FALL 2023

The Bulletin is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay

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HIGHLIGHTS

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California Federal Court Certifies Advertiser Classes in Consumer Fraud Case Against Google

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Litigators Must Seek to Preserve Corporate Communications Transmitted Over Text and Chat Applications: Lessons from the WhatsApp Probe, Google Play Sanctions, and the FTX Bankruptcy

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EVENTS — What's to Come

KESSLERTOPAZ MELTZERCHECK LLP

KTMC WINS HISTORIC $612 MILLION JURY VERDICT FOR FANNIE MAE AND FREDDIE MAC STOCKHOLDERS

Grant D. Goodhart III, Esquire

On August 14, 2023, after a three-week trial in the U.S. District Court for the District of Columbia, a federal jury unanimously found in favor of plaintiff shareholders of the Federal National Mortgage Association ("Fannie Mae"), and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). The jury found that in August 2012 the Federal Housing Finance Agency ("FHFA") breached the implied covenant of good faith and fair dealing inherent in the Fannie Mae and Freddie Mac shareholder contracts and awarded shareholders damages of $612.4 million. Kessler Topaz

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CALIFORNIA FEDERAL COURT CERTIFIES ADVERTISER CLASSES IN CONSUMER FRAUD CASE AGAINST GOOGLE

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

On August 15, 2023, The Honorable Edward J. Davila of the U.S. District Court for the Northern District of California issued an order in *Cabrera, et al. v. Google LLC*, Case No. 5:11-cv-01263, certifying two classes of online advertisers who advertised through Defendant Google LLC's ("Google") AdWords program. Google's AdWords program allows advertisers to create and display ads on webpages within Google's advertising networks.[1] In addition, the Court appointed Plaintiffs Rene Cabrera and RM Cabrera Company, Inc. ("RMC") as Class Representatives, and Kessler Topaz and Nix Patterson LLP as Class Counsel. In the same opinion, the Court also denied Google's motion for summary judgment in its entirety. The case will now proceed toward trial.

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[1] There are two components to these advertising networks: (1) the "Search Network," which consists of google.com and Google's partner search websites, and (2) the "Display Network," which consists of other webpages whose owners partner with Google to display advertisements. *Cabrera v. Google LLC*, 2023 WL 5279463, at *1 (N.D. Cal. Aug. 15, 2023).

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18TH ANNUAL

RIGHTS & RESPONSIBILITIES OF INSTITUTIONAL INVESTORS

ESG, Investing, Engagement & Litigation in a New World for Investors

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Institutional Investor, in partnership with Kessler Topaz & Check, LLP, will hold the 18th annual Rights & Responsibilities of Institutional Investors event. Join us as we draw together senior investment, legal, governance, and compliance professionals from European, North American, Middle Eastern, and Asian public pension funds, asset managers, insurance companies, and sovereign wealth funds to discuss the most pressing issues for engaged investors and active shareholders.

PRELIMINARY TOPICS

We are excited to bring you the first look of our 2024 discussion topics. Topics under consideration include:

- Geopolitics and the Evolving Role of the Governance and Sustainability Professionals
- AI: The Good, the Bad or Just the End of the World?
- A Review of the Global Asset Recovery Landscape
- Democracy in Danger - Risks, Responsibilities and Implications for Long-term Global Investors
- Assessing the Utility of Climate Litigation as an ESG Strategy
- The Expanding Complexity, and Importance of the Global Shareholder Litigation Landscape
- The Societal Role of Asset Managers and Owners – Human Rights, DEI & Workers Rights
- Solving the Energy Transition Dilemma
- Government Overreach and a Historic Jury Verdict for Stockholders: The Fannie Mae/Freddie Mac Conservatorship
- What's Driving the Evolution of ESG as we Know it?

For more information and to register, please contact Darren J. Check at dcheck@ktmc.com or Sabrina Gill at sabrina.gill@iilondon.com

Registration is Complimentary for Qualified Delegates

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SEC STRENGTHENS INVESTOR PROTECTIONS AGAINST INSIDER TRADING THROUGH RULE 10B5-1 AMENDMENTS

Nathan Hasiuk, Esquire and Vanessa Milan, Esquire

In December 2022, the Securities and Exchange Commission ("SEC") adopted amendments to Rule 10b5-1, which provides a defense to insider trading liability under Section 10(b) of the Exchange Act and Rule 10b-5.[1] The Rule was first adopted by the SEC in 2000 and gives executives who are frequently exposed to material non-public information a safe harbor for transactions involving their company's securities.[2] However, Rule 10b5-1 has since come under scrutiny as a means for corporate insiders to avoid liability for illegal insider trading. The recent amendments seek to deter misuse of the safe harbor and strengthen investor protections.

Rule 10b5-1 allows executives to create a plan to transact in their company's securities according to a prearranged schedule ("10b5-1 plan"), and in theory, without taking advantage of insider information they possess by virtue of their high-level position in the company. The defense applies if the executive demonstrates that the pre-arranged trades were entered into at a time before the executive became aware of material nonpublic information and did not permit the executive (or anyone acting on the executive's behalf) from influencing the timing of the trades.[3]

In the securities fraud context, allegations that a defendant sought to profit from insider trading while issuing false or misleading statements is one of the classic means to establish that the defendant acted with scienter, or fraudulent intent.[4] Since the adoption of Rule 10b5-1, defendants in cases involving allegations of insider trading have argued that because their trades were made pursuant to a 10b5-1 plan, they could not have intended to capitalize on inside information and thus they did not have the required

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[1] U.S. Securities and Exchange Commission, *SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures* (December 14, 2022), https://www.sec.gov/news/press-release/2022-222.

[2] 17 CFR § 240.10b5-1(c).

[3] *Id.*

[4] *See, e.g.*, *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000) (scienter "generally met when corporate insiders were alleged to have misrepresented to the public material facts about the corporation's performance or prospects in order to keep the stock price artificially high while they sold their own shares at a profit").

KTMC RESOLVES CBS-VIACOM MERGER LITIGATION FOR $167.5 MILLION

Grant D. Goodhart, Esquire

In *In re CBS Corporation Stockholder Class Action and Derivative Litigation*, Consolidated C.A. No. 2020-0111-JRS, Kessler Topaz alleged that the merger of CBS and Viacom was unfair to CBS and its public shareholders because CBS was forced to overpay for Viacom's declining business. Representing Cleveland Bakers and Teamsters Pension Fund, Kessler Topaz alleged that the merger was the culmination of a years-long effort by Shari Redstone, who controlled both CBS and Viacom, to combine the two companies in order to save her family's investment in the floundering Viacom as it suffered from industry headwinds due to consumers shifting away from cable television subscriptions. Ms. Redstone twice previously attempted to merge CBS and Viacom in the years leading up to the merger, but failed due to opposition by the board. Then, in 2019 after replacing a majority of directors on the CBS board, she successfully pursued a third merger attempt, despite the lack of economic benefit to CBS of the merger and the previous opposition of CBS directors and stockholders alike.

After the merger was announced in August 2019, Kessler Topaz suspected that the then-proposed merger was unfair to CBS and its public stockholders. Kessler Topaz and co-counsel quickly initiated a books and records investigation pursuant to Delaware law in order to investigate potential merger-related claims against CBS's board of directors. After negotiations over the scope of the investigation broke down, Kessler Topaz pursued its clients' inspection rights through a successful books and records trial. After trial, the Delaware Court

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LITIGATORS MUST SEEK TO PRESERVE CORPORATE COMMUNICATIONS TRANSMITTED OVER TEXT AND CHAT APPLICATIONS: LESSONS FROM THE WHATSAPP PROBE, GOOGLE PLAY SANCTIONS, AND THE FTX BANKRUPTCY

Jennifer L. Joost, Esquire and Michelle M. Newcomer, Esquire

Five years ago, in an article titled, "Ephemeral Messaging and the Expanding Digital Universe," we highlighted the fact that as employees grew more mobile and used their own devices to communicate, companies would be hard-pressed to maintain and preserve data from new messaging and chat applications, like Signal, over multiple devices.[1] Based in part on the cautionary tale of how Uber Technologies Inc.'s use of ephemeral and encrypted messaging negatively impacted a trade secret lawsuit brought by Alphabet Inc.'s autonomous driving subsidiary, Waymo LLC,[2] we observed that employees' use of these applications instead of email to communicate could prevent the creation and preservation of a real-time historical corporate record, potentially hamstringing regulators' and investors' ability to prevent or seek redress for injustices.

Recent examples — the U.S. Securities Exchange Commission's and Commodities Futures Trading Commission's crackdowns on U.S. financial institutions' use of WhatsApp, Alphabet's failure to preserve employees' Google chats, and FTX's use of Slack and Signal before its November 2022 bankruptcy — demonstrate the peril of employees using these applications to engage in business-related communications without any enterprise-wide

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[1] Jennifer Joost, *Ephemeral Messaging and the Expanding Digital Universe*, The Bulletin, Spring 2018, https://www.ktmc.com/newsletters/the-bulletin-spring-2018#6632.

[2] *Waymo v. Uber Techs., Inc.*, No. 3:17-cv-00939-WHA (N.D. Cal.).

KTMC RECOVERS $85 MILLION TO REMEDY DOLAN-LED MADISON SQUARE GARDEN MERGER

Grant D. Goodhart, Esquire

In March 2021, Madison Square Garden Entertainment ("MSGE") announced that it was buying MSG Networks, Inc. ("MSGN") in an all-stock merger. MSGE owned a collection of live entertainment, restaurant, and nightlife assets, the crown jewel of which was Madison Square Garden. MSGN was a broadcast company that aired professional sporting events in the New York City metro area, including New York Knicks, New York Rangers, New York Islanders, and New Jersey Devils games.

MSGE and MSGN shared a controlling stockholder, James Dolan, who approved the merger himself without a shareholder vote, based on his personal voting control. Upon the announcement of the merger MSGE's stock price immediately plummeted, which Kessler Topaz alleged reflected the market's understanding that MSGE was bailing out MSGN's foundering network business, just as MSGE's venues were returning to profitability as the pandemic eased.

Kessler Topaz, representing Hollywood Firefighters' Pension Fund, promptly launched a books and records investigation and received non-public documents relating to the merger. After reviewing those documents, in May 2021, Kessler Topaz initiated litigation, In Re Madison Square Garden Entertainment Corp. Stockholders Litigation, C.A. No. 2021-0468-KSJM, alleging that the merger was unfair to MSGE and its shareholders.

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COURT GIVES PLAINTIFFS INITIAL VICTORY IN RIVIAN IPO CASE

Sharan Nirmul, Esquire, Richard A. Russo, Jr., Esquire, and Alex B. Heller, Esquire

On July 3, 2023, U.S. District Judge Josephine L. Staton of the Central District of California issued an order denying, in their entirety, two motions to dismiss a federal securities class action brought against Rivian Automotive, Inc. ("Rivian" or the "Company"), its senior executives and Board members, and the investment banks that underwrote Rivian's $13 billion initial public offering ("IPO"). [1] On February 16, 2023, the Court dismissed the action with leave to replead. Plaintiffs filed their operative Amended Complaint in this action on March 2, 2023, asserting claims on behalf of all investors who purchased Rivian common stock between November 10, 2021 and March 10, 2022 alleging that Defendants[2] violated Sections 10(b) and 20(a) of the Securities Exchange Act and Sections 11, 12(a)(2) and 15 of the Securities Act. Defendants moved to dismiss the Amended Complaint on March 16, 2023. Now that the Court has denied Defendants' motions to dismiss, the case will proceed to discovery.

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[1] The case is *Crews v. Rivian Automotive Inc., et al.*, No. 2:22-cv-01524-JLS-E. The plaintiffs are Court-appointed lead plaintiff Sjunde AP-Fonden and additional named plaintiff James Stephen Muhl. Kessler Topaz serves as lead counsel for the Class.

[2] Defendants include Rivian, its CEO Robert J. Scaringe ("Scaringe"), CFO Claire McDonough ("McDonough"), Chief Accounting Officer Jeffrey R. Baker ("Baker"). Defendants also include Rivian Directors Karen Boone, Sanford Schwartz, Rose Marcario, Peter Krawiec, Jay Flatley, and Pamela Thomas-Graham. Defendants also include the Rivian IPO Underwriters Morgan Stanley & Co. LLC, Goldman Sachs & Co., LLC, J.P. Morgan Securities LLC, Barclays Capital Inc., Deutsche Bank Securities Inc., Allen & Company LLC, BofA Securities, Inc., Mizuho Securities USA LLC, Wells Fargo Securities, LLC, Nomura Securities International, Inc., Piper Sandler & Co., RBC Capital Markets, LLC, Robert W. Baird & Co. Inc., Wedbush Securities Inc., Academy Securities, Inc., Blaylock Van, LLC, Cabrera Capital Markets LLC, C.L. King & Associates, Inc., Loop Capital Markets LLC, Samuel A. Ramirez & Co., Inc., Siebert Williams Shank & Co., LLC, and Tigress Financial Partners LLC.

KTMC PREVAILS IN NINTH CIRCUIT APPEAL SETTING STAGE FOR TRIAL IN LONG-STANDING CASE CHALLENGING CAPTIVE REINSURANCE ARRANGEMENTS

Lisa Lamb Port, Esquire

KTMC is lead counsel in a case brought under the anti-kickback provisions of the Real Estate Settlement Procedures Act ("RESPA")[1] against mortgage lender PHH Corporation ("PHH") and its affiliates. The suit challenges a series of captive reinsurance arrangements between PHH's reinsurance subsidiary, Atrium Insurance Corporation ("Atrium"), and four mortgage insurers who agreed to purchase reinsurance from Atrium in exchange for referrals of private mortgage insurance ("PMI") business from PHH.

After more than a decade, the case was poised to go to trial in February of 2022 when a newly assigned judge struck Plaintiffs' sole expert witness on Article III standing — a threshold issue to proving liability at trial. The Court decided that the expert, and the accompanying evidence showing that the class suffered harm by overpaying for their mortgage insurance, were belatedly disclosed under the governing pretrial order. Plaintiffs promptly appealed that decision and, on February 24, 2023, the Ninth Circuit reversed, holding that the District Court misapplied the Supreme Court's August 2021 pivotal decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) in holding that Plaintiffs should have reasonably anticipated the need to develop that monetary harm evidence at an earlier date. The case has now been remanded to the District Court for pretrial proceedings and trial.

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[1] 12 U.S.C. §§ 2607.

NINTH CIRCUIT REVIVES "CRYPTO MINING" SECURITIES FRAUD SUIT AGAINST NVIDIA

Matthew L. Mustokoff, Esquire

On August 25, 2023, the U.S. Court of Appeals for the Ninth Circuit reversed the dismissal of a long-running securities fraud class action against NVIDIA, the world's largest maker of graphic processing units (GPUs).

The 2019 lawsuit alleges that in 2017 and 2018, NVIDIA's revenues skyrocketed when it sold a record number of its GPUs to cryptocurrency miners who use the company's chips to verify crypto transactions on digital blockchain ledgers using extensive computer power. As a result, and unbeknownst to the market, NVIDIA's sales to crypto miners rapidly outpaced sales to the company's traditional customer base of video gamers. The suit alleges that NVIDIA misrepresented the true impact of its cryptocurrency-related sales on the company's financial performance in order to conceal the extent to which NVIDIA's revenue growth depended on the notoriously volatile demand for crypto. After the price of Etherium, a leading digital token, nosedived in 2018, so too did NVIDIA's revenues and its stock price, damaging investors by billions of dollars in market losses.

In reversing U.S. District Judge Haywood S. Gilliam Jr.'s 2021 order dismissing the case, the Ninth Circuit held that the plaintiffs adequately alleged securities fraud claims against NVIDIA and its CEO Jensen Huang. Writing for the court, Circuit Judge William A. Fletcher found that the investors' complaint sufficiently alleged that NVIDIA and Huang "made materially false or misleading statements about the company's exposure to crypto, leading investors and analysts to believe that NVIDIA's crypto-related revenues were much smaller than they actually were."

In sustaining the complaint, the Ninth Circuit rejected NVIDIA's argument that the plaintiffs' expert economists, who estimated that the company had understated its crypto revenues by approximately $1.13 billion during the class period, failed to use a reliable methodology because their analysis did not depend on internal evidence from the company. As the court explained, the Private Securities Litigation Reform Act (PSLRA) "nowhere requires experts to rely on internal data and witness statements to prove falsity. It merely requires that the complaint state with particularity all facts on which the belief [underlying the allegations of falsity] is formed." The Ninth Circuit concluded: "To categorically hold that, to be credible, an expert opinion must rely on internal data and witness statements would place an onerous and undue pre-discovery burden on plaintiffs in securities fraud cases. We decline to turn the PSLRA's formidable pleading requirement into an impossible one." The court was also swayed by "the inescapable and otherwise inexplicable fact that when the price of cryptocurrency and the market for crypto mining GPUs collapsed, NVIDIA was forced on November 15, 2018, at the end of the Class Period, to reduce its revenue forecast by 7%."

The case will now proceed to discovery.

The Kessler Topaz team representing Plaintiffs and the shareholder class on the appeal included Matthew Mustokoff, Andrew Zivitz, and Jennifer Joost.

The case is *In re Nvidia Corp. Securities Litigation*, case number 3:19-cv-00766, pending in the U.S. District Court for the Northern District of California, Oakland Division. ■

CALIFORNIA FEDERAL COURT CERTIFIES ADVERTISER CLASSES IN CONSUMER FRAUD CASE AGAINST GOOGLE

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Google's Schemes to Overcharge Advertisers

This twelve-year old action alleges that, for almost a decade, Google engaged in two schemes to overcharge unsuspecting advertisers. First, Plaintiffs allege that Google misrepresented to AdWords advertisers that it would only charge them for clicks on advertisements placed within targeted locations of their choosing. In actuality, Plaintiffs allege, Google defrauded its advertisers — and lined its own pockets — by secretly charging them for clicks on advertisements that were outside of their explicitly designated locations. Plaintiffs assert that Google's misconduct violated California's Unfair Competition Law (the "UCL"), which prohibits unlawful, unfair, and fraudulent business practices.

Second, Plaintiffs allege that Google represented in its standard, three-page form contract with AdWords advertisers (the "AdWords Agreement") that it would apply its "Smart Pricing" measurements, generated by an algorithm which tracks bids on advertisements, to automatically discount the cost of clicks on ads.[2] Unbeknownst to these advertisers, however, Google did not Smart Price (discount) clicks according to its algorithm as promised. Plaintiffs allege that by overcharging advertisers beyond the cost indicated by its Smart Pricing measurements, Google breached its contract with advertisers.

The Court's Class Certification Decision

Plaintiffs moved to certify classes of advertisers who were harmed by these two schemes. Google opposed Plaintiffs' motion. In the Court's order, the Court certified two classes. First, the Court certified a class of "[a]ll persons and entities located within the United States who, between January 1, 2004 and March 22, 2011, advertised through Google's AdWords program and paid for clicks on their Google AdWords advertisement(s), where such clicks did not originate from the location selected by the advertiser" (the "Location Targeting Class").[3]

In certifying the Location Targeting Class, Judge Davila found that Plaintiffs had adequately demonstrated that Federal Rule 23(a) and (b)(3)'s requirements had been met, and rebuffed Google's arguments that individualized questions relating to materiality, reliance, choice of law, injury, and damages would predominate over questions common to the Class.[4] The Court also rejected Google's contention that differences in advertiser sophistication defeated class certification, explaining that Google's argument "flies in the face of the UCL's objective 'reasonable consumer' standard, as well as the UCL's broad purpose to protect consumers from unfair business practices."[5]

Second, the Court certified a class of "[a]ll persons and entities located within the United States who, between June 1, 2009 and December 13, 2012, advertised through Google's AdWords program and paid for clicks on their Google AdWords advertisement(s), where such clicks were not Smart Priced because they" were so-called "Search Bundled Clicks" (the "Smart Pricing Subclass").[6] Search Bundled Clicks are "clicks on ads on the Display Network where the advertiser's settings allowed its ads to show on both the Search and Display Networks and did not set a Display Network bid different from the Search Network bid."[7] In certifying the Smart Pricing Subclass, the Court rejected Google's arguments that individualized questions regarding the interpretation of the AdWords Agreement and exposure to extrinsic evidence, advertisers' return on investment, and determining the correct level of Smart Pricing discounts would predominate over common questions.[8]

With respect to extrinsic evidence, for instance, Google argued that interpreting the AdWords Agreement required extrinsic evidence and, as a result, individualized inquiries would be necessary "to determine which pieces of extrinsic evidence each putative class member did or did not view."[9] The Court disagreed, reasoning that "[w]hile Google's argument might hold merit in the context of bargained-for contracts, when interpreting standardized form contracts like the AdWords Agreement, the subjective understanding of the signatories is not a factor."[10] As the Court explained, "it is an 'axiom of contract law[] that when there is a standardized agreement like the form contract at issue in this case, the agreement is

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[2] Google's Smart Pricing measurement is supposed to "discount[] the price that advertisers pay based on the likelihood that a click 'converts' or leads to a 'conversion,' *i.e.*, a successful transaction as defined by the advertiser. Put differently, when a click on one web property is less likely to convert than a click on a benchmark property, Google will provide a discount." *Id.* at *2.

[3] *Id.* at *28.

[4] *Id.* at *28-39.

[5] *Id.* at *29; *see also id.* at *35.

[6] *Id.* at *16-17. Plaintiffs moved to certify a single, uniform Smart Pricing Class. *Id.* The Court, however, determined that the proposed class included four different categories of clicks—(1) Non-Smart Priced Clicks, (2) AFMA Clicks, (3) Search Bundled Clicks, and (4) mGDN Clicks—which it treated as four separate subclasses. *Id.* Ultimately, the Court certified the Search Bundled Clicks Smart Pricing Subclass but declined to certify the other three Smart Pricing subclasses on the ground that individualized issues would predominate because Plaintiffs had failed to provide a classwide method for identifying the correct level of Smart Pricing that should have been applied to a click, or whether Smart Pricing should have been applied at all. *Id.* at *24-26. By contrast, because Plaintiffs contended that every Search Bundled click was uniformly overpriced by 6%, the Court found that under Plaintiffs' theory "every Search Bundled Click would represent an injury because every such click would be overpriced." *Id.* at *26.

[7] *Id.* at 17.

[8] *Id.* at *17-24, 26.

[9] *Id.* at *17.

[10] *Id.* at *18.

KTMC WINS HISTORIC $612 MILLION JURY VERDICT FOR FANNIE MAE AND FREDDIE MAC STOCKHOLDERS

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served as Co-Lead Plaintiffs' counsel for this momentous trial verdict, which was reached after a decade of litigating stockholders' claims through multiple rounds of pleadings, appeals, and after a previous jury was unable to reach a verdict after a twelve-day trial in November 2022.

On September 6, 2008, at the height of the financial crisis, FHFA placed Fannie Mae and Freddie Mac into conservatorship, giving FHFA full authority to run the companies. The law authorizing conservatorship directed FHFA as conservator to "preserve and conserve assets," and FHFA told stockholders at that time that the conservatorship would be temporary, and was designed to return Fannie Mae and Freddie Mac to safe and solvent condition, and to return the entities to their stockholders.

Also in 2008, the U.S. Treasury bought senior preferred stock in Fannie Mae and Freddie Mac, and provided a funding commitment of up to $100 billion for each of Fannie Mae and Freddie Mac in exchange for a 10% annual dividend on any amount Fannie Mae or Freddie Mac drew on the commitment. Treasury's funding commitment was later raised to $200 billion, and was later amended to be unlimited through the end of 2012. Treasury, Fannie Mae, and Freddie Mac memorialized this agreement in the Senior Preferred Stock Purchase Agreements ("PSPAs"). Treasury ultimately invested a total of $189 billion in Fannie Mae and Freddie Mac to help support each companies' critical mission of backstopping the nation's housing finance system through the financial crisis.

Four years later, Fannie Mae and Freddie Mac had just posted their first two quarters of profitability in four years. The housing market was recovering, and Fannie Mae and Freddie Mac management projected that the companies were on their way to sustained profitability. Stockholders reasonably believed that Fannie Mae and Freddie Mac were on a path to begin building capital and ultimately exit conservatorship. Instead, with no notice to stockholders, on August 17, 2012, Treasury and FHFA agreed to amend the PSPAs, changing the 10% dividend into a "Net Worth Sweep." The Net Worth Sweep required Fannie Mae and Freddie Mac to pay the full amount of their net worth to Treasury every quarter. As a result, Plaintiffs alleged that Fannie Mae and Freddie Mac were unable to build capital, or ever pay dividends to private shareholders, regardless of how profitable either company was. The Net Worth Sweep has continued to sweep all of Fannie Mae's and Freddie Mac's profits to the U.S. Treasury every quarter since 2012, resulting in Treasury receiving over $150 billion in dividends in excess of what it would have received under the original PSPAs, and all at stockholders' expense. Moreover, Fannie Mae and Freddie Mac still remain in conservatorship after fifteen years.

Plaintiffs proved at trial that FHFA's agreeing to the Net Worth Sweep was an "arbitrary and unreasonable" violation of stockholders' reasonable expectations under their shareholder contracts. Plaintiffs sought $1.61 billion in damages, which was the amount that Fannie Mae's and Freddie Mac's common and preferred stock prices collectively fell on August 17, 2012 when the Net Worth Sweep was announced. At trial, Plaintiffs called twelve witnesses, including stockholder class representatives, former Fannie Mae and Freddie Mac management, and three expert witnesses. Plaintiffs also cross-examined representatives of FHFA and Defendants' expert, who opined that the Net Worth Sweep was reasonable.

After ten hours of deliberations, the jury awarded damages of $612.4 million to Fannie Mae and Freddie Mac stockholders. Appeals are anticipated.

KTMC's trial team consisted of attorneys Lee Rudy, Eric Zagar, Grant Goodhart, Lauren Lummus, plus numerous additional staff.

The case is titled *In re Fannie Mae/Freddie Mac Senior Preferred Stock Purchase Agreement Class Action Litigations, No. 13-mc-1288 (RCL) (D.D.C).* ■

CALIFORNIA FEDERAL COURT CERTIFIES ADVERTISER CLASSES IN CONSUMER FRAUD CASE AGAINST GOOGLE

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interpreted wherever reasonable as treating alike all those similarly situated, *without regard to their knowledge or understanding of the standard terms* of the writing.'"[11] Moreover, contrary to Google's argument, the Court held that this rule applied even in situations where a contract term was ambiguous and extrinsic evidence was necessary because "[c]ourts have consistently and unequivocally stated that form contracts should be interpreted without regard for an individual party's knowledge" and "they have not indicated that there is an exception when extrinsic evidence is considered."[12] "To ask about whether a class member read or was exposed to a particular piece of extrinsic evidence, then, would run counter to this well-established canon of construction."[13] The Court thus concluded that the "interpretation of the AdWords Agreement presents common questions" and certified the Smart Pricing Subclass.[14]

The Court's Summary Judgment Decision

In addition to opposing class certification, Google also moved for summary judgment on all of Plaintiffs' claims. In the Order, the Court denied Google's motion for summary judgment in its entirety. With respect to the Location Targeting claims, Judge Davila found that Plaintiffs had "introduced sufficient evidence to survive summary judgment."[15] The Court also reasoned that Google had challenged "elements that are largely not required under California law for UCL fraud claims, such as reasonable (as opposed to actual) reliance and materiality."[16]

For example, Judge Davila rejected Google's argument that Plaintiffs could not have reasonably relied on its representations.[17] First, the Court found that Google's argument failed as a matter of law, because "reasonable reliance is not required for [a plaintiff] to prevail on [a] UCL claim."[18] Moreover, even if reasonable reliance were an element of a UCL claim, the Court found that Plaintiffs "presented evidence that suggests an appreciable number of reasonably prudent advertisers did, in fact, rely on and believe that Location Targeting would yield clicks only within the selected geographic area."[19] As one example, the Court cited a help ticket from an advertiser complaining as follows: "*As recommended by Google*, I have drawn very specific boundaries around the area in which I want my ads to appear (Hawaii only). In the last month, there have been 80 clicks outside this area and I'm being charged for those clicks against my will."[20] Ultimately, the Court concluded that "Google's motion for summary judgment on RMC's Location Targeting UCL claim is not meritorious."[21]

The Court also concluded that "summary judgment in favor of Google on Plaintiffs' Smart Pricing breach of contract claim is not warranted."[22] Judge Davila reasoned that "[d]espite Google's efforts to contest Plaintiffs' theory of damages and interpretation of the AdWords Agreement, Plaintiffs have advanced enough evidence to establish questions of fact unsuitable for summary judgment."[23]

For example, the Court rejected Google's argument that "the AdWords Agreement cannot be interpreted to require any particular discount, so summary judgment should be granted as to all clicks receiving at least *some* Smart Pricing discount."[24] In rejecting Google's argument, the Court reasoned that when the AdWords Agreement was read in the context of extrinsic evidence provided by Plaintiffs, "[a] fact finder could conclude that… Google must apply discounts 'according' to its conversion data" so that "an advertiser receives a greater discount as conversion rates decrease."[25] In other words, "[u]nder this understanding of the AdWords Agreement, Google is required to do more than apply some arbitrary discount to clicks."[26] The Court thus denied Google's motion for summary judgment as to the Smart Pricing Claims.

Conclusion

Judge Davila's recent order in *Cabrera v. Google* is a significant decision for consumers seeking redress for systemic overcharging. The Court's decision provides important clarity on the governing standards for UCL claims, including with respect to reliance and materiality. It also soundly rejects the argument (often asserted by defendants) that differences in class member sophistication can defeat class certification, given the UCL's "broad purpose to protect consumers from unfair business practices." In addition, the order underscores that cases involving the breach of standard form contracts are particularly well-suited for class treatment, given that the interpretation of such contracts presents common questions that do not require individualized inquiries into the subjective understanding of class members.[27] ■

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[11] *Id.* (quoting *Williams v. Apple, Inc.*, 338 F.R.D. 629, 638 (N.D. Cal. 2021)).

[12] *d.* at *19.

[13] *Id.*

[14] *Id.* at *20.

[15] *Id.* at *13.

[16] *Id.*

[17] *Id.* at *9-10.

[18] *Id.* at *9.

[19] *Id.* at *10.

[20] *Id.* (citing Ex. 51 at 10).

[21] *Id.* at *13.

[22] *Id.* at *9.

[23] *Id.*

[24] *Id.* at *8.

[25] *Id.*

[26] *Id.*

[27] The Kessler Topaz team representing Plaintiffs and the advertiser classes includes Joseph Meltzer, Matthew Mustokoff, Stacey Kaplan, Margaret Mazzeo, and Nathaniel Simon.

COURT GIVES PLAINTIFFS INITIAL VICTORY IN RIVIAN IPO CASE

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Rivian's IPO

Rivian designs, manufactures, and sells EVs to consumer and commercial customers. In December 2017, after years of keeping a low profile, Rivian publicly revealed its two flagship EVs — the R1T, a five-passenger truck, and the R1S, a seven-passenger SUV — at the 2018 LA Auto Show. Rivian's marketing campaign for the R1T and R1S (collectively, the "R1 Platform" or "R1") centered on its ability to combine a unique EV design (quad motors, over 700 horsepower, and 300 plus miles of battery range) with ultra-high-end interior finishes — all for a price tag of just $69,000 and $72,500 for the R1T and R1S, respectively. Fueled by intense market excitement over the R1 Platform's "world-beating specs" and "very reasonable price tag," Rivian had generated a backlog of over 55,000 R1 pre-orders by November 2021.

That same month, Rivian raised over $13 billion from investors in its IPO — the seventh largest IPO in the history of U.S. public markets. The offering documents provided to potential IPO investors touted the R1 Platform's impressive features and the substantial backlog of pre-orders. It also disclosed to investors that while Rivian expected to generate a "negative gross profit per vehicle" over the near term, those negative gross profits were the result of Rivian's high "fixed costs from investments in vehicle technology, manufacturing capacity, and charging infrastructure" being spread over smaller production volumes. The IPO offering documents indicated to investors that once production volumes increased, Rivian expected to begin generating a "positive gross profit" on each R1 vehicle sale. Finally, the IPO offering documents warned investors that if R1 material costs increased, Rivian could be forced to increase prices and its financial condition could be harmed as a result.

On March 1, 2022, less than four months after the IPO, Rivian announced that it was increasing the prices of R1T and R1S vehicles by a minimum of 17% to 20%. In a shock to customers that had placed orders for Rivian's vehicles, Rivian said the price increases would apply not only to future sales, but also to the 70,000 pre-orders for their R1 vehicles prior to March 1, unless those customers agreed to accept a vehicle with significantly downgraded features. Two days later, after facing intense backlash from customers, Rivian reversed course on its decision to apply the price increases to the 70,000 customers with existing pre-orders. As the market digested this news and its potential financial impact on the Company of delivering its backlog of pre-orders at substantial losses per vehicle, Rivian's common stock price fell by over $30 per share, and by March 14, 2022, it was trading at less than half of its $78 IPO price.

Plaintiffs' Claims Against the Defendants

Key to the Plaintiffs' pending securities case is what was known internally at Rivian before the IPO regarding the need to raise prices on Rivian's vehicles. Based on Plaintiffs' investigation, which included interviews with several highly placed former employees, Plaintiffs allege that contrary to Defendants' representations in the IPO offering documents, Rivian was not generating a negative gross profit per vehicle because of its high fixed costs, and Rivian could not possibly generate positive gross profits simply by increasing R1 production volumes. This is because, unbeknownst to investors, the total cost of the R1 bill of materials ("BOM") — the roughly 3,000 parts required to build each R1 vehicle — exceeded $110,000 at the time of the IPO. In essence, Rivian was selling $110,000 worth of car parts to consumers for just $70,000. As a result, Rivian was losing (and would continue losing) approximately $40,000 on each vehicle sold on material costs alone, without regard to its fixed costs or production volumes. Indeed, this undisclosed, upside-down cost structure guaranteed that Rivian would continue generating negative gross profits per vehicle on the R1 Platform unless and until the Company substantially increased R1 retail prices or substantially downgraded its features.

Defendants were aware of these facts at the time of (and, in fact, long before) the November 2021 IPO. By no later than 2019, Rivian began to learn that the BOM cost estimates it used to set initial retail prices for the R1 Platform were vastly understated. As Rivian attempted to source R1 parts for production, suppliers complained that Rivian's cost estimates — which had been developed by a third-party consultant — were not realistic, and they criticized the Company for its failure to accurately estimate material costs. By the end of 2019, Rivian had fired the third-party consultant, and after its in-house teams took over costing for the R1 Platform, its BOM costs skyrocketed. By September 2021, when Rivian began manufacturing its first R1 vehicles, its BOM costs were at least $110,000 and vastly exceeded R1 retail prices. These BOM costs were recorded in an internal Rivian database known as "Project X," to which Scaringe, McDonough, and other senior Rivian employees had access. These senior executives plainly knew about Rivian's astronomical BOM costs because, as the IPO drew near, Rivian employees scrambled to source less expensive materials for the R1 vehicles. At the same time, senior executives internally acknowledged that Rivian needed to raise R1 vehicle prices, but they resolved to wait until after the IPO to do so.

Following the IPO, when Rivian held its third quarter 2021 earnings call on December 16, 2021, Defendants continued to mislead investors about Rivian's cost structure and its need to raise R1 prices. For example, McDonough again attributed Rivian's negative profits to its high fixed costs and low production volumes without disclosing its upside-down pricing structure. Thus, as noted above, when on March 1, 2022, Rivian tried to implement its pre-IPO plan to raise R1 pricing, and announced price increases of between 17% and 20% on virtually all R1T and R1S vehicles, it was actually putting into place a pricing decision that it knew prior to the IPO that it had to implement to attempt to reverse its upside-down price structure.

Rivian applied these price increases not only to new vehicle sales, but also to the more than 70,000 confirmed R1 pre-orders as of that date, unless those pre-order customers agreed to accept a car with half as many motors and a much smaller battery. Rivian's stock price cratered more than 20% in response to this disclosure.

Two days later, on March 3, 2022, Rivian responded to the intense market criticism over its price hikes by reversing its decision to apply the price increases to existing pre-order customers. Over the ensuing week, Rivian's stock price declined further as investors attempted to determine the impact of these disclosures on the Company's financial prospects. Finally, on March 10, 2022, Rivian disclosed highly disappointing EBITDA projections of negative $4.75 billion for 2022, which it attributed in part to its intention to minimize future price increases. When the dust settled following these disclosures, Rivian's common stock price was trading at less than half its IPO price.

The Court's Opinions

Defendants argued that their statements in the IPO offering documents were not materially false and misleading for several reasons, including because Rivian had no duty to disclose its BOM costs to investors and because Rivian's statements about its near-term "negative gross profit per vehicle" were not objectively false. Rivian also argued that the IPO offering documents were not false and misleading because it expressly warned investors that Rivian had a history of losses and may never become profitable. On the original complaint that the Court dismissed on February 16, 2023, the Court was persuaded by these arguments in so far as it viewed Plaintiffs' theory as one principally related to whether Rivian had adequately disclosed whether it could be profitable.[3]

In the Amended Complaint, Plaintiffs zeroed in on the crux of the issue — whether Rivian's underwater pricing structure that guaranteed a loss on every vehicle sold regardless of any efficiencies from ramping up production was a material fact required to be disclosed to

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[3] *Crews v. Rivian Auto., Inc.*, 2023 U.S. Dist. LEXIS 27602, at *32 (C.D. Cal. Feb. 16, 2023) ("the Court notes again that the Prospectus clearly indicated that Rivian did not expect to be profitable for the foreseeable future and warned that Rivian might never achieve positive margins.")

COURT GIVES PLAINTIFFS INITIAL VICTORY IN RIVIAN IPO CASE

(continued from page 11)

investors. On Plaintiffs' second attempt, the Court rejected each of Defendants' arguments. Regardless of whether Rivian had a duty to disclose BOM costs, the Court held, Plaintiffs had sufficiently alleged that "Rivian misled investors when it represented material cost increases as a possibility rather than a known problem with which Rivian had been contending for years."[4] According to the Court, the Amended Complaint sufficiently pled "that the risk of increasing material costs was not a mere possibility" but rather "an issue that had already come to fruition" over "a span of years" predating the IPO.[5]

The Court further held that even if Rivian's representations about its negative gross profits were technically accurate, and notwithstanding the IPO offering documents' risk warnings, Plaintiffs had sufficiently alleged that it was misleading for Rivian to "focus[] on one factor driving negative gross profits that is common to many startup companies while ignoring the proverbial elephant in the room — i.e., that scaling up would drive Rivian's gross losses up because each R1 EV's component costs far exceeded its retail price."[6] Importantly, the Court held that "[w]hat Plaintiffs allege was concealed from investors is not a garden-variety adverse event, but a major obstacle to profitability unique to Rivian," and it held that Defendants' statements "misled investors by misidentifying and obscuring the key facts that would ensure Rivian's continuing negative gross profits absent price increases."[7]

The Court likewise sustained Plaintiffs' allegation that Defendants violated their disclosure obligations under Items 105 and 303 of Regulation S-K by failing to disclose Rivian's upside-down pricing structure in the IPO offering documents.[8] Judge Staton concluded that "the substantial negative differential between R1 retail prices and the platform's BOM costs" satisfied the materiality threshold under Item 303 and could be considered a significant factor that made investing in Rivian's IPO especially risky.[9]

With respect to scienter, Defendants principally argued that Plaintiffs could not demonstrate that Defendants acted knowingly or recklessly because the former employees cited in the Amended Complaint did not "interact[] personally with the Rivian Defendants and therefore cannot make any reliable statements about their state of mind."[10] The Court rejected these arguments, holding that they were "strained and demand too much at the pleading stage, even under the PSLRA's exacting standards,[11] and finding a strong inference of scienter based on the fact that Rivian's senior executives were heavily involved in all aspects of the R1 design and pricing, had access to the "Project X" database which housed the R1 BOM costs, and participated in meetings where rising R1 BOM costs were discussed.[12] Based on these allegations, the Court concluded that "the inference that Rivian senior executives knew that the BOM cost for each R1 EV exceeded its retail price by approximately $40,000 leading up to the IPO is far more plausible than the inference that those executives were in the dark about the issue," particularly since the R1 Platform was Rivian's "flagship offering."[13]

Conclusion

Judge Staton's decision in *Crews v. Rivian Automotive* represents an important victory for investors in public securities offerings. It recognizes that issuers and their underwriters cannot insulate themselves from liability for specific misrepresentations simply by including generic risk warnings in their offering materials. It also confirms that even technically true statements can mislead investors when they attribute a company's poor performance to one factor while omitting other significant drivers of that underperformance. And it confirms that allegations from former employees can contribute to a strong inference of scienter even if those former employees did not personally interact with the individuals named as defendants. ■

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[4] *Crews v. Rivian Automotive, Inc.*, 2023 U.S. Dist. LEXIS 115419, at *26 (C.D. Cal. July 3, 2023).

[5] *Id.* at 27-28.

[6] *Id.* at 33.

[7] *Id.* at 32-33.

[8] *Id.* at 46-51.

[9] *Id.* at 50.

[10] *Id.* at 41.

[11] *Id.* at 42.

[12] *Id.* at 40-41.

[13] *Id.* at 43.

KTMC RESOLVES CBS-VIACOM MERGER LITIGATION FOR $167.5 MILLION

(continued from page 3)

of Chancery ordered CBS to turn over significant additional documents, including internal communications. Kessler Topaz analyzed the documents received and used them to craft a 118-page complaint against CBS's board of directors in April 2020.

After successfully defeating the CBS board of directors' and Ms. Redstone's motions to dismiss in January 2021, the case moved into discovery and the parties prepared for trial. Kessler Topaz developed significant facts that the merger was concocted purely by Ms. Redstone and her advisors in order for CBS to bail out her failing interest in Viacom, a company comprised of a collection of cable-TV networks that was described by many as a "melting ice cube" due to the prevalence of "cord-cutting." Ms. Redstone's hand-picked directors acquiesced to her plans, while hold-over directors from the previous board's opposition to the merger were sidelined throughout the process and given no substantive role. And because the market widely viewed Viacom as a weaker company without significant upside prospects, CBS's stock price plummeted in the wake of the merger announcement, costing shareholders hundreds of millions of dollars in value.

Trial in the case was set to begin in June 2023. On April 18, 2023, after extensive mediation, and after completing virtually all of fact and expert discovery, the parties reached an agreement to settle the action in exchange for a $167.5 million cash payment to reimburse CBS for its overpayment for Viacom. Because plaintiffs' primary case theory was derivative, as opposed to direct, the money will flow from defendants (including Shari Redstone) and their insurance carriers into CBS. Unlike in a class action, the settlement fund will not be distributed to CBS's minority stockholders, because the alleged harm was to CBS, the corporation, for overpaying for Viacom.

Shari Redstone was the beneficiary of a dual-class stock structure that allowed her to wield absolute control over the affairs of the company through super-voting shares, despite owning an economic minority of the company's outstanding stock. This disparity between Redstone's ownership level and voting control can lead to situations where a controller leverages her power to cause the corporation to enter into transactions that primarily serve the controller's private interests, even if it is value destructive to the corporation she controls. Kessler Topaz will therefore continue to monitor these situations for improprieties and conflicts of interest, and will not hesitate to act swiftly to protect our clients' interests as necessary to ensure the fairness that they deserve. ■

KTMC RECOVERS $85 MILLION TO REMEDY DOLAN-LED MADISON SQUARE GARDEN MERGER

(continued from page 4)

Plaintiff alleged that Mr. Dolan forced the merger on MSGE as a means for him to increase his ownership in MSGE. MSGE had bright prospects and much investor optimism as a pure play live entertainment company. MSGN, meanwhile, was a company in decline due to its reliance on cable-TV carriage fees for its revenues in an environment where many customers were "cutting the cord." Plaintiffs uncovered that the merger was timed in such a way to take advantage of MSGE's stock price weakness in the COVID environment, and to leverage a short-squeeze on media stocks exposed to cable television, which drove the price of MSGN up well beyond its true value. This dynamic allowed Dolan to exchange his overvalued MSGN stock for undervalued MSGE stock at a favorable ratio, and when market participants expected MSGE's value would rapidly increase once COVID-era restrictions on live entertainment events receded.

Between May 2021 and March of 2023, the parties heavily litigated the action and engaged in extensive fact and expert discovery. The action was scheduled for trial beginning in April 2023. On March 14, 2023, after extensive, arm's-length negotiations under the supervision of a mediator, and less than one month before the trial, Plaintiff and Defendants reached an agreement to settle the action in exchange for an $85 million cash payment to MSGE. The settlement fund will go to MSGE, the company, rather than to stockholders, because the alleged harm was to MSGE for overpaying for MSGN. The settlement was approved by Vice Chancellor Lori W. Will of the Delaware Court of Chancery on August 14, 2023, who described the result as "an excellent settlement" and a "significant benefit" for the company and its shareholders. ■

SEC STRENGTHENS INVESTOR PROTECTIONS AGAINST INSIDER TRADING THROUGH RULE 10B5-1 AMENDMENTS

(continued from page 3)

mental state. While many courts have accepted these arguments, a growing number of courts hold that 10b5-1 plans do not provide a complete defense to insider trading liability, recognizing that insiders can disguise illegal trades through opportunistic use of 10b5-1 plans.[5]

The Rule has also been widely criticized by experts who have analyzed corporate insiders' use of the plans. These studies have revealed rampant abuse, suggesting insiders use 10b5-1 plans to maximize gains or avoid losses at the expense of public shareholders.[6] According to an analysis conducted by The Wall Street Journal of approximately 75,000 prearranged stock sales from 2016 through 2021, one-fifth of these sales occurred within 60 trading days of an adoption a Rule 10b5-1 plan.[7] Collectively, those insiders "reaped $500 million more in profits than they would have if they sold three months later."[8]

The SEC and the Department of Justice ("DOJ") have increasingly targeted executives who seek to illegally capitalize on insider information through the adoption or modification of Rule 10b5-1 plans.[9] In fact, on March 1, 2023, the DOJ announced the first criminal prosecution of an insider based exclusively on the use of a Rule 10b5-1 plan.[10] The DOJ charged Terren Peizer, the CEO and Chairman of the Board of Directors of publicly-traded healthcare company Ontrak, with insider trading after he entered into two Rule 10b5-1 plans while in possession of inside information. According to the DOJ, Peizer adopted the plans shortly after learning that Ontrak was going to lose its then-largest customer and then began to sell his Ontrak stock the following day. When the company announced the customer terminated its contract six days later, the stock price dropped by 44%. Peizer's last-minute 10b5-1 plan adoptions helped him avoid more than $12.5 million in losses.[11]

The recent amendments to Rule 10b5-1 seek to curtail such abuse of 10b5-1 plans. The SEC will now (among other new regulations) require a cooling-off period before trades can commence under a 10b5-1 plan.[12] Under the amended Rule, directors and officers cannot commence any trades under their 10b5-1 plans until 90 days following the adoption or modification of the plan.[13] Additionally, they must certify that at the time of the adoption or modification (i) they are not aware of any inside information and (ii) they are adopting the plan in good faith and not as a scheme to evade prohibitions on insider trading.[14] The SEC has also restricted the ability of executives to use multiple overlapping trading plans and implemented new disclosure requirements related to the plans.[15]

The amendments to Rule 10b5-1, combined with the SEC and DOJ's increased focus on enforcing insider trading regulations, will make it harder for corporate insiders to profit from material non-public information. The 90 day limit on insider trades following the adoption of a 10b5-1 plan should also allow private plaintiffs to better identify insider trades that support an inference of scienter (i.e., if they were executed less than 90 days after the adoption of a plan). However, given the new timing and enhanced certification and disclosure requirements, it is likely that defendants will argue that trades executed pursuant to amended Rule 10b5-1 do not provide evidence of scienter. While it remains to be seen whether courts will accept such arguments, plaintiffs may still rely on the pre-amendment cases holding that where "the purpose of the plan was to take advantage of an inflated stock price, the plan provides no defense to scienter."[16] Therefore, complaints alleging insider sales should continue to plead facts showing that defendants possessed material non-public information at the time they adopted any 10b5-1 plans. ■

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5 *See, e.g.*, *Emps.' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 309 (2d Cir. 2015) ("When executives enter into a trading 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."); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 891 (4th Cir. 2014) (a "10b5-1 plan does less to shield [an insider] from suspicion [when] he instituted the plan . . . after the start of the class period"). As one Southern District of New York case recognized, "a clever insider might 'maximize' their gain from knowledge of an impending price drop . . . and seek to disguise their conduct with a 10b5-1 plan." *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 200 (S.D.N.Y. 2010).

6 *See, e.g.*, David F. Larcker, Bradford Lynch, Phillip Quinn, Brian Tayan, Daniel J. Jaylor, *Gaming the System: Three "Red Flags" of Potential 10b5-1 Abuse*, Stanford Closer Look Series (January 19, 2021), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-88-gaming-the-system.pdf (analyzing over 20,000 10b5-1 plans and concluding that "[s]ales made pursuant to these plans avoid significant losses and foreshadow considerable stock price declines that are well in excess of industry peers"); Artur Hugon and Yen-Jung Lee, *SEC Rule 10b5-1 Plans and Strategic Trade Around Earnings Announcements* (December 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2880878 (analyzing adoption of Rule 10b5-1 plans around earnings announcements and finding "insiders divert aggressive earnings-based trades into planned trading accounts after the availability of Rule 10b5-1"); Alan D. Jagolinzer, *SEC Rule 10b5-1 and Insiders' Strategic Trade* (July 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=541502 (presenting evidence that (i) participants of Rule 10b5-1 plans "on average, generate abnormal trade returns," (ii) "a substantive proportion of selected 10b5-1 plan initiations are associated with pending adverse news disclosures," and (iii) "participants terminate sales plans before positive shifts in firm returns").

7 Tom McGinty and Mark Maremont, *CEO Stock Sales Raise Questions about Insider Trading*, Wall Street Journal (June 29, 2022), https://www.wsj.com/articles/executive-stock-sales-questions-insider-trading-11656514551.

8 *Id.*

9 *See* Dave Michaels and Mark Maremont, *Insider-Trading Cases Once Deemed Too Hard to Crack are Now Targets of U.S. Government*, Wall Street Journal (March 3, 2023), https://www.wsj.com/articles/insider-trading-cases-once-deemed-too-hard-to-crack-are-now-targets-of-u-s-government-c5320fac.

10 U.S. Department of Justice, *CEO of Publicly Traded Health Care Company Charged for Insider Trading Scheme* (March 1, 2023), https://www.justice.gov/opa/pr/ceo-publicly-traded-health-care-company-charged-insider-trading-scheme.

11 *Id.*

12 *See* U.S. Securities and Exchange Commission, *Insider Trading Plans and Related Disclosures* (December 2022), at 11-12, 27-37, https://www.sec.gov/rules/final/2022/33-11138.pdf.

13 *Rule 10b5-1: Insider Trading Arrangements and Related Disclosure Fact Sheet*, https://www.sec.gov/files/33-11138-fact-sheet.pdf.

14 *Id.*

15 *Id.*

16 *Blanford*, 794 F.3d at 309.

LITIGATORS MUST SEEK TO PRESERVE CORPORATE COMMUNICATIONS TRANSMITTED OVER TEXT AND CHAT APPLICATIONS: LESSONS FROM THE WHATSAPP PROBE, GOOGLE PLAY SANCTIONS, AND THE FTX BANKRUPTCY

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controls or preservation efforts. In a press release announcing nearly $2 billion in regulatory fines tied to the first example, SEC Chair, Gary Gensler cogently explained why the SEC aggressively pursued what amounted to "recordkeeping" violations in order to redress the institutions' failure to preserve records of employee communications: "Since the 1930s, [] recordkeeping has been vital to preserve market integrity. As technology changes, it's even more important that registrants . . . maintain and preserve [] communications" about business matters.[3] The Director of the SEC's Enforcement Division, Gurbir S. Grewal, further confirmed that these "recordkeeping requirements" are "sacrosanct," noting that "we must be able to examine a firm's books and records to determine what happened" in the face of "allegations of wrongdoing or misconduct."[4] In short, "[b]ooks and records matter."[5]

WhatsApp Use at U.S. Financial Institutions.

On September 27, 2022, the SEC and the CFTC announced that more than 10 financial institutions had admitted wrongdoing and agreed to pay penalties totaling more than $1.8 billion because their employees had "routinely communicated about business matters using text messaging applications," including WhatsApp and Signal, "on their personal devices" and the banks "did not maintain or preserve the substantial majority of these off-channel communications, in violation of the federal securities laws."[6] On May 11, 2023, the SEC and CFTC announced $67.5 million in additional penalties levied against two more financial institutions caught up in its sweep, HSBC and Scotia Capital.[7] Most recently, on August 8, 2023, the SEC and CFTC announced settlements totaling $549 million with more than 11 additional financial institutions for "widespread and longstanding failures by the firms and their employees to maintain and preserve electronic communications," including on messaging apps WhatsApp and Signal, as part of its ongoing probe.[8]

The SEC first uncovered this trend at a J.P. Morgan entity in 2020 after the bank was unable to produce requested records in another matter.[9]

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[3] Press Release, SEC, *SEC Charges 16 Wall Street Firms with Widespread Recordkeeping Failures* (Sept. 27, 2022), https://www.sec.gov/news/press-release/2022-174.

[4] *Id.*

[5] Gary Gensler, Chair, SEC, "This Law and Its Effective Administration": Remarks Before the Practising Law Institute's 54th Annual Institute on Securities Regulation (Nov. 2, 2022), https://www.sec.gov/news/speech/gensler-remarks-practising-law-institute-110222.

[6] Press Release, SEC, *supra* note 3; Press Release, CFTC, *CFTC Orders 11 Financial Institutions to Pay Over $710 Million for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methodshttps* (Sept. 27, 2022), https://www.sec.gov/news/press-release/2022-174.

[7] Press Release, SEC, *SEC Charges HSBC and Scotia Capital with Widespread Recordkeeping Failures* (May 11, 2023), https://www.sec.gov/news/press-release/2023-91; Press Release, CFTC, *CFTC Orders HSBC to Pay a $30 Million Penalty for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods* (May 12, 2023), https://www.cftc.gov/PressRoom/PressReleases/8701-23; Press Release, CFTC, *CFTC Orders The Bank of Nova Scotia to Pay a $15 Million Penalty for Recordkeeping and Supervision Failures for Widespread Use of Unapproved Communication Methods* (May 11, 2023), https://www.cftc.gov/PressRoom/PressReleases/8699-23.

[8] Press Release, SEC, *SEC Charges 11 Wall Street Firms with Widespread Recordkeeping Failures* (Aug. 8, 2023), https://www.sec.gov/news/press-release/2023-149 (announcing charges against Wells Fargo entities, BNP Paribas Securities, SG Americas Securities, BMO Capital Markets, Mizuho Securities USA, Houlihan Lokey Capital, Moelis & Company, Wedbush Securities, and SMBC Nikko Securities America); https://www.cftc.gov/PressRoom/PressReleases/8762-23.

[9] J.P. Morgan Sec. LLC, Exchange Act Release No. 93807 (Dec. 17, 2021) (cease-and-desist order), https://www.sec.gov/litigation/admin/2021/34-93807.pdf.

Thereafter, in September 2021, the SEC "commenced a risk-based initiative to investigate whether" other banking institutions "were properly retaining business-related messages sent and received on personal devices."[10] J.P. Morgan admitted wrongdoing and paid a $125 million fine in December 2021.[11]

That initiative uncovered the fact that employees and executives at these institutions had been using WhatsApp in violation of record-keeping obligations since at least 2018 and led to the admissions and penalties announced in September 2022. The SEC's continued investigation into other institutions uncovered "pervasive and longstanding 'off-channel' communications" by "employees at multiple levels of authority, including supervisors and senior executives," "through various messaging platforms on [employees'] personal devices, including iMessage, WhatsApp, and Signal, about the business of their employers" and concluded that the firms' failure to "maintain or preserve the substantial majority of these off-channel communications . . . likely deprived the Commission of these off-channel communications in various SEC investigations."[12]

The regulators' investigations also remain ongoing, with Truist Financial recently disclosing that it is being investigated by the SEC and CFTC regarding its "compliance with applicable recordkeeping requirements for business-related electronic communications."[13] It seems likely that more fines and admissions from these financial institutions will follow.

While the SEC's "sweep" to uncover the use of and failure to maintain and preserve communications generated through text, messaging, and chat applications using personal devices at U.S. financial institutions have shined a light on practices that may have taken years to uncover via litigation and regulatory inquiries, the spoliated WhatsApp and Signal communications will never be recovered.

Google's Failure to Preserve Chats.

Private antitrust litigation against Alphabet's Google subsidiary related to its Play store has successfully illuminated efforts by Google to avoid preserving and producing chat messages exchanged over its eponymous chat application. In a March 28, 2023 sanctions order, a San Francisco-based federal court found that Google instructed its employees that chatting "'off the record' via [Google] Hangouts" was "[b]etter than sending [an] email" because Google did not retain one-on-one Google chats for

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[10] BofA Sec., Inc., et al., Exchange Act Release No. 95921 (Sept. 27, 2022) (cease-and-desist order) https://www.sec.gov/litigation/admin/2022/34-95921.pdf; *see also* Chris Prentice & Jody Godoy, *EXCLUSIVE U.S. SEC opens inquiry into Wall Street banks' staff communications –sources*, Reuters (Oct. 12, 2021, 3:45 PM), https://www.reuters.com/legal/litigation/exclusive-us-sec-opens-inquiry-into-wall-street-banks-staff-communications-2021-10-12/.

[11] Press Release, SEC, *JPMorgan Admits to Widespread Recordkeeping Failures and Agrees to Pay $125 Million Penalty to Resolve SEC Charges* (Dec. 17, 2021), https://www.sec.gov/news/press-release/2021-262.

[12] Press Release, SEC, *supra* note 8.

[13] *Id.*; Truist Fin. Corp., Annual Report (Form 10-Q) (July 31, 2023), at 32.

LITIGATORS MUST SEEK TO PRESERVE CORPORATE COMMUNICATIONS TRANSMITTED OVER TEXT AND CHAT APPLICATIONS: LESSONS FROM THE WHATSAPP PROBE, GOOGLE PLAY SANCTIONS, AND THE FTX BANKRUPTCY

(continued from page 17)

more than 24 hours, and only up to 30 days if one user had "history" turned-on.[14] Moreover, while Google had the ability to turn history "on" for any employee that subsequently received a litigation hold, it chose not to and left the decision as to whether to preserve one-on-one Google chats to the employees.[15] The result was predictable: Google employees and executives used one-on-one "history off" Google chats to discuss substantive issues even while under mandatory litigation holds. According to the sanctions order, "the[y] intentionality manifested at every level within Google to hide the ball with respect to Chat," such that "[i]n effect, Google adopted a 'don't ask, don't tell' policy for Chat preservation."[16]

As a sanction for this conduct, the court ordered Google to cover attorneys' fees and costs associated with the sanction motions, including the evidentiary hearing and related events. The parties recently informed the court that they had reached agreement as to the amount of these sanctions. The court also left open the door to non-monetary sanctions that could include foreclosing Google from making certain arguments or relying on certain evidence at trial. The evidentiary record plaintiffs developed in the Google Play case led the U.S. Department of Justice to seek sanctions in a separate anti-trust case against Google currently pending in a Washington, D.C.-based federal court.[17] Google also is now preserving its employees' chats, at least in the context of litigation. But Google chats from the time period critical to both the Google Play antitrust litigation, as well as the DOJ's lawsuit are lost and cannot be recreated.

FTX's Use of Slack and Ephemeral Messaging.

On November 11, 2022, FTX Trading Ltd, a multi-billion cryptocurrency exchange filed for bankruptcy. Its founder and former CEO, Sam Bankman-Fried, has been indicted by a Brooklyn-based federal court for fraud. The bankruptcy proceedings have revealed that Bankman-Fried and a close group of insiders used Slack and Signal to run the business.

For example, the FTX bankruptcy trustee noted that 35 of the FTX entities "relied on a hodgepodge of Google documents, Slack communications, shared drives, and Excel spreadsheets . . . to manage their assets and liabilities."[18] FTX insiders used "Slack, Signal, and other informal methods of communication" to approve the transfer of funds among FTX's many related entities.[19] Additionally, "Signal and Telegram were at times utilized in communications with both internal and external parties with 'disappearing messages' enabled, rendering any historical review impossible."[20] Per the FTX bankruptcy trustee, FTX "[e] xpenses and invoices . . . were submitted on Slack and were approved by 'emoji.'"[21] In addition to using ephemeral messaging to conduct FTX business, Bankman-Fried's "inner circle" at FTX discussed the events leading up to FTX's collapse on a Signal group chat titled, "Wirefraud."[22] All told, "[t]hese informal, ephemeral messaging

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[14] *In re Google Play Store Antitrust Litig.*, ___ F. Supp. 3d ____, 2023 WL 2673109, at *3-4 (N.D. Cal. Mar. 28, 2023).

[15] *Id.* at *5.

[16] *Id.* at *8-9.

[17] Mot. for Sanctions, *United States v. Google LLC*, No. 20-cv-3010-APM (D.D.C. Feb. 10, 2023), ECF No. 495.

[18] First Interim Rep. at 12-13, *In re FTX Trading LTD*, No. 22-11068-JTD (Bankr. D. Del. Apr. 9, 2023), ECF No. 1242, https://restructuring.ra.kroll.com/FTX/Home-DownloadPDF?id1=MTQ5MDc2OQ==&id2=-1.

[19] *Id.* at 15.

[20] *Id.*

[21] *Id.*

[22] Matthew Cranston, *FTX's inner circle had a secret chat group called 'Wirefraud'*, Financial Review (Dec. 13, 2022 at 11:19am), https://www.afr.com/companies/financial-services/ftx-s-inner-circle-had-a-secret-chat-group-called-wirefraud-20221213-p5c5sx.

systems were used to procure approvals for transfers in the tens of millions of dollars, leaving only informal records of such transfers, or no records at all" for the bankruptcy trustee to review.[23]

* * *

Each of these examples demonstrates why preservation of data and communications generated by messaging, chat, and collaboration applications is vital in the fight against corporate fraud. It is not possible to argue about whether data concerning the subject matter of the litigation must be produced from a corporation's Slack environment or from its employees' personal devices if that data no longer exists. In the case of the SEC, DOJ, the private litigants in the Google Play case, and the FTX bankruptcy trustee, the data they needed to regulate or litigate was no longer available. Compensation, even if in the millions or hundreds of millions of dollars, does not make up for the missing evidence necessary to ferret out fraud or prove that these companies harmed investors or consumers. In order to obtain meaningful, non-monetary sanctions, regulators and private litigants often have to demonstrate what the destroyed evidence would have proven had it been introduced at trial, often an insurmountable task. That is likely why the DOJ sought to modify Bankman-Fried's bail conditions after it learned that he had used Signal and encrypted messages to communicate with potential witnesses. Ultimately, Bankman-Fried was barred from using Signal and similar applications and may only use WhatsApp if "monitoring technology is installed on his cellphone that automatically logs and preserves" all of these messages.[24]

Moreover, the sudden shift to remote work in response to and in the aftermath of the COVID-19 pandemic has forced companies to immediately adopt and deploy applications like WhatsApp, Google chat, and Slack in order to allow employees to easily communicate and collaborate in a fully remote work environment. Indeed, it is anticipated that such short message communications will surpass email discovery in litigation by 2024.[25] Because most complex class actions filed today will have some or all of the COVID-19 pandemic period — roughly, March 2020 to March 2023 — as part of the relevant period for discovery, communications and other data generated by these applications will be critical to private litigants seeking redress for securities fraud, anti-trust violations, and faulty products.

To address the serious concerns posed by the "ubiquitous" use of third-party messaging and chat applications by employees, and the availability of that data in the context of a criminal investigation, on March 1, 2023, Assistant Attorney General Kenneth A. Polite, Jr. announced changes to the criteria set forth in the DOJ's Evaluation of Corporate Compliance Programs (ECCP), including how the DOJ considers "a corporation's approach to the use of personal devices as well as various communications platforms and messaging applications, including those offering ephemeral messaging," in the context of a criminal investigation.[26] Under the revised criteria, the DOJ "will consider how policies governing these messaging applications . . . ensure that, as appropriate, business-related electronic data and communications can be preserved and accessed," "how companies communicate the policies to employees, and whether they enforce them on a consistent basis."[27] Polite further remarked that if, during an investigation, a company has not produced communications from these third-party messaging applications, "our prosecutors will not accept that at face value," and a company's answers to questions regarding such communications "may very well affect the offer it receives to resolve criminal liability."[28]

Litigators must use the groundwork laid by the SEC, DOJ, and private litigants to push companies to identify and preserve, and, at the appropriate time, collect and search relevant personal devices, as well as chat, messaging, and data created in collaborative tools. In turn, parties seeking discovery, including as representatives of a class of investors, must be careful to maintain and preserve data from employees' personal devices and messaging and chat applications and collaboration tools as appropriate and consistent with applicable law. ■

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[23] First Interim Rep., *supra* note 18 at 15.

[24] Turner Wright, *Judge denies motion allowing SBF to use messaging apps*, Cointelegraph (Feb. 7, 2023), https://cointelegraph.com/news/judge-denies-motion-allowing-sbf-to-use-messaging-apps.

[25] *See* Cristin Traylor, *The Proliferation of Short Message Data Pushes E-Discovery to Tackle New Challenges*, Law.com (Mar. 21, 2023, 10:24 AM), https://www.law.com/legaltechnews/2023/03/21/the-proliferation-of-short-message-data-pushes-e-discovery-to-tackle-new-challenges/?slreturn=20230430133133.

[26] Kenneth A. Polite, Jr., Asst. Att'y Gen., DOJ, Keynote Address at the ABA's 38th Ann. Nat'l Inst. on White Collar Crime (Mar. 3, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-kenneth-polite-jr-delivers-keynote-aba-s-38th-annual-national.

[27] *Id.*

[28] *Id.*

KTMC PREVAILS IN NINTH CIRCUIT APPEAL SETTING STAGE FOR TRIAL IN LONG-STANDING CASE CHALLENGING CAPTIVE REINSURANCE ARRANGEMENTS

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Background of RESPA and Case History

Passed by Congress in 1974, RESPA broadly regulates various aspects of real estate transactions.[2] In passing RESPA, Congress sought to combat the "unnecessarily high settlement charges caused by certain abusive practices" by eliminating kickbacks and referral fees that inflate the cost of real estate settlement services.[3] Specifically, § 8(a) of RESPA, also known as RESPA's anti-kickback provision, prohibits giving or accepting "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, [in relation to the referral of] a real estate settlement service involving a federally related mortgage loan."[4]

Although RESPA's prohibition on kickbacks and referral fees is written broadly, Congress tempered its reach by enacting a safe harbor, which provides that "[n]othing in this section shall be construed as prohibiting . . . the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed."[5] The U.S. Department of Housing and Urban Development ("HUD") later issued an opinion letter on August 6, 1997, explaining that captive mortgage reinsurance arrangements are permissible under RESPA's safe harbor "if the payments to the reinsurer: (1) are for reinsurance services 'actually furnished or for services performed'" — i.e., there is, among other things, a "real transfer of risk" — "and (2) are bona fide compensation that does not exceed the value of such services."[6] PMI, which a mortgage lender generally requires a homebuyer purchase if it puts less than 20% down to guard against the risk of default, is a real estate settlement service that is regulated pursuant to RESPA.

KTMC first brought suit under §8(a) of RESPA on behalf of a class of homebuyers who had obtained residential mortgage loans from PHH and were required to purchase PMI from one of PHH's four preferred mortgage insurers. Plaintiffs alleged that a portion of the premiums paid by the homebuyers to the mortgage insures was then paid by those insurers to PHH's captive reinsurance subsidiary, Atrium, in violation of RESPA's anti-kickback provision. The crux of Plaintiffs' claim is that the captive reinsurance arrangements ("CRAs") at issue were in essence a sham to filter part of the homebuyers' insurance premiums to Atrium in exchange for PHH's referrals of mortgage insurance business to those third party mortgage insurers.

At summary judgment, the Court, as it did various times prior, held that Plaintiffs satisfied their pre-trial burden to establish standing. The Court explained that "regardless of whether plaintiffs were overcharged for settlement services, inadequate disclosures could have led them to enter into an agreement they would not have otherwise entered into or to transact with a party they would not have otherwise elected to do business with."[7] In other words, if the jury were to find that Atrium did not provide real reinsurance, the disclosures to homebuyers about such "reinsurance" were necessarily false and misleading, and therefore not meaningful, thus conferring standing on a classwide basis under *Spokeo*.[8]

Following Plaintiffs' victory at summary judgment, the case was poised to proceed to trial on the sole question of whether the CRAs were protected by RESPA's § 8(c)(2) safe harbor as interpreted by HUD in the 1997 HUD Letter.[9] Plaintiffs, who have the burden of proof at trial, were prepared to present substantial evidence developed during discovery, both through documentary and deposition evidence as well as through

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[2] *In re Zillow Grp., Inc. Sec. Litig.*, No. 2:17-cv-01387-JCC, 2018 WL 4735711, at *5 (W.D. Wash. Oct. 2, 2018) (citing 12 U.S.C. §§ 2601 et seq.).

[3] 12 U.S.C. § 2601(a), (b)(2).

[44] RESPA § 8, 12 U.S.C. § 2607 (2012).

[5] 12 U.S.C. § 2607(c)(2).

[6] U.S. Dep't of Hous. & Urban Dev., Opinion Letter on Captive Reinsurance Programs to Countrywide Funding Corporation (Aug. 6, 1997) ("1997 HUD Letter") at 3

[7] *Id.*

[8] *Id.*

[9] 12 U.S.C. § 2607(c)(2)).

the record created by Plaintiffs' four experts, that the safe harbor did not apply to the CRAs because no real risk was transferred and, even if it was, such risk was not commensurate with the premiums paid by the mortgage insurers to Atrium.

TransUnion v. Ramirez and Monetary Harm

The Supreme Court's decision in *TransUnion* then fundamentally changed the law on standing. In a decision handed down a year after summary judgment was decided here, the Supreme Court held that plaintiffs alleging intangible harms for standing purposes — such as the asserted informational injury — must show that the statutory violation resulted in "downstream consequences" or "adverse effects" as to each and every class member in order to constitute concrete injury for Article III standing purposes. Critically, the Supreme Court also held, in contrast to prior precedent, that a party can not establish those downstream adverse consequences by relying on Congress's stated intent in passing a particular statute (effectively stripping Congress of any powers to create enforceable rights).[10]

As a result of *TransUnion*, Plaintiffs could no longer rely on an informational harm theory to prove standing at trial and sought to develop evidence of classwide monetary harm (another harm Congress identified in passing RESPA and that *TransUnion* held to be "concrete" without further showing[11]). Plaintiffs retained Professor Robert Hoyt, a renowned academic in risk management and insurance, who opined that the CRAs (which he assumed did not involve a real risk transfer) simply increased transaction costs and in turn the premiums paid by the borrowers, thus resulting in monetary harm for standing purposes as to each and every class member.

The Court's Decision to Strike Professor Hoyt

Defendants seized on the Supreme Court's decision to *TransUnion* to move to decertify the class in October 2021, arguing that Plaintiffs could no longer establish standing post-*TransUnion*. Plaintiffs opposed decertification including by submitting an expert report prepared by Dr. Hoyt. At trial, and in light of *TransUnion,* Plaintiffs would present common evidence of classwide monetary harm through Dr. Hoyt's report and testimony (as well by reference to certain Congressional findings that kickbacks in connection with settlement services tend to unnecessarily drive up the costs of those services and to Congress's stated purpose in passing RESPA to combat the "unnecessarily high settlement charges caused" by kickbacks).

Defendants also moved in December 2021 to strike the new evidence, including Dr. Hoyt's report, because Plaintiffs could not meet the exacting standard in the final pretrial order for

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[10] *TransUnion LLC v. Ramirez,* 141 S. Ct. 2190, 2205 (2021).

[11] *Id.* at 2197.

KTMC PREVAILS IN NINTH CIRCUIT APPEAL SETTING STAGE FOR TRIAL IN LONG-STANDING CASE CHALLENGING CAPTIVE REINSURANCE ARRANGEMENTS

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allowing undisclosed witnesses or undisclosed exhibits at trial. In a remarkable decision issued by Judge Baker, newly assigned to this case after twelve some years of litigation and only two weeks before trial was set to begin, the District Court held that Plaintiffs' submission of the new evidence did not satisfy the final pretrial order's criteria for late witness and exhibit disclosure, nor did it comply with Federal Rule of Civil Procedure 16(e) to modify a final pretrial order.[12] The Court held that Plaintiffs should have somehow reasonably anticipated the need to develop and disclose the monetary harm evidence years earlier, as *TransUnion* merely "clarified" but did not change the prior standing law as articulated in *Spokeo*. Thus, the Court, in holding that Plaintiffs did not comply with the pretrial order's requirements for disclosing evidence or establish a basis for modifying the pretrial order, excluded Plaintiffs' sole expert witness on standing and effectively stripped Plaintiffs of the ability to prove standing at trial. Plaintiffs promptly appealed.

Plaintiffs Prevail in the Ninth Circuit

On February 24, 2023, the Ninth Circuit reversed. The three-judge panel found unanimously, and without argument, that the district court "abused its discretion in barring under [the pretrial order] one witness and one exhibit that Plaintiffs sought to introduce as evidence of economic injury for purposes of Article III standing."[13] The Court's analysis was simple: Plaintiffs properly proffered this evidence in light of the Supreme Court's intervening decision in *TransUnion*, which was decided after the pretrial conference, and which changed the law on standing (as Defendants themselves had conceded). It was only after *TransUnion* that Plaintiffs were prohibited from relying on an informational injury, based on Congress' stated purpose in passing RESPA, without also proving adverse consequences on a classwide basis.[14]

As a result of prior precedent, the Court explained, "***Plaintiffs could not have reasonably anticipated the need for evidence of economic injury five years prior to the final pretrial conference.***"[15] The Court of Appeals went on to note that Plaintiffs were entitled to rely on the district court's summary judgment decision and the subsequent final pretrial order, both of which made clear that Plaintiffs' alleged informational injury was sufficient to satisfy Article III's injury-in-fact requirement prior to *TransUnion*, and that evidence of economic injury was not then required for standing purposes.[16] Thus, Plaintiffs demonstrated, in satisfaction of the pretrial order, that Professor Hoyt and the related evidence was for the purpose of rebutting evidence that could not have been reasonably anticipated at the pretrial conference.[17] The evidence was, therefore, improperly excluded.

The Ninth Circuit's decision is a significant victory for Plaintiffs, who may now finally bring this case to resolution. It is also noteworthy in that it provided the first opportunity for the Ninth Circuit to consider the Supreme Court's seminal decision in *TransUnion*, which the Court described as representing a "change in the law" on standing.[18] Specifically, the Ninth Circuit recognized that, contrary to past precedent, *TransUnion* now requires plaintiffs "to further prove 'downstream consequences' from [an] alleged informational injury because an 'asserted informational injury that causes no adverse effects cannot satisfy Article III,'" notwithstanding Congress's stated intent and purpose in passing the federal statute under which the claim is brought.[19] ■

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[12] *Munoz v. PHH Mortg. Corp.*, 2022 WL 286619, at *8 (E.D. Cal. Jan. 31, 2022), rev'd and remanded sub nom. *Munoz v. PHH Corp.,* No. 22-15407, 2023 WL 2202228 (9th Cir. Feb. 24, 2023).

[13] *Munoz v. PHH Corp.,* No. 22-15407, 2023 WL 2202228, at *1 (9th Cir. Feb. 24, 2023).

[14] *Id.*

[15] *Id.* at 2.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* (quoting *TransUnion,* 141 S. Ct. at 2214).

WHAT'S TO COME

SEPTEMBER 2023

Michigan Association of Public Employee Retirement Systems (MAPERS) 2023 Fall Conference

September 9 – 12

Bellaire, MI ■ Shanty Creek Resort

Council of Institutional Investors (CII) 2023 Fall Conference

September 11 – 13

Long Beach, CA ■ The Westin Long Beach

Georgia Association of Public Pension Trustees (GAPPT) 9th Annual Trustee School

September 18 – 20

Athens, GA ■ The Classic Center

OCTOBER 2023

Florida Public Pensions Trustees Association (FPPTA) 2023 Fall Trustee School

October 1 – 4

Ponte Vedra Beach, FL ■ Sawgrass Marriott Golf Resort & Spa

International Foundation of Employee Benefit Programs (IFEBP) 69th Annual Employee Benefits Conference

October 1 – 4

Boston, MA ■ Boston Convention & Exhibition Center

Illinois Public Pension Fund Association (IPPFA) 2023 Mid-America Pension Conference

October 4 – 6

Lincolnshire, IL ■ Crane's Landing Golf Club

NOVEMBER 2023

State Association of County Retirement Systems (SACRS) 2023 Fall Conference

November 7 – 10

Rancho Mirage, CA ■ Omni Rancho Las Palmas Resort & Spa

County Commissioners Association of Pennsylvania (CCAP) 2023 Fall Conference

November 18 – 21

Dauphin County, PA ■ The Hotel Hershey

FEBRUARY 2024

National Association of Public Pension Attorneys (NAPPA) Winter Seminar

February 22 – 24

Tucson, AZ ■ Loews Ventana Canyon

MARCH 2024

California Association of Public Retirement Systems (CALAPRS) General Assembly

March 2 – 5

Rancho Mirage, CA ■ Omni Rancho Las Palmas Resort & Spa

Council of Institutional Investors (CII) Spring Conference

March 7 – 9

Washington, D.C. ■ The Mandarin Oriental Hotel

18th Annual Rights & Responsibilities of Institutional Investors (RRII)

March 14

Amsterdam, Netherlands ■ The Renaissance Amsterdam Hotel

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EDITORS

Darren J. Check, Esquire

Nicole B. Schoeffling,
Business Development Marketing Manager

Please direct all inquiries regarding this publication to Darren J. Check, Esquire at 610.822.2235 or dcheck@ktmc.com

---

280 King of Prussia Road
Radnor, PA 19087
P 610.667.7706
F 610.667.7056

One Sansome Street
Suite 1850
San Francisco, CA 94104
P 415.400.3000
F 415.400.3001

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