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## 2022 Securities Litigation Year in Review

During 2022, securities case filings fell for the fourth consecutive year and were down slightly from 2021. The number of announced settlements rose substantially last year, as did total settlement amounts. The 2022 settlements include 10 mega-settlements of more than $100 million. Case filings involving COVID-19, SPACs, and cryptocurrencies represented nearly one third of all filings in 2022, and we address important developments relating to securities litigation in each of those sectors.

Our *2022 Securities Litigation Year in Review* focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts, including the Supreme Court's grant of certiorari in *Pirani v. Slack Technologies, Inc.* to resolve whether plaintiffs must plead and prove that they bought shares registered under the registration statement they claim is misleading. We also discuss the latest developments in the long-running Goldman Sachs securities litigation following last year's Supreme Court decision remanding the case and providing guidance as to how the lower courts should consider genericness in the price impact context. We analyze 12 decisions from the federal appellate courts addressing the pleading requirements for securities fraud cases and also explain a number of significant decisions related to forum-selection provisions decided in 2022.

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## INTRODUCTION

During 2022, the third year of the COVID-19 pandemic, securities class action cases fell for the fourth consecutive year, with 205 new cases filed this year compared with 210 cases filed in 2021.[1] The number of federal court securities suits filed in 2022 was 10% below the 1996–2020 annual average of 228.[2] The 2022 filings were nearly 53% below the 431 filings in 2018, the recent peak year for federal securities-suit filings.[3]

These numbers were impacted by the continuing decline in class action merger objection lawsuit filings. In 2022, only eight federal court merger objection class actions were filed compared with 15 in 2021 and in sharp contrast with the 205 merger objection suits filed in 2017 alone.[4] Plaintiffs continue to file merger objection lawsuits but are increasingly filing them as individual actions rather than class actions.[5]

As has been the case for the last 11 years, suits alleging Rule 10b-5 claims were the vast majority of all new case filings in 2022. Suits against defendants in the health technology and electronic technology services sector were the most common, with each accounting for 27% of total filed cases in 2022.[6]

Notably, securities lawsuits relating to special purpose acquisition companies ("SPACs"), COVID-19, and cryptocurrency and other digital assets totaled 51 cases last year, representing more than 26% of all federal securities class action filings. We analyze noteworthy developments in each of those sectors in more detail below.

As intermittent disruption of federal and state courthouses as a result of COVID-19 subsided, the number of settlements of securities cases rose substantially in 2022, with 104 approved class action settlements compared with 82 in 2021.[7] Likewise, total settlement amounts more than doubled in 2022, increasing to $4 billion from $1.9 billion.[8] The average settlement value was $38 million, an increase of more than 70% over the $22 million average settlement in 2021.[9]

Settlements in 2022 included 10 mega-settlements in excess of $100 million, topped by the $809 million settlement in the Twitter case.[10] The Twitter settlement ranks as the 19th largest settlement since enactment of the Private Securities Litigation Reform Act ("PSLRA"). The 10 mega-settlements in 2022 constituted 7% of all settlements but 51% of total settlement amounts.[11] All of the cases on the 2022 top 10 list settled after years of litigation, and some, including Twitter, settled on the eve of trial.[12] Three of the top five settlements in 2022 involved non-U.S. companies: Teva Pharmaceutical ($420 million), Luckin Coffee ($175 million), and NovaStar Mortgage ($165 million). Nine of the top 10 settlements were in cases filed in federal courts. Five of the top 10 settlements occurred in the Southern District of New York or the Northern District of California.[13] The only top 10 settlement resolved in a state court was the $100 million settlement in the *NCI Building Systems* case in Delaware Chancery Court.[14]

Our *2022 Securities Litigation Year in Review* focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts. We discuss the Supreme Court's grant of certiorari in *Pirani v. Slack Technologies, Inc.* to resolve a circuit split as to whether plaintiffs must plead and prove that they bought shares registered under the registration statement they claim is misleading.[15] As we discussed in last year's *Review*, a sharply divided panel of the Ninth Circuit affirmed a district court's decision that a purchaser of shares in a direct listing who could not conclusively determine whether he had purchased registered or unregistered shares nevertheless had standing to sue under Sections 11 and 12 of the Securities Act of 1933 ("Securities Act").[16] While relatively few companies have gone public using a direct listing rather than a traditional initial public offering, a Supreme Court decision affirming the reasoning of the Ninth Circuit would have implications for litigation relating to IPOs more broadly.[17]

We also discuss the latest developments in the long-running Goldman Sachs securities case following the Supreme Court's ruling last year vacating class certification and remanding the case based on its conclusion that it was unclear whether the Second Circuit had properly considered the generic nature of Goldman's alleged misrepresentations in reviewing the trial court's price impact determination. In 2022, the district court once again granted class certification and found that even applying the Supreme Court's updated guidance as to genericness, the defendants had failed to show that the alleged misrepresentations had no price impact.[18] The Second Circuit heard oral argument last fall, and a decision in this closely watched case is expected later this year.

In this year's *Review*, we analyze 12 decisions from the federal appellate courts addressing the pleading requirements

for securities fraud cases under Section 10(b) of the Securities Exchange Act ("Exchange Act") and Rule 10b-5. The cases arise from a variety of factual contexts, including failed mergers, data breaches, disappointing clinical drug trials, post-acquisition difficulties, and pending regulatory investigations, among others. The courts consistently emphasized the high burdens facing plaintiffs under the PSLRA and Rule 9(b) of the Federal Rules of Civil Procedure and affirmed dismissal of the complaints in all but two of the decisions. We explain the key takeaways for companies' disclosure policies from those two decisions permitting the plaintiffs to avoid dismissal.[19]

There was continued activity related to forum-selection provisions in 2022. As we explained in our 2020 *Review*, after the Supreme Court decision in *Cyan v. Beaver County Employees Retirement Fund* holding that state courts have concurrent jurisdiction over Securities Act lawsuits and that such lawsuits cannot be removed to federal court, plaintiffs increasingly brought Securities Act claims in state courts, sometimes forcing companies to defend duplicative suits in federal and state courts.[20] In response, some companies incorporated in Delaware began adopting federal forum-selection provisions ("FFPs") in their charters or bylaws, requiring Securities Act claims to be brought exclusively in federal court. Delaware became the first state to uphold FFPs as valid under state law and consistent with federal and state public policy.[21]

Last year, we reported that a New York appellate court approved FFPs under that state's law and federal law.[22] In 2022, an appellate court in California rejected an array of challenges to FFPs under California and federal law, and California thereby became the third state to uphold the provisions.[23] An appellate court in Utah is poised to become the fourth state appellate court to weigh in on the validity and enforceability of FFPs after hearing argument in a case in December 2022. A pair of conflicting decisions from the Seventh and Ninth Circuits issued last year addressed forum-selection clauses adopted by Delaware companies that required derivative claims to be brought exclusively in Delaware Chancery Court. A divided Seventh Circuit panel held that a forum-selection bylaw could not be applied to a derivative Section 14(a) claim, while a unanimous panel of the Ninth Circuit concluded that an identical forum-selection bylaw was enforceable. The Ninth Circuit granted *en banc* review and heard oral argument in December 2022.[24] If the Ninth Circuit reaches the same result as the original panel, Supreme Court review may be necessary to resolve the Circuit split.

Finally, in one of the few securities fraud suits to be resolved at trial, shortly before publication of this *Review*, a federal jury in San Francisco returned a verdict in favor of Tesla CEO Elon Musk over his 2018 tweets that he had "funding secured" to take the company private, rejecting investor claims that they were owed $12 billion for losses incurred from the allegedly false tweets. The verdict was returned after just hours of deliberations and was notable because the judge overseeing the case had previously found that the evidence showed that no concrete financing was in place at the time of the tweets. The judge had also found that Musk had acted recklessly, but left the jury to decide whether the tweets were material to the plaintiffs' investment decisions and led to their financial losses. In September 2018, Musk agreed to step down as Tesla's chairman and pay a $20 million fine as a part of a settlement with the SEC, and the company agreed to pay a $20 million fine as well. In September 2022, Musk acquired Twitter in a $44 billion take-private deal.

### COVID-19

The steady pace of securities suits related to the COVID-19 pandemic continued in 2022. There were 24 COVID-related securities cases filed in 2022 compared with 20 such filings in 2021 and 33 in 2020.[25] Just as the impact of the pandemic has evolved as variants have emerged and ebbed, the focus of COVID-related cases has likewise changed over time. The first wave of cases were filed against companies that experienced outbreaks in their facilities such as cruise ship lines and private prison operators, while later cases targeted companies poised to profit from the pandemic such as diagnostic test and vaccine developers.[26] As the pandemic persisted, plaintiffs sued companies whose financial results were negatively impacted by the pandemic.[27]

As we discussed in last year's *Review*, the results have been mixed, with dismissal motions granted in a number of COVID-related cases.[28] In 2022, plaintiffs had some success in opposing motions to dismiss or achieving settlements in cases against companies involved in developing COVID-19 vaccines. In *Sinnathurai v. Novavax*, the complaint alleged that the company made misleading statements about its manufacturing capabilities and downplayed issues that would have impacted

its timeline for regulatory approval. In December 2022, the district court denied the motion to dismiss in part, finding that a number of the alleged misstatements were actionable and that the plaintiffs had adequately pled scienter.[29] In August 2022, substantial settlements were announced in two securities suits against COVID-19 vaccine manufacturers that included similar claims to those alleged in *Novavax* and where the district court had denied the defendants' motions to dismiss.[30] Given these results and the continuing need for development of vaccines in response to the evolving strains of COVID-19, we expect to see continued filings involving pharmaceutical manufacturers; companies in that space should carefully consider disclosures relating to capacity, potential obstacles, and timelines for regulatory approval.

Another group of cases targeted companies that initially benefitted financially from the COVID-19 pandemic but performed less well as the pandemic subsided. One of the best-known examples was Peloton, the manufacturer of internet-connected stationary bicycles and treadmills, which boomed during the stay-at-home orders and business closures during the early stages of the pandemic. As shutdowns ended and offices reopened, the red-hot demand for its products and services cooled and its stock price declined substantially in late 2021. The company was sued in a class action that alleged it had falsely overstated demand and understated the impact of reopening gyms on its revenue.[31]

Another case in this category is the Fourth Circuit's decision in *Boykin v. K12, Inc.*, which we discuss below.[32] The complaint alleged that the stock price of this virtual-learning company rose early in the pandemic as schools pivoted to virtual education, but that the company began to make misleading statements to boost its flagging share price as schools began to reopen. The Fourth Circuit affirmed dismissal of the complaint based on the plaintiff's failure to show that any particular statement was misleading and also rejected the plaintiff's scienter allegations as insufficient, noting the complaint failed to "connect the dots" as to why a lagging stock price in the absence of any suspicious insider trading or self-dealing "would have motivated the defendants to commit securities fraud."[33] The decision is notable as one of the first COVID-19 cases to be decided by a federal appellate court, but it is not likely to be the last as other COVID-related cases move through the district courts.

As we discussed in last year's *Review*, the SEC has continued to take an aggressive approach to regulation and enforcement related to COVID-19. In May 2022, the SEC released an unusually blunt Investor Alert titled "Watch Out for Fake COVID-19 Claims When Investing," which explicitly warned the public of pandemic-related fraud schemes: "Investors should be aware that false statements may be made—including in company press releases, promotional materials, and social media posts—about a company offering or developing products that prevent, detect or treat COVID-19, in order to inflate the value of a company's stock."[34] The Alert touted the SEC's "numerous" enforcement actions against companies for making misleading claims about COVID-related products and the trading suspensions it obtained for "dozens" of companies' stock following questionable COVID-related statements. The Alert prominently highlighted an enforcement action brought in 2022 against SCWorx Corp., a hospital supply company, and two officers alleging that the company issued a press release in April 2020 falsely claiming that it had a "committed purchase order" for the sale of two million COVID-19 rapid tests in a deal valued at $840 million, despite having neither a legitimate supplier of test kits nor an executed purchase order.[35] The SEC obtained a trading suspension in the company's stock shortly after the press release, and investors filed a class action suit after the trading suspension expired alleging violations of Section 10(b) and Rule 10b-5.[36] A $3 million settlement of the class action was announced in March 2022, and the SEC announced that it had filed charges on March 31, 2022, nearly two years after the allegedly false press release.

The case is noteworthy for two reasons. First, the nearly two-year delay between the trading suspension and the announcement of filed charges is a reminder that SEC investigations have a long fuse and also suggests that the SEC may still bring enforcement actions arising out of trading suspensions and alleged misleading statements that were made early in the pandemic. Second, the settlement with the SEC required the company to satisfy its disgorgement and prejudgment interest obligations by contributing company stock—valued at $600,000 at the time of issuance—to the class action plaintiffs.[37]

We expect the SEC to continue to focus enforcement efforts on false or misleading disclosures regarding the prevention,

diagnosis, and treatment of COVID-19 made during the early days of the pandemic as well as disclosures relating to therapeutic and diagnostic products announced as the pandemic enters its fourth year. As in the *SCWorx* case, we also expect that COVID-related private litigation will continue in tandem with ongoing SEC enforcement activity relating to COVID-19.

### SPACs

As we predicted in last year's *Review*, the popularity of SPACs continued to decline in 2022, resulting in a crash in the SPAC market. 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 specified time frame, typically 18 to 24 months. The SPAC's acquisition of a private company, known as a de-SPAC transaction, requires SPAC shareholder approval and the filing of proxy materials with the SEC. SPACs serve as an alternative to a traditional IPO for a private company, and their use took off in 2020 and skyrocketed in early 2021, at one point eclipsing the number of traditional IPO offerings. Their use steadily declined during 2021 in response to challenging market conditions, heightened regulatory scrutiny, and private lawsuits against SPAC participants, and the decline accelerated in 2022.

In 2022, 86 SPAC IPOs were completed, resulting in $13.4 million in gross proceeds, down from 613 SPAC IPOs in 2021 resulting in $265 million in gross proceeds.[38] In contrast, the pace of SPAC liquidations accelerated, with 70 occurring in December 2022 alone and many more announced wind-downs.[39] Losses sustained by SPAC creators are estimated to have exceeded $1.1 billion in 2022.[40] Further, because many SPACs completed their IPOs during late 2020 and early 2021, many are approaching the end of their 24-month window to identify a merger partner. With nearly 400 SPACs still seeking targets as of year-end 2022,[41] difficult market conditions and limited merger partners will likely lead to further liquidations in 2023.

In March 2022, the SEC unveiled proposed new rules to "enhance disclosure and investor protection" in both SPAC IPOs and de-SPAC transactions.[42] In the accompanying press release, SEC Chair Gary Gensler explained that the proposed rules are intended to ensure the "tools" at the SEC's disposal to regulate traditional IPOs are applied to SPACs as well.[43] While not yet final, these proposed rules would, among other things: (i) require SPAC participants to make additional public disclosures, including regarding potential conflicts of interest, dilution, and the fairness of any proposed business combination; (ii) potentially expose certain SPAC participants to an increased risk of liability under the federal securities laws; (iii) remove the safe harbor for forward-looking statements that many SPACs have relied upon to include financial projections in their de-SPAC disclosures; and (iv) create a safe harbor that would exempt SPACs from registering as investment companies if certain criteria are satisfied. On the heels of the SEC's announcement of its proposed rules, several bulge-bracket banks scaled back their involvement in the SPAC market, including Goldman Sachs, Citigroup, and Bank of America, citing changes in the regulatory landscape and heightened liability risks.[44]

The SEC continues to emphasize its enforcement efforts against SPAC participants. In 2022, the Commission brought its first enforcement action under the Investment Advisors Act in the SPAC context.[45] The complaint alleged that a New York-based investment advisor failed to disclose conflicts of interests regarding its ownership of SPAC sponsors, which it recommended as investments to its clients. Dabney O'Riordan, Chief of the Enforcement Division's Asset Management Unit, remarked that this action was part of the SEC's "continued effort to hold private fund advisors accountable when they fail to live up to their obligations."[46] Given the SEC's continuing focus on the risks to SPAC investors, and the potential impact of its proposed rules, if implemented, we expect to see an uptick in SEC enforcement actions relating to SPAC transactions in 2023.

On top of increased regulatory pressures and underwriters leaving the space, the SPAC market also faced rising interest rates and declining stock prices that created the conditions for what some commentators called the "Great SPAC Crash of 2022."[47] Large SPAC targets, such as *Forbes* magazine and SeatGeek, announced they would remain private after cancelling SPAC mergers, and Bill Ackman's largest-ever-funded SPAC, which raised $4 billion in its 2020 IPO, dissolved in July 2022 after failing to find a target by its deadline.[48] This trend continued, and in the final weeks of 2022, at least 32 SPACs holding $18 billion sought to dissolve by year-end, and a further 50 SPACs, holding $15 billion, were seeking investor approval for additional time to complete their de-SPAC merger.

SPACs also continued to be the subject of significant securities litigation in 2022, with 25 new class actions filed, down slightly from the 32 filed in 2021 but substantially higher than the 13 filings in 2019 and 2020 combined.[49] And while none of these recently filed suits has yet to work its way up to a federal appellate court, a number of district courts have allowed SPAC-related claims to survive motions to dismiss.[50] For example, in *Bond v. Clover Health Investments Corp.*, the district court denied a motion to dismiss, ruling that the plaintiff sufficiently alleged fraudulent misstatements regarding the target company's business prospects based on a fraud-on-the-market theory.[51] The vast majority of new complaints filed in 2022 alleged that SPAC participants made misleading statements or omissions regarding the prospects of the target to obtain shareholder approval in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Two-thirds of new class action SPAC-related suits were filed in New York or California federal courts—with the Southern District of New York remaining the most popular venue for the third year in a row. With most SPACs trading below their IPO prices, we expect to see increased securities litigation activity in this space in 2023.

The Delaware Chancery Court has also weighed in on SPAC-related issues. As discussed in last year's *Review*, that court issued a first-of-its-kind decision applying traditional fiduciary principles in the SPAC context and allowing claims for breach of fiduciary duty to proceed against the board of directors, the sponsor, and the controlling shareholder of a SPAC.[52] In November 2022, the defendants announced a settlement of the lawsuit for $33.75 million.[53] Given the continuing volatility of the markets, the *MultiPlan* decision and settlement may prompt additional Delaware suits seeking to vindicate SPAC shareholders' redemption rights for Delaware incorporated SPACs whose stock prices decline below their redemption price after their de-SPAC transaction.

The Delaware Chancery Court has also made clear that it intends to be in the forefront of developing law relating to SPACs. In March 2022, the Chancery Court issued an unpublished opinion refusing to stay a Delaware class action asserting fiduciary-duty claims arising out of a SPAC transaction notwithstanding the pendency of earlier-filed federal securities class actions arising out of the same SPAC IPO in other jurisdictions.[54] As the lawsuits arising from SPAC transactions continue to work their way through the courts, early trial court decisions indicate that such entities are not immune from settled securities law and fiduciary duty principles that have been routinely applied in other contexts. This space will be one to watch in 2023 as early cases mature.

### Cryptocurrency

Coming off a year of unprecedented growth, in 2022 the cryptocurrency sector encountered tightening monetary policy that dramatically reduced investor appetite for speculative asset classes.[55] As central banks began to raise interest rates, investors saw opportunities to earn attractive yields with lower-risk investments, leading many to reposition out of the crypto market and causing prices to fall.[56] As prices fell, leveraged positions began to unwind, causing further sell-offs and exacerbating falling prices. By June 2022, the total market value of all cryptocurrencies fell to about $1 trillion, down from about $3 trillion in late 2021.[57] By the end of 2022, total market value remained at about $800 billion.[58] Not surprisingly, the collapsing valuations of prominent cryptocurrencies bankrupted several large digital-asset companies and became the topic of extensive media coverage and increased enforcement activity and private litigation.

Against this backdrop, the SEC repeatedly affirmed its stance on cryptocurrency, asserting itself as the lead regulator in the cryptocurrency market. In May 2022, the Commission announced that it had added 20 new positions to the newly renamed Crypto Assets and Cyber Unit (previously called the "Cyber Unit") in the Division of Enforcement, nearly doubling its size.[59] SEC Chair Gary Gensler reiterated his view that the "vast majority" of the nearly 10,000 tokens in the crypto market meet the definition of a "security" and are therefore covered under the securities laws. He urged crypto trading platforms and other crypto intermediaries to proactively register with the SEC and comply with applicable securities laws.[60] *In SEC v. W.J. Howey Co.*, the Supreme Court held that the three elements for distinguishing an investment contract subject to the federal securities laws from other commercial dealings include: (i) an investment of money; (ii) a common enterprise; and (iii) the expectation of profit.[61] In response to many crypto industry participants calling for greater guidance as to the specific facts and circumstances that would cause a particular digital asset to satisfy the *Howey* test, Chair Gensler stated that the Commission has already spoken with a "clear voice" through the "DAO Report, the Munchee Order, and through dozens of enforcement actions."[62] As a further indication of the SEC's intent to police the crypto sector, in its Fiscal Year

2023 Congressional Budget Justification, the SEC requested 125 new hires, of which 33 positions are to be allocated to the Crypto Assets and Cyber Unit and 44 positions toward increasing capacity to investigate misconduct and accelerate enforcement actions.[63]

The Commission's increased capacity has allowed it to ramp up its enforcement activity in the crypto sector. In 2022, the SEC brought 30 enforcement actions, consisting of 24 lawsuits in federal court and six administrative proceedings, representing a 50% increase over the 20 total enforcement actions brought in 2021 in the crypto sector.[64] Of the announced enforcement actions in 2022, allegations of fraud or unregistered securities offerings comprised the substantial majority, with 22 complaints alleging violations under Sections 5(a) and 5(c) of the Securities Act for offering unregistered securities and 21 complaints alleging fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5.[65]

Among the notable SEC enforcement actions brought last year were claims against BlockFi Lending LLC for failing to register the offerings and sales of its retail crypto lending product and, in a first-of-its-kind action against crypto lending platforms, claims for violation of the registration requirements of the Investment Company Act of 1940.[66] The Commission also brought claims against Sam Bankman-Fried, co-founder of FTX, a cryptocurrency exchange, and his associates, Caroline Ellison and Gary Wang, alleging FTX investors were defrauded out of $1.8 billion.[67] Among other things, the complaint against Ellison and Wang alleged that FTX's digital token, FTT, was sold as an unregistered security.[68] In another first-of-its-kind action, the SEC filed a complaint against a product manager at Coinbase and two other defendants in connection with a scheme to commit insider trading of digital-asset securities. The complaint identified nine digital tokens that the SEC alleges the defendants traded that are securities under the *Howey* test.[69]

In 2021, we noted that the exact parameters for whether a cryptocurrency falls under the *Howey* definition of an "investment contract" remained unclear, and that courts had come down on both sides.[70] In last year's *Review*, we highlighted the Eleventh Circuit's decision in *Fedance v. Harris* holding that the "cryptographic tokens" at issue in that case met the requirements of an investment contract under the *Howey* test and thus were subject to the federal securities laws.[71]

Recent developments in the closely watched *SEC v. Ripple Labs* case demonstrate that the issue remains both consequential and contentious. In September 2022, the parties filed motions for summary judgment, and third-party requests to file amicus briefs quickly followed, including by cryptocurrency exchange Coinbase Inc.[72] Among Ripple's arguments were that the SEC has failed to demonstrate that XRP, Ripple's digital token, is a security for purposes of the federal securities laws while other decentralized cryptocurrencies, such as Bitcoin and Ethereum, are not. A decision in this closely watched case is expected in 2023 and will likely provide further clarity as to whether and how a cryptocurrency meets the *Howey* investment contract test, with broad consequences for both enforcement actions and private litigation.

Consistent with the increased SEC enforcement activity last year, the crypto sector also saw private securities class actions accelerate in 2022 as investors sought relief from collapsing valuations. Plaintiffs filed 23 securities class actions related to cryptocurrency in federal courts, marking a dramatic increase from 11 suits filed in 2021 and 12 in 2020.[73] Further, plaintiffs sought relief in a broader range of venues than in years past, in line with a trend that began in 2021, including federal district courts in Florida and Utah. Notably, plaintiffs brought more suits against crypto industry intermediaries and participants, such as exchanges and lending platforms, than they did against issuers or promoters of crypto tokens. This may reflect a fallback strategy among investors looking to recoup losses, since a substantial majority of the cases brought against exchanges and other market participants were filed in the latter six months of 2022 after many crypto issuers had collapsed and filed for bankruptcy.

A majority of the private claims against intermediaries and market participants were predicated on alleged sales of unregistered cryptocurrency assets or unregistered crypto-related products, channeling the SEC's position that the products meet the *Howey* test and are therefore subject to the federal securities laws. For example, plaintiffs in one suit filed last year alleged that the defendant's interest-bearing account product, through which investors could lend crypto assets and be paid in cryptocurrency, was an unregistered security in violation of federal securities law.[74] In another 2022 suit, plaintiffs alleged that the defendant made material misstatements about its cryptocurrency operations because it allowed investors to trade digital assets that it knowingly or recklessly

disregarded should have been registered as securities with the SEC.[75]

As we discuss below, in one of the first cryptocurrency cases to be decided by a federal appellate court, last year the Eleventh Circuit held that mass online communications promoting cryptocurrency constitute solicitation within the meaning of the Securities Act, a decision that is likely to increase litigation risk for cryptocurrency promoters who have used online platforms to market their products.[76]

## FALSE AND MISLEADING STATEMENTS

### "Although the Pleading Requirements for Securities-Fraud Cases are Daunting, They are Not Insurmountable": Sixth Circuit Reverses Dismissal of Class Action Lawsuit Against Senior Executive and Company

In *City of Taylor General Employees Retirement System v. Astec Industries, Inc*., the Sixth Circuit revived portions of a class action lawsuit alleging that Astec Industries and certain executives concealed from investors the failing performance of two wood pellet production plants it had sold by making public statements that were inconsistent with the terms of their sales and the performance realities at the plants.[77] Noting that the complaint "[was] not a model of clarity or conciseness," the court nevertheless held that the plaintiff had complied with the requirements of Rule 9(b) and the PSLRA because the complaint's theory of liability was clearly pleaded: The "[d]efendants painted a rosy picture of Astec's performance without disclosing the plants' problems and without providing a fair disclosure of the financial consequences of the plants' failure to meet contractual obligations."[78] The court held that a holistic review of the CEO's statements "reveals a theme [of] relentless, unfounded optimism that was contradicted by the undisclosed facts" sufficient to establish "a strong inference that he recklessly misled Astec's investors," and that his scienter could be attributed to the company.[79] This decision is an important reminder that public companies and their officers must balance a desire to express optimism about their business with their obligation to fairly disclose known facts and circumstances on the ground.

The complaint alleged that Astec manufactured industrial equipment and sold modular plants capable of producing construction materials, such as concrete and asphalt. In the late 2000s, it began developing and selling modular plants that produced wood pellets in response to a push for renewable energy in the European Union. The crux of the complaint was that the company sold two modular wood pellet plants with unusual financing terms that were not fully disclosed to shareholders when the deals were announced. In 2013, the company sold its first plant to Hazlehurst Wood Pellets for $60 million. The deal was not structured as an outright purchase; rather, the complaint alleged that the purchaser bought the plant on credit provided by Astec and agreed to repay the loan after securing traditional financing within three years. In the meantime, the company did not recognize any revenue on the transaction. In 2015, the company sold a second wood-pellet plant to Highland Pellets for $152.5 million.[80] Although Highland paid cash for its purchase, the deal required the plant to successfully produce a certain amount of high-quality pellets within a 30-day period before April 2018 or Highland could "clawback" the full $152.5 million purchase price.[81] Once built, both plants failed to perform and struggled to operate their wood-burning furnaces. The complaint alleged that Hazlehurst's ability to secure financing to repay Astec was jeopardized because financing was contingent on operational wood-burning furnaces being compliant with EU environmental standards. According to the complaint, Highland's wood-burning furnace consistently threw off sparks that caused it to operate at diminished capacity and threatened to trigger the "clawback" provision.[82]

Despite the plants' struggles, the complaint alleged that Astec's CEO touted the company's modular wood pellet plant business, dismissed concerns that Hazlehurst would not be able to secure financing needed to repay Astec, and told investors the plants were "making good progress."[83] During an investor conference in 2018, the company finally announced that it would have to repay Highland $75 million in cash and other in-kind compensation under the "clawback" provision.[84] The complaint alleged that as a result of this disclosure and a poor earnings report, Astec's stock dropped to $32.79 per share, a decline of nearly $28. Shortly thereafter, Astec announced a $65.7 million write-off related to the Hazlehurst plant.[85]

Stockholders filed a class action suit alleging that by repeatedly touting "good progress," the company and senior officers had misled them in violation of Section 10(b) of the Exchange Act and Rule 10b-5.[86] The district court granted the defendants' motion to dismiss the complaint based on its conclusion that

it "fail[ed] to identify, with the level of specificity required [for fraud claims], why the statements they believe are misleading are in fact misleading" and criticized the plaintiffs' "puzzle pleading," describing it as "merely a long list of quotes followed by some generalized allegations of fraud" that did not clear the heightened bar required for fraud claims.[87]

The Sixth Circuit acknowledged that the complaint was "not a model of clarity or conciseness" but nevertheless reversed the dismissal of the claims against Astec and the CEO because the complaint sufficiently pleaded fraudulent statements as required by Rule 9(b) and the PSLRA.[88] Noting that a plaintiff must allege the "who, what, where, when and why" of alleged fraudulent statements to survive a motion to dismiss, the court held that the complaint did so with respect to each alleged misrepresentation.[89] Acknowledging that the factual allegations were lengthy, the court held that they clearly articulated the plaintiffs' theory of liability and required reversal: "Defendants painted a rosy picture of Astec's performance without disclosing the plants' problems," and "[t]hese deceits led to an artificial inflation of Astec's stock price."[90]

The court likewise held that the complaint pleaded sufficient facts to support a strong inference that the CEO acted with scienter. To determine whether a strong inference had been adequately pled, the court consulted a nonexhaustive list of factors, including: (i) "disregard of the most current factual information before making statements"; (ii) "divergence between internal reports and external statements on the same subject"; and (iii) "insider trading at a suspicious time or in an unusual amount."[91]

The court concluded that a "holistic review" of the CEO's public statements revealed a theme of "relentless, unfounded optimism that was contradicted by undisclosed facts."[92] The court cited alleged statements by the CEO that the wood pellet plants were making "good progress" despite allegations that he was "intimately aware of what was occurring at the plants," including participation in conference calls to discuss shortfalls in production and receipt of two inspection reports about one plant "that chronicled all of its issues."[93] The court also noted that the CEO's sales of company stock, netting a profit of $3.1 million, were "extremely suspicious" inasmuch as they were his first sales of stock in three years and came shortly after touring the Highland plant and less than a week before the company disclosed the full details of the $152 million "clawback" provision of the Highland deal.[94]

Because the complaint sufficiently alleged that the CEO acted with the requisite scienter and his state of mind could be imputed to the company, the court held that the Section 10(b) claim against the company should also have survived the motion to dismiss.[95] Given the viability of the Section 10(b) claims, the court also held that the Section 20(a) claim against the CEO could continue.[96]

### Corporate Braggadocio or Genuinely False and Misleading Statements: Ninth Circuit Holds Challenged Statements Constituted Non-Actionable Puffery

In *Macomb County Employees Retirement System v. Align Technology, Inc.*, the Ninth Circuit considered whether corporate executives misrepresented their company's prospects in China to such an extent that their statements were actionable under the federal securities laws and concluded they did not.[97] The court affirmed the district court's ruling that six challenged statements were non-actionable "puffery" because they vaguely expressed optimistic opinions incapable of objective verification.[98] Citing Supreme Court precedent that "[o]ur securities laws 'do not create an affirmative duty to disclose any and all material information,'" the court also rejected the plaintiff's argument that since the company touted positive facts about its growth in China, it had a duty to disclose negative facts to make the statements not misleading because the challenged statements were non-actionable.[99] The case is an important reminder that companies and executives should carefully vet all public statements to ensure that they are not inconsistent with the actual state of affairs on the ground.

Align is a medical device manufacturer best known for selling clear, plastic "Invisalign" braces. The complaint alleged that between 2013 and 2018, the company experienced explosive growth in sales, particularly in China.[100] In early 2019, Align's growth rate in China began to dip, allegedly due to competitive pressure and decreased demand.[101] Despite this growth decline, Align executives continued to tout the company's growth prospects in China.[102] By 2019, news about the company's declining growth in China was revealed to the market and resulted in a decline in the company's stock price of approximately 27%.[103] The complaint alleged that company executives made 12 false and misleading statements that misrepresented

the company's slowing growth in China in violation of Section 10(b) of the Exchange Act and Rule 10b-5.[104]

The district court dismissed the complaint on the grounds that six challenged statements were non-actionable puffery and the rest were not false or misleading. The six challenged statements found to be puffery included: (i) "We still have a great business in [the Asia-Pacific region ("APAC")] from a growth standpoint overall," and "China is a great growth market for us"; (ii) "China . . . gets a lot of attention. And rightly so, it's a huge market opportunity for us"; (iii) "[W]e see tremendous growth in APAC, in China in particular"; (iv) Align was "seeing tremendous growth" in China; (v) [T]he "dynamics" and "appetite for growth and new technology adoption in China has been great for us" and "the economics work well for us"; and (vi) China was "a market that's growing significantly for us."[105]

On appeal, the Ninth Circuit affirmed the dismissal. As a threshold matter, the panel rejected Align's argument that affirmance was warranted because the complaint was based on an "unsupported premise"; namely, that the plaintiff failed to allege sufficient facts to make plausible the inference that the company's rate of growth in China had begun to decline "significantly" by the time the challenged statements were made.[106] Citing settled precedent that "the passage of just a short period of time between executives' rosy statement about their company's growth and a downturn in [its] prospects is 'circumstantial evidence' that the challenged statements 'were false when made,'" the court accorded that evidence more weight because there had been no "intervening catastrophic event" that might have suggested a later abrupt downturn or that the executives' statements were true when made.[107] Given that circumstantial evidence and additional evidence from analyst reports and former employees that the company's growth rate in China had slowed by the time of the challenged statements, the court held that the complaint did not rest on an unsupported premise.

Pointing to the heightened pleading requirements for fraud claims under Rule 9(b) and the PSLRA, the court held that the plaintiff failed to meet its burden of showing that any of the challenged statements were material misstatements. Instead, the court concluded that "[t]hese six statements plainly fit beneath the umbrella of puffery" because "[a]ll use vague, generically positive terms" that are not "objectively verifiable" and that none "present the kind of precise information on which investors rely."[108] The court cited its prior decisions holding that "'vague statements of optimism like 'good,' 'well-regarded,' or other feel good monikers, are not actionable because professional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives.'"[109]

The court also rejected the plaintiff's argument that the district court erred by not considering the context in which the six challenged statements were made.[110] Noting that "'general statements of optimism' made against a clearly pessimistic backdrop 'may form a basis for a securities fraud claim,'" the court held that the challenged statements did not create an impression of the company's status in China that differed from reality.[111] Instead, the court pointed to the allegations that at the time the challenged statements were made, the company's sales were still growing in China "albeit at a diminished rate" and thus the "feel-good descriptions" by company executives did not affirmatively create an impression of a state of affairs that differed in a material way from the one that actually existed.[112] The court also affirmed the district court's ruling that the remaining six challenged statements did not create a false impression of the company's growth in China and were thus not actionable because they contained factual assertions uncontradicted by the complaint or were accurate assessments of past growth or were not "clearly untrue" or a "misleading gloss."[113]

Additionally, the court rejected the plaintiff's argument that because the company touted "positive facts about China," it had "a duty to disclose negative facts in order to make the statements not misleading."[114] Citing Supreme Court precedent holding that "[o]ur securities laws 'do not create an affirmative duty to disclose any and all material information,'" the court concluded that because all 12 challenged statements were non-actionable, Align had no duty to provide additional statements to render those statements "not misleading."[115]

### Fourth Circuit Affirms Dismissal for Failure to Adequately Plead Falsity or Scienter: "The Mere Incidence of a Declining Stock Price Should Not Elicit Lawyer-Driven Litigation"

In one of the first COVID-related securities cases to be decided by a federal appellate court, in *Boykin v. K12, Inc*., the Fourth Circuit addressed the heightened pleading requirements facing plaintiffs alleging securities fraud based on a

declining stock price and held that the plaintiffs had failed to meet their burden as to any challenged statement.[116] Instead, the court concluded that the alleged misrepresentations were non-actionable puffery, statements of opinion, or forward-looking statements. The court likewise held that the complaint failed to plead facts giving rise to a strong inference of scienter and pointed out the absence of allegations of suspicious insider stock trading or other self-dealing by the individual defendants. The decision is a reminder that to overcome the PSLRA's pleading hurdle, plaintiffs must put forth facts tending to make a fraudulent inference at least as compelling as one of innocence.

The complaint alleged that K12 furnished schools with curricula, administrative support, virtual learning software, and other services. The plaintiffs alleged that as the COVID-19 pandemic unfolded, the company and two executives made a number of statements in 2020 touting, among other things, that physical school closures would be a major business opportunity, that its customers did not experience disruption of services, and that it stood ready to support schools of any size during the pandemic as part of an alleged scheme to boost its flagging share price. The complaint also alleged that an executive allegedly made false statements alluding to a signed contract with the Miami-Dade school district.

The company's stock price initially rose in tandem with the broader market between April and early August 2020. However, after public revelations about cyberattacks on K12's platform and rumors of a troubled relationship with Miami-Dade, including a decision by the school board to terminate its relationship with K12, the company's stock price declined to $30.55, a 35% drop in one month. The stock price fell again when another school district announced it was ending its partnership with K12, and eventually reached a low of $20.39 per share by year-end. The plaintiffs filed a class action complaint alleging that the defendants made numerous fraudulent misstatements to artificially inflate the company's stock price in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The district court found that the plaintiffs had failed to adequately plead falsity and scienter and dismissed the complaint.

The Fourth Circuit affirmed the dismissal, holding that the plaintiffs failed to meet the PSLRA pleading standard requiring them to specify each statement alleged to have been misleading and the reason why. Noting that not all material misstatements are actionable, the court held that most of the alleged misstatements were non-actionable puffery that exemplified "the kind of general positivity" that reasonable investors could not have relied on when deciding to buy stock.[117] In particular, the court noted that the company offered no quantitative metrics, qualitative comparisons, or other specifics to bolster its claims of "competency" and "flexibility."[118]

The court held that a second set of challenged statements constituted non-actionable opinions. Explaining that opinion is subject to reasonable disputation in a way that a false statement is not, the court held that statements prefaced by "I believe" or "I think" convey that a speaker is sharing a personal belief, not warranting facts.[119] Citing Supreme Court precedent that liability attaches only if an opinion contains "embedded" false facts or omits material facts "that cannot be squared," the court held that the complaint failed to plead facts showing that liability should attach.[120] It further noted that the challenged statements were made in the framework of a Form 10-K filing in which defendants provided "ample" disclosures that provided necessary context for investors.

Finally, a number of other challenged statements were held to be non-actionable under the PSLRA's safe harbor for forward-looking statements under settled precedent holding that such statements, when made with "meaningful cautionary" language and without "actual knowledge" of falsity, will not support a 10b-5 violation.[121]

The court also concluded that the plaintiffs failed to allege with the required particularity facts giving rise to an inference of the defendants' "intention to deceive, manipulate or defraud."[122] The PSLRA's heightened pleading standard requires that such an inference of scienter "must be cogent and at least as compelling as any opposing inference of non-fraudulent intent."[123] According to the court, the "first strike" against the plaintiffs' scienter claim was their inability to point to a statement of clear falsity with respect to the company's relationship with Miami-Dade.[124] Nor did the plaintiffs allege any suspicious insider trading or self-dealing by the CEO or CFO or "connect the dots" as to why a lagging stock price would have motivated the defendants to commit securities fraud.[125] "The unvarnished wish to increase K12's share price is precisely the kind of generalized motive shared by all companies that is insufficient to plead scienter under the PSLRA."[126]

The court likewise rejected the argument that the complaint established that the defendants had acted with the "severe recklessness" that may suffice to plead scienter. Explaining that the standard refers to "highly unreasonable" conduct making "such an extreme departure from the standard of ordinary care as to present a danger of misleading the plaintiff," the court held that the plaintiffs' reliance on accounts of confidential witnesses about the defendants' unfounded optimism regarding the possible contract with Miami-Dade district did not meet that high threshold.[127]

### First Circuit Affirms Dismissal Because Plaintiff Failed to Plausibly Allege Material Misstatements Regarding Interim Results of Clinical Drug Trial

Life sciences companies often face challenging decisions on disclosure of information about ongoing clinical drug trials and new drug applications to the U.S. Food and Drug Administration. In *Thant v. Karyopharm Therapeutics Inc.*, the First Circuit affirmed the dismissal of a securities class action complaint claiming that Karyopharm Therapeutics and its executives made materially misleading statements and omissions regarding the safety and efficacy of a cancer-fighting drug candidate, selinexor.[128] The court held that the plaintiffs failed to plausibly allege an actionable statement or omission in disclosures about the drug's success in ongoing clinical trials, holding that the statements were either non-actionable puffery or that no reasonable investor would interpret a statement that the drug's safety profile was "predictable" and "manageable" to mean the drug was "benign."[129] The court concluded that statements of optimism about a product's anticipated success, even in light of data suggesting otherwise, do not necessarily amount to an actionable material misstatement, particularly where, as here, the company had "proactively and regularly informed investors, through Form 10-Ks issued before and during the class period" about serious adverse events in certain clinical trial participants and that such events could impact future FDA approval.

The complaint alleged that between 2015 and 2018, Karyopharm initiated a series of studies to assess the safety and efficacy of a combination treatment of selinexor and another drug in patients with relapsed or refractory myeloma cancer (i.e., patients with disease that had not been eradicated despite treatment or had returned at least once after initial successful treatment). Interim results from one of the trials—the STORM trial—demonstrated the toxicity of the selinexor dosage administered and that 88.6% of participating patients modified their dosage due to treatment-emergent adverse events ("TEAEs"), which included 18 deaths. Before the conclusion of the STORM trial, the company commenced another trial of selinexor's efficacy when used in combination with two other treatments ("BOSTON trial") and, unlike the STORM trial, it was designed to evaluate the drug in comparison to a control group.

In August 2018, following the conclusion of the STORM trial but before the end of the BOSTON trial, the company submitted a new drug application to the FDA. In March 2019, the FDA released a document highlighting its issues with the selinexor application, which focused on the lack of a control group in the STORM trial, the lack of conclusive data regarding toxicity, and the lack of a conclusive recommended dose. Thereafter, the company's stock price dropped by $3 per share and declined further after the FDA's decision to delay approval of the application pending the results of the BOSTON trial.

Plaintiffs alleged that the defendants had made materially misleading statements and omissions about selinexor that artificially inflated the company's stock price in violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5. First, the plaintiffs pointed to statements in an April 30, 2018, press release, stating that selinexor "demonstrated a predictable and manageable tolerability profile, with safety results that were consistent with those previously reported."[130] Second, the plaintiffs took issue with statements made by Karyopharm's co-founder and CEO during a May 1, 2018, conference call, which included a claim that the "success" of the STORM trial was "an important milestone" and a "significant step in establishing the efficacy and safety of selinexor as a new treatment option for patients with myeloma."[131] Plaintiffs alleged that both statements were materially misleading because they were unaccompanied by data from the clinical trial that demonstrated negative results, including frequent and severe TEAEs, and also showed that that selinexor was "extremely toxic, not well tolerated, and ineffective."[132]

The district court concluded that the alleged statements, made in light of the alleged negative results from the trial, likely "skewed" the data and thus the plaintiffs plausibly alleged the existence of materially misleading statements in

both the press release and the conference call. However, the district court dismissed the complaint based on its finding that the complaint failed to plead facts sufficient to establish scienter.[133]

On appeal, a unanimous panel affirmed the dismissal but on different grounds. The court held that dismissal was warranted because the plaintiffs had failed to plausibly allege a materially misleading statement in either the press release or conference call. Noting that the May 1 conference call included statements that the results of the STORM trial constituted "an important milestone" for the company and represented "a significant step in establishing the efficacy and safety of selinexor," the court easily concluded that the statements were nothing more than "non-actionable puffery" and were not material misstatements for purposes of the heightened pleading requirements of Rule 9(b) and the PSLRA.[134] According to the court, "such vague optimism" about a product's likelihood of success cannot constitute a material misstatement for purposes of the applicable pleading requirements.[135]

The court likewise held that the April 30 press release, which allegedly omitted known information from the STORM trial about the risks of treatment with selinexor, was not materially misleading because investors were already aware of the omitted information, and failure to point out information of which the market is aware is not a material omission. The court emphasized that before and during the class period, the company issued several Form 10-Ks informing investors about "serious" adverse effects in some patients being treated with selinexor.[136] It also warned investors that the company's own assessment of the drug's adverse effects did not guarantee that the FDA would view the adverse effects in the same light or approve it for sale. In addition, the court held that investors had already been informed that the clinical trial at issue involved severely ill patients whose cancer continued to progress despite extensive treatment and who ultimately had no remaining medical options.

Given the public availability of this information to investors, the court reasoned that "it is difficult to imagine that any investor would read the defendants' statements that Karyopharm had a 'predictable,' 'manageable,' and 'consistent' tolerability profile to indicate that selinexor was benign, or that the FDA would find it so."[137] Finally, even if there were a material omission in the press release, the court held that it was not misleading given the company's clear statements that its assessments did not guarantee FDA approval.

### Ninth Circuit Affirms Dismissal Based on Plaintiffs' Failure to Adequately Plead Falsity and Holds that Disappointing Test Results from Clinical Drug Trial Without More Are Not Indicative of Fraud

In *In re Nektar Therapeutics Securities Litigation*, the Ninth Circuit affirmed the dismissal of a complaint alleging securities fraud by a pharmaceutical company in connection with its disclosures about an experimental cancer drug because the plaintiffs failed to adequately plead falsity and loss causation.[138] The crux of the complaint was that the company misleadingly relied on certain "outlier data" from a single patient during its first clinical trial of the new drug.[139] After initially reporting promising results from that trial, data from a subsequent and more comprehensive clinical trial indicated that the drug was not as effective as the original trial had suggested.[140]

The court held that the complaint did not sufficiently explain what the first clinical trial would have shown without including the outlier data or how that would have affected the investing public's assessment of the drug and thus failed to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b) and the PSLRA to state with particularity the circumstances constituting alleged fraud.[141] The decision is a reminder that "[w]ithout specific allegations to connect the dots" as to why statements are materially misleading to investors, plaintiffs fail to plead a plausible theory of securities fraud.[142] Importantly, the court declined to assume wrongdoing because "[e]xperimental drug candidates do not always live up to their potential, even if initial clinical trials yield highly promising results. But, as this case illustrates, that does not mean that a pharmaceutical company has defrauded the investing public."[143]

The court also held that the plaintiffs did not plausibly plead loss causation because nothing in the complaint suggested that the later clinical trial uncovered "falsity" in the original trial.[144] The court also rejected the plaintiffs' reliance on "an anonymous and self-interested short-seller's internet musings about [the results in the original] clinical trial" to plead loss causation.[145]

The complaint alleged that the company commenced a Phase 1 clinical trial (code-named EXCEL) in which 28 cancer patients received a dosage of an experimental drug identified

as NKTR-214 every two or three weeks.[146] During the trial, the company presented interim results on a chart purportedly showing that cancer-fighting cells increased "by an average of 30-fold in tumors" in 10 patients treated with the experimental drug ("30-fold chart").[147] Thereafter, the company launched a second clinical trial (code-named PIVOT) designed to evaluate the effectiveness of the experimental drug when dosed together with a second drug, Opdivo.[148] In June 2018, the company reported data from the PIVOT trial showing that the overall response rate for the drug in treating cancer had declined from 85% in the first trial to 50%.[149] After this announcement, Nektar's share price declined by more than 40%.[150]

Approximately four months later, anonymous short sellers released a report ("Plainview Report") claiming that the 30-fold chart was misleading based on a different chart displayed by the company that purportedly identified an outlier result from one patient ("Patient 14") in the trial that skewed the reported data.[151] The stock price declined further, and the plaintiffs filed suit alleging that the company had made false and materially misleading statements by failing to disclose the use of outlier results in its reports about the EXCEL trial in violation of Section 10(b) and Rule 10b-5 of the Exchange Act.[152] The district court dismissed the complaint with prejudice.[153]

On appeal, the Ninth Circuit affirmed. The court held that the plaintiffs failed to adequately allege falsity with the specificity required by Rule 9(b) and the PSLRA.[154] The plaintiffs' theory of falsity was that the 30-fold chart was misleading due to its failure to inform investors that it included outlier data from Patient 14.[155] Noting that an "omission is materially misleading if there is a substantial likelihood that it would have been viewed by the reasonable investor as having significantly altered the total mix of information made available for the purpose of decision-making by stockholders concerning their investments,"[156] the court held that the plaintiffs were unable to meet their burden because they failed to specify *why* the inclusion of Patient 14's outlier results in the 30-fold chart would have deceived a reasonable investor.[157] In other words, "we simply do not know what the results would have been without the outlier data or what those results would mean as a medical matter."[158]

In particular, the court easily dispatched the plaintiffs' "three stabs" at specifying how the 30-fold chart would have changed had the outlier data been omitted.[159] First, the court rejected the plaintiffs' reliance on anonymous allegations in the Plainview Report that the 30-fold chart would look "very different" if the result had been calculated based on only three patients from the first clinical trial because "cherry-picking data from only three patients does not plausibly show the falsity of the 30-fold claim."[160] Second, the court dismissed "vague and hyperbolic" allegations by a former company employee and confidential witness cited in the complaint that the 30-fold chart was "misleading," "deceitful," and "lacking scientific integrity," noting that "conclusory adjectives do not meet the PSLRA's heightened pleading requirements."[161] Finally, the court discounted the complaint's reliance on a statistical analysis by an expert, noting that the plaintiffs "cannot evade the PSLRA's exacting pleading standards by merely citing an expert who makes assertions about falsity based on questionable assumptions and unexplained reasoning."[162]

In addition, the panel held that the district court properly dismissed the complaint because it did not adequately allege loss causation.[163] "When considering loss causation, 'the ultimate issue is whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss.'"[164] The court noted that plaintiffs typically satisfy their burden of pleading loss causation by alleging that defendants reveal the truth through corrective disclosures that cause a company's stock price to drop and investors to lose money.[165]

Applying Ninth Circuit precedent requiring that plaintiffs "show a 'causal connection between the fraud and the loss by tracing the loss back to the very facts about which the defendant lied,'" the court concluded that the complaint failed to do so.[166] First, the court held that the later PIVOT trial was not a corrective disclosure exposing the falsity of the earlier EXCEL trial because it did not suggest that the initial trial data had been improperly manipulated or flawed, did not correct or revise previous patient data, and merely integrated newly collected data into its reporting.[167] Instead, "[the] factual allegations most plausibly suggest that relatively disappointing test results, not any revelation of earlier falsehoods, caused [the company's] share price to plunge."[168]

The court also held that the Plainview Report was likewise not a corrective disclosure that caused the company's share price to drop.[169] Pointing to the analysis in its recent decision in *In re Bofl Holding, Inc. Securities Litigation,* addressing when a short-seller's report can satisfy the loss causation element and noting the "high bar" that plaintiffs must meet in relying on

self-interested and anonymous short-sellers who disavow the accuracy or completeness of their reports, the court held the plaintiffs failed to meet their burden.[170] Even if the short-seller's report revealed new information to the market that had not yet been reflected in the company's stock price, the court concluded that "it is not plausible that the market would perceive the Plainview Report as revealing false statements because the nature of the report means that investors would have taken 'its contents with a healthy grain of salt.'"[171]

Finally, the court rejected the plaintiffs' attempted reliance on a "zone of risk" theory to plead loss causation, noting that the theory has not been adopted by the Ninth Circuit, because it is unclear whether the courts that have adopted it require any lesser showing as to the loss causation element.[172]

### First Circuit Affirms Dismissal of Complaint Alleging False Statements and Misleading Omissions to Conceal Post-Acquisition Difficulties

Companies face challenging disclosure decisions in the wake of acquisitions that prove to be less successful than expected while continuing to express optimism about the long-term prospects of the acquired business. In *City of Miami Firefighters' and Police Officers' Retirement Trust v. CVS Health Corp.*, the First Circuit held that the plaintiffs had not sufficiently alleged that CVS made false statements or omitted material information about a long-term care ("LTC") business it acquired in 2015 that resulted in a substantial goodwill write-off in 2019.[173] Notwithstanding a lengthy complaint that included evidence from 19 confidential witnesses who were former employees of the LTC business, a unanimous panel concluded that "on careful de novo review," the complaint "fails to allege sufficiently specific facts about the state of the LTC business at particular points in time to enable us to conclude that any of the goodwill write-downs were too late or that any of the defendants' alleged misstatements contradicted the state of that business as it then stood."[174]

On the contrary, the court pointed out that during the putative class period, the company "repeatedly and publicly" wrote off chunks of the $8.6 billion in goodwill originally assigned to the acquired LTC business and also disclosed challenges to its future prospects.[175] The court applied the well-settled principle that for allegedly false statements to support a claim of securities fraud, they must be false when made because plaintiffs may not plead fraud by hindsight.[176]

The complaint alleged that executives of CVS and its newly acquired LTC subsidiary employed false statements and misleading nondisclosures to conceal from investors the deterioration of the LTC customer base due to mismanagement that led to a series of goodwill write-downs totaling more than $8 billion. The plaintiffs' theory was that the company's disclosures of the escalating difficulties in its LTC business came too late and that the full extent of the declining customer base and corresponding lost value was not fully disclosed until early 2019, in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The district court dismissed the complaint on the grounds that it failed to allege any actionable false statements or misleading omissions.

After carefully canvassing "five buckets" of alleged misstatements and omissions, a unanimous panel affirmed the dismissal because the plaintiffs failed to adequately allege that the defendants made statements of fact that were false when made or misleadingly incomplete in light of contemporaneous circumstances.[177] The panel highlighted the complaint's failure to provide a "meaningful way to compare defendants' disclosures and statements about the LTC business with the contemporaneous state of the business," and pointed to the lack of a timeline in the plaintiffs' brief on appeal despite criticism by the district court on this point.[178] The court concluded that the plaintiffs' failure to establish a "reasonably clear timeline of customer losses inconsistent with the company's goodwill disclosures is representative of the complaint's overarching failure to allege material facts inconsistent with defendants' public statements."[179]

The court also pointed out that the plaintiffs' concession that they "do not dispute anything about [d]efendants' accounting, which necessarily includes the figures included in the company's goodwill reports throughout the class period, reinforces the gap in their pleading."[180] The court also rejected the plaintiffs' argument that the failure of the LTC acquisition was a "near certainty" that supported an inference that any material net loss of customers was not timely reflected in the company's earlier goodwill write-downs, explaining that "[o]ur caselaw on this variety of omission theory 'does not require a company to be omniscient, even if the company looks foolish in hindsight for not properly predicting whatever harm befell it.'"[181]

The panel also affirmed the district court's dismissal of the complaint with prejudice, rejecting the plaintiffs' efforts "to

be allowed a third bite of the apple in the form of a second amended complaint."[182] The court noted that the plaintiffs never filed a motion for leave to file an amended complaint but rather relied on a footnote in their opposition to dismissal asking for a "conditional opportunity" to move for leave to amend should the district court grant any portion of the motion to dismiss.[183]

In the absence of any argument in support of amendment and failure to proffer a proposed amended complaint, the court agreed with the district court that such a "contingent" request held "no legal significance."[184] The court likewise affirmed the denial of the plaintiffs' motion to reconsider dismissal pursuant to Rule 59(e) based on a claim of newly discovered evidence because the "presumptively best examples of late-discovered evidence" were available to the plaintiffs months before the district court granted dismissal and they failed to notify the court of their ongoing investigation in advance of the ruling.[185]

### Second Circuit Reverses Dismissal and Holds that Failure to Disclose an Existing SEC Investigation Related to Accounting Weaknesses Was a Material Omission in Light of Company's Prior Disclosures

In *Noto v. 22nd Century Group, Inc.,* the Second Circuit addressed the complex issue of whether and when a company must disclose an SEC investigation to avoid running afoul of the federal securities laws.[186] In *Noto*, a unanimous panel reversed the dismissal of a complaint alleging securities fraud by 22nd Century Group and two former executives and held that in light of multiple prior disclosures in the company's SEC filings about material weaknesses in its internal financial controls, the defendants had a duty to disclose an SEC investigation of the same issues. Noting that "[a]n omission is material when a reasonable investor would attach importance to it when making a decision," the court concluded that the fact of the SEC investigation would directly bear on a reasonable investor's assessment of the reported accounting weaknesses.[187] The decision is a reminder that disclosure assessments related to ongoing government investigations are highly fact-specific and that nondisclosure may be found misleading particularly where, as here, the company had previously acknowledged accounting issues while denying the existence of an SEC investigation.

The complaint alleged that in 2017, the defendants engaged in an illegal stock promotion scheme in which they paid third parties to write positive articles about the company, thereby artificially inflating its stock price. During that period, the stock price tripled and the company closed a stock offering that realized net proceeds of $50.7 million.[188] The complaint also alleged that the defendants failed to disclose an ongoing investigation by the SEC into material weaknesses in the company's financial controls, notwithstanding that the company had publicly acknowledged those accounting issues in its SEC filings between 2016 and 2018. In its Form 10-Q for the second quarter of 2018, the company disclosed that it had completed the testing and implementation of remedial efforts regarding the accounting issues.[189]

In 2018, an anonymous online commentator posted an article asserting that the company had engaged in a paid promotion scheme to inflate its stock price; after the article was posted, the stock price fell 6.9%. After a second article suggested that the SEC was investigating the company, the stock price fell an additional 4.3%. In response, the company issued a press release denying knowledge of an SEC enforcement proceeding. According to a confidential witness cited in the complaint, the SEC had commenced an investigation by the time the witness was hired in 2016, and the company had engaged counsel to meet with SEC staff to discuss the investigation.

In 2019, after a third online article repeated the claims of an illegal stock promotion scheme and an existing SEC investigation, the stock price fell again, and the company issued another press release stating that the article "falsely alleges that [the company] is supposedly under SEC investigation."[190] Finally, after the company announced that its CEO would be retiring for personal reasons, the stock price dropped yet again. The plaintiffs filed suit alleging that the illegal stock promotion scheme and failure to disclose the SEC investigation constituted violations of Section 10(b) of the Exchange Act and SEC Rule 10(b)-5.[191] The district court found that the complaint failed to state a claim and dismissed with prejudice and denied the plaintiff's request to amend a second time.

On appeal, the Second Circuit reversed, disagreeing with the district court's finding that the defendants had no duty to disclose the SEC investigation. The court concluded that because

the defendants had publicly disclosed material weaknesses in internal financial controls and that the company had successfully implemented a remedial plan to address those accounting issues, the existence of an ongoing SEC investigation into the same issues would "directly bear on the reasonable investor's assessment of the severity of the reported accounting weaknesses."[192] Citing settled Second Circuit precedent that "[e]ven when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth," the court found that the company's prior statements about the accounting issues gave rise to a duty to disclose the investigation.[193]

Given the company's specific statements about its accounting weaknesses, "the failure to disclose [the investigation] would cause a reasonable investor to make an overly optimistic assessment of the risk."[194] Thus, the court held that the defendants had a duty to disclose the SEC investigation. Further, the court held that the defendants' denial of the investigation amounted to an "admission of the materiality" of the nondisclosure and that the denials "were affirmatively misleading in their own right."[195]

As to the plaintiff's claim of fraud based on the alleged stock promotion scheme, the court agreed with the district court that the complaint failed to adequately allege that such a scheme existed or that its nondisclosure was an actionable omission. Citing Supreme Court precedent that only a statement's maker, not the beneficiary, has a duty to disclose that a statement was paid for, the court held that the complaint did not adequately allege that the defendants had ultimate control over the articles and thus had no duty to disclose the payments.[196] Explaining that Rule 10b-5 makes unlawful the omission of a material fact "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," the court pointed out that the articles did little more than republish publicly available content and there were no allegations that the articles themselves were false or misleading.[197] Likewise, the court affirmed the dismissal of the plaintiff's "scheme liability" claims under Rule 10b-5(a) and (c) because the complaint failed to support a claim that the defendants manipulated the market based on the information in the articles, the payments to the writers, or the nondisclosure of those payments.

### Fourth Circuit Affirms Dismissal of Data Breach-Related Suit Because Challenged Statements Were Not False When Made

In *In re Marriott Int'l, Inc.*, the Fourth Circuit affirmed dismissal of a class action alleging securities fraud as a result of the defendants' alleged failure to disclose information about the vulnerabilities of the company's data privacy and protection systems in the wake of a massive data breach that exposed guest records.[198] The court agreed that the plaintiffs did not adequately allege that the company's statements about the strength of its cybersecurity systems were false and misleading when made or created the misleading impression that it was securing or protecting the customer data that was revealed as a result of the breach.[199] The court noted that Marriott "could have provided more information to the public about its experience with or vulnerability to cyberattacks, but the federal securities laws did not require it to do so."[200] Given the increasing instances of cybersecurity breaches and the SEC's proposed cybersecurity disclosure rules that would create stronger and more uniform guidelines for companies about cybersecurity incidents, the decision is a reminder that companies should carefully consider statements concerning the strength of their cybersecurity measures and include robust disclosure of risks and vulnerabilities to stave off potential after-the-fact challenges that such disclosures are misleading.

In 2016, Marriott merged with Starwood Hotels and Resorts Worldwide and subsumed all of Starwood's computer systems, software, and databases. Shortly thereafter, Marriott experienced the second-largest data breach in history, with malware impacting approximately 500 million guest records in Starwood's database. The complaint alleged that subsequent investigation revealed unauthorized access to the Starwood network since 2014. As a result, investors alleged that the defendants had misled investors about the company's cybersecurity protection in violation of Section 10(b) of the Exchange Act and Rule 10b-5. Specifically, the plaintiffs focused on three sets of disclosures: (i) statements regarding the importance of data protection to Marriott's business; (ii) privacy statements on Marriott's websites; and (iii) cybersecurity risk disclosures. The district court granted the defendants' motion to dismiss, concluding that the investors "failed to adequately allege a false or misleading statement or omission, a strong inference of scienter, and loss causation."[201]

On appeal, the Fourth Circuit affirmed because the company provided sufficient information to ensure that its statements were neither false nor misleading when made. Explaining that "an omission is actionable only if—absent the fact omitted—'a reasonable investor, exercising due care, would gather a false impression from a statement, which would influence an investment decision,'" the court concluded that none of the challenged statements were false and misleading.[202]

First, the court held that statements about the critical importance of data protection amounted to little more than nonactionable puffery and pointed out that, in those disclosures, Marriott did not "assign a quality to Marriott's cybersecurity that it did not have."[203] Second, the court concluded that privacy statements on Marriott's website stating that Marriott "'seek[s] to use reasonable organizational, technical and administrative means to protect' personal data," while also noting that "no data transmission or storage system can be guaranteed to be 100% secure" were neither false nor misleading.[204] The court also held that no reasonable reader of the company's public statements could have understood them to have overrepresented the extent to which it was securing and protecting customer data given the company's robust disclosures about the key risks that made Starwood's system vulnerable. Third, the court concluded that Marriott's cybersecurity risk disclosures were not materially misleading because, in addition to general warnings of cybersecurity risks, the company updated its disclosures after the breach, acknowledging that it had experienced cyberattacks and that "the frequency and sophistication of such efforts could continue to increase."[205] The court explained that this admission ensured that the company's forward-looking statements did not constitute misleading omissions about current or past challenges.

Finally, the court acknowledged that while Marriott "certainly could have provided more information to the public about its experience with or vulnerability to cyberattacks," the securities laws did not require it to do so.[206] The court cited the SEC's 2018 Statement and Guidance on Public Company Cybersecurity Disclosure, advising companies against "making detailed disclosures that could compromise their cybersecurity efforts . . . ."[207] Notably, in March 2022, the SEC approved revised cybersecurity related guidelines, which included substantially heightened cybersecurity disclosure guidance, including requirements for companies to report material cybersecurity incidents more quickly and requiring updates on previously reported incidents.[208]

### "Securities Law Requires Honest Disclosure But Not Prescience or Mindreading": Seventh Circuit Affirms Dismissal of Securities Complaint Arising Out of Failed Merger

Companies often face investor actions in the wake of failed mergers or other busted transactions. In *Water Island Event-Driven Fund, LLC v. Tribune Media Co.*, the Seventh Circuit addressed shareholder claims alleging that a company's failure to disclose its merger partner's aggressive strategy for addressing regulatory concerns about a proposed merger was an actionable material omission, and concluded it was not.[209] Central to the panel's affirmance was its conclusion that the offering materials correctly stated all the material facts about the proposed merger transaction, as did the press releases, proxy materials, quarterly filings, and other statements issued before the merger was abandoned. The decision written by Judge Easterbrook is notable for "two additional points" that the court deemed "worth making" in *dicta*.[210] First, the panel noted that "[n]othing in the 1934 Act or any of the SEC's regulations requires" that managers' thoughts during a major corporate transaction "must be an open book" and observed that "[t]o the contrary, secrecy can be valuable" in the context of strengthening a potential merger partner's hand in negotiations with the regulator.[211] Second, the court expressed doubt that Tribune would have understood news about its merger partner's hardball negotiations as adverse to investors since "if Sinclair's gambit had succeeded investors would have been the winners,"[212] but even if the gambit failed, it is settled law that there is no "fraud by hindsight."[213]

In May 2017, Tribune Media Company and Sinclair Broadcasting Group announced an agreement to merge. The complaint alleged that while the merger was pending regulatory review, Tribune's largest investor sold some company shares in a registered public offering managed by Morgan Stanley. Tribune ultimately abandoned the merger and sued Sinclair, accusing it of failure to use "reasonable best efforts" to satisfy the demands of the Department of Justice and the Federal Communications Commission, both of which had the authority to block the merger.[214] The crux of the complaint was that the offering materials failed to disclose that Sinclair was playing "hardball" with federal regulators regarding possible divestiture

of stations as a condition of securing approval of the merger, thereby increasing the risk that the merger would be stymied, as well as by devising transactions that would have left it in practical if not legal control of any divested stations in violation of Section 12 of the Securities Act and Section 10(b) of the Exchange Act.[215] The district court dismissed the complaint on the grounds that the challenged statements—including predictions that the merger was "likely"—amounted to non-actionable forward-looking statements. The court also determined that the company had expressly cautioned investors about the need for regulatory approval and that the merging firms could prove unwilling to do what the regulators sought.[216] Finally, it found that the plaintiffs failed to adequately allege scienter.

On appeal, a unanimous panel of the Seventh Circuit affirmed the dismissal. As a preliminary matter, the court held that the plaintiffs had adequately alleged that at least some of the plaintiffs had bought shares in the secondary offering and thus established a statutory condition of liability to support a claim under Section 12.[217] However, the court concluded that the registration statement and prospectus through which the shares were offered "stated all of the material facts" about the proposed merger.[218] The panel also rejected the plaintiff's argument that Tribune's failure to reveal that Sinclair "was playing a dangerous game with the regulators" with respect to negotiations about divestiture of stations as a condition of approving the merger amounted to an actionable misleading omission.[219] The court noted that the negotiations with the regulators did not even commence until two weeks after the plaintiffs had purchased their shares. It also pointed to the lack of any allegation that either Tribune or Morgan Stanley "knew that Sinclair was preparing to look the lion in the teeth," and when Tribune did find out, it chided Sinclair for acting inconsistently with its contractual promise to use "reasonable best efforts" to obtain necessary regulatory clearance.[220] Accordingly, the court held that "[i]t is impossible to rest any liability on the 1933 Act."[221]

The court likewise affirmed dismissal of the claim asserting fraud in violation of Section 10(b) because the challenged statements about the merger were protected forward-looking statements under the PSLRA's safe harbor provision. The court noted that the challenged statements accurately stated the terms of the deal, including Sinclair's agreement to use reasonable best efforts to secure regulatory approval, and were not alleged to have misstated any historical facts. The court declined to describe a difference in the parties' understanding of "reasonable" best efforts as fraud, particularly in light of Tribune's fulsome, cautionary disclosures about the potential obstacles to completion of the merger.[222] The court also held that the plaintiffs' failure to allege the time that the defendants learned things relative to their public statements "makes it impossible to see how Tribune could have had fraudulent intent when it made the challenged statements."[223]

### "Rule 10b-5 and Section 10(b) Are Not Insurance Against an Investment Loss": First Circuit Affirms Dismissal of Complaint Because Defendants Had No Duty to Repeat Information Already Known to Investors

In *Jorge Ponsa-Roball v. Santander Securities LLC*, the First Circuit addressed the viability of a securities class action filed by investors who purchased Puerto Rico Municipal Bonds ("PRMBs") through funds marketed by Santander during a 2012–2013 recession in Puerto Rico.[224] The PRMB securities were marketed through prospectuses that disclosed, among other things, the investment risks for each fund.[225] Although PRMBs had been attractive investments for some years because they offered higher interest rates than comparable investments and were exempt from Puerto Rico and United States income and estate taxes, beginning in 2012 Puerto Rico began issuing billions of dollars in PRMB bonds and using the proceeds to pay off existing debt rather than to stimulate its economy—the original purpose of the bonds. This impacted the Puerto Rico bond market through heightened volatility, rising yields, and lower prices of PRMBs and related securities.[226] The plaintiffs allegedly sustained substantial losses when the Puerto Rico bond market ultimately crashed in late 2013. Although the complaint alleged that during the same period various public sources, including analyst reports and debt rating firms, began issuing warnings about the deteriorating Puerto Rico economy and the risks of PRMBs, the plaintiffs alleged that the prospectuses used by Santander omitted material information about the state of the Puerto Rico bond market and also hid Santander's simultaneous efforts to sell its proprietary holdings of PRMBs, all in violation of Section 10(b) of the Exchange Act and Rule 10b-5.[227] The district court granted Santander's motion to dismiss the claims with prejudice.[228]

On appeal, the First Circuit affirmed, holding that the plaintiffs failed to meet their burden of pleading an actionable omission under Rule 9(b) and the PSLRA. Pointing to Supreme Court

precedent that an omission is actionable under Rule 10b-5 only where the complaint shows that a defendant made an affirmative statement that was rendered misleading by an omission and there was an affirmative duty to disclose the omitted information, the court easily concluded the complaint failed to do so.[229] As to the allegation that the defendants should have disclosed information about the deteriorating market for Puerto Rico bonds, the court pointed to multiple statements cited in the complaint about the weakening economy in Puerto Rico, downgraded bond ratings, and the increased riskiness of PRMBs.[230] Citing settled First Circuit precedent, the court concluded: "Santander was simply not under any duty to repeat information already known or readily accessible to investors."[231]

The court also easily dispatched the allegation that Santander should have disclosed that it was ridding itself of PRMBs during the same period it was soliciting investment in the PRMBs and related securities. Based on its "diligent search of plaintiffs' complaint," the court found no allegations of a special relationship or any particularized investment instruction that the plaintiffs may have given Santander that would support a duty to disclose the allegedly omitted information.[232]

Referring to its prior decisions bucketing omissions in securities fraud cases as either akin to the Grand Canyon (where the risk of failing to disclose a material fact is great) or more like a ditch (where the failure to disclose a material fact makes a situation merely risky), the court concluded: "While finding oneself in a ditch is no picnic in a meadow, it is also not dining at the edge of the Grand Canyon."[233] Finally, the court held that even if the plaintiffs had pled an actionable omission, nowhere in the complaint did they set forth facts that Santander acted with the requisite scienter or evidence of fraudulent intent at least as compelling as any opposing inference of nonfraudulent intent.[234]

### The Federal Securities Laws "Do Not Require Real-Time Business Updates": Ninth Circuit Affirms Dismissal of Lawsuit Alleging Company Hid Scope and Impact of Software Bugs

In *Weston Family Partnership LLLP v. Twitter, Inc.*, the Ninth Circuit addressed when a company is required to update its disclosures in the wake of a negative internal development and held that updates are not required unless their omission would make other prior statements materially misleading.[235] The court rejected the plaintiffs' argument that Twitter had a duty to disclose to investors a setback it faced in dealing with software bugs affecting its systems, holding that a company need only disclose a negative internal development if omitting it would make other company statements materially misleading. "While society may have become accustomed to being instantly in the loop about the latest news (thanks in part to Twitter), our securities laws do not impose a similar requirement."[236]

The complaint alleged that Twitter's failure to disclose the impact of software bugs impacting its Mobile App Promotion ("MAP") product until August 2019 was materially misleading, because the company's prior statements in July 2019—that work to resolve problems with and improve its MAP product were "on track"—were false.[237] In August 2019, Twitter revealed that it had inadvertently shared with advertisers the personal data of users who had opted out of data-sharing but reassured investors it had "fixed these issues."[238] During its quarterly earnings call a few months later, the company disclosed that the bugs had hampered its advertisement customization business and caused a $25 million revenue shortfall. The plaintiffs alleged that the company's failure to disclose the bugs in July 2019 and their likely impact on revenues was an actionable omission in violation of Section 10(b) of the Exchange Act and Rule 10b-5. The district court dismissed the complaint, finding that the challenged July 2019 statements that the MAP product was "on track" were non-actionable puffery.[239]

A unanimous panel affirmed dismissal of the Section 10(b) claims because the plaintiffs failed to plausibly allege falsity based on their theory that the software issues had materialized and impacted revenues in July 2019. The court held that the challenged statements at issue in July 2019 were not false or materially misleading but rather were "qualified and factually true," and thus Twitter had no duty to disclose more than it did. "To the contrary, a company can speak selectively about its business so long as its statements do not paint a misleading picture."[240] The panel noted that the challenged statements offered a "much more qualified and less definitive characterization of the MAP program," pointing to a shareholder letter and Form 10-Q filing that stated the company was "continuing [its] work to increase the stability, performance, and flexibility of [its] ads platform and [MAP] . . . but we're not there yet."[241]

The court also rejected the plaintiffs' argument that the defendants "must have known" about issues with the MAP product in

July 2019 based on the disclosures in August 2019. "[I]t is simply not enough to assume or implausibly infer that the defendants must have known about these issues in July based on later facts or developments."[242] Finally, the court agreed that the July 2019 statements fell within the safe harbor for forward-looking statements because they were accompanied by "very detailed meaningful cautionary language" and thus were non-actionable under the Exchange Act.[243]

### Context Matters: Second Circuit Affirms Dismissal of Securities Class Action Challenging Statements About an Unsuccessful Clinical Drug Trial

A recent decision from the Second Circuit provides another reminder that in the wake of the Supreme Court's decision in *Omnicare v. Laborers District Council Construction Industry Pension Fund*, falsity cannot be pleaded in a vacuum.[244] In *Arkansas Public Employees Retirement System v. Bristol-Myers Squibb Co.*,[245] the plaintiffs alleged that Bristol-Myers and certain of its officers made materially false statements and omissions in describing a clinical trial of a new lung cancer treatment. The complaint alleged that company statements that the trial would focus on results among patients "strongly" expressing a protein known as PD-L1—without specifying the exact percentage of expression—were false and misleading, given a later company announcement that defined "strong expression" as 5% or greater PD-L1 and an "industry consensus" that "strong" PD-L1 expression meant a 50% threshold.[246]

A unanimous panel rejected the plaintiffs' theory that the company had an obligation to disclose the precise percentage of PD-L1 expression defined as "strong" in the clinical trial. The court also concluded that the complaint and the documents on which it relied showed there was no generally understood meaning of "strong" expression that contradicted the company's use of the term."[247] Accordingly, the court held that the plaintiffs failed to allege facts sufficient to show a material misstatement or omission. The decision highlights the importance of context, including analyst reports submitted by defendants but omitted from the complaint, in evaluating alleged misstatements or omissions. The decision also strengthens the defense that stock sales executed pursuant to a 10b5-1 plan, even when a plan is adopted during the class period, do not support an inference of scienter where the complaint fails to sufficiently allege that the purpose of the plan was to take advantage of an inflated stock price or was not entered into in good faith.

The complaint alleged that Bristol-Myers developed a new drug to treat non-small cell lung cancer. The drug was designed to prevent an interaction between PD-L1 and PD-1 proteins in cancer cells to make the cells vulnerable to the body's immune system.[248] Because not all cancer cells have the PD-L1 protein, the higher the percentage of cancer cells with PD-L1, the "stronger" the patient's PD-L1 "expression."[249] The company's initial disclosure about the clinical trial indicated that the drug was more effective in treating cancer in patients with a higher expression of PD-L1 but did not specify the precise threshold of PD-L1 expression needed for participation in the study. Instead, the company stated that the study would target patients "strongly expressing" PD-L1.[250] Three years later, Bristol-Myers announced that the clinical trial had failed. In that announcement, the company disclosed for the first time that the study had focused on patients with a PD-L1 expression of at least 5%. Following that announcement, the company and various commentators attributed the trial's failure to the selection of a 5% PD-L1 expression threshold.[251]

The company's stock price fell following the disclosure that the clinical trial had failed.[252] The plaintiffs brought suit alleging that the price drop resulted from the trial's failure and that the company and certain officers had obscured the risk of failure by neglecting to disclose the precise PD-L1 threshold selected and by misrepresenting that the study would focus on patients "strongly" expressing PD-L1.[253] The district court dismissed a second amended complaint with prejudice for failure to allege material misrepresentations or omissions or facts giving rise to a strong inference of scienter.

The Second Circuit affirmed. As an initial matter, the court held that the district court had properly taken judicial notice of investment analyst reports proffered by defendants that were not referenced in the complaint.[254] The reports, which were published contemporaneously with the announcement of the clinical trial, correctly predicted that the trial selected a 5% threshold for "strong" PD-L1 expression.[255] Noting that the complaint itself established that "there was no generally understood meaning of 'strong' expression that contradicted

Bristol-Myers's use of the term to mean 5%," the court concluded that the company's statement that the trial involved patients "strongly" or "highly" expressing PD-L1 could not be misleading.[256]

The court also held that the company had no obligation to disclose the precise percentage, observing that disclosure of details about the structure of the trial might be commercially "unwise" given the competition in the immune-oncology sector.[257] The court likewise held that the company did not make any misleadingly incomplete statements by withholding the exact PD-L1 expression threshold used in the trial.[258] The remaining statements in the complaint were held not to be actionable because they were either forward-looking and accompanied by meaningful cautionary language or were statements of subjective opinion containing one or more embedded factual statements that the plaintiffs did not allege to be false.[259]

In addition, the court held that the plaintiffs failed to allege scienter. The panel rejected plaintiffs' sole theory of improper motive—that defendants sought to inflate the stock price to sell their own shares at a profit during the class period—as unsupported by the trading history pled in the complaint.[260] The court noted that the vast majority of the trades by four individual defendants during the class period were made pursuant to 10b5-1 trading plans and all four defendants bought more shares than they sold during the period.[261] While acknowledging that the individual defendant responsible for most of the trading entered into a 10b5-1 plan during the class period, the court rejected the plaintiffs' argument that the plan provided no defense to scienter allegations because the plaintiffs failed to sufficiently allege that the purpose of the plan was to take advantage of an inflated stock price.[262] The court held that the complaint failed to allege strong circumstantial evidence of conscious misbehavior or recklessness by the company in allegedly disregarding the industry's consensus definition of a strong PD-L1 expression because no such consensus definition existed.[263] Without a viable primary violation under Section 10(b) and Rule 10b-5, the court also affirmed dismissal of the Section 20(a) claims.[264]

## SCIENTER

### Seventh Circuit Affirms Dismissal of Exchange Act Claim Against Owner of Options Exchange Holding that Plaintiffs Failed to Adequately Allege Scienter

A plaintiff alleging claims under Section 10(b) of the Exchange Act must show that a defendant acted with scienter, which encompasses an intent to mislead investors or reckless indifference to whether investors would be misled. Since corporations as well as natural persons can be Section 10(b) defendants, courts often face questions about how to plead scienter for a corporate entity. In *Barry v. Cboe Global Markets,* the Seventh Circuit considered whether a complaint supported a strong inference of scienter by the Chicago Board Options Exchange and its affiliates ("Cboe").[265] The Court rejected the plaintiffs' theory that Cboe should have known that changes it made to the method of calculating the Volatility Index ("VIX") increased the risk of manipulation and that it ignored unusual trading patterns that followed the change in method.

The court likewise declined to infer scienter based on the mere possibility that Cboe profited from the trades of unknown entities accused of manipulating the VIX absent allegations quantifying the amount Cboe stood to lose, because if potential losses outweighed potential gains, it would be "implausible to attribute wrongful intent to Cboe."[266] The decision is a reminder that alleged negligence is insufficient to state an Exchange Act claim or establish bad faith by an exchange under the Commodities Exchange Act.

The complaint alleged that the VIX is based on real-time prices of options on the S&P 500 Index and is designed to reflect investors' consensus view of future (30-day) expected stock market volatility. The VIX is often referred to as the market's "fear gauge."[267] Initially the calculation of the VIX was based on option prices of four stocks, but Cboe later increased it to 130 stocks.[268] The plaintiffs alleged that trading in futures contracts and option contracts based on the VIX made manipulation possible by last-minute trades in thinly traded options that affected the VIX formula, thereby increasing the profits of unknown entities at the expense of honest traders.[269] The plaintiffs alleged that Cboe should have known that including more options in the VIX formula increased the risk of

manipulation, and that when "unusual patterns developed, Cboe should have taken more rigorous enforcement actions" but failed to stop the alleged manipulation because it benefitted from the trading.[270] The district court dismissed the complaint, finding that the plaintiffs failed to adequately allege that Cboe acted with scienter or that Cboe itself carried out any manipulative acts.[271]

A unanimous panel of the Seventh Circuit affirmed, holding that the plaintiffs failed to adequately allege that Cboe acted with scienter because the complaint did not show that the "forbidden intent [was] at least as likely as its absence," as required by the PSLRA.[272] While a plaintiff can plead corporate scienter by alleging that a natural person had the requisite scienter that can be imputed to the corporation, the plaintiffs conceded that Cboe did not engage in any of the alleged manipulation by unknown entities. The court concluded that "[i]t is difficult to see more than negligence on Cboe's part."[273] Further, the court held that the plaintiffs' theory that Cboe aided and abetted the unknown traders was precluded by Supreme Court precedent holding that "private litigants cannot pursue [aiding-and-abetting] claims" under the Exchange Act.[274]

The court also rejected the plaintiffs' argument that scienter could be inferred from the fact that Cboe profited from the alleged manipulation, pointing out that the plaintiffs did not quantify how much Cboe stood to lose if it took action to prevent the alleged manipulation.[275] "As far as we can see, potential losses outweighed potential gains, making it implausible to attribute wrongful intent to Cboe."[276] Finally, the court noted that Cboe's anti-manipulation efforts, although alleged to be inadequate, made the "imputation of fraudulent intent even harder."[277]

The court likewise disposed of the plaintiffs' claim under Section 25 of the Commodities Exchange Act that Cboe was liable for "fail[ing] to enforce a rule that the CFTC requires it to enforce—including the rule against trading manipulable contracts."[278] Although the district court dismissed the claim because the plaintiffs had failed to identify specific trades in which manipulation allegedly caused losses, the panel focused on the statutory requirement that a person seeking to enforce liability against a registered exchange must establish that it acted or failed to act in "bad faith."[279] "The [plaintiffs] do not seriously try to show that Cboe acted in bad faith as that phrase is normally understood in law." [280] The panel also rejected the argument that a prior Seventh Circuit decision established that "bad faith" means "negligence" for purposes of alleging liability under Section 25, noting that the case did not discuss the statutory text, context, or history in reaching a negligence standard and thus amounted to nonprecedential dicta.[281]

## CLASS CERTIFICATION

### Second Circuit Poised to Rule on Class Certification for a Third Time in Goldman Sachs Securities Litigation

Class certification is a critical inflection point in securities class actions. One of the most important class certification cases remains the long-running Goldman Sachs securities case, which is now more than 12 years old. In March 2022, the Second Circuit granted a rare third petition for review of class certification pursuant to Rule 23(f), and oral argument was held in October 2022.

By way of background, as we discussed in our 2020 and 2021 *Reviews*, in *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, a divided panel of the Second Circuit in 2020 affirmed certification of a class based on its finding that Goldman failed to rebut the *Basic* presumption by a preponderance of the evidence.[282] The court rejected Goldman's request to narrow the inflation-maintenance theory, holding that its proposal to exclude generic statements as a matter of law too closely resembles the materiality inquiry, which is inappropriate at the class certification stage.[283] Thereafter, the Supreme Court granted certiorari to consider: (i) whether the presumption of classwide reliance in a securities class action can be rebutted by arguing that the "generic" nature of the alleged misstatements demonstrates a lack of price impact; and (ii) whether a defendant seeking to rebut the *Basic* presumption of classwide reliance has the ultimate burden of persuasion.

On June 21, 2021, the Supreme Court ruled in an 8–1 decision that the generic nature of a misrepresentation often is important evidence of price impact that courts should consider at the class certification stage, while a six-Justice majority agreed that defendants bear the burden of persuasion—by a preponderance of the evidence—to prove a lack of price impact at class certification.[284] The Court vacated and

remanded the case based on its conclusion that "it is unclear whether the Second Circuit properly considered the generic nature of Goldman's alleged misrepresentations in reviewing the District Court's price impact determination."[285] The Court also instructed that on remand, the lower courts should take into account "*all* record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue."[286] The Second Circuit subsequently vacated its decision and remanded the case to the district court for further proceedings consistent with the Supreme Court's ruling.[287]

On December 8, 2021, in light of the guidance from the Supreme Court and the Second Circuit following remand and noting its "due consideration of all evidence" before it, the district court again granted class certification, holding that the plaintiffs had presented compelling evidence that Goldman's alleged misstatements concerning its purported conflicts of interest artificially maintained an inflated stock price. In addition, the court held, "[e]ven applying the Supreme Court's updated guidance as to genericness," the defendants had failed to show that the alleged misstatements had no price impact.[288] In so holding, the district court rejected the defendants' theory that the statements about Goldman's policies for managing conflicts of interest were so generic that—both as a matter of law and as a matter of fact—they could not have had any impact on Goldman's stock price.[289]

To the contrary, the court held that "[t]he alleged misstatements were not so generic as to diminish their power to maintain pre-existing price inflation—and given the strong evidence of price impact [presented by Plaintiffs], the Court finds that the statements *did* in fact maintain price inflation in this instance."[290] The district court noted that "even the more generic statements, when read in conjunction with one another . . . may reinforce misconceptions about Goldman's business practices, and thereby serve to sustain an already-inflated stock price."[291]

The district court also rejected the defendants' contention that the alleged misstatements and subsequent corrective disclosures presented a "glaring informational mismatch sufficient to defeat any inference of price impact."[292] The district court found that the "comfortable, though certainly not boundless, gap in genericness between the alleged misstatements and subsequent corrective disclosures fail[ed] to satisfy the [d]efendants' burden to demonstrate a complete lack of price impact attributable to the alleged misstatements."[293]

On December 22, 2021, Goldman filed a Rule 23(f) petition, seeking permission to appeal class certification for a third time. The petition for review was supported by multiple amici including the U.S. Chamber of Commerce, the Bank Policy Institute, and the Securities Industry and Financial Markets Association.[294]

On March 9, 2022, the Second Circuit granted Goldman's Rule 23(f) petition, and oral argument was held on September 21, 2022.[295] The crux of Goldman's argument on appeal is that the district court misapplied the Supreme Court's guidance regarding the "mismatch" analysis and erred by requiring that corrective disclosures merely "implicate" alleged false statements.[296] Goldman argued that if the district court's decision stands, shareholders will be able to sue as a class whenever they can claim a company's general disclosures were related to subsequent revelation of misconduct and a decline in a company's stock price, and thus class certification "would become nearly automatic."[297] A decision in the latest appeal of class certification is expected later this year.

## CRYPTOCURRENCY

### "A Seller Cannot Dodge Liability Through His Choice of Communications": Eleventh Circuit Holds Mass Online Communications Promoting Cryptocurrency Can Constitute Solicitation Under Section 12 of the Securities Act

In *Wildes v. Bitconnect International PLC*, the Eleventh Circuit addressed an important issue related to emerging cryptocurrencies: whether promoting a cryptocurrency in a mass communication constitutes solicitation within the meaning of the Securities Act.[298] Noting that "[s]olicitation has long occurred through mass communication" and "online videos are merely a new way of doing an old thing," the court held that using modern, online communication platforms enabled by developing technology can constitute solicitation of the purchase of a security under Section 12 of the Securities Act.[299]

The district court dismissed a Section 12 claim on the grounds that the plaintiffs had failed to allege that the promoters urged or persuaded the plaintiffs individually to purchase

the cryptocurrency.[300] A unanimous appellate panel reversed, explaining that nothing in the Securities Act or applicable precedent distinguishes between individually targeted sales efforts and broadly disseminated pitches.[301] Observing that "a new means of solicitation is not any less of a solicitation," the Eleventh Circuit declined to adopt an interpretation that would contradict the statutory text and allow "easy end-runs" around the Securities Act.[302] Noting that "[a] seller cannot dodge liability through his choice of communications," the decision is likely to increase litigation risk for cryptocurrency promoters who have used online platforms to market their products.[303]

## SHORT-SWING TRADING

### Ninth Circuit Holds Corporate Insider Not Required to Disgorge Profits from Short-Swing Trading Where the Acquisition of Company Securities Was Authorized by the Board of Directors Consistent with Applicable State Law

In *Alpha Venture Capital Partners LP v. Pourhassan,* the Ninth Circuit addressed the procedure that a corporate board must follow to approve an equity grant to a corporate insider to exempt subsequent short-swing profits from the disgorgement requirement of Section 16(b) of the Exchange Act.[304] Section 16(b) requires insiders to disgorge to the issuer any short-swing profits—that is, profits from sales and purchases that occur within six months of each other.[305] The court affirmed the dismissal of a complaint demanding disgorgement of short-swing profits by the company's CEO, because the board of directors had previously approved his acquisition of stock options and warrants and thus subsequent transactions resulting in profits fell within an exemption to the short-swing trading rule set forth in Rule 16-3(d)(1).[306] The court concluded that approval of the transaction by the affirmative vote of three of the company's five directors at a board meeting where only four directors were present was sufficient to satisfy the board approval exemption, and a unanimous decision was not required by Rule 16-3(d)(1), Delaware corporate law, or the company's bylaws.

Acknowledging that Rule 16-3(d)(1) does not specify a particular method for approving an insider's acquisition of securities to trigger the board approval exemption, the court held that "state corporate codes, supplemented by the articles of incorporation and corporate bylaws of individual corporations," provide the proper procedure and that board approval in this case complied with applicable Delaware law and the company's bylaws.[307] The decision is important because the court found that "no federal law expressly requires us to federalize the state rules governing corporate boards' internal affairs" and further noted that "the careful balance between federal securities law and state corporate law" required it to leave to the law of the state of incorporation the determination of what a board must do to approve an insider's acquisitions of issuer securities.[308] "When it comes to the precise procedure that a corporate board of directors must follow to satisfy Rule 16b-3(1)(d), federal securities law defers to—and does not displace—the state laws governing corporate boards."[309]

The case arose out of the issuance of options and warrants to the company's CEO in 2019. Less than six months later, the CEO exercised the options and sold nearly five million shares, resulting in a significant profit.[310] It was undisputed that the grant of options and warrants had been approved by three members of the board at a meeting attended by four directors of a five-person board.[311] The plaintiffs alleged that the board approval exemption under Rule 16b-3(d)(1) did not apply because all directors—not just a majority of the board—did not approve the equity award.[312] The district court dismissed the complaint, holding that the insider's acquisition of company securities fell within an exemption because the transaction had been approved by the board of directors.[313]

The Ninth Circuit affirmed. It rejected the plaintiffs' argument that the term "approved by the board of directors" in Rule 16b-3(d)(1) requires "full board" approval.[314] The court carefully parsed the two component phrases "approved" and "board of directors" in reaching its conclusion that nothing in those definitions inherently requires "unanimity, a supermajority, a particular quorum, or any other specific steps."[315] Since Rule 16b-3(d)(1) sets out no specific procedure for how a board must approve a securities acquisition, the court cited Supreme Court precedent holding that "gaps" in federal laws "bearing on the allocation of governing power within [a] corporation" should generally "be filled with state law."[316] Noting that state corporate codes, supplemented by the articles of incorporation and bylaws of individual corporations, typically specify the procedure that a board must follow to "approve" corporate decisions, the court held that under Delaware law, a decision made by a majority of a quorum of the board constitutes an act of the board of directors, "not an act of just part of the

board."[317] Accordingly, the court held that the board's approval of the CEO's equity grant by a majority vote of a quorum complied with both Delaware law and the company's bylaws, and the subsequent trading profits were thus exempt from disgorgement under Rule 16b-3(d)(1).

## STATE LAW BREACH OF FIDUCIARY DUTY CLAIMS

### Eleventh Circuit Affirms that Breach of Fiduciary Duty Class Claims Based on State Law Are Barred by SLUSA

The Securities Litigation Uniform Standards Act ("SLUSA") was enacted in response to plaintiffs' attempts to circumvent the stringent pleading requirements of the PSLRA by pleading their securities law claims as violations of state, rather than federal, law.[318] SLUSA bars plaintiffs from bringing a covered class action based on state law alleging a misrepresentation or omission of a material fact. In *Cochran v. Penn Mutual Life Insurance Co.*, the Eleventh Circuit affirmed dismissal of a putative class action against brokerage firm Hornor, Townsend & Kent ("HTK") and its parent company, The Penn Mutual Life Insurance Company, on the grounds that the plaintiff's fiduciary duty claims based on Georgia law were barred by SLUSA.[319] Holding that the complaint alleged an untrue statement or omission of material fact in connection with the purchase or sale of a covered security, a unanimous panel held that the plaintiff was barred by SLUSA from using a class action to bring those state law claims. The plaintiff's "central problem" was that "[t]o be viable under Georgia law, [plaintiff's] claims against HTK must and do involve allegations of misrepresentation or omission, and because they do, [plaintiff's] class action allegations are SLUSA-barred."[320]

The complaint alleged that HTK urged and directed the plaintiff to invest his retirement funds in a Penn Mutual variable annuity that was not a suitable choice for a tax-advantaged account. The plaintiff alleged that HTK was motivated by a conflict of interest to sell unsuitable variable annuity products because it and its parent, Penn Mutual, profited more from the sale of variable annuities than other, allegedly more suitable investment products, in violation of the fiduciary duty owed by brokers to their customers under Georgia law. The district court concluded that because the essence of the complaint was the unlawful marketing of tax-deferred annuities, either by misrepresenting their suitability for tax-deferred retirement plans or by failing to disclose their unsuitability for such accounts, the class claims for breach of fiduciary duty were barred by SLUSA.

On appeal, the Eleventh Circuit affirmed, holding that SLUSA preemption applied. As a preliminary matter, the court canvassed decisions by other appellate courts holding that the SLUSA analysis hinges on a determination of the "gravamen" or "essence" of the claims.[321] The determination "is not 'a formalistic search through the pages of the complaint for magic words' but a search to see 'whether the complaint covers the prohibited theories, no matter what words are used (or disclaimed) in explaining them.'"[322]

The court examined the fiduciary duty claims under Georgia law and determined that the theory of liability alleged by the plaintiff required proof of two elements: a conflict of interest and a material misrepresentation or omission.[323] The court pointed to 11 references in the complaint regarding "recommendations, advice, or other communications" by the brokerage firm to the plaintiff and concluded that while the complaint may not have explicitly alleged misrepresentations or omissions, the nature of the allegations was such that misrepresentations and omissions were essential to the class claims for breach of fiduciary duty and those claims thus were barred by SLUSA.[324] In December 2022, the plaintiff filed a petition for writ of certiorari, and we expect the Supreme Court to decide whether to grant the petition later this year.

## CONCURRENT STATE JURISDICTION AND FEDERAL FORUM PROVISIONS

### California Trial Court Holds PSLRA Discovery Stay Applies in State Court Proceedings Under the Securities Act and Urges the Supreme Court to "Provide the Last Word as Soon as Possible" so State Courts Around the Country "No Longer Have to Struggle with This Vexing Question"

In last year's *Review*, we addressed the Supreme Court's decision to grant certiorari in *Pivotal v. Superior Court of California* to determine whether the PSLRA's discovery stay applies to cases alleging violations of the Securities Act in both state and federal courts or solely to actions in federal courts.[325] In *Pivotal*, a California trial court refused to apply the PSLRA discovery stay in a suit alleging claims under the Securities Act, and both the California Court of Appeal and the California Supreme

Court summarily denied defendants' petitions for review.[326] The company's petition for certiorari was supported by amicus briefs from the U.S. Chamber of Commerce and the Securities Industry and Financial Markets Association, which argued that refusing to apply mandatory discovery stays in state securities class actions "creates additional risk and uncertainty for issuers and underwriters participating in IPOs."[327]

The Supreme Court granted certiorari even though no federal court had addressed the issue of the PSLRA's applicability in state court suits.[328] However, a much-anticipated resolution of the issue by the Supreme Court was not to be. A settlement reached by the parties prior to the completion of merits briefing in the Supreme Court left the issue unresolved. The continued discontinuity between federal and state discovery practices creates a strong incentive for plaintiffs to bring Securities Act cases in state court, where they can obtain early discovery and leverage settlements from defendants who seek to avoid substantial pre-answer discovery costs. A recent decision by a California state court holding that the PSLRA discovery stay applies in both state and federal courts provides an important model for other state courts considering the issue.

In *Ocampo v. Williams*, the plaintiff filed parallel state and federal suits alleging that defendants' sale of certain cryptocurrency tokens constituted the sale of unregistered securities in violation of Sections 5, 12(a), and 15 of the Securities Act.[329] Discovery was stayed in the federal action pursuant to the PSLRA. Following the filing of demurrers challenging the sufficiency of the complaint in the state action, the trial court stayed discovery until it determined the applicability of the PSLRA's stay provisions in state court proceedings.

Notwithstanding a split among California state courts on the applicability of the PSLRA stay in state court proceedings, the *Ocampo* court held that it did apply. The court first noted that the ordinary meaning of the phrase "any private action arising under this subchapter [of the PSLRA]" favored applying the stay in state court actions under the Securities Act during the pendency of a motion to dismiss.[330] Noting that the Supreme Court has made clear that the safe-harbor provisions shielding certain forward-looking statements under Section 77z-2 of the Securities Act apply in state and federal courts, the court reasoned that the similarly worded stay provisions of the PSLRA also apply in state and federal courts.[331]

The court next concluded that applying the stay in state court aligned with the purpose of the PSLRA, in which Congress sought to deter abusive practices in securities litigation, including "vexatious discovery requests."[332] The court easily rejected arguments that the Supreme Court's decision in *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund* drew a distinction between "substantive" provisions of the Securities Act that apply in both federal and state actions and "procedural" provisions such as the PSLRA discovery stay that apply only in federal court, holding that *Cyan* held no such thing.[333] The court dispatched the argument that the separate stay provision of SLUSA, which allows a court presiding over a Securities Act case in which the PSLRA stay is in effect to stay discovery in any other private action, does not require a different result because the stays serve separate functions, and applying the PSLRA stay in state and federal court does not render the SLUSA stay superfluous.[334] Finally, the court declined to hold that the Tenth Amendment of the United States Constitution precluded application of the PSLRA stay in state court because under settled Supreme Court precedent, Congress may impose procedural rules for federal causes of action litigated in state court.[335]

The court concluded by noting that it "will not have the last word on this issue. The United States Supreme Court presumably will" and urged "the high court to provide the last word as soon as possible so it, like numerous other state courts in California and throughout the country, no longer have to struggle with this vexing question."[336]

### California Appellate Court Upholds Validity of Federal Forum-Selection Provision Adopted by Delaware Corporation Requiring Securities Act Claims to Be Brought in Federal Court

In *Wong v. Restoration Robotics, Inc.*, a California appellate court affirmed that a Delaware company's federal forum-selection provision ("FFP") was valid and enforceable under California law and public policy, thereby joining appellate courts in Delaware and New York in upholding the validity of FFPs.[337] As we explained in our 2020 *Review*, in the wake of the Supreme Court's decision in *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund* that state courts have concurrent jurisdiction over lawsuits asserting violations of the Securities Act and that those lawsuits cannot be removed to federal court, plaintiffs increasingly filed Securities Act claims in state court.[338] In some instances, companies have been forced to defend overlapping Securities Act suits in both state and federal courts

because there is no procedure or mechanism under existing law to consolidate or coordinate such cases.[339]

To avoid the risk of inconsistent judgments and rulings, some companies incorporated in Delaware adopted federal forum-selection provisions in their bylaws or charter documents requiring that any Securities Act claims against them be brought exclusively in federal court. Delaware was the first state to uphold FFPs as valid and enforceable under state law and consistent with federal and state public policy but expressly invited the courts of other states to determine whether FFPs violate the law or public policies of their jurisdictions.[340] In *Wong*, the California Court of Appeal addressed an array of challenges to FFPs under federal and California law and policy and rejected all of them. The decision is significant for companies looking to stop duplicative litigation under the Securities Act, particularly in cases filed in California state court.[341] With this third appellate decision upholding the validity of FFPs and the low likelihood of a different outcome in future stockholder challenges, we expect the pace of Delaware-based companies adopting FFPs to accelerate.

Restoration Robotics, a Delaware corporation headquartered in California, developed and manufactured a robotic system used in hair transplant procedures. In 2017, the company filed a registration statement with the SEC in a step toward an initial public offering. Among the documents was an amended Certificate of Incorporation that included the FFP at issue.[342] Following the IPO and a steep decline in the price of the company's stock, the plaintiff filed a class action suit in California state court alleging false and misleading statements in the offering documents in violation of the Securities Act. Citing the Delaware Supreme Court's decision in *Salzberg*, the company moved to dismiss the complaint based on its FFP. Treating the motion to dismiss as a motion for *forum non conveniens*, the trial court determined that because the FFP was valid and enforceable, it lacked jurisdiction over the case and granted the motion to dismiss.

The California Court of Appeal rejected all of the plaintiff's challenges to the FFP under federal and state law and public policy. The court easily dispatched the argument that the FFP violated the removal bar of the 1933 Act, which provides that, "no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."[343] The court concluded that the provision narrowly prohibits removal only, whereas the FFP at issue "requires Wong to file his action in federal court in the first place, rather than in state court. Removal is not at issue here, so the removal bar has no apparent application to the FFP."[344]

The court also rejected the argument that the FFP violated the "anti-waiver provision" of Section 77n of the Securities Act.[345] Applying the Supreme Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, the court reasoned that the concurrent jurisdiction provision of the Securities Act "does not impose any duty" requiring compliance and thus could be overridden by a forum-selection clause without violating the anti-waiver provision of the statute.[346] In *Rodriguez*, the Supreme Court cited to its prior analysis of an analogous anti-waiver provision in the Securities Exchange Act and held that the jurisdiction provision of that statute, which gives district courts of the United States exclusive jurisdiction over claimed violations of the Securities Exchange Act, does not impose any affirmative duty that persons trading in securities must comply with, and therefore an arbitration provision did not run afoul of the statute's anti-waiver provision.[347]

The court likewise rejected the plaintiff's argument that the FFP violated either the Commerce Clause or the Supremacy Clause of the United States Constitution. As a preliminary matter, the court held that a state action is a threshold requirement for a viable Commerce Clause claim, and a private company's decision to adopt an FFP is not a state action.[348] On the merits, the court applied a balancing test requiring it to uphold the statute unless the burden on interstate commerce was "clearly excessive and outweighs the benefits," and easily found that it did not: "Delaware has a legitimate interest in allowing its corporations to include FFP's in their certificates of incorporation, and … any burden on interstate commerce from the inclusion of an FFP does not exceed the benefits provided by the statute."[349]

The court likewise dispatched the plaintiff's Supremacy Clause challenge. Noting that the Supremacy Clause prohibits states from "dissociat[ing] themselves from federal law because of disagreement with its content" and from "refusing to allow state court jurisdiction over federal claims while permitting state court jurisdiction over similar state-law actions, the court concluded that the Delaware statutes enabling companies to adopt FFPs did no such thing."[350] "[B]y allowing corporations

and shareholders to agree on forum-selection provisions that limit 1933 Act claims to federal courts, Delaware does not purport to shut its doors, or the door of any other state, to 1933 Act claims."[351]

Finally, the court held that the FFP was both valid and enforceable. Applying the internal affairs doctrine to hold that Delaware law governed validity,[352] the court relied on the *Salzberg* decision holding that FFPs are valid under Delaware law.[353] As to enforceability, the court held that California law applied and that under California precedent, "unless there is a showing that it was outside the reasonable expectations of the weaker or adhering party or that enforcement would be unduly oppressive or unconscionable," the FFP was enforceable.[354] The court agreed with the trial court's ruling that the provision "did not disrupt any of the substantive rights of shareholders," and made only "a procedural change."[355] As to the alleged unconscionability of the FFP, the court "decline[d] to hold that there is anything substantively unconscionable in the waiver of the waivable procedural right to a state forum, particularly where, as here, the provision does not restrict a plaintiff's procedural right under the statute to file suit in a local federal court."[356]

### Seventh Circuit Reverses Dismissal and Rejects "Catch-22" Result that Would Bar Litigation of Derivative Section 14(a) Claim in Any Forum

In *Seafarers Pension Plan v. Bradway* ("Boeing"), a divided panel of the Seventh Circuit reversed the dismissal of a derivative action alleging that Boeing had made materially false and misleading statements in several years of proxy statements about the development and operation of its 737 MAX airliner prior to two crashes in 2018 and 2019, which resulted in a worldwide grounding of the aircraft.[357] The plaintiff filed suit in federal district court in Illinois where Boeing then maintained its headquarters and alleged violations of Section 14(a) of the Exchange Act. Boeing moved to dismiss on *forum non conveniens* grounds citing a company bylaw requiring that any derivative action against it be brought in Delaware Chancery Court.[358] The district court agreed and dismissed the suit.

On appeal, the majority reversed and held the forum bylaw unenforceable under Delaware law and federal securities law because it would force the plaintiff to raise its claim in Delaware state court, which is not authorized to exercise jurisdiction over Exchange Act claims. The court characterized this outcome as "checkmate for defendants" that would impermissibly "close all courthouse doors to this derivative action."[359] The majority held that the forum bylaw could not be applied to a derivative action asserting a Section 14(a) claim that is subject to exclusive federal jurisdiction. The decision is significant for Delaware corporations that have or may be considering enactment of a forum-selection bylaw because plaintiffs often plead federal securities claims as well as state law claims in derivative actions. If other jurisdictions follow the reasoning of the majority in this decision, plaintiffs may be able to circumvent a forum-selection bylaw by alleging a federal securities law claim.

Reversing the district court's dismissal, the majority concluded that "[t]he most straightforward resolution of this appeal is under Delaware corporation law, which we read as barring application of the Boeing forum bylaw to this case invoking non-waivable rights under the federal Exchange Act."[360] As a preliminary matter, the majority held that Section 115 of the Delaware General Corporation Law ("DGCL"), which authorizes Delaware corporations to enact choice-of-forum bylaws, was the relevant statute at issue rather than DGCL Section 109, which provides broadly that a corporation's bylaws may contain any provision not inconsistent with law or the certificate of incorporation.[361]

Next, the majority zeroed in on two key phrases within Section 115 to support its conclusion. First, it held that the forum bylaw violated Section 115's requirement that all forum bylaws be "consistent with [all] applicable jurisdictional requirements" because it is inconsistent with the jurisdictional requirements of the Exchange Act; namely, "[b]y eliminating federal jurisdiction over [the plaintiff's] exclusively federal derivative claims, Boeing's forum bylaw forecloses suit in a federal court based on federal jurisdiction. That's exactly what Section 115 'was not intended to authorize.'"[362] On this point, the majority cited to the legislative history of Section 115, which stated that the statute was "not intended to authorize a provision that purports to foreclose suit in a federal court based on federal jurisdiction."[363]

Second, pointing to the language in Section 115 providing that forum bylaws may require that any or all internal corporate claims shall be brought solely and exclusively "in any or all [of the] courts in this State" and noting that federal courts in Delaware are courts "in" that state, as distinct from courts "of"

that state, the majority held that Section 115 does not authorize a forum bylaw "to close the courthouse doors entirely on derivative actions asserting federal claims subject to exclusive federal jurisdiction."[364] The majority also rejected the argument that the Delaware Supreme Court's decision in *Salzberg* was to the contrary.[365] "*Salzberg* expressly presumed that the reference to 'courts *in* this State' in the bylaws authorized by the [then] new Section 115 included federal courts, which the Boeing forum bylaw does not."[366]

Finally, the majority rejected the dissent's proposed solution to allow a Delaware state court to hear a derivative action under Section 14(a), citing the Supreme Court's "caution against using choice-of-forum and choice-of-law clauses to attempt prospective waivers of federal statutory remedies."[367]

In a forceful dissent, Judge Easterbrook explained that he would have affirmed dismissal of the derivative claim under Section 14(a) because the forum bylaw applied only to derivative actions, and therefore the plaintiff retained the right to sue directly under Section 14(a) in federal court. The dissent also disagreed that jurisdiction to enforce the Exchange Act is exclusive to the federal courts, and thus "there is no problem with litigating plaintiff's claim in the courts of Delaware."[368] Specifically, the dissent noted that while Section 27(a) provides for exclusive jurisdiction of claims under it, the Supreme Court has held that exclusivity is a right that can be waived, and the anti-waiver provision of Section 27(a) is limited to the substantive standards of the Exchange Act.

The dissent pointed to *Shearson/American Express, Inc. v. McMahon*, in which the Supreme Court held that issuers and investors are free to agree to arbitrate claimed violations of the Exchange Act without running afoul of its exclusivity or anti-waiver provisions.[369] Noting that the Supreme Court has deemed arbitration to be "a kind of forum-selection agreement," the dissent concluded that "*McMahon*'s reasoning means that 'other forum-selection agreements are permissible' and '[t]he provision in Boeing's bylaws is just another forum-selection clause.'"[370]

The dissent also disagreed with the majority's conclusion that the forum bylaw is unlawful under Delaware law or policy because its "analysis [of that subject] is colored by their belief that the bylaw extinguishes a right under federal law. I've shown why that is not so."[371] In addition, the dissent disagreed that DGCL Section 115 always contemplates that Delaware federal courts are a permissible forum under any valid forum-selection clause authorized by that section, given the statutory language that "any or all internal corporate claims shall be brought solely and exclusively in any or all of the courts in this State."[372] Noting that both a federal district court and the state's Court of Chancery are "in" Delaware, the dissent concluded that "[t]he option to choose among 'any' of the courts 'in' Delaware gives Boeing the right to do exactly what it has done."[373] Therefore, requiring a plaintiff to litigate the derivative claim in Delaware state court as required by the forum bylaw "is not problematic."

### Ninth Circuit Affirms Dismissal of Derivative Section 14(a) Claim and Upholds the Enforceability of Delaware Forum-Selection Bylaw

The Ninth Circuit addressed the enforceability of an identical Delaware forum-selection bylaw in a federal derivative action filed against The Gap, and a unanimous panel held that it was enforceable. In *Lee v. Fisher*, the plaintiff filed a derivative complaint in federal court in California where Gap maintained its headquarters.[374] The complaint alleged violations of Section 14(a) based on alleged misstatements in the company's proxy materials about the level of diversity it had achieved. The District Court granted the company's motion to dismiss the complaint on *forum non conveniens* grounds after concluding that the plaintiff's complaint was bound by the company's forum-selection bylaw that required all derivative claims against it be brought in Delaware Chancery Court.[375] On appeal, the Ninth Circuit affirmed the dismissal. Noting that a forum-selection clause creates a strong presumption in favor of transferring a case, the court concluded that the plaintiff had not carried her heavy burden to show that the forum-selection bylaw contravened strong public policy, rendering it unenforceable.[376]

The decision is important for companies with forum-selection bylaws requiring derivative actions to be brought in Delaware Chancery Court. Following *Lee*, defendants in the Ninth Circuit might have been able to obtain *forum non conveniens* dismissal based on forum-selection bylaws even if plaintiffs are left without any forum to bring federal claims derivatively. However, in October 2022, the Ninth Circuit ordered that the case be heard *en banc* and vacated the decision of the

three-judge panel.[377] As a result, we expect further developments relating to forum-selection bylaws pending the Ninth Circuit's rehearing *en banc* and the possibility of Supreme Court review to resolve a Circuit split following the Seventh Circuit's recent decision on *Boeing* if the Ninth Circuit reaches the same result as the original panel.

Noting that the plaintiff conceded the validity and applicability of the forum-selection bylaw to her lawsuit, the panel first determined that the only relevant dispute before it was the enforceability of the forum bylaw.[378] The court began its analysis with the doctrine of *forum non conveniens*. Unlike a typical case not involving a forum-selection clause in which the courts evaluate facts such as convenience of the parties, it observed that "[a] forum-selection clause . . . creates a strong presumption in favor of transferring a case, and the plaintiff 'bears the burden' to establish that transfer is unwarranted."[379]

Pointing to the general rule that "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer," the panel identified three general principles established by the Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.* that establish extraordinary circumstances.[380] The panel asserted that the plaintiff did not contend that the forum-selection clause was invalid due to fraud and did not contend that litigating the derivative claim in the Delaware forum would be gravely difficult. Therefore, the panel considered only the second *Bremen* factor and asked whether enforcement of the clause would contravene strong public policy.[381]

In construing that principle, the court looked to the forum in which suit was brought to determine whether the plaintiff had identified "a statute or judicial decision in that forum that clearly states a strong public policy rendering the clause unenforceable."[382] The court concluded that the plaintiff failed to meet her burden by pointing to the anti-waiver or exclusive federal jurisdiction provisions of the Exchange Act, Delaware case law, or a federal court's obligation to hear cases within its jurisdiction.[383]

Holding that the Exchange Act's anti-waiver provision does not contain a clear declaration of federal policy, the court held that binding Ninth Circuit precedent established that "the strong federal policy in favor of enforcing forum-selection clauses . . . supersede[s] anti-waiver provisions in state statutes as well as federal statutes, regardless whether the clause points to a state court, a foreign court, or another federal court."[384] The court likewise held that the Exchange Act's exclusive federal jurisdiction provision does not provide a clear statutory declaration and pointed out that the Supreme Court has held that the exclusivity provision is waivable and does not impose any statutory duties.[385]

The court rejected the plaintiff's reliance on a Delaware Chancery case as unavailing because it did not "clearly stat[e] that she could not get any relief in the Delaware Court of Chancery."[386] The court dispatched the plaintiff's argument that federal courts have a "virtually unflagging obligation" to hear cases within their exclusive jurisdiction based on abstention doctrine precedent because that "obligation is overcome by the strong presumption in favor of enforcing forum-selection clauses."[387]

Finally, while the court acknowledged the Seventh Circuit's contrary decision in *Boeing* holding an identical forum-selection bylaw to be unenforceable under Delaware corporation law and federal securities law, it noted that the plaintiff in *Lee* failed to identify Section 115 of the DGCL in her opening brief on appeal and had thus waived any reliance on that provision.[388] The court explained that prior Ninth Circuit precedent foreclosed its reliance on the anti-waiver provision of the Exchange Act as a basis to reject the enforceability of the forum-selection bylaw and thus explained its different conclusion than the Seventh Circuit's in *Boeing*.

As noted, the Ninth Circuit granted the plaintiff's petition for rehearing *en banc* and vacated the three-judge panel decision. An *en banc* panel heard oral argument in December 2022, and we expect the court to rule on the case later this year.

## STANDING

### Supreme Court Grants Certiorari to Resolve Circuit Split About Standing for Securities Act Claims Involving Direct-Listed Securities

As we discussed in last year's *Review*, in *Pirani v. Slack Technologies, Inc.*, a divided panel of the Ninth Circuit affirmed the district court's decision that a purchaser of shares in a direct listing who could not conclusively determine whether he had purchased registered or unregistered securities

nevertheless had standing to sue under Section 11 and Section 12(a)(2) of the Securities Act.[389] The *Slack* decision created a circuit split about the "tracing" requirement for standing under the Securities Act, and the Supreme Court has granted certiorari to address the issue.

Unlike a traditional initial public offering, a company going public in a direct listing does not issue any new shares and instead files a registration statement with the SEC solely for the purpose of allowing existing shareholders to sell their shares; thus, both registered and unregistered shares may be available for purchase by investors. The Ninth Circuit reasoned that because both registered and unregistered shares were sold simultaneously upon the effectiveness of a single registration statement and because the purchase could have occurred only because of that registration statement, all of the shares offered in the direct listing could "be traced to that one registration."[390] The majority also noted that if directly listed shares were not considered "such securit[ies]" under Section 11, companies would be allowed to "avoid any risk of Section 11 liability by choosing a direct listing" and thereby "create a loophole large enough to undermine the purpose of" that provision "as it has been understood since its inception."[391]

The dissent argued that the text of Sections 11 and 12 limits its standing to purchasers of registered shares even if that meant no investor had standing to sue under the Securities Act in connection with Slack's direct listing.[392] The dissent also argued that it should be left to Congress to update the securities laws to address the consequences stemming from innovations in the financial markets such as direct listings.[393]

The Ninth Circuit denied the defendants' petition for rehearing and rehearing *en banc*.[394] In their petition for certiorari to the Supreme Court, the defendants urged the Court to resolve the "lopsided" circuit split created by the decision, arguing that every other federal court of appeals to consider the issue had affirmed dismissal of Section 11 claims when the plaintiff failed to show that the shares he purchased were issued under the allegedly false and misleading registration statement.[395] The petition argued that the logic of the Ninth Circuit's decision extended beyond direct listings and would "drastically" expand liability under Sections 11 and 12 and "will inevitably generate excessive lawsuits, discourage innovation in the capital markets, and create needless doubt about the application of the securities laws."[396] The Court is expected to decide the case later this year.

### Second Circuit Holds Plaintiff Who Did Not Purchase Securities of the Issuer About Which Alleged Misstatements Were Made Does Not Have Standing to Sue Under Section 10(b) or Rule 10b-5

While neither Section 10(b) of the Securities Exchange Act nor Rule 10b-5 expressly provides a private right of action, the Supreme Court has long held that a private right of action is implied.[397] In *Blue Chip Stamps v. Manor Drug Stores*, the Supreme Court adopted the purchaser-seller rule limiting the plaintiff class for purposes of a private damages action under Section 10(b) or Rule 10b-5 to actual purchasers or sellers of securities of the issuer about which an alleged material misstatement were made.[398]

Applying the purchaser-seller rule in *Menora Mivtachim Ins. Ltd. v. Frutarom Indus. Ltd.,* the Second Circuit affirmed dismissal of a suit by investors who claimed to have purchased stock of International Flavors & Fragrances ("IFF") at inflated values as a result of false and misleading statements made by an acquisition target of IFF, Frutarom Industries Ltd., about Frutarom's compliance with anti-bribery laws and the source of its business growth.[399] The court held that proper application of the purchaser-seller rule meant that the plaintiffs lacked standing to sue based on statements made by Frutarom about itself because they never purchased or sold shares of Frutarom. The court also declined to find that the plaintiffs had standing under Section 10(b) or Rule 10b-5 based on a sufficiently "direct relationship" between IFF and Frutarom.[400]

The complaint alleged that following a 2018 announcement of a merger between IFF and Frutarom and prior to the consummation of the deal, Frutarom made materially misleading statements about its compliance with anti-bribery laws and the source of its business growth while failing to disclose that its growth resulted from a bribery scheme. Most of the alleged misstatements were incorporated into IFF's registration statement. After the transaction closed, Frutarom became a wholly owned subsidiary of IFF. In 2019, IFF acknowledged that Frutarom had made improper payments to representatives of customers in Russia and Ukraine. The next day, IFF's stock

price dropped by nearly 16%. Plaintiffs sued IFF, Frutarom, and certain senior officers of both companies alleging violations of Section 10(b) of the Securities Exchange Act and Rule 10b-5.

The district court granted the defendants' motion to dismiss on the grounds that the allegedly false statements of fact or omissions were not actionable or material. It also found that the plaintiffs lacked standing to assert claims under Section 10(b) or Rule 10b-5 against the Frutarom defendants for statements they made about Frutarom because the plaintiffs did not buy or sell Frutarom stock. The plaintiffs pursued their appeal solely against the Frutarom defendants.

On appeal, the Second Circuit affirmed dismissal of the complaint for lack of standing based on application of the purchaser-seller rule: "[P]laintiffs lack statutory standing under Section 10(b) to bring claims against the Frutarom defendants" based on alleged misstatements that the company made about itself because they bought shares of IFF, not Frutarom.[401] As a preliminary matter, the court cited Supreme Court precedent that the "judicially created private rights of action should be construed narrowly" and should not be extended "beyond its present boundaries."[402]

The court also rejected the argument that the plaintiffs had standing because the complaint alleged a "sufficiently 'direct relationship' between Frutarom's misstatements about itself and the price of IFF's shares."[403] The court concluded that adopting such a "direct relationship" test would "begin exactly the 'endless case-by-case erosion' of the purchaser-seller rule about which the *Blue Chip Stamps* court warned."[404] In particular, the court held that application of a direct relationship test would result in "shifting and highly fact-oriented" inquiries by courts to determine "whether there was a sufficient direct link between one company's misstatements and another company's stock price" that would be inconsistent with the Supreme Court's caution against adding "further uncertainty" to Section 10(b)'s rule of liability imposed on the conduct of business transactions.[405]

Finally, the court easily dispatched the argument that a different result was warranted based on *dicta* in *Ontario Pub. Serv. Emp. Union Pension Tr. Fund v. Nortel Networks Corp.*—that a merger creates a far more significant relationship between two companies than does the sale of a business unit and that a potential merger might require a different outcome.[406] The court explained that in *Nortel*, it said that was "a question that we leave for another day" but "now answer the question by holding that purchasers of a security of an acquiring company do not have standing under Section 10(b) to sue the target company for alleged misstatements the target made about itself prior to the merger between the two companies."[407]

The court also stated that *NYSE Specialists Sec. Litig.* "clarified that *Nortel* did not preclude purchasers of a stock from suing 'underwriters, brokers, bankers, and non-issuer sellers' under Rule 10b-5," and the holding in that case "'is entirely consistent with the purchaser-seller rule."[408] That is because "[p]laintiffs may be able to sue entities other than the issuer of a security if those entities made material misstatements about the security, as long as the plaintiff purchased or sold the securities about which the misstatements were made."[409] In short, Section 10(b) standing does not depend on the significance or directness of the relationship between two companies but on a plaintiff's purchase or sale of a security in a company about which an alleged material misstatement was made.[410]

## CONCLUSION AND 2023 OUTLOOK

The COVID-19 pandemic continued to defy projections in 2022 with the emergence of new variants and ongoing economic consequences. It is not surprising that COVID-related claims remained a substantial portion of securities class actions filed in 2022. We expect the trend to continue as the pandemic enters its fourth year, although the nature of the claims may evolve, as we discussed above. While many of the COVID-related complaints have been dismissed, the majority of COVID-related cases remain unresolved, and it may be that courts will be less inclined to find that issuers were unaware or unable to foresee the effects of the pandemic years after it began. In addition, the relative success that plaintiffs have had in avoiding dismissal in suits brought against vaccine manufacturers and health-related companies and the announcement of several large settlements in 2022 by companies in those sectors are likely to encourage plaintiffs to bring additional COVID-related cases in 2023.

Environmental, social, and governance ("ESG") disclosures have been an increasing area of interest for investors and the SEC alike. In 2021, the SEC created an ESG Task Force within the Enforcement Division, and in 2022 it filed enforcement

actions relating to a company's disclosures about mining dam safety and an investment fund's claims about green investing options. In March 2022, the SEC proposed new climate-related disclosure requirements for public companies that would require issuers to disclose emissions for which they are directly responsible, as well as emissions from supply chains and products. Following public comment, the SEC is expected to finalize and issue the guidelines in 2023, and they inevitably will be challenged in litigation. Several securities class action filings last year included claims of "greenwashing," in which a company touts its environmental consciousness for marketing purposes but actually makes little effort at sustainability.[411] It remains to be seen how such cases will fare. Although ESG cases have been a very small percentage of total securities filings in the last four years, we expect that plaintiffs will bring more ESG-related cases in 2023, particularly if there is greater clarity from the SEC as to disclosure guidelines.

After booming in popularity during 2020 and 2021, SPAC IPOs decreased sharply by the end of 2021 and appeared to bottom out entirely by the end of 2022. The decline of SPAC IPOs has given way to a "frenzy" of liquidations, with more than 70 SPACs liquidated at the end of 2022 alone.[412] Another consequence of the 2020–21 SPAC boom is the large number of SPACs still seeking merger partners as they approach the end of their 24-month search period. Given market volatility and concerns about economic conditions, it is possible that many SPACs will not find a merger partner and will liquidate. Liquidations may lead to litigation, as at least one group of investors filed suit against a SPAC that had announced its intent to liquidate following disagreement with the SPAC's directors and officers about how the liquidation would proceed.[413] Heightened SEC enforcement efforts and substantially more onerous regulation, if proposed SEC rules become effective, will pose additional challenges for SPACs in 2023.

The signs point toward elevated cryptocurrency-related securities litigation in 2023, likely surpassing the 25 crypto-related filings in 2022. The continued meltdown and serial bankruptcies of companies in the sector show no signs of abating soon. The SEC has signaled its intent to continue robust enforcement, with numerous actions for allegedly offering unregistered securities, failing to register as an investment company, or participating in a fraudulent scheme, among other charges. As discussed above, whether crypto assets are securities under *Howey* has broad consequences across this sector. The issue of whether digital assets are securities will also likely determine whether the SEC or the Commodity Futures Trading Commission will serve as the main regulator of crypto trading platforms.[414] Finally, the spectacular collapse of FTX and the prompt filing of civil and criminal charges against its former officers have resulted in renewed calls for Congress to act. In October 2022, the Financial Stability Oversight Council, a U.S. regulatory panel comprising top financial regulators, recommended that Congress pass legislation addressing risks that digital assets pose to the financial system, including bills to bolster oversight of cryptocurrency, stablecoins, and other digital products. For all these reasons, we expect more private securities class actions related to cryptocurrencies, as investors seek to recoup losses sustained in the recent market decline.

While it is unclear whether the recent trend of declining securities fraud filings will continue, there have already been 13 securities fraud class actions filed in January 2023.[415] Looking ahead, 2023 is likely to be another year with substantial shareholder recoveries in securities cases. As noted, several large settlements have already been announced and are likely to be approved this year, including Dell Technologies ($1 billion), McKesson ($141 million), and Grupo Televisa ($95 million). If approved, the Dell settlement would be in the top 20 largest settlements and the largest securities settlement ever in state court.[416]

Finally, we expect there will again be a substantial number of important securities-related decisions from the Supreme Court and the federal appellate courts. The Supreme Court is poised to clarify whether investors who cannot trace their shares to a particular registration statement nevertheless have standing to sue under the Securities Act, in the *Pirani v. Slack Technologies, Inc.* case discussed above. The Second Circuit will likely rule whether a district court that certified a class for the third time in the long-running *Goldman Sachs Securities Litigation* case properly considered all evidence related to price impact following the Supreme Court's clarifying guidance in 2021.

## LAWYER CONTACTS

Jones Day lawyers are available to assist in addressing any questions you may have about this annual review. Please contact any of the members of the Securities Litigation & SEC Enforcement Practice listed below.

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145 *Id.*

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248 *Id.* at 347.

249 *Id*.

250 *Id*.

251 *Id.* at 348.

252 *Id.*

253 *Id.* at 350.

254 *Id.* at 351.

255 *Id.* at 352.

256 *Id.* at 348.

257 *Id.* at 352–53.

258 *Id*. at 353.

259 *Id.* at 354–55 (citing *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165, 175 (2d Cir. 2020) (holding that when a statement of opinion implies facts or the absence of contrary facts, and the speaker knows or reasonably should know that contrary material facts were omitted, then liability under Rule 10b-5 may follow). We addressed the *Newlink Genetics Corp.* decision and when a statement of opinion may be actionable under the *Omnicare* framework in our 2020 *Review*. *See* Jones Day, *2020 Securities Litigation Year in Review* at 2 (Feb. 2020).

260 *Id.* at 355.

261 *Id.* at 356.

262 *Id.* at 356, n.4, citing *Emps.' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 309 (2d Cir. 2015) (holding that when executives of a corporation enter into a 10b5-1 plan during the class period and the complaint sufficiently alleges that the purpose of the plan was to take advantage of an inflated stock price, the plan provides no defense to scienter allegations at the pleading stage).

263 *Id.* at 356.

264 *Id*. at 356–57.

265 42 F.4th 619 (7th Cir. 2022).

266 *Id*. at 623.

267 *See* Index Dashboard, CBOE. (last visited Jan. 26, 2023).

268 42F.4th at 622.

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.* (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007)).

273 *Id*. at 623.

274 *Id.* at 622-23 (citing *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc*., 552 U.S. 148 (2008); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver*, N.A., 511 U.S. 164 (1994)).

275 *Id*. at 623.

276 *Id.*

277 *Id.*

278 *Id.* at 624 (citing 7 U.S.C. § 25(b)(1)(A)).

279 *Id*.

280 *Id*. at 625 (citing *Bosco v. Serhant*, 836 F.2d 271, 276-78 (7th Cir. 1987)).

281 *Id*. at 625 (citing *Sam Wong & Son, Inc. v. New York Mercantile Exch.*, 735 F.2d 653, 670 (2d Cir. 1984)). The panel acknowledged that the Second Circuit, which has jurisdiction over the other principal futures exchanges, understands bad faith "in the traditional way" and also requires a plaintiff to allege a "self-interest or other ulterior motive unrelated to proper regulatory concerns" that constitutes "the sole or the dominant reason" for the exchange's action and concluded that the complaint did not allege any such ulterior motive.

282 Jones Day, *2020 Securities Litigation Year in Review* at 9-10 (Feb. 2021); Jones Day, *2021 Securities Litigation Year in Review* at 22-23 (Feb. 2022); 955 F.3d 254, 267, 271-74 (2d Cir. 2020).

283 *Id.* at 267.

284 *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1958 (2021); *see also* Jones Day, "U.S. Supreme Court Clarifies the Permissible Evidence and Burdens at Class Certification in Securities-Fraud Cases" (June 2021).

285 141 S. Ct. at 1963.

286 *Id*. at 1961.

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

288 *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 579 F. Supp. 3d 520, 523, 535 (S.D.N.Y. 2021).

289 *Id.* at 533-34.

290 *Id.* at 534.

291 *Id.*

292 *Id.* at 537 (cleaned up).

293 *Id.* at 538.

294 Brief of Amici Curiae Securities Industry and Financial Markets Association, Bank Policy Institute, American Bankers Association, Chamber of Commerce Of The United States of America, and American Property Casualty Insurance Association in Support of Defendants-Appellants, *Arkansas Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, No. 22-484 (2d Cir., May 18, 2022), ECF No. 113.

295 Order, *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, No. 22-484 (2d Cir., Mar. 9, 2022), ECF No 2.

296 *See* Brief and Special App'x, *Arkansas Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, No. 22-484 (2d Cir., May 11, 2022), ECF No. 75.

297 *Id.* at 73.

298 25 F.4th 1341 (11th Cir. 2022).

299 *Id.* at 1343.

300 *Id.* at 1344.

301 *Id.* at 1347.

302 *Id.* at 1346.

303 *Id.*

304 30 F.4th 920 (9th Cir. 2022).

305 15 U.S.C. § 78p(b) (2018).

306 The parties did not contest that the board of directors need only have approved an insider's acquisition of securities from the issuer and not subsequent sales of the securities and the court assumed without deciding that the parties were correct. *Id*. at 923 n.1, 927 (citing *Gryl ex. Rel. Shire Pharms. Grp. PLC v. Shire Pharms. Grp. PLC*, 298 F.3d 136, 140-46 (2d Cir. 2002) (affirming ruling that Rule 16d-3(d)(1) exemption applied because the board of directors approved a compensation plan that precisely specified securities grants to individual defendants without inquiring whether the plan also specified how the defendants could sell the securities)).

307 *Id.* at 925-26.

308 *Id*. at 929.

309 *Id*.

310 *Id.* at 923.

311 *Id.*

312 *Id.* at 924.

313 *Id.*

314 *Id.* at 926.

315 *Id*. at 925.

316 *Id*. (quoting *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)).

317 *Id*. at 926.

318 15 U.S.C. § 78bb(f)(1).

319 35 F.4th 1310, 1312 (11th Cir. 2022).

320 *Id*. at 1317.

321 *Id.* at 1315.

322 *Id.* (quoting *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310-11 (6th Cir. 2009)).

323 *Id. at* 1317.

324 *Id. at* 1315.

325 Jones Day, *2021 Securities Litigation Year in Review* at 34–35; 141 S.Ct. 2884 (2021) (mem.).

326 Order, *Pivotal Software, Inc. v. Super. Ct. of California*, No. A162228 (Cal. Ct. App. April 14, 2021); Order, *Pivotal Software, Inc. v. Super. Ct. of California*, No. S267949 (Cal. April 14, 2021).

327 Securities Industry and Financial Markets Association's Amicus Curiae Brief in Support of Petitioners, *Pivotal Software, Inc. v. Super. Ct. of California*, *City and County of San Francisco*, No. 20-1541, 2021 WL 3809706, at *5 (U.S. Aug. 23, 2021); Chamber of Commerce of the United States of America and the Securities Industry and Financial Markets Association's Amicus Curiae Brief in Support of Petitioners, *Pivotal Software, Inc. v. Zhung Tran*, No. 20-1541, 2021 WL 1894977 (U.S. May 7, 2021).

328 141 S.Ct. 2884 (2021) (mem.).

329 Order Granting Motion Regarding a Discovery Stay, *Daniel Ocampo v. Dominic Williams*, No. 21-CIV- 03843 (Cal. Super. July 25, 2022).

330 *Id.* at p. 3.

331 *Id*. (citing 15 U.S.C. § 77z-2).

332 *Id.* at p. 6 (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320 (2007)).

333 *Id*. at p. 8 (citing *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 200 L. Ed. 2d 332 (Mar. 20, 2018)).

334 *Id.* at pp. 7–8 (citing Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), PL 105–353, November 3, 1998, 112 Stat. 3227, Nov. 3, 1998)).

335 *Id*. at p. 8.

336 *Id.* at p. 9.

337 *Wong v. Restoration Robotics, Inc.*, 78 Cal.App.5th 48 (2022); *Matter of Sundial Growers, Inc. Sec. Litig.*, 191 A.D.3d 543 (N.Y. App. Div. 2021); *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020) (*reversing Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018), *judgment entered* (Del. Ch. 2019), *vacated* (Del. Ch. 2020), and *reversed*, 227 A.3d 102 (Del. 2020)).

338 Jones Day, *2020 Securities Litigation Year in Review* at 13–15 (Feb. 2021).

339 *Cyan, Inc. v. Beaver County Employees Retirement Fund*, 200 138 S. Ct. 1061 (2018).

340 *Salzberg*, 227 A.3d 102.

341 Notably, all reported trial court cases addressing challenges to FFPs have found them to be valid and enforceable.

342 *Id.* at 61 (Article VIII of the company's amended Certificate of Incorporation filed as an exhibit to its IPO offering materials was entitled "Exclusive Forum" and contained the following forum-selection clause: "Unless the Corporation consents in writing to the selection of an alternative forum, the federal district courts of the United States of America shall be the exclusive forum for the resolution of any complaint asserting a cause of action arising under the Securities Act of 1933, as amended. Any person or entity purchasing or otherwise acquiring any interest in any security of the corporation shall be deemed to have notice of and consented to this Article VII.").

343 *Wong*, 78 Cal.App.5th at 62 (citing 15 U.S.C. § 77v(a)).

344 *Id.* at 63.

345 *Id.* at 65 (citing 15 U.S.C. § 77n).

346 *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477 (1989) (holding that a plaintiff's decision to litigate Securities Act claims in state court could be overridden by means of an arbitration provision, "which are 'in effect, a specialized kind of forum-selection clause.'").

347 *Id.* at 481 (citing *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220 (1987) (holding that an arbitration provision is enforceable and did not violate the anti-waiver provision of Section 77n of the Securities Exchange Act)).

348 78 Cal.App.5th at 60.

349 *Id.* at 490.

350 *Id.* at 356 (quoting *Howlett By & Through Howlett v. Rose*, 496 U.S. 356, 371, 378 (1990)); *see also* Del. Gen. Corp. Law §§ 102(b)(1) and 115.

351 *Id.*

352 *Id.* at 75.

353 *Id.* (citing the Delaware Supreme Court's decision in *Salzberg*, which we analyzed in our 2020 *Review*. *See* Jones Day, *2020 Securities Litigation Year in Review* at 13–14 (Feb. 2021)).

354 *Id.* at 76.

355 *Id.*

356 *Id.* at 79.

357 *Seafarers Pension Plan on behalf of Boeing Co. v. Bradway*, 23 F.4th 714 (7th Cir. 2022).

358 *Id.* (quoting the Boeing bylaw in relevant part: "With respect to any action arising out of any act or omission occurring after the adoption of this By-Law, unless the Corporation consents in writing to the selection of an alternative forum, the Court of Chancery of the State of Delaware shall be the sole and exclusive forum . . . for any derivative action or proceeding brought on behalf of the Corporation. . .").

359 *Id.*

360 *Id.*

361 *Id.*

362 *Id.* at 714.

363 *Id.* at 720 n.2.

364 *Id.*

365 *Id.* at 721 (citing *Salzberg*, 227 A.3d 102 (Del. 2020)). We address the significance of *Salzberg* in our discussion of a recent California appellate decision upholding a federal forum-selection provision enacted by Delaware corporations requiring that claims asserted under the Securities Act be brought in federal court, *see supra* page 26.

366 *Id*.

367 *Id.* at 745 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

368 *Id.* at 732.

369 482 U.S. 220, 227-28 (1987).

370 23 F.4th at 730 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

371 *Id.* at 731.

372 *Id.* at 720 (citing Del. Code Ann. Tit. 8, § 115 (2015)).

373 *Id.* at 732.

374 *Lee v. Fisher*, 34 F.4th 777 (9th Cir. 2022).

375 *Id.* at 779.

376 *Id.* at 782. Notably, in her petition for rehearing *en banc*, plaintiff disputed the panel's statement that she had conceded either the validity of the forum-selection bylaw or its applicability to the case. *See also, e.g.*, Appellant's Petition for Rehearing *En Banc* at 7, n.2, *Lee v. Fisher*, No. 21-15923 (9th Cir. June 24, 2022), ECF No. 50.

377 *Id.* (citing Order Granting Rehearing *En Banc* and Vacating Three-Judge Panel Decision, *Lee v. Fisher*, No. 21-15923 (9th Cir. Oct. 24, 2022), ECF No. 55).

378 *Id.* at 780.

379 *Id*. (internal citations omitted).

380 *Id.* (citing *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 52 (2013) and *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)).

381 *Id.* at 781 (internal citations omitted).

382 *Id.* at 780 (citing *Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1090 (9th Cir. 2018)).

383 *Id.* at 781.

384 *Id.* at 777 (citing *Yei A. Sun*, 901 F.3d at 1090).

385 *Id.* at 781 (citing *Shearson/American Exp., Inc.*, 482 U.S. at 228).

386 *Id.* at 782 (citing *State ex rel. Donahue v. Holbrook*, 136 Conn. 691 (Conn. 1950) (rejecting facial challenge to enforceability of forum-selection bylaw where plaintiffs failed to show that the bylaws could not operate lawfully or equitably under any circumstances.)).

387 *Id.*

388 *Id.*

389 13 F.4th 940 (9th Cir. 2021). We provided a detailed analysis of the Ninth Circuit's majority and dissenting opinions in last year's *Review*; *see* Jones Day, *2021 Securities Litigation Year in Review* at 37-38 (Feb. 2022).

390 *Id.* at 947.

391 *Id*. at 948.

392 *Id.* at 953.

393 *Id.*

394 Order, *Pirani v. Slack Techs., Inc.*, No. 20-16419 (9th Cir. May 2, 2022), ECF No. 75.

395 *Slack Techs., LLC v. Pirani*, No. 22-200, 2022 WL 4080632 (U.S. Aug. 31, 2022).

396 *Id*. at *32.

397 *Ontario Pub. Serv. Emp. Union Pension Tr. Fund v. Nortel Networks Corp*., 369 F.3d 27, 30 (2d Cir. 2004) (citing *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946); *Superintendent of Ins. of State of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971)).

398 *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) (adopting purchaser-seller rule first articulated by the Second Circuit in *Birnbaum v. Newport Steel Corp*., 193 F.3d 461 (2d Cir. 1952)).

399 *Menora Mivtachim Ins. Ltd. v. Frutarom Indus. Ltd.,* 54 F.4th 82 (2d Cir. 2022).

400 *Id*. at 86.

401 *Id.* at 85.

402 *Id*. at 86-87.

403 *Id*. at 86.

404 *Id*. at 87 (citing *Blue Chip Stamps*, 421 U.S. at 755).

405 *Id*. at 87.

406 *Id*. at 87-88 (citing *Nortel*, 369 F.3d 29 (2d Cir. 2004)).

407 *Id*. at 88.

408 *Id*. (citing *NYSE Specialists Sec. Litig*., 503 F.3d 89, 102 (2d Cir. 2007)).

409 *Id*.

410 *Id.* at 88-89. Judge Pérez concurred with the judgment but wrote separately to state her view that the court could have resolved the question presented solely based on application of the court's reasoning in *Nortel*.

411 *See* Complaint, *Fagen v. Enviva Inc.*, No. 22-cv-02844 (D. Md. Nov. 3, 2022); Complaint, *Rosencrants v. Danimer Scientific, Inc.*, No. 21-cv-02708 (E.D.N.Y. May 14, 2021).

412 Ramkumar, *supra* note 39.

413 *See* Complaint, *Special Opportunities Fund, Inc. v. FAST Acquisition Corp.,* No. 2022-0702 (Del. Ch. Aug. 9, 2022).

414 Speech, Chair Gary Gensler, U.S. Sec. & Exch. Comm'n, "Prepared Remarks of Gary Gensler On Crypto Markets Penn Law Capital Markets Association Annual Conference" (April 4, 2022).

415 Securities Class Action Clearinghouse, *supra* note 6.

416 INSTITUTIONAL S'HOLDER SERVS., *supra* note 6.