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

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EVENTS — What's to Come

KESSLER TOPAZ ACHIEVES SIGNIFICANT VICTORY AT THE U.S. SUPREME COURT IN NVIDIA SECURITIES FRAUD CASE

Nathan Hasiuk, Esquire

In a major victory for investors, on December 11, 2024, the U.S. Supreme Court dismissed NVIDIA's appeal in a closely watched securities fraud case.[1] The decision maintains investors' ability to bring securities fraud claims under well-established pleading rules, rejecting NVIDIA's proposed restrictions that would have made such cases significantly more difficult to pursue.

The lawsuit, led by Swedish institutional investor Lannebo Kapitalförvaltning AB (previously known as Öhman Fonder AB) and Dutch pension fund Stichting Pensioenfonds PGB, alleges that NVIDIA and its CEO Jensen Huang fraudulently concealed the company's true reliance on cryptocurrency-related Graphic Processing Unit ("GPU") sales between August 2017 and November 2018. According to plaintiffs, when

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[1] *NVIDIA Corp., et al v. E. Ohman J:Or Fonder AB, et al.*, No. 23-970, 604 U.S. __ (2024), 2024 WL 5058572.

COURT REJECTS SOCIAL MEDIA COMPANIES' CHALLENGES TO LOCAL GOVERNMENT AND SCHOOL DISTRICTS' CLAIMS IN MULTIDISTRICT LITIGATION REGARDING THE YOUTH MENTAL HEALTH CRISIS

Jordan Jacobson, Esquire and Matthew Macken, Esquire

The Court presiding over *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047 (N.D. Cal.)—a multidistrict litigation ("MDL") involving lawsuits filed by hundreds of school districts and local governments from around the country—has found that the nation's largest social media companies cannot escape liability for the harms caused to school districts and local governments by their addictive platforms. This lawsuit seeks to provide recovery to the school districts and local governments who serve as first responders in the youth mental health crisis spurred by the social media companies, which has disrupted school operations and caused local governments and schools to divert and increase expenditures to deal with the crisis. On October 24, 2024, the Court

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INVESTORS MAY PROCEED WITH CLAIMS THAT WELLS FARGO CONDUCTED SHAM INTERVIEWS OF DIVERSE CANDIDATES TO MEET DIVERSE SEARCH REQUIREMENTS

Jennifer L. Joost, Esquire and Dylan Isenberg, Esquire

On July 29, 2024, Judge Trina L. Thompson of the Northern District of California issued an order denying a motion to dismiss Lead Plaintiff SEB Investment Management AB's Amended Complaint for Violations of the Federal Securities Laws ("Amended Complaint"), holding that the Amended Complaint adequately alleged that Wells Fargo & Company ("Wells Fargo" or the "Company") and three of its senior executives made materially false and misleading statements about Wells Fargo's Diverse Search Requirement and diversity hiring goals between February 24, 2021 and June 9, 2022 (the "Class Period").

In its July 29 order, the Court recounted Wells Fargo's history of issues with diversity, equity, and inclusion ("DE&I") alleged therein, explaining that "Wells Fargo has faced myriad complaints and public scrutiny for corporate scandal and alleged discriminatory conduct" "[i]n recent years."[1] The Court also noted that, by the start of the Class Period "trust in the Company [had] dwindled" "from the years of allegations of discrimination, unequal treatment, and other forms of financial scandal."[2] These scandals collectively led to $13.6 billion in legal costs by the end of 2020 and significant penalties, fines, and settlements, including a $1.95 trillion asset cap levied by the U.S. Federal Reserve until such time as Wells Fargo was able to revamp its risk management processes. As explained by the Court in the June 29 order, "[t]he inability to grow its assets and appease investors incentivized Wells Fargo to reshape internal controls and risk management practices, to reposition itself in the good graces of the government and ultimately the investing public."[3]

In the context of DE&I, Wells Fargo's efforts to "reshape" its practices included rolling out

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[1] Order Denying Motion to Dismiss Amended Complaint ("MTD Order") at 2.

[2] *Id.*

[3] *Id*

KTMC SCORES UNIQUE VICTORY WHERE COURT FINDS CONTROLLING STOCKHOLDER AND FINANCIAL ADVISORS CONFLICTED BY TAX RECEIVABLE AGREEMENT IN SALE OF FOUNDATION BUILDING MATERIALS

J. Daniel Albert, Esquire and Kevin Kennedy, Esquire

On May 31, 2024, Firefighters' Pension System of the City of Kansas City, Missouri Trust ("Plaintiff") secured an important victory in its class action litigation challenging the January 2021 acquisition of Foundation Building Materials, Inc. ("FBM" or the "Company") by American Securities LLC ("American Securities") (the "Merger").

Plaintiff alleged that the Merger was instigated by FBM's then-controlling stockholder, Lone Star Fund IX (U.S.), L.P. (collectively with its affiliate LSF9 Cypress Parent 2 LLC, "Lone Star") in order to trigger a contractual change-in-control provision in a tax receivable agreement entered into between Lone Star and the Company, which entitled Lone Star to a substantial lump-sum payment upon the sale of the Company. Lone Star orchestrated the sale process with the help of FBM's conflicted financial advisor, RBC Capital Markets ("RBC"), and faced little resistance from a "special committee" of the FBM Board of Directors (the "Board") empaneled to protect the Company's minority stockholders' interests (the

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KTMC SECURES $169 MILLION SETTLEMENT FOR SELF-ADMINISTERED GROUP HEALTH PLANS

Melissa Yeates, Esquire and Jon Neumann, Esquire

KTMC recently secured a landmark settlement agreement of approximately $169 million on behalf of a class of self-administered, self-insured group health plans (the "Class"). Pursuant to the agreement, which was fully approved by the U.S. Court of Federal Claims ("Claims Court") in May 2024, the U.S. Government ("Government") will pay 91.25% of all available damages, with the average Class member receiving more than $350,000, and roughly 10% of the Class receiving over $1 million. The settlement, one of the largest ever of its kind, comes after nearly a decade of zealous advocacy and hard-fought litigation on behalf of the Class, and represents an outstanding and unprecedented recovery for Class members.

I. Background

This case dates back to 2014, when the lead plaintiff, Electrical Welfare Trust Fund ("EWTF"), and other Class members were forced by the Government to contribute to the Affordable Care Act's ("ACA") newly-created Transitional Reinsurance Program ("TRP"). The TRP was meant to stabilize the insurance market, which the Government feared

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A LOOK AT RECENT SECURITIES DECISIONS REVOLVING AROUND THE COVID-19 PANDEMIC

Joshua S. Keszczyk, Esquire and Geoffrey C. Jarvis, Esquire

The COVID-19 pandemic was an unprecedented event that left the United States navigating uncharted waters, including with respect to how investors could hold public companies and their executives accountable under the federal securities laws for material misstatements made regarding a company's performance during and after the pandemic. Significantly, statements made by companies regarding their post-pandemic prospects have served as the basis for a number of lawsuits brought under the federal securities laws.[1] This article summarizes how a few notable cases have progressed under the federal securities laws.

To be actionable under Section 10(b) of the Securities Exchange Act of 1934, statements made by a company or its officers must be materially false or misleading.[2] The federal securities laws though, insulate forward-looking statements or statements about a company's future projections or expectations from liability through the statutory safe harbor provision[3] if a company also provides "meaningful cautionary statements" that its results could differ from those noted in the forward-looking statement, or if the forward-looking statement is immaterial.[4] Forward-looking statements made with actual knowledge of their falsity are not shielded from liability.[5] Additionally, "vague statements of optimism" upon which no reasonable investor would rely, commonly known as "puffery," and statements of opinion are typically deemed immaterial to investors and are not actionable.[6]

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1 *See* 15 U.S.C. §§ 77k, 78j(b), 78t(a); 17 C.F.R. § 240.10b-5.

2 *See Dura Pharms., Inc., v. Broudo*, 544 U.S. 336, 341 (2005) (Section 10(b) imposes liability for "the making of any untrue statement of material fact or the omission of any material fact necessary in order to make the statements made . . . not misleading" in connection with the purchase or sale of securities) (internal quotations and citation omitted; ellipsis in original).

3 *See* 15 U.S.C. § 78u-5(c).

4 15 U.S.C. § 78u-5(c)(1)(A); *see also Wochos v. Tesla, Inc.*, 985 F.3d 1180, 1189-92 (9th Cir. 2021) (explaining that the safe harbor "is designed to protect companies and their officials when they merely fall short of their optimistic projections") (internal citation and quotation marks omitted).

5 *See* 15 U.S.C. § 78u-5(c)(1)(B).

6 *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111(9th Cir. 2010) (noting that "vague statements of optimism . . . have been held to be non-actionable puffing.") (internal citations omitted); *see also Glen Holly Ent., Inc. v. Tektronix, Inc.*, 352 F.3d 367, 379 (9th Cir. 2003) ("generalized, vague and unspecific assertions" constitute "puffery upon which a reasonable consumer could not rely"); *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188 (2015) (holding that "a statement of opinion is not misleading just because external facts show the opinion to be incorrect" because "[r]easonable investors do not understand such statements as guarantees.").

Keynote Speaker

Al Gore

Environmental activist, Co-Founder and Chairman, Generation Investment Management, Former Vice President of the United States (1993 to 2001) and keynote speaker at the first Rights & Responsibilities of Institutional Investors event 19 years ago.

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- ESG is dead.... Long live sustainability and impact?
- Taking stock — an appraisal of active ownership.
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A LIMITED CARVE OUT UNDER *MORRISON*? FOR NOW, U.S. FEDERAL COURTS CAN HEAR SECTION 10(B) CLAIMS ON BEHALF OF U.S. PURCHASERS OF DUAL-LISTED SECURITIES PURCHASED ON THE TEL-AVIV STOCK EXCHANGE LTD.

Geoffrey C. Jarvis & Varun Elangovan, Esquire

For more than a decade, the Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), has precluded virtually all private litigation in federal district courts under the Securities Act of 1933 (the "Securities Act"),[1] or the Securities and Exchange Act of 1934 (the "Exchange Act")[2], based on securities purchased on exchanges outside of the U.S. Following *Morrison*, multiple cases have held that, even when the parties already have undertaken substantial litigation in the United States district courts, the U.S. securities laws apply only to transactions in securities listed on domestic exchanges or to domestic transactions.[3] Further, many district courts have declined to exercise their supplemental jurisdiction to allow plaintiffs to pursue claims under the laws of the country where their purchases occurred.[4] A few district courts, however, primarily in cases under Israeli law, have exercised their supplemental jurisdiction and allowed foreign law claims to proceed notwithstanding *Morrison*.[5]

A recent decision in the United States District Court for the Eastern District of Pennsylvania bucks the majority trend of federal cases and has allowed a case to proceed, and a class to be certified, under Section 10(b) of the Exchange Act (no Israeli law claims were pled), where shares were purchased on the Tel-Aviv Stock Exchange Ltd. (the "TASE").[6] The *Halman* decision, while departing from the holdings of prior cases in the United States federal courts regarding the jurisdictional reach of the U.S. securities laws, opens an exception to *Morrison* based upon the unusual legal regime established in Israel relating to transactions for dual-listed securities on the TASE.

Israel's Unusual Legal Regime Relating to Dual-Listed Securities on the TASE

Unlike most sovereign states, Israel has decided that where securities purchased on the TASE are dual registered in another jurisdiction, the law of the foreign jurisdiction will govern any action for fraud in connection with the securities — regardless of whether the transaction takes place on the TASE or the foreign exchange.[7] In *In re Teva*, the court examined the history of the TASE and Israeli dual-listing law, noting the conscious choice by the Israeli government to defer to the laws of foreign jurisdictions with respect to the regulation of the securities of TASE dual-listed companies:

> In the late 1990s, the TASE had a relatively small market capitalization; as a result, many Israeli companies eschewed listing on the TASE and, instead, listed exclusively on a foreign market's stock exchange. If they listed on the TASE, Israeli companies would have had to comply with two separate legal regimes, one in Israel and one in the country of their other listing, with all the concomitant costs. That was an unattractive proposition, and Israel sought to

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[1] 15 U.S.C. § 77a et seq.

[2] 15 U.S.C. § 78a et seq.

[3] *See, e.g.*, *CLAL Fin. Batucha Inv. Mgmt., Ltd. v. Perrigo Co.,* No. 09 Civ. 2255(TPG), 2011 WL 5331648, at *2 (S.D.N.Y. Sept. 28, 2011) (dismissing securities claims of lead plaintiffs because they purchased their stocks on the Tel-Aviv Stock Exchange Ltd., but conducting little analysis beyond the plain language of *Morrison*'s holding); *In re Alstom SA Sec. Litig.*, 741 F. Supp. 2d 469, 471 (S.D.N.Y. 2010) (dismissing plaintiffs' Section 10(b) claims pursuant to *Morrison* because securities were purchased on a French exchange); *Cornwell v. Credit Suisse Grp.*, 729 F. Supp. 2d 620, 624 (S.D.N.Y. 2010) (dismissing plaintiffs' Section 10(b) claims pursuant to *Morrison* because purchases occurred on a Swiss exchange, and stating that "[n]othing in the plain language of the Supreme Court's new test, or in the contextual circuit court case law that prompted it, suggests that *Morrison* envisions [] exceptions and embellishments . . ."); *Cascade Fund, LLP v. Absolute Cap. Mgt. Holdings Ltd.*, No. 08-CV-01381-MSK-CBS, 2011 WL 1211511, at *7 (D. Colo. Mar. 31, 2011) (dismissing plaintiffs' Section 10(b) claims pursuant to *Morrison* because transactions were completed in Cayman Islands).

[4] *See, e.g.*, *Alstom*, 741 F. Supp. 2d at 473 (declining to exercise supplemental jurisdiction to allow case to proceed under French law, even where discovery was completed); *In re Toyota Motor Corp. Sec. Litig.*, 2011 WL 2675395, at *7 (C.D. Cal. July 7, 2011) ("[w]hile there may be instances where it is appropriate to exercise supplemental jurisdiction over foreign securities fraud claims, any reasonable reading of Morrison suggests that those instances will be rare"); *In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 799 (S.D. Tex. 2012) ("[b]ecause this Court does not have jurisdiction over the Ordinary Share Purchasers' section 10(b) claims, the Court cannot exercise supplemental jurisdiction over Plaintiffs' English law claims").

[5] *See, e.g.*, *In re Teva Sec. Litig.,* 512 F. Supp. 3d 321, 357 (D. Conn. 2021) (holding that *Morrison* did not preclude the court's exercise of supplemental jurisdiction over the Israeli plaintiffs' Israeli law securities claims); *Roofer's Pension Fund v. Papa*, 2018 WL 3601229, at *24 n.24 (D.N.J. July 27, 2018) ("the Court will not refuse to exercise supplemental jurisdiction over the Israeli law claim articulated in Count Four given the remaining federal claims").

[6] *See generally Halman Aldubi Provident and Pension Funds Ltd. v. Teva Pharm. Indus. Ltd.*, No. CV 20-4660-KSM, 2023 WL 7285167 (E.D. Pa. Nov. 3, 2023), *aff'd on other grounds*, *Forsythe v. Teva Pharm. Indus. Ltd.*, 102 F.4th 152 (3d Cir. 2024).

[7] *See generally In re Teva*, 512 F. Supp. 3d at 341-44.

KESSLER TOPAZ ACHIEVES SIGNIFICANT VICTORY AT THE U.S. SUPREME COURT IN NVIDIA SECURITIES FRAUD CASE

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cryptocurrency prices collapsed in mid-2018, it revealed NVIDIA's previously undisclosed exposure to the crypto market, leading to a sharp decline in both GPU sales and NVIDIA's stock price.[3]

Heightened Pleading Requirements Under the PSLRA

The Private Securities Litigation Reform Act ("PSLRA") imposes heightened pleading requirements on securities fraud plaintiffs.[4] Under the PSLRA, plaintiffs alleging violations of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 must specifically allege why a defendant's statements were materially false or misleading and "state with particularity facts giving rise to a strong inference" of scienter (fraudulent intent or severe recklessness).[5] The Supreme Court has previously addressed these standards in prior cases, including *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, which held that courts must assess scienter allegations "holistically," analyzing "*all* of the facts alleged, taken collectively,"[6] and *Matrixx Initiatives, Inc. v. Siracusano*, which unanimously affirmed *Tellabs* and rejected bright-line pleading rules.[7]

The Ninth Circuit's Application of *Tellabs*

In August 2023, a split panel of the U.S. Court of Appeals for the Ninth Circuit reversed the district court's dismissal of plaintiffs' complaint, concluding that "the totality of detailed allegations in Plaintiffs' amended complaint easily satisfies the PSLRA pleading standard for falsity."[8] The Ninth Circuit found that Huang's repeated statements that NVIDIA's crypto-related revenues were largely confined to its crypto-specific GPU product, while failing to disclose that the majority of crypto-related revenues actually came from sales of NVIDIA's flagship gaming GPU, were materially false or misleading.[9] In support of this conclusion, the Ninth Circuit cited the complaint's extensive factual detail, including "internal information and witness statements" regarding NVIDIA's sales of gaming GPUs to crypto-miners, an expert analysis estimating NVIDIA's crypto-related gaming GPU sales (which was corroborated by an independent third-party analysis by the Royal Bank of Canada), and the "sudden and substantial reduction of NVIDIA's earnings projection that followed collapse of crypto prices," which "Huang attributed [] to a 'crypto hangover.'"[10]

With respect to scienter, the Ninth Circuit found that a "holistic review" of the complaint gave rise to a strong inference that Huang knew or recklessly disregarded that his statements were materially false or misleading when made.[11] Among other allegations, the complaint alleged that "(1) Huang had detailed sale reports prepared for him; (2) Huang had access to detailed data on both crypto demand and usage of NVIDIA's products; (3) Huang was a meticulous manager who closely monitored sales data; and (4) sales data at the time would have shown that a large portion of GPU sales were being used for crypto mining."[12] In addition, "Huang himself admitted to closely monitoring sales data," and it was implausible that Huang was unaware of "the source of more than a billion dollars in company revenue during a fifteen-or eighteen-month period."[13]

Supreme Court Proceedings

In June 2024, the Supreme Court granted Huang's and NVIDIA's petition for a writ of certiorari seeking review of the Ninth Circuit's opinion. Defendants' appeal to the Supreme Court claimed that the Ninth Circuit's opinion created or deepened differences in the standards applied by U.S. Courts of Appeals when assessing the sufficiency of securities fraud complaints, and asked the Supreme Court to intervene to resolve these purported differences.[14] Defendants proposed two bright-line rules that would have required plaintiffs to (1) plead the exact contents of internal documents referenced in complaints in order to establish a strong inference of scienter and (2) limited plaintiffs' ability to rely on

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2 Respondents' Brief at 19-21, *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Sept. 25, 2024).

3 *Id.* at 17-18.

4 15 U.S.C. § 78u-4(b)(1)-(2).

5 *Id.*, § 78u-4(b)(2).

6 551 U.S. 308, 322-23, 326 (2007).

7 563 U.S. 27, 48-49 (2011).

8 *E. Ohman J:or Fonder AB v. NVIDIA Corp.*, 81 F.4th 918, 942 (9th Cir. 2023), *cert. granted sub nom. NVIDIA Corp. v. Ohman J*, 144 S. Ct. 2655 (2024), *and cert. dismissed as improvidently granted*, 2024 WL 5058572 (U.S. Dec. 11, 2024).

9 *Id.*

10 *Id.* at 941-42.

11 *Id.* at 940.

12 *Id.*

13 *Id.* at 940, 946.

14 Petition for Writ of Certiorari at 3-5, *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Mar. 4, 2024).

expert analysis in satisfying the PSLRA's requirements for pleading falsity.[15]

Plaintiffs, supported by eight *amicus curiae* — including the U.S. Department of Justice, the U.S. Securities & Exchange Commission, legal scholars, public-interest groups, and institutional investors[16] — argued that defendants' proposed rules were "a solution in search of a problem."[17] Specifically, plaintiffs argued that lower courts were well-versed in applying *Tellabs*' holistic scienter standard, and that any categorical rule requiring plaintiffs to allege detailed descriptions of internal documents — before obtaining discovery — would be unworkable and only serve to preclude meritorious cases from proceeding.[18] Moreover, plaintiffs demonstrated that the complaint contained ample factual detail supporting Huang's knowledge of crypto-related GPU sales, including detailed allegations concerning internal documents and data sources, and former employee accounts and other allegations not tied to specific internal documents.[19] With respect to falsity, plaintiffs argued that the PSLRA does not differentiate between factual allegations based on expert analysis and those based on other sources, and so there was no basis to create special pleading requirements for such allegations.[20] This was particularly true for the complaint, since the expert analysis of NVIDIA's crypto-revenue only bolstered plaintiffs' already particularized falsity allegations, including those based on the Royal Bank of Canada's nearly-identical conclusions.[21]

During oral argument on November 13, 2024, several Justices expressed skepticism about defendants' claim that the Court needed to intervene to clarify the PSLRA's pleading requirements. For example, Justice Kagan told defendants' counsel that "we don't like bright-line rules in this context and have said so a thousand times."[22] Justice Brown Jackson similarly challenged defendants' proposed internal documents rule, stating "you appear to be requiring for plaintiffs to actually have the evidence in order to plead their case, and I didn't understand the pleading standards, even with particularity, to require that they have the documents, nor do I understand how they could have the documents when discovery hasn't occurred yet."[23] Justice Sotomayor questioned if defendants were effectively asking the Court to "error-correct" the Ninth Circuit's opinion, a point that Justices Barrett and Gorsuch reiterated in their questioning of defendants' counsel.[24]

Soon after oral argument, on December 11, 2024, the Supreme Court dismissed the writ of certiorari as improvidently granted.[25] While the order itself does not provide a rationale for the Court's decision, the Justices' questioning during oral argument strongly suggests that the Court did not find defendants' proposed bright-line rules necessary or consistent with the Court's precedent.

Impact of *NVIDIA* on Securities Fraud Litigation

The Supreme Court's decision in *NVIDIA* means that the Ninth Circuit's decision sustaining plaintiffs' complaint stands, and is now binding precedent in the Ninth Circuit. Beyond *NVIDIA*, the decision represents a significant victory for investors seeking to hold corporations accountable for securities fraud, and has far-reaching implications for securities fraud litigation going forward.

The Supreme Court's rejection of the defendants' proposed categorical rules means that lower courts may continue to apply *Tellabs*' flexible, holistic approach in evaluating securities fraud complaints. The decision also preserves securities fraud plaintiffs' ability to rely on expert analyses in complaints, which is particularly important in case involving complex industries and sophisticated frauds.

Furthermore, by not adopting any further heightening of the PSLRA's pleading standards, the *NVIDIA* case ensures that private securities actions will continue to serve as an "essential supplement" to government enforcement efforts.[26] As one of plaintiffs' *amici* aptly stated, "private enforcement of the law is one of the things that makes the United States different" and "and our markets are more nimble, innovative, and honest because of it."[27]

The Supreme Court's dismissal of the *NVIDIA* appeal, along with a similar dismissal in a case against Meta Platforms, Inc.,[28] may also signal heightened scrutiny of securities litigation petitions going forward. As noted by several defense-side securities litigators, future petitioners will likely need to demonstrate clear Circuit splits or unresolved questions of law, rather than merely challenging the application of established standards to specific facts.[29] If these predictions prove correct, this will further strengthen private securities litigation by making it more difficult for defendants to overturn appellate rulings in plaintiffs' favor. ■

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[15] Petitioners' Brief at (i), 19-22, 30-33, 41-44, *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Aug. 13, 2024).

[16] *See NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 Supreme Court Docket, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/23-970.html (last visited Dec. 13, 2024).

[17] *See supra* note 2, at 4.

[18] *Id.* at 32-38.

[19] *Id.* at 32-34, 38-42.

[20] *Id.* at 43-47.

[21] *Id.* at 47-49.

[22] Transcript of Oral Argument at 23, *Nvidia Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Nov. 13, 2024).

[23] *Id.* at 6.

[24] *Id.* at 11-12, 24, 26.

[25] *See* note 1.

[26] The United States as *Amicus Curiae* Supporting Respondents Brief at 1, *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Oct. 2, 2024).

[27] Brian T. Fitzpatrick as *Amicus Curiae* in Support of Respondents Brief at 20, *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, No. 23-970 (Oct. 2, 2024) (citation omitted).

[28] *Facebook, Inc. v. Amalgamated Bank*, 604 U.S. 4 (2024).

[29] Jessica Corso, *Justices' Cold Feet On Nvidia, Meta Leaves Attys Guessing*, LAW360 (Dec. 11, 2024), https://www.law360.com/technology/articles/2272421/justices-cold-feet-on-nvidia-meta-leaves-attys-guessing.

INVESTORS MAY PROCEED WITH CLAIMS THAT WELLS FARGO CONDUCTED SHAM INTERVIEWS OF DIVERSE CANDIDATES TO MEET DIVERSE SEARCH REQUIREMENTS

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initiatives to boost diversity and inclusion efforts at the Company. Shortly after Wells Fargo hired its current CEO, Charles Scharf, the Company announced its Diverse Search Requirement, a policy that required interview slates for positions with compensation above $100,000 to consist of at least 50% diverse candidates. However, and as specifically noted by the Court in its July 29 order, "[l]ess than three months later, in the wake of social unrest following the murder of George Floyd, Scharf circulated a company-wide memo stating that the lack of Black employees at Wells Fargo could be attributed to the 'very limited pool of Black talent to recruit from.'"[4] Scharf "further blamed Wells Fargo's inability to reach its diversity goals on the lack of 'minority talent'" during an internal Zoom meeting.[5] Once the public learned of Scharf's comments, he was forced to apologize. For its part, Wells Fargo hired Kleber Santos to head its newly created Diverse Segments, Representation, and Inclusion group and required additional reporting on these issues to its Board of Directors.

As explained in the Court's July 29 order, Scharf's comments "also drew the focus of Wells Fargo's investors," with "three institutional investors submit[ing] a [proxy] proposal for Wells Fargo's hiring processes" in December 2020.[6] In order to satisfy its investors and avoid a public fight over the proxy proposal, Wells Fargo agreed to provide additional public disclosures regarding its diversity hiring practices and, in particular, the Diverse Search Requirement, beginning with its 2020 Annual Report dated February 23, 2021. The Amended Complaint alleged that statements therein were materially false and misleading when made by Wells Fargo and the individual defendants, Scharf, Santos, and Carly Sanchez, Wells Fargo's Executive Vice President of Diversity Recruitment, because the Company had only satisfied the Diverse Search Requirement by conducting "fake" or "sham" interviews of diverse candidates who would not be hired by Wells Fargo.

More specifically, based on the accounts of dozens of current and former employees, the Amended Complaint alleged "that Wells Fargo sought out diverse candidates to interview for positions that had already been filled, or for which the candidate was not qualified for and could not receive an offer" simply to comply with the Diverse Search Requirement on paper.[7] The Amended Complaint alleged that "fake" or "sham" interviews — which occurred when the hiring manager already had picked an internal candidate or preferred external referral for the role — were sufficiently widespread at the Company, occurring in a number of its divisions and geographical locations, before, during, and after the Class Period. The Amended Complaint likewise alleged that Wells Fargo's recruiters interviewed diverse candidates that were less qualified than the preferred or internal candidates or did not have the necessary experience for the job opening simply to "check the box" with respect to the Diverse Search Requirement. In short, diverse candidates subjected to these interviews had "no real chance" to work in the role for which they interviewed.[8]

Investors allegedly learned the relevant truth on June 9, 2022, with the New York Times publication of a second story exposing these practices. The first article, published May 19, 2022, told the story of 11 current or former Wells Fargo employees and Joe Bruno, a former Senior Vice President in Wells Fargo's Wealth Management Division, who claimed to have been fired by the Company after he internally blew the whistle about the use of "fake" interviews. In response, Santos publicly claimed that Wells Fargo could not substantiate the accounts in the May 19 article and that the Diverse Search Requirement was "working."[9] The second New York Times Article broke the news that the U.S. Department of Justice had issued a criminal grand jury subpoena following the May 19 article seeking to investigate Wells Fargo's diversity hiring practices and provided the stories of 10 more current and former Wells Fargo employees who

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[4] *Id* at 3.

[5] *Id*

[6] *Id* at 4.

[7] *Id*

[8] *Id*

[9] *Id* at 10.

had participated in, or seen paperwork reflecting the use of "sham" interviews across the Company. In response to the second New York Times article, the Amended Complaint alleged that the price of Wells Fargo's common stock declined more than 10% over two trading days, damaging investors.

In its July 29 order, the Court held that the Amended Complaint sufficiently alleged that Defendants made material misrepresentations about the Diverse Search Requirement and Wells Fargo's diversity hiring practices.[10] For instance, the Court found that "Defendants' statements misleadingly impl[ied] that the Diverse Search Requirement advanced Wells Fargo's DE&I efforts," explaining that "[i] nterviewing candidates who had no chance of receiving an offer could not accomplish Defendants' stated goal of improving workforce diversity" and, as a "practice," may "alienate and demean diverse candidates."[11]

The Court also disagreed with Defendants' assertion that the statements at issue never promised that the diverse candidates would be hired, finding that they had "ignore[d] the . . . the greater context in which the statements were made," including the fact that Wells Fargo publicly stated that it had implemented the Diverse Search Requirement to "improv[e] work force DE&I" and the statements at issue in the Amended Complaint had been made "in the context of pressure from the government, investors, and [the] general public regarding DE&I issues."[12] According to the Court, "[a] reasonable investor would expect a policy that is presented as a method of developing DE&I in the workplace to be implemented in a manner that could accomplish that goal," and "address the underlying issues" instead of "a way that actively moved away from those goals," as alleged in the Amended Complaint.[13]

The Court further held that the Amended Complaint's allegations with respect to the sham interviews were particularized, and thus, the instances of sham interviews were sufficiently widespread to render Defendants' statements materially misleading when made. This was an important shift by Judge Thompson as she had found the prior complaint deficient in this regard. According to the July 29 order, "[t]he Amended Complaint . . . provided new allegations expanding the geographical and organizational scope of the sham interviews" and "Defendants [] neither cited any authority nor provided any argument indicating that allegations across multiple states and divisions are insufficiently widespread to establish falsity."[14]

Finally, the Court found that the allegations set forth in the Amended Complaint gave rise to a strong inference that each Defendant made false and misleading statements with the intent to deceive investors. For example, the Court credited the Amended Complaint's allegations of "direct notice" that these interviews were occurring as to each Defendant, including the receipt of Joe Bruno's letter about fake interviews in the Wealth Management division.[15] The Court likewise credited the Amended Complaint's "circumstantial allegations of scienter," which included "Wells Fargo's overall focus on workplace diversity and Defendants' involvement in these issues," the Company's "maintain[ence of] extensive records regarding its interview processes and diversity initiatives, including records of every job interview," regular meetings and a "deep dive" into the resulting data, and Board and senior management oversight of Wells Fargo's diversity initiatives.[16] The Court likewise determined that Defendants had "reputational incentives to make misleading statements" about the Diverse Search Requirement because they already had "been the subject of multiple investigations and lawsuits regarding diversity issues in [Wells Fargo's] workforce" and "institutional investors explicitly demanded that [the Company] take action to address these issues."[17]

Judge Thompson's order denying the motion to dismiss the Amended Complaint is an important step forward for investors harmed by Defendants' conduct, and for diverse candidates seeking employment at Wells Fargo and other financial institutions. After a brief "pause" and internal investigation, Wells Fargo has reinstated an updated version of the Diverse Search Requirement. The DOJ, as well as the SEC, has concluded an investigation of Wells Fargo's diversity hiring practices without taking any actions. As a result, it is left to private litigants to hold Wells Fargo and executives accountable for feigning compliance with the Company's DE&I initiatives. ■

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[10] *Id* at 14-16.

[11] *Id* at 14.

[12] *Id* at 14-15.

[13] *Id*

[14] *Id* at 16-17.

[15] *Id* at 18.

[16] *Id* at 18-19.

[17] *Id* at 19-20.

KTMC SCORES UNIQUE VICTORY WHERE COURT FINDS CONTROLLING STOCKHOLDER AND FINANCIAL ADVISORS CONFLICTED BY TAX RECEIVABLE AGREEMENT IN SALE OF FOUNDATION BUILDING MATERIALS

(continued from page 2)

"Special Committee" or the "Committee"). The Special Committee was also advised by a conflicted banker, Evercore Group LLC ("Evercore"). As a result, Plaintiff alleged that FBM's public stockholders were cashed out at an inopportune time and at the unfair price of $19.25 per share, while Lone Star received over $80 million due to the termination of the tax receivable agreement.

Plaintiff filed suit challenging several aspects of the Merger, and the defendants moved to dismiss all claims. Vice Chancellor Travis J. Laster of the Delaware Court of Chancery denied, in large part, the Defendants' motions to dismiss Plaintiff's claims.

Factual Background

FBM was founded in 2011 and acquired by Lone Star in 2015. Lone Star then took the Company public through an initial public offering in February 2017 (the "IPO"). Lone Star retained approximately 65% of FBM's outstanding shares following the IPO and appointed seven of the initial eleven members of FBM's Board. In connection with the IPO, Lone Star and FBM entered into a "tax receivable agreement" (the "TRA"), pursuant to which FBM would pay Lone Star 90% of the tax savings realized (or deemed to be realized) by the Company through tax assets generated prior to the IPO.

The TRA was initially worth an estimated $203.8 million to Lone Star over 15 years. But the Tax Cuts and Jobs Act of 2017 (the "TCJA") reduced the federal corporate income tax rate and, in turn, reduced the value of the TRA to Lone Star because FBM would realize fewer tax savings than previously expected. Following the enactment of the TCJA, the TRA's value fell to an estimated $135.8 million to Lone Star. However, instead of waiting for uncertain proceeds to be paid out from the TRA annually over 15 years, Lone Star could obtain a lump-sum payment under the TRA if the contract was terminated early due to a "change in control," such as a sale of the Company to a third party.

In early 2018, shortly after the TJCA took effect, Lone Star began exploring a sale of the Company. At Lone Star's behest, FBM engaged RBC — a bank that had enjoyed a lucrative relationship with Lone Star — as its financial advisor and agreed to pay RBC a "success fee" based on the total consideration received in a sale of the Company, including any early TRA termination payment to Lone Star. This fee arrangement incentivized RBC to secure an early termination payment for Lone Star — aligning its interests with the conflicted controlling stockholder.

In September 2018, recognizing the conflict created by Lone Star's interests in the TRA, the Board formed the Special Committee to evaluate and approve a potential sale of the Company. The Special Committee, however, did not participate meaningfully in the sale process. Instead, the Committee remained completely passive, deferring to Lone Star, with the help of RBC, to run the sale process. Indeed, it was not until the summer of 2020 that the Committee, at Lone Star's direction, was permitted to finally hire its own financial advisor, Evercore. Despite the fact that the Special Committee, and by extension its advisor Evercore, was in place to protect the interests of FBM's minority stockholders from Lone Star's potential conflicts, the Special Committee approved a fee structure for Evercore that, like RBC's, incentivized Evercore to bless a merger that would trigger an early TRA termination payment to Lone Star. Nonetheless, Evercore's retention changed little about the conflicted process, as Lone Star and RBC continued running the sale process and required potential bidders to agree to a transaction structure that would include a TRA termination payment to Lone Star.

In November 2020, FBM agreed to the Merger with American Securities, which included an early termination payment of $74.8 million to Lone Star (and would also include an $8.6 million payment due to Lone Star under the TRA prior to the Merger's closing). Shortly after the Board approved FBM's agreement to the Merger, Lone Star, as FBM's majority stockholder, provided the necessary stockholder approval for the Merger by written consent. Therefore, public stockholders were not given the opportunity to vote for or against the Merger.

However, FBM's public stockholders had a statutory right to seek appraisal of the fair value

of their shares pursuant to Section 262 of the Delaware General Corporation Law ("Section 262"). Section 262 required FBM to notify stockholders of their appraisal rights at least twenty days before the December 24, 2020 deadline for appraisal demands to be delivered to the Company. FBM claimed that it "first mailed" the appraisal notice "on or about December 4, 2020."

The Merger closed on January 29, 2021.

The Litigation and the Court's Ruling

Plaintiff first undertook a lengthy books and records investigation, where Plaintiff filed a complaint to compel the Company to produce books and records pursuant to Section 220 of the Delaware General Corporation Law ("Section 220"), filed briefing in advance of a Section 220 trial in the Delaware Court of Chancery and moved the Court to order FBM to produce documents withheld from the Company's production of books and records on the grounds of attorney-client privilege.

Using the fruit of its labor from the books and records investigation, Plaintiff filed a detailed complaint asserting four sets of claims against various defendants. First, Plaintiff asserted breach of fiduciary duty claims in connection with the sale process leading to the Merger (the "Sales Process Claims") by (a) Lone Star, the Lone Star-affiliated directors on the Board, and FBM's Chief Executive Officer (together, the "Lone Star Defendants"), and (b) the Special Committee directors (the "Special Committee Defendants"). Second, Plaintiff asserted that the Lone Star Defendants and the Special Committee Defendants breached their duty of disclosure to the public stockholders by filing a misleading and incomplete appraisal notice (the "Disclosure Claims"). Third, Plaintiff asserted that RBC, Evercore, and American Securities aided and abetted the aforementioned breaches of fiduciary duty (the "Aiding and Abetting Claims"). And fourth, Plaintiff asserted that FBM, the Board, Lone Star, American Securities, and American Securities' subsidiary ASP Flag Intermediate Holdings, Inc. ("ASP Flag") violated Delaware's appraisal statute requiring the timely notice of appraisal rights (the "Appraisal Notice Claim"). All Defendants moved to dismiss the claims brought against them.

The Court upheld the Sales Process Claims against the Lone Star Defendants and the Special Committee Defendants. The Court found that the Lone Star Defendants were conflicted in pursuing a transaction that would trigger an early TRA termination payment and, therefore, it is reasonably conceivable they will have to prove that the Merger was fair compared to the Company's prospects as a standalone public company. The Court further found it reasonably conceivable that the Special Committee Defendants consciously disregarded their fiduciary duties by failing to participate in the sale process, showing "excessive deference" to Lone Star, and approving their advisor's conflicted fee structure.

The Court upheld the Disclosure Claims against the directors of the Board, finding it reasonably conceivable that they failed to disclose material information to stockholders, including information regarding (1) the significant role the TRA played in the sale process, (2) the terms of RBC and Evercore's fee arrangements, and (3) the depth of RBC's lucrative relationship with Lone Star. The Court dismissed the disclosure claim asserted against Lone Star, finding that the controlling stockholder did not separately owe a duty of disclosure relating to the Merger, although its Board appointees did.

The Court upheld the Aiding and Abetting Claims against RBC and Evercore, finding that their fee arrangements rendered them conflicted by aligning their interests with Lone Star and finding it reasonably conceivable that both advisors acted in furtherance of Lone Star's interests. The Court dismissed the aiding and abetting claim against American Securities, finding that it was not reasonably conceivable that the buyer believed it was wrong to agree to the early TRA termination payment.

Finally, as to the Appraisal Notice Claim, the Court held that the notice's statement that it was "first being mailed to stockholders on or about December 4, 2020," allowed for the inference that the notice was not sent to *all* stockholders by December 4, 2020 — twenty days before the deadline to demand appraisal. The Court upheld the Appraisal Notice Claim against FBM and ASP Flag, finding it reasonably conceivable that not all stockholders received the statutorily mandated twenty days notice of their appraisal rights. The Court found that Lone Star, American Securities, and the directors of the Board were not appropriate defendants for this statutory claim because Section 262's notice requirement applies only to a "constituent corporation" of a transaction giving rise to appraisal rights. Because the Merger was between FBM and ASP Flag, only those corporations were required by Section 262 to provide timely notice of appraisal rights.

The Court's ruling addresses esoteric aspects of Delaware law relating to statutory construction and appraisal notice rights, but also makes clear that the Court will not countenance controlling stockholders pursuing their own interests at the expense of minority stockholders where the procedural protections put in place (here a special committee with a conflicted advisor) were hardly properly functioning. At bottom, the Court's ruling represents a significant victory for Plaintiff and the putative class. ■

COURT REJECTS SOCIAL MEDIA COMPANIES' CHALLENGES TO LOCAL GOVERNMENT AND SCHOOL DISTRICTS' CLAIMS IN MULTIDISTRICT LITIGATION REGARDING THE YOUTH MENTAL HEALTH CRISIS

(continued from page 1)

broadly rejected Defendants' motion to dismiss the negligence claim asserted by plaintiffs and found plaintiffs' claim that "defendants deliberately designed their social media platforms to foster compulsive use and addiction in minors, whose mental and physical health deteriorated" were well supported. *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047, ECF No. 1267 at 3 (N.D. Cal. Oct. 24, 2024). This is the third order on a motion to dismiss in this wide-ranging litigation involving hundreds of actions brought by personal injury claimants, school districts and local governments, and state attorneys general. Kessler Topaz partners Joseph H. Meltzer and Melissa L. Yeates serve on the Local Government and School District Committee, which Ms. Yeates Co-Chairs, representing hundreds of schools and governments across the nation.

In a lengthy opinion, Judge Yvonne Gonzalez Rogers of the Northern District of California denied the motion to dismiss the negligence claim filed by defendants Meta, Snap, TikTok and YouTube ("Defendants"). This is a resounding victory for the school districts and local governments, which have been severely impacted by Defendants' negligent conduct.

Background on Local Government and School District Claims

In 2022, the Judicial Panel on Multidistrict Litigation ("JPML") centralized hundreds of personal injury actions alleging that the addictive and dangerous nature of Defendants' social media platforms damage youth mental health. Defendants first moved to dismiss these personal injury 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 based on the content published on their social media platforms; and (ii) all content on the social media platforms was protected free speech insulated from liability. In a detailed opinion issued on November 14, 2023, Judge Gonzalez Rogers individually analyzed each of the platform features, and ruled that while claims based on certain features impermissibly sought to impose liability based on content published on the social media platforms, the majority of the plaintiffs' claims were not barred by Section 230 or the First Amendment and could proceed.

While the personal injury claims were proceeding, the JPML also transferred a growing number of actions brought by school districts and local governments into the existing MDL to be litigated alongside the personal injury claims. Judge Gonzalez Rogers appointed a Local Government and School District Committee on November 21, 2023. Thereafter, the Local Government and School District Committee, led by KTMC partner Melissa Yeates, filed a 320-page Master Complaint on December 18, 2023, asserting claims for public nuisance and negligence. In the Master Complaint, Plaintiffs alleged that Defendants' knowing operation of dangerous social media platforms—designed to promote compulsive use and addiction in young users—has caused a youth mental health crisis that has required local governments and school districts to expend, divert, and increase resources to ameliorate the harm caused by Defendants, and support the emotional and mental health of young people in their communities. The Master Complaint asserted negligence and public nuisance claims under nineteen states where the school district and local government Plaintiffs are located.[1]

Defendants moved to dismiss the Master Complaint on February 5, 2024, renewing the same arguments that Plaintiffs' claims were barred by Section 230 and the First Amendment. They further raised additional "threshold" issues, including that Plaintiffs' claims were (1) barred by the derivative injury rule because any harm was suffered by the youth users of Defendants' platforms and not the schools and governments; and (2) that Plaintiffs had failed to allege that the addictive platforms proximately caused their harm because any harms suffered by schools and governments were caused by third parties. Finally, Defendants argued that Plaintiffs had failed to state the requisite elements of a negligence claim and that Plaintiffs' negligence claims were barred by the economic loss doctrine.

Plaintiffs filed an opposition on March 4, 2024, which KTMC was heavily involved in drafting, and Defendants replied on March 25, 2024. The Court heard oral argument on the motion on May 17, 2024, with KTMC partner, Melissa Yeates, arguing against Defendants' challenge to the

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[1] The states at issue are Alaska, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, Nevada, North Carolina, Pennsylvania, Rhode Island, South Carolina, Utah and Virginia.

negligence claim and their assertion of the economic loss doctrine.

The Court Rejects Defendants' Threshold Arguments and Concludes Plaintiffs Stated a Claim for Negligence

On October 24, 2024, Judge Gonzalez Rogers issued a 46-page opinion granting in part and denying in part Defendants' motion to dismiss the Master Complaint. The Court's opinion addressed Defendants' threshold arguments regarding both the public nuisance and negligence claims, as well as the substantive elements of the negligence claim and the economic loss doctrine. The only part of the motion that was granted involved the Court incorporating its prior ruling on Section 230 and the First Amendment, which limits the harmful features Plaintiffs can point to in support of their claims. Otherwise, the Court soundly rejected Defendants' arguments and detailed Defendants knowing and harmful conduct including noting that "[s]cientific research, including defendants' own studies, directly connects defendants' platform design choices with compulsive use and its attendant behavioral problems" and finding that "defendants have deliberately targeted school-aged children with knowledge of the impact their conduct could have on schools." *In re Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-md-03047, ECF No. 1267 at 3, 8.

First, the Court rejected Defendants' argument that Plaintiffs sought only indirect damages based on injuries to minor users of the social media platforms, and thus their claims were barred by the derivative injury rule. The Court explained that injuries to "the school districts are related to, but unique from, the alleged injuries of their minor students." *Id.* at 20. Defendants, the Court held, "are alleged to have deliberately fostered compulsive use in minor users, which would foreseeably cause the kind of damage mitigation expenditure incurred by the school districts." *Id.* at 21. Moreover, the injuries to school districts and local governments —who allege the youth mental health crisis caused by Defendants required them to expend, divert and increase resources to support the emotional and mental health of young people in their communities— were held to be "distinct and borne exclusively by the school districts [and local governments]." *Id.*

Second, the Court rejected Defendants' argument based on causation and found that Plaintiffs' injuries were not too attenuated or remote from Defendants' conduct, and were a foreseeable result of Defendants' conduct. *Id.* at 21-23. The Court noted that Plaintiffs' "core theory of injury," that Defendants' promotion of addiction and compulsive use by minors foreseeably caused Plaintiffs to expend resources to mitigate the impact of the mental health crisis, was sufficient to establish proximate cause. *Id.* at 26. Indeed, the foreseeability of harm to governments and schools was "bolstered" by allegations that Defendants knew that their platforms were having a disruptive impact on schools and local communities. *Id.* at 24. And while a limited subset of Plaintiffs' claims based on dangerous challenges, threats, and crimes facilitated by social media could not be based on Defendants' general knowledge of bad actors on the platforms, such claims were not barred "to the extent defendants promoted, developed, or participated in a foreseeably dangerous challenge." *Id.*

Finally, Judge Gonzalez Rogers upheld Plaintiffs' negligence claims, rejecting Defendants' arguments that Plaintiffs had failed to allege a cognizable legal duty and that the claims were barred by the economic loss doctrines under certain states' laws. The Court explained that, across the jurisdictions at issue, three "fundamental considerations" determined the existence of a legal duty giving rise to a negligence claim: (1) the relationship between the defendant's conduct and the plaintiff's injuries; (2) the foreseeability of the plaintiffs' injury; and (3) public policy. Having already concluded that Plaintiffs' injuries were a direct result of Defendants' conduct, the Court concluded there was a sufficiently close relationship between conduct and harm to support existence of a duty. *Id.* at 28-29.

Next, the Court concluded that Defendants' "actual knowledge" that their "targeting and capture of minor users as to instill compulsive use of the platforms" rendered it "objectively reasonable to expect" the injuries to governments and schools. *Id.* at 30-31. The Court also rejected Defendants' public policy arguments that finding a duty here risked limitless liability or a curtailment of free speech, because Defendants' legal duty arose from their "concrete and particularized awareness of potential and actual harms to these plaintiffs," and because Plaintiffs' core theory imposed liability only on Defendants' "non-expressive and intentional design choices to foster compulsive use in their minor users and a failure to warn thereof," and thus imposing a duty here would have no impact on First Amendment rights. *Id.* at 32-34.

Judge Gonzalez Rogers also concluded that Plaintiffs' claims were not barred by the economic loss doctrine applied in certain states. *Id.* at 35. Conducting a state-by-state analysis, the Court held that for each jurisdiction at issue, the doctrine either did not apply, or Plaintiffs' allegations fell within an exception and were not barred. *Id.* The Court noted, as argued by Ms. Yeates during oral argument, that Plaintiffs' injuries do not "implicate the considerations the doctrine aims to resolve—notably, requiring contracting parties to resort exclusively to their contractual remedies for a product purchaser's disappointed economic expectations." *Id.*

The Court's order is a significant victory, ensuring that the negligence claims of all school district and local government Plaintiffs will proceed. This opinion also makes clear that negligence remains "a flexible mechanism to redress evolving means for causing harm," and is capable of holding even the world's largest technology companies accountable for the foreseeable consequences of their actions. *Id.* at 2. KTMC will continue to vigorously pursue these claims to obtain much needed relief for the school districts and local governments on the front lines of the youth mental health crisis fueled by Defendants' platforms. ■

KTMC SECURES $169 MILLION SETTLEMENT FOR SELF-ADMINISTERED GROUP HEALTH PLANS

(continued from page 3)

would be disrupted by the ACA's mandate that commercial insurers cover high-risk persons who were previously denied coverage. To offset these new costs, the ACA created a reinsurance pool and imposed a charge on "health insurance issuers, and third-party administrators on behalf of group health plans" (the "TRP Contribution").[1] Once funded, the TRP would make reinsurance payments to commercial insurers to offset the risk from covering high-risk individuals. Congress delegated authority to the U.S. Department of Health and Human Services ("HHS") to implement the TRP. In order to receive TRP Contributions from as many entities as possible, HHS tapped self-administered group health plans, like EWTF, to help fund it. They did this even though these entities already covered high-risk individuals, and were not eligible to receive TRP reinsurance payments.

Notably, the plans in the Class do not fall within the ACA's express statutory language, which defines the entities required to make TRP Contributions. They are not commercial health insurance issuers (like Cigna or Humana); they are non-profit entities established exclusively to provide health and welfare benefits to workers and their families. Class members also do not use third-party administrators; instead, they rely on a staff of in-house administrators to perform tasks such as claims processing, adjudication, and enrollment. Given this, many Class members, including EWTF, strongly objected to HHS's imposition of the TRP Contribution on them. KTMC's co-counsel in this case, William P. Dale, was at the forefront of many of these efforts, and filed several comment letters with the Government challenging HHS's interpretation of the statute.

In response to these comments, HHS eventually relented, but only in part. It acknowledged that its reading of the statute was not the best and relieved self-administered plans of the obligation to pay in the two later years of the program, 2015 and 2016. However, Class members were still required to pay in 2014, the most expensive year of the TRP. The purported justification? Releasing these plans of their obligation to pay in 2014 would have been administratively inconvenient and "disruptive" to commercial health insurers.[2]

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[1] 42 U.S.C. § 18061(b)(1)(B).

[2] 78 Fed. Reg. 72322-01.

While HHS's actions were unjust, finding a legal hook for relief was anything but certain. Other law firms surveyed this precarious legal landscape and declined to pursue litigation, but KTMC pushed ahead based on our belief that the Government's conduct was unfair and contrary to law.

After KTMC filed the case in the U.S. Court of Claims asserting an illegal exaction claim under the U.S. Constitution, we defeated the Government's motion to dismiss. The Claims Court held that the "plain language of section 18061(b)(1)(A)" did not apply to self-administered plans like EWTF and that "HHS did not have authority to ignore the plain language of the statute in the name of public policy or administrative efficiency."[3]

II. Bringing the Claims to Judgment and Opt-In Process

Although the Claims Court's order on the motion to dismiss effectively resolved the central legal issue, it took three more years to bring the case to resolution. Following the Court's order in July 2021, we negotiated an expedited schedule, pursued discovery from the Government and, in 2022, prevailed in getting a class certified.

Class actions in the Claims Court are unique because putative class members must affirmatively opt in to the class — this is different from traditional class actions, where putative class members are considered class members unless they opt out. To assist with the opt-in process, KTMC sent notice packets to hundreds of plans, followed up with personal phone calls and emails, engaged our internal Investigative Services Department to track down and update stale contacts, and distributed FAQs to help putative class members determine whether they were eligible to participate. After months of outreach, 654 plans filed opt-in forms. KTMC evaluated each individual opt-in and recommended to the Claims Court that 357 plans be included in the Class.

In a somewhat surprising move, the Government objected to the inclusion of 157 of these plans, which represented more than $100 million in damages, arguing that the plans' 5500s[4] showed they were not self-administered. KTMC strenuously opposed the Government's objection and, as result of what the Claims Court described as a "professionally conducted meet and confer process,"[5] eventually persuaded the Government to drop its objections at a hearing immediately before oral argument was to be heard.

In May 2023, the Claims Court accepted all 357 plans for Class membership and, at KTMC's request, entered Judgment in the amount of $185 million against the Government, representing 100% of all available damages.

III. Settlement and Final Approval

As expected, the Government appealed the $185 million Judgment. During the pendency of the appeal, KTMC negotiated the settlement on highly favorable terms. While we were confident in our ability to prevail at the appellate court, the modest reduction to the Judgment (roughly 9%) guaranteed a substantial recovery for the Class and, importantly, eliminated any delay in returning the money Class members were illegally forced to part with nearly a decade ago. In fact, when factoring in the time value of money, the recovery is roughly the same as the Judgment.

Following a fairness hearing, at which KTMC partners Joe Meltzer and Melissa Yeates presented argument, the Claims Court approved the settlement in full. In its nearly 50-page order, the Claims Court explained that the case "has moved through every stage of proceedings, including fulsome briefing, oral argument, discovery, issuance of a thorough Memorandum and Order [denying the Government's motion to dismiss], and ultimately Judgment in favor of the Exaction Class, and appeal of that Judgment."[6]

The Claims Court praised the "91.25% recovery [as] significantly higher than others" with comparable damages.[7] It further took note of the "extraordinary support" from the Class of "sophisticated businesses" — including declarations submitted by EWTF and 1199SEIU Benefit & Pension Funds, the Class member with the largest aggregate damages. In the 1199SEIU declaration, its General Counsel stated that the "[s]ettlement represents a truly exceptional recovery for the Exaction Class and, candidly, one we did not think possible when this litigation began."

Finally, the Claims Court was highly complimentary of KTMC and EWTF's efforts, noting that the record "reaffirm[s] and support[s] that EWTF and Class Counsel have more than adequately represented the Exaction Class." Specifically, it highlighted that it "has viewed Class Counsel's actions throughout this litigation and finds that Class Counsel has acted with thoroughness and diligence" and, further, that EWTF "actively participated in each stage of litigation, including extensive discovery and settlement negotiations."[8]

Together, these factors — the result achieved, extraordinary support from the Class, and quality of representation — convinced the Claims Court that the settlement merited final approval. KTMC and our litigation team are incredibly proud to have reached this result and to have provided Class members with a near total recovery. ■

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[3] *EWTF v. United States*, 155 Fed. Cl. 169, 184 (2021) (*EWTF I*).

[4] A form 5500 is a publicly filed document that lists certain key information regarding a group health plan, such as its assets and the contractors it works with.

[5] *EWTF v. United States*, 171 Fed. Cl. 362, 373 (2024) (*EWTF II*).

[6] *EWTF II*, 171 Fed. Cl. at 379.

[7] *EWTF II*, 171 Fed. Cl. at 390.

[8] *EWTF II*, 171 Fed. Cl. at 392.

A LOOK AT RECENT SECURITIES DECISIONS REVOLVING AROUND THE COVID-19 PANDEMIC

(continued from page 3)

This article surveys a number of recent motion to dismiss decisions regarding investor claims that certain companies misled investors about the effect of the COVID-19 pandemic on their businesses and operations, and discusses each court's analysis with respect to forward-looking statements, statements of opinion, and puffery. In general, investor claims that the company and its respective management overstated the sustainability of the company's financial growth during the COVID-19 pandemic have, as might be expected, fared best where management strongly rejected the impact of a "pandemic effect" on company performance, but have fared less well where companies clearly outlined potential risks warning investors of the possibility that the pandemic could be positively impacting their results.

CASES DENYING MOTIONS TO DISMISS

WESTON v. DOCUSIGN, INC.

Weston v. DocuSign, Inc., a case pending in the Northern District of California, analyzed whether defendants' statements regarding the sustainability of consumer demand for DocuSign, Inc. ("DocuSign")'s products, which had "skyrocket[ed] to unprecedented levels" during the COVID-19 pandemic, were actionable under the federal securities laws.[7]

DocuSign is a software company that offers products allowing users to send and sign documents electronically without the need for paper copies and "wet" signatures.[8] DocuSign saw significantly increased demand for its products during the COVID-19 pandemic as a result of individuals working remotely and being unable or unwilling to meet in person to sign documents.[9] According to DocuSign and its senior management, the uptick in DocuSign's "billings" — a key financial metric that "measures the amounts invoiced to customers over a particular time period" — would be sustainable after the pandemic and accompanying lockdowns subsided because, once customers switch to digital processes, "they don't go back" to paper formats.[10] Specifically, DocuSign and its executives repeatedly assured investors of the sustainability of DocuSign's growth, saying that it "is not a short-term thing" and that "COVID-related one-time use cases" represented the "vast minority" of DocuSign's growth.[11] However, from December 2021 through June 2022, DocuSign and its senior management increasingly revealed to investors that DocuSign's billings growth was significantly slowing, so much so that on June 9, 2022, defendants admitted that DocuSign generated "the lowest billings growth DocuSign has ever experienced as a public company" — approximately $200 million lower than its quarterly billings guidance.[12]

As a result of these disclosures, plaintiffs filed suit against DocuSign and certain of its management for violations of the federal securities laws, arguing that DocuSign and its executives misled investors "about the sustainability of DocuSign's COVID-19 pandemic-driven growth."[13] The defendants filed a motion to dismiss the complaint, asserting that the allegedly false and misleading statements were not actionable because they were either forward-looking and, thus, protected by the statutory safe harbor, or that the statements were opinions or puffery.[14]

The *DocuSign* Court rejected defendants' arguments wholesale. It reasoned that many of defendants' statements regarding demand, billings, revenue, and future growth were actually about past or present facts with respect to DocuSign's business and were not subject to safe harbor protection.[15] For example, the statement that "there are some COVID-19 very specific use cases . . . the majority of the thing we've seen has just been an acceleration," was not considered forward-looking in the Court's view because the statement was "about the current impact of such cases on DocuSign's billings growth."[16] On the other hand, statements attempting to predict customer behavior — e.g., that the defendants "believe that these customers will remain with us" going forward —

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[7] 669 F. Supp. 3d 849, 862 (N.D. Cal. 2023) (alterations in original).

[8] *See id.*

[9] *See id.*

[10] *Id.* at 862-64.

[11] *Id.* at 866-67.

[12] *Id.* at 868-69.

[13] *Id.* at 862.

[14] *See* Defs.' Notice of Mot. & Mot. to Dismiss Am. Compl., *Weston v. DocuSign, Inc.*, No. 3:22-cv-00824-WHO, ECF No. 68 (N.D. Cal. Sept. 16, 2022), at 9-17.

[15] *See DocuSign*, 669 F. Supp. 3d at 874-75.

[16] *Id.*

were deemed to be forward-looking by the *DocuSign* Court. Even these forward-looking statements, however, were found not to qualify for safe harbor protection because some of these statements lacked meaningful cautionary language identifying them as forward-looking and because DocuSign's risk disclosures only warned investors of` potential future risks that *may* occur, instead of risks that *had already* occurred.[17]

Furthermore, the *DocuSign* Court rejected defendants' arguments that certain statements constituted statements of opinion or corporate puffery, ruling that "even general statements of optimism, when taken in context, may form a basis for a securities fraud claim when those statements address specific aspects of a company's operation that the speaker knows to be performing poorly."[18]

LEVENTHAL v. CHEGG, INC.

Leventhal v. Chegg, Inc., another case pending in the Northern District of California, involved allegations that Chegg, Inc. ("Chegg") misrepresented the factors underlying its growth during the COVID-19 pandemic.[19] Chegg is an educational technology company that provides textbook rentals, tutoring services, and homework help to students.[20] A significant part of what Chegg offers, and its primary revenue driver, is its "Services" segment, which includes "online subscription products such as 'Expert Q&A,' wherein freelance experts answer students' academic questions in nearly real-time."[21]

Plaintiffs alleged that Chegg's unprecedented growth during the COVID-19 pandemic was due to students increasingly utilizing Chegg's services to engage in "rampant cheating" on graded assignments and exams.[22] Specifically, the plaintiffs argued that the rise of online education and remote learning during the pandemic created an environment where students could cheat on graded assignments by using Chegg's Expert Q&A feature to answer questions from exams, homework, and other assignments.[23] These allegations were consistently denied by Chegg's executive management. In fact, Chegg repeatedly insisted that its growth did not depend on students being at home or on campus.[24] The plaintiffs utilized information from former Chegg employees, documents from U.S. universities regarding cheating on Chegg's platform, and an empirical analysis showing a surge in questions to Chegg's Expert Q&A during the proposed class period, about a quarter of which exhibited "indicia of cheating," to support their claims that the ability to cheat was the primary driver behind Chegg's growth.[25]

In their motion to dismiss the plaintiffs' complaint, the defendants claimed that the plaintiffs failed to adequately allege the existence of widespread cheating using Chegg's platform or that the increase in Chegg's subscriber count was due to students using the platform to cheat.[26] The defendants also argued that testimony by former Chegg employees failed to demonstrate that cheating on the platform was the main driver of Chegg's growth during the class period and that evidence provided by universities and faculty members was anecdotal and not indicative of a problem on Chegg's platform.[27]

The *Chegg* Court rejected the defendants' arguments. Reviewing the plaintiff's allegations, the *Chegg* Court reasoned that the empirical analysis provided by the plaintiffs, which demonstrated data trends on Chegg's platform before, during, and after the class period, provided sufficient evidence to permit a "more robust statistical analysis" during in the discovery process.[28] The *Chegg* Court further determined that such evidence provided a reasonable basis to demonstrate "that there was substantial cheating on the platform" and that the allegations were sufficient to "infer that cheating on Expert Q&A drove Chegg's revenue and subscriber growth."[29]

Additionally, the *Chegg* Court rejected the defendants' argument that the plaintiffs' theory of the case was wrong because Chegg's subscriber count grew after the class period, finding that, despite a growing number of total subscribers, Chegg's growth metrics were below its own and investor consensus estimates.[30] The *Chegg* Court also disagreed that the defendants' statements were "either statements of historical fact about Chegg's revenue, vague expressions of optimism, opinions about Chegg's value proposition, protected aspirational statements, or expectations about the future," and found the various statements actionable because, when taken in context, "it is at least plausible that these statements were misleading to the public."[31] The *Chegg* Court's conclusions were bolstered by a statement from Chegg's chief executive officer that Chegg is "not a COVID stock" — implying to investors that Chegg's

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[17] *See id.* at 877-79. Critically, the *DocuSign* Court also held the plaintiffs adequately pled that "DocuSign allegedly knew at the start of the pandemic . . . that the pandemic-related risks the company warned investors about during the earnings call had already come to fruition, meaning their disclosures were inadequate." *Id.* at 879.

[18] *Id.* at 881 (internal citation omitted).

[19] No. 21-cv-09953-PCP, 2024 WL 924484 (N.D. Cal. Mar. 4, 2024), *reconsideration denied*, 2024 WL 3447516 (N.D. Cal. July 17, 2024).

[20] *See Chegg*, 2024 WL 924484, at *1.

[21] *Id.*

[22] *Id.*

[23] *See id.*

[24] *See id.*

[25] *Id.* at *2.

[26] *See id.* at *3.

[27] *See id.* at *4-5.

[28] *Id.* at *4.

[29] *Id.* at *5.

[30] *See id.* at *5 (noting that Chegg lowered its revenue guidance at the end of the class period "because enrollment slowed in fall 2021").

[31] *Id.* at *6.

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growth was not primarily attributable to the COVID-19 pandemic.[32]

IN RE THE HONEST COMPANY SECURITIES LITIGATION.

In *In re The Honest Company, Inc. Securities Litigation*, a decision from the Central District of California, the court evaluated claims that The Honest Company, Inc. ("Honest"), a company "focused on developing clean, sustainable, effective, and thoughtfully designed products primarily in the diapers and wipes, skin and personal care, and household and wellness categories," failed to disclose in documents supporting its initial public offering ("IPO") "the negative impact to the company of consumers' stock-up of Honest products in response to the COVID-19 pandemic," among other things.[33] The *Honest* Court declined to dismiss the plaintiff's claims because the consolidated complaint detailed that "COVID-19 related product demand was declining at the time [the] [d]efendants published the offering documents due to consumers' stockpiling of those products" and the defendants did not make a "stringent showing" that their statements "contained enough cautionary language of risk disclosure" to apply safe harbor protections.[34]

CASES GRANTING MOTIONS TO DISMISS

CITY OF HIALEAH EMPLOYEES RETIREMENT SYSTEM v. PELOTON INTERACTIVE, INC.

A case from the Southern District of New York, *City of Hialeah Employees Retirement System v. Peloton Interactive, Inc.*, provides an example of a district court dismissing claims against defendants for statements related to company growth during the COVID-19 pandemic.[35]

Peloton Interactive, Inc. ("Peloton") is a fitness company that sells stationary bikes, treadmills, and other fitness products to be used in conjunction with Peloton's online fitness platform.[36] Given Peloton's focus on at-home and online fitness training, demand for its products increased exponentially during the COVID-19 pandemic when commercial gyms were closed.[37] Such increased demand for Peloton's products strained its supply chain and caused substantial backlogs of its products and, in response, Peloton announced that it would invest in its supply chain to meet surging demand.[38] The plaintiffs alleged, however, that Peloton and its executives were already seeing declining demand for Peloton's products by early 2021, due to the reopening of brick-and-mortar gyms, but the defendants assured investors that they were "not

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[32] *Id.* The *Chegg* Court also found that the defendants did not provide meaningful cautionary statements for their forward-looking statements. *See id.*

[33] *IIn re The Honest Co., Inc. Sec. Litig.*, No. 2:21-cv-07405-MCS-PLA, ECF No. 71, at 2 (C.D. Cal. July 18, 2022). The plaintiff's other allegations include that Honest's registration statement and prospectus for its IPO failed to disclose that "customers panned one of Honest's recently launched products, the Clean Conscious Diaper," and that such documents "failed to disclose and misrepresented risks associated with the offering, including the potential impact customer dissatisfaction with the Clean Conscious Diaper and COVID-19 stock up of Honest products could have on the company." *Id.*

[34] *Id.* at 7-8. The *Honest* Court did, however, dismiss claims (permitting the plaintiff leave to amend the allegations) that Honest's statements regarding the COVID-19 related "stock up" were false and misleading with respect to Honest's "omnichannel approach." *Id.* at 9-10. After the *Honest* Court certified a class against Honest and its officers, the plaintiff amended its complaint to include additional defendants. *See In re The Honest Co., Inc. Sec. Litig.*, No. 2:21-cv-07405-MCS-PLA, ECF No. 217, at 1. The *Honest* Court dismissed the claims against the additional defendants as untimely, but permitted plaintiff to amend the allegations. *See id.* After amending the allegations and filing a Second Amended Class Action Complaint, the *Honest* Court denied the defendants' motion to dismiss, ruling that newly-added evidence (which was not available through public means) adequately alleged that certain defendants had control over Honest and its executives at the time of Honest's IPO. *See id.* at 6.

[35] 665 F. Supp. 3d 522 (S.D.N.Y. 2023) ("*Peloton I*"). The court initially dismissed all claims, but provided plaintiffs with an opportunity to amend their complaint. After the amendment, the court again dismissed all claims. *Robeco Cap. Growth Funds SICAV – Robeco Glob. Consumer Trends, v. Peloton Interactive, Inc.*, No. 21-cv-9582 (ALC)(OTW), 2024 WL 4362747, at *7, *13 (S.D.N.Y. Sept. 30, 2024) ("*Peloton II*"), *appeal filed sub nom.*, *City of Hialeah Emps. Ret. Sys. v. Peloton Interactive, Inc.* 24-2803 (2d Cir. filed Oct. 21, 2024).

[36] *See Peloton II*, 2024 WL 4362747, at *1.

[37] *See id.* at *2; *see also Peloton I*, 665 F. Supp. 3d at 527.

[38] *See Peloton II,* 2024 WL 4362747, at *2; *Peloton I*, 665 F. Supp. 3d at 527.

seeing a softening of demand."[39] The defendants also asserted that Peloton was able to churn out more of its products and reduce its backlog due to increased manufacturing capacity — not a decrease in underlying demand.[40] Nevertheless, on November 4, 2021, the defendants reduced Peloton's fiscal year 2022 revenue guidance range by approximately 15% at the midpoint because "customers were increasingly free to exercise outside the home" and about 91% of Peloton's inventory on hand remained unsold.[41]

As previously held in *Peloton I*, the *Peloton II* Court stated that the plaintiffs "still failed to cure the deficiencies the Court has specified in its dismissal of the first amended complaint" and ruled that defendants' statements were: (1) not false when made; (2) forward-looking and protected by the statutory safe harbor; and (3) statements of opinion or corporate optimism.[42] Specifically, the *Peloton II* Court held that "the challenged statements are non-actionable, forward-looking statements that fall within the [Private Securities Litigation Reform Act of 1995]'s statutory safe harbor."[43] Critically, the *Peloton II* Court pointed to the "extensive company-specific warnings that actual results may differ materially" from those provided by Peloton and noted that "these very detailed warnings were substantively repeated in Peloton's [U.S. Securities and Exchange Commission] filings throughout the [c]lass [p]eriod."[44]

MICHALSKI v. WEBER INC.

In *Michalski v. Weber Inc.*, a case from the Northern District of Illinois, the plaintiff claimed that Weber Inc. ("Weber"), a manufacturer of barbecue grills and similar products, misled investors through the registration statement and prospectus (the "Weber Offering Documents") for its IPO regarding the demand for Weber's products while consumers remained at home during the COVID-19 pandemic.[45] Looking to the *Peloton I* decision, the *Weber* Court held that Weber adequately cautioned investors about the unsustainable demand for its products generated during the COVID-19 pandemic through certain risk factors in the Weber Offering Documents by noting that, despite "higher demand in [Weber's] grill business as consumers sheltered in place and have spent more time at home as a result of the COVID-19 pandemic, such growth may not be sustainable and may not be repeated in future periods," as well as that "the COVID-19 pandemic could continue to affect demand for [Weber's] products in the foreseeable future."[46] According to the *Weber* Court, the "plaintiff cannot reasonable contend . . . that defendants concealed the pandemic's effect on its sales results or misled investors by suggesting that the company's future results were likely to mirror those" experienced during the class period.[47]

CASES TO WATCH

IN RE NETFLIX, INC. SECURITIES LITIGATION

Recently, claims in the Northern District of California were dismissed against Netflix, Inc. ("Netflix") and certain of its executive officers for the plaintiff's failure to show that the defendants' statements were false when made.[48] In *Netflix*, the plaintiffs alleged that Netflix misrepresented its revenue and subscriber growth due to the COVID-19 pandemic after Netflix saw a surge in revenue growth during the beginning of pandemic-related lockdowns, which quickly flattened out and "created a lot of bumpiness" and pull forward in Netflix's revenues.[49] Netflix and its management assured investors that its slowed growth was due to "COVID pull forward," but in reality, Netflix was oversaturated in the market because of customers sharing Netflix accounts and hindering Netflix's ability to gain new subscribers.[50] The *Netflix* Court dismissed the plaintiff's claims and ruled that the defendants were not adequately aware of the account sharing problem (and therefore defendants' statements were not false when made) because the impact of account sharing on Netflix's growth was "obscured by [its] COVID growth."[51] The dismissal was without prejudice and the plaintiff filed a Second Amended Class Action Complaint on February 16, 2024.[52] Defendants filed a motion to dismiss this complaint on April 16, 2024, and briefing on defendants' motion is currently before the *Netflix* Court for consideration.[53]

There also are several other cases involving pandemic-related claims where motions to dismiss are pending

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[39] *Peloton I*, 665 F. Supp. 3d at 529.

[40] *See id.* at 528-534.

[41] *Id.* at 534 (internal quotations and citation omitted).

[42] *See Peloton II*, 2024 WL 4362747, at *9-13. The *Peloton I* Court held that many of defendants' statements qualified as forward-looking statements because they constituted "projections regarding the future demand for [Peloton's] products." *Peloton I*, 665 F.3d at 538 (alteration added).

[43] *Peloton II*, 2024 WL 4362747, at *9.

[44] *Id.* at *9-10. These statements included a "change in consumer spending preference or buying trends, whether as a result of the COVID-19 pandemic or otherwise" and that Peloton is "uncertain how the COVID-19 pandemic will impact Subscriber renewal rates in the long-term." *Peloton I*, 665 F.3d at 538-39. Additionally, the *Peloton I* Court noted that, unlike many other businesses, [Peloton] viewed the lessening of restrictions as a material risk rather than an opportunity for growth." *Peloton I*, 665 F.3d at 539.

[45] *See Michalski v. Weber Inc.*, 695 F. Supp. 3d 964, 966 (N.D. Ill. 2023).

[46] *Id.* at 968-69 (alterations added).

[47] *Id.*

[48] *See Pirani v. Netflix, Inc.*, 710 F. Supp. 3d 756, 771 (N.D. Cal. Jan. 5, 2024).

[49] *Id.* at 763.

[50] *Id.* at 764, 768.

[51] *Id.* at 770 (alterations in original).

[52] *See* Second Am. Class Action Compl., *In re Netflix, Inc. Sec. Litig.*, 4:22-cv-02672-JST, ECF No. 48 (N.D. Cal. filed Feb. 16, 2024).

[53] *See id.*, ECF Nos. 51 (Defs.' Mot. to Dismiss Second Am. Class Action Compl.), 55 (Pl.'s Opp'n to Mot. to Dismiss Second Am. Class Action Compl.), 56 (Defs.' Reply in Supp. of Mot. to Dismiss Second Am. Class Action Compl.).

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in their respective courts. In the District of Connecticut, claims are pending against Stanley Black & Decker, Inc. ("Stanley"), a manufacturer of hand tools, power tools, and outdoor products, regarding misrepresentations to investors that demand for Stanley's products — which saw a significant uptick during the COVID-19 pandemic — was "robust" and that Stanley was "positioned for significant growth in 2022 and beyond."[54]

Additionally, there is a pending action in the District of Arizona against Leslie's, Inc. ("Leslie's"), a direct-to-consumer pool and spa care brand, for misleading investors about the state of demand for Leslie's products, particularly for chlorine-based pool treatments.[55] There, the plaintiff alleged that Leslie's warned its loyalty customers during the pandemic about potential supply-chain issues regarding chlorine-based products, despite previously touting its ability to effectively manage its supply chain. These warnings are alleged to have caused Leslie's customers to buy significant quantities of chlorine-based products and cannibalize Leslie's future sales.[56] After months of emphasizing increased levels of customer demand, Leslie's ultimately acknowledged that its customers entered Leslie's peak selling season with increased inventory levels, leading to substantially decreased demand for Leslie's chlorine-based products.[57]

CONCLUSION

Importantly, the aforementioned decisions highlight the nuance with which district courts view allegedly false and misleading statements and demonstrate that the characterization of each statement is highly important to the court's analysis.

For example, each of the *DocuSign*, *Chegg*, and *Honest* Courts viewed the statements by the respective defendants as statements about *current* demand, not future demand. The *DocuSign* Court determined that the defendants' statements were describing the present demand environment when discussing DocuSign's billings growth, rather than predicting the future demand environment, and the *Chegg* Court also deemed the defendants' statements to be actionable by determining that such statements were discussing that "cheating *is* limited on the platform," not some future expectation of cheating. The *Honest* Court similarly declined to dismiss the claims against the defendants because the defendants' statements were made while demand was already declining. Moreover, where the statements were deemed to be forward-looking, the courts found that the statutory safe harbor was not implicated because of the lack of adequate cautionary statements and because actual knowledge of the falsity of the statements was alleged.

Conversely, while some statements detailed in the *Peloton I* and *II* decisions could seemingly be described as statements relating to the current state of demand (e.g., statements that defendants were not seeing softening demand), the characterization of those statements as projections of future demand, and thus forward-looking, framed the statements in a manner in which the court would more likely view them as non-actionable by the plaintiffs. Arguably more important to the *Peloton I* and *II* decisions, as well as the *Weber* decision, were the explicit and comprehensive risk factors contained within each company's regulatory filings that warned investors of the exact scenarios that came to fruition. With less effective warnings, these decisions could have been decided in line with *DocuSign* where certain forward-looking statements were found to be actionable due to inadequate risk disclosures.

Given the variation in each court's reasoning, the upcoming decisions in *Netflix*, *Stanley*, and *Leslie's* will be interesting to watch considering their potential to provide greater insight into this facet of the federal securities laws. ■

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[54] Am. Class Action Compl., *Rammohan v. Stanley Black & Decker, Inc.*, 3:23-cv-00369-KAD, ECF No. 41, at 2, 4 (D. Conn. filed Oct. 13, 2023).

[55] *See* Consol. Compl., *Treasurer of N.C. v. Leslie's, Inc.*, 2:23-cv-01887-PHX-SMB, ECF No. 30, at 2 (D. Ariz. filed Feb. 20, 2024).

[56] *See id.* at 11.

[57] *See id.* at 13-31.

A LIMITED CARVE OUT UNDER *MORRISON*? FOR NOW, U.S. FEDERAL COURTS CAN HEAR SECTION 10(B) CLAIMS ON BEHALF OF U.S. PURCHASERS OF DUAL-LISTED SECURITIES PURCHASED ON THE TEL-AVIV STOCK EXCHANGE LTD.

(continued from page 5)

> address the situation by adopting the dual-listing regime . . .
>
> [B]y Israeli statutory law, a dual-listed company's reporting requirements for listing on the TASE are determined entirely by the foreign market's reporting and disclosure requirements. Thus, Israel intentionally adopted a dual-listing regime that includes explicit concessions on its sovereignty by subordinating its jurisdiction to prescribe, to adjudicate, and to enforce relevant securities laws and anti-fraud statutes to that of foreign jurisdictions, including the United States.[[8]]

The *In re Teva* court also noted the Israeli government's stance on extraterritoriality concerns, particularly that the Israeli government believed that *Morrison* was incompatible with Israeli dual-listing law, and that U.S. courts are the proper forum for Section 10(b) claims against TASE dual-listed companies:

> In a 2011 comment letter to the SEC regarding *Morrison*'s effect, the Israel Securities Authority (the "ISA") . . . [explained] that *Morrison*'s reasoning applies especially poorly to Israeli dual-listed companies.
>
> In the ISA's view, notwithstanding *Morrison*, claimants who believe they have a valid claim under section 10(b) against a dual-listed company should have a private right of action in the US irrespective of whether they purchased the relevant securities on the US domestic exchange or on the non-US exchange. The ISA opined that, in its view, the concerns surrounding international comity do not apply in relation to dual listing. The ISA continued: Any argument that hearing a claim in the US constitutes unreasonable interference with foreign sovereignty ignores both the essence and the practical consequences of the dual listing arrangement, and so investors who purchase in the non-US market should at least have the option to bring an action in the US. The incompatibility that the *Morrison* Court highlighted is eliminated when the applicable law in the other country is US law. In sum, the ISA believed that the dual-listing regime provided for a single law, and a single forum in Section 10(b) cases because there is no meaningful difference between purchasing dual listed securities on a US domestic exchange or in Tel Aviv.[[9]]

Finally, the court explained that "it is settled as a matter of Israeli law that United States securities law establishes civil liability under [Israeli securities laws]," and that "[a]t least three Israeli district courts . . . have reached that conclusion," with the Israeli Supreme Court saying that two of those district courts were "correct."[10]

Morrison and Dual-Listing Law

In *Morrison*, the Supreme Court held that Section 10(b) of the Exchange Act does not provide an extraterritorial cause of action in private litigation (i.e., does not provide the ability to apply Section 10(b) to conduct abroad), instead, a plaintiff can only allege a Section 10(b) violation based on "transactions in securities listed on domestic exchanges, and domestic transactions in other securities."[11] The Supreme Court adopted this bright line test for the purposes of international comity, and to avoid "interference with foreign securities regulation[.]"[12]

The holding in *Morrison* has been applied to preclude U.S. litigation regarding transactions outside the U.S., even where the security at issue was dual-listed on a U.S. exchange and a foreign exchange. In *City of Pontiac Policemen's & Firemen's Retirement System v. UBS AG*, 2014 WL 1778041 (2d Cir. May 6, 2014), the Second Circuit held that "*Morrison* does not support the application of § 10(b) of the Exchange Act to claims by a foreign purchaser of foreign-issued shares on a foreign exchange simply because the shares are also listed on a domestic exchange."[13] Plaintiffs in that case offered a so-called "listing theory," in which they argued that so long as the shares purchased on the foreign exchange were cross-listed on the New York Stock Exchange ("NYSE"), that purchase was "within the purview of Rule 10(b), under the first prong of *Morrison* — 'transactions in securities listed on domestic exchanges.'"[14] The Second Circuit, however, found that plaintiffs' listing theory was irreconcilable with *Morrison* because *Morrison* emphasized that "the focus of the Exchange Act is upon purchases and sales of securities in the United States," which "evinces a concern with the location of the securities transaction and not the location of an exchange where the security may be dually listed."[15] Further, the Second Circuit stated that "*Morrison*'s emphasis on 'transactions in securities listed on domestic exchanges,' makes clear that the focus of both prongs was domestic transactions of any kind, with the domestic listing acting as a proxy for a domestic transaction," and that the "Supreme Court explicitly rejected the notion that the 'national public interest pertains to transactions conducted upon foreign exchanges and markets.'"[16]

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[8] *Id.* at 341.

[9] *Id.* at 342-343 (internal quotations and citations omitted).

[10] *Id.* at 358 (internal quotation omitted).

[11] *Morrison*, 561 U.S. at 267.

[12] *Morrison*, 561 U.S. at 269.

[13] *City of Pontiac*, 2014 WL 1778041, at *181.

[14] *Id.* at *179-80 (citation omitted).

[15] *Id.* at *180 (internal quotation omitted).

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

A LIMITED CARVE OUT UNDER *MORRISON*? FOR NOW, U.S. FEDERAL COURTS CAN HEAR SECTION 10(B) CLAIMS ON BEHALF OF U.S. PURCHASERS OF DUAL-LISTED SECURITIES PURCHASED ON THE TEL-AVIV STOCK EXCHANGE LTD. *(continued from page 21)*

The District Court Distinguishes *Morrison* in *Halman*

Notwithstanding the decisions of multiple federal courts declining to apply the U.S. securities laws to securities transactions on foreign securities exchanges, including dual-listed securities, the District Court in *Halman* distinguished *Morrison*, finding persuasive certain "policy considerations and the fact that Israeli law requires application of U.S. law," making the "facts here [] distinguishable from *Morrison*."[17] Specifically, the District Court stated that "*Morrison* did not consider the applicability of Section 10(b) of the Securities Exchange Act in the unique circumstance of a security dual-listed between the United States and Israel."[18] Furthermore, the District Court noted that "*Morrison*'s stated concerns for its holding — nonintervention in foreign securities regulation — have been mitigated entirely by the Israeli Supreme Court's ruling that U.S. substantive law governs Israeli securities law claims."[19]

Defendants had argued that plaintiff's allegations did not involve Israeli securities law claims, which arguably made plaintiff's case distinguishable from the cases that the District Court was relying on, which included such claims.[20] The District Court found this distinction to be meaningless, finding that "Israel's absolute deference to U.S. substantive law [wa]s still relevant because the class seeks to include purchasers of ordinary shares sold only on the TASE, who would otherwise only bring Israeli law claims."[21]

Accordingly, because *Halman* was factually distinguishable from *Morrison*, and Israeli dual-listing laws mitigated international comity and regulatory interference concerns raised by the Supreme Court in *Morrison* (since Israeli dual-listing law requires the application of U.S. securities law), the District Court granted class certification to a class of plaintiffs who "purchased or otherwise acquired Teva securities, including ADSs on the NYSE and ordinary shares on the TASE[.]"[22]

On May 16, 2024, the Third Circuit in *Forsythe*, 102 F.4th 152, denied defendant Teva Pharmaceuticals Industries Limited's ("Teva") Federal Rule of Civil Procedure 23(f) petition for interlocutory review of the District Court's grant of class certification in *Halman*. In its petition, Teva argued that the District Court improperly included purchasers of ordinary shares purchased on the TASE in the class definition when, in deciding the issue, the District Court "appl[ied] the U.S. securities laws extraterritorially to transactions involving securities of a foreign issuer on a foreign exchange based on the extent to which the foreign securities regime defers to or mirrors the U.S. law," rather than "whether or not any domestic transaction [wa] s involved" as proscribed by the Supreme Court in *Morrison* — thus "call[ing] into question *Morrison*'s holding itself."[23]

In denying Teva's petition, the Third Circuit ruled that "any question of whether or how Section 10(b) applies to dual-listed securities does not directly relate to the requirements of Rule 23(a) or (b), and thus need not be decided at the class certification stage," because "'to ask what conduct § 10(b) reaches . . . is a merits question,'" and thus, "[r]eview under 23(f) is therefore not appropriate."[24] In other words, the Third Circuit did not opine on the merits of Teva's argument, despite calling it a "novel" issue.[25] Thus, the issue of whether U.S. securities laws can apply extraterritorially to transactions involving securities of a foreign issuer on a foreign exchange based on the extent to which the foreign securities regime defers to or mirrors U.S. law remains unanswered by an appellate court.

Conclusion

The District Court's efforts to distinguish *Morrison* for dual-listed TASE securities on factual and policy grounds (and the Third Circuit's decision not to review the merits of this issue, for now) is important only for U.S. securities holders that purchased their dual-listed securities off the TASE. We will continue to assess whether a court would extend *Halman*'s holding to any other dual-listed securities. ■

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[17] *Halman*, 2023 WL 7285167, at *7-9.

[18] *Id.*

[19] *Id.* (citing *In re Teva*, 512 F. Supp. at 358).

[20] *Halman,* 2023 WL 7285167, at *9

[21] *Id.* (quotation and citation omitted).

[22] *Id.*

[23] *Forsythe*, 102 F.4th at 155, 157-58.

[24] *Id.* at 158 (quoting *Morrison*, 561 U.S. at 254).

[25] *Id.*

WHAT'S TO COME

FEBRUARY 2025

National Association of Public Pension Attorneys (NAPPA) Winter Seminar

February 19 – 21

Charlotte, NC ■ Charlotte Mariott City Center

MARCH 2025

California Association of Public Retirement Systems (CALAPRS) General Assembly

March 2 – 5

Napa, CA ■ Silverado Resort

Council of Institutional Investors (CII) Spring Conference & 40th Anniversary Celebration

March 10 – 12

Washington, DC ■ Salamander Hotel

19th Annual Rights & Responsibilities of Institutional Investors (RRII)

March 12 – 14

Amsterdam, Netherlands | Hotel Krasnapolsky

APRIL 2025

Texas Association of Public Employee Retirement Systems (TEXPERS) 2025 Annual Conference

April 1 – 2

Austin, TX ■ Renaissance Austin Hotel

Pennsylvania State Association of County Controllers (PSACC) 2025 Spring Conference

April 22 – 24

Gettysburg, PA ■ Wyndham Gettysburg Hotel

MAY 2025

State Association of County Retirement Systems (SACRS) 2025 Spring Conference

May 13 – 16

Mirage, CA ■ Omni Rancho Las Palmas Resort & Spa

JUNE 2025

Florida Public Pensions Trustees Association (FPPTA) 41st Annual Conference

June 22 – 25

Orlando, FL ■ Renaissance Orlando Hotel

National Association of Public Pension Attorneys (NAPPA) Legal Education Conference 2025

June 24 – 27

Denver, CO ■ Hilton Denver City Center

JULY 2025

Pennsylvania State Association of County Controllers (PSACC) 2025 Annual Conference

July 27 – 31

Erie, PA ■ Sheraton Erie Bayfront Hotel

AUGUST 2025

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

August 17 – 20

Somerset County, PA
Seven Springs Mountain Resort

280 King of Prussia Road
Radnor, PA 19087

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