WINTER 2024

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

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HIGHLIGHTS

KESSLER TOPAZ TAPPED TO LEAD LOCAL GOVERNMENT AND SCHOOL DISTRICT PLAINTIFFS IN SOCIAL MEDIA MDL

Tyler Graden, Esquire and Matt Macken, Esquire

In a case that is topical and timely, two Kessler Topaz partners have been appointed to represent local government and school district plaintiffs from across the nation in a multidistrict litigation ("MDL") seeking to hold the largest social media companies accountable for harms caused by their addictive platforms. Partners Joseph H. Meltzer and Melissa L. Yeates were appointed to the Local Government and School District Committee (the "Committee"), with Ms. Yeates named as Co-Chair, in *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047 (N.D. Cal.). The

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FEDERAL JUDGE DENIES GENERAL ELECTRIC'S SUMMARY JUDGMENT BID, SETTING THE STAGE FOR A RARE SECURITIES FRAUD TRIAL

Austin Manning, Esquire and Josh Materese, Esquire

On September 28, 2023, the Honorable Jesse M. Furman of the U.S. District Court for the Southern District of New York issued an order in *Sjunde AP-Fonden v. General Electric Company, et al.*, No. 1:17-cv-08457-JMF (S.D.N.Y.) (the "Order") denying Defendants'[1] motion for summary judgment and rejecting their motions to exclude Plaintiffs' experts.[2]

Led by Swedish pension fund Sjunde AP-Fonden ("AP7") and The Cleveland Bakers and Teamsters Pension Fund (together, "Plaintiffs") and Lead Counsel KTMC, this case is believed to be the first reported securities fraud class action to survive summary judgment and proceed to trial on claims arising, in

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[1] "Defendants" are the General Electric Company ("GE") and its former Vice Chairman and Chief Financial Officer, Jeffrey S. Bornstein.

[2] *See Sjunde AP-Fonden v. Gen. Elec. Co.,* 2023 WL 6314939, at *1 (S.D.N.Y. Sept. 28, 2023).

KESSLERTOPAZ MELTZERCHECK LLP

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dangers of the use (and misuse) of social media platforms are both widespread and well-known. This is a case that is poised to have a long-lasting impact on our nation's youth and Kessler Topaz is pleased to be helping to direct these important efforts through this multidistrict litigation.

The Committee represents hundreds of local governments and school districts who are battling an unprecedented mental health crisis among children and teens caused by Defendants' design, operation and marketing of dangerous and addictive social media platforms. Left to deal with the fallout from Defendants' conduct, local governments and school districts have been forced to commit significant resources to providing emotional and mental health support for young people in their communities. This consolidated litigation seeks monetary recovery and equitable relief on behalf of all local governments and school districts that have filed or will file complaints seeking relief.

Background on *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*

In 2022, individuals across the country brought personal injury claims against various social media companies — Meta's Facebook and Instagram, Google's YouTube, ByteDance's TikTok, and Snapchat — alleging that the addictive and dangerous nature of the social media companies' platforms caused mental health and other injuries. In October 2022, the Judicial Panel on Multidistrict Litigation ("JPML") centralized these personal injury cases in the Northern District of California.

Local governments and school districts also filed claims against the social media companies, seeking to hold them accountable for, among other things, the expense of human and financial resources needed to address the youth mental health crisis. School districts, which are the primary funders and providers of mental health services to youth, have had their resources stretched thin as a result of Defendants' conduct. Municipal and county governments, which fund school districts and provide youth services — including mental health treatment, outpatient therapy, behavioral health services, and after-school programming — are similarly harmed by Defendants' conduct causing addiction to, and excessive use of, social media platforms and the resulting youth mental health crisis. As the number of these cases grew, the JPML transferred them to be litigated alongside the personal injury claims in the Northern District of California, assigned to the Honorable Yvonne Gonzalez Rogers.

Defendants first moved to dismiss these claims based on Section 230 of the Communications Decency Act, 47 U.S. Code § 230, and the First Amendment to the United States Constitution, arguing that (i) as website operators they should have immunity from all claims, which they asserted were content-based; and (ii) the social media platforms merely amounted to free speech. On November 14, 2023, the Court largely rejected defendants' arguments. *In re Soc. Media Adolescent Addiction/Pers. Inj. Prod. Liab. Litig.*, No. 4:22-MD-03047-YGR, 2023 WL 7524912, at *1 (N.D. Cal. Nov. 14, 2023). In a lengthy opinion, the Court individually analyzed each of the platform features plaintiffs alleged to be problematic and found that, although some of plaintiffs' claims were based on the content published on the platforms and thus fell under Section 230 and the First Amendment, many did not. The majority of claims were allowed to proceed.

Local Government and School District Claims

On November 21, 2023, after denying Defendants' efforts to dismiss based on Section 230 and the First Amendment, Judge Yvonne Gonzalez Rogers appointed Ms. Yeates to Co-Chair the Local Government and School District Committee in charge of leading the litigation on behalf of the hundreds of local governments and school districts pursuing claims against the social media Defendants for causing and contributing to the youth mental health crisis in their communities. Partner Joe Meltzer was also appointed to a leadership role within the Committee. In addition to its leadership position, Kessler Topaz represents the City of Providence, Rhode Island and Montgomery County, Pennsylvania, two communities which, like many others, have borne the consequences of the ongoing youth mental health crisis.

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OKLAHOMA COURT GREEN-LIGHTS PLAINTIFFS' CLAIMS IN CONTINENTAL RESOURCES TAKE-PRIVATE LITIGATION

Kevin Kennedy, Esquire

On October 3, 2023, Judge Richard C. Ogden of the District Court of Oklahoma County denied, in its entirety, a partial motion to dismiss claims against Harold Hamm and other directors of Continental Resources, Inc. relating to Hamm's 2022 acquisition of all outstanding shares of Continental common stock he and his family did not already own (the "Transaction"). Now that the Court has denied Defendants' partial motion to dismiss, the case is in discovery.

Factual Background

Harold Hamm is Continental's founder, controlling shareholder, and Chairman of the board of directors. In the fall of 2021, Hamm met with his advisors to consider taking Continental private. Rather than announcing such a transaction, Hamm quietly commenced a series of smaller purchases of Continental common stock, purchasing more than 800,000 shares for over $41 million between November 2021 and March 2022. During that same period, Hamm also caused the Company to repurchase more than 3 million shares of Continental common stock for over $158 million. None of the public stockholders who sold these 3.8 million shares to Hamm or to Continental knew that Hamm was imminently planning to take Continental private.

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THE FINAL ACT IN THE LONG-RUNNING GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION CONFIRMS THAT PRICE IMPACT ARGUMENTS PROFFERED BY DEFENDANTS SHOULD HAVE LITTLE TRACTION IN THE VAST MAJORITY OF SECURITIES CASES

Geoffrey C. Jarvis, Esquire and Varun Elangovan, Esquire

Our Winter 2022 newsletter[1] discussed the Supreme Court's then-recent decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021), and the District Court's subsequent decision[2] applying the Supreme Court's updated guidance on how defendants in federal securities class action lawsuits can rebut the presumption of reliance established by the fraud-on-the-market doctrine. After the Supreme Court's decision, the District Court (for the third time) certified a class of Goldman Sachs Group, Inc. ("Goldman") investors,[3] but on a renewed appeal (the third appeal) to the United States Court of Appeals for the Second Circuit, the appellate court reversed and decertified the class, finding that the lower court had committed clear error.[4]

The Second Circuit's August 2023 decision in *Goldman VII* constitutes the final chapter in this long-running securities litigation.[5] While

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[1] Sauder, K. & Schwartz B., *Recent Developments In Securities Class Certification Law Affirm That Generic Misstatements Can Cause Price Impact*, The Bulletin, Winter 2022, at 5.

[2] *In re Goldman Sachs Grp., Inc. Sec. Litig.*, 579 F. Supp. 3d 520 (S.D.N.Y. 2021) ("*Goldman VI*").

[3] *Id.* at 532-39.

[4] *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 93-102, 105 (2d Cir. 2023) ("*Goldman VII*").

[5] A class was initially certified by the District Court in 2015 in *In re Goldman Sachs Grp, Inc. Sec. Litig.*, No. 10 Civ. 3461, 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015) ("*Goldman I*"), but that decision was overturned on appeal. *See Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474 (2d Cir. 2018) ("*Goldman II*"). The class was recertified by the District Court in 2018, *In re Goldman Sachs Grp., Inc. Sec. Litig.*, No. 10 Civ. 3461, 2018 WL 3854757, at *2 (S.D.N.Y. Aug. 14, 2018) ("*Goldman III*), and this time was upheld by the Second Circuit. *See Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020) ("*Goldman IV*"). Certiorari was granted, and the Second Circuit's affirmance of the class was reversed and remanded by the Supreme Court in *Goldman Sachs Group, Inc.*, 594 U.S. --, 141 S. Ct. 1951 (2021) ("*Goldman V*"). The decisions in *Goldman VI* and *Goldman VII* followed.

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part, from violations of Item 303 of Regulation S-K.[3] Item 303 requires registrants like Defendant GE to identify, among other things, known trends that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way.[4]

I. Plaintiffs' Claims and Background of the Litigation

This case concerns Defendants' scheme to misrepresent GE's financial health by concealing significant cash flow problems within GE Power, GE's largest industrial business. Plaintiffs allege that Defendants concealed GE's cash flow problems by increasing the Company's reliance on long-term receivables factoring. Factoring involves the sale of accounts receivables to another party in exchange for immediate cash. In this case, GE sold long-term receivables (i.e., receivables with payment due more than 365 days in the future) from GE Power to GE Capital, GE's financing arm. GE's long-term factoring pulled forward cash associated with its future receivables, which GE then reported as cash from operating activities ("CFOA"). In 2016, GE relied on cash received from long-term factoring transactions to meet the CFOA targets it publicly disclosed to investors.

Plaintiffs allege that Defendants violated the federal securities laws[5] by making material misrepresentations and omissions regarding GE's use of factoring, including long-term factoring, to generate Industrial CFOA. Indeed, in stark contrast to the true state of affairs within GE Power — and in violation of Item 303 — GE's financial statements did not disclose the true extent of GE Power's cash flow problems, GE's reliance on factoring — namely, long-term factoring — to conceal those problems, or the risks inherent in its long-term factoring transactions. When GE could no longer rely on long-term factoring to conceal its weak Industrial cash performance, GE's cash flows declined and its stock price plummeted, causing substantial harm to Plaintiffs and the Class.

Prior to summary judgment, the Court had sustained Plaintiffs' claims based on allegations that GE failed to disclose material facts relating its practice of and reliance on factoring, in violation of Item 303, and affirmatively misled investors about the purpose of GE's factoring practices.[6] The Court had also granted Plaintiffs' motion for class certification, certifying a Class of investors who purchased or otherwise acquired GE common stock during the Class Period, appointed AP7 and The Cleveland Bakers and Teamsters Pension Fund as Class Representatives, and appointed KTMC as Lead Counsel.[7]

II. The Court's Summary Judgment and *Daubert* Decisions

A. Defendants' Item 303 Disclosure Violations

At summary judgment, Defendants' challenges focused heavily on Plaintiffs' Item 303 claims. Defendants argued that they did not conceal any information from investors, GE's factoring practices had no impact on the Company's liquidity because they involved intracompany transactions, and Plaintiffs could not show any material undisclosed trend was known to Defendants. In its Order, the Court addressed — and rejected — each of those arguments.

First, the Court found that Defendants' "lack of disclosure here did, in fact, conceal from investors what GE itself recognized: that the reported amount of cash was inflated by unsustainable LT [i.e., long-term] factoring."[8] To get there, the Court pointed to internal communications, which detailed how GE pulled forward future cash flows through

[3] 17 C.F.R. § 229.303(a)(1), (a)(3).

[4] *Sjunde AP-Fonden*, 2023 WL 6314939, at *6.

[5] Plaintiffs' claims assert violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. §§ 78j(b), 78t(a), as well as Securities and Exchange Commission ("SEC") Rule 10b-5, 17 C.F.R. § 240.10b-5.

[6] *See Sjunde AP-Fonden v. Gen. Elec. Co.*, 2021 WL 311003, at *1 (S.D.N.Y. Jan. 29, 2021).

[7] *See Sjunde AP-Fonden v. Gen. Elec. Co.*, 341 F.R.D. 542, 553 (S.D.N.Y. 2022). In that same order, the Court granted Plaintiffs' motion for leave to amend their complaint to pursue claims based on an additional false statement made by Defendant Bornstein, which, as discussed herein, will also proceed to trial.

[8] *Sjunde AP-Fonden*, 2021 WL 311003, at *6.

long-term factoring, leaving it with large cash holes in the future and no viable source of cash to fill them.[9] In addition to GE's internal records, the Court observed that securities analysts specifically reported that "the market did not know that GE had been monetizing billions of dollars in deferred assets over the previous two years, which, in turn, indicates that the market was not yet fully aware of what GE's 'normalized' cash-flow performance looked like."[10] In other words, the market was left in the dark about the source, nature, and sustainability of GE's cash flows and it's monetization of billions of dollars in future receivables during the Class Period.[11]

Second, Judge Furman correctly held that Defendants were not absolved of their disclosure duties simply because GE's factoring took place between two GE segments. The Court reasoned that "[t]o hold, as Defendants suggest, that such a company's actions were immune from scrutiny under Item 303 because they involved only intracompany transactions would undermine the goal of giving investors the information needed to make better predictions of a company's future financial condition."[12] Indeed, the Court observed that "Plaintiffs' theory is not only supported by the evidence, but it is also more consistent than Defendants' theory with the stated objection of Item 303 that disclosures 'must focus' on trends that are 'reasonably likely to cause financial information not to be necessarily indicative of future operating results[.]"[13] Judge Furman found there was "sufficient evidence for a jury to conclude that the extent of GE's factoring was material," holding that practice "and the attendant cashflow issues were critical pieces of financial information that a reasonable investor would consider important, and GE insiders were well aware of that fact."[14] And the Court held that GE's alleged factoring practices "*did* have a negative effect" on the Company's cash flows.[15]

Third, the Court found there existed sufficient evidence "for a jury to find

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at *7.

[13] *Id.*

[14] *Id.* at *8.

[15] *Id.* at *7.

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that Defendants knew a trend of declining cash flow was reasonably likely to occur and have a material effect."[16] Here, Judge Furman highlighted evidence wherein "management-level employees of GE repeatedly demonstrated knowledge both that cash was key to the company and its investors and that GE Power's use of factoring to accelerate cash was contributing to a cash problem."[17] Among other examples, the Court pointed to emails in which Bornstein "described the '[c]ash issue' as ''huge,''' was told "one of the 'key factors' causing the company's cash issue was 'factoring / monetization to accelerate cash,''' and Defendants were "aware of plans to conduct billions of additional LT factoring."[18]

From there, the Court rejected Defendants' bid for dismissal on scienter grounds. To demonstrate scienter, Plaintiffs must show that Defendants knew or were reckless in disregarding that their false statements and omissions would mislead investors. Scienter is typically the most difficult element for a plaintiff to prove in a securities fraud case.[19] But here, the Court found there was ample evidence that Bornstein and other "management-level employees knew that LT factoring was substantial and posed serious future risks," yet "these critical facts were not reflected in GE's disclosures."[20] The Court also concluded that "a rational jury could infer that Bornstein and other executives benefitted in a concrete and personal way from the purported fraud" because their executive compensation was tied to GE's cash performance.[21] Thus, as to the key question of "whether the alleged fraud provided [Bornstein] a financial benefit," the Court held that "[t]he answer is that it did, as Defendants themselves all but concede."[22]

B. Misrepresentations in GE's Annual Report and Earnings Call

In addition to their Item 303 claim, Plaintiffs successfully defended their claims based on misstatements made by Defendant Bornstein during GE's January 20, 2017 earnings call and in GE's 2016 Form 10-K (i.e., Annual Report) concerning the purpose of factoring.[23] Specifically, Bornstein told investors that factoring impacted GE's CFOA by just $1.6 billion in 2016 when, in truth, GE had generated $4.2 billion in CFOA from factoring that year, due in large part to the vast expansion of GE's long-term factoring program. Plaintiffs allege that Defendants then made changes to disclosures concerning GE's factoring activities within the Annual Report to conceal the truth and align those disclosures with Bornstein's misstatements.

With respect to Bornstein's misstatements, the Court held there was "sufficient evidence in the record to support Plaintiffs' arguments that (1) Bornstein was aware of contrary data in his January 20, 2017 statements and (2) that he then attempted to align the 10-K disclosures with his misstatements."[24] Indeed, the Court explained that "a reasonable jury could find that Bornstein's response to the analyst question about factoring during the January 20, 2017 earnings call was knowingly misleading," including because of evidence showing "Bornstein had access to documents showing that GE's factoring — and its impact on Industrial CFOA — was higher than he disclosed."[25] Turning to the Annual Report, the Court observed that Plaintiffs' allegations and supporting evidence "arguably show that Bornstein attempted to cover up the impact of his misstatement."[26]

C. Loss Causation

Plaintiffs next overcame Defendants' array of challenges to loss causation, which is the causal link between Defendants' misrepresentations and the fraud-related losses. The centerpiece of Defendants' challenge was that there was no

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16 *Id.* at *9.

17 *Id.* at *9.

18 *Id.*

19 *Id.* at *10-11.

20 *Id.* at *10.

21 *Id.* at *11.

22 *Id.*

23 *Id.* at *9.

24 *Id.*

25 *Id.* at *10.

26 *Id.*

evidence of the required causal link because "any losses are attributable to a global downturn in the power market."[27]

Here, Judge Furman correctly held that "Plaintiffs' evidence . . . raises a permissible inference that GE's undisclosed factoring led to a massive gap in cash flow that materialized in 2017."[28] Specifically, Judge Furman explained that contrary to Defendants' argument, GE's own "internal discussions of the cash shortfall pointed the finger at factoring and made no mention of the global downturn in the power sector."[29] Thus, the Court held that Defendants' fact-intensive challenges "cannot be resolved on summary judgment."[30]

D. Plaintiffs Strike Defendants' Expert's Belated Testimony

Proceeding in parallel to Defendants' summary judgment motion were the parties' motions regarding expert testimony. Defendants sought to exclude the reports and testimony of Plaintiffs' experts. In the Order, the Court rejected Defendants' invitation in all material respects, holding that cross-examination of these witnesses at trial, not exclusion, is the proper way to resolve all such challenges.[31]

Conversely, Plaintiffs succeeded in striking the supplemental expert declaration of Defendants' damages expert, which Defendants disclosed for the first time at summary judgment.[32] In the Order, the Court agreed with Plaintiffs that the declaration "materially alters [Defendants' expert's] prior analysis by fixing a significant error."[33] Finding Defendants had "no persuasive explanation for their failure to produce" the declaration, Judge Furman barred Defendants from relying on it, explaining that "Defendants' sandbagging here is especially noteworthy" and "plainly caused Plaintiffs prejudice."[34] This is a significant development and a rare victory on a motion to strike expert testimony prior to trial.

III. Conclusion

The Court's Order is a significant victory for both GE shareholders and the Plaintiffs' bar as a whole. It reinforces the importance of developing a strong, evidentiary record across elements in preparation for summary judgment and also provides important clarity on the governing standards under controlling Second Circuit law for claims brought pursuant to Item 303. ■

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[27] *Id.* at *12.

[28] *Id.*

[29] *Id.*

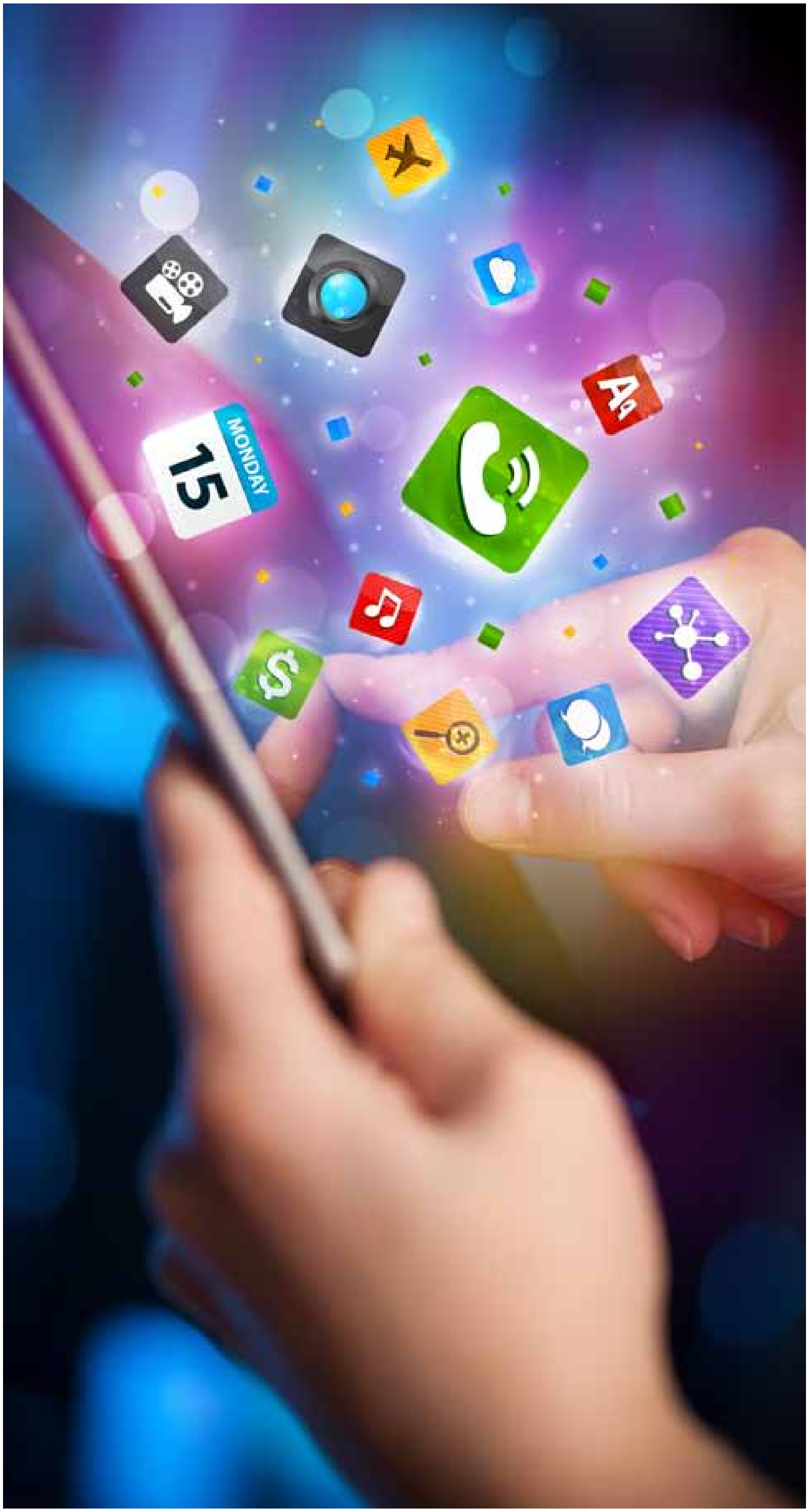
[30] *Id.*

[31] *Id.* at *15-16, 19.

[32] *Id.* at *18.

[33] *Id.*

[34] *Id.*; *see also id.* at n.12.



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As one of the first orders of business, the Local Government and School District Committee filed a 320-page Master Complaint on December 18, 2023, asserting claims for public nuisance and negligence based on Defendants' knowing operation of social media platforms which are designed to promote compulsive use and addiction, and which have required local governments and school districts to expend, divert and increase resources to support the emotional and mental health of young people in their communities. Any local government or school district that filed a complaint can adopt the allegations in the Master Complaint by filing a Short Form Complaint, which preserves their claims while the consolidated litigation proceeds in the MDL.

Kessler Topaz is pleased to represent its clients, along with local governments and school districts across the country seeking to hold the Defendant social media companies to account for the harms their conduct has inflicted on America's youth, our country's educational system, and our local governments and communities. Defendants should be required to abate the public nuisance they have caused and pay for the increasing costs school districts and local governments are left to shoulder to address the mental health harms these companies have knowingly inflicted on the nation's children and adolescents.

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These stock purchases happened at the same time that Continental was engaged in a $4 billion spending spree that expanded the Company's presence in the Permian Basin of Texas and the Powder River Basin of Wyoming. The rapid expansion of Continental's assets temporarily depressed Continental's stock price at the same time Hamm was buying shares.

In June 2022, Hamm announced a proposal to take Continental private at $70 per share (the "Proposal"). Stockholders and market analysts were quick to condemn the offer as unfairly low. Since Hamm was not willing to condition the deal on Continental's public stockholders' approval, Hamm's controlling stake made the take-private a foregone conclusion. The Continental Board appointed two directors to a "Special Committee" charged with negotiating the Transaction with Hamm. As part of the deal, however, Hamm had allowed each of these directors to "roll over" their own personal shares in Continental into an ownership interest in the surviving private company. This gave each of the directors a conflicting incentive to keep the price offered to public stockholders in the Transaction low. In October 2022, the Board approved Hamm's acquisition of the minority shares of Continental for $74.28 per share.

Plaintiffs' Claims

Plaintiffs brought three sets of claims. First, Plaintiffs asserted a claim against Hamm and his family (together, the "Controller Defendants") for breaches of fiduciary duty for effectuating the unfair transaction. Second, Plaintiffs pled a claim against Hamm for insider trading in connection with his stock purchases and Continental's stock buy-backs which were effected while Hamm had material, non-public information about his impending take-private offer. Third, Plaintiffs asserted claims against the rest of Continental's Board (the "Director Defendants"), including the Special Committee directors, for breaches of fiduciary duty in approving the unfair transaction.

Defendants' Partial Motion to Dismiss

The Controller Defendants did not move to dismiss the entire fairness claim against them. Oklahoma law generally follows Delaware law, which requires a conflicted fiduciary to establish the "entire fairness" of a claim against him. Hamm and his family did not move to dismiss the claim against them for effectuating an unfair transaction, because they assumedly understood that such a claim could only be resolved at trial.

The *Brophy* Claim

Hamm did move to dismiss the insider trading claim. This claim is sometimes known as a "*Brophy* claim," *see Brophy v. Cities Service Co.*, 70 A.2d 5 (Del. Ch. 1949)). Hamm argued that a *Brophy* claim is derivative in nature, meaning that Continental, as opposed to its stockholders, suffered any alleged injury from Hamm's insider trading. Thus, Hamm argued that Plaintiffs and other class members did not have standing to assert the *Brophy* claim. Hamm further argued that he did not commit insider trading because he did not possess material non-public information at the time of the trades and was not motivated to trade by any such information.

In response, Plaintiffs pointed to recent Delaware law holding that *Brophy* claims may be brought directly, rather than derivatively, when the alleged insider trading affected the fairness of a merger. Plaintiffs allege that Hamm delayed his take-private proposal in order to purchase, and to cause Continental to repurchase, almost 4 million shares, and that such trades affected the fairness of the Transaction by minimizing the total price Hamm had to pay in the Transaction.

The Claims Against the Director Defendants

In addition to Hamm's motion to dismiss the *Brophy* claim, the Director Defendants moved to dismiss all claims against them, arguing that Plaintiffs failed to plead non-exculpated breaches of fiduciary duty against them. Breaches of the duty of care, for example, are generally exculpated by Continental's charter, so these directors could not be found liable for mere negligence. The Director Defendants argued that they did not receive material improper personal benefits in the Transaction, were independent from Hamm, and did not act in bad faith in approving the Transaction.

In response, Plaintiffs argued that the Director Defendants stood on both sides of the Transaction because they rolled over their personal shares into the post-closing private Continental. Plaintiffs argued that this benefit gave each director a personal financial interest in the Transaction, which subjected each of them to potential claims for breaches of their duties of good faith or loyalty. Plaintiffs further argued that the Director Defendants lacked independence from Hamm, noting each director's extensive compensation from Continental.

Court's Ruling

On October 3, 2023, the parties convened in Oklahoma County before District Judge Richard C. Ogden to argue the Defendants' partial motion to dismiss. After two hours of argument, the Court denied Defendants' motion to dismiss in its entirety. This ruling represents an important victory for the Plaintiffs, as the case has now moved into discovery on all claims and against all Defendants. ■

THE FINAL ACT IN THE LONG-RUNNING GOLDMAN SACHS GROUP, INC. SECURITIES LITIGATION CONFIRMS THAT PRICE IMPACT ARGUMENTS PROFFERED BY DEFENDANTS SHOULD HAVE LITTLE TRACTION IN THE VAST MAJORITY OF SECURITIES CASES

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the decision offers some additional hope for defendants seeking to avoid class certification in securities class action litigation, on balance, it should only impact a limited number of cases where plaintiffs seek to rely on generic false statements in conjunction with more specific corrective disclosures that resulted in share price declines and investor losses. It should have little or no impact on the vast majority of federal securities class actions.

The *Basic* Presumption

As we explained in our Winter 2022 newsletter, plaintiffs seeking to certify a securities fraud class action must show that "questions of law or fact common to class members predominate over any questions affecting only individual members."[6] In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), the Supreme Court established the fraud-on-the-market presumption that provided that courts can presume the reliance element under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act")[7] on a classwide basis, but also allowed defendants to offer evidence to rebut the presumption. The presumption applies if plaintiffs establish that: (1) the defendants' false statements were publicly known; (2) the relevant shares traded in an efficient market; and (3) the plaintiffs purchased their shares at the market price after the misrepresentations were made but before the truth was revealed.[8] As explained by the Second Circuit in *Goldman VII* (and many prior cases):

> defendants can rebut the presumption and defeat class certification by demonstrating, by a preponderance of the evidence, that the misrepresentations did not actually affect, or impact, the market price of the stock [known as "price impact"].[9]

The *Goldman* saga largely involves the amount and type of evidence defendants need to present to establish a lack of price impact so as to rebut the presumption of reliance and preclude class certification — particularly where so-called "generic" statements are the basis for the plaintiffs' allegations.

The *Goldman* Allegations

Goldman was brought by several pension funds (collectively, the "Plaintiffs") seeking to represent a class of investors who purchased shares of Goldman stock between February 5, 2007 and June 10, 2010. The investors alleged that Goldman and certain of its former executive officers (collectively, "Defendants") violated Sections 10(b) and 20(a) of the Exchange Act by failing to disclose that it had substantial conflicts of interest with respect to at least four collateralized debt obligation ("CDO") transactions involving subprime mortgages.[10] The claims centered on a particular CDO — Abacus 2007 AC-1 ("Abacus") — in which Goldman secretly allowed a hedge fund to dictate the composition of the mortgages within Abacus, while also taking a short position against the CDO. The CDO collapsed, and Goldman and the hedge fund made enormous profits. Goldman ultimately paid a $550 million fine to the Securities and Exchange Commission ("SEC") for its role in the Abacus debacle. The corrective disclosures in this case, which were the immediate cause of Plaintiffs' losses, centered around disclosures of SEC investigations against Goldman — primarily (but not entirely) related to Abacus between April 16, 2010 and June 10, 2010.[11]

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[6] Fed. R. Civ. P. 23(b)(3).

[7] To establish liability under Section 10(b), a plaintiff must show that: (1) the defendant made a material misrepresentation or omission; (2) the misrepresentation or omission was made with an intent to deceive, manipulate or defraud; (3) there is a connection between the misrepresentation or omission and the plaintiff's purchase or sale of a security; (4) the plaintiff relied on the misrepresentation or omission; (5) the plaintiff suffered economic loss; and (6) there is a causal connection between the misrepresentation or omission and the plaintiff's loss. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005).

[8] *Basic*, 485 U.S. at 248-49.

[9] *Goldman VII*, 77 F.4th at 80.

[10] *Goldman IV*, 955 F.3d at 258-59.

[11] *Goldman VII*, 77 F.4th at 83.

Since Goldman had not made specific statements regarding its participation in Abacus, the false statements alleged by the Plaintiffs centered on alleged misrepresentations concerning Goldman's commitment to avoiding conflicts of interest in its business operations. Plaintiffs alleged that Defendants had made certain general statements (the "business principle" statements) about "complying fully with the letter and spirit of the laws," "[o]ur clients' interests always come first," and "[i]ntegrity and honesty are at the heart of our business."[12] The Plaintiffs also pointed to somewhat more specific allegedly false statements by Defendants (the "conflict of interest" statements) that Goldman maintains "extensive procedures and controls that are designed to identify and address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses."[13]

The crux of Plaintiffs' efforts to certify the class and counter Defendants' arguments that there was no "price impact" on Goldman's shares from the false statements was not that the allegedly false conflict disclosure statements had caused an increase in the price of Goldman shares, but merely that those statements maintained pre-existing inflation due to fraud that was dissipated by the "corrective" disclosures of the SEC's investigations of Goldman. Thus, they asserted that the back-end decline in Goldman's shares were evidence of the price impact from the false statements.

While Plaintiffs' contention that price impact can be established through back-end corrective disclosures is well accepted,[14] the central issue raised by Defendants throughout the litigation was whether the false statements were sufficiently specific such that there was a "match" between the corrective disclosures that caused the decline in the price of Goldman stock and the false statements.[15]

The Supreme Court Provides New Guidance as to Price Impact

After two rounds of District Court and Second Circuit litigation, the Supreme Court granted certiorari to review the Second Circuit's decision in *Goldman IV* affirming the certification of the class. Among other questions, the Supreme Court considered whether generic statements about business principles are relevant to the price impact inquiry at class

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[12] *Id.* at 82.

[13] *Id.* (emphasis omitted).

[14] *See id.* at 80–81.

[15] *See id.*

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certification.

The Supreme Court reversed the Second Circuit decision upholding class certification, which had rejected Defendants' argument that the alleged false statements did not impact the price of Goldman's stock,[16] and concluded that District Courts determining whether defendants have rebutted the *Basic* presumption should consider whether a misrepresentation was so generic and nonspecific that it did not affect the price of the securities at issue. Specifically, the Supreme Court stated that, "[i]n assessing price impact at class certification, courts 'should be open to *all* probative evidence on that question — qualitative as well as quantitative — aided by a good dose of common sense.'"[17] The Supreme Court further noted that "[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory"[18] — where plaintiffs argue that defendants' misleading statements maintained the existing inflation of the company's stock price, rather than introducing new price inflation. The Supreme Court remanded this issue, instructing the Second Circuit to "take into account *all* record evidence relevant to price impact, regardless whether that evidence overlaps with materiality or any other merits issue."[19]

The District Court Applies the Supreme Court's New Guidance

On remand, the Second Circuit, consistent with the Supreme Court's commentary, vacated the District Court's class certification decision, stating that "it is unclear whether the District Court considered the generic nature of Goldman's alleged misrepresentations," and remanded for the District Court to reconsider class certification in light of the Supreme Court's decision.[20]

On December 8, 2021, the District Court again granted Plaintiffs' motion for class certification. The District Court concluded that Defendants failed to rebut the presumption of reliance.[21] Specifically, the District Court held that Plaintiffs' expert had effectively linked the declines in Goldman's stock price to pre-disclosure inflation, that Defendants' experts did not persuasively rebut these findings, and that Defendants' "alleged misstatements were not so generic as to diminish their power to maintain pre-existing price inflation."[22]

The District Court concluded that certain of Defendants' statements relating specifically to conflicts of interest (such as those claiming that "[w]e have extensive procedures and controls that are designed to identify and address conflicts of interest") were reasonably specific, and "even the more generic statements [regarding general business principles]," when read in context and in conjunction with more specific statements, "may reinforce misconceptions about Goldman's business practices, and thereby serve to sustain an already-inflated stock price."[23]

The Second Circuit's Review of the District Court's Application of the Supreme Court's New Guidance

On August 10, 2023, the Second Circuit in *Goldman VII* reversed the class certification decision in *Goldman VI* and decertified the class. It first concluded that the District Court committed "clear error" in assessing the generic nature of the pled "business principles" statements, which the District Court acknowledged "present as platitudes."[24] Specifically, the Second Circuit held that the District Court overstated the specificity of these statements by reading them "in conjunction with statements specifically concerning conflicts[]."[25] The Second Circuit reasoned that the business principles and conflicts statements were "separately disseminated to shareholders in separate reports at separate times, and plaintiffs offered no evidence . . . to support a finding that, notwithstanding that space in medium and time, investors would still conjunctively consume those statements."[26] Additionally, the Second Circuit noted that while a statement can be materially misleading when "defendants' representations, taken together and in context, would have mislead a reasonable investor," the "relevant 'context' is not a separately disseminated misstatement — at least where, as here, the statements do not obviously compliment or implicate the same topics — but the reality of the company's affairs or condition at a time when a misstatement was made."[27]

The Second Circuit then addressed

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[16] *Id.* at 88-89.

[17] *Goldman V*, 141 S. Ct. at 1960 (citations omitted).

[18] *Id.* at 1961.

[19] *Id.* This latter statement engenders some level of discord in the case law since in *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 276 (2014), the Supreme Court had explicitly held that materiality was not an issue that plaintiffs had to establish at class certification.

[20] *Ark. Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 11 F.4th 138, 143-44 (2d Cir. 2021).

[21] *Goldman VI*, 579 F. Supp. 3d at 538-39.

[22] *Id.* at 534.

[23] *Id.* (first bracket in original).

[24] *Goldman VII*, 77 F.4th at 94.

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

[26] *Id.*

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

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whether the more specific conflicts disclosure statements were ultimately capable of establishing price impact so as to support the presumption of reliance established in *Basic*. The Second Circuit, after an extensive review of its case law, and the Supreme Court's decision in *Goldman V*, found that, in cases based upon an inflation maintenance theory where price impact is shown by a back-end corrective disclosure (the vast majority of cases):

> a plaintiff cannot (a) identify a specific back-end, price-dropping event, (b) find a front-end disclosure bearing on the same subject, and then (c) assert securities fraud, unless the front-end disclosure is sufficiently detailed in the first place. The central focus, in other words, is ensuring that the front-end disclosure and back-end event stand on equal footing; a mismatch in specificity between the two undercuts a plaintiff's theory that investors would have expected more from the front-end disclosure.[28]

The Second Circuit found in *Goldman VII* that there was a mismatch in specificity between the alleged conflict disclosure statements and the corrective disclosures and, after reviewing all of the evidence, that the District Court had committed clear error. It concluded:

> In summary, a searching review of the record leaves us with the firm conviction that there is an insufficient link between the corrective disclosures and the alleged misrepresentations. Defendants have demonstrated, by a preponderance of the evidence, that the misrepresentations did not impact Goldman's stock price, and, by doing so, rebutted *Basic*'s presumption of reliance.[29]

Conclusion

To date, there do not appear to be any District Court cases that meaningfully apply the principles set forth in the Second Circuit's *Goldman VII* decision regarding generic misstatements and their price impact. Regardless, while it undoubtedly will be slightly more difficult to prosecute federal securities class actions based upon generalized false statements that do not reference the issues underlying the alleged corrective disclosures, that has always been a potential concern and Kessler Topaz does not, in the main, seek to involve our clients in such cases.[30] Particularly since complaints based upon generic statements have almost always faced materiality challenges from defendants. Thus, we do not anticipate that the Second Circuit's recent decision in *Goldman VII* will meaningfully impact the types of securities class action cases we prosecute. In sum, while the Supreme Court's and the Second Circuit's recent opinions provide updated guidance for courts and litigants to consider when assessing price impact, they do not mark a sea change in securities class action litigation and should only impact a minority of cases. ■

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[28] *Id*. at 102.

[29] *Id*. at 105.

[30] We note that, in a footnote, the Second Circuit in *Goldman VII* issued dicta regarding loss causation at the merits stage that securities fraud defendants undoubtedly will seek to utilize. *Id*. at 99 n.11 ("To be sure, with respect to the loss causation element of securities fraud—that is, the causal link between the alleged misconduct and the loss ultimately suffered by plaintiff—the 'basic [ ] calculus' remains the same whether the truth is revealed in 'a corrective disclosure describing the precise fraud' or through 'events constructively disclosing the fraud.' *Vivendi*, 838 F.3d at 262. Yet the question here—whether there is a basis to infer that the back-end price equals front-end inflation—is a different question than loss causation, and, in light of *Goldman*, requires a closer fit (even if not precise) between the front- and back-end statements.").

WHAT'S TO COME

APRIL 2024

Texas Association of Public Employee Retirement Systems (TEXPERS) 2024 Annual Conference

April 6 – 10

Dallas, TX ■ Hyatt Regency Dallas

Pennsylvania State Association of County Controllers (PSACC) 2024 Spring Conference

April 17 – 19

TBD

MAY 2024

State Association of County Retirement Systems (SACRS) 2024 Spring Conference

May 7 – 10

Santa Barbara, CA ■ Hilton Santa Barbara Beachfront Resort

JUNE 2024

Florida Public Pensions Trustees Association (FPPTA) 40th Annual Conference

June 23 – 26

Orlando, FL ■ Renaissance Orlando at SeaWorld

National Association of Public Pension Attorneys (NAPPA) Legal Education Conference 2024

June 25 – 28

Fort Lauderdale, FL ■ Marriott Harbor Beach

JULY 2024

Pennsylvania State Association of County Controllers (PSACC) 2024 Annual Conference

July 21 – 26

TBD

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