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KESSLERTOPAZ MELTZERCHECK LLP

AMENDING THE COMPLAINT TO LEVERAGE FACTS UNEARTHED IN DISCOVERY AND STRENGTHEN THE CLASS'S CLAIMS

Vanessa M. Milan, Esquire, Joshua A. Materese, Esquire, and Joshua E. D'Ancona, Esquire

While securities fraud litigators often point to dispositive motions as key moments where the claims-at-issue in a case can be clarified and refined, in two ongoing cases, KTMC has taken another, less-prevalent approach to aggressively strengthen class member claims mid-litigation. Namely, in two hard-fought cases — *In re Celgene Corporation Securities Litigation* ("*Celgene*") and *Sjunde AP-Fonden v. General Electric Company* ("*GE*") — KTMC won motions to amend the complaint based on facts unearthed during extensive fact discovery. In each case, the amendments enlarged the claims at issue, and provided significant momentum for the plaintiffs

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SEC PROPOSED RULES REGARDING CLIMATE-RELATED DISCLOSURES WOULD BE A WIN FOR INVESTORS

Barbara A. Schwartz, Esquire, and Karissa J. Sauder, Esquire

In March 2022, the United States Securities and Exchange Commission (the "SEC") proposed new rules that would require public companies to make extensive climate-related disclosures (the "Proposed Rules").[1] The Proposed Rules would require public companies to disclose, *inter alia*, their greenhouse gas emissions, the emissions of certain upstream and downstream supplies, material climate-related risks to the business, and the governance and oversight processes that have been put into place to monitor climate-related risk at the company.[2]

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[1] *See SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, U.S. Securities and Exchange Commission (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46.

[2] *See* The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (Apr. 11, 2022).

GREENWASHING: A NEW COLOR OF CORPORATE MISCONDUCT

Thomas H. Kjærgaard, *Founder at Kjærgaard Capital & Advisor to Kessler Topaz Meltzer & Check*

Environmental, social, and governance (ESG) criteria are a set of standards companies and investors use to screen potential investments in an effort to become and remain socially conscious. Greenwashing occurs when an organization spends more time and money on marketing itself (or one of its products or executives) as environmentally or climate friendly, or pursuing ESG initiatives, than on actually minimizing the environmental impact. Put differently, it is to position a company as more environmentally or climate friendly than it is.

The extent to which a company engages in greenwashing varies. Often, greenwashing is conducted within the limitations of the law and, to some extent, greenwashing has become accepted by consumers. We are accustomed to companies twisting, framing, and promoting product attributes favorably in the market and in line with initiatives that are at the forefront of society at the time.

But as the world, at least in theory, transitions to a "greener" future, we must continue to look critically at what companies say and how they operate, and, in turn, how those words and actions impact investors' pursuit of their own ESG initiatives.

Green Temptations

Since the 1990s consumers and politicians have gradually accepted that human-made CO2 emissions cause — or at least — contribute to climate change. Consumers today are faced with the environmental and ecological distress that is caused by increasing populations and mass production. NGOs, non-governmental organizations, are groups or institutions with a social mission, which operate independently from the government. NGOs are effective in investigating and uncovering corporate misconduct, even in remote locations and at the very beginnings of global value chains.

Consequently, companies have seen an increasing commercial incentive to position themselves as part of the green solution instead of part of the problem (to use a favorite NGO-ultimatum). Every inch of energy efficiency in a process, recyclability in a product, or strategic ambition to meet a more sustainable future rather sooner than later is therefore used in the competition to win — or at least not to lose — market share. We want companies to compete fiercely, so we can enjoy the fruits of their ingenuity — the same is true in our pursuit to solve climate change and environmental distress. But, greenwashing is the price we are paying — at least in the short run.

True crime or marketing mishap

Leaning into the connotation of whitewashing, greenwashing — paradoxically a "washed" expression itself — is not comparable to other types of corporate and financial crime such as money laundry, corruption, terror financing or tax evasion.

Most are now familiar with the Volkswagen "clean diesel" scandal — the company cheated in engine tests and lied to customers about it. The German car manufacturer was fined substantially in 2016 in the US. Lying and misleading is illegal, but it is regulated very differently across countries and regions. Earlier this year the French oil- and gas company Total Energies rebranded itself; and subsequently faced a greenwashing lawsuit by climate activists. Even DWS, the Deutsche Bank owned asset manager, has had a hard time understanding its own "green" playbook. On June 1, 2022, DWS CEO, Asoka Woehrmann, announced he would step down only one day after prosecutors raided DWS offices over allegations that the company misled investors about its green funds. Apparently, DWS did none of the ESG-steps it promised investors. To some extent creativity is part of the playbook, but misleading and neglecting promises is not. Did DWS confuse itself?

Only time will tell whether complicity in greenwashing activities will be viewed as just another byproduct of corporate ambition and marketing-gone-bad or repulsed as a true crime.

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GUEST AUTHOR

Thomas H. Kjærgaard

Thomas is an ESG pioneer in the Nordics who headed Danske Bank Group's Responsible Investment programme for many years. After leaving Danske Bank, Kjaergaard teamed up with Nordea Life & Pension, as Head of Investment Governance and ESG. Alongside these accolades, he has been engaged in UN PRI and IIGCC working groups to improve the standards in the industry and founded Dansif in 2009 where he also served as chairman of the board.

He currently works as an advisor to Kessler Topaz Meltzer & Check, professional investors, and as an external lecturer at Copenhagen Business School.

KTMC OBTAINS CLASS CERTIFICATION IN CASE AGAINST GOVERNMENT FOR RECOVERY OF ACA TRANSITIONAL REINSURANCE PROGRAM CONTRIBUTIONS

Jon Neumann, Esquire

KTMC is lead counsel in a novel case seeking recovery of contributions (payments) made by self-insured entities in connection with the Patient Protection and Affordable Care Act ("ACA"), and specifically its Transitional Reinsurance Program ("TRP"), for benefit years 2014-2016. The case is pending in the U.S. Court of Federal Claims ("Court of Claims"), a court that has jurisdiction to hear cases for monetary damages against the U.S. Government ("Government").

On June 22, 2022, KTMC notched a significant victory: the Court certified a class of all self-insured, self-administered entities ("SISAs") who made TRP contributions for benefit year 2014 (as defined below, the "Exaction Class"). These payments total in the hundreds of millions of dollars. The Court recently ordered KTMC to send notice of the pendency of the suit to members of the Exaction Class by September 12, 2022. The notice packet will include an opt-in form that Exaction Class members must complete and return within 60 days if they wish to be included in the litigation. As explained in greater detail below, unlike a traditional class action where class members are included unless they opt-out, here putative class members must affirmatively opt-in to join this action.

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LOSS CAUSATION IN SECURITIES FRAUD CASES BROUGHT IN THE WAKE OF GOVERNMENT INVESTIGATIONS

Matthew L. Mustokoff, Esquire and Stacey M. Kaplan, Esquire

This article originally appeared in the April, 2022 edition of The NAPPA Report.

Shareholder litigation and government investigations often go hand in hand when large-scale corporate misconduct occurs and investment losses are suffered. In such cases, the plaintiff's burden of establishing "loss causation" is not always straightforward. Loss causation is the connection between the defendant's misrepresentations and the stock price decline that results when information concealed by those misrepresentations is revealed.

Loss causation is one of the most hotly-contested areas in securities fraud litigation. In particular, the question of whether disclosures regarding a government investigation can give rise to loss causation — and whether the resulting stock drop can give rise to damages — is one with which the courts have grappled with for the last seventeen years since the Supreme Court established the loose contours of the pleading requirement for loss causation in *Dura Pharmaceuticals, Inc. v. Broudo*.[1] This article examines the courts' treatment of the issue and surveys decisions from some of the most newsworthy corporate scandals in recent memory, including the "1MDB" Malaysian sovereign wealth fund scandal and the industrywide price-fixing conspiracy in the US generic drug markets.

To establish loss causation, a plaintiff must demonstrate a "causal connection" between the plaintiff's loss and the defendant's misrepresentations — for example, by establishing that the "share price fell significantly after the truth became known."[2] The element of loss causation — and particularly, what sort of "corrective disclosures" are sufficiently "causally connected" to the defendants' alleged fraud — has been a major area of contention in Rule 10b-5 litigation. Thus, in shareholder suits stemming from regulatory probes, disputes often arise over whether disclosures regarding government investigations can serve as corrective disclosures. While courts in every circuit recognize that announcements regarding government investigations can constitute corrective disclosures under some conditions, there is disagreement about exactly what circumstances suffice.

For instance, the Eleventh Circuit holds that "the commencement of an SEC investigation, without more, is insufficient to constitute a corrective disclosure" because "[t]he announcement of an investigation reveals just that — an investigation — and nothing more."[3] Nevertheless, the Eleventh Circuit is clear that its holding is *not* "that an SEC investigation could *never* form the basis for a corrective disclosure" but rather that "the disclosure of an SEC investigation,

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1 544 U.S. 336, 347 (2005).

2 *Dura*, 544 U.S. at 347.

3 *Meyer v. Greene*, 710 F.3d 1189, 1201 (11th Cir. 2013).

AMENDING THE COMPLAINT TO LEVERAGE FACTS UNEARTHED IN DISCOVERY AND STRENGTHEN THE CLASS'S CLAIMS

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as the parties moved towards expert discovery, summary judgment and trial.

Celgene

In *Celgene*, Lead Plaintiff AMF Pensionsförsäkring AB ("AMF") filed a first amended complaint in the District Court of New Jersey on February 27, 2019 alleging that Defendants Celgene Corporation ("Celgene"), and former executives Terrie Curran, Philippe Martin, and Scott Smith among others made fraudulent misrepresentations and omissions regarding two of Celgene's drugs: Otezla and Ozanimod.[1]

Based on eyewitness accounts of former Celgene employees, AMF alleged that Celgene and its executives made public statements throughout 2015 and 2016 that Otezla — used to treat psoriatic arthritis and psoriasis — was on track to meet its 2017 sales guidance despite early internal warnings and knowledge that the guidance was unachievable.[2] Impediments included: (i) strong competitor drugs that physicians deemed more established and more effective than Otezla, (ii) the saturation of the market by competitor drugs, suppressing demand for Otezla, (iii) a poor pricing strategy that relied on offering steep discounts to induce insurance companies to cover Celgene's less effective drug, (iv) limited patient access, and (v) a Celgene policy that allowed wholesalers to purchase Otezla in excess of their demand before a price increase took effect.[3] The truth was revealed to the market on October 26, 2017, when Celgene announced it was lowering its 2017 Otezla sales guidance by more than $250 million, causing its stock price to plummet.[4]

Meanwhile, Defendants publicly stated that a New Drug Application ("NDA") for major new drug Ozanimod (a treatment for relapsing multiple sclerosis and ulcerative colitis) would be filed with the FDA by the end of 2017.[5] FDA guidance required extensive additional testing prior to that submission if Celgene discovered the presence of an active metabolite — a drug byproduct that remains in the body after a drug breaks down and impacts drug safety.[6] Thus, when Celgene found a major active metabolite during the Class Period, Celgene employees explicitly warned executives that the Ozanimod NDA could not be filed by the year-end 2017 deadline given the need to perform substantial further tests.[7] Ignoring these warnings and concealing the discovery of the metabolite and its impact on the Ozanimod NDA, Celgene pressed on to submit the NDA in December 2017 despite a severe likelihood of rejection.[8] As predicted internally, Celgene received a refuse to file letter from the FDA, causing a massive stock price decline.[9]

In partially denying the defendants' motion to dismiss, in a December 2019 opinion District Court Judge John Michael Vazquez sustained (i) multiple statements Defendant Curran and Celgene made about Otezla's ability to achieve the 2017 sales guidance and (ii) multiple statements by Defendants Martin, Smith, and Celgene regarding Celgene's Ozanimod NDA submission, as well as omissions by these defendants of information about the discovery of the active metabolite.[10] Other categories of misstatements were dismissed.[11]

After those claims were sustained, in fact discovery, the KTMC team reviewed nearly five million pages of documents and conducted twenty depositions of Celgene employees, former employees and consultants.[12] In this process, KTMC discovered new evidence to bolster the existing claims against the defendants and evidence that would support the assertion of a

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1 *See* Second Amended Consolidated Class Action Complaint (hereinafter "SAC"), *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 57.

2 Third Amended Consolidated Class Action Complaint (hereinafter "TAC"), *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 178-1 at ¶¶ 92-207.

3 *Id*. at ¶¶ 94-115, 119-28, 138-207.

4 *Id*. at ¶¶ 208-216.

5 *Id*. at ¶¶ 218-220.

6 *Id*. at ¶¶ 229-46.

7 *Id*. at ¶¶ 254-95.

8 *Id*. at ¶¶ 304-39.

9 *Id*. at ¶¶ 340-49, 356-62.

10 Op. Mot. to Dismiss, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 75 at 28-46.

11 *Id*.

12 Mot. to Amend, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 136 at 4.

fraudulent misstatement that was not pleaded in the current complaint.[13] Thus, as fact discovery came to a close, AMF moved to amend the complaint to, among other things: (i) allege a new misrepresentation by Curran made to investors about Otezla's market share and level of prescriber adoption based on evidence demonstrating that her statement was contrary to data she had reviewed; (ii) allege new facts supporting Smith's personal authority and responsibilities related to publishing the already-sustained misstatements and omissions about the Ozanimod NDA; and (iii) conform the pleadings to other evidence developed in fact discovery that supported the scienter of Smith, Martin, Curran and Celgene itself.[14]

On February 24, 2022, Magistrate Judge James Clark granted the motion to amend predicated on AMF's "extensive additional allegations" "after lengthy discovery."[15] Magistrate Judge Clark found that AMF had demonstrated that the proposed amendments were sufficient to plead the new alleged misrepresentation by Curran,[16] and sufficiently detailed to plead that Smith made knowingly false statements about Ozanimod.[17] On March 9, 2022, the defendants appealed this decision to the district court.[18]

On June 1, 2022, the district court affirmed the magistrate judge's opinion.[19] In his opinion, Judge Vazquez also clarified the scope of the case. The court's December 2019 motion to dismiss opinion[20] had not explicitly analyzed each alleged misstatement, leaving the door open for the defendants to repeatedly argue that certain misstatements not specifically discussed in the opinion had been dismissed.[21] Judge Vazquez's opinion on the motion to amend confirmed (as AMF had argued all along) that "Defendants' position that this Court previously dismissed the corporate statements is incorrect."[22] Reviewing his own prior analysis, Judge Vazquez affirmed that the scope of the case was much larger than Defendants had insisted.[23]

AMF thus entered expert discovery with the momentum of winning a long-standing disagreement between the parties over the scope of the case, adding a significant new misrepresentation by the defendants, and with the ability to rely on a complaint that tells a detailed and compelling story of Celgene's fraud and the culpability of its executives.

GE

In *GE*, Lead Plaintiff Sjunde AP-Fonden ("AP7") and Additional Plaintiff Cleveland Bakers and Teamsters Pension Fund alleged that the company and its former Chief Financial Officer, Jeff Bornstein, made false and misleading statements and omissions regarding the true nature and extent of GE's reliance on factoring to meet cash flow targets and to conceal downturns in the business.[24] Among other claims, plaintiffs alleged that: (i) Defendants failed to disclose in GE's financial statements material facts and trends regarding the Company's factoring practices in violation of Item 303 of Regulation S-K and Section 10(b)[25]; and (ii) Defendant Bornstein materially misled the market during a January 20, 2017 earnings conference call about GE's reliance on factoring with GE Capital, GE's financing arm, and its supposed outsized contribution to the Company's 2016 cash performance.

In a January 29, 2021 opinion, Judge Jesse M. Furman sustained plaintiffs' claims related to GE's misstatements and omissions about factoring in its SEC filings and financial statements, including as required by Item 303[26] and sustained claims of control person liability against Bornstein.[27] However, the court dismissed the alleged claims based on Bornstein's January 20, 2017 statement.[28] Plaintiffs had alleged that on a January 20, 2017 earnings call, when asked "[I]s there any factoring this quarter from GE Capital into GE [I]ndustrial?", Bornstein stated:

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[13] *Id*. at 4-11.

[14] *Id*.; *see* TAC, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 178-1.

[15] Letter Order, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 173 at 8.

[16] *Id*. at 8-12.

[17] *Id*. at 5-8.

[18] Defs.' Appeal of Magistrate Judge Decision, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 180.

[19] Op. Mot. to Amend, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 206.

[20] Op. Mot. to Dismiss, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 75

[21] *See id*. at 6-7; Opp. Br. to Pltf.'s Mot. Class Cert., *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 95 at 22; Opp. Br. to Pltf.'s Mot. Amend, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 145 at 5-9.

[22] Op. Mot. to Amend, *In re Celgene Corporation*, No. 2:2018-cv-04772 (D.N.J. 2018), ECF No. 206. at 6.

[23] *Id*. at 7.

[24] Sixth Amended Consolidated Class Action Complaint (hereinafter "6AC"), *Sjunde AP-Fonden v. General Electric Company*, No. 1:2017-cv-08457 (S.D.N.Y. 2017), ECF No. 327.

[25] *See* Item 303(b)(1)(i) (requiring disclosure of SEC filings "any known trends . . . that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way.")

[26] Op. Mot. to Dismiss, *Sjunde AP Fonden v. General Electric Company,* No. 1:2017-cv-08457 (S.D.N.Y. 2017), ECF No. 206 at 30.

[27] *Id*. at 32.

[28] *Id*. at 28.

AMENDING THE COMPLAINT TO LEVERAGE FACTS UNEARTHED IN DISCOVERY AND STRENGTHEN THE CLASS'S CLAIMS

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> So within that accounts receivable performance you asked about factoring. For the total year, factoring with GE Capital was a $1.6 billion change for the year. It was $1.7 billion last year, so actually year-to-year it was $100 million less of a benefit in the year between what we did with GE Capital around factoring. And in the fourth quarter importantly, and you see it because our receivables improved $500 million, is from the third to fourth quarter of 2015, the benefit was $2.3 billion, the benefit going from this past third quarter to this quarter was $700 million. So it was actually down $1.6 billion year-to-year between third and fourth quarter each of those years. So there's very good underlying performance here. It's not just about, it's actually very little to do with GE Capital factoring.[29]

The court dismissed these statements on scienter grounds, holding that the "simultaneous disclosure of the actual factored dollar amounts in [the fourth quarter of] 2015 and 2016 in the very same statement undermines any inference that he intended to deceive investors or was reckless regarding the risk that they might be misled."[30]

However, through eleven depositions and the review of over 200,000 documents, evidence emerged supporting those dismissed statements by Bornstein, including facts concerning his knowledge of GE's factoring with GE Capital and this practice's contribution to GE's reported cash figures.[31] Armed with this new information, and nearing the close of fact discovery, plaintiffs filed a motion seeking leave to amend their complaint to revive their claim against Bornstein, laying out for the court exactly how their proposed pleading would cure the very deficiencies the court had previously identified.[32] Specifically, plaintiffs pled new evidence-based allegations that provided more details about why the statements were false and how Bornstein knew they were false at the time he made them.[33]

On April 11, 2022, after contested motion practice, the court issued its opinion granting the motion to amend and permitting plaintiffs to pursue the previously dismissed claim against Bornstein based on his January 20, 2017 statements.[34] In his Order, Judge Furman first examined whether plaintiffs had met the high threshold of the good cause standard, finding they did: "Plaintiffs could not have successfully filed their proposed amendment before receiving the documents they received during fact discovery; indeed, they tried to plead the same claim without the benefit of discovery, and it was twice dismissed."[35]

Next, Judge Furman analyzed whether the proposed amendment would have been "futile." An amendment is futile if its allegations would not be sufficient to withstand a motion to dismiss.[36] When analyzing futility, judges utilize the same standard of review that they use to decide a motion to dismiss. Applying this standard, Judge Furman found that the proposed allegations based on the new evidence were sufficient to meet that pleading standard.[37] Specifically, Judge Furman concluded that plaintiffs, using previously-unavailable evidence, adequately alleged that Bornstein knew that GE had expanded its use of factoring between 2015 and 2016, and misrepresented that change in his January 20, 2017 statements.[38]

Judge Furman's decision rested on critical facts plaintiffs obtained in discovery, including (i) documents provided to Bornstein before January 20, 2017 demonstrating that the total amount of factoring transactions had increased; (ii) deposition testimony of a former GE employee who stated that the numbers Bornstein disclosed on the call were manipulated; (iii) a document

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[29] 6AC, *Sjunde AP-Fonden v. General Electric Company*, No. 1:2017-cv-08457 (S.D.N.Y. 2017), ECF No. 327 at ¶¶ 429-31.

[30] Op. Mot. to Dismiss, *Sjunde AP-Fonden v. General Electric Company*, No. 1:2017-cv-08457 (S.D.N.Y. 2017), ECF No. 206 at 28.

[31] Mot. to Amend, *Sjunde AP-Fonden v. General Electric Company*, No. 1:2017-cv-08457 (S.D.N.Y. 2017), ECF No. 280 at 3.

[32] *See generally id.*

[33] *Id.* at 1-2.

[34] Op. Mot. to Dismiss, *Sjunde AP-Fonden v. General Electric Company*, No. 1:2017-cv-08457 (S.D.N.Y. 2017), ECF No. 314 at 10.

[35] *Id.* at 12.

[36] *Id.* at 11.

[37] *Id.* at 13-15.

[38] *Id.*

suggesting that GE created two sets of factoring data — one for internal use and one to be disseminated externally; and (iv) Bornstein's deposition testimony in which he stated that he shared a document with GE's lawyers shortly after his misrepresentation and explained that the use of factoring had escalated.[39] These facts showed that the proposed amendment was not futile — and would likely withstand any motion to dismiss for failure to state a claim.

With fact and expert discovery now behind them, the *GE* plaintiffs head into summary judgment in what was already a strong case with the benefit of a newly-sustained, additional claim against the individual defendant in the case.

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As demonstrated by the *Celgene* and *GE* cases, there is tremendous potential value in not only building a strong evidentiary record during fact discovery, but in leveraging it, when appropriate, to bolster the class's claims through a motion to amend the complaint based on facts established in discovery. Through such motions around the close of fact discovery, the litigation teams in *Celgene* and *GE* were able to both reinforce their existing claims and to allege powerful additional fraudulent misrepresentations. Both cases are stronger, larger in scope, and potentially more valuable in terms of the potential damages and recovery for Class Members as a result. Not every case will present similar opportunities in fact discovery. But KTMC will be ready to seize them when they do. ■

[39] *Id.* at 14-15.

GREENWASHING: A NEW COLOR OF CORPORATE MISCONDUCT

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Investor Opportunism and Confusions

The investor community is not exempted from ESG pressures, or confusion. ESG is no longer a niche option for avant-garde or values-based investors. A recent paper published by European Securities and Markets Authority (ESMA) in May 2022 concludes that ESG (environmental, social, and governance) funds at the end of 2021 had an almost 20% of market share among all UCITS (i.e., "Undertakings for the Collective Investment in Transferable Securities") funds domiciled in the European Union (EU). In other words, ESG is now a steady component of big business, and it has caused major confusion among regulators, fund managers and institutional and retail investors: What is an ESG-fund — besides being a fund putting special emphasis on environmental, social and governance characteristics? There is no commonly accepted definition, and it is up to every fund manager's skill and creativity to make up their own (green) success criteria, which is what they do.

In general, the investor community has a big task ahead explaining the pure basics of sustainability. For example, why does Tesla, the electric car manufacturer, not qualify for an ESG-index, but Exxon Mobil does? It made headlines when the S&P left Tesla out, but left the oil giant in the S&P500 ESG Index. In the fund industry, many insiders do not know that ESG data assesses a company's risk, and not its actual impact on the planet. An "impact index," on the other hand, leverages impact data and will almost certainly come to the opposite conclusions about the two companies. Confused yet? Similarly, today, one will find a multitude of "Paris-aligned" investment funds well-exposed to the fossil fuel industry that heroically promise carbon neutrality in 2050, the year of net-zero CO2 emissions if temperature increases should be kept below 2 degrees. The fund industry's communication about future emission levels is probably the most frequent greenwashing risk for the time being.

Steps in the right direction to prevent greenwashing

Years back the EU Commission and Parliament decided that sustainability was too important to be left unregulated. The EU wanted to transform into a green region and to provide better investor (and consumer) protection. The EU Sustainable Finance Disclosure Regulation (SFDR) is a major European step to guide investments and consumers in more sustainable directions.

The SFDR is a new regulation that requires financial service providers and owners of financial products to assess and disclose ESG considerations publicly. Its purpose is to provide transparency on sustainability within the financial community, further the EU's goal to meet its Paris Agreement ambitions — CO2 net-zero emissions in 2050, and to prevent greenwashing. One of the tools in the SFDR, the EU Taxonomy, establishes certain criteria that determine whether an economic activity is, in fact, an environmentally sustainable investment. Leaving aside that the EU parliament decided on July 6, 2022, to categorize some gas and nuclear energy technologies as sustainable, the SFDR is very helpful for EU's ambitions and to companies and consumers. When fully implemented in 2024, the SFDR will be a valuable resource for fiduciary and stewardship responsibilities. It provides a solid framework for investing in climate and environmentally friendly companies and is a framework that will reduce the green equivocality and uncertainty. For now, SFDR is a significant step forward for all in the EU, but the green transition's finish line is still far away. ■

KTMC OBTAINS CLASS CERTIFICATION IN CASE AGAINST GOVERNMENT FOR RECOVERY OF ACA TRANSITIONAL REINSURANCE PROGRAM CONTRIBUTIONS

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I. Case History and Background

KTMC filed the first complaint on behalf of self-insured entities in 2016, alleging that mandatory TRP contributions amounted to an illegal tax. The firm litigated a motion to dismiss in the U.S. District Court for the District of Maryland and an appeal to the Fourth Circuit Court of Appeals, and ultimately the case was dismissed for jurisdictional (non-substantive) reasons. Both courts concluded that the proper venue for Plaintiffs' case was the Court of Claims. Recognizing this possibility, KTMC filed a parallel action in the Court of Claims, which is ongoing.

In July 2021, the Court of Claims denied the Government's motion to dismiss and sustained Plaintiffs' two theories of liability: that, under the U.S. Constitution, the Government's act of requiring self-insured entities to pay the TRP contribution amounted to: (1) an illegal exaction in violation of the Fifth Amendment's Due Process Clause (on behalf of the "Exaction Class"), and (2) a taking in violation of the Fifth Amendment's Takings Clause (on behalf of the "Takings Class"). While both the exaction and takings claims are currently being litigated, this article focuses on Plaintiffs' illegal exaction claims.

Plaintiffs' allegations stem from one of the key reforms of the ACA: its mandate that commercial insurers cover high-risk persons who were previously denied coverage. To offset these new costs, the ACA created a reinsurance pool, known as the TRP, and imposed a charge on commercial insurers including "health insurance issuers, and third party administrators on behalf of group health plans."[1] Congress also included instructions regarding the method of calculating the TRP payment which would be determined by reference to each health insurance issuer's "commercial book of business."[2] In all, the TRP was to raise $10 billion for 2014, $6 billion for 2015, and $4 billion for 2016.

Congress further delegated authority to the U.S. Department of Health and Human Services ("HHS"), in consultation with the National Association of Insurance Commissioners ("NAIC"), to implement the TRP. Acutely aware of the need for insurance industry support as the Government rolled out the biggest healthcare reform in generations, HHS expanded the class of entities required to pay the TRP contribution. It announced that non-commercial, self-insured employee health benefit plans were required to contribute to the TRP, even though these plans could never receive TRP funds. The result? Private commercial insurers would pay less but still receive the same benefit in TRP reimbursements.

Members of the Exaction Class have several defining features that differentiate them from the entities that should have been required to fund the TRP. First, and most significantly, none is a commercial health insurance issuer. Rather, they are funded through employee contributions to a benefit trust which exists for the sole purpose of providing health and welfare benefits to its members. Second, they are 100% self-insured. That is, they are closed risk-sharing systems: when participants in the ERISA Funds incur medical expenses, those expenses are paid for out of the trust funds. Third, they are 100% self-administered, meaning they do not use a third-party administrator. And finally, even before the ACA's reforms, they did not exclude participants on the basis of being high-risk or having pre-existing conditions.

Given these features, coupled with aggressive lobbying by the labor industry, HHS eventually conceded that it had wrongly required SISAs to make the TRP contribution. Then-Secretary Sylvia Matthews Burwell admitted that "the better reading of section 1341 is that a self-insured, self-administered plan should not be a contributing entity," and agreed that Section 1341(b)(1)(A) of the ACA "does not refer to self-insured, self-administered plans."[3] But even though it excused SISAs from the 2015 and 2016 payments, HHS still required these plans to pay the TRP contribution in 2014 (the most expensive year of the program). The agency's justification was that relieving these plans from the obligation to pay the contribution would be administratively inconvenient and "disruptive to [commercial] plans and [private] issuers." [4]

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[1] 42 U.S.C. § 18061(b)(1)(A).

[2] 42 U.S.C. § 18061(b)(3)(B).

[3] 79 Fed. Reg. 13744

[4] 78 Fed. Reg. 72322-01.

II. The Court Sustains Plaintiffs' Illegal Exaction Claims for Payment of the 2104 TRP Contribution

In 2021, the Court sustained Plaintiffs' illegal exaction claims. An illegal exaction claim is one in which the plaintiff alleges "the value sued for was improperly paid, exacted, or taken in contravention of the Constitution, a statute, or a regulation" and "the Government has the citizen's money in its pocket."[5] Here, the Court explained that the "central question" underlying this claim is "whether Congress intended for Plaintiffs to make transitional reinsurance contributions under 42 U.S.C. § 18061."[6]

In denying the Government's motion to dismiss, the Court found that the "plain language" of the statute applies only to "health insurance issuers, and third-party administrators on behalf of group health plans" — not SISAs.[7] The Court also rejected the Government's purported justification for including SISAs in the 2014 payment, concluding that "HHS did not have authority to ignore the plain language of the statute in the name of public policy or administrative efficiency."[8]

III. The Court Certifies the Exaction Class, Approves Plaintiffs' Proposed Notice, and Requires Class Members to Opt-In to the Litigation

In March of this year, Plaintiffs negotiated a bifurcated schedule with the Government that streamlines and fast tracks Plaintiffs' illegal exaction claims. Under the bifurcated schedule, Plaintiffs moved for certification of the Exaction Class on April 8, 2022.

The Court granted Plaintiffs' motion in full on June 22, 2022.[9] In so doing, the Court found that the case was well suited to proceed as class action given that (1) the "proposed class's claims 'are based on the same exact government action,' namely HHS requiring self-administered, self-insured entities to pay the TRP contribution for benefit year 2014 in contravention of the plain language of 42 U.S.C. § 18061," and (2) "damages may be calculated using a common methodology," using the Government's own documents and information.[10] In addition to certifying the Exaction Class, the Court appointed KTMC as co-lead counsel, commending it for its investment of "significant time and resources investigating and litigating the claims in this action."[11]

As noted, class actions in the Court of Claims are unique because putative class members must affirmatively opt-in to be considered a member of the class. This is different from traditional class actions, where putative class members are considered parties unless they opt-out of the litigation. The stated purpose of the opt-in rule is "the need for specificity in money judgments against the United States."[12] In other words, where a judgment is ultimately obtained, the Government is entitled to know exactly how much it must pay and to whom.13

Following certification of the Exaction Class, Plaintiffs asked the Court to approve the form and manner of class notice.[14] The Court approved Plaintiffs' motion on July 27, 2022, and ordered Plaintiffs to send notice to putative members of the Exaction Class by September 12, 2022. The notice packet — which will include detailed instructions on how to join the action — will likely be issued shortly after the Labor Day holiday, which this year falls on September 5, 2022. At that point, members of the Exaction Class will have 60 days to fill out a short opt-in form indicating their intent to join the action. Opt-in forms will be provided in the notice packet and available electronically at a dedicated case website.

IV. Conclusion

As is evident by the nearly six years KTMC has been litigating this case, the claims in this litigation are novel and challenging. In fact, they carried significant uncertainty from their inception: there was no case law interpreting Section 1341; the issue of whether a contribution to the Government mandated by statute could be considered an illegal exaction (or taking) is not often litigated; and the ultimate strength of the government's defenses was unknown.

But, as the Court has recognized, the claims are meritorious. KTMC looks forward to its continued prosecution of the action and representation of class members who plainly should not have been required to pay into the TRP. ■

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[5] *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-08 (Ct. Cl. 1967).

[6] *EWTF v. United States*, 155 Fed. Cl. 169, 182 (2021).

[7] *Id.* at 183.

[8] *Id.* at 184.

[9] *EWTF v. United States*, ---Fed. Cl.---, 2022 WL 2252460, at *3 (Fed. Cl. June 22, 2022) (certifying the following Exaction Class: "All self-administered, self-insured employee health and welfare benefit plans that are or were subject to the assessment and collection of the Transitional Reinsurance Contribution under Section 1341 of the Affordable Care Act for benefit year 2014.").

[10] *Id.* at*4

[11] *Id.* at *5.

[12] RCFC 23 rules committee's notes to 2002 revision.

[13] Payments by the Government are made from a so-called "Judgement Fund." As the Supreme Court has explained, the "Judgment Fund is a permanent and indefinite appropriation for '[n]ecessary amounts . . . to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . payment is not otherwise provided for." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1318 n.3 (2020) (quoting 31 U.S.C. § 1304(a)(1)). According to its annual report to Congress, roughly $8.2 billion was paid out of the Judgment Fund in 2021. *See* https://www.fiscal.treasury.gov/judgment-fund/annual-report-congress.html.

[14] *See* RCFC 23(c)(2) ("For any class certified under RCFC 23(b) . . . the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

SEC PROPOSED RULES REGARDING CLIMATE-RELATED DISCLOSURES WOULD BE A WIN FOR INVESTORS

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If adopted, the Proposed Rules would give investors much more clear and consistent information to guide their investing choices. The Rules would also strengthen investors' ability to hold companies accountable for false and misleading statements regarding climate-related issues, urge company decision makers to adopt better climate policies, and more.

The SEC's Increased Attention to Climate Disclosures

In recent years, the SEC has begun examining companies' responsibilities to disclose information about climate change and other environmental, social, and governance ("ESG") issues more closely than ever. The SEC's attention to these matters dates back to at least 2010, when the SEC issued interpretive guidance (the "2010 Guidance") to Item 303 of Regulation S-K, which requires companies to disclose any known trends or uncertainties expected to materially impact revenues or income. In the 2010 Guidance, the SEC stated that climate change might materially impact registrants through legislation, regulation, market trends, and business operations — including direct physical effects that might impact supply and distribution chains or facilities, and other property.[3] Although the 2010 Guidance did not impose specific new disclosure requirements, it suggested that companies may be required under some circumstances to disclose certain climate-related risks.

The SEC's focus on increased climate and other ESG reporting has drastically accelerated under President Biden's administration. For example, in March 2021, the SEC announced the creation of a Climate and ESG Task Force (the "Task Force") within the SEC's Division of Enforcement.[4] The Task Force was created to "develop initiatives to proactively identify ESG-related misconduct" and "analyze disclosure and compliance issues relating to investment advisers' and funds' ESG strategies," as well as to "identify potential violations," including "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules."[5]

Then, in September 2021, the SEC's Division of Corporation Finance published a Sample Letter to provide "sample comments that the Division may issue to companies regarding their climate-related disclosure or the absence of such disclosure" under the 2010 Guidance.[6] The Sample Letter made significant requests for company disclosures pertaining to, *inter alia*, "material effects of transition risks related to climate change that may affect your business, financial condition, and results of operations, such as policy and regulatory changes that could impose operational and compliance burdens, market trends that may alter business opportunities, credit risks, or technological changes," "physical effects of climate change on your operations and results," and "material increased compliance costs related to climate change."[7]

In March 2022, the SEC's Division of Examinations announced that its 2022 examination priorities would include, among other things, ESG investing and that it would review registrants' business continuity and disaster recovery plans, with an eye to the impact of climate risk, and would scrutinize whether registered investment advisors and registered funds accurately disclosed ESG investing approaches and adopted controls designed to prevent violations of the federal securities laws relating to their ESG disclosures.[8] The Division further explained that examinations would review whether advisors'

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[3] *See Commission Guidance Regarding Disclosure Related to Climate Change*, U.S. Securities and Exchange Commission (Feb. 8, 2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf.

[4] *See SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. Securities and Exchange Commission (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

[5] *Id*.

[6] *See Sample Letter to Companies Regarding Climate Change Disclosures*, U.S. Securities and Exchange Commission (Sept. 22, 2021), https://www.sec.gov/corpfin/sample-letter-climate-change-disclosures.

[7] *Id*.

[8] *See SEC Division of Examinations Announces 2022 Examination Priorities*, U.S. Securities and Exchange Commission (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-57.

and funds' voting of client securities aligned with "ESG-related disclosures and mandates, and whether there are misrepresentations of the ESG factors considered or incorporated into portfolio selection."[9]

The March 2022 Proposed Rules

The SEC's recent focus on environmental disclosures has culminated in the Proposed Rules issued on March 21, 2022, providing for a comprehensive set of disclosures addressing material risks, impacts, and opportunities relating to environmental impact. The Proposed Rules, if adopted, would provide investors with consistent and comparable information across public companies and would significantly increase public companies' reporting obligations under the federal securities laws.

Specifically, the Proposed Rules would require public companies to disclose, among other things:

- Climate-related risks that may have a material impact on their businesses;
- Impact of climate-related risks on strategy or outlook;
- Data regarding direct emissions and indirect emissions from purchased energy;
- Emissions data from upstream and downstream activity; and
- Data relating to any publicly set climate-related targets or goals.[10]

As drafted, the Proposed Rules would be phased into effect, with large accelerated filers (generally companies with a public float exceeding $700 million) subject to most provisions in 2024 (for filings pertaining to the 2023 fiscal year).[11]

The SEC has estimated that the Proposed Rules would raise the cost of complying with federal securities disclosure rules from $3.9 billion to $10.2 billion, or around half a million dollars per year for each public company.[12] These high costs reflect the fact that, although many companies voluntarily report some climate-related data, the Proposed Rules will require more extensive (and consistent) reporting.

Possible Effects of the Proposed Rules on Investors

If adopted, the Proposed Rules would be a win for investors simply by substantially increasing the amount of meaningful information they would receive. Companies would be newly required to provide investors with specific warnings about previously undisclosed risks relating to climate, as well as information about companies' own contributions to climate change. As the effects of climate change increase, these disclosures can help investors make much more informed choices.

Additionally, the Proposed Rules are expected to markedly expand investors' opportunities to hold companies accountable for false and misleading statements and omissions. While investors can presently sue — and have sued — for companies' misrepresentations and omissions relating to climate change, cases and legal theories have been relatively limited to date due, in large part, to the absence of concrete rules and guidance.

Notably, Exxon Mobil Corporation ("Exxon") has faced several recent investigations and lawsuits regarding its disclosures relating to climate change. In addition to several government investigations of Exxon's disclosures and omissions regarding the risks and costs of climate change, the state of New York filed suit, alleging that Exxon had violated New York securities laws by "essentially keeping two sets of books in regard to climate change: one presented to the public that accounted for the potential future costs and another internal set in which those costs were disregarded."[13] While New York's action was not successful, an investor class action lawsuit alleging that Exxon violated federal securities laws by misleading shareholders through similar conduct continues to proceed in the Northern District of Texas, where the court partly denied Exxon's motion to dismiss in 2018.[14] Specifically, the court held that plaintiff sufficiently alleged that Exxon made material misstatements through its various accounting choices, including its internal use of a "proxy cost" of carbon — which Exxon used to calculate the effects of climate-related government policies on Exxon's oil and gas business — that differed from the cost Exxon projected in public.[15]

While there are few other cases to date where investors have alleged that companies failed to make appropriate disclosures relating to climate, experts agree that such litigation is likely to increase in the future, particularly if the regulatory framework around climate-related disclosures is strengthened through the adoption of the Proposed Rules. Indeed, as *The Wall Street Journal* has stated, the "wide-ranging climate disclosures the SEC wants would up the

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[9] *Id.*

[10] *See Fact Sheet: Enhancement and Standardization of Climate-Related Disclosures*, U.S. Securities and Exchange Commission, (Mar. 21, 2022), https://www.sec.gov/files/33-11042-fact-sheet.pdf.

[11] *See id.*

[12] Jean Eaglesham & Paul Kiernan, *Fight Brews Over Cost of SEC Climate-Change Rules*, The Wall Street Journal (May 17, 2022), https://www.wsj.com/articles/fight-brews-over-cost-of-sec-climate-change-rules-11652779802

[13] John Schwartz, *New York Loses Climate Change Fraud Case Against Exxon Mobil,* The New York Times (Dec. 10, 2019), https://www.nytimes.com/2019/12/10/climate/exxon-climate-lawsuit-new-york.html.

[14] *Ramirez v. Exxon Mobil Corp.*, No. 3:16-cv-03111-K (N.D. Tex. filed Nov. 7, 2016).

[15] *See Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832 (N.D. Tex. 2018).

LOSS CAUSATION IN SECURITIES FRAUD CASES BROUGHT IN THE WAKE OF GOVERNMENT INVESTIGATIONS

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standing alone and without any subsequent disclosure of actual wrongdoing . . . does not qualify as a corrective disclosure."[4]

On the other hand, courts in the First, Second, Third, and Fourth Circuits have held that announcements regarding government investigations, on their own, can serve as corrective disclosures.[5] In so holding, many of these courts have relied on "the Supreme Court's general principle, announced in [*Dura*], that a corrective disclosure need not take a particular form."[6] They have also reasoned that to embrace the notion "that the disclosure of an investigation, absent an actual revelation of fraud, is not a corrective disclosure," "would be to preclude any type of action . . . where there has been no conclusive finding of fraud by a government agency, or a criminal charge initiated, or a formal corrective disclosure [by] the defendant."[7]

The Fifth and Ninth Circuits take a middle approach, holding that disclosures regarding government investigations must often be paired with other corrective information, but taking a more lenient stance on the form that other information may take. For example, while the Fifth Circuit agrees that "generally, commencement of government investigations on suspected fraud do not, standing alone, amount to a corrective disclosure," it also rejects the "overly rigid rule that government investigations can never constitute a corrective disclosure in the absence of a discovery of actual fraud."[8] This is because "[t]o require, in all circumstances, a conclusive government finding of fraud merely to plead loss causation would effectively reward defendants who are able to successfully conceal their fraudulent activities by shielding them from civil suit."[9] The Fifth Circuit has thus upheld a government investigation disclosure to establish loss causation when viewed "together with the totality of the other alleged partial disclosures," including executive departures, poor financial results, and media speculation.[10]

These same issues continue to be vigorously litigated today, including in shareholder suits involving some of the most prominent corporate scandals of the last several years.

AP-Fonden v. Goldman Sachs Group, Inc.

Sjunde AP-Fonden v. Goldman Sachs Grp., Inc. involved the aftermath of the 1Malaysia Development Berhad ("1MDB") scandal, wherein high-level officials siphoned off over $4.5 billion from the fund.[11] Goldman was involved in raising funds for 1MDB and "underwrote $6.5 billion of 1MDB debt . . . which resulted in Goldman earning $600 million in fees."[12] As the scandal was uncovered beginning in early 2015, leading to multiple government investigations, Goldman downplayed its knowledge of, and role in, the 1MDB scandal.[13] The plaintiffs alleged that, in reality, Goldman knew funds were being siphoned off or, at the least, ignored several red flags surrounding the 1MDB bond offerings.[14]

The plaintiffs alleged a series of corrective disclosures in November and December 2018, most

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[4] *Id.* at 1201 n.13 (emphasis added). Since *Meyer*, courts in the Eleventh Circuit have upheld disclosures of government investigations as corrective when made in conjunction with other disclosures. *See, e.g.*, *In re Flowers Foods, Inc. Sec. Litig.*, 2018 WL 2190904, at *1 (M.D. Ga. May 10, 2018).

[5] *See, e.g.*, *In re StockerYale Sec. Litig.*, 453 F. Supp. 2d 345, 359 (D.N.H. 2006) (announcement of SEC investigation constituted corrective disclosure); *In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 387 (E.D.N.Y. 2013) ("[T]he Court rejects the idea that the disclosure of an investigation, absent an actual revelation of fraud, is not a corrective disclosure."); *Hull v. Glob. Dig. Sols.*, Inc., 2017 WL 6493148, at *14 (D.N.J. Dec. 19, 2017) (rejecting argument that "Plaintiff cannot rely on the unproven allegations in the SEC Complaint as a corrective disclosure"); *Singer v. Reali*, 883 F.3d 425, 446-47 (4th Cir. 2018) (disclosure of subpoena from DHHS and analyst report discussing subpoena constituted corrective disclosures).

[6] *Hull*, 2017 WL 6493148, at *14.

[7] *Gentiva*, 932 F. Supp. 2d at 387.

[8] *Pub. Emps.' Ret. Sys. of Miss. v. Amedisys, Inc.*, 769 F.3d 313, 323-24 (5th Cir. 2014).

[9] *Id.* at 325 (citation omitted).

[10] *Id.* at 24; *see also Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016) (explaining that "the announcement of an investigation can 'form the basis for a viable loss causation theory' if the complaint also alleges a subsequent corrective disclosure" and upholding government investigation disclosure paired with disclosure of large write-off) (citation omitted).

[11] 545 F. Supp. 3d 120 (S.D.N.Y. 2021).

[12] *Id.* at 128.

[13] *Id.* at 139, 149.

[14] *Id.* at 129-32.

involving government investigations into Goldman's role in the 1MDB offerings.[15] Judge Vernon Broderick of the Southern District of New York sustained one such disclosure and dismissed the remainder for failure to establish loss causation.[16] In so holding, the court distinguished between disclosures of investigative risks that the market was already aware of, and those it was not. For example, the court upheld a December 17, 2018 disclosure "that the Malaysian government . . . would pursue criminal charges against Goldman over the 1MDB scandal."[17] The court rejected the defendants' argument that Goldman had already "disclosed it was subject to 'investigations and reviews' related to 1MDB," reasoning that "[a]lthough it is true that these reports disclosed some amount of risk to investors, they are somewhat vague and fail to mention the possibility of any criminal probe into Goldman, let alone one by the Malaysian government."[18]

On the other hand, the court dismissed four other disclosures regarding government investigations, finding that they constituted "materialization[s] of known risks."[19] For example, the court dismissed a November 12, 2018 disclosure that the Malaysian government was seeking repayment of Goldman's underwriting fees.[20] The court reasoned that this "constitutes mere materialization of known risk" because "in June 2018, multiple news outlets reported that the Malaysian government planned to seek at least $600 million from Goldman — the full amount that Goldman received in the three 1MDB transactions."[21]

Evanston Police Pension Fund v. McKesson Corporation

Evanston Police Pension Fund v. McKesson Corp. concerned the impact of "widespread anti-competitive conduct in the generic drug market" that led to "[i]nvestigations by Congress, the Department of Justice, and forty-nine state Attorneys General."[22] More specifically, the plaintiffs alleged that McKesson knew that its increased profits were a result of the price-fixing conspiracy amongst third-party drug manufacturers, but misled investors by instead attributing the improvement to other factors.[23]

At the pleading stage, the court upheld two corrective disclosures as having satisfied the loss causation requirement.[24] First, on January 11, 2016, McKesson disclosed that it did not expect generic prices to continue rising.[25] Second, on November 3, 2016, news articles disclosed that charges were imminent in the DOJ investigations into the third-party manufacturers.[26] The defendants moved for partial summary judgment on the second disclosure.[27]

Judge Charles Breyer of the Northern District of California dismissed the second disclosure, reasoning that the plaintiff's theory of the case was that "McKesson misled investors by suggesting that its profits were likely to continue" but as a result of previous disclosures, "[b]y November 3, 2016, the market knew that drug price inflation had ended."[28] In other words, the corrective information had already "been disclosed before November 3" and thus could not have caused McKesson's stock price to decline on that date.[29] The court also emphasized that the investigations did not involve McKesson, but instead "other entit[ies]," and thus, "confirmed nothing about McKesson."[30] Simply put, "[e]ven if statements about the investigation into and indictment of the manufacturers provided new information and led to a stock price decline, that decline was only tangentially related to McKesson's alleged fraud."[31]

Longo v. OSI Systems

Longo v. OSI Systems, Inc. involved allegations that the defendants touted OSI's new $200 million contract with the Albanian government, while omitting the fact that OSI had sold "a 49% ownership stake" in the contract entity to an Albanian "dentist with no known experience in the security field" "for a mere $4.50."[32] The plaintiffs alleged two corrective disclosures. First, on December 6, 2017, Muddy Waters, an investment analyst, issued a report revealing the 49% transfer, and accusing OSI of misstating its financials by failing to disclose it.[33] Within hours, OSI issued a press release confirming the 49% transfer but denying any wrongdoing."[34] Judge Fernando Olguin of the Central District of California upheld this disclosure, reasoning that "plaintiffs have adequately pled that the [Muddy Waters] report revealed, in whole or in part, the truth concealed by OSI's misleading statements and/or omissions."[35]

Second, on February 1, 2018, "OSI issued a press release announcing that the SEC and the DOJ had commenced investigations into defendants' compliance with the FCPA and federal securities laws."[36] The government investigations

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[15] *Goldman Sachs*, 545 F. Supp. 3d at 146-50.

[16] *Id.*

[17] *Id.* at 148.

[18] *Id.* (citation omitted).

[19] *Goldman Sachs*, 545 F. Supp. 3d at 147-50 (citation omitted).

[20] *Id.* at 147-48.

[21] *Id.*

[22] 2021 WL 4902420, at *1 (N.D. Cal. Oct. 21, 2021).

[23] *Id.*

[24] *McKesson*, 2021 WL 4902420, at *2.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *McKesson*, 2021 WL 4902420, at *4.

[29] *Id.*

[30] *Id.* at *5.

[31] *Id.*

[32] 2021 WL 1232678, at *7 (C.D. Cal. Mar. 31, 2021).

[33] *Id.* at *2.

[34] *Id.*

[35] *Id.* at *10.

[36] *OSI*, 2021 WL 1232678, at *11.

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were announced the day after Muddy Waters issued a follow-up report refuting OSI's denials of wrongdoing.[37] The defendants argued that the "[a] nnouncement of the investigations did not reveal a pertinent truth about anything" and thus were not corrective.[38] The court disagreed, reasoning that "plaintiffs have pled more than simply an announcement of an investigation" and pointing to OSI's press release verifying the 49% transfer, as well as the two Muddy Waters reports.[39] In other words, "'when viewed together and in the context of the other allegations in the [complaint],' the announcement of the SEC and DOJ investigations 'are sufficient to plead facts giving rise to a reasonable inference that the market became aware of the misrepresentations.'"[40]

[37] *Id.*

[38] *Id.*

[39] *Id.*

[30] *Id.* at *11 (citation omitted).

Conclusion

As these recent cases demonstrate, courts regularly uphold disclosures regarding government investigations, and do so even when such disclosures are made *after* the facts underlying the fraud have already been disclosed. In such circumstances, however, courts are careful to ensure that the disclosures have revealed some incrementally new news or information to the market related to or stemming from the defendants' fraud. Because the circuit and district courts have not read *Dura* to require a "mirror-image" correction of a fraud — or a corrective disclosure that expressly states that the defendant's statements were fraudulent — the courts have wide latitude in determining whether particular information is in fact "corrective" for purposes of loss causation. As a result, shareholder lawyers will continue to joust over the contours of loss causation in cases arising from government investigations — in particular, whether a sufficient nexus exists between the defendant's fraudulent representations and disclosures related to such investigations. ■

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number of avenues for a lawsuit."[16] Because the Proposed Rules would specifically require the disclosure of quite a few new subjects, investors would have many more opportunities to identify materially false or misleading statements within those disclosures (or omissions). For example, investors could evaluate companies' statements about risks relating to climate change and bring suit if companies fail to disclose known risks that, for example, extreme weather caused by climate change is likely to disrupt the company's operations or materially increase other costs of doing business. Other potential claims might focus on greenwashing — that is, companies' representations that their techniques or products are environmentally friendly, when in fact they produce substantial carbon emissions or are otherwise not as "green" as claimed.

While the Proposed Rules are likely to face sustained legal challenges before taking effect,[17] implementing the rules in their current form will enhance investors' knowledge and power, giving investors better information and more tools to use in holding companies accountable for false statements, and urging boards to adopt better policies relating to climate. ■

[16] Richard Vanderford, *SEC Climate Disclosure Proposal Looms as Litigation Risk*, The Wall Street Journal (Mar. 26, 2022), https://www.wsj.com/articles/sec-climate-disclosure-proposal-looms-as-litigation-risk-11648299600.

[17] *See* Jacqueline M. Vallette & Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, Harvard L. Sch. F. on Corp. Governance (May 10, 2022), https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/.

WHAT'S TO COME

AUGUST 2022

County Commissioners Association of Pennsylvania (CCAP) Annual Conference & Trade Show

August 7 – 10

Lancaster, PA ■ Lancaster County Convention Center and Lancaster Marriott at Penn Square

Texas Association of Public Employee Retirement Systems (TEXPERS) Summer Forum

August 21 – 23

El Paso, TX ■ Paso Del Norte Hotel

SEPTEMBER 2022

Michigan Association of Public Employee Retirement Systems (MAPERS) 2022 Fall Conference

September 17 – 20

Mackinac Island, MI ■ The Grand Hotel

Georgia Association of Public Pension Trustees (GAPPT) 8th Annual Trustee School

September 19 – 21

Athens, GA ■ The Classic Center

Council of Institutional Investors (CII) 2022 Fall Conference

September 21 – 23

Boston, MA ■ The Westin Copley Place

OCTOBER 2022

Illinois Public Pension Fund Association (IPPFA) 2022 Mid-America Pension Conference

October 5 – 7

Oak Brook, IL ■ Oak Brook Hills Resort and Conference Center

Florida Public Pensions Trustees Association (FPPTA) Fall Trustee School

October 9 – 12

Orlando, FL ■ Renaissance Orlando at Sea World

International Foundation o Employee Benefit Programs (IFEBP) 68th Annual Employee Benefits Conerence

October 23 – 26

Las Vegas, NV ■ Mandalay Bay

NOVEMBER 2022

State Association of County Retirement Systems (SACRS) Fall Conference

November 8 – 11

Long Beach, CA ■ Hyatt Regency Long Beach

County Commissioners Association of Pennsylvania (CCAP) Fall Conference

November 20 – 22

Dauphin County, PA ■ The Hotel Hershey

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