



2025 SECURITIES LITIGATION YEAR IN REVIEW

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2025 Securities Litigation Year in Review

Our *2025 Securities Litigation Year in Review* focuses on trends in private securities litigation and significant decisions from the U.S. Supreme Court and the federal appellate courts.

During 2025, securities lawsuit filings declined by 11% from 2024, and the 207 new filings were the lowest in a decade, other than the 204 filings in 2022. Settlements and aggregate recoveries also declined last year; there were seven mega-settlements of more than \$100 million, including one derivative suit settlement. AI and crypto-related case filings increased in 2025 and comprised 15% of all filings, while COVID-19 and SPAC-related filings decreased. Filings related to cybersecurity and customer privacy breach-related issues held steady. Last year included the first securities suit filings with U.S. tariff-related claims.

We discuss the Supreme Court's expected decision in *F.S. Credit Opportunities v. Saba Master Fund Ltd.*, argued last year, in which the Court will determine whether there is a private right of action to void contracts under the Investment Company Act of 1940. We look ahead to another case to be heard by the Court this year, *SEC v. Sripetch*, in which the Court is asked to resolve a circuit split as to who qualifies as a victim of securities fraud and whether the SEC must prove harm to seek equitable disgorgement. We analyze 25 decisions from the federal appellate courts addressing the pleading requirements for securities fraud cases and highlight significant decisions relating to Delaware forum selection clauses, insider trading, short-swing trading, and D&O insurance coverage.

INTRODUCTION

Securities class action case filings declined in 2025, with 207 new filings, an 11% decline from the 232 cases filed in 2024.¹ The number of filings in 2025 was the second lowest in recent years, and well below the 423 cases filed in 2018, the recent peak year for federal securities-suit filings.²

These numbers were impacted by the continuing decline in class action merger objection lawsuit filings and in cases with Section 11 and/or Section 12 claims without an accompanying Rule 10b-5 claim. In 2025, only seven federal merger objection lawsuits were filed, the same as in 2024. Plaintiffs continue to bring merger objection lawsuits but increasingly file them as individual actions rather than as class actions. Suits alleging only Section 11 and/or Section 12 claims continued to decline last year to 15 filings, the lowest level in the past decade and mirroring the slow-down in IPO activity in recent years.³

As has been the case for the last several years, suits alleging only Rule 10b-5 claims were the majority of all new cases filed in 2025, with 176 filings, a decrease from 198 in 2024.⁴ Suits against companies in the technology, technology services, and health care technology and services sectors were the majority of all new cases filed in 2025, comprising 57% of filings, roughly the same as the 56% in 2024.⁵ The number of suits in the finance sector decreased for the second straight year to 9% in 2025 from 11% in 2024.⁶ As companies increasingly discuss artificial intelligence (“AI”) in their SEC filings, earnings calls, and public disclosures, there were 17 filings related to AI in 2025, compared with 16 filings in 2024.⁷ As we discuss in our “2026 Outlook” (below), given the rapid developments in the AI sector, the more frequent release of new AI models and technologies, and increasing public awareness of problems with or limitations of AI models, we expect the number of AI-related suits to increase in 2026.

Securities lawsuits related to cryptocurrency continued to increase in 2025, with 14 crypto-related filings, representing 7% of all federal securities filings and nearly double the number of such filings in 2024.⁸ In contrast, filings related to special purpose acquisition companies (“SPACs”) declined for the fourth consecutive year, with only five filings in 2025.⁹ Similarly, securities suit filings with COVID-related claims declined, with just three filings in 2025 and only one suit filed in the second half

of the year.¹⁰ We analyze noteworthy developments in each of those sectors in more detail below.

The number of settlements of securities cases declined in 2025, with 79 announced class action settlements compared with 94 in 2024.¹¹ In 2025, aggregate settlements totaled \$2.9 billion, a substantial drop from the \$3.9 billion in 2024, and the third straight year of declines in aggregate settlements.¹² The median settlement value for 2025 was \$17 million, slightly up from median settlement values in 2023 and 2024.¹³ Notably, the trend of derivative suit settlements with substantial cash components continued in 2025 with the announced settlement of a derivative case against Wells Fargo (\$100 million) that was notable for the fact that the plaintiffs’ attorneys’ fees in that case of approximately \$33 million are to be paid in Wells Fargo stock.¹⁴ The settlement stands as one of the largest derivative suit settlements in recent years.

For the second year in a row, there were no settlements of \$1 billion or higher. The average settlement value was \$40 million.¹⁵ Settlements in securities class actions included three of at least \$100 million—compared with eight such mega-settlements in 2024—topped by the \$433 million settlement in the *Alibaba* case.¹⁶ The Second Circuit accounted for five of the 10 largest settlements last year. All of the cases on the 2025 top 10 list settled after years of litigation, and one, the *Alta Mesa Resources* SPAC-related case, settled three weeks into a federal jury trial.¹⁷ We discuss that settlement below.

Artificial intelligence continued to be a major news topic in 2025, with a growing number of companies incorporating AI into their operations and addressing those changes in their SEC filings, earnings calls, and public disclosures. The fact that securities suits involving AI continued to be filed at high rate in 2025, representing 8% of all filings and slightly exceeding the 16 suits filed in 2024, is therefore not surprising.¹⁸

The types of allegations in AI-related securities cases continued to evolve. Many of the AI-related cases filed in 2025 alleged so-called “AI-washing,” asserting that companies made materially false and misleading statements about their prospects or opportunities related to AI. For example, in a suit filed against an AI-based health care company, the plaintiffs alleged that the company’s actual AI capabilities were overstated and resulted in a corresponding overstatement of

the company's business and revenue prospects.¹⁹ Another example of an AI-washing securities suit involved AppLovin Corporation, which provided a software platform allowing advertisers to enhance marketing and monetize their content.²⁰ The complaint alleged that the company misled investors by attributing its growth to its incorporation of AI technology, while plaintiffs contended that the company forced unwanted applications on customers by a backdoor installation scheme that falsely inflated installation numbers and profits.

A different category of AI-securities suits involved allegations that companies understated their AI risks. For example, a suit filed in 2025 against social media website Reddit alleged that the company misled investors by downplaying the impact on the company's site traffic and ad revenue after its search provider adopted AI-search results.²¹ Another example of an AI-risk related lawsuit was a derivative suit against executives of a digital ad tracking firm, which alleged that the defendants failed to disclose that the company's ad tracking technology could not distinguish human traffic from bad actors' AI-generated traffic, which undercut revenues.²²

Issues related to AI risks and company disclosures also remained a focus for the SEC. In 2025, the SEC announced that the Office of the Chief Accountant is assessing how to responsibly integrate AI into financial reporting, which SEC staff indicated would affect auditors and management alike.²³ Also in 2025, senior officials from the SEC's Enforcement Division and newly constituted Cyber and Emerging Technologies Unit reiterated that "rooting out" fraud schemes related to AI-washing remains an enforcement priority.²⁴

Speaking at a public forum, an SEC enforcement official emphasized that the SEC staff is scrutinizing how both public companies and startups describe their AI capabilities to customers and investors and is evaluating, among other things, whether an issuer is accurately describing genuine machine-learning functionality or is simply repackaging rule-based automation under an AI label, and whether it is being communicated responsibly.²⁵ The SEC official pointed to settlements of a pair of enforcement actions against investment advisors Delphia Inc. and Global Predictions Inc. that involved alleged fraud and misleading statements about their purported use of AI or the capabilities of their respective AI models in their investment processes, SEC filings, press releases, and on their

websites as representative of the types of cases the new unit may be interested in pursuing.²⁶

Last year, the SEC brought an enforcement action against the founder of shopping application Nate Inc., who was also indicted on allegations that he falsely claimed the shopping app was powered by advanced AI technology when it was not.²⁷ The SEC also charged a restaurant technology company for making materially false and misleading statements about critical aspects of its flagship AI product designed to automate aspects of drive-through order taking at fast food restaurants.²⁸ As we discuss in our "2026 Outlook" below, a number of legislative developments will potentially impact AI-related liability as well.

2025 brought substantial media coverage of the current administration's tariff policies that have affected global trade, disrupted supply chains, and impacted the operations and financial results of companies. Shareholders filed several civil securities suits arising from the tariffs, alleging either that defendants misrepresented their compliance with the tariffs or misrepresented the anticipated impact of the tariffs on company operations and financial results.

In August 2025, a shareholder filed a securities class action suit against a major chemical manufacturer, alleging that the company's prior statements that it was well positioned to weather macroeconomic and tariff-related headwinds while maintaining sufficient levels of financial flexibility to support its dividend were false and misleading in light of subsequent disappointing results, which the company blamed on "the lower-for-longer earnings environment that our industry is facing, amplified by recent trade and tariff uncertainties."²⁹ Company executives were separately sued in a shareholder derivative action based on the same allegations.³⁰

A number of other companies faced tariff-related securities suits in 2025. For example, a suit against used-car retailer CarMax alleged that it misled investors by portraying a quarterly sales surge that preceded the tariffs' impact as being due to longer-term company advantages rather than tariff-related consumer behavior.³¹ While it remains to be seen how the Supreme Court will rule in a case currently pending before it in which the plaintiffs alleged that many of the tariffs are unconstitutional, the administration has stated that in the event

of an adverse decision, there are still alternative grounds to impose tariffs.³²

Last year brought a change in the SEC's policy approach in several areas in addition to crypto assets and AI. In March 2023, the SEC adopted comprehensive climate change disclosure guidelines. As we reported in prior *Reviews*, the guidelines were controversial and were immediately challenged in court before they could take effect, with the case currently pending on appeal in the Eighth Circuit.³³ In March 2025, the SEC voted to end the agency's defense of the climate change disclosure guidelines.³⁴ The SEC's decision underscores the change in its regulatory priorities, and the prospect of further climate disclosure rulemaking or enforcement activity appears unlikely.

The SEC also signaled a major policy shift with respect to cybersecurity disclosure. Under prior Chair Gensler, the SEC had taken an active enforcement approach relating to cybersecurity disclosure and data breaches. In 2023 and 2024, the SEC announced enforcement actions against several technology companies for making materially misleading disclosures regarding cybersecurity risks and intrusions, including an action against SolarWinds, which was particularly notable because it named the company's former Chief Information Security Officer as a defendant.³⁵ The enforcement action alarmed in-house gatekeepers because it charged the former Chief Information Security Officer with securities fraud based partly on his responsibility for the technical content and accuracy of the company's cybersecurity risk disclosures, which the SEC contended conflicted with internal risk assessments. Commissioners Peirce and Uyeda issued dissenting statements regarding the cybersecurity enforcement actions against SolarWinds customers initiated under the prior administration that previewed the agency's narrower approach to cybersecurity disclosures and incidents under Chair Atkins.

On November 20, 2025, the SEC announced that it was dismissing the SolarWinds action with prejudice.³⁶ The dismissal followed a 2024 ruling by a federal judge who dismissed most of the SolarWinds claim, including the novel application of the internal controls statute to police financial cybersecurity controls. The dismissal was also consistent with statements by Commissioners Peirce and Uyeda dissenting from the decision to bring the SolarWinds charges, to the effect that a company that has been the subject of a cyberattack should be treated as a victim, not a perpetrator.³⁷

It remains to be seen the approach that the SEC's Cyber and Emerging Technologies Unit will take with respect to cybersecurity enforcement. It also remains to be seen whether the SEC under Chair Atkins will withdraw or simply choose not to enforce the cybersecurity disclosure guidelines that were adopted under the prior administration, and which drew opposition from two Commissioners.³⁸ In March 2025, then acting SEC Chair Uyeda called publicly for the withdrawal of the cybersecurity disclosure guidelines, and banking industry groups have also called on the SEC to rescind them.³⁹ Notably, the SEC's Division of Examinations highlighted cybersecurity resilience in its announced 2026 exam priorities for financial services firms.⁴⁰

Civil securities suits related to cybersecurity have continued to fall since 2021, when seven cybersecurity securities suits were filed, with only three suits filed in 2025, up slightly from the two filings in both 2023 and 2024.⁴¹ Two of the cybersecurity-related suits arose from alleged breaches of cybersecurity infrastructure that went undetected and whether the companies' disclosures about security protocols prior to the breaches and the timing and content of their disclosures after the breaches were materially false or misleading or omitted key facts.⁴² In one of the filings, the plaintiffs specifically alleged that the defendant company failed to comply with the SEC's cybersecurity guidelines discussed above.⁴³

Another notable development in 2025 was a change in the SEC's longstanding policy on mandatory arbitration bylaws that would cover securities claims. For years, the SEC delayed the IPOs of companies with mandatory arbitration bylaws by refusing to accelerate their registration statements until the arbitration provisions were removed. In a Policy Statement issued in September 2025, the SEC announced a change in the policy, stating that the presence of a mandatory arbitration bylaw will not impact decisions by the SEC whether to accelerate the effectiveness of a registration statement containing such a provision.⁴⁴ Instead, the SEC staff will now focus on "the adequacy of the registration statement's disclosures regarding issuer-investor arbitration provisions."⁴⁵ While the Policy Statement expressly disclaims any endorsement of mandatory arbitration provisions, Chair Atkins has been quoted as stating that the prior policy "effectively strangled" IPO companies.⁴⁶

It remains to be seen whether and how prospective IPO companies will seek to take advantage of the change in SEC

policy. Among other things, the law of the jurisdiction where a company is incorporated may address whether mandatory arbitration provisions are permitted. As of last year, for example, Delaware required its corporations to guarantee shareholder access to at least one Delaware court for resolution of intra-company disputes.⁴⁷ Whether the Federal Arbitration Act preempts such a state-law requirement is an issue that may need to be addressed.

It is also unclear how institutional investors and pension funds will view the new policy; numerous public pension funds and some large institutional investors opposed the SEC's policy change. The Policy Statement convincingly argues that mandatory arbitration clauses for federal securities actions are not implicated by the anti-waiver provisions of the federal securities laws. In December of last year, Zion Oil & Gas became the first company to adopt a mandatory arbitration provision following the SEC's policy shift. However, the amendment in that case was enacted solely by board approval under a Texas law that did not require a shareholder vote and the company was already public, not a prospective IPO company.⁴⁸

There was continued activity related to forum-selection provisions adopted by Delaware companies in their governance documents. On July 21, 2025, the Supreme Court of California issued a much-anticipated decision upholding mandatory forum-selection clauses requiring most shareholder lawsuits to be brought exclusively in the Delaware Court of Chancery.⁴⁹ The California Supreme Court reversed lower court rulings that the forum-selection provisions were unenforceable as a matter of California public policy because they would effectively deprive the plaintiff of the right to a jury trial on certain claims. The unanimous court held that an exclusive forum-selection clause designating a forum such as the Delaware Court of Chancery where a civil jury trial would be unavailable is not barred by California public policy.

Acknowledging that California has a strong public policy favoring the right to a jury trial and against pre-dispute waivers of that right, the court held that the policy does not override a forum-selection clause because the civil jury trial right is a procedural right, not a substantive one, and thus protects only litigants in California courts, not elsewhere. The court also pointed out that its holding was in accord with the "modern trend" favoring enforceability of forum-selection clauses because they "serve vital commercial purposes and should

generally be enforced."⁵⁰ The court explained that arms-length commercial transactions between sophisticated parties may depend on the selection of a forum for dispute resolution, such as the courts of a foreign country, that does not offer a jury trial right.

While the court did not reach a challenge to the clause based on the manner of its adoption because the lower courts had not considered the issue, the ruling provides greater commercial certainty for Delaware corporations with stockholders residing in California.

There was also activity related to federal forum-selection provisions ("FFPs") requiring Securities Act claims to be brought exclusively in federal court. As we have discussed in prior *Reviews*, FFPs emerged as an alternative for companies in the wake of the Supreme Court's *Cyan* decision, which held that state courts have concurrent jurisdiction over Securities Act lawsuits and that such lawsuits cannot be removed to federal court.⁵¹ *Cyan* led to plaintiffs increasingly bringing Securities Act suits in state courts, sometimes forcing companies to defend parallel Securities Act suits in both federal and state courts. In 2020, Delaware became the first state to uphold FFPs as valid under state law and consistent with federal and state public policy.⁵²

In 2021, a New York appellate court approved FFPs under that state's law and federal law.⁵³ In 2022, an appellate court in California in *Wong v. Restoration Robotics, Inc.* rejected an array of challenges to FFPs under California and federal law, and California became the third state to uphold the provisions.⁵⁴

Since *Wong* was decided, multiple California Courts of Appeal have confronted the enforceability of FFPs in follow-on challenges, and each has adopted *Wong's* ruling and reasoning. Notably, the California Supreme Court has declined to review the decisions upholding the enforceability of FFPs in four cases.⁵⁵

Last year, another California appellate court affirmed the dismissal of a Securities Act suit brought against Rivian Automotive that alleged the manufacturer and its underwriters misled investors ahead of its 2021 IPO. The trial court dismissed the action based on an FFP in the company's articles of incorporation following the ruling in *Wong*. On appeal, the

California Court of Appeal affirmed the dismissal and rejected the plaintiffs' argument that the FFP at issue violated the Securities Act's prohibition on removing claims to federal court, holding that the company did not seek removal of the suit but rather sought dismissal.⁵⁶ In an unpublished opinion, the court rejected arguments that the FFP was invalid or unenforceable under California law or public policy. The court rejected the argument that the FFP was oppressive or unconscionable, noting that it was made public in Rivian's amended articles of incorporation at the time of the IPO, and thus there was no reason why shareholders should not have expected to be bound by it.

Finally, the appellate court ruled that the trial court did not err in granting dismissal to the underwriters, who had filed a joinder to the company's motion to dismiss, finding that the underwriters had standing to enforce the FFP because the allegations against them and the company were so intertwined that they could not be separated. The Supreme Court of California denied a petition for review. In December 2025, the plaintiffs were granted an extension of time to file a petition of certiorari until January 9, 2026.

While it remains to be seen whether the Supreme Court will grant certiorari, the decision and the California Supreme Court's decision not to grant review suggests that FFPs properly adopted by Delaware corporations with full notice to shareholders are likely to withstand scrutiny and provide a defense to Securities Act claims brought in state court.

Our *2025 Securities Litigation Year in Review* focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts.

The Supreme Court heard only one securities suit in 2025, down from the four securities cases on its docket in 2024. In *FS Credit Opportunities Corp. v. Saba Capital Master Fund, Ltd.*, the Court was requested to resolve whether shareholders of registered investment companies have a private right of action to rescind contracts that violate the Investment Company Act of 1940 ("ICA").⁵⁷ The suit arose from a dispute in which a well-known activist investor sought to void the bylaws of four closed-end mutual funds. The bylaws prohibited a 10%-plus shareholder from exercising voting rights absent approval by a two-thirds vote of other fund shareholders. The complaint alleged that the bylaws violated Section 18(i) of the

ICA by denying equal voting rights and sought rescission of the bylaws in reliance on a purported private right of action under Section 47(b) of the ICA. The funds argued that there is no private right of action to void contracts under that section of the ICA.

The Southern District of New York granted summary judgment for the activist investor and ordered that the bylaws be rescinded. On appeal, the Second Circuit affirmed, but did not address whether Section 47(b) of the ICA confers a private right of action.⁵⁸ The Second Circuit had previously held that Section 47(b) creates an implied private right of action for rescission, concluding that the statutory language is "effectively equivalent to providing an express cause of action."⁵⁹ The funds argued in their petition for certiorari that the Second Circuit's decision affirming the district court's judgment and its prior decision in *Oxford University Bank* created a circuit split with the Third, Fourth, and Ninth Circuits, which have held that Section 47(b) does not create an implied right of action.⁶⁰

The SEC urged the Court to hear the case and to hold that Section 47(b) does not create a private right of action. It argued that the statutory section lacks rights-creating language in contrast with other provisions of the ICA that expressly create private rights of action, and pointed to a shift in case law beginning in the 1970s, when the Court adopted a more cautious approach to implied private rights of action.⁶¹

The Supreme Court heard oral argument on December 10, 2025. During oral argument, Justice Kavanaugh noted that the SEC had previously taken the position (in 2001) that Section 47(b) does allow for a private right of action, and he described the case as "extremely close."⁶² A decision is expected by mid-2026.

CRYPTOCURRENCY

No sector experienced as much change in 2025 as cryptocurrency. As we previewed in last year's *Review*, 2025 began with acting SEC Chair Uyeda introducing a "crypto task force dedicated to developing a comprehensive and clear regulatory framework for crypto assets."⁶³ He charged SEC Commissioner Hester Peirce, who had long been critical of the prior administration's "regulation-by-enforcement" approach to cryptocurrency, with leading the crypto task force and stressed the need for "a sensible regulatory path" forward.⁶⁴ SEC Chair

Paul Atkins has stated his strong support for the work of the crypto task force as “a framework for coherent, transparent treatment of crypto assets under the federal securities laws” in announcing the “core principles of project crypto,” in which “the Commission will consider establishing a token taxonomy that is anchored in the longstanding *Howey* investment contract securities analysis, recognizing that there are limiting principles to our laws and regulations.”⁶⁵

In late 2025, following multiple roundtables with market participants and review of a large body of written public input, the SEC released a number of crypto-related statements and guidance aimed at regulatory clarity and sought further input on how to improve the regulatory landscape for alternative trading systems and exchanges trading crypto assets.⁶⁶ This change came on the heels of an executive order, “Strengthening American Leadership in Digital Financial Technology,” that promoted “the responsible growth and use of digital assets, blockchain technology, and related technologies,” and the SEC’s rescission of Staff Accounting Bulletin 121.⁶⁷ Staff Accounting Bulletin 121 had “required financial institutions to classify cryptocurrencies as liabilities on their balance sheets, significantly raising the financial risks for banks seeking to offer crypto custody services.”⁶⁸

Other actions by federal and state agencies in 2025 provided further clarity as to the treatment of crypto assets and increased mainstream adoption of crypto products and services in the banking and financial services sector.⁶⁹ Meanwhile, Congress endeavored to codify a comprehensive crypto market structure framework into law through the Guiding and Establishing National Innovation for U.S. Stablecoins Act of 2025 (“GENIUS Act”), which established a regulatory framework for issuers of stablecoins and was signed into law in July 2025. In addition, the Digital Market Clarity (“CLARITY Act”), which is currently being considered by the Senate, would establish registration categories for digital assets and divide regulatory jurisdiction between the CFTC and the SEC.⁷⁰ SEC Chair Atkins has stated that the SEC fully supports the proposed cryptocurrency legislation.⁷¹

The SEC’s creation of the crypto task force was followed by its disbanding of “a special unit of more than 50 lawyers and staff that had been dedicated to bringing crypto enforcement actions.”⁷² Although Chair Atkins announced that the SEC’s crypto project framework “is not a promise of lax enforcement,”

in 2025 the SEC voluntarily dismissed or terminated a number of pending enforcement actions, including high-profile actions against Binance, Coinbase, Cumberland DRW, and Lejillex, among many others.⁷³ The SEC entered a “joint stipulation with Coinbase . . . to dismiss the ongoing civil enforcement action” and cited the crypto task force’s pending work as the basis for dismissal.⁷⁴ Commissioner Peirce lauded the dismissal as marking the SEC’s move to a policy-centered approach that does not “rel[y] on a series of enforcement actions to write crypto policy.”⁷⁵ Other dismissals of crypto-related enforcement actions soon followed.⁷⁶

Notwithstanding the shift in the SEC’s position as to whether and when crypto assets are securities—Chair Atkins has stated that “while most crypto assets are not themselves securities, crypto assets can be part of or subject to an investment contract [when] accompanied by certain representations or promises to undertake essential managerial efforts that satisfy the *Howey* test”—the SEC has touted the “use of its enforcement tool in appropriate cases.”⁷⁷ For example, in *SEC v. Unicoïn, Inc.*, the SEC filed a complaint alleging that Unicoïn misrepresented that its rights certificates were sufficiently “asset-backed” and that it had “sold more than \$3 billion in rights certificates, when it raised no more than \$110 million.”⁷⁸ The SEC complaint also detailed how Unicoïn claimed its rights certificates and tokens “were ‘SEC-registered’ or ‘U.S. registered,’ when they were not.”⁷⁹ The enforcement action began with a Wells notice issued during the prior administration, but unlike other crypto enforcement actions since dropped, the SEC continued to pursue enforcement against Unicoïn, consistent with Chair Atkins’s signaling that the SEC will focus on fraud claims relating to crypto offerings.⁸⁰

The SEC’s charge against Ramil Palafox, founder of PGI Global, also illustrated the SEC’s focus on enforcement actions relating to crypto-based fraud.⁸¹ The SEC charged Palafox for allegedly “orchestrating a fraudulent scheme that raised approximately \$198 million from investors worldwide and for misappropriating more than \$57 million of investor funds.”⁸² Rather than focusing on the underlying crypto instrument’s status as a security, the SEC detailed how Palafox misappropriated investor funds for personal expenses and furthered the “Ponzi-like scheme.”⁸³

In 2025, plaintiffs filed 14 securities class actions related to cryptocurrencies in federal court.⁸⁴ These filings are below the 17 securities suits filed in 2023 and the 23 suits filed in

2022 but an increase from the eight suits filed in 2024.⁸⁵ As in past years, many of the claims (at least five of the 14) were predicated on alleged sales of unregistered cryptocurrency assets or unregistered crypto-related products in violation of the Securities Act.⁸⁶ Two of the lawsuits filed in 2025 involved “memecoins,” a volatile genre of cryptocurrency based on characters or memes, where plaintiffs allege that the defendants leveraged their social media influence and promises of exorbitant returns to drive up the asset’s value before the valuation ultimately plummeted, resulting in losses to investors.⁸⁷ Another investor claim alleged scams involving non-fungible tokens (“NFTs”), in which defendants allegedly sold NFTs to investors with the promise of high returns and other benefits, only to disappear or fail to deliver on their promises.⁸⁸

As 2025 progressed, however, more of the crypto-related securities filings focused on fraud allegations, perhaps indicating that the SEC’s revamped approach has steered litigants away from asserting that cryptocurrencies constitute investment contracts and are thus subject to the Securities Act.⁸⁹ Several of the filings claimed that defendants falsely represented unregistered securities as asset-backed or equity-backed investments.⁹⁰

SPACs

There was a notable uptick in SPAC activity in 2025, with technology-focused mergers leading the trend while the number of securities suits arising from SPAC-related transactions was down from 2024. A SPAC is an entity formed for the sole purpose of raising capital through an IPO with the objective of finding and acquiring an existing, privately owned business within a specific time frame, typically 18–24 months. If a SPAC does not complete a merger within that time and the investors do not agree to an extension, the SPAC liquidates and the IPO proceeds are returned to public shareholders. A SPAC’s acquisition of a private company, known as a de-SPAC transaction, requires 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 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. SPAC activity increased in 2025, with more than 144 offerings that raised more than \$30 billion, in contrast with the 57 SPAC transactions that raised \$9.6 billion in 2024.⁹¹ SPAC IPOs represented 63% of all IPOs in 2025, significantly higher than in 2024, when SPAC IPOs represented 43% of total IPOs.⁹² SPAC transactions last year included companies in quantum computing, nuclear technology, AI software, biotechnology, financial technology, and crypto products. There were less than 10 SPAC dissolutions reported last year, down from the 51 SPAC dissolutions in 2024, suggesting that more SPACs have been able to identify a target and complete a de-SPAC transaction based on improving market conditions.⁹³

As we reported last year, in January 2024 the SEC adopted new rules to enhance disclosures and provide investor protections in IPOs by SPACs and in subsequent de-SPAC transactions. The new rules, which took effect on July 1, 2024, required enhanced disclosures about conflicts of interest, SPAC sponsor compensation, and dilution.⁹⁴ The new rules also require registrants to provide additional information about the target company to help investors make voting and investment decisions in connection with a de-SPAC transaction. The new rules did not appear to cause a drag on SPAC transactions given the uptick in SPAC IPOs in 2025. While the SEC under former Chair Gensler repeatedly expressed skepticism about the risks SPACs present to investors, and was active in bringing enforcement actions in the SPAC sector, the SEC under Chair Atkins has taken a decidedly friendlier approach. Chair Atkins has stated that the SEC is reviewing the SPAC rules enacted during the prior administration as part of a broader policy of promoting IPOs.⁹⁵

The SEC continued to bring enforcement actions arising from SPAC transactions in 2025, including two actions after the change of administration. The SEC charged a former CEO with fraud in connection with a SPAC merger, alleging that the target company made misleading statements about its business before and after its merger with a SPAC.⁹⁶ The SEC also filed an enforcement action against a co-founder of an environmental sustainability company, alleging that he misled investors through statements about fake revenues from environmental sustainability services in the run-up to a SPAC merger.⁹⁷ In January 2025, the SEC commenced an enforcement action against a restaurant technology company, alleging

that it made false and misleading statements in SEC filings and public statements about its products and revenue prior to and after a SPAC merger.⁹⁸

Likely reflecting the improving environment for the SPAC sector and possibly the impact of the SEC SPAC regulations, there were only five SPAC-related securities suit filings in 2025, and none after April 2025. After the number of SPAC-related securities filings peaked in 2021, they have declined in each of the four subsequent years. As in past years, the complaints filed in 2025 alleged that SPAC participants made misleading statements or omissions regarding the prospects or financial health of the target company in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

One of the largest securities-suit settlements in 2025 was in a SPAC-related case involving a high profile and now bankrupt SPAC, Alta Mesa Resources, Inc. The investors' complaint alleged that the company as well as certain former officers and directors and a private equity firm made material misrepresentations and omissions of material facts in a proxy statement issued in connection with a de-SPAC transaction in which Alta Mesa Resources, an oil and gas pipeline business, merged with a shell entity to become a public company. The settlement totaled \$126.3 million and was announced three weeks into a federal jury trial on the investors' claims.⁹⁹

COVID-19

Although six years have passed since the start of the COVID-19 pandemic, COVID-related securities suits continued to be filed in 2025, albeit at a lower rate. In 2025, there were only three COVID-related securities suits, down substantially from the 19 suits filed in 2024 and ending the streak of double-digit COVID-related filings in each year since 2020.¹⁰⁰ The claims brought in 2025 were similar to the majority of the filings in 2024, with plaintiffs targeting capital goods companies that were alleged to have benefited from pandemic-era stimulus programs or increased customer demand during COVID lockdowns but misrepresented or omitted the extent to which their post-pandemic performance was slowing or that pandemic-era business models were unsustainable as conditions returned to normal.

For example, in a suit filed last year against Petco, the complaint alleged that the company touted the beneficial impact

of pandemic tailwinds on its growth and profitability, notwithstanding that its sales metrics and financial performance began to decline as early as mid-2023.¹⁰¹ According to the company, the pandemic-related benefits were largely due to increased rates of pet adoption, coupled with the company's transformation from a general pet retailer into a more health-focused pet company that accompanied a business strategy built around health and premium pet products. The complaint alleged that in reality, the company's metrics began to worsen by mid-2023 and the company made false or misleading statements or failed to disclose that the pandemic-related tailwinds were unsustainable.

In contrast, West Pharmaceutical, a manufacturer of supplies related to injectable drugs, was hit with a securities suit last year that alleged that its reports about the pandemic's disruption on its performance masked the actual reasons for its poor financial performance and customer losses.¹⁰² In particular, the plaintiffs alleged that because the company repeatedly claimed it had strong visibility into its customer inventory levels and their demand for company products, investors were misled into believing that the company's poor performance was the temporary result of the pandemic, when in fact its financial performance and customer losses were due to unrelated and undisclosed factors.

As we discussed in last year's *Review*, the results in COVID-19 securities suits have been decidedly mixed. Last year, the Southern District of New York certified a class of Dentsply Sirona investors who accused the dental health product supplier of misleading investors about the extent of its pandemic woes.¹⁰³ The investors claimed that company executives artificially inflated sales and downplayed supply chain issues resulting from the pandemic; a motion to dismiss was denied in 2024.¹⁰⁴

Consistent with prior years, other COVID-19 suits stalled at the initial pleading stage with district courts continuing to grant motions to dismiss. For example, a securities suit against Generac, a company that sells power generators and power storage systems, was dismissed last year.¹⁰⁵ Demand for generators surged during the pandemic and resulted in substantial increases in customer orders and sales. As the pandemic progressed, Generac could not keep up with the increase in orders, and sales stalled. As lockdown orders lapsed, orders and sales declined, resulting in a substantial stock price drop.

The plaintiffs alleged the defendants failed to disclose several negative trends that amounted to securities fraud. The district court granted the defendants' motion to dismiss without prejudice and in a lengthy opinion concluded that the plaintiffs had not adequately pleaded falsity, scienter, and materiality, noting that "misfortune does not necessarily equate with fraud" and that "no reasonable investor would have believed that the surge in demand from the pandemic would continue indefinitely."¹⁰⁶

As we reported in last year's *Review*, the SEC's COVID-19 enforcement efforts slowed in 2024 and continued to decline in 2025. Most notably, last year the SEC announced the settlement of an enforcement action against Emergent BioSolutions, a vaccine manufacturer, related to a series of alleged misstatements touting its ability and readiness to manufacture COVID-19 vaccine doses while omitting information about problems with the state of readiness of its facilities, personnel training, and quality control protocols.¹⁰⁷ The company agreed to pay a civil penalty of \$1.5 million. In 2024, Emergent BioSolutions announced that it had agreed to pay \$40 million to settle a suit alleging that it misled investors about how prepared it was to handle high-profile deals to manufacture COVID-19 vaccines for two different vaccine manufacturers after a report that the company had mixed up ingredients for two different vaccines, contaminating as many as \$15 million worth of the doses of the Johnson & Johnson vaccine.¹⁰⁸

FALSE AND MISLEADING STATEMENTS

Second Circuit Applies Fraud-on-the-Market Presumption and Holds Loss Causation Adequately Pleaded Under a Theory of Lost Appraisal Rights in Section 10(b) Case Involving Freeze-Out Merger

In *In re Shanda Games Limited Securities Litigation*, a divided panel of the Second Circuit addressed whether investors who accepted an allegedly undervalued tender price in a freeze-out merger could rely on the fraud-on-the-market presumption to establish that they relied on alleged misrepresentations in proxy materials in deciding to hold their shares rather than dissenting and seeking appraisal.¹⁰⁹ The majority concluded that they could because "investors who trade at the market price are not the only ones who rely on the market price in making decisions to buy or sell."¹¹⁰ Specifically, the majority held that the fraud-on-the-market presumption applies when minority shareholders allege that materially misleading statements in

proxy materials caused them to accept an undervalued buy-out in a freeze-out merger, resulting in the forfeiture of the shareholders' appraisal rights "because such a person may be presumed to rely on the market price as an accurate measure of his stock's value when deciding to tender."¹¹¹ The majority also held that the plaintiff's allegation that he suffered an economic loss when he accepted the tender price due to misleading statements in the proxies instead of receiving a higher value in an appraisal action adequately pleaded loss causation under Second Circuit precedent.

In dissent, Judge Jacobs took issue with the majority's reasoning on reliance, noting that there was no investment decision alleged because the plaintiff simply retained his shares until they were canceled in exchange for a set price dictated by the terms of the merger, and there was no allegation that the plaintiff had read the allegedly misleading proxy materials or voted at the shareholder meeting to approve the merger. By allowing minority shareholders who tender shares in a freeze-out merger to assert Section 10(b) claims and invoke the fraud-on-the-market presumption when they decide to hold their shares in exchange for merger consideration rather than exercising appraisal rights in the absence of any allegation that they considered allegedly false statements in proxy materials, *In re Shanda* expands the scope of a Section 10(b) cause of action in the Second Circuit and may result in investor actions being brought under that section instead of through appraisal actions under state law.

Shanda Games Limited ("Shanda") was a video games business registered in the Cayman Islands and headquartered in China with American Depository Shares ("ADS") listed on Nasdaq.¹¹² Its main asset was the right to market an online computer game called *Mir II* in China.¹¹³ For years, *Mir II* was a lucrative "golden goose," generating more than \$1 billion in revenue for Shanda.¹¹⁴ But sales began declining in approximately 2013, when Shanda turned to the expanding mobile games market to revitalize its business.¹¹⁵ Between 2013 and 2015, Shanda invested heavily in a mobile version of *Mir II*—*Mir II Mobile* or *MIIM*—to access this new market.¹¹⁶ Initial testing on *MIIM* was successful, and Shanda launched the game in August 2015 with high expectations.¹¹⁷

Months before launching *MIIM*, Shanda explored a going-private transaction, forming a Special Committee to negotiate with potential buyers and engaging Merrill Lynch to provide

financial advice.¹¹⁸ Throughout the process, multiple buyer groups emerged.¹¹⁹ One group—comprising the CEO and dominant shareholder Ningxia—eventually controlled 90% of all shareholder votes.¹²⁰

In March 2015, that buyer group proposed a purchase price of \$6.90 per ADS.¹²¹ To assist in evaluating the offer, Shanda provided the Special Committee and Merrill Lynch with updated financial projections, which were “materially flawed,” predicted lower income and revenue than previous projections, and differed from the way Shanda calculated its prior projections (which violated accepted accounting principles and substantially overestimated certain items that led to decreased overall value).¹²² The financials also projected significantly less revenue from MIIM.¹²³ After discussions with Merrill Lynch, the Special Committee requested a price of \$7.10 per ADS.¹²⁴ The buyer group agreed, and Merrill Lynch issued a fairness opinion, which concluded that the price was fair based on the updated projections.¹²⁵

While the buyer group controlled sufficient voting power to approve the freeze-out, Shanda was still required to put the transaction to a vote to allow dissenters the opportunity to object prior to seeking appraisal. In November 2015, the merger was approved.¹²⁶ Most minority shareholders who did not sell their stock during the class period (and who later formed the putative class) had their shares cancelled in exchange for \$7.10 per share.¹²⁷ But three shareholders objected to the freeze-out merger and filed an appraisal action in the Cayman Islands.¹²⁸ The Cayman Islands court ultimately found that the merger price did not represent the fair value of the shares and awarded the three dissenting shareholders \$12.84 per ADS.¹²⁹

Shareholder litigation followed in the Southern District of New York.¹³⁰ The lead plaintiff—a minority shareholder—alleged that Shanda, its CEO, its former CFO, and its directors violated Sections 10(b), 20A, and 20(a) of the Exchange Act.¹³¹ The complaint alleged that Shanda and the individual defendants misled shareholders by underestimating the anticipated revenue from MIIM—which in turn deflated the market price and caused the putative class to accept an artificially low price in the freeze-out merger, rather than seeking appraisal.¹³²

The district court dismissed the claims, holding that certain of the alleged misstatements were inactionable opinions and that the plaintiff failed to plead reliance.¹³³ Ruling on a

motion to dismiss an amended complaint, the district court found that the plaintiff had alleged actionable misstatements and an efficient market, thereby allowing him to plead reliance through the fraud-on-the-market presumption. But the district court dismissed the amended complaint for failure to plead loss causation “because the Complaint lack[ed] allegations explaining in a plausible manner how or why Plaintiff was personally induced to sell his shares instead of exercising his appraisal rights.”¹³⁴

On appeal, a divided panel of the Second Circuit affirmed in part and vacated in part, allowing the Section 10(b) claims to proceed and holding that “the fraud-on-the-market presumption is available to minority shareholder tenderers, such as [plaintiff], who sold their shares in a freeze-out merger.”¹³⁵ Conceding that the plaintiff’s decision to dissent would not have prevented the freeze-out merger, the majority explained that the plaintiff “did have the choice whether to permit his shares to be sold in the Merger or to dissent and exercise his appraisal rights.”¹³⁶ The majority reasoned that “when material misrepresentations ‘pertain to shares that trade in a developed market,’ as here, such a person may be presumed to rely on the market price as an accurate measure of his stock’s value when deciding to tender.”¹³⁷ The majority thus held that in such circumstances, and at the pleadings stage, the plaintiff was entitled to the rebuttable presumption that in making this choice, he relied on the market price of his shares.

In contrast with the district court, the majority concluded that the plaintiff adequately pleaded loss causation under a theory of lost appraisal rights, explaining that under Second Circuit precedent, loss causation “may be established when a proxy statement prompts a shareholder to accept an unfair exchange ratio for his shares rather than recoup a greater value through a state appraisal.”¹³⁸ The majority pointed to the plaintiff’s allegation that he suffered an economic loss when he accepted the tender price of \$7.10 per share due to the misleading statements in the proxies instead of receiving a higher value in an appraisal action.¹³⁹ The majority concluded that the plaintiff had “plausibly alleged that the Proxies concealed the higher value of Shanda, foreseeably resulting in forfeiture of [his] appraisal rights, by means of the alleged materially misleading statements” and that such allegations adequately pleaded loss causation under a theory of lost appraisal rights.¹⁴⁰

In dissent, Judge Jacobs disagreed with the majority's conclusion that a minority shareholder can claim reliance on an open market price that was constrained by the merger price as a basis for challenging his passive acquiescence to the forced tendering of his shares and would have affirmed dismissal. Explaining that the fraud-on-the-market theory presumes reliance when an investment decision is made to purchase or sell a security at a market price tainted by fraud, the dissent pointed to the lack of any investment decision made by the plaintiff—who simply held onto his shares until they were cancelled upon consummation of the merger—and characterized the majority's decision as “an unsound extension of a distinguishable case on a close question.”¹⁴¹

Judge Jacobs reasoned that unless the votes of minority shareholders are needed to approve a proposed merger, which they were not in the freeze-out merger, “they cannot as a matter of law establish a causal link between pre-merger proxy statements and the approval of the impending merger.”¹⁴² The dissent characterized the majority's application of the fraud-on-the-market presumption as a “speculative theory” that “expands the implied right of action under section 10(b) and rule 10b-5 to the point where reliance in any form is no longer required.”¹⁴³ The dissent further maintained that any loss to the minority shareholders was the result of the merger terms themselves, not the alleged fraud.¹⁴⁴ Finally, the dissent expressed concern that the majority's decision could erode state law appraisal rights by giving shareholders a “second-chance claim” for appraisal under Section 10(b).¹⁴⁵ The panel denied Shanda's petition for rehearing, and the full court denied the petition for rehearing *en banc*.

Third Circuit Revives Class Action Against Reinsurance Company and Clarifies the Materiality Standard for Misleading-by-Omission Opinion Statements

Under Section 10(b) of the Exchange Act and Rule 10b-5, issuers of registered securities must not make false statements of material fact or omit material facts necessary to make statements made, in light of their circumstances, not misleading.¹⁴⁶ As the Supreme Court made clear in its recent decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, Rule 10b-5 requires disclosure of information necessary to ensure that statements are non-misleading.¹⁴⁷ While statements of opinion convey less certainty than statements of fact, they

can still mislead investors if the speaker leaves out material information.¹⁴⁸

In *In re Maiden Holdings, Ltd. Securities Litigation*, the Third Circuit clarified the materiality standard for misleading-by-omission opinion statements and vacated a summary judgment order because the district court misapplied the “context-sensitive framework” for determining whether withheld information is material to the challenged opinion statement.¹⁴⁹ The decision is a reminder that materiality “always depends on context” and 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.¹⁵⁰

Maiden Holdings was a publicly traded reinsurance company. Its biggest client was AmTrust Financial Services, Inc., a multinational project and casualty insurance company focusing on small to mid-sized businesses, that accounted for the vast majority of Maiden's net premiums.¹⁵¹ The complaint alleged that Maiden and AmTrust had an agreement whereby AmTrust gave a portion of the premiums it collected to Maiden, which in turn was obligated to compensate AmTrust for a portion of the claims AmTrust paid to its customers.¹⁵² Under their agreement, Maiden also paid AmTrust a 31% commission, rendering the reinsurance agreement unprofitable for Maiden if AmTrust reached or exceeded loss ratios of roughly 69%.¹⁵³

Maiden employed a team of actuaries to estimate its loss reserve needs and provided details about its loss reserve process in filings with the SEC.¹⁵⁴ Maiden advised investors that loss reserves do not represent an exact calculation of liability and that historic loss development and trend experience is assumed to be indicative of future loss developments and trends.¹⁵⁵ Historical loss development for Maiden's AmTrust business indicated that losses increased over time.¹⁵⁶ At the end of 2012, the loss ratios for AmTrust from 2008 through 2012 ranged from 48.6% to 71.7%.¹⁵⁷ Over the next two years, those loss ratios shot up to 69.2% to 78.5%.¹⁵⁸ By year-end 2017, loss ratios reached a range of 75.1% to 82.2%.¹⁵⁹

Notwithstanding these trends, Maiden consistently based its loss reserves on projected loss ratios between 50% and 60% for its AmTrust business, resulting in reserve amounts that were hundreds of millions of dollars less than recommended

by Maiden's actuaries.¹⁶⁰ Maiden's loss reserves proved inadequate. After a series of negative financial developments for AmTrust in 2017 and 2018, Maiden had to pay out more in claims to AmTrust than Maiden had budgeted for in its loss reserves, was forced to increase its loss reserves, and lost hundreds of millions of dollars as a result.¹⁶¹ After informing investors that it could offer "no assurance that [it] w[ould] return to profitability," its stock plummeted more than 80%.¹⁶²

The plaintiffs, representing a class of Maiden common stock owners, sued the company alleging violations of Section 10(b), Rule 10b-5, and Section 20(a).¹⁶³ The plaintiffs alleged that Maiden made misleading statements about its loss reserves, financial performance, and the profitability of its AmTrust segment due to the omission of material information regarding adverse developments in its AmTrust business, including the fact that in several years, the loss ratios related to AmTrust exceeded the 69% profitability threshold.¹⁶⁴ The plaintiffs alleged that Maiden knew of the adverse developments related to AmTrust but omitted disclosure of them because the data contradicted the "artificially low loss ratio assumptions" Maiden used to set its loss reserves.¹⁶⁵

The district court denied the defendant's motion to dismiss in part and held that discovery was necessary to test the plaintiffs' theory of liability that Maiden "should have disclosed the historical loss ratios of the AmTrust book of business" because this information constituted "material, adverse historical data of which [Maiden] had knowledge."¹⁶⁶ Although the plaintiffs sought documents to confirm whether Maiden's historic AmTrust loss ratios reached the 70% to 80% levels alleged in the complaint and whether Maiden knew or had access to this information when it picked loss ratios of 50% to 60% to set loss reserves, the company objected to the scope of the discovery sought.¹⁶⁷ The court denied the plaintiffs' discovery requests for the historical loss data, reasoning that Maiden's disclosure of at least some historical loss data was satisfactory because it demonstrated that Maiden considered the information in its loss reserve announcements.¹⁶⁸

Thereafter, the district court granted summary judgment to Maiden and denied the plaintiffs' motion for discovery under Rule 56(d), finding that Maiden's reserve announcements were not misleading as a matter of law for two reasons. First, the district court reasoned that the announcements did not mislead

investors by omitting AmTrust's historical loss data because there was no dispute that Maiden knew of and considered this undisclosed data.¹⁶⁹ Second, the court reasoned that the withheld historical loss ratios were "only one of many factors" and would not "totally eclipse" Maiden's other considerations in setting its loss reserves if revealed to investors.¹⁷⁰ Thus, the court held that Maiden's statements were not misleading as a matter of law and omission of the AmTrust historical loss data was immaterial.¹⁷¹

On appeal, the Third Circuit vacated the district court's grant of summary judgment and remanded the dispute to the district court with instructions to apply the proper materiality standard and to permit full discovery.¹⁷² The panel clarified the materiality standard for misleading-by-omission opinion statements established by the Supreme Court in *Omnicare, Inc. v. Laborers District Council Construction Industries Pension Fund*.¹⁷³ The panel explained that while statements of opinion convey some lack of certainty, they still can mislead investors if the speaker leaves out key information.

In *Omnicare*, the Supreme Court identified two ways in which an opinion statement may mislead investors by omission "about the speaker's basis for holding that view"—the inquiry theory and the knowledge theory.¹⁷⁴ The inquiry theory refers to an opinion statement that may mislead investors by omitting material facts about the speaker's inquiry into the facts relevant to the opinion.¹⁷⁵ The knowledge theory refers to an opinion statement that may mislead investors by omitting material facts known to the speaker that are relevant to the opinion.¹⁷⁶

The court pointed to its recent application of *Omnicare* to claims of misleading loss reserve statements by an insurance company in *City of Warren Police & Fire Retirement System v. Prudential Financial, Inc.*, which held that when loss reserves are challenged as predictive statements about funds needed for future claims, "the stated reserve amount, as a manifestation of actuarial judgment, functions as an opinion."¹⁷⁷ In *Prudential*, the Third Circuit determined that the plaintiff failed to allege necessary facts about the omitted data's importance to the setting of loss reserves because it alleged that one segment within a larger insurance portfolio had a consistently negative mortality experience, but alleged nothing about the significance of that adverse data among the many factors Prudential considered in setting its reserves.¹⁷⁸

The panel explained that *Prudential* did not hold that omitting adverse historical data from a loss reserve statement is never misleading. “[O]ur *Prudential* decision does not stand for the proposition that insurance companies may withhold all adverse data from the view of investors when announcing reserves simply because reserve determinations are complex.”¹⁷⁹ The panel further explained that “[s]eparating the material from the immaterial is a context-specific task,” and *Prudential* “did not create a context-blind rule governing all claims of misleading reserve statements.”¹⁸⁰

Applying this precedent, the court concluded that there were genuine, material factual disputes in the current record that provided grounds to vacate summary judgment and identified two critical errors made by the district court in applying the *Omnicare* standard. First, the district court incorrectly analyzed the plaintiffs’ claim using an inquiry theory when it should have analyzed the claim using a knowledge theory.¹⁸¹ The plaintiffs’ theory of liability was that Maiden unlawfully omitted known, materially adverse historical loss ratios that conflicted with Maiden’s loss ratio estimates and loss reserve statements as reported in its SEC disclosures. Thus, Maiden’s mere consideration of historical loss ratios did not entitle Maiden to judgment as a matter of law because the plaintiffs alleged that Maiden “considered but concealed its historical loss ratio data,” and there was “no dispute that Maiden had access to historical loss data that it omitted from its statements about loss reserves.”¹⁸²

Second, the panel concluded that the district court misapplied Third Circuit precedent regarding the materiality of historical loss data and that there was sufficient evidence in the summary judgment record to permit a reasonable factfinder to conclude that the omitted historical loss data “was indeed material.”¹⁸³

The panel based its conclusion on consideration of three pieces of evidence in the record, viewed holistically and not in isolation.¹⁸⁴ First, because AmTrust made up such a large portion of Maiden’s premiums, “negative developments in the AmTrust segment would have an outsized impact on Maiden’s entire business.”¹⁸⁵ Second, there was evidence that Maiden had access to historical loss data for AmTrust that was inconsistent with its loss ratio picks.¹⁸⁶ “Maiden informed investors it expected continued profits without disclosing the adverse historical data suggesting otherwise.”¹⁸⁷ Finally, Maiden made

repeated statements that historical loss data was or should have been “one of the ‘most significant’ components of its loss reserve calculation process.”¹⁸⁸

The panel also rejected Maiden’s argument that the district court correctly held that the omitted data was immaterial because it did not “totally eclipse” the numerous other considerations used to set reserves.¹⁸⁹ The panel reasoned that the proposed “total eclipse” rule “suggests a heightened standard of materiality that our *Prudential* decision cannot support.”¹⁹⁰ The panel explained that the Third Circuit has long held that materiality questions “demand ‘delicate assessments of the inferences a reasonable shareholder would draw from a given set of facts [that] are peculiarly for the trier of fact,’” and that such an approach “is consistent with the Supreme Court’s description of materiality ‘as a fact-specific inquiry’ into whether there is a ‘substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the total mix of information made available.’”¹⁹¹

Ninth Circuit Affirms Dismissal, Holding that a Snappy Slogan Didn’t Show Falsity or Scierter

In *Sneed v. Talphera*, the Ninth Circuit affirmed the dismissal of a securities suit against a pharmaceutical company based on its use of the marketing slogan “Tongue and Done” for its under-the-tongue pharmaceutical product.¹⁹² The court rejected the plaintiffs’ claims that the slogan was misleading because it failed to disclose all of the steps for administering the drug.¹⁹³ Noting that the company provided copious additional disclosures about the product alongside the slogan in materials intended for investors, the court held that because “[a] reasonable investor would not blindly accept a slogan without considering other information,” the slogan was not necessarily deceptive, and that this “flimsy evidence of falsity necessarily undermines the ability to show scierter.”¹⁹⁴ The court also concluded that the fact that the FDA sent a warning letter about the slogan was not dispositive or even necessarily probative of falsity claims brought under the Exchange Act because “FDA regulations focus on the perspective of patients and ‘prescribers of drugs’ [and] may require the disclosure of information to medical personnel that a reasonable investor would not need.”¹⁹⁵

The complaint alleged that Talphera developed a powerful opioid tablet for acute pain management called DSUVIA

(the “drug”).¹⁹⁶ To reduce the risks of misuse of such a potent painkiller, the FDA conditioned approval of the drug on compliance with an agency safety plan called a Risk Evaluation and Mitigation Strategy (“REMS”), which, among other things, required the product to be administered only by trained medical personnel in medically supervised settings such as hospitals, surgical centers, and emergency departments.¹⁹⁷ Because the drug’s main appeal was that it could be administered orally rather than through an IV, which eliminated the need for frequent redosing and would satisfy unmet demand given a national shortage of IV-administered opioids, the company adopted the slogan “Tongue and Done” to advertise its desirable sublingual mode of delivery.¹⁹⁸

In 2021, Talphera received a warning letter from the FDA alleging that Talphera made “false and misleading claims” within the meaning of the Federal Food, Drug, and Cosmetic Act (“FDCA”) by not listing the “risks and benefits” of the drug.¹⁹⁹ Later that year, Talphera stopped using the slogan altogether.²⁰⁰ It was also undisputed that the company had repeatedly warned investors about the risks of such a letter even as it worked with the FDA to ensure its marketing materials complied with FDA regulations.²⁰¹

Shareholders sued Talphera in 2021 alleging violation of Section 10(b) of the Exchange Act and Rule 10b-5 based on use of the “Tongue and Done” slogan in marketing displays and in a statement by the company’s CEO at a conference. The complaint alleged that the slogan and public statement misled investors by omitting material information on dosing, the process of administering the drug, and limitations on its use.²⁰² The district court dismissed the complaint for failure to adequately plead facts leading to a strong inference of scienter, but did not rule on the falsity issue, calling it a “close call.”²⁰³

The Ninth Circuit found the complaint deficient as to both falsity and scienter and affirmed the dismissal.²⁰⁴ As to falsity, the court held that the plaintiffs failed to adequately allege that the “Tongue and Done” slogan, considered in context, would mislead a reasonable investor about the need to administer the drug under a REMS or about the scale of the drug’s potential market.²⁰⁵

First, the court explained that “a reasonable investor would not blindly accept a marketing slogan by itself when she has

access to other contextual information.”²⁰⁶ It further concluded that reasonable investors take marketing slogans for what they are, “catchy phrases designed to highlight a desirable or unique product feature.”²⁰⁷ The court also pointed to the fact the slogan itself made no representation about REMS-related restrictions on who may administer the drug or in what settings and that the company provided “copious clarifying information” next to the “Tongue and Done” slogan.²⁰⁸

Second, the court dismissed the significance of the FDA warning letter referencing a potential violation of the FDCA because “[a]n FDA warning letter is not dispositive of a falsity claim under the Securities Act” because the FDCA and the Exchange Act are different legal vehicles with different requirements.²⁰⁹ In particular, the court explained that “[j]ust because the FDA requires disclosure of specific instructions to medical providers does not make the omission of that information relevant for investors.”²¹⁰

As to scienter, the court found that because Talphera “most likely made a good-faith determination” that the slogan would truthfully highlight the drug’s “major selling point,” the plaintiffs failed to plead facts giving rise to a strong inference that the defendants acted with scienter.²¹¹ The court noted that it is harder to adequately plead scienter when, as in this case, the “statements are not flagrantly false” because “an innocent alternative explanation becomes more likely.”²¹² The court rejected the plaintiffs’ heavy reliance on confidential witnesses to show scienter, because most of the witnesses never interacted with the executives and thus lacked personal knowledge of their decision-making, and their dissenting views about the slogan spoke “more to a good-faith difference of opinion” than to the executives’ intent to mislead investors.²¹³

The plaintiffs also failed to show scienter through a “core operations” theory, which allows courts to infer that facts critical to a business’s core operations or an important transaction are known to the company’s key officers, because there was no indication at the time that company officials knew that the “Tongue and Done” slogan conveyed any “patently false” information.²¹⁴ “The facts in the pleadings do not establish a strong inference of scienter because it is more probable that [the company executives] wanted to use the ‘Tongue and Done’ slogan to help market the drug’s biggest selling point” and “[t]his alternative explanation is more probable because [the company executives] likely did not intend to defraud investors

by concealing the REMS and its restrictions on [the drug's] use while simultaneously disclosing that information in myriad contexts.”²¹⁵

Third Circuit Affirms Dismissal of Opioid Securities Disclosure Suit and Holds Company Had No Duty to Disclose Early-Stage Government Investigations as “Reasonably Possible” Liability

In *In Re: Walmart Inc. Securities Litigation*, the Third Circuit addressed whether and when it is misleading to omit a pending, early-stage government investigation from a company's disclosure of its “reasonably possible” liabilities.²¹⁶ The plaintiffs alleged that Walmart had not sufficiently disclosed the existence of a federal probe into its controlled substances dispensing practices, which the plaintiffs claimed amounted to a reasonably possible material liability that should have been disclosed. Relatedly, the plaintiffs alleged that the company's statement that it disclosed all reasonably possible material liabilities was misleading because it omitted the federal investigations in violation of ASC 450, a Generally Accepted Accounting Principles (“GAAP”) rule mandating disclosure of loss contingencies in financial statements.

The Third Circuit affirmed the dismissal in all respects, agreeing with the district court that the complaint did not plausibly allege any misrepresentation or omission of material fact and that the company's disclosures as the investigation progressed were sufficient. It held that “because the complaint does not plausibly allege the investigations into Walmart constituted a liability or a reasonably possible liability, or that Walmart's disclosures implied that it was *not* under investigation,” the plaintiffs' theory of fraud failed.²¹⁷

The court also rejected the plaintiffs' alternative theory of fraud based on alleged violation of ASC 450. Noting that “[n]ot every possible loss, however, is a loss contingency, and not every loss contingency needs to be disclosed” under GAAP, the court held that the complaint did not plausibly allege that the government investigations were definite enough in scope that any loss was at least reasonably possible.²¹⁸ “[W]here the loss contingency is litigation that is only threatened, there are further conditions before companies are obligated to disclose it.”²¹⁹

The complaint alleged that in late 2016, federal prosecutors in the Eastern District of Texas began investigating two

Texas doctors who were prescribing large amounts of opioids. The investigation led to a search warrant issued to Walmart related to documents involving certain pharmacists in Texas, and in 2017, the investigation broadened to include the company's dispensing of controlled substances. The company also received broad document demands from another federal prosecutor who was conducting a parallel civil investigation. Allegedly, in 2018, a federal prosecutor's warning that it was her intention to seek an indictment of the company led to negotiations between Walmart and the government.

While the Department of Justice ultimately declined to pursue a criminal prosecution, a civil investigation into potential violations of the Controlled Substance Act (“CSA”) continued. It was undisputed that the company disclosed the ongoing government investigations in a Form 10-Q filed with the SEC on June 4, 2018. The “Contingencies” section in that filing stated that “[t]he [c]ompany [had] been responding to subpoenas, information requests and investigations from governmental entities relating to nationwide controlled substance dispensing practices involving the sale of opioids” and that it “can provide no assurance as to the scope or outcome of the matters and no assurance as whether its business, financial condition or results of operations would be materially adversely affected.”²²⁰

In March 2020, a journalist published an article about the criminal investigations and the DOJ's decision not to pursue an indictment. The article also disclosed that in 2011, Walmart had entered into a memorandum of agreement with the Drug Enforcement Administration to resolve an administrative action that covered all company stores and imposed various compliance and monitoring requirements. Walmart's share price dropped approximately 5% after the article's publication and another 1.88% in December 2020, when the company announced that the DOJ had filed a civil lawsuit alleging violations of the CSA. A securities suit followed, alleging that the SEC filings between March 2017 and December 2020 either omitted entirely or made insufficient reference to the ongoing investigations into Walmart's controlled substances practices, in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

The district court granted Walmart's motion to dismiss, rejecting the plaintiffs' theory of fraud and holding that there was “no legal authority for the proposition that being the subject or

target of an investigation constituted a ‘liability’” and that “no investor could [have] read the company’s disclosures” after Walmart’s 10-Q filed on June 4, 2018 “without understanding what was true—namely, that Walmart potentially faced losses if the [i]nvestigation resulted in criminal charges or civil claims and that the scope of any such losses was indeterminate.”²²¹

The district court also rejected the plaintiffs’ GAAP-based theory of fraud, finding that Walmart could not have known a loss “may have been incurred” until a federal prosecutor allegedly told the company at the end of April 2018 that they intended to indict it, and Walmart’s disclosures afterward sufficed.²²²

On appeal, the Third Circuit affirmed the dismissal and focused solely on the element of falsity. The court rejected the plaintiffs’ misrepresentation theory, namely that Walmart’s disclosures before its June 4, 2018, 10-Q were misleading because, without disclosing the federal investigations, the forms stated “where a liability is reasonably possible and may be material, such matters have been disclosed.”²²³ The court pointed to the Supreme Court holding that Section 10(b) and Rule 10b-5 do not create an affirmative duty to disclose any and all material information and that “[d]isclosure is required under [those] provisions only when necessary to make . . . statements made, in the light of the circumstances under which they were made, not misleading.”²²⁴ It also noted the Supreme Court’s recent holding in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.* that “[o]missions are actionable only when they render some other affirmative statement misleading.”²²⁵

Applying these precedents, the court concluded that the complaint did not plausibly allege that the federal investigations amounted to a “reasonably possible” liability that “may be material” during the relevant periods before a prosecutor allegedly threatened an indictment.²²⁶ The court agreed with the district court that there is no legal authority that merely being the subject or target of an investigation constitutes a liability.

Pointing to the limited, early-stage nature of the investigations, the court also rejected the plaintiffs’ contention that the defendants’ knowledge of past CSA violations bore upon whether the company sincerely or reasonably believed that the investigations did not represent a reasonably possible risk of material liability. “[P]laintiffs have not adequately connected the government’s preliminary and somewhat undefined

investigations with these past investigations, leaving unclear whether the investigations were in fact likely to uncover [that] wrongdoing.”²²⁷

The court also concluded that the fact that one prosecutor allegedly stated an intent to seek an indictment did not transform the investigations into a “reasonably possible, material liability” because the specifics of any indictment were unclear, the investigation remained ongoing, and no indictment or notice regarding the nature of any potential claims had come.²²⁸ The court also distinguished cases in which courts sustained Section 10(b) claims where defendants made affirmative statements about potential liabilities stemming from investigations or threatened legal proceedings but also failed to disclose ongoing government investigations. “[T]hese cases have one feature in common that is not present here—in each, the defendant made a statement not merely that they had disclosed reasonably possible liabilities, but implying the defendant was not under investigation, when in fact, it was.”²²⁹

In contrast, the challenged statement in Walmart’s “Contingencies” disclosures prior to June 4, 2018, referred only to liabilities and made no reference to investigations or subpoenas.

The court likewise rejected the plaintiff’s theory that the loss contingency disclosures violated ASC 450. Explaining that a loss contingency can be thought of as a liability that may occur in the future, the court noted that under ASC 450, “companies must assess whether the likelihood that a future event will confirm a loss is remote, reasonably possible, or probable, and need only disclose the event if the loss is at least reasonably possible.”²³⁰ The court concluded that from the beginning of the class period until June 4, 2018, the complaint “does not plausibly allege the investigations were definite enough in scope that any loss was at least reasonably possible.”²³¹

The court also concluded that the complaint did not plausibly allege that Walmart’s disclosures on or after June 4, 2018, when it first disclosed the investigations, were misleading or otherwise insufficient. “Walmart’s disclosure included ‘the nature of the contingency’—that is, it was subject to an investigation into a specific area of its operations that could lead to losses—and ‘a statement that’ ‘an estimate of the possible loss or range of loss . . . could not be made.’”²³² The court held that the detail in the disclosures about the investigations sufficed to make the

company's general "Contingencies" statement not misleading. "[I]f plaintiffs are right that the investigations were a liability that could be material at this point in the class period, Walmart explicitly disclosed them as such."²³³

The court also held that Walmart's disclosures after June 4, 2018, passed muster under *Omnicare*, in which the Supreme Court explained scenarios when opinion statements can be fraudulent.²³⁴ "On the facts pled in the complaint, if this disclosure [that Walmart could provide no assurance as to the scope and outcome of the investigations and no assurance as to whether its business, financial condition or results of operations will not be materially adversely affected] is an opinion statement (both parties assume so), it is not fraudulent" because the complaint does not plausibly suggest that Walmart could provide "assurance as to the scope of the investigations" or whether its business would be adversely affected, and there was "no embedded, untrue statement of fact."²³⁵

The court also concluded that Walmart did not omit a fact in its possession that would make its statement misleading under *Omnicare*. "Walmart did not need to disclose every fact that went to its opinion unless the omission of those facts made the opinion misleading."²³⁶ The court thus agreed with the district court that the complaint did not plausibly allege that Walmart's disclosures from June 4, 2018, to the end of the class period were misleading or violated ASC 450.

Finally, the court held that the district court did not abuse its discretion in denying leave to amend the complaint to add allegations from a parallel derivative lawsuit in Delaware over related conduct. The district court concluded that while the evidence from the derivative action might bolster the scienter allegations in the federal suit, it dismissed the complaint without reaching scienter, and thus leave to amend was unwarranted. The Third Circuit acknowledged that falsity and scienter are intertwined in many cases but concluded that the scienter allegations in the proposed amended complaint would not have contributed to the adequacy of the falsity allegations. "None of the facts plaintiffs would incorporate from the derivative complaint suggest the [federal] investigations were a more reasonable possible, or potentially material, liability than they were without those facts," and thus "leave to amend would have been futile."²³⁷

Ninth Circuit Revives Suit Over Robinhood IPO, Holds Companies May Need to Disclose Intraquarter Financial Information if Material

A divided panel of the Ninth Circuit partially reinstated a securities suit against Robinhood and several of its executives, alleging that they misled investors in violation of the Securities Act by failing to include final results for the second quarter of 2021 and interim results for the third quarter of 2021 in offering documents filed prior to the company's IPO on July 30, 2021.²³⁸ The plaintiffs alleged that the offering documents did not disclose substantial declines in key financial metrics that had already occurred by the time of the IPO. The majority held that when an issuer has made statements about a prior period, Section 11 and Item 303 of Regulation S-K impose a duty to disclose material intraquarter or interim information when nondisclosure would render the statements about earlier periods misleading.

In its ruling, the majority deepened a circuit split over a company's duty to disclose interim results by joining the Second Circuit in applying the materiality standard, under which disclosure is required whenever a reasonable investor would view the omitted interim data as significantly altering the total mix of information, and rejecting the First Circuit's "extreme departure test," which requires issuers to disclose intraquarter performance only when it diverges so dramatically from expectations that nondisclosure would render other statements misleading.²³⁹ The decision is a reminder to companies preparing for IPOs to consider whether there have been any recent material changes that could trigger the duty to provide updates.

During 2020, more than 90% of Robinhood's transaction-based revenue came from conventional trading in stocks and options.²⁴⁰ However, between January and April 2021, retail trading activity involving so-called "meme stocks" like as GameStop and AMC exploded, and many investors used Robinhood for those trades. During the same period, the cryptocurrency Dogecoin skyrocketed in value, and its trading volume on Robinhood substantially increased.²⁴¹ When these trendy trades slowed beginning in the second quarter of 2021, Robinhood's revenue from equity and options trading dropped 34.5% from the previous quarter, and there was a similar decline in the company's cryptocurrency revenue.²⁴²

On July 1, 2021, Robinhood filed a draft registration statement with the SEC seeking to sell shares to the public and filed its final prospectus for the IPO on July 29, 2021.²⁴³ The registration statement included the company's revenue and KPIs from 2019 to early 2021 but did not provide final results for the second quarter of 2021 or interim results for the ongoing third quarter of 2021, and stated instead that "its expectations for those periods were in line with previous statements."²⁴⁴ When Robinhood eventually reported its third-quarter financial results, they reflected declines in virtually all KPIs compared to the second quarter; analysts characterized the results negatively, and the company's stock price fell by about 10%.²⁴⁵ Robinhood's results for the fourth quarter of 2021 reflected further declines in financial performance resulting in another drop in the stock price.

In 2022, investors filed suit, alleging that Robinhood failed to disclose non-final results for the second quarter of 2021 or any interim results for the first month of the third quarter of 2021, which would have showed significant declines in trading volumes and revenue for equity and options trading and cryptocurrency trading.²⁴⁶ Specifically, the plaintiffs alleged that Robinhood's offering documents violated Sections 11, 12(a)(2), and 15 of the Securities Act because they misrepresented the company's financials as they existed at the time of the IPO by omitting material downturns in key drivers of its revenue and KPIs in the months immediately preceding the IPO.²⁴⁷

Alternatively, the plaintiffs alleged that Item 303 of Regulation S-K, which requires disclosure of certain trends and the quantification of known effects "to the extent reasonably practicable," required Robinhood to disclose the interim and intraquarter financial results for the second and third quarters of 2021.²⁴⁸

The district court dismissed the plaintiffs' suit with prejudice, holding that Robinhood was not obligated to disclose intra-quarter or interim data unless they reflected declines that were an "extreme departure" from the company's historical performance, applying a test derived from the First Circuit.²⁴⁹ The district court reasoned that the plaintiffs failed to show the alleged decline in Robinhood's performance met the "historically extraordinary" standard, and concluded that the revenue decline could have been merely "seasonal or aberrational."²⁵⁰ The district court also held that the alleged trends were "not so

persistent" or "historically extraordinary" to trigger Robinhood's disclosure obligation under Item 303.²⁵¹

On appeal, the majority acknowledged that it had previously declined to rule on the validity of the "extreme departure" standard and clarified that the test is not the law of the Ninth Circuit. "Instead, the proper test for the duty to disclose is the test for materiality" adopted by the Second Circuit, which had previously rejected the "extreme departure" test in favor of a more holistic approach drawn from Supreme Court case-law, focusing on "'the total mix of information' available to investors."²⁵²

The majority reasoned that by "collapsing the duty to disclose into materiality, we make the securities law in this circuit clearer and more predictable."²⁵³ Applying that standard, the majority held that where a challenged omission involves the relationship between an issuer's "prior statement concerning a particular time period and an event subsequent to that time period," it must disclose later developments that are material with respect to the statement, not merely those that represented an extreme departure from historical results.²⁵⁴ Accordingly, the court remanded the case for the district court to ascertain whether the plaintiffs adequately alleged that the interim financial information was material because "[i]f they did, they have adequately alleged that Robinhood had a duty to disclose the omitted information" under Section 11.²⁵⁵

The majority also held that the district court erred in analyzing the plaintiffs' theory of liability under Item 303 of Regulation S-K, which requires disclosure of certain known trends, uncertainties, or events that are reasonably likely to materially affect operations, "to the extent reasonably practicable."²⁵⁶ The majority faulted the district court for focusing exclusively on the "trends" prong of Item 303, noting that the regulation also applies to discrete events and uncertainties. It concluded that the district court failed to address whether the plaintiffs' allegations of "dramatically lower [payment for order flow] from equity trading, cratering trading volume in equities and cryptocurrency, and declining KPIs" at Robinhood during the second and third quarters of 2021 were events or uncertainties" under Item 303.²⁵⁷ The panel held that a registrant's duty to disclose under Item 303 is not limited to long-standing or persistent trends but also applies to short-lived events if they are "reasonably likely to have a material . . . impact" on the business.²⁵⁸

The majority rejected a “bright-line two-month rule” adopted by several district courts as too mechanical.²⁵⁹ While acknowledging that “not every set of interim financial results is a trend,” the majority reasoned that “holding that some patterns less than two months long can be trends for purposes of Item 303 would not impose an ‘unworkable and potentially misleading . . . system of instantaneous disclosure out [of] normal reporting periods.’”²⁶⁰ The majority also disagreed with the district court’s analysis that the alleged omissions were not so persistent as to require disclosure. “Because Item 303 imposes a broader duty of disclosure than Section 11’s ‘misleading’ prong, the extreme departure test is especially inapplicable here.”²⁶¹ Instead, the majority ruled that on remand, the district court should consider whether disclosure of the interim results was required under Item 303’s duty of disclosure, namely whether they were reasonably likely to materially affect operations.

In contrast, the full panel agreed with the district court that the plaintiffs had not stated a claim for violation of Item 105, which requires registrants to quantify the “material factors that make an investment in the registrant or offering speculative or risky.”²⁶² The plaintiffs argued that Robinhood violated Item 105 by “present[ing] risks as contingent when they [had] already come to fruition” and failing to disclose that its “revenues had become far more volatile than they had been historically.”²⁶³ The court explained that “presenting past harms as contingent future risks may be misleading” but does not, standing alone, “violate Item 105” and that “the [d]efendants did disclose the risk” that Robinhood’s revenues would be more volatile than its historical performance.²⁶⁴

Dissenting in part, Judge Rawlinson concluded that the information and disclosures provided by Robinhood, together with the available marketplace information, equaled or exceeded what the court previously has accepted as adequate under Item 303 to preclude liability. Based on her view that settled Ninth Circuit precedent dictated the outcome, the dissent stated that there was no need for the panel to address the “extreme departure” standard applied by the district court.

Second Circuit Revives Securities Fraud Suit Alleging Channel Stuffing

The Second Circuit addressed the sufficiency of securities fraud claims against a company and certain of its officers and directors, alleging that statements about financial results, internal controls, revenue recognition policies, and compliance

with Generally Accepted Accounting Principles (“GAAP”) were materially misleading for failing to disclose the company’s reliance on channel stuffing to meet revenue targets.²⁶⁵ A unanimous panel concluded that the complaint pleaded actionable misstatements and omissions made with scienter. While agreeing with the district court that “[c]hannel stuffing is not necessarily illegal,” the court held that the complaint adequately alleged that the company “made a series of misleading ‘half-truths’ in discussing the causes of its financial success without disclosing its reliance on channel stuffing.”²⁶⁶

The complaint alleged that in order to meet Wall Street forecasts, the company inflated its reported revenues by offering distributors significant end-of-quarter incentives to accept more product than they could sell, and that these practices were not adequately disclosed to investors.²⁶⁷ The plaintiffs contended that the company’s public statements attributed sales growth to “strong demand for [its] organic and natural brands,” while omitting the material fact that its growth was driven in part by unsustainable channel-stuffing incentives.²⁶⁸ The complaint also alleged that the company subsequently restated its financials and conceded that it lacked adequate internal controls over its distribution practices. In addition, an SEC investigation resulted in a cease-and-desist order. After these developments were announced, the company’s stock price dropped substantially and investors brought suit alleging both scheme liability under Rule 10b-5(a) and (c) and misstatement liability under Rule 10b-5(b).

The district court granted the defendants’ first motion to dismiss, in an opinion that the Second Circuit vacated and remanded in 2021. In its 2021 decision, the Second Circuit held that the dismissal of the scheme-liability claim under Rule 10b-5(a) and (c) was not dispositive of the misstatement-liability claim under Rule 10b-5(b), because a Rule 10b-5(b) claim “focuses ‘not on schemes, devices, or practices, but on statements made.’”²⁶⁹ On remand, the district court again dismissed the complaint, holding that the plaintiffs failed to plead an actionable misstatement or omission and also failed to plead scienter.²⁷⁰

On appeal, the Second Circuit again vacated and remanded, holding that the plaintiffs adequately alleged actionable misstatements and half-truths, scienter, and loss causation. Consistent with the Supreme Court’s decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, the court limited

its analysis to statements the company made and concluded that the plaintiffs plausibly alleged falsity in the defendants' reported financial results, assertions of compliance with GAAP, representations about the existence of effective internal controls, and descriptions of its revenue-recognition policies.²⁷¹ The court pointed out that the company's subsequent restatement of its financial results and disclosure of material weaknesses in its internal controls and financial-reporting and accounting practices "suffice to establish that these statements were in fact false at the time they were made."²⁷²

The court further held that statements attributing sales growth to strong demand, momentum, and portfolio strength were adequately alleged to have been misleading "half-truths," due to the defendants' failure to disclose the company's alleged reliance on channel stuffing. The panel explained that "once a company speaks on an issue or topic, it has a duty to tell the whole truth."²⁷³ The court also concluded that statements minimizing issues with excess inventory as "one-offs" were similarly actionable in light of alleged saturation of distributors as a result of the channel stuffing.²⁷⁴

The court rejected the defendants' contention that the company adequately disclosed its sales practices to investors under the "truth-on-the-market" defense, explaining that "corrective information must be conveyed to the public with a degree of intensity and credibility sufficient to counter-balance effectively any misleading information created by the alleged misstatements."²⁷⁵ The court further observed that the "truth-on-the-market-defense is intensely fact-specific," holding that "whether [the company]'s generic language about offering sales incentives and promotions sufficiently counterbalanced the statements that attributed sales growth to growing demand should not be resolved at the pleadings stage."²⁷⁶

As to scienter, the Second Circuit concluded that "all of the facts alleged, taken collectively, give rise to a strong inference of scienter" that was cogent and at least as compelling as any opposing inference.²⁷⁷ The court reasoned that the plaintiffs adequately alleged a strong inference of scienter by pleading both motive and opportunity "based on the unusual stock sales and executive compensation tied to [the company]'s overstated financial results," including a near-miss bonus threshold that would have been unmet under proper accounting.²⁷⁸

The court also held that the plaintiffs offered circumstantial evidence of conscious misbehavior or recklessness, noting that "securities fraud claims typically have sufficed to state a claim based on recklessness when they have specifically alleged [the] defendants' knowledge of facts or access to information contradicting their public statements."²⁷⁹ The court pointed to allegations based on several confidential witnesses that company executives negotiated concessions directly with distributors, directed employees to push product on distributors, and discouraged open discussion of end-of-quarter sales tactics, including the use of credits and accruals to offset sales deficits.²⁸⁰ Employees who questioned these practices were allegedly reprimanded or even terminated, reinforcing an environment where concerns about financial reporting were suppressed.²⁸¹

The court credited allegations that the defendants fostered a culture of secrecy and fear, which contributed to the concealment of improper accounting practices.²⁸² Consistent with its observation that "[s]uch secrecy insinuates knowledge of wrongdoing," the court found a strong inference that the individual defendants acted with scienter in making the alleged misstatements.²⁸³ The court also noted that the importance of channel stuffing and inventory to the company's overall business supported the inference that the individual defendants would have "monitored [these operations] closely' . . . and knew or should have known information contradicting their public statements."²⁸⁴ The court also concluded that allegations of the departure of several individual defendants and other key personnel under suspicious circumstances or because they took issue with the company's channel-stuffing practices and its financial reporting provided "supplemental, circumstantial support for the [p]laintiffs' scienter pleadings," warranting reversal of the district court's scienter determination.²⁸⁵

Ninth Circuit Affirms Dismissal and Holds Independent Auditor Not Strictly Liable for Information in Registration Statement Prepared By Issuer

In *Hunt v. PricewaterhouseCoopers LLP*, the Ninth Circuit held that an independent auditor is not strictly liable under Section 11 of the Securities Act simply because it certified the financial statements prepared by the issuer.²⁸⁶ The court noted that while Section 11 is a strict liability statute with respect to issuers of securities and their directors, the statute provides

defenses for other non-issuer defendants, including experts such as accountants. The court explained that the statute allows accountants to avoid liability if they employed due diligence in preparing or certifying statements in a registration statement “by showing that they ‘had, after reasonable investigation, reasonable grounds to believe and did believe, at the time such part of the registration statement became effective, that the statements were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading.’”²⁸⁷

The court agreed with the Second Circuit that limiting strict liability to those involved in “enumerated distributional activities” avoids “the implausible result of transforming every lawyer, accountant, and other professional whose work is theoretically ‘necessary’ to bringing a security to market into an ‘underwriter’ subject to strict liability under § 11, a dramatic outcome that Congress provided no sign of intending.”²⁸⁸ The court further explained that this approach is consistent with the Supreme Court’s decision in *Omnicare*, which held that an independent accountant is protected from liability for its opinions, but not factual statements, about underlying documents prepared by an issuer as long as the opinion was sincerely held.²⁸⁹

The complaint alleged that Bloom, a company that designs, sells, and installs fuel-cell servers (“energy servers”) that convert natural gas or biogas into electricity, improperly accounted for sale-leaseback transactions (“MSAs”) involving the energy servers. A sale-leaseback transaction involved the sale of an energy server to a bank with a leaseback to Bloom, and a simultaneous sublease to a customer, which in turn paid Bloom for the service, thereby funding lease payments to the bank and generating income for Bloom. The company could account for MSAs in two ways with different accounting consequences: as an operating lease, accounting for the revenue when it sold an energy server to a bank; or as a capital lease, accounting for the revenue when it received payments from the customer over the course of the service agreement. A capital lease would be recognized if the transaction met specific criteria in relevant provisions of the Accounting Standards Codification; if none of the criteria were met, the transaction was classified as an operating lease. It was undisputed that Bloom initially accounted for all its MSAs as operating leases.²⁹⁰

In 2018, the company decided to go public in an IPO. In connection with its registration statement, the company prepared its own financial statements for 2016, 2017, and the first quarter of 2018. PricewaterhouseCoopers (“PwC”) was hired to express an opinion on the 2016 and 2017 financial statements and conducted audits in accordance with relevant PCAOB standards. PwC’s audits did not identify any issue with the company’s classification of the MSAs as operating leases under GAAP or GAAS. It was also undisputed that the registration statement described the sale-leaseback transactions, stated that the MSAs could be classified as capital leases or operating leases, and explained how that classification could affect the company’s recognition of revenue and liabilities. The registration statement went effective in July 2018, and shares were sold in the IPO at \$15 per share.

In 2019, the company initiated a review of its accounting for certain MSAs after PwC identified an issue it had not previously identified related to the accounting of the MSA transactions, and the company ultimately determined that the MSAs should be treated as capital leases, not operating leases. After reclassification of certain MSAs, the company revised its 2016 and 2017 financial statements and restated its 2018 and 2019 financial statements. The next day, the price of Bloom stock dropped by 13.8%.

Shareholders filed suit against the company, its officers and directors, and 10 underwriters of the IPO, asserting claims under Section 10(b) of the Exchange Act and Section 11 of the Securities Act based on alleged misstatements made from 2018 to 2019 and in the registration statement. After the company announced the restatements of the 2018 and 2019 financial statements, the plaintiffs amended their complaint to add allegations regarding the reclassifications of the MSAs and to add PwC as a defendant, alleging that it violated Section 11 because it purported to have “conducted an adequate and reasonable investigation into the business operations, financial statements, and accounting of Bloom Energy.”²⁹¹

The district court granted PwC’s motion to dismiss the Section 11 claims against it, based on its finding that the auditor’s opinion was inactionable under *Omnicare*. It concluded that PwC was not liable because the auditor said only that the financial statements “‘present fairly, in all material respects, the financial position of the Company . . . in conformity [with GAAP]”; that

'the financial statements [were] the responsibility of [Bloom Energy's] management'; that PwC only had the responsibility 'to express an opinion on [Bloom Energy's] consolidated financial statements based on [its] audits'; and that the classification of 'MSAs are complex.'²⁹² The district court also rejected the plaintiffs' argument that the PwC opinions contained within them, as embedded statements of fact, the financial statements prepared by Bloom. Lastly, the district court held that PwC's certification of the financial statements was not a guarantee that they were accurate but rather was limited to the conclusions of the audit opinion.

On appeal, the plaintiffs dropped their arguments that PwC's opinion contained misrepresentations that met one or more of the three exceptions under *Omnicare* and instead requested the Ninth Circuit to hold only that PwC was strictly liable under Section 11(a)(4) for the misstatements in Bloom's 2017 financials. The court rejected this argument, noting that under settled precedent, only issuers are held strictly liable under Section 11 for damages resulting from misrepresentations in a registration statement. The court noted the statutory provision allowing accountants to avoid liability if they employed due diligence in preparing or certifying statements. "In other words, accountants must exercise their due diligence in investigating the materials provided to them using the accepted practices of their profession."²⁹³ While the court acknowledged that the statute distinguishes between preparing and certifying financial statements, it explained that as a result of the due diligence defense, Section 11 imposes a negligence standard for an accountant's liability.

The court concluded that limiting strict liability to those persons engaged in "enumerated distributional activities" related to bringing a security to market rather than transforming "every lawyer, accountant, and other professional" working with an issuer into an underwriter subject to strict liability under Section 11 is also consistent with *Omnicare*, in which the Supreme Court limited the scope of liability for statements of opinion.²⁹⁴ "Under the Supreme Court's reasoning, accountants may be liable for statements of fact if they did not act with due diligence; however, accountants will not be liable for statements of opinion, even if they reflect a subjective belief that admits there is a possibility of error, as long as the statement of opinion was sincerely held."²⁹⁵

The court noted that under *Omnicare*, a statement of opinion is not an untrue statement of a material fact simply because it is later determined to be incorrect. Acknowledging that *Omnicare* did not insulate accountants from all liability and that an audit opinion may still be subject to liability under Section 11 under one of the three exceptions outlined by the Supreme Court, "where (1) 'the speaker did not hold the belief she professed'; (2) 'the supporting fact[s] [the speaker] supplied were untrue'; or (3) the opinion omits facts 'whose omission makes the opinion at issue misleading,'" the court noted that the plaintiffs attempted but failed to establish liability for PwC under those exceptions in the district court and abandoned the argument on appeal.²⁹⁶

Applying these standards, the Ninth Circuit affirmed dismissal of the Section 11 claims against PwC. As a preliminary matter, the court observed that "no one" disputes that PwC did not prepare the 2017 financial statements or that Bloom was responsible for preparing its consolidated financial statements.²⁹⁷ Since accountants do not, "by virtue of auditing a company's financial statements somehow make, own or adopt the assertions contained therein," and its opinion merely affirmed that the company followed the proper accounting principles, PwC's statements of opinion are protected under *Omnicare*, and PwC was not liable as a preparer.²⁹⁸

The court also declined to impose strict liability on PwC simply because it certified Bloom's financial statements. "Section 11 does not require that PwC, by certifying the financial statements, guarantee that the documents provided by Bloom Energy were free from error."²⁹⁹ Rather, the court concluded that PwC was required to, and did, act in compliance with GAAP and GAAS, by performing a reasonable investigation and having reasonable grounds to believe, and did believe, that the statements provided by the company were true and that there were no omissions that made the statements misleading. The court also pointed out that the plaintiffs "made no allegation that PwC did not sincerely believe that Bloom Energy's classification of the MSAs aligned with proper accounting principles based on the evidence available at the time."³⁰⁰

Finally, the Ninth Circuit affirmed the district court's conclusion that the plaintiffs failed to adequately plead that three challenged line items in the financial statements relating to

whether the MSAs should be classified as operating or capital leases were statements of fact, rather than opinions. “The district court recognized that Bloom Energy’s classification of the MSAs was the product of accounting judgments; it determined that those judgments involve[d] complex consideration[] of various GAAP provisions in determining how to evaluate the term of the MSAs and the value of the energy servers.”³⁰¹ The court agreed that because the plaintiffs failed to plead or even argue any of the *Omnicare* exceptions to establish liability for a statement of opinion, the district court correctly concluded that the three line items were not actionable.

SCIENTER

“Corporate Trauma Alone Does Not Constitute Securities Fraud and Neither Does Ordinary Negligence”: Third Circuit Affirms Dismissal of Securities Suit Against Real Estate Investment Trust

In *Handal v. Innovative Industrial Properties, Inc.*, the Third Circuit affirmed dismissal of a securities suit brought against a REIT by investors who alleged that the REIT’s executives made false or misleading statements regarding one of its major tenants, a cannabis-cultivation company that was later discovered to have committed fraud.³⁰² The court concluded that the district court correctly held that the complaint failed to state a claim under Section 10(b) and Rule 10b-5, because the plaintiffs failed to identify specific statements and plead with particularity that those statements were false or misleading at the time they were made and failed to allege any facts that the one statement plausibly alleged to be false or misleading was made with scienter.³⁰³

Notably, the Third Circuit joined the Second, Fifth, Sixth, Eighth, and Ninth Circuits in holding that “[A]n egregious refusal to see the obvious, or to investigate the doubtful’ can support a strong inference of scienter when the facts left undiscovered are those that made a statement false or misleading.”³⁰⁴ Applying that standard, the court concluded that the plaintiffs failed to plead specific facts with the requisite particularity to support such an inference in this case. “We are prepared to believe that Innovative’s decision to release a same-day response to [a short-seller’s] report with a blanket statement about all its reimbursements was rash . . . [b]ut it was not willfully ignorant.”³⁰⁵

The panel also declined to adopt the plaintiffs’ alternate theory of corporate scienter, in which “[a] plaintiff can use corporate or collective scienter to plead an inference of scienter against a corporate defendant without raising the same inferences required to attribute scienter to an individual defendant,” noting that in circuits that do recognize corporate scienter, it is typically reserved for “exceedingly rare” cases unlike this one.³⁰⁶

The complaint in *Handal* arose from the relationship between Innovative Industrial Properties, Inc. (“Innovative”), a REIT, and its tenant Kings Garden, a cannabis-cultivation company.³⁰⁷ Innovative’s business model was to purchase real estate from cannabis companies and lease the property back to them in “triple-net” lease transactions. Innovative also provided to Kings Garden, as it did for other tenants, financing of expenses for qualifying capital improvements, such as HVAC systems, grow lighting, and electrical upgrades. Under so-called reimbursement agreements, Innovative allocated a defined amount of money for a capital project, and a tenant would seek reimbursement from Innovative for its qualifying expenses by submitting a “draw request.”³⁰⁸ Through 2021 and into 2022, Kings Garden collected more than \$48 million in reimbursements from Innovative relating to expenses for purported capital improvements at its leased properties.³⁰⁹

On April 14, 2022, a short-seller released a report criticizing certain Innovative tenants and arguing that Innovative’s stock was overvalued.³¹⁰ The report unearthed multiple lawsuits alleging that Kings Garden and its founder, Michael King, committed fraud in connection with the operation of Kings Garden and that the founder had allegedly falsified books and records to enrich himself and swindle investors.³¹¹ Although the short-seller report did not comment on Innovative’s reimbursement agreements with Kings Garden, it did allege that another tenant had received suspicious reimbursements.³¹²

On the same day, Innovative issued a statement that the short-seller did not understand its process for underwriting tenants’ improvements and that any reimbursements related only to verified, qualified improvements and were not for any other purpose.³¹³ In the day following publication of the short-seller report, Innovative’s stock fell by 7.5%.³¹⁴

By June 2022, however, Innovative had discovered inconsistencies between the amounts of money requested by Kings Garden in reimbursement for capital projects and the supporting documentation it had submitted.³¹⁵ This prompted an investigation revealing that Kings Garden had funneled money to unidentified third parties, overcharged for property improvements, and requested reimbursement for nonexistent expenses.³¹⁶ When Innovative informed Kings Garden it had identified irregularities and that further reimbursements would not be forthcoming until those irregularities were resolved, Kings Garden responded that “it was out of money and would not be paying its July 2022 rent.”³¹⁷

On July 13, 2022, Innovative disclosed the default of Kings Garden’s July rent and related monetary obligations amounting to approximately \$2.2 million in a Form 8-K, but did not mention the alleged reimbursement fraud or that the company had commenced an investigation of Kings Garden weeks earlier.³¹⁸ Within a day of that Form 8-K disclosure, Innovative’s stock price fell by 14.3%.³¹⁹ On July 25, 2022, following Kings Garden’s failure to pay rent, Innovative sued Kings Garden for breach of contract.³²⁰ On August 2, 2022, Innovative amended its complaint to raise claims related to Kings Garden’s alleged reimbursement fraud, claiming that Kings Garden exhibited “red-flags of a Madoff-style Ponzi scheme” and alleging a history of alleged fraudulent misconduct by its CEO.³²¹

On August 4, 2022, Innovative disclosed its suit in a Form 10-Q.³²² Within a day after filing the Form 10-Q disclosure of the lawsuit, Innovative’s stock price fell by another 4%.³²³

Thereafter, three stockholders separately sued Innovative and its executives, alleging that various statements pertaining to Innovative’s relationship with Kings Garden were false or misleading under the Exchange Act.³²⁴ The plaintiffs identified five categories of allegedly false or misleading statements about Innovative’s: (i) evaluation and due diligence of potential tenants; (ii) ongoing evaluation and monitoring of Kings Garden; (iii) statements of praise for Kings Garden; (iv) statements concerning reimbursement arrangements; and (v) July 2022 Form 8-K relating to Kings Garden’s nonpayment of the July 2022 rent.³²⁵

The court first addressed Innovative’s statements regarding its due diligence of Kings Garden, concluding that they were not actionably false or misleading. The complaint alleged that

Innovative’s securities filings “repeatedly and affirmatively stated” that due diligence investigations were conducted prior to Innovative’s purchase of properties and leaseback to tenants, and that Innovative’s failure to detect Kings Garden’s fraud sooner demonstrated a lack of due diligence that rendered its statements false or misleading.³²⁶

However, the court rejected this claim because Innovative’s filings did not affirmatively warrant that all of its purchases followed satisfactory completion of due diligence investigations—but instead only that purchase agreements were “typically subject to closing conditions” that included the “satisfactory completion of due diligence investigations.”³²⁷ Summarizing the plaintiffs’ argument as asserting that Innovative’s diligence was, in essence, inadequate at best or even subpar, the court explained that Innovative “never promised that its diligence would meet any particular standard of thoroughness.”³²⁸ Instead, Innovative represented that it relied on management (as opposed to third parties or other actors) and typically subjected deals to closing conditions. Because the complaint and attached documents showed those disclosures to be true, the court concluded that “[e]ven if Innovative missed obvious red flags,” that fact cannot sustain a securities claim.³²⁹

The court also held that the remaining challenged statements about Innovative’s evaluation and diligence of potential tenants, made by a senior executive in a 2021 earnings call, were not plausibly false or misleading because the transcript showed that the executive was responding to a question about other tenants, and “the Complaint pleads no facts explaining why, in that context, a reasonable investor would have understood [the executive’s] statement to refer to Kings Garden.” Thus, there was no actionably false or misleading statement.³³⁰

Similarly, the court concluded that Innovative’s recurrent representations about its ongoing evaluation and monitoring of tenants were not false or misleading simply because Innovative failed to scrutinize tenant draw requests that were “fraudulent on their face and otherwise failed to detect that Kings Garden had not obtained the work for which Innovative reimbursed.”³³¹ In its filings, Innovative disclosed that “in some instances, we monitor our tenants by periodically conducting site visits and meeting with the tenants to discuss their operations.”³³² The court pointed out that Innovative “did not make a blanket promise to conduct site visits or discuss with tenants their

operations” in all cases, but rather stated that such monitoring and meetings occurred only “in some instances.”³³³ Although the complaint plausibly alleged that Innovative did not visit Kings Garden’s sites to audit the work it had paid for, those allegations were insufficient to render Innovative’s disclosures false or misleading because they failed to allege that Innovative “categorically does not conduct site visits or meet with tenants across its portfolio to discuss their operations.”³³⁴

The court next held that Innovative’s statements praising Kings Garden’s business practices and productivity, which were statements of opinion, were not actionable. During a February 2022 earnings call, Innovative executives gave various opinions about Kings Garden, describing the tenant as a “top producer” and “focused on long-term, responsible, sustainable production.”³³⁵ During a May 2020 earnings call, an Innovative executive stated that a dividend paid by Kings Garden “was and is considered highly unusual among any prominent brand in the industry and . . . demonstrates their belief in the long-term prospects in the business.”³³⁶

The court explained that under *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, a statement of opinion can be actionable if any untrue statement of material fact or the omission of a material fact renders the statement misleading.³³⁷ Specifically, liability for statements of opinion may exist in only three situations: first, if the speaker does not believe what they say, their opinion is false; second, an opinion statement that contains expressly embedded factual assertions is misleading if any of the embedded factual assertions are untrue; and third, an opinion statement may be misleading when the speaker omits material facts regarding the speaker’s knowledge of (or inquiry into) facts underlying the opinion, if such facts would conflict with a reasonable investor’s takeaway from the statement itself.³³⁸

The court explained that whether such omissions are actionable “always depends on context.”³³⁹ Noting that the plaintiffs alleged that the opinions at issue were actionable under the third *Omnicare* scenario because on the date when each statement was uttered, Innovative possessed at least one fraudulent draw request and some Kings Garden financial statements showing millions of dollars disappearing from its accounts, the court concluded that the plaintiffs did not allege that Innovative executives knew of or suspected the fraudulent activity before the alleged opinion statements were made.³⁴⁰

Thus, the court concluded that Innovative’s opinion statements of praise were not actionably misleading by omission.³⁴¹

The court similarly found no actionable omission regarding Innovative’s Form 8-K disclosure of Kings Garden’s nonpayment of rent in July 2022.³⁴² The plaintiffs alleged that the disclosure was misleading because although the defendants “were duty-bound to disclose that Kings Garden was a Ponzi scheme designed to, and accomplishing, the embezzlement of tens of millions of dollars via forged and fraudulent draw requests,” Innovative did not provide information about Kings Garden’s purported fraud or embezzlement to investors.³⁴³ The plaintiffs also alleged that the Form 8-K failed to disclose Kings Garden’s history of dishonesty and the indicia of fraud in its financial statements.

The court rejected these arguments, noting the plaintiffs’ failure to allege any facts plausibly suggesting that Innovative’s statement about non-payment of rent or any other factual averment in the Form 8-K was false. The court also concluded that the Form 8-K was not misleading by omission, because a reasonable investor would not have expected Innovative to also disclose the results of its then-unfinished investigation of Kings Garden, and that plaintiffs had failed to plead facts indicating that the company had a duty to disclose an unfinished investigation.³⁴⁴

In contrast, the court found actionable one statement in Innovative’s press release issued in response to the short-seller report: specifically, an affirmative representation that *any* Innovative reimbursements to Kings Garden related only to “verified,” “qualified” improvements and never were funding for any type of loan to be utilized for any other purpose.³⁴⁵ Noting that the plaintiffs’ complaint pleaded with particularity that Innovative had issued reimbursements to Kings Garden “that neither qualified for reimbursement nor were verified by Innovative,” the court concluded that the “certainty” expressed by the press release was incorrect and that the statement was actionable.³⁴⁶

After identifying one well-pleaded misstatement, the court next evaluated whether Innovative made the statement with scienter and concluded it did not.³⁴⁷ Attempting to meet this standard, the plaintiffs advanced three theories: (i) individuals’ scienter; (ii) corporate scienter; and (iii) the *Avaya* “focused questions” standard.³⁴⁸

First, under a theory of individuals' scienter, the plaintiffs contended that the plausibly misleading statement was made while Innovative's executives willfully ignored Kings Garden's red flags, thus constituting scienter that could be imputed to Innovative.³⁴⁹ Rejecting this argument, the court first noted that the complaint did not allege that anyone at Innovative knew or suspected that it was being defrauded at the time of the statement.³⁵⁰ Next, the court rejected the plaintiffs' assertion that Innovative executives "should have known of Kings Garden's wrongdoing" at the time of the statement because even if Innovative plausibly should have discovered the fraud earlier, Rule 10b-5 requires more than negligent nonfeasance.³⁵¹

The court also addressed the plaintiffs' argument that a speaker acts recklessly when discussing subject matter while willfully turning a blind eye to potentially material red flags, and that Innovative, as the "speaker" of the statement in its press release, acted with scienter under a willful blindness theory.³⁵² Accepting this theory as a matter of first impression, the Third Circuit adopted the standard applied in several other circuits: "[A]n egregious refusal to see the obvious, or to investigate the doubtful can support a strong inference of scienter when the facts left undiscovered are those that made a statement false or misleading."³⁵³

Despite recognizing for the first time the willful blindness theory of scienter in the Third Circuit, the court found that the plaintiffs failed to adequately plead it because they did not allege with particularity that any Innovative employees were aware of Kings Garden's fraud and failed to investigate, or that Innovative had any motivation to have willfully blinded itself to the fraud.³⁵⁴ "[W]hile 'it is not necessary to plead motive to establish that a defendant acted with scienter,' it 'is significant' that the [c]omplaint does not allege what would have motivated Innovative or its agents to bury their heads in the sand about the company's own victimization."³⁵⁵

Second, the plaintiffs argued that the doctrine of corporate scienter applied—which involves drawing a strong inference of a corporation's scienter "without being able to name the individuals [in the corporation] who concocted and disseminated the fraud."³⁵⁶ Specifically, the plaintiffs asserted that Innovative's small size and the strength of the plaintiffs' "allegations of no site visits, no contacting contractors, and possessing documents that were incomplete or altered on their

face" provided a strong inference that the company acted with scienter.³⁵⁷

The court noted that other circuits have approached the corporate scienter doctrine differently, "to the extent they recognize the doctrine at all," and that in a previous case, the Third Circuit had declined to affirmatively adopt or reject the doctrine of corporate scienter.³⁵⁸ The court again declined to adopt or reject the doctrine and left the issue open for a future case.³⁵⁹ In doing so, however, the court noted that other circuits adopting corporate scienter had done so in exceedingly rare cases involving statements that were "dramatically false," and that the lone misstatement in Innovative's press release was not of similar magnitude and that application of the doctrine would not have changed the result in this case.³⁶⁰

Finally, the plaintiffs argued that scienter was adequately pleaded pursuant to the "focused questions" analysis adopted by the Third Circuit in *Institutional Investors Group v. Avaya, Inc.*³⁶¹ In *Avaya*, the defendant corporation's chief financial officer was asked "focused questions" on earnings calls about pricing, and responded by repeatedly denying price-discounting.³⁶² The *Avaya* court held that the executive could be culpable if "what he *knew* made obvious the risk that his confident, unhedged denials of unusual discounting would mislead investors."³⁶³ The plaintiffs argued that under *Avaya*, when posed with a "pointed inquiry about a matter at the core of one's business, it is reckless to deny with certainty material, knowable, adverse facts," and thus it followed that Innovative's April 14 statement about Kings Garden was reckless.³⁶⁴

The court rejected the plaintiffs' proffered application of *Avaya* and distinguished the case on multiple grounds. First, the court noted that there were no allegations that anything Innovative knew made it obvious that its confident declaration in the April 14 press release was false.³⁶⁵ Second, the Innovative press release was issued in response to (and on the same day as) the short-seller report that criticized Innovative's relationships with tenants generally.³⁶⁶ The court observed that the short-seller report did not comment on Innovative's reimbursement arrangement with Kings Garden at all, and thus did not present the same "focused questions" that the company executive faced in *Avaya*.³⁶⁷

Finally, it was more likely that Innovative's press release was attributable to nonculpable ignorance because it was

restricted to one subject concerning one tenant, as opposed to *Avaya*, in which the question involved company-wide policy and was not restricted to only a few products or customers.³⁶⁸ Accordingly, the court concluded that the complaint did not adequately plead a strong inference of scienter as required by the Private Securities Litigation Reform Act, or PSLRA, and the district court properly found that the plaintiffs failed to plead that the April 14 statement violated Section 10(b) or Rule 10b-5.

LOSS CAUSATION

Fourth Circuit Affirms Dismissal of Securities Suit, Highlighting Demanding Standard for Pleading Loss Causation Based on Short-Seller Reports

In *Defeo v. IonQ, Inc.*, the Fourth Circuit affirmed dismissal of securities fraud claims against quantum computer developer IonQ, holding that the plaintiffs failed to adequately plead loss causation and that allowing further amendment of the complaint would be futile.³⁶⁹ A unanimous panel found that the plaintiffs failed to clear the “high bar” of showing that a short-seller report—which relied on anonymous sources and disclaimed the accuracy of its information—revealed the truth of IonQ’s alleged fraud to the market.³⁷⁰

Noting the absence of any authority suggesting that a firm must issue a point-by-point rebuttal to a public allegation of fraud instead of a blanket denial of a report’s accuracy to show it is not acknowledging its truth, the court also rejected the plaintiff’s argument that IonQ’s response to the report was a corrective disclosure. While the court declined to impose a categorical ban on the use of short-seller reports to plead loss causation, the decision is a reminder that “when a short seller makes the kinds of disclaimers the [r]eport does here, its potential evidentiary value evaporates,” and courts are likely to find it implausible that such statements published by an activist short-seller would reveal some new truth to the market.³⁷¹

IonQ was a publicly traded company dedicated to developing quantum computers, including a 32-qubit system that purportedly had potential to be “the most powerful computing system in the world.”³⁷² On May 3, 2022, an activist short-selling firm published a report—based on certain public information and selective interviews of unnamed former IonQ employees, customers, and quantum computing experts—claiming that IonQ was a “scam built on phony statements about nearly all key

aspects of the technology and business.”³⁷³ Specifically, the report alleged that IonQ’s purported 32-qubit computer was “a brazen hoax,” that IonQ had made false claims about manufacturing its existing systems at a small-enough size to be commercially practical, that IonQ had misled investors about the error rates of its computers, and that IonQ’s revenue and bookings were driven by related-party deals that created “the illusion of commercial momentum.”³⁷⁴

The report also included a long set of disclosures and disclaimers. It divulged that the firm publishing the report “[stood] to realize significant gains in the event that the price of [IonQ’s] stock, bonds, options, and/or other securities decline or change.”³⁷⁵ It also stated that while the firm’s “opinions are held in good faith,” it could not “provide any representations or warranties with respect to the accuracy” of “the public information, sources, the interviewed individuals, and any social media posts” cited in the report.³⁷⁶ It disclaimed the credibility of witnesses interviewed for the report, including hired experts and former IonQ employees who may have had “conflicts of interest or other biases with respect to IonQ.”³⁷⁷ Finally, the report disclosed that its quotations “do not always represent a precise transcript” of the expert interviews and “may be paraphrased, truncated, and/or summarized solely at [the short-selling firm’s] discretion.”³⁷⁸

On May 4, 2022, the day after the report was published, IonQ responded with a press release highlighting that the short-selling firm “[stood] to profit in the event that the stock price of IonQ decline[d]” and that there were “important inaccuracies and mischaracterizations” regarding IonQ’s business.³⁷⁹ The company also encouraged investors not to trade its stock based on the report. On May 12, 2022, IonQ released a longer, sterner statement asserting that the report was “intended to manipulate the stock price of IonQ” and “riddled with disinformation.”³⁸⁰

Nonetheless, IonQ’s stock price experienced a significant decline following the report’s release, falling from \$7.86 per share the day before publication to \$4.34 by the time IonQ issued its written statement 10 days later. Shortly thereafter, the plaintiffs filed a securities class action on behalf of IonQ stockholders, alleging violations of Sections 10(b), 14(a), and 20(a) of the Exchange Act and Rules 10b-5 and 14a-9. The complaint mirrored the allegations in the report.

The district court dismissed the plaintiffs' complaint in its entirety for failure to state a claim under Rule 12(b)(6).³⁸¹ It found that the plaintiffs had not alleged that the report itself or confidential witness cited therein were "reliable sources" and therefore had "not alleged the elements of a Section 14(a), Section 10(b), or Section 20(a) claim."³⁸² It further found that, even if it were to consider the report and the confidential witness's allegations, the claims would still be dismissed because the plaintiffs failed to adequately plead any materially false or misleading statements, scienter, and loss causation.

The plaintiffs then simultaneously moved for reconsideration under Rule 59(e) and for leave to file an amended complaint under Rule 15(a). The district court denied both motions on the sole ground that the proposed amendment to the complaint would be futile because it still failed to plead loss causation.³⁸³

On appeal, the Fourth Circuit affirmed the district court's dismissal for failure to plead loss causation and the denial of leave to amend. The court explained that "the first requisite to adequately pleading loss causation is pointing to the emergence of *new* facts in the market that reveal the truth behind the company's fraud."³⁸⁴ It further emphasized that "it is not enough to plead that some allegation of fraud hit the market if it is implausible to believe that said allegation revealed any new truth to the market."³⁸⁵ Applying these principles, the court rejected the plaintiffs' argument that the report and IonQ's response—taken individually or together—plausibly revealed any new truth to the market about alleged fraud in IonQ's business.

Noting that the issue of whether a short-seller report can plausibly expose the truth of a company's fraud as needed to plead loss causation was one of first impression in the Fourth Circuit, the court followed the Ninth Circuit in acknowledging that there is no "categorical ban on using short-seller reports to plead loss causation," while emphasizing that there is a "high bar that plaintiffs must meet in relying on self-interested and anonymous short-sellers."³⁸⁶ The court found the Ninth Circuit's jurisprudence "persuasive," noting that those decisions have "considered this precise circumstance, and concluded that similar publications cannot meet the pleading standard."³⁸⁷

For example, in *In re Bofl Holding, Inc.*, the Ninth Circuit found that reasonable investors would read anonymous blog

posts from short-sellers that disclaimed their own accuracy with "a healthy grain of salt," and therefore concluded that it was "not plausible that the market reasonably perceived [those] posts as revealing the falsity of [the company's] prior misstatements."³⁸⁸ In *In re Nektar Therapeutics*, the Ninth Circuit held that a self-interested short-seller report that relied on anonymous sources for its non-public information and disclaimed its accuracy was inadequate to reveal any truth about alleged fraud to the market. Applying these principles, the Fourth Circuit concluded that "when authors of a report are 'anonymous and self-interested short-sellers who disavowed any accuracy,' their reports are 'rendered . . . inadequate' for purposes of pleading loss causation."³⁸⁹

Accordingly, the court concluded that the plaintiffs' argument that the report exposed new information to the market was "lacking."³⁹⁰ Like the reports cited in the Ninth Circuit decisions, the court noted that the report was self-interested, relied on anonymous sources for its non-public information, and disclaimed its accuracy. The court also found it "particularly troubling" that the report included disclaimers about altering quotations, which "could allow it to say just about anything and cloak it in the imprimatur of truth in order to make a buck."³⁹¹ Pointing to the "the character of the [r]eport," the court concluded that any "potential evidentiary value evaporates" and found "it implausible these statements accompanied by those kinds of disclosures, published by an activist short-seller, would reveal some new truth to the market."³⁹²

Furthermore, the Fourth Circuit rejected the plaintiffs' argument that certain news articles about the report demonstrated that it had revealed truth to the market. The court emphasized that none of the articles credited the report for any new information, but instead merely observed that IonQ's stock price fell after the inflammatory allegations were published. Distinguishing between the "revelation" of fraud and the "allegation" of fraud, the court concluded that, taken together or separately, the articles "do no more than suggest a possible correlation" between the report and the stock price, and "correlation does not equal loss causation."³⁹³

The court also held that IonQ's reaction to the report was not a corrective disclosure. It acknowledged that "in theory," there may be a scenario "where a third party exposes some unverified bombshell about a company and the company's tacit *mea culpa* could function as a verification of that bombshell."³⁹⁴

But the court found that “that theory holds no water here.”³⁹⁵ The court rejected the plaintiffs’ argument that IonQ implicitly conceded that the report was accurate because it issued a blanket denial rather than a point-by-point rebuttal, noting that the company’s press release pointed out that the report contained many inaccuracies and urged shareholders not to trade its stock based on the allegations in the report.

Because nothing in the allegations revealed “new facts suggesting IonQ had perpetrated a fraud on the market,” the court affirmed the district court’s ruling that the proposed amended complaint failed to state a claim and that allowing amendment would be futile.³⁹⁶

Eleventh Circuit Reverses Dismissal of Suit Against Energy Company, Deepens Circuit Split as to Whether Heightened Pleading Standard Applies to Loss Causation

In *Jastram v. NextEra Energy*, the Eleventh Circuit revived a securities suit alleging that an energy company misrepresented its involvement in a Florida election interference scheme, holding that the district court erred in applying a heightened pleading standard to the plaintiffs’ loss causation allegations.³⁹⁷ A unanimous panel held that neither the PSLRA nor Rule 9(b) required loss causation to be pleaded with particularity. Instead, the court held that loss causation allegations should be reviewed for compliance with the general pleading requirements of Rule 8(a).

Applying that standard, the court concluded that the district court erred in dismissing the complaint on loss causation grounds because the plaintiffs had not alleged a single corrective disclosure that revealed the truth that was previously concealed or obscured by the defendants’ alleged fraud. Pointing to Eleventh Circuit precedent holding that corrective disclosures can come “from any source and take any form,” the court concluded that the district court had “improperly searched for a singular corrective disclosure.”³⁹⁸ Explaining that “the proper inquiry is whether enough truth has saturated the market to make investors second-guess the earlier fraud,” the court concluded that the complaint alleged facts that, when read together, “plausibly impl[ied] enough truth was illuminated to cause investors to seriously question [the defendants’] earlier misstatements.”³⁹⁹

The decision deepens a circuit split as to the pleading standard applicable to loss causation by joining the Fifth Circuit in holding that Rule 8(a) applies while the Ninth Circuit has held that Rule 9(b)’s heightened pleading requirements apply to loss causation allegations.⁴⁰⁰

The court described the complaint as “ha[ving] it all: corporate malfeasance, bribery, off-the-books recordkeeping, surveilling journalists, creating ‘ghost’ candidates, corrupting independent media outlets, and a failed acquisition that spiraled into two federal indictments.”⁴⁰¹ The crux of the securities fraud claim was that between 2018 and 2020, the defendants conspired with political strategists to sway state and local elections, but when the scheme came to light in 2021, executives at NextEra and its subsidiary Florida Power & Light made a series of public denials that were both knowingly false and materially misleading.

The complaint alleged that on January 25, 2023, the defendants changed course in two Form 8Ks filed by NextEra. First, the company disclosed that Florida Power & Light had unexpectedly severed ties with its CEO and attached a severance agreement that, among other things, included a severance compensation claw-back in the event the former CEO was convicted of or pleaded guilty to a felony because of any actions related to his employment. Second, the company also announced new risks related to potential violations of law by NextEra and Florida Power & Light, warning investors of potential “material fines” and “material adverse impact on the reputation” of the companies.⁴⁰² By the close of the market on January 25, NextEra’s stock had dropped 8.7% and lost more than \$14 billion in market capitalization.

The complaint further alleged that a newspaper article published on January 31, 2023, reported that the compensation claw-back provision in the former CEO’s severance agreement was not customary for NextEra and further suggested that the provision tacitly acknowledged the link between the executive’s departure and the political misconduct allegations. NextEra stock lost an additional \$850 million in market capitalization in the wake of the article.

The plaintiffs filed suit alleging that executives of NextEra and Florida Power & Light knowingly lied to investors about the

company's involvement in the alleged election interference scheme in violation of Section 10(b) and Rule 10b-5. The district court, applying the Rule 9(b) heightened pleading standard, dismissed the 10b-5 claim for failure to adequately plead loss causation. In particular, the district court found that the plaintiffs had failed to identify a single corrective disclosure that revealed a truth that was previously concealed or obscured by the defendants' alleged fraud.

The Eleventh Circuit reversed. The court held that because the PSLRA requires only a heightened pleading standard with respect to alleged misleading statements and scienter and Rule 9(b) applies to the circumstances constituting fraud or mistake only, "loss causation need not be pleaded with particularity; we review for general compliance with Federal Rule of Civil Procedure 8(a) as interpreted by *Twombly* and *Iqbal*."⁴⁰³

Applying Rule 8(a)'s less stringent standard, the court explained that a plaintiff must plausibly allege that a fraudulent statement inflated the security price and that this inflated price was later eroded in a way that relates back to the fraud. Noting that courts accept well-pleaded facts as conclusive, it concluded that "it should not prove burdensome for a plaintiff . . . to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind."⁴⁰⁴ The court explained that because the element of loss causation is limited to establishing a causal connection between a misstatement and the plaintiff's loss, "we must presume the earlier statements were fraudulent; whether fraud was properly alleged is an important but separate inquiry."⁴⁰⁵

Noting that "[w]hatever may be the disposition of loss causation, a plaintiff must still show material fraud to recover under Rule 10b-5 . . . [a]nd that fraud must be pled with particularity to survive a motion to dismiss," the court concluded that loss causation is not the element to litigate the fraud but rather "simply asks whether the loss was proximately caused by the alleged misstatements" or "whether the price dropped for the reason the plaintiff claimed it dropped."⁴⁰⁶

Although the decision did not expressly refer to the circuit split on the issue of which pleading standard applies to loss causation allegations, it certainly deepens it. As noted, the Fifth Circuit has concluded that Rule 8(a) applies to loss causation allegations while the Ninth Circuit has held that the heightened pleading requirements of Rule 9(a) apply to loss causation.⁴⁰⁷

The Fourth and Seventh Circuits have suggested that heightened pleading standards apply to loss causation.⁴⁰⁸ It remains to be seen whether the Supreme Court will resolve the circuit split.

The Eleventh Circuit concluded that the district court erred in granting dismissal for several reasons warranting reversal. First, it held that the district court improperly searched for a single corrective disclosure in contravention of settled circuit precedent, which held that "a plaintiff need not rely on a single, complete corrective disclosure; rather, it is possible to show that the truth gradually leaked out into the marketplace 'through a series of partial disclosures.'"⁴⁰⁹ The court observed that the district court's focus on a single complete corrective disclosure was based on the erroneous assumption that markets cannot link multiple pieces of information. "[W]e hold that the proper inquiry is whether enough truth has saturated the market to make investors second-guess the earlier fraud."⁴¹⁰

Next, the court rejected the district court's finding that the alleged corrective disclosures were inadequate because they did not explicitly mention any of the alleged misstatements upon which the plaintiffs based their fraud claims. "Companies are not usually keen to draw attention to their earlier fraud, but investors do not need handholding to connect the dots."⁴¹¹ Lastly, the court faulted the district court for substituting its own judgment about whether the corrective disclosures related to the fraud "in lieu of well-pleaded facts that *investors* made the connection."⁴¹²

In contrast, the Eleventh Circuit explained that in its view, the complaint alleged facts that, "when read together, plausibly imply enough truth was illuminated to cause investors to seriously question [the defendants'] earlier misstatements."⁴¹³ While it acknowledged that "[s]cattered or less dramatic revelations may indeed make it more difficult for a plaintiff to rule out other explanations" for a decline in stock price (such as market sentiment, poor financial performance, or general speculation), the court reasoned that "requiring a corrective disclosure to decisively and unequivocally debunk the earlier fraud overstates the role of loss causation—especially at the pleading stage."⁴¹⁴ The court focused its analysis on three pieces of information that the plaintiffs contended changed the market's perception about the alleged election fraud and also examined their alleged cumulative effect on the investing public.

The first piece of information was the company's disclosure in its January 25 Form 8-K addressing possible legal and reputational consequences stemming from the alleged election scheme. The court emphasized that while the disclosure was "no admission of wrongdoing" and NextEra "would be foolish to stipulate to fraud," the statement was notably different from earlier statements by company executives that there was no basis to any of the allegations.⁴¹⁵ The court rejected the district court's characterization of the statement as a potential future risk rather than a correction of an earlier statement as "a creative reading but not a persuasive one" because "[a]cknowledging that past misconduct may give rise to future liability, of course, necessarily reveals something about the earlier misconduct."⁴¹⁶ The court concluded instead that the new disclosure was broader and more comprehensive and its timing, in a Form 8-K rather than in a regularly scheduled Form 10-Q, "sent a signal to the market."⁴¹⁷

The second piece of information revealed in the Form 8-K was the announced separation of Florida Power & Light's CEO and that his replacement would be a former NextEra executive who had previously retired in 2019. The court rejected the district court's finding that the disclosure was not a surprise because the CEO had previously announced an intention to retire since "[e]ven if [the CEO] did *ex post* state that his retirement had always been planned, we should not assume investors would believe him."⁴¹⁸ On this point, the court pointed to allegations in the complaint that in a January 25, 2023, call with investors, the CEO tried to emphasize other reasons for his departure and "at least one investment analyst reported 'investors weren't buying' it."⁴¹⁹

The final piece of news released on January 25 deemed relevant by the court was a copy of the former CEO's severance agreement attached to the Form 8-K. The court pointed to the claw-back provision, which the plaintiffs alleged "raised a red flag to investors."⁴²⁰ The court noted that the provision required the former CEO to disgorge and repay his severance under a variety of circumstances, including upon a conviction or guilty plea to a violation of federal or state law based on any actions or omissions committed during his employment. The court pointed out that the complaint also alleged that NextEra executives later disclosed to investment analysts that the claw-back provision was not customary and the company's executive compensation policies did not describe any similar provisions. The court also highlighted the allegations that the

claw-back provision amounted to a "foreseeable materialization of a concealed risk" and that after a January 31, 2023, article tacitly acknowledging the link between the departure and the political misconduct allegations, NextEra's stock lost an additional \$850 million in market capitalization.⁴²¹

Finally, the court explained that to properly examine the relationship between corrective disclosures and the earlier alleged fraud, "we must consider the proffered statements *in toto*."⁴²² The court noted that although the complaint recited "an abundance of statements by financial analysts who linked the full January 25, 2023, update with NextEra's political scandal," resulting in several outlets downgrading their rating of the company's stock "specifically citing concerns over legal, regulatory, and reputational damage from the campaign allegations," the district court did not mention any of the statements in its decision.⁴²³

The Eleventh Circuit reasoned that the statements were integral to the analysis of loss causation in at least two ways. First, they showed that those with financial acumen made the connection at the heart of the loss causation inquiry. Second, as they came from prominent financial outlets, they may have influenced the market's reaction to the statements "and helped less savvy investors see the connection to the earlier fraud."⁴²⁴

The court held that because the plaintiffs had identified corrective disclosures, a subsequent price drop, and plausibly ruled out other explanations, the complaint adequately alleged loss causation, and reversal of the district court's dismissal was required.

CLASS CERTIFICATION

Sixth Circuit Vacates Class Certification in Suit Against Public Utility Holding Company, Clarifies Critical Issues Regarding Reliance and Damages in Securities Fraud Case

The Sixth Circuit vacated class certification in a securities suit against a public utility holding company and certain current and former officers and directors in a matter of first impression for the circuit, limiting the applicability of the *Affiliated Ute* presumption to cases based on omissions, not to cases involving a mix of alleged omissions and misrepresentations.⁴²⁵ A unanimous panel held that in mixed cases, district courts must follow a rigorous, two-step analysis of every alleged

misstatement or omission to determine whether the case is one of the rare instances in which the *Affiliated Ute* presumption applies.⁴²⁶ “[A] narrow legal construction of what constitutes an omission is important.”⁴²⁷ In contrast, if the district court determines a claim to be primarily based on misrepresentations, plaintiffs may be entitled to a rebuttable presumption of reliance under *Basic, Inc. v. Levinson*.⁴²⁸

The court separately held that district courts must conduct a “rigorous analysis” of a plaintiff’s proposed classwide damages model to determine whether it is capable of measuring damages across the entire class as required by the predominance requirement of Rule 23(b)(3) and the Supreme Court’s decision in *Comcast Corp. v. Behrend*.⁴²⁹ “[I]n all cases—involving single or multiple theories of liability—we require a rigorous analysis of predominance.”⁴³⁰

With this decision, the Sixth Circuit joins a growing number of federal appellate courts that have narrowed the applicability of the *Affiliated Ute* presumption to cases truly centered on omissions.⁴³¹ The court’s rulings on both reliance and damages will provide important arguments for defendants in securities fraud actions at the class certification phase.

The complaint alleged that the price of FirstEnergy’s stock dropped after a federal criminal complaint was unsealed that included allegations about the company’s political activities. The complaint focused on a series of alleged omissions and misrepresentations by the defendants, including that the company did not disclose a lobbying campaign in Ohio, falsely represented that it had complied with state and federal lobbying laws, and failed to adequately disclose the risks of engaging in political activities in violation of Section 10(b) of the Exchange Act and Rule 10b-5.

The district court granted the plaintiffs’ motion for class certification, finding that the mixture of alleged omissions and misrepresentations was primarily omissions-based and thus entitled to the *Affiliated Ute* presumption of reliance. The district court also concluded, with little discussion, that the plaintiffs’ damages methodology was susceptible to classwide measurement and applied the same analysis to the plaintiffs’ non-fraud Securities Act claims and fraud-based Exchange Act claims. The Sixth Circuit granted the defendants’ request for interlocutory appeal of the class certification order under Rule 23(f).

The Sixth Circuit reversed the district court on both the reliance and damages issues and vacated the class certification order. The court clarified the correct standard to be applied in securities cases involving both alleged omissions and misrepresentations when determining whether plaintiffs should be granted a presumption of reliance. The court held that the *Affiliated Ute* presumption, which is easier to establish, does not apply in mixed cases where both misstatements and omissions are alleged. The court explained that if a case is primarily based on misrepresentations, the presumption of reliance should be analyzed under *Basic*.

The court set forth a two-step framework for a district court’s assessment of whether the *Affiliated Ute* or *Basic* presumption of reliance applies. First, courts must “classify each claim or group of claims as alleging either an omission or a misrepresentation.”⁴³² Second, courts must “characterize whether the overall case is primarily based on omissions or on misrepresentations,” and the Sixth Circuit held that “half-truths and generic, aspirational corporate statements are misrepresentations,” not omissions.⁴³³

The court explained that this step requires a determination of whether any one of the four factors is present: “whether the omissions are only the inverse of the misrepresentations, in that the ‘omissions’ are essentially the same as the alleged misrepresented truths”; whether “reliance is practically possible to prove by pointing to some actual misrepresentation and connecting it to the injury”; whether “the preponderance and primary thrust of the claims involve misrepresentations made by the defendant(s)”; and, whether “the omissions alleged have no standalone impact apart from any alleged misrepresentations.”⁴³⁴

The court further explained that “[i]f a case satisfies even one factor, that means that misrepresentations constitute the essence of the case.”⁴³⁵ It also cautioned that “to warrant application of the powerful medicine that is the *Affiliated Ute* presumption of reliance, a mixed case must incontrovertibly revolve around omissions.”⁴³⁶

Applying these factors to 13 groupings of the alleged materially false and misleading statements and omissions, the Sixth Circuit concluded that “this case is all about misrepresentations” and “thus it is subject to review only under the *Basic* presumption.”⁴³⁷ Holding that the district court abused its

discretion by holding that this mixed case was primarily based on omissions and that *Affiliated Ute* applied in granting the plaintiffs a presumption of reliance, the Sixth Circuit vacated that portion of the certification order and remanded for application of the standards enunciated in the decision.

The Sixth Circuit also reversed the district court based on its grant of class certification as to the plaintiffs' Exchange Act claims, due to the court's failure to apply the classwide-damages requirement set forth by the Supreme Court in *Comcast Corp. v. Behrend*, which held that a plaintiff seeking class certification under Rule 23(b)(3) must establish that damages are capable of measurement on a classwide basis to satisfy the predominance requirement "because, otherwise, [q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."⁴³⁸ While acknowledging that the classwide-damages calculation need not be exact, the court explained that at both class certification and trial, district courts must conduct a "rigorous analysis" to determine whether a plaintiff's damages case is consistent with its liability case.⁴³⁹

The Sixth Circuit concluded that the district court "failed to conduct any analysis at all, let alone a rigorous one," of the Exchange Act claims brought by the plaintiffs.⁴⁴⁰ In particular, the court pointed out that the district court rejected FirstEnergy's objections to the plaintiffs' experts in one sentence and concluded without any additional analysis "that predominance exists with respect to damages for the same reasons as articulated in the previous section."⁴⁴¹

The court explained that the problem with the district court's citation to the previous section was that it concerned the plaintiffs' claims brought under the Securities Act, not the Exchange Act, and the Securities Act provides a statutory formula for calculating damages that may apply uniformly across a class. Noting "the vastly different world of the Exchange Act," which lacks any damages formula and requires proof of loss causation, the Sixth Circuit determined that conclusory statements by the district court as to predominance did not satisfy Comcast's rigorous-analysis requirement, warranting remand for application of the proper standard and determination of whether the plaintiffs' methodology is susceptible of measuring damages across the entire class and satisfies the predominance requirement of Rule 23(b)(3).⁴⁴²

INSIDER TRADING

Second Circuit Affirms Dismissal of Insider Trading Claims Arising from the Collapse of Archegos Capital Management; Holds Plaintiffs Failed to Allege an Actionable Fiduciary Duty

In *In Re Archegos 20A Litigation*, the Second Circuit addressed insider-trading claims alleging that Goldman Sachs and Morgan Stanley illegally profited from inside information that Archegos Capital Management was on the brink of collapse, by trading their Archegos-related positions before the firm's failure became public.⁴⁴³

The claims arose in the context of the much-publicized collapse of Archegos, which had amassed vast, non-public positions in the stock of seven issuers through total return swaps, derivative contracts that allowed it to receive the benefits of owning stock without actually purchasing the underlying shares. In 2021, when the prices of the issuers' stock began to rapidly fall, Archegos was overexposed and lacked liquidity to meet mounting margin calls. Once the brokerage firms learned that Archegos could not pay its margin debt—and before the public became aware of the imminent collapse—the brokerage firms divested themselves of their stock in the seven issuers, "thereby drastically decreasing the share prices at the expense of the remaining shareholders."⁴⁴⁴

The Second Circuit affirmed dismissal of the complaint alleging insider trading by the brokerage firms under the classical theory of insider trading, because Archegos did not owe a fiduciary duty to the issuers in which it owned substantial equity and thus the brokerage firms were not liable as Archegos' tippees. It likewise affirmed dismissal under the misappropriation theory of insider trading because the brokerage firms dealt with Archegos at arm's length and neither established nor accepted a fiduciary-like duty to Archegos. Finally, the court concluded that the complaint lacked sufficient factual allegations that the firms tipped off their preferred clients that Archegos was about to collapse, thereby allowing them to trade before public disclosure of the debacle.

The complaint alleged that the founder of Archegos was Sung Kook Hwang, the founder of hedge fund Tiger Asia Management, LLC and related entities, which were investigated by the SEC and, in 2012, entered into a settlement

based on their “insider trading and market manipulation.”⁴⁴⁵ Tiger Asia pleaded guilty to one count of criminal wire fraud, and Hwang was banned from managing money on behalf of clients for at least five years.

In 2013, Hwang created Archegos, which he classified as a “family office” to manage his own wealth.⁴⁴⁶ Under the SEC Family Office Rule, Archegos was exempt from much regulatory oversight and was not required to file regular reports regarding its holdings and borrowing to the SEC or the Financial Stability Oversight Council.

The complaint further alleged that in early 2020, Archegos began acquiring large, non-public, and highly leveraged positions of seven predominantly mid-to-small cap public companies (the “issuers”). It financed its purchases of stock in the issuers through total return swaps (“TRS”), a type of derivative contract that permitted Archegos to receive the benefits of owning stock without actually purchasing the underlying shares.

Under a TRS contract, a broker purchases stock and pays the client the appreciation in the stock’s price and dividends in exchange for payment of agreed-upon fees. If the value of the stock decreases, the broker can issue a margin call whereby the client must compensate the broker for the amount of the stock’s decline. Because the broker owns the underlying stock in a TRS contract, the client is not subject to SEC reporting requirements for the underlying assets. To manage the risk in a TRS contract that a stock might increase in value requiring payments to the client, the brokerage firms hedged against this possibility by purchasing their own “proprietary hedged shares” in addition to the shares purchased through the TRS contracts.⁴⁴⁷ The liquidity afforded by the TRS contracts allowed Archegos to beneficially own between 30% and 70% of each issuer’s stock. From March 2020 to March 2021, Archegos’s assets under management grew from approximately \$1.5 billion to \$35 billion.

In March 2021, one of the issuers in which Archegos had a large position as a result of the TRS contracts announced a \$2 billion secondary public offering, and its stock price plummeted. At the same time, the value of Archegos’s positions in several of the other issuers also rapidly deteriorated. Archegos unsuccessfully attempted to stymie the decline and lessen its liability to the brokerage firms by executing hundreds of

millions of dollars of trades in the issuers’ stock. In a two-day period, Archegos’s capital declined from \$36.2 million to \$16.9 million, but its trading activity did not stop the decline in the issuers’ stock prices or Archegos’s mounting losses and debt owed to the brokerage firms.

On March 24, 2021, Archegos informed the brokerage firms that it would not be able to meet their pending margin calls by the next day and that its gross exposure was \$120 billion while it had only \$9 billion to \$10 billion in equity. After negotiations failed, the brokerage firms began to trigger events of default and exercised their early termination rights as to their Archegos-related positions, including both their proprietary hedged shares and the shares they owned on Archegos’s behalf. According to the complaint, “[b]y rushing to sell their Archegos-related positions, [the brokerage firms] avoided billions of dollars in losses at the expense of ordinary investors who were unaware of Archegos’ impending collapse.”⁴⁴⁸

Shareholders in the issuers brought claims against the brokerage firms alleging that they engaged in insider trading in violation of Section 10(b) and Rule 10b-5 and derivative causes of action under Sections 20A and 20(a) of the Exchange Act. The district court granted the motions to dismiss.⁴⁴⁹ Acknowledging that Archegos could be considered a corporate insider that owed a fiduciary-like duty to the issuers, it dismissed the complaint under the classical theory of insider trading because the plaintiffs did not allege facts plausibly alleging that Archegos was a corporate insider of any issuer, received confidential information from any issuer, or shared any such confidential information with the brokerage firms.

As to the misappropriation theory, the district court found that the complaint failed to allege that the brokerage firms received material, non-public information from Archegos and breached a duty to Archegos by selling shares in the issuers. The court likewise found that the complaint lacked factual support for the plaintiffs’ alternative argument under the misappropriation theory that the brokerage firms were liable for tipping some of their preferred clients about the impending collapse of Archegos, enabling them to trade before the public learned of the collapse.

On appeal, the Second Circuit affirmed the district court’s dismissal under both theories of insider trading. As to the classical theory, the court noted that the plaintiffs’ only basis for

claiming that Archegos was a corporate insider was the “limited allegation that Archegos was the beneficial owner of large quantities of each issuer’s stock and the conclusory assertion that this beneficial ownership resulted in ‘massive control over the price of the stocks themselves.’”⁴⁵⁰

Pointing out that Archegos did not own a majority of shares in any one issuer’s stock and that the brokerage firms, not Archegos, actually owned the issuers’ shares, the court concluded that the plaintiffs’ own allegations supported a conclusion “that Archegos was *not* a controlling shareholder of any issuer.”⁴⁵¹ The court explained because Archegos’s beneficial ownership of stock in the issuers did not empower it to vote its shares, influence corporate decisions, or access internal corporate information, it did not obtain confidential information in the way that an officer or director would and did not act on the issuers’ behalf in a manner giving rise to a relationship of trust and confidence, such as when an attorney or consultant works for a corporation.

The court thus held that the complaint did not plausibly allege that Archegos was a corporate insider, or otherwise owed a fiduciary or fiduciary-like duty to the issuers’ shareholders that would support a claim under the classical theory of insider trading.

The court likewise affirmed the dismissal of the insider trading claim under the misappropriation theory, which outlaws trading on the basis of non-public information by a corporate outsider in a breach of a duty owed not to a trading party, but to the source of the information. “[T]he misappropriation theory targets persons who were entrusted with material non-public information, and in violation of their fiduciary duty to the source of that information, used the information for their own gain.”⁴⁵² A defendant may also be liable if, with the requisite scienter and for his own benefit, he tipped the material non-public information to a third party. “Even assuming, without deciding, that the news of Archegos’ collapse constituted material non-public information,” the court concluded that the insider duty claim still failed because the brokerage firms “did not owe any fiduciary duties to Archegos.”⁴⁵³

Pointing out that the plaintiffs did not allege that the brokerage firms entered into an agreement with Archegos to act in its best interest or that the firms ever agreed to serve as Archegos’s fiduciaries, the court noted that the plaintiffs

acknowledged that the brokerage firms were contractually entitled to sell their Archegos-related positions upon Archegos’s default. “This type of commercial arrangement between adverse parties indicates that [the brokerage firms] negotiated with Archegos at arm’s length.”⁴⁵⁴ Given that fact and its conclusion that nothing else in the complaint alleged “the existence of an additional relationship of confidence or trust to Archegos from which a fiduciary obligation could be implied,” the court held that the complaint failed to plausibly allege the existence of a key element of insider trading: “the existence of a fiduciary-like duty.”⁴⁵⁵

The court also held that the plaintiffs failed to adequately allege insider trading under an alternative misappropriation theory that the brokerage firms “tipped their so-called ‘preferred clients’ about Archegos’ imminent collapse, thereby breaching their fiduciary duties to Archegos.”⁴⁵⁶ Noting that the complaint cited circumstantial evidence that the brokerage firms encouraged their preferred clients to front-run the market and trade Archegos-related positions, the court concluded that the allegations were insufficient both because the brokerage firms owed no fiduciary-like duty to Archegos and also failed for lack of particularity. “Without particular factual allegations regarding the tips, it is an entirely conjectural leap to disregard Archegos’ flurry of trading activity and instead to attribute the movement in the issuers’ stock to improper unidentified trading by [the brokerage firms’] unidentified tippees.”⁴⁵⁷

SHORT-SWING TRADING

Second Circuit Rejects Novel Theory of Liability for Short-Swing Trading Based on an Issuer’s Repurchases of Its Own Shares

In *Roth v. LAL Family Corp.*, the Second Circuit rejected a novel theory for short-swing trading liability under Section 16(b) in two related cases in which the plaintiff sought to pair sales of shares by controlling shareholders with share repurchases by the controlled companies.⁴⁵⁸ The court rejected the plaintiff’s theory because “the identified transactions are different in kind because of the peculiar nature of the shares repurchased by an issuer under Delaware law, and these differences make Section 16(b) impossible to apply.”⁴⁵⁹

A shareholder of The Estée Lauder Companies Inc. and Altice USA, Inc., respectively, filed lawsuits under Section 16(b) of the

Exchange Act, seeking disgorgement of alleged short-swing trading profits by the defendants, controlling shareholders who had engaged in substantial open-market sales of stock within six months of the companies' repurchase of significant quantities of their shares.⁴⁶⁰ Section 16(b) requires corporate insiders and beneficial owners of more than 10% of a company's shares to disgorge profits realized from any purchase and sale, or sale and purchase, of any securities of the issuer occurring within a six-month window to prevent abusive insider trading.⁴⁶¹

The court concluded that issuer repurchases cannot be paired with insiders' sales to create Section 16(b) liability because "[t]he repurchased shares were instantly and automatically converted into treasury shares by virtue of Delaware corporate law" and "removed them from the pool of outstanding shares and divested of any incidents of ownership, such as rights to vote or receive dividends."⁴⁶² Under settled Second Circuit precedent, pairable transactions triggering Section 16(b) liability must involve substantively identical equity securities.⁴⁶³ The court concluded that because applicable state law transformed the shares repurchased by the issuers into treasury shares, the plaintiffs sought "to pair the non-pairable" transactions, and "these differences make Section 16(b) impossible to apply."⁴⁶⁴

In the first case, the complaint alleged that in November 2021, entities controlled by the Lauder family beneficially owned more than 10% of Estée Lauder's common stock and sold two million shares of common stock at \$342.23 per share. During the six-month statutory window centered on the defendants' sales, Estée Lauder repurchased nearly seven million common shares pursuant to a stock buyback program at prices ranging from \$244.73 to \$338.56 per share. It was undisputed that the repurchased shares were instantly and automatically converted into treasury shares by virtue of Delaware law.

In the second case, the complaint alleged that Patrick Drahi and his affiliates beneficially owned more than 10% of Altice's common stock and sold nearly four million of those shares in May 2021 at \$37.21 per share. During the six-month statutory window centered on Drahi's sales, Altice repurchased approximately 9.5 million shares of its common stock at prices from \$30.42 to \$33.81 per share. The repurchased shares likewise "instantly and automatically became treasury shares at the moment of repurchase."⁴⁶⁵

The plaintiff argued that a portion of each issuer's share repurchases, proportional to the insiders' beneficial ownership interest, should be matched with the insiders' sales to establish Section 16(b) liability.⁴⁶⁶ If the plaintiff could match the proportionally attributed shares repurchased by the issuers with the shares sold by the defendants, the complaint alleged that the Lauder defendants would owe more than \$56 million in short-swing profits to Estée Lauder and the Drahi defendants would owe more than \$17 million in short-swing profits to Altice.⁴⁶⁷

After both companies declined to pursue Section 16(b) claims following the plaintiff's demands, he filed derivative suits seeking disgorgement in separate district courts.⁴⁶⁸ Both district courts dismissed the complaints, holding that an issuer's share repurchases could not be paired with insiders' sales of outstanding shares to create Section 16(b) liability.⁴⁶⁹

On appeal, the Second Circuit concluded that both suits were premised "on the same invalid legal theory" and addressed five separate problems with the theory that warranted affirming the dismissals.⁴⁷⁰

The court first held that the repurchases were not attributable to the defendants because they lacked beneficial ownership over the repurchased securities.⁴⁷¹ Although the plaintiff conceded that the defendants did not directly purchase any shares, he argued instead that the defendants indirectly purchased shares when the corporations they controlled repurchased shares.⁴⁷² In order to attribute those transactions indirectly to the defendants, the court explained that "Section 16(b) requires the defendants to have become indirect beneficial owners of the repurchased shares."⁴⁷³ The court held that controlling shareholders do not become indirect beneficial owners of shares acquired by an issuer when that issuer repurchases its own stock because state law automatically transforms those shares into treasury shares at the time of the transaction. The court pointed to SEC regulations defining "beneficial owner" for purposes of Section 16(b) and noted they provide a non-exhaustive list of indirect pecuniary interests "none of which maps onto the facts alleged here."⁴⁷⁴

The court further distinguished shares repurchased by an issuer from securities owned by an issuer in which shareholders may have an indirect pecuniary interest, noting that "portfolio securities are 'all securities owned by any entity, other than securities issued by the entity.'"⁴⁷⁵ The court further

noted that once a company repurchases its own shares, those shares become “treasury shares,” and under state law treasury shares are not considered outstanding and do not confer any financial benefit or voting rights to any shareholder, including insiders.⁴⁷⁶ The court thus concluded that “[w]ithout an opportunity to profit, there is no pecuniary interest; without a pecuniary interest, there is no beneficial ownership; and without beneficial ownership, there is no liability.”⁴⁷⁷

The court next addressed and rejected the plaintiff’s argument that the treasury shares repurchased by the issuers were the same or “substantively identical” to the shares sold by the defendants, which would permit the transactions to be paired and establish liability under Section 16(b).⁴⁷⁸ The court explained that Section 16(b) requires paired transactions “in any equity security,” but transactions may be paired only if they involve the same class of security with identical rights and economic attributes.⁴⁷⁹ “Transactions in ‘readily distinguishable’ stocks cannot be paired because they are not trades in ‘any equity security,’ a term of art that Congress intentionally made singular.”⁴⁸⁰

The court explained that open-market trades involve the transfer of outstanding shares between investors, which does not affect the total number of shares or the ownership structure of the company.⁴⁸¹ In contrast, when a company repurchases its own shares, those shares become treasury shares and are effectively removed from circulation, thereby changing the ownership structure for all remaining shareholders.⁴⁸²

Concluding that open-market trades and issuer share repurchases are fundamentally different in both substance and economic effect, the court held that they cannot be paired under Section 16(b) and “[w]ithout pairable transactions, there is no liability.”⁴⁸³

The court also held that the plaintiff failed to establish that the defendants realized any profit from the non-pairable transactions alleged in the complaint.⁴⁸⁴ Ordinarily, the profit requirement is clear: When an equity security is bought and sold within six months, profit is simply the excess of the sale price over the purchase price, and “any resulting excess becomes ‘recoverable’ by the issuer.”⁴⁸⁵

Because the transactions the plaintiff sought to pair were fundamentally different—insiders sold outstanding shares, while

the issuer’s repurchases converted those shares into valueless treasury shares—there was no way to match a purchase price with a sale price or to calculate any actual profit realized by the defendants.⁴⁸⁶ “[A]n insider sued under Roth’s theory lacks an expenditure to subtract from any return” and “[w]ithout a cost basis or a corresponding return from paired transactions in substantively identical securities,” the court held that there is no excess.⁴⁸⁷ “[W]ithout an excess, there is nothing to disgorge; without anything to disgorge, there is again no liability” under Section 16(b).⁴⁸⁸

The court also rejected the plaintiff’s theory of recovery, noting that if it were valid, issuers could pursue claims for disgorgement against their insiders based on the issuer’s own conduct.⁴⁸⁹ The court explained that Section 16(b)’s equitable remedy is not designed to produce the inequitable result that would follow from the plaintiff’s theory of recovery and that such anomalous results had been previously recognized and rejected by the SEC.⁴⁹⁰ “The SEC once advised expressly that ‘[i]ssuer repurchases are exempt from the application of Sections 16(a) and 16(b)’ because ‘[i]mposition of the short-swing profit recovery provisions of Section 16(b) would be incongruous [where] the company would owe any profit to itself.’”

Noting that the SEC had not revisited its position on this issue even after withdrawing the guidance as unnecessary because “the issuer is not subject to Section 16,” and that neither the SEC nor the courts have concluded that Section 16(b) reaches an issuer’s transactions in its own stock, the court concluded that Section 16(b) does not apply where disgorgement would be incongruous with the alleged conduct.⁴⁹¹ The court cautioned that imposing strict liability under Section 16(b) in this context, where neither the statutory text nor regulatory guidance would have “warned insiders—or their lawyers,” would be arbitrary and unjust.⁴⁹²

Finally, the court expressed concern about the “surprising ramifications” if the plaintiff’s theory of recovery were to be recognized, noting that not all insiders possess inside information about share repurchases and that Section 16(b)’s strict liability “obviates the need to prove knowledge of insider information, let alone intent to abuse it.”⁴⁹³ Since there can be insiders without knowledge of stock repurchases, the court concluded that adopting the plaintiff’s theory would expose insiders to strict liability for transactions they might not even

know about, effectively making “Section 16(b) a trap sprung with every transaction,” an outcome at odds with congressional intent.⁴⁹⁴ The court also dismissed the plaintiff’s reliance on the Supreme Court’s decision in *Kern County Land Co. v. Occidental Petroleum Corp.*, noting that the decision warns that courts should implement congressional objectives without extending the reach of the statute beyond its intended limits as a basis for treating share repurchases “as a vehicle for the evil which Congress sought to prevent” in enacting Section 16(b).⁴⁹⁵

Judge Calabresi concurred only in the result and wrote separately to stress that strict liability under Section 16(b) should be imposed only when the law is clear. “The law far from being clear would readily lead one to believe that the transactions at issue did not give rise to liability.”⁴⁹⁶ Judge Calabresi preferred that the court decide the case as narrowly as possible since “Congress or the SEC might, in appropriate ways, make rules that are clear and prevent the abuse that the current situations may present,” and he “would not want any language in today’s holding to make such governmental action more difficult.”⁴⁹⁷

Second Circuit Rejects Novel Knowledge Requirement for Rule 16b-3(d) Exemption to Apply to Short-Swing Trading by Insiders Approved in Advance by the Issuer’s Board of Directors

In *Roth v. Armistice Capital, LLC*, the Second Circuit affirmed dismissal of an investor’s complaint that insiders were liable for short-swing profits resulting from trades in the stock of Vaxart, Inc., a biopharmaceutical company that had been selected to participate in a COVID-19 vaccine study, because the company’s board knew that the trades were to be made by insiders and had unanimously approved the transactions in advance.⁴⁹⁸ The plaintiff alleged that on June 5, 2020, the company approved amendment of warrants increasing the maximum amount of Vaxart shares that could be owned by investment fund Armistice Capital, LLC, and that in late June 2020, following the exercise of the warrants, the sale of the resulting shares by two Vaxart directors who were also executives of Armistice amounted to short-swing transactions in violation of Section 16(b).⁴⁹⁹

Although it was undisputed that the warrant amendments had been approved in advance by a unanimous Vaxart board, the plaintiff argued that the Rule 16b-3(d) exemption to liability did not apply because the board was unaware that Armistice was

a “director by deputization” of Vaxart and that Armistice had to formally disclose that status to Vaxart.⁵⁰⁰

The court concluded that the district court correctly rejected this “novel knowledge requirement” because it was not supported by the text of Rule 16b-3(d) or Second Circuit precedent.⁵⁰¹ The court rejected the argument that to be an effective gatekeeper in these circumstances, an issuer’s board must be aware that the transaction it approved was an insider transaction or that some sort of additional but undefined “formal” notice of an investor’s legal status was required.⁵⁰² “[T]he issuer’s board need not be on notice of the investor’s formal, legal status as a ‘director by deputization’ to understand that it is approving a transactions with an insider.”⁵⁰³

The complaint alleged that Armistice, an investment management firm, was a substantial investor in Vaxart, a company that sought to develop COVID-19 vaccines administered through tablets rather than injections. In addition to acquiring Vaxart common stock, Armistice also acquired two series of warrants in 2019 that gave the firm the right to purchase additional Vaxart shares that included “blocker” provisions limiting the total shares in Vaxart that Armistice was permitted to hold.⁵⁰⁴

After Armistice acquired its stake in Vaxart, the founder and managing member of Armistice successfully requested changes to the Vaxart board of directors, replacing two Vaxart directors with Armistice-affiliated directors and adding two board seats to be filled by independent directors of Armistice’s choice. It was undisputed that two Armistice executives, Stephen Boyd and Keith Maher, were appointed to the Vaxart board, received confidential information about the company, and did not receive compensation for their board service as a result of Armistice’s policies.

The complaint further alleged that in May 2020, Boyd and another Armistice executive initiated discussions to amend the blocker provisions in the warrants to raise Armistice’s equity limit to 19.99%. An Armistice executive reached out to the Vaxart board, other than Boyd and Maher, to discuss the proposed amendments. The non-Armistice directors participated in a call with Vaxart’s outside counsel to discuss the benefits and drawbacks of the potential amendments; because Boyd and Maher were considered interested parties, they did not participate in the call.

On June 5, 2020, the Vaxart board approved the amendments through a unanimous written consent signed by all Vaxart directors. The resolution specifically acknowledged that Boyd and Maher were interested parties because they were members of the board of Vaxart as well as affiliates of Armistice. The resolution also confirmed that the transactions were “fully disclosed to all members of the Board as ‘Interested Party Transactions.’”⁵⁰⁵ Following the increase in its equity cap, Armistice exercised its warrants in late June 2020 and sold more than 27 million shares of Vaxart stock—including 20 million shares it received after exercising the warrants—allegedly netting more than \$87 million in profit.

The plaintiff alleged that the sales violated Section 16(b) of the Exchange Act, which imposes strict liability on statutory insiders such as beneficial owners, directors, and officers, and requires them to disgorge profits to the issuing corporation when an insider purchases and sells an issuer’s stock within a six-month period. The plaintiff’s theory was that the amendments increasing the equity Armistice could own constituted a cancellation and re-grant of the warrants and therefore was an “acquisition for purposes of Section 16(b).”⁵⁰⁶ He further contended that Armistice’s exercise of the warrants and sale of its Vaxart shares within six months of the amendments violated Section 16(b). The district court granted the defendants’ motion for summary judgment without addressing whether the warrant amendments constituted an “acquisition” because, even if they did constitute an acquisition, the defendants were exempt from liability under Rule 16b-3(d) because the Vaxart board approved the transaction in advance.⁵⁰⁷

On appeal, the Second Circuit affirmed the district court’s ruling that the Rule 16b-3(d) exemption applied because the transaction satisfied the three conditions articulated in prior circuit precedent: The transaction involved an insider acquiring issuer equity securities from the issuer; the insider was a director or officer of the issuer at the time of the transaction; and the transaction was approved in advance by the issuer’s board of directors.⁵⁰⁸ The court also held that “[t]his shield extends to directors by deputization, such as Armistice.”⁵⁰⁹

The court explained that “to ensure that short-swing profits are not ‘at the expense of uninformed shareholders,’ an issuer’s board simply needs to be aware that one of its members serves as the eyes, ears, voice, and vote of an investor when deciding whether to approve a transaction with that investor.”⁵¹⁰

The court clarified that “[a]t most, Rule 16b-3(d) requires that the Vaxart board understood Boyd and Maher to be acting as representatives of Armistice when it permitted the investor to acquire additional equity” and rejected the plaintiff’s contention that some sort of “additional but undefined ‘formal’ notice of Armistice’s legal status as a director was required” under applicable law or regulations.⁵¹¹

CONCURRENT STATE-COURT JURISDICTION AND FORUM-SELECTION CLAUSES

California Supreme Court Upholds Exclusive Delaware Forum Selection Clause

The California Supreme Court issued a long-awaited decision in *EpicentRx Inc. v. Superior Court of San Diego County*, holding that a “forum selection clause is not unenforceable simply because it requires the parties to litigate in a jurisdiction that does not afford civil litigants the same right to trial by jury as litigants in California courts enjoy.”⁵¹² In so holding, the Supreme Court reversed and remanded a California Court of Appeal decision holding that a trial court had properly declined to enforce forum selection clauses in a company’s certificate of incorporation and bylaws designating the Delaware Court of Chancery as the exclusive forum for stockholder suits because they constituted an implied predispute jury trial waiver, in violation of the right to trial by jury under the California Constitution.⁵¹³

As we discussed in our 2023 *Review*, the lawsuit began when a minority stockholder of EpicentRx, Inc., a Delaware biotechnology firm, sued in California Superior Court.⁵¹⁴ The complaint alleged claims including breach of contract, fraud, and breach of fiduciary duty against the company, its controlling stockholder, and several individuals, and the plaintiff demanded a jury trial.⁵¹⁵ The defendants moved to dismiss the case for *forum non conveniens*, citing forum selection clauses in EpicentRx’s certificate of incorporation and bylaws that designated the Delaware Court of Chancery as the exclusive venue for most stockholder litigation.⁵¹⁶

The trial court denied defendants’ motion, and the Court of Appeal denied a petition for writ of mandate challenging the trial court’s order.⁵¹⁷ Both courts declined to enforce the forum selection provision because there is no right to a jury trial in the Delaware Court of Chancery, while, in contrast, litigating

in California would afford the plaintiff a right to a jury trial.⁵¹⁸ The courts reasoned that the clauses would effectively operate as a predispute waiver of the plaintiff's jury trial rights in violation of California's public policy against such waivers.⁵¹⁹ The California Supreme Court granted the defendants' petition for review to consider whether the lower courts were correct to decline enforcement of the forum selection clauses on that basis.⁵²⁰

In a unanimous opinion, the California Supreme Court confirmed that forum selection clauses "typically will be enforced, absent a showing that enforcement of the forum selection clause would be unfair or unreasonable."⁵²¹ While one exception to the general rule of enforceability exists if enforcement of a forum selection clause would violate public policy, the Supreme Court explained that this exception is to be invoked sparingly and only when the violation of public policy "is certain and substantial, not theoretical or problematical."⁵²²

The Supreme Court further warned that the exception "does not give courts unbounded discretion to decline to enforce otherwise valid forum selection clauses," emphasizing that the authority to declare a contract void for being in contravention of public policy "is a very delicate and undefined power, and . . . should be exercised only in cases free from doubt."⁵²³ It was undisputed that the party challenging the clause bore the burden of proving it violates settled public policy.⁵²⁴

The plaintiff argued that California's strong public policy in favor of the right to trial by jury "requires courts to decline to enforce a forum selection clause that would impair a party's right to trial by jury that it would otherwise enjoy in California."⁵²⁵ The Supreme Court disagreed, reasoning that while California public policy supports the right to trial by jury, this policy "does not speak to the availability of the jury trial right in other forums."⁵²⁶ The Supreme Court recognized that sophisticated parties often agree to resolve disputes in forums that do not offer jury trials, and refusing to enforce these agreements could disadvantage California businesses by making foreign entities hesitant to transact with them.⁵²⁷ In addition, the Supreme Court emphasized the "vital commercial purposes" of forum selection clauses, such as protecting parties' expectations and providing certainty, which may be critical factors in business agreements.⁵²⁸

The Supreme Court also disagreed with the plaintiff's analogy of the forum selection clauses at issue to a predispute jury trial waiver, which California law does not permit.⁵²⁹ The Court explained that the "former reflects *where* a dispute will be litigated, while the latter reflects *how* it will be litigated."⁵³⁰ Thus, it concluded that "[t]his analogy is inapt."⁵³¹

The Supreme Court concluded that the practical effect of losing a jury trial is not, by itself, enough to invalidate an otherwise valid forum selection clause, noting that "California does not have a strong public policy against forum selection clauses or agreements to litigate in a jurisdiction that does not recognize the same civil jury trial right."⁵³² The Supreme Court remanded the case, instructing the Court of Appeal to consider the plaintiff's other arguments against enforcement, such as the manner of the clause's adoption in the corporate charter, which the court declined to address for the first time on review.⁵³³

STANDING

Ninth Circuit Clarifies Test for Determining Adequacy of Derivative Plaintiff, Affirms Dismissal Due to "Outside Entanglements" Between the Parties

In *Bigfoot Ventures Ltd. v. Brighton*, the Ninth Circuit affirmed the dismissal of a derivative lawsuit, holding that the record supported the district court's finding that the plaintiff was not an adequate representative of the shareholders due to the lengthy and ongoing history of litigation between the plaintiff and the company.⁵³⁴ The court explained that because a derivative action is an extraordinary procedure "that impinge[s] on the inherent role of corporate management to conduct the affairs of the corporation" and that courts have generally characterized such suits as a remedy of last resort, "a particular shareholder's adequacy to advance the interests of the corporation's shareholders is a critical prerequisite for a derivative action."⁵³⁵

Bigfoot Ventures Limited, a venture capital firm and shareholder of NextEngine, made several loans to NextEngine between 2002 and 2005 that were secured by NextEngine's intellectual property.⁵³⁶ When the loans came due in 2008, NextEngine was unable to pay, and Bigfoot sued NextEngine to collect on the debts.⁵³⁷ Since that initial lawsuit, NextEngine,

Bigfoot, and their respective affiliates were involved in several lawsuits relating to the repayment of the loans and the ownership of NextEngine's intellectual property.⁵³⁸

In October 2017, Bigfoot discovered that NextEngine's founder and CEO had created another entity—ShapeTools—and transferred all of NextEngine's inventory and revenue to ShapeTools. A state court presiding over one of the lawsuits between the parties described ShapeTools as existing only to shield NextEngine's assets from Bigfoot.⁵³⁹ In September 2019, Bigfoot brought a shareholder derivative action on behalf of NextEngine, alleging that the agreement with ShapeTools was not intended to benefit NextEngine or its shareholders.⁵⁴⁰ A month before trial was set to begin in the derivative lawsuit, Bigfoot brought yet another action against NextEngine's founder and CEO related to the outstanding debts.⁵⁴¹

In light of the ongoing lawsuits, defendants in the derivative suit filed a motion to dismiss pursuant to Rule 12(b)(1), arguing that Bigfoot lacked standing to bring a derivative claim due to its antagonistic relationship with NextEngine and that the action was really a veiled direct action brought on behalf of Bigfoot.⁵⁴² The district court ordered briefing on whether Bigfoot satisfied the multi-factor test set forth by the Ninth Circuit in *Larson v. Dumke* to assess the adequacy of a plaintiff's representation in a shareholder derivative action as required by Rule 23.1(a).⁵⁴³ Rule 23.1(a) states that a derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the right of the corporation or association.

Several other shareholders submitted declarations in support of the motion, stating that they “did not believe that Bigfoot could competently and fairly represent their interests as Next Engine shareholders” and objecting to Bigfoot's representation of NextEngine as the plaintiff in the derivative action in light of Bigfoot's “chronic litigation” against NextEngine.⁵⁴⁴ The district court found that the derivative action was “just one more skirmish in a larger war between Bigfoot and the defendants, perverted into a weapon which, at its highest and best use, would be leverage in [Bigfoot's] other lawsuits” and on that basis concluded that Bigfoot was an inadequate derivative plaintiff.⁵⁴⁵

On appeal, the Ninth Circuit explained the eight-factor *Larson* test for determining the adequacy of a derivative plaintiff's

representation.⁵⁴⁶ The factors include: (i) indications that the plaintiff is not the true party in interest; (ii) the plaintiff's unfamiliarity with the litigation and unwillingness to learn about the suit; (iii) the degree of control exercised by the attorneys over the litigation; (iv) the degree of support received by the plaintiff from other shareholders; (v) the lack of any personal commitment to the action on the part of the plaintiff; (vi) the remedy sought by the plaintiff in the derivative action; (vii) the relative magnitude of the plaintiff's personal interests as compared to his interest in the derivative action itself; and (viii) the plaintiff's vindictiveness toward the defendants.⁵⁴⁷

Noting that the factors “are intertwined or interrelated” and “it is frequently a combination of factors” that leads courts to conclude that the plaintiff does not fulfill the requirements of Rule 23.1, the court explained that “it is not mandatory for a court to assess each and every one of the *Larson* factors when determining plaintiff adequacy in a shareholder derivative action.”⁵⁴⁸ Nor are the *Larson* factors “exhaustive,” meaning that courts “may consider other factors like outside entanglements in addition to the *Larson* factors,” including “whatever other factors help them assess whether a plaintiff ‘does not fairly and adequately represent the interests of shareholders[.]’”⁵⁴⁹

Applying Rule 23.1 and the *Larson* test, the Ninth Circuit concluded that the district court did not err in considering the ongoing lawsuits between Bigfoot and NextEngine to be significant “outside entanglements” in its assessment of whether Bigfoot could adequately represent NextEngine shareholders because “[s]uch entanglements may ‘mak[e] it likely that the interests of the other stockholders will be disregarded in the management of the suit.’”⁵⁵⁰ The court specifically credited the other shareholders' declarations in light of “the strong evidence that Bigfoot is more likely to be motivated by its personal interests than to be acting as a fair steward for the interests of all corporate shareholders.”⁵⁵¹ Taking into account Bigfoot's “consistently contentious nature toward NextEngine” that resulted in the significant outside entanglements and the views of the other shareholders, the court held that the derivative action could not be maintained because Bigfoot did not fairly and adequately represent the interests of NextEngine's shareholders.⁵⁵²

The Ninth Circuit further held that the district court correctly found that four of the *Larson* factors weighed against Bigfoot's adequacy: (i) there were indications that Bigfoot was the true

party in interest but not in its capacity as a NextEngine shareholder; (ii) Bigfoot's interest in seeking to gain control of Next Engine's intellectual property was greater than its interest in asserting rights on behalf of NextEngine; (iii) nothing indicated that other NextEngine shareholders supported the derivative action with no shareholders submitting declarations in support of or otherwise endorsing the action; and (iv) the lengthy litigation history supported the district court's finding that Bigfoot was vindictive toward NextEngine and its CEO and that Bigfoot's demonstrated animus would preclude the possibility of a suitable settlement, "which is precisely why we consider vindictiveness when evaluating adequacy of representation."⁵⁵³

While the court noted that the district court erred in its analysis of two other *Larson* factors—plaintiffs' unfamiliarity with the litigation and lack of personal commitment to the action—it explained that not every *Larson* factor must be analyzed individually for a plaintiff to be found inadequate and concluded that the district court's determination was amply supported by Bigfoot's outside entanglements and inadequacy in light of the four other *Larson* factors.⁵⁵⁴

Third Circuit Affirms Denial of Investor's Motion to Opt Out of Class Action Years After Deadline; Rejects "Reasonable Indication" Opt-Out Standard

In *Perrigo Institutional Investor Group v. Papa*, the Third Circuit addressed the issue of whether an investor who intended to opt out of a class but failed to submit the required exclusion request by the deadline set by the district court should be allowed to opt out years after the class had been certified.⁵⁵⁵ The court held that Rule 23 authorizes district courts to decide when and how class members may opt out and that nothing in the Rule requires district courts to accept any particular form of a request for exclusion.⁵⁵⁶ The court rejected the plaintiff's argument that a class member may opt out merely by providing a "reasonable indication" of its intent to do so.⁵⁵⁷ "Because Rule 23 requires a district court to prescribe the way for class members to request exclusion, they have to follow those instructions in order to opt out—a mere 'reasonable indication' of an intent to opt out will not do."⁵⁵⁸

The court reasoned that the "reasonable indication" standard would unduly complicate the district court's determination of opt outs. The decision adds to a circuit split on this issue, with the Third Circuit joining the Seventh in rejecting the "reasonable indication" standard while the Second and Tenth Circuits

have adopted it.⁵⁵⁹ It remains to be seen whether the deepening circuit split will at some point be resolved by the Supreme Court, given the substantial practical implications for district courts tasked with "resolving 'dozens or hundreds of difficult questions'—each necessitating its own factfinding—to determine whether class members are in or out of the class at any point during the pendency of the class action."⁵⁶⁰

A group of institutional investors brought a securities suit alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5 against a pharmaceutical company and several of its officers after the company's share price dropped significantly following the rejection of a takeover bid and subsequent negative financial disclosures. In November 2018, the lead plaintiff moved to certify the class under Rule 23(b)(3). Sculptor Master Fund Ltd. was one of the largest holders of Perrigo stock during the class period and decided, like a number of other investors, to pursue a separate action rather than remain in the class. In February 2019, while class certification remained pending, Sculptor initiated its own lawsuit against Perrigo, alleging substantially the same violations of the federal securities laws as the class complaint. The district court certified the class in November 2019.

In July 2020, the district court approved a class action notice pursuant to Rule 23(c)(2)(B) to be sent to class members informing them of the pendency of the class action and their right to opt out of the class. The notice included instructions for requesting exclusion, including that the investor send a signed letter by mail stating that "you request exclusion" along with other specified information and that class members had until December 3, 2020 to opt out.⁵⁶¹

It was undisputed that Sculptor knew about the notice and the instructions for requesting exclusion. The opt-out deadline passed without Sculptor submitting an exclusion request. Neither Sculptor nor Perrigo realized this mistake at the time, and "the missteps picked up pace as both parties carried on litigating Sculptor's individual action."⁵⁶² Describing the case as "born of mistakes," the Third Circuit noted that neither party took note when the list of opt-outs was published in early 2021 without Sculptor's name on it or throughout that year when other investors who did notice their names missing requested and were granted exclusion by the district court after the opt-out deadline.⁵⁶³

Sculptor's failure to opt out finally came to light in April 2024 when the district court granted preliminary approval of a proposed settlement in the class action. The proposed settlement required class members pursuing individual actions to dismiss those actions within 30 days of the preliminary approval or risk forfeiting participation in the settlement. At that point, Perrigo contended that Sculptor was precluded from pursuing its individual action, which had been hotly litigated during the intervening three and a half years, while Sculptor's former counsel investigated and confirmed that the investor never requested exclusion from the class.⁵⁶⁴

Sculptor moved belatedly to opt out of the class, arguing that its maintenance of an individual action throughout the pendency of the class action, along with other related conduct, "provided a 'reasonable indication' of its intent to opt out and, thus, it should be deemed to have timely requested exclusion."⁵⁶⁵ Alternatively, Sculptor contended that it should have been permitted to opt out after the deadline because it had demonstrated excusable neglect and also challenged the adequacy of the class notice. The district rejected each argument and denied the motion.

On appeal, the Third Circuit affirmed the district court's ruling in all respects, noting that Sculptor had the opportunity to opt out early in the litigation but failed to do so. "Having made that mistake, it has to live with the consequences."⁵⁶⁶ As a preliminary matter, the court held that the plain text of Rule 23 authorizes district courts to decide when and how class members may opt out, "and nothing in it requires district courts to accept any particular form of a request for exclusion, whether through a 'reasonable indication of a desire to opt out' or otherwise."⁵⁶⁷

The court further explained that "permitting parties to opt out through mere 'indication' rather than following the directed means of requesting exclusion promises to make administering class actions even more difficult."⁵⁶⁸ Citing the Seventh Circuit's rejection of the "reasonable indication" standard, the court also concluded that adopting that standard "complicates the analysis a district court must undertake when considering whether to approve a class action settlement" because it "makes class membership an endlessly moving target given the breadth of potential actions that might satisfy it."⁵⁶⁹

Finally, the court pointed out that enforcing compliance with a district court's chosen opt-out mechanism guarded against the "the option of one-way intervention" in which "a savvy class member might recognize that it can minimize its downside by litigating an individual action while simultaneously not opting out of the class."⁵⁷⁰ By requiring a request for exclusion by a specified deadline, "class members are faced with a choice—strike out on their own in an individual action or remain a member of the class."⁵⁷¹ The court explained that enforcing this choice would eliminate an "advantageous strategy" and prevent class members from "unfairly 'hedg[ing] their bets' to the detriment of the court and the class."⁵⁷²

The Third Circuit also held that the district court did not abuse its discretion by declining to permit the investor's late opt-out under Rule 6(b)(1)(B), which permits a district court to excuse an untimely filing when a party fails to act because of excusable neglect.⁵⁷³ Applying the four-factor test articulated by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, the court agreed with the district court that "those factors—the danger of prejudice; length of delay; reason for delay; and whether the movant acted in good faith—weigh[ed] against Sculptor" and did not excuse its late opt-out.⁵⁷⁴

As to prejudice, the court agreed that the factor weighed against Sculptor but for a different reason than the district court's. The court explained that permitting Sculptor to opt out at that late stage "had the prospect of sending the parties back to the drawing board to negotiate a new settlement in light of the diminished class" and that "the risk of undermining a provisionally approved settlement is exactly the type of 'danger of prejudice to the nonmovant' that support[ed] the [district court's finding] that the prejudice factor slightly disfavors Sculptor."⁵⁷⁵

The court next agreed with the district court that the length of delay factor strongly disfavored Sculptor. "That three-and-a-half year delay is substantial and cuts against characterizing Sculptor's neglect as 'excusable.'"⁵⁷⁶ The court easily rejected Sculptor's argument that the district court erred by weighing this factor against it because its delay did not affect the progression of the class action. "[C]onsideration of the current effect of the delay on the proceedings' is inconsistent with

our precedent that dictates ‘the length of the delay should be considered in absolute terms.’⁵⁷⁷

The court held that the third *Pioneer* factor, the reason for the movant’s delay, also tilted against Sculptor for similar reasons. Acknowledging that “all agree” that Sculptor’s mistake was due to its “former counsel’s failure to file the opt-out request,” the court explained that while that failure might be excusable in isolation, “what followed [was] not.”⁵⁷⁸ Rather, it pointed to the fact that the flurry of activity immediately after the opt-out deadline should have alerted Sculptor’s former counsel to at least check the opt-out list. “This omission on top of counsel’s initial failure to submit an opt-out form only highlights a general ‘lack of diligence,’” and “Sculptor bears the burden of its former counsel’s mistakes.”⁵⁷⁹

The court also agreed with the district court that the good faith factor weighed in Sculptor’s favor because nothing in the record suggested that the investor failed to timely opt out to gain a tactical advantage or that its failure to do so was intentional. Accordingly, the court agreed that Sculptor failed to demonstrate that its excuse was excusable and that the district court did not err in refusing Sculptor’s request to opt out when it discovered its mistake.

Finally, the court rejected Sculptor’s argument that the class notice was inadequate because it did not adequately apprise class members of the consequences of remaining in the class. The court held that the notice supplied class members with enough information about their rights and how to protect them, noting that the notice cautioned class members about the consequences of class certification three times.

The court disagreed with Sculptor’s claim that the notice violated due process because “it fail[ed] to adequately explain the consequences of one particular configuration of events” in that it lacked any “warning that a settlement could eliminate [class members’] rights to pursue individual litigation” and instead only warned that a loss of “individual claims” might occur if defendants prevailed.⁵⁸⁰ Explaining that this argument “necessitates a hyper-technical reading of the notice that strains to create ambiguity where none exists,” the Third Circuit pointed to settled precedent holding that the fact that a class notice “could have more clearly described the effects of

a settlement is not enough to demonstrate a due process violation” and affirmed the district court on this ground as well.⁵⁸¹

In *Xeriant, Inc. v. Auctus Fund LLC*, the Second Circuit addressed a claim for rescission under Section 29(b) of the Exchange Act, which creates a private right of action to rescind a contract made in violation of the Exchange Act. The plaintiff sought to rescind a securities purchase agreement on the ground that its contractual counterparty was not a registered securities dealer and lacked authority to engage in securities transactions contemplated by the agreement.⁵⁸² The Second Circuit rejected the claim, noting that Section 29(b) “permits only the rescission of unlawful contracts, not lawful contracts from which unlawful transactions are made.”⁵⁸³

In 2021, Xeriant, an aerospace company, entered into a stock purchase agreement (“SPA”) with Auctus, a hedge fund, to fund a joint venture and an acquisition.⁵⁸⁴ Auctus loaned Xeriant \$5.1 million by purchasing a convertible promissory note in the amount of \$6.05 million, which Xeriant was required to pay back within one year in either cash or stock. The SPA allowed repayment through a warrant for approximately 51 million shares of Xeriant stock at a set price of \$0.12 per share. It was undisputed that nothing in the SPA obligated Auctus to sell any shares it acquired in the event it exercised the warrant.

After several amendments to the SPA extending the repayment deadline and granting Auctus warrants to acquire additional Xeriant shares as consideration for the extensions, Xeriant failed to repay the loan. Auctus sought to convert the debt into stock as permitted by the SPA, but Xeriant refused to approve the request. Instead, Xeriant filed suit, arguing that the SPA was void.⁵⁸⁵

Xeriant’s suit pointed to pending enforcement actions against Auctus arising from two other similar transactions in which the SEC alleged that the company had acted as an unregistered dealer in violation of Section 15(b).⁵⁸⁶ The SEC alleged that between 2013 and 2021, Auctus entered into more than 100 contracts similar to the SPA and exercised its conversion rights to obtain more than 60 billion shares of stock that it subsequently sold in the market to reap more than \$100 million in profits. The SEC’s theory was that the volume and form of Auctus’s lending to microcap companies demonstrated

that it operated as a securities dealer subject to the registration requirements of the Exchange Act. Xeriant's complaint alleged that because Auctus acted as an unregistered securities dealer and was not lawfully permitted to effectuate the securities transaction outlined in the SPA, it was entitled to rescind the agreement.

Auctus moved for dismissal, arguing that Xeriant's Section 29(b) claim was time-barred and that the SPA was not void because it did not require Auctus to transact securities or otherwise act as a securities dealer.⁵⁸⁷ Auctus emphasized that the SPA did not mandate Auctus to sell any Xeriant shares on the open market.⁵⁸⁸

The district court agreed with Auctus and granted its motion to dismiss the complaint.⁵⁸⁹ The court reasoned that although Auctus failed to register as a securities dealer with the SEC, the SPA did not obligate Auctus to transact securities or otherwise act as a securities dealer.⁵⁹⁰ The district court also found that Xeriant's claim was timely filed.

On appeal, the Second Circuit first explained that the Exchange Act defines "broker" as any person engaged in the business of effecting transactions in securities for the account of others, while a "dealer" is any person engaged in the business of buying or selling securities for his own account through a broker or otherwise.⁵⁹¹ Under the statute, any individual or entity acting as a broker or dealer without registering with the SEC violates Section 15(a)(1).⁵⁹²

In determining whether Auctus was a dealer within the meaning of the statute, the court pointed to a number of recent SEC enforcement actions under Section 15(a) against so-called "toxic lenders, i.e., convertible debt purchasers who buy and then dump stock in small-cap companies to reap considerable returns."⁵⁹³ The court also noted that the pending SEC enforcement action against Auctus was premised upon the SEC's theory "that buying convertible debt for the purpose of immediate conversion and resale is quintessential 'dealer' activity, and lenders cannot engage in these transactions without being a registered dealer."⁵⁹⁴

The court also considered a recent Eleventh Circuit decision affirming summary judgment in favor of the SEC in one of those cases, in which it concluded that "[t]he volume and regularity of [the lender's] transactions support [our] ruling that

[the lender] was 'in the business' of buying and selling securities," and that "[a] lender who bought penny-stock companies' convertible debt for immediate conversion and resale violated the Exchange Act by failing to register as a securities dealer."⁵⁹⁵

Finally, the court noted that numerous district courts, including the court that presided over the SEC enforcement action against Auctus, had found that unregistered lenders are "dealers" when they "acquire stock of microcap companies for immediate resale, engage in high volume resales of those shares, and behave like underwriters when bringing shares to the open market, and use third parties to solicit market participants on their behalf."⁵⁹⁶ However, the court noted that each of the courts that had examined convertible debt lending practices had done so in the context of an SEC enforcement action, not in a private Section 29(b) rescission action.

Thus, the court concluded that it need not decide precisely what a plaintiff or the SEC must allege to state a violation of Section 15(b) "because we assume without deciding that Xeriant has plausibly alleged that Auctus violated Section 15(a)" by engaging in quintessential "dealer activity" in violation of Section 15(a).⁵⁹⁷

As a preliminary matter, the court observed that the Second Circuit had previously left open the question of whether a rescission action under Section 29(a) may be predicated upon a Section 15(a)(1) violation and noted that Section 15 "is not one of the enumerated exceptions to Section 29(b) private actions and nothing in the language of Section 29(b) indicates that a contract could not be rescinded for violating Section 15(a)(1)."⁵⁹⁸ Accordingly, the court held that Section 15(a)(1) can serve as a predicate for rescinding a contract under Section 29(b).

The court next explained that Section 29(b) creates only a limited private right of action and that "only unlawful contracts may be rescinded, not unlawful transactions made pursuant to lawful contracts."⁵⁹⁹ It cited settled case law that a contract can be voided only where there could be no performance under the contract without violating the Exchange Act and noted that district courts in the Second Circuit "have long recognized that to make out a violation under Section 29(b), plaintiffs must show that the contract involved a prohibited transaction."⁶⁰⁰

Applying these principles, the court held that the SPA did not require Auctus to transact securities while operating as an unregistered securities dealer and provided for it to purchase shares by exercising warrants only in the event Xeriant failed to repay its loan. It pointed out that the SPA did not require Auctus to sell shares on the market, “a core tenet of ‘dealer’ activity”; did not require Auctus to convert the debt into shares as opposed to accepting repayment of the cash loan; and the exercise stock purchase warrants pursuant to the SPA did not require registration as a dealer.⁶⁰¹ “In other words, neither the terms of the contract itself nor its performance requires a ‘prohibited transaction.’”⁶⁰²

Based on its conclusion that the SPA was not an illegal contract and did not require Auctus to violate Section 15(a)(1), the court agreed with the district court that the parties’ contract could not be rescinded under Section 29(b). The court also affirmed the district court’s finding that Xeriant’s claim was timely filed because the facts underlying Auctus’s alleged status as an unregistered securities dealer were not knowable to Xeriant even with due diligence until the SEC filed its complaint in 2023.

New York Court of Appeals Applies Internal Affairs Doctrine and Affirms Dismissal of Derivative Action Brought on Behalf of Foreign Corporation

In *Ezrasons, Inc. v. Rudd*, the New York Court of Appeals affirmed dismissal of a shareholder derivative suit against current and former officers and directors of Barclays PLC, a bank incorporated under the laws of England and headquartered in London.⁶⁰³ It was undisputed that the plaintiff, a New York corporation, was a beneficial owner of Barclays shares and would have lacked standing to assert derivative claims under English law, which limits the right to bring such claims to registered members of an English corporation. The plaintiff argued that certain provisions of New York’s Business Corporation Law (“BCL”) allow a shareholder to bring a derivative claim in New York on behalf of a foreign corporation as long as it satisfies the BCL’s requirements for such suits, even if the plaintiff lacks standing under the law of the place of incorporation.

In a 6–1 decision, the majority rejected that argument and held that the BCL provisions at issue “do not clearly manifest legislative intent to displace the long-settled internal affairs doctrine,” which applies the substantive law of the place of incorporation rather than the law of the forum to the issue of

who has standing to assert derivative claims.⁶⁰⁴ Holding that the BCL provisions “do not preclude a defense that plaintiff lacks standing under English substantive law to maintain this derivative action,” the majority affirmed dismissal.⁶⁰⁵

On the same day it handed down *Ezrasons*, the Court of Appeals also affirmed dismissal of a derivative suit involving a German pharmaceutical company in which the plaintiffs likewise argued that they had standing under the BCL even if they lacked standing under German law.⁶⁰⁶ It remains to be seen whether the decisions will slow the recent influx of derivative suits against foreign corporations filed in New York courts, but the decisions will provide foreign corporations with ammunition to seek early dismissal of derivative actions.

Shareholder derivative suits brought in the United States against non-U.S. companies were relatively rare until recently because, under the internal affairs doctrine, U.S. courts generally apply the substantive law of the company’s place of incorporation to determine whether a shareholder has standing to bring a derivative suit, and many foreign jurisdictions have laws that substantially restrict or prohibit such lawsuits. But in 2017, the New York Court of Appeals allowed a derivative suit involving a Cayman Islands corporation to proceed. The court held that a Cayman Islands law requiring a shareholder to seek leave of a Cayman Islands court prior to bringing a derivative suit was procedural rather than substantive because it appeared in that country’s civil procedure rules, not its corporation statute. Thus, the law applied only to actions brought in Cayman courts but not to derivative suits filed in foreign jurisdictions.⁶⁰⁷ In the wake of *Davis v. Scottish Re Group Ltd.*, numerous derivative suits involving non-U.S. companies were filed in New York, with the plaintiffs asserting that they did not need to comply with legal prerequisites imposed where the foreign corporations were incorporated.

In *Ezrasons*, the plaintiff sought to bring a derivative action in New York on behalf of Barclays arising out of a variety of alleged breaches of fiduciary duty by the defendants. Conceding it lacked standing to bring a derivative action in England based on its status as a beneficial rather than registered owner of Barclays shares, the plaintiff argued that BCL Sections 626(a) and 1319(a)(2)—which allow shareholders in certain circumstances to bring derivative suits in New York on behalf of foreign corporations doing business in New York—constituted the only requirements to establish standing

to do so, regardless of whether English law imposed additional requirements. The trial court disagreed and dismissed the complaint, and the intermediate appellate court affirmed the dismissal.⁶⁰⁸

In the Court of Appeals, the majority first noted its recent reaffirmance that New York applies the internal affairs doctrine in litigation implicating internal corporate rights and relationships. “[T]he doctrine operates as a choice-of-law rule and mandates that ‘with rare exception, the substantive law of the place of incorporation applies to disputes involving the internal affairs of a corporation.’”⁶⁰⁹ The decision surveyed the evolution and rationale of the internal affairs doctrine, noting that “[i]n addition to providing consistency to legal obligations, the internal affairs doctrine also protects the interests and expectations of shareholders by giving effect to their choice as to what jurisdiction’s laws will govern the corporation’s affairs.”⁶¹⁰

While recognizing that the internal affairs doctrine is susceptible to override by statute, the majority emphasized that “a clear and specific legislative intent is required to override the common law and that such a prerogative must be unambiguous.”⁶¹¹ Holding that nothing in the BCL’s statutory text amounted to a “clear manifestation” of a legislative intent to overrule the internal affairs doctrine, the majority explained that the provisions relied upon by the plaintiff “simply confirm[] New York courts’ jurisdiction to entertain derivative actions brought on behalf of foreign corporations—an issue that was unsettled in the state until shortly before the BCL was enacted” in 1961.⁶¹²

The majority also disagreed with the plaintiff’s contention that the BCL provisions “implicitly” displaced the doctrine as it applies to shareholder derivative standing, noting that in the 64 years since the BCL was enacted, the vast majority of New York courts and practitioners have not treated the provisions as displacing the internal affairs doctrine with respect to shareholder derivative standing.⁶¹³ Notably, the majority did not reach the issue of whether the standing requirements under English law were substantive or procedural because the plaintiff failed to preserve the issue for appeal. Nor did the majority mention the court’s prior decision in *Davis*.

In a lone and lengthy dissent, Chief Judge Wilson wrote that he would have held that the BCL provisions at issue expressly overrode other jurisdictions’ standing requirements and

“clearly apply New York law to the question of which shareholders can bring a derivative action on behalf of a foreign corporation.”⁶¹⁴

SECURITIES ACT OF 1933

Ninth Circuit Revives Real Estate Investor Suit for a Second Time and Addresses the Scope of Liability for Misleading Opinion Statements and Material Omissions Under Section 12(a)(2) and *Omnicare*

In *Pino v. Cardone Capital, LLC, et al.*, a unanimous Ninth Circuit panel reversed for a second time the district court’s dismissal of a securities suit alleging that defendant Grant Cardone, a real estate syndicator who invested in real estate with money pooled from numerous unaccredited investors, made opinion statements that he subjectively disbelieved and omitted material facts about the internal rate of return and distribution projections for the real estate investment funds offered by the defendants (“funds”), and also misstated material facts regarding the funds’ debt obligations.⁶¹⁵

In a case of first impression in the Ninth Circuit, the panel held that a misleading opinion claim required both subjective and objective falsity and that the plaintiff’s disclaimer of allegations of fraud in her complaint did not foreclose her from showing subjective falsity because fraud is not an element of a Section 12(a)(2) claim. The court noted that “a fair reading of *Omnicare* is consistent with [the plaintiff’s] argument that disclaiming fraud alone does not foreclose an entirely separate § 12(a)(2) misstatement cause of action.”⁶¹⁶

The decision also clarified that an omission claim under Section 12(a)(2) based on alleged failure to disclose an SEC letter requesting the defendant to remove projected rates of return and distributions from their offering materials could not be defeated based on the public availability of the SEC letter on the EDGAR database, “because constructive knowledge does not bar recovery for § 12 claims.”⁶¹⁷

In 2019, Luis Pino, an unaccredited investor, invested in the funds. The complaint alleged that Grant Cardone projected investment returns to unsophisticated investors promising up to 15% annualized returns. Cardone shared his projections on social media and “boast[ed] on Instagram that investors could double their money and [told] viewers on YouTube ‘[Y]ou’re

gonna walk away with a 15% annualized return. If I'm in that deal for 10 years, you're gonna earn 150% You can tell the SEC that's what I said it would be."⁶¹⁸

The complaint also alleged that Cardone misstated that he—not investors—would be responsible for debt obligations of the funds.⁶¹⁹ Additionally, the complaint alleged that the offering materials failed to disclose that the SEC had sent a letter to Cardone, requesting that he remove the projected rates of return and distributions from the offering materials “as the projections lacked backing.”⁶²⁰ The plaintiff alleged that Cardone removed that information from the offering materials but failed to remove them from his social media messaging.

In 2020, Pino filed suit alleging violations of Sections 12(a)(2) and 15 of the Securities Act. The district court granted the defendants' motion to dismiss, concluding that Cardone and another entity were not sellers as defined under Section 12(a)(2) and the challenged statements were not actionable. The Ninth Circuit reversed, holding that the plaintiff plausibly alleged that Grant Cardone and defendant Cardone Capital qualified as statutory sellers under the Securities Act.

In a separate memorandum disposition, the court further concluded that some of Cardone's statements regarding the funds' claimed 15% return on investment and distributions, as well as statements about who was responsible for the funds' debt obligations, were actionable under the Securities Act. A second amended complaint largely tracked the allegations in the original complaint as to the opinion misstatements and alleged material omissions the Ninth Circuit had held to be actionable. The district court again granted the defendants' motion to dismiss, this time with prejudice.

On appeal, the Ninth Circuit reversed the district court's dismissal once again, holding that Pino plausibly alleged each of her claims and remanded the matter to the district court.

The unanimous panel disagreed with the district court's conclusion that the plaintiff could not proceed with claims challenging opinion statements because she “disclaimed any and all allegations of fraud.”⁶²¹ Instead, the court concluded that “[a] careful reading of *Omnicare* does not support this analysis.”⁶²² Noting that “[c]ontext matters,” the court explained that “[*Omnicare*'s] reference [to a fraud waiver] merely underscore[d] that plaintiffs did not argue subjective

disbelief at all, and instead argued defendant's sincerely held opinion proved wrong.”⁶²³ “The Court's decision in *Omnicare* makes clear that it is the absence of claims of subjective disbelief, rather than the absence of *fraud* claims specifically, that doomed plaintiffs' claims.”⁶²⁴

Applying this principle, the court further explained that fraud is not an element of a Section 12(a)(2) claim, and thus “a fair reading of *Omnicare* is consistent with Pino's argument that disclaiming fraud alone does not foreclose an entirely separate § 12(a)(2) misstatement cause of action.”⁶²⁵ The court also noted that “in *Omnicare*, the plaintiffs' broad waiver encompassed ‘any allegation that could be construed as alleging fraud or *intentional or reckless misconduct*’” and was thus “far broader than Pino's waiver, which is limited to ‘any allegation in th[e] complaint that could be construed as alleging fraud.’”⁶²⁶

Acknowledging that the Ninth Circuit had not previously dealt directly with the fraud waiver issue, the panel noted that “it is instructive that we do not ordinarily impose Federal Rule of Civil Procedure 9(b)'s particularity requirement on standalone § 11 and § 12 claims” and “have previously held that a plaintiff must plead a § 11 claim with particularity only where those factual allegations ‘sound[] in fraud.’”⁶²⁷ Finally, the court explained that Section 12(a)(2) is “unique as ‘a virtually absolute liability provision that does not require an allegation that defendants possessed scienter’” as a further reason for concluding that “[t]he district court erred in reasoning that Pino's fraud disclaimer doomed her subject falsity claim.”⁶²⁸

The court then considered whether Pino sufficiently alleged subjective and objective falsity and concluded that she had done so, given the deferential standard of review at the motion to dismiss stage. Applying *Omnicare*'s standard for determining subjective falsity, the court considered whether Cardone actually held the stated belief and concluded that “Pino's allegation of Cardone's subjective disbelief is both strong and reasonable.”⁶²⁹ The court found that Cardone's “*reaction to the SEC letter*”—stating that the projections of 15% returns and relatedly high distributions lacked backing and should be removed from the offering materials—was “telling.”⁶³⁰

Rather than opposing the SEC's position, Cardone adopted their suggestions “without any rebuttal or comment” but continued to repeat the 15% return and distribution projections in communications to would-be investors on social media.⁶³¹

In contrast, Cardone pushed back on other criticisms from the SEC. At the motion to dismiss stage, the court found that “Cardone’s telling *reaction* to the SEC letter – removing the projections without any rebuttal or comment – evinces Cardone’s subjective disbelief.”⁶³²

Explaining that “objective falsity means the statement is untrue,” the court rejected the district court’s conclusion that Pino did not and could not allege objective falsity because the funds’ SEC Form 1-K filings purportedly projected performance in line with the 15% projection on social media.⁶³³ The court found that “[t]his approach elevates Cardone’s self-serving statements over other evidence,” noting that the complaint alleged that the projections lacked a basis, no prior funds had performed to this level, and “the properties for the Funds had not yet been purchased,” all of which supported a conclusion that the projections were objectively untrue when made.⁶³⁴

Next, the court considered Pino’s omission claim with respect to the failure to disclose the SEC letter that requested Cardone to remove the projected rates of return and distributions and concluded the complaint sufficiently alleged an omission claim under *Omnicare*. To allege a viable Section 12(a)(2) material omission claim, Pino was required to show that Cardone “omit[ted] to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.”⁶³⁵

In *Omnicare*, the court found that the omitted fact must be material, not just a fact “cutting the other way.”⁶³⁶ The court also noted that when the federal government takes the “opposite view” from the issuer, “the investor [] has cause to complain.”⁶³⁷ The court rejected the district court’s reasoning that Pino had constructive knowledge of the SEC letter because it was available publicly, pointing to settled law in the Ninth Circuit that constructive knowledge does not bar recovery for Section 12 claims.

The court likewise rejected Cardone’s alternative argument that the public availability of the SEC letter meant that there was no omission in the first place as a “backhanded effort” to avoid the constructive knowledge argument.⁶³⁸ The court noted that in *Casella v. Webb*, the court held that even when the plaintiff had access to both an alleged false oral statement and the contradictory printed offering, the claim could proceed. Accordingly, the court concluded that “Cardone’s

[alleged] failure to disclose the SEC letter ... supports an omission claim.”⁶³⁹

Finally, the court held that the district court erred in concluding that the misleading statement about debt obligations—that Cardone was responsible for the funds’ debt and not the investors—was not material. Pino’s misstatement claim required a showing of materiality, which examines whether there was a “substantial likelihood” that the fact would have “significantly altered the ‘total mix’ of information.”⁶⁴⁰ Noting its prior disposition on the first appeal that the alleged statements were “untrue statements of fact” and thus actionable, the court stated that it had implicitly addressed and resolved the materiality issue in Pino’s favor.⁶⁴¹

The court nevertheless concluded that Cardone’s arguments failed on the merits. The court rejected out of hand Cardone’s argument that the misstatement was immaterial because the debt was a small percentage of the total costs associated with running the funds, noting that “there would be fewer costs for investors and thus greater returns if Cardone were responsible for the debt.”⁶⁴² Explaining that “[a] potential change in costs and returns thus could alter the ‘total mix’ of available information in the eyes of a reasonable investor,” the court had little trouble concluding that “at the inference, not conclusion, stage,” Pino had alleged enough to support materiality.⁶⁴³

Second Circuit Reverses Dismissal and Clarifies that a Complaint May Rely On Factual Allegations or Reports from Other Proceedings

On October 6, 2025, a unanimous panel of the Second Circuit partially reversed the dismissal of a securities suit against Abengoa, a Spanish construction company; its former CEO and other officers; and several underwriters involved in filing a registration statement for the company’s IPO in 2013.⁶⁴⁴ The plaintiffs’ principal allegation was that Abengoa “manipulated its financial records to conceal the company’s liquidity crisis” by misusing the percentage-of-completion revenue recognition method, shifting costs among projects, and booking premature or fictitious cost provisions to accelerate revenue, “thereby contributing to the firm’s bankruptcy.”⁶⁴⁵

The panel held that the Securities Act claims were timely filed under the applicable one-year statute of limitations and that the district court erred in failing to credit allegations from confidential witnesses and information from Spanish criminal

proceedings, which gave rise to the plausible inference that the defendants violated Section 11. The court explained that, to the extent its prior case law was ambiguous, “we clarify that a complaint may rely on factual allegations or reports incorporated in complaints from other proceedings, subject, of course, to the limitations of Federal Rule of Procedure 11.”⁶⁴⁶

The court likewise concluded that the district court erred in dismissing the plaintiffs’ Exchange Act claims on the grounds that the plaintiffs had failed to adequately allege the existence of an underlying accounting fraud scheme or scienter, because that ruling was also based on its refusal to consider the same allegations from the confidential witnesses and Spanish proceedings.

The complaint alleged that Abengoa consisted of 532 subsidiary companies, 17 associated companies, and 34 joint ventures that operated throughout the world.⁶⁴⁷ After a substantial stock decline in 2014–2015 and ensuing Spanish criminal and civil proceedings, investors filed suit alleging violations of sections 11 and 15 of the Securities Act and section 10(b) and Rule 10b-5.⁶⁴⁸

The plaintiffs alleged that Abengoa’s registration statement represented that the company followed a “percentage-of-completion” method to recognize revenue from construction contracts.⁶⁴⁹ The registration statement further described the method in detail while emphasizing that the company relied only on “objective data” such as physical inspections or third-party confirmations and that costs related to future projects were not included in determining the percentage of completion.⁶⁵⁰ Relying on statements by several confidential whistleblowers who were former corporate insiders, however, the plaintiffs alleged that Abengoa systematically inflated its estimated profit margin by understating its costs. According to the complaint, this allegedly fraudulent practice allowed Abengoa to prematurely recognize revenue over the course of its projects, with some projects being “hyper-inflated to rapidly accelerate project revenue.”⁶⁵¹ The plaintiffs alleged that by doing so Abengoa was able to “portray[] a more profitable and liquid appearance to the public.”⁶⁵²

The allegations of the corporate insiders were corroborated by reports filed in the Spanish criminal proceedings, which concluded that accounting fraud had occurred at Abengoa at the direction of senior management and that Albengoa

manipulated the revenue recognized in its financial statements by altering project margins and advancing percentages of completion on projects to inflate the company’s earnings.⁶⁵³

The defendants moved to dismiss, arguing that the Securities Act claims were untimely and that the plaintiffs failed to state a claim under the Securities Act and the Exchange Act.⁶⁵⁴ The district court agreed, holding that the Securities Act claims were barred by the one-year statute of limitations. It also held that even if the claims had been timely filed, the plaintiffs failed to state a claim, concluding that some of the alleged false statements in the registration statement were inactionable puffery, the allegations based on confidential witness statements were insufficiently particular, and filings from various Spanish criminal proceedings should not be accepted as true.⁶⁵⁵

The district court dismissed the Exchange Act claims on the ground that the complaint failed to adequately allege the existence of an underlying accounting fraud scheme and, alternatively, that the plaintiffs failed to adequately plead scienter premised on its decision to disregard the allegations from the confidential witnesses and Spanish criminal proceedings.⁶⁵⁶

On appeal, the Second Circuit largely reversed the district court’s decision. The panel first concluded that the plaintiffs timely filed suit within the one-year limitations period, “which begins to run upon ‘the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence.’”⁶⁵⁷

According to the Second Circuit, the district court erred in finding that Abengoa’s November 2014 disclosure that it had mischaracterized some of its corporate debt provided the so-called “storm warning” to investors, triggering the plaintiffs’ duty to inquire.⁶⁵⁸ The panel reasoned that an investor’s duty to inquire arises when information “relates directly” to the misrepresentations and omissions the plaintiffs alleged in their complaint.⁶⁵⁹ Because the November 2014 disclosure merely acknowledged that the company had misclassified its debt, it did not “relate directly” to the plaintiffs’ allegations that the company made misrepresentations in its registration statement regarding the company’s accounting practices.⁶⁶⁰

Rather, the panel held that the company’s statement on August 3, 2015, announcing “a massive capital increase and

asset divestiture, which raised concerns among investors regarding Abengoa's liquidity," was the "storm warning" that triggered the investors' duty to inquire.⁶⁶¹ Accordingly, because the plaintiffs filed their complaint within one year from that announcement, the Securities Act claims were timely.⁶⁶²

The court also rejected the defendants' alternative argument that even if the first amended complaint had been timely filed, Securities Act claims in a later iteration of the complaint were filed outside of the limitations period and did not relate back to the claims asserted in the first amended complaint.⁶⁶³ The court explained that the plaintiffs' new claims in the later complaint—that the company's representations in the registration statement regarding its use of the percentage-of-completion method were false or misleading—arose out of the same conduct alleged in the earlier complaint and thus related back.

The court also rejected the defendants' "novel" argument that a Securities Act claim alleging a new misstatement "can never relate back" as inconsistent with circuit precedent and at odds with the purpose of Rule 15, which is "to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities."⁶⁶⁴

In addition, while the panel agreed with the district court that some of the alleged misstatements were inactionable puffery, it also held that the plaintiffs adequately alleged misrepresentations about how the company measured the completion of its projects for purposes of revenue recognition.⁶⁶⁵ The court took issue with the district court's disregard of allegations made by confidential witnesses and allegations based on reports filed in Abengoa's Spanish proceedings.

Specifically, the panel explained that "[w]e have held that 'there is no requirement that [confidential sources] be named, provided they are described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.'"⁶⁶⁶ The court held that the plaintiffs readily met that standard by providing the statements from former employees regarding the company's accounting fraud and facts pleaded with sufficient particularity to support the probability that the persons in the positions formerly occupied by the confidential sources would possess the information alleged.⁶⁶⁷

The panel also held that the district court erred by disregarding the allegations based on the company's Spanish proceedings.⁶⁶⁸ Emphasizing that the Second Circuit does not "foreclose plaintiffs from relying on facts and allegations incorporated in another proceeding," the panel held that plaintiffs may do so subject to the limitations of Federal Rule of Civil Procedure 11.⁶⁶⁹ The panel reasoned that the plaintiffs' allegations were "detailed, independently corroborated, and the product of an independent investigation," thereby plausibly alleging Abengoa's misconduct in using the percentage-of-completion method.⁶⁷⁰

With respect to the plaintiffs' Exchange Act claims, the panel vacated the dismissal of those claims, concluding that the plaintiffs had adequately alleged the existence of a fraudulent accounting scheme.⁶⁷¹ The panel also rejected the district court's finding that the plaintiffs failed to adequately plead scienter because its analysis was premised in large part on the district court's erroneous decision to disregard allegations from the confidential witnesses and the Spanish criminal proceedings.⁶⁷²

Finally, the panel affirmed the district court's ruling denying the plaintiffs leave to amend their Exchange Act claims against the former CEO, because it agreed with the district court that the plaintiffs' reliance on the timing of the former CEO's retirement was insufficient to support a strong inference of scienter in the absence of other compelling circumstantial allegations supporting scienter.⁶⁷³

Ninth Circuit Applies *Howey* Test and Holds that Fractional Interests in Life Settlements Are Securities

In *SEC v. Barry*, the Ninth Circuit held that fractional interests in life settlements are investment contracts and thus are securities required to be registered under the federal securities laws.⁶⁷⁴ The court concluded that three features of the contracts offered by defendant Pacific West Capital Group ("PWCG")—its selection of specific policies on certain terms, its construction and operation of its premium reserve system, and the fractionalized nature of the interests—together satisfied the *Howey* test's requirement that profits come "from the efforts of others."⁶⁷⁵

The court also held that the fractional interests were not exempt from the registration requirements of the federal securities laws because they shared a financing scheme, were the same type of security, and were offered to at least one out-of-state resident and thus were part of an integrated, interstate offering requiring registration. The decision deepens a circuit split, with the Ninth Circuit joining the Fifth and Eleventh Circuits in concluding that pre-purchase activities of a promoter or third party should be weighed case by case and departing from a conclusion reached by the D.C. Circuit that those activities should be heavily discounted, if weighed at all.⁶⁷⁶

The decision has implications beyond traditional products such as life settlements in light of the changing regulatory environment for digital assets. Although the SEC chair has stated that “most crypto assets are not securities,” the *Barry* decision underscores that the SEC viewed pre-purchase managerial activities by the promoter as sufficient to satisfy *Howey*, and the Ninth Circuit affirmed the SEC’s reliance on *Howey*’s framework notwithstanding debates about its suitability in the context of recently developed products such as tokenized assets.⁶⁷⁷

The SEC complaint alleged that the defendants sold fractional interests in life settlements to investors. A life settlement is a transaction in which a person who owns a life insurance policy on his or her own life sells that policy to investors for a negotiated price. The investors pay the premiums on the policy until the insured dies, at which point those investors receive the policy’s death benefits. The crux of the complaint was the SEC’s allegation that the defendants were responsible for reviewing medical information about the insureds whose policies were being purchased, for fractionalizing the interests in those policies, for handling payment of premiums on the purchased policies, and for maintaining reserves to avoid any shortfall until payouts were distributed upon an insured’s death.

Although PWCG had established a “three-tiered premium reserve system that [was] unique in the industry,” it was undisputed that the system failed.⁶⁷⁸ Many of the insureds lived longer than the anticipated four to seven years. When the reserves ran out, PWCG resorted to premium calls from investors totaling more than \$17 million or used the sale of new policy interests to pay for premiums on existing policies. The SEC alleged that the defendants’ promotion and sale of the

fractional interests amounted to the offering and sale of unregistered securities and that the defendants failed to register as broker-dealers in violation of Section 15(a) of the Exchange Act.

The district court granted summary judgment to the SEC, finding that the fractionalized interests were investment contracts and thus securities under the *Howey* test and that the defendants had not established an applicable exemption from the registration requirement of the securities laws.⁶⁷⁹ The district court ordered disgorgement, civil penalties, and enjoined a defendant from future violations of the securities laws.

On appeal, the Ninth Circuit affirmed the district court’s judgment in all respects. The court explained that in *Howey*, the Supreme Court interpreted “investment contract” to mean “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits from the efforts of the promoter or a third party.”⁶⁸⁰ It was undisputed that only the third element of the *Howey* test, often described as the “efforts of others requirement,” was at issue.⁶⁸¹

Citing circuit precedent holding that the efforts of the promoter or a third party does not require that the efforts of others be the only factor for profit, the court explained the relevant inquiry to be “whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.”⁶⁸² The court noted that a “key factor for satisfying the efforts-of-others inquiry is when a promoter has ‘practical,’ or ‘complete control’ over the enterprise and its profitability.”⁶⁸³

Pointing to three features of PWCG’s life settlements—its selection of specific policies, its construction and operation of its premium reserve system, and the fractionalized nature of the interests sold—the court agreed that together those features satisfied the *Howey* test’s requirement that expected profits come from the efforts of others. Because “[i]nvestors depended on the entire package of services that PWCG offered to manage and maintain the life insurance policies,” the court concluded that the fractional interests were investment contracts subject to the federal securities laws.⁶⁸⁴

In reaching this conclusion, the court stated its agreement with the Eleventh and Fifth Circuits “that pre-purchase activities can be relevant for evaluating whether profits can be

expected to come from the efforts of others.” The court disagreed with the D.C. Circuit’s reasoning that it could “heavily discount pre-purchase entrepreneurial activities in evaluating the efforts of others because the value of those activities have already been impounded in the promoter’s fees or the purchase price of the investment.”⁶⁸⁵

The court also agreed with the district court that the fractional interests were not exempt from registration requirements because they shared a financing scheme, were the same type of security, and were offered to at least one out-of-state resident and thus did not qualify for the intrastate exemption for securities exclusively offered within one state. It also affirmed the district court’s rejection of the defendants’ argument that the fractional interests were not an integrated issue.

Applying the five-factor inquiry adopted by the Ninth Circuit in *SEC v. Murphy*, the court concluded that four of the five factors identified in *Murphy* favored a conclusion that the offerings were integrated.⁶⁸⁶ Specifically, the court agreed with the district court that the interests in life settlements were part of a single plan of financing in that they were all part of the PWCG premium reserve system; all offerings were of the same class because they were fractionalized interests in policies held by a single PWCG entity; it was undisputed that PWCG received the same type of consideration for the interests purchased by all investors; and the life settlement offers were all made for the same general purpose “of profiting from the deaths of the insureds.”⁶⁸⁷

D&O INSURANCE COVERAGE

Fourth Circuit Holds that D&O Policy’s “Bump-Up Exclusion” Bars Coverage for Settlements of Post-Merger Lawsuits Seeking Increased Consideration

In *Towers Watson & Co. v. National Union Fire Insurance Co. of Pittsburgh*, the Fourth Circuit addressed whether the bump-up exclusion in a merging company’s D&O policy barred coverage for settlement costs of shareholder litigation alleging that the merger agreement was negotiated under an undisclosed conflict of interest and resulted in a below-market valuation.⁶⁸⁸ The court concluded that the exclusion did apply, finding that the entire amount of the settlements—including the portion that ultimately went toward the plaintiffs’ attorneys’ fees—represented an effective increase in the consideration for the transaction.⁶⁸⁹ The unanimous panel rejected the insured’s

argument that the settlements of Section 14(a) claims can never represent an increase in deal consideration, so “the only question that remains is ‘whether the [\$90 million settlement] is a loss covered by insurance,’ or if it falls within the scope of the D&O policy’s bump-up exclusion.”⁶⁹⁰

The court also held that the mechanics of the settlements, which allowed the shareholders, class counsel, and the district court to determine the attorneys’ fees to be paid out of the settlement funds, “confirm[ed] that the common fund doctrine is applicable” and bars coverage of the portion of the settlements that ultimately went toward attorneys’ fees under the bump-up exclusion.⁶⁹¹

In 2015, Towers Watson and Willis Group Holdings agreed to merge via a reverse triangular merger.⁶⁹² Towers Watson became a wholly owned subsidiary of Willis, and dissolved after merging into “WTW Delaware Holdings LLC,” another wholly owned subsidiary of Willis.⁶⁹³ In exchange for cancellation of their shares pursuant to the merger transaction, Towers Watson shareholders received the right to 2,649 shares of Willis ordinary shares, which were thereafter to be converted into one Willis ordinary share with a nominal value of \$0.000304635 per share, plus a pre-merger special dividend of \$10 per share of Towers Watson stock.⁶⁹⁴

Towers Watson shareholders filed two sets of lawsuits against the company and various directors and officers, both predicated on the claim that former Towers Watson CEO John Haley failed to disclose a conflict of interest in negotiating the merger—a \$165 million compensation package that he would be entitled to upon closure of the deal—and that because of this alleged conflict, the defendants agreed to a below-market valuation of Towers Watson.⁶⁹⁵ A federal suit in Virginia alleged violation of Section 14(a) of the Exchange Act against former Tower Watson directors; lawsuits filed in Delaware Chancery Court alleged they breached their fiduciary duties.⁶⁹⁶

The federal and state claims ultimately settled for \$90 million, including \$75 million in the Virginia action and \$15 million in the Delaware action. Towers Watson sought coverage under its D&O insurance policy with National Union (and excess coverage from additional insurers that followed form to the primary policy).⁶⁹⁷ The insurers agreed to fund the defense of the lawsuits but denied coverage for the settlements, asserting that the settlements represented increased consideration for

Towers Watson shares acquired in the merger and thus triggered the D&O policy's bump-up exclusion.⁶⁹⁸ Towers Watson filed suit seeking a declaration that the bump-up exclusion did not apply to the settlements.⁶⁹⁹

The district court initially granted summary judgment in favor of Towers Watson, finding that the merger agreement did not involve an "acquisition" within the meaning of the bump-up exclusion.⁷⁰⁰ On appeal, the Fourth Circuit vacated and remanded, holding that the merger agreement did in fact involve an acquisition and leaving the district court to decide the question of whether the bump-up exclusion barred coverage for the settlements.⁷⁰¹

On remand, the district court found that the "real result" of the settlements was an increase in consideration received by the shareholders.⁷⁰² Accordingly, the district court found the bump-up exclusion applied.⁷⁰³ The court additionally concluded that the common fund doctrine excluded from coverage the portion of the settlements that was allocated to the shareholders' attorneys' fees.⁷⁰⁴

The insureds appealed, and the Fourth Circuit affirmed. The court noted that the bump-up exclusion required two conditions to be established to trigger it: (i) there must be a claim alleging that the consideration paid for an acquisition was inadequate, and (ii) that "the settlement of such claim must 'represent' an 'effective increase' in the 'price or consideration' shareholders received for that acquisition."⁷⁰⁵

The court concluded that the first condition had been easily satisfied but noted that the D&O policy did not define the terms of the second condition.⁷⁰⁶ Looking in part to the dictionary definitions of the disputed terms, the court had "little trouble concluding that the bump-up exclusion's second condition is satisfied because the terms 'represent' and 'effective increase,'" particularly when read together, required the court to look to the "real result" of the settlements.⁷⁰⁷

The court concluded that the district court properly found that the shareholders claimed that their shares were devalued in the merger because of the former CEO's undisclosed conflict of interest, and the purpose of their lawsuits was to rectify that shortfall through receipt of additional consideration for their relinquished shares.⁷⁰⁸ "The settlements they eventually received constituted—i.e., 'represented[ed]—precisely such a

bump-up."⁷⁰⁹ With both requirements met, the court held that the bump-up exclusion applied and Towers Watson was not entitled to coverage for the settlements.

The court rejected Towers Watson's argument that settlements of Section 14(a) claims are "categorically immune" from a bump-up exclusion because the statute applies to inadequate disclosures, not inadequate consideration.⁷¹⁰ Emphasizing that the parties had already settled the underlying claims before the suit had been filed, the court concluded that "we need not determine what statutory or common law rights may have been violated."⁷¹¹

The court declined to follow the Delaware Superior Court decision in *Harman International Industries, Inc. v. Illinois National Insurance Co.*, which applied Delaware law and likewise concerned the settlement of a Section 14(a) action but declined to find that the settlement in that case reflected an increase in deal price or consideration for purposes of triggering a bump-up exclusion because a "cured inadequate deal price isn't the remedy for Section 14(a) . . . claims."⁷¹² Instead, applying Virginia law, the court likened the case to *Komatsu Mining Corp. v. Columbia Casualty Co.*, in which the Seventh Circuit focused on the narrow issue of whether a bump-up exclusion precluded coverage for a settlement, not on the validity of the alleged Section 14(a) violation alleged in the complaint because "the parties' settlement does in fact 'represent[]' an 'effective[] increase[]' in deal consideration such that it falls within the terms of the exclusion."⁷¹³

The court also affirmed the district court's finding that the portion of the settlements that ultimately went toward the shareholders' attorneys' fees (more than \$17 million) also was subject to the bump-up exclusion under the common fund doctrine.⁷¹⁴ "A common fund recovery . . . 'places the plaintiffs' cost of litigation on the recovering beneficiaries of a lawsuit."⁷¹⁵

The court explained that the "entire amount" of the \$90 million settlements represented an increase in the consideration paid for the merger, even if the Towers Watson shareholders used part of the increased consideration to compensate their lawyers.⁷¹⁶ It noted that the settlements set few parameters on the allocation of settlement funds for attorneys' fees, granting discretion to shareholders, class counsel, and the district court to determine the reasonableness of the fees.⁷¹⁷

Based on the “discretionary and open-ended nature of that decision,” the court affirmed the district court’s conclusion that the \$90 million total of the settlements represented an effective increase in consideration and that “the bump-up exclusion bars indemnity for the entirety of the settlement award, including the portion of which ultimately went toward attorneys’ fees.”⁷¹⁸

Delaware Supreme Court Clarifies “Related” Claim Analysis in D&O Policies, Holds Securities Suit “Meaningfully Linked” to Alleged Wrongful Acts in Previous SEC Action

In *In re Alexion Pharmaceuticals, Inc. Insurance Appeals*, the Delaware Supreme Court considered whether a securities lawsuit filed in 2016 was sufficiently related to a 2015 SEC subpoena to be covered under the company’s 2015 D&O insurance policies.⁷¹⁹ Finding that the matters were “meaningfully linked,” the court held that the earlier insurance tower applied, reversing the trial court.

Alexion, which developed pharmaceutical therapies for people living with rare disorders, was insured under two claims-made D&O programs covering two different periods: “Tower 1,” providing \$85 million of coverage for claims made between June 2014 and June 2015; and “Tower 2,” providing \$105 million of coverage for claims made between June 2015 and June 2017.

Among Alexion’s drug therapies was Soliris, a so-called “orphan drug,” which had a retail price of \$500,000 to \$700,000 for each patient.⁷²⁰ An orphan drug is a medication developed to treat rare diseases typically affecting small patient populations that are not ordinarily profitable without government assistance. To find and retain these uncommon but highly lucrative patients, Alexion allegedly engaged in improper business practices.

In March 2015, the SEC launched an investigation into possible violations of the securities laws as a result of Alexion’s business practices related to Soliris and issued a subpoena requesting documents related to grantmaking practices; compliance with the FCPA, including alleged gifts and payments to public health institutions and government agents; and the company’s lobbying efforts, specifically in Brazil, Japan, Russia, and Turkey.⁷²¹ Alexion notified the Tower 1 insurers of the subpoena (“2015 Notice”) and stated that the subpoena sought information related to Alexion’s activities and policies

worldwide and also related to the company’s recalls of specific lots of Soliris and related securities disclosures. The 2015 Notice expressly warned that other investigations or proceedings, including lawsuits brought by private litigants, “may also follow as a consequence” of the SEC subpoena.⁷²²

In December 2016—during the Tower 2 coverage period—investors filed a securities suit against Alexion and its directors and officers, alleging violations of the federal securities laws stemming from a series of allegedly unethical and illegal sales and lobbying practices, including funding foreign organizations to obtain customers, particularly in Brazil.⁷²³ In January 2017, Alexion sent its Tower 2 insurers notice of the securities suit (“2017 Notice”) and sought coverage for expenses relating to the lawsuit under Tower 2.⁷²⁴ Chubb, the primary insurer for both insurance towers, initially accepted coverage for the securities suit under Tower 2, but it later re-assigned coverage to Tower 1. Chubb justified the reassignment on the grounds that the lawsuit arose out of the same circumstances that were reported in the 2015 Notice disclosing the SEC subpoena. Chubb stated that the overlap included Alexion’s grantmaking activities, its compliance with the FCPA, and its activities in Japan, Brazil, Turkey, and Russia.⁷²⁵

In July 2020, Alexion settled with the SEC for approximately \$21.5 million, and in September 2023, it settled the securities suit for \$125 million. Although the securities settlement exceeded the coverage limits of both towers, Alexion demanded that the settlement be covered under Tower 2, which provided \$20 million more coverage than Tower 1.⁷²⁶

Alexion filed a coverage action in the Delaware Superior Court against its Tower 2 insurers, alleging that they breached their coverage contracts.⁷²⁷ Alexion argued that the securities suit was unrelated to the SEC subpoena and was thus a separate claim first made in 2016 during the Tower 2 coverage period.⁷²⁸ The Superior Court agreed with Alexion and granted its motion for partial summary judgment, thereby placing the securities suit coverage in Tower 2.⁷²⁹

The trial court determined that the “meaningful linkage” standard should be used to interpret the prior notice exclusion and concluded that the securities suit and the SEC subpoena were “only loosely connected by Alexion’s activities in Brazil” and that the link was merely “tangential, not meaningful” as required by Delaware precedent.⁷³⁰ The trial court noted that

the securities suit plaintiffs did not use the SEC findings to prove their allegations but rather used them “more generally” to demonstrate “a sustained pattern of illegal and unethical conduct in the sale and marketing of Soliris.”⁷³¹

On appeal, the Delaware Supreme Court reversed.⁷³² First, the court explained that the lower court “erred in identifying the objects of comparison for the ‘meaningful linkage’ analysis” as the securities suit and the SEC subpoena.⁷³³ Instead, the Supreme Court held that the proper comparison was whether the securities suit arose from “any [w]rongful [a]ct, fact, or circumstance’ that was the subject of Alexion’s 2015 Notice.”⁷³⁴ The Supreme Court held that the trial court erred by treating the 2015 Notice as a “claim” under the policies instead of as a “disclosure of ‘facts or circumstances that may give rise to a future claim.’”⁷³⁵

By treating the 2015 Notice as a claim, “the Superior Court narrowed the scope of the inquiry to the wrongful acts alleged in the SEC Subpoena.”⁷³⁶ Instead, the trial court “should have focused on Alexion’s disclosure of the SEC investigation in the 2015 Notice [and] should have asked whether the [securities suit] [was] meaningfully linked to any of the alleged wrongful acts disclosed in the 2015 Notice.”⁷³⁷

The Delaware Supreme Court also disagreed with the lower court’s conclusion that the link between the securities suit and the 2015 Notice was “tangential [and] not meaningful.”⁷³⁸ Alexion argued that the focus of the SEC investigation was different from the securities suit because “[u]nlike the SEC Investigation, which focused on . . . examples of book-keeping violations under the FCPA in Brazil, the [securities suit] alleged that Alexion’s third-party payments to a patient advocacy group in Brazil unethically funded fraudulent lawsuits, and that Alexion failed to disclose this practice.”⁷³⁹ This difference, according to the company, rendered the link “tangential” and “insufficient to lasso the entire [securities suit] back into Tower 1.”⁷⁴⁰

The Supreme Court stated that it was “unpersuaded” by that argument, reasoning that both matters “involve[d] the same underlying wrongful act”; namely, Alexion’s worldwide grant-making and sales practices and FCPA compliance, with a focus on activities in Brazil.⁷⁴¹ The court pointed out that the securities suit explicitly referenced the SEC investigation and subpoena, as well as news articles reporting on the SEC’s

enforcement efforts.⁷⁴² The court rejected Alexion’s attempts to differentiate the two incidents based on the different theories of liability and “non-identical” time periods, concluding that “while not perfectly identical, they do meaningfully overlap.”⁷⁴³

Based on its conclusion that both actions involved the same alleged wrongful acts relating to Alexion’s grantmaking activities, the court held that the securities suit was deemed to have been first made at the time the 2015 Notice was received by Chubb, during the Tower 1 coverage period. “Applying the Prior Notice Exclusion provision of Tower 2, no coverage is available under Tower 2 [and] [t]he judgment of the Superior Court is reversed.”⁷⁴⁴

ATTORNEY–CLIENT PRIVILEGE

Sixth Circuit Vacates District Court’s Discovery Order, Holds Internal Investigation Materials Are “Clearly” Protected by Attorney–Client Privilege and Work Product Doctrine

In a *per curiam* opinion, the Sixth Circuit granted defendant FirstEnergy’s petition for a writ of mandamus and vacated a discovery order directing FirstEnergy to produce previously withheld materials related to two internal investigations conducted by outside counsel, holding that the investigations were protected by both the attorney–client privilege and the work product doctrine and that no waiver had occurred.⁷⁴⁵ The decision is an important reaffirmation that materials related to internal investigations led by outside counsel, which often serve overlapping legal and business objectives, are protected both by the attorney–client privilege and the work product doctrine as long as the company primarily sought and received legal advice from its attorneys. As the court observed, “[o]ver and over, FirstEnergy showed that it primarily sought and received legal advice from its attorneys throughout the investigations.”⁷⁴⁶

In July 2020, the federal government released a criminal complaint charging Larry Householder, former speaker of the Ohio House of Representatives, with violating the Racketeer Influenced and Corrupt Organizations Act.⁷⁴⁷ The complaint alleged that an unnamed company, understood to be FirstEnergy, and its executives contributed to Ohio politicians’ campaign funds in exchange for support of legislation expected to benefit the company.⁷⁴⁸ In connection with the complaint, the DOJ issued subpoenas to FirstEnergy.⁷⁴⁹ The

day after the complaint became public, FirstEnergy's stock price dropped by 45%.

FirstEnergy and its board of directors promptly initiated two internal investigations.⁷⁵⁰ The board hired Squire Patton Boggs LLP to investigate the allegations in the criminal complaint, and FirstEnergy retained Jones Day to investigate the allegations and advise the company regarding the related subpoenas.⁷⁵¹

In the wake of the Householder complaint, FirstEnergy was the subject of several legal and regulatory actions, including a securities class action alleging that the company and several executives defrauded investors in violation of federal securities laws.⁷⁵² The plaintiffs in that lawsuit requested complete access to the materials created in the course of both of the internal investigations and also demanded that the district court order FirstEnergy's witnesses "to answer all questions (past and future) related to the internal investigation[s]," which defendants resisted on the grounds of attorney-client privilege and work product.⁷⁵³

The plaintiffs moved to compel, and a special master recommended that the district court grant the plaintiffs' motion; the district court accepted the special master's recommendation and ordered disclosure of the internal investigations.⁷⁵⁴ FirstEnergy moved for certification of the order for interlocutory review, which the district court denied, so FirstEnergy filed a petition for writ of mandamus and requested a stay of the district court's order, which was granted.⁷⁵⁵

In an unanimous decision, a three-judge panel granted the mandamus petition, concluding that the materials relating to the internal investigations were protected by the attorney-client privilege and the work product doctrine.⁷⁵⁶ Relying on the Supreme Court's decision in *Upjohn v. United States*, which held that the attorney-client privilege applies when a company seeks legal advice to assess risks of criminal and civil liability, the Sixth Circuit held that, like *Upjohn*, FirstEnergy and its board, through the investigations, "clearly sought" and received legal advice regarding what acts occurred, whether those acts were illegal, and what criminal and civil consequences might ensue.⁷⁵⁷

Because FirstEnergy and its board anticipated that the company would face government investigations, civil litigation, and regulatory proceedings and those expectations prompted

the internal investigations, the court also concluded that the requested materials were protected by the work product doctrine.⁷⁵⁸ The work product doctrine applies to documents prepared in anticipation of litigation, and work product protection applies if the company or counsel created the document "because of" a party's 'reasonable' anticipation of litigation, as opposed to its ordinary business purposes.⁷⁵⁹

The Sixth Circuit rejected the district court's reasoning that FirstEnergy had initiated the investigations for business advice, noting that what matters is "whether a company seeks legal advice . . . not what it later does with that advice[.]"⁷⁶⁰ To accept the district court's reasoning, the panel explained, would require the court to "overlook that numerous civil lawsuits and multiple federal and state regulatory actions were filed against FirstEnergy" in the weeks following the Householder complaint.⁷⁶¹ "FirstEnergy's internal investigation produced materials because of actual, not merely threatened legal and regulatory threats" and thus the court concluded that "[t]he work-product doctrine plainly applie[d] to the civil and criminal litigation crisis FirstEnergy faced."⁷⁶²

The Sixth Circuit also found that the district court erred by refusing to consider a FirstEnergy director's declaration describing the investigations and what prompted the company to launch them solely because he swore his declaration "under penalty of perjury" without swearing it "as true under penalty of perjury" and thus deviated from the language prescribed by statute.⁷⁶³ The court noted that an affiant need only "substantially" comply with the statutory language, which it held the director did.⁷⁶⁴

Regardless, the court noted that "the attorney-client privilege and work-product doctrine protect FirstEnergy's investigative materials with or without the . . . declaration" because "[i]t does not take a company leader's insider knowledge to discern that criminal and civil investigations, state and federal regulatory action, and numerous shareholder lawsuits led FirstEnergy to expect litigation and seek legal advice."⁷⁶⁵

The Sixth Circuit found that the extraordinary remedy of mandamus was appropriate in this case because: (i) FirstEnergy established that it had no other adequate means to obtain the relief it sought, noting that the district court denied the company's request that it certify the privilege and work product questions for interlocutory appeal; (ii) the district court's error

was clear and beyond the bounds of discretion in departing from “strong and long-standing” privilege and work-product doctrines; and (iii) the district court’s order created substantial uncertainty not just for FirstEnergy but for corporations more broadly, as reflected by the more than 40 law firms, corporate law and ethics scholars, and legal and business groups that submitted *amici* briefs to the court urging reversal.⁷⁶⁶ The court explained that “[b]ecause ‘predictable and certain’ privilege and work-product standards are essential for FirstEnergy and future litigants facing perilous litigation consequences, mandamus relief is eminently appropriate here.”⁷⁶⁷

Finally, the court rejected arguments that FirstEnergy waived protection under the attorney–client privilege and work product doctrine by sharing part of its investigation with its independent auditor. Acknowledging that the company disclosed thousands of documents to its auditor, the court pointed out that the materials shared were solely non-privileged and that “the disclosure of non-privileged material never waives the attorney client privilege.”⁷⁶⁸

Noting that “the work product privilege looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality [and] is not automatically waived by the disclosure to a third party,” the court joined other circuits in reaffirming that only disclosures to an adversary will waive work product protection.⁷⁶⁹ Because the plaintiffs had not established that FirstEnergy and its auditor were adversaries, “[a]nything divulged to [the auditor] would, therefore, at a minimum, remain protected as work product.”⁷⁷⁰

REMEDIES

Second Circuit Holds Section 29(b) Rescission Unavailable Where Agreement Did Not Obligate Defendant to Engage in Securities Transactions in Violation of Registration Requirements of Section 15(a)

In *Xeriant, Inc. v. Auctus Fund LLC*, the Second Circuit addressed a claim for rescission under Section 29(b) of the Exchange Act, which creates a private right of action to rescind a contract made in violation of the Exchange Act. The plaintiff sought to rescind a securities purchase agreement on the ground that its contractual counterparty was not a registered securities dealer and lacked authority to engage in securities transactions contemplated by the agreement.⁷⁷¹ The Second

Circuit rejected the claim, noting that Section 29(b) “permits only the rescission of unlawful contracts, not lawful contracts from which unlawful transactions are made.”⁷⁷²

In 2021, Xeriant, an aerospace company, entered into a stock purchase agreement (“SPA”) with Auctus, a hedge fund, to fund a joint venture and an acquisition.⁷⁷³ Auctus loaned Xeriant \$5.1 million by purchasing a convertible promissory note in the amount of \$6.05 million, which Xeriant was required to pay back within one year in either cash or stock. The SPA allowed repayment through a warrant for approximately 51 million shares of Xeriant stock at a set price of \$0.12 per share. It was undisputed that nothing in the SPA obligated Auctus to sell any shares it acquired in the event it exercised the warrant.

After several amendments to the SPA extending the repayment deadline and granting Auctus warrants to acquire additional Xeriant shares as consideration for the extensions, Xeriant failed to repay the loan. Auctus sought to convert the debt into stock as permitted by the SPA, but Xeriant refused to approve the request. Instead, Xeriant filed suit, arguing that the SPA was void.⁷⁷⁴

Xeriant’s suit pointed to pending enforcement actions against Auctus arising from two other similar transactions in which the SEC alleged that the company had acted as an unregistered dealer in violation of Section 15(b).⁷⁷⁵ The SEC alleged that between 2013 and 2021, Auctus entered into more than 100 contracts similar to the SPA and exercised its conversion rights to obtain more than 60 billion shares of stock that it subsequently sold in the market to reap over \$100 million in profits.

The SEC’s theory was that the volume and form of Auctus’s lending to microcap companies demonstrated that it operated as a securities dealer subject to the registration requirements of the Exchange Act. Xeriant’s complaint alleged that because Auctus acted as an unregistered securities dealer and was not lawfully permitted to effectuate the securities transaction outlined in the SPA, it was entitled to rescind the agreement.

Auctus moved for dismissal, arguing that Xeriant’s Section 29(b) claim was time-barred and that the SPA was not void because it did not require Auctus to transact securities or otherwise act as a securities dealer.⁷⁷⁶ Auctus emphasized that the SPA did not mandate Auctus to sell any Xeriant shares on the open market.⁷⁷⁷

The district court agreed with Auctus and granted its motion to dismiss the complaint.⁷⁷⁸ The court reasoned that although Auctus failed to register as a securities dealer with the SEC, the SPA did not obligate Auctus to transact securities or otherwise act as a securities dealer.⁷⁷⁹ The district court also found that Xeriant's claim was timely filed.

On appeal, the Second Circuit first explained that the Exchange Act defines "broker" as any person engaged in the business of effecting transactions in securities for the account of others, while a "dealer" is any person engaged in the business of buying or selling securities for his own account through a broker or otherwise.⁷⁸⁰ Under the statute, any individual or entity acting as a broker or dealer without registering with the SEC violates Section 15(a)(1).⁷⁸¹

In determining whether Auctus was a dealer within the meaning of the statute, the court pointed to a number of recent SEC enforcement actions under Section 15(a) against so-called "toxic lenders, *i.e.*, convertible debt purchasers who buy and then dump stock in small-cap companies to reap considerable returns."⁷⁸² The court also noted that the pending SEC enforcement action against Auctus was premised upon the SEC's theory "that buying convertible debt for the purpose of immediate conversion and resale is quintessential 'dealer' activity, and lenders cannot engage in these transactions without being a registered dealer."⁷⁸³

The court also considered a recent Eleventh Circuit decision affirming summary judgment in favor of the SEC in one of those cases. It concluded that "[t]he volume and regularity of [the lender's] transactions support [our] ruling that [the lender] was 'in the business' of buying and selling securities," and that "[a] lender who bought penny-stock companies' convertible debt for immediate conversion and resale violated the Exchange Act by failing to register as a securities dealer."⁷⁸⁴

Finally, the court noted that numerous district courts, including the court that presided over the SEC enforcement action against Auctus, had found that unregistered lenders are "dealers" when they "acquire stock of microcap companies for immediate resale, engage in high volume resales of those shares, and behave like underwriters when bringing shares to the open market, and use third parties to solicit market participants on their behalf."⁷⁸⁵ However, the court noted that each of the courts that had examined convertible debt lending

practices had done so in the context of an SEC enforcement action, not in a private Section 29(b) rescission action.

Thus the court concluded that it need not decide precisely what a plaintiff or the SEC must allege to state a violation of Section 15(b) "because we assume without deciding that Xeriant has plausibly alleged that Auctus violated Section 15(a)" by engaging in quintessential "dealer activity" in violation of Section 15(a).⁷⁸⁶

As a preliminary matter, the court observed that the Second Circuit had previously left open the question of whether a rescission action under Section 29(a) may be predicated upon a Section 15(a)(1) violation and noted that Section 15 "is not one of the enumerated exceptions to Section 29(b) private actions and nothing in the language of Section 29(b) indicates that a contract could not be rescinded for violating Section 15(a)(1)."⁷⁸⁷ Accordingly, the court held that Section 15(a)(1) can serve as a predicate for rescinding a contract under Section 29(b).

The court next explained that Section 29(b) creates only a limited private right of action and that "only unlawful contracts may be rescinded, not unlawful transactions made pursuant to lawful contracts."⁷⁸⁸ It cited settled case law that a contract can be voided only where there could be no performance under the contract without violating the Exchange Act and noted that district courts in the Second Circuit "have long recognized that to make out a violation under Section 29(b), plaintiffs must show that the contract involved a prohibited transaction."⁷⁸⁹

Applying these principles, the court held that the SPA did not require Auctus to transact securities while operating as an unregistered securities dealer and provided for it to purchase shares by exercising warrants only in the event Xeriant failed to repay its loan. It pointed out that the SPA did not require Auctus to sell shares on the market, "a core tenet of 'dealer' activity"; did not require Auctus to convert the debt into shares as opposed to accepting repayment of the cash loan; and the exercise stock purchase warrants pursuant to the SPA did not require registration as a dealer.⁷⁹⁰ "In other words, neither the terms of the contract itself nor its performance requires a 'prohibited transaction.'"⁷⁹¹

Based on its conclusion that the SPA was not an illegal contract and did not require Auctus to violate Section 15(a)(1), the court agreed with the district court that the parties' contract

could not be rescinded under Section 29(b). The court also affirmed the district court's finding that Xeriant's claim was timely filed because the facts underlying Auctus's alleged status as an unregistered securities dealer were not knowable to Xeriant even with due diligence until the SEC filed its complaint in 2023.

SEC

Ninth Circuit Upholds SEC's "No-Deny" Settlement Policy on Narrow Grounds But Does Not Foreclose Future As-Applied Challenges

In *Powell v. SEC*, the Ninth Circuit addressed whether the SEC's longstanding policy that the agency will not settle a civil enforcement case unless the defendant agrees not to publicly deny the allegations violates the First Amendment.⁷⁹² A unanimous panel concluded that SEC Rule 202.5(e), which codified the "no-deny" or "no-admit, no deny" policy in place since 1972, was not facially invalid under settled Supreme Court and Ninth Circuit precedent applicable to a voluntary relinquishment of First Amendment rights.⁷⁹³ "Rule 202.5(e) is not simply a speech-restricting rule, but a rule that defendants voluntarily accede to in return for substantial benefits."⁷⁹⁴

Noting that while a defendant who agrees to a Rule 202.5(e) settlement potentially faces the prospect of reopened civil proceedings in the event of a violation, the panel explained that a defendant may conclude that agreeing to the SEC's allegations or litigating instead of settling are inferior options. "We do not think the First Amendment forecloses the SEC from giving defendants the optionality reflected in Rule 202.5(e) [and] [o]n this basis, we narrowly reject petitioners' facial-type challenge."⁷⁹⁵ The court emphasized the limited nature of its holding, which "resolves only whether an agreement allowing the SEC to seek to reopen proceedings upon a defendant's bare denial of allegations violates the First Amendment."⁷⁹⁶ The court cautioned that no specific settlement agreement was at issue in the case and that settlement agreements that impose further restrictions on defendants' speech beyond the face of Rule 202.5(e) or that apply in perpetuity would require a different analysis and could be challenged in future cases.⁷⁹⁷

The challenge to the "no deny" policy was not initially brought by a defendant facing civil enforcement proceedings but rather by an organization that filed a petition requesting that the SEC

amend Rule 202.5(e) as violative of the First Amendment. The SEC denied the petition and rejected the petitioner's First Amendment objections, explaining that "[t]here is a large body of precedent confirming that a defendant can waive constitutional rights as part of a civil settlement, just as a criminal defendant can waive constitutional rights as part of a plea bargain."⁷⁹⁸

Notably, SEC Commissioner Hester Peirce dissented from the Commission's denial of the petition and concluded that "[t]he policy of denying defendants the right to criticize publicly a settlement after it is signed is unnecessary, undermines regulatory integrity, and raises First Amendment concerns."⁷⁹⁹ Following the SEC's denial of the petition, additional petitioners, including eight individuals who had entered into settlements with the SEC containing the Rule 202.5(e) obligation, challenged the denial in the Ninth Circuit.

On appeal, the Ninth Circuit canvassed the criticism of the longstanding "no deny" requirement of Rule 202.5(e) and noted that while the criticism was not uniform, "[i]t is not our role to second-guess the SEC's policy decisions or enforcement priorities . . . [n]or is it within our authority to decide what rules would most promote public confidence in the SEC."⁸⁰⁰ Pointing out that the petition did not seek relief as to any civil enforcement defendant based on his or her facts and circumstances, the language of any particular consent judgment, or the threatened actions of the SEC as to that defendant, the court determined that the petition should be analyzed as a facial challenge. For facial challenges in the First Amendment context, the court explained that the central question is "whether a substantial number of [the Rule's] applications are unconstitutional, judged in relation to the [Rule's] plainly legitimate sweep."⁸⁰¹

The court began its analysis by citing Supreme Court precedent holding that in proper circumstances, constitutional rights, including First Amendment rights, can be waived, and pointed to voluntary waivers of First Amendment rights in consent decrees and other settlements of judicial proceedings, including guilty pleas in criminal matters. Applying the framework established by the Supreme Court in *Town of Newton v. Rumery*, in which the Court upheld an agreement in which a defendant released his rights to bring a civil rights action in exchange for the prosecutor dismissing pending criminal

charges against him, the court pointed out that Rule 202.5(e) applies only when a party voluntarily agrees not to deny the SEC's allegations as a condition of settlement.⁸⁰²

It also noted the limited scope of the SEC's potential remedy for an alleged breach of the "no deny" rule, which is to request a court to reopen the case in order to proceed to litigation of its claims against the defendant. The court explained that in *Rumery*, the Supreme Court recognized that a waiver of rights can be permissible, even when it forces parties to make "difficult choices."⁸⁰³ The court thus held that, provided that any limitation on speech remains within proper bounds, and given the ability of a defendant to waive First Amendment rights at least to some extent, "the SEC has an interest in giving defendants the option to agree to a speech restriction as part of a broader settlement agreement."⁸⁰⁴

The decision aligns with one by the Second Circuit that likewise applied *Rumery* in rejecting a challenge to SEC Rule 202.5(e) brought by one of the same petitioners. In *SEC v. Romeril*, the Second Circuit held that the defendant's consent judgment with the SEC did not violate the First Amendment because he waived his right to publicly deny the allegations in the complaint.⁸⁰⁵ "A defendant who is insistent on retaining the right to publicly deny the allegations against him has the right to litigate and defend against the charges [but] Romeril elected not to litigate."⁸⁰⁶

DELAWARE

Delaware Supreme Court Holds that Business Judgment Rule Applies to Review of Reincorporation Decision

In *Maffei v. Tripadvisor, Inc.*, the Delaware Supreme Court reversed the Court of Chancery and held that Tripadvisor's decision to convert from a Delaware corporation to a Nevada corporation was subject to the business judgment rule rather than the more stringent entire fairness standard of review.⁸⁰⁷

Shareholders sued certain officers, directors, and stockholders of Tripadvisor and its controlling corporation, Liberty TripAdvisor, both Delaware publicly traded corporations, after they announced plans to reincorporate in Nevada. The plaintiffs contended that reincorporation in Nevada would confer material non-ratable benefits to the defendants in the form of reduced liability exposure because of Nevada's allegedly

less developed and predictable corporate laws and its statutory business judgment rule that governs all claims against corporate directors and officers of Nevada corporations. The Supreme Court concluded that "the hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future is too speculative to constitute a material, non-ratable benefit" that would trigger entire fairness review.⁸⁰⁸

The decision underscores that corporations are free to leave Delaware and that Delaware courts will defer to a board's business judgment in deciding where to incorporate in the absence of "concrete allegations" of a material, non-ratable benefit such as pending claims or threatened litigation against directors or a controlling shareholder based on past conduct.

The complaint alleged that Gregory Maffei, a Tripadvisor director and the CEO, president, and chairman of Liberty TripAdvisor, beneficially owned super-voting common stock of Liberty, constituting 43% of its voting power, and that Liberty owned a 56% voting interest in Tripadvisor. It was undisputed that the decisions to convert to Nevada corporations would have been voted down without the controlling shareholder's votes in favor.

After the decision to reincorporate in Nevada was announced, minority shareholders brought a fiduciary duty claim challenging the decision, arguing that the move was motivated by the directors', officers', and controlling shareholders' self-interested desire to "insulate [themselves] from almost any stockholder litigation, including claims that would be highly meritorious under Delaware law" by moving to a state that had "been engaged in a project to craft a no-liability corporate safe haven." The plaintiffs sought to enjoin the conversions.⁸⁰⁹ The defendants moved to dismiss, arguing that the business judgment rule applied because the plaintiffs had failed to plead a self-interested transaction.

Ruling on the defendants' motion to dismiss, the Court of Chancery refused to enjoin the conversions but also declined to dismiss the plaintiffs' claims. The court found that the plaintiffs had adequately alleged that the controlling shareholders of both corporations had obtained a non-ratable benefit from the conversions in the form of a reduced risk of litigation. The court also concluded that the proper standard of review was entire fairness and because "the [c]onversions in

this case operate like stock-for-stock mergers,” the entire fairness inquiry would consider “whether stockholders received the substantial equivalent of what they had before.”⁸¹⁰

Noting Delaware precedent holding that “the presumptive standard of review is entire fairness” where “a controlling stockholder transacts with the controlled corporation and receives a non-ratable benefit,” the court found that the conversion would provide the defendants a material non-ratable benefit because reincorporating Tripadvisor in Nevada would diminish the minority stockholders’ “litigation rights” versus the defendants.⁸¹¹ Accordingly, the court applied the entire fairness test and concluded that the plaintiffs pleaded sufficient facts to make it reasonably conceivable that the conversions were not entirely fair and, thus, the defendants had the burden of demonstrating entire fairness.⁸¹²

After granting the defendants’ request for an interlocutory appeal, the Delaware Supreme Court disagreed with the Court of Chancery, and held that the plaintiffs failed to plead adequate facts to show that the defendants would receive a material non-ratable benefit. As a preliminary matter, the court reasoned that “temporality is a key factor because it weighs heavily in determining” whether a non-ratable benefit is material, and the lack of any alleged existing or threatened litigation claims that would be impaired by the conversions weighed heavily against finding the alleged non-ratable benefit material.⁸¹³

In evaluating a line of cases relied upon by the Chancery Court, the Supreme Court reasoned that “limiting liability for existing potential liabilities stemming from past conduct may convey a non-ratable benefit on fiduciaries.”⁸¹⁴ However, the court explained that those cases were distinguishable, because the *Maffei* plaintiffs’ allegations were centered on the “hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future.”⁸¹⁵ Analogizing to boards’ routine decisions to secure D&O insurance, protect directors with rights to indemnification and advancement of expenses, and provide for director exculpation as permitted by Delaware statute, each of which reduces the risk of liability exposure in future litigation for future conduct, the court explained that the allegations in the complaint were “too speculative to constitute a material, non-ratable benefit triggering entire fairness review.”⁸¹⁶

Accordingly, the court held that business judgment was the applicable standard of review. Applying that standard, the court noted that the Tripadvisor board “considered a number of factors in their weighing of the costs and benefits of the [c]onversions,” including “the respective court systems, the predictability of the courts with respect to corporate matters, the judges’ expertise in handling such disputes, [and] the development and body of judicial decisions,” among other factors.⁸¹⁷ The court also cautioned that “courts are ill-equipped to quantify the costs and benefits of one state’s corporate governance regime over another’s” and “should be cautious about second-guessing the judgments of the directors as to how best evaluate and weigh the various competing considerations as such factors might apply to a specific corporation.”⁸¹⁸

The court concluded that its holding furthered “the goals of comity” between states by declining to engage in a cost-benefit analysis of the Delaware and Nevada corporate governance regimes. Such an analysis, the court explained, “risks intruding on the value judgments of state legislators and directors of corporations.”⁸¹⁹

2026 OUTLOOK

AI and cryptocurrency were hot topics in 2025, and we expect more securities suits to be filed in those sectors in 2026, and for more decisions to be handed down on motions to dismiss.⁸²⁰ It is likely that plaintiffs will continue to file AI risk-related cases in shareholder derivative cases. In one case filed in Delaware last year, plaintiffs in a derivative suit against executives of a digital ad trafficking firm alleged that the defendants had failed to disclose that AI-related developments were undercutting the company’s revenue.⁸²¹

Even as the federal government takes a more relaxed approach to regulation in the AI and crypto sectors, state authorities are continuing to consider how to regulate AI. For example, several U.S. state legislatures, including in California, Colorado, Utah, and Texas, already have enacted AI-specific laws.⁸²² The push by the states to regulate AI has in turn resulted in pushback from the federal government. Late last year, a new executive order, “Ensuring a National Policy Framework for Artificial Intelligence,” was issued that seeks to override or preempt state laws on AI in favor of unified federal regulation, and the debate will continue to play out in 2026.⁸²³

Although the number of securities suits related to cybersecurity and customer privacy breaches remained steady last year, we expect that there will be more activity in this sector in 2026, given the steady pace of announced cybersecurity breaches. Last year's announcement of the SEC's newly formed Cyber and Emerging Technologies Unit focusing on, among other things, "combatting cyber-related misconduct," suggests that the agency will continue to be focused on cybersecurity breaches and related issues.⁸²⁴

However, the SEC's dismissal with prejudice of the high-profile and controversial enforcement action against SolarWinds and its chief information security officer indicates a shift in SEC enforcement priorities under Chair Atkins. Some members of the Commission have made clear that the agency should recalibrate enforcement priorities, including treatment of companies that experience cybersecurity breaches.

In dissenting to the decision to bring enforcement actions against customers of SolarWinds, Commissioners Hester Peirce and Mark Uyeda pointedly stated that "[t]he Commission needs to start treating companies subject to cyberattacks as victims of a crime, rather than as perpetrators of one," and suggested that the SEC should protect investors by ensuring that companies disclose material incidents rather than "donning a Monday morning quarterback's jersey to insist that immaterial information be disclosed."⁸²⁵

One major indicator of the SEC's current view of enforcement in the cybersecurity sector will be if it heeds the call of Commissioner Uyeda and others to formally withdraw the Cybersecurity Disclosure Guidelines adopted during the prior administration that have been widely criticized but remain in place and have been used by plaintiffs' lawyers to buttress cybersecurity-related securities claims against companies that experience a breach.⁸²⁶ It is noteworthy that the SEC declined to approve additional cybersecurity disclosure guidelines that would have applied to investment advisory firms and companies participating in the financial markets.⁸²⁷

While last year saw the first tariff-related securities suits filed, we expect there will be more such litigation regardless of how the Supreme Court rules in the currently pending challenge to some of the tariffs imposed in 2025.⁸²⁸ The administration has made clear that tariff enforcement will be a priority in 2026.⁸²⁹ The DOJ announced in 2025 the formation of a cross-agency

task force "to bring robust enforcement against importers and other parties seeking to defraud the United States."⁸³⁰ More active tariff-related enforcement raises the possibility of civil litigation by shareholders, alleging that companies misrepresented their tariff compliance or the anticipated impact of the tariffs on operations and financial results.

Last year we forecast that new leadership of the SEC would result in changes to the agency's rulemaking and enforcement priorities relating to ESG, and that certainly proved to be the case. The new administration made clear that it would take a very different approach to ESG and climate change by signing executive orders to promote the growth of domestic energy sources, especially fossil fuels.⁸³¹

The SEC followed suit; in March 2025, it announced it was withdrawing its defense of the climate change disclosure guidelines adopted under the prior administration and facing a legal challenge in the Eighth Circuit.⁸³² Although the SEC has not formally withdrawn the climate change disclosure guidelines, it has become clear that the agency is no longer prioritizing ESG rulemaking or enforcement. Chair Atkins announced that he has requested the SEC staff to consider significant changes to the shareholder proposal process, including reevaluation of rules requiring companies to bring ESG-related proposals to a shareholder vote at annual meetings.⁸³³

Securities class actions premised on misleading environmental claims or alleged "greenwashing," in which a company touts its environmental consciousness for marketing purposes but actually makes little effort at sustainability, continued to be filed at a slower pace in 2025, with just two filings, down from the recent high of nine filings in 2023.⁸³⁴ Two major settlements of alleged corporate greenwashing cases were announced last year against food production companies arising out of state court proceedings. The cases alleged that statements in marketing materials by the companies relating to progress in reaching announced climate goals and emission reductions were false and misleading.⁸³⁵

We expect that ESG-related litigation will continue to be filed in various state courts, such as California, in light of the policy changes at the federal level. Notably, a number of states other than California have enacted pro-ESG measures. The status of state climate change disclosure requirements enacted by California and other states will also be a focus. The Ninth

Circuit is expected to rule on a challenge to California SB 261, the state's climate-related financial risk disclosures in 2026, having issued an emergency injunction staying the effectiveness of the legislation in late 2025 and with oral arguments heard in early 2026.⁸³⁶ The other major California climate change law, relating to mandatory greenhouse gas emissions disclosure, has a final reporting deadline of August 10, 2026, for 2025 data.⁸³⁷

It remains to be seen how many companies will seek to take advantage of the SEC's changed policy on mandatory arbitration bylaws. As noted above, the issue of whether a company actually can adopt such a bylaw may be affected by the law of the state of incorporation. In Delaware, where many companies are incorporated, mandatory arbitration bylaws are effectively prohibited by a state law requiring companies to designate at least one Delaware court to hear shareholder-related disputes; there are, however, unresolved questions about whether that prohibition is preempted by the Federal Arbitration Act.⁸³⁸

As noted above, Zion Oil & Gas, a Texas-based corporation, became the first company to adopt a mandatory arbitration provision following the change in SEC policy. However, the mandatory arbitration provision it adopted was enacted solely by board approval under Texas law and did not require a shareholder vote.

The issue will likely impact the ongoing debate as to whether Delaware is the most advantageous state for companies, the recent push by Nevada and Texas to lure companies to reincorporate in those states, and the announcements during 2025 by a few high-profile companies that they were leaving Delaware.⁸³⁹ There will also be continued debates about whether mandatory arbitration is the best approach for corporations, weighing the efficiencies and confidentiality of arbitration against certain features of federal litigation, such as the availability of appeals, and the automatic stay of discovery under the PSLRA.

Finally, we expect a number of important securities-related decisions from the Supreme Court and the federal appellate courts in 2026. As noted above, the Supreme Court heard argument in the one securities case on its docket last year, *FS Credit Opportunities v. Saba Capital Master Fund Ltd.*, and is expected to hand down a decision later this year.⁸⁴⁰ The case

requests the Court to resolve whether shareholders of registered investment companies have a private right of action to rescind contracts that violate the ICA. The funds urged the Court to overturn a ruling by the Second Circuit and argued that there is no private right of action to void contracts under the ICA. The SEC had urged the Court to hear the case and to hold that Section 47(b) of the ICA does not create a private right of action, arguing that the section lacks the rights-creating language in contrast with other sections of the ICA that expressly create private rights of action.

The government also pointed to a shift in the Court's precedents beginning in the 1970s adopting a more cautious approach to finding implied rights of action. The impact of the closely watched case could be substantial, given its potential effect on the enforceability of fund governance provisions in bylaws and operational agreements applicable to various aspects of fund operations. Given the breadth of the ICA, the impact of a ruling that there is a private right of action could also extend beyond registered investment companies to business development companies and private funds that are subject to different provisions of the ICA.

The Supreme Court has also agreed to hear a securities case in 2026 that could resolve a circuit split over whether the SEC must prove investor harm in order to secure disgorgement from alleged fraudsters.⁸⁴¹ The case arose from a Ninth Circuit decision affirming a \$2 million disgorgement order against a defendant who participated in a pump-and-dump scheme. The circuit split emerged in the wake of *Liu v. SEC*, in which the Supreme Court ruled 8–1 that the SEC can seek equitable disgorgement of a defendant's net profits from a fraud scheme provided the disgorgement is for the benefit of harmed investors.⁸⁴² The Court reasoned that limiting the SEC's ability to seek disgorgement avoided "transforming an equitable remedy into a punitive sanction."⁸⁴³

In 2021, Congress enacted Section 21(d) of the National Defense Authorization Act, which allows federal courts to grant the SEC "any equitable relief that may be appropriate or necessary" in enforcement actions.⁸⁴⁴ The lower courts have since split on who qualifies as a victim and whether the SEC must prove pecuniary harm to the victims of the fraud to obtain disgorgement. In 2023, the Second Circuit ruled the SEC must prove harm to secure an award of equitable disgorgement.⁸⁴⁵

In contrast, the First Circuit upheld a \$22.7 million disgorgement order against an investment adviser who was found to have defrauded his clients without requiring the SEC to show proof of harm to investors.⁸⁴⁶ Joining the First Circuit's reasoning and rejecting the Second Circuit's contrary holding, the Ninth Circuit held that a claimant seeking disgorgement need only show "an actionable interference . . . with the claimant's legally protected interests" and that, to be a victim, "the claimant need not show any loss whatsoever, let alone a pecuniary loss."⁸⁴⁷ The Ninth Circuit stated that the Second Circuit's holding "ignores the fundamental distinction between compensatory damages, which are designed to compensate the victim for her losses, and [disgorgement], which is designed to deprive the wrongdoer of his ill-gotten gains."⁸⁴⁸

The SEC agreed that the Court should grant certiorari to resolve a clear circuit split and contended that pecuniary harm should not be required for disgorgement to be awarded because disgorgement focuses on whether a defendant made a profit, not whether victims suffered a financial loss.

We expect that there will be continued focus on class certification in the federal appellate courts and the proper application of *Comcast Corp. v. Behrend*, which held that a plaintiff seeking class certification under Rule 23(b)(3) must establish that damages are capable of measurement on a classwide basis to satisfy the predominance requirement, because otherwise "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class."⁸⁴⁹ As discussed above, in 2025 the Sixth Circuit reversed class certification of Exchange Act claims due to the district court's failure to apply the classwide-damages requirement, noting that the district court had "failed to conduct any analysis at all, let alone a rigorous one."⁸⁵⁰

Also in 2025, the Fourth Circuit granted Rule 23(f) interlocutory review to address whether a classwide-damages model satisfied the *Comcast* requirement in *In re The Boeing Company Securities Litigation*.⁸⁵¹ The case arose out of a suit by investors claiming that the company misrepresented the safety of its 737 MAX fleet. In seeking interlocutory review of class certification, the defendants contended that the plaintiffs' damages expert devoted only three pages of his report to the proposed calculation of damages for purchasers of Boeing stock and conceded that developing a model to calculate how inflation per

share may have evolved over the class period would require a case-specific analysis that he had not yet performed. Oral argument is currently scheduled to occur in March 2026.

The issue of whether and to what extent a company's risk disclosures require disclosure of past events will continue to be addressed by the lower courts in 2026. As we reported last year, the Supreme Court's decision to dismiss the appeal in *Facebook v. Amalgamated Bank* left intact a ruling by a divided Ninth Circuit panel that the plaintiffs adequately pleaded falsity as to statements in the company's risk disclosures because the company represented the risk of improper access to or disclosure of user data as purely hypothetical when the exact risk had transpired in the past.⁸⁵² The Supreme Court's dismissal also left intact a circuit split as to the circumstances when risk factors must address past events.

The Ninth Circuit will once again be asked to address the issue in *Steamfitters Local 449 Pension & Retirement Security Funds v. SunPower Corp.*⁸⁵³ The plaintiffs in that case challenged the company's risk factors regarding its commercial business as materially misleading for failing to disclose the existence of an allegedly known product defect and related warranty and replacement costs. The district court dismissed the complaint with prejudice, finding that it contained no particularized allegations of the defendants' contemporaneous knowledge of the alleged product defect or the impacts at the time the challenged statements were made.⁸⁵⁴ On appeal, the plaintiffs argued that the district court misstated the applicable law by requiring actual harm to have materialized for a risk factor statement to be misleading. The case is expected to be set for oral argument later in 2026.

The impact of the Supreme Court's class certification decision in *Goldman Sachs* will continue to play out in 2026. In its decision, the Court directed district courts to consider the generic nature of an alleged misrepresentation when evaluating whether to apply the *Basic* presumption of reliance. The Court explained that the inference that a back-end stock price drop equals front-end inflation starts to break down when there is a mismatch between the contents of an initial statement and the alleged corrective disclosure.

Courts have taken varying approaches in applying *Goldman Sachs*. The Ninth Circuit was widely expected to be the next

federal appeals court to address the correct application of *Goldman Sachs* in *Jaeger v. Zillow Group, Inc.*⁸⁵⁵ In an unpublished 2025 decision, the court affirmed class certification and held that the “front-end and back-end statements [about Zillow’s now-closed home-buying business] are matched enough under *Goldman*.”⁸⁵⁶

While the case presented an opportunity for guidance on how to interpret or apply *Goldman Sachs*, the Ninth Circuit’s ruling only underscores that the requisite analysis turns on particular allegations and disclosures and outcomes are difficult to predict. Although a group of law professors and former SEC officials supported the company’s bid for the full Ninth Circuit to review the panel’s decision, the court declined to do so. We will continue to track the application and interpretation of *Goldman Sachs* this year.

LAWYER CONTACTS

Authors



Roman E. Darmer

Irvine
+1.949.553.7581
rdarmer@jonesday.com



Geoffrey J. Ritts

Cleveland
+1.216.586.7065
gjritts@jonesday.com

Additional Contacts



Walter W. Davis

Practice Leader
Atlanta
+1.404.581.8517
wwdavis@jonesday.com



Nina Yadava

Practice Leader
New York
+1.212.326.3746
nyadava@jonesday.com



Marjorie P. Duffy

Columbus
+1.614.281.3655
mpduffy@jonesday.com



Henry Klehm III

New York
+1.212.326.3706
hklehm@jonesday.com



Michael J. McConnell

Atlanta
+1.404.581.8526
mmcconnell@jonesday.com



Adrienne Ferraro Mueller

Cleveland
+1.216.586.7370
afmueller@jonesday.com

The following Jones Day lawyers contributed to the preparation of this White Paper: *Jonathan S. Alamir, Christopher Ames, Elizabeth A. Benschoff, Abigail C. Bosch, EJ Choi, Sam Gordon, Risa W. Lake, Nick Marasco, Jeffrey E. Meehan, Ikenna Ojukwu, Alexandra Reis, Holly Shavelle, Charlotte A. Sweeney, William Tomlinson, and Brittany N. Wilhelm.*

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- 77 Commissioner Hester M. Peirce, U.S. Sec. & Exch. Comm'n, *Getting Back on Base: Statement of Commissioner Hester M. Peirce on the Dismissal of the Civil Enforcement Action Against Coinbase* (Feb. 27, 2025); Chairman Paul S. Atkins, U.S. Sec. & Exch. Comm'n, *The SEC's Approach to Digital Assets: Inside "Project Crypto"* (Nov. 12, 2025).
- 78 *Id.*
- 79 *Id.*
- 80 *Id.*
- 81 Press Release, U.S. Sec. & Exch. Comm'n, *SEC Charges PGI Global Founder with \$198 Million Crypto Asset and Foreign Exchange Fraud Scheme* (Apr. 22, 2025).
- 82 *Id.*
- 83 *Id.*
- 84 Flores, *supra* note 1, at 10.
- 85 Jones Day, *supra* note 63, at 12.
- 86 See Compl., *Carnahan v. Baton Corp. LTD*, No. 25-CV-00490 (S.D.N.Y. Jan. 16, 2025), Dkt. No. 1; Compl., *Cantner v. Game of Silks, Inc.*, No. 25-CV-80262 (S.D. Fla. Feb. 24, 2025), Dkt. No. 1; Compl., *Clarke v. Chow* No. 25-CV-03268 (S.D.N.Y. Apr. 19, 2025), Dkt. No. 1.
- 87 See Compl., *Carnahan v. Baton Corp. LTD*, No. 25-CV-00490 (S.D.N.Y. Jan. 16, 2025), Dkt. No. 1; Compl., *Clarke v. Chow* No. 25-CV-03268 (S.D.N.Y. Apr. 19, 2025), Dkt. No. 1.
- 88 Compl., *Cantner v. Game of Silks, Inc.*, No. 25-CV-80262 (S.D. Fla. Feb. 24, 2025), Dkt. No. 1.
- 89 See, e.g., Compl., *Maxwell v. Sarris*, No. 25-CV-05643 (S.D.N.Y. July 9, 2025), Dkt. No. 1; Compl., *Hamza v. MicroStrategy Inc.*, No. 25-CV-00861 (E.D. Va. May 16, 2025), Dkt. No. 1; Compl., *Olympio v. Bitfarms Ltd.*, No. 25-CV-02630 (E.D.N.Y. May 9, 2025), Dkt. No. 1.
- 90 *Arochi v. Unicorn, Inc. et al.*, Docket No. 1:25-cv-09273 (S.D.N.Y. Nov 06, 2025); *Finch et al. v. Unicorn, Inc. f/k/a TransparentBusiness, Inc. et al.*, Docket No. 1:25-cv-07939 (S.D.N.Y. Sep 24, 2025).
- 91 See Bailey Lipschultz, *What are SPACs and Why They're Booming Again*, BLOOMBERG (Oct. 30, 2025).
- 92 See *SPAC & U.S. Total IPO Activity*, SPAC ANALYTICS (last visited Jan. 26, 2026).
- 93 See *DEAL POINT DATA: IPO COVERAGE* (choose "SPAC Dissolution Date" from "Find Search Terms" dropdown; then choose "On or After 01/01/2024") (last visited Jan. 26, 2026); *BOARDROOM ALPHA: SPAC ANALYTICS* (last visited Jan. 26, 2026).
- 94 Jones Day, *supra* note 63, at 9.
- 95 Tom Zanki, *Atkins Says SEC Is Taking a Fresh Look at SPAC Regulations*, LAW 360 (Jul. 2, 2025).
- 96 *SEC Charges CEO with Fraud in Connection with SPAC Merger*, Lit. Release No. 26429 (Dec. 3, 2025).
- 97 *SEC Charges Co-Founder of Environmental Sustainability Company with Fake Revenue Scheme*, Lit. Release No. 26382 (Aug. 21, 2025).
- 98 *In re Presto Automation Inc.*, Exchange Act Release No. 102177 (SEC Jan. 14, 2025).
- 99 Order Preliminarily Approving Settlement and Providing Notice, *In re Alta Mesa Resources Securities Litigation*, No. 4:19-cv-009517 (S.D. Tex. Jan. 17, 2025).
- 100 Flores, *supra* note 1, at 1, 12.
- 101 Complaint, *Spurbeck v. Petco Health & Wellness Co.*, No. 25-cv-1667 (S.D. Cal. June 30, 2025), Dkt. No. 1.
- 102 Complaint, *New England Teamsters Pension Fund v. West Pharm. Servs., Inc.*, No. 25-cv-2285 (E.D. Pa. May 5, 2025), Dkt. No. 1.
- 103 *San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc.*, 349 F.R.D. 606 (S.D.N.Y. 2025).
- 104 *San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc.*, 732 F. Supp. 3d 300 (S.D.N.Y. 2024).
- 105 *City Pension Fund for Firefighters and Police Officers in the City of Tampa Bay v. Generac Holdings Inc.*, 765 F. Supp. 3d 775 (E.D. Wis. 2025).
- 106 *Id.* at 795, 804.
- 107 *In re Emergent BioSolutions, Inc.*, Securities Act Release No. 11371, Admin. Proc. File No. 3-22472 (Apr. 7, 2025).
- 108 Plaintiffs Unopposed Motion for Preliminary Approval of Class Action Settlement, *In re Emergent BioSolutions Inc. Sec. Litig.*, No. 21-cv-00955 (D. Md. Sept. 12, 2024), Dkt. No. 185.
- 109 *In re Shanda Games Ltd. Sec. Litig.*, 128 F.4th 26 (2d Cir. 2025).
- 110 *Id.* at 54.
- 111 See generally *id.*
- 112 *Id.* at 36.
- 113 *Id.*
- 114 *Id.* at 38.
- 115 *Id.*
- 116 *Id.* at 36–38.
- 117 *Id.* at 38.
- 118 *Id.*
- 119 *Id.*
- 120 *Id.*
- 121 *Id.*
- 122 *Id.* at 38–39.
- 123 *Id.* at 39.
- 124 *Id.*
- 125 *Id.*
- 126 *Id.* at 40.

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at 40–41.

131 *Id.*

132 *Id.*

133 *Id.* (“The district court ruled that [plaintiff] had failed to plead reliance because after the announcement of the Merger, the market in ADS was not efficient, so [the plaintiff] could not rely on the fraud-on-the-market presumption But the district court also held that the statements that the Freeze-Out Merger was fair were inactionable opinion statements because [plaintiff] had failed to allege that the facts supporting the belief that the deal was fair are untrue or that Defendant could not have believed \$7.10 was fair.”) (cleaned up).

134 *Id.* at 41.

135 *Id.* at 41–42. The majority also concluded that the plaintiff adequately pleaded actionable misstatements, scienter, and loss causation.

136 *Id.* at 55.

137 *Id.*

138 *Id.* at 57 (quoting *Wilson v. Great Am. Indus., Inc.*, 979 F.2d 924, 931 (2d Cir. 1992) (“As we have previously explained, ‘[t]he transaction effected by a proxy involves not only the merger of corporate entities . . . but also the forfeiture of shareholder’s appraisal rights,’ so ‘[t]he injury sustained by a minority shareholder powerless to effect the outcome of the merger vote is . . . the loss of his appraisal right.’”) (cleaned up)).

139 *Id.*

140 *Id.* at 58.

141 *Id.* at 61 (citing *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737–38 (1975) (“That the fraudulent proxies caused [the plaintiff] to forego appraisal cannot be inferred from his failure to pursue it . . . he can sustain his burden only by plausibly alleging that he read and directly relied on the proxy statements in voting to approve the merger[, which] he does not.”)).

142 *Id.* (citing *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102 (1991)).

143 *Id.* at 62.

144 *Id.* at 62–65.

145 *Id.* at 67 (“I worry that (at least in the freeze-out merger context) minority shareholders who fail to exercise their individual right to appraisal under state law in the first instance will now have a second-chance claim via a class action under the federal securities law.”).

146 *In re Maiden Holdings, Ltd. Sec. Litig.*, 153 F.4th 354, 362 (3d Cir. 2025), *reh’g denied*, No. 24-1118, 2025 WL 2671744 (3d Cir. Sept. 16, 2025).

147 *Id.*, quoting *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 264 (2024). We analyzed *Macquarie v. Moab* in our 2024 *Review*. Jones Day, *supra* note 63, at 12–14.

148 *Id.*

149 *Id.* at 358.

150 *Id.*

151 *Id.* at 359.

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at 360.

162 *Id.* at 357.

163 *Id.* at 358.

164 *Id.* at 359–60.

165 *Id.* at 360.

166 *Id.*

167 *Id.* at 360–61.

168 *Id.* at 361.

169 *Id.* at 358.

170 *Id.*

171 *Id.* at 361.

172 *Id.* at 358.

173 *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015).

174 *In re Maiden Holdings*, 153 F.4th at 363.

175 *Id.* at 362.

176 *Id.*

177 *Id.* at 363, quoting *City of Warren Police & Fire Ret. Sys. v. Prudential Fin., Inc.*, 70 F.4th 668, 684 (3d Cir. 2023). We analyzed *City of Warren* decision in our 2023 *Review*. Jones Day, *2023 Securities Litigation Year in Review* 11–12 (2024).

178 *Id.*

179 *Id.* at 364.

180 *Id.*

181 *Id.*

182 *Id.* at 365.

183 *Id.*; *In re Ikon Off. Sols., Inc.*, 277 F.3d 658, 666 (3d Cir. 2002).

184 *In re Maiden Holdings*, 153 F.4th at 365.

185 *Id.*

186 *Id.* at 365–66.

187 *Id.*

188 *Id.* at 366.

189 *Id.* 366–67.

190 *Id.* at 367.

191 *Id.* (citations omitted).

192 *Sneed v. Talphera, Inc.*, 147 F.4th 1123, 1127 (9th Cir. 2025).

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.*

197 *Id.* at 1128.

198 *Id.*

199 *Id.* at 1129–30.

200 *Id.*

201 *Id.* at 1130.

202 *Id.*

203 *Id.*

204 *Id.* at 1131.

205 *Id.*

206 *Id.* at 1132.

207 *Id.*

208 *Id.*

209 *Id.* at 1133.

210 *Id.*

211 *Id.* at 1134.

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.* at 1127.

216 *In re Walmart Inc. Securities Litigation*, 151 F.4th 103, 107 (3d Cir. 2025).

217 *Id.* at 115 (emphasis in original).

218 *Id.* at 116.

219 *Id.* at 116 (italics in original omitted).

220 *Id.* at 110–11.

221 *Id.* at 111.

222 *Id.*

223 *Id.* at 113.

224 *Id.* (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 45 (2011)).

225 *Id.* (quoting *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 264 (2024)).

226 *Id.*

227 *Id.* at 114 (quotation omitted).

228 *Id.* (cleaned up).

229 *Id.* at 115 (italics in original omitted).

230 *Id.* at 116 (quotation omitted).

231 *Id.*

232 *Id.* at 119.

233 *Id.* (italics in original omitted).

234 *Id.* (citing *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 184–86 (2015)).

235 *Id.* at 120.

236 *Id.*

237 *Id.* at 121.

238 *Sodha v. Golubowski*, 154 F.4th 1019 (9th Cir. 2025).

239 *Id.* at 1035–36 (citing *Stadnick v. Vivint Solar, Inc.*, 861 F.3d 31, 36 (2d Cir. 2017); *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1203 (1st Cir. 1996), *abrogated on other grounds by* 15 U.S.C. 78u-4(b)(2)).

240 *Id.* at 1026.

241 *Id.*

242 *Id.*

243 *Id.* at 1027.

244 *Id.* at 1028.

245 *Id.* at 1031.

246 *Id.* at 1032.

247 *Id.* at 1032–33.

248 *Id.* at 1040.

249 *Golubowski v. Robinhood Markets, Inc.*, No. 21-CV-09767-EMC (EMC), 2024 WL 269507, at *7 (N.D. Cal. Jan. 24, 2024), *aff'd in part, vacated in part, remanded sub nom. Sodha v. Golubowski*, 154 F.4th 1019 (9th Cir. 2025).

250 *Id.*

251 *Id.* at 13.

252 *Golubowski*, 154 F. 4th at 1036 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

253 *Id.*

254 *Id.* at 1034–35.

255 *Id.* at 1037.

256 *Id.* at 1038; 17 C.F.R. § 229.303(b)(2)(ii).

257 *Id.* at 1039–40.

258 *Id.* at 1040.

259 *Id.* at 1038.

260 *Id.* at 1039.

261 *Id.* at 1041.

262 *Id.*

263 *Id.* at 1041–42.

264 *Id.* at 1042.

265 *Gimpel v. The Hain Celestial Grp., Inc.*, 156 F.4th 121 (2d Cir. 2025).

266 *Id.* at 128, 143.

267 *Id.* at 128.

268 *Id.* at 141.

269 *Id.* at 134. We analyzed the Second Circuit's prior decision in our 2021 Review. *Jones Day*, *supra* note 53, at 12–13.

270 *Gimpel*, 156 F.4th 121 at 135.

271 *Id.* at 143.

272 *Id.* at 140.

273 *Id.* at 141 (quoting *Meyer v. Jinkosolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014)).

274 *Id.* at 141 (citing *Novak v. Kasaks*, 216 F.3d 300, 311–12 (2d Cir. 2000); *Oklahoma Firefighters Pension & Ret. Sys. v. Lexmark Int'l, Inc.*, 367 F. Supp. 3d 16, 31 (S.D.N.Y. 2019)).

275 *Id.* at 142 (quoting *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 167 (2d Cir. 2000)).

276 *Id.*

277 *Id.* at 144 (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 323 (2007)).

278 *Id.* at 151.

279 *Id.* at 146 (quoting *Setzer v. Omega Healthcare Invs., Inc.*, 968 F.3d 204, 215 (2d Cir. 2020)).

280 *Id.* at 147.

281 *Id.* at 148–49.

282 *Id.* at 148.

283 *Id.*

284 *Id.* at 149 (quoting *San Antonio Fire & Police Pension Fund v. Dentsply Sirona Inc.*, 732 F. Supp. 3d 300, 319 (S.D.N.Y. 2024)).

285 *Id.* at 150.

286 *Hunt v. PricewaterhouseCoopers LLP*, No. 24-3568, 2025 WL3137726, at *10 (9th Cir. Nov. 10, 2025).

287 *Id.* at *6 (quoting 15 U.S.C. § 77k(b)(3)(B)(i)).

288 *Id.* at *7 (quoting *In re Lehman Bros. Mortg.-Backed Sec. Litig.*, 650 F.3d 167, 181 (2d Cir. 2011)).

289 *See Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015).

290 *Hunt*, 2025 WL3137726, at *3. Under ASC 840-10-25-1, a capital lease is recognized if it meets any of the following criteria: (i) ownership is transferred to the lessee at the end of the lease term; (ii) the lease contains a bargain purchase option; (iii) the lease term is at least 75% of the property's estimated remaining economic life; or (iv) the present value of the minimum lease payments is 90% or more of the fair value of the leased property.

291 *Id.* at *4.

292 *Id.*

293 *Id.* at *6.

294 *Id.* at *7 (quoting *In re Lehman Bros.*, 650 F. 3d at 181).

295 *Id.* at *9 (quoting *Omnicare*, 575 U.S. at 183).

296 *Id.* at *7 (citations omitted).

297 *Id.* at *8.

298 *Id.* (quoting *Deephaven Priv. Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1174 (10th Cir. 2006)).

299 *Id.*

300 *Id.* at *10.

301 *Id.*

302 *Handal v. Innovative Indus. Props., Inc.*, 157 F.4th 279, 286–87 (3d Cir. 2025).

303 *Id.* at 286–87 (citing 15 U.S.C. § 78u-4(b)(2)(A)).

304 *Id.* at 302–03 (citing *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000); *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 695 (6th Cir. 2004); *SEC v. Shanahan*, 646 F.3d 536, 544 (8th Cir. 2011); *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1098 (9th Cir. 2011); *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 700 (5th Cir. 2005)).

305 *Id.* at 303.

306 *Id.* at 303–04 (citing *Jackson v. Abernathy*, 960 F.3d 94, 99 (2d Cir. 2020) (holding statements at issue to be dramatically false)).

307 *Id.* at 287.

308 *Id.*

309 *Id.*

310 *Id.* at 290.

311 *Id.* at 290–91.

312 *Id.* at 291.

313 *Id.*

314 *Mallozzi v. Innovative Indus. Props., Inc.*, No. 22-cv-2359 (EP) (JRA), 2024 WL 4285398, at *2 (D.N.J. Sept. 25, 2024), *aff'd sub nom. Handal*, 157 F.4th at 279.

315 *Handal*, 157 F.4th at 287–88.

316 *Id.*

317 *Id.* at 288.

318 *Id.* at 291.

319 *Mallozzi*, 2024 WL 4285398, at *4.

320 *Handal*, 157 F.4th at 288 n.1.

321 *Id.* at 288.

322 *Id.*

323 *Mallozzi*, 2024 WL 4285398, at *4.

324 *Handal*, 157 F.4th at 288.

325 *Id.*

326 *Id.* at 294 (cleaned up).

327 *Id.* (emphasis in original).

328 *Id.* at 294–95.

329 *See id.* at 295.

330 *See id.*

331 *Id.* (cleaned up).

332 *Id.* at 296 (emphasis in original omitted).

333 *Id.* (emphasis in original omitted).

334 *Id.*

335 *Id.*

336 *Id.*

337 *Id.* at 297 (citing *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 184–186, 188–89 (2015)).

338 *Id.* at 297 (citing *Omnicare, Inc.*, 575 U.S. at 184–85, 189).

339 *Id.*

340 *Id.* at 297–98.

341 *Id.* at 298.

342 *Id.* at 300.

343 *Id.*

344 *Id.*

345 *Id.* at 299.

346 *Id.*

347 *See generally id.* at 300–05.

348 *See id.* at 302–05.

349 *Id.* at 302.

350 *Id.*

351 *Id.* at 302–03.

352 *See id.*

353 *Id.* (citing *Novak*, 216 F.3d at 308; *PR Diamonds, Inc.*, 364 F.3d at 695; *Shanahan*, 646 F.3d at 544; *N.M. State Inv. Council*, 641 F.3d at 1098; *Plotkin*, 407 F.3d at 700) (cleaned up).

354 *Id.* at 303.

355 *Id.* (quoting *Rahman v. Kid Brands, Inc.*, 736 F.3d 237, 245 (3d Cir. 2013)).

356 *Id.* (citing *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008)).

357 *Id.*

358 *Id.*

359 *Id.*

360 *Id.* at 304; *cf. Jackson v. Abernathy*, 960 F.3d 94, 98–99 (2d Cir. 2020) (explaining that in “exceedingly rare” cases involving “dramatic” statements, a shareholder may impute scienter onto a corporation without identifying the individuals responsible for disseminating the fraud).

361 *Institutional Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242 (3d Cir. 2009).

362 *Handal*, 157 F.4th at 304 (citing *Avaya, Inc.*, 564 F.3d at 270).

363 *Id.* (citing *Avaya, Inc.*, 564 F.3d at 270).

364 *Id.*

365 *Id.*

366 *Id.* The short-seller report targeted multiple tenants of Innovative to argue that Innovative’s stock was overvalued. *Id.* at 290. In relation to Kings Garden, it unearthed multiple fraud suits, one of which alleged that Kings Garden’s co-founder “falsified books and records to personally enrich himself, and swindle money from investors.” *Id.* at 290–91. That same day, in response to the short-seller report, Innovative issued its press release containing the statements at issue. *Id.* at 291, 304.

367 *Id.* at 304.

368 *Id.*

369 *Defeo v. IonQ, Inc.*, 134 F.4th 153 (4th Cir. 2025).

370 *Id.* at 163.

371 *Id.* at 164.

372 *Id.* at 157 n.1.

373 *Id.* at 158.

374 *Id.*

375 *Id.*

376 *Id.* at 158–59.

377 *Id.* at 159.

378 *Id.*

379 *Id.*

380 *Id.*

381 *Leacock v. IonQ, Inc.*, No. 22-cv-1306 (DLB), 2023 WL 6308045 (D. Md. Sept. 28, 2023).

382 *Id.* at *15.

383 *Leacock v. IonQ, Inc.*, No. 22-cv-1306 (DLB), 2024 WL 3360647 (D. Md. July 10, 2024).

384 *Defeo*, 134 F.4th at 162 (cleaned up).

385 *Id.*

386 *Id.* at 163 (quoting *In re Nektar Therapeutics Sec. Litig.*, 34 F.4th 828, 839 (9th Cir. 2022)). In 2022, we analyzed the *Nektar Therapeutics* decision. Jones Day, *supra* note 54, at 12–14. The court also cited *In re Genius Brands Int’l, Inc. Sec. Litig.*, 97 F.4th 1171, 1186–87 (9th Cir. 2024) (crediting an anonymous short-seller report that revealed new, empirical facts to the market to find loss causation adequately pleaded). In 2024, we analyzed the *Genius Brands* decision. Jones Day, *supra* note 63, at 26–28.

387 *Defeo*, 134 F.4th at 163 (citing *Nektar Therapeutics*, 34 F.4th at 839; *In re Bofl Holding, Inc. Sec. Litig.*, 977 F.3d 781, 794–95 (9th Cir. 2020)).

388 *Id.* (quoting *Bofl*, 977 F.3d at 797).

389 *Id.* (quoting *Nektar Therapeutics*, 34 F.4th at 840).

390 *Id.* at 162.

391 *Id.* 163.

392 *Id.* at 163–64 (cleaned up).

393 *Id.* at 164.

394 *Id.* at 165.

395 *Id.*

396 *Id.* at 166 (cleaned up).

397 *Jastram v. NextEra Energy, Inc.*, 161 F.4th 693 (11th Cir. 2025).

398 *Id.* at 709 (citation omitted).

399 *Id.*

- 400 *Compare Lormand v. US Unwired, Inc.*, 565 F.3d 228 (5th Cir. 2009), with *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598 (9th Cir. 2014).
- 401 *Jastram*, 161 F.4th at 698.
- 402 *Id.* at 706.
- 403 *Id.* at 707–08.
- 404 *Id.* at 708 (quoting *Dura Pharms. Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).
- 405 *Id.*
- 406 *Id.* at 714.
- 407 *Compare Lormand*, 565 F.3d at 255, with *Apollo Grp.*, 774 F.3d at 605.
- 408 See *Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462 (4th Cir. 2011); *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824 (7th Cir. 2007). The Second Circuit applies a different, but heightened two-part test for loss causation. See *ATSI Comm'n's, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007).
- 409 *Jastram*, 161 F.4th at 709 (quoting *Meyer v. Greene*, 710 F.3d 1189, 1197 (11th Cir. 2013)).
- 410 *Id.*
- 411 *Id.*
- 412 *Id.* (emphasis in original).
- 413 *Id.*
- 414 *Id.* at 709–10.
- 415 *Id.* at 711.
- 416 *Id.*
- 417 *Id.*
- 418 *Id.* at 712.
- 419 *Id.*
- 420 *Id.*
- 421 *Id.*
- 422 *Id.*
- 423 *Id.* at 712–13.
- 424 *Id.* at 713.
- 425 *In re FirstEnergy Corp. Sec. Litig.*, 149 F.4th 587 (6th Cir. 2025). Jones Day represented a group of 16 current and former officers and directors.
- 426 *Id.* at 603 (citing *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972)).
- 427 *Id.* at 609.
- 428 See *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).
- 429 *FirstEnergy Corp.*, 149 F.4th at 620 (citing *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013)).
- 430 *Id.* at 621 (italics omitted).
- 431 *Id.* at 607 (“[N]early all our sister circuits have either held that *Affiliated Ute* is applicable only to cases that are primarily based on omissions, or held the contrapositive, that *Affiliated Ute* is not applicable if a case is primarily based on misrepresentations.”).
- 432 *Id.* at 603.
- 433 *Id.*
- 434 *Id.* at 611.
- 435 *Id.* at 611–12.
- 436 *Id.* at 612.
- 437 *Id.* at 618.
- 438 *Id.* at 620 (citing *Comcast*, 569 U.S. at 34).
- 439 *Id.*
- 440 *Id.* at 621.
- 441 *Id.*
- 442 *Id.*
- 443 *In Re: Archegos 20A Litigation*, 2025 WL 2652262 (2d Cir. Sept. 16, 2025).
- 444 *Id.* at *1.
- 445 *Id.*
- 446 *Id.* at *2.
- 447 *Id.* at *1.
- 448 *Id.* at *3.
- 449 See *Tan v. Goldman Sachs Grp. Inc.*, No. 21-cv-8413 (PAC), 2023 WL 2753238 (S.D.N.Y. Mar. 31, 2023); see also *Tan v. Goldman Sachs Grp. Inc.*, No 1:21-cv-8413 (JSR), 2024 WL 1357354 (S.D.N.Y. Apr. 1, 2024).
- 450 *Archegos*, 2025 WL 2652262, at *6.
- 451 *Id.* (emphasis in original).
- 452 *Id.* at *7.
- 453 *Id.*
- 454 *Id.*
- 455 *Id.*
- 456 *Id.* at *8.
- 457 *Id.*
- 458 *Roth v. LAL Family Corp.*, 138 F.4th 696 (2d Cir. 2025). The Second Circuit consolidated two related appeals from dismissals of cases brought by the same plaintiff under the same theory of liability. See *Roth v. LAL Family Corp.*, 748 F. Supp. 3d 180 (S.D.N.Y. 2024); *Roth v. Drahi*, No. 23-cv-5522, 2024 WL 4198517 (E.D.N.Y. Sept. 16, 2024).
- 459 *Roth v. LAL Family*, at 700.
- 460 *Id.* The alleged controlling shareholder defendants comprised Lauder family entities LAL Family Corporation and LAL Family Partners L.P. (“Lauder defendants”) in the Estée Lauder case and Patrick Drahi and his affiliates (“Drahi defendants”) in the Altice case.
- 461 *Id.* at 699–700. See also 15 U.S.C. § 78p(b); *Blau v. Lamb*, 363 F.2d 507, 515 (2d Cir. 1966) (explaining Section 16(b)’s strict liability requirements). But see *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 252 (1976) (holding that it is unjust to impose Section 16(b)’s strict liability where statutory language is unclear).
- 462 *Roth v. LAL Family*, at 704.
- 463 *Id.* at 702 (citing *Gibbons v. Malone*, 703 F.3d 595, 599–600 (2d Cir. 2013)).
- 464 *Id.* at 700.
- 465 *Id.* at 701.
- 466 *Id.* at 699–701.
- 467 *Id.*
- 468 *Id.* at 700–01.
- 469 *Id.*
- 470 *Id.* at 703.
- 471 *Id.* at 703–04.
- 472 *Id.*
- 473 *Id.* at 704–05; § 78p(b).
- 474 *Id.* at 704–05; 17 C.F.R. § 240.16a-1 (a)(2).
- 475 *Roth v. LAL Family*, at 704 (quoting 17 C.F.R. § 240.16a-1(g)) (emphasis in original).
- 476 *Id.* at 704–05. See *E.R. Squibb & Sons v. Helvering*, 98 F.2d 69, 70–71 (2d Cir. 1938) (concluding it is “impossible . . . to understand how the notion of a gain to the corporation from” share repurchases “is legally tenable, except when the sale of the shares is at a price higher than their real value at the time of the sale”); Christine J. Chen, Y. Carson Zhou, Tooley Brooks, *No Exceptions—Equity Dilution Is Direct*, 26 U. Pa. J. Bus. L. 1, 29 (2023) (“A company is not worth more because it holds its own (treasury) stock[,] and it is not worth less if it gives out that stock for free.”).
- 477 See *Feder v. Frost*, 220 F.3d 29, 34 (2d Cir. 2000) (holding that Section 16(b) liability attaches only where the transacted securities “affect[ed] the value” of the corporation).
- 478 *Roth v. LAL Family*, at 705; *Gibbons*, 703 F.3d at 601 (explaining that Section 16(b) captures profit realized from trading in securities that are differently named yet “essentially indistinguishable”).
- 479 *Roth v. LAL Family*, at 705; *Gibbons*, 703 F.3d at 601–02.
- 480 *Roth v. LAL Family*, at 705.
- 481 *Id.* at 705–06.

482 *Id.*

483 *Id.* at 706.

484 *Id.*

485 *S. & S. Realty Corp. v. Kleer-Vu Industries, Inc.*, 575 F.2d at 1043–44 (2d Cir. 1978).

486 *Roth v. LAL Family*, at 706.

487 *Id.*

488 *Id.*

489 *Roth v. LAL Family*, at 707.

490 *Id.*

491 *Id.*

492 *Id.*

493 *Id.*

494 *Id.*; See *Gwozdinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305 (2d Cir. 1998) (explaining that Section 16(b) was designed to prevent insiders from profiting “by virtue of . . . inside information”); *Blau*, 363 F.2d at 515 (“Congress explicitly made irrelevant the intent of any insider who engages in a short-term transaction.”).

495 *Roth v. LAL Family*, at 708 (quoting *Kern County Land Co. v. Occidental Petrol. Corp.*, 411 U.S. 582, 594–595).

496 *Id.* at 708–09 (Calabresi, J. concurring). See *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 252 (1976) (“It is inappropriate to reach the harsh result of imposing [Section] 16(b)’s liability without fault on the basis of unclear language. If Congress wishes to impose liability, we must assume it will do so expressly or by unmistakable inference.”); *C.R.A. Realty Corp. v. Tri-South Invs.*, 738 F.2d 73, 76 (2d Cir. 1984) (“Since the liability imposed is strict and the remedy harsh . . . courts have been chary of holding transactions within [Section] 16(b) unless Congress’s intent to make the section applicable was clear.”).

497 *Id.* (emphasis in original).

498 *Roth v. Armistice Capital, LLC*, No. 24-950, 2025 WL 2471028 (2d Cir. Aug. 28, 2025).

499 *Id.*

500 *Id.* at *5.

501 *Id.*

502 *Id.* at *6.

503 *Id.* at *5.

504 *Id.* at *1.

505 *Id.* at *2.

506 *Id.* at *3.

507 *Roth v. Armistice Capital, LLC*, No. 1:20-cv-08872 (JLR), 2024 WL 1313817 (S.D.N.Y. Mar. 27, 2024).

508 *Roth*, 2025 WL 2471028, at *4 (citing *Gryl ex rel. Shire Pharms. Grp. PLC v. Shire Pharms. Grp. PLC*, 298 F.3d 136, 141 (2d Cir. 2002)).

509 *Id.*

510 *Id.* at *5.

511 *Id.* at *5–6.

512 *EpicentRx, Inc. v. Superior Court of San Diego County*, 18 Cal.5th 58, 67 (2025).

513 *Id.* at 66–68.

514 *EpicentRx, Inc. v. Superior Ct.*, 95 Cal.App.5th 890 (2023), as modified on denial of reh’g (Oct. 10, 2023); Jones Day, *supra* note 177, at 34.

515 *EpicentRx*, 18 Cal.5th at 68.

516 *Id.* at 69.

517 *Id.* at 66.

518 *Id.* at 67.

519 *Id.*

520 *Id.* at 71; *EpicentRx, Inc. v. Superior Ct.*, No. S282521, 315 Cal.Rptr.3d 726 (Mem) (2023); Jones Day, *supra* note 63, at 2.

521 *EpicentRx*, 18 Cal.5th at 74 (quoting *EpicentRx*, 95 Cal.App.5th at 899–900).

522 *Id.* at 76.

523 *Id.* at 75–76.

524 *Id.* at 76.

525 *Id.* at 78.

526 *Id.* at 67.

527 *Id.*

528 *Id.*

529 *Id.* at 79.

530 *Id.*

531 *Id.*

532 *Id.*

533 *Id.* at 84–85.

534 *Bigfoot Ventures Ltd. v. Knighton*, 132 F.4th 1138, 1140 (9th Cir. 2025).

535 *Id.* at 1147.

536 *Id.* at 1140.

537 *Id.* at 1141.

538 *Id.* at 1141–42.

539 *Id.* at 1142.

540 *Id.*

541 *Id.*

542 *Id.*; see also *Bigfoot Ventures Ltd. v. Knighton*, 2023 WL 9318505, at *9 (C.D. Cal. Aug. 7, 2023).

543 *Id.*, citing *Larson v. Dumke*, 900 F.2d 1363, 1367 (9th Cir. 1990).

544 *Id.* at 1142–43.

545 *Id.* at 1143; see also *Bigfoot Ventures Ltd.*, 2023 WL 9318505, at *7.

546 *Id.* at 1143–44.

547 *Id.*

548 *Id.* at 1143.

549 *Id.* at 1144.

550 *Id.*, quoting *RePet, Inc. v. Zhao*, 2016 WL 11518482 at *5 (C.D. Cal. June 28, 2016).

551 *Id.* at 1145.

552 *Id.*

553 *Id.* at 1145–46.

554 *Id.* at 1146 n.6.

555 *Perrigo Institutional Inv. Grp. v. Papa*, 150 F.4th 206 (3d Cir. 2025).

556 See Fed. R. Civ. P. 23.

557 *Perrigo*, 150 F.4th at 213–17.

558 *Id.* at 217.

559 *Compare In re Navistar MaxxForce Engines Mktg., Sales Pracs., & Prods. Liab. Litig.*, 990 F.3d 1048, 1053 (7th Cir. 2021), with *In re Four Seasons Sec. L. Litig.*, 493 F.2d 1288, 1291 (10th Cir. 1974) (“A reasonable indication of a desire to opt out ought to be sufficient.”), and *Plummer v. Chem. Bank*, 668 F.2d 654, 657 n.2 (2d Cir. 1982) (“Any reasonable indication of a desire to opt out should suffice.”).

560 *Perrigo*, 150 F.4th at 215 (quoting *Navistar*, 990 F.3d at 1053).

561 *Id.* at 211–12.

562 *Id.* at 212.

563 *Id.* at 210.

564 “According to counsel, the failure was inadvertent because ‘she instructed an associate at her firm to submit an opt-out request to the Court-approved Claims Administrator.’” *Id.* at 213 (quoting *Roofers’ Pension Fund v. Papa*, No. 16-cv-2805 (RMB), 2024 WL 4205638, at *5 (D.N.J. Sept. 12, 2024)).

565 *Id.*

566 *Id.* at 221.

567 *Id.* at 215 (quoting *Four Seasons*, 493 F.2d at 1291).

568 *Id.*

569 *Id.* at 216.

570 *Id.* (quotations omitted).

571 *Id.*

572 *Id.* (quotations omitted)

573 See Fed. R. Civ. P. 6(b)(1).

574 *Perrigo*, 150 F.4th at 217 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)).

575 *Id.* at 218 (quoting *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 246 F.3d 315, 322–23 (3d Cir. 2001)).

576 *Id.*

577 *Id.* (quoting *Orthopedic Bone Screw*, 246 F.3d at 325).

578 *Id.* at 218–19 (quoting *Roofer's Pension Fund*, 2024 WL 4205638 at *13).

579 *Id.* at 219 (quoting *Roofer's Pension Fund*, 2024 WL 4205638, at *14).

580 *Id.* at 220.

581 *Id.* at 220–21 (citations omitted).

582 *Xeriant, Inc. v. Auctus Fund LLC*, 2025 WL 1748776, at * 11 (2d Cir. 2025).

583 *Id.*

584 *Id.* at 3.

585 *Id.*

586 *Id.*

587 *Id.* at 8.

588 *Id.* at 3.

589 *Id.* at 4.

590 *Id.*

591 *Id.* at 12 (citing 15 U.S.C. § 78c(a)(5)(A)).

592 *Xeriant*, 2025 WL 1748776, at *12 (citing 15 U.S.C. § 780(a)(1)); see *SEC v. Almagarby*, 92 F.4th 1306, 1315 (11th Cir. 2024) (holding that securities brokers must be registered with the SEC).

593 *Id.* at 13 (citing *SEC v. Keener*, 102 F.4th 1328, 1331 (11th Cir. 2024)).

594 *Id.* at 13.

595 *Xeriant*, 2025 WL 1748776, at *13 (citing *Almagarby*, 92 F.4th at 1306).

596 *Id.* at 14 (quoting *Xeriant*, 2024 WL 3498593, at *5).

597 *Id.* at 15–16.

598 *Id.* at 19 (citing *Boguslavsky v. Kaplan*, 159 F.3d 715, 522 n.6 (2d Cir. 1998)).

599 *Id.* at 19.

600 *Id.* at 20 (citing *Williams v. Binance*, 96 F.4th 129, 144 (2d Cir. 2024)).

601 *Id.* at 23.

602 *Id.*

603 *Ezrasons, Inc. v. Rudd*, 2025 WL 1436000 (N.Y. May 20, 2025).

604 *Id.* at *1.

605 *Id.*

606 *Haussmann v. Baumann*, 2025 WL 1435989 (N.Y. May 20, 2025). The plaintiffs sought to bring a derivative suit on behalf of Bayer AG, a German corporation, based on alleged breaches of fiduciary duty arising out of Bayer's purchase of Monsanto in 2018. The trial court dismissed the complaint on a number of grounds, including that the plaintiffs lacked standing under German law (which applied under the internal affairs doctrine) and *forum non conveniens*. The intermediate appellate court affirmed. In a memorandum disposition, the Court of Appeals affirmed the dismissal solely on the *forum non conveniens* ground and did not reach the internal affairs doctrine or the standing issue.

607 *Davis v. Scottish Re Grp. Ltd.*, 88 N.E.3d 892 (N.Y. 2017).

608 *Ezrasons, Inc. v. Rudd*, 2022 WL 20476314 (N.Y. Sup. Ct. May 4, 2022); *Ezrasons, Inc. v. Rudd*, 191 N.Y.S.3d 349 (N.Y. App. Div. 2023).

609 *Ezrasons*, 2025 WL 1436000, at *2 (quoting *Eccles v. Shamrock Capital Advisors, LLC*, 245 N.E.3d 1110, 1115 (N.Y. 2024)). We analyzed the *Eccles* decision in our 2024 *Review*. Jones Day, *supra* note 63, at 43.

610 *Ezrasons*, 2025 WL 1436000, at *4 (citations omitted).

611 *Id.* (cleaned up).

612 *Id.* at *5–6.

613 *Id.* at *5.

614 *Id.* at *10 (Wilson, C.J., dissenting).

615 *Christine Pino v. Cardone Cap., LLC*, 139 F.4th 1102, 1107 (9th Cir. 2025). Christine Pino was the successor-in-interest to the claims originally asserted by Luis Pino.

616 *Id.* at 1110 (discussing *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 185 (2015)).

617 *Id.* at 1111 (citing *Casella v. Webb*, 883 F.2d 805, 809 (9th Cir. 1989) (holding constructive knowledge does not bar a purchaser's recovery under Section 12 as purchasers may recover unless they have actual knowledge of the untruth or omission)).

618 *Id.* at 1107.

619 *Id.* at 1108.

620 *Id.*

621 *Id.* at 1109.

622 *Id.*

623 *Id.* (discussing *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 186 (2015)).

624 *Id.*

625 *Id.* at 1110.

626 *Id.* (quoting *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 182 (2015)).

627 *Id.* (quoting *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009)).

628 *Id.* (quoting *Miller v. Thane Int'l, Inc.*, 519 F.3d 879, 886 (9th Cir. 2008) (quoting *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 269 (3d Cir. 2006))).

629 *Id.*

630 *Id.* at 1111.

631 *Id.*

632 *Id.*

633 *Id.* (citing *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 616 (9th Cir. 2017)).

634 *Id.*

635 *Id.* (quoting 15 U.S.C. § 771(a)(2)).

636 *Id.* (quoting *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 189 (2015)).

637 *Id.* (quoting *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 188–189 (2015)).

638 *Id.* at 1112.

639 *Id.* at 1111.

640 *Id.* at 1112 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231–231 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 499 (1976))).

641 *Id.*

642 *Id.*

643 *Id.* at 1112–1113.

644 *Sherman v. Abengoa, S.A.*, 156 F.4th 152 (2d Cir. 2025).

645 *Id.* at 157.

646 *Id.*

647 *Id.* at 158.

648 *Id.* at 157.

649 *Id.* at 158.

650 *Id.* at 158–59.

651 *Id.* at 160.

652 *Id.*

653 *Id.* at 160–61.

654 *Id.* at 161.

655 *Francisco v. Abengoa, S.A.*, 481 F. Supp. 3d 179, 202–03, 208–09, 212 (S.D.N.Y. 2020), vacated in part sub nom. *Sherman v. Abengoa, S.A.*, 156 F.4th 152 (2d Cir. 2025).

656 *Id.* at 208, 213.

657 *Sherman v. Abengoa S.A.*, 156 F.4th at 162.

658 *Id.* at 162–63.

659 *Id.* at 162.

660 *Id.*

661 *Id.* at 163.

662 *Id.*

663 *Id.*

664 *Id.*

665 *Id.* at 164.

666 *Id.*

667 *Id.* at 164–65.

668 *Id.* at 165.

669 *Id.* at 165–66.

670 *Id.* at 166–67.

671 *Id.* at 169.

672 *Id.*

673 *Id.* at 170.

674 *SEC v. Barry*, 146 F.4th 1242 (9th Cir. 2025).

675 *Id.* at 1253 (quoting *SEC v. W.J. Howey Co.*, 328 U.S. 293, 301 (1946)).

676 See *id.* at 1255.

677 Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm'n, *American Leadership in the Digital Finance Revolution* (July 31, 2025); Hester M. Peirce, Comm'r, U.S. Sec. & Exch. Comm'n, *Enchanting, but Not Magical: A Statement on the Tokenization of Securities* (July 9, 2025) (“Blockchain technology has unlocked novel models for distributing and trading securities in a ‘tokenized’ format. Tokenization may facilitate capital formation and enhance investors’ ability to use their assets as collateral While blockchain-based tokenization is new, the process of issuing an instrument representing a security is not. The same legal requirements apply to on- and off-chain versions of these instruments.”); see also Responsible Financial Innovation Act of 2025 (discussion draft circulated by Sens. Tim Scott, Cynthia M. Lummis, Bill Hagerty & Bernie Moreno, Sept. 5, 2025) (pending Senate legislation that provides an alternative regulatory framework for digital assets from the CLARITY Act and directs the SEC to engage in rulemaking specifying clear criteria and definitions governing the term “investment contract” as used across the federal securities laws).

678 *Id.* at 1250.

679 See *SEC v. Barry*, No. 2:15-cv-02563, 2023 WL 4491724 (C.D. Cal. July 12, 2023).

680 *Barry*, 146 F.4th at 1251 (quoting *Howey*, 328 U.S. at 298–99).

681 *Id.*

682 *Id.* at 1251–52 (quoting *SEC v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476, 482 (9th Cir. 1973) (emphasis omitted)).

683 *Id.* at 1252 (quoting *SEC v. Goldfield Deep Mines Co. of Nev.*, 758 F.2d 459, 464 (9th Cir. 1985); *SEC v. R. G. Reynolds Enters., Inc.*, 952 F.2d 1125, 1131 (9th Cir. 1991)) (cleaned up).

684 *Id.* at 1260.

685 *Id.* at 1255–56 (citations omitted)

686 *Id.* at 1261 (citing *SEC v. Murphy*, 626 F.3d 633 (9th Cir. 1980)).

687 *Id.*

688 *Towers Watson & Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 138 F.4th 786, 788 (4th Cir. 2025).

689 *Id.*

690 *Id.* (quoting *Komatsu Mining Corp. v. Columbia Casualty Co.*, 58 F.4th 305, 307 (7th Cir. 2023)).

691 *Id.*

692 *Id.* at 790.

693 *Id.*

694 *Towers Watson & Co. v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 2021 WL 4555188, at *3 (E.D. Va. Oct. 5, 2021).

695 *Towers Watson & Co.*, 138 F.4th 786 at 788.

696 *Id.*

697 *Id.*

698 *Id.*

699 *Id.* at 790–91.

700 *Id.* at 791.

701 *Id.*

702 *Id.*

703 *Id.*

704 *Id.*

705 *Id.* at 793.

706 *Id.*

707 *Id.*

708 *Id.* at 794.

709 *Id.*

710 *Id.*

711 *Id.* at 794–95.

712 *Id.* at 795, n.10 (citing *Harman Int’l Indus., Inc. v. Illinois Nat’l Ins. Co.*, No. N22C-05-098 PRW CCLD, 2025 WL 84702, at *10 (Del. Sup. Ct. Jan. 7, 2025)).

713 *Id.* at 794–95 (citing *Komatsu Mining Corp. v. Columbia Casualty Co.*, 58 F.4th 305 (7th Cir. 2023)). We analyzed the Seventh Circuit’s decision in *Komatsu* in our 2023 *Review*. Jones Day, *supra* note 177, at 44.

714 *Id.* at 796–97.

715 *Id.*

716 *Id.*

717 *Id.* at 797.

718 *Id.*

719 *In re Alexion Pharms., Inc. Ins. Appeals*, 339 A.3d 694 (Del. 2025).

720 *Id.* at 698.

721 *Id.* at 699.

722 *Id.*

723 *Id.* 699–700.

724 *Id.* at 700.

725 *Id.*

726 *Id.*

727 *Id.*

728 *Id.*

729 *Id.* at 701.

730 *Id.* (citing *ACE Am. Ins. Co. v. Guaranteed Rate, Inc.*, 305 A.3d 339, 349 (Del. 2023)).

731 *Id.* at 701.

732 *Id.* at 702–05.

733 *Id.* at 703.

734 *Id.* at 701–02.

735 *Id.* at 701 (emphasis in original).

736 *Id.* at 703.

737 *Id.* at 703–04.

738 *Id.*

739 *Id.* at 704.

740 *Id.*

741 *Id.*

742 *Id.*

743 *Id.* at 705.

744 *Id.*

745 *In re FirstEnergy Corp.*, No. 24-3654, 2025 WL 2814286, at *1 (6th Cir. Oct. 3, 2025) (per curiam).

746 *Id.*

747 *Id.*

748 *Id.*
749 *Id.*
750 *Id.*
751 *Id.*
752 *Id.*
753 *Id.*
754 *Id.*
755 *Id.*
756 *Id.* at *3.
757 *Id.* at *2.
758 *Id.* at *3.
759 *Id.* (citing *In re Pros. Direct Ins. Cos.*, 578 F.3d 432, 439 (6th Cir. 2009)). See also Fed. R. Civ. P. 26(b)(3).
760 *Id.*
761 *Id.* at *4.
762 *Id.*
763 *Id.* (citing 28 U.S.C. § 1746(2)).
764 *Id.*
765 *Id.* at *5.
766 *Id.* at *5–6.
767 *Id.* at *6 (citation omitted).
768 *Id.* at *8 (citing *In re King's Daughters Health Sys., Inc.*, 31 F.4th 520, 527 (6th Cir. 2022)).
769 *Id.* (quoting *In re Grand Jury Subpoena*, 220 F.3d 406, 409 (5th Cir. 2000)). See also *In re Columbia/HCA Healthcare Corp. Billing Pracs. Litig.*, 293 F.3d 289, 306 & n. 28 (6th Cir. 2002); *United States v. Deloitte LLP*, 610 F.3d 129, 140 (D.C. Cir. 2010).
770 *Id.*
771 *Xeriant, Inc. v. Auctus Fund LLC*, 2025 WL 1748776, at * 11 (2d Cir. 2025).
772 *Id.*
773 *Id.* at 3.
774 *Id.*
775 *Id.*
776 *Id.* at 8.
777 *Id.* at 3.
778 *Id.* at 4.
779 *Id.*
780 *Id.* at 12 (citing 15 U.S.C. § 78c(a)(5)(A)).
781 *Xeriant*, 2025 WL 1748776, at *12 (citing 15 U.S.C. § 780(a)(1)); see *SEC v. Almagarby*, 92 F.4th 1306, 1315 (11th Cir. 2024) (holding that securities brokers must be registered with the SEC).
782 *Id.* at 13 (citing *SEC v. Keener*, 102 F.4th 1328, 1331 (11th Cir. 2024)).
783 *Id.* at 13.
784 *Xeriant*, 2025 WL 1748776, at *13 (citing *Almagarby*, 92 F.4th at 1306).
785 *Id.* at 14 (quoting *Xeriant*, 2024 WL 3498593, at *5).
786 *Id.* at 15–16.
787 *Id.* at 19 (citing *Boguslavsky v. Kaplan*, 159 F.3d 715, 522 n.6 (2d Cir. 1998)).
788 *Id.* at 19.
789 *Id.* at 20 (citing *Williams v. Binance*, 96 F.4th 129, 144 (2d Cir. 2024)).
790 *Id.* at 23.
791 *Id.*
792 *Powell v. SEC*, No. 24-1899, 2025 WL 2233792 (9th Cir. Aug. 6, 2025).
793 See 17 C.F.R. § 202.5(e).
794 *Powell*, 2025 WL 2233792, at *5.
795 *Id.* at *11.
796 *Id.*
797 *Id.* at *11–12.

798 *Id.* at *3.
799 *Id.*
800 *Id.* at *4.
801 *Id.* (quoting *Moody v. NetChoice, LLC*, 603 U.S. 707, 723 (2024)).
802 See *Town of Newton v. Rumery*, 480 U.S. 386 (1987).
803 *Powell*, 2025 WL 2233792, at *6 (quoting *Rumery*, 480 U.S. at 393).
804 *Id.* at *10.
805 See *SEC v. Romeril*, 15 F.4th 166 (2d Cir. 2021).
806 *Powell*, 2025 WL 2233792, at *8 (quoting *Romeril*, 15 F.4th at 172).
807 *Maffei v. Tripadvisor, Inc.*, 339 A.3d 705, 712–13 (Del. 2025) (discussing purported legal advantages of reincorporation that were cited by the board in meeting materials related to the conversion).
808 *Id.* at 739.
809 *Id.* at 717.
810 *Id.* at 722.
811 *Id.* at 722–23; 730.
812 *Id.* at 722.
813 *Id.* at 733.
814 *Id.* at 739.
815 *Id.*
816 *Id.*
817 *Id.* at 742–43.
818 *Id.* at 743.
819 *Id.* at 744.
820 See Flores, *supra* note 1 at 10–11.
821 See *Kaszirer v. Zagorski*, No. 1:25-cv-10200 (S.D.N.Y. filed Dec. 9, 2025).
822 See, e.g., California Artificial Intelligence Transparency Act, S.B. 942, 2023–2024 Reg. Sess. (Cal. 2024); Texas Responsible Artificial Intelligence Governance Act, H.B. 149, 89th Leg., R.S. (Tex. 2025).
823 *Ensuring a National Policy Framework for Artificial Intelligence*, Exec. Order No. 14365, 90 C.F.R. 58499 (2025).
824 [SEC Announces Cyber and Emerging Technologies Unit to Protect Retail Investors](#), Press Release 2025-42 (Feb. 20, 2025).
825 Hester M. Peirce & Mark T. Uyeda, Comm'rs, U.S. Sec. & Exch. Comm'n, *Statement Regarding Administrative Proceedings Against SolarWinds Customers* (Oct. 22, 2024).
826 See, e.g., Mark T. Uyeda, Comm'r, U.S. Sec. & Exch. Comm'n, *Statement on the Final Rule: Cybersecurity Risk Management, Strategy, Governance, and Incident Disclosure* (July 26, 2023); Letter from House Financial Services Committee to Acting SEC Chairman Uyeda (Mar. 31, 2025); *Barry v. Coupang*, No. 3:25-cv-10795 (N.D. Cal. filed Dec. 18, 2025).
827 See Eric Geller, *SEC Scraps Proposed Cybersecurity Rules for Investment Advisers, Market Participants*, CYBERSECURITY DIVE (June 16, 2025).
828 See, e.g., *Trump v. V.O.S. Selections*, No. 25-205 (U.S. argued Nov. 5, 2025).
829 See, e.g., Matthew R. Galeotti, Acting Assistant Att'y Gen., U.S. Dep't of Just., *Memorandum to All Criminal Division Personal Regarding Focus, Fairness, and Efficiency in the Fight Against White-Collar Crime*, at 3–5 (May 12, 2025).
830 [Departments of Justice and Homeland Security Partnering on Cross-Agency Trade Fraud Task Force](#), Press Release No. 25-893 (Aug. 29, 2025).
831 See, e.g., *Unleashing American Energy*, Exec. Order No. 14154, 90 C.F.R. 8353 (2025); *Establishing the National Energy Dominance Council*, Exec. Order No. 14213, 90 C.F.R. 9945 (2005); *Reinvigorating America's Beautiful Clean Coal Industry*, Exec. Order 14261, 90 C.F.R. 15517 (2025).
832 See [SEC Votes to End Defense of Climate Disclosures](#), Press Release No. 2025-58 (Mar. 27, 2025).
833 Paul S. Atkins, Chairman, U.S. Sec. & Exch. Comm'n, *Keynote Address at the John L. Weinberg Center for Corporate Governance's 25th Anniversary Gala* (Oct. 9, 2025).

- 834 See Flores, *supra* note 1, at 13.
- 835 See *Environmental Working Group v. Tyson Foods, Inc.*, No. 2024-CAB-005935 (D.C. Super. Ct. settled Nov. 13, 2025) (announced settlement included \$400,000 fine and agreement to stop touting net-zero emissions by 2050 pledge); *People v. JBS USA Food Co.*, No. 450682/2024 (N.Y. Sup. Ct. settled Nov. 3, 2025) (announced settlement included \$1.1 million fine and agreement to reform climate marketing practices).
- 836 *Chamber of Commerce v. Sanchez*, No. 25-5327 (9th Cir. argued Jan. 9, 2026).
- 837 See generally [Mandatory Greenhouse Gas Emissions Reporting](#), CALIFORNIA AIR RESOURCES BOARD (last visited January 30, 2026).
- 838 See 8 Del. C. § 115(c).
- 839 See, e.g., Jai Ramaswamy, Andy Hill & Kevin McKinley, [We're Leaving Delaware, And We Think You Should Consider Leaving Too](#), ANDREESSEN HOROWITZ (July 9, 2025); Paul Grewal, [Why Coinbase Sees Greener Pastures in Texas](#), COINBASE: BLOG (Nov. 12, 2025); Tom Hals, [In Tesla's Wake, More Big Companies Propose Voting 'Dexit' to Depart Delaware](#), REUTERS (Mar. 14, 2025).
- 840 See *supra* p. 6 (analysis of *FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd.*, No. 24-345 (U.S. argued Dec. 10, 2025)).
- 841 The Court granted certiorari to review the Ninth Circuit decision in January 2026. See *SEC v. Sripetch*, 154 F.4th 980 (9th Cir. 2025), cert. granted, No. 25-466, 2026 WL 73091 (U.S. Jan. 9, 2026).
- 842 *Liu v. SEC*, 591 U.S. 71 (2020).
- 843 *Id.* at 79.
- 844 15 U.S.C. § 78u(d)(5).
- 845 *SEC v. Govil*, 86 F.4th 89, 106 (2d Cir. 2023) (vacating judgment because the district court did not make predicate finding of pecuniary harm and therefore abused its discretion).
- 846 *SEC v. Navellier & Assocs., Inc.*, 108 F.4th 19, 41 & n.14 (1st Cir. 2024) (“Neither *Liu* nor our case law, however, require investors to suffer pecuniary harm as a precondition to a disgorgement award.”).
- 847 *Sripetch*, 154 F.4th at 986.
- 848 *Id.* at 987.
- 849 *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013).
- 850 See *supra* pp. 37–39 (analysis of *In re FirstEnergy Corp. Sec. Litig.*, 149 F.4th 587, 621 (6th Cir. 2025)).
- 851 *In re The Boeing Company Sec. Litig.*, No. 25-1492 (4th Cir. May 2, 2025). The Ninth Circuit declined to grant leave for an interlocutory appeal raising a similar Comcast challenge based on the district court’s alleged failure to provide the requisite rigorous analysis of the plaintiffs’ damages model in its class certification order. See *SEB Inv. Mgmt. AB v. Wells Fargo & Co.*, No. 25-3021, 2025 WL 2028400 (9th Cir. July 17, 2025).
- 852 *In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934 (9th Cir. 2023); see also Jones Day, *supra* note 63, at 14.
- 853 *Steamfitters Local 449 Pension & Ret. Sec. Funds v. SunPower Corp.*, Case No. 25-1831 (9th Cir. 2025).
- 854 See *Jaszczyszyn v. Sunpower Corp.*, No. 22-cv-00956, 2025 WL 510431 (N.D. Cal. Feb 14, 2025).
- 855 *Jaeger v. Zillow Group, Inc.*, 2025 WL 2741642 (9th Cir. Sept. 26, 2025).
- 856 *Id.* at *2.

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