FALL 2025

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

FULLY INFORMED

HIGHLIGHTS

KESSLERTOPAZ MELTZERCHECK LLP

COURT IN SOCIAL MEDIA MULTIDISTRICT LITIGATION WILL BEGIN BELLWETHER TRIALS IN JUNE 2026

Matthew T. Macken, Esquire

After nearly two years of litigation, 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 around the country — has announced that it intends to begin the first bellwether trials for plaintiffs in June 2026.

This groundbreaking lawsuit seeks to provide recovery to the school districts and local governments who have incurred significant costs and diverted scarce resources in responding to the youth mental health crisis spurred by the social media companies. Kessler Topaz partners Joseph H. Meltzer and Melissa L. Yeates serve on the Local Government and School

(continued on page 4)

THE REVIVED DISCUSSION ABOUT ELIMINATING MANDATORY QUARTERLY REPORTING FOR U.S. PUBLIC COMPANIES

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

President Donald Trump recently called on the U.S. Securities and Exchange Commission ("SEC") to eliminate the mandatory quarterly reporting requirements for public companies listed on U.S. exchanges (which have been in place since 1970)[1]. This revived an ongoing debate as to whether U.S. public companies should be required to report their financial earnings on a quarterly or semiannual basis. President Trump made a

(continued on page 6)

[1] U.S. public companies are required to file with the SEC on an ongoing basis: (1) annual reports on Form 10-K, which provide a comprehensive overview of the company, its business, financial condition, and audited financial statements, among other things; and (2) quarterly reports on Form 10-Q, which provide similar information to the annual report (and typically incorporate it by reference), as well as unaudited quarterly financial statements, among other things..

KTMC ACHIEVES $100 MILLION SETTLEMENT FOR ONLINE ADVERTISERS IN GOOGLE ADWORDS CONSUMER FRAUD LITIGATION

Matthew Mustokoff, Esquire, Margaret Mazzeo, Esquire, and Dylan Isenberg, Esquire

After 14 years of litigation, Kessler Topaz recently secured a landmark $100 million recovery on behalf of two classes of online advertisers in *Rene Cabrera, et al. v. Google LLC*, 11-cv-1263-EJD (N.D. Cal.). The settlement, approved by U.S. District Judge Edward J. Davila of the Northern District of California, resolves a long-running consumer fraud suit alleging that Google overcharged users of its AdWords online advertising platform. This is believed to be the one of the largest-ever settlements of a deceptive sales practice claim under California's Unfair Competition Law ("UCL") involving internet advertising, a highly under-regulated area.

The action was first filed in March 2011 in federal district court in San Jose, California and alleged two overcharging schemes directed at users of Google's AdWords platform.

First, plaintiffs alleged that Google violated the UCL by covertly displaying online ads beyond the explicitly-designated geographical boundaries of class members' advertising campaigns and then charging advertisers for clicks on these ads. Specifically, plaintiffs claimed that during the AdWords sign-up process, advertisers were presented with a settings screen that asked them to select the geographic areas where they wanted their ads to appear. Plaintiffs further claimed that Google disregarded these advertisers' settings, displayed their ads to internet users located outside of their selected locations, and

(continued on page 11)

CHANCELLOR SAYS "GAME-ON" TO KTMC'S ACTIVISION-MICROSOFT MERGER LITIGATION

Lauren Lummus, Esquire

On October 2, 2025, Chancellor McCormick of the Delaware Court of Chancery (the "Court") issued a decision (the "Opinion") largely denying Defendants' second motions to dismiss in the long-running stockholder litigation (the "Action") challenging the $70 billion merger (the "Merger") of Microsoft Corporation ("Microsoft") and Activision Blizzard, Inc. ("Activision").[1]

A. Background of the Merger Litigation

The Opinion reflects Plaintiff Sjunde AP-Fonden's ("AP7") second, and most critical, pleading-stage victory in this Action. The Chancellor had largely rejected Defendants' first motion to dismiss AP7's statutory claims and conversion claims back in February 2024,[2] after finding it reasonably conceivable that Defendants had violated multiple provisions of the Delaware General Corporation Law (the "DGCL") and that the Merger was statutorily invalid (the "2024 Decision").[3] In response to the 2024 Decision, Microsoft and Activision sought and received judicial validation of the Merger under Section 205 of the DGCL. AP7 then filed its 320-page third amended complaint (the "Complaint"), which Defendants moved to dismiss.

(continued on page 12)

---

1 *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, No. 2022-0281-KSJM, 2025 WL 2803254, at *1 (Del. Ch. Oct. 2, 2025).

2 *See generally* Lauren Lummus, *Delaware Chancery Court Tells Activision: Statutory Compliance is Not A Game*, Kessler Topaz Meltzer & Check, LLP, The Bulletin – Summer 2024.

3 The Chancellor found that AP7 had pled viable statutory violations, including: (i) a Section 251(b) claim the Board failed to properly approve an agreement of merger with all required terms; (ii) a Section 251(c) claim that the Board failed to provide proper notice of the stockholder meeting with the required copy of the full merger agreement or a brief summary thereof; and (iii) a Section 141(c) claim that the Board improperly delegated to an *ad hoc* Board committee the negotiation and approval of the dividend provision of the merger agreement. *See Sjunde AP-fonden v. Activision Blizzard, Inc.*, No. 2022-1001-KSJM, 2024 WL 863290 (Del. Ch. Feb. 29, 2024), as corrected (Mar. 19, 2024); *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, 2024 WL 863325 (Del. Ch. Feb. 29, 2024).

KESSLER TOPAZ REPRESENTS HEALTH & WELFARE FUNDS SEEKING TO RECOVER OVERCHARGES FROM THE ILLEGAL DELAY OF GENERIC COMPETITION TO TWO BLOCKBUSTER DRUGS

Barbara A. Schwartz, Esquire

Kessler Topaz recently filed two class action complaints on behalf of certain drug purchasers, including health plans, that overpaid for two blockbuster prescription drugs — Entresto and Xifaxan.[1] These two cases seek to hold brand and generic drug companies accountable for abusing the regulatory regime governing prescription drugs and denying purchasers access to lower-cost generic versions of drugs.

Entresto

Entresto, which treats heart failure, is Novartis Pharmaceuticals' highest-grossing drug with more than $4 billion in U.S. sales in 2024. The complaint, filed by Kessler Topaz on behalf of The Iron Workers Local 580 Insurance Fund, alleges that Novartis improperly submitted U.S. Patent No. 8,101,659 (the "'659 patent") for listing in the U.S. Food and Drug Administration's ("FDA's") *Approved Drug Products and Therapeutic Equivalence Evaluations* (the "Orange Book"). This improper listing allowed Novartis to secure an unwarranted market exclusivity period and delayed generic competition to Entresto for at least six months.

Brand drug companies are required to list each patent that claims their drugs — or methods of using their drugs — in the Orange Book.[2] Listing patents in the Orange Book allows brand drug companies like Novartis to obtain certain market exclusivities (*i.e.* when no competing generic drug products can be sold). The U.S. Federal Trade Commission and courts across the country have recognized that improperly listing patents in the Orange Book can serve as the basis for a claim that a brand drug company violated the antitrust laws.

(continued on page 13)

[1] *The Iron Workers Local 580 Insurance Fund v. Novartis Pharmaceuticals Corporation*, No. 1:25-cv-07230 (S.D.N.Y.); *Rhode Island Laborers Health & Welfare Fund v. Bausch Health Companies Inc., et al.*, No. 1:25-cv-00479-MRD-PAS (D.R.I.).

[2] 21 C.F.R. § 314.53(b)(1); *see also* 21 U.S.C. § 355(b)(1).

8TH CIRCUIT REJECTS SEC ATTEMPT TO END CLIMATE DISCLOSURE RULES

Karissa Sauder, Esquire

Since President Trump again took office in January 2025, the United States Securities and Exchange Commission (the "SEC") has been revisiting a number of its positions on policies instituted during the Biden Administration. One such attempt to revise polices previously established pursuant to notice-and-comment rulemaking under the Administrative Procedure Act (the "APA") involves the March 2024 rules requiring publicly traded companies to make extensive disclosure of climate-related risks, data, and costs (the "Climate Disclosure Rules").

Earlier this year, as discussed in our prior article,[1] the SEC announced its intention to stop defending the Climate Disclosure Rules in litigation challenging the rules in the Eighth Circuit. Instead, the SEC asked the Eighth Circuit to rule on the merits of the Climate Disclosure Rules — without the SEC's ongoing defense or input — effectively abandoning the rules and inviting the Eighth Circuit to strike them down by default.

On September 12, 2025, the Eighth Circuit rejected this request, ordering that it would continue to hold the litigation in abeyance until the SEC either formally reconsiders the rules by notice-and-comment rulemaking or renews its defense of the rules in the litigation.[2] As discussed below, the Eighth Circuit's decision is a win for investors and may have the effect of preserving the Climate Disclosure Rules until a different presidential administration takes office in the future.

(continued on page 15)

[1] *See SEC Climate Disclosure Rules Enter Legal Limbo*, THE BULLETIN (Spring 2025), https://www.ktmc.com/newsletters/the-bulletin-spring-2025#14803.

[2] *See* Order, *Iowa v. SEC*, No. 24-1522 (8th Cir. Sep. 12, 2025).

COURT IN SOCIAL MEDIA MULTIDISTRICT LITIGATION WILL BEGIN BELLWETHER TRIALS IN JUNE 2026

(continued from page 1)

District Committee, which Ms. Yeates Co-Chairs, leading the efforts of the hundreds of school districts and local governments seeking to hold the major social media companies — Meta, Snap, TikTok, and YouTube — responsible for their negligence and creation of a public nuisance. Now, with fact and expert discovery closed, the school districts and local governments are advancing toward their day in court.

Background on Local Government and School District Claims

In re Social Media Litigation, 22-md-03047 (N.D. Cal.), is a wide-ranging multidistrict litigation involving the claims of personal injury claimants, school districts and local governments, and actions brought by a coalition of twenty-nine State Attorneys General. These actions were centralized by the Judicial Panel on Multidistrict Litigation before Judge Yvonne Gonzalez Rogers of the Northern District of California. The Local Government and School District Committee, co-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 design and operation of dangerous social media platforms — designed to promote compulsive use and addiction in young users — has caused a youth mental health crisis and disruptions in school district operations, requiring local governments and school districts to expend, divert, and increase resources to ameliorate the harm caused by Defendants.

In opinions issued on October 24 and November 15, 2024, the Court broadly rejected Defendants' motion to dismiss the Master Complaint. First, the Court rejected Defendants' arguments asserting that Plaintiffs sought indirect damages based on injuries to minor users of Defendants' platforms, and that Plaintiffs' injuries were too attenuated from Defendants' conduct. *In re Soc. Media Adolescent Addiction/Pers. Inj. Prods. Liab. Litig.*, 754 F. Supp. 3d 946, 964-72 (N.D. Cal. 2024). The Court concluded that the injuries alleged by the local governments and school districts were "distinct and borne exclusively by the school districts [and local governments]," and that Defendants' "conduct would foreseeably injure the school districts" such that it could be deemed a proximate cause of their harm. *Id.* at 968, 970.

Second, the Court 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. *Id.* at 973. The Court concluded that all three factors supported finding a duty here. *Id.* at 973-78. Further, following a state-by-state analysis, the Court concluded that for each jurisdiction at issue, the economic loss doctrine either did not apply or Plaintiffs' allegations fell within an exception and were not barred. *Id.* at 978. 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.*

Finally, the Court considered and largely rejected Defendants' efforts to dismiss Plaintiffs' claims for public nuisance. The Court concluded that "[p]ublic nuisance, like negligence, provides a flexible mechanism to redress evolving means for causing harm" and declined to "*per se* prohibit the kind of action brought by the school districts under the alleged facts of this case." *In re Soc. Media Adolescent Litig.*, 2024 WL 5694360, at *1 (N.D. Cal. Nov. 15, 2024). The Court further held that Plaintiffs successfully stated a claim for public nuisance under the laws of the nineteen states at issue, having "successfully established unreasonable interference with the public's right to health and safety" and demonstrating that their "injuries seek recovery of costs uniquely imposed on them and not similarly borne by any other members of the community." *Id.* at *13-17.

RULE 23(F) PETITIONS: A VEHICLE FOR CHALLENGING PLAINTIFFS' PROPOSED CLASS-WIDE DAMAGES MODEL

Marianne Uy, Esquire[1]

I. Introduction

Class certification is a pivotal point in all class actions. For class actions brought in federal court, plaintiffs seeking to represent a class must establish that their claims meet all the prerequisites of Federal Rule of Civil Procedure ("Rule") 23. Rule 23(a) requires that a plaintiff prove that the proposed class meets four requirements: (1) that the class is too numerous such that joining all individual claims together is impracticable (i.e., "numerosity"); (2) that the claims of class members share common facts and legal theories (i.e., "commonality"); (3) that the claims of the class representative are typical of the claims of the class members (i.e., "typicality"); and (4) that the class representative is adequate (i.e., "adequacy").[2]

In addition to these criteria, in a class action seeking monetary damages, a plaintiff must demonstrate the requirements of Rule 23(b)(3) which requires proof that common issues "predominate" over any individualized issues among class members (i.e., "predominance") and that a class action is a "superior" method of resolving the claims of all class members (i.e., "superiority").[3] Upon the grant or denial of class certification, Rule 23(f) affords parties the opportunity to appeal the class certification decision.[4]

The Ninth Circuit has described securities fraud class actions as fitting Rule 23 "like a glove."[5] It is rare that a defendant is successful in rebutting Rule 23(a)'s requirements. Often, such attacks are directed at the adequacy and typicality of the lead plaintiff but these attacks have largely been unsuccessful particularly now that most securities class actions are led by institutional plaintiffs who readily meet the adequacy and typicality requirements.[6]

(continued on page 17)

---

[1] Marianne Uy, Esq., is an associate at Kessler Topaz who graduated from Temple University Beasley School of Law in May 2024. She is a member of the litigation team that recently secured an $85 million settlement from Wells Fargo arising out of its misrepresentations to investors regarding its diversity hiring initiative and the widespread practice of fake interviews.

[2] *See* Fed. R. Civ. P. 23(a).

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

[4] *See* Fed. R. Civ. P. 23(f).

[5] *Epstein v. MCA, Inc.*, 50 F.3d 644, 668 (9th Cir. 1995), *rev'd on other grounds*, 516 U.S. 367 (1996).

[6] *See, e.g.*, *City of Sunrise Firefighters' Pension Fund v. Oracle Corp.*, 2022 WL 1459567, at *4-5 (N.D. Cal. May 9, 2022) ("[T]he fact that [proposed class representative] is a large institutional investor . . . provides further support that they will adequately represent the Class."); *SEB Inv. Mgmt. AB v. Wells Fargo & Co.* (*Wells Fargo I*), No. 3:22-cv-03811, 2025 WL 1243818, at *4-5 (N.D. Cal. Apr. 25, 2025) (finding institutional plaintiffs satisfied adequacy and typicality); *Weston v. DocuSign, Inc.*, 348 F.R.D. 354, 363-67 (N.D. Cal. 2024) (same).

The Court Prepares for Trial in First School District Bellwether Trials

As 2026 approaches, the Court and the parties are rapidly preparing for the historic first trial in this groundbreaking litigation. Following the close of fact discovery on April 4, 2025, the pool of twelve discovery bellwether school districts was narrowed to six trial bellwether school districts located in Breathitt County (Kentucky), Charleston County (South Carolina), DeKalb County (Georgia), Harford County (Maryland), Irvington (New Jersey), and Tucson (Arizona). ECF No. 2055. The parties have already exchanged preliminary witness lists on September 24, 2025, and will propose jury instructions on October 20th.

On September 23, 2025, the Court announced its plan for the six bellwether trials. *See* ECF No. 2274. Judge Gonzalez Rogers noted that she "anticipates selecting a jury in May and beginning trial in June" of 2026. *Id.* at 2. The first trial, Breathitt County School District, is currently scheduled to take place in McKinleyville, California, followed by trials in Oakland, California and Atlanta, Georgia.

Following two years of fiercely contested litigation, Plaintiffs are mere months away from taking the world's largest technology companies to court to hold them accountable for the foreseeable harm they've caused to schools and local governments. KTMC will continue its efforts to obtain critical relief for these Plaintiffs who stand on the forefront of the new and evolving harms presented by Defendants' social media platforms. ■

THE REVIVED DISCUSSION ABOUT ELIMINATING MANDATORY QUARTERLY REPORTING FOR U.S. PUBLIC COMPANIES

(continued from page 1)

similar call during his first term in 2018, but after the SEC put the proposal out for public comment, there were no changes made to the regulatory scheme. The SEC has publicly stated that it is currently prioritizing President Trump's plea to cease mandatory quarterly reporting, and SEC Chairman Paul Atkins stated that a proposal, which will be subject to a potentially lengthy notice and comment rulemaking period, may come as soon as the end of 2025 or early 2026.[2]

Despite the lengthy period of time in which the quarterly reporting requirements have been in effect in the United States (more than 50 years — over half the entire period in which the SEC has been in existence), the rules have been subjected to periodic criticism, which has been revitalized by the recent comments from the current Administration. This article summarizes the arguments presented by those who seek to preserve the status quo and those who seek to change the current required reporting cadence. The arguments presented fall into two primary categories: (1) whether less frequent reporting on companies' financial performance would benefit investors by allowing companies to take a longer-term view of their businesses or harm investors by reducing the timeliness of information that investors use to guide their investing decisions; and (2) whether the reduction in required reporting frequency would materially decrease costs that would benefit both companies and investors.

I. Reducing Transparency To Promote Long-Term Outcomes

The primary argument for eliminating mandatory quarterly reporting for U.S. public companies is that longer reporting periods would encourage companies to reduce shortsightedness and invest for long-term growth.[3] When advocating for the change on social media site Truth Social, President Trump stated that semiannual reporting "will save money, and allow managers to focus on properly running their companies."[4] In the same social media post, President Trump compared the quarterly management of U.S. public companies to China's purported "50 to 100 year view on management of a company," claiming that the difference was "Not Good!!!" for the United States — thereby highlighting his belief that U.S. companies should take a longer-term view of management.[5]

The most prominent criticism of requiring quarterly reporting is that expectations are created for a company, either through financial guidance it explicitly provides, or through expectations created by investors and Wall Street analysts, regarding how a company will perform each quarter when it presents its mandatory quarterly financial report. The belief is that, if the company's financials are not provided quarterly, then there will be no quarterly expectations imposed on a company, freeing it to take a longer-term outlook. According to noted economist John Maynard Keynes, the market typically expects that "competition between expert [financial] professionals, possessing judgment and knowledge beyond that of the average private investor, would correct the vagaries of the ignorant individual left to

---

[2] *See* Johann M. Cherian, *et al.*, *Trump renews calls for ending quarterly reports for companies*, Reuters, (Sep. 16, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/trump-renews-calls-ending-quarterly-reports-companies-2025-09-16/; Douglas Gillison & Manya Saini, *US SEC chair fast-tracks Trump push to end quarterly earnings reports*, Reuters, (Sep. 29, 2025), https://www.reuters.com/business/us-sec-chairman-atkins-vows-fast-track-scrapping-quarterly-corporate-reports-ft-2025-09-29/.

[3] *See* Jessica Corso, *Atkins Hints At Flexible Reporting Deadlines For Public Cos.*, Law360, (Sep. 25, 2025), https://www.law360.com/securities/articles/2391889?nl_pk=75a3fe50-0c45-4342-8e44-dbd22d08222f&utm_source=newsletter&utm_medium=email&utm_campaign=securities&utm_content=2025-09-26&read_more=1&nlsidx=0&nlaidx=0.

[4] Donald. J. Trump (@real Donald Trump), Truth Social, https://truthsocial.com/@realDonaldTrump/posts/115208219886830624 (last visited Sep. 29, 2025).

[5] *Id.* It is worth pointing out that at least one article by *The Wall Street Journal* highlighted that China requires companies to report quarterly as well. *See* James Mackintosh, *All the Reasons Trump Would be Wrong to Ditch Quarterly Earnings*, (Sep. 19, 2025), https://www.wsj.com/finance/investing/all-the-reasons-trump-would-be-wrong-to-ditch-quarterly-earnings-6fd3a231?mod=hp_lead_pos6&ref=philmckinney.com.

himself."[6] He challenged this idea nearly 90 years ago, however, stating that:

> For most of [the professional investors and speculators] are, in fact, largely concerned, not with making superior long-term forecasts of the probable yield of an investment over its whole life, but with foreseeing changes in the conventional basis of valuation a short time ahead of the general public. They are concerned, not with what an investment is really worth to a man who buys it "for keeps," but with what the market will value it at, under the influence of mass psychology, three months or a year hence."[7]

More recent research addressing the theme noted by Keynes suggests that increasing the reporting frequency produces shorter term earnings measures that fail to reflect the value of managerial actions that generate value only in the long run.[8] This, in turn, engenders premature evaluation of managers that makes it unviable for them to engage in long-term investments. Thus, a more frequent reporting regime exacerbates the disincentives to invest in long-term projects.

One prominent example showing the impact that the freedom from quarterly reporting requirements can provide to companies is the case of Dell Technologies Inc. (formerly Dell Computer Corporation) ("Dell"), which went private in 2013.[9] In a 2014 op-ed, Dell's Founder, Michael Dell, reflected on the company's decision to go private approximately one year after the fact.[10] At the outset, he emphasized that "[p]rivatization has unleashed the passion of our team members who have the freedom to focus first on innovating for customers in a way that was not always possible when striving to meet the quarterly demands of Wall Street," and further lauded that "Dell now has the freedom to take a long-term view. No more pulling R&D and growth investments to make in-quarter numbers."[11] Accordingly, Mr. Dell noted that, in 2014, Dell was able to invest several hundred millions of dollars "in areas with significant time horizons, such as cloud and analytics, that might not have been feasible in today's environment for public companies."[12] While Mr. Dell did not explicitly state that the limitations on taking a long-term perspective were the result of expectations created by Wall Street analysts, rather than any guidance provided by the Company, his perspective shows that the creation of quarterly expectations can negatively impact a company's long-term goals.

Looking specifically at one potential area for increased investment, *Reuters* noted that many sustainability-focused investors would welcome the United States' shift away from mandatory quarterly reporting, suggesting that "investors [could] push[] boards to do more on issues such as climate change that are set to increasingly impact corporate value."[13]

Others have noted the potential pitfalls of a "quarter-to-quarter" mindset, although the focus of many of these commentators has been on the impact of providing future financial guidance on a quarterly basis. Notably, in 2018, Jamie Dimon, the CEO of JPMorgan Chase, and legendary investor Warren Buffett jointly penned an op-ed featured in *The Wall Street Journal* entitled "Short-Termism is Harming the Economy."[14] In that editorial, Messrs. Dimon and Buffett "encourage[ed] all public companies to consider moving away from providing quarterly earnings-per-share guidance" because "quarterly earnings guidance often leads to an unhealthy focus on short-term profits at the expense of long-term strategy, growth and sustainability."[15] Messrs. Dimon and Buffett claimed that "Companies frequently hold back on technology spending, hiring, and research and development to meet quarterly earnings forecasts that may

(continued on page 8)

---

6 John Maynard Keynes, *The General Theory of Employment, Interest and Money*, 138-39 (Macmillan) (1936).

7 *Id.*

8 *See* Arthur G. Kraft, Rahul Vashishtha & Mohan Venkatachalam; *Frequent Financial Reporting and Managerial Myopia*, 93 (2) The Accounting Review 249-275, (2018), https://doi.org/10.2308/accr-51838.

9 *See* Michael Dell, *Going Private Is Paying Off for Dell*, Wall St. J., (Nov. 24, 2014), https://www.wsj.com/articles/michael-dell-going-private-is-paying-off-for-dell-1416872851?gaa_at=eafs&gaa_n=ASWzDAid9mRNiY6NvJ2T0JN5gpeWQaTCs42xYTxuF9fozvTdaneUEHVQXxwg&gaa_ts=68ee6d8a&gaa_sig=c7K8pZlVb1MGTvfSefuxkCJPRqQOuY3eZm19y3ZGRm85U0cvwf0EecePcuP2ylX9UnyQor8MZqqXeeOL8WhDzg%3D%3D. Dell shares began trading publicly again in 2018. *See* John Edwards, *Dell's Transition: Why Its Stock Disappeared and What's Next*, Investopedia, (last updated Oct. 9, 2025), https://www.investopedia.com/articles/markets/110915/dell-stock-doesnt-exist-here-why.asp.

10 *See id.*

11 *Id.*

12 *Id.*

13 Simon Jessop, *Trump's call to end quarterly reports gets unlikely support from climate-conscious investors*, Reuters, (Sep. 17, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/trumps-call-end-quarterly-reports-gets-unlikely-support-climate-conscious-2025-09-16/.

14 *See* Jamie Dimon & Warren E. Buffett, *Short-Termism Is Harming the Economy*, Wall. St. J., (June 6, 2018), https://www.wsj.com/articles/short-termism-is-harming-the-economy-1528336801.

15 *Id.*

THE REVIVED DISCUSSION ABOUT ELIMINATING MANDATORY QUARTERLY REPORTING FOR U.S. PUBLIC COMPANIES

(continued from page 7)

be affected by factors outside of the company's control, such as commodity-price fluctuations, stock-market volatility and even the weather."[16] According to them, "[t]he pressure to meet short-term earnings estimates has contributed to the decline in the number of public companies in America over the past two decades."[17] Nevertheless, Messrs. Dimon and Buffett clarified that "[t]ransparency about financial and operating results is an essential aspect of U.S. public markets."[18]

In contrast, those opposed to eliminating the quarterly reporting requirements focus much more on the provision of operating results, arguing that the proposed change would reduce investors' insight into company performance and operations. They assert that reducing the mandatory reporting frequency to "[s]emiannual reporting would work against investors by increasing information gaps, raising the risk of surprises, and creating more room for insider advantage," which would leave investors "with stale data, and when results finally arrive, the adjustment to new information could be sharper and more volatile."[19] These impacts would be especially felt in "fast-moving industries like technology, where six months can radically alter a company's outlook."[20] Indeed, *The Wall Street Journal* recently suggested that "the business cycle is getting shorter, not longer," and highlighted that investors do not "want to miss out when a company's fortune changes suddenly, such as what happened at Nvidia."[21] For some market commentators, the answer is not to change the reporting requirements, but to incentivize a long-term view by setting executive compensation to reflect this desire.[22]

Furthermore, those who favor retaining the quarterly reporting scheme contend that changing to semiannual reporting will not meaningfully promote longer-term business decisions.[23] Notably, the CFA Institute, a prominent not-for-profit organization that promotes financial education to investment professionals, commissioned a study analyzing the impact that changes in reporting requirements had on public companies in the United Kingdom.[24] Beginning in 2007, the United Kingdom and European Union member states began requiring public companies to issue interim management statements on a quarterly

---

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] Lance Roberts, *Semi-Annual Reporting Requirements Are Overhyped*, Investing.com, (Sep. 17, 2025), https://www.investing.com/analysis/semiannual-reporting-requirements-are-overhyped-200667052p; *see also* Jonathan Weil, *What Investors Get Out of Quarterly Earnings*, Wall St. J., Sep. 16, 2025, https://www.wsj.com/finance/investing/quarterly-earnings-reports-why-6ce13780 ("And just because information goes unreported for long stretches doesn't mean it ceases to exist. Insiders will still have it, and act on it.").

[20] Lance Roberts, *Semi-Annual Reporting Requirements Are Overhyped*, Investing.com, (Sep. 17, 2025), https://www.investing.com/analysis/semiannual-reporting-requirements-are-overhyped-200667052; *see also*, Robert Pozen & Mark J. Roe, *Ditch quarterly earnings like Trump says? What's needed is better reporting – not less*, *see also* Morningstar, Sep. 18, 2025, https://www.morningstar.com/news/marketwatch/20250918509/ditch-quarterly-earnings-like-trump-says-whats-needed-is-better-reporting-not-less ("Without this information [quarterly reports], stock prices could become stale, thus leading to more inefficient capital markets.").

[21] Jonathan Weil, *What Investors Get Out of Quarterly Earnings*, Wall St. J., Sep. 16, 2025, https://www.wsj.com/finance/investing/quarterly-earnings-reports-why-6ce13780.

[22] *See e.g.,* Valens Rsch., *A change in quarterly reporting could alter how investors evaluate stocks*, (Sep. 18, 2025), https://www.valens-research.com/investor-essentials-daily/a-change-in-quarterly-reporting-could-alter-how-investors-evaluate-stocks/ ("Rather than sacrificing investors transparency, management teams who feel pressured by quarterly reporting and the need to deliver on short term targets should evaluate their compensation framework, and adjust their payment terms to reward and incentivize management on a longer-term view.").

[23] *See* Robert Pozen & Mark J. Roe, *Ditch quarterly earnings like Trump says? What's needed is better reporting – not less*, Morningstar, Sep. 18, 2025, https://www.morningstar.com/news/marketwatch/20250918509/ditch-quarterly-earnings-like-trump-says-whats-needed-is-better-reporting-not-less ("It is highly doubtful that replacing quarterly with semiannual reporting will induce corporate executives to make longer-term business decisions.").

[24] *See* Robert Pozen, *et al.*, *Impact of Reporting Frequency on UK Public Companies*, CFA Inst. Rsch. Found., (Mar. 2017), https://rpc.cfainstitute.org/sites/default/files/-/media/documents/article/rf-brief/rfbr-v3-n1-1-pdf.pdf.

basis (as opposed to only issuing semiannual reports).[25] According to its analysis, the CFA Institute did not find a statistically significant difference in the levels of company investment[26] after the switch to mandatory quarterly reporting when comparing companies that previously had been voluntarily reporting on a quarterly basis prior to the mandatory requirements and the companies that had not previously done so.[27] Put differently, the report found no significant decline in investment that could be attributed to the adoption of mandatory quarterly reporting.

Subsequently, in 2014, the United Kingdom eliminated the requirement that public companies file interim management statements on a quarterly basis. After this change, the CFA Institute found that less than 10% of all U.K. public companies stopped reporting on a quarterly basis and that "there was no statistically significant difference between the levels of corporate investment of the U.K. companies that stopped quarterly reporting and those that continued quarterly reporting."[28] Specifically, the CFA Institute found that there was not a "statistically significant *increase*" in company investment by the companies that decided to stop issuing quarterly reports.[29] Thus, merely increasing the reporting period from three months to six months did not appear to have the desired impact on company investment in the United Kingdom.

Critically, some individuals have noted that the U.S. stock markets are the "gold standard in the world for their efficiency and transparency," and that it does not make sense as to why "we want to be emulating markets that people view as less attractive." Indeed, U.S. stocks typically trade at a premium compared to those offered internationally in part due to the United States' strict reporting requirements.[31]

Additionally, advocates of maintaining the current reporting schedule have noted that permitting companies to decide the frequency of their reporting could present challenges for investors trying to compare similar companies, especially those in the same or related industries, if one company chooses to report quarterly and another chooses to report semiannually.[32] This asymmetry could result in investors drawing incorrect conclusions about a company (that reports semiannually) when a peer company discloses potentially industry-wide information in a quarterly report.

II. Reducing Reporting Frequency to Decrease Costs

Another prominent argument proffered by advocates for eliminating mandatory quarterly reporting is that the current reporting requirements impose high costs on companies to produce the reports, which adversely impacts smaller companies and deters them from going public (and therefore harms investors by preventing more investing options from entering the market).[33]

Market commentators generally acknowledge that it takes a lot of time, money, and resources to prepare quarterly financial reports to be filed with the SEC.[34] According to *CNBC*, "[o]n average, it takes about 180 hours to prepare a requisite [F]orm 10-Q, at an expense that can vary from $50,000 for smaller companies to well over $1 million for large-cap enterprises" excluding "expenditures for internal

(continued on page 10)

---

[25] *See id.* at 2. Interim management statements are quarterly reports describing material events and transactions that impacted the company's financial performance in the quarter, among other things, but which are not accompanied by financial statements.

[26] The CFA Institute analyzed capital expenditures, spending on research and development, and spending on property, plant, and equipment in analyzing changes company investment. *See id.*

[27] *See id.* at 6. The CFA Institute also found that companies issued managerial guidance at similar rates, regardless of whether the company issued quarterly reports prior to the 2007 requirements or not. *See id.* at 8.

[28] *Id.* at 2.

[29] *Id.* at 16 (emphasis added).

[30] Johann M. Cherian, *et al.*, *Trump renews calls for ending quarterly reports for companies*, Reuters, (Sep. 16, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/trump-renews-calls-ending-quarterly-reports-companies-2025-09-16/.

[31] *See* Douglas Gillison & Manya Saini, *US SEC chair fast-tracks Trump push to end quarterly earnings reports*, Reuters, (Sep. 29, 2025), https://www.reuters.com/business/us-sec-chairman-atkins-vows-fast-track-scrapping-quarterly-corporate-reports-ft-2025-09-29/.

[32] Robert Pozen & Mark J. Roe, *Ditch quarterly earnings like Trump says? What's needed is better reporting – not less*, Morningstar, Sep. 18, 2025, https://www.morningstar.com/news/marketwatch/20250918509/ditch-quarterly-earnings-like-trump-says-whats-needed-is-better-reporting-not-less ("Without this information [quarterly reports], stock prices could become stale, thus leading to more inefficient capital markets.").

[33] *See* Matt Toledo, *Trump Calls for Semiannual Reporting Instead of Quarterly Schedules*, Chief Inv. Officer, (Sep. 16, 2025), https://www.ai-cio.com/news/trump-calls-for-end-to-quarterly-reporting-adoption-of-bi-annual-schedules/.

[34] *See e.g.,* Richard Torrenzano, *Fewer earnings reports, more regret: The high cost of going quiet*, Fortune, (Oct. 9, 2025), https://fortune.com/2025/10/09/quarterly-earnings-reports-change-trump-good-idea-or-not/ (acknowledging that "quarterly reporting is time-consuming, frustrating and expensive," and that "the average cost of compliance and financial reporting can be hundreds of thousands annually, millions for large firms").

[35] Bob Woods, *Investors aren't the market's biggest loser if Trump, SEC end quarterly reporting*, CNBC, (Oct. 5, 2025), https://www.cnbc.com/2025/10/05/trump-sec-quarterly-earnings-reports-accounting-firms.html#:~:text=On%20average%2C%20it%20takes%20about%20180%20hours,well%20over%20$1%20million%20for%20large%2Dcap%20enterprises.

THE REVIVED DISCUSSION ABOUT ELIMINATING MANDATORY QUARTERLY REPORTING FOR U.S. PUBLIC COMPANIES

(continued from page 9)

audit teams and operations."[35]

Less relevant, but still related, is SEC Chairman Atkins' recent call to "make IPOs great again" by reducing the impediments that prevent companies from going public.[36] Although there are numerous considerations for a private company before deciding to become publicly traded, mandatory quarterly reporting can be tedious and very costly, especially for smaller companies, and Chairman Atkins noted that there is very little incentive for companies to go public given the cumbersome requirements and the "really robust private markets" that can offer similar benefits.[37] Even Adena Friedman, the Chair and CEO of Nasdaq Inc., has come out in support of reporting flexibility, saying that it would "minimize the 'friction, burden and costs' of listing on Wall St" and "could further inject energy into the U.S. capital markets and spur economic growth."[38]

Despite these significant costs, an article published by *Fortune* argued that the "[a]ctual cost of moving to semiannual reporting is not financial, it is informational."[39] According to *Fortune*, fewer company updates breed "more uncertainty – and higher risk premiums, which translate into complex capital costs."[40] *Fortune* further highlighted the "rich body of academic research [which] shows when companies disclose less frequently, investors demand higher returns to compensate for increased opacity. What's saved on audit bills is lost on the trading floor."[41] Others have similarly argued that less frequent disclosures will actually lead to an *increase* in the cost of capital because investors may "demand a higher risk premium, effectively pushing equity valuations lower."[42]

III. Conclusion

For many companies, the debate over mandated quarterly reporting may not be a significant issue. Even if the SEC eliminates the mandatory quarterly reporting requirements, many companies may find that it is better (or easier) to continue reporting on a quarterly basis (as they have been doing) rather than make any major changes to potentially upset investors and analysts. This clearly was the case in the United Kingdom when, in 2014, regulators relaxed the disclosure requirements, requiring only semiannual reporting, yet the majority of companies chose to continue reporting quarterly. For those companies that do see potential benefits from reducing their reporting frequency, however, they may have an opportunity to attempt to realize those benefits, and the market can determine whether reduced frequency of reporting is a net positive for such companies and investors. ■

---

[36] CNBC, *First on CNBC: Transcript: SEC Chair Paul Atkins Speaks with CNBC's "Squawk Box" Today*, (July 2, 2025), https://www.cnbc.com/2025/07/02/first-on-cnbc-transcript-sec-chair-paul-atkins-speaks-with-cnbcs-squawk-box-today.html.

[37] *Id.*

[38] Johann M. Cherian, *et al.*, *Trump renews calls for ending quarterly reports for companies*, Reuters, (Sep. 16, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/trump-renews-calls-ending-quarterly-reports-companies-2025-09-16/; Reuters, *Nasdaq supports reforms to reduce burden on public companies, CEO Friedman says*, Reuters, (Sep. 15, 2025), https://www.reuters.com/sustainability/boards-policy-regulation/nasdaq-supports-reforms-reduce-burden-public-companies-ceo-friedman-says-2025-09-15/.

[39] Richard Torrenzano, *Fewer earnings reports, more regret: The high cost of going quiet*, Fortune, (Oct. 9, 2025), https://fortune.com/2025/10/09/quarterly-earnings-reports-change-trump-good-idea-or-not/.

[40] *Id.*

[41] *Id.*

[42] Lance Roberts, *Semi-Annual Reporting Requirements Are Overhyped*, Investing.com, (Sep. 17, 2025), https://www.investing.com/analysis/semiannual-reporting-requirements-are-overhyped-200667052.

[43] *See infra* Section I (the CFA Institute found that less than 10% of all U.K. public companies stopped reporting on a quarterly basis); *see also* Robert Pozen, *et al.*, *Impact of Reporting Frequency on UK Public Companies*, CFA Inst. Rsch. Found., (Mar. 2017), at 2, https://rpc.cfainstitute.org/sites/default/files/-/media/documents/article/rf-brief/rfbr-v3-n1-1-pdf.pdf.

KTMC ACHIEVES $100 MILLION SETTLEMENT FOR ONLINE ADVERTISERS IN GOOGLE ADWORDS CONSUMER FRAUD LITIGATION

(continued from page 2)

unwittingly charged for "out-of-area" clicks on these ads. Among other things, plaintiffs alleged that Google employed an "override" feature that circumvented advertisers' settings by making an internet user appear to be located within an advertiser's selected area even though they were not — a feature that was not disclosed to consumers. This is believed to be the first-ever claim under California's UCL for fraudulently charging for online ads that were shown beyond advertisers' selected campaigns (UCL claims are traditionally asserted in product liability cases involving, for example, tobacco, food, and health products).

Second, plaintiffs alleged that Google breached its agreement with advertisers by manipulating its "smart pricing" algorithm, a pricing model designed to automatically reduce the cost of ads following an online auction for ad placement, resulting in the systematic overcharging of advertisers. For example, Plaintiffs claimed that Google applied an arbitrary 6% boost to the scores generated by its smart pricing algorithm for advertisers that did not set a separate bid for the two Google networks, the Search Network and the Display Network, resulting in a 6% overcharge on each damaged click on an affected ad.

Discovery in this case spanned more than a decade, and included forty-two depositions of fact and expert witnesses across seven U.S. states, Canada, France, and the United Kingdom. Following discovery directed to the lead plaintiff, Rene Cabrera, Google challenged Cabrera's standing to bring the action on the theory that he had sold any causes of action against Google when he sold his software training company — the business for which he advertised on Google's platform — prior to the end of the class period. The district court accepted Google's arguments and dismissed Cabrera's claims in 2019. KTMC appealed Judge Davila's dismissal order to the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the dismissal order, finding that while Cabrera had transferred certain physical and intangible assets when he sold his company, as a matter of contract, the intangibles transferred under the sale contract did not include the AdWords account or the right to sue Google under the AdWords agreement. *See Cabrera v. Google LLC*, 842 F. App'x 38 (9th Cir. 2021).

Following the appeal, the case returned to the district court in 2021. Plaintiffs ultimately obtained class certification following expert discovery, two rounds of briefing, and a full-day hearing. In a 69-page opinion issued in August 2023, Judge Davila certified two advertiser classes over Google's opposition — a class for the UCL claim and a class for the breach of contract claim. *See Cabrera v. Google LLC*, 2023 WL 5279463 (N.D. Cal. Aug. 15, 2023).

In the same opinion, Judge Davila also denied Google's summary judgment motion through which Google sought to dismiss both claims. Google argued with respect to the UCL claim that because it separately disclosed on its Help Center webpage that ads may be shown to users regardless of their physical location, plaintiffs could not have reasonably relied on the settings screen statement regarding the geographic placement of their ads. Google also argued that plaintiffs were not injured because they benefitted from the out-of-area clicks on their ads and thus received the "benefit of the bargain." Judge Davila rejected these arguments, holding that "reasonable reliance is not required . . . to prevail on the UCL claim" and that there were triable issues of fact as whether a reasonable advertiser would have likely been deceived by the settings screen. The court noted that "Google had made other statements suggesting Location Targeting would appear *only* to users within the selected areas and regions" and that "[t]hese additional statements counterbalance any curative effect from Help Center disclosures, undermining Google's ability to prevail on summary judgment." Judge Davila also rejected Google's "benefit of the bargain" argument as having "no support under California law."

In addition, Google unsuccessfully moved for summary judgment on plaintiffs' breach of contract claim. First, Google asserted that the discount afforded by the smart pricing algorithm applied to advertisers' bids in the ad placement auctions, not the cost of clicks on advertisers' ads, and because it is impossible to recreate the mechanics of these ad auctions, plaintiffs were unable to show that they were actually harmed by Google's failure to properly apply its smart pricing model. Google also asserted that the AdWords agreement with advertisers did not obligate Google to apply the discounts generated by the Smart Pricing algorithm. Judge Davila rejected both arguments to preclude summary judgment. The court's class certification and summary judgment decision cleared the way for the final phase of expert discovery regarding class-wide damages.

After multiple attempts to settle the case, in December 2024, the parties participated in a mediation with U.S. Magistrate Judge Virginia K. DeMarchi in the San Jose federal courthouse — just weeks before trial was set to begin. Through the negotiations facilitated by Judge DeMarchi, the parties ultimately settled the case on Christmas Eve for $100 million. The court approved the settlement on August 30, 2025, and distribution of the settlement proceeds will begin in the coming weeks. This substantial recovery for online advertisers targeted by Google's consumer fraud stands among the firm's significant litigation achievements — a hard-fought case against an industry giant that was prosecuted from the earliest pre-suit investigation to the doorstep of trial. ■

CHANCELLOR SAYS "GAME-ON" TO KTMC'S ACTIVISION-MICROSOFT MERGER LITIGATION

(continued from page 2)

AP7's Complaint alleges that Activision CEO and board chairman Robert Kotick ("Kotick") and ten members of Activision's board of directors (together with Kotick, the "Director Defendants") orchestrated the Merger in response to the public fallout from Activision's sexual harassment scandal (the "Harassment Scandal"). The Harassment Scandal hurt Activision's public image and stock price, and embroiled Activision's officers and directors in serious litigation and public scrutiny. Knowing that a sale of Activision would help them avoid personal accountability for the Harassment Scandal, Kotick wasted no time in negotiating the $95/share Merger with Microsoft, and the Director Defendants rushed to approve an incomplete version of the merger agreement by mid-January 2022.

Among other claims, the Complaint pleads that: (i) Kotick and the other Director Defendants breached their fiduciary duties by entering into the Merger, including by approving a Letter Agreement in July 2023 to extend the merger agreement's termination date; (ii) the Merger caused an unlawful conversion of Activision shares; and (iii) Activision improperly paid $424 million in dividends on treasury shares not eligible to receive dividends.

B. AP7's "Core" Fiduciary Claim and Disclosure Claims

Most importantly, the Opinion holds that AP7 pled viable, non-exculpated claims that the Director Defendants breached their fiduciary duties in connection with the process preceding the Merger. The Chancellor agreed with AP7 that it was reasonably conceivable that Kotick rushed Activision into the Merger to keep his job, secure his change-of-control payments, and insulate himself from liability from the Harassment Scandal, and that Kotick tainted the sale process by undercutting Activision's negotiating efforts, stiff-arming alternative bidders, delaying and limiting disclosures to the Board, and reducing management projections to justify the Merger price. Notably, the Court also found it reasonably conceivable that the other Director Defendants failed to properly oversee and manage Kotick's conflicts.

Chancellor McCormick found that AP7 also pled viable fiduciary claims against Defendant Kotick and the other Director Defendants in connection with their approval of the Letter Agreement. The Court found that the Director Defendants approved the Letter Agreement instead of terminating the Merger Agreement, which allowed Kotick to continue working, extended the Merger Agreement's protections for the Director Defendants, and ensured that the Merger would ultimately eliminate the derivative lawsuits stemming from the Harassment Scandal. The Court thus found that it was reasonably conceivable "that the same conflicts and mindset that allegedly tainted Board approval of the Merger Agreement infected the Director Defendants' actions when approving the Letter Agreement."

Notably, the Court did not need to decide whether to apply "entire fairness" review—the highest standard of review—to the Merger. The Court found AP7's "core" fiduciary claims viable even under the intermediate 'enhanced scrutiny' standard for which Defendants advocated. Further, the Court held that Defendants could not use a mechanism known as "*Corwin* cleansing" to reduce the standard of review to the deferential "business judgment" rule because AP7 carried its burden to plead that it was reasonably conceivable that (i) Activision's stockholder vote did not comply with statutory requirements of the DGCL, and (ii) disclosures in Activision's proxy were materially misleading and incomplete such that the stockholder approval of the Merger was not fully informed. Among other proxy disclosure violations, the Court found that AP7 sufficiently pled "glaring omissions" about the Harassment Scandal's role in the Merger, which could have changed a reasonable stockholder's view of the Merger's fairness.

C. AP7's Conversion Claim

AP7's Complaint asserts multiple theories of conversion, including that Activision stockholders' shares were (i) converted through the Merger, and (ii) the filing of a false Merger Certificate in violation of Sections 103 and 251(c)(4) of the DGCL. The Opinion rejects Defendants' second attempt to dismiss these conversion theories, citing the 'law of the case' doctrine and pointing to the 2024 Decision's holding that AP7 had pled a viable conversion claim.

D. AP7's Dividend Claim

In her 2024 Decision, the Chancellor found it reasonably conceivable that, in violation of Section 141(c) of the DGCL, the Board delegated to an *ad hoc* committee approval of the provision in the merger agreement governing dividends that Activision stockholders would receive during the "lengthy regulatory review process" before the Merger closed. Activision suggested that this claim was mooted by the Letter Agreement. The Chancellor rejected this argument, held that Activision's recent motion did not "meaningfully develop" a mootness argument, and denied Defendants' second attempt to dismiss AP7's dividend claim.

E. AP7's Treasury Dividends Claim

Finally, the Opinion converted Defendants' motion to dismiss into a motion for summary judgment with respect to AP7's treasury dividends claim. This claim essentially alleges that Activision improperly paid $424 million of dividends on its subsidiary's treasury stock that was not eligible to receive dividends. The Court noted that the parties' complex dispute about the law and facts governing AP7's treasury dividends claim could generate "one full 80-plus page decision on their own." The Chancellor's decision to later evaluate this claim under the summary judgment standard grants AP7 the opportunity to take discovery and present expert opinions about the nuances and value of this claim.

This tremendous result would not have been possible without AP7's tenacity in prosecuting this Action for almost four years. In the words of Chancellor McCormick, "[P]laintiff's complaint can now launch. Game on." ■

KESSLER TOPAZ REPRESENTS HEALTH & WELFARE FUNDS SEEKING TO RECOVER OVERCHARGES FROM THE ILLEGAL DELAY OF GENERIC COMPETITION TO TWO BLOCKBUSTER DRUGS

(continued from page 3)

As alleged in the complaint, Novartis submitted the '659 patent for Entresto's Orange Book listing even though the patent does not claim Entresto or a method of using Entresto. Listing the '659 patent in the Orange Book enabled Novartis to obtain and enforce a six-month "pediatric exclusivity" that prevented generic Entresto from launching until July 2025. This exclusivity could not have been granted to Novartis—and would not have blocked generic competition to Entresto—but for Novartis improperly listing the'659 patent in the Orange Book.

Without the unwarranted six-months of market exclusivity, at least one generic Entresto would have become available in January 2025, and purchasers would have paid significantly lower prices for generic versions of the drug. Kessler Topaz's complaint alleges that Novartis's conduct violates state antitrust and consumer protection statutes and seeks to recover the overcharges that purchasers were forced to pay.

Xifaxan

Xifaxan 550 mg is approved to treat irritable bowel syndrome and to reduce the risk of recurring overt hepatic encephalopathy (a brain disorder caused by liver disease). Xifaxan is Bausch Health's highest-grossing drug with more than $1.9 billion in U.S. sales in 2024. Kessler Topaz filed a complaint, on behalf of Rhode Island Laborers Health & Welfare Fund, alleging that Bausch engaged in an anticompetitive scheme with would-be generic competitor Teva and that the scheme unlawfully delayed the availability of generic Xifaxan 550 mg and threatens to delay generic competition until 2028.

Under The Drug Price Competition and Patent Term Restoration Act of 1984, generic drug companies are allowed to bypass the more burdensome New Drug Application ("NDA") process that brand companies must follow and file an Abbreviated New Drug Application ("ANDA"), which relies on the safety and effectiveness findings contained in the brand manufacturer's original NDA.

When it files an ANDA with the FDA, a generic drug company must certify that it will not infringe any patents that the brand drug company has listed in the Orange Book. The generic drug company can satisfy this requirement in numerous ways, including by certifying that the patent at issue is invalid or will not be infringed by the generic drug company's proposed product. This is known as a "paragraph IV certification." When a generic drug company has made a paragraph IV certification, the brand drug company can initiate a lawsuit for patent infringement.

Bausch listed more than ***twenty patents*** in the Orange Book as claiming Xifaxan 550 mg and its uses, with expiration dates ranging from August 2019 to October 2029. When generic drug manufacturer Teva filed an ANDA with the FDA for a generic version of Xifaxan, Bausch sued Teva for infringing its patents to prevent the launch of Teva's generic product.

Bausch knew its multi-billion dollar Xifaxan franchise was vulnerable to generic competition and feared that allowing potential competitors to challenge its patents in court could result in those patents being invalidated. To avoid this loss of patent protection, Bausch settled the lawsuit with Teva in 2018 by entering into an unlawful agreement and improper allocation of the market for Xifaxan 550 mg. The settlement agreement provided that Bausch, who had filed the lawsuit, would pay defendant Teva, to settle the infringement action –

(continued on page 14)

KESSLER TOPAZ REPRESENTS HEALTH & WELFARE FUNDS SEEKING TO RECOVER OVERCHARGES FROM THE ILLEGAL DELAY OF GENERIC COMPETITION TO TWO BLOCKBUSTER DRUGS

(continued from page 13)

this is commonly referred to as a "reverse payment" and the U.S. Supreme Court has held that reverse payment settlements can violate the antitrust laws.[3]

Under the settlement agreement, Teva agreed to drop its challenges to Bausch's patents and agreed that it would not launch its generic Xifaxan until January 2028. This represented a years-long delay—Bausch had expected to compete with generic versions of Xifaxan by 2024. In exchange, Bausch's payment to Teva included an agreement that, when Teva eventually did begin selling its generic, Bausch would not compete with its own generic product—a so-called authorized generic. This aspect of the agreement would allow Teva to sell more generic product, at a far higher price than it could if Bausch marketed an authorized generic to compete with Teva.

The agreement also provided that, if another company launched a generic version of Xifaxan before January 2028, Teva could beginning selling its generic. This reduced other generic drug companies' incentive to challenge Bausch's patents (in fact, at least two more generic manufacturers (Sun and Sandoz) agreed to drop their patent challenges to keep their generic versions of Xifaxan off the market until January 2028).

Without the unlawful reverse payment settlement with Bausch, Teva's generic Xifaxan 550 mg would already be available for purchase, the FDA would have already granted final approval to other generic manufacturers, and multiple lower-cost generic versions of Xifaxan would be available to purchase today. The complaint alleges that Bausch and Teva's scheme violates federal and state antitrust statutes and state consumer protection statutes, and Kessler Topaz is seeking to recover the overcharges that drug purchasers are forced to pay because they are prevented from accessing generic Xifaxan 550 mg, as well as injunctive relief and a declaratory judgment that Bausch and Teva's conduct violated the Sherman Antitrust Act, which would allow generics to launch before January 2028.

As these two cases proceed into motion practice and discovery, Kessler Topaz looks forward to vigorously litigating these claims to recover overcharges stemming from Novartis, Bausch, and Teva's anticompetitive conduct. ■

---

[3] *See FTC v. Actavis*, 570 U.S. 136, 133 S. Ct. 2223 (2013).

8TH CIRCUIT REJECTS SEC ATTEMPT TO END CLIMATE DISCLOSURE RULES

(continued from page 3)

The SEC Finalizes, then Abandons, the March 2024 Climate Disclosure Rules

In March 2024, the SEC finalized a new set of rules that required public companies to make much more extensive climate-related disclosures, including: (1) climate-related risks; (2) company efforts to identify, assess, mitigate, and adapt to material climate-related risks; (3) information about the company's climate-related targets or goals; (4) data regarding certain emissions; and (5) costs, expenditures, and losses resulting from climate-related factors.[3] Adopted on March 6, 2024, the Climate Disclosure Rules were set to become effective on May 28, 2024, with reporting obligations to be phased in over several years.

Immediately after the SEC announced the final Climate Disclosure Rules, however, the rules faced a series of legal challenges by Republican state attorneys general, the United States Chamber of Commerce, energy companies, and others. These lawsuits were consolidated in the United States Court of Appeals for the Eighth Circuit.[4]

In April 2024, the SEC announced that it would voluntarily pause its implementation of the Climate Disclosure Rules in order to avoid regulatory uncertainty while litigation proceeded.[5]

The legal battle over the Climate Disclosure Rules continued throughout 2024, with the SEC defending the disclosure requirements and completing the case's briefing before the Eighth Circuit.

Then, following President Trump's second inauguration and the resulting change in SEC leadership and policy, the SEC announced on March 27, 2025, that it was ending its legal defense of the Climate Disclosure Rules.[6]

The Eighth Circuit Litigation Is Held in Abeyance Until the SEC Takes Appropriate Action

Days after the SEC announced the withdrawal of its defense, an intervenor group of Democratic state attorneys general moved to hold the litigation in abeyance, arguing that a formal pause in the litigation would "maintain the status quo and preserve judicial resources while SEC evaluates its course of action so that this Court does not devote the time and energy to hearing oral argument and writing a potentially unnecessary opinion on the legality of securities regulations that SEC may soon amend or rescind."[7]

On April 24, 2025, the Eighth Circuit granted the intervenors' motion, ordering that the litigation regarding the Climate Disclosure Rules would be held in abeyance until further order of the court.[8] The court further ordered the SEC to file a status report by July 23, 2025, regarding "whether the Commission intends to review or reconsider the rules at issue in this case."[9] Moreover, the court ruled that, if the SEC had "determined to take no action" regarding the Climate Disclosure Rules, then its status report "should address whether the Commission will adhere to the rules if the petitions for review are denied and, if not, why the Commission will not review or reconsider the rules at this time."[10]

The SEC filed a status report on July 23, 2025, stating that the "Commission does not intend to review or reconsider the Rules at this time" — without explaining why, other than to say that it could not "prejudge" the position it would take on the Climate Disclosure Rules if the Eighth Circuit were to uphold any part of the rules.[11] The SEC also requested "that the Court terminate the abeyance, continue considering the parties' arguments, and exercise its jurisdiction to decide the case."[12] Remarkably, the SEC effectively asked the Eighth Circuit to determine the fate of the Climate Disclosure Rules without any ongoing input from the agency responsible for the promulgation and enforcement of the rules.

While the SEC's status report carefully avoided taking a position on the legality of the Climate Disclosure Rules, commentators and experts have observed that the SEC — which now opposes the Climate Disclosure Rules on principle — appeared to hope that the Eighth Circuit would simply strike down the rules, allowing the SEC to avoid the lengthy process of rescinding or revising the rules pursuant to notice-and-comment rulemaking process under the APA.

Recognizing what her agency was seeking to do, SEC Commissioner Caroline A. Crenshaw (who has publicly criticized the SEC's actions with respect to the Climate Disclosure Rules throughout 2025) issued a statement stating that "[t]he Commission simply does not want to say what we all know

(continued on page 16)

---

[3] *See SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, U.S. Securities and Exchange Commission (Mar. 6, 2024), https://www.sec.gov/newsroom/press-releases/2024-31.

[4] *See Iowa v. SEC*, No. 24-1522 (8th Cir.).

[5] *See Amid legal challenges, SEC pauses its climate rule*, Associated Press (Apr. 5, 2024), https://apnews.com/article/sec-climate-disclosure-rule-climate-change-lawsuits-35f464a554a5173e76c279e6ce399592.

[6] *See SEC Votes to End Defense of Climate Disclosure Rules*, U.S. Securities and Exchange Commission (Mar. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-58.

[7] Intervenor States' Motion to Hold Cases in Abeyance at 2, *Iowa v. SEC*, No. 24-1522 (8th Cir. Apr. 4, 2025).

[8] *See* Order, *Iowa v. SEC*, No. 24-1522 (8th Cir. Apr. 24, 2025).

[9] *Id.*

[10] *Id.*

[11] Status Report of the Securities and Exchange Commission in Response to the Court's April 24, 2025 Order, *Iowa v. SEC*, No. 24-1522 (8th Cir. July 23, 2025).

[12] *Id.*

8TH CIRCUIT REJECTS SEC ATTEMPT TO END CLIMATE DISCLOSURE RULES

(continued from page 15)

to be true by now — it has no intention of allowing the Climate-Related Disclosure Rules to go into effect."[13] Crenshaw further warned that the SEC cannot "take the easy way out" by "ask[ing] the Court to do the work for us," and stated that, if the SEC "wants to rescind, repeal or modify the Rules, . . . then it must do the statutorily-required work" of engaging in notice-and-comment rulemaking.[14] In conclusion, Crenshaw criticized the SEC for "effectively ignor[ing] the Court's order and throw[ing] the ball back at the Court," and urged the Eighth Circuit to "decline to play these games."[15]

The Eighth Circuit, it seems, agrees with Commissioner Crenshaw and firmly rejected the SEC's apparent gamesmanship. On September 12, 2025, the court entered an order rejecting the SEC's request to terminate the abeyance, holding instead that the litigation would remain in abeyance "until such time as the [SEC] reconsiders the challenged Final Rules by notice-and-comment rulemaking or renews its defense of the Final Rules."[16] Notably, the court stated that "[i]t is the agency's responsibility to determine whether its Final Rules will be rescinded, repealed, modified, or defended in litigation."[17] The Eighth Circuit made clear that its role is to rule on live legal disputes, not to do the work of an agency that is ducking its statutory obligations.

Future of the Climate Disclosure Rules

Following the Eighth Circuit's September order, the ball is firmly back in the SEC's court, and the future of the Climate Disclosure Rules depends on the SEC's next move. There are at least three paths forward from here.

First, the SEC could do nothing. As the rules are not currently enforced and the litigation is in abeyance, the Trump Administration's SEC could maintain the status quo by neither defending the rules nor seeking to modify them through the appropriate statutory procedures. Under this option, the Climate Disclosure Rules would theoretically be preserved for a future administration to potentially defend again. At that point, presumably, the Eighth Circuit would terminate the abeyance and rule on the merits of the litigation involving the rules — finally determining whether or not they can be enforced.

Second, the SEC could attempt to revise or rescind the Climate Disclosure Rules through notice-and-comment rulemaking. If the SEC wants to eliminate the rules in order to make it more difficult for a future presidential administration to potentially revive them, the SEC could engage in notice-and-comment rulemaking. Statutory rulemaking, however, can be a lengthy process. It took the SEC years to promulgate the Climate Disclosure Rules in the first place, and there is no guarantee that the SEC could complete this process while President Trump remains in office. It is also unclear whether terminating the Climate Disclosure Rules is a priority for the SEC, whose workforce and resources are being increasingly stretched thin.

Third, the SEC could resume its defense of the Climate Disclosure Rules. Given that a majority of SEC Commissioners now oppose the Climate Disclosure Rules, the agency seemingly would be unlikely to seek to resume its defense of the rules. If, however, the SEC believes that the Eighth Circuit is likely to strike down the rules on the merits, it might make the strategic decision to again defend the rules (even if halfheartedly) so that the Eighth Circuit terminates the abeyance and rules on the legality of the Climate Disclosure Rules.

Regardless of how the SEC chooses to move forward, the Eighth Circuit's September 2025 order is a positive development for investors, as it preserves the Climate Disclosure Rules for now and clarifies the SEC's responsibility to defend or modify its own rules, rather than asking courts to do that work on its behalf. ■

---

[13] *Statement on the Commission's Status Report in the Climate-Related Disclosure Rules Litigation* (July 23, 2025), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-climate-related-disclosure-rules-litigation-072325.

[14] *Id.*

[15] *Id.*

[16] Order, *Iowa v. SEC*, No. 24-1522 (8th Cir. Sep. 12, 2025).

[17] *Id.*

RULE 23(F) PETITIONS: A VEHICLE FOR CHALLENGING PLAINTIFFS' PROPOSED CLASS-WIDE DAMAGES MODEL

(continued from page 5)

Given that Rule 23(a) provides little basis for an attack on class certification, it is not surprising that defendants have focused their recent attention on Rule 23(b)(3)'s predominance requirement as the principal avenue to challenge class certification. A particular focus of such attacks has been the "fraud-on-the-market" theory of reliance, which creates a rebuttable presumption that if a plaintiff establishes proof of an efficient market, the impact of any material misstatement or omission is impounded in the company's stock price.[7] Accordingly, a plaintiff need not show individualized reliance for every class member — a requirement that would defeat the predominance prong of Rule 23(b)(3).[8] The Supreme Court's decision in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113 (2021), reflects a sustained effort by the defense bar to forge a path to attacking the fraud-on-the-market theory at class certification through evidence of a lack of "price impact" of the alleged false statements on the stock price.[9]

While district courts are still tussling with interpreting and applying *Goldman Sachs* in the context of price impact, the defense bar has begun a new offensive on predominance that centers on what showing a plaintiff in a securities case must make to establish the existence of a class-wide damages methodology tied to its theory of liability, under the Supreme Court's opinion, *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013).

In *Comcast*, the issue at class certification was whether plaintiffs showed that the existence of individual injury from the alleged antitrust violation was (1) "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) "that the damages resulting from that injury were measurable on a class-wide basis through use of a common methodology."[10] The plaintiffs submitted a single damages model that encompassed four theories of antitrust impact.[11] However, the plaintiffs' damages model did not match their only remaining theory of liability, thus warranting reversal of class certification.[12] In holding so, the Supreme Court clarified the standard for proving class-wide damages to satisfy Rule 23(b)(3)'s predominance requirement.

The Court held:

> [A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3). Calculations need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation. And for purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so.[13]

Damages in securities fraud cases are traditionally calculated by measuring the amount of artificial inflation in the company's stock due to defendants' alleged misrepresentations and omissions.[14] This inflation is the amount the plaintiff overpaid for the stock, and when the inflation was removed through the truth about the fraud being revealed, resulted in an out-of-pocket loss.[15] An event study, or regression analysis, has become the standard methodology deployed by plaintiffs — typically through expert evidence — to calculate the artificial inflation in the stock price.[16] That methodology seeks to understand what the corrective information was that revealed the falsity of the defendants' statements, measures the impact of that corrective information on the stock price and then removes any effect of non-fraud explanations from the negative return.[17] In most cases, at the merits stage, once discovery is completed, the parties exchange expert reports in which the

(continued on page 18)

---

[7] *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988); *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 283-84 (2014).

[8] *Halliburton*, 573 U.S. at 281-82; *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 594 U.S. 113, 119 (2021).

[9] *Goldman Sachs*, 594 U.S. at 124-27.

[10] *Comcast Corp. v. Behrend*, 569 U.S. 27, 30 (2013) (internal quotations omitted) (alteration in original).

[11] *Id.* at 31-32.

[12] *Id.* at 32.

[13] *Id.* at 35 (internal citations and quotations omitted).

[14] *See, e.g.*, *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 155 (1972); *Weston v. DocuSign, Inc.*, 348 F.R.D. 354, 368 (N.D. Cal. 2024).

[15] *DocuSign*, 348 F.R.D. at 368.

[16] *SEB Inv. Mgmt. AB v. Wells Fargo & Co.* (*Wells Fargo I*), No. 3:22-cv-03811, 2025 WL 1243818, at *8 (N.D. Cal. Apr. 25, 2025); *Forsythe v. Teva Pharm. Indus. Ltd*, 102 F.4th 152, 159 (3d Cir. 2024); *In re NII Holdings, Inc. Sec. Litig.*, 311 F.R.D. 401, 413-14 (E.D. Va. 2015).

[17] *DocuSign*, 348 F.R.D. at 368.

RULE 23(F) PETITIONS: A VEHICLE FOR CHALLENGING PLAINTIFFS' PROPOSED CLASS-WIDE DAMAGES MODEL

(continued from page 17)

calculation of damages is reduced to competing expert opinions of the inputs and outputs necessary to calculate the artificial inflation.[18]

Given that the event study has become standard practice as a damages methodology in securities cases, at the class certification stage, it has become typical for plaintiffs to simply explain, through an expert, the principles of the methodology to establish its connection to the liability theory and application class-wide, *i.e.*, that false statements resulted in inflation in stock price and that inflation can be measured over the class period for every class member to calculate their individual loss.[19] Since *Comcast*, courts in securities fraud class actions have routinely affirmed these descriptions of a class-wide damages methodology tied to a stock inflation theory of liability as satisfying *Comcast*.[20]

Seeking to make the *Comcast* standard more demanding for securities class action plaintiffs, the defense bar has advocated in a number of recent cases that an actual application of the specific facts of the case should be required at class certification rather than a theoretical explanation of the event study methodology to measure inflation.[21] In effect, these arguments amount to bringing forward expert disclosure on damages at class certification even before fact discovery has concluded.[22]

This article focuses on this new offensive and examines a trio of recent cases where defendants have sought appellate review of a class certification decision on the single basis of whether the plaintiffs have sufficiently demonstrated a class-wide damages model that meets Rule 23(b)(3)'s predominance standard post-*Comcast*.

II. *SEB Inv. Mgmt. AB v. Wells Fargo & Co.*, No. 25-3021 (9th Cir. July 17, 2025)

In *SEB Investment Management AB v. Wells Fargo & Co.*, a case in which Kessler Topaz is lead counsel, plaintiffs alleged securities fraud related to defendants' disclosures to investors about its diversity hiring practices, which plaintiffs alleged were misleading because of a widespread practice of fake interviews.[23] At class certification, plaintiffs described the typical damages methodology that is used in securities cases to measure inflation in the stock price.[24] Through an expert, plaintiffs described how this methodology would quantify the amount of artificial inflation that existed in Wells Fargo's common stock price during the class period, and which was caused by defendants' misrepresentations and omissions, by employing standard statistical tools such as a regression and event study.[25]

Defendants challenged the out-of-pocket damages methodology as insufficiently satisfying *Comcast*.[26] They claimed that references to unidentified financial tools and event studies should not be enough, for if they were, "[p]laintiffs' expert could copy and paste the entirety of his expert report in every securities fraud case and meet the predominance requirement."[27] Defendants asserted four principal arguments: (1) plaintiffs' expert failed to explain how the event study model applied to the specific facts of the case; (2) plaintiffs' expert failed to explain whether the challenged statements induced new inflation in the stock price or maintained preexisting inflation; (3) plaintiffs' expert did not take into account the unique circumstances of the case when proposing the damages methodology; and (4) plaintiffs' expert's methodology was flawed as to the use of the decline in the stock price on the date of the corrective disclosure as a starting point.[28]

---

18 *See, e.g.*, *Wells Fargo I*, 2025 WL 1243818, at *8.

19 *DocuSign*, 348 F.R.D. at 367-69.

20 *See Wells Fargo I*, 2025 WL 1243818, at *8; *DocuSign*, 348 F.R.D. at 367-69; *Teva*, 102 F.4th at 158-59; *NII Holdings*, 311 F.R.D. at 413-14.

21 *See, e.g.*, *Wells Fargo I*, 2025 WL 1243818, at *8; *Int'l Bhd. of Elec. Workers Loc. 98 Pension Fund v. Deloitte & Touche LLP* (*Deloitte & Touche I*), No. 3:2019-cv-03304, 348 F.R.D. 35, 46 (D.S.C. 2024); *In re Boeing Co. Sec. Litig.* (*Boeing I*), No. 1:2024-cv-00151, 2025 WL 2428481, at *2 (E.D. Va. Mar. 7, 2025).

22 *Deloitte & Touche I*, 348 F.R.D. at 44 (explaining that loss causation analyses are not appropriate at class certification as they "often incorporate[] information produced during discovery").

23 *Wells Fargo I*, 2025 WL 1243818, at *2.

24 *Id.* at *7.

25 *Id.*

26 *Id.* at *8.

27 *Id.*

28 *Id.*

The district court was not persuaded by defendants' *Comcast* arguments. The court held that plaintiffs adequately demonstrated that their damages were capable of measurement on a class-wide basis that was consistent with their theory of liability.[29] In so holding, the court explained that *Comcast* does not require plaintiffs to produce an out-of-pocket damages methodology that applies specifically to the instant case.[30] The court viewed "[d]efendants' loss causation arguments dressed as *Comcast* arguments" as "premature and not a bar to class certification."[31] In reaffirming the out-of-pocket or event study methodology as the standard method for calculating damages in securities cases, the district court granted plaintiffs' motion for class certification.[32]

Pursuant to Rule 23(f), defendants filed a petition for permission to appeal the class certification decision. They requested the Ninth Circuit's review of the question: "what do plaintiffs in securities litigation have to show regarding their damages methodology post-*Comcast* in order to certify a class?"[33]

Defendants argued that the district court erred in certifying the class, as "'[m]erely gesturing at a model or describing a general method will not suffice to meet this standard[,]'"[34] and "it is not enough for a plaintiff's expert to 'merely assert[] that he would be able to develop a model at some point in the future.'"[35] Defendants asserted that plaintiffs' expert's report committed to no damages methodology and instead made only "vague references" to an "unspecified approach."[36] Defendants reiterated for appellate review that "plaintiffs must propose a valid method for calculating damages that is specifically consistent with [their] liability case."[37] They urged the Ninth Circuit to review the district court's "manifestly erroneous" certification decision, as the court improperly applied the Supreme Court's guidance in *Comcast*; and even if not erroneous, the decision concerned an "unsettled and fundamental issue" of law warranting Rule 23(f) review.[38]

(continued on page 20)

---

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at *8-9.

33 *SEB Inv. Mgmt. AB v. Wells Fargo & Co.* (*Wells Fargo II*), No. 25-3021, Dkt. No. 1 at 2 (9th Cir. May 9, 2025).

34 *Id.* at 15 (quoting *Lytle v. Nutramax Labs., Inc.*, 114 F.4th 1011, 1032 (9th Cir. 2024)).

35 *Wells Fargo II*, Dkt. No. 1 at 15 (quoting *Ward v. Apple Inc.*, 784 F. App'x 539, 540 (9th Cir. 2019)) (alteration in original).

36 *Wells Fargo II*, Dkt. No. 1 at 15-18.

37 *Id.* at 22 (citation and internal quotations omitted).

38 *Id.* at 23.

RULE 23(F) PETITIONS: A VEHICLE FOR CHALLENGING PLAINTIFFS' PROPOSED CLASS-WIDE DAMAGES MODEL

(continued from page 19)

In opposition, plaintiffs explained that the district court's holding was in harmony with virtually every court on the *Comcast* issue — that at class certification, plaintiffs need only show that damages are capable of measurement on a class-wide basis consistent with their theory of liability, and need not prove loss causation (a merits issue) or detail how the damages methodology accounts for every fact in the case.[39] As the expert's methodology proposal was widely recognized as the gold standard for measuring damages in securities actions, defendants did not identify any unsettled issue for Rule 23(f) review.[40]

Indeed, the Ninth Circuit was not persuaded by defendants' arguments and denied their petition for permission to appeal, citing only to Rule 23(f) and *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959-60 (9th Cir. 2005), which sets forth the Court's stringent 23(f) review factors.[41]

III. *In re Deloitte & Touche LLP*, No. 24-258 (4th Cir. Feb. 13, 2025)

In *In re Deloitte & Touche LLP*, the plaintiff alleged the auditor defendants violated securities laws when they approved false and misleading statements concerning a company's nuclear project.[42] At class certification, the issue was whether plaintiff offered a damages model consistent with its liability case pursuant to *Comcast*.[43] Plaintiff's expert employed a standard event study and regression damages methodology that analyzed the decline in the company's stock price when defendants' misrepresentations and omissions materialized.[44] Defendants challenged plaintiff's damages model on two grounds: (1) plaintiff's expert advanced two damages theories — a materialization-of-the-risk theory and a corrective disclosure theory — but ignored the former theory; and (2) plaintiff's expert failed to isolate damages attributable to its claims against defendants versus the audited company.[45] In response, plaintiff argued that the expert's out-of-pocket methodology was "undoubtedly scientific and reliable," and "routinely employed by experts and uniformly credited by courts, including by the courts in the Fourth Circuit, to certify securities class actions around the country."[46]

The district court found the plaintiff's expert's damages methodology sufficient at the class certification stage.[47] The court explained that "the ultimate loss causation inquiry under either the corrective disclosure theory or the materialization of a concealed risk theory is the same: whether a misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security."[48] The court credited the use of the out-of-pocket methodology in other securities cases, explained that a methodology is not required to make an allowance for any damages caused by things other than the defendants' alleged fraud, and accordingly, granted class certification.[49]

The defendants filed a petition for permission to appeal the grant of class certification, specifically requesting the appellate court to consider the application of *Comcast* in securities cases.[50] Defendants argued that the district court abused its discretion when it found plaintiff satisfied Rule 23(b)(3)'s predominance requirement, asserting that (1) under *Comcast*, plaintiff was required to present a damages model that measured damages attributable only to the losses caused by defendants' audit opinions; and (2) plaintiff did not attempt to present a damages model supporting its materialization-of-the-risk theory.[51] In opposition, plaintiff re-asserted that courts routinely reject similar *Comcast* challenges to the out-of-pocket methodology, thereby precluding appellate review.[52] Plaintiff claimed

---

39 *Wells Fargo II*, Dkt. No. 7.1 at 8-19 (9th Cir. May 19, 2025).

40 *Id.* at 19-22.

41 *Wells Fargo II*, Dkt. No. 12 (9th Cir. July 17, 2025).

42 *Int'l Bhd. of Elec. Workers Loc. 98 Pension Fund v. Deloitte & Touche LLP* (*Deloitte & Touche I*), No. 3:2019-cv-03304, 348 F.R.D. 35, 41 (D.S.C. 2024).

43 *Id.* at 45, 52.

44 *Id.* at 46.

45 *Id.* at 45-47, 52.

46 *Id.* at 45 (citation and internal quotations omitted).

47 *Id.* at 52.

48 *Id.* at 46 (citation and internal quotations omitted).

49 *Id.* at 46-47, 52, 54.

50 *In re Deloitte & Touche LLP* (*Deloitte & Touche II*), No. 24-258, Dkt. No. 2-1 (4th Cir. Nov. 26, 2024).

51 *Id.* at 20-25.

52 *Deloitte & Touche II*, Dkt. No. 18 at 13-14 (4th Cir. Dec. 16, 2024).

that defendants' arguments failed to justify review under the Fourth Circuit's "sliding scale" factor analysis.[53]

In February 2025, the Fourth Circuit granted the Rule 23(f) petition exclusively on the *Comcast* damages issue.[54] Thereafter, the parties reached a settlement agreement.[55] The interlocutory appeal is in abeyance pending resolution of settlement proceedings in the district court.[56]

In contrast to *Wells Fargo*, the *Comcast* damages issue presented in *Deloitte* concerned two theories and multi-party fraud. Additionally, compared to the Fourth Circuit's standard of review, which employs a sliding scale of factors, the Ninth Circuit takes a more conservative approach, granting review of class certification decisions only in the narrowest of circumstances. These differing considerations may explain the Fourth Circuit's decision to grant defendants' 23(f) petition, and suggest that unique *Comcast* issues (e.g., auditor liability) impact the trajectory of the litigation and are thereby worthy of additional scrutiny.

IV. *In re The Boeing Co. Sec. Litig.*, No. 25-135 (4th Cir. May 2, 2025)

In *In re The Boeing Co. Securities Litigation*, plaintiffs alleged securities fraud related to Boeing's aircraft safety and safety procedures.[57] Plaintiffs moved for class certification, upon which defendants challenged the predominance requirement.[58] Defendants contested plaintiffs' expert's out-of-pocket methodology, asserting that it was inconsistent with plaintiffs' theory of liability under *Comcast* — that investors were damaged by purchasing the company's stock at inflated prices due to defendants' fraud.[59] Defendants argued that plaintiffs failed to address how their proposed class-wide damages model (1) would account for the changing mix of information that occurred during the class period; (2) was consistent with their liability theory that the misleading statements became material through repetition; and (3) was consistent with their materialization-of-the-risk liability theory.[60]

To the contrary, plaintiffs asserted that their damages methodology was tied to their theory of liability and was the "standard and well accepted" approach across securities cases.[61] Plaintiffs declared that *Comcast* does not require a detailed damages methodology and explained that "[d]efendants' arguments about the supposed difficulty of measuring inflation speak to the merits issue of proving damages, not to whether common issues predominate over individualized issues or whether the damages method is consistent with the liability theory."[62]

The district court granted class certification, rejecting defendants' propositions that plaintiffs' damages methodology was insufficient because "the vast majority of courts, including this Court, have interpreted Rule 23(b)(3) and *Comcast* to permit the standard out-of-pocket method for calculating damages to be used in securities class actions."[63] Plaintiffs were not required "to conduct detailed damages modeling to meet Rule 23's predominance requirement at the class certification stage."[64]

Pursuant to Rule 23(f), defendants appealed the class certification decision and requested the Fourth Circuit's review of *Comcast* requirements.[65] Defendants maintained that *Comcast* requires evidentiary proof of a case-specific damages methodology, and plaintiffs' failure to provide such proof made the class certification decision erroneous and ripe for review.[66] They requested the Fourth Circuit follow the same course as in *Deloitte* and provide clarity as to whether securities plaintiffs satisfy their evidentiary burden under *Comcast* by "having their expert recite the generally applicable rule for measuring damages" and promise to develop a case-specific methodology at a later date.[67] In opposition, plaintiffs maintained the position that their damages methodology satisfied *Comcast* and class certification was appropriate.[68] They claimed that defendants fundamentally misunderstand *Comcast*, for at the class certification stage, damages methodologies are presented merely to show that individualized issues will not predominate.[69] The details of measuring inflation are merits issues that are distinct from *Comcast*'s mandate that plaintiffs demonstrate the out-of-pocket methodology fits their theory of liability.[70] On May 2, 2025, the Fourth Circuit granted the petition for permission to appeal.[71] The appeal is currently being briefed.

(continued on page 22)

---

53 *Id.* at 16-18.

54 *Deloitte & Touche II*, Dkt. No. 26 (4th Cir. Feb. 13, 2025).

55 *Deloitte & Touche I*, Dkt. No. 300 (D.S.C. Apr. 29, 2025).

56 *Deloitte & Touche I*, Dkt. No. 302 (D.S.C. May 2, 2025).

57 *In re Boeing Co. Sec. Litig.* (*Boeing I*), No. 1:2024-cv-00151, 2025 WL 2428481, at *1 (E.D.Va. Mar. 7, 2025).

55 *Deloitte & Touche I*, Dkt. No. 300 (D.S.C. Apr. 29, 2025).

58 *Id.* at *2.

59 *Id.*

60 *Boeing I*, Dkt. No. 115 at 10-24 (E.D.Va. Jan. 21, 2025).

61 *Boeing I*, Dkt. No. 129 at 3 (E.D.Va. Feb. 20, 2025).

62 *Id.* at 4-5.

63 *Boeing I*, 2025 WL 2428481, at *2.

64 *Id.*

65 *In re The Boeing Co. Sec. Litig.* (*Boeing II*), No. 25-135, Dkt. No. 2 (4th Cir. Mar. 21, 2025).

66 *Id.* at 12-24.

67 *Id.* at 5.

68 *Boeing II*, Dkt. No. 30 at 10-13 (4th Cir. Apr. 3, 2025).

69 *Id.* at 4, 10-13.

70 *Id.*

71 *Boeing II*, Dkt. No. 36 (4th Cir. May 2, 2025); *In re: The Boeing Co.* (*Boeing III*), No. 25-1492 (4th Cir. May 2, 2025); *In re Boeing Co. Sec. Litig.* (*Boeing I*), No. 1:2024-cv-00151, Dkt. No. 159 (E.D.Va. May 2, 2025).

RULE 23(F) PETITIONS: A VEHICLE FOR CHALLENGING PLAINTIFFS' PROPOSED CLASS-WIDE DAMAGES MODEL

(continued from page 21)

In their opening brief, defendants challenged plaintiffs' expert's class certification reports, which provided two approaches to measuring damages: (1) constant-dollar inflation; and (2) constant-percentage inflation.[72] Defendants argued that these approaches — which should have been fatal to class certification — are inconsistent with plaintiffs' theories of liability for three reasons: (1) regarding plaintiffs' materiality-through-repetition theory of liability, any alleged inflation in Boeing's stock price created by the earliest alleged misstatements must be less than the cumulative inflation created by the later repetition of the same or similar statements; (2) the approaches fail to account for the recurring reports of quality issues during the class period; and (3) the proposed methodology to calculate the constant level of inflation using the full decline in Boeing's stock price after the Alaska Airlines accident is inconsistent with plaintiffs' materialization-of-the-risk theory of causation.[73]

Defendants urged the Fourth Circuit to review the district court's holding that *Comcast* is satisfied merely by invoking the generally applicable out-of-pocket standard for damages in securities cases, and require an exacting standard that "plaintiffs need a methodology for determining *how much* [the out of pocket recovery] is for each investor . . . consistent with their liability theory that the inflation in the stock price increased over time."[74] They proclaim that plaintiffs and their expert must propose such a methodology at class certification to establish that common questions predominate over individual ones.[75] As they interpret *Comcast*'s "evidentiary proof" requirement, "plaintiffs cannot offer an expert at class certification who pledges to develop a classwide damages methodology *after* the class is certified."[76] Defendants plead that securities plaintiffs must be held to the same standard as antitrust plaintiffs — requiring an actual methodology for computing artificial inflation.[77] Plaintiffs are expected to respond by October 17, 2025.[78]

Contrary to *Wells Fargo*, the *Comcast* issue in *Boeing* concerned distinct theories of liability, such as materiality-through-repetition and materialization-of-the-risk theory of loss causation. Because of these unique theories, courts may be inclined to evaluate whether the general requirements of *Comcast* apply, or if more scrutiny is warranted for class certification. As evinced in *Deloitte*, the Fourth Circuit takes a broader approach to permitting Rule 23(f) review, applying a sliding scale of factors, different from the Ninth Circuit's standard of review. The decision to grant defendants' petition may suggest the Fourth Circuit may take this opportunity to clarify the requirements of *Comcast* under more complex factual scenarios.

Conclusion

Since *Comcast* was decided, its impact has been a highly contested issue at class certification. In securities cases, district courts have consistently construed *Comcast*'s class-wide damages methodology mandate broadly, so as not to bar class certification. In fact, district courts credit the description of a traditional out-of-pocket methodology as both sufficient for satisfying Rule 23(b)(3)'s predominance requirement and a tried-and-true methodology for establishing damages in securities cases. Circuit courts that have deep experience with securities fraud cases should understand that the types of issues defendants often raise at class certification regarding damages are merits issues not suitable for determination at this stage. Nevertheless, the plaintiffs' bar expects that defendants will continue to formulate creative challenges to otherwise standard damages methodologies at class certification and seek review to circuit courts through Rule 23(f) petitions. Whether this results in a new equilibrium in the evidence required for damages methodologies at class certification will unfold in decisions over the next few years. ■

---

[72] *Boeing III*, Dkt. No. 25 at 38 (4th Cir. July 21, 2025).

[73] *IId.* at 19-24.

[74] *Id.* at 4 (emphasis in original).

[75] *Id.*

[76] *Id.* at 27 (emphasis in original).

[77] *Id.* at 33.

[78] *Boeing III*, Dkt. No. 44 (4th Cir. Sept. 2, 2025).

WHAT'S TO COME

FEBRUARY 2026

National Association of Public Pension Attorneys (NAPPA) Winter Seminar

Feb 18 – 20

Nashville, TN ■ W Nashville Marriott

MARCH 2026

California Association of Public Retirement Systems (CALAPRS) General Assembly

March 8 – 11

Carlsbad, CA ■ The Westin Carlsbad Resort & Spa

Council of Institutional Investors (CII) 2026 Spring Conference

March 9 – 11

Washington, DC ■ Salamander Hotel

20th Annual Rights & Responsibilities of Institutional Investors (RRII) Conference

March 12

Amsterdam, Netherlands
Renaissance Amsterdam Hotel

APRIL 2026

Pennsylvania State Association of County Controllers (PSACC) 2026 Spring Conference

April 22 – 24

Harrisburg, PA ■ The Central Hotel

Texas Association of Public Employee Retirement Systems (TEXPERS) 2026 Annual Conference

April 26 – 29

Galveston, TX ■ San Luis Resort

MAY 2026

State Association of County Retirement Systems (SACRS) 2026 Spring Conference

May 12 – 15

Olympic Valley, CA ■ Everline Resort & Spa

JUNE 2026

National Association of Public Pension Attorneys (NAPPA) Legal Education Conference 2026

June 16 – 19

Grand Rapids, MI ■ Amway Grand Plaza

Florida Public Pensions Trustees Association (FPPTA) 42nd Annual Conference

June 28 – July 1

Orlando, FL ■ Renaissance Orlando SeaWorld

AUGUST 2026

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

August 2 – 5

Monroe County, PA ■ Kalahari Resorts and Conventions

280 King of Prussia Road
Radnor, PA 19087

EDITORS

Darren J. Check, Esquire

Nicole B. Schoeffling, Director of Marketing

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

---

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

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

KESSLER TOPAZ MELTZER CHECK LLP

KTMC.COM