SUMMER 2024

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

FULLY INFORMED

HIGHLIGHTS

DELAWARE CHANCERY COURT TELLS ACTIVISION: STATUTORY COMPLIANCE IS NOT A GAME

Lauren Lummus, Esquire

In the latest chapter of long-running litigation against the directors of Activision Blizzard, Inc. ("Activision"), the Delaware Court of Chancery allowed plaintiff Sjunde AP-Fonden ("AP-7") to pursue claims challenging Activision's 2023 merger (the "Merger") with Microsoft Corporation ("Microsoft"). This decision (the "Opinion") prompted a swift response for legislative reform by the corporate bar, a flurry of corrective measures in other M&A transactions, and a global conversation about the duties and best practices of corporate fiduciaries and transactional practitioners. The Opinion also lets AP-7 continue to press its claims that the $70 billion Merger shortchanged Activision's stockholders.

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SUPREME COURT CLARIFIES THE BOUNDARIES OF LIABILITY UNDER RULE 10B-5(B) PREMISED ON ITEM 303 DISCLOSURE VIOLATIONS

Joshua A. Materese, Esquire and Richard A. Russo, Jr., Esquire

On April 12, 2024, the United States Supreme Court issued a rare unanimous ruling in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*[1] At issue in *Macquarie* was whether a company's failure to make a disclosure required under Item 303 of SEC Regulation S-K ("Item 303")[2] can give rise to a private claim under Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"). Item 303 requires public companies to disclose, among other information, material "known trends or uncertainties" that are reasonably likely to impact their future sales, revenue, or liquidity in the "Management, Discussion and Analysis" (MD&A) section of registration statements, annual and quarterly reports, and certain other filings.

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[1] *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 144 S. Ct. 885 (2024).

[2] 17 C.F.R. § 229.303(a)(1), (a)(3).

KESSLER TOPAZ SECURES IMPORTANT PROTECTIONS FOR STOCKHOLDERS IN HIGHLY-ANTICIPATED DELAWARE SUPREME COURT OPINION

Mike McCutcheon, Esquire

On April 4, 2024, the Delaware Supreme Court issued an Opinion and reversed the Delaware Court of Chancery's dismissal of a stockholder suit brought by Kessler Topaz and other plaintiffs challenging the fairness of a 2020 transaction in which IAC/InterActiveCorp ("IAC") separated itself from its controlled subsidiary, Match Group, Inc. ("Match"), the online dating service (the "Separation").[1] The Supreme Court's opinion is a substantial victory not just for the plaintiffs in this case, but for *all* public stockholders of Delaware corporations.

Factual Background

Leading up to the Separation, IAC held a majority of Match's voting power and thus controlled Match. Media mogul Barry Diller ("Diller") wields 43% of IAC's voting power and chairs its board of directors.

On August 7, 2019, at Diller's behest, IAC announced that it was considering separating from Match. To negotiate the transaction, Match formed a three-member committee of directors, each supposedly independent of IAC (the "Separation Committee"). Because IAC controls Match, the independence of the Separation Committee was critical to ensure that any transaction didn't unfairly favor IAC over Match. One Separation Committee member, however, Thomas McInerney was a former IAC senior executive who had received more than $50 million in compensation over the course of his decade-plus tenure with IAC.

The Separation provided that Match would issue a special dividend before the Separation, 80% of which (i.e., $680 million) would be paid to IAC. It also required Match to assume $1.7 billion worth of IAC's preexisting debt. Plaintiffs thus alleged that the effect of the Separation was to suck the cash out of Match and saddle Match with IAC's debt. In return, Match's minority stockholders would own 2% more of Match

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[1] *In re Match Group, Inc. Derivative Litigation*, Del. Supr. __ A.3d __, No. 368, 2022, Seitz, C. (April 4, 2024).

AFTER KESSLER TOPAZ LAWSUIT, KAISER ADMITS TO PRIVACY BREACH AFFECTING 13.4 MILLION MEMBERS

Tyler Graden, Esquire and Matthew Macken, Esquire

In April 2024, Kaiser Permanente, the nation's largest managed care organization, notified state and federal regulators that its use of third-party web tracking technologies resulted in a privacy breach affecting 13.4 million current and former health plan members. This admission comes nearly a year after Kessler Topaz filed a class action lawsuit in June 2023, alleging that Kaiser's use of these technologies resulted in patients' personally identifying information ("PII") and protected health information ("PHI") being transmitted to numerous third-party adtech companies, including, *inter alia*, Adobe, Google, Microsoft, and Twitter. *See Doe et al. v. Kaiser Foundation Health Plan, Inc. et al.*, 4:2023-cv-02865 (N.D. Cal.).

Plaintiffs filed an amended complaint on September 15, 2023 alleging that Kaiser's embedding of the third-party code on its website ("Site") and mobile applications ("Apps") resulted in the unauthorized transmission of Kaiser members' PII and PHI to third-party companies in violation of federal and state laws. Kaiser embedded

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KTMC SECURES DELAWARE SUPREME COURT REVERSAL RE-AFFIRMING MATERIALITY OF BANKER CONFLICTS IN SQUEEZE-OUT TRANSACTIONS

Kevin Kennedy, Esquire and Grant D. Goodhart, Esquire

On May 1, 2024, the Supreme Court of Delaware reversed the dismissal of a putative class action brought by KTMC challenging the fairness of the acquisition of Inovalon Holdings, Inc. ("Inovalon" or the "Company") by a consortium of private-equity buyers (the "Transaction"). The Delaware Court of Chancery had dismissed the stockholder complaint in *City of Sarasota Firefighters' Pension Fund, et al., v. Inovalon Holdings, Inc., et al.*, C.A. No. 2022-0698-KSJM, finding that the Plaintiffs' claims were subject to business judgment review. However, on appeal, the Delaware Supreme Court found that the Transaction was not subject to the deferential business judgment review standard because the Company failed to adequately disclose conflicts among the bankers advising on the Transaction.

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KTMC OBTAINS FIRST-OF-ITS-KIND CLASS CERTIFICATION WIN IN SECURITIES FRAUD CASE AGAINST GOLDMAN SACHS ARISING FROM THE 1MDB SCANDAL

Nathan Hasiuk, Esquire and Nathaniel Simon, Esquire

Our Winter 2024 newsletter[1] discussed the recent decision by the United States Court of Appeals for the Second Circuit in *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc.*, 77 F.4th 74 (2d Cir. 2023) ("*ATRS*"), which provided guidance to lower courts on how to assess evidence presented by defendants at the class certification stage that alleged misrepresentations did not actually affect, or impact, the market price of the stock ("price impact"). Specifically, the Second Circuit held that where an alleged misstatement is generic and the alleged corrective disclosure is specific, courts must ensure that "the front-end disclosure and back-end event stand on equal footing" by assessing whether there is sufficient connection between the alleged misstatement and alleged corrective disclosure.[2] In *ATRS*, the Second Circuit found such a connection lacking, and so it decertified the class.[3] At the time of our Winter 2024 newsletter, there were no decisions in the Second Circuit applying the guidance set forth in *ATRS*, and it remained to be seen whether the *ATRS* framework would lead to more exacting price impact analyses by lower courts, particularly in cases that did not involve the type of generic misstatements at issue in *ATRS*.

On April 5, 2024, Magistrate Judge Katharine H. Parker of the U.S. District Court for the Southern District of New York issued a Report and Recommendation in *Sjunde AP-Fonden v. The Goldman Sachs Group, Inc.*, recommending that the District Court certify a class of investors that purchased or acquired shares of Goldman Sachs Group, Inc. ("Goldman") between December 22, 2016 and November 8, 2018. Judge Parker further recommended that the District Court appoint Sjunde AP-Fonden ("AP7") to serve as Class Representative and KTMC to serve as Class Counsel.

Judge Parker's decision followed extensive briefing and a full-day evidentiary hearing and oral argument on February 22, 2024. The decision is a significant win for Goldman investors and is the first ruling in the Second Circuit certifying or recommending certifying a class under the standards articulated in *ATRS*. As discussed

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[1] Jarvis, G. & Elangovan, V., 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, The Bulletin, Winter 2024, at 3.

[2] *ATRS*, 77 F.4th at 102.

[3] *Id*. at 105.

DELAWARE CHANCERY COURT TELLS ACTIVISION: STATUTORY COMPLIANCE IS NOT A GAME *(continued from page 1)*

Background of the Merger

Activision produces popular video games like *Call of Duty* and *World of Warcraft*. In 2021, news reports shone a light on Activision's toxic corporate culture of sexual harassment (the "Harassment Scandal") led by Activision's CEO Robert Kotick ("Kotick"). AP-7 served Activision with a books and records demand under 8 *Del. C. § 220* to investigate potential breaches of fiduciary duty by Kotick and the rest of Activision's board of directors (the "Board").

The Harassment Scandal took a toll on Activision's public image and its stock price. Kotick and the Board faced uncomfortable and meritorious litigation. Activision's stock, which had traded for over $100 per share in February 2021, had dropped to $65 per share by January 2022. Knowing that a sale of Activision could prevent further scrutiny and potentially put his legal woes behind him, Kotick hastily negotiated the Merger with Microsoft for $95 per share in cash (the "Merger Consideration") and the Board rushed to approve an incomplete version of the merger agreement.

AP-7's Allegations

AP-7 sought additional books and records relating to the Merger. AP-7 then alleged that the Board failed to comply with multiple statutory requirements in approving the Merger. The draft of the merger agreement approved by the Board did not include the party names, the $95 Merger Consideration, the disclosure schedules, the company disclosure letter, the certificate of incorporation for the post-Merger company (the "Survivor's Certificate"), or the dividend provision.

The Merger was anticipated to face significant antitrust scrutiny. Since Activision had historically paid regular dividends, a key term of the Merger would be how Activision would handle dividend payments during the pendency of the Merger. AP-7 alleged that, rather than make this determination, the Board improperly delegated it to an *ad hoc* committee. In fact, after the Board approved the incomplete draft merger agreement, Kotick (who was not on the committee) and Microsoft negotiated the dividend provision, which prevented Activision from issuing more than one $0.47/share dividend during the Merger's lengthy pendency. The *ad* hoc committee then rubberstamped the dividend provision.

AP-7 asserted multiple statutory violations and breaches of fiduciary duty by Activision's Board. The statutory claims allege that the Board failed to comply with the Delaware General Corporation Law (the "DGCL"), including: (i) Section 251(a)-(c) claims that the Activision Board and stockholders did not approve a valid merger agreement with all required terms and essential items (the "Section 251 claims"); and (ii) a Section 141(c) claim that the Board improperly delegated the negotiation and approval of the dividend provision to an *ad hoc* committee (the "dividend claim"). AP-7 also alleged that because of these statutory violations, the Merger constituted an improper "conversion" of Activision's public shares. Finally, AP-7 alleged that the Board breached its fiduciary duties by violating the DGCL, and by agreeing to the Merger in the midst of the Harassment Scandal in order to insulate themselves from judicial scrutiny.

Defendants Close the Invalid Merger

As anticipated, antitrust scrutiny both in the U.S. and the U.K. prevented the Merger from closing for more than twenty months. On July 18, 2023, Activision and Microsoft extended the outside termination date of the merger agreement and, in part responsive to AP-7's complaint, declared a second dividend to stockholders of $0.99/share, totaling more than $700 million. On October 13, 2023, the defendants consummated the Merger without ratifying or validating their deficient conduct under the DGCL, despite having been informed of their violations by AP-7.

The Opinion

On June 5, 2023, the defendants moved to dismiss the statutory and conversion clams. On February 29, 2024, Chancellor Kathaleen St. J. McCormick issued the Opinion, largely denying defendants' motions to dismiss AP-7's statutory and conversion claims.

First, the Opinion held that DGCL Section 251(b) requires a board of directors to approve either a final merger agreement or, at "bare minimum," an "essentially complete" version. The Court connected this statutory requirement to a board's fiduciary duties, declaring that boards "must strictly comply with statutory requirements governing mergers," and that requiring board approval of an "essentially complete" merger agreement merely reflects "the basic exercise of fiduciary duties, not to mention good corporate hygiene."

The Court rejected defendants' arguments that such a standard would disrupt current market practices, reasoning that "transactional attorneys can surely achieve this requirement without much exertion," and "[w]here market practice exceeds the generous bounds of private ordering afforded by the DGCL, then market practice needs to check itself." Finally, the Court determined the Merger price was an "essential" item, and listed reasons why the company disclosure letter, the Survivor's Certificate, and the dividend provision could also be considered "essential" items. The Court concluded it was therefore reasonable to infer that the Board-approved version of the merger agreement did not contain all "essential" items.

The Court determined that AP-7 pled a viable Section 141(c) claim that the Board improperly delegated the approval of the dividend provision to an *ad hoc* Board committee. Since the dividend provision was a term of the merger agreement, and committees are not permitted to approve merger agreement terms under Section 141(c)(2), the Court reasoned that the Board improperly delegated approval of the dividend provision under Section 251(b).

As to AP-7's conversion claims, the Court reasoned that "[d]efendants took Plaintiff's shares and replaced them with something else, in disregard of [its] rights as a stockholder under Section 251." The Court then determined that AP-7 adequately alleged that "conversion by merger" satisfies the tort of conversion, and that the Section 251 claims were proper predicate statutory violations for the conversion claims against defendants.

Chancellor McCormick concluded the Opinion by advising defendants that "Delaware law offers solutions for missteps" and citing to Sections 204 and 205 of the DGCL. DGCL Section 205 authorizes a court to "ratify" or "validate" certain defective corporate acts. The Court's recommendation to defendants did not specify *which* of defendants' "missteps" would potentially be curable under Sections 204 and 205.

Activision's & Microsoft's Section 205 Application

Defendants took the Court's advice. On May 2, 2024, Microsoft and Activision filed an application seeking the Court's validation of the Merger under Section 205 (the "205 Application"). The question now facing the Court is which of defendants' multiple errors in effecting the Merger can Section 205 appropriately validate.

AP-7 does not oppose Section 205 validation of its Section 251 claims that the Board approved a materially incomplete merger agreement. Allowing defendants to fix these statutory failures would remove doubt as to the validity of subsequent stock issuances and dividends, and would provide a corporate benefit to Microsoft and its stockholders.

Defendants, however, are seeking much more than validation of the Section 251 violations. Indeed, Defendants appear to be asking the Court to let their 205 Application eliminate or impair AP-7's dividend claim, appraisal claim, conversion claims, and/or fiduciary claims. Accordingly, AP-7 plans to vigorously oppose any improper attempts by defendants to validate or dismiss claims beyond the Section 251 claims. AP-7's goal is to preserve these additional claims, and hopefully to recover additional consideration for Activision's former stockholders.

The Opinion's Impact on Corporate Law

The Opinion reinforces the critical role that successful shareholder enforcement actions play in promoting good corporate hygiene on boards of public companies. From the explosion of proposed legislation, press coverage, academic scholarship, and advisory updates reacting to the Opinion, it is clear that corporate lawyers and corporate boards have a strong interest in understanding how the Opinion affects the duties and procedures of corporate fiduciaries and transaction advisors under the DGCL. Publicly traded corporations undergoing mergers have also cited the Opinion in conjunction with public disclosures about their attempts to ratify their potential or suspected violations of the DGCL.[1]

Defense and transactional practitioners have wasted no time in advocating for proposed amendments to the DGCL.[2] These proposed amendments would make it easier for corporate boards to approve merger agreements even when the terms of those agreements are subject to additional negotiation and finalization.

What's Next?

The Opinion would not have been possible without AP-7's commitment to prosecuting this action on behalf of the class of Activision shareholders. Since the Opinion, Kessler Topaz and AP-7 have continued their investigative and discovery efforts, engaged in extensive motion practice, and filed a 300-plus page amended complaint. If AP-7's conversion, dividend, appraisal, and fiduciary duty claims survive defendants' motions to dismiss and 205 Application, Activision stockholders may be entitled to significant damages, particularly considering that the Merger was valued at $70 billion and converted more than 700 million Activision shares. ■

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1 *See, e.g.*, Agiliti, Inc., Preliminary Information Statement (Schedule 14C) (Mar. 12, 2024) at 40 (purporting to ratify prior board, committee, and stockholder merger approvals under Section 204 of the DGCL in light of the Opinion).

2 *See, e.g.*, Allison L. Land, Edward B. Micheletti, and Lauren N. Rosenello, *Proposed DGCL Amendments Would Expressly Authorize Stockholders' Agreements and Align DGCL Provisions With Current M&A Practices*, Skadden, Arps, Slate, Meagher & Flom LLP (Apr. 4, 2024) (advocacy article published by defendants' counsel of record, acknowledging that certain of the DGCL amendments were directed at the Opinion and repeating various arguments from defendants' motion to dismiss briefing).

KESSLER TOPAZ SECURES IMPORTANT PROTECTIONS FOR STOCKHOLDERS IN HIGHLY-ANTICIPATED DELAWARE SUPREME COURT OPINION *(continued from page 2)*

than they previously held, but IAC would retain a controlling interest in the post-Separation Match.

Plaintiff's Claims

Plaintiffs' operative complaint alleges, on behalf of a class of minority Match stockholders, that IAC and Diller breached their fiduciary duties as Match's controllers by unfairly orchestrating the Separation for IAC's benefit. Plaintiffs also asserted that Match's board of directors breached their fiduciary duties by approving the Separation.

Defendants' Motion to Dismiss

In Delaware, controller-led transactions like the Separation will be scrutinized under the plaintiff-friendly "entire fairness" standard of review (the most exacting standard under Delaware law), which requires defendants prove that such a transaction was entirely fair to that company's minority stockholders as to both price and process. However, if negotiations were conditioned from the beginning on six factors outlined by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*"), the standard of review shifts to "business judgment," a defendant-friendly standard that defers to the company's decisions and avoids judicial scrutiny. Chief among the *MFW* factors are that the transaction must be subject to approval by (i) an "independent committee" of directors, and (ii) a fully-informed vote of the company's minority stockholders. Defendants' motion to dismiss argued that the Separation complied with *MFW* and thus business judgment applied.

Court of Chancery's Dismissal

On September 1, 2022, the Delaware Court of Chancery issued an Order and Opinion granting Defendants' motion to dismiss. The Court of Chancery held that business judgment was the applicable standard of review for the Separation because all six of *MFW*'s conditions were satisfied. Among other findings, the Court of Chancery determined that although McInerney was <u>not</u> independent of IAC or Diller, the Separation had been approved by an "independent committee" under *MFW* because a <u>majority</u> of the Separation Committee's members were independent.

Appeal to the Supreme Court

Plaintiffs appealed the Court of Chancery's dismissal to the Delaware Supreme Court. Plaintiffs argued, among other things, that the Court of Chancery misapplied *MFW* by holding that a special committee need not be comprised <u>entirely</u> of independent directors.

At oral argument before the Delaware Supreme Court, defendants raised for the first time an argument that had never been raised before at the court below. Defendants argued that the Separation did not need to comply with *MFW* in the first place. Defendants referred to this concept as "*MFW* creep." According to Defendants, Delaware law historically only subjected "freeze-out" mergers (in which a controlling stockholder buys out the minority shares he does not already own) to entire fairness review. Defendants argued that other controller-led transactions, like the Separation, were not subject to entire fairness review and thus need not comply with *MFW*. Defendants argued that over time, courts had improperly allowed *MFW*'s plaintiff-friendly protections to "creep" beyond freeze-outs. Instead, Defendants argued that <u>either</u> an independent special committee <u>or</u> a majority vote of the company's minority shareholders would be sufficient to let controller-led transaction be considered under the business judgment rule. Defendants thus sought to "clarify" that the Separation was not subject to entire fairness review, was not required to comply with *MFW*, and should pass muster under business judgment review.

Following arguments, the Supreme Court was thus left to consider two important questions of Delaware law. The <u>first</u> was whether entire fairness review (and *MFW*) applied to all controller-led transactions, or merely freeze-outs. The implications of a win for defendants on this argument would have doomed litigation challenging some of the most arguably unfair corporate transactions, i.e., deals proposed by corporate controllers for their own benefit. Had the Supreme Court sided with Defendants on this question, controlling stockholders would

know that they would be protected from litigation if their proposed deal was approved by either an independent committee or the public stockholders. The second was whether a special committee evaluating a controller-led transaction under *MFW* needs to be entirely independent, or if it can be deemed independent simply by a majority of its members.

Supreme Court's Opinion

On April 4, 2024, the Supreme Court handed down its highly-anticipated decision, siding with Plaintiffs on both issues.

First, the Supreme Court held that entire fairness was applicable in all controller-led transactions. The Court emphasized that the need for entire fairness review stems from a broad concern about controller self-dealing. Thus, entire fairness would apply to the Separation if IAC did not properly observe *MFW*'s conditions. Second, the Supreme Court agreed with the Court of Chancery that Plaintiffs sufficiently alleged that McInerney lacked independence from IAC, but it held that a special committee must be entirely independent from a controller, and as a result, Plaintiffs sufficiently alleged that the Special Committee lacked independence from IAC due to McInerney's conflicts. Consequently, IAC did not properly abide by *MFW* and the Separation was subject to entire fairness review.

Ultimately, the Supreme Court reversed the Court of Chancery's dismissal of Plaintiff's complaint and remanded the case for further proceedings. KTMC will now commence with document and deposition discovery. Defendants will face the burden of proving at trial that the Separation was entirely fair to Match's former minority stockholders.

The implications of the Supreme Court's opinion will surely resonate beyond this case. The diligent, years-long litigation efforts by Kessler Topaz and its fellow plaintiffs kept the door open for minority stockholders of all Delaware corporations to receive the benefits of entire fairness review and *MFW*'s protections in all controller-led transactions. Moreover, the litigation protects stockholders further by ensuring that when a company creates an "independent" special committee, courts will require each and every member of that committee to be independent. ■

SUPREME COURT CLARIFIES THE BOUNDARIES OF LIABILITY UNDER RULE 10B-5(B) PREMISED ON ITEM 303 DISCLOSURE VIOLATIONS

(continued from page 1)

Over the last two decades, Circuit courts across the country have debated whether an Item 303 disclosure violation could form the basis for a private claim under Section 10(b), and, if so, under what circumstances. Notably, this was second time that the Supreme Court has granted a petition to consider the reach of Item 303 in the securities fraud context. The first case, *Leidos, Inc. v. Indiana Public Retirement System*, No. 16-581, settled in 2018 after the parties and several amici briefed the issues but before the Supreme Court held oral argument. In the run up to the Supreme Court's decision in *Macquarie,* anticipation thus grew that the forthcoming ruling could have profound implications for securities litigation and, more specifically, the viability of Section 10(b) claims based on alleged Item 303 violations.

Ultimately, however, the Supreme Court weighed in only on what one court has since deemed an "exceedingly narrow"[3] issue. The Court held that while "pure omissions" — i.e., when a company says nothing "in circumstances that do not give any particular meaning to that silence" — are not actionable under Section 10(b) and Rule 10b-5(b), Item 303 omissions can indeed support a Rule 10b-5(b) if the omission renders the company's statements misleading.[4]

The *Macquarie* decision — though limited — provides important clarification and guidance to private plaintiffs seeking to plead and prove securities fraud claims premised on a company's violation of its Item 303 disclosure obligations. Below, we provide a brief overview of Item 303, the competing Circuit Court views pre-*Macquarie* on Item 303 liability, and the Supreme Court's *Macquarie* decision.

I. Item 303 Liability Pre-*Macquarie* — Confusion Across the Circuits

Courts have long recognized that a duty to disclose under Section 10(b) can derive from statutes or regulations that obligate a party to speak. Whether and to what extent a failure to make required disclosure under Item 303 could serve as the basis for a securities fraud claim under Section 10(b), however, was hotly debated in the decades leading up to *Macquarie.*

Section 13(a) of the Exchange Act requires issuers to file periodic informational statements.[5] These statements include the MD&A section of Form 10-K (annual) and Form 10-Q (quarterly) filings. Item 303, in turn, "imposes disclosure requirements on companies filing SEC-mandated reports."[6] These disclosure requirements, which are designed to "better allow investors to view the [company] from management's perspective,"[7] include "the obligation to '[d]escribe any known trends or uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on . . . revenues or income from continuing operations."[8] Thus, a public company satisfies the requirements of Item 303 by providing investors with commentary on known future trends and uncertainties that could materially impact its business. Investors can then make use of those disclosures to, for example, better assess the company's financial condition and future outlook.

At the start of this century, there was general agreement across federal courts that private plaintiffs could rely on Item 303 omissions to assert claims under the Securities Act of 1933, which "prohibits any registration statement that contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[9] But, prior

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[3] *Sjunde AP-Fonden v. Gen. Elec. Co.*, No. 17-CV-8457 (JMF), 2024 WL 2124504, at *1 (S.D.N.Y. May 10, 2024) (finding the "question presented in Macquarie was exceedingly narrow: whether the failure to disclose information required by Item 303 can support a private action under Rule 10b-5(b), even if the failure does not render any 'statements made' misleading." (Internal citations and quotations omitted).

[4] *Macquarie*, 144 S. Ct. at 890-91.

[5] *See* 15 U.S.C. §§ 78m(a)(1), 78l(b)(1).

[6] *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015).

[7] 17 C.F.R. § 229.303(a).

[8] *Stratte-McClure*, 776 F.3d at 101 (citing 17 C.F.R. § 229.303(a)(3)(ii)).

[9] *Macquarie*, 144 S.Ct. at 891 (citing 15 U.S.C. § 77k(a)) (alterations in original; internal quotations and citations omitted).

to 2013, the only Circuit to squarely address the question of whether an Item 303 omission can give rise to Exchange Act claims was the Third Circuit.

In *Oran v. Stafford*, 226 F.3d 275, 287 (3d Cir. 2000), the plaintiffs argued to the United States Court of Appeals for the Third Circuit that "even if there is no independent private cause of action under SK–303 [Item 303], the regulation nevertheless creates a duty of disclosure that, if violated, constitutes a material omission under Section 10(b) of the Securities Exchange Act and Rule 10b–5."[10] Writing for the Third Circuit, now-U.S. Supreme Court Justice Samuel Alito rejected that argument and held that "a violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5."[11] Judge Alito reasoned that the materiality standard (and, in turn, disclosure requirement) differed under Item 303 and Rule 10b-5, as set forth in the U.S. Supreme Court's decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Because the alleged omissions were not material under controlling Rule 10b-5 precedent, the Third Circuit held that merely alleging an Item 303 omission, without more, was insufficient to state a claim under Section 10(b) and Rule 10b-5. Notably, the Third Circuit did not conclude in *Oran* that Item 303 violations are never actionable under Rule 10b-5, but rather that an Item 303 disclosure violation does not "inevitably" give rise to Section 10(b) liability.[12]

For years following *Oran*, district courts wrestled with questions concerning the extent of Section 10(b) liability for Item 303 omissions — often reaching conflicting conclusions — but Circuit courts remained on the sidelines. Then, in 2013, in *Cohen v. NVIDIA Corp. (In re NVIDIA Corp. Sec. Litig.)*, 768 F.3d 1046 (9th Cir. 2013), the Ninth Circuit weighed in. Relying on *Oran*, the Ninth Circuit took that holding a step further, concluding that "Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5"[13] Its conclusion too rested on the basis that the materiality standards for Section 10(b) and Item 303 were different and hence, an Item 303 omission did not "inevitability" satisfy the more demanding materiality standards for a Section 10(b) claim.[14] In short, this decision has been interpreted to foreclose plaintiffs from using Item 303 violations as the predicate for a Rule 10b-5(b) claim in the Ninth Circuit — one of the most active jurisdictions for securities fraud litigation.

Two years later, the landscape shifted when the Second Circuit put its stamp of approval on Item 303-based securities fraud claims. In *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), an appeal led by Kessler Topaz, the Second Circuit held that "Item 303's affirmative duty to disclose in [SEC filings] can serve as the basis for a securities fraud claim under Section 10(b)."[15] In its decision, the Second Circuit first took aim at the Ninth Circuit's interpretation of *Oran*, explaining that "[c]ontrary to the Ninth Circuit's implication that *Oran compels* a conclusion that Item 303 violations are never actionable under 10b–5, *Oran* actually suggested, without deciding, that in certain instances a violation of Item 303 *could* give rise to a material 10b–5 omission."[16]

In explaining its ruling, the Second Circuit noted that Rule 10b-5 requires disclosure of "material fact[s] necessary in order to make [the] statements made [by a company] not misleading."[17] It further reasoned that "omitting an item required to be disclosed [by Item 303] on a 10-Q can render that financial statement misleading" because "a reasonable investor would interpret the absence of an Item 303 disclosure to imply the nonexistence of" known trends that were reasonably likely to impact the company.[18] Thus, while the Second Circuit noted, like the Third Circuit did in *Oran*, that an Item 303 violation "is not by itself sufficient to state a [Section 10(b)] claim," it concluded that an Item 303 omission can form the basis for a Section 10(b) claim if the materiality standards of *Basic* are also met.[19]

Not long after *Stratte-McClure*, the scope of Section 10(b) liability for Item 303 violations again took center stage when the Supreme Court granted certiorari to decide whether there exists a duty to disclose under Item 303 that is actionable under Section 10(b) and Rule 10b-5.[20] In *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 91 (2d Cir. 2016), relying on *Stratte-McClure*, the Second Circuit held that the plaintiffs had sufficiently pled securities fraud claims based on Item 303 disclosure violations. The parties settled prior to oral argument, however, so the Supreme Court dismissed the petition.

Thus, leading up to *Macquarie*, the question of whether, and to what extent, Item 303 violations could give rise to Section 10(b) liability remained unsettled.

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[10] *Id.*

[11] *Id.* at 288.

[12] *Id.*

[13] See, e.g., NVIDIA, 768 F.3d at 1056.

[14] According to the *NVIDIA* court, because "Management's duty to disclose under Item 303 is much broader than what is required under the standard pronounced in *Basic*," the "demonstration of a violation of the disclosure requirements of Item 303 does not lead inevitably to the conclusion that such disclosure would be required under Rule 10b-5. Such a duty to disclose must be separately shown." *NVIDIA*, 768 F.3d at 1055 (internal quotations and citations omitted).

[15] *Stratte-McClure*, 776 F.3d at 101.

[16] *Id.* at 103.

[17] *Id.* at 102.

[18] *Id.*

[19] *Id.*

[20] *Leidos, Inc. v. Indiana Public Retirement System, No. 16-581.*

SUPREME COURT CLARIFIES THE BOUNDARIES OF LIABILITY UNDER RULE 10B-5(B) PREMISED ON ITEM 303 DISCLOSURE VIOLATIONS

(continued from page 9)

II. The Supreme Court's *Macquarie* Decision — What the Court Held (And What the Court Sidestepped)

In *Macquarie*, the court-appointed plaintiff, Moab Partners, L.P., alleged that Macquarie and certain of its officers violated Section 10(b) the Exchange Act by, among other things, making material misstatements to investors and failing to disclose information required by Item 303.

On September 7, 2021, the district court dismissed Moab's claims, concluding that Moab failed to adequately allege an actionable Item 303 omission and likewise failed to adequately allege that any of Macquarie's affirmative statements were materially false and misleading.[21]

Moab appealed the ruling to the Second Circuit and, on December 20, 2022, the Second Circuit issued a decision reversing the district court's dismissal order.[22] With respect to the district court's ruling that Moab had failed to allege an actionable misstatement or omission, the Second Circuit reversed on two separate grounds. First, it held that the complaint adequately alleged that Macquarie had violated its disclosure obligations under Item 303.[23] The Second Circuit concluded that, because the other elements of a Section 10(b) violation — including materiality, scienter, and loss causation — had been adequately alleged, Macquarie's omission of material information in violation of Item 303 could serve as the basis for Section 10(b) liability.[24]

Second, the Second Circuit held that the "district court also erred in determining that Plaintiff failed to plead any actionable omissions or 'half-truths.'"[25] In particular, the Second Circuit concluded that Macquarie's omission of material facts rendered its affirmative statements to investors misleading because, by choosing to speak affirmatively about certain topics in its statements to investors, Macquarie assumed "a duty to speak accurately, giving all material facts in addressing those issues to permit investors to evaluate the potential risks."[26]

On May 30, 2023, Macquarie filed a petition for a writ of certiorari with the U.S. Supreme Court. The question Macquarie presented to the Supreme Court was "[w]hether the Second Circuit erred in holding — in conflict with the Third, Ninth, and Eleventh Circuits[[27]] — that a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement."[28] The Supreme Court granted Macquarie's petition on September 29, 2023. A number of amicus briefs were filed on behalf of both the Petitioner (Macquarie) and Respondents (Plaintiffs). Notably, Kessler Topaz submitted an amicus brief on behalf of a number of its institutional clients highlighting the important disclosure role Item 303 plays in the market.[29]

Even though the question presented to the Supreme Court in the briefing was limited to whether Section 10(b) liability existed in the absence of an otherwise misleading statement, much of the oral argument before the Supreme Court centered on whether and how an Item 303 omission could render misleading, as half-truths, a company's affirmative statements to investors.[30]

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[21] *City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp.*, 2021 WL 4084572 (S.D.N.Y. Sept. 7, 2021).

[22] *Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, 2022 WL 17815767 (2d Cir. Dec. 20, 2022).

[23] *Id.* at *2.

[24] *Id.*

[25] *Id.* at *4.

[26] *Id.*

[27] The Eleventh Circuit Court of Appeals had held than an Item 303 violation does not automatically give rise to a Section 10(b) claim. *Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1331 (11th Cir. 2019) ("On its face, Item 303 imposes a more sweeping disclosure obligation than Rule 10b-5, such that a violation of the former does not *ipso facto* indicate a violation of the latter.").

[28] *Macquarie*, 144 S. Ct. at 892 n.2.

[29] Brief of Institutional Investors as Amicus Curie In Support of Respondents, *Macquarie Infrastructure Corp. v. Moab Partners*, L.P., 601 U.S. 257 (2024).

[30] *See, e.g.*, Transcript dated Jan. 16, 2024 at 7-13, 26-42, 55-56 (available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1165_4425.pdf).

Relatedly, the parties and Justices engaged in an extended discussion on the question of what constitutes a "statement" for purposes of Section 10(b) and, in particular, whether a company's financial statement as a whole, or the MD&A section of those financial statements, constituted a "statement" that could be rendered misleading by an Item 303 omission.[31] This led some in the legal community to speculate that the Supreme Court could rule that Section 10(b) claims can never be based on Item 303 omissions, or could provide guidance on what constitutes a "statement" for purposes of Section 10(b) and Rule 10b-5 liability.

These predictions did not come to pass. On April 12, 2024, the Supreme Court issued an opinion vacating and remanding the Second Circuit's decision. Addressing the narrow question presented, the Supreme Court held that "[p]ure omissions are not actionable under Rule 10b-5(b)," meaning that an Item 303 omission does not, standing on its own, give rise to liability under Section 10(b) and Rule 10b-5.[32] However, the Supreme Court clarified that an Item 303 omission can, in fact, support a Section 10(b) claim "if the omission renders affirmative statements made misleading."[33]

In explaining its ruling, the Court provided helpful guidance regarding the distinction between a "pure omission" and a "half-truth," — i.e., an omission that renders an affirmative statement misleading. The Court defined a "pure omission" as a scenario where "a speaker says nothing, in circumstances that do not give any particular meaning to that silence."[34] As an example, the Court stated that "[i]f a company fails entirely to file an MD&A, then the omission of particular information required in the MD&A has no special significance because no information was disclosed."[35] By contrast, the Court defined "half-truths" as "representations that state the truth only so far as it goes, while omitting critical qualifying information."[36] The Court reasoned that "the difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert."[37] According to the Court, the former cannot give rise to Section 10(b) liability, but the latter can, and, as a result, it required plaintiffs asserting Section 10(b) claims on the basis of Item 303 omissions to plead that the omissions rendered the company's affirmative statements to investors misleading.[38]

Importantly, however, the Supreme Court did not weigh in on either of the issues that the parties focused on during oral argument. Instead, the Court made clear that it was only addressing the Second Circuit's "pure omission" ruling, "not its half-truth analysis."[39] As a result, the Court expressly stated that it was not expressing any opinion whatsoever on the issues of "what constitutes 'statements made'" under Rule 10b-5(b) and "when a statement is misleading as a half-truth."[40] The Court also clarified that its opinion was limited to Rule 10b-5(b), which prohibits companies from making false and misleading statements to investors, and that it was not expressing any opinion on whether a "pure omission" of information required to be disclosed by Item 303 could give rise to liability under Rule 10b-5(a) and (c), which prohibit companies from engaging in schemes that defraud investors.[41]

III. Conclusion

While the ultimate impact (if any) of *Macquarie* on securities fraud litigation remains to be seen, the Supreme Court's decision clarifies the rule for "pure omissions" and provides helpful guidance to plaintiffs seeking to hold companies accountable for their Item 303 omissions. It also largely reaffirms the standard the Second Circuit first articulated in *Stratte-McClure* — that an Item 303 omission can be actionable under Section 10(b) if it renders defendants' statements' misleading.

But *Macquarie* is perhaps most notable for the issues it does not resolve, including the question of what constitutes a "statement made" for purposes of Rule 10b-5(b) liability. Given the Supreme Court's decision not to weigh in on this question, *Macquarie* neither addresses nor overrules the Second Circuit's conclusion in *Stratte-McClure* that a company's financial statement constitutes a "statement[] made" under Rule 10b-5(b) and can be rendered misleading by an Item 303 omission.[42] Rather, the immediate takeaway from *Macquarie* is that a plaintiff asserting such a theory must plead it, and it will be up to the district courts and Circuit courts to assess the viability of complaints alleging such a theory. ■

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31 *Id.*

32 *Macquarie*, 144 S.Ct. at 889.

33 *Id.* at 892.

34 *Id.* at 890.

35 *Id.* at 890-91.

36 *Id.* at 891.

37 *Id.*

38 *Id.* at 892.

39 *Id.* at 892 n.2.

40 *Id.* ("The Court granted certiorari to address the Second Circuit's pure omission analysis, not its half-truth analysis. . . . The Court does not opine on issues that are either tangential to the question presented or were not passed upon below, including what constitutes 'statements made,' [or] when a statement is misleading as a half-truth[]").

41 *Id.*

42 *Stratte-McClure*, 776 F.3d at 103 ("10b-5 only makes unlawful an omission of 'material information' that is 'necessary to make . . . statements made,' in this case the Form 10-Qs, 'not misleading'"); *id.* at 102 ("omitting an item required to be disclosed on a 10-Q can render that financial statement misleading").

KTMC SECURES DELAWARE SUPREME COURT REVERSAL RE-AFFIRMING MATERIALITY OF BANKER CONFLICTS IN SQUEEZE-OUT TRANSACTIONS *(continued from page 3)*

Factual Background

In August 2021, Inovalon agreed to sell the Company to a consortium of private-equity buyers led by Nordic Capital Epsilon SCA, SICAV-RAIF ("Nordic," and together with its affiliates, the "Consortium") for $41 per share in cash. KTMC alleged that the Transaction was unfair to public shareholders for a variety of reasons, including a "Rollover Agreement" with Dr. Keith Dunleavy ("Dunleavy"), Inovalon's founder, CEO, Chairman, and controlling shareholder, which permitted Dunleavy and other major shareholders to "roll over" $1.3 billion worth of their shares into the post-Transaction company. The Rollover Agreement allowed Dunleavy and others to remain major shareholders in the private Company at a favorable, tax-free price, and also allowed them to share in the value created by the Company's future growth. Further, KTMC alleged that while Dunleavy and other major shareholders received special treatment in the Transaction, the price that public shareholders were given was unfair.

After pursuing an investigation and receiving substantial Company books and records pursuant to Section 220 of the Delaware General Corporation law, KTMC filed a Verified Class Action Complaint (the "Complaint") of behalf of City of Sarasota Firefighters' Pension Fund in August 2022. KTMC's investigation confirmed that the Transaction was the culmination of a sale process that was dominated by the Company's conflicted controlling shareholder, with the assistance of a conflicted financial advisor, J.P. Morgan Securities LLC ("J.P. Morgan"). Based on the books and records received, KTMC was able to plead a detailed complaint that after years of strong financial performance and growth, Dunleavy favored a take-private transaction with Nordic from the outset after Nordic first expressed its interest in acquiring Inovalon in April 2021.

On July 18, 2021, after Nordic submitted an offer of $44 per share, the Board established a "Special Committee" of directors to negotiate the Transaction. On July 23, 2021, the Special Committee retained Evercore, Inc. ("Evercore") as its financial advisor. However, during the ensuing negotiations, Dunleavy and J.P. Morgan continued to lead negotiations with Nordic while the Special Committee and its purportedly "independent" advisor played little more than second fiddle. Based on confidential books and records, KTMC pled that this dynamic was problematic because J.P. Morgan had extensive business ties to Nordic and other members of the Consortium that had paid J.P. Morgan hundreds of millions of dollars in the last two years alone.

Then, on August 10, Nordic informed J.P. Morgan that it could not secure the financing necessary to fund a transaction at $44 per share. After further negotiation with Dunleavy and J.P. Morgan, Nordic submitted a "best and final" offer of $41 per share. On August 18, 2021, J.P. Morgan and Evercore provided the Special Committee with fairness opinions, and the Board approved the Transaction at the reduced price, despite initially balking and taking the position the $41 per share offer was insufficient.

On October 15, 2021, the Company issued a proxy statement (the "Proxy") soliciting shareholder approval of the Transaction. While the Proxy disclosed the fees Evercore had earned from Nordic and other members of the Consortium in the preceding two years, the Proxy did *not* disclose that Evercore, during the period it was advising the Special Committee, was also (i) advising Nordic on exiting an unrelated investment and (ii) advising a Consortium member on a $20 billion fundraise.

With respect to J.P. Morgan, the Proxy noted that J.P. Morgan had business relationships with the members of the Consortium, including Nordic, and mentioned that J.P. Morgan had earned $15.2 million from Nordic in the preceding two years. But the Proxy *completely omitted* the nearly $400 million in fees that J.P. Morgan had earned from the other Consortium members during the same two-year period. These are the parties that J.P. Morgan was purportedly negotiating *against* during Transaction discussions after Nordic lowered its proposal. The Proxy also failed to disclose the amount of fees J.P. Morgan stood to earn from certain concurrent representations with Consortium members.

The Chancery Court Proceedings

On August 9, 2022, KTMC and co-counsel filed the Complaint against Inovalon and its Board, asserting breaches of fiduciary duty and related claims that alleged that the Company's minority shareholders were denied fair value for their shares in the Transaction.

Defendants moved to dismiss the Complaint, arguing that the Transaction satisfied certain procedural elements under Delaware law that required the Court to apply the deferential "business judgment" review in evaluating Plaintiffs' claims. Plaintiffs argued that those elements were not satisfied and the more rigorous "entire fairness" review applied because, among other things, (1) the Special Committee failed to exercise due care in negotiating and approving the Transaction, and (2) the vote of the minority stockholders was not adequately informed due to the Proxy's omissions.

On July 31, 2023, the Chancery Court granted the Defendants' motion to dismiss. In finding that the Proxy adequately disclosed the banker's conflicts, the Chancery Court summarily concluded that the advisor conflicts were not material.

The Appeal

On appeal, Plaintiffs again argued that minority stockholders were not adequately informed of the conflicts faced by J.P. Morgan and Evercore and, therefore, the Complaint should not have been dismissed. Plaintiffs argued that the Chancery Court erred in summarily concluding that the banker conflicts were not material information requiring disclosure. The Delaware Supreme Court agreed, holding that disclosure claims require a specific assessment of the materiality of the alleged misstatements or omissions, especially because conflicts among advisors to a special committee are particularly important to minority shareholders in deciding whether to approve a transaction.

The Court credited KTMC's allegations and held that the Proxy failed to adequately disclose Evercore's and J.P. Morgan's conflicts. As to Evercore, the Proxy misled stockholders by stating that Evercore 'may' advise Nordic and other Consortium members in other transactions "when, in fact, it was providing such services, and thus there was an actual concurrent conflict."

As to J.P. Morgan, the Court found that the Proxy's disclosure that J.P. Morgan would receive "customary compensation" for its concurrent representations of Consortium members was not sufficient. The Court reasoned that, without knowing the amount of the fees, stockholders could not adequately assess the advisor's potential conflicts. The Court also found the Proxy misleading because it disclosed the $15.2 million J.P. Morgan had earned in two years from Nordic, but omitted the nearly $400 million J.P. Morgan had earned from the other Consortium members in the same period. The Court reasoned the Proxy could mislead stockholders "into thinking that the undisclosed fees earned in the concurrent representations were of a similar magnitude."

Finding that these omissions meant the Transaction did not receive a fully informed stockholder vote, the Delaware Supreme Court reversed the Chancery Court's dismissal. The decision is a boon for public shareholders because it reaffirms the importance of disclosure of conflicts of interest that can have a real impact on deal negotiations in consequential transactions for investors. The case has been remanded to the Chancery Court and will now proceed to the discovery phase. ■

KTMC OBTAINS FIRST-OF-ITS-KIND CLASS CERTIFICATION WIN IN SECURITIES FRAUD CASE AGAINST GOLDMAN SACHS ARISING FROM THE 1MDB SCANDAL

(continued from page 3)

below, despite somewhat greater price impact scrutiny, the decision demonstrates that *ATRS* should not present an insurmountable hurdle for investors seeking class certification in the Second Circuit.

Goldman's Alleged Misstatements Related to the 1MDB Scandal

In 2012 and 2013, Goldman served as the sole underwriter for three bond offerings by 1Malaysia Development Berhad ("1MDB"), a Malaysia state investment fund, raising $6.5 billion. In one of the largest financial frauds in recent memory, financier Jho Low and his co-conspirators (including two Goldman bankers) stole billions of the bond proceeds from 1MDB, laundering the money and using it to pay bribes and kickbacks and finance Low's extravagant lifestyle. By 2016, Low's scheme had become a global financial scandal, leading the press to question Goldman about the bank's knowledge of or complicity in Low's criminal scheme. In response to these questions, Goldman assured investors on December 22, 2016 that "we have found no evidence showing any involvement by Jho Low in the 1MDB bond transaction"; and during a November 1, 2018 interview, Goldman's then-CEO Lloyd Blankfein stated that he was "not aware" of any "red flags" concerning the 1MDB bond transactions.

AP7 alleged that investors learned the falsity of Goldman's denials on November 8 and 9, 2018, when the *Financial Times* and *The Wall Street Journal* reported that Blankfein had met with Low to discuss 1MDB business in 2013, despite warnings from Goldman's compliance department about Low. As a result of this revelation, Goldman's stock price dropped on November 9, 2018 by 3.89% and on November 12, 2018 by 7.46%.

The Court's Price Impact Analysis Under *ATRS*

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."[4] 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 on a class-wide basis, but also allowed defendants to offer evidence to rebut the presumption. Whether a plaintiff can establish predominance typically turns on whether investors can invoke the *Basic* presumption of reliance and, if they can, whether defendants can rebut the *Basic* presumption of reliance by offering evidence that the misstatements did not impact the company's stock price. Judge Parker concluded that the "invocation of the *Basic* presumption is appropriate," and therefore addressed the "evidence that [Defendants] contend shows the misstatements had no price impact."[5] In doing so, Judge Parker applied the *ATRS* framework.[6]

Match Between the Alleged Misstatements and Corrective Disclosure

Judge Parker found that AP7 had shown that Goldman's December 22, 2016 statement concerning knowledge of Low's involvement in the 1MDB deals and Blankfein's November 1, 2018 statement about his awareness of red flags "are a sufficient match to the November 8-9, 2018, corrective disclosure to support the *Basic* presumption."[7] Judge Parker reasoned that: "while the market may have initially believed Goldman's and Blankfein's denials that the bank (and particularly C-suite executives in New York) were unaware of Low's involvement in the 1MDB bond transactions, . . . , the revelation that Blankfein himself met with Low shortly after the last 1MDB bond transaction to discuss 1MDB rendered it implausible that the institution and its

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

[5] *Sjunde AP-Fonden v. Goldman Sachs Grp., Inc.*, 2024 WL 1497110, at *12 (S.D.N.Y. Apr. 5, 2024) ("*Goldman*").

[6] *Id.* at *15-25.

[7] *Id.* at *14.

chairman did not know about Low's involvement in the 1MDB bond transactions."[8] Further, Judge Parker found that "the corrective disclosure which states that Blankfein's 2013 meeting with Low 'came after [the] bank's compliance department had raised concerns about dealing with financier Jho Low' renders false Blankfein's statement that he was unaware of any red flags."[9]

Despite the connection between the alleged misstatements and corrective disclosure, Defendants argued that AP7 could not rely on the November 8-9 disclosure to establish price impact because "there were truthful substitutes for these two misstatements (or prior corrections to the misstatements) that did not impact the stock price."[10] Judge Parker rejected this argument, reasoning that "none of this prior news indicated that Blankfein himself knew of red flags and Low's involvement, which Plaintiffs contend was the final piece of news about 1MDB that caused the stock price to react."[11] For example, while Defendants' expert "identified 24 news articles predating the corrective disclosure that discussed senior-level meetings between Goldman officials and 1MDB officials," Judge Parker found that "none of the articles revealed that Goldman's Chairman met with Low about 1MDB after legal and compliance departments had warned against dealing with Low."[12]

In sum, Judge Parker credited "Plaintiffs' consistent theory of price impact [] that Goldman's longstanding dishonesty about its role in one of the largest financial scandals in history propped up its stock price until it was revealed that Goldman's CEO had met with the fraud's architect, Low, after Goldman's internal compliance team raised red flags about Low and the transactions, which caused a precipitous decline in Goldman's stock price over the next two trading days."[13]

Additional Evidence of Price Impact Supporting the Court's Decision

Judge Parker credited additional evidence presented by AP7 showing price impact, including "opinions from [its] economic expert showing a statistically significant drop in Goldman's stock price on November 9-12, 2018 . . .; articles from the

(continued on page 17)

[8] *Id.* at *15.

[9] *Id.*

[10] *Id.* at *16.

[11] *Id.*

[12] *Id.* at *24.

[13] *Id.* at *17.

INSTITUTIONAL INVESTOR | KESSLERTOPAZ MELTZERCHECK LLP

Nordic Investors

Shareholder Rights, Asset Recovery and Litigation

23 October 2024
Grand Hôtel Stockholm

The array of tools and options available to investors from active ownership and shareholder litigation has expanded significantly over the past several years — as has the number and type of investors open to these solutions. This openness to, and use of, these tools has become more developed as a reflection of the growing acceptance of active engagement by both asset managers and investors.

One of the more interesting developments in this area has been the use of litigation to not only recover assets, but also change corporate behavior. This reflects the desire by investors to exercise all of their rights on behalf of their participants and stakeholders. This half-day meeting, Nordic Investors ~ Shareholder Rights, Asset Recovery and Litigation, will examine these and other developments by focusing on the needs of legal and compliance teams at Nordic investing institutions. All through the lens of active engagement, shareholder actions, and affirmative litigation.

Topics to be covered:

- Affirmative litigation as a tool for asset recovery and corporate reform.
- The stewardship toolbox ~ what works and what doesn't.
- Case study on corporate governance litigation in the United States.
- The upside and the downside of being a plaintiff.
- Nordic investors leading the way in shareholder litigation.

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KTMC OBTAINS FIRST-OF-ITS-KIND CLASS CERTIFICATION WIN IN SECURITIES FRAUD CASE AGAINST GOLDMAN SACHS ARISING FROM THE 1MDB SCANDAL

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financial press, including Dow Jones and Barron's, attributing the drop in price on November 9-12, 2018 to the corrective disclosure; heightened analyst attention to the risk that the 1MDB scandal presented to Goldman's reputation after the corrective disclosure as compared to before the disclosure; and analyst reports specifically referencing that Blankfein met with 1MDB representatives."[14] In the face of this evidence, Judge Parker rejected Defendants' attempt to "rebut price impact by pointing to a supposed lack of coverage of the 1MDB scandal and Goldman's misstatements in analyst reports and lack of interest in quarterly earnings calls."[15]

Defendants' Attempts to Rebut Price Impact Based on Supposed Economic Evidence

Defendants made several additional arguments which they claimed showed that the alleged misstatements did not impact Goldman's stock price. For example, Defendants argued that the "proper window to evaluate the statistical significance of abnormal returns" — i.e., stock price movements after adjusting for market and industry factors — should be "limited to the first fifteen minutes after market open," and claimed that Goldman's stock price did not decline in a statistically significant manner within this window. Judge Parker rejected this bright-line rule, finding that courts should not "expect the stock market to incorporate material new information into stock prices within fifteen minutes."[16] Similarly, Judge Parker rejected Defendants' attempt to limit the price impact window (the period during which Goldman's stock price responded to the corrective disclosure) to November 9, 2018, finding "[t]his argument is unpersuasive because there is no bright line rule that price impact is confined to one trading day."[17] Finally, Judge Parker rejected Defendants' arguments that Goldman's stock drops on November 9 and November 12, 2018 were attributable to confounding news, i.e., news unrelated to the corrective disclosure. In particular, Judge Parker noted that "Defendants offer no economic analysis to demonstrate that the confounding stories were the cause of the stock drop."[18]

Implications for Establishing Price Impact In Future Cases

Goldman demonstrates that while *ATRS* may have raised the class certification bar slightly, it should not substantially change how courts consider price impact challenges. The decision also provides a roadmap to securities fraud plaintiffs on the types of evidence that may be found persuasive when opposing defendants' price impact challenges. For example, in *ATRS*, the Second Circuit instructed that "market commentary can provide insight into the kind of information investors would rely upon in making investment decisions — and therefore can serve as indirect evidence of price impact."[19] In *Goldman*, Judge Parker relied on market commentary presented by AP7 in finding that there was a sufficient connection between the alleged misstatements and corrective disclosure, that the corrective disclosure was the cause of the declines in Goldman's stock price, and therefore, that the alleged misstatements impacted Goldman's stock price. Marshalling this type of evidence may become more important in future cases. Overall, however, Judge Parker's opinion demonstrates that post-*ATRS* (as before), defendants will still need to present compelling evidence to rebut price impact where there is a match between the misstatements and corrective disclosure and other evidence (including plaintiff's economic expert's opinion) establishing price impact.

Adequacy of AP7 as Class Representative and KTMC as Class Counsel

In recommending that a class should be certified, Judge Parker found that AP7 had "demonstrated its commitment to participate in and supervise the prosecution of this action on behalf of the proposed class."[20] Judge Parker also concluded that KTMC could adequately serve as Class Counsel, stating that KTMC "has demonstrated its competency by its excellent advocacy in this case thus far. It has been prepared for all conferences and arguments, submitted top quality briefs, and otherwise zealously represented the interests of its client and the proposed class."[21]

Next Steps

Defendants have filed objections to the Report and Recommendation, which will be considered by The Honorable Vernon S. Broderick, who is the District Judge assigned to this matter. ■

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[14] *Id.*

[15] *Id.* at *24.

[16] *Id.* at *17-18.

[17] *Id.* at *19.

[18] *Id.* at *17.

[19] *ATRS*, 77 F.4th at 104.

[20] *Goldman*, 2024 WL 1497110, at *8.

[21] *Id.* at *10.

AFTER KESSLER TOPAZ LAWSUIT, KAISER ADMITS TO PRIVACY BREACH AFFECTING 13.4 MILLION MEMBERS

(continued from page 2)

this code throughout its Site and Apps, including within the patient portal where patients communicate with their healthcare providers, access test results, schedule appointments, make payments, and perform other sensitive tasks. As a result, the third parties received Kaiser members' PHI, including patient status, health conditions, prescribed medications, test results, and names of healthcare providers. Plaintiffs alleged that Kaiser's conduct was negligent, violated multiple state and federal statutes, constituted an unlawful invasion of privacy, and was in breach of Kaiser's express and implied promises to its patients who used the Site and Apps.

On October 6, 2023, Kessler Topaz filed a motion for a preliminary injunction, seeking a court order compelling Kaiser to immediately remove the third-parties' code from its Site and Apps. Following this motion, Kaiser filed a declaration on November 22, 2023 representing to the Court that it had removed the offending code and was no longer transmitting sensitive patient data to the third-parties.

Now, Kaiser has admitted in filings with the U.S. Department of Health and Human Services,[1] as well as state regulators in California and Washington,[2] that its use of the "third-party online technologies on its website and mobile application" provided "unauthorized access" to Kaiser members' "Protected Health Information (PHI) under the Health Insurance Portability and Accountability Act (HIPAA)." According to the filings, this information includes Kaiser members' "IP address, name, information that could indicate a member was signed into a Kaiser Permanente account or service, information showing how the member interacted with and navigated through the website or mobile applications, and search terms used in the health encyclopedia."

While Kaiser's admission confirms Plaintiffs' allegations, Kessler Topaz continues to seek redress for Kaiser's unlawful conduct on behalf of the 13.4 million current and former Kaiser members affected by this privacy breach ■

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[1] *See Cases Currently Under Investigation*, U.S. Dep't Health & Human Servs., available at https://ocrportal.hhs.gov/ocr/breach/breach_report.jsf.

[2] *See Doe et al. v. Kaiser Foundation Health Plan, Inc., et al.*, 4:23-cv-02865, ECF No. 127 (N.D. Cal. Apr. 29, 2024).

WHAT'S TO COME

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 ■ The Marriott Harbor Beach

JULY 2024

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

July 21 – 25

York, PA ■ The Yorktowne Hotel

AUGUST 2024

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

August 4 – 7

Adams County, PA ■ The Wyndham at the Gateway Complex

SEPTEMBER 2024

Council of Institutional Investors (CII) 2024 Fall Conference

September 9 – 11

Brooklyn, NY
The New York Marriott Brooklyn Bridge

Georgia Association of Public Pension Trustees (GAPPT) 10th Annual Trustee School

September 16 – 18

Columbus, GA ■ The Columbus Marriott

Michigan Association of Public Employee Retirement Systems (MAPERS) 2024 Fall Conference

September 21 – 24

Acme, MI ■ The Grand Traverse Resort

Florida Public Pensions Trustees Association (FPPTA) Fall Trustee School

September 22 – 25

Orlando, FL ■ The Hilton Bonnet Creek

Illinois Public Pension Fund Association (IPPFA) 2024 Mid-America Pension Conference

September 24 – 27

Lincolnshire, IL ■ The Marriott Lincolnshire Resort

OCTOBER 2024

Nordic Investors — Shareholder Rights, Asset Recovery and Litigation

October 23

Stockholm ■ The Grand Hotel Stockholm

NOVEMBER 2024

International Foundation of Employee Benefit Programs (IFEBP) 70th Annual Employee Benefits Conference

November 10 – 13

San Diego, CA ■ The San Diego Convention Center

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