESOP Committee was appointed to replace the Appvion officers and was authorized to conduct an internal investigation. The investigation resulted in "an avalanche of claims against dozens of individuals and corporations" based on the central allegation that the defendants had fraudulently inflated the price of Appvion in 2001 and that the stock price remained inflated until the company's bankruptcy. The ESOP ultimately asserted a variety of claims, including that Stout, Reliance, and the officers on the ESOP Committee falsely represented the value of the stock in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The trial court dismissed the federal securities claims, finding that the plaintiff failed to adequately allege scienter as to all defendants.

On appeal, the Seventh Circuit affirmed the dismissal of the securities claims, holding that the complaint failed to meet the PSLRA's requirement that it "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."[284] Further, the court held that the allegations in the complaint did not meet the high bar of showing that "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged."[285]

With respect to the plaintiff's claim that Stout intentionally inflated its valuations of Appvion, the court concluded that "[t]he biggest obstacle . . . is [the plaintiff's] failure to identify a motive."[286] The complaint alleged that Stout received a flat fee for each of its valuations without any bonuses for using particular methodologies or arriving at particular valuations. The court explained that even if Stout had an interest in continuing to receive those flat fees and feared the ESOP trustee would switch to another appraiser if it stopped issuing inflated valuations, "continued business and flat fees, 'standing alone' typically, will not suffice to establish fraudulent intent" under pre-*Tellabs* case law.[287] "All third party contractors have an interest in retaining the business of their customers, and so any plaintiff could point to that interest to establish scienter."[288]

The court also rejected the plaintiff's reliance on language in *Tellabs* "that the absence of a motive is not fatal" to pleading scienter because in the same paragraph, the Supreme Court stated that "the significance that can be ascribed to an allegation of motive, or lack thereof, depends on the entirety of the complaint."[289] The court explained that the Supreme Court did not find the lack of a direct financial motive dispositive in *Tellabs* because it reasoned that the CEO of a company has a strong incentive to make her company appear more successful that it is, even if she does not directly benefit financially by selling her shares in the company.

In contrast, the court noted that Stout was a global investment bank with many clients, and even if it had some incentive to be seen as cooperative by those clients, its "greatest asset is its reputation for honesty followed closely by its reputation for careful work," and the flat fees it received from the ESOP trustee "could not approach the losses [it] would suffer from a perception that it would muffle a client's fraud."[290] Thus, the court reasoned, it made no sense that Stout and its managing directors would "risk following in the footsteps of Enron simply to keep one of its many clients happy" when they reaped none of the gain from any alleged fraud.[291]

As to the plaintiff's Rule 10b-5 claim against Reliance, the court likewise held that the plaintiff failed to show scienter. Noting that Reliance also received a flat fee for its service as trustee, the court concluded that without more allegations to show that it should have been aware that Stout's valuations were inflated, "the complaint does not do enough to show that Reliance was reckless, rather than just negligent."[292] The court also noted that Reliance was less familiar with the valuations than Stout, but even if it had a fiduciary duty to scrutinize Stout's valuations more carefully, the failure to abide by a fiduciary duty is not enough to show scienter.[293]

Lastly, the court acknowledged that the plaintiff's claim against the officers who served on the ESOP Committee was a closer call because the complaint alleged a motive resulting from the incentive plans that awarded them cash bonuses based on Appvion's appraised stock price that they were responsible for approving. However, the court nonetheless concluded that the plaintiff failed to clear the scienter bar. The court explained that under post-*Tellabs* case law, the receipt of bonuses is not in itself enough to show scienter.[294] While the officers had a motive not to question allegedly inflated valuations, the court pointed out that there was no allegation or evidence that they knew the valuations to be inflated, so the plaintiff could not show "that fraud is a more likely inference than incompetence" and thus failed to adequately allege scienter.[295]

LOSS CAUSATION

Ninth Circuit Reverses Dismissal of Securities Suit in Part, Holding Actionable Misstatements and Loss Causation Adequately Alleged

In *In re: Genius Brands International, Inc. Securities Litigation*, the Ninth Circuit held that the plaintiffs adequately alleged that the company misled investors when it professed that it had not compensated any entity to solicit others to purchase its securities despite having allegedly retained a third party to write and disseminate favorable articles about it. The court also held that the plaintiffs adequately alleged loss causation for certain claims, while one claim was appropriately dismissed for failure to plead loss causation.[296]

The court explained that to plead loss causation, a plaintiff need only allege an artificial price *inflation* and not necessarily an artificial price *increase,* holding that the district court "impermissibly conflated" these two concepts and thus erred in dismissing three claims for failing to adequately plead loss causation.[297] The court also held that a statement based on publicly available information can still serve as a corrective disclosure if the information was not easily accessible or digestible by readers in its prior state, reasoning that "issuers should not escape liability for misrepresentations merely because they can show that corrective information was publicly available on some webpage tucked in a deep corner of the internet or buried in some unwieldy spreadsheet."[298]

Genius Brands was a publicly traded children's entertainment company.[299] In 2019, Genius's shares fell below the NASDAQ's minimum trading requirement of $1 per share, prompting a warning from NASDAQ that the company had six months to regain compliance.[300] In response, the complaint alleged that Genius undertook a series of measures to buoy the value of its securities, leading to months of stock price volatility.[301] These measures included touting itself on social media and through press releases and shareholder letters. One press release stated that its hit preschool television series "Rainbow Rangers" had increased to 26 airings per week on the Nickelodeon Jr. channel, resulting in a jump in the stock price.[302] Genius also allegedly retained a securities promotion company, PennyStocks.com, to write and disseminate favorable articles about Genius in exchange for more than 90,000 shares of Genius stock.[303]

On May 7, 2020, in connection with a stock offering, Genius stated in a securities purchase agreement ("SPA") that it had not, and to its knowledge no one acting on its behalf had, paid or agreed to pay anyone compensation to solicit purchases of Genius stock.[304] The company did not mention that it had retained and compensated PennyStocks to publish articles on its behalf months before the SPA.[305]

On June 3, 2020, a financial news organization published an article speculating that Disney or Netflix might acquire Genius. Genius's share price rose 42.8%.[306] Thereafter, on June 4 and 5, 2020, two activist short sellers published reports that Genius had an undisclosed stock promoter and that "Rainbow Rangers" had aired fewer than 26 times per week, contrary to what had been reported in its press release.[307] In response, Genius's stock price fell.[308]

Genius continued to engage in efforts to rescue its share price, and the price continued to fluctuate. On June 15, 2020, it tweeted that Arnold Schwarzenegger would invest in the company, causing the stock price to rise.[309] On the same day, a financial analysis group reported that Genius had engaged PennyStocks to "pump" Genius stock.[310] Over the next two days, Genius's share price declined again.[311]

On June 21, 2020, a financial news organization published a second article speculating that Disney or Netflix would acquire Genius.[312] Genius retweeted the article from its official company account on Twitter (now X) alongside hashtags and dollar signs.[313] Ten days later, Genius issued a press release stating that it would announce a "key business development" on July 6, 2020, leading to online speculation that this would be about Disney or Netflix acquiring Genius.[314] Instead, Genius announced that it was partnering with another entertainment company to purchase rights in the works of comic book author Stan Lee.[315] Genius's share price tumbled. One day later, Genius allegedly received a letter from a law firm asserting that the rights in the Stan Lee universe that Genius was claiming to own had already been bought by another company, but Genius did not disclose the letter.[316]

On August 14, 2020, Genius filed its Form 10-Q report announcing that Schwarzenegger would be working on one of Genius's shows, not that he was investing in Genius as previously indicated, and its share price fell.[317] Seven months later, Genius issued a press release indicating that its ownership of the Stan Lee universe had been contested, and the stock price fell again.[318]

After months of stock price volatility and "erratic" publicity, Genius shareholders filed suit against the company and its CEO and CFO, asserting violations of Sections 10(b) and 20(a) of the Securities and Exchange Act and Rule 10b-5.[319] Although the complaint included at least 38 allegedly false or misleading statements or omissions relating to several topics, the court focused on five of the alleged statements or omissions: Genius fraudulently concealed its relationship with PennyStocks.com to promote the company; Genius misstated its relationship with Arnold Schwarzenegger; Genius exaggerated the number of times that "Rainbow Rangers" aired on television; Genius misrepresented that Disney or Netflix would acquire the company; and, Genius overstated its rights to the Stan Lee universe.[320]

The district court dismissed the plaintiffs' claims entirely for failure to state a claim under Rule 12(b)(6).[321] It dismissed the PennyStocks claim on the ground that the plaintiffs failed to allege that anything in the PennyStocks articles was false or misleading and because PennyStocks had no duty to disclose Genius as the source of its funding.[322] The court dismissed the Schwarzenegger claim because the plaintiffs did not allege a "moment where the truth about [the] statement[] was revealed" and found that the August 2020 10-Q was not a corrective disclosure. The court dismissed the "Rainbow Ranger" claim and the claims relating to Disney or Netflix because the complaint failed to allege that those statements caused an artificial increase in the Genius stock price.[323] Lastly, the court dismissed the Stan Lee claim without explanation when it dismissed the complaint as a whole.[324]

On appeal, the Ninth Circuit reversed the dismissal of the PennyStocks claim, concluding that the plaintiffs adequately alleged that Genius had misled investors when it claimed in the SPA that it had not compensated any entity to solicit its securities when it had retained PennyStocks to promote it.[325] The court reasoned that PennyStocks' writing and disseminating favorable articles about Genius amounted to "solicitation" within the meaning of the SPA.[326] Noting that Genius had no affirmative duty to disclose its relationship with PennyStocks and "if [it] had been silent, it likely would not have misled investors," a duty to disclose arose once Genius chose to represent that it had not paid anyone to solicit purchases of its securities.[327] Thus, the court held that a reasonable investor would have taken Genius's statements to mean that it had not retained anyone to promote its securities, when in reality it had, and therefore allowed the claim to proceed.[328]

Next, the court addressed the district court's disposition of the claims based on failure to adequately plead loss causation. At the outset, the court explained that "[i]n a fraud-on-the-market case [such as] this one, loss causation 'begins with the allegation that the defendants' misstatements (or other fraudulent conduct) artificially inflated the price at which the plaintiff purchased her shares.'"[329] Plaintiffs must then allege that the truth was eventually revealed and that "the revelation [thereby] caused the fraud-induced inflation in the stock's price to be reduced or eliminated."[330] "In the end, 'loss causation is simply a variant of proximate cause, [and] the ultimate issue is whether the defendant's misstatement, as opposed to some other fact[s], foreseeably caused the plaintiff's loss.'"[331]

Applying this framework, the Ninth Circuit affirmed the district court's dismissal of the Schwarzenegger claim because the shareholders failed to allege a moment at which the truth about Genius's statements in the June 14, 2020, tweet referring to the celebrity was revealed.[332] The court agreed that the Form 10-Q relied upon by the plaintiffs could not have been a corrective disclosure revealing the truth behind the allegedly misleading tweet because while the tweet asserted that Schwarzenegger would invest in Genius, the 10-Q indicated that Genius and Schwarzenegger had developed a new show together, and "[those two things] are not mutually exclusive."[333] Accordingly, the court held that it could not be said that the "market understood" that the tweet was false based on the statements in the 10-Q.[334]

In contrast, the court held that the district court improperly dismissed three claims on loss causation grounds due to a fundamental misunderstanding that this standard requires an allegation of an artificial price *increase*.[335] Noting that a price increase is one way of showing price inflation, the court explained that it is not the only way, and "it suffices to plausibly allege that the stock price was higher than it would have been but for the defendant's statement—whether because the statement increased the stock price, maintained the stock price, or prevented a greater decrease in the stock price."[336]

Applying this principle, the court concluded that the complaint did allege that the defendants' June 2020 statement about the frequency that the "Rainbow Rangers" program aired increased the price of the stock and that the stock fell substantially after a short-seller report revealed the discrepancy between the statement and the actual frequency of airings sufficient to demonstrate loss causation at the pleading stage. The court also dispatched the argument that the short seller's report did not "reveal the truth to the market" because the information about frequency of airing was already publicly available through an online broadcast schedule.[337]

The court disagreed, holding that a disclosure based on already-public information can still be a corrective disclosure if it converts the information into a format that is accessible and digestible by investors.[338] The broadcast schedule had "little to no probative value in its native state" because investors would have to jump through hoops to "access [and] understand it," whereas only once it was converted into the report did it reach investors and affect stock price.[339]

The court likewise reversed the dismissal of the claim based on statements about a possible acquisition of Genius by Disney or Netflix, holding that the plaintiffs plausibly alleged that the stock price was higher than it would have been but for the defendant's June 22 tweet regarding a potential acquisition by Disney or Netflix and that the "truth became known" in a July 6, 2020, announcement by the company without mention of a buyout by Disney or Netflix.

Finally, the court reversed the dismissal of the claim based on the July 6 misstatement by the company about joint ownership of intellectual property with Stan Lee. Pointing to an alleged statement by the company on July 2, 2020, promising a "big announcement" on July 6, the court noted that the stock price fell sharply on that day, "indicat[ing] that investors understood [it was] bad news" because it failed to mention an acquisition by Disney or Netflix.[340] The court concluded that the plaintiffs plausibly alleged that if Genius had not made the misstatement about Stan Lee on July 6, "Genius's stock price would have fallen even more."[341] That allegation, taken together with the allegation that Genius later disclaimed its rights in the Stan Lee intellectual property, which resulted in a further 28% drop in Genius's stock price, was sufficient to plead loss causation.

Ninth Circuit Highlights Demanding Standard for Pleading Scienter and Loss Causation Based on Short-Seller Reports

In *Espy v. J2 Global, Inc.*, the Ninth Circuit affirmed dismissal of a securities fraud class action suit against information services company J2 Global, Inc. because the plaintiff did not adequately plead scienter or loss causation.[342] A unanimous panel observed that "[d]issatisfaction with a company's strategy, management, and approach to accounting, coupled with a stock drop, make for interesting reading but not an actionable securities fraud claim."[343]

The decision is a reminder that to plead scienter for an omissions-based claim, plaintiffs must provide credible allegations of an intent to defraud and cannot rely on mere allegations that the defendants had knowledge of contrary facts. The decision also underscores that a short-seller report may not qualify as a corrective disclosure for purposes of adequately pleading loss causation if the report is not tied to the alleged misrepresentation or omission in the complaint or if it required no expertise or special skills beyond what a typical market participant would possess.

The complaint alleged that J2 used an acquisition model to grow its business, acquiring 186 companies for $3 billion since its founding in 1995. The acquired companies were integrated into one of two divisions of J2; J2 reported only the performance of the two divisions and did not report financial performance at the acquired-company level. The plaintiff alleged that investors learned about J2's corporate mismanagement and deceptive practices from reports published by two well-known short sellers, and that publication of the short-seller reports caused J2's stock price to decline.

The plaintiff alleged that J2 made materially misleading statements to investors about: (i) a 2015 acquisition, when it omitted to disclose that the acquired company was a shell start-up and was acquired from a J2 employee, allegedly as part of his compensation (the "2015 Acquisition"); (ii) a 2017 investment, when it omitted facts about alleged conflicts of interest and the precise amount of management fees paid by J2 to the investment fund (the "2017 Investment"); and (iii) its growth-through-acquisition strategy, which disguised the poor performance and overvaluation of those acquisitions and misrepresented the true health of J2's business. The district court dismissed the complaint with prejudice for failure to adequately plead scienter.

On appeal, the Ninth Circuit upheld the district court's dismissal for failure to plead scienter, and further found that the plaintiff failed to adequately allege loss causation, noting that "[f]ailure to sufficiently plead either scienter or loss causation is fatal to [the plaintiff's] complaint.[344]

The complaint alleged that the 2015 Acquisition was in reality a bonus incentive for a former vice president of the company who, along with his girlfriend, was one of two employees of the acquisition target, and a vehicle to bring his girlfriend to the United States. The plaintiff endeavored to plead scienter "by reference to statements of two confidential former employees" about meetings between the former employee and J2 executives at which the employee's compensation structure and desire to bring his girlfriend to the United States were allegedly discussed.[345] The former employees were a former managing director of J2's Australia and New Zealand division and a former global head of human resources.

The court explained that under settled law, "confidential witnesses whose statements are introduced to establish scienter must be described with sufficient particularity to establish their reliability and personal knowledge," and the statements "themselves [must] be indicative of scienter.'"[346] The court rejected the plaintiff's assertion that he adequately pleaded scienter as to alleged misstatements about the true purpose of the 2015 Acquisition based on the statements of the former employees because the majority of those statements "fail to establish reliability or personal knowledge, or simply amount to criticisms of J2's management practices and compensation structures," largely because the former employee's allegations either relied on secondhand information or they consisted of firsthand accounts that were not specific to the 2015 Acquisition.[347]

Further, the court concluded that "it [was] unclear whether those statements come from general knowledge, gossip, or the meeting where [the employee] was present."[348] The court also held that even if the claimed purpose of the 2015 Acquisition could be imputed to company executives, "that alone would not indicate a strong inference of scienter in J2's failure to disclose those details."[349] Pointing out that the press release announcing the 2015 Acquisition also reported eight other acquisitions by J2 in the same quarter without any further discussion about any of those transactions, the court concluded that "[i]t is more plausible that the details of the [2015 Acquisition] were equally unimportant to the press release as the details of the other eight acquisitions announced in the same disclosure."[350]

The court similarly rejected the plaintiff's attempt to plead scienter based on alleged omissions in the company's disclosure regarding the 2017 Investment about the precise amount of management fees to be paid by J2 and the existence of relationships between some J2 employees and the investment fund. "[The plaintiff] does not explain why the information that was left out . . . compels a strong inference of scienter."[351] The court noted that J2 disclosed "significant details" in its 2017 proxy statement, including the amount of its investment, the calculation of the annual management fees owed by J2, and that J2's former CEOs had interests in the investment fund.[352]

Relatedly, the court held that the plaintiff did not adequately plead how J2's alleged omission of other relationships between company executives and the investment fund compelled a strong inference of scienter when the company had disclosed the "arguably more important" relationships with other senior executives.[353]

The court additionally held that the plaintiff failed to plead scienter as to J2's accounting practices based on statements by former employees attesting to corporate management's "general awareness" of the company's finances, as opposed to the specific details regarding the accounting for the 2015 Acquisition and 2017 Investment.[354] The court concluded that "[w]hile allegations regarding management's role in a company may be relevant and help to satisfy the PSLRA scienter requirement, allegations of 'corporate management's general awareness of the day-to-day workings of the company's business does not establish scienter.'"[355]

The court also explained that the plaintiff's allegations of scienter were implausible because there were "'hundreds of companies' with different accounting systems incorporated into J2, [and] it was difficult even for financial analysts within J2 to 'line up the numbers.'"[356] Therefore, "inconsistent statements from former employees d[id] not demonstrate that the individual defendants actually knew the underlying data of each of their acquisitions with the requisite accuracy to report detailed financials for each."[357]

As to allegations by a former employee that his boss's instruction not to talk publicly about new acquisitions, which the plaintiff argued supported an inference of scienter, the court concluded instead that "[t]he competing innocuous inferences—that a company might want to keep a lid on lower-level employees speaking publicly about insider information or that the company did not want to invite unfounded speculation on individual acquisitions—are much more compelling."[358]

The court also rejected the sufficiency of the plaintiff's scienter allegations under the "core operations" doctrine, concluding that "[a]llegations that [management] signed off on every acquisition, received detailed reports, or were 'obsessed with numbers,' [did] not compel a strong inference that [management] had knowledge of the alleged omitted information about particular underperforming acquisitions under J2's umbrella and used consolidated accounting to cover them up."[359]

Finally, although the district court had not reached the issue, the Ninth Circuit exercised its discretion to consider whether the plaintiff had adequately pleaded loss causation, because failure to do so would also be "fatal" to the complaint.[360] The court concluded that the plaintiff failed to plead that two published reports by well-known short sellers arguing, among other things, that J2's "opaque acquisition approach has opened the door to egregious insider self-enrichment" qualified as "corrective disclosures" that revealed, in whole or in part, the truth concealed by the defendants' alleged misrepresentations or omissions.

The court explained that to plead loss causation, the plaintiff was required to state particularized facts plausibly suggesting that the alleged misstatements or omissions, "as opposed to some other fact, foreseeably caused" the plaintiff's loss.[361] "To be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but must relate back to the misrepresentation and not to some other negative information about the company."[362] The court acknowledged that because the two short sellers relied on public information to compile the reports, whether those reports revealed "the truth concealed by the defendants' misstatements is an open question" in the Ninth Circuit.[363] While a disclosure based on publicly available information, in certain circumstances, may constitute a corrective disclosure, "the inquiry is whether, "[b]ased on [the plaintiff's] particularized allegations, can we plausibly infer that the alleged corrective disclosures provided new information to the markets that was not yet reflected in the company's stock price?"[364]

The court concluded that while statements referenced in the first short-seller report may have disclosed negative information about J2, that information did not "relate back" to the false or misleading statements alleged in the complaint, pointing out that the report predated the 2017 Investment, made no mention of the 2015 Acquisition, and included only generalized criticisms of the use of consolidated accounting. The court acknowledged that the second report was "more tethered to J2's alleged misrepresentations and omissions" but still did not qualify as a corrective disclosure because its analysis was based entirely on already-public information that required no expertise to understand.

Because the report simply reflected "a careful reading of public documents, including J2's investor presentations, press releases, employees' LinkedIn profiles, board members' resumes, public corporate records, and SEC filings," and the plaintiff "alleg[ed] no facts to plausibly explain why the information—already publicly available . . . was not reflected in J2's stock price," the report did not qualify as a corrective disclosure.[365]

CLASS CERTIFICATION

Fifth Circuit Vacates Class Certification, Citing District Court's Improper Denial of Sur-Reply to Address New Evidence Related to Predominance Requirement and Failure to Perform a Full *Daubert* Analysis of Rebuttal Expert Report

In *Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corporation*, the Fifth Circuit vacated a district court decision certifying a class of shareholders to bring claims under Section 10(b) and Rule 10b-5.[366] The plaintiffs alleged that the defendants made materially misleading disclosures regarding the potential value of Anadarko's Shenandoah oil field project in the Gulf of Mexico.[367] The crux of the complaint was that after market hours on May 2, 2017, Anadarko disclosed that a well in the Shenandoah field was dry, that the company would take a $902 million write-off for the Shenandoah project, and that the company would suspend further appraisal of the oil well. These statements allegedly resulted in a substantial decline in the company's stock price on May 3, 2017.[368]

In their motion to certify the class, the plaintiffs invoked the presumption under *Basic v. Levinson* that the company's stock traded in an efficient market.[369] Defendants opposed the motion, arguing that the May 3 stock decline was not caused by its Shenandoah disclosure, but by a separate and distinct event—news linking the company to a fatal home explosion in Colorado and related regulatory requirements estimated to cost Anadarko $140 million, which was disclosed the same day as the Shenandoah project write-off.[370]

With their reply, plaintiffs filed a rebuttal expert report with additional analysis and evidence purporting to show: (i) that Anadarko's stock price declined in the after-hours market after the Shenandoah disclosure but prior to the news of the Colorado explosion; and (ii) a new event study demonstrating a statistically significant stock price decline even controlling for the Colorado explosion news.[371]

Defendants moved for leave to file a sur-reply, arguing that the plaintiffs' rebuttal report constituted new evidence to which they were entitled to respond to rebut the *Basic* presumption.[372] Defendants also sought to exclude the rebuttal expert report, arguing in a *Daubert* motion that it was not reliable for a number of reasons.[373]

The district court denied both defense motions and certified the class.[374] The class certification order cited evidence from the plaintiffs' rebuttal report, stating that "the Anadarko stock price dropped 4.1 percent during after-hours trading between the time Anadarko made its [Shenandoah] disclosures and the time the [Colorado] news broke" and that the event study concluded that "the price drop on May 3rd remained statistically significant even when controlling for the [Colorado] news."[375] The district court also denied the defendants' motion for reconsideration.

On appeal, a unanimous panel concluded that the district court should have permitted the defendants to file a sur-reply addressing the evidence in the plaintiffs' reply brief, including the expert report and event study that the lower court itself had described as "new."[376] Acknowledging that sur-replies are "heavily disfavored" and that the decision to allow filing one lies within the district court's discretion, the court cited Fifth Circuit precedent that "when a party raises new arguments or evidence for the first time in a reply, the district court must either give the other party an opportunity to respond or decline to rely on the new arguments or evidence."[377]

The court explained that while the "primary focus" of the plaintiffs' original expert report was "market efficiency," the subject of the rebuttal report was "price impact," and the rebuttal material was indisputably not in the record prior to the reply brief.[378] The court also pointed to Supreme Court precedent holding that a defendant may rebut the *Basic* presumption by demonstrating that the alleged misrepresentation did not actually affect the market price of the stock.[379]

Noting that the district court considered the rebuttal expert report "where pertinent" and specifically referred to new evidence of after-hours trading in Anadarko stock and to a new event study in the rebuttal report in its predominance analysis, the court held that the material "constituted key new evidence directly related to the central class certification dispute: whether Anadarko's stock price decline was caused by the Colorado news or the Shenandoah disclosure" and failure to allow a sur-reply was an abuse of discretion.[380] The court likewise agreed that the "district court failed to perform a full *Daubert* analysis" of the plaintiffs' rebuttal expert report, and that it was also not clear whether the district court had "applied *Daubert*'s reliability standard with full force."[381]

On remand, the court directed the district court to fully consider the defendants' *Daubert* challenge, including whether the rebuttal report was unreliable for "fail[ing] to establish that the after-hours market was efficient, fail[ing] to conduct an event study specifically for after-hours trading to determine whether the stock movement was statistically significant, and erroneously identif[ying] the time the Colorado news became public."[382]

Third Circuit Denies Petition for Interlocutory Review of Class Certification Order, Holds Extraterritorial Reach of Section 10(b) is a Merits Question

In *Forsythe v. Teva Pharmaceutical Industries Ltd.*, the Third Circuit denied Teva's petition for interlocutory review of the district court's order granting class certification.[383] Teva argued that interlocutory review was proper under Fed. R. Civ. P. 23(f) because the district court's order both involved a novel question of law related to extraterritorial application of federal securities laws and misapplied the law in its predominance analysis.[384] The court disagreed with Teva's argument that its petition presented a novel legal issue, "the resolution of which will advance the development of class certification jurisprudence in securities cases," and agreed with the district court's predominance analysis with respect to the plaintiff's proposed class-wide damages methodology and thus denied the petition for interlocutory review.[385]

With respect to whether the petition presented a novel question of law, Teva challenged the district court's conclusion "that the class definition should include purchasers of ordinary shares purchased on the [Tel Aviv Stock Exchange]."[386] While Teva's "ordinary shares" are listed on the Tel Aviv Stock Exchange, they are dual listed on a one-for-one basis on the New York Stock Exchange, and Teva shares traded as American depositary receipts ("ADRs") on the NYSE are known as "Teva Pharmaceutical Industries Limited American Depository Shares."[387] The district court determined, after an analysis of the Supreme Court's decision in *Morrison v. National Australia Bank, Ltd.*, that the class definition could include purchasers of Teva's ordinary shares.[388]

The Third Circuit noted that when the basis for interlocutory review under Rule 23(f) is that the appeal implicates a novel or unsettled question of law, the "certification decision," rather than the "underlying litigation," must turn on the novel or unsettled question of law.[389] The court emphasized that questions at the heart of the underlying litigation "are usually best resolved through dispositive motions, including motions for partial summary judgment."[390]

Applying this distinction to Teva's petition regarding the district court's inclusion of Teva's ordinary shares in the class definition, the court held that "Teva's challenge amounts to a request to define—at the class certification stage—the reach of Section 10(b) of the Securities Exchange Act with respect to dual-listed securities," which "is a merits question."[391] While the court acknowledged that *Morrison* left open "the applicability of Section 10(b) to dual-listed securities," interlocutory review under Rule 23(f) was still "not appropriate" because "any question of whether or how Section 10(b) applies to dual-listed securities does not directly relate to the requirements of Rule 23(a) or (b), and thus need not be decided at the class certification stage."[392]

The Third Circuit then turned to Teva's challenge to the district court's predominance determination. Teva asserted that the district court's determination was erroneous because the plaintiff's proposed class-wide damages model was inconsistent with its theory of liability.[393] The operative complaint alleged that Teva and its officers made three categories of misstatements or omissions regarding a drug Teva manufactured to treat multiple sclerosis.[394] The district court dismissed one of the categories of misstatements, but the others remained in the case.[395] The district court reasoned that the three "categories of misstatements identified by [the plaintiff] ultimately reach[ed] the same theory of the case."[396]

In its petition, Teva characterized each category of alleged misstatements as a distinct theory of liability and took issue with the district court's finding that all three categories reached the same theory of the case—that Teva and its officers "made material misrepresentations and omissions, that these misrepresentations artificially inflated Teva's stock price, and that the stock price declined when the truth emerged, causing financial loss to . . . the class."[397] The Third Circuit rejected Teva's characterization in favor of the district court's analysis because "even though it dismissed one of three categories of misstatements," they all were part of the same theory of liability, "and said theory remained viable."[398]

Teva also challenged the plaintiff's use of an event study as its proposed damages model on the grounds that it was inconsistent with its theory of liability and that the district erred in finding that loss causation and disaggregation of confounding factors need not be considered at the class certification stage.[399] The Third Circuit noted that under Rule 23(b)(3), damages must be "susceptible of measurement across the entire class," which means that "any model supporting a plaintiff's damages case must be consistent with its liability case."[400] Pointing to the fact that the "defendants agree that a model like the one proposed by [plaintiff] is a common methodology in securities cases," the court concluded that there was no error in the district court's assessment of the damages model and its relation to the plaintiff's proposed theory of liability.[401]

Eighth Circuit Reverses Class Certification in Best-Execution Case and Rejects Theory of Economic Loss Based on Commissions Paid to Online Brokerage Platform

In *Ford v. TD Ameritrade Holding Corporation*, the Eighth Circuit reversed for the second time the certification of a class consisting of TD Ameritrade clients whose orders allegedly did not receive best execution because the brokerage firm routed them to trading venues that paid it the most money rather than provided the best outcome for customers.[402] A unanimous panel held that the theory of economic loss advanced by the plaintiffs—that paying a commission to TD Ameritrade in exchange for brokerage services that were not provided constitutes an economic loss for the customer—did not align with the definition of "economic loss" articulated by the court in a previous decision in the case; namely, that "the economic loss allegedly caused by TD Ameritrade's alleged order routing practice is 'the difference between the price at which [customers'] trades were executed and the 'better' price allegedly available from an alternative trading source."[403]

The court further ruled that even if commissions paid could be a form of economic loss in a best-execution case, it would still require analysis of individualized questions inconsistent with class certification under Rule 23.[404] The court also rejected the district court's alternative certification of an injunctive class under Rule 23(b)(2) and an issues class under Rule 23(c)(4).[405] The decision is a reminder that individual issues of economic loss or damages can defeat predominance.

The complaint alleged that TD Ameritrade "systematically sends customer orders to trading venues that pay the company the most money, rather than to venues that provide the best outcome for customers," in violation of Section 10(b) of the Exchange Act and Rule 10b-5.[406] The plaintiffs originally filed suit in 2014 and moved for class certification in 2017.[407]

In 2021, the Eighth Circuit reversed the district court's certification order because individual questions of economic loss precluded a conclusion that common issues predominated.[408] The court explained that the economic loss allegedly caused by TD Ameritrade's order-routing practices was "the difference between the price at which [the plaintiffs'] trades were executed and the 'better' price allegedly available from an alternative trading source."[409]

On remand, the plaintiffs filed a new motion for class certification.[410] While the original class certification motion advanced a theory of economic loss based on the customers' lost opportunity to trade through other brokers to get a better price, the new motion advanced a different theory of economic loss: that "paying a commission to TD Ameritrade in exchange for brokerage services that were not provided constitutes an economic loss for the customer."[411] The plaintiffs contended that under the new theory of economic loss, common questions predominated over individualized ones, because the "loss was suffered by every class member in a similar manner and in an amount that may easily be calculated from the number of trades executed by TD Ameritrade for each customer and the amount of commission paid."[412]

The district court certified the class under Rule 23(b)(3) and stated that if certification was held not to be proper under Rule 23(b)(3), it would have alternatively certified an injunctive class under Rule 23(b)(2) and an issues class under Rule 23(c)(4).413 The Eighth Circuit allowed an interlocutory appeal and reversed class certification once again.[414]

The Eighth Circuit concluded that the new theory of economic loss did not align with its definition of "economic loss" announced in its previous decision, which explained that "the economic loss allegedly caused by TD Ameritrade's order routing practices is 'the difference between the price at which [customers'] trades were executed and the 'better' price allegedly available from an alternative trading source.'"[415] The court pointed out that a commission is not the difference between the price at which the customers' trades were executed and a better price available elsewhere and thus do not indicate whether using TD Ameritrade's services made plaintiffs worse off.[416] Rather, "[a] commission is a flat rate that says nothing about the best price reasonably available under the circumstances at the time of [the] trade."[417]

Moreover, the court reasoned that whether a flat-rate commission resulted in economic loss would still require analysis of individualized questions that would defeat predominance, "such as the existence of alternative brokers, the commission fees of other brokers, and the prices that other brokers could have obtained for each trade."[418] For these reasons, the panel held that the district court abused its discretion in certifying a class under Rule 23(b)(3).[419]

The Eighth Circuit also rejected the alternative certification of an injunctive class under Rule 23(b)(2) and an issues class under Rule 23(c)(4).[420] First, the court noted that class certification under Rule 23(b)(2) is proper only when the primary relief sought is declaratory or injunctive; the class claims must be "cohesive," which is a more stringent requirement than the predominance requirement in Rule 23(b)(3); and "injuries remedied through (b)(2) actions are really group, as opposed to individual, injuries."[421]

Pointing out that the circumstances of each customer's trades were unique, the court concluded that "[d]etermining whether a customer was harmed involves individualized questions about the type of trade, prices received, and other prices available, so certification [was] not appropriate" under Rule 23(b)(2).[422] The court also noted that the injunctive class failed because TD Ameritrade no longer charged commissions, so the requested relief would not remedy the plaintiffs' past injuries.

Second, the court explained that a Rule 23(c)(4) class brought with respect to particular issues should not be certified where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of litigation.[423] Rejecting the district court's finding that the Rule 23(c)(4) class "would 'determine the issue of liability on the merits on the question of whether TD Ameritrade complied with the duty of best execution . . . during the class period,'" the court held that resolution of that issue would not materially advance the litigation because "too many individualized issues would remain" and thus certification was not proper.[424]

RELIANCE

Digital Dividend, Short Squeeze, and a Russian Spy: Tenth Circuit Affirms Dismissal of Securities Suit, Holding Short Seller Failed to Plead Reliance and Company's Issuance of Unregistered Crypto Dividend that Resulted in Short Squeeze Not Manipulative Conduct Under Section 10(b)

In *The Mangrove Partners Master Fund, Ltd. v. Overstock.com, Inc.*, a decision addressing issues of first impression, the Tenth Circuit affirmed dismissal of a securities suit brought by a short seller who alleged that the defendants manipulated the market when the company announced it would issue a dividend in cryptocurrency that would not be registered with the SEC in order to drive up the company's stock price, allow the former CEO to sell his shares for large profits, and create a "short squeeze."[425] The Tenth Circuit disagreed, concluding that a fully disclosed corporate transaction was not manipulative conduct actionable under the Exchange Act.[426] The court pointed to the company's disclosure of the digital dividend terms almost eight weeks before the record date "[a]nd importantly, Overstock disclosed that the dividend shares would not be registered under the Exchange Act—thus not available for resale for a period after distribution."[427]

The court also affirmed dismissal because the plaintiff failed to plausibly allege reliance, holding that although neither party contested that the complaint entitled the plaintiff to the *Basic* presumption, the defendants rebutted the presumption by demonstrating that the plaintiff believed that the defendants' statements were false but purchased its shares anyway because of "other unrelated concerns."[428] Notably, the court agreed that the defendants rebutted the presumption based on the plaintiff's statements in the complaint. "In Plaintiff's own words, 'Overstock forced a huge group of investors to purchase Overstock stock to cover their positions in very short order *who would not have otherwise done so*.'"[429] Based on that concession, the court concluded that "if Plaintiff bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of Defendant's alleged misstatements" and thus failed to adequately plead reliance.[430]

The plaintiff was an institutional investor that shorted millions of Overstock shares. Short selling refers to a trading strategy in which an investor borrows shares, sells them, and later buys them back to return them to the lender, in the hope that the share price will have declined in the meantime.

The complaint alleged that Overstock was founded by the former CEO as an online retailer of furniture and home goods but just three years after its IPO in 2002, its stock price began to slide, and the former CEO blamed short sellers. For example, in a 2005 call with investors, the former CEO stated his belief that there's been a plan "to destroy our stock" and that the plan involved a conspiracy of "hedge funds, journalists, and regulators led by a faceless menace he dubbed the 'Sith Lord.'"[431]

In 2014, the company launched a blockchain-based research and investment company and planned to create an alternative trading platform where investors could trade blockchain-based securities. The complaint alleged that in the years just before the class period, the company's retail sales declined sharply, but its outlook improved by 2019. On May 9, 2019, the first day of the class period, the company reported promising financial results and adjusted its EBITDA guidance upward, and the former CEO sold 15% of his Overstock shares for $10 million. In July 2019, the company once again raised its EBITDA guidance upward.

Shortly thereafter, the plaintiff alleged that the former CEO learned that news of his romantic relationship with notorious Russian spy Maria Butina was about to go public and would force him to leave the company. It alleged that the defendants knew then that the company had 17.8 million shares sold short that represented more than half of all shares outstanding. According to the complaint, the defendants concocted a scheme to squeeze the short sellers by artificially inflating the company's share price and enabling the former CEO to make millions of dollars in stock sales.

The company announced that it would issue Digital Voting Series A-1 Preferred Stock in the form of a blockchain-based digital security token with a record date of September 23, 2019. On that date, each shareholder would receive the crypto equivalent of one share of Series A-1 Preferred Stock for each 10 shares of common stock and certain preferred stock owned. The defendants also announced that the dividend shares would be tradeable only on the company's blockchain-based ATS platform and that the company planned to issue the new dividend without registering the securities with the SEC. Because unregistered securities cannot be bought or sold until six months after issuance, the Overstock crypto dividend could not be traded or transferred until the lock-up period expired.

The plaintiff alleged that after the dividend announcement, the short sellers' only route to avoid breaching their lending contracts was to close their short positions by buying new shares and returning them to their lenders before the record date (since the crypto dividend would not be transferable for six months after it was issued). The complaint alleged that this "forced buying" artificially increased the stock's trading volume and price, thereby creating a "short squeeze" as the dividend's record date approached.[432] The looming crypto dividend and resulting stock purchases by short sellers caused the stock price to spike, nearly doubling by September 13, 2019.

The former CEO, who had by then decamped to Indonesia, blogged that "[t]he [Overstock shorts] were asleep at the switch and got caught in a jam," and "[t]here are those who would claim that this was [a] deliberately created squeeze."[433] Shortly thereafter, the former CEO learned that the SEC planned to intervene and force the company to postpone the dividend's record date. In response, the former CEO sold all his remaining shares of company stock, yielding him $90 million.

The plaintiff sued the company, the former CEO, and other officers alleging that they made false and misleading statements about the future and past performance of the company and the digital dividend. The complaint also alleged that they illegally manipulated the market by inducing an artificial short squeeze in violation of Section 10(b) of the Exchange Act and Rules 10b-5(a) and (c). The district court granted a motion to dismiss the complaint.

On appeal, the Tenth Circuit noted that neither party contested that the plaintiff's complaint triggered the *Basic* presumption of reliance based on the "fraud-on-the-market theory," but held that the defendants had rebutted the presumption with statements in the plaintiff's own complaint.[434] The court pointed out that the plaintiff "admitted" that the company's looming crypto dividend, not any alleged misstatements or the fairness of the company's stock price, caused it to buy Overstock shares.[435]

According to the complaint, "Overstock forced a huge group of investors to purchase Overstock stock to cover their positions in very short order *who would not have otherwise done so*."[436] Noting that a party remains bound by concessions in pleadings and that factual assertions in pleadings, unless amended, are considered judicial admissions conclusively binding on the party who made them, the court concluded that the district court correctly found that the plaintiff had conceded it would have purchased no matter the price of the stock. "Plaintiff cannot have it both ways: if Plaintiff bought its shares to avoid breaching its lending contracts, it cannot also have bought its shares because of Defendant's alleged misstatements."[437]

The court easily dispatched the plaintiff's alternative argument that it should treat the *Basic* presumption as unrebutted "because *Basic* creates a relaxed pleading standard that Defendants can never rebut before discovery."[438] Noting that the plaintiff identified no authority for allowing a facially deficient allegation to proceed past a motion to dismiss, the court affirmed the dismissal of the plaintiff's 10b-5 claims.

The Tenth Circuit also rejected the plaintiff's argument that the defendants manipulated the market by issuing the unregistered digital dividend to force the company's short sellers to cover their positions, drive the company's stock to artificially high levels, and allow the former CEO to sell his shares for a massive profit. Noting that the issue of whether an open-market transaction may qualify as manipulative was one of first impression in the Tenth Circuit, the court followed the Second Circuit's approach and held that an open-market transaction may qualify as manipulative conduct, "but only if accompanied by plausibly alleged deception."[439]

The court rejected the plaintiff's contention that the act of issuing an unregistered dividend alone constituted manipulative conduct because the defendants acted with the intent to create an artificial price. Pointing to Supreme Court precedent making clear that Section 10(b) prohibits practices that are manipulative in the "technical sense of artificially affecting market activity in order to mislead investors," the court concluded that "for market activity to 'artificially' affect the price of securities, the manipulative conduct must be 'aimed at deceiving investors as to how other market participants have valued a security.'"[440] Because the defendants truthfully disclosed the terms of the company's upcoming digital dividend, the court held that they did not deceive investors as to how the market valued the company's stock.

The court noted that well before the distribution date, the company announced that the dividend shares would be tradeable only on the company's blockchain-based platform and would not be registered under the Exchange Act and thus would not be available to sell for a period after distribution. Based on these disclosures, the court concluded "that the market received notice that short sellers might buy [the company] stock to cover their positions before the dividend's record date, evinced by market analysts' descriptions of the dividend's potential impact."[441]

Acknowledging out-of-circuit cases holding that certain open-market transactions that are not inherently manipulative can become manipulative when accompanied by manipulative intent, the court observed that "[t]hese cases finding a violation of securities laws based on manipulative intent share an element that is absent here: secrecy."[442] It contrasted Overstock's publicly announced plan for the digital dividend with the secrecy and nondisclosure of market activity that was a central feature of the alleged manipulation in the other cases.[443]

The court also rejected the argument that while full disclosure defeats a plaintiff's market manipulation claim, Overstock's disclosures about the digital dividend came too late. In determining whether a defendant's activity sends a false signal to the market at times relevant to a plaintiff's purchase, the court held that in the context of short sales, "the relevant time is not when Plaintiff opened or maintained its short position—but when Plaintiff *closed* it."[444]

It explained that like most investments, short sales involve two transactions, a purchase and a sale. "The only difference with short selling is that the sale comes first."[445] The court concluded that there was no "reason to treat the short sales at issue differently than traditional investments."[446] "In either instance, we ask whether [a] defendant's activity sent a 'false pricing signal to the market' at the time of the complained-of trade, whether that trade be a purchase or a sale."[447]

Because the alleged manipulative act is the company's issuance of a fully disclosed unregistered dividend and the company's stock price did not begin to rise until five weeks later, "[h]ad Plaintiff chosen to cover during the five-week period right before September 3, rather than wait until September 6, Plaintiff would have avoided any loss it attributes to the short squeeze."[448] Accordingly, "whether we look to what the market knew when Defendants committed their allegedly manipulative act or when Plaintiff bought its shares, our conclusion is the same: Defendants' disclosures prevented any false signal that would deceive investors from entering the market."[449]

The court likewise rejected the plaintiff's argument that the digital dividend was manipulative because Overstock omitted material information from its disclosures in violation of Rule 10b-5's prohibition of misleading statements. It held that neither the plaintiff's allegations that the defendants were "bluffing" about issuing an unregistered dividend when they intended to register it all along, never obtained an "ex-dividend date" from Nasdaq, and that the broker tasked with administering the dividend could not answer basic questions or perform ordinary ministerial tasks, nor their reasonable inferences, revealed that the defendants were lying about issuing an unregistered dividend.[450]

The court also easily dispatched the plaintiff's argument that because the company ultimately filed for the registration of the digital dividend on September 24, 2019, the defendants must have intended to do so when the company first announced its plans to issue an unregistered dividend. The court disagreed and held that the plaintiff ignored the "'obvious alternative explanation' for [the] Defendants' actions" relating to post-announcement discussions with the SEC that resulted in the company's filing for registration.[451] Instead, the court concluded that the alternative explanation is "all the more likely" given the plaintiff's own allegation that the replacement CEO commented on September 24 that the company "appreciate[s] the cooperation and guidance we are receiving from regulatory authorities."[452]

Finally, the court also rejected the argument that the defendants' failure to disclose that it was illegal for the company to issue the digital dividend without registering it with the SEC, and that the true reason behind not registering the dividend was to create an artificial price at which the former CEO could sell his shares, amounted to manipulative conduct. Noting that the federal securities laws provide for unregistered securities and that the plaintiff failed to cite any statute, rule, or regulation to the contrary, the court also pointed to the lack of any allegation in the complaint that any regulatory authority "commanded" the company to register its digital dividend. Because the plaintiff alleged only the former CEO's stock sales and post-hoc statements in the complaint, the court also concluded that while the allegations taken as true "certainly" support an insider trading claim, they failed to allege with the requisite particularity that the company decided not to register the digital dividend to enable the former CEO to profit personally.[453]

INSIDER TRADING

Ninth Circuit Affirms Dismissal of Securities Suit Alleging Insider Trading and Holds Plaintiffs Failed to Adequately Plead Possession of Material Non-Public Information

In *Walleye Opportunities Master Fund Ltd. v. Silver Lake Group, L.L.C.*, the Ninth Circuit affirmed dismissal of a securities suit against three large shareholders of satellite operator Intelsat, including the chairman of its board, alleging that they had acquired material non-public information from a November 5, 2019, meeting between Intelsat and the FCC that the shareholders allegedly relied upon in trading during an after-hours sale of Intelsat stock on the same day.[454] The meeting related to whether the FCC would pursue a public or private auction of the frequency range known as "C-Band," which is often used for television broadcasts. Without the benefit of proceeds from a private auction of C-Band rights, Intelsat was likely to suffer serious financial consequences, including possible bankruptcy.

Noting that insider trading actions must meet the higher, exacting pleading standards of Rule 9(b) and the PSLRA, the court concluded that the plaintiffs failed to meet those stringent standards as to whether the shareholders knew about the November 5 meeting or that any information learned by the company there constituted material, non-public information.

The decision is a reminder that to plead possession, a plaintiff must "specifically allege the who, what, when, where or how that [a defendant] learned the material, non public information" and how he used it for his own advantage."[455] The decision also underscores a plaintiff's obligation to sufficiently plead that the alleged information was material. "Given the fact that Intelsat and other interested parties held 50 or more other meetings with the FCC over a two-year period, nothing in the [complaint] indicates that the fact of the meeting itself would have altered the mix of already available information" at the time.[456]

The complaint alleged that a significant portion of Intelsat's business involved its license to use the C-Band range and that beginning in 2017, there were discussions among interested parties about options for "freeing up" the C-Band to aid in the adoption of 5G technology. Intelsat and other members of the "C-Band Alliance" proposed that they voluntarily vacate the

C-Band and conduct a private auction of the rights to use the vacated portion of the spectrum to cell phone service providers, potentially netting $60 billion in proceeds.[457] In contrast, the FCC traditionally used a public auction to allocate spectrum bands with the federal government receiving the auction proceeds.

By late October 2019, "the tides began turning against a private auction," and Intelsat requested a meeting with FCC staff, which occurred on November 5, 2019.[458] Intelsat's CEO and others from the C-Band Alliance attended the meeting with a senior counsel to the FCC chair. Although "[w]hat occurred at the meeting is not entirely clear," after the markets closed on the same date, the defendants offered 10 million shares of Intelsat at a 6.6% discount to the market closing price and gave interested buyers an hour to accept the offer.[459]

A few days later, the FCC publicly disclosed that its staff had met with the C-Band Alliance on November 5 and that the group had submitted an amended proposal to the FCC in response to a request "to clear more spectrum."[460] Intelsat's stock promptly dropped by 1.85% and fell again after the FCC chair announced that he would vote in favor of a public auction on November 18, 2019, representing a 70% decline from the stock price on November 5, 2019. In February 2020, the FCC formally voted for a public auction, and Intelsat filed for bankruptcy several months later.

The plaintiffs alleged that the defendants acquired material, non-public information about the November 5 meeting and relied on that information for their after-hours block sale of stock in violation of Sections 10(b), 20(a), and 20A of the Securities and Exchange Act and Rule 10b-5. The district court dismissed the complaint based on its finding that the plaintiffs failed to plead particularized facts showing the that the defendants were aware of material, non-public information regarding the C-Band auction at the time of their after-hours trade.

On appeal, the Ninth Circuit affirmed the dismissal because the complaint did not "specifically allege the who, what, when, where or how" the defendants learned of the November 5 meeting prior to selling their Intelsat shares. The court held that the mere fact that one of the defendants was the second-largest shareholder in the company that was entitled to "special Board-level information rights from the Company" and to "receive from the Company upon reasonable request any information," including "from time to time non-public information," was not sufficient to adequately plead that the shareholder had in fact received material non-public information about the November 5 meeting.[461] Likewise, the court held that statements from confidential witnesses alleged in the complaint did not explain with the requisite specificity how or when the shareholders allegedly learned of the meeting with the FCC.[462]

The court also concluded that the mere fact that one of the shareholders was a board member and that Intelsat kept the board apprised of the negotiations with the FCC through regular board meetings was insufficient because the complaint identified no communications on November 5 with the shareholder or the full board. The court likewise held that allegations that one defendant "often worked from the Intelsat offices" on the same floor as senior company executives was insufficient to adequately allege possession of any material non-public information because the complaint did not allege that he was there on November 5 or received information from company executives.

Finally, the court rejected the plaintiffs' description of the November 5 meeting as leading to several independent pieces of material, non-public information because "the existence of the meeting, [the FCC staffer's] body language and management's speculation about the FCC position d[id] not 'significantly alter' the total mix of information available to the public at the time."[463]

SHORT-SWING TRADING

Second Circuit Holds Shareholder May Bring Suit Under Section 16(b) Because Short-Swing Trading by a 10% Beneficial Owner Is Sufficient to Establish Constitutional Standing

In *Packer v. Raging Capital Management LLC*, the Second Circuit applied settled Circuit precedent and concluded that a statutory fiduciary who engages in short-swing trading owes its gains to the corporation under Section 16(b), and the deprivation of those profits inflicts an injury sufficiently concrete to confer constitutional standing.[464] The case arose from a derivative suit alleging that the defendants, who held more than 10% of the company's shares, engaged in trading in the company's stock within a six-month period and that the company did not promptly sue to recover the "short-swing" profits that resulted.[465]

In support of its holding that a shareholder has constitutional standing to sue under Section 16(b), the panel pointed to its prior decision in *Donoghue v. Bulldog Investors General Partnership*. That decision explained the "flat rule" of Section 16(b) that imposes a form of strict liability effectively prohibiting an entire class of transactions in which the possibility of abuse of inside information was believed to be intolerably great and thus mandates that any profits from such transactions be disgorged to the company to prevent insider trading and protect the integrity of the financial markets.[466]

Reversing the district court's determination that the Supreme Court's decision in *TransUnion LLC v. Ramirez* abrogated *Donoghue*, the court explained that nothing in *TransUnion*, which instructed courts to identify a "close historical or common-law analogue for the [] asserted injury," undermined the analogue identified in *Donoghue*: "[j]ust as a common-law fiduciary who 'deals with the trust estate for his own personal profit' must account to the beneficiary 'for all the gain which he has made,' a statutory fiduciary who engages in short-swing trading owes its gains to the corporation under Section 16(b)."[467] The court likewise declined to revisit its rationale in *Donoghue or* hold that the case is no longer good law and reversed the dismissal of the action for lack of constitutional standing.

In granting the defendants' motion to dismiss, the district court reasoned that the plaintiff lacked constitutional standing to bring a Section 16(b) suit because the complaint failed to allege that he had suffered a concrete injury as required by the Supreme Court in *TransUnion LLC v. Ramirez*.[468] In particular, the district court determined that Section 16(b) merely protects against "speculative harm," and found that the violation alleged in the complaint did not pass Article III muster in light of *TransUnion's* holding that "risk of harm" alone does not qualify as "concrete" harm.[469] Although the district court acknowledged that *Donoghue* "unequivocally" held that an alleged violation of Section 16(b) can establish constitutional standing, it found that the later *TransUnion* case and its progeny cast doubt on the precedent and predicted that the Second Circuit would likely "come to the same conclusion if presented with the opportunity to re-consider its holding" in *Donoghue*.[470]

A unanimous panel rejected the district court's reasoning. As a preliminary matter, the court explained that to establish Article III standing—also known as constitutional standing—"a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[471] Injuries may be tangible harms, such as physical and monetary harms, or intangible harms, such as reputational harms, disclosure of private information, or intrusion upon seclusion.[472]

To determine whether an intangible injury is sufficiently concrete to satisfy Article III, the Supreme Court advised courts to consider the "history and the judgment of Congress," as well as whether the injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts."[473] The Supreme Court explained that although Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," a statutory violation alone does not establish constitutional standing.[474]

Five years later, in *TransUnion*, the Supreme Court instructed plaintiffs to identify a "close historical or common-law analogue for their asserted injury" but explained that the analogue need not be "an exact duplicate in American history and tradition."[475] *TransUnion* further held that in a suit for damages, "the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a *separate* concrete harm."[476]

The Second Circuit concluded that a close historical or common-law analogue to short-swing trading by a Section 16(b) insider is a claim for breach of fiduciary duty, and that a fiduciary's profits from dealing with an estate involves an injury sufficiently concrete to confer constitutional standing. "Nothing in *TransUnion* undermined the analogue we identified in *Donoghue*."[477]

The court also held that the district court was mistaken in determining that Section 16(b) protects merely against the risk of harm. "[Plaintiff] does not base his standing argument on a risk of harm . . . [t]he concrete injury that confers standing on [plaintiff] is, as we recognized in *Donoghue*, the breach by a statutory insider of a fiduciary duty owed to the issuer not to engage in and profit from any short-swing trading of its stock."[478] The Supreme Court declined to review the Second Circuit's decision.

STATE LAW BREACH OF FIDUCIARY DUTY CLAIMS

Third Circuit Clarifies De Novo Standard of Review Applies to Demand Futility Decisions and Joins Six Sister Circuits and Delaware in Rejecting Abuse-of-Discretion Standard

In *In re Cognizant Technology Solutions Corporation Derivative Litigation*, the Third Circuit, sitting en banc, overruled its precedent and held that a district court's decision to dismiss a shareholder derivative action for failure to plead demand futility is to be reviewed de novo.[479] Acknowledging that many other courts have expressed skepticism regarding the appropriateness of the abuse-of-discretion standard in the context of demand futility and given that it ordinarily reviews dismissals on the pleadings de novo, the court concluded that "we see no sound reason to apply a different standard of review to shareholder derivative actions than we would to any other type of case."[480]

The court also explained that "reviewing demand futility cases for an abuse of discretion 'is not only unworkable in practice but also flawed in conception' because whether demand is futile is not a matter of one's discretion, but instead depends only on whether the plaintiff adequately pleaded the state-law requirements. That being so, it hardly makes sense to review whether a district court has abused discretion that it does not have."[481] Applying the de novo standard, the court held that the district court correctly dismissed the complaint because the plaintiffs had not shown that a majority of the directors faced a substantial likelihood of liability on the claims asserted in the derivative complaint or were insufficiently independent from another director who did, and thus failed to adequately plead demand futility under Rule 23.1 and Delaware law.[482]

The suit arose after it was revealed that from 2010 to 2015, Cognizant employees in India allegedly paid approximately $6 million in bribes to Indian government officials for the purpose of securing construction-related permits and operating licenses.[483] During that period, the company's board of directors received updates indicating that the company's anti-corruption controls could be improved, including reports that the company's case management tool for tracking incidents of bribery and corruption suffered from "[i]nconsistent and untimely documentation . . . leading to lack of visibility of potential compliance issues."[484]

In 2015 and 2016, the company with board approval released two public Sustainability Reports stating that no incidents of corruption had been reported in either 2014 or 2015 and also describing the ongoing efforts to improve compliance controls and procedures. By late 2016 and early 2017, the company had publicly disclosed the alleged India bribery scheme and reported it to both the DOJ and SEC. The DOJ declined prosecution, but the SEC fined the company $25 million for alleged violations of the Foreign Corrupt Practices Act ("FCPA").

In July 2017, shareholders brought suit against 11 directors and five current and former officers alleging breach of fiduciary duties, corporate waste, unjust enrichment, and contribution and indemnification.[485] According to the complaint, the defendants knew of "several red flags" in the company's FCPA compliance program dating back to 2014 but ignored the problems and hid their concerns from shareholders.[486]

The defendants moved to dismiss the action because of the plaintiffs' failure to make a pre-suit litigation demand. The district court granted the motions to dismiss, holding that the complaint failed to state with particularity the reasons why making such a demand on the board would have been futile.[487]

On appeal, the Third Circuit first addressed the threshold question of the standard of appellate review when a district court dismisses a derivative action based on failure to plead demand futility under Rule 23.1. Noting that Rule 23.1 merely sets the pleading standard by requiring derivative complaints to allege "with particularity" either that a satisfactory pre-suit demand was presented to and refused by the board of directors or the reasons for not making the effort to do so, the court explained that the state of incorporation establishes the demand requirement and governs the analysis of whether demand was wrongfully refused or excused as futile.

In its 1992 decision *Blasband v. Rales*, the Third Circuit first explained that a district court's determination of demand futility is "reviewed for abuse of discretion," largely informed by other courts of appeals' adoption of an abuse-of-discretion standard in such cases at that time. Acknowledging that the abuse-of-discretion standard in the demand-futility context had subsequently lost favor in both federal and state courts, with the courts of appeals for the First, Second, Sixth, Seventh, Eighth, and Tenth Circuits as well as the supreme courts of Delaware and New Jersey all adopting de novo review, the court concluded that "reevaluation of *Blasband* is in order."[488]

The court next addressed several "significant relevant factors" identified by the Supreme Court in deciding whether to exercise a deferential abuse-of-discretion or de novo review of a district court's decision, "though the analysis 'is not rigorously scientific.'"[489] Those factors include: (i) whether "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question"; (ii) "[t]he non-amenability of the problem to rule, because of the diffuseness of circumstances, novelty, vagueness, or similar reasons that argue for allowing experience to develop"; (iii) "the language and structure of the governing statute" or rule; and (iv) whether the decision under review "ordinarily has such substantial consequences" that "one might expect it to be reviewed more intensively."[490]

The court concluded that all four factors weighed in favor of a de novo standard of review. First, the court explained that "district courts are no better positioned than appellate courts to decide whether demand should be excused as futile."[491] Reviewing the dismissal of a derivative claim requires "an appellate court [to] perform[] exactly the same task as when reviewing the dismissal of any other action." Namely, the court must "read the facts alleged in the complaint, assume the truth of those facts, and decide whether those facts state a claim under the applicable legal standard."[492]

When a district court "dismisses a complaint due to the legal insufficiency of its allegations, that decision ordinarily gets de novo review."[493] Because deciding demand futility does not require "discretionary rulings involving the balance of potentially competing factors" that are ordinarily reserved for the "trial judge's expertise and experience," the court found no reason to treat it differently from any other dismissal review.[494]

Second, the court held that demand futility is amenable to general rules that cover a wide range of circumstances, and therefore lends itself appropriately to a de novo review.[495] Third, nothing in Rule 23.1 or applicable state law indicates a preference for the trial court's decision on this issue that would warrant abuse-of-discretion review.[496] Fourth, the court reasoned that demand futility has "substantial consequences" in "shareholder cases, given both the serious potential consequence of ending the litigation and the frequency with which this issue arises in derivative actions."[497] Accordingly, "one might expect it to be reviewed more intensively," and "[w]e see no reason to perpetuate the concept of discretion in this context."[498]

Applying de novo review, the court affirmed the district court's finding that the plaintiffs failed to establish demand futility because the majority of the directors did not: (i) receive a material personal benefit from the alleged misconduct; (ii) face a substantial likelihood of liability on any of the claims at issue; or (iii) lack independence from someone who received a material personal benefit from or face substantial likelihood of liability on the alleged misconduct. The court rejected the plaintiff's core argument that the director defendants had breached their fiduciary duty of loyalty by informing shareholders that no incidents of corruption were reported in 2014 or 2015, notwithstanding that company employees were actively engaged in a bribery scheme at the time, because the complaint failed to allege that the defendants knowingly disclosed any false information.

Pointing to the absence of any allegation that the director defendants knew officers and employees had paid bribes to foreign officials or were participating in wrongdoing by signing off on the Sustainability Reports, the court concluded the omissions were "fatal to [p]laintiffs' claims because, under these circumstances, the [d]irector [d]efendants must have known that they were disseminating false or misleading information to have violated their fiduciary duty of loyalty."[499] The court likewise dispatched the argument that the director defendants had constructive knowledge of the bribery scheme because they knew about a "staggering number of gaps in Cognizant's compliance scheme" and held that "[i]nforming the [d]irector [d]efendants that Cognizant's internal compliance system failed to 'reliably track incidents of corruption' and needed improvement did not impart to those directors that Cognizant employees were paying bribes."[500] Therefore, the court affirmed the district court's dismissal of the derivative complaint.

Delaware Supreme Court Reverses Dismissal of *Caremark* Claims and Holds Chancery Court Erred in Relying on "Reasonably Disputed" Factual Findings of a Federal Court in a Related Case

In *Lebanon County Employees' Retirement Fund v. Collis*, the Supreme Court of Delaware reversed dismissal of a derivative complaint alleging *Caremark* claims against the directors of AmerisourceBergen for failure to oversee the company's compliance with the laws governing the distribution of opioids and held that the Delaware Court of Chancery erred by taking judicial notice of factual findings of an out of state federal court when the underlying facts were reasonably disputed.[501] The court held that the Delaware Court of Chancery erred in dismissing the complaint for failure to allege demand futility based on judicial notice of factual findings in opioid-related multidistrict litigation in the U.S. District Court for the Southern District of West Virginia that were favorable to the defendants, including findings that "'[n]o culpable acts by defendants caused an oversupply of opioids'" and that the defendant's anti-diversion efforts were legally compliant.[502]

Noting that Delaware Rule of Evidence ("D.R.E.") 202 may be invoked for judicial notice of case law in other courts but not for judicial notice of disputed facts, the court held that it was an error to rely on the federal court's factual findings as the "sole basis" for dismissing the complaint. "In the face of well-pleaded facts in the plaintiffs' complaint, which under our rules of procedure are presumed to be true, the court accepted a contradictory version of those facts and, consequently, dismissed the plaintiffs' claims. This unfairly deprived the plaintiffs of the opportunity to prove the truth of their well-pleaded allegations."[503]

The complaint alleged inadequate director and officer oversight under *Caremark* based on two distinct theories. First, the plaintiffs alleged that the directors and officers fostered "'a culture of non-compliance'" and were therefore complicit in the company's violations of the Controlled Substances Act ("CSA").[504] This theory was based on statements in *In re Massey Energy Company* that "Delaware law does not charter law breakers," and by enabling violation of the law, a fiduciary has violated their duty of loyalty.[505] The complaint also alleged liability under a "'Red-Flags Theory,'" asserting that the director and officer defendants were liable because they ignored a "'tidal wave of red flags,'" even if they did not know about specific violations of law.[506] The complaint alleged that demand on the board was futile because a majority of directors faced a substantial likelihood of liability on the claims as pleaded and were consequently incapable of responding impartially to a demand.

As a preliminary matter, the Delaware Court of Chancery concluded that "'[s]tanding alone, the avalanche of investigations and lawsuits without any apparent response . . . would support a well-pled Red-Flags Claim. Likewise, the series of decisions that culminated in [a settlement], along with the decision to keep that framework in place until [a later settlement], would support a well-pled *Massey* claim,'" warranting denial of the motion to dismiss.[507]

However, the court nevertheless dismissed the complaint based on its judicial notice of a decision by a West Virginia federal court, following a two-month trial on the merits, that AmerisourceBergen had complied with the CSA. Finding that the federal court's findings were persuasive if not preclusive, the Delaware Court of Chancery concluded that the findings "'fatally undermine[d] the [plaintiffs'] complaint.'"[508] It concluded that "'[i]n light of the West Virginia Court's thorough analysis, it is not possible to infer that the Company failed to comply with its anti-diversion obligations, nor is it possible to infer that a majority of the directors who were in office when the complaint was filed face a substantial likelihood of liability on the plaintiffs' claims.'"[509] Accordingly, the Delaware Court of Chancery found that demand was not futile and that the plaintiffs lacked standing to assert their derivative claims.

The Delaware Supreme Court reversed, holding that the dismissal was erroneously based on judicial notice of the federal court's factual findings under D.R.E. 202, which provides for judicial notice of common law and case law, but not disputed adjudicative facts. "The Court of Chancery's use of D.R.E. 202, which provides for judicial notice of law, to effectively adopt the factual findings of another court in another case reflects a category error and a departure from the principles that animate the concept of judicial notice."[510]

The court noted that whether the defendants in the multidistrict litigation engaged in wrongful conduct and failed to comply with the CSA are questions of fact, and even if they are recorded in the case law of the United States, they do not establish or recognize a rule or principle of law of the kind that is subject to judicial notice under D.R.E. 202. Pointing to federal cases interpreting Federal Rule of Evidence 201, which is nearly identical to D.R.E. 202, the court noted that for a fact to be judicially noticed, "'indisputability is a prerequisite,'" and "'the fact must be one that only an unreasonable person would insist on disputing.'"[511]

The Delaware Supreme Court concluded that because the fact of AmerisourceBergen's compliance with the CSA "was, and is, reasonably disputed" and, according to the Delaware Court of Chancery, the "opposite was adequately pleaded" in the complaint, the lower court erred by denying the plaintiffs' standing in deference to the federal court's factual findings.[512] The Supreme Court also held that the Court of Chancery's reliance on the factual findings of the federal court effectively (and wrongly) changed the date at which demand futility was considered from the date on which the complaint was filed to a date six months later, well after the defendants filed their motions to dismiss.

New York Court of Appeals Affirms Presumption that, with Rare Exceptions, the Substantive Law of the Place of Incorporation Applies to Disputes Involving the Internal Affairs of a Corporation and Reverses Dismissal of Fiduciary Duty Claims Under Foreign Law

In *Eccles v. Shamrock Capital Advisors*, the New York Court of Appeals issued a unanimous decision clarifying the choice-of-law principles governing alleged breaches of fiduciary duties in international business disputes.[513] The dispute related to a 2018 merger between FanDuel Ltd., a fantasy sports market company founded in Scotland that later established headquarters in New York, and the U.S. assets of Paddy Power Betfair PLC ("Paddy Power"), and whether Scottish law or New York law should govern the fiduciary duty claims of FanDuel's common shareholders that arose from the merger.

The merger agreement provided that the two companies would be compensated for their contributions of capital to what would become the merged company, with FanDuel shareholders to receive approximately 40% of the shares in the new company and Paddy Power to receive the remaining 60%. At closing, the merger proceeds were valued at $465.5 million, below the $559 million subscription price paid by the preferred shareholders of FanDuel.

As a result of a provision in FanDuel's operating documents, in the event of the winding down of the company, its preferred shareholders were entitled to be compensated first for the value of their stock, and thus the preferred shareholders received the entirety of FanDuel's 40% of shares of the company created by the merger, while FanDuel's common shareholders received nothing. The plaintiffs, including common shareholders and the founders of FanDuel, alleged that certain preferred shareholders and directors deliberately undervalued the value of the post-merger company to benefit themselves in breach of their fiduciary duties.

The defendants moved to dismiss the complaint, arguing that under the internal affairs doctrine, Scottish law applied to claims that arose from the relationship between and among the directors and shareholders of a Scottish business entity. Noting that the case required it "to resolve questions that frequently confront our courts in the course of international business disputes," the court held that "with rare exception, the substantive law of the place of incorporation applies to disputes involving the internal affairs of a corporation."[514] Once a court determines that another jurisdiction's law governs, however, "it has significant flexibility and discretion in deciding whether to take notice of that foreign law and applying it to the case at hand."[515]

Concluding that New York's Appellate Division, First Department correctly found that Scottish law applied and that it could take judicial notice of that law, the court held that "based on the unique circumstances of this case . . . plaintiffs' allegations at least give rise to a possible inference that special circumstances are present." Thus, it held that the plaintiffs had sufficiently pleaded causes of action for breach of fiduciary duty, requiring reversal of the dismissal of the complaint.[516]

The crux of the plaintiffs' claims was that because the post-merger proceeds of FanDuel's shares in the new company were valued at $465.5 million, below the $559 million subscription price originally paid by FanDuel's preferred shareholders, and those preferred shareholders were entitled to be compensated first from the proceeds of any winding-down transaction under a provision of FanDuel's governance documents, the common shareholders received nothing after the merger closed.[517] The plaintiffs claimed that the defendants were motivated by self-interest, did not seek an independent valuation of the proposed merger consideration, manipulated the valuation of the post-merger company to ensure the common shareholders received nothing, and that no shareholder vote on the merger ever occurred, all constituting a breach of their fiduciary duties.[518] The merger was approved shortly after the Supreme Court held that Congress could not preclude states from legalizing sports gambling.[519] The plaintiffs also alleged that a pre-merger presentation to the board projected that if sports betting was legalized in the United States, FanDuel would earn more than $1.1 billion in revenue within five years.

The defendants moved to dismiss the complaint, arguing that under the internal affairs doctrine, Scottish law applied to the claims, which arose from the relationships between the directors and shareholders of an entity incorporated in Scotland. They also argued that claims based on alleged duties owed by directors to shareholders were not cognizable under Scottish law because directors owed duties to the corporation as a whole rather than to the shareholders unless "special factual circumstances" caused such a duty to arise.[520]

The trial court granted the motions to dismiss in part, holding that New York law applied to the claims because the internal affairs doctrine was inapplicable "where the defendants [were] not current officers, directors, and shareholders" at the time of the lawsuit."[521] The Appellate Division reversed, holding that the claims for breach of fiduciary duty were governed by Scottish law under the internal affairs doctrine and that the complaint failed to state a claim because under that law, directors owed fiduciary duties only to the company rather than shareholders, except in "special circumstances . . . not present here."[522]

As a preliminary matter, the court of appeals noted that "[a]lthough New York courts reject a per se application of the internal affairs doctrine, they generally apply the law of the place of incorporation unless another state has an 'overriding interest in applying its own law and a defendant has 'little contact apart from the fact of its incorporation, with the state of incorporation.'"[523] Applying the presumption that Scottish law applied as the place of FanDuel's incorporation, the court held that the defendants had failed to overcome the presumption by demonstrating both that the interest of the place of incorporation was minimal and that New York had a dominant interest in "applying its own substantive law."[524] It noted that FanDuel "has considerable contacts with Scotland" apart from its incorporation there and that "[t]his is simply not a situation where New York has an overriding interest in applying its own law to plaintiffs' breach of fiduciary claims," and thus the Appellate Division properly applied Scottish law to the claims.[525]

Turning to the merits, the court of appeals held that applying Scottish law, the plaintiffs' fiduciary-duty claims stated a cause of action. Pointing to the allegation that the common shareholders suffered a unique harm because the directors' actions prevented them from receiving any consideration from the merger despite their valuable contributions and ownership interests, the court concluded that "[t]his is therefore not a case of plaintiffs attempting to impermissibly repackage a derivative claim against the company as a direct one."[526]

While the court acknowledged that under the relevant English common law principles, a director does not owe any fiduciary duties directly to the shareholders based on his or her relationship with the company, it noted that "there may be special circumstances in which a fiduciary duty is owed by a director to a shareholder personally and in which breach of such a duty has caused loss to [the shareholder] directly . . . as distinct from the loss sustained . . . by a diminution in the value of [the shareholder's] shares.[527] Specifically, the court held that these fiduciary duties depend on "establishing a special factual relationship between the directors and shareholders in the particular case" based on "well established categories of fiduciary relationships."[528]

The court pointed to the interaction between the waterfall provision and the drag-along rights, "which left the common shareholders in an especially vulnerable position, and the fact that the directors were "vested with the power to negotiate a merger agreement and subsequently value intangible merger consideration" as sufficient to show that the directors "undertook a duty not to undermine the common shareholders' interests in those transactions, much less to do so for their own self-interest."[529] Under New York's liberal pleading standard, the court held that the complaint could therefore be read to allege a "special circumstance" that could give rise to a cognizable fiduciary claim under Scottish law.

FEDERAL JURISDICTION

Second Circuit Holds that Purchasers of Cryptoassets on Decentralized Exchange Plausibly Alleged Transactions Occurred in the United States and Their Claims Are Subject to Federal and State Securities Laws

In *Williams v. Binance*, the Second Circuit held that purchases of cryptoassets on a decentralized exchange that "reject[ed] having any physical headquarters in any geographic jurisdiction" involved domestic transactions subject to federal and state securities laws.[530] Noting Binance's intentional efforts to evade the jurisdiction of any regulators in any country, the court pointed to allegations that the company maintained a "substantial presence" in the United States, with servers, employees, and customers across the country despite its failure to register as a securities exchange or a broker-dealer under the federal securities laws.[531]

The court held that because the plaintiffs plausibly alleged that their trade orders were matched, and therefore became irrevocable, on Binance servers located in the United States, the transactions were "domestic transactions in other securities" and thus did not run afoul of the presumption against extraterritorial application of the securities laws announced by the Supreme Court in *Morrison v. Nat'l Australia Bank Ltd.*[532] The court also reversed the dismissal of the plaintiffs' claims under Section 12(a)(1) of the Securities Act and Section 29(b) of the Exchange Act as time-barred because those claims did not accrue until the plaintiffs could have filed suit, which was only after they made their purchases. Thus, any claims based on purchases made during the year before filing suit were timely.

Plaintiffs alleged that they purchased certain security "tokens," cryptoassets created and sold by third-party issuers in initial coin offerings ("ICOs") and listed on Binance's exchange for secondary trading.[533] Security tokens are distinct from other classes of cryptoassets because they have some present tangible use beyond their potential to appreciate. Each ICO was accompanied by a white paper that included advertising and a technical blueprint for a proposed project associated with the token.

The plaintiffs agreed to Binance's Terms of Use, submitted purchase orders for tokens, were matched by Binance with sellers of those tokens, and paid Binance transaction fees.[534] At all times, the plaintiffs were based in the United States.[535] The Terms of Use did not require users of the Binance platform to place any particular trade order but dictated that once a trade order was placed, Binance had the right to reject a request to cancel it, and that once matching occurred, the order could not be cancelled at all.

After the tokens "crashed" in value and became worth only "a tiny fraction of their 2017–2018 highs," the plaintiffs filed suit under Section 12(a) of the Securities Act and sought rescission of their purchases under Section 29(b) of the Exchange Act.[536] The district court granted Binance's motion to dismiss, finding that the plaintiffs' claims constituted an impermissible extraterritorial application of the securities laws under *Morrison v. National Australia Bank Ltd.* and that the claims also were time-barred.

On appeal, the Second Circuit considered whether domestic securities laws applied to the transactions at issue or whether applying domestic law would be impermissibly extraterritorial. The court explained that the Supreme Court ruled in *Morrison* that when a statute gives no clear indication of extraterritorial application, "it has none" and invoked the presumption against extraterritoriality to interpret the Exchange Act as applying only to "[1] securities listed on domestic exchanges, and [2] domestic transactions in other securities."[537]

Noting that it has extended the *Morrison* framework to Securities Act claims as well as claims under state Blue Sky laws, the Second Circuit concluded that the transactions at issue were "domestic transactions in other securities" under *Morrison* and the complaint should not have been dismissed on extraterritoriality grounds.[538] The court explained that to sufficiently allege the existence of a "domestic transaction in other securities," plaintiffs must allege facts indicating that "irrevocable liability was incurred or that title was transferred within the United States."[539] In other words, irrevocable liability attaches when "the parties to the transaction are committed to one another" or when "there was a meeting of the minds of the parties."[540]

The court explained that to determine whether a transaction is domestic, courts must consider both when and whether the transaction became irrevocable. It acknowledged that the task is particularly difficult when a transaction takes place over an exchange that claims to have no physical location in any geographic jurisdiction and is not subject to the oversight of any country's regulatory authority. Nevertheless, the court concluded that the plaintiffs plausibly alleged facts showing that two transactional steps giving rise to an inference of irrevocable liability occurred in the United States.

First, the court noted that Binance matched the plaintiffs' offers to buy tokens with sellers on computer servers and data centers hosting Binance's platform provided by Amazon Web Services and that almost all of Binance's infrastructure was physically located in the United States. The court explained that it was appropriate to determine where matching occurred solely based on the locations of the servers because "Binance has not registered in any country, purports to have no physical or official location whatsoever, and the authorities in Malta, where its nominal headquarters are located, disclaim responsibility for regulating Binance."[541]

Second, the court held that the plaintiffs plausibly alleged that irrevocable liability attached because contract formation between Binance and the plaintiffs occurred in the United States: The plaintiffs "committed to the investment[s]" while in their states or territories of residence, made payments from the United States to an exchange that disclaimed any location or sovereign, and were unable to revoke their purchase order unilaterally under Binance's Terms of Use.[542] Because irrevocable liability attached in the United States, the court held that the plaintiffs adequately alleged that their transactions on the Binance exchange were domestic transactions and that application of federal and state securities laws was not impermissibly extraterritorial.[543]

The court also reversed the district court's dismissal of the plaintiffs' claims under Section 12(a)(1) as time-barred. Section 13 of the Securities Act requires that a claim for solicitation of an unregistered security under Section 12(a)(1) be brought within one year after the violation upon which it is based.[544] The court pointed to longstanding Second Circuit precedent holding that Section 13's statute of limitations does not begin to run as to an illegal offer until the plaintiff acquires the security to avoid the "extreme case" of "a running of the statute of limitations before the claim had even arisen."[545]

"[A]lthough § 13 dates" the running of the statute of limitations "from the 'violation' in cases of claims under § 12(a)(1), it would be unreasonable to read § 13 as starting the short period for an action . . . before the action could have been brought" and thus "the limitations period . . . begins to run only after the sale" of a security following an illegal solicitation.[546] The court held that the plaintiffs' Section 12(a)(1) claims arising from purchases made within the year prior to filing suit were timely.[547]

The court likewise reversed the district court's dismissal on timeliness grounds of the plaintiffs' claims under Section 29(b) of the Exchange Act for rescission of their purchases. Under Section 29(b), contracts for sale of securities by an unregistered exchange or unregistered broker-dealer are voidable and rescindable by the injured party.[548] Although that section does not contain an express cause of action tied to a statute of limitations, the parties agreed that claims for rescission under Section 29(b) expire one year after they accrue.[549]

Binance argued that because the relevant contract to be rescinded was its Terms of Use and the plaintiffs had not adequately alleged that they entered into new, implied contracts every time they conducted a transaction on Binance's platform, the claims for rescission accrued when the Terms of Use were signed—regardless of when or whether transactions later were made pursuant to the Terms of Use.[550] As a preliminary matter, the court held that Section 29(b)'s express one-year limitations period applied. The court next rejected Binance's argument that the relevant contract to be rescinded was its Terms of Use, concluding that it provided mere "governing rules [for] Plaintiffs [if they decided to trade]" and agreement to the Terms of Use "did not effectuate a 'completed sales transaction.'"[551] By agreeing to the Terms of Use, the plaintiffs were not "committed to pay [an] amount under the contract," and could stop trading on Binance "at any time."[552]

Noting that a Section 29(b) claim must be predicated on an underlying violation of the Exchange Act, the court concluded that the plaintiffs' rescission claims could not have accrued, and the statute of limitations could not have begun to run, absent a specific transaction on the Binance platform. "Plaintiffs could not have known the facts 'required to adequately plead . . . and survive a motion to dismiss' without knowing what, if any, violative transactions constituted the alleged underlying violation of the Exchange Act."[553] Thus, the plaintiffs' claims under Section 29(b) based on purchases made during the year before filing suit were timely.[554]

The Supreme Court declined to review the decision earlier this year.

Ninth Circuit Vacates Stay of Securities Fraud Suit Pending Completion of Company's Chapter 11 Bankruptcy Case

In *In re PG&E Corporation Securities Litigation*, the Ninth Circuit held that it had jurisdiction over an interlocutory appeal from a district court order staying a securities fraud suit under the Supreme Court's *Moses H. Cone* doctrine because the stay imposed was indefinite and likely to be extremely lengthy.[555] The court held that the district court properly concluded that "because the bankruptcy court must address issues identical to those presented in this action in resolving the securities claims asserted against PG&E in the bankruptcy action," the district court could receive "considerable assistance" in resolving the securities suit from the bankruptcy court's development of the record.[556]

However, the Ninth Circuit vacated the stay because the district court failed to weigh the relative hardships the stay might cause to the parties; it remanded for consideration of the potential prejudice to the plaintiffs and whether a stay would promote the just and efficient determination of the securities suit. The decision affirms the authority of appellate courts to exercise jurisdiction over interlocutory appeals from orders imposing stays that are both indefinite and likely to be lengthy, and serves as a reminder that district courts must weigh the relative hardships that might arise from a stay of substantial length.

The securities suit arose after wildfires ravaged parts of Northern California in 2017 and 2018. A group of retirement and pension funds filed a securities class action against PG&E and some of its current and former officers and directors (collectively, "Individual Defendants"), and more than 20 financial institutions that participated in certain PG&E note offerings, alleging numerous misstatements and omissions concerning PG&E's wildfire-safety policies and regulatory compliance. Because PG&E filed for bankruptcy after the operative complaint was filed, the securities suit was automatically stayed in district court as to the company but not as to the Individual Defendants, who moved to dismiss the claims against them.[557]

The bankruptcy court confirmed PG&E's plan of reorganization in June 2020. The plan provided for the bankruptcy court to retain jurisdiction over proofs of claim filed by purchasers of PG&E securities asserting federal securities-law claims against PG&E. The plaintiffs in the district court securities suit had previously and unsuccessfully attempted to pursue their securities claims against PG&E through "a class-action procedure" in the bankruptcy case, proposing that their claims be treated as "class proofs of claim," with the lead plaintiff in the district court securities suit appointed as lead claimant for the class, and that the proposed class's claims be based on the allegations in the district court securities suit.[558] The bankruptcy court denied the request for class treatment and instead adopted "a specialized multi-step alternative-dispute-resolution procedure ... to 'facilitate and simplify the resolution of' the securities claims filed in the bankruptcy case," which required the bankruptcy court to address the merits of the securities claims.[559]

In April 2021, more than a year after the Individual Defendants had filed their motions to dismiss in the district court action, the district court issued a notice that it intended to stay the securities suit pending resolution of the bankruptcy proceeding. The district court cited concerns for judicial efficiency and avoiding inconsistent judgments based on representations that the bankruptcy and district court proceedings would necessarily involve identical issues.

Plaintiffs objected to the notice based on the fact that the bankruptcy court's decisions were appealable to the district court, thereby eventually requiring the district court to decide all of the securities-related issues itself. Plaintiffs also argued they would be prejudiced by the stay, citing multiple experts estimating that the bankruptcy court's proposed ADR procedure would likely take up to seven years to complete, which would increase "the likelihood of lost evidence and fading memories."[560] The plaintiffs also argued that a stay would unfairly increase PG&E's bargaining power and unfairly inflate the importance of the securities-claim ADR because class members who did not or could not submit claims were excluded from participating in the ADR.[561]

The district court entered a stay in September 2022, but the order differed from the notice in several ways. The order referenced only "efficiency" and an "overlap between the bankruptcy proceedings and the instant securities fraud action" without any analysis and notably did not include the notice's additional justifications of "the potential for inconsistent judgments" or the impact on "the size and potential damage claims of the putative classes in this action."[562] Nor did the stay order address the plaintiffs' concerns regarding prejudice.[563] Moreover, the order stayed the case until "resolution of the bankruptcy proceedings," rather than until "completion of the [securities-claims ADR]" as indicated in the notice.[564] The plaintiffs appealed the stay order.

On appeal, the Ninth Circuit first addressed its jurisdiction over the interlocutory appeal. Noting that "[o]dinarily, a stay order is not an appealable final decision," and citing the Supreme Court's decision in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, the court reasoned "that a stay order is appealable as a final decision under 28 U.S.C. § 1291 if the order places the plaintiff 'effectively out of court.'"[565] Although *Moses H. Cone* addressed a federal stay imposed pending resolution of a state court action that would have preclusive effect, the court concluded that the Supreme Court's rationale "applies even 'absent risk that another proceeding will have res judicata effect' where 'an indefinite delay amounts to a refusal to proceed to a disposition on the merits.'"[566] The court concluded that the district court's stay was both lengthy *and* indefinite and that either factor allowed for interlocutory review under the *Moses H. Cone* doctrine.

On the merits, the court explained that a district court "must weigh" "three non-exclusive factors" when considering a stay, including "(1) the possible damage which may result from the granting of a stay; (2) the hardship or inequity which a party may suffer in being required to go forward; and (3) the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law."[567] The Ninth Circuit agreed with the district court that the stay would promote the third factor because the bankruptcy court would need to address identical issues, including "the complex element of loss causation."[568]

However, the court vacated the stay because the district court failed to "weigh the relative hardships that a stay might cause."[569] In so ruling, the court explained that the district court was "silent" as to the plaintiffs' prejudice arguments and did not explain "why the efficiencies the district court seeks to gain outweigh the potential prejudice caused by the significant delay."[570] The court remanded the case to the district court to weigh the plaintiffs' objections to the stay and, if it determines that a stay is appropriate, to explain why a stay would promote a "just and efficient determination" of the securities case.[571]

STANDING

Ninth Circuit Affirms Dismissal, Holding that SPAC Investors Who Do Not Purchase Shares of Target Company Do Not Have Standing to Sue Under Section 10(b) or Rule 10b-5

In *In re CCIV/Lucid Motors Securities Litigation*, the Ninth Circuit applied the "purchaser-seller rule" adopted by the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores* to hold that an acquiring company's investors did not have standing to sue under Section 10(b) of the Exchange Act or Rule 10b-5 for alleged misstatements made by the target company before it merged with the acquiror.[572]

On February 22, 2021, Lucid Motors announced a merger with Churchill Capital Corp. IV ("CCIV"), a SPAC. The complaint alleged that prior to the merger closing, the CEO of Lucid made misrepresentations about the company's ability to meet certain production targets, including that it expected to produce 6,000 to 7,000 units in 2021 and that the "first phase" of a factory in Arizona was "good for 34,000 units."[573]

On the day the merger was announced, Lucid first publicly disclosed that it expected to produce only 577 cars in 2021 and that production would begin months later than previously projected. The merged company's stock plunged on the "unexpectedly grim production news" and the plaintiffs—investors in CCIV stock—brought suit against Lucid and its CEO, alleging violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 based on the allegedly false or misleading statements made by Lucid prior to the merger's closing.[574]

The defendants moved to dismiss, arguing that the plaintiffs lacked statutory standing to bring a Section 10(b) claim against Lucid because they did not purchase or sell Lucid stock, and that the alleged misstatements were immaterial to the plaintiffs as a matter of law because they were made before the announcement of the merger. The district court rejected the defendants' standing argument, holding that a plaintiff has standing if he purchased or sold a security affected by a defendant's alleged misrepresentations, even if the purchased security was not the subject of the alleged misrepresentation.[575]

The district court considered and rejected the Second Circuit's decision in *Menora Mivtachim Insurance Ltd. v. Frutarom Industries Ltd.*, the only other circuit court to have considered Section 10(b) standing in the context of alleged misstatements made in advance of an anticipated merger, because the Ninth Circuit had not yet spoken on the limits of Section 10(b) standing.[576] The district court, however, agreed that the alleged misrepresentations were not material and dismissed the complaint on that ground.[577]

On appeal, the Ninth Circuit affirmed the dismissal on the alternative ground that the plaintiffs lacked standing under Section 10(b). The unanimous panel held that the formulation of Section 10(b) adopted by the district court would vastly expand the boundaries of Section 10(b) standing and contradict the express limiting purpose of the purchaser-seller rule, which limits standing to "purchasers or sellers of the stock in question."[578] The court reasoned that the plaintiffs' preferred rule would "require courts to determine 'whether the security plaintiff purchased is sufficiently *connected* to the misstatement' on a case-by case basis," resulting in a "'shifting and highly fact-oriented' inquiry" that would be contrary to the bright-line rule announced in *Blue Chip Stamps.*[579]

In rejecting the "sufficiently connected" test, the court agreed with the Second Circuit that the Supreme Court had adopted the bright-line rule for standing—even at the risk of it being arbitrary in some cases—to "avoid the type of 'endless case-by-case'" analysis contemplated by the plaintiffs."[580]

Applying this standard to the undisputed fact that the alleged misstatements had been made by Lucid and its CEO, that the statements all occurred prior to the merger between Lucid and CCIV, and that the plaintiffs never purchased or owned Lucid securities, the court concluded that the plaintiffs lacked standing to sue under Section 10(b).[581] Neither the fact that CCIV later acquired Lucid, nor the fact that CCIV was a SPAC, changed the court's analysis. It declined to create an exception to the purchaser-seller rule for SPACs, noting that "[i]f Congress wants to treat SPAC acquisitions differently than traditional mergers, it has the authority to do so."[582]

SANCTIONS

"No Better Than a Racket": Seventh Circuit Holds that District Court Has Discretion Under PSLRA and Rule 11 to Impose Sanctions in Merger Objection Strike Suits, Including Disgorgement of Attorneys' Fees

In *Alcarez v. Akorn, Inc.*, the Seventh Circuit outlined a procedure for shareholders to object to mootness fees paid to plaintiffs' attorneys in settlements of merger objection suits and affirmed that district courts have discretion to impose sanctions, including disgorgement of attorneys' fees, when they conclude that a merger objection suit was meritless.[583]

Pointing to the Delaware Chancery Court's landmark ruling in *In re Trulia, Inc. Stockholder Litigation* that merger objection suits seeking extra disclosure would be subject to "disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission," the court observed that by 2018, more than 92% of merger objection suits were filed in federal court to avoid *Trulia* and that those suits were typically filed as class actions seeking more disclosure but not contending that any of the existing disclosures were false or materially misleading.[584] By settling such suits before moving for class certification, the plaintiffs avoided judicial approval of settlements or voluntary dismissals of class actions required by Rule 23(e).

While acknowledging that such suits are "problematic" under federal securities law as a result of the Supreme Court's recent decision in *Macquarie* that nondisclosure does not violate Rule 10b-5, the court expressed its disfavor of settlements of frivolous merger objection suits in which "money moves from corporate treasuries to plaintiffs' lawyers; the investors get nothing, yet the payment diminishes (though only a little) the market price of each share."[585]

The court concluded that while the district court did not have inherent authority to reopen a suit following voluntary dismissal, it erred in denying the shareholder's motion to intervene in order to make a motion under Rule 60(b) seeking relief. The court explained that the PSLRA requires district courts to include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) as to any complaint alleging violations of the Exchange Act "whether or not a litigant asks."[586]

Given the district court's conclusion that the settlements "provided nothing of value" and that the plaintiffs' attorneys' fees were paid "to avoid the nuisance of ultimately frivolous lawsuits disrupting the transaction," the court held that under Rule 11(c)(4), the district court had discretion over the choice of sanction to be imposed, including an order "to direct counsel who should not have sued at all to surrender the money they extracted from Akorn."[587]

The decision is a reminder of the unique interplay between the PSLRA and Rule 11 and a stark warning that if a plaintiff's only goal in filing a securities complaint is to force a quick settlement or mootness resolution and payment of attorneys' fees that needlessly increase the cost of litigation, it may be found to have violated Rule 11 and be subject to PSLRA-mandated sanctions, including disgorgement of attorneys' fees.[588] The decision is also another admonition by the Seventh Circuit that frivolous merger objection suits "that yield[] fees for class counsel and nothing for the class is no better than a racket," and "[i]t must end."[589]

The underlying suits at issue, including five class actions, were filed after Akorn asked investors to approve a merger valued at more than $4 billion. The complaints alleged that notwithstanding the 82-page proxy statement and 144 pages of exhibits, the disclosures should have contained additional details, the absence of which violated Section 14(a) of the Exchange Act. Within weeks, the company amended its proxy statement to add some additional disclosures while insisting that none of them were required by law.

Thereafter, the plaintiffs voluntarily dismissed the suits, asserting that the additional disclosures mooted their claims. It was undisputed that the plaintiffs did not notify the proposed classes or seek judicial approval of the dismissals under Rule 23(e). The merger was overwhelmingly approved by the shareholders, and the plaintiffs informed the district court that any claim to attorneys' fees and costs had been resolved by a payment of $322,500 in "mootness fees."[590]

After learning through the press about the payment of the mootness fees, a shareholder filed a motion to intervene and requested the court to order disgorgement of the mootness fees as unjust enrichment since the suits had not achieved any benefit for the investors, and further requested the district court to enjoin the lawyers who represented the plaintiffs to stop filing "strike suits, whose only goal is to extract money for counsel."[591]

The district court denied the motion to intervene on the grounds that since it did not anticipate awarding any of the remedies requested, intervention would be moot.[592] Thereafter, in the face of disagreements among some of the plaintiffs' lawyers as to their share of the mootness fees, the district judge acknowledged that under settled Seventh Circuit precedent, merger objection suits seeking extra disclosure should be reviewed immediately after filing but that he had failed to do so.[593] The district court ultimately concluded that the plaintiffs' suits should have been "dismissed out of hand," that the supplemental disclosures "provided Akorn's shareholders with nothing of value," and that the quick dismissals "obviously took place in an effort to avoid the judicial review [the *Walgreen* decision] imposes.[594]

The court then exercised its inherent authority "to rectify the injustice that occurred" by abrogating the mootness fee agreements and ordering the plaintiffs' counsel to return the mootness fees to the company.

On appeal, the Seventh Circuit stated that it was "inclined to agree with the district judge's analysis" but took issue with the legal basis for the district court's decision.[595] As a preliminary matter, the court disagreed with the reason given for denying the shareholder's motion to intervene. "'I'm planning to reject your proposed remedies, so your request is moot' is not a recognized legal doctrine."[596] Noting that a case becomes moot only when it is impossible to grant effective relief, the unanimous panel held that it was possible to grant the sort of relief requested by the shareholder.

The court explained that when representative plaintiffs and the defendants strike a deal in a class action suit, intervention by a member of the class may be essential to protect the class's interests. "We have told judges to grant intervention freely when a class member contends that the representatives (or, more realistically, their lawyers) are misbehaving."[597] The court held that the shareholder was therefore entitled to participate as a party who would be entitled to make a motion for relief under Rule 60(b) and "[h]e will have that opportunity on remand."[598]

The Seventh Circuit also took issue with the remedies initially sought by the shareholder, including disgorgement or an injunction, since the district court ordered the money returned to the company, and an injunction against the plaintiffs' lawyers would not be proper unless they were added as parties. The court explained that rather than rely on its inherent authority, the district court should have referred to the PSLRA and Rule 11(b) in reaching its conclusion that the suits were meritless and disgorgement was warranted as a sanction. It noted that the PSLRA not only obliges a district judge to determine whether a suit was proper at the moment it was filed but also directs the court to the criteria of Rule 11, which entails notice and an opportunity to be heard. "Those steps have not been put in motion, given the denial of [the shareholder's] motion to intervene, but they should occur on remand."[599]

Since the shareholder alleged and the district court found that the very purpose of the suits was needlessly to increase the cost of litigation to induce the company to pay the lawyers to go away, the court noted that a violation of Rule 11(b)(1) had likely occurred, thereby triggering Rule 11(c)(4), which gives the district judge discretion over the choice of sanction to be imposed and that "the court would be entitled to direct counsel who should not have sued at all to surrender the money they extracted from Akorn."[600] The court therefore remanded the case because "selecting an appropriate remedy (if any) should await resolution of the proceedings under [the PSLRA] and, derivatively, Rule 11.[601]

2025 OUTLOOK

As the COVID-19 pandemic receded in 2023, it was not surprising that the number of COVID-related claims dropped from the peak years of 2021 and 2022, with only nine actions filed and none in the last four months of 2023.[602] That trend did not continue in 2024, with 19 pandemic-related securities filings in 2024 and three in the last four months of the year.[603]

The latest filings in 2024 reflect the continuing long-term effects of the pandemic at the individual company level and particularly the challenges for companies that benefited from surging demand early in the pandemic but faced rapidly declining demand as the pandemic waned and lockdowns ended.

The suit against MGP Ingredients ("MGPI") filed on December 16, 2024, is emblematic of this type of action.[604] MGPI is a manufacturer of alcoholic beverages. The complaint alleged that it reaped the benefits of a dramatic spike in alcohol consumption in 2020 during the pandemic lockdowns as the company quickly ramped up production and increasing sales led to favorable earnings results for several periods. By 2023, demand for liquor began to taper off, and investors were aware that "an industry-wide destocking in spirts had begun to take place" and that a backlog of inventory began to increase.[605]

The plaintiffs alleged what while the company assured its investors it was ahead of the game, having already "cycled through" its inventory, and that its exposure to overstocking was smaller than its peers' exposure, the defendants made false statements about the reality on the ground and continued to downplay the situation by promising that high inventory levels were of minimal concern.[606] In October 2024, when MGPI finally disclosed that soft demand and high inventories were undermining sales, a substantial stock drop followed.

A similar scenario was alleged in a suit filed in late 2024 against Hasbro, a toy and entertainment company that faced increased demand for its products during pandemic lockdowns but allegedly overpurchased inventory to meet that demand. The complaint alleged that the defendants made numerous misstatements about the quality of Hasbro's inventory and that rising inventory levels reflected outstanding and anticipated demand rather than excess supply that outpaced waning demand, resulting in artificial inflation of the stock price.[607]

As noted previously, while the results in COVID-related securities suits have been mixed, plaintiffs scored a victory in late 2024 when a California federal judge certified a class of Vaxart's investors accusing the company's onetime controlling shareholder of dumping stock at inflated prices following deceptive headlines about a potential COVID-19 vaccine. The court concluded that a revised motion for class certification fixed issues of predominance and the damages model.[608] The case will now proceed to discovery in 2025. In 2023, investors finalized a $12 million settlement with Vaxart and its executives.

We expect that pandemic-related filings will continue in 2025. It remains to be seen whether the COVID-related enforcement efforts of the SEC and the DOJ's COVID-19 Fraud Enforcement Task Force will taper off in the new administration.

Last year saw continuing public debate surrounding environmental, social & governance ("ESG") matters. In addition to some high-profile announcements of companies dialing back ESG efforts, there were legislative efforts in both the Senate and House to curb the use of ESG factors in retirement fund choices.[609] A number of states have introduced legislation seeking to prevent the use of ESG criteria to select investments for state pension funds.[610] The intense public debate has given rise to the term "greenhushing," referring to companies being more cautious about how they communicate about their environmental claims or their ESG efforts.[611]

Despite the ongoing debate, many U.S. companies have stepped up reporting on ESG matters in recent years, with 85% of large-cap U.S. companies sharing environmental details of their greenhouse gas emissions, up from 54% in 2019.[612] The share of S&P 500 companies making workforce data by race and gender public rose to 82.6% as of September 2024, up from 5.3% in 2019.[613] Likewise, although a few companies have decided not to participate, more than 1,400 companies are reported to have participated in the Human Rights Campaign survey, which surveys companies on issues including same-sex partner benefits and transgender health care, up slightly from 1,384 in the most recent survey issued in 2023.[614]

Several securities lawsuits in 2024 included claims of "greenwashing," in which a company touts its environmental consciousness for marketing purposes but actually makes little effort at sustainability. Last year, there were two cases in which appellate courts addressed greenwashing claims for the first time.

In *Danimer Scientific Inc. Securities Litigation*, the Second Circuit upheld dismissal of a lawsuit accusing Danimer of greenwashing by making claims that allegedly over-hyped the environmentally friendly nature of a plastics alternative it produced.[615] Investors alleged the company falsely claimed that its key product was 100% biodegradable.

The district court dismissed the complaint, finding that the plaintiffs failed to adequately plead scienter. In an unpublished summary order, the Second Circuit agreed: "The complaint says nothing specific about why [the product] would be central or key to the company's operations, such as being a central revenue stream; nor does it allege with specificity that the limitations on [the product's] biodegradability were known to anyone at the time of the alleged misrepresentations."[616] The court rejected the plaintiffs' argument that a statement by the chief technology officer characterizing a statement by the CEO as not "wholly accurate" and that the company's "products are unlikely to biodegrade in most landfills" adequately alleged scienter because the complaint did not plead particularized facts that the CTO had conveyed this information to the CEO.[617] "Absent any allegations that [the CEO] was aware of [the CTO's] later-expressed views at the time [the CEO] made the alleged statement, the CTO's statement cannot support an inference of scienter on the part of the [CEO]."[618]

In *Earth Island Institute v. The Coca-Cola Company*, the D.C. Court of Appeals reversed a trial court's dismissal of greenwashing claims brought under the D.C. Consumer Protection Procedures Act, holding that the plaintiff stated plausible misrepresentation claims relating to statements that Coca-Cola's business was environmentally sustainable and about its efforts to increase the recyclability of its products. "Earth Island has plausibly alleged that Coca-Cola's statements, when viewed in their surrounding context, mislead consumers into believing that it is an environmental steward, when it is in fact an environmental scourge."[619] The unanimous panel also held that the plaintiff plausibly alleged that the company misled consumers about the extent recycling can offset the impact of the company's massive plastic production and about its intentions to hit announced recycling targets.

The court rejected Coca-Cola's arguments that the challenged statements on its consumer-facing website were mere puffery or aspirational in nature without any promises or measurable data points that would render them true or false and thus not actionable. Noting that there was no real dispute about the thrust of Coca-Cola's representations that it is working toward environmental sustainability, the court explained that "[w]here the parties disagree is whether those representations give consumers a false impression of Coca-Cola's current and anticipated environmental impact on the ground" and permitted the case to proceed.[620]

Last year there was also a settlement in a high-profile greenwashing suit. The suit against Oatly, a Swedish alternative milk manufacturer, claimed that it overhyped demand for its products and engaged in greenwashing by claiming it was more environmentally sound than it really was, based on a short-seller report that accused the company of greenwashing shortly after its IPO.[621] In 2024, the case concluded in a $9.25 million settlement after the court had dismissed two complaints and some of the alleged greenwashing had been deemed corporate puffery.

The SEC continued to be active in the ESG space notwithstanding the dissolution of its Climate and ESG Task Force last year, just three years after it was established. In March 2021, the SEC announced its formation of a Climate and ESG Task Force to "develop initiatives to proactively identify ESG-related misconduct" as well as to "coordinate the effective use of Division resources, including through the use of sophisticated data analysis to mine and assess information across registrants, to identify potential violations."[622]

The statement announcing dissolution of the task force stated that "[t]he Commission brought a number of important actions in the area[,] which ha[s] sent a strong message to market participants about the importance of complying with the law when it comes to ESG considerations" and that the task force's expertise will "reside across" the Enforcement Division.[623] Notably, while ESG had been identified as an examination priority in fiscal years 2021–2023, it was not identified in the examination priorities announced for fiscal years 2024 or 2025 by the Division of Examinations.

The SEC has also faced headwinds in its ESG-related rulemaking efforts. In March 2024, the SEC adopted climate change disclosure guidelines requiring issuers to disclose information about greenhouse gas emissions and other climate-related information but voluntarily stayed the implementation of the rules in the face of court challenges by multiple states and industry participants. The SEC has also faced opposition to its proposed amendments to regulations under the Investment Advisers Act and Investment Company Act that would require enhanced disclosures about ESG practices to the extent that a fund advertises that such information is part of the fund's strategy.[624]

The SEC did have some success in enforcement actions relating to alleged ESG greenwashing in 2024. The SEC charged Keurig Dr. Pepper Inc. with making inaccurate statements about the recyclability of its K-Cup single-use beverage pods. It alleged that statements that third-party recycling facilities had "validate[d]" recyclability were inaccurate because they did not disclose that two of the largest recycling companies in the United States had expressed significant concerns regarding the commercial feasibility of curbside recycling of K-Cup pods, and that they did not presently intend to accept them for recycling.[625] Commissioner Peirce dissented from the order of settlement, asserting that the statements regarding the recyclability of the K-Cup pods remain accurate even if a third-party recycler elects not to do so and because the order did not indicate that the statements were material.[626] Keurig agreed to pay $1.5 million to settle the charges.

Investment adviser WisdomTree Asset Management agreed to a cease-and-desist order and to pay $4 million to settle SEC charges that it misleadingly marketed three exchange-traded funds as not investing in fossil fuel and tobacco companies when in fact the funds invested in companies that were involved in coal mining, natural gas extraction, and retail sales of tobacco products.[627] Another investment adviser agreed to a censure and to pay $17.5 million to settle SEC charges that it made misleading statements about the percentage of assets under management that incorporated ESG factors into investment decisions. The SEC alleged that the investment advisor stated that between 70% and 90% of its parent company's assets were "ESG-integrated" when in fact a substantial percentage were held in passive exchange traded funds that did not consider ESG factors, and the company lacked any written policy defining ESG integration.[628]

It is likely that new leadership of the SEC following the changeover in the administration will result in changes to the agency's rulemaking and enforcement priorities relating to ESG issues, and it seems unlikely that ESG issues will continue to be a priority.[629] For example, it remains to be seen whether the SEC will continue to defend the litigation challenging its final climate disclosure rules or seek Supreme Court review of the

Fifth Circuit's en banc decision rejecting the Nasdaq corporate board diversity rule and holding that the SEC had exceeded its authority under the Exchange Act.[630]

It also seems unlikely that the SEC will continue to finalize its proposed rules focused on ESG investment disclosures. Finally, a new SEC chair could also revive policies of the first Trump administration that granted companies more leeway to omit stockholder proposed ESG issues in proxy statements that do not have a significant impact on their businesses.[631]

Artificial intelligence continued to be a hot topic once again in 2024, with the release of many new AI tools and models leading to discussions about the challenges of AI and whether and how it should be regulated. A growing number of companies are disclosing AI capabilities, opportunities, and risks in filings with the SEC. Last year, the SEC proposed new rules that would govern how broker-dealers and investment advisers can use AI.[632] The rules, if adopted as proposed, would prevent firms from using predictive data analytics, which includes AI and other technologies, to interact with investors "to prevent firms from placing their interests ahead of investors' interests.[633]

In 2024, a significant number of bills were proposed in 29 state legislatures that would regulate private-sector use of AI models.[634] Notably, California enacted a series of laws related to AI, including the California Transparency Act, which, among other things, requires certain developers of widely used AI systems to provide certain AI-detection tools at no charge to users as well as watermarking capabilities, which give users the option to include conspicuous disclosures that identify AI-generated content.[635]

Against this backdrop, it is unsurprising that the number of securities suit filings relating to AI continued to rise, with 13 cases filed in 2024 compared with six each in 2023 and 2022.[636] The earliest AI-related securities suit was filed in 2020. AI-related filings are those in which the company at issue develops AI models, manufactures products used in AI infrastructure, or uses AI models for business purposes, and the complaints allege misrepresentations or failures to disclose risks associated with the use of AI. Most of the suits were brought against companies developing software or whose businesses offer services through a digital platform, and they typically alleged that the defendants overstated their AI technology and capabilities or the extent to which AI technology impacted revenues.

There was one significant settlement of an AI-related securities case announced in 2024.[637] The lawsuit was filed in 2021 against a software company that made AI-powered virtual assistants for the automotive market, and it alleged that the company hid sliding revenues caused by the global semiconductor shortage by pulling forward licensing sales for its products. The complaint alleged that the former CEO and CFO, whose resignations were announced along with lower financial guidance in early 2022, deceived the public and inflated the price of the company's stock price. In September 2024, the judge presiding over the case granted initial approval of a $30 million settlement.[638]

Continued focus by the SEC and DOJ on AI-related misconduct and significant growth in the number of AI-related disclosures could result in the filing of more AI-related securities suits next year. In January 2024, the SEC issued an Investor Alert highlighting an increase of investment frauds involving the purported use of AI, noting that "[i]ndividual investors should know that bad actors are using the growing popularity and complexity of AI to lure victims into scams."[639] Among other categories of AI-related misconduct, the Alert focused on unregistered or unlicensed investment platforms claiming to use AI, false claims made by a company about its products and services relating to AI that might be part of a pump-and-dump scheme, and the particular risks posed by microcap stocks in connection with possible scams involving AI-related claims.[640]

A few months later, the SEC announced settled charges against two investment advisers for making false and misleading statements about their purported use of AI and civil penalties totaling $400,000.[641] According to the SEC, the advisers made statements about their purported use of AI and machine learning to benefit investors when they did not in fact have either capability. In the press release accompanying the settled charges, Chair Gensler repeated statements that he made last year about the potential information gap between companies promoting their uses of AI and customers and investors who lack enough information to evaluate corporate claims, a gap he referred to as "AI washing."[642]

In another example of the SEC's commitment to pursue enforcement actions against advisory firms that misrepresent their AI capabilities, the SEC sued a China-based investment advisory firm, its holding company, and the two firms' CEO alleging that the firm deceived investors by falsely claiming it would provide exceptional returns to its investors by using AI when it did not.[643] The complaint also alleged that in order "to provide an air of legitimacy to their fraudulent enterprise," the defendants pointed clients and prospective investors to the firm's SEC filings, but those disclosures "were materially deficient" and incomplete. The SEC also brought the first AI-related enforcement action against a market participant, charging the founder and former CEO of now shuttered AI recruitment startup Joonko with fraudulently claiming that the company used proprietary AI to help clients find diverse and underrepresented candidates to fulfill their diversity, equity, and inclusion goals when he knew the platform did not work as described to investors or potential customers.[644]

In early 2024, Deputy Attorney General Monaco gave a speech in which she announced a new initiative by the DOJ dubbed "Justice AI," to understand and prepare for how AI will affect the Justice Department's mission and "to ensure we accelerate AI's potential for good while guarding against its risks." [645] The Deputy AG made clear that as part of that initiative, the DOJ would not hesitate to seek stricter penalties for those who exploit generative AI for misconduct. "Going forward, where Department of Justice prosecutors can seek stiffer sentences for offenses made significantly more dangerous by the misuse of AI—they will."[646]

DAG Monaco also announced that federal prosecutors will consider how companies mitigate the risk of misusing artificial intelligence and directed the Criminal Division to include an assessment of disruptive technology risks, including AI, in the DOJ's Evaluation of Corporate Compliance Programs ("ECCP"). The ECCP is the roadmap Criminal Division prosecutors use to evaluate a company's corporate compliance program, including the questions prosecutors should ask in determining how to resolve a criminal investigation.

In September 2024, the DOJ announced an updated ECCP that included specific questions on the use and implementation of AI by companies.[647] Among other things, the updated guidance directs prosecutors considering whether a company should be held criminally responsible for the actions of its agents and employees to consider how the company managed emerging risks to ensure compliance with applicable laws, including risks related to AI. The updated guidance includes nine questions about AI-related risks, including whether a company's AI-driven compliance program was well-designed and earnestly implemented, whether a company's AI system was equipped to detect and prevent misconduct, and how accountability over use of AI was monitored and enforced.

Finally, the DOJ has brought a number of criminal securities fraud cases against executives of companies who allegedly deceived investors about their purported AI-related capabilities. For example, the founder and former CEO of Kubient, Inc. was charged and pleaded guilty to criminal securities fraud based on allegations that he inflated the company's revenues and lied about the performance of one of its signature products, an AI-powered tool that was supposed to detect advertising fraud in the digital advertising industry but did not.[648] It remains to be seen whether the DOJ will continue its activity in the AI sector under the new administration.

Finally, we expect there will again be a number of important securities-related decisions from the appellate courts in 2025.

The impact of the Supreme Court's class-certification decision in the long-running Goldman Sachs securities litigation will continue to play out this year. As we discussed in our 2021 *Review*, in *Goldman Sachs*, the Supreme Court directed courts to consider the generic nature of an alleged misrepresentation when evaluating whether to apply the *Basic* presumption of reliance, explaining that the inference that a back-end stock price drop equals front-end inflation starts to break down when there is a mismatch between the contents of the initial statement and the corrective disclosure.[649] The Second Circuit applied the Supreme Court's newly enunciated standard in 2023 on remand in *Goldman Sachs* and vacated class certification.[650]

The Ninth Circuit is likely to be the next federal appeals court to address the correct application of *Goldman Sachs*. In *Jaeger v. Zillow Group, Inc.*, the plaintiff alleged that vague statements made by Zillow about improved pricing models, consumer demand, and operational improvements in its home-buying segment known as Zillow Offers failed to disclose that the company was overriding its pricing algorithm to increase its offering bids for homes and was struggling to find contractors to renovate homes so they could be flipped, leading to a significant amount of overpriced inventory and an artificially inflated stock price.[651] The plaintiffs alleged that a series of analyst reports detailing the company's overpriced inventory led the stock price to drop and that the stock would have been priced correctly if Zillow had been forthright about the way its home-flipping segment operated. The district court granted class certification.

On appeal, the defendants argued that the district court erred in granting class certification because it failed to apply *Goldman Sachs* properly. The defendants argued that the district court wrongly used a plausibility standard (rather than the preponderance-of-the-evidence standard) to determine whether the plaintiffs had satisfied the requirements for class certification, and that the court failed to take into account all record evidence relevant to price impact. In particular, Zillow argued that the district court ignored expert evidence that the alleged corrective disclosures did not render false the company's alleged misrepresentations or sufficiently match the front-end statements to support the "final inference—that the back-end price drop equals front-end inflation," as required by *Goldman Sachs*.[652] Zillow argued that the Ninth Circuit has not yet addressed *Goldman Sachs*, leaving district courts without guidance on how to interpret or apply it, and that the case presents an opportunity to fill that gap. The Ninth Circuit granted permission for an interlocutory appeal under Fed. R. Civ. P. 23(f). Briefing is under way, with oral argument likely to be scheduled in late 2025.

As discussed above, the last of the three lawsuits that followed the SEC's adoption of proxy rules in 2020 and amendments in 2022 is pending on appeal in the D.C. Circuit. In February 2024, a district court struck down the rules relating to proxy voting firms such as Institutional Shareholder Services Inc. ("ISS").[653] Writing before the Supreme Court handed down *Loper Bright*, the district judge applied the *Chevron* doctrine and found that the ordinary meaning of "solicit" in 1934 did not encompass proxy voting advice for a fee and that the legislative history of the Exchange Act did not support the SEC's reading, holding that "[t]he court therefore has no cause to move to *Chevron* step two and afford deference to the agency's position."[654]

The court granted summary judgment in favor of ISS and vacated the definitional amendment in the 2020 proxy rules that made clear that proxy advisory firms were presumptively subject to the proxy rules.[655] A key factor in the court's reasoning was that the proxy firms' advice is tailored to their clients' interest, not their own, and they have no financial or governance interest in the outcome of the vote.[656] Both the SEC and the National Association of Manufacturers appealed to the D.C. Circuit, although the SEC later dropped its appeal without explanation.

Given that the Fifth and Sixth Circuits handed down conflicting decisions as to whether the SEC proxy rules and amendments violated the APA but no party to those cases sought review by the Supreme Court, a decision by the D.C. Circuit is much anticipated. A decision is likely later this year or in early 2026.

Another closely watched case likely to be decided in 2025 is *In re FirstEnergy Corp.*, where the Sixth Circuit granted a Rule 23(f) petition for interlocutory appeal of a class certification order to determine whether the district court erred in extending the *Affiliated Ute* presumption of reliance to claims based on "half-truths," in conflict with other courts of appeal that have held that such claims should be treated as affirmative misrepresentations and not omissions.[657] After the Sixth Circuit granted the Rule 23(f) petition, the Supreme Court decided *Macquarie*, holding that pure omissions in the face of an alleged duty to speak cannot support claims under Section 10(b) or Rule 10b-5. The parties in FirstEnergy filed letters addressing *Macquarie*'s application to the case, with the plaintiffs arguing that *Affiliated Ute* could still apply to half-truths because *Macquarie* did not expressly preclude it.

Defendants argued that the Court distinguished half-truths from pure omissions, thereby confirming that half-truths are not omissions for purposes of the *Affiliated Ute* presumption. The Sixth Circuit's decision will likely be the first decision by a federal appeals court to apply *Macquarie* in the context of the *Affiliated Ute* presumption.

LAWYER CONTACTS

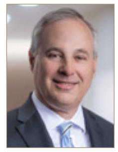
AUTHORS

Roman E. Darmer

Irvine

+1.949.553.7581

rdarmer@jonesday.com



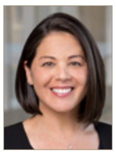
Geoffrey J. Ritts

Cleveland

+1.216.586.7065

gjritts@jonesday.com

ADDITIONAL CONTACTS



Marjorie P. Duffy

Columbus

+1.614.281.3655

mpduffy@jonesday.com

Henry Klehm III

New York

+1.212.326.3706

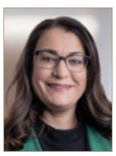
hklehm@jonesday.com

Michael J. McConnell

Atlanta

+1.404.581.8526

mmcconnell@jonesday.com



Adrienne F. Mueller

Cleveland

+1.216.586.7370

afmueller@jonesday.com

John C. Tang

San Francisco

+1.415.875.5892

jctang@jonesday.com

Nina Yadava

New York

+1.212.326.3746

nyadava@jonesday.com

The following Jones Day lawyers contributed to the preparation of this White Paper: *JoeAl Akobian*, *Christopher Ames*, *Elizabeth A. Benshoff*, *Abigael C. Bosch*, *Maxwell Dvorak*, *Alexander J. Gonzalez*, *Christopher A. Haines*, *Patrick J. Hall*, *H. Cole Hassay*, *Sicily Maleva Kiesel*, *David Kim*, *Connor F. Lang*, *Jared Lockhart*, *Jeffrey E. Meehan*, *Risa W. Lake*, *Lauren Murtagh*, *Matthew Rodriguez*, and *Brandon L. Winchel*.

ENDNOTES

1 Edward Flores & Svetlana Starykh, NERA Econ. Consulting, *Recent Trends in Securities Class Action Litigation: 2024 Full Year Review* 1 (Jan. 22, 2025); Cornerstone reported 225 filings in 2024, up from the 215 it reported for 2023. Aganin, A, Cornerstone Research, *Securities Class Action Filings - 2024 Year in Review* (Jan. 29, 2025). NERA and Cornerstone use different methodologies for calculating total filings.

2 *Id.*

3 *Id.* at 2.

4 *Id.*

5 *Id.*

6 *Id.* at 3.

7 *Id.* at 4.

8 *Id.* at 12.

9 *Id.* at 11–12.

10 *Id.* at 10–11.

11 *Id.* at 13.

12 *Id.* at 20.

13 *Id.* at 22–23.

14 Jeff Montgomery, *Walmart, Execs Settle Chancery Opioid Suit for $123M*, Law360 (Oct. 15, 2024); Jennifer Kay, *Warner Bros.' Discovery Merger $125 Million Settlement Approved*, Bloomberg Law (Oct. 10, 2024).

15 Jones Day, *2023 Securities Litigation Year in Review* 1 (2024); Flores & Starykh, *supra* note 1, at 22.

16 Jones Day, *supra* note 15, at 1; Flores & Starykh, *supra* note 1, at 24; Kevin M. LaCroix, *Under Armour Securities Suit Settles for $434 Million*, The D&O Diary (June 25, 2024).

17 Flores & Starykh, *supra* note 1, at 24; LaCroix, *supra* note 16.

18 601 U.S. 257 (2024).

19 *Id.* at 264, 266.

20 *Id.* at 265 (citing *Basic v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5.")).

21 *Id.* at 263 (quoting *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 188 (2016)).

22 *Id.* at 266, n.2. On remand, the Second Circuit addressed the Supreme Court's decision by striking those portions of the complaint based on pure omissions but leaving intact the claims based on "half-truths" in which the plaintiffs alleged statements made by the company rendered its silence misleading. *City of Riviera Beach. Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, No. 21-2524, 2024 WL 3867669, at *2 (2d Cir. Aug. 19, 2024).

23 601 U.S. 23, 25 (2024) (reversing *Murray v. UBS Sec. LLC*, 43 F.4th 254 (2d Cir. 2022)).

24 601 U.S. at 33.

25 *EpicentRX, Inc. v. Superior Ct.*, 95 Cal.App.5th 890 (2023), *as modified on denial of reh'g* (Oct. 10, 2023); Jones Day, *2023 Securities Litigation Year in Review*, at 34.

26 *EpicentRX, Inc. v. Superior Ct.*, No. S282521, 315 Cal.Rptr.3d 726 (Mem) (2023).

27 *Amicus curiae* briefs were filed by the Chamber of Commerce of the United States of America, Berkeley Center for Consumer Law and Economic Justice, Consumers for Auto Reliability and Safety, California Association for Microenterprise Opportunity, East Bay Community Law Center, Impact Fund, Legal Aid at Work, Privacy Rights Clearinghouse, Public Justice, and Lockton Companies.

28 *SEC v. Jarkesy*, 603 U.S. 109 (2024).

29 CFTC, Statement of Commissioner Caroline D. Pham on *SEC v. Jarkesy* (June 28, 2024).

30 603 U.S. 369 (2024).

31 No. 1:23-cv-03257 (D.D.C. 2023). Jones Day represents KalshiEX in the ongoing litigation.

32 Plaintiff's Notice of Supplemental Authority, *KalshiEX v. Commodity Futures Trading Comm'n*, No. 1:23-cv-03257-JMC (D.D.C. June 28, 2024), Dkt. No. 44 (giving notice of the Supreme Court's decision in *Loper Bright* and stating that the court must determine whether the best reading of the Commodity Exchange Act is that event contracts hinging on control of Congress are contracts that involve unlawful activity or gaming and that "the Commission can no longer expect the Court to defer to its contrary, idiosyncratic interpretations.").

33 Memorandum Opinion, *KalshiEX v. Commodity Futures Trading Comm'n*, No. 23-3257 (JMC), 2024 WL 4164694, at **1, 7 (D.D.C. Sep. 12, 2024).

34 Opinion, *KalshiEX v. Commodity Futures Trading Comm'n*, No. 24-5205, 119 F.4th 58, 67 (D.C. Cir. Oct. 2, 2024).

35 Press Release, *SEC Adopts Rule Amendments to Provide Investors Using Proxy Voting Advice More Transparent, Accurate and Complete Information*, U.S. Sec. & Exch. Comm'n (Jul. 22, 2020).

36 *Id*.

37 *Id*.

38 Press Release, *SEC Adopts Amendments to Proxy Rules Governing Proxy Voting Advice*, U.S. Sec. & Exch. Comm'n (Jul. 13, 2022).

39 *Id*.

40 H. Peirce, *U-Turn: Comments on Proxy Voting Advice*, U.S. Sec. & Exch. Comm'n (Jul. 13, 2022); M. Uveda, *Statement on Final Rule Amendments on Proxy Voting Advice*, U.S. Sec. & Exch. Comm'n (July 13, 2022).

41 Complaint, *Institutional Shareholder Services Inc. v. SEC, et al.*, No. 1:19-cv-03275 (D.D.C. Oct. 31, 2019), Dkt. No. 1.

42 Order, *Institutional Shareholder Services v. SEC*, *et al.*, No. 1:19-cv-03275 (D.D.C. Feb. 23, 2024), Dkt. No. 69.

43 *Id*.

44 The SEC abandoned its appeal late last year without explanation.

45 *National Association of Manufacturers v. SEC*, 105 F. 4th 802, 811 (5th Cir. 2024).

46 *Chamber of Commerce of United States v. SEC,* 115 F. 4th 740 (6th Cir. 2024).

47 *Id*. at 749.

48 *Id*. at 751.

49 Among other recommendations, the shareholder proposal provided in pertinent part "Shareholders support the Company, by an advisory vote, to go beyond current plans, further accelerating the pace of emission reductions in the medium-term for its greenhouse gas (GHG) emissions across Scope 1, 2, and 3, and to summarize new plans, targets and timetables." *See* Memorandum Opinion & Order, *Exxon Mobil Corporation v. Arjuna Capital, LLC*, No. 4:24-cv-00069 (N.D. Tex. May 22, 2024), Dkt. No. 37. Jones Day represented Exxon in the litigation.

50 Complaint, *Exxon Mobil Corporation v. Arjuna Capital, LLC*, (N.D. Tex. Jan. 21, 2024), Dkt. No. 1.

51 Memorandum Opinion & Order, *Exxon Mobil Corporation v. Arjuna Capital, LLC*, at 7 (N.D. Tex. May 22, 2024), Dkt. No. 37.

52 *Id*. at 9.

53 *Id*. at 11.

54 Order, *Exxon Mobil Corporation v. Arjuna Capital, LLC* at 2-3 (N.D. Tex. Jun. 17, 2024), Dkt. No. 52. The court also criticized the SEC in its order dismissing the case as moot. *Id*. at 6 ("The SEC is behind the ball on this issue . . . . But the Court cannot advise Exxon of its rights without a live case or controversy to trigger jurisdiction.").

55 Plaintiff's Brief in Reply and Further Support of Motion for Judgment as Matter of Law or in the Alternative for a New Trial, *In re Tesla, Inc. Sec. Litig*., No. 3-18-cv-04865-EMC (N.D. Cal. Mar. 24, 2023), Dkt. No. 692.

56 *In re Tesla, Inc. Sec. Litig*., No. 3:18-cv-04865-EMC, 2024 WL 4688894, at *1 (9th Cir. Nov. 6, 2024).

57 *Id*.

58 *Id*.

59 *SEC v. Musk*, No. 18-cv-8865 (LJL), 2022 WL 1239252 (S.D.N.Y. Apr. 27, 2022); *aff'd*, *SEC v. Musk*, No. 22-1291, 2023 WL 3451402 (2d Cir. May 15, 2023); *cert. denied, Musk v. S.E.C.*, No. 23-626, 144 S. Ct. 1457 (Mem) (U.S. Apr. 29, 2024).

60 Flores & Starykh, *supra* note 1, at 11.

61 *See, e.g.,* Complaint, *Adriano Ladewig v. BioNTech SE*, No. 24-CV-00337 (C.D. Cal. Jan. 12, 2024); *Bristol County Ret. System v. QuidelOrtho Corporation*, No. 24-CV-02804 (S.D.N.Y. Apr. 12, 2024); *Beal v. Gritstone bio, Inc.*, No. 24-CV-03640 (N.D. Cal. June 17, 2024).

62 *See, e.g.*, Complaint, *Plumbers and Pipefitters Local Union No. 719 Pension Trust Fund v. Dick's Sporting Goods, Inc.*, No. 24-cv-00196 (W.D. Pa. Feb. 16, 2024); Complaint, *City of Pontiac Police and Fire Ret. System v. ZoomInfo Tech. Inc.*, No. 24-cv-05739 (W.D. Wash. Sep. 9, 2024).

63 Complaint, *Robeco Capital Growth Funds SICAV-Robeco Global Consumer Trends v. Peloton Interactive Inc.*, No. 21-cv-09582 (Nov. 18, 2021).

64 *Id*., Opinion and Order (Sept. 30, 2024).

65 Order, *In re Talis Biomedical Securities Litigation*, No. 22-cv-00105-SI (N.D. Cal. Apr. 28, 2023).

66 Order, *San Antonio Fire and Police Pension Fund v. Dentsply Sirona Inc.*, case No. 22-cv-6339 (AS) (S.D.N.Y. May 1, 2024) (citations omitted).

67 *In re Emergent BioSolutions Inc. Securities Litigation*, No. 21-cv-00955-DLB (D. Md. Sept. 12, 2024), Dkt. No. 185.

68 *Sinnathurai v. Novavax, Inc.*, 645 F. Supp. 3d 495 (D. Md. 2022).

69 *Id*. at 520.

70 Litigation Release No. 26122, U.S. Sec. & Exch. Comm'n, *SEC Charges CEO and Two Others in Penny-Stock Fraud Scheme* (Sep. 23, 2024).

71 Litigation Release No. 26058, U.S. Sec. & Exch. Comm'n, *SEC Charges Ex-CEO of View Systems, Inc. with Securities Fraud for Falsely Claiming the Company Was Engaged in Business Operations that It Was Not* (July 26, 2024).

72 Litigation Release No. 25964, U.S. Sec. & Exch. Comm'n, *SEC Obtains Final Judgment Against California Trader Engaged in Manipulative Trading Scheme Involving COVID-19 Claims* (Apr. 3, 2024).

73 Litigation Release No. 26008, *SEC Obtains Final Judgments Against Strategic Legacy Investment Group, Inc. and SLIG High-Interest Liquid Savings Company in Connection with a Ponzi-Like Scheme* (May 20, 2024).

74 U.S. Department of Justice, *COVID-19 Fraud Enforcement Task Force 2024 Report* at 1 (April 2024).

75 Press Release, U.S. Attorney's Office, Middle District of Pennsylvania, *York County Judge Indicted for Fraud, Tampering With A Witness, And Obstruction of Justice* (Oct. 8, 2024).

76 Press Release, U.S. Attorney's Office, District of Massachusetts, *Massachusetts Business Owner Indicted for $18 Million in Paycheck Protection Program Fraud* (Sep. 13, 2024).

77 Press Release, U.S. Attorney's Office, District of Oregon, *Arizona Man and Co-Defendants Facing Federal Charges For Role in $178 Million COVID-19 Fraud Conspiracy* (Sep. 10, 2024).

78 Press Release, U.S. Attorney's Office, Northern District of Georgia, *Atlanta Promoter, Entrepreneur and Former NFL Player Sentenced for Paycheck Protection Program Fraud* (Sept. 12, 2024).

79 Press Release, U.S. Attorney's Office, Eastern District of California, *Tracy Woman Sentenced to 9 Years in Prison for Fraudulent Scheme To Steal California Unemployment Insurance Benefits* (Sep. 18, 2024).

80 CommonFi, Inc., *ListingTrack: SPAC Overview 2024* (last visited Jan. 9, 2025).

81 ICR, *Yearend 2024 SPAC Market Update & Outlook* (Jan. 7, 2025).

82 CommonFi, Inc., *ListingTrack: SPAC Market Stats 2024* (last visited Jan. 9, 2025).

83 *Id*.

84 Flores & Starykh, *supra* note 1 at 11; Cornerstone Research & Stanford Law School Securities Class Action Clearinghouse, *supra* note 1.

85 *In re: CCIV/Lucid Motors Sec. Litig.*, 110 F.4th 1181, 1185 (9th Cir. 2024) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742 (1975).

86 *See infra* at 48.

87 *See, e.g.*, *Alta Partners, LLC v. Forge Glob. Holding, Inc.*, 2024 WL 1116682 (S.D.N.Y. Mar. 13, 2024); *Felipe v. Playstudios Inc.*, 2024 WL 1380802 (D. Nev. Mar. 31, 2024); *In re Grab Holdings Ltd. Sec. Litig.*, 2024 WL 1076277 (S.D.N.Y. Mar. 12, 2024).

88 *In re Grab Holdings Ltd. Sec. Litig.*, 2024 WL 1076277, at *16.

89 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Adopts Rules to Enhance Investor Protections Relating to SPACs, Shell Companies and Projections* (Jan. 24, 2024).

90 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Cantor Fitzgerald Over Misleading SPAC Disclosures* (Dec. 12, 2024).

91 Litigation Release No. 26051, U.S. Sec. & Exch. Comm'n, *SEC Charges Former SPAC CEO with Fraud* (July 17, 2024).

92 Litigation Release No. 26137, U.S. Sec. & Exch. Comm'n, *SEC Charges Former CEO of Romeo Power, Inc. for Misleading Investors* (Sept. 27, 2024).

93 Jones Day, *2022 Securities Litigation Year in Review* (2023) at 32; *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784 (Del. Ch. 2022).

94 *Solak v. Mountain Crest Capital LLC*, 2024 WL 4524682, at *1 (Del. Ch. Oct. 18, 2024).

95 *Id*.

96 *Id*. at *7.

97 *Id*. at **9–10 (emphasis in original).

98 *Id*. at *9.

99 *In re Hennessey Capital Acquisition Corp. IV Stockholder Litigation*, 318 A.3d 306, 310 (Del. Ch. 2024).

100 *Id*. at 328 (citations omitted).

101 Chair Gary Gensler, U.S. Sec. & Exch. Comm'n, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products* (Jan. 10, 2024) (last visited Jan. 9, 2025).

102 Lee, Isabelle, Bloomberg, *Why the Crypto Crowd Is Excited About Spot-Ether ETFs* (July 24, 2024) (last visited Jan. 10, 2025).

103 Coin MarketCap, *Global Live Cryptocurrency Charts & Market Data* (last visited Jan. 9, 2025).

104 Mulima, Monique, Bloomberg Law, *How Trump Came Around to Crypto – and What Crypto Wants in Return* (Jan. 9, 2025) (last visited Jan. 11, 2025); Chow, Andrew R., Time, *What Trump's New AI and Crypto Czar David Sacks Means for the Tech Industry* (Dec. 10, 2024) (last visited Jan. 16, 2025).

105 *Id*.

106 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Crypto 2.0: Acting Chairman Uyeda Announces Formation of New Crypto Task Force*(Jan. 21, 2025).

107 *Id*.

108 E. Howcraft, *et al.*, Reuters, *Trump's new memecoin soars on his first day in office, lifts other tokens* (Jan. 20, 2025).

109 *Id*.

110 Executive Order, The White House, *Strengthening American Leadership in Digital Financial Technology* (Jan. 23, 2025).

111 Staff Accounting Bulletin No. 122, U.S. Sec. & Exch. Comm'n (Jan. 23, 2025).

112 Crypto Assets, U.S. Sec. and Exch. Comm'n (last visited Jan. 16, 2025).

113 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Announces Enforcement Results for Fiscal Year 2024* (Nov. 22, 2024) (hereinafter, *SEC Enforcement Results 2024*).

114 *Id*.

115 Press Release, U.S. Sec. and Exch. Comm'n, *BarnBridge DAO Agrees to Stop Unregistered Offer and Sale of Structured Finance Crypto Product* (Dec. 22, 2023) (last visited Jan. 17, 2025); Nelson, Danny, CoinDesk, *SEC Blasts 'Purportedly Decentralized' DAOs in $1.7M Settlement with BarnBridge* (Dec. 22, 2023) (last visited Jan. 17, 2025).

116 *SEC Enforcement Results 2024*, *supra* note 13; Bloom, Deborah & Stempel, Jonathan, Reuters, *Binance crypto founder Zhao sentenced to four months in prison* (May 1, 2024) (last visited Jan. 9, 2025); Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Founder of $1.7 Billion "HyperFund" Crypto Pyramid Scheme and Top Promoter with Fraud* (Jan. 29, 2024) (last visited Jan. 8, 2025).

117 Press Release, U.S. Dep't of Justice, *Samuel Bankman-Fried Sentenced to 25 Years for His Orchestration of Multiple Fraudulent Schemes* (Mar. 28, 2024) (last visited Jan. 15, 2025).

118 Press Release, U.S. Sec. & Exch. Comm'n, *eToro Reaches Settlement with SEC and Will Cease Trading Activity in Nearly All Crypto Assets, Firm charged with operating unregistered broker, clearing agency in connection with its crypto asset trading platform* (Sept. 12, 2024).

119 Jones Day, *2023 Securities Litigation Year in Review*, at 5 (Feb. 2024); Jones Day, *supra* note 15 at 5.

120 *SEC v. Ripple Labs, Inc.*, 682 F. Supp. 3d 308, 324 (S.D.N.Y 2023).

121 De, Nikhilesh, CoinDesk, *SEC Files Notice of Appeal in Case Against Ripple* (Oct. 3, 2024) (last visited Jan. 8, 2025). The SEC filed its opening brief on appeal just days before the change of administration.

122 Graffeo, Emily & Yang, Yueqi, Bloomberg, *Crypto Exuberance Hits Overdrive as SEC Battle Over Ether Looms* (Mar. 4, 2024) (last visited Jan. 9, 2025); Crypto.com, *Crypto.com Has Filed Suit Against the SEC to Protect the Future of Crypto in the U.S.* (Oct. 8, 2024) (last visited Jan. 9, 2025) (hereinafter, *Crypto.com Has Filed Suit*).

123 Graffeo, *supra* note 22.

124 Matthewson, Amelia, FinTech Magazine, *SEC Approves Ether ETFs* (Jul. 25, 2024) (last visited Jan. 11, 2025).

125 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Consensys Software for Unregistered Offers and Sales of Securities Through Its MetaMask Staking Service* (Jun. 28, 2024) (last visited Jan. 9, 2025).

126 *Crypto.com Has Filed Suit*, note 22. Jones Day represented Crypto.com in its action against the SEC. Miller, Ben, Bloomberg Law, *Crypto Suit Uses Texas Legal Strategy to Dial Up Attack on SEC* (Oct. 30, 2024) (last visited Jan. 17, 2025).

127 *Crypto.com Has Filed Suit*, *supra* note 22.

128 Shahid, Mohammad, Be(in) Crypto, *Crypto.com CEO Meets Trump and Drops SEC Lawsuit* (Dec. 17, 2024) (last visited Jan. 11, 2025).

129 *Coinbase, Inc. v. SEC*, No. 23-3202, 2025 WL 78330, at *1, *4 (3d Cir. Jan. 13, 2025).

130 *Id.* at *20.

131 Flores & Starykh, *supra* note 1 at 10.

132 *See, e.g.,* Compl., *Azad v. Jenner*, No. 24-CV-09768 (C.D. Cal. Nov. 13, 2024), Dkt. No. 1.

133 *Id.*; Compl., *Mena v. Schultz*, No. 24-cv-08695 (E.D.N.Y. Dec. 20, 2024), Dkt. No. 1.

134 Compl., *Hermann v. Veluz-Nepomuceno*, No. 24-CV-07704 (N.D. Cal. Nov. 5, 2024), Dkt. No. 1; Compl., *Brown v. Dolce & Gabbana USA Inc.*, No. 1:24-cv-03807 (S.D.N.Y. May 16, 2024), Dkt. No. 1.

135 *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 260 (2024), *aff'd in part, vac. in part*, 2024 WL 4356386 (Oct. 1, 2024); 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

136 *Id*.

137 *Id*. (quoting 17 C.F.R. § 229.303(b)(2)(ii) (2002)).

138 *Id*. at 260.

139 *Id*. at 265.

140 *Id*. at 261.

141 *Id*.

142 *Id*.

143 *Id*.

144 *Id*.

145 *Id*.

146 *Id*.

147 *Id*.

148 *Id*. at 262.

149 *Id*. at 261–62.

150 *Id*.

151 *Id*. Compare *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015) (finding Item 303's affirmative duty to disclose can serve as the basis for securities fraud claims under Section 10(b)) with *In re Nvidia*, 768 F.3d 1046, 1056 (9th Cir. 2014) (finding Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5).

152 *Macquarie*, 601 U.S. at 262–63. In last year's *Review*, we addressed the Second Circuit's opinion, the resulting circuit split, and the Supreme Court's decision to grant certiorari. *See* Jones Day, *supra* note 15 at 46–47.

153 *Macquarie*, 601 U.S. at 262-63.

154 *Id*. at 263.

155 *Id*.

156 *Id*.

157 *Id*. at 264.

158 *Id*. at 265.

159 *Id*. The Seventh Circuit recently observed that federal suits filed as class actions seeking more disclosure regarding mergers but not contending that any of the existing disclosures were false or materially misleading could be "problematic" in light of the *Macquarie* decision*. Alcarez v. Akorn, Inc.*, 99 F.4th 368, 373 (7th Cir.), *cert. denied*, 2024 WL 4486385 (U.S. Oct. 15, 2024). We analyze the Seventh Circuit's decision in *Alcarez* elsewhere in this year's *Review*. *Supra* note 49.

160 *Macquarie*, 601 U.S. at 265.

161 *Id*.

162 *Id*. at 265–66.

163 *Id*.

164 Order granting Writ of Cert., *Facebook, Inc. v. Amalgamated Bank*, 144 S. Ct. 2629 (June 10, 2024).

165 *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934 (9th Cir. 2023). We addressed the Ninth Circuit's decision in last year's *Review*. *See* Jones Day, *supra* note 15 at 16–17.

166 87 F.4th at 949.

167 *Id*. at 960.

168 Pet. for Writ of Cert., *Facebook, Inc. v. Amalgamated Bank*, No. 23-980, 2024 WL 3815071, *1 (U.S. Aug. 9, 2024).

169 *Id*. at *4.

170 Compare *Bondali v. Yum! Brands, Inc.*, 620 Fed. Appx. 483, 491 (6th Cir. 2015) (a company cannot be held liable for failing to disclose that an incident mentioned in its risk disclosures happened in the past because risk disclosures warn investors of what harm may come to their investment in the future, but do not educate investors on what harms are currently affecting the company) and *Karth v. Keryx Biopharms.*, 6 F.4th 123, 138 (1st Cir. 2021) (plaintiffs may base claims on risk disclosures only when they allege that the business knew the warned-of harm had already begun to materialize at the time the statement was made).

171 *Bondali*, 620 Fed. Appx. at 491.

172 *See*, *e.g.*, Brief for the Chamber of Commerce of the United States of America and the Securities Industry and Financial Markets Association as Amici Curiae Supporting Petitioners at 16, *Facebook, Inc. v. Amalgamated Bank*, No. 23-980, 2024 WL 1556296, at 16 (U.S. Apr. 5, 2024).

173 Brief for the United States As Amicus Curiae Supporting Respondents, *Facebook, Inc. v. Amalgamated Bank,* No. 23-980, 2024 WL 4388505 (U.S. Oct. 1, 2024).

174 *Id*. at 10.

175 The Court also dismissed another securities case following oral argument in *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, 604 U.S. ___ (Dec. 11, 2024).

176 97 F.4th 634, 637, 643 (9th Cir. 2024).

177 *Id.* at 642.

178 *Id.* at 643.

179 *Id.*

180 *Id.* at 637–38.

181 *Id.* at 641.

182 *Id.*

183 *Id.*

184 *Id.* at 638.

185 *Id.* at 639.

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.* at 640.

191 *Id.*

192 *Id.*

193 *Id.* at 637, 643.

194 *Id.*

195 *Id.* at 641.

196 *Id.*

197 *Id.*

198 *Id.* at 643.

199 *Id.* at 642.

200 *Id.* at 642–43.

201 *Id.* at 643.

202 *Zhou v. Desktop Metal, Inc.*, ___ F.4th ___, 2024 WL 458990 (1st Cir. Oct. 28, 2024).

203 *Id*. at *11.

204 *Id*. at *5 (citing First Circuit precedent holding that "[w]e determine as a matter of law whether a party has sufficiently developed its claim before the district court, such that the claim is preserved for appeal.").

205 *Id*. at *10.

206 *Id*.

207 *Id*. at *11.

208 *Id*. at *12.

209 *Id*.

210 *Id*. at *5.

211 *Id*.

212 *Id*. at *6.

213 *New England Carpenters Guaranteed Annuity and Pension Funds v. AmTrust Fin. Servs., Inc.*, ___ F.4th ___, 2023 WL 11965444 (2d Cir. Oct. 31, 2024). We analyzed the Second Circuit's initial opinion in the case in last year's *Review*. Jones Day, *supra* note 15 at 13–14.

214 *New England Carpenters Guaranteed Annuity and Pension Funds*, 2023 WL 11965444 at *18.

215 Brief of the SEC as Amicus Curiae, No. 20-1643 (Feb. 16, 2024). The Second Circuit invited the SEC to comment on the brief of former SEC officials as *amicus curiae*, also requesting the court to reconsider its materiality analysis of the false audit certification.

216 *New England Carpenters Guaranteed Annuity and Pension Funds*, 2023 WL 11965444 at *17.

217 *Id*. at *16.

218 Brief of the SEC, *supra* note 215 at 11–12.

219 Brief of the SEC, *supra* note 215 at 11–15.

220 *New England Carpenters Guaranteed Annuity and Pension Funds*, 2023 WL 11965444 at *17.

221 *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165 (2d Cir. 2020). We analyzed the *Abramson* case in our 2020 *Review*. Jones Day, *2020 Securities Litigation Year in Review*, at 13.

222 *Abramson*, 965 F.3d at 175.

223 *Id*.

224 *New England Carpenters Guaranteed Annuity and Pension Funds*, 2023 WL 11965444 at *6 (cleaned up).

225 *Id*. at *9 (emphasis in original).

226 *Id*. at *10.

227 *Id*. at *11.

228 *Id*.

229 *Id*.

230 *Id*. at *13.

231 *Id*. at *17 (quoting *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp.*, 77 F.4th 74, 80 (2d Cir. 2023)). We analyzed the Second Circuit's decision in the Goldman Sachs securities litigation in last year's *Review*. Jones Day, *supra* note 15 at 30–31.

232 *New England Carpenters Guaranteed Annuity and Pension Funds*, 2023 WL 11965444 at *17.

233 *In re Cloudera, Inc.*, 121 F.4th 1180, 1187–88 (9th Cir. 2024).

234 *Id*. at 1184.

235 *Id*.

236 *Id*.

237 *Id*. at 1185.

238 *Id*.

239 *Id*.

240 *Id*.

241 *Id*. The plaintiffs did not appeal the dismissal of these claims.

242 *Id*. at 1186.

243 *Id*. at 1187.

244 *Id*. at 1187–88.

245 *Id*. at 1187.

246 *Id*. at 1188.

247 *Id*.

248 *Id*.

249 *Id*.

250 *Wochos v. Tesla, Inc.*, 985 F.3d 1180 (9th Cir. 2021). We analyzed *Wochos v. Tesla, Inc.* in our 2021 *Review*. Jones Day, *2021 Securities Litigation Year in Review* (2022) at 5–6.

251 *Cloudera*, 121 F.4th at 1193 (cleaned up) (emphasis in original).

252 *Id*. at 1188.

253 *Id*. (quoting *Wochos*, 985 F.3d at 1185–86, 1193–94).

254 *Id*. at 1190.

255 106 F.4th 177 (1st Cir. 2024).

256 *Id.* at 181.

257 *Id.* at 180.

258 *Id.* at 184.

259 *Id.* at 183 (quoting *New Jersey Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 56 (1st Cir. 2008)).

260 *Quinones*, 106 F.4th at 180.

261 *Id.*

262 *Quinones v. Frequency Therapeutics, Inc.*, 665 F. Supp. 3d 156, 163 (D. Mass. 2023).

263 *Id.*

264 *Id.* at 163–64.

265 *Id.* at 164.

266 *Id.*

267 *Id.* at 168–69.

268 *Quinones*, 106 F.4th 177. As a preliminary matter, the court declined Frequency's argument that the district court erred in finding that the plaintiffs had adequately alleged a false statement, noting that "[t]he complaint allege[d] that [a confidential witness] confirmed that multiple patients enrolled in Phase 2a … despite not having met the inclusion criteria" by "fak[ing] being deaf" and "taking that as true, Frequency's subsequent statements to investors representing that all Phase 2a trial participants had meaningful word recognition deficits are necessarily false." *Id.* at 182.

269 *Id.*

270 *Id.*

271 *Id*.

272 *Id.* at 183.

273 *Id*. (quoting *Shash v. Biogen, Inc.*, 84 F.4th 1, 16 (1st Cir. 2023)).

274 *Id.* at 183–84.

275 *Id.*

276 *Id.* (quoting *Brennan v. Zafgen, Inc.*, 853 F.3d 606, 615–16 (1st Cir. 2017)).

277 *Id.* (quoting *In re Ariad Pharms., Inc. Sec. Litig.*, 842 F.3d 744, 754 (1st Cir. 2016).

278 *Id.* at 184.

279 *Id.*

280 *Id.* (citing *Tellabs, Inc.*, 551 U.S. 308, 323 (2007)).

281 *Id.*

282 *Id.* (internal quotation marks omitted).

283 99 F.4th 928 (7th Cir. 2024). The court also reversed dismissal of several ERISA claims that we do not address here.

284 15 U.S.C. §78u-4(b)(2)(A).

285 *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

286 *Appvion*, 99 F.4th at 951.

287 *See, e.g.*, *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 841 (7th Cir. 2007).

288 *Appvion*, 99 F.4th at 951.

289 *Id*. at 952.

290 *Id.*

291 *Id.*

292 *Id.*

293 *Id.*

294 *Plumbers and Pipefitters Local Union 719 Pension Fund v. Zimmer Holdings, Inc.*, 679 F.3d 952, 956 (7th Cir. 2012).

295 *Appvion*, 99 F.4th at 953.

296 *In re Genius Brands Int'l, Inc. Sec. Litig.*, 97 F.4th 1171 (9th Cir. 2024).

297 *Id*. at 11185.

298 *Id*. at 1186.

299 *Id*. at 1177.

300 *Id*.

301 *Id*. at 1177–78.

302 *Id*. at 1178.

303 *Id*. at 1177–78.

304 *Id*. at 1178.

305 *Id*.

306 *Id*.

307 *Id*.

308 *Id*.

309 *Id*.

310 *Id*.

311 *Id*.

312 *Id*. at 1178–79.

313 *Id*. at 1179.

314 *Id*.

315 *Id*.

316 *Id*.

317 *Id*.

318 *Id*.

319 *Id*.

320 *Id*.

321 *Id*.

322 *Id*.

323 *Id.* at 1179–80.

324 *Id*. at 1180.

325 *Id*. at 1181–82.

326 *Id.* at 1181–82.

327 *Id*. at 1182–83.

328 *Id.* at 1183.

329 *Id*. (citing *In re Bofi Holding*, 977 F.3d 781, 789 (9th Cir. 2020)).

330 *Id*. (citing *In re Bofi Holding*, 977 F.3d at 789).

331 *Id*.

332 *Id.* at 1184.

333 *Id*.

334 *Id*. at 1184–86 (citing *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753 (9th Cir. 2018; *In re Facebook, Inc. Sec. Litig*., 87 F.4th 934, 942 (9th Cir. 2023)). We analyzed the *Facebook* decision in our 2023 *Review*. *Supra* note 15 at 16–17.

335 *Id*.

336 *Id*. at 1187.

337 *Id*. at 1186.

338 *Id*. at 1186–87.

339 *Id*. at 1186.

340 *Id*. at 1188.

341 *Id*.

342 *Espy v. J2 Glob., Inc*., 99 F.4th 527 (9th Cir. 2024).

343 *Id*. at 533.

344 *Id*. at 540.

345 *Id*. at 536.

346 *Id*. (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009)).

347 *Id*.

348 *Id*. at 537.

349 *Id*.

350 *Id*.

351 *Id*. 538.

352 *Id*.

353 *Id*.

354 *Id*. at 539–540.

355 *Id*. at 539 (quoting *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 784–85 (9th Cir. 2008)).

356 *Id*.

357 *Id*. at 538.

358 *Id*. at 539.

359 *Id*. (citing *Zucco*, 552 F.3d at 1000).

360 *Id*. at 540.

361 *Id*.

362 *Id*. (quoting *Lloyd v. CVB Fin. Corp*., 811 F.3d 1200, 1210 (9th Cir. 2016)).

363 *Id*.

364 *Id*. at 541 (quoting *In re BofI Holding, Inc. Sec. Litig*., 977 F.3d 781, 795 (9th Cir. 2020)). For a discussion of *In re BofI* and loss causation, see the analysis of *In re Nektar Therapeutics Sec. Litig.*, *supra* note __34 F.4th 828, 839–40 (9th Cir. 2022) in our *2022 Securities Litigation Year in Review* at 12–14.

365 *Id*. at 542.

366 99 F.4th 770 (5th Cir. 2024).

367 *Id*. at 772–73.

368 *Id*. at 773.

369 *Id*.

370 *Id*.

371 *Id*.

372 *Id*.

373 *Id*.

374 *Id*. at 773–74.

375 *Id*. (alteration in original).

376 *Id*. at 774.

377 *Id*.

378 *Id*.

379 *Id*. at 773 (citing *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113, 118 (2021)). We addressed the Supreme Court's discussion of rebuttal of the *Basic* presumption in the *Goldman* litigation in prior *Reviews*. *See, e.g.*, *2020 Securities Litigation Year in Review* at 9–10.

380 *Id*. at 774.

381 *Id*. at 775.

382 *Id*.

383 *Forsythe v. Teva Pharmaceutical Ind., Ltd.*, 102 F.4th 152, 154 (3d Cir. 2024).

384 *Id*. at 154–55.

385 *Id*. at 154, 158–59.

386 *Id*. at 157–58.

387 *Id*. at 155.

388 *Id*. (citing *Morrison v. Nat'l Australia Bank, Ltd.*, 561 U.S. 247 (2010)).

389 *Id*. at 157 ("We thus reiterate that permission to appeal should be granted where the certification decision itself under Rule 23(a) and (b) turns on a novel or unsettled question of law, not simply where the merits of a particular case may turn on such a question.").

390 *Id*.

391 *Id*. at 158 (quoting *Morrison*, 561 U.S. at 254).

392 *Id*.

393 *Id*.

394 *Id*. at 154–55.

395 *Id*. at 159 n.12.

396 *Id*. at 159 (quoting *Halman Aldubi Provident & Pension Funds Ltd. v. Teva Pharms. Indus. Ltd.*, No. CV 20-4660-KSM, 2023 WL 7285167, *21 (E.D. Pa. Nov. 3, 2023)) (cleaned up).

397 *Id*. at 159 (quoting *Halman*, 2023 WL 7285167 at *21) (cleaned up).

398 *Id*. at 159 n.12.

399 *Id*. at 159.

400 *Id*. at 158 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)) (cleaned up).

401 *Id*. at 159 (quoting *Halman*, 2023 WL 7285167 at *23) (cleaned up).

402 *Ford v. TD Ameritrade Holding Corp.*, 115 F.4th 854 (8th Cir. 2024).

403 *Id*. at 859.

404 *Id*. at 860; Fed. R. Civ. P. 23(b)–(c).

405 *Id*. at 860–61.

406 *Id*. at 858; 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5.

407 *Ford*, 115 F.4th at 858.

408 *Id*.

409 *Id*. at 859 (citing *Ford v. TD Ameritrade Holding Corp.*, 995 F.3d 616, 621 (8th Cir. 2021)).

410 *Id*. at 858.

411 *Id*. at 859.

412 *Id*.

413 *Id*. at 858–59.

414 *Id*. at 861.

415 *Id*. at 859.

416 *Id*. at 859–60.

417 *Id*. at 859.

418 *Id*. at 860

419 *Id*.

420 *Id*. at 860–61.

421 *Id*. at 860.

422 *Id*.

423 *Id*. at 861.

424 *Id*.

425 *The Mangrove Partners Master Fund, Ltd. v. Overstock.com, Inc*., 119 F.4th 787, 796 (10th Cir. 2024).

426 *Id*. at 793.

427 *Id*. at 803.

428 *Id*. at 800 (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 249 (1988)).

429 *Id*. (emphasis in original).

430 *Id*.

431 *Id*. at 794.

432 *Id*. at 795–96 & n.11 (explaining that a "'short squeeze' occurs when the price of a heavily shorted stock rapidly increases, which forces short sellers to close their positions by purchasing shares, adding upward pressure on the stock").

433 *Id*. at 797.

434 *Id*. at 799 (citing *Basic Inc*., 485 U.S. at 243).

435 *Id*. at 800.

436 *Id*. (emphasis in original).

437 *Id*. at 800 & n.19 (explaining that applying the same reasoning, the plaintiff's concession also undermined any allegation of actual reliance).

438 *Id*.

439 *Id*. at 802 (citing *Set Cap. LLC v. Credit Suisse Grp. AG*, 996 F.3d 64, 76–77 (2d Cir. 2021)). We analyzed the Second Circuit's decision in our 2021 *Review*. Jones Day, *2021 Securities Litigation Year in Review* at 17–19.

440 *Id*. at 802–03 (citing *Santa Fe Indus. v. Green*, 430 U.S. 462, 477 (1977)).

441 *Id*. at 803.

442 *Id*. at 804.

443 *Id*. (noting that the corporation and corporate officers in *Set Capital* issued millions of notes in an undisclosed scheme, knowing or recklessly disregarding the virtual certainty that their own hedging activity would trigger a liquidity squeeze in futures contracts, destroy the value of the notes, and allow the corporation to accelerate and redeem the notes at a substantial loss to investors while locking in a profit for its own account).

444 *Id*. at 804–05 (emphasis in original).

445 *Id*. at 805.

446 *Id*.

447 *Id*.

448 *Id*.

449 *Id*.

450 *Id*.

451 *Id*. at 806.

452 *Id*. (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (circumstantial evidence does not support an inference of wrongdoing if the evidence is consistent with an obvious alternative explanation).

453 *Id*. at 807.

454 *In re Silver Lake Group, LLC Sec. Lit.,* 108 F.4th 1178, 1194 (9th Cir. 2024). As a preliminary matter, the court held that the plaintiffs had Article III standing to sue because they sufficiently pleaded both injury and causation. "If the allegations in the [complaint] constitute insider trading, [the plaintiffs were] concretely harmed by a defendant's statutory violation and [have] Article III standing to bring [their] insider trading claims." *Id*. at 1189 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021)). The court also rejected the argument that the plaintiffs lacked statutory standing under Section 20A because they traded on the public market and did not buy the shares of company stock sold by the defendants during the after-hours private block trade that was the crux of the complaint. The court explained that because the defendants sold Intelsat shares on November 5, 2019, and on November 5 and 6, 2019, the plaintiffs purchased securities "of the same class," they traded "contemporaneously" for purposes of establishing standing under Section 20A. "Although the contemporaneous trading rule acts as a stand-in for privity, it merely requires that the seller and buyer engaged in transactions close in time, not with each other." *Id*. at 1189–90.

455 *Id*. at 1191.

456 *Id.* at 1194.

457 *Id*. at 1185.

458 *Id*.

459 *Id*. at 1186.

460 *Id*. at 1187.

461 *Id*. at 1191–92.

462 *Id*. at 1192.

463 *Id*. at 1194.

464 *Packer ex rel. 1-800-Flowers.com, Inc. v. Raging Capital Mgmt*., 105 F.4th 46 (2d Cir. 2024).

465 *Id.* at 49–50.

466 *Donoghue v. Bulldog Inv'rs Gen. P'ship*, 696 F.3d 170, 172 (2d. Cir. 2012) (citing 15 U.S.C. § 78p(b).).

467 *Packer*, 105 F.4th at 50 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021); 54 (quoting *Barney v. Saunders*, 57 U.S. (16 How.) 535, 543, 14 L.Ed. 1047 (1853); *see also Donoghue*, 696 F.3d at 177 (quoting *Gratz v. Claughton*, 187 F.2d 46 at 49 (2d Cir. 1951) (drawing this analogy)).

468 *Packer ex rel. 1-800-Flowers.com, Inc. v. Raging Cap. Mgmt., LLC*, 661 F.Supp.3d 3, 17–18 (E.D.N.Y. 2023).

469 *Id*. at 13–18.

470 *Id*.

471 *TransUnion*, 594 U.S. at 423.

472 *Id*. at 425.

473 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016).

474 *Id*. at 341 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555 at 578 (1992)).

475 *TransUnion*, 594 U.S. at 424.

476 *Id*. at 436.

477 *Packer*, 105 F.4th at 54.

478 *Id*. at 55 (internal quotation omitted).

479 *In re Cognizant Technology Solutions Corporation Derivative Litigation*, 101 F.4th 250 (3d Cir. 2024) [hereinafter *In re Cognizant*].

480 *Id*. at 255.

481 *Id*. at 262.

482 *Id*. at 262–63.

483 *Id*. at 255.

484 *Id*.

485 *Id*. at 256 (stating that a class-action suit against Cognizant settled after the derivative action was filed).

486 *Id*.

487 *Id*.

488 *Id*. at 258–59. As a result, two of the cases relied on by the Third Circuit in reaching its decision in *Blasband v. Rales*, 971 F.2d 1034 (3rd Cir. 1992) are no longer good law. *See Starrels v. First Nat'l Bank of Chi*., 870 F.2d 1168, 1170 (7th Cir. 1989), *abrogation recognized by Westmoreland Cnty. Emp. Ret. Sys. v. Parkinson,* 727 F.3d 719, 724–25 (7th Cir. 2013); *Lewis v. Graves*, 701 F.2d 245, 248 (2d Cir. 1983) *abrogation recognized by Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 797 F.3d 229, 235–36 (2d Cir. 2015).

489 *Id*. at 259 (quoting *Pierce v. Underwood*, 487 U.S. 552, 559, 563 (1988)).

490 *Pierce v. Underwood*, 487 U.S. at 559, 562–63.

491 *In re Cognizant*, 101 F.4th at 260.

492 *Id*. (cleaned up).

493 *Id*.

494 *Id*.

495 *Id*.

496 *Id*.

497 *Id*. at 260–61.

498 *Id*. (quoting *Pierce v. Underwood*, 487 U.S. at 563, and *Brehm v. Eisner*, 746 A.2d 244, 253 (Del. 2000) (*en banc*)).

499 *Id*. at 264.

500 *Id*.

501 *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 311 A.3d 773, 806 (Del. 2023).

502 *Id*. at 798 (quoting *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, No. 2021-1118, 2022 WL 17841215 at *13 (Del. Ch. Dec. 22, 2022), *motion for relief from judgment denied*, No. 2021-1118, 2023 WL 2582399 (Del. Ch. Mar. 21, 2023), *rev'd*, 311 A.3d 773 (Del. 2023), *and rev'd and remanded*, 311 A.3d 773 (Del. 2023) (hereinafter "*Rule 23.1 Opinion*")).

503 *Id*. at 799–800.

504 *Id*. at 780.

505 *In re Massey Energy Co.*, No. CIV.A. 5430-VCS, 2011 WL 2176479 at *20 (Del. Ch. May 31, 2011).

506 *Lebanon Cnty. Emps.' Ret. Fund v. Collis*, 311 A.3d 773, 780 (Del. 2023) (quoting Appendix to Plaintiff-Appellants' Opening Brief at A227).

507 *Id*. at 781 (quoting *Rule 23.1 Opinion* *2).

508 *Id*. at 781 (quoting *Rule 23.1 Opinion* at *3).

509 *Id*. at 781–82 (quoting *Rule 23.1 Opinion* at *3).

510 *Id*. at 797.

511 *Id*. at 799 (quoting *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)).

512 *Id*. at 800.

513 *Eccles v. Shamrock Capital Advisors, LLC*, 2024 N.Y. Slip. Op. 02841 (N.Y. May 23, 2024), 42 N.Y.3d 321 (2024).

514 *Id*. at 328.

515 *Id*.

516 *Id*. at 346.

517 *Id*. at 329 (describing Article 83 of FanDuel's Articles of Association as creating a "waterfall provision, which provided that in the event of the winding down of the company, preferred shareholders were entitled to be compensated first for the value of their stock," limited "to the original subscription prices of their shares").

518 *Id*. at 331 (describing the so-called "Drag Along Notice" from certain defendants exercising their "drag-along rights and accepting the [merger] offer on behalf of all FanDuel shareholders," thereby precluding a shareholder vote on the merger).

519 *Id*. at 330 (citing *Murphy v. National Collegiate Athletic Assn.*, 584 U.S. 453 (2018)).

520 *Id*. at 333.

521 *Id*. at 334.

522 *Id.* at 335.

523 *Id*. at 338–39.

524 *Id*. at 339.

525 *Id*. at 340. The court also held that the Appellate Division did not err in taking judicial notice of foreign law based on the submission of "voluminous materials" provided by the parties, including expert affidavits, demonstrating that it had sufficient information to take judicial notice of Scottish law for the purpose of resolving the motions to dismiss and did not abuse its discretion by doing so without a hearing. *Id*. at 342.

526 *Id*. at 343.

527 *Id*. at 344.

528 *Id* at 345.

529 *Id*. at 346.

530 *Williams v. Binance*, 96 F.4th 129, 133 (2d Cir. 2024), *cert. denied*, 2025 WL 76442 (Jan. 13, 2025).

531 *Id*. at 133.

532 *Id*. at 136 (citing *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 267 (2010)).

533 *Id*. at 134.

534 *Id*. at 133–35.

535 *Id*. at 134.

536 *Id*. at 134–35. The complaint also included claims under the Blue Sky laws of 49 states, the District of Columbia, and Puerto Rico.

537 *Id*. at 136; *See Morrison*, 561 U.S. at 269.

538 *Williams*, 96 F.4th at 136.

539 *Id*. at 136; *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 62 (2d Cir. 2012).

540 *Williams*, 96 F.4th at 136–37; *Absolute Activist*, 677 F.3d at 68 (quoting *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2d Cir. 1972)).

541 *Williams*, 96 F.4th at 139; *See Myun-Uk Choi v. Tower Rsch. Cap. LLC*, 890 F.3d 60, 68 (2d Cir. 2018) (explaining that at least one time at which irrevocable liability attaches is when orders are matched between a purchaser and a seller).

542 *Williams*, 96 F.4th at 139–41; *See City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 181 n.33 (2d Cir. 2014) (quoting *Absolute Activist*, 677 F.3d at 69–70) (explaining how the location of where purchase orders were made can serve as the basis for where irrevocable liability attached); *see also, e.g., United States v. Vilar*, 729 F.3d 62, 77 (2d Cir. 2013) (looking to location where party executed documents necessary to make investment and location from where money was sent).

543 *Williams*, 96 F.4th at 140–41.

544 *Id*. at 141; 15 U.S.C. § 77m.

545 *Williams*, 96 F.4th at 141–42 (quoting *Diskin v. Lomasney & Co.*, 452 F.2d 871, 875–76 (2d Cir. 1971)).

546 *Id*. at 141.

547 *Id*. at 142–43.

548 *Id*. at 143; 15 U.S.C. §§ 78cc(b), 78o(a)(1).

549 *Williams*, 96 F.4th at 143.

550 *Id*. at 143–45.

551 *Id*. at 144; *Kahn v. Kohlberg, Kravis, Roberts & Co. (KKR)*, 970 F.2d 1030, 1038 (2d Cir. 1992).

552 *Williams*, 96 F.4th at 144.

553 *Id*. at 145 (citing *City of Pontiac Gen. Emp. Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175–76 (2d Cir. 2011)).

554 *Id*. at 144.

555 *In re PG&E Corp. Sec. Litig.*, 100 F.4th 1076 (9th Cir. 2024).

556 *Id*. at 1086.

557 *Id.* at 1081 (citing 11 U.S.C. § 362).

558 *Id*.

559 *Id.*

560 *Id.* at 1083.

561 *Id.*

562 *Id.*

563 *Id.* at 1083, 1087.

564 *Id*. at 1083.

565 *Id.* at 1084 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 9 (1983)).

566 *Id.* (quoting *Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., Inc.*, 490 F.3d 718, 723–24 (9th Cir. 2007)).

567 *Id.* at 1085 (cleaned up) (quoting *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 842 (9th Cir. 2023)).

568 *Id.* at 1086.

569 *Id.* at 1087.

570 *Id.* at 1087–88.

571 *Id.* at 1088 (quoting *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 864 (9th Cir. 1979)).

572 *In re: CCIV/Lucid Motors Sec. Litig.*, 110 F.4th 1181, 1185 (9th Cir. 2024) (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742 (1975)).

573 *Id.* at 1183.

574 *Id.*

575 *In re CCIV/Lucid Motors Sec. Litig.*, No. 4:21-cv-9323, 2023 WL 325251, at *10 (N.D. Cal. Jan. 11, 2023). We analyzed the district court's decision in last year's *Review*. See Jones Day, *supra* note 15 at 4.

576 *Id.* at *8 (citing *Menora Mivtachim Ins. Ltd. v. Frutarom Indus. Ltd.*, 54 F.4th 82, 85–86 (2d Cir. 2022)).

577 *Id.* at *11.

578 *In re: CCIV/Lucid Motors Sec. Litig.*, 110 F.4th at 1185–86 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. at 742).

579 *Id.* (quoting *Menora,* 54 F.4th at 87). We analyzed the Second Circuit's decision in *Menora* in last year's *Review*. *See* Jones Day, *supra* note 15 at 31–32.

580 *Id.* at 1186 (citing *Blue Chip*, 421 U.S. at 378–39, 755).

581 *Id.* at 1187.

582 *Id.* The Ninth Circuit subsequently denied a petition for an *en banc* rehearing.

583 99 F.4th 368 (7th Cir. 2024).

584 *Id*. at 372 (citing *In re Trulia, Inc. Stockholder Lit.*, 129 A.3d 884, 898 (Del. Ch. 2016)).

585 *Id*. at 373 (citing *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024)). We analyze the Supreme Court's decision in *Macquarie* elsewhere in this year's *Review*. *See supra* at 12–14.

586 *Id*. at 376 (citing the "[m]andatory review by court" provision of 15 U.S.C.s 78u-4(c)(1)).

587 *Id*. at 377.

588 In 2023, we analyzed the Third Circuit's decision in *Scott v. Vantage Corp.* holding that the PSLRA requires some sanction to be imposed where a plaintiff filed a complaint solely to force a settlement in violation of Rule 11. Jones Day, *supra* note 15 at 42–43.

589 99 F.4th at 372 (quoting *In re Walgreen Co. Stockholder Litigation*, 832 F.3d 718, 724 (7th Cir. 2016)).

590 *Id*.

591 *Id*.

592 *Id*.

593 *Id*. (citing *Walgreen Co. Stockholder Litigation*).

594 *Id*. at 377.

595 *Id*.

596 *Id*. at 375.

597 *Id*. (citations omitted).

598 *Id*.

599 *Id.* at 376.

600 *Id*. at 377.

601 *Id*.

602 Cornerstone Research & Stanford Law School Securities Class Action Clearinghouse, *Securities Class Action Filings 2024* (2024).

603 Flores & Starykh*, supra* note 1 at 11.

604 Complaint, *Operating Engineers Constr. Indus. Misc. Pension Fund v. MGP Ingredients, Inc.*, case 1:24-cv-09685 (S.D.N.Y. Dec. 16, 2024), Dkt. No. 1.

605 *Id*. at 2.

606 *Id*.

607 Complaint at 2, *West Palm Beach Firefights' Pension Fund v. Hasbro, Inc.*, 1:24-cv-08633 (S.D.N.Y. Nov. 13, 2024), Dkt. No. 1.

608 Order, *In re Vaxart, Inc. Securities Litigation*, 3:20-cv-05949 (N.D. Cal. Dec. 17, 2024), Dkt. No. 431.

609 *See* U.S. Senate, Restoring Integrity in Fiduciary Duty Act, Sen. B. 5174 (2024); U.S. House, Protecting Americans' Investments from Woke Policies Act, H.R. 5339 (2024). The bills would amend ERISA to add language restricting retirement plan fiduciaries' investment decisions to pecuniary factors with limited exceptions.

610 Henry Engler, *Anti-ESG legislation seen facing uphill struggle to become law*, Reuters (Feb. 22, 2024).

611 Flores & Starykh, *supra* note 1, at 11.

612 Ross Kerber, *Companies boost social and climate reporting amid ESG backlash*, Reuters (Nov. 6, 2024).

613 *Id*. (citing DiversIQ data based on public disclosures from U.S. EEO-1 filings).

614 *Id*.

615 *In re Danimer Scientific Inc. Securities Litigation*, No. 23-7674 (2d Cir. Sept. 27, 2024) (unpublished summary order).

616 *Id*. at 5.

617 *Id*. at 4.

618 *Id*.

619 *Earth Island Institute v. The Coca-Cola Company*, No. 22-CV-0895, at 4 (D.C. Court of Appeals Aug. 29, 2024).

620 *Id*. at 8.

621 *In re: Oatly Group AB Securities Litigation*, No. 1:21-cv-06360-AKH (S.D.N.Y. Feb. 16, 2024). In our 2023 *Review*, we reported on a $10 million settlement centered on a demonstrably inaccurate statement about a product's supposed recyclability.

622 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Announces Enforcement Task Force Focused on Climate and ESG Issues* (Mar. 4, 2021).

623 Lamar Johnson, *SEC Disbands its Climate and ESG Enforcement Task Forces*, ESGDive (Sept. 13, 2024).

624 The enhanced ESG disclosure rules were originally proposed in 2022, but the rules have not been finalized.

625 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Keurig with Making Inaccurate Statements Regarding Recyclability of K-Cup Beverage Pod* (Sep. 10, 2024).

626 Statement, U.S. Sec. & Exch. Commissioner Hester M. Peirce*, Not so Fast: Statement on In the Matter of Keurig Dr. Pepper Inc.* (Sep. 10, 2024).

627 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Advisory Firm WisdomTree with Failing to Adhere to its Own Investment Criteria For ESG-Marketed Funds* (Oct. 21, 2024).

628 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Invesco Advisers for Making Misleading Statements About Supposed Investment Considerations* (Nov. 8, 2024).

629 On November 21, 2024, Chair Gensler announced that he would step down on January 20, 2025, when the new administration takes over. Press Release, U.S. Sec. & Exch. Comm'n, *SEC Chair Gensler to Depart Agency on January 20* (Nov. 21, 2024).

630 The Nasdaq corporate board diversity rule required Nasdaq-listed companies to have, or publicly disclose why they do not have, at least two diverse directors, and publicly disclose board diversity statistics using a standardized format on an annual basis. *Alliance for Fair Bd. Recruitment v. SEC*, No. 21-60626, 2024 WL 5078034 (5th Cir. Dec. 11, 2024).

631 Staff Legal Bulletin, U.S. Sec. & Exch. Comm'n, *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)* (Nov. 3, 2021) (rescinding the standards the SEC staff will apply when evaluating company requests that the staff not recommend enforcement action if a company omits a stockholder proposal for shareholder approval in the company's proxy statement based on an exclusion permitted under Rule 14a-8).

632 Press Release, U.S. Sec. & Exch. Comm'n. *SEC Proposes New Requirements to Address Risks to Investors From Conflicts of Interest Associated with the Use of Predictive Data Analytics by Broker-Dealers and Investment Advisers* (July 26, 2023).

633 *Id*. The SEC has not yet announced a date for voting on a final rule.

634 NCSL, *Artificial Intelligence 2024 Legislation* (updated Sept. 9, 2024).

635 Cal. Senate Bill 942 (2024).

636 Flores & Starykh, *supra* note 1, at 11.

637 Memorandum and Order, *City of Miami Fire Fighters' and Police Officers' Retirement Trust v. Cerence Inc.*, No. 1:22-10321, (D. Mass. Mar. 25, 2024), Dkt. No. 51.

638 Order Preliminarily Approving Settlement and Providing Notice, *City of Miami Fire Fighters' and Police Officers' Retirement Trust v. Cerence Inc.*, No. 1:22-10321, (D. Mass. Sept. 23, 2024), Dkt. No. 78.

639 Investor.gov, *Artificial Intelligence (AI) and Investment Fraud: Investor Alert* (Jan. 25, 2024).

640 *Id*.

641 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Two Investment Advisors with Making False and Misleading Statements About Their Use of Artificial Intelligence* (Mar. 18, 2024).

642 *Id*.; *see also* Video, U.S. Sec. & Exch. Comm'n, *Office Hours With Gary Gensler/AI Washing* (Sept. 4, 2024).

643 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges China-Based QZ Asset Management Ltd. and its CEO in Pre-IPO Fraud Scheme* (Aug. 27, 2024).

644 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges Founder of AI Hiring Startup Joonko With Fraud* (June 11, 2024). In a parallel action, the U.S. Attorney's Office for the Southern District of New York announced criminal charges against the founder on the same date. *See* Press Release, U.S. Attorney's Office for the Southern District of New York, *Founder and Former CEO of Artificial Intelligence Company Charged With Securities Fraud* (June 11, 2024).

645 Remarks, DOJ Criminal Division, *Deputy Attorney General Lisa O. Monaco Delivers Remarks at the University of Oxford on the Promise and Peril of AI* (Feb. 14, 2024).

646 *Id*.

647 Remarks, DOJ Criminal Division, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks at the Society of Corporate Compliance and Ethics 23rd Annual Compliance & Ethics Institute* (Sep. 23, 2024).

648 Press Release, U.S. Attorney's Office for the Southern District of New York, *Former CEO of Kubient, Inc. Charged and Pleads Guilty In Connection With Accounting Fraud Scheme* (Sep. 16, 2024).

649 *See* our previous discussion of *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 594 U.S. 113 (2021) at Jones Day, *supra* note 250 at 22–23.

650 *See supra* at 30–31; *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74 (2d Cir. 2023).

651 *Jaeger v. Zillow Group, Inc.*, No. 24-6605 (9th Cir. Jan. 8, 2025).

652 *Goldman Sachs*, 594 U.S. at 123.

653 *Inst. S'holder Servs. Inc. v. SEC*, 718 F. Supp. 3d 7 (D.D.C. 2024).

654 *Id.* at 29.

655 *Id.*

656 *Id*. at 27.

657 *In re FirstEnergy Corp.*, No. 23-0303 (6th Cir. 2023).