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2023 Securities Litigation Year in Review

During 2023, securities lawsuit filings rose for the first time in four years. Settlements declined last year; there were nine mega-settlements of more than $100 million, including a $1 billion settlement. Case filings involving COVID-19, SPACs, and cryptocurrencies represented 18% of all filings in 2023, down substantially from 2022. Turmoil in the banking sector in early 2023 led to a substantial uptick in suits against financial institutions.

Our *2023 Securities Litigation Year in Review* focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts. We discuss the Supreme Court's unanimous decision in *Pirani v. Slack Technologies, Inc.* resolving a circuit split about the tracing requirement for claims under the Securities Act of 1933. We also discuss the latest developments in the long-running Goldman Sachs securities case after the Supreme Court vacated class certification in 2021. We analyze 16 decisions from the federal appellate courts addressing the pleading requirements for securities fraud cases and also highlight a significant circuit split related to forum-selection provisions.

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INTRODUCTION

During 2023, securities class action case filings rose slightly, with 228 new cases filed compared with 206 cases filed in 2022.[1] The number of filings in 2023 matched the 1996–2020 annual average of 228 and reflected the first increase in four years.[2] The filings were nearly 53% below the 432 filings in 2018, the recent peak year for federal securities-suit filings.[3]

These numbers were impacted by the continuing decline in class action merger objection lawsuit filings. In 2023, only seven federal merger objection actions were filed compared with nine in 2022. Plaintiffs continue to bring merger objection lawsuits but are increasingly filing them as individual actions rather than class actions.

As has been the case for the last several years, suits alleging Rule 10b-5 claims were the vast majority of all new case filings in 2023, with 184 filings compared with 137 filings in 2022.[4] Suits against companies in the electronics technology, technology services, and health technology and services industries were the most common, accounting for 41% of total filed cases in 2023.[5] Tumult in the banking sector in early 2023 that resulted in several high-profile bank failures led to 12 securities fraud suit filings against financial institutions.[6] Four of those filings related to the collapse of Credit Suisse in March 2023.[7]

Securities lawsuits relating to special purpose acquisition companies ("SPACs"), COVID-19, cryptocurrency, and other digital assets totaled 42 cases last year, representing more than 18% of all federal securities class action filings.[8] We analyze noteworthy developments in those sectors in more detail below.

With virtually all state and federal courthouses open again following the COVID-19 pandemic, the number of settlements and dismissals of securities cases held steady in 2023, with 190 announced class action settlements and dismissals compared with 223 in 2022.[9] Total settlements were $5.8 billion, up from $4.2 billion in 2022.[10] The average settlement value was $46 million, an increase of 17% over the average settlement in 2022.[11] Notably, the trend of derivative suit settlements with substantial cash components continued in 2023; there were several settlements in 2023 that are among the all-time largest derivative suit settlements, including Tesla ($735 million) and CBS/Viacom ($167 million).[12] A separate direct action filed by Viacom shareholders settled for $122.5 million.[13]

Settlements in securities class actions in 2023 included nine mega-settlements in excess of $100 million—compared to 10 mega-settlements in 2022—topped by the $1.3 billion settlement in the Wells Fargo case and $450 million in the Kraft Heinz case, which was the second-largest settlement ever reported in the Northern District of Illinois.[14] Wells Fargo also had the third-largest settlement last year (for $300 million) in a separate case arising out of alleged irregularities in its automobile insurance business.[15] All of the cases on the 2023 top 10 list settled after years of litigation, and some, including the third-largest Wells Fargo case, settled on the eve of trial. Three of the top 10 settlements involved non-U.S. companies: Allianz Global Investors ($145 million), MicroFocus ($107.5 million), and Groupo Televisa ($95 million).[16] Two of the top 10 settlements were in state courts, with the MicroFocus settlement in California Superior Court and the Newell Brands settlement ($102.5 million) in New Jersey Superior Court.[17]

Our *2023 Securities Litigation Year in Review* focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts. We discuss the Supreme Court's unanimous decision in *Pirani v. Slack Technologies, Inc.* resolving a circuit split about the tracing requirement for claims under the Securities Act of 1933 ("Securities Act").[18] As we discussed in last year's *Review*, a sharply divided panel of the Ninth Circuit affirmed a district court's decision that a purchaser of shares in a direct listing who could not conclusively determine whether he had purchased registered or unregistered shares nevertheless had standing to sue under Sections 11 and 12 of the Securities Act.[19] That decision conflicted with decisions in other circuits holding that Securities Act plaintiffs must allege that their securities can be traced to the registration statement alleged to be false or misleading. The Supreme Court resolved the circuit split against the Ninth Circuit based on its analysis of textual clues in the Securities Act, concluding that a Securities Act plaintiff must plead and prove a purchase of shares traceable to the allegedly defective registration statement to have standing to sue.

We also discuss the latest developments in the long-running Goldman Sachs securities case following the Supreme Court's 2021 ruling vacating class certification and remanding based on its conclusion that it was unclear whether the Second Circuit properly considered the generic nature of Goldman's alleged misrepresentations when it addressed the issue of price impact.[20] In 2022, the district court once again certified

a class and found that the defendant had failed to show that the alleged misrepresentations had no price impact notwithstanding the genericness of the challenged statements.[21] Last year, analyzing that decision and applying the Supreme Court's guidance, the Second Circuit concluded that the district court had erred. The Second Circuit held that the specificity of the back-end corrective disclosures did not match the genericness of the front-end alleged misstatements and thus remanded the case for decertification of the class.

There was continued activity related to forum-selection provisions in 2023. As we discussed in last year's *Review*, a pair of conflicting decisions from the Seventh and Ninth Circuits addressed forum-selection bylaws that required derivative claims to be brought in Delaware Chancery Court.[22] A divided panel of the Seventh Circuit held that such a forum-selection bylaw was enforceable while a unanimous panel of the Ninth Circuit concluded that an identical forum-selection bylaw was enforceable. In 2023, an en banc Ninth Circuit panel affirmed the original panel's decision that the forum-selection bylaw was enforceable, thereby confirming the circuit split.[23]

In this year's *Review*, we analyze 16 decisions from the federal appellate courts addressing the pleading requirements for securities fraud cases under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 10b-5. The cases arise from a variety of factual contexts, including failed mergers, data breaches, disappointing clinical drug trials, post-acquisition difficulties, and pending regulatory investigations, among others. The courts consistently emphasized the high burdens facing plaintiffs under the Private Securities Litigation Reform Act ("PSLRA") and Rule 9(b) of the Federal Rules of Civil Procedure ("Rule 9(b)") and affirmed dismissal of the complaints in all but six decisions. We explain the key takeaways for companies' disclosure policies from those decisions permitting the plaintiffs to avoid dismissal.

Last year was notable for the number of high-profile bank failures that occurred between March and May. The failed banks had $548.7 billion of combined assets, the highest ever in a single year, and included the second- and fourth-largest bank failures in U.S. history.[24] While forceful actions by federal banking regulators were effective in preventing further failures, continuing concerns about the stability of the sector led to credit rating downgrades against a number of banks, and the turmoil led to increased securities litigation, with 12 suits filed against banks or related entities in 2023.[25]

Investors filed more class action suits against companies in the banking sector in the first six months of 2023 than in all of 2022.[26] A complaint against failed Silicon Valley Bank alleged that the bank and its management downplayed its exposure to interest rate changes by the Federal Reserve, and another suit alleged that Credit Suisse, which was acquired by UBS Group in the wake of its solvency crisis, hid financial losses from investors. Several other suits challenge the adequacy of banks' disclosures about liquidity issues or allege misrepresentations about large unrealized losses and significant amounts of uninsured deposits, issues that contributed to the failure of Silicon Valley Bank.[27]

Finally, in one of the few securities fraud suits to be resolved at trial, a federal jury in San Francisco returned a verdict in favor of Tesla and its CEO, Elon Musk, over his 2018 tweets that he had "funding secured" to take the company private, rejecting investor claims for $12 billion in losses incurred from the allegedly false tweets.[28] The verdict was returned after just hours of deliberation and 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. In September 2018, Musk agreed to step down as Tesla's chairman and paid a $20 million fine as part of a settlement with the SEC arising out of the tweets, and the company agreed to pay a $20 million fine as well.[29]

COVID-19

One of the consequences of the COVID-19 pandemic was a surge in pandemic-related securities suits. In 2020, there were 33 pandemic-related filings.[30] That number declined to 20 in both 2021 and 2022. Not surprisingly, as the COVID-19 pandemic receded, the pace of related securities suits likewise receded, and there were only 12 filings in 2023.[31] Just as the impact of the pandemic has evolved as variants emerged and ebbed, the focus of COVID-related cases has likewise changed. The first wave of cases was filed against companies that experienced outbreaks in their facilities, such as cruise

ship lines and private prison operators, while 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.

Although it appeared that COVID-related filings would continue to ebb as the pandemic receded and no such suits were filed last year after August, cases continue to be filed in 2024 and the plaintiffs' theories of liability continue to evolve. In January 2024, a suit was filed against BioNTech, the German biotechnology firm that, along with its partner Pfizer, developed a mRNA-based vaccine for COVID-19. The company experienced substantial financial gains after the vaccine was launched.[32] In October 2023, after Pfizer announced lower-than-expected sales of its vaccine and a $5.5 billion inventory write-off, BioNTech announced its own write-off. The complaint alleged that the company made false or misleading statements or failed to disclose material information about reduced demand for its vaccine and accumulation of excess inventory of raw materials in violation of Section 10(b) and Rule 10b-5. It remains to be seen whether the plaintiffs will be able to adequately allege scienter and other elements of a securities suit.

In a second suit filed in January 2024, a shareholder sued BioVie, a developmental-stage biotech company, after the company reported disappointing results from its phase 3 clinical trial of a potential Alzheimer's treatment, alleging that the company failed to disclose that the ongoing COVID-19 pandemic caused limited access to clinical trial sites that significantly affected the company's ability to properly oversee the trial.[33] Most of the securities suits related to COVID-19 filed in 2023 likewise alleged that diagnostic test manufacturers made false or misleading statements related to the impact of the waning demand for their products or alleged that companies whose products were not COVID-related failed to adequately disclose the impact of the pandemic on their expected growth and revenue.[34]

As we discussed in last year's *Review*, the results in COVID-19 securities suits have been decidedly mixed. While plaintiffs had some success in opposing motions to dismiss or obtaining settlements in cases against companies involved in developing vaccines, they have been less successful in cases targeting companies that initially benefited from the pandemic but performed less well as the pandemic subsided. A prime example was Peloton, the manufacturer of internet-connected stationary bicycles and treadmills, which boomed during the early stages of the pandemic but did less well as shutdowns ended and offices and gyms reopened. As demand for its products cooled, its stock price declined in late 2021, and the company was hit with a securities suit alleging that it had overstated demand and understated the impact of reopened gyms on its revenue.[35]

In March 2023, the court granted the defendants' motion to dismiss (without prejudice) in a decision that suggests the limits of this theory of liability.[36] The court held that the plaintiff had not pleaded that the challenged statements were actually false and found other statements to be nonactionable puffery or forward-looking statements protected by the PSLRA's safe harbor. In particular, the court rejected allegations that the company's risk disclosures were mere boilerplate, characterizing them as "specific and realistic" as to how relaxation of COVID-19 protocols could hamper future growth. The court did not reach scienter or loss causation.

The SEC continued to focus enforcement efforts on false or misleading disclosures regarding the prevention, diagnosis, and treatment of COVID-19 made during the early days of the pandemic. For example, in July 2023, the SEC announced charges against a molecular diagnostics company related to two press releases in February 2020 shortly before a securities offering that "misleadingly suggested that the test could be used by consumers to detect COVID-19 when, in fact, at that time, the test could not be sold for clinical diagnostic purposes."[37] The complaint further alleged that even after the company was contacted by the FDA to express concerns about the accuracy of the two press releases soon after publication, the company did not correct them until the FDA contacted it again approximately two weeks later.

The SEC also announced charges against a biopharmaceutical company that developed a scorpion venom product called Escozine, alleging that a press release in 2021 misrepresented that the FDA had validated a clinical trial of Escozine as a COVID-19 treatment and recognized the potential therapeutic benefits of the drug.[38] In another case, the SEC announced settled charges against Chembio Diagnostics, which developed a COVID-19 test and received an emergency use authorization in April 2020. The charges arose out of statements in a 2020 prospectus that "[t]he accuracy of the COVID-19 System after eleven

days post the onset of symptoms is 100% for total antibodies."[39] The SEC alleged that the statement was contradicted by the results of an earlier evaluation by the National Cancer Institute and the company's own internal analysis that the test identified COVID-19 antibodies in only 75% of positive samples.

The SEC also charged a Pfizer statistician with insider trading ahead of the company's announcement that a study of its COVID-19 treatment, Paxlovid, was successful, which resulted in the largest single-day price move since 2009.[40] Given the number of COVID-19 securities suits filed last year and the early filings in 2024, we expect that COVID-related private litigation will continue in tandem with ongoing SEC enforcement activity relating to COVID-19.

SPACs

As we predicted in last year's *Review*, the popularity of SPACs continued to wane in 2023. 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 to 24 months, unless investors agree to an extension. 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 were 198 announced SPAC liquidations in 2023, a substantial increase over the 144 liquidations in 2022.[41] Those numbers stand in stark contrast with the one announced liquidation in 2021.[42] As of the end of 2023, 351 SPACs had liquidated. The SPAC fallout in 2023 included 21 bankruptcies, resulting in an estimated loss of $46 billion in total equity value measured from peak market capitalization.

Although 102 de-SPAC transactions closed in 2023, that was a steep decline from the 199 transactions closed in 2021.[43] Under a provision in the Inflation Reduction Act that went into effect in 2023, SPAC sponsors faced a 1% excise tax if they returned cash to investors.[44] As a result of these developments, in 2023, just 31 SPAC IPOs were completed, resulting in gross proceeds of $3.8 billion, a remarkable slide from the 613 SPAC IPOs completed in 2021 with gross proceeds of $162.5 billion.[45]

Notwithstanding the serious headwinds facing the SPAC sector, securities suits related to SPACs fell to 14 in 2023, down from 24 filed in 2022.[46] Filings related to SPACs peaked in 2021 with 31 securities suits. The majority of the complaints were filed in the wake of disappointing financial performance of combined companies following de-SPAC transactions and typically alleged conflicts of interest and misstatements about the combined companies' business operations and outlook to obtain shareholder approval of the transaction.[47] A few cases survived motions to dismiss in 2023. For example, in a case involving CCIV/Lucid Motors, the court held that shareholders in a SPAC who purchased their shares before announcement of the de-SPAC transaction nevertheless had standing to sue based on alleged misstatements by the SPAC company's CEO about the target company even though they did not own shares in that company.[48]

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."[49] The new rules require enhanced disclosures about conflicts of interest, SPAC sponsor compensation, dilution, and other information that is important to investors in SPAC IPOs and de-SPAC transactions. Among other things, the new rules also require registrants to provide additional information about the target company to help investors make more informed voting and investment decisions in connection with de-SPAC transactions.

According to the SEC, "[t]he rules more closely align the required disclosures and legal liabilities that may occur in de-SPAC transactions with those in traditional IPOs."[50] In an accompanying commentary on the final rules, Chair Gensler noted that they would "enhanc[e] investor protections in three areas: disclosure, use of projections, as well as issuer obligations."[51] Given that the new rules will eliminate many of the benefits of SPACs in comparison with traditional IPOs and heighten private litigation risk following unsuccessful de-SPAC transactions, they will likely cause a further drag on SPAC transactions in the future.

In addition to rulemaking and the SEC's expressed skepticism about the risks SPACs present to investors, the SEC has also been active in bringing enforcement actions in the SPAC sector. It has charged investment advisers with failing to disclose conflicts of interest regarding their ownership of SPAC sponsors into which they advised their clients to invest. Nor are gatekeepers immune. Last year the SEC settled charges against an audit firm and a lead audit partner at another firm based on their alleged failure to audit SPAC companies in conformance with applicable professional standards and SEC professional conduct rules. Another SPAC company settled charges for making false and misleading statements in connection with social media company Trump Media & Technology Group.

Finally, as we discussed in last year's *Review*, the Delaware Chancery Court has weighed in on SPAC-related issues, most notably in its groundbreaking decision applying traditional fiduciary principles in the SPAC context and allowing fiduciary duty claims to proceed against the board of directors, the sponsor, and the controlling shareholder of a SPAC.[52] In 2023, the Chancery Court again held that claims brought by a shareholder against a SPAC's board and sponsor alleging false and misleading proxy statements were direct, not derivative, and the entire fairness standard of review applied because the sponsor was conflicted and the plaintiff stated a plausible claim as to the alleged disclosure violations.[53] 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 face an uphill battle in moving to dismiss SPAC-related breach of fiduciary duty claims depending on the facts asserted.

CRYPTOCURRENCY

As we noted in last year's *Review*, in 2022 the crypto sector encountered massive sell-offs in the wake of tightening monetary policy and the collapse of the Terra/Luna ecosystem, crypto exchange FTX, and crypto lender Celsius. In 2023, the sector experienced a remarkable recovery in what many industry participants believe will mark the beginning of a bull period. Major drivers of the comeback occurred in the latter half of 2023 and include Ripple's favorable ruling against the SEC in the closely watched *SEC v. Ripple Labs* case, Grayscale's successful appeal of the SEC's decision denying Grayscale's request to convert its bitcoin trust into an exchange-traded fund, and higher institutional interest in cryptocurrency from Blackrock, Fidelity Investments, ARK Investment Management, and Invesco, among other institutional investors.[54]

Prior to publication, a split SEC voted to approve spot Bitcoin ETFs while SEC Chair Gensler made clear that approval of the products were not an endorsement of Bitcoin, which he described as "primarily a speculative, volatile asset that's also used for illicit activity including ransomware, money laundering, sanctions evasion and terrorist financing."[55] The total crypto market capitalization increased by more than 100% in 2023, from roughly $800 billion in January to $1.7 trillion by year-end.[56] Notably, this year-end high was still markedly far off from the late-2021 high of roughly $2.8 trillion.[57]

Surprisingly, the crypto sector's comeback occurred in the midst of the SEC's most active year of crypto enforcement to date. In the absence of a regulatory framework for crypto assets, the SEC continued its often criticized "regulation-by-enforcement" regime in the first full year with its newly doubled-in-size Crypto Assets and Cyber Unit.[58] The SEC brought 46 cryptocurrency enforcement actions, consisting of 26 lawsuits in federal court and 20 administrative proceedings, representing a notable increase from its 2022 pace, when it brought 30 enforcement actions, consisting of 24 lawsuits in federal court and six administrative proceedings.[59]

The SEC's enforcement efforts last year were more targeted toward individuals and crypto platforms than in years prior, with eight actions related to promotion of securities without disclosing compensation and eight actions related to failing to register as a broker or as an exchange.[60] For comparison, in 2022 there were only two enforcement actions related to promoting securities without disclosing compensation and four related to failing to register as a broker or as an exchange.[61] Twenty-eight of the SEC enforcement actions brought alleged an unregistered securities offering violation under Section 5(a) and 5(c) of the Securities Act.[62]

Among the notable SEC enforcement actions brought last year against exchanges and other intermediaries were claims against Beaxy, Bittrex, Binance, and Coinbase for allegedly operating their respective crypto-asset trading platforms as unregistered national securities exchanges, brokers, and clearing agencies.[63] Additionally, the SEC charged numerous firms with allegedly offering unregistered securities through

crypto-asset lending and/or staking programs, including Genesis/Gemini, Celsius, Kraken, and Nexo. In addition, in first-of-its-kind actions, the SEC charged both Impact Theory, LLC and Stoner Cats 2 LLC for conducting unregistered offerings of crypto securities in the form of non-fungible tokens ("NFTs").[64]

The Commission also brought claims against crypto-asset entrepreneur Justin Sun and three of his wholly owned companies for the unregistered offer and sale of alleged crypto securities Tronix ("TRX") and BitTorrent ("BTT"). It also brought claims against celebrities Lindsay Lohan, Jake Paul, DeAndre Cortez Way (aka Soulja Boy), Austin Mahone, Michele Mason (aka Kendra Lust), Miles Parks McCollum (aka Lil Yachty), Shaffer Smith (aka Ne-Yo) and Aliaune Thiam (aka Akon) for allegedly illegally touting TRX and/or BTT without disclosing that they had been compensated for doing so.[65]

In early 2023, the federal judge overseeing the SEC's civil suit against Sam Bankman-Fried put the case on hold pending the outcome of the federal criminal case against the founder of the now-bankrupt FTX cryptocurrency exchange.[66] In October 2023, a federal jury convicted Bankman-Fried on seven counts, and sentencing is expected later this year.[67]

In last year's *Review*, we highlighted that the exact parameters for whether a cryptocurrency falls within the *Howey* definition of an "investment contract" remained unclear, but that a decision in the *SEC v. Ripple Labs* case would likely provide clarity.[68] In *SEC v. W.J. Howey Co.*, the Supreme Court held that the three elements for distinguishing an investment contract subject to the federal securities laws from other commercial dealings include: (i) an investment of money; (ii) a common enterprise; and (iii) the expectation of profit.[69]

In July 2023, the federal judge presiding over the *Ripple Labs* case sided with the SEC's assertion that Ripple's XRP token constituted an investment contract under *Howey*, but only to the extent it was sold to "sophisticated individuals and entities."[70] The court agreed with Ripple that "programmatic sales" of the token, sales occurring on crypto exchanges and through the use of trading algorithms that match buyers and sellers in blind transactions, did not constitute the offering or sale of an investment contract.[71] The court reasoned that because XRP is not in and of itself a "contract, transaction[,] or scheme," the totality of the circumstances surrounding the sale and distribution of XRP must be analyzed to determine whether the token is an investment contract under *Howey*.[72]

The court concluded that when XRP was sold to institutional buyers, those buyers reasonably expected that Ripple would use the capital it received from its sales to improve the XRP ecosystem and thereby increase the price of XRP, but that the programmatic buyers could not reasonably expect the same.[73] The court further reasoned that while an institutional buyer knowingly purchased XRP directly from Ripple pursuant to a contract, the programmatic buyer "stood in the same shoes as a secondary market purchaser who did not know to whom or what it was paying its money."[74]

While the ruling was not an outright victory for Ripple, many crypto industry participants celebrated the decision's potential implications for secondary crypto-asset trading among retail investor on public crypto exchanges.[75] At a minimum, we expect that defendant coin issuers will attempt to use the ruling to significantly narrow potential classes of purchasers alleging violations of the securities laws.

Unlike the increased SEC enforcement activity last year, filings of crypto-related private securities class actions in 2023 decreased to pre-2022 levels. Plaintiffs filed 14 securities class actions related to cryptocurrency in federal courts, representing a little more than half of the 23 suits filed in 2022 and more consistent with the 11 suits filed in 2021 and 12 in 2020.[76] As in years past, a majority of the claims were predicated on alleged sales of unregistered cryptocurrency assets or unregistered crypto-related products in violation of the Securities Act.

For example, plaintiffs in one suit filed in 2023 alleged that the defendant sold unregistered securities in the form of interest-bearing accounts, through which investors can earn a return through the defendant's deployment of investor funds and cryptocurrency in various ways, including as loans to institutional, corporate, and other borrowers and investments in equities and futures.[77] In another suit filed last year, plaintiffs alleged that the defendants sold unregistered securities in the form of mining contracts, whereby the defendants purportedly hosted and serviced physical Bitcoin mining equipment at facilities they owned, thereby allowing the plaintiffs to mine and procure Bitcoin.[78] Two of the 12 suits brought alleged that the defendants' offering and sale of NFTs were unregistered sales of securities.[79]

As we discuss in more detail below, the Ninth Circuit recently revived a shareholder suit alleging that the defendant knowingly or recklessly understated its reliance on crypto-based revenues based on post-hoc expert analysis. The decision will likely increase litigation risk for defendants whose businesses have exposure to cryptocurrency market fluctuations, as investors will look to use expert witnesses to bolster falsity allegations where they are otherwise lacking.[80]

FALSE AND MISLEADING STATEMENTS

Investors Cannot Expect to Know Every Fact About a Clinical Trial: Fourth Circuit Affirms Dismissal of Securities Fraud Claims Against Biopharmaceutical Company

In *Employees' Retirement System of the City of Baton Rouge and Parish of East Baton Rouge v. MacroGenics, Inc.*, the Fourth Circuit affirmed the dismissal of a securities fraud lawsuit against biopharmaceutical company MacroGenics, alleging that the company's selective disclosure of optimistic statements about results from its clinical trial of a new breast cancer drug margetuximab was materially misleading.

A unanimous panel affirmed the district court's dismissal of claims that the company's public comments expressing confidence about the interim results of a clinical trial either misled investors or triggered a duty to disclose other supposedly negative data about the clinical trial. The court also affirmed that many of the defendants' statements were inactionable puffery, protected opinions regarding the company's interpretation of clinical data or protected forward-looking statements.

Notably, the decision acknowledged the challenges facing public biopharmaceutical companies in making disclosure decisions. "Biopharmaceutical clinical trial drug companies constantly find themselves in the hot seat. Not only does their longevity depend on the creation of ground-breaking, experimental drugs designed to combat the world's deadliest illnesses, i.e. Cancer, but also a significant portion of their success turns on the amount of capital raised to explore these unchartered waters, making investors an integral part of the equation."[81] Citing the Supreme Court's statement in *Omnicare* reminding investors to "not expect that every fact known to an issuer supports its opinion statement," the court stated that it would be "a great disservice to stifle biopharmaceutical companies' pursuit of medical advancements by failing to safeguard against an inundation of lawsuits alleging securities-law violations."[82]

The decision is also a reminder of the importance of including explicit risk disclosures directly relevant to a company's operations that cannot be described as generic enough to apply to any company.

The complaint alleged that in 2016, MacroGenics began a clinical trial for its new breast cancer treatment drug to pair with chemotherapy, margetuximab, to analyze the treatment's effects on delaying the progression of the disease ("progression-free survival," or "PFS") and the overall survival rate ("OS") without regard to the progression of the disease in the study's 536 patients compared to the current standard-of-care, the drug trastuzumab and chemotherapy.[83] The study was designed with these two metrics to serve as its "endpoints" after a predetermined number of occurrences.

In February 2019, the company announced that the study had recorded enough data to reach the PFS endpoint in October 2018 and that patients in the study experienced a 24% risk reduction in PFS compared to patients treated with trastuzumab.[84] Later that day, MacroGenics CEO Scott Koenig spoke about the new data on a conference call in which he described the OS endpoint data as "ongoing" and trending "positive in the direction of margetuximab, but we just don't have enough events to be able to have significance here."[85]

Over the next few months, MacroGenics made a series of encouraging statements about the OS data in anticipation of releasing the full data set to the public that summer, such as that the data was "promising" and that they "anticipate[d] the preliminary positive trend in favor of margetuximab to continue."[86] In June 2019, the company presented data from the October 18 endpoint of the trial at a major conference and declared that it depicted a "statistically significant improvement in PFS for patients in the [m]argetuximab cohort compared to the [t]rastuzumab cohort" of the trial.[87] However, one of the clinical trial's independent investigators also presented data at the conference and interpreted certain results as "unfavorable," amounting to a "red flag for investors."[88]

Following the conference and multiple analyst reports and articles, the company's stock price suffered a "two-day decline of

nearly 22%."[89] Investors filed suit alleging that the defendants made material misrepresentations and misleading statements or omissions concerning the clinical trial of margetuximab in violation of Section 10(b) of the Exchange Act and Rule 10(b)(5) and Sections 11, 12(a), and 15 of the Securities Act and Regulation S-K.[90]

The district court granted the defendants' motion to dismiss after concluding that the plaintiffs had failed to sufficiently allege any actual misrepresentations or omissions that would give rise to defendants' duty to disclose additional data and that most of the challenged statements were also immunized from suit as inactionable puffery, opinion regarding interpretation of scientific data, or protected forward-looking statements.[91]

On appeal, the Fourth Circuit affirmed the district court in every respect. Recognizing that a company's duty to disclose all material information may emerge when it "chooses to speak about a material subject to investors" or, following the Supreme Court's decision in *Matrixx Initiatives, Inc. v. Siracusano*, when "necessary to make statements made, in light of the circumstances under which they were made, not misleading," the court held that the defendants did not have a duty to disclose interim OS results because their prior disclosures did not "speak" about the OS data.[92] This decision is in line with another key Fourth Circuit case, *Zak v. Chelsea Therapeutics International, Ltd.*, holding that the duty to disclose is present when a corporation's public statements conflict with its awareness of non-public information.[93]

The court also rejected the plaintiffs' theory that the title of a press release referring to clinical results somehow put "all" of the clinical trial results "in play."[94] Rather, the court explained that a company's "mere reference to full trial data in a discussion of top-line results 'does not trigger a duty to disclose the full results of a study.'"[95] The court likewise dispatched the plaintiff's argument that oral statements made during analyst calls and other occasions characterizing OS data positively put that data in play and required prior disclosure of a "Kaplan-Meier curves graph" presented for the first time at the June 2019 conference because that graph was allegedly inconsistent with defendants' prior positive statements.[96]

The court concluded that on the facts pleaded, defendants' optimism "appears to have been warranted" and given the clinical results reported at the conference were not false and misleading, there was no duty to disclose the curve graph.[97] The court also rejected the plaintiffs' argument that not only were MacroGenics's statements about the positive interim data materially misleading, but that the full data, which would have been available to the company long before the 2019 conference, indicated margetuximab to be *less* effective than the current standard of care.[98]

The court characterized the alleged data dispute as "merely a difference of opinion, which is insufficient to establish a securities law violation."[99] The court also affirmed dismissal based on plaintiffs' challenge to other statements either as inactionable puffery (for using language like "positive," "excited," and "promising") or forward-looking statements under the safe harbor provision of the PSLRA as statements "accompanied by meaningful cautionary language."[100]

Finally, the court easily affirmed the district court's dismissal of plaintiffs' claim under Sections 11 and 12 of the Securities Act relating to the defendants' offering documents because those claims are "inextricably intertwined" with the alleged misstatements and omissions underlying their Exchange Act claims and thus cannot prevail.[101] The court likewise rejected the plaintiffs' claims under Regulation S-K because the warnings in the Risk Factors section of the offering documents were explicit and directly relevant to the SOPHIA clinical trial and not "generic enough to apply to any pharmaceutical company."[102]

Divided Ninth Circuit Panel Reverses Dismissal, Holding Plaintiffs Adequately Pleaded Falsity and Scienter

In *Glazer Capital Management, L.P. v. Forescout Technologies, Inc.*, a split panel of the Ninth Circuit held that the plaintiffs can proceed with a portion of a suit alleging that a cybersecurity company and its executives misled investors about the company's sales pipeline following announcement of a proposed merger.[103] Rejecting the defendants' argument that plaintiffs alleged insufficiently particularized facts as to challenged statements about the sales pipeline, the majority noted that requiring more detail than those alleged in the complaint would transform the PSLRA's "formidable pleading requirement into an impossible one."[104]

The majority also held that the plaintiffs had adequately alleged falsity and scienter as to a statement about the expected closing date based on allegations that the company

made the statement after receiving notice from the merger partner that it was considering withdrawing from the deal.[105]

The decision is a reminder that companies should regularly evaluate whether risks described as hypothetical in their disclosures have subsequently materialized, or are very likely to do so in the near term, and whether it may be advisable to update those disclosures consistent with the facts on the ground to avoid liability.[106]

The crux of the complaint was that following the announcement of a planned merger with a private equity firm, the company and certain executives misled investors about several issues, including the strength of the company's sales pipeline, the experience of its sales force, business lost in its inventory channel, as well as the likelihood that the merger would actually close. Plaintiffs alleged that the disclosures were materially misleading because they did not reflect the actual state of the company's affairs and were directly contradicted by information in the defendants' possession in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The district court granted the motion to dismiss with prejudice for failure to state a claim, finding that the plaintiffs failed to adequately plead that any of the alleged statements were false or misleading or made with the requisite scienter.

On appeal, the majority held that the plaintiffs adequately alleged falsity and scienter as to challenged statements that the sales pipeline was "strong" and "healthy" when it was actually deteriorating.[107] The court concluded that the claims were pleaded with the requisite particularity, noting that the complaint included evidence from multiple confidential witnesses supporting the allegations that the sales pipeline was not as strong as defendants made it seem. The court pointed to allegations that "Forescout employees struggled to make sales in 2019, [their] 'technical wins' were illusory deals … [that] were included in Forescout's revenue projections, and [that] there was a pressure campaign at Forescout to categorize deals as 'committed' even when they were not likely to close by payment."[108]

The majority also concluded that the alleged "company-wide pressure campaign" was sufficient to raise a strong inference of scienter for the sales pipeline statements.[109] Because some statements held to be actionable addressed the company's disappointing financial performance in prior quarters, the court concluded that they were not protected by the PSLRA's safe harbor for forward-looking statements.[110] The majority likewise concluded that falsity and scienter were sufficiently alleged as to a company statement that it expected the merger to close in light of its alleged receipt of a telephone call from the proposed merger partner that it "was reconsidering the deal."[111]

In dissent, Judge Hawkins disagreed that the plaintiffs had adequately alleged falsity and scienter with respect to the sales pipeline statements, finding those statements to "reflec[t] business judgements and opinions" about the timing of deals and the underlying causes of missing quarterly forecasts rather than intentional falsification.[112] The dissent also concluded that the plaintiffs failed to identify specific information within internal reports or data that conflicted with public statements that would have made it "so obvious" that the defendants must have been aware that their assessments of the pipeline and slipped deals were incorrect. In this regard, the dissent noted that the complaint "lacks a sufficient indication that the [confidential witnesses] would have had access to company-wide global sales information or information about the personal knowledge of the individual Defendants."[113]

Fourth Circuit Affirms Dismissal of Proxy Misstatement Claims Because Omission of Cash-Flow Projections Was Not Material

In *Karp v. First Connecticut Bancorp, Inc.*, the Fourth Circuit affirmed summary judgment in favor of a company facing Section 14(a) claims for failing to include cash-flow projections in a merger proxy statement, holding that the plaintiff failed to show a genuine issue of material fact about materiality and loss causation.[114] The court concluded that omission of cash-flow projections in light of an "array of metrics" that were included in the proxy statement did not make the proxy statement deficient.[115]

The decision is a reminder that shareholders are not entitled to the disclosure of every financial metric used in a fairness opinion so they may "'double-check every aspect of … the [financial] advisor's math' so long as the proxy statement contains an 'adequate and fair' statement of their work."[116]

The court also affirmed summary judgment based on the plaintiff's failure to establish a genuine issue of material fact as to loss causation in the absence of any evidence that omission

of the cash-flow projections would have resulted in an additional $3.18 per share price over the actual merger price.[117]

The complaint alleged that in 2018, People's United Financial, Inc. acquired First Connecticut Bancorp, Inc. ("FCB") through a stock-for-stock merger in which FCB shares were valued at approximately $32.33 per share—a 24.3% premium over the stock's closing price on the day the merger was announced.[118] FCB's financial advisor reviewed the transaction and provided a fairness opinion.[119] FCB issued a merger proxy statement to shareholders summarizing the various financial analyses used by the financial advisor in reaching its fairness opinion, one of which was a discounted cash flow analysis that estimated FCB's present value of after-tax cash flows as a stand-alone company.[120]

The complaint also alleged that approximately seven months earlier, in November 2017, while exploring a different merger, the financial advisor presented the FCB board with a different set of cash-flow projections that arrived at a higher valuation of FCB shares.[121] Unlike the 2018 valuation, the earlier valuation was prepared without input from FCB's management.[122] Unaware of the 2017 valuation, FCB shareholders approved the merger as proposed in the proxy statement.[123]

The complaint alleged that the proxy statement was deficient because it omitted the cash-flow projections used by the financial advisor in its discounted cash-flow analysis and that inclusion of those projections would have shown that the merger consideration was inadequate.[124] In particular, the plaintiff relied on the cash-flow projections used in the 2017 valuation to support the contention that each FCB share was actually worth $3.18 per share more than the valuation presented in the proxy statement.[125] The district court granted FCB's motion for summary judgment because it found that the plaintiff had not shown a genuine dispute of material fact relevant to materiality or loss causation.[126]

On appeal, a unanimous panel affirmed the district court's ruling that no reasonable jury could find the omission of the cash-flow projections material.[127] The court relied on a recent Seventh Circuit decision, *Kuebler v. Vectren Corp.*, which held that the omission of unlevered cash-flow projections from a proxy statement was immaterial in light of the "wealth of information" included in the proxy statement.[128] Pointing to the "bevy of information" in FCB's proxy statement, including projections that showed improving financial prospects and several other analyses that concluded the $32.22 merger price was within the valuation range, the court found it unlikely that the omitted cash-flow projections would have significantly altered the total mix of information available to investors.[129]

The court rejected plaintiff's argument that his own testimony established why the omitted cash flows would have been important to a hypothetical reasonable investor.[130] While the plaintiff testified that he considered cash flows important and that they would have provided a "better picture" of forthcoming growth, he could not even recall whether he had voted for the merger or what information he would have relied upon if he had.[131] The court explained that although the standard refers to a "reasonable shareholder," it was "at least relevant that the lead plaintiff … didn't even look for the cash-flow projections."[132]

Finally, the court rejected the plaintiff's argument that the omitted cash-flow projections were material because they left shareholders unable to calculate the cash flows on their own and thus unable to critically review the fairness opinion.[133] The court held that "shareholders aren't entitled to 'double-check every aspect of … the advisor's math' so long as the proxy statement contains an 'adequate and fair' statement of their work."[134] Thus, the court concluded that the plaintiff's testimony was insufficient to explain how the omitted cash-flow projections were material in light of all the other information in the proxy statement.[135]

The court also held that the plaintiff failed to establish loss causation because he failed to show that shareholders suffered an economic loss due to the omission of the cash-flow projections from the proxy statement.[136] The court rejected the plaintiff's allegation that shareholders would have received $35.51 per share—representing $3.18 per share more than the merger price—if the cash-flow projections had been disclosed.[137] First, FCB's stock price was $26 per share the day before the merger was announced.[138] Second, there was no evidence that the merger deprived shareholders of a "viable superior offer" because the merger partner was "willing to walk" if FCB rejected the $32.22 offer and it was undisputed that there was no other offer on the table.[139] "So, it's unclear how the shareholders would have realized the $35.51 price had the proxy statement included the cash-flow projections—or whether they even would have rejected the merger in that case."[140]

Third Circuit Joins Other Circuits Applying *Omnicare* to Evaluate Opinion Statements Under Section 10(b) and Rule 10b-5 and Vacates Dismissal of Complaint that Plausibly Pleaded Falsity with Respect to CFO's Statements

In *City of Warren Police and Fire Retirement System v. Prudential Financial, Inc.*, the Third Circuit joined every other circuit that has considered the issue by holding that the Supreme Court's framework for evaluating allegedly false statements of opinion announced in *Omnicare, Inc. v. Laborers District Council Constr. Indus. Pension Fund* applies to claims under Section 10(b) of the Exchange Act and Rule 10b-5.[141]

The court partially vacated the dismissal of a shareholder suit, holding that the plaintiffs had alleged a plausible claim that statements by the company's CFO falsely downplayed mortality rates among life insurance policyholders as "normal" in June 2019, less than two months before the company announced that it would increase its reserves by $208 million to account for an unexpected number of deaths among policyholders of a particular group.[142]

The decision is an important reminder that public companies and their officers must balance a desire to express optimism about their business with their obligation to fairly disclose known facts and circumstances on the ground.

The complaint alleged that a large publicly traded insurance company suddenly announced it would need to increase the reserves relating to its life insurance segment by $208 million and that earnings would be reduced by $25 million per quarter "for the foreseeable future."[143] The reserve adjustment was made in response to the shorter-than-anticipated life expectancies of policyholders within a block of insurance policies acquired from another insurer, known as the "Hartford Block."

Within two days of the increased reserve announcement, the company's stock declined by more than 12%. Shareholders filed suit, alleging that the company knew beforehand of the problem with its reserves and misled investors in violation of Section 10(b) and Rule 10b-5. The complaint alleged that several statements prior to the reserve adjustment were misleading, including statements about the company's reserve methodology, the adequacy of reserves, the lack of systemic issues with underwriting practices or mortality assumptions, and statements by the CFO that recent mortality experiences were "normal" or only "slightly negative."[144] The district court granted the defendants' motion to dismiss the complaint with prejudice on the grounds that the plaintiffs failed to adequately plead falsity as to all statements.

On appeal, the court affirmed the dismissal except as to the CFO's statements. In pleading falsity, the plaintiffs relied on information provided by a confidential former employee, which the company argued should be steeply discounted under the PSLRA. The court rejected the argument, noting that the allegations indicated the confidential witness, who qualified as credible at the pleading stage, had a dependable basis of knowledge and provided an appropriate degree of detail, and that the witness' information was corroborated by other allegations in the complaint and was internally consistent with the plaintiffs' otherwise "coherent" narrative.[145] The court also pointed to the temporal proximity of the CFO's statement—made just eight weeks before the announced $208 million reserve adjustment—and the magnitude of the company's corrective actions as satisfying the heightened pleading requirements for falsity.

While the court concluded that the complaint identified statements by the company in its 2018 Form 10-K regarding its reserve-setting methodology with the particularity required by Rule 9(b) and the PSLRA and provided reasons for their falsity, it nevertheless held that the allegations failed to plausibly demonstrate that the company misrepresented its methodology for setting reserves. Noting that establishing plausibility required that the plaintiffs "must demonstrate that discovery would be reasonably likely to reveal evidence of the falsity of the two statements," the court held that the plaintiffs failed to do so either in the complaint or on appeal, and thus the district court properly denied leave to amend this part of the claim.[146]

The court also addressed the district court's rejection of a statement allegedly made by the company's vice chairman in a meeting with analysts that "there are no systemic issues with underwriting or mortality assumptions" as a basis for a Rule 10b-5 claim.[147] The district court reasoned that because "the statement, which was a paraphrasing, not a direct quotation, appeared in an analyst report," it was not "made" by the vice chairman or the company as required by the Supreme Court's decision in *Janus Capital Group, Inc. v. First Derivative Traders*.[148] The court held that the district court's application of *Janus* was "incorrect, but inconsequential" because the contents of the vice chairman's statement and its attribution to

him were not based on information and belief and did not rely on confidential sources and thus, under the PSLRA, "nothing more is needed to accept those allegations as true at [the pleading] stage."[149]

The court nevertheless held that the complaint failed to plausibly allege the falsity of the statement because it related to the life insurance segment of the company, not just the Hartford Block. Also, the complaint lacked allegations about the relative size of the Hartford Block compared to the life insurance segment, or about the magnitude of the problems in the Hartford Block relative to the company's full life insurance portfolio.

The Exchange Act Contains No Promise of "a Better Deal": Seventh Circuit Holds that Merger Proxy Statement Without Alternative Deal Options Was Not Materially Misleading

In *Smykla v. Molinaroli*, the Seventh Circuit addressed whether a merger proxy statement that did not disclose alternative merger options or management's alleged underlying motivations for the merger was materially misleading.[150] The court held that it was not, holding that investors are not entitled to "receive a list of alternative deal options that may provide a better return on their investment" and that management's true purpose for taking a course of action is not material under federal securities laws.[151]

In January 2016, Johnson Controls Inc. ("Johnson") and Tyco International PLC ("Tyco") entered into a merger agreement.[152] The transaction was structured as a reverse merger in which Johnson would merge with an indirect wholly owned subsidiary of Tyco (the "merger sub"), such that Johnson shareholders would avoid paying capital gains taxes.[153] However, proposed government regulations were subsequently introduced that, if finalized, would eliminate the tax benefits of the deal.[154] Despite this, Johnson's directors recommended in the proxy statement that shareholders approve the merger.[155] The proxy statement also disclosed the opinions of two financial advisors that both concluded the merger was fair to Johnson shareholders and that Johnson's directors and executive officers had interests in the merger that were different from, or in addition to, interests of shareholders.[156]

After Johnson shareholders voted overwhelmingly to approve the merger, plaintiffs sued Johnson, its officers and directors, Tyco, and the merger sub, alleging violations of federal and state securities laws, including Section 14(a) of the Exchange Act.[157] Plaintiffs alleged that the proxy statement was materially misleading for failing to disclose that the merger could have been structured differently to avoid taxation for shareholders and that management structured the merger for their own benefit and at the expense of shareholders.[158] The district court held that the plaintiffs failed to plead a materially misleading statement or omission and that leave to amend would be futile, dismissing the claims with prejudice.[159]

On appeal, the Seventh Circuit first agreed that the plaintiffs failed to satisfy the PSLRA's heightened pleading standard because they failed to allege *why* each alleged misleading statement or omission was misleading.[160] Next, the court affirmed the district court's decision to dismiss the complaint without leave to amend. While materiality is normally a question of fact for the jury, it may be resolved as a matter of law when "the information at issue is so obviously unimportant that reasonable minds could not differ."[161]

The court found that failing to discuss alternative merger structures, even if they would be beneficial to shareholders, is not a material omission. Section 14(a), while promoting disclosures, "is not a license for shareholders to acquire all the information needed to act as a sort of super-appraiser: appraising the appraiser's appraisal after the fact."[162] To find otherwise and "require[e] proxy statements to include a laundry list of potential merger options and disclose the potential benefits and drawbacks of each" would create "unnecessary noise and confusion in the proxy statement."[163]

Likewise, the court found that failing to disclose management's alleged "true purpose" for the merger "is not material under federal securities laws, even if that motive constitutes a fiduciary breach under state law."[164] This is because a "defendant's subjective disbelief or hidden motivation" behind a stated opinion does not alone render the opinion materially misleading.[165] Rather, the defendant would also have to misrepresent, affirmatively or by omission, either the underlying facts used to form the opinion or the scope of inquiry made prior to rendering the opinion.[166] Here, the proxy statement disclosed the details of the merger and the facts used to form the directors' opinions and the scope of the inquiry they conducted, including the analysis of the two financial advisors, who concluded that the deal was fair.[167] The court found that this was sufficient.

Citing the Supreme Court's instruction that courts should ask if "reasonable minds" could differ on the question of materiality, the court concluded that reasonable minds could not differ on the finding that the plaintiffs failed to allege materially misleading statements or omissions, and thus they were not material as a matter of law.[168] The court cautioned that the purpose of the Exchange Act is to "ensure transparency," not to guarantee shareholders "a better deal than the one they received."[169] The court also affirmed the district court's decision to relinquish jurisdiction over the state law claims following the dismissal of the federal claims and properly declined to impose sanctions or require further investigation notwithstanding its conclusion that the plaintiffs' claims failed under the PSLRA.[170]

Second Circuit Partially Vacates Dismissal of Securities Act Claims and Clarifies its Post-*Omnicare* Precedent as to When a Statement of Opinion Is Actionable

In *New England Carpenters Guaranteed Annuity and Pension Funds v. DeCarlo*, the Second Circuit addressed the recurring issue of "[w]hen is a statement of opinion that reflects some subjective judgment nevertheless actionable under federal securities laws?"[171] The court held that the plaintiffs had adequately pleaded violations of Sections 11, 12, and 15 following a restatement that acknowledged accounting errors that substantially overstated a company's financial performance over a period of five years.[172] The unanimous panel held that in light of its more recent precedents, a defendant can face Section 11 claims based on statements about accounting policies that are adequately pleaded to have been incorrect and not "justified by the accepted method."[173] Notably, the court affirmed the district court's dismissal of Section 11 claims based on SOX certifications as non-actionable statements of opinion in the absence of any allegations that the executives who signed the certifications did not believe what they certified or failed to undertake a meaningful inquiry before signing.

In April 2017, AmTrust, one of the country's largest publicly traded insurance companies, announced its restatement of five years of financial results to correct what it acknowledged were significant accounting errors. The restatement was primarily based on two significant changes to the company's accounting policies: (i) recognition of revenue from the sale of extended warranties was changed from a "time-of-sale" approach to a "straight-line basis"; and (ii) accounting for employee bonus expenses was changed from recording in the year of payment to recording in the year bonuses were earned.[174]

Prior to the restatement, AmTrust had conducted two stock offerings pursuant to a registration statement filed in June 2015.[175] That registration statement and the related prospectus supplements incorporated AmTrust's financial statements, which AmTrust ultimately admitted to be inaccurate in its restatement.[176] The complaint alleged that from 2012 to 2016, the price of AmTrust stock skyrocketed but the restated financial results for those years revealed that the company's income and earnings had been "significantly overstated."[177]

Shareholders brought claims against AmTrust, various officers and directors ("AmTrust Defendants"), multiple underwriters, and the company's outside auditor alleging violation of Sections 11, 12, and 15, among other claims. The district court dismissed all claims with prejudice.[178]

On appeal, the court applied its recent precedents following the Supreme Court's landmark *Omnicare Inc.* ruling: *Fait v. Regions Financial Corp.* and *Abramson v. Newlink Genetics Corp.*[179] The court noted that in *Abramson* it "rejec[ted] 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."[180] Rather, *Abramson* explained that opinions may be actionable not only when the speaker "did not hold the belief he professed," but also if the statement of opinion contains embedded statements of facts that are untrue, or the statement omits information whose omission conveys false facts about the speaker's basis for holding that view and makes the statement of opinion misleading to a reasonable investor.[181]

Acknowledging that a company's decisions about accounting treatment of revenues and expenses might be "statements of opinion," the court held that such opinions can still be actionable misstatements because "opinions lead double lives," and investors expect opinion statements to "rest on some meaningful … inquiry."[182] Citing its precedent that a statement of opinion may be actionable under Section 11 when "it contains an embedded statement of fact that is not true," the court explained that "[t]his occurs where, for example, there is an accepted method for assessing whether the statement is true, but the statement is not justified by the accepted method and clearly contradicts the facts on which it purports to rest."[183]

Applying its precedent to the issue of AmTrust's statements about its warranty accounting, the court rejected the argument that the company's pre-restatement decision of how to recognize revenue was a non-actionable statement of opinion and a question of judgment.[184] The AmTrust defendants argued that the company had to choose between two acceptable but differing sections of the Accounting Standard Codification ("ASC") and opted to follow a "time-of-sale" approach until April 2017.[185] However, the court noted that the relevant section of the ASC called for a general rule of "straight-line" revenue recognition unless "sufficient historical evidence indicates that the costs of performing services under the contract are incurred on other than a straight-line basis."[186] The court concluded that the complaint adequately pleaded that the company had no "historical evidence" to deviate from straight-line recognition and thus pre-2017 statements about warranty accounting were misleading to investors, who would have reasonably concluded that AmTrust had such "historical evidence."[187]

The court likewise found that the complaint adequately pleaded that the AmTrust Defendants violated Section 11 because their statements about the company's bonus accounting materially misrepresented reported income.[188] The AmTrust Defendants argued that the recording of employee bonus expenses in the year they were paid was acceptable under relevant sections of the ASC.[189] Noting that those sections instruct a company to record a bonus expense when it is earned if the payment is "probable,"[190] the court rejected the company's argument that its decision until April 2017 that the payments were not "probable" on the date earned was "a classic exercise of subjective judgment" and a non-actionable opinion.[191] Instead, the court held that even if these accounting decisions were statements of opinion, the complaint adequately pleaded that the deferral of recognition of expenses until bonuses were paid was "objectively improper rather than an exercise of subjective judgment."[192] The court further concluded that the complaint plausibly alleged that AmTrust had no reason to believe the payment of bonuses was not probable and that its historical accounting treatment of the bonus expenses was not based on "meaningful inquiry."[193]

In contrast with the Securities Act claims, the court affirmed dismissal of the Exchange Act claims against the AmTrust Defendants because the complaint failed to plead facts giving rise either to a strong inference that the defendants had acted with scienter or strong circumstantial evidence of conscious misbehavior or recklessness.

Second Circuit Holds Statements About Scientific Studies Were Opinions and Challenged Statements Ultimately Endorsed by FDA Were "Per Se" Reasonable

The Second Circuit addressed two questions of first impression in *In Re Philip Morris Int'l Inc. Securities Litigation*, in which the complaint alleged that the defendants made a series of false and misleading statements about smoke-free tobacco products produced by Philip Morris International ("PMI").[194] First, the court considered whether a defendant's statement that its scientific studies complied with a methodological standard that is published and internationally recognized, but stated in general and inherently subjective terms, was properly analyzed as a statement of opinion rather than of fact and held that it was. Second, the court held that challenged statements expressing an interpretation of scientific data that was ultimately endorsed by the FDA were "per se '[]reasonable'… as a matter of law."[195] The decision clarifies the standards for pleading a Rule 10b-5 claim in the context of statements about clinical trials conducted in the course of product development.

The complaint centered on PMI's flagship "reduced-risk product, 'IQOS,' an electronic device that heats - but does not combust - tobacco," in single-use cartridges. The product purportedly released a flavorful nicotine-containing aerosol inhaled by the user without fire, ash, or smoke. The product launched in Japan in 2016 and captured a substantial amount of the "heat-not-burn" tobacco market between 2016 and 2018.[196] Around the same time, PMI applied to the FDA for authorization to market IQOS in the United States either generally or as a "reduced-exposure" tobacco product or a "reduced-risk" product and submitted a variety of studies about the product's toxicological profile and effects on humans.[197]

The complaint alleged that the defendants expressed misplaced optimism about the prospects of both continued IQOS sales growth in Japan and FDA approval. In late 2017, a publication reported criticisms of, and allegations of serious irregularities in, the IQOS clinical studies, resulting in a stock drop of 3.47%. In 2018, an FDA advisory panel recommended that it grant PMI's application for a reduced-exposure approval but deny the application for a reduced-risk approval, resulting in

another stock price drop. Finally, in April 2018, PMI disclosed that IQOS sales were down 39% from the prior quarter. In 2020, the FDA authorized PMI to market IQOS in the United States as a reduced-exposure product and found that the company's scientific studies showed that switching completely from conventional cigarettes to IQOS significantly reduced exposure to harmful chemicals.

The complaint alleged that the defendants made false and misleading statements regarding the results and methodology of the scientific studies submitted to the FDA and the outlook for sales in Japan in violation of Section 10(b) and Rule 10b-5. The district court dismissed the first and second amended complaints, finding that the plaintiffs had failed to allege that any of the challenged statements were false or misleading or that the defendants acted with the requisite scienter.

On appeal, a unanimous panel held that the plaintiffs failed to plead material falsity and affirmed dismissal. Pointing to challenged statements characterizing PMI's methodology as "rigorous," "extensive," "thorough," "systematic," and "world class," the court concluded that such vague descriptions of the scientific studies' methodology offering only generally optimistic opinions were "too general to cause a reasonable investor to rely upon them" and amount to the type of puffery consistently held by courts to be nonactionable.[198] The court also found that many of the challenged statements were opinions and that the plaintiffs had failed to allege their falsity under the Supreme Court's *Omnicare* standard. It rejected the plaintiffs' argument that the challenged statements were "determinate, verifiable statements" of fact and noted that the plaintiffs could not point to any objective, "black and white standard" to verify whether the studies were in fact "rigorous," "very advanced," or "the best science" and thereby render the descriptions to be untrue.[199]

The court likewise agreed with the district court that various PMI representations that the IQOS studies were conducted according to "Good Clinical Practice" standards were nonactionable statements of opinion. Rejecting the argument that statements without words such as "we think" or "we believe" were necessarily statements of fact rather than opinion, the court explained that the Supreme Court has held that the use of such words is sufficient, but not necessary, to render a statement a statement of opinion.[200] "The Court … clarif[ied] that where a statement expresses an 'inherently subjective … assessment' that is also sufficient to render it one of 'pure opinion.'"[201] Thus, the court concluded that whether a clinical trial is "sound," whether a researcher is "qualified," or resources are "adequate" are all questions that require inherently subjective assessments under *Omnicare* and do not lend themselves to resolution as matter of objective fact.[202]

The court also held that the challenged statements regarding the results of the IQOS studies were not actionably false. As a preliminary matter, the court pointed to its precedent rejecting the proposition that a mere "dispute about the proper interpretation of data" can form the basis for liability under Section 10(b) and Rule 10b-5.[203] The court focused on the importance of the FDA's acceptance of a defendant's interpretation of data. "We also have previously suggested in dicta – and now hold – that where 'the FDA eventually accept[s]' a '[d]efendant['s] interpretation of the data,' that interpretation is per se '[]reasonable' as a matter of law."[204] The court reasoned that a defendant's statements about the implications of data cannot be misleading merely because a regulatory body disagreed, holding that, "so long as … [a] defendant conducted a 'meaningful' inquiry and in fact held th[e] view [that it] expressed, [it] will not be deemed to [have] 'misled in a manner that is actionable.'"[205] The court emphasized that the issue was not whether the defendants' statements were factually false when made "but whether they expressed 'an interpretation of the data' that was objectively 'irrational or unreasonable' when they were made."[206]

Applying this standard, the court affirmed the district court's finding that the challenged statements about the results of the clinical studies were not affirmatively misleading. The court also held that the challenged statements were not misleading by omission because PMI failed to disclose the results of the four clinical studies allegedly showing contrary results.[207] "[A]n opinion statement about the 'interpretation of … data' is "not misleading simply because the [speaker] 'knows, but fails to disclose, some fact cutting the other way.'"[208] The court pointed to the fact that the FDA agreed to allow the sale and marketing of IQOS in the United States as a safer alternative to conventional cigarettes even after reviewing the results of the four studies suggesting a contrary result.[209] Finally, the court easily dispatched challenged statements about non-clinical toxicology studies because they were "verifiably true as a matter of objective fact," and thus not 'actionable.'"[210]

Ninth Circuit Reinstates Securities Fraud Claims, Holding that Plaintiffs Adequately Pleaded Falsity as to Risk Disclosure Statements About a Risk that Had Already Come to Fruition

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 user data.[211] The majority held that the plaintiffs adequately pleaded falsity as to statements about the risks of misuse or leakage of user data 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."[212]

The decision arose out of a suit filed by a putative class of Facebook shareholders in the wake of news reports that: (i) Cambridge Analytica improperly harvested and stored personal data from Facebook users; (ii) Facebook knew of Cambridge Analytica's misconduct but failed to inform its users; and (iii) Facebook allowed certain "whitelisted" third-party applications to access Facebook users' data without their consent.[213] Plaintiffs asked the Ninth Circuit to overturn dismissal of claims that Facebook and its executives violated Sections 10(b), 20(a), and 20A of the Exchange Act and Rule 10b-5.[214] Plaintiffs' claims stemmed from three categories of alleged misstatements and omissions.[215]

As to the first category, the "Risk Statements," the court considered whether the plaintiffs adequately alleged falsity.[216] Specifically, the court was tasked to determine whether plaintiffs sufficiently alleged that it was false for Facebook to allegedly represent: (i) "only the hypothetical risk" that "improper third-party misuse of Facebook users' data could harm Facebook's business, reputation, and competitive position" when Facebook allegedly knew of Cambridge Analytica's misconduct; and (ii) that "Facebook cannot provide 'absolute [data] security' and that Facebook's business will suffer if the public does not perceive Facebook's products to be 'useful, reliable, and trustworthy.'"[217]

Relying primarily on its decision in *In re Alphabet, Inc. Sec. Litig.*, which instructed that "falsity allegations [are] sufficient to survive a motion to dismiss when the complaint plausibly allege[s] that a company's SEC filings warn[] that risks 'could' occur when, in fact, those risks had already materialized,"[218] the majority held that "the shareholders adequately pleaded falsity as to the statements' warning that misuse of Facebook users' data could harm Facebook's business, reputation, and competitive position…."[219] This was because "Facebook represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired," and "[a] reasonable investor" reading Facebook's disclosure "would have understood the risk of a third party accessing and utilizing Facebook user data improperly to be merely conjectural."[220] Moreover, the court held that it did not matter that "Facebook did not know whether its reputation was already harmed" when it made the alleged Risk Statements, because those statements "create[d] an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]."[221]

On the other hand, the majority held that the district court "correctly dismissed the challenged statements regarding the risk of security breaches and the risk of the public not perceiving Facebook's products to be 'useful, reliable, and trustworthy'" because "[t]hose statements do not relate to the misuse of Facebook user data by Cambridge Analytica, and the shareholders do not allege that those risks had materialized" at the time the alleged misstatements were allegedly made.[222]

As to the second category, the "Cambridge Analytica Investigation Statements," the majority agreed with the district court that the plaintiffs had not adequately alleged scienter.[223] Specifically, the court analyzed alleged misstatements by a Facebook spokesperson in March 2017 that its investigation into Cambridge Analytica had "not uncovered anything that suggest[ed] wrongdoing."[224] The court held that the allegations about the Cambridge Analytica Investigation Statements did not give rise to the strong inference of scienter required under the PSLRA, because "the shareholders pleaded only that the Facebook spokesperson should have known that Facebook's investigation into Cambridge Analytica had uncovered misconduct, not that the spokesperson actually knew of any misconduct or even that there was a strong inference of an 'intent to deceive, manipulate, or defraud.'"[225]

The court further explained that "[t]he mere reference by an unidentified spokesperson to Facebook's investigation is insufficient to show that the spokesperson knowingly or intentionally made false or materially misleading statements about the investigation," and "[t]he shareholders' allegations [did] not rise to the level of showing that it was 'so obvious' that Facebook's investigation had uncovered misconduct related

to Cambridge Analytica's political work that the spokesperson 'must have been aware of it.'"[226]

Finally, as to the third category of alleged misstatements, the "User Control Statements," the court also considered whether the plaintiffs adequately alleged loss causation.[227] Specifically, the court considered whether reporting in March 2018 regarding Cambridge Analytica, and in June 2018 regarding Facebook's whitelisting policy, constituted corrective disclosures that "revealed the falsity of Facebook's statements about users' control over their data" such that the reporting could be deemed to have caused Facebook's March 2018 and July 2018 stock drops.[228]

With respect to the March 2018 stock drop, the majority held that the plaintiffs adequately pleaded that "the March 2018 revelation about Cambridge Analytica was the first time Facebook investors were alerted that Facebook users did not have complete control over their own data," and "[b]efore the March 2018 news broke, reasonable investors would not have known that Cambridge Analytica had improperly accessed Facebook users' data such that users did not have control over their personal information on the platform."[229] Moreover, in the weeks following the March 2018 reporting, "Facebook's stock dropped nearly 18%, representing a loss of more than $100 billion in market capitalization and plausibly causing economic loss for the shareholders."[230] Accordingly, the majority held that the plaintiffs "satisfie[d] the pleading criteria for a corrective disclosure" sufficient to plead loss causation in connection with the User Control Statements.[231]

As for the July 2018 stock drop, the court considered whether the alleged corrective disclosures from March and June 2018 could give rise to loss causation even though the alleged stock drop did not occur until July 2018—immediately after Facebook announced a disappointing earnings report.[232] According to the court, "[f]or Facebook's July 2018 stock price drop to be actionable, it must be because Facebook's earnings report revealed new information to the market; specifically, that Facebook's Q2 earnings call in July 2018 allowed the public to 'appreciate [the] significance' of the Cambridge Analytica and whitelisting scandals."[233]

The majority held that the "shareholders adequately pleaded that the Cambridge Analytica and whitelisting revelations, not any other factor, caused the July 2018 stock price drop." Also, "[a]lthough the stock drop occurred nearly two months after the whitelisting revelation, the shareholders allege with particularity that the drop was caused by 'dramatically lowered user engagement, substantially decreased advertising revenue and earnings, and reduced growth expectations going forward' on account of the Cambridge Analytica and whitelisting scandals."[234]

Writing to concur in part and dissent in part, Judge Bumatay joined the majority's conclusion that the plaintiffs failed to plead scienter as to the Cambridge Analytica Investigation Statements and as to the majority's holding that the plaintiffs had adequately pleaded loss causation concerning the User Control Statements, but only with respect to the alleged corrective disclosures concerning whitelisting.[235] In dissent, Judge Bumatay "disagree[d] with the majority on two fundamental points." First, he disagreed that the plaintiffs "sufficiently allege[d] that Facebook's risk factor statements in its public filings were fraudulent."[236] Second, he disagreed that the plaintiffs "show[ed] that Facebook's [U]ser [C]ontrol [S]tatements were false based on the Cambridge Analytica revelations."[237]

On the first point, Judge Bumatay wrote that none of the risk factor statements was false or misleading because, although Facebook may have known of improper third-party misuse of Facebook users' data at the time it made its risk factor statements, the plaintiffs did not "allege that Facebook knew that those breaches would lead to immediate harm to its business or reputation."[238] According to Judge Bumatay, "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."[239]

As for the second point, Judge Bumatay wrote that the March 2018 reporting regarding Cambridge Analytica did not make the User Control Statements materially false.[240] Disagreeing with the majority, Judge Bumatay wrote that this disclosure was not corrective because "Cambridge Analytica's lies to Facebook and its continued violation of Facebook's privacy policies do not mean that Facebook's privacy protections do not actually exist," and "a supposed bad actor violating Facebook's privacy controls to improperly access user data doesn't make the company's statements about its policies misleading."[241] Accordingly, Judge Bumatay concluded that the court "should have limited Facebook's liability for the [U]ser [C]ontrol [S]tatements to the 'whitelisting' allegations."[242]

SCIENTER

Sixth Circuit Affirms Dismissal Because Plaintiffs Failed to Plead Strong Inference of Scienter Where There Was "A More Plausible Nonculpable Inference"

In *Teamsters LCL 237 Welfare Fund v. ServiceMaster Global Holdings*, the Sixth Circuit concluded that the district court correctly dismissed a complaint against ServiceMaster and its former CEO and CFO because the plaintiffs failed to adequately allege a strong inference of scienter.[243] Noting the Supreme Court precedent requiring that the inference of scienter "must be cogent and … compelling" and "at least as compelling as any opposing inference of nonfraudulent intent," the unanimous panel easily held that the plaintiffs failed to meet that threshold, holding that the allegations were consistent with a more plausible nonculpable inference.[244]

The decision is a reminder that "vague assertions" and lack of detail about the subject of internal meetings regarding a particular business crisis do not establish the kind of "red flags" necessary to support a strong inference of scienter.[245]

The complaint centered on ServiceMaster's response to a "super termite" crisis affecting the Southeastern United States in 2019.[246] ServiceMaster's largest and most important subsidiary, Terminix, provided residential and commercial pest-control services.[247] Plaintiffs alleged that Terminix performed inadequate termite inspections, undertreated at-risk properties, and failed to conduct appropriate follow-up inspections or retreatment, allowing the "super termite" infestations to take hold.[248] According to the complaint, Terminix then took steps to insulate itself from the mounting financial exposure relating to the termite crisis, including attempting to cause at-risk customers to abandon their annual contracts by raising premiums, restricting coverage and benefits for renewing customers, and appealing any arbitration award over $1 million related to termite damage claims regardless of the merits of the case.[249] Despite the mounting complaints against Terminix, plaintiffs alleged that ServiceMaster's former CEO and CFO continued to tout the success of their strategy to improve the company's overall profitability and create long-term sustainable growth.[250]

Throughout the class period, ServiceMaster made periodic disclosures regarding its financial exposure to termite-damage claims, but continued to state that there were "no changes" affecting termite-damage accruals in its SEC filings.[251] In October 2022, the company announced its third-quarter results, which were 65% lower than the previous year, and revised its projected full-year EBITDA range to include $20 million in reductions attributable to the termite crisis.[252]

The complaint alleged that, as a result of the disclosure, ServiceMaster's stock dropped almost 40% from its trading high during the class period.[253] Shortly thereafter, the CEO resigned and the CFO retired.[254] Toward the end of the class period, the attorney general of Alabama began an investigation into Terminix's business practices that ultimately found (after the class period) that Terminix had failed to provide promised services to Alabama customers.[255] Terminix eventually settled the claims for $60 million in November 2020, more than a year after the class period ended.[256]

Stockholders filed a class action lawsuit alleging that, through a series of misrepresentations and omissions that understated ServiceMaster's liability for the termite-damage claims, concealed the risk of such claims from investors, and falsely touted the company's customer retention efforts while strategically using price increases to cause affected customers to drop their service contracts in an attempt to limit future liability, the company and its senior officers misled them in violation of Section 10(b) of the Exchange Act and Rule 10b-5.[257] Plaintiffs also asserted Rule 10b-5(a) and (c) claims for scheme liability and Section 20(a) claims.[258]

The district court granted the defendants' motion to dismiss the Rule 10b-5(b) claims based on its conclusion that most of the alleged misstatements were general statements of optimism that were not actionable and that plaintiffs had failed to plead a strong inference of scienter as to the only potentially actionable statements.[259] It also dismissed the scheme liability claims for the same reason.[260]

Plaintiffs appealed and a unanimous panel affirmed, holding that the district court correctly determined that plaintiffs had failed to allege a strong inference of scienter.[261] With respect to the former officers, the court held that, although the plaintiffs alleged a "plausible inference of scienter," the allegations are also "consistent with a more plausible nonculpable inference."[262] While the plaintiffs' allegations could be read to "plausibly suggest" that the individuals knew the company had a problem and were attempting to hide the termite issues, the court concluded that the opposite inference was "more

plausible": that defendants had developed what they thought was a solution to the larger problems at Terminix.[263]

The Sixth Circuit likewise held that the plaintiffs had failed to adequately plead scienter against ServiceMaster, particularly in light of the fact that the complaint made almost no allegations that anyone other than the former CEO and CFO was involved in the disclosures at issue or knew anything about their truthfulness.[264] The court noted that the plaintiffs' complaint also relied on the proffered testimony of four confidential witnesses, but did not attach affidavits or declarations from those witnesses.[265]

The court distinguished its conclusion from its recent decision in *City of Taylor General Emp. Ret. Sys. v. Astec Indus., Inc.*, where it concluded that the CEO acted with scienter because the complaint plausibly alleged that he publicly contradicted the most current information available to him, including two specific internal reports, regarding the business crisis at issue in that case.[266] Unlike *Astec Industries*, the court found that the plaintiffs had not alleged that ServiceMaster's disclosures about liability for termite-damage claims were "flatly contradicted" by any internal information.[267]

While plaintiffs relied heavily on the volume of litigation arising from termite damage claims as evidence that the former officers should have disclosed more about the financial risks facing the company, the court noted that the complaint failed to provide sufficient detail about when the awards became final or how the disclosures were inadequate.[268] The court also held that allegations that the termite crisis was discussed among the former officers were inadequate to show scienter because they did not include any detail about what was discussed, whether the potential liability or financial impacts of the termite crisis were discussed, or even when the alleged discussions took place.[269] Accordingly, allegations regarding mere attendance at meetings did not support a strong inference of scienter.[270]

The panel also rejected the plaintiffs' argument that the company's mitigation efforts supported an inference of scienter, finding that the competing, nonfraudulent explanation that defendants thought their mitigation efforts would limit the damage was stronger.[271] The court also rejected the notion that it could infer scienter based on the officer-defendants' senior positions with the company.[272] The court concluded that the plaintiffs' allegations that the defendant-officers failed to verify information disclosed to investors supported an inference of negligence at best, which was not sufficient to prove scienter.[273]

Finally, acknowledging that the Sixth Circuit has not defined the elements of a scheme liability claim under Rules 10b-5(a) and (c), the panel adopted the definition set forth by the Second Circuit in *Benzon v. Morgan Stanley Distribs., Inc.*, and affirmed the dismissal of the scheme liability claims for failure to adequately plead scienter.[274]

Tenth Circuit Holds Corporate Knowledge or Access to Contrary Information Is Not Enough to Satisfy PSLRA's Scienter Requirement

In *Meitav Dash Provident Funds & Pension Ltd. v. Spirit AeroSystems Holdings, Inc.*, a split panel of the Tenth Circuit affirmed the dismissal of a securities fraud suit against a large aerostructures manufacturing company and certain executives, holding that the plaintiffs failed to allege facts showing a strong inference of scienter in support of claims that the defendants engaged in a scheme to mislead investors and artificially inflate the market price of Spirit's stock.[275] The complaint alleged that the defendants made false statements and omissions about the likelihood that production of Spirit's main shipset—used in the production of Boeing's 737 MAX jetliner—would be slowed or halted following the FAA's grounding of the 737 MAX and relating to the adequacy of Spirit's accounting controls.

Applying the PSLRA's "strong inference" standard, the majority held that the complaint came up short. In particular, the majority rejected the plaintiffs' core theory of liability—that the defendants knew that Boeing would imminently stop production of the 737 MAX and, thus, also stop or significantly reduce its purchase of Spirit shipsets—as lacking particularized factual allegations of fraudulent intent or reckless disregard of accessible information.

The majority emphasized that an executive's access to information alone is not sufficient to satisfy the PSLRA's strong inference standard, because "if access alone were enough, a strong inference of scienter would exist for high-level executives whenever they make a public statement contradicting something in the company's files."[276] Acknowledging that access to contradictory information can sometimes contribute

to a strong inference of scienter, the panel held that to survive a motion to dismiss, complaints must "allege facts with particularity showing not only the executive's access to contradictory information but also the executive's fraudulent intent or reckless disregard of accessible information."[277] Notably, the majority declined to follow decisions by the Second and Sixth Circuits, which allow plaintiffs to plead scienter through a senior officer's knowledge of a misrepresentation, and is, thus, an important clarification of the requirements for pleading scienter in the Tenth Circuit.[278]

The complaint alleged that in 2019, sales of shipsets to Boeing accounted for approximately 79% of Spirit's net revenue. Boeing produced approximately 52 737 MAX jetliners per month and purchased a corresponding 52 shipsets per month until March 2019, when the FAA and authorities worldwide grounded the aircraft following two crashes. In response, Boeing reduced production from 52 to 42 jetliners per month, but continued to purchase 52 Spirit shipsets per month.

The plaintiffs alleged that on October 31, 2019, Spirit's CEO falsely reassured investors that Boeing would continue to purchase 52 shipsets per month "for an extended period of time."[279] On the same day, Spirit's CFO signed the company's quarterly filings with the SEC, declaring that Spirit expected Boeing to continue purchasing 52 shipsets every month and certifying the adequacy of Spirit's accounting controls. On November 24, 2019, a market observer reported on "takeaways" from a meeting with Spirit executives, suggesting that Spirit would continue monthly sales of 52 shipsets until at least May 2020.[280]

The complaint alleged that on December 16, 2019, Boeing announced it would soon temporarily halt production of the 737 MAX. Three days later, Boeing instructed Spirit to stop delivering the shipsets. Shortly thereafter, Boeing disclosed it would stop production of the 737 MAX altogether. Also in December 2019, Spirit disclosed that its accounting controls were inadequate, fired the executive responsible, and reported that the VP-Controller and the CFO had both resigned. Pointing to allegations from several former employees, the complaint alleged that the defendants knew Spirit's accounting practices were inadequate on October 31, 2019, when Spirit certified their adequacy in its SEC filings and that statements by the CEO in the same SEC filing that Spirit expected Boeing to continue purchasing 52 shipsets per month were false and misleading in violation of Section 10(b) and Rule 10b-5, because Boeing had already told Spirit executives that Boeing planned to reduce 737 MAX production and Spirit shipset purchases. The district court dismissed the complaint with prejudice, finding that the plaintiffs failed to adequately plead scienter.

On appeal, the panel split on the issue of whether the complaint adequately alleged scienter. The majority explained that "it's not enough for the plaintiffs to allege briefings to a speaker on the underlying data or the speaker's access to internal reports" and "an executive's position in the company doesn't show knowledge of specific facts."[281] Access to information is not sufficient to draw a strong inference of scienter because "[i]f access alone were enough, a strong inference of scienter would exist for high-level executives whenever they make a public statement contradicting something in the company's files."[282] Rather, to adequately plead scienter from access to contradictory information, "[a] plaintiff must thus allege facts with particularity showing not only the executive's access to contradictory information but also the executive's fraudulent intent or reckless disregard of accessible information," and they concluded that the complaint failed to do so.[283]

The majority concluded that unparticularized allegations that certain unidentified Boeing employees told unspecified Spirit executives of Boeing's plan to reduce purchases did not adequately allege that Spirit or the defendant executives were actually aware of the decrease in Boeing's expected production and purchases. Further, the majority held that conclusory allegations that the defendant-CEO was provided certain layoff projections based on Boeing's expected reduction in shipset purchases similarly failed to plead a strong inference of scienter because while the executive "presumably knew, as the public did, that Boeing might reduce purchases … [T]he complaint doesn't contain particularized allegations showing that [the CEO] was aware, by October 31, 2019, that Boeing had decided to reduce purchases of shipsets[,]" when he made a statement to the contrary.[284]

The majority also held that allegations that the CEO "served as a hands-on executive with close ties to Boeing" were insufficient.[285] The majority likewise concluded that the complaint failed to adequately allege scienter as to the VP-Controller based on statements from a former employee who had expressed concerns that the company's accounting controls were inadequate because an "even more plausible inference

is that [the executive] disagreed with [the former employee] and maintained confidence in Spirit's accounting controls."[286]

In dissent, Judge Phillips disagreed with the majority's scienter analysis and its reading of the allegations that the CEO and the VP-Controller "did not know about two seismic problems bubbling at the company but that several low-level employees did."[287] Rather, the dissent argued that, holistically considering of all the alleged facts together, the plaintiffs sufficiently alleged a strong inference of scienter and that "[t]he majority imposes too high a pleading burden at the dismissal stage by mandating allegations of direct evidence of … knowledge"[288] and further noted that "the PSLRA permits securities plaintiffs to prove scienter through circumstantial evidence of a defendant's state of mind and motive."[289]

As to the VP-Controller, the dissent would have held the allegation "that [the executive] knew of the accounting misconduct after learning of it from a concerned employee" was enough to show direct knowledge and scienter regarding inadequate accounting controls, noting "I see no lurking innocent explanation here."[290] As to the CEO, the dissent asserted that when "[v]iewed holistically, these allegations raise a strong inference that the CEO—who touted Spirit's close relationship with Boeing, the company's most important customer—knew about Boeing's 737 MAX production cuts by early October 2019, when he made public statements to the contrary."[291]

Asserting that the majority had ignored the principle that scienter can be shown through reckless disregard of information, the dissent concluded that "this strong inference of recklessness is at least as plausible as any competing inference that [the] CEO [] did not know about the production cuts" since "[t]he competing inference depends on CEO []'s being inattentive in his duty as head of Spirit—that he didn't talk to Boeing about its jetliner cuts, that he didn't attend meetings where his employees discussed the impact of those cuts, and that he never viewed layoff analyses that his direct reports worked closely on (or that he viewed these layoff analyses as mere contingency plans). And all this concerning Boeing, Spirit's biggest customer, which accounted for almost 80% of Spirit's net revenue."[292]

Thus, the dissent would have found that the complaint, as a whole, sufficiently pleaded a strong inference of scienter and would have reversed the district court's dismissal.

"Not Every Financial Disappointment Is Actionable Under Federal Law": Fourth Circuit Affirms Dismissal Because Plaintiffs Failed to Allege Scienter

In *San Antonio Fire & Police Pension Fund v. Syneos Health Inc.*, the Fourth Circuit affirmed dismissal of a securities suit brought by investors of a merged pharmaceutical company who alleged that company executives made overly optimistic statements about the merger without also disclosing critical, adverse facts.[293]

The court agreed with the district court that the plaintiffs' pleadings insufficiently alleged a strong inference of scienter in contrast with the competing inference that defendants made optimistic projections that did not pan out.[294] The court rejected the plaintiffs' reliance on "general due diligence" conducted prior to the merger because "simply knowing this information would not be enough for scienter[,] … [d]efendants would also have to know—or, at a bare minimum, be reckless to a risk—that declining to share [the] information would render their rosy predictions *misleading* for investors."[295]

This decision highlights the challenge facing Section 10(b) plaintiffs who must raise a strong inference that defendants intended to deceive or created such a high risk of being deceptive that the defendants must have known they were being deceptive and that such inference is at least as compelling as a benign competing inference. The court also affirmed dismissal of the plaintiffs' Section 14(a) claim that the company's proxy materials omitted material facts that rendered them false and misleading, noting that the alleged omissions were not material because the cautionary statements included specific warnings that "assumptions underlying [the company's] projections were uncertain and potentially flawed" and that the specific warnings were "'tailored to address' [p]laintiffs' exact complaints."[296]

The decision is a reminder that while cautionary statements in proxy materials can negate materiality, the warnings must be specific and carefully tailored because "[v]ague, boilerplate disclaimers will not cut it."[297]

INC Research Holdings, Inc. was a public clinical trial company specializing in assisting biopharmaceutical firms to gain FDA approval for new medicines.[298] In November 2016, INC began laying the groundwork to acquire inVentiv Health, Inc., a private company focusing on marketing recently approved drugs.[299] After INC conducted due diligence on inVentiv, including a

diligence meeting in May 2017, and filed a proxy statement with the SEC containing optimistic economic predictions, INC's shareholders approved the merger, and the companies combined to form Syneos Health Inc. in August 2017.[300] Shortly thereafter, in September 2017, Syneos's stock plummeted following negative comments from management regarding inVentiv's commercial business and inVentiv's failure to secure any large sales contracts.[301]

A class action suit was filed alleging violations of Section 10(b) and Section 14(a) based on management's alleged misleading statements and omissions about inVentiv prior to the merger.[302] The district court dismissed the plaintiffs' case for failure to state a claim, holding that the plaintiffs had not satisfied Section 10(b)'s scienter standard and that any misstatements or omissions were immaterial and did not satisfy the requirements of a Section 14(a) claim.[303]

On appeal, the panel agreed that the plaintiffs had inadequately pleaded scienter and thus the Section 10(b) claim failed.[304] In so holding, the court declined to "infer specific knowledge from [due diligence]" and assume, based only on the occurrence of due diligence meetings, that the defendants had learned of inVentiv's failure to secure large sales contracts prior to the merger.[305] The court went on to state that even if the court made such an inference, the plaintiffs "would still be out of luck," as "simply knowing [the] information would not be enough for scienter" and the plaintiffs would also have to establish that the defendants "[knew]—or, at a bare minimum, [were] reckless to a risk—that declining to share that information would render their rosy predictions misleading for investors."[306] The court found that the plaintiffs had "raised no inference of scienter" and contrasted this with the competing inference that defendants simply "made optimistic projections that didn't pan out."[307]

Further, the court also held that the four-month gap between the diligence meetings in May and the negative announcement in September 2017 was too wide to support a "temporal proximity" inference of scienter and that based on the facts of the case, any "link between an earlier misstatement and a later revelation [would be] 'purely speculative.'"[308]

Regarding the Section 14(a) claim, the court held that the alleged misstatements and omissions were not material in light of the "specific warnings" in the proxy statement that were "tailored to address" the plaintiff's complaints.[309] Citing Supreme Court precedent that a fact is material if there is a substantial likelihood that its disclosure or removal "would have been viewed by the reasonable investor as having significantly altered the total mix of information made available," the court emphasized that the plaintiffs had received, among other cautionary language, warnings that the "assumptions underlying [the financial] projections were uncertain and potentially flawed," and any optimistic statements were "based on 'pipeline discussions' with customers rather than finalized deals."[310]

The panel concluded that "[g]iven both the breadth and specificity of these warnings, [p]laintiffs cannot plausibly contend that the total mix of information available to them would have been significantly altered" had the allegedly inaccurate or omitted information been set forth.[311] Ultimately, the court concluded that the plaintiffs' understandable "right to be disappointed that their company's performance did not meet its optimistic projections" does not equate to "a right to civil remedies under federal securities law."[312]

Ninth Circuit Affirms Dismissal of Section 14(e) Claim Despite the District Court's Erroneous Application of a "Strong Inference" Requirement for Pleading Subjective Falsity; Holds that Section 14(e) Merely Requires Negligence

In *In re Finjan Holdings, Inc. Securities Litigation*, the Ninth Circuit affirmed dismissal of a securities fraud action alleging misstatements in connection with a tender offer, despite the district court's erroneous application of a "strong inference" standard from the PSLRA.[313] Following its prior decision in *Varjabedian v. Emulex Corp.,* the court held that scienter is not required for a claim under Section 14(e) and the allegations need only support a "reasonable inference" rather than a "strong inference" of subjective falsity. The unanimous panel explained that where a challenged statement is an opinion, "[b]ecause an author could negligently state an opinion in which he does not subjectively believe, subjective falsity does not necessarily require scienter."[314]

Despite its conclusion that the district court incorrectly applied a heightened pleading standard, the court upheld dismissal because the plaintiff failed to allege facts sufficient to create even a "reasonable inference" of subjective falsity.[315] Notably, the decision did not cite the decisions of other circuit courts

that have rejected *Emulex* and held that shareholders bringing Section 14(e) claims must show scienter.[316] The decision that shareholders need only plead negligence rather than scienter when suing companies for disclosing allegedly false opinions during tender offers could allow more plaintiffs in the Ninth Circuit to survive a motion to dismiss.

The case arose when a former Finjan shareholder sued the company, its CEO, and members of the board of directors after the board struck a deal with Fortress Investment Group LLC ("Fortress") to purchase all Finjan shares for $1.55 per share, a transaction that Finjan shareholders ultimately approved.[317] The complaint alleged that management provided false revenue predictions and share-value estimates to shareholders and that management knowingly provided deflated numbers to create the appearance that the sale price offered by Fortress was a good deal for Finjan shareholders.[318] The complaint alleged that the motive for the false disclosures was management's fear of a hostile takeover by a third party ("Party B"), and preferred the Fortress deal in order to keep their positions after the sale to Fortress.

The plaintiff challenged three statements made by the company to its shareholders. First, he alleged that the revenue projections provided by Finjan management to Finjan's financial advisor ("Atlas"), projecting a total revenue of $166 million through 2024, were false.[319] Second, the complaint alleged that Atlas's estimation of the value of Finjan's shares, which concluded that the sale price of $1.55 per share was within the range of reasonable prices, was false. Third, the complaint alleged that statements by Finjan management, which endorsed the revenue projections and estimated share values as "reasonable," were false.[320] The challenged statements were all statements of opinion, and the parties agreed that the statements could be false only under a theory of subjective falsity as explained by the Supreme Court in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*.[321]

To prove a Section 14(e) claim, a plaintiff must establish that: (i) the defendant made a false statement of material fact or a misleadingly incomplete statement; (ii) shareholders relied on the false or misleading statement in accepting or rejecting the tender offer; and (iii) shareholders suffered an economic loss as a result of the acceptance or rejection of the tender offer.[322] Where a plaintiff relies on a theory of subjective falsity, the plaintiff must allege both that the speaker did not hold the belief she professed "subjective falsity" and that the belief is objectively untrue—"objective falsity."[323]

The district court characterized the plaintiff's claim as sounding in fraud and therefore applied two heightened pleading standards based on the PSLRA, separate from Rule 9(b)'s pleading requirements for fraud allegations. First, the district court applied a heightened standard under Section 4(b)(1) of the PSLRA, which requires increased particularity for allegations of untrue statements of material fact.[324] Second, the district court applied a heightened pleading standard under Section 4(b)(2) of the PSLRA applicable to state-of-mind allegations.[325]

Unlike Rule 9(b) and Section 4(b)(1), Section 4(b)(2) substantially increases the pleading requirement, requiring a "strong inference" that the defendant acted with the required state of mind.[326] Importantly, Section 4(b)(2) applies only if the cause of action has scienter as a required element.[327] The district court concluded that the Section 14(e) claim had a scienter requirement and that the complaint failed to plead particularized facts giving rise to a strong inference of scienter.[328]

On appeal, the panel held that the district court was correct to apply Rule 9(b) because the plaintiff's claim "sounds in fraud" even if fraud is not an essential element of the cause of action.[329] The court also concluded that the district court correctly applied the particularity requirements for allegations of untrue statements of material fact because "it is undisputed that Section 4(b)(1) applies to all Section 14(e) actions, including this one."[330]

However, the court held that the district court erroneously applied the "strong inference" requirement for subjective falsity based on its finding that the Section 14(e) claim had a scienter requirement.[331] The court reasoned that Section 4(b)(2)'s heightened plausibility standard did not apply to Section 14(e) actions because the mere fact that a plaintiff has included allegations of fraud will not by itself add a scienter element to every cause of action alleged in the complaint.[332]

The court explained that the language of Section 4(b)(2) focuses on the proof demanded by the nature of the claim, not on the particularities of the allegations in the complaint and because an author could negligently state an opinion in which he does not subjectively believe, subjective falsity in the context of a statement of opinion does not necessarily require

scienter.[333] Thus, because Section 14(e) can be satisfied without scienter even when the statements at issue are statements of opinion, the court held that *Emulex* "is thus indistinguishable, and we are bound by it."[334]

Applying the proper pleading requirements for Section 14(e) claims, the court concluded that none of the complaint's factual allegations, standing alone, were sufficient to create a reasonable inference that Finjan management did not believe the sale price of $1.55 per share was reasonable and, even taking the factual allegations together, "it is not reasonable to infer subjective falsity."[335] Among other things, the court found that Finjan engaged in an open sale process involving the solicitation of bids from more than 50 entities, which strongly supported the conclusion that Finjan management did not believe the sale price was too low.[336]

Further, Finjan's liquidation valuation analysis implied that the sale price of $1.55 per share would have offered a better deal to shareholders than a sale of Finjan's assets, which Party B had offered to Finjan shortly before Finjan finalized the deal with Fortress.[337] The court also pointed to the "Discounted Cash Flow Analysis" provided by the company's financial advisor as strong support for the conclusion that management did not believe the sale price for $1.55 was too low and rejected other attacks on the assumptions used by the advisor.[338]

The court also held that the complaint's motive allegations regarding management were implausible for several reasons, including that Finjan did not need false revenue figures to steer the deal toward Fortress, because Fortress simply offered a better deal than Party B.[339] Accordingly, the court held that because the plaintiff failed to provide a plausible allegation of subjective falsity, a critical element of his Section 14(e) claim, the dismissal was affirmed.[340]

"Discount Does Not Mean Unfettered Discretion to Discard": Fifth Circuit Credits Confidential Informant Allegations and Revives Securities Class Action

In *Oklahoma Firefighters Pension and Retirement System v. Six Flags Entertainment Corp*, the Fifth Circuit reversed the dismissal of a securities fraud class action, according much more weight to confidential informant allegations than the lower court had. Noting that "[t]he degree of discounting [allegations from a confidential source] depends on the circumstances involved," a unanimous panel held there was enough detail in the complaint about the confidential source as well as some corroborating evidence that warranted only a "minimal discount."[341] The complaint, which relied almost entirely on information from a former Six Flags employee, alleged misstatements about the progress and finances of new theme parks under construction in China, and that the misstatements were contradicted by internal reports reflecting substantial problems with the projects. Holding that the confidential witness allegations should have been discounted only minimally and rejecting arguments that the alleged misstatements were protected either as forward-looking statements or puffery, the court revived the class action.

This case serves as a notice that at least in the Fifth Circuit, confidential sources may be credited if the source's credentials are clearly stated and the relevance of the person's job is not too attenuated from the allegations, even if the source lacks direct responsibility for the subject of the challenged statement.

The events that led to the suit began with Six Flags's partnership with a Chinese developer, Riverside Investment Group. The partners announced plans to open several Six Flags-branded theme parks in China beginning in late 2019 through 2021. The complaint alleged that Six Flags and its former CEO and CFO misled investors by projecting unrealistic or impossible timelines for the China park openings from 2018 until the company announced termination of the China parks project in early 2020. The complaint alleged that throughout 2018, the defendants maintained publicly that the parks were "progressing nicely towards their anticipated opening dates," even though there was little to no construction according to the information provided by Former Employee 1 ("FE1").[342]

In early 2019, the company admitted that the opening of the China parks would be delayed six to 12 months and that it would not recognize any revenue from them and also announced a negative revenue adjustment of $15 million in the prior quarter, but still maintained that construction was "progressing."[343] By late 2019, the defendants began speaking more cautiously about the parks, while still assuring investors that there were "no [further] delays."[344] Throughout this period, the company's stock price declined from a high of $73.38 in June 2018 to $31.89 in February 2020—the lowest in more than seven years.[345]

Acknowledging Fifth Circuit precedent that requires courts to discount allegations from confidential sources, the panel took issue with the district court's "general" discount applied to FE1's global allegations and the "significant" discount it applied to his allegations about Riverside's financial health.[346] The court explained that the practice of discounting anonymous allegations is required by the PSLRA, which requires courts to weigh a plaintiff's proposed inferences of scienter against other possible inferences, and that that comparison is "obstructed when the witness is anonymous."[347] The court held, however, that "the degree of discounting depends on the circumstances involved" and that there is reason to credit a confidential informant's reliability when "consider[ing] the details in the description of the source and whether those details substantiate that the source has the necessary knowledge.'"[348]

The court noted that FE1 was clearly described in the complaint as having a high-level and relevant position as the "Director of International Construction and Project Management," responsible for overseeing construction of the China parks and routinely performing site inspections.[349] The court concluded that the complaint sufficiently detailed specific meetings FE1 had attended and noted that his statements were corroborated by at least one piece of evidence—an April 2018 photograph showing that little construction had occurred. The court construed prior Fifth Circuit precedent as requiring "heavy" discounting "in circumstances where the person's credentials are less clear, or the relevance of the person's job is more attenuated to the allegations, than is the case here."[350] The court also stated that a case-by-case framework for evaluating confidential witness allegations is consistent with the approach for evaluating the credibility of confidential sources adopted by other circuits.[351]

The court held that the plaintiffs met their burden to show that the 2018 statements were actionable. First, the court held that the statements were ineligible for protection under the PSLRA's safe harbor for forward-looking statements as to the statements that addressed present construction status (e.g., "right now, barring some other decision that's made, all our parks are progressing nicely towards their anticipated opening dates") or as to mixed present/future statements.[352]

With respect to statements regarding delayed opening dates that were deemed to be forward-looking, the court held that they also were ineligible for safe-harbor protection because they were not accompanied by meaningful cautionary language. In particular, the court disagreed with the district court's grant of "blanket safe-harbor protections" and concluded that the company's disclaimers amounted to "classic boilerplate cautionary statements unattached to individual forward-looking statements."[353]

The court agreed that general statements about the prospect of future parks in China (e.g., "I think 20 parks is possible") were mere puffery, while other statements in the context of announcing specific projected opening dates (e.g., "the parks are progressing nicely") were not puffery, but declined "to undertake the task of grouping all the contested statements as puffery or not" and held that the district court had applied too broad a definition of the term.[354] The court likewise held that the alleged misstatements before October 2019 satisfied the pleading standard but the later alleged misstatements did not because the defendants "had adequately tempered their optimistic language" by then.[355]

Finally, the court held that "a reasonable person would deem the inference of scienter cogent and at least as compelling as an opposing inference."[356] It pointed to FE1's allegations that senior executives and the board had received reports detailing the lack of construction progress as well as the alleged motive of senior executives who could have received significant bonuses. Even after the opportunity to receive financial bonuses had expired in 2019, the court concluded that the defendants "could still [have been] plausibly motivated by a desire to save face regarding the parks," which, when combined with the additional circumstantial allegations, supported a strong inference of scienter for the 2019 statements.[357]

Split Ninth Circuit Relies on Expert Analysis and Confidential Witness Statements to Revive Securities Suit

In *E. Ohman J:or Fonder AB v. NVIDIA Corp.*, a divided Ninth Circuit panel overturned in part the dismissal of a securities suit against software company and graphics processing unit ("GPU") manufacturer NVIDIA, holding that the plaintiffs adequately alleged that the company and its CEO, but not other executives named as defendants, knowingly or recklessly made false or misleading statements regarding the impact of the ever-fluctuating cryptocurrency market on the company's GPU sales.[358]

The majority concluded that a holistic review of the allegations combined to support a strong inference that the CEO reviewed sales data showing that a large share of GPUs were being purchased by crypto miners and thus the complaint adequately alleged scienter. The dissent would have affirmed dismissal of all claims and criticized the majority for its purported reliance on "post hoc" expert analysis commissioned by the plaintiffs to bolster falsity allegations that were otherwise lacking.

The plaintiffs alleged that NVIDIA, whose GeForce GPUs are traditionally used to render computer graphics, had seen a significant uptick in demand due to their performance of a non-graphics task—namely cryptocurrency mining.[359] Cryptocurrency tokens are "mined" through the use of high-powered computers to solve "a difficult mathematical puzzle through laborious trial-and-error work," and GPUs have proven to be well-suited to that task.[360] Accordingly, as cryptocurrency prices fluctuate, so does the profitability of mining, and, as the plaintiffs in *NVIDIA* alleged, so does the demand for high-powered GPUs such as those manufactured by NVIDIA.[361] All revenue from the sales of GeForce GPUs were recorded in the Gaming segment of the company even though a substantial portion of those revenues were the result of purchases by crypto miners.

The plaintiffs alleged that, as cryptocurrency prices soared in 2017 and 2018, NVIDIA saw as much as a 68% year-over-year increase in its revenues but, when analysts specifically asked the company the extent to which the increased revenues were due to cryptocurrency mining, its executives insisted that the company's "exposure to crypto volatility was limited" and that crypto-related sales made up a small fraction of revenue.[362] However, in Q4 2018, when cryptocurrency prices dropped significantly, NVIDIA reported lower revenue due to a decline in demand for GPUs, with one executive referring to the excess inventory as a "crypto hangover."[363] Following these reports, NVIDIA's stock price dropped 28% in two trading days.[364]

The district court granted the company's motion to dismiss with prejudice, holding the plaintiffs failed to adequately allege scienter, but a split Ninth Circuit panel reversed. The majority held that plaintiffs sufficiently alleged NVIDIA misstated the proportion of its revenue attributable to crypto mining, relying on allegations based on an analyst's report and the analysis of plaintiffs' retained experts.[365] The majority rejected the defendants' argument that the analysis of the plaintiffs' experts—concluding that the company hid more than $1 billion in GeForce GPU sales to crypto miners over a 15-month period—was unreliable, holding that allegations based on the analysis were reliable based on the credentials of the experts, the detail of their analysis, and the similar results reached by independent assessments of the sales data.[366]

The majority further held that the allegations in the complaint were sufficient to infer that NVIDIA's CEO acted with scienter when he downplayed the impact of crypto-related sales on NVIDIA's revenues. In particular, the majority pointed to allegations based on statements by two confidential former employees indicating that NVIDIA very closely tracked the purchases of its GPUs and that the CEO had access to, and frequently and meticulously reviewed reports based on, that sales data.[367] The majority held that, based on the level of detail of the allegations, they gave rise to a strong inference of scienter.[368] "It is reasonable to infer that [the CEO]'s detail-oriented management style would have led him to become aware of the source of more than one billion dollars in company revenue during a fifteen or eighteen-month period."[369]

As for the CFO, the majority held plaintiffs failed to adequately allege scienter where they alleged only that he had access to, but did not allege that he actually accessed, the sales data contradicting the company's statements about the extent of its reliance on sales to crypto miners.[370]

In a lengthy dissent, Judge Sanchez disagreed with the majority that the plaintiffs satisfied the PSLRA's "formidable" and "exacting" pleading standard and would have affirmed the district court's dismissal of the entire complaint.[371] The dissent took significant issue with the plaintiffs' use of, and the majority's reliance on, a post hoc analysis by an outside expert that relied solely on public information and purportedly undisclosed assumptions.[372] The dissent wrote that courts "have never allowed an outside expert to serve as the primary source of falsity allegations where the expert has no personal knowledge of the facts on which their opinion is based," citing the Ninth Circuit's 2022 decision in *In re Nektar Therapeutics Securities Litigation*, which criticized plaintiffs' use of experts making "assertions about falsity based on questionable assumptions and unexplained reasoning."[373]

The dissent further criticized the majority's holding with respect to scienter, noting that the confidential witnesses cited in the

complaint never alleged that the CEO actually accessed the company sales databases and failed to allege the contents of any internal reports viewed by the CEO that would have put him on notice that sales to crypto miners were substantially higher than the company had publicly stated.[374]

Despite its criticism of the practice just last year in *In re Nektar*, the majority's opinion in *NVIDIA* may result in an increase in plaintiff-investors' use of expert witnesses to bolster falsity allegations where they are otherwise lacking. The Ninth Circuit denied NVIDIA's petition for rehearing en banc.[375]

LOSS CAUSATION

Eleventh Circuit Holds that Failure to Show Loss Causation Does Not Equate to Lack of Standing but Nonetheless Affirms Dismissal of Claims Under Section 10(b) and Rule 10b-5

In *Carpenters Pension Fund of Illinois v. MiMedx Group, Inc.*, the Eleventh Circuit considered whether shareholders adequately pleaded loss causation at the motion to dismiss stage and whether the district court correctly decided that the plaintiffs lacked standing to assert federal securities claims.[376] The court reversed the district court's ruling that the plaintiffs lacked standing. It held that because the allegations in the complaint, taken as true at the pleading stage, adequately alleged that the plaintiffs suffered a decrease in the value of their shares and that the loss was fairly traceable to the defendants' misleading statements and actions, they met Article III standing requirements separate and apart from their inability to adequately plead loss causation. However, the court affirmed the district court's ruling that the complaint failed to sufficiently plead loss causation because none of the statements alleged in the complaint qualified as corrective disclosures necessary to demonstrate loss causation.

This decision underscores that a complaint's failure to adequately allege an element of a cause of action is not the same as a lack of standing. "And while a plaintiff may both lack standing and fail to state a claim, it is also true that a plaintiff can meet the requirement for constitutional standing but nonetheless fail to state a claim."[377] This decision is also a reminder that to qualify as a corrective disclosure, a statement must "relate back" to a company's prior alleged misrepresentation, "disclose new information," and occur while claimants "*still hold their stock*."[378]

Plaintiffs' complaint alleged that MiMedx and three company executives artificially inflated MiMedx's profitability through "myriad improper and illicit sales and distribution practices" and "a massive accounting fraud perpetrated at the behest of [MiMedx's] executive leadership."[379] Plaintiffs alleged that while MiMedx reported "explosive growth" from the first quarter of 2012 to the third quarter of 2017, defendants achieved those reported results through a "channel-stuffing scheme" in which the company entered into several surreptitious agreements with distributors to overstock MiMedx products with clients, thus "inflat[ing MiMedx's] financial results by millions of dollars."[380]

The district court found that plaintiffs lacked standing. To meet the "case or controversy requirement" establishing Article III standing, the district court reasoned that the plaintiffs must "sufficiently allege 'that the fraud-induced inflation that was baked into the purchase price of the MiMedx stock was subsequently removed from the stock's price by a corrective disclosure'" *before* the plaintiffs sold their MiMedx stock, thus causing their harm.[381] Because the named plaintiff sold its MiMedx stock prior to the issuance of any qualifying corrective disclosures that revealed the defendants' fraud and wrongdoing, the district court concluded that plaintiffs failed to establish harm that was fairly traceable to the alleged misrepresentations.

The district court also found that none of the statements identified in the complaint qualified as corrective disclosures for the purpose of alleging loss causation at the pleading stage. Plaintiffs alleged that "over the course of several years, the 'truth regarding Defendants' extensive misconduct leaked into the market'" through several partial corrective disclosures in the form of: (i) publications and statements by MiMedx; (ii) news articles and reports from securities analysts; and (iii) announcements concerning lawsuits and investigations into MiMedx's business practices.[382] The district court found that none of the alleged statements in any of these categories qualified as corrective disclosures because they failed to reveal any past fraud or wrongdoing by the defendants or reveal new information to the public.

On appeal, the Eleventh Circuit affirmed the dismissal in part and reversed in part and held that the district court correctly

determined that none of the alleged partial corrective disclosures qualified as such to sufficiently plead loss causation, but also held that the district court erred in determining that the plaintiffs lacked standing simply because they failed to plead loss causation.

With respect to standing, the court warned against equating the plaintiffs' failure to "plausibly plead loss causation as to [their] claims under § 10(b) of the Exchange Act" with a failure "to establish traceability for purposes of Article III standing."[383] Instead, the court found it sufficient that at the time they filed the complaint, and taking the allegations as true at the pleading stage, the plaintiffs adequately "alleged [they] suffered a decrease in the value of [their] MiMedx shares that was caused by—or fairly traceable to—Defendants' allegedly misleading statements and actions about MiMedx and the loss 'would likely be redressed by a ruling in its favor.'"[384] No more was required to establish standing.

Notwithstanding its holding that plaintiffs had standing to bring suit, the court upheld the district court's dismissal of the complaint for failure to plead loss causation because the plaintiffs could not identify any statements that qualified as corrective disclosures prior to the sale of their MiMedx stock. The court explained that a corrective disclosure could be shown through a series of "partial disclosures" that "gradually leaked" the truth into the market and that corrective disclosures "obviously must disclose new information" rather than consisting of "merely confirmatory" content.[385] The court emphasized the importance of timing, noting that "where a purchaser of stock sells its shares 'before the relevant truth begins to leak out, the misrepresentation will not have led to any loss.'"[386]

Adopting the district court's categorization of plaintiffs' multiple alleged corrective disclosures in the complaint as: (i) allegedly misleading corrective disclosures; (ii) news articles and analyst reports; and (iii) lawsuits and investigations, the court concluded that none of them qualified as corrective disclosures to establish loss causation. As to the first category, the court upheld the district court's reliance on the Second Circuit's holding in *In re Flag Telecom Holdings, Ltd. Securities Litigation*, which held that the "plaintiffs could not 'have it both ways' by alleging the defendants made certain misstatements … while simultaneously alleging that the misstatements constituted corrective disclosures."[387] The court noted that "MiMedx did not correct any 'falsehood' in any of these alleged disclosures," but rather, the statements showed defendants' continued issuance of "misleading statements to conceal the alleged ongoing fraud by the company," which, "at the time, the market continued to digest."[388]

The court also agreed with the district court's finding that various news articles and analyst reports did not qualify as corrective disclosures because they failed to reveal any new information to the public. The court relied on its prior decision in *Meyer v. Greene*, where it previously held that "the mere repackaging of already-public information by an analyst or short-seller is simply insufficient to constitute a corrective disclosure."[389] The court concluded that although MiMedx's stock price may have dropped after the release of each report, the decline in stock price was attributable to a new voice wielding "great clout in the industry" and espousing "negative opinion[s] about the Company," rather than the revelation of new evidence of fraud.[390]

The court affirmed the district court's finding that announcements of investigations into and lawsuits concerning MiMedx's conduct failed to qualify as corrective disclosures. The court again pointed to its previous decision in *Meyer*, where it held that "the commencement of an SEC investigation, without more, is insufficient to constitute a corrective disclosure for the purposes of § 10(b)."[391]

In their argument, the plaintiffs leaned heavily on a footnote in *Meyer* in which that panel contemplated that, "[i]t may be possible, in a different case, for the disclosure of an SEC investigation to qualify as a partial corrective disclosure for purposes of opening the class period when the investigation is coupled with a later finding of fraud or wrongdoing."[392] The court declined to answer whether the hypothetical question posed in *Meyer* could be answered in the current case and instead relied on its decision in *FindWhat Investor Group v. FindWhat.com* and the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo* in reaching its conclusion that because the plaintiffs sold their MiMedx stock months before actual revelation of the company's fraud and wrongdoing, the plaintiffs could not rely on these earlier statements as corrective disclosures.[393]

Finally, the court concluded that even considering plaintiffs' alleged partial disclosures cumulatively, the disclosures "still [did] not qualify as a series of partial corrective disclosures

to demonstrate loss causation."[394] The court also rejected the plaintiffs' argument that it should apply the same standard to all class members regardless of when each member sold their stock as foreclosed by the Supreme Court's decision in *Dura* and settled Eleventh Circuit precedent that alleged corrective disclosures must occur prior to a plaintiff's sale of their stock to demonstrate loss causation.[395]

First Circuit Revives Claim Relating to Statement About Clinical Drug Trial and Holds that a Gap in Time Between Corrective Disclosure and Stock Drop Does Not Render Loss Causation "Per Se Implausible"

In *Shash v. Biogen, Inc.*, the First Circuit revived a claim accusing Biogen of misleading investors about the effectiveness of its Alzheimer's treatment, concluding that an executive's statement that "you really need to get to the higher dose," coupled with "I think our data are all consistent with that," was belied by data from a subgroup showing that a higher drug dose did not result in better outcomes and that the benefits of a higher dose were "virtually nil."[396]

The court also considered whether an immediate stock drop after a corrective disclosure is required to adequately allege loss causation and whether a "gap in time" between the disclosure and the price response rendered plaintiffs' loss causation theory per se implausible. The court concluded that whether the stock price drop was caused by the alleged corrective disclosure was a fact question to be resolved later in the litigation, and it reversed the district court's dismissal based on loss causation.

The complaint alleged that the proposed Alzheimer's treatment, aducanumab, was a monoclonal antibody that targeted aggregated amyloid beta, a protein believed to form plaque in the brain, interfering with brain functions and resulting in loss of cognition. The company conducted two clinical trials, ENGAGE and EMERGE, to establish the drug's tolerability, safety, and efficacy. The studies' protocol required an independent group to perform a "futility analysis" once 50% of the participants had the opportunity to complete the primary efficacy assessment after eighteen months.[397]

In 2019, the company announced that the studies met the futility criteria and were being terminated. Subsequently, the company's stock price fell more than 29%. Following termination, the company conducted its own review of the clinical data and concluded that when the results of the studies were analyzed independently as opposed to together, the data showed that a group of study participants in EMERGE who received high doses of the drug met efficacy criteria. The company shared the data with the FDA and began discussing pathways to approval of the drug.

Beginning in October 2019, the company publicly announced its changed perspective on the treatment and stated that high doses of the drug reduced clinical decline, thereby supporting a filing with the FDA. During the following months, company executives repeated the same findings on multiple occasions, including a 2020 earnings call in which the Chief Medical Officer made the statement, "[Y]ou really need to get the higher dosage.... I think our data are all consistent with that."[398]

Following Biogen's application for FDA approval, an Advisory Committee was convened to provide independent review and advice on the product. Prior to the Advisory Committee meeting, the company and the FDA jointly prepared briefing materials, which the FDA posted on its website on November 4, 2020. The materials mirrored the company's prior statements about the treatment, and the FDA's commentary was "overwhelmingly favorable."[399] The exception was a report prepared by the FDA's statistical reviewer, which opined that "the totality of the data does not seem to support the efficacy of the high dose" and included detailed analysis of the clinical data supporting that negative view.[400]

Biogen's stock price rose on November 4, closing at $355.63. On November 5, however, the stock fell to $328.90. On November 6, trading was halted because the Advisory Committee was meeting on that date. The Advisory Committee ultimately concluded that "it was unreasonable to consider EMERGE as 'primary evidence of effectiveness of aducanumab for the treatment of Alzheimer's disease, even in light of the [company's] post hoc analyses' of the clinical data."[401] On November 9, 2020, the next trading day, Biogen stock dropped 30%.

Investors filed suit, alleging multiple false and misleading statements about aducanumab and concealment of clinical data that demonstrated the statements were false in violation of Section 10(b) and Rule 10b-5. The district court granted the defendants' motion to dismiss, finding the plaintiffs failed to allege a misleading statement or omission, scienter, and loss causation.

On appeal, the court affirmed the dismissal of all but one claim, reversing as to the All Data statement, concluding that the plaintiffs had adequately stated a claim. As a preliminary matter, the court noted that it was undisputed that the statement was an opinion and that under the Supreme Court's ruling in *Omnicare*, a statement of opinion may convey three facts: that the speaker has such a belief, that the belief fairly aligns with the facts known to the speaker, and that the speaker has made the type of inquiry that a reasonable investor would expect under the circumstances. Thus, "if the real facts are otherwise, but not provided, the opinion … will mislead the audience."[402]

Applying this standard to the All Data statement, the court concluded that the statement plausibly conveyed that the speaker believed that "all of Biogen's data" was consistent with a high dose of aducanumab providing a clinical benefit, that this opinion "fairly align[ed] with the facts known to him when he made the statement," and that the opinion was informed by the type of inquiry a reasonable investor would expect given the circumstances.[403] Pointing to allegations that the EMERGE study showed that some patients did better on a lower dose and others experienced the same lack of clinical benefit whether they were on the higher dose or not, the court held that because the undisclosed data "would have contextualized the[ir] '[A]ll [D]ata' claim," the complaint plausibly alleged that the defendants misled investors.[404]

The court further concluded that the plaintiffs met the materiality burden as to the All Data statement because whether all of the company's data supported the benefits of high doses of aducanumab, or only some, was a significant part of the mix of information that a reasonable investor would have considered in evaluating Biogen as an investment. The court also held that the plaintiffs alleged facts supporting an inference "that [d]efendants were aware of the contradictory subgroup data and that their failure to disclose said data was 'a highly unreasonable omission' giving rise to a strong inference of scienter."[405] The court reached the opposite conclusion as to all other allegedly false and misleading statements and affirmed dismissal of those claims.

The court also disagreed with the district court's dismissal based on failure to plead loss causation. The district court concluded that the complaint failed to plead loss causation because the alleged corrective disclosure—the statistical reviewer's report published on November 4, 2020—was published before the plaintiffs had purchased Biogen stock. The appellate court rejected "the presumption that any hit to Biogen's stock price would have immediately followed the corrective disclosure and thus was already accounted for in the stock's price when the investors purchased shares."[406]

Acknowledging that the precise pleading standard for loss causation remains unsettled in the First Circuit, the court cited decisions from several other circuits addressing delayed market reactions and found them "persuasive."[407] The court noted that the issue of when and why Biogen's stock price dropped is a question of fact not properly resolved on a motion to dismiss and thus reversed, holding that the "investors' [loss causation] allegations cannot be per se implausible simply because a gap in time separates the price drop from the corrective disclosure."[408]

CLASS CERTIFICATION

Second Circuit Orders Class Decertification in *Goldman Sachs*, Provides Valuable Guidance on Applying the Supreme Court's Price-Impact "Mismatch" Framework

As we previewed in our 2022 *Review*, the Second Circuit ruled on class certification for a third time in August 2023 following the Supreme Court's June 2021 decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*.[409] In the June 2021 decision, the Supreme Court held that courts should consider the generic nature of a misrepresentation when evaluating whether to apply the *Basic* presumption of reliance in a securities fraud class action. Importantly, the Court explained that the "final inference—that the back-end price drop equals front-end inflation—starts to break down when there is a mismatch between the contents of the misrepresentation and the corrective disclosure,"[410] and that where the misrepresentation is generic and the disclosure specific, "it is less likely that the specific disclosure actually corrected the generic misrepresentation."[411]

The Supreme Court remanded to the Second Circuit because it was unclear whether the Second Circuit considered evidence regarding the generic nature of the misrepresentation.[412] The Second Circuit then found in August 2021 that the record was not sufficiently developed, and remanded to the district court to apply the Supreme Court's "mismatch" framework.[413] On remand, in December 2021, the district court found

a sufficient match between Goldman's generic misrepresentations and later-issued, specific corrective disclosures.[414] The district court thus determined that Goldman failed to rebut the presumption of reliance and certified the class. The defendants then appealed to the Second Circuit once again.

In its August 2023 decision, the Second Circuit addressed whether defendants sufficiently rebutted the presumption of reliance at the class stage by establishing that the challenged generic front-end misstatements failed to match the specific back-end corrective disclosures for purposes of establishing price impact under Supreme Court precedent.[415]

In an inflation-maintenance case, a "front-end" misstatement props up, or maintains, an inflated stock price. A later "back-end" corrective disclosure exposes the falsity of the front-end misstatement and deflates the price of the stock accordingly. As the Second Circuit observed, however, the Supreme Court placed limits on the use of a back-end statement to establish front-end inflation-maintenance where the corrective disclosure is specific while the earlier misstatement is generic.[416]

The Second Circuit explained that although the Supreme Court had previously held that courts could not address materiality at the class stage, its subsequent *Goldman* decision clarified that courts should consider the genericness of front-end misstatements, "particularly in cases proceeding under the inflation-maintenance theory … regardless whether that evidence is also relevant to a merits question like materiality."[417] The Second Circuit observed that "back-end price drop is, at most, backward-looking indirect evidence,"[418] and that such indirect evidence is less compelling when the front-end misstatement is so generic that it could not impact, let alone prop up, the price of the stock.[419]

The court concluded that the district court's mismatch analysis, which focused on Goldman's conflicts risk disclosures, misapplied the inflation-maintenance theory in weighing whether the back-end corrective disclosures were indirect evidence of price impact caused by a front-end misstatement.[420] Specifically, unlike other Second Circuit inflation-maintenance cases, the level of specificity of the back-end corrective disclosures did not match the genericness of the challenged front-end misstatement.[421]

The court also rejected plaintiffs' contention that, had the generic risk disclosures contained a detailed admission of severe wrongdoing, a price drop would have followed. In rejecting that argument, the court relied upon "duty-to-disclose" case law and observed that if a risk disclosure is too generic for a shareholder to rely upon, then it is too generic to trigger a duty to disclose specific adverse information that a corporation is not otherwise obligated to disclose.[422]

In sum, for purposes of the mismatch price impact analysis, the court held that a plaintiff cannot rely upon a specific back-end, price-dropping event to show front-end price impact "unless the front-end disclosure is sufficiently detailed in the first place."[423] At least in the context of an inflation-maintenance argument, the court thereby permits district courts to consider evidence bearing on the materiality of the front-end misstatement to conduct a price impact analysis.[424]

In closing, the court provided guidance for district courts and future litigants. It directed district courts to conduct a "searching price impact analysis" where: (i) a "considerable gap" between the genericness of the front-end and back-end statements exists; (ii) the back-end corrective disclosure does not specifically refer to the front-end misstatement; and (iii) a plaintiff claims that a generic risk-disclosure was misleading by omission.[425] The Second Circuit then remanded to the district court with instructions to decertify the class.[426]

On November 16, 2023—after 13 years of litigation—the parties stipulated to dismissal of the case with prejudice.

STATE LAW BREACH OF FIDUCIARY DUTY CLAIMS

Delaware Court of Chancery Extends Oversight Duties to Corporate Officers

The Delaware Court of Chancery addressed the scope of corporate officers' duties of oversight in *In re McDonald's Corporation Stockholder Derivative Litigation*.[427] In a derivative action, shareholders of McDonald's sued former Global Chief People Officer David Fairhurst on behalf of the company for breaching his duty of oversight. The shareholders alleged that Fairhurst breached this duty by "allowing a corporate culture to develop that condoned sexual harassment and misconduct"

and ignoring "red flags" indicating such behavior.[428] The shareholders also alleged that Fairhurst breached his duty of loyalty to McDonald's by sexually harassing employees himself. Fairhurst moved to dismiss the suit, contending that the shareholders could not state a claim on which relief could be granted because the duties of oversight imposed on corporate directors after *Caremark* did not extend to corporate officers. The Court of Chancery disagreed and denied his motion, holding that the duty of oversight applies equally to officers.[429] "This decision clarifies that corporate officers owe a duty of oversight. The same policies that motivated Chancellor Allen to recognize the duty of oversight for directors apply equally, if not to a greater degree, to officers."[430] However, the court limited oversight liability to areas that fall within an officer's scope of control and also explained that an officer who notices "red flags" suggesting wrongdoing outside of his or her area of responsibility still has a duty to report upward.

The court's decision in *McDonald's* was largely informed by the original *Caremark* decision and Delaware Supreme Court precedent. In *Caremark*, the Court of Chancery explained that the duty of oversight imposes two requirements on directors.[431] First, they must make a good-faith effort to ensure that information and reporting systems exist to monitor business performance and compliance.[432] Second, they must respond to "red flags" within the company that suggest wrongdoing or mismanagement.[433]

In *McDonald's*, Vice Chancellor Laster reasoned that, because officers are typically tasked with executing the day-to-day functions of corporations and are agents who report to the board, officers owe a duty of oversight.[434] Further, the court pointed to the Delaware Supreme Court's decision in *Gantler v. Stephens*, holding that "the fiduciary duties of officers are the same as those of directors."[435] Applying this principle, Vice Chancellor Laster concluded that "[i]f officers owe the same duties as directors," then they must owe a duty of oversight.[436] "And just as a senior manager with supervisory duties can hold a junior manager accountable for failing to fulfill the junior manager's supervisory duties, so too can a board with a duty of oversight hold an officer accountable for failing to fulfill the officer-level duty."[437]

Although the court held that officers are subject to the same fiduciary duties as directors, the scope of liability may differ. The *McDonald's* court explained that an officer's oversight responsibilities are contextual, and may vary depending on their particular area of responsibility within the company. While some officers, such as CEOs and chief compliance officers, may have company-wide roles, many officers' responsibilities are cabined to particular divisions of the company.[438] Therefore, the court held that officers in these limited roles will generally be responsible only for addressing red flags within their respective areas of authority.[439] However, the court noted that officers may not simply dismiss evidence of wrongdoing because it is "not in [their] area."[440] Instead, if an officer notices "red flags" suggesting wrongdoing outside his or her area of responsibility, the officer has a duty to report upward.

The court explained that the standard of liability for officers is the same as for directors: Officers will be liable for violations of the duty of oversight only if a plaintiff can prove that they acted in bad faith and hence were disloyal to the company.[441] "The officer must consciously fail to make a good faith effort to establish information systems, or the officer must consciously ignore red flags."[442]

In *McDonald's*, the court found that the plaintiffs alleged sufficient facts to state a claim that Fairhurst had violated his duty of oversight. The complaint identified several red flags that sexual harassment was occurring throughout the organization and pointed to the fact that Fairhurst engaged in two acts of sexual harassment himself. Given Fairhurst's job as the head of human resources, the court concluded that the plaintiffs alleged facts supporting a reasonable inference that he knew about and ignored those red flags. "When a corporate officer himself engages in acts of sexual harassment, it is reasonable to infer that the officer consciously ignored red flags about similar behavior by others."[443]

The plaintiffs also alleged that Fairhurst's acts of sexual harassment independently violated his duty of loyalty to McDonald's. The court explained that the duty of oversight is part of a fiduciary's duty of loyalty to the corporation.[444] "[O]fficers only will be liable for violations of the duty of oversight if a plaintiff can prove that they acted in bad faith and hence disloyally."[445] The court further explained a "fiduciary acts in bad faith when the fiduciary 'intentionally acts with a purpose other than that of advancing the best interests of the corporation."[446]

Applying these principles, the court found that the plaintiffs had adequately stated a claim that Fairhurst acted disloyally by allegedly sexually harassing employees. Because "[s]exual harassment is bad faith conduct …. [and] [b]ad faith conduct is disloyal conduct," the court found that plaintiff's claim against Fairhurst could survive a motion to dismiss.[447]

Eleventh Circuit Affirms Dismissal of Investor Claims against Robinhood Because Customer Agreement Gave Robinhood the Right to Restrict Trades

In *In re January 2021 Short Squeeze Trading Litigation*, investors who used the popular trading platform Robinhood appealed the dismissal of state-law claims alleging that Robinhood wrongfully restricted investors' ability to trade "meme stocks."[448] The Eleventh Circuit affirmed, stating that Robinhood "had the right to do exactly what it did," and that the investors' "contract with Robinhood gives the company the specific right to restrict its customers' ability to trade securities…."[449] The court further found that Robinhood did not violate any fiduciary obligation to its investors by restricting trading, and that the implied covenant of good faith and duty of care did not limit Robinhood's ability to restrict trading in accordance with the express terms of its customer agreement.[450] While noting publicity surrounding the plaintiffs' allegations, the court emphasized that "Robinhood is only accountable for specific legal duties" and ultimately, the plaintiffs could not show that Robinhood breached those duties.[451] "Whether in agency, contract, or tort, the plaintiffs' amended master complaint does not adequately allege that Robinhood breached a common law duty."[452]

The complaint arose out of actions by Robinhood in response to a trading frenzy in January 2021.[453] During that time, social media platforms were abuzz with discussions about investments in meme stocks such as GameStop.[454] As a result of these online discussions, purchases of GameStop shares skyrocketed, resulting in a 700% increase in the closing price between January 21 and January 27.[455] The complaint alleged that, beginning on January 28, due to collateral requirements mandated by the National Securities Clearing Corporation, Robinhood imposed "position closing only" restrictions on certain meme stocks, thereby preventing investors from buying shares of these stocks while continuing to allow sales.[456] The plaintiffs alleged that Robinhood drove "down prices by artificially restricting demand and spook[ed] holders into selling their shares" of the meme stocks.[457] The complaint also alleged that, by imposing the trading restrictions, Robinhood stopped the plaintiffs from acquiring an asset that would have continued to increase in value.[458]

Plaintiff's complaint contained seven counts against Robinhood, for: "(I) negligence; (II) gross negligence; (III) breach of fiduciary duty; (IV) breach of the implied duty of care; (V) breach of the implied covenant of good faith and fair dealing; (VI) tortious interference with contract and business relationship; and (VII) civil conspiracy."[459] At the center of Robinhood's defense were the terms of the agreement that all Robinhood investors were required to sign before using Robinhood's trading app.[460] This agreement, in relevant part, required investors to acknowledge that "Robinhood may at any time, in its sole discretion and without prior notice to Me, prohibit or restrict My ability to trade securities."[461] Robinhood further argued that it did not assume any fiduciary duties to its customers under the agreement, and that there was no duty in tort law to avoid causing economic loss to its customers.[462] The district court agreed with Robinhood, granting its motion to dismiss and denying leave to further amend the complaint.[463]

Affirming the dismissal, the Eleventh Circuit held that the claims were precluded by the express language of Robinhood's customer agreement. In addressing the fiduciary-duty and contract claims, the court focused on the express limitations of the relationship between Robinhood and its investors, holding that the "extent of the [fiduciary] duties of the agent [Robinhood] to the principal [investors] are determined by the terms of the agreement between the parties."[464] Because the customer agreement clearly granted Robinhood the discretion to decline trading requests, the court found that Robinhood did not owe the investors a duty to accept their trades involving meme stocks.[465] The court applied this same reasoning in affirming dismissal of the claims for breach of the implied covenant of good faith and fair dealing, breach of the implied duty of care, and tortious interference with contract and business relationship.[466]

In affirming dismissal of the negligence claims, the court found that Robinhood had no duty to prevent pure economic loss.[467] The court based its conclusion on California's economic loss rule; it declined to decide whether Florida or California law applied because California and Florida law both compelled the same conclusion.[468] Under California law, "[i]n general,

there is no recovery in tort for negligently inflicted purely economic losses, meaning financial harm unaccompanied by physical or property damage."[469]

CONCURRENT STATE-COURT JURISDICTION AND FORUM-SELECTION CLAUSES

California Appellate Court Declines to Enforce Forum-Selection Clause Designating Delaware Chancery Court as Exclusive Venue Because Enforcement Would Result in Implied Waiver of Plaintiff's "Inviolate Right" to a Jury Trial on Fraud and Contract Claims

In *EpicentRx, Inc. v. The Superior Court of San Diego County*, a California appellate court held that enforcement of a forum-selection clause designating the Delaware Court of Chancery as the exclusive forum for certain shareholder litigation 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 because that right cannot be waived by contract prior to the commencement of a dispute.[470] The plaintiff was a minority shareholder who sued the company, officers, employees, and affiliates for allegedly mishandling investor monies, among other things. In addition to equitable claims, the complaint alleged fraudulent concealment, promissory fraud, and breach of contract and demanded a jury trial as to all claims eligible for a jury trial.

The crux of the decision declining to enforce the forum-selection clause was that jury trials are not generally available in Delaware Chancery Court: "To the extent a jury [trial] in the Court of Chancery is not extinct, it is a vestigial structure, more evocative of the human appendix or coccyx than that vital organ, the Superior Court petit jury…."[471] Holding that the plaintiff was indisputably entitled to a jury trial on his fraud claims and that such a fundamental right under California law could not be waived by a pre-dispute contract such as a certificate of incorporation or bylaws, the appellate court concluded that the trial court correctly declined to enforce the forum-selection clause.

The clause at issue identified four distinct categories of shareholder claims to be adjudicated in the Delaware Court of Chancery but did not include common law fraud and breach of contract claims.[472] The *EpicentRx* court recognized that forum-selection clauses "can benefit the parties subject to them" and acknowledged prior California decisions enforcing forum-selection clauses, but noted that none of those cases had considered whether enforcing a particular forum-selection clause would impair a party's constitutional right to a jury trial.[473] Accordingly, even if common law fraud and contract claims are atypical causes of action in shareholder litigation, to facilitate the goal of ensuring that "disputes are heard by courts with special expertise in, and familiar with, corporate governance matters," Delaware corporations might consider specifying "courts of Delaware" in their forum-selection clauses rather than only the Court of Chancery.[474]

En Banc Ninth Circuit Affirms Dismissal of Derivative Section 14(a) Claim, Upholds Enforceability of Delaware Forum-Selection Bylaw, and Creates Circuit Split

In *Lee v. Fisher*, the Ninth Circuit, sitting en banc, addressed the enforceability of a Delaware forum-selection bylaw in a federal derivative action against The Gap.[475] In a split 6–5 decision, the majority held that the bylaw was enforceable, did not violate the anti-waiver or exclusive jurisdiction provisions of the Exchange Act, and was not void as a matter of federal or Delaware law or public policy.[476] The majority acknowledged that its decision created a circuit split with the Seventh Circuit and expressly rejected that court's reasoning in its 2022 *Seafarers (Boeing)* decision because of its "flawed" and "mistaken" analysis of Delaware and federal law and failure to consider the implications of the availability of a direct Section 14(a) action.[477]

It remains to be seen if the Supreme Court will ultimately resolve the circuit split.[478] In the meantime, in the Ninth Circuit, corporations may now use a forum-selection bylaw to force all derivative claims to be brought in Delaware Chancery Court, thereby eliminating federal derivative suits. However, shareholders remain free to bring such a claim as a direct or class action to recover any damages personally sustained.

The complaint alleged derivative claims under Section 14(a) based on alleged misstatements in the company's proxy statements regarding the level of diversity the company had achieved in director nominations and executive hiring.[479] The defendants brought a motion to dismiss on *forum non conveniens* grounds based on its forum-selection bylaw, which required all derivative actions to be brought in Delaware Chancery Court.[480] The plaintiff argued that the bylaw violated the anti-waiver and exclusive jurisdiction provisions of Sections

29(a) and 27(a) of the Exchange Act and also was contrary to Delaware and federal public policy.[481]

The district court granted the defendants' motion to dismiss on *forum non conveniens* grounds, holding that the forum-selection bylaw rendered the Northern District of California an improper forum.[482] As discussed in last year's *Review*, the Ninth Circuit unanimously affirmed the dismissal.[483] The panel noted that a forum-selection clause created a strong presumption in favor of transferring the case and concluded that the plaintiff had not carried her heavy burden to show that the forum-selection bylaw contravened strong public policy rendering it unenforceable. Notably, the original panel did not address the contrary result reached by the Seventh Circuit in the *Seafarers (Boeing)* decision analyzing an identical forum-selection bylaw. The full Ninth Circuit subsequently granted the plaintiff's petition for rehearing en banc and vacated the panel's decision.[484]

The majority quickly dispatched the plaintiff's argument that the forum-selection bylaw amounted to an express waiver in violation of the Exchange Act's anti-waiver provisions "because the clause does not expressly state that Gap need not comply with § 14(a) or Rule 14a-9 or the substantive obligations they impose."[485] The majority likewise rejected the plaintiff's argument that the bylaw "functionally" waived compliance with Section 14(a) because enforcement of the clause would mandate that the Delaware Chancery Court dismiss her derivative Section 14(a) action, effectively precluding her from bringing such an action in any federal forum in violation of the exclusive jurisdiction provisions of the Exchange Act.[486] The majority held that there was no functional waiver of the exclusive jurisdiction provisions of the Exchange Act because the plaintiff could still seek to enforce Section 14(a)'s substantive obligations by filing a direct action in federal court as a matter of Delaware law, which governs whether a claim is direct or derivative.[487]

The majority also rejected the plaintiff's contention that the forum-selection bylaw violated a strong public policy in favor of having a federal forum for Section 14(a) derivative actions based on the Supreme Court's decision in *J.I. Case Co. v. Borak*, which first implied a private right of action allowing a shareholder to bring a "federal cause of action" to redress violations of Section 14(a).[488] Based on a close look at the language of *Borak* and its historical context, the majority concluded that *Borak* failed to explain how the availability of a derivative action would apply to the shareholder in that case, who explicitly brought only a direct action alleging Section 14(a) claims.[489] Disagreeing with the plaintiff's analysis of *Borak*, the majority concluded that the language implying the availability of a derivative Section 14(a) action in *Borak* was merely dicta and that a Section 14(a) action is now better characterized as a direct action under Delaware law since *Borak* was decided before it was presumed that state law governed corporate law obligations, and that a direct action satisfies the policy considerations at the heart of *Borak*.[490]

Finally, the majority rejected the plaintiff's argument that the forum-selection bylaw violated Section 115 of Delaware General Corporation Law, which provides that "bylaws may require, consistent with applicable jurisdictional requirements, that any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State."[491] In particular, the plaintiff pointed to the official synopsis to Section 115—which stated that it was "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction"—in support of her argument that the bylaw effectively foreclosed some suits in federal court based on federal jurisdiction altogether.[492]

The majority disagreed, holding that the argument was foreclosed because derivative Section 14(a) claims are not "internal corporate claims" under Section 115, given that the Delaware Supreme Court has held that the phrase "internal corporate claims" in that section "refers only to claims brought under Delaware, rather than federal, law."[493] Concluding that no language in Delaware case law, Section 115, or the official synopsis operated to limit the scope of what constitutes a permissible forum-selection bylaw permissible under Section 109(b), the majority held that the forum-selection bylaw approved pursuant to Section 109(b) was valid under Delaware law.[494]

The majority also squarely rejected the Seventh Circuit's analysis of Section 115 and Delaware case law as "contrary" to the reasoning of the Delaware Supreme Court.[495] The majority likewise deemed the Seventh Circuit's application of federal law to be "mistaken," noting that it failed to recognize the possibility of a direct Section 14(a) action notwithstanding the "well-reasoned" dissent by Judge Easterbrook.[496] Accordingly, the court declined to follow *Seafarers (Boeing)* and affirmed dismissal of the complaint on *forum non conveniens* grounds.[497]

The dissent, authored by Judge Thomas, mirrored the reasoning of the majority in the Seventh Circuit's decision in the *Seafarers*

(Boeing) case, which declined to enforce a similar forum-selection bylaw in similar circumstances.[498] The dissent asserted that because the forum-selection bylaw entirely eliminated the plaintiff's ability to assert federal derivative claims under Section 14(a), it violated the anti-waiver and exclusive jurisdiction provisions of Sections 29(a) and 27(a) of the Exchange Act.[499] The dissent criticized the majority for treating direct and derivative actions as interchangeable and pointed out that they are distinct as a matter of law and remedy.[500] The dissent also concluded that a federal policy preference for enforcing forum-selection provisions should not supersede the exclusive jurisdiction and anti-waiver provisions of the Exchange Act.[501]

FEDERAL JURISDICTION UNDER CLASS ACTION FAIRNESS ACT

Second Circuit Upholds Remand of Suit Arising Out of REIT Merger and Expands Scope of the Securities Exception to the Class Action Fairness Act

The Class Action Fairness Act ("CAFA") expanded federal jurisdiction to permit a defendant to remove a class action or mass action involving 100 or more class members, an aggregate amount in controversy greater than $5 million, and minimal diversity (e.g., where at least one plaintiff and one defendant are citizens of different states) to federal court in order to allow federal courts to hear class actions of national importance.[502] CAFA also carved out three exceptions to that jurisdiction, including claims arising from a covered security, corporate internal affairs, or duties and obligations "relating to or created by or pursuant to any security."[503]

In *Krasner v. Cedar Realty Trust*, the Second Circuit considered whether the securities-related exception of CAFA prohibited removal to federal court of a class action alleging aiding and abetting a breach of fiduciary duty and tortious interference claims and concluded that it did.[504] Applying principles established in three of its prior decisions collectively referred to as the *Cardarelli* trilogy that considered the scope of the securities-related exception, a unanimous panel held that because the aiding and abetting and tortious interference claims related to state-law fiduciary duties and contractual obligations "created by" the plaintiff's securities, the securities-related exception applied and the case was properly remanded to state court.[505] The decision further expands the scope of the securities-related exception in the Second Circuit, and it remains to be seen whether other courts of appeal will likewise interpret the exception more broadly.[506]

The case arose out of a reverse cash-out merger between Cedar and a REIT. The complaint was filed in state court and alleged that the transaction deprived the plaintiff and similarly situated preferred stockholders of a liquidation preference and/or conversion rights guaranteed by Articles Supplementary, a contract between Cedar and its preferred shareholders under Maryland law that defined the rights of the shareholders in connection with their securities. The complaint alleged that Cedar, its CEO, and its board of directors breached a contract and fiduciary duties owed to preferred shareholders. The complaint also alleged that in acquiring Cedar, the REIT tortiously interfered with the preferred shareholders' contractual rights and aided and abetted the Cedar board's breach of fiduciary duties.

The defendants removed the action to federal court pursuant to CAFA, and the plaintiff moved to remand, arguing that the securities-related exception required remand. The district court granted the remand motion based on its finding that the complaint failed to satisfy CAFA's numerosity requirement and also suggested without deciding that the claims appeared to fall within CAFA's exceptions.

On appeal, the Second Circuit affirmed the district court's remand order, holding that it lacked jurisdiction because the complaint fell squarely within the securities-related exception to CAFA and thus it did not need to address the issue of whether the complaint satisfied CAFA's numerosity requirement. As a preliminary matter, the court explained that its *Cardarelli* trilogy established several principles relevant to the case, including: (i) the securities-related exception applies where plaintiffs, as security-holders, bring claims that are "grounded in the terms of the security itself"; (ii) whether a party in the litigation was a party to the contracts underlying the securities is "not relevant" because Congress focused the exception on the source of the right that the plaintiff's claim seeks to enforce, not the identity of the parties; and (iii) duties superimposed by state law as a result of the relationship created by or underlying the security fall within the plain meaning of the statute.[507]

Applying these principles and acknowledging that the term "relates to" is "admittedly indeterminate," the panel concluded that Supreme Court precedent required it to analyze "the

context of 'relates to" in the underlying claims in order to determine whether the aiding and abetting and tortious interference claims fell within the CAFA exception.[508] The court noted that under Maryland law, proof of the claims "necessarily" depended on proving a breach of fiduciary duty grounded in Krasner's securities and the Articles Supplementary. "To argue that such claims do not 'relate[] to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to' a security strains credulity."[509] The court therefore concluded that where proving a "concededly excepted claim (such as breach of fiduciary duty) is an element of another claim (such as aiding and abetting said breach), a relation plainly exists."[510]

The court further explained that "[o]ur holding today thus reflects an understanding of the phrase 'relates to' that is neither so broad as to negate CAFA's purpose nor so narrow as to atextually read the phrase out of the statute."[511] The court also rejected the plaintiff's argument that the claims against the REIT were created by state common law and thus did not arise under the terms of the securities, reasoning that the securities created a relationship between Cedar and the plaintiff that gave rise to fiduciary duties on the part of Cedar and the potential for additional claims against parties who aid and abet Cedar's breach of those duties. "Thus, the aiding and abetting claim – and by the same logic, the tortious interference with contract claim – 'seek enforcement of a right that arises from an appropriate instrument.'"[512]

STANDING

Ninth Circuit Dismisses Appeal by Plaintiff Who Filed Original Complaint Because He Lacked Standing to Appeal Dismissal of a Later Amended Complaint Filed by Lead Plaintiff Appointed Pursuant to the PSLRA

In *Habelt v. iRhythm Techs. Inc.*, a split panel of the Ninth Circuit held that the plaintiff who had filed the original complaint but who was not appointed lead plaintiff pursuant to the PSLRA and did not otherwise participate in the litigation lacked standing to appeal the dismissal of a subsequently filed amended complaint.[513] The majority concluded that neither the fact of filing the original complaint nor the plaintiff's continued listing in the caption of the operative amended complaint was sufficient to confer party status on him.

Following a stock drop after iRhythm received a historically low Medicare reimbursement for one of its products, Habelt filed a securities fraud class action complaint alleging that investors were misled during the regulatory proceedings prior to the stock drop. Applying the procedure mandated by the PSLRA, the district court appointed PERSM as lead plaintiff. Thereafter, the lead plaintiff filed two amended complaints alleging securities fraud against the company and additional corporate officers.

The district court granted the defendants' motion to dismiss for failure to state a claim. While PERSM did not appeal, the original plaintiff filed a timely notice of appeal. The majority dismissed the appeal for lack of jurisdiction, reasoning that only parties to a lawsuit "or those that properly become parties, may appeal an adverse judgment."[514] The majority noted that following the appointment of a lead plaintiff pursuant to the PSLRA, PERSM gained control over all "aspects of the litigation such as discovery, choice of counsel, and assertion of legal theories."[515]

The majority rejected the argument that the original plaintiff was a party to the case based on the filing of the initial complaint or his listing in the caption of subsequent amended complaints. Rather, the panel concluded that "the more important indication of whether [someone] is a party to the case are

Instead, the majority stated that the body of the operative complaint made clear that the Public Employees' Retirement System of Mississippi ("PERSM"), which had been appointed as lead plaintiff pursuant to the PSLRA, was the sole plaintiff, and the original complainant's status as a putative class member did not give him standing to appeal. The majority also held that the plaintiff failed to demonstrate the exceptional circumstances necessary to confer standing on a non-party to appeal.

The majority decision makes clear that an original plaintiff who is not designated the lead plaintiff by the district court and who does not otherwise participate in the litigation lacks standing to appeal or cannot demonstrate the exceptional circumstances necessary for a non-party to have standing to appeal. However, defendants in cases presenting this unique procedural posture might consider noting in their motion to dismiss the operative complaint that any original complaint has been extinguished to avoid the time and expense of dealing with the issue for the first time on appeal when the lead plaintiff has chosen not to appeal a dismissal.

in … the body of the operative pleading," and the lack of any mention in the amended complaint filed by the lead plaintiff, which extinguished the initial complaint.[516]

The majority also rejected the argument that the original plaintiff's status as a putative class member gave him standing to appeal because the definition of "party" does not cover an unnamed party before a class is certified.[517] Noting that the court has allowed non-parties to appeal only "when they were significantly involved in the district court proceedings," the majority held that the original complainant's lack of participation did not meet that high bar, given that his involvement "all but ceased with the filing of the" initial complaint, he did not seek selection as lead plaintiff, and he did not otherwise participate in the litigation after appointment of PERSM as lead plaintiff.[518]

In dissent, Judge Bennett wrote that he would allow the appeal by the original complainant to proceed because he was a party under settled law and, even if he was not, exceptional circumstances should allow him to appeal as a non-party. The dissent asserted that nothing in the PSLRA or case law provides that the appointment of a lead plaintiff pursuant to the PSLRA "automatically extinguishes" an original complaint.[519]

The dissent also disagreed with the majority's conclusion that a plaintiff who filed an initial complaint is "indistinguishable" from unnamed members of the putative class simply because he was not named lead plaintiff or named in the body of the operative complaint, noting that "[w]e have never elevated form over substance to such an extent."[520] Finally, the dissent stated that on the merits, it would have reversed the district court's dismissal as to three alleged misstatements made by the defendants and allowed the suit to proceed as to them.

STATUTE OF LIMITATIONS

"We Are Aware of No Authority Suggesting that Statutes of Repose Are Intended to Protect Litigants from Evidence Uncovered Late in the Course of Litigation": Tenth Circuit Reverses Dismissal of Second Amended Complaint as Untimely

In *Hogan v. Pilgrim's Pride Corp.*, the Tenth Circuit reversed the dismissal of the plaintiff's second amended complaint, which alleged that the defendants committed securities fraud by making materially false and misleading statements that concealed a "massive collusive effort by Pilgrim and other poultry industry leaders to artificially fix, raise, and maintain high prices on broiler chicken."[521] While it was undisputed that the first amended complaint was timely, the plaintiff did not file a second amended complaint until 19 months after the earlier complaint was dismissed without prejudice and more than five years after the alleged misstatements had been made.[522]

The district court found that the second amended complaint was therefore barred by the five-year statute of repose applicable to securities fraud suits.[523] The Tenth Circuit disagreed, holding that the filing of a second amended complaint that added no new parties or claims or additional alleged misstatements, and that had been explicitly authorized in the prior dismissal order, did not amount to bringing a new action but rather related back to the earlier, timely complaint and was thus not barred by the statute of repose.[524] "Setting aside a dismissal before final judgment is entered is no more the bringing of a new action than resuming play after a timeout is the start of a new football game."[525]

While acknowledging that the defendants "may feel put upon because of the long delay" as a result of the district court's failure to impose a deadline by which an amended complaint could be filed, the court pointed out that they were not without recourse to expedite the matter and could have requested the court to impose a deadline for a second amended complaint or filed a motion seeking dismissal for failure to prosecute but took no such action.[526]

The district court dismissed the first amended complaint on the grounds that it failed to plead sufficient facts to establish the existence of a conspiracy.[527] However, noting that the case was "essentially premature but not necessarily hopeless," the district court dismissed the complaint without prejudice and expressly granted the plaintiff leave to amend the complaint if he could obtain additional evidence to buttress his claims.[528] Notably, the dismissal order did not set a deadline to file the second amended complaint.[529]

Nearly 19 months later and more than five years after certain of the alleged misstatements, the plaintiff filed the second-amended complaint with additional factual allegations.[530] Pointing to the plaintiff's nearly two-year delay in filing the second amended complaint, the district court effectively treated

the later pleading as if it were an initial complaint and dismissed it under the five-year statute of repose.[531]

On appeal, the Tenth Circuit reversed, based on its conclusion that filing the second amended complaint did not constitute "bringing" a new claim.[532] The court interpreted the word "bring" in the applicable statute of repose as meaning "to initiate or commence a claim" and concluded that the second amended complaint should be characterized as the plaintiff's attempt to "*continu*[e] to pursue a claim."[533] The court noted that the second amended complaint, which added factual allegations to support its existing claims, "did not add any new parties or causes of action, nor did it identify any additional statements by Defendants that were allegedly false or misleading."[534]

Moreover, the court found support in Rule 15(c)(1)(B), which provides that an amendment to a pleading will "relate back" to the date of the original pleading if "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."[535] The court also pointed out that it is well settled that an amendment that relates back to an earlier timely pleading is not barred by a statute of limitations and held that "[w]e can think of no reason why a statute of repose should be treated otherwise."[536]

Finally, the court reasoned that the district judge's dismissal of the first amended complaint without prejudice was not a final judgment because the district judge granted the plaintiff's request to amend the complaint and did not provide a deadline for re-filing, thereby indicating that "further proceedings were anticipated."[537]

Ninth Circuit Reverses Dismissal of Complaint on Statute of Limitations Grounds and Clarifies Test for Determining When a "Reasonably Diligent" Plaintiff Discovers Facts Constituting its Claim

In *York County ex rel. Cnty. of York Ret. Fund v. HP, Inc.*, the Ninth Circuit reversed the dismissal of a complaint alleging securities fraud as time-barred by the two-year statute of limitations notwithstanding that the alleged misstatements by company executives about its inventory practices, related losses, and drop in stock price had all occurred by 2016, more than four years prior to the filing of the complaint.[538] Following the Second Circuit, a unanimous panel held that the discovery rule first recognized by the Supreme Court in *Merck & Co., Inc. v. Reynolds* meant that a reasonably diligent plaintiff has not discovered one of the facts constituting a securities fraud violation until he can plead that fact with sufficient detail and particularity to survive a motion to dismiss for failure to state a claim.[539]

The court concluded that the key fact that permitted the plaintiff to plead scienter was not discovered until September 2020, less than two years before the complaint was filed, when the SEC instituted cease-and-desist proceedings alleging that the company's disclosures about channel inventory practices were misleading. "What matters is that [the plaintiff] has plausibly alleged that the SEC Order provided facts and context without which it could not have otherwise pleaded scienter."[540] Since the defendants failed to show that the plaintiff discovered the key fact allowing it to plead scienter more than two years prior to the filing of its complaint, the district court erred in dismissing the complaint on statute of limitations grounds. The decision further clarified that to evaluate whether a securities fraud complaint is time-barred, a court must first identify "the critical date," the date two years before the complaint was filed, and then determine whether the facts constituting the alleged violation were discovered prior to that date.[541]

The decision is also a reminder that when a company settles with the SEC, allegations included in a settlement decree may be used against defendants by private plaintiffs even in the absence of any scienter-based claims or admissions.[542]

On April 21, 2021, the plaintiff filed a complaint against HP Inc. for alleged violations of Section 10(b) of the Exchange Act and Rule 10b-5 arising out of the company's inventory practices and disclosures.[543] Among other things, the complaint alleged that the company's channel inventory model included a "push model" where some but not all distributors were offered incentives to purchase printing supplies.[544] The company also created a metric called "Weeks of Supply" ("WOS"), through which it calculated how many weeks it could supply its products if sales continued at the same pace as in prior weeks, which excluded certain inventory from the calculations and did not inform investors of that omission.[545]

The complaint also alleged that HP provided substantial discounts known as "pull-ins" to encourage certain distributors to acquire more inventory than necessary in a particular quarter.[546]

Finally, the complaint alleged that following an investigation, the SEC accepted a settlement offer from the company in September 2020. The SEC Order alleged that HP's disclosures regarding channel inventory during the relevant period were materially misleading and that the company had agreed to pay $6 million without admitting or denying the allegations.[547]

The district court granted the defendants' motion to dismiss, reasoning that the relevant facts were all publicly available to "a reasonably diligent plaintiff" by 2016, and thus the securities fraud claims were barred by the two-year statute of limitations.[548]

On appeal, the panel first pointed to the Second Circuit's observation that *Merck* had left unresolved the question of "how much information" a reasonable investor must have about the facts before they are deemed "discovered" for limitations purposes.[549] The Second Circuit answered that question in *City of Pontiac Gen. Employees' Ret. Sys. v. MBIA*, holding "that a fact is not deemed 'discovered' until a reasonably diligent plaintiff would have sufficient information about that fact to adequately plead it in the complaint."[550] Noting that the same standard has been adopted by the Third Circuit and district courts in the Ninth Circuit, the panel adopted the reasoning of *MBIA*.

Rejecting the argument that dismissal is warranted only where a defendant can "conclusively show" the exact date that plaintiff discovered its claim more than two years before the initial complaint, the panel explained that a defendant can establish that a complaint is time-barred under section 1658(b) if it conclusively shows that either: (i) the plaintiff could have pleaded an adequate complaint based on facts discovered prior to the critical date and failed to do so; or (ii) the complaint does not include any facts necessary to plead an adequate complaint that were discovered following the critical date.[551]

The court concluded that HP failed to make either showing since it was not until the SEC Order that investors could have known the implications of HP's public disclosures regarding its inventory practices.[552] "Without additional information, these statements seem like standard assurances to shareholders; they could not form the basis of a claim for securities fraud."[553] HP also failed to show that the SEC Order did not provide necessary information for the plaintiff to plead an adequate complaint.[554] Finally, the court held that the company failed to show that the plaintiff could have pleaded an adequate complaint prior to the critical date.[555] Accordingly, the district court erred in dismissing the complaint as time-barred.

SECURITIES ACT OF 1933

Second Circuit Affirms that Syndicated Loans Are Not Securities Under *Reves v. Ernst & Young*

In *Kirschner v. JP Morgan Chase Bank,* the Second Circuit affirmed dismissal of state-law securities claims brought against arrangers of syndicated loans because the plaintiff failed to plead facts plausibly suggesting that the syndicated loans were securities under the test announced by the Supreme Court in *Reves v. Ernst & Young*.[556] In *Reves*, the Supreme Court reasoned that Congress's goal in enacting the Securities Act and Exchange Act was to regulate the investment markets and not to provide a "broad federal remedy for all fraud."[557] Accordingly, it held that only "notes issued in an investment context" are securities for purposes of the federal securities laws in contrast with notes issued in a commercial or consumer context, which are not.[558] Under *Reves*, courts must apply a "family resemblance test" to determine whether a "note" is a "security," which begins with a presumption that every note is a security, followed by examination of four factors to uncover whether the note was issued in an investment contract and is thus a security.[559]

The notes at issue were issued pursuant to senior secured credit facilities totaling $1.825 billion by a private laboratory services company as part of a recapitalization and marketed to institutional investors by the defendants, who acted as arrangers for the syndicated credit facilities. The court held that while the first *Reves* factor, the motivations of the parties, weighed in favor of concluding that the complaint plausibly alleged that the notes were securities, the other three *Reves* factors did not.

As to the second and third factors, the court noted that the plan of distribution rendered the notes unavailable to the general public by virtue of restrictions on assignments in the notes and that the lenders were sophisticated and experienced institutional entities with ample notice that the notes were not securities.[560] It held that the fourth *Reves* factor, the existence of other risk-reducing factors, weighed against concluding that the notes were securities because they were secured by collateral, and federal regulators have issued specific policy guidance addressing syndicated loans.

Applying the *Reves* factors, a unanimous panel thus concluded that the notes bore a strong resemblance to one of the enumerated categories of notes that are not securities (e.g., loans issued by banks for commercial purposes) and held that the district court properly dismissed the plaintiff's state-law securities claims. On December 19, 2023, the plaintiff filed a petition for certiorari in the Supreme Court arguing that the Second Circuit misinterpreted *Reves* and that if *Reves* "can be read so capaciously as to support the Second Circuit's approach, the Court should reconsider the decision." The Supreme Court is likely to determine whether to grant certiorari later this year.[561]

Unanimous Supreme Court Clarifies the Tracing Requirement for Section 11 Claims Involving Securities Purchased in Direct Listing and Resolves Circuit Split

Under the Securities Act, a company must register securities it intends to offer to the public with the Securities and Exchange Commission. The Act imposes strict liability when issuing companies include material misstatements or misleading omissions in their registration statement.

The Securities Act creates a private right of action for public buyers, but the federal courts have long held that such plaintiffs must meet certain pleading requirements, including that a shareholder must allege that his securities can be traced to the registration statement alleged to be false or misleading. A unanimous Supreme Court addressed this requirement in the highly anticipated decision in *Slack Technologies, LLC v. Pirani*.[562] The decision significantly limits the ability of purchasers to pursue Section 11 claims against companies that go public through a direct listing when both registered and unregistered shares are offered for sale.

This case arose when Slack Technologies commenced a direct listing to sell shares in 2019 by filing a registration statement for a specified number of shares to be sold through the direct listing. Under the direct listing process, holders of preexisting unregistered shares, including employees and early investors, could also sell their shares in the direct listing. The plaintiff purchased 30,000 Slack shares on the day of the direct listing and later purchased an additional 220,000 shares over the next few months. After Slack's stock price dropped, the plaintiff sued the company, alleging violations of Sections 11 and 12 based on a materially misleading registration statement for the direct listing.[563]

Slack moved to dismiss. It argued that the Securities Act authorizes only suits by public purchasers whose shares were issued pursuant to the allegedly misleading registration statement; it further argued that the plaintiff lacked standing because the complaint failed to allege that the shares he purchased in the direct listing could be traced to the allegedly misleading registration statement filed in connection with the direct listing. The company reasoned that the plaintiff could just as easily have purchased unregistered shares on the open market unconnected to the company's registration statement.[564]

The district court denied the motion to dismiss, but certified its ruling for interlocutory appeal. As we discussed in last year's *Review*, a divided panel of the Ninth Circuit affirmed the district court's decision.[565] The majority reasoned that because both registered and unregistered shares became available upon the effectiveness of the registration statement for the direct listing, all publicly available shares could "be traced to that one registration."[566] The dissent argued that the text of Sections 11 and 12 limits standing to purchasers of registered shares even if that meant no investor had standing to sue in connection with Slack's direct listing.

The dissent also explained that the words "such security" in the text of Section 11 referred to securities registered under the registration statement at issue, regardless of the context, and that the majority's decision created a split of authority with every other court of appeals to have considered the issue.[567] The panel denied the defendant's motion for rehearing, and the full court declined to grant its motion for rehearing en banc. The Supreme Court granted certiorari to resolve the circuit split.[568]

Noting that "[f]or many years, lower federal courts have held that liability under [Section] 11 … attaches only when a buyer can trace the shares he has purchased to a false or misleading registration statement," the Court acknowledged that its decision turned on its determining the meaning of the phrase "such security."[569] Does "such security" refer to the specific shares issued pursuant to an allegedly false or misleading registration statement, or does it also encompass additional securities that came onto the public market at the same time? By looking to contextual clues in the Securities Act, a unanimous Supreme Court adopted the former interpretation and held that "the better reading of the particular provision before us requires a plaintiff to plead and prove that he purchased shares traceable to the allegedly defective registration statement."[570]

First, the Court reasoned that because the statute imposes liability for false statements or misleading omissions in "*the* registration statement," the use of a definite article to reference a particular registration statement implied that plaintiffs must acquire "such security" under that document's terms.[571]

Second, the Court observed that the statute repeatedly used the word "such" to narrow its focus, suggesting that reference to "such security" means a security registered under the particular registration statement alleged to contain a falsehood or misleading omission.[572]

Third, the Court noted that the statute's provision capping damages against underwriters in lawsuits to the "total price at which the securities underwritten by [them] and distributed to the public were offered to the public" tied the maximum available recovery to registered shares alone.[573] The Court reasoned that this provision further supported the conclusion that the Securities Act authorizes suits only by stockholders who can trace their securities to a certain registration statement alleged to be false or misleading.[574]

Finally, the Court rejected the plaintiff's policy arguments. Although he suggested that adopting a broader reading of "such security" would expand liability for falsehoods and misleading omissions, the Court concluded that this outcome was not an altogether obvious purpose of the Securities Act and it would not endorse that line of reasoning. Rather, it held that a converse inference—that the Securities Act meant to limit liability to certain instances—was equally plausible.[575] The Court also observed that "Congress remains free to revise the securities laws at any time, whether to address the rise of direct listings or any other development."[576]

SANCTIONS

Third Circuit Holds that PSLRA Requires Some Sanction to Be Imposed Where Plaintiff Filed Complaint Solely to Force a Settlement in Violation of Rule 11

In *Scott v. Vantage Corp.*, the Third Circuit held that the PSLRA requires a court to impose some sanction after it determines that a party violated Rule 11 in any proceeding governed by the PSLRA.[577] The unanimous panel explained that Congress enacted the PSLRA for the "twin goals" of curbing "frivolous, lawyer-driven litigation, while preserving investors' ability to recover on meritorious claims."[578] To that end, the PSLRA modified how courts should apply Rule 11.[579] Specifically, the PSLRA provides that if any Rule 11 violations are found to have occurred in a federal securities action, the court "shall" impose sanctions.[580] This mandatory requirement contrasts with the discretionary standard in a non-PSLRA inquiry where a court "may" impose sanctions when parties are found to have violated Rule 11.[581]

While the court acknowledged that "settlements pervade civil litigation" and that filing a complaint "with a hopeful eye towards eventual settlement is not, by itself, a Rule 11 violation," it affirmed the district court's finding that the plaintiffs' express strategy was to file their complaints to force a settlement and that two out of the three claims lacked factual support in violation of Rule 11(b)(3).[582] While the court also upheld the finding that the complaint did not constitute a "substantial failure" to comply with Rule 11, it nevertheless held that the lower court abused its discretion in not imposing any sanctions in light of the mandatory language of the PSLRA and instructed it on remand to award "some form of sanction" against plaintiffs.[583] Noting that the available options "run the gamut from an award of attorneys' fees … 'to a written order admonishing by name the individual lawyers responsible for the Rule 11(b) violations,'" the panel remanded the case for imposition of such Rule 11 sanction as the district court deems appropriate.[584]

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 settlement, it may be found to have violated Rule 11 and be subject to PSLRA-mandated sanctions. The decision is also noteworthy because the court adopted a "streamlined version" of the Fourth Circuit's approach to assessing whether a complaint "substantially violates Rule 11" as required by the PSLRA.[585]

The complaint alleged that shortly after the plaintiffs purchased $5 million of Vantage stock in a private offering, they became concerned about the company's financial condition and the lack of transparency as to the status of their investments.[586] Plaintiffs sought to recoup their original contributions, but their investments were illiquid and they had no right to rescind their investments under their stock purchase agreements.[587] The plaintiffs filed suit alleging the defendants sold unregistered and non-exempt securities, made material misrepresentations in connection with the issuance of a security, and made materially misleading statements about Vantage's proprietary trading

software in violation of Sections 10(b), 771, and 771(a)(2) of the Exchange Act and Rule 10b-5.[588] Although the plaintiffs survived a motion to dismiss, the district court ultimately granted summary judgment to the defendants on all claims.[589] The defendants had filed a Rule 11 motion as to the complaint, but the district court held it in abeyance until after the Third Circuit affirmed the summary judgment ruling.[590] Thereafter, the district court performed the Rule 11 inquiry mandated by the PSLRA.

Relying on an email from a plaintiff acknowledging that the plaintiffs' "strategy was to file [] complaints to force a settlement," the district court found that the complaint was filed for an improper purpose in violation of Rule 11(b)(1) and that the unregistered securities and misrepresentation claims lacked factual support in violation of Rule 11(b)(3).[591] However, the district court found that the Rule 10b-5 claim did not violate Rule 11 notwithstanding that it had previously granted summary judgment as to that claim.[592]

With respect to whether the complaint constituted a "substantial failure" to comply with Rule 11 that would have created a presumption in favor of awarding attorneys' fees under the PSLRA, the district court applied the Second Circuit's two-step approach for assessing whether a complaint containing multiple counts constituted a substantial failure and concluded it did not.[593] First, the district court determined that some of the claims violated Rule 11 while another did not.[594] Second, the court analyzed all the claims collectively and determined that because the Rule 10b-5 claim was the "heart" of the complaint and did not violate Rule 11, the complaint as a whole did not constitute a "substantial failure" triggering the PSLRA's attorney fee presumption.[595] Accordingly, the district court exercised its discretion not to impose sanctions for the Rule 11 violations.[596]

On appeal, the Third Circuit affirmed the district court's findings as to the Rule 11 violations. With respect to whether the violations amounted to a substantial failure for purposes of the PSLRA attorney fee presumption, the court noted that the PSLRA does not define "substantial failure," nor had the Third Circuit expounded on the meaning or the reach of the term.[597] The court analyzed the Second Circuit's two-step test for assessing "substantial failure" applied by the district court and the Fourth Circuit's modified version of that test.

In *Morris v. Wachovia Securities, Inc.*, the Fourth Circuit altered the language of step two and held that it "requires an inquiry into whether the complaint's Rule 11(b) violations make the complaint as a whole 'essentially,' 'without material qualification,' 'in the main,' or 'materially' frivolous."[598] Concluding that the Fourth Circuit's approach "is more closely tied to the [dictionary] definition of 'substantial,'" the court adopted a "streamlined version" of the Fourth Circuit's approach; namely, if a trial court determines that some claims violate Rule 11 and others do not, "the court should examine the claims collectively to assess whether the Rule 11 violations render the complaint, as a whole, frivolous."[599] Applying this framework, the court held that it was reasonable to conclude that the Rule 10b-5 claim was the "heart" of the complaint and that the "heart" of the complaint did not violate Rule 11.[600]

Thus, the court affirmed the district court's finding that the plaintiffs' Rule 11 violations did not constitute a substantial failure and the PSLRA's attorney fee presumption was not applicable.[601] However, as noted above, the court found that the district court abused its discretion in declining to impose any sanction after finding Rule 11 violations and vacated the order with instructions to impose, in its discretion, some form of sanction against plaintiffs.[602]

PSLRA STAY APPLICABILITY IN STATE ACTIONS

New York Appellate Court Holds that PSLRA Discovery Stay Applies in State Actions

On November 2, 2023, in *Camelot Event Driven Fund v. Morgan Stanley & Co.*, New York's Appellate Division, First Department determined that the PSLRA applies in state court actions filed under the Securities Act to stay discovery pending the district court's resolution of a motion to dismiss.[603] The court further held that the PSLRA discovery stay does not apply during the pendency of appeals from denied motions to dismiss. The First Department noted that its holding was consistent with federal courts, which lift discovery stays upon a ruling on a motion to dismiss, and therefore the First Department's decision prevents an incentive for forum shopping.[604]

This decision resolves a split in the New York County Commercial Division courts, which we reported in August 2019, as to whether the PSLRA automatic stay of discovery applies in state court. The issue of whether the PSLRA discovery stays apply in state court litigation was to be argued before the U.S. Supreme Court in November 2021 in *Pivotal Software v. Tran*,

but the parties settled in advance of oral argument, which mooted the issue.

D&O INSURANCE COVERAGE

Seventh Circuit Holds Post-Merger Shareholder Lawsuits Constituted "Inadequate Consideration Claims" Excluded from Coverage Under D&O Policy

In *Mining Corp. v. Columbia Casualty Co.*, the Seventh Circuit addressed whether shareholder lawsuits alleging a failure to disclose information that could have been used to negotiate a higher merger price constituted "inadequate consideration claims" under the acquired corporation's D&O policies, such that they were excluded from coverage.[605] The court concluded that they were, reasoning that while the settled claims were Section 14(a) inadequate disclosure claims on their face, the heart of the allegations was inadequate price.[606] "The *only* objection to this merger was that [the target company] could and should have held out for more money, and that revealing this would have induced the investors to vote "no" (or file suit in state court) and so trigger a renegotiation of the price."[607]

This case serves as a reminder to corporations not to hastily settle inadequate price lawsuits with the expectation that they will be indemnified before carefully considering the definition of excluded inadequate consideration claims in their D&O policies. Indeed, the court noted that while it was "doubtful" that the shareholders stated good federal claims under Section 14 in the first place, the settlement stood nonetheless and someone had to pay it.[608] In rejecting the insureds' argument that the inadequate consideration provision of its policies did not apply, the court noted that it "wants us to proceed as if all D&O policies contain the same language, but they don't, so we shouldn't."[609]

In 2016, Joy Global Inc. and Komatsu America Corp. agreed to merge, resulting in surviving company Komatsu Mining Corp.[610] After voting to approve the merger, shareholders of Joy Global sued the company and its directors and officers, asserting state and federal securities law violations, including under Section 14(a) of the Exchange Act.[611] Specifically, plaintiffs alleged that Joy Global failed to disclose projections of future growth that would have shown the purchase price was inadequate and prompted shareholders to vote no and thereby force the parties to renegotiate the purchase price.[612] The transaction closed, and all but one of the shareholder lawsuits were settled before the merger. The surviving company, Komatsu Mining, agreed to settle the final shareholder claims for $21 million and then turned to the Joy Global D&O carriers for indemnification.[613] However, the carriers denied coverage on the ground that the settled claims constituted "inadequate consideration claims," which they asserted were excluded from coverage under the D&O policies.[614] On the contrary, Komatsu Mining argued that the settled claims were not about inadequate consideration but rather were about inadequate disclosure, thereby making the settlement a covered loss under the policies.[615]

The district court sided with the carriers and granted summary judgment.[616] Under the policy, an inadequate consideration claim was defined as a "part of any claim alleging that the price or consideration paid … for the acquisition … is inadequate."[617] A "claim" was further defined as, among other things, a civil proceeding alleging a wrongful act.[618] The district court concluded that since the lawsuits alleged the wrongful act of failing to disclose documents that could have been used to seek a higher price, they fit squarely within the definition of "inadequate consideration claim" in the policies and thus were excluded from coverage (with the exception of defense costs).[619]

The Seventh Circuit affirmed. First, the court addressed the issue of whether the shareholders "stated good federal claims."[620] The court pointed to the Supreme Court's decision in *Santa Fe Industries, Inc. v. Green*, holding that "securities laws cannot be used to contend that a corporate transaction did not fetch the best price"; such arguments are reserved for state law remedies.[621] However, the court acknowledged that the settlement obviated the need to answer this question, leaving only one question remaining: Who pays?[622]

In answering that question, the unanimous panel agreed with the district court that the claims fell within the definition of "inadequate consideration claim" in the policies and that the insurer was not responsible.[623] While the settled claims on their face were about alleged misrepresentations, the court held that "the loss from any legal wrong depended on a conclusion that the price offered in the merger was too low."[624] Thus, the claims could not be separated from the issue of inadequate consideration. The court rejected Komatsu Mining's contention that Section 14(a) claims cannot possibly be about insufficient price because the Supreme Court has held that

such arguments are governed by state law.[625] Additionally, the court declined to follow a recent Delaware Superior Court case holding that inadequate price must be the sole allegation in the complaint and that any other kind of allegation, including insufficient disclosure, nullifies the exclusion because that decision invoked a rule of Delaware insurance law requiring that all conceivable ambiguities be construed against an insurer and Wisconsin law, which the parties agreed governed the policies, contained no such provision.[626]

2024 OUTLOOK

As the COVID-19 pandemic receded in 2023, it is 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.[627] Notwithstanding the continuing emergence of new variants of COVID-19 and ongoing economic consequences, we expect the trend to continue as the pandemic enters its fifth year, although the nature of the claims will likely evolve, as we discussed above. For example, on January 12, 2024, a securities fraud suit was filed against BioNTech, the company that along with Pfizer developed a mRNA-based vaccine for COVID-19 and benefited from the high demand for it. The complaint alleges that the company overstated demand for its vaccine and accumulated excess inventory of raw materials that put it at risk of recording substantial write-offs, and that its public statements about these issues were false and misleading.[628]

Last year saw an intensified public debate surrounding environmental, social, and governance ("ESG") disclosures. Several securities lawsuits in 2023 included claims of "greenwashing," in which a company allegedly touts its environmental consciousness for marketing purposes but actually makes little effort at sustainability. While none of the cases has been addressed by appellate courts, some trial courts have shown a willingness to hear greenwashing claims, allowing them to survive motions to dismiss.[629] In one high-profile greenwashing case that concluded in a $10 million settlement in 2023, the district court denied a motion to dismiss and granted class certification. The complaint centered on a demonstrably inaccurate statement about a product's supposed recyclability.[630]

The SEC continued to be active in the ESG space through its Climate and ESG Task Force created in 2021. In 2023, the SEC announced a $55.9 million settlement with Brazilian mining company Vale S.A. The complaint alleged that the company made false and misleading disclosures in relation to a collapsed dam that allegedly caused deaths and "immeasurable environmental and social harm."[631] The Vale settlement makes clear that the Task Force is scrutinizing SEC filings as well as voluntary reports and statements on company websites or otherwise made public.

The SEC is expected to release its final climate change disclosure guidelines this year following extensive public comment and repeated delays.[632] The final guidelines are likely to require companies to disclose information about, among other things, greenhouse gas emissions and climate change-related risk management. In addition, California enacted two laws in 2023 that will impose significant disclosure obligations relating to greenhouse gas emissions, climate-related financial risk, and measures to reduce climate risk.[633] The two laws, which become effective in 2026 if they survive court challenges, apply to many companies even if they are not based in California.

In July 2023, the European Union adopted the first European Reporting Standards, which specify detailed reporting requirements for companies doing business in the European Union related to sustainability and ESG topics, subject to a materiality assessment.[634] These new disclosure requirements could increase litigation risk, and companies should expect their claims about emission efforts or sustainability to be closely scrutinized by the plaintiffs' bar and regulators.

We expect cybersecurity-related litigation filings to increase in 2024. The SEC was active in bringing enforcement actions based on cybersecurity-related issues last year and is likely to continue. The SEC's cybersecurity-related disclosure guidelines that went into effect in September 2023 could increase the securities litigation risk for companies that experience cybersecurity incidents.[635] Among other things, the guidelines include incident disclosure provisions requiring reporting companies to disclose any cybersecurity incident they determine to be material within four days of making that determination, and to provide details about the nature and scope of the incident and its impact on the company's financial condition and operations. These newly required disclosures could provide a road map for plaintiffs to criticize past statements for not adequately disclosing risks or inaccurately describing security policies and procedures for preventing data breaches.

While it is unclear whether the uptick in securities fraud filings will continue, there have already been 29 securities class actions filed in 2024.[636] Even if the number of filings is higher than in 2023, the composition of the cases will change, as it does every year. The steep decline in filings relating to SPACs in 2023 is likely to continue in 2024, given the continuing drought of SPAC initial public offerings and de-SPAC transactions. There are likely to be fewer filings in the banking sector this year, as the tumult that roiled the industry in early 2023 and resulted in several high-profile bank failures appears to have been limited by decisive regulatory action and the prospect of lower interest rates in 2024. The spectacular implosion of FTX and the SEC's sustained enforcement efforts against cryptocurrency defendants likely means increased filings in this sector in 2024. As in the last few years, there were significant numbers of federal securities filings in 2023 against companies in the biotech, pharmaceutical, and high-tech sectors, and we expect that trend to continue.

Looking ahead, 2024 is likely to be a another year with substantial shareholder recoveries in securities cases. As noted, although there were fewer mega settlements of securities suits announced in 2023, there were a number of very large derivative settlements, involving Tesla ($735 million), the largest derivative settlement in history, and CBS ($167.5 million). A related direct action against Viacom also arising out of CBS's acquisition of Viacom in 2019 settled last year for $122.5 million. We expect the trend of large derivative case settlements to continue in 2024.

Artificial intelligence was a hot topic in 2023, with the release of many new AI tools and models leading to discussion about the challenges of AI and whether and how it should be regulated. Because there are many different definitions of the technology, companies may promote their uses of AI while customers or investors lack enough information to evaluate corporate claims. SEC Chair Gensler noted this potential information gap in public comments late last year, cautioning businesses not to "AI wash" or mislead investors as to their AI capabilities, comparing the practice to greenwashing.[637] He added that statements to investors about AI are governed by the "same set of basic laws, but also the same basic concept" as disclosures to the investment community on other topics.[638]

A few weeks later, Chair Gensler publicly stated that AI in itself "is a net positive to society," but warned that it also comes with "the macro-level risk that a large swath of financial services providers will end up relying on a small number of models and data aggregators," and financial instability could ensue if many people rely on AI models that are complicated or biased.[639] We will closely watch this space in 2024 to see if plaintiffs assert AI washing or other claims based on companies' disclosures of their use or reliance on AI.

Finally, we expect there will again be a substantial number of important securities-related decisions from the Supreme Court and the federal appellate courts in 2024. Given that the Supreme Court reviews relatively few securities cases, there is widespread interest in its grant of certiorari to consider whether shareholders can sue under Section 10(b) and Rule 10b-5 for a failure to disclose information required by Item 303 of Regulation S-K.[640]

Item 303 requires companies to describe known trends or uncertainties that have had or that the company reasonably expects will have a material favorable or unfavorable impact on net sales, revenues or income from continuing operations.[641] In the *Macquarie* case, the Second Circuit decided—contrary to the Ninth Circuit—that a violation of Item 303 can be the basis of a Rule 10b-5 claim.[642]

In its certiorari petition, Macquarie argued that the Second Circuit improperly expanded the scope of the private right of action under Section 10(b) beyond what is supported by congressional intent or Supreme Court precedent.[643] The shareholder opposing certiorari argued that the circuit split was insignificant "and could well disappear with further percolation."[644] The Supreme Court's decision to hear the case is unsurprising given that it previously granted certiorari to address the same issue in *Leidos, Inc. v. Indiana Pub. Ret. Sys.*, but was prevented from ruling because the case settled before oral argument.[645]

The *Macquarie* case has generated substantial interest because Item 303's MD&A disclosure is a requirement for every public company. The U.S. Chamber of Commerce and the Securities Industry and Financial Markets Association filed an amicus brief in support of Macquarie, arguing that uncertainty over the issue has resulted in companies issuing bloated and over-inclusive disclosures for fear of being sued.[646] In contrast, the United States filed an amicus brief in support of the suing shareholder, arguing that acceptance of

Macquarie's position "would create a significant loophole from Section 10(b)'s coverage [of] conduct that is plainly fraudulent [and enable] issuers to deliberately omit information required by Item 303 to dupe investors into believing that the security was less risky than it actually was."[647] A decision is expected by the end of the 2023–2024 term.

It also appears that the Supreme Court will not address forum-selection clauses after the Ninth Circuit's en banc ruling in *Lee v. Fisher* upholding the application of a clause requiring all derivative suits to be brought in Delaware Chancery Court, thus divesting a California federal court of jurisdiction over a derivative Section 14(a) claim.[648] As we discussed above, the decision confirms a circuit split with the Seventh Circuit, which ruled in 2022 that a Delaware company may not use a forum-selection clause to preclude such a suit from being brought in federal court.[649] The Ninth Circuit denied the plaintiff's petition for rehearing by the full court, and the plaintiff did not file a petition for writ of certiorari from the Supreme Court.[650] Given the benefits to Delaware companies of adopting similar forum-selection clauses, it is likely that other suits will give other circuit courts of appeal the opportunity to weigh in on the issue.

The impact of the Supreme Court's decision in the long-running *Goldman Sachs* securities litigation will continue to play out this year. As we discussed in our 2021 *Review*, 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 back-end 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.[651]

As we discussed above, last year the Second Circuit became the first appellate court to apply the Supreme Court's newly enunciated standard on remand in *Goldman Sachs*.[652] Addressing the issue for the third time, the Second Circuit concluded that the district court's mismatch analysis, which focused on Goldman's conflict risk disclosures, was incorrect. The court held that the specificity of the back-end corrective disclosures did not match the genericness of the front-end alleged misstatements and remanded the case for decertification of the class. Currently, there are cases pending in district courts in which companies are opposing class certification based on arguments that the plaintiffs failed to meet the standard announced by the Supreme Court in the *Goldman* case.[653] We will track those cases as they move through the courts and potentially result in additional appellate court decisions in 2024.

In *In re FirstEnergy Corp. Securities Litigation*, 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.[654] The petition asserted that because *Affiliated Ute* applies to claims based on omissions and not affirmative misrepresentations, the plaintiffs must invoke the more difficult presumption of reliance recognized by the Supreme Court in *Basic v. Levinson*, which requires a showing that securities traded in an efficient market and which the defendants may rebut with any evidence that severs the link between the alleged misstatement and the stock price.[655]

The petition also requested that the court decide whether the district court misconstrued the Supreme Court's requirement in *Comcast Corp. v. Behrend*. The requirement in question mandated that the plaintiff submit a common damages methodology as a prerequisite to class certification by: (i) certifying an Exchange Act class based on a statutory damages formula that applies only to Securities Act claims; and (ii) failing to require the plaintiffs to identify the common damages methodology on which they would rely to establish damages across the 3.5-year class period.[656] A decision in this closely watched case is expected later this year.

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ENDNOTES

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34 *Hawkins v. Danaher Corp.*, No. 1:23-cv-02055 (D.D.C. July 17, 2023) (manufacturer of COVID-19 diagnostic test); *Lowe v. Tandam Diabetes Care, Inc.*, No. 3:23-cv-01657-H-BLM (S.D. Cal. Sep. 8, 2023).

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84 *Id*.

85 *Id*. at 377.

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90 *Id*.

91 *Id*.

92 *Id*. (quoting *In re Amarin Corp. PLC Sec. Litig.*, No. 21-2071, 2022 WL 2128560, at *3 (3d Cir. June 14, 2022); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011)).

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94 *MacroGenics*, 61 F.4th at 383.

95 *Id*. at 388 (quoting *Amarin*, 2022 WL 2128560 at *15).

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97 *Id*. at 386.

98 *Id*. at 387–89.

99 *Id*. at 387.

100 *Id*. at 386, 389.

101 The court affirmed dismissal of the Section 15 claim because it is a derivative claim that depends on Sections 11 and 12, and such claims are "properly dismissed if the parent statutes fail to state a claim upon which relief may be granted." *Id*. at 393–94 (quoting *Greenhouse v. MCG Cap. Corp.*, 392 F.3d 650, 656 n.7 (4th Cir. 2004)).

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105 *Id.* at 757.

106 *Id*. at 779 (citing *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 702 (9th Cir. 2022), *cert. denied sub nom. Alphabet Inc. v. Rhode Island*, 142 S. Ct. 1227 (2022) (holding that the plaintiffs alleged actionable misstatements because the defendant company included as a risk factor concerns about data security but did not mention a security vulnerability that the company had already discovered)).

107 *Id*. at 757, 759, 778–79.

108 *Id*. at 768.

109 *Id*. at 772.

110 *Id*. at 774.

111 *Id*. at 779 (citing *Omnicare*, 575 U.S. at 189; *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1208–09 (9th Cir. 2016)).

112 *Id*. at 782.

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117 *Id.* at 228.

118 *Id.* at 227.

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

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127 *Id.* at 234.

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129 *Id.*

130 *Id.*

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135 *Id.* (quoting *Kuebler*, 13 F.4th at 637).

136 *Id.* at 236.

137 *Id.* at 234–35 (citing *Karp*, 535 F. Supp. 3d at 473).

138 *Id.* at 235.

139 *Id.*

140 *Id.*

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142 *City of Warren*, 70 F.4th at 678.

143 *Id.*

144 *Id.*

145 *Id.* at 692. In 2023, the Fifth Circuit addressed the appropriate weight courts should give to confidential witness allegations in securities litigation. We analyze that case, *Oklahoma Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.*, 58 F.4th 195, 207 (5th Cir. 2023), at *supra* pp. 24–25.

146 *City of Warren*, 70 F.4th at 682 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Lutz v. Portfolio Recovery Assocs., LLC*, 49 F.4th 323, 328 (3d Cir. 2022)).

147 *Id.* at 687.

148 *Id*. at 687–88 (citing *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011)). *Janus* announced that for a person or entity to "make" a statement, that person must have "ultimate authority over the statement, including its content and whether and how to communicate it." *Id.* at 142. The decision also held that "attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed." *Id.* at 143.

149 *City of Warren*, 70 F.4th at 688.

150 *Smykla v. Molinaroli*, 85 F.4th 1228 (7th Cir. 2023).

151 *Id.* at 1236–37.

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157 *Id.* at 1233–34.

158 *Id.* at 1234.

159 *Id.*

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161 *Id.* at 1236 (citing *Kuebler v. Vectren Corp.*, 13 F.4th 631, 638 (7th Cir. 2021)). We analyzed *Kuebler v. Vectren* in our 2021 *Review*. Jones Day, *supra* note 20 at 9–10.

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163 *Id.* at 1236–37.

164 *Id.* at 1237 (citing *Kademian v. Ladish Co.*, 792 F.2d 614, 623–24 (7th Cir. 1986)).

165 *Id.* at 1238.

166 *Id.*

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168 *Id*. at 1239. (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)).

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174 *Id*. at 167.

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177 *Id.*

178 *Id*. at 167–68.

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181 *Id*.

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203 *Id*. at 420 (citing *Tongue v. Sanofi*, 816 F.3d 199, 214 (2d Cir. 2016)).

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206 *Id*. at 422 (citing *Tongue*, 816 F.3d at 214).

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209 *Id*. at 425.

210 *Id*. at 423 (citing *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d at 571 (S.D.N.Y. 2014; *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988)), aff'd, 604 F. App'x 62 (2d Cir. 2015)). The court also affirmed the district court's dismissal of claims relating to the defendants' statement during an earnings call regarding their projections about performance in the Japanese market but on different grounds. The court found that considering the challenged statements in the fuller context of the entire call, they were "not false at all," thus mooting the question of whether the statement qualifies as a forward-looking statement for purposes of the PSLRA's statutory safe harbor. The court also agreed, "with the district court that any distinction between the disclosures PMI actually made and the disclosures the [plaintiffs] insist PMI *should have* made is a distinction without a difference," and thus the complaint failed to plead any allegation of violations of Items 303 or 105 "let alone one that would be actionable under Section 10(b) or Rule 10b-5." *Id*. at 427.

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223 *Id.*

224 *Id.*

225 *Id.* at 953 (citing *Glazer Cap. Mgmt., LP v. Magistri*, 549 F.3d 736, 742 (9th Cir. 2008) ("Glazer I") (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)).

226 *Id.* (citing *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 765 (9th Cir. 2023) ("Glazer II")).

227 *Id.* at 953–54.

228 *Id.* at 953.

229 *Id.* at 954.

230 *Id.*

231 *Id.* at 955.

232 *Id.* at 955–57.

233 *Id.* at 956 (citing *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1058 (9th Cir. 2008)).

234 *Id.* (citing *In re Gilead*, 536 F.3d 1049, 1056–58).

235 *Id.* at 957.

236 *Id.*

237 *Id.*

238 *Id.* at 960–61.

239 *Id.* at 960.

240 *Id.* at 962–63.

241 *Id.* at 963.

242 *Id.*

243 *Teamsters Loc. 237 Welfare Fund v. ServiceMaster Glob. Holdings, Inc.*, 83 F.4th 514 (6th Cir. 2023).

244 *Id.* at 526–27.

245 *Id.* at 531.

246 *Id.* at 519.

247 *Id.*

248 *Id.* at 520.

249 *Id.* at 521.

250 *Id.* at 520.

251 *Id.* at 521.

252 *Id.* at 522.

253 *Id.*

254 *Id.*

255 *Id.* at 521.

256 *Id.*

257 *Id.* at 519.

258 *Id.* at 522–23.

259 *Id.* at 519.

260 *Id.* at 523–24. Because the defendants had not addressed the scheme liability claims in their motion to dismiss, they subsequently moved for judgment on the pleadings under Rule 12(c). Since the scheme liability claims relied on the same allegations and factual circumstances underlying the misrepresentation and omission claims addressed on the motion to dismiss, the district court "found no reason to deviate from its previous order" and entered judgment in favor of defendants. *Id.* at 524.

261 *Id.* at 514.

262 *Id.* at 523–24.

263 *Id.*

264 *Id.* at 532.

265 *Id.*

266 *Id.* at 529–30 (discussing *City of Taylor Gen. Emp. Ret. Sys. v. Astec Indus., Inc.*, 29 F.4th 802 (6th Cir. 2022)). We analyzed the *City of Taylor v. Astec* decision in last year's *Review*. Jones Day, *supra* note 18 at 7–8 .

267 *Id.* at 530.

268 *Id.*

269 *Id.* at 531.

270 *Id.*

271 *Id.* at 530–31.

272 *Id.* at 531.

273 *Id.*

274 *Id.* at 525, 533-34 (citing *Benzon v. Morgan Stanley Distribs., Inc.*, 420 F.3d 598, 610 (6th Cir. 2005) ("To state a scheme liability claim, a plaintiff must show (1) that the defendant committed a deceptive or manipulative act, (2) in furtherance of the alleged scheme to defraud, (3) with scienter, and (4) reliance.").

275 79 F.4th 1209 (10th Cir. 2023).

276 *Spirit AeroSystems*, 79 F.4th at 1217.

277 *Id.*

278 *Id.* at 1230 (citing *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 177 (2d Cir. 2015); *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 476 (6th Cir. 2014)).

279 *Id*. at 1217.

280 *Id*. at 1215.

281 *Id.* at 1217 (citing *Anderson v. Spirit Aerosystems Holdings, Inc.,* 827 F.3d 1229, 1245–46 (10th Cir. 2016), as amended (July 6, 2016)).

282 *Id.*

283 *Id.*

284 *Id*. at 1222–23.

285 *Id*. at 1221.

286 *Id*. at 1227.

287 *Id*. at 1235.

288 *Id.* at 1237.

289 *Id.* at 1236.

290 *Id.* at 1237, 1240.

291 *Id.* at 1242.

292 *Id*. (citing *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7th Cir. 2008)).

293 *San Antonio Fire & Police Pension Fund v. Syneos Health Inc.*, 75 F.4th 232 (4th Cir. 2023).

294 *Id.*

295 *Id.* at 243 (citing *Maguire Fin., LP v. PowerSecure Int'l, Inc.*, 876 F.3d 541 (4th Cir. 2017)).

296 *Id.* at 245–46 (citing *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 319 (4th Cir. 2019)).

297 *Id.* at 245 (citing *In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357 (3d Cir. 1993)).

298 *Id.* at 238.

299 *Id.*

300 *Id.* at 239.

301 *Id.*

302 *Id.* at 239–40.

303 *Id.* at 240.

304 *Id.* at 244 (citing *Tellabs, Inc. v. Makor Issues & Rts., Ltd*., 551 U.S. 308, 326 (2007)).

305 *Id.* at 242.

306 *Id.* at 243 (emphasis omitted).

307 *Id.* at 244.

308 *Id.* (citing *In re Triangle Cap. Corp. Sec. Litig.*, 988 F.3d 743 (4th Cir. 2021)).

309 *Id.* at 245–46.

310 *Id.* at 246 (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

311 *Id.*

312 *Id.* at 246–47.

313 *In re Finjan Holdings, Inc.*, 58 F.4th 1048 (9th Cir. 2023).

314 *Id*. at 1059 (citing *Varjabedian v. Emulex Corp.*, 888 F.3d 399 (9th Cir. 2018)).

315 *Id.* at 1052.

316 *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009); *U.S. Sec. & Exch. Comm'n v. Ginsburg*, 362 F.3d 1292, 1297 (11th Cir. 2004); *In re Digital Island Sec. Litig.*, 357 F.3d 322, 331–332 (3d Cir. 2004); *Conn. Nat'l Bank v. Fluor Corp.*, 808 F.2d 957, 961 (2d Cir. 1987); *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir. 1980). Although the Supreme Court granted certiorari in the *Emulex* case to resolve the circuit split, it did not decide the case after determining that certiorari had been improvidently granted. *Emulex Corp. v. Varjabedian*, 139 S. Ct. 1407 (2019). It remains to be seen whether the plaintiff will seek certiorari in this case, thereby giving the Supreme Court another opportunity to resolve the circuit split created by *Emulex*.

317 *In re Finjan Holdings, Inc.*, 58 F.4th at 1051.

318 *Id.*

319 *Id.* at 1055.

320 *Id.*

321 *Id.* at 1055–56 (citing *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. at 184-89 (2015)).

322 *Id.* at 1055.

323 *Id.* at 1056.

324 *Id.* at 1057.

325 *Id.* at 1058.

326 *Id.*

327 *Id.*

328 *Id.* at 1058–59.

329 *Id.* at 1057.

330 *Id.* at 1058.

331 *Id.* at 1059.

332 *Id.*

333 *Id.*

334 *Id.*

335 *Id.* at 1063.

336 *Id.* at 1064.

337 *Id.*

338 *Id.* at 1061.

339 *Id.* at 1063.

340 *Id.* at 1064.

341 *Okla. Firefighters Pension & Ret. Sys. v. Six Flags Ent. Corp.*, 58 F.4th 195, 208 (5th Cir. 2023).

342 *Id.* at 205.

343 *Id.*

344 *Id.*

345 *Id.*

346 *Id.* at 207.

347 *Id.*

348 *Id.* at 208.

349 *Id.* ("Indeed, the use of what would appear to be FE1's unique and significant corporate title makes us wonder just how unknown he is to the parties.").

350 *Id.* at 208 n.9.

351 *See Institutional Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242 (3d Cir. 2009); *Cal. Pub. Empl.'s Ret. Sys. v. Chubb Corp.*, 394 F.3d 126 (3d Cir. 2004); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874 (4th Cir. 2014).

352 *Six Flags*, 58 F.4th at 210.

353 *Id.* at 211.

354 *Id.* at 220.

355 *Id.* at 218.

356 *Id.* at 219.

357 *Id.* at 218.

358 *E. Ohman J:or Fonder AB v. NVIDIA Corp*., 81 F.4th 918, 947 (9th Cir. 2023).

359 *Id.* at 924–27.

360 *See id.* at 924.

361 *Id.* at 924–25.

362 *Id.* at 926.

363 *Id.* at 926–27.

364 *Id.* at 927.

365 *Id.* at 929–30.

366 *Id.* at 930–32.

367 *Id.*

368 *Id.* at 940 (citing *Glazer Cap. Mgmt. L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 766 (9th Cir. 2023)). *See supra* pp. 8–9 for our analysis of *Glazer*.

369 *Id*. at 946 (quoting *Nursing Home Pension Fund, Loc. 144 v. Oracle Corp.*, 380 F.3d 1226, 1234 (9th Cir. 2004) (internal quotations omitted)).

370 *Id.* at 940–41.

371 *Id.* at 947.

372 *Id.*

373 *Id.* (citing *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 837 (9th Cir. 2022)). We analyzed the *Nektar* decision in our 2022 *Review*. Jones Day, *supra* note 18 at 12–14.

374 *NVIDIA*, 81 F.4th at 957–61.

375 *E. Ohman J.:or Fonder AB v. Nvidia Corp.*, No. 21-15604, 2023 WL 7984780, at *1 (9th Cir. Nov. 15, 2023).

376 *MacPhee v. MiMedx Grp., Inc.*, 73 F.4th 1220 (11th Cir. 2023), *reh'g denied,* No. 22-10633, 2023 U.S. App. LEXIS 23725 (11th Cir. Sept. 6, 2023).

377 *Id*. at 1240.

378 *Id.* at 1243 (quoting *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d at 1315 (11th Cir. 2011); *In re Williams Sec. Litig.-WCG Subclass*, 558 F.3d at 1140 (10th Cir. 2009) (emphasis in the original) (citing *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013)); *accord FindWhat Inv. Grp.*, 658 F.3rd 1282, 1311 n.28 (11 Cir. 2011).

379 *Id.* at 1230.

380 *Id.* at 1229–30.

381 *Id.* at 1237.

382 *Id.* at 1230–34.

383 *Id.* at 1240.

384 *Id.*

385 *Id.* at 1242 (quoting *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013) (citing *Lormand v. US Unwired, Inc.*, 565 F.3d at 260-61 (5th Cir. 2009)); *id.* at 1243 (quoting *FindWhat Inv. Grp.*, 658 F.3d at 1311 n.28).

386 *Id.* (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. at 342 (2005)).

387 *MiMedx Grp., Inc.*, 73 F.4th at 1245 (citing *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29 (2d Cir. 2009)).

388 *Id.* (citing *FindWhat Inv. Grp.*, 658 F.3d at 1310).

389 *Id.* at 1246 (quoting *Meyer v. Greene*, 710 F.3d 1189, 1199 (11th Cir. 2013)).

390 *Id.* (quoting *Meyer*, 710 F.3d at 1200) (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005)).

391 *Id.* at 1247 (quoting *Meyer*, 710 F.3d at 1201).

392 *Meyer*, 710 F.3d at 1202 n.13 (citing *In re Take–Two Interactive Sec. Litig.*, 551 F.Supp.2d at 287–90 (S.D.N.Y. 2008); *In re IMAX Sec. Litig.*, 587 F.Supp.2d 471. 485 (S.D.N.Y. 2008)).

393 *FindWhat Inv. Grp.*, 658 F.3d at 1315 ("When the truth underlying the falsehood is finally revealed, however, the market will digest the new information and cease attributing the artificial inflation to the price. *At that time*, investors who purchased at inflated prices (and who still hold their stock) will suffer economic loss.") (emphasis added); *Dura Pharms.*, 544 U.S. at 342 ("But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss.")

394 *MiMedx Grp., Inc.*, 73 F.4th at 1248.

395 *Id.* at 1249 ("Carpenters also urges us to adopt 'a loss causation pleading standard that considers all partial disclosures cumulatively through the end of a class period, and apply that standard to all class members equally, regardless of when they sold stock.' However, Carpenters' argument is foreclosed by the Supreme Court's decision in *Dura* and our decisions in *FindWhat* and *Meyer*.").

396 *Shash v. Biogen, Inc.*, 84 F.4th 1, 9 (1st Cir. 2023).

397 *Id*. at 7.

398 *Id*. at 11.

399 *Id*. at 9.

400 *Id*.

401 *Id*. at 9–10.

402 *Id*. at 12 (quoting *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188, (2015)).

403 *Id*.

404 *Id.*

405 *Id*. at 14 (citing *Loc. No. 8 IBEW Ret. Plan & Tr. v. Vertex Pharms., Inc.*, 838 F.3d 76, 80 (1st Cir. 2016) (quoting *In re Smith & Wesson Holding Corp. Sec. Litig.*, 669 F.3d 68, 77 (1st Cir. 2012)).

406 *Id*. at 20.

407 *Id*. at 21 (citing *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 267 n.33 (5th Cir. 2009) (In discussing loss causation, where a "disclosure was followed immediately by a stock price increase rather than a decrease," loss causation could still be adequately pleaded because "[t]he market could plausibly have had a delayed reaction" and "[t]he actual timing [of a loss] is a factual question," disputes over which are "not enough to dismiss a complaint that alleges a specific causal link.") (emphasis in the original)). The Ninth Circuit held similarly in *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1059 (9th Cir. 2008) (When the court explained that "[a] limited temporal gap between the time a misrepresentation is publicly revealed and the subsequent decline in stock value does not render a plaintiff's theory of loss causation per se implausible."); *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 754 (9th Cir. 2018) ("a stock price drop comes immediately after the revelation of fraud can help to rule out alternative causes. But that sequence is not a condition of loss causation."). The Tenth Circuit agreed in *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1154 (10th Cir. 2015) (concluding that loss causation was adequately pleaded despite a "concern about the attenuated relationship between the false statement and materialization of the risk … because the significance of intervening events[,] [if any existed,] created a fact issue that could not be resolved in a motion to dismiss under Rule 12(b)(6)"). In *Singer v. Reali*, 883 F.3d 425, 447 (4th Cir. 2018), the Fourth Circuit concluded that plaintiffs had adequately alleged loss causation where the complaint stated that the company's stock price dropped, in part because of a corrective disclosure revealed the day prior in a Form 8-K filing).

408 *Id*. at 21–22.

409 *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021).

410 *Id.* at 1961.

411 *Id.*

412 *Id.*

413 *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 11 F.4th 138, 143 (2d Cir. 2021).

414 *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 579 F. Supp. 3d 520, 538-39 (S.D.N.Y. 2021), *rev'd and remanded sub nom. Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc*., 77 F.4th 74 (2d Cir. 2023).

415 *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 81 (2d Cir. 2023) (citing *Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. at 1961 (2021)).

416 *Ark. Tchr. Ret. Sys.,* 77 F.4th at 99.

417 *Id.* at 90 (citing *Goldman Sachs Grp., Inc.*, 141 S. Ct. at 1961 (2021)).

418 *Id.* at 93 (quoting *In re Allstate Corp. Sec. Litig*., 966 F.3d at 613 (7th Cir. 2020)).

419 *Id.* at 100 (quoting *In re Goldman Sachs Grp.,* 579 F. Supp. 3d at 536 (S.D.N.Y. 2021) (citing *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d at 259 (2d Cir. 2016)).

420 *Id.* at 96–105.

421 *Id.* at 97.

422 *Id.* at 101–102.

423 *Id.* at 102.

424 *Id.*

425 *Id.* at 102–05 (citing *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017)).

426 *Id.* at 105.

427 *In re McDonald's Corp. S'holder Derivative Litig.*, 289 A.3d 343 (Del. Ch. 2023). The Chancery Court dismissed similar derivative claims alleging breach of fiduciary duties, breach of duty of oversight, and waste in connection with the board's handling of alleged sexual harassment by the company's former CEO and Fairhurst against nine directors for failure to state a claim. *In re McDonald's Corporation Stockholder Derivative Litig.*, 291 A.3d 652 (Del. Ch. 2023).

428 *In re McDonald's*, 289 A.3d at 349 (Del. Ch. 2023).

429 *Id*.

430 *Id*.

431 *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

432 *Caremark*, 698 A.2d at 970.

433 *Id.*

434 *In re McDonald's,* 289 A.3d at 362.

435 *Gantler v. Stephens,* 965 A.2d 695, 709 (Del. 2009).

436 *In re McDonald's*, 289 A.3d at 362.

437 *Id* at 350.

438 For example, "the Chief Financial Officer is responsible for financial oversight …. [t]he Chief Legal Officer is responsible for legal oversight …. [t]he executive officer in charge of sales and marketing is not responsible for the financial or legal reporting systems." *Id.* at 369–70.

439 *Id.* at 370.

440 *Id.*

441 *Id.*

442 *Id.* at 375.

443 *Id.* at 350.

444 *Id.* at 358, 371 (citing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d at 67 (Del. 2006); *Marchand v. Barnhill*, 212 A.3d at 824 (Del. 2019)).

445 *Id.* at 370.

446 *Id.* at 380–81 (quoting *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369 (Del. 2006)).

447 *Id.* at 382.

448 *In re Jan. 2021 Short Squeeze Trading Litig,* 76 F.4th 1335, 1342 (11th Cir. 2023).

449 *Id.*

450 *Id.* at 1347–48.

451 *Id.* at 1355.

452 *Id.*

453 *Id.* at 1343.

454 *Id.*

455 *Id.*

456 *Id.* at 1344.

457 *Id.*

458 *Id* at 1342.

459 *Id* at 1344.

460 *Id.* at 1345.

461 *Id.*

462 *Id.*

463 *Id.*

464 *Id.* at 1346–47.

465 *Id* at 1347–48.

466 *Id.* at 1348–54.

467 *Id.* at 1350.

468 *Id.* at 1352.

469 *Id.* (quoting *Sheen v. Wells Fargo Bank, N.A.*, 12 Cal. 5th at 922 (2022), reh'g denied (June 1, 2022)) (citing *S. California Gas Leak Cases,* 7 Cal. 5th 391, 400 (2019); *Aas v. Superior Ct.*, 24 Cal. 4th 627, 636 (2000), *Seely v. White Motor Co.* 63 Cal. 2d 9, 18 (1965)).

470 *EpicentRx, Inc. v. Superior Ct.*, 95 Cal. App. 5th 890 (2023), *as modified on denial of reh'g* (Oct. 10, 2023).

471 *Id*. at 904 (quoting *Preston Hollow Cap. LLC v. Nuveen LLC*, 216 A.3d 1, 11 n.64 (Del. Ch. 2019)).

472 *Id*. at 896. As provided in EpicentRx's Certificate of Incorporation: "Unless [EpicentRx] consents in writing to the selection of an alternative forum, the Court of Chancery in the State of Delaware shall be the sole and exclusive forum for any stockholder (including beneficial owner) to bring (i) any derivative action or proceeding brought on behalf of [EpicentRx], (ii) any action asserting a claim of breach of fiduciary duty owed by any director, officer or other employee asserting a claim against [the company, its directors, officers or employees arising pursuant to any provision of the (Delaware General Corporation Law)] … certificate of incorporation or bylaws or (iv) any action asserting a claim … governed by the internal affairs doctrine …." *Id*. at 896, n.2.

473 *Id.* at 906. In last year's *Review*, we addressed the California Court of Appeal's decision upholding a Delaware corporation's federal forum-selection clause requiring Securities Act claims to be brought in federal court. *See* Jones Day, *supra* note 18 at 26–28 (analyzing *Wong v. Restoration Robotics, Inc.*, 78 Cal. App. 5th 48 (2022)). In addition, we analyzed a decision by the Seventh Circuit holding that a forum-selection clause requiring any derivative action to be brought in Delaware Chancery Court is unenforceable under both Delaware law and federal securities law because it would have forced the plaintiff to assert its claim under Section 14 of the Exchange Act in Delaware state court, which is not authorized to exercise jurisdiction over federal Exchange Act claims and thus would "impermissibly 'close all courthouse doors to this derivative action.'" *Id.* at 28 (quoting *Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, 23 F.4th 714, 720 (7th Cir. 2022)). The Ninth Circuit later reached the opposite conclusion on the same question in *Lee v. Fisher*, 70 F.4th 1129, 1156–57 (9th Cir. 2023).

474 *EpicentRx*, 95 Cal. App. 5th at 906 (citing *Salzberg v. Sciabacucchi*, 227 A.3d 102, 120 (Del. 2020) (Delaware courts have an "interest and expertise in corporate law")). The Superior Court of the State of Delaware has statewide jurisdiction over civil matters, except equity cases over which the Court of Chancery has exclusive jurisdiction. Jury trials are available in the Superior Court. *See* Delaware Courts Judicial Branch, *Legal Jurisdiction* (October 19, 2023).

475 *Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023).

476 *Id.*

477 *Lee*, 70 F.4th at 1156–59; *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022).

478 The Ninth Circuit denied the plaintiff's request for rehearing en banc, and no petition for certiorari had been filed as of the date of this publication. Order Den. Reh'g En Banc Before the Full Court, *Lee v. Fisher*, No. 21-15923 (9th Cir. Aug. 1, 2023), Dkt. No. 103.

479 *Lee*, 70 F.4th at 1137.

480 *Id.* at 1136–37.

481 *Id.* at 1138.

482 *Id.* at 1135.

483 Jones Day, *supra* note 18 at 29–30.

484 Order Granting Reh'g En Banc and Vacating Three Judge Panel Decision, *Lee v. Fisher*, No. 21-15923 (9th Cir. Oct. 24, 2022), Dkt. No. 55.

485 *Lee*, 70 F.4th at 1139. Section 29(a) provides that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, … shall be void." 15 U.S.C. § 78cc(a).

486 *Lee*, 70 F.4th at 1139.

487 *Id.*

488 *Id.* at 1144 (citing *J.I. Case Co. v. Borak* 377 U.S. 426, 428 (1964)).

489 *Id.* at 1144.

490 *Id.* at 1146 ("Therefore, *Borak*'s statement that a shareholder could bring a derivative § 14(a) action, which was not necessary to decide that case, and not addressed in subsequent Supreme Court cases, does not establish a strong public policy in favor of such actions."); *id.* at 1146–47 ("[B]ecause a direct § 14(a) action will satisfy the policy goal identified in *Borak*—to ensure that private parties can supplement SEC enforcement actions—the application of Delaware's rule is entirely consistent with the federal policy underlying the implied § 14(a) cause of action."). The majority also noted that since *Borak*, the Supreme Court has expressed disapproval of implied rights of action created by the Court and cast doubt on the standing of a corporation to bring a Section 14(a) action. *Id.* at 1147–49.

491 *Id.* at 1154–56.; 8 Del. C. § 115.

492 *Lee*, 70 F.4th at 1155; S.B. 75, 148th Gen. Assembly, Regular Session (Del. 2015) (synopsis).

493 *Id.*

494 *Id.* at 1156. The forum-selection bylaw approved by the Gap was based on language authorizing such bylaws in Section 109 of the Delaware General Corporation Law.

495 *Id.* at 1158; *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

496 *Lee*, 70 F.4th at 1158.

497 *Id.* at 1159.

498 *Compare id.* at 1159–67, *with Seafarers (Boeing)*, 23 F.4th 714.

499 *Id.* at 1163.

500 *Id.* at 1161 ("[D]irect and derivative stockholder actions are distinct, with different purposes and different remedies …. Direct and derivative suits are not interchangeable[.]").

501 *Id.* at 1162–63.

502 28 U.S.C. §§ 1332(d)(9)(C), 1453(d)(3).

503 *Id*. at §§ 1332(d)(4)(A)-(C), 1332(d)(9).

504 *Krasner v. Cedar Realty Tr., Inc.*, 86 F.4th 522 (2d Cir. 2023).

505 *Id*. at 527 (citing *Est. of Pew v. Cardarelli*, 527 F.3d 25 (2d Cir. 2008), *Greenwich Fin. Servs. Distressed Mortg. Fund 3 LLC v. Countrywide Fin. Corp.* 603 F.3d 23 (2d Cir. 2010), *BlackRock Fin. Mgmt. Inc. v. Segregated Account of Ambac Assurance Corp.*, 673 F.3d 169 (2d Cir. 2012).

506 *See Dominion Energy Inc. v. City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325 (4th Cir. 2019) (analyzing and applying reasoning of Second Circuit's *Cardarelli* trilogy).

507 86 F. 4th at 31–32.

508 *Id*. at 529 (citing *Maracich v. Spears*, 570 U.S. 48, 59 (2013)).

509 *Id*. at 530.

510 *Id*.

511 *Id*. (citing *Cardarelli*, 527 F.3d at 32).

512 *Id.* at 531 (citing *Greenwich*, 603 F.3dat 29).

513 *Habelt v. iRhythm Techs, Inc.,* 83 F.4th 1162 (9th Cir. 2023).

514 *Id*. at 1164 (citing *Devlin v. Scardelletti*, 536 U.S. 1, 15 (2002)).

515 *Id.* at 1165 (quoting *In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001), *as amended* (Oct. 3, 2001)).

516 *Id*. at 1166 (citing *Hoffman v. Halden*, 268 F.2d 280, 304 (9th Cir. 1959), *overruled in part on other grounds* by *Cohen v. Norris*, 300 F.2d 24 (9th Cir. 1962)).

517 *Id.* (citing *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011)); *see also Emps.-Teamsters Loc. Nos. 175 & 505 Pension Tr. Fund v. Anchor Cap. Advisors*, 498 F.3d 920, 923 (9th Cir. 2007) ("[B]ecause the class was never certified, Appellants were not parties to the district court action and lack standing to bring this appeal.").

518 *iRhythm*, 83 F.4th at 1166 (quoting *United States ex rel. Alexander Volkhoff, LLC v. Janssen Pharmaceutica N.V.*, 945 F.3d 1237, 1241 (9th Cir. 2020)).

519 *Id*. at 1168 (citing 15 U.S.C. § 78u-4(a)(3)).

520 *Id*. at 1169.

521 *Hogan v. Pilgrim's Pride Corp.*, 73 F.4th 1150, 1152–53 (10th Cir. 2023).

522 *Id.* at 1153–55.

523 *Id.* at 1155 (citing 18 U.S.C. § 1658(b)(2)).

524 *Id.* at 1156–62.

525 *Id.* at 1159.

526 *Id.* at 1161–62 (citing *Jung v. K. & D. Min. Co.*, 356 U.S. 335, 337 (1958); Fed. R. Civ. P. 41(b)).

527 *Id.* at 1154.

528 *Id.* (quoting *Hogan v. Pilgrim's Pride Corp.*, No. 16-CV-02611-RBJ, 2018 WL 1316979, at *9 (D. Colo. Mar. 14, 2018)).

529 *Id.*

530 *Id.* at 1155.

531 *Id.*

532 *Id.* at 1157.

533 *Id.* (citing 28 U.S.C. § 1658(b)(2)) (emphasis added).

534 *Id.* at 1155.

535 *Id.* at 1158 (quoting Fed. R. Civ. P. 15(c)(1)(B)).

536 *Id.*

537 *Id.* at 1159–60.

538 *York Cnty. ex rel. Cnty. of York Ret. Fund v. HP, Inc.*, 65 F.4th 459 (9th Cir. 2023).

539 *Id*.

540 *Id*. at 468.

541 *Id*. at 465–66 (citing *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 638 (2010)).

542 The panel rejected HP's argument that the SEC's decision not to charge a defendant with fraud does not hurt a plaintiff's "ability to plead a strong inference of scienter." *Id*. at 468 (citing *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 707 n.5 (9th Cir. 2012)).

543 *Id*. at 462–63.

544 *Id*. at 462.

545 *Id*.

546 *Id*.

547 *Id*. at 462–63.

548 *Id*. at 463.

549 *Id*. at 464.

550 *Id*. at 465.

551 *Id*. at 466 (citing *City of Pontiac Gen. Emp. Retirement System v. MBIA, Inc.,* 637 F.3d 169, 174 (2d Cir. 2011)).

552 *Id*. at 467.

553 *Id*.

554 *Id*.

555 *Id*.

556 *Kirschner v. JP Morgan Chase Bank, N.A.,* 79 F.4th 290, 303 (2d Cir. 2023) (citing *Reves v. Ernst & Young,* 494 U.S. 56 (1990)).

557 *Reves*, 494 U.S. at 61.

558 *Id.* at 63.

559 *Id.* at 65.

560 *Kirschner*, 79 F.4th at 307 (noting that the second *Reves* factor is the plan of distribution while the third *Reves* factor is the reasonable expectations of the public).

561 Pet. for Writ of Cert. at 4, *Kirschner v. JP Morgan Chase Bank, N.A.* (U.S. Dec. 19, 2023) (case number pending).

562 *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023).

563 *Id.* at 764–65.

564 *Id.* at 765.

565 *Id.;* Jones Day, *supra* note 18 at 30–31.

566 *Pirani v. Slack Techs., Inc.*, 13 F.4th 940, 947 (9th Cir. 2021).

567 *Id*. at 950–54.

568 *Slack Techs.,* 598 U.S. at 765 (2023) (citing *Pirani v. Slack Techs., Inc.*, 445 F. Supp. 3d at 380–81 (N.D. Cal. 2020), *Pirani v. Slack Techs., Inc.*, 13 F.4th at 945–52 (9th Cir. 2021)).

569 *Id.* at 762, 766.

570 *Id.* at 770.

571 15 U.S.C. § 77k (emphasis added); *Slack Techs.*, 598 U.S. at 767.

572 *Slack Techs.*, 598 U.S. at 770.

573 *Id.* (citing 15 U.S.C. § 77k(e)).

574 *Slack Techs.*, 598 U.S. at 768.

575 *Id.* at 769–70.

576 *Id*. at 770.

577 *Scott v. Vantage Corp.*, 64 F.4th 462, 466 (3d Cir. 2023); Fed. R. Civ. P. 11.

578 *Scott*, 64 F.4th at 467.

579 *Id.*

580 *Id*. at 467 (citing 15 U.S.C. 78u-4(c)(2)).

581 *Id*. at 467.

582 *Id.* at 472–73.

583 *Id.* at 477.

584 *Id.* at 477 (quoting *Morris v. Wachovia Securities, Inc.*, 448 F.3d 268, 285 (4th Cir. 2006)).

585 *Id.* at 475.

586 *Id.* at 468.

587 *Id.* at 468.

588 *Id.* at 469.

589 *Id.* at 470.

590 *Id.* at 470.

591 *Id.* at 468, 470–71, 473.

592 *Id.* at 471.

593 *Id*. at 475 (citing *Gurary v. Nu-Tech Bio-Med. Inc.*, 303 F.3d 212 (2d Cir. 2002)).

594 *Id.* at 475–76.

595 *Id*. at 476.

596 *Id*. at 476.

597 *Id*. at 475.

598 *Morris v. Wachovia Securities, Inc.*, 448 F.3d 268, 278–79 (4th Cir. 2006).

599 *Scott*, 64 F.4th at 475.

600 *Id.* at 475.

601 *Id.* at 475.

602 *Id.* at 476–77.

603 *Camelot Event Driven Fund v. Morgan Stanley & Co. LLC*, 221 A.D. 3d 403, 403–04 (2023).

604 *Id.* at 404.

605 *Komatsu Mining Corp. v. Columbia Cas. Co.*, 58 F.4th 305 (7th Cir. 2023).

606 *Id.* at 308.

607 *Id*.

608 *Id.* at 307.

609 *Id*. at 309.

610 *Id.* at 306.

611 *Id.* at 306–07.

612 *Id.*

613 *Id.* at 305.

614 *Id.* at 307.

615 *Id.* at 308.

616 *Id.* at 307.

617 *Id.*

618 *Id.*

619 *Id.*

620 *Id.* (citing *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977)).

621 *Id.* (quoting *Santa Fe Industries*, 430 U.S. 462). The court acknowledged that the Second Circuit allows *Santa Fe Industries* to be skirted by pleading that Section 14 requires a company to disclose facts that could facilitate litigation about the price of a transaction in state court but observed that the Seventh Circuit "has deprecated that approach and said that arguments about price belong entirely under state law." *Id*. (citing *Goldberg v. Meridor*, 567 F.2d 209, 217–21 (2d Cir. 1977); *Harris Tr. & Sav. Bank v. Ellis*, 810 F.2d at 704 (7th Cir. 1987), *O'Brien v. Cont'l Illinois Nat. Bank & Tr. Co. of Chicago*, 593 F.2d 54 (7th Cir. 1979)).

622 *Id.*

623 *Id.* at 308.

624 *Id.*

625 *Id.*

626 *Id.* at 308–09; *Northrop Grumman Innovation Sys., Inc. v. Zurich Am. Ins. Co.*, No. N18C-09-210, 2021 WL 347015 (Del. Sup. Ct. Feb. 2, 2021). The state law claims in the case were based on Wisconsin law, where the litigation was commenced.

627 Kevin LaCroix, *A New COVID-Related Securities Suit for the New Year*, The D&O Diary (January 14, 2024).

628 *Ladewig v. BioNTech SE*, No. 2:24-cv-00337 (C.D. Cal. Jan. 12, 2024).

629 Order Den. Mot. to Dismiss, *White v. Kroger Co.*, No. 21-cv-08004-RS (N.D. Cal. Mar. 25, 2022), Dkt. No. 50.

630 *Smith v. Kuerig Green Mountain, Inc.*, No. 18-cv-06690-HSG (N.D. Cal. Feb. 27, 2023).

631 Press Release, U.S. Sec. & Exch. Comm'n, *Brazilian Mining Company to Pay $55.9 Million to Settle Charges Related to Misleading Disclosures Prior to Deadly Dam Collapse* (Mar. 28, 2024).

632 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors* (Mar. 21, 2022).

633 CA S.B. 253, Reg Sess. 23-24 (Oct. 7, 2023); CA S.B. 257, Reg Sess. 23-24 (Oct. 7, 2023).

634 European Comm'n, *The Commission Adopts the European Sustainability Reporting Standards* (July 31, 2023).

635 Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure, 88 Fed. Reg. 51896 (Aug. 4, 2023) (codified at 17 C.F.R. §§ 229, 232, 239–40, 249).

636 Stanford Securities Class Action Clearinghouse, *supra* note 76.

637 Hailey Konnath, *SEC Chair Warns Businesses Against AI Washing: 'Don't Do It'*, Law360, (Dec. 5, 2023); Gary Gensler, Chairman, U.S. Sec. & Exch. Comm'n, *Remarks before the Financial Stability Oversight Council: 2023 Annual Report* (Dec. 14, 2023).

638 R*emarks before the Financial Stability Oversight Council*, *supra* note 623.

639 Sarah Jarvis & Hailey Konnath, *Gensler Warns AI 'Monoculture' May Weaken Financial System*, Law360, (Jan. 17, 2024).

640 *Riviera Beach Gen. Emp. Ret. Sys. V. Macquarie Infrastructure Corp,* No. 21-2524, 2022 WL 17815767 (2d Cir. Dec. 20, 2022), *cert. granted sub nom. Macquarie Infrastructure v. Moab Partners, L.P.*, 216 L.Ed.2d 1312 (Sept. 29, 2023).

641 17 C.F.R. 229.303(a)(3)(ii)(2018). In 2020, after the time period at issue in this case, the SEC amended Item 303 to require issuers "to disclose" any known trends or uncertainties that have had or that are reasonably like to have a material or unfavorable impact on net sales or revenues or income from continuing operations.

642 *Riviera Beach Gen. Emp. Ret. Sys. V. Macquarie Infrastructure Corp,* No. 21-2524, 2022 WL 17815767 (2d Cir. Dec. 20, 2022), *cert. granted sub nom. Macquarie Infrastructure v. Moab Partners, L.P.*, 216 L.Ed.2d 1312 (Sept. 29, 2023). The Fifth and Eleventh Circuits have also declined to find that violations of Item 303 may support a suit under Section 10(b) and Rule 10b-5.

643 Pet. for Writ of Cert., *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165, 2023 WL 3778765 (May 30, 2023).

644 Brief in Opp. to Pet. for Writ of Cert., *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165, 2023 WL 5280342 at*2 (Aug. 11, 2023).

645 *Leidos, Inc. v. Ind. Pub. Ret. Sys.*, 138 S. Ct. 2670 (2018).

646 Brief for the Securities Industry and Financial Markets Association ("SIFMA") and the Chamber of Commerce of the United States. as Amici Curiae in Supp. of Pets., *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165, 2023 WL 4400782 (July 3, 2023).

647 Brief for the United States as Amicus Curiae in Supp. of Resp. on Writ of Cert. *Macquarie Infrastructure v. Moab Partners, L.P.*, No. 22-1165, 2023 WL 8869701, at *34 (Dec. 20, 2023).

648 *See* our previous discussion of *Lee v. Fisher*, 34 F.4th 777 (9th Cir. 2022), in last year's *Review*. Jones Day, *supra* note 18 at 29–30.

649 We analyzed the *Seafarers Pension Plan ex rel. Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022) decision in our 2022 *Review*. Jones Day, *supra* note 18 at 28–29.

650 *Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023).

651 *See* our previous discussion of *Goldman Sachs Grp. Inc. v. Ark. Tchr. Ret. Sys.*, 141 S. Ct. 1951 (2021) at Jones Day, *supra* note 20 at 1, 22–23, 40.

652 *See supra* pp. 30–31; *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74 (2d Cir. 2023). *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474 (2d Cir. 2018), reversed and remanded Defendants' interlocutory appeal. *Ark. Tchsr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020), affirmed and remanded Defendants' second interlocutory appeal. Certiorari was granted. *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020) was vacated and remanded in the SCOTUS decision, *Goldman Sachs Grp. Inc. v. Ark. Tchrs. Ret. Sys.*, 141 S. Ct. 1951 (2021). The Second Circuit vacated and remanded the SCOTUS decision. *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 11 F.4th 138 (2d Cir. 2021). The Defendants' filed a third interlocutory appeal. *In re Goldman Sachs Grp., Inc. Sec. Litig.,* 579 F. Supp. 3d 520 (S.D.N.Y. 2021). This class certification was reversed and remanded in a third interlocutory appeal filed by Defendants. *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74 (2d Cir. 2023).

653 *In re Alphabet, Inc. Sec. Litig.,* No. 18-CV-06245-JSW, 2023 WL 2277074 (N.D. Cal. Feb. 28, 2023).

654 *In re FirstEnergy Corp. Sec. Litig.*, No. 2:20-CV-3785-ALM-KAJ, 2023 WL 8105369 (S.D. Ohio Aug. 9, 2023); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972).

655 Def. FirstEnergy Corp.'s and Certain Individual Defs.' Pet. for Permission to Appeal Pursuant to Fed. R. Civ. Proc. 23(f) at 4, *In re First Energy Corp. Sec. Litig.*, No. 23-0303 (April 14, 2023), Dkt. No. 1-2 (citing *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988)).

656 *Id.* at 2–5 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)).

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