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2020 Securities Litigation Year in Review

2020 was another active year for securities litigation in the United States. Federal securities class actions continued to be filed at record levels notwithstanding the COVID-19 pandemic. In fact, a number of those newly filed cases involved COVID-related claims. The number and size of announced settlements of securities cases also set a record, including two mega-settlements of more than $1 billion and a number of other large settlements.

Our 2020 Securities Litigation Year in Review focuses on significant securities-related decisions from the U.S. Supreme Court and the federal appellate courts. Perhaps the most significant development—though it remains to be seen—was the Supreme Court's grant of certiorari to review the Second Circuit's affirmance of class certification in the Goldman Sachs case. The decision in that case will bear upon whether defendants have a realistic chance of defeating class certification in most securities cases; at present, class certification is an uphill battle for defendants.

There was also notable activity in the federal appellate courts on key issues involving scienter, loss causation, and opinion statements following the Supreme Court's landmark *Omnicare* decision. We have also noted select important decisions by federal district courts and state courts in litigation against companies and their officers and directors.

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INTRODUCTION

2020 was another active year for securities litigation in the United States. Although securities case filings were down from 2019, federal securities class action cases continued to be filed at historically high levels notwithstanding the COVID-19 pandemic.[1] The number and size of announced settlements of securities cases set a record—$5.84 billion in 2020 compared with $3.62 billion in 2019—an increase of 61% year over year.[2] The 2020 settlement amounts included two mega-settlements of more than $1 billion,[3] and three other settlements were substantially larger than any settlement in 2019.[4]

A number of the securities cases filed in 2020 involved COVID-related claims. The first two COVID-related securities cases were filed on March 12, 2020, against a cruise line and a pharmaceutical company, alleging misrepresentations about the safety and efficacy of each company's products. An additional 17 COVID-related securities cases were filed through year-end 2020 targeting companies in the travel, health care, and financial services industries. The allegations in those cases involved misrepresentations or failure to disclose business risks associated with COVID-19, alleged misrepresentations or omissions about how COVID-19 was impacting the operations of the company, or false or exaggerated claims about COVID-19 tests and vaccines. The filings included cases against foreign issuers as well as cases involving COVID-19 in initial public offering prospectuses and registration statements.

Another noteworthy trend was the continuing increase in securities case filings against non-U.S. based companies listed on a U.S. exchange. Of the 324 securities cases filed, 88 of those cases (27%) were against foreign issuers, an increase from 2019. A number of these cases were actions against cryptocurrency and cannabis companies, many of which are non-U.S. based, including 11 cases filed in a single day in the Southern District of New York against exchanges and issuers alleged to have been engaged in the unlawful sale of unregistered digital tokens.[5] The country with the highest number of cases filed against companies based there was China, including the *Luckin Coffee* case, one of the largest cases of alleged securities fraud involving a Chinese company trading on the U.S. markets,[6] followed by Canada, the United Kingdom, and Israel.

Our 2020 Securities Litigation Year in Review focuses on significant securities-related decisions from the Supreme Court and the federal appellate courts. Perhaps the most significant development—though it remains to be seen—was the Supreme Court's grant of certiorari to review the Second Circuit's affirmance of class certification in the Goldman Sachs case. The decision in that case will bear upon whether defendants have a realistic chance of defeating class certification in most securities cases; at present, class certification is an uphill battle for defendants. There was also notable activity in the federal appellate courts on key issues involving scienter, loss causation, and opinion statements following the Supreme Court's landmark *Omnicare* decision.

We also highlight important developments relating to federal forum provisions enacted by many Delaware companies following the Supreme Court's decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*[7] affirming the nonremovability of claims under the Securities Act of 1933. This year, following the Delaware Supreme Court's decision upholding federal forum provisions under Delaware law, a California state court exercised its discretion to dismiss a securities class action based on a federal forum provision after concluding that it did not violate California law or policy.

Finally, we provide an update on developments in the directors and officers liability arena and D&O insurance marketplace.

FALSE AND MISLEADING STATEMENTS

Second and Third Circuits Address Omissions that Render Statements of Opinion Actionable

The Supreme Court's landmark decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* established clear standards for evaluating the scope of liability for false statements of opinion by issuers and others under the Securities Act of 1933.[8] The Court held that a statement of opinion is false under the securities laws only if the speaker does not genuinely believe it to be true or if it omits information that in context would cause the statement to materially mislead a reasonable investor. The Court made clear that whether a statement of opinion is false "always depends on context," including other statements by the speaker, other publicly available information, and the customs and practices of the relevant industry. In 2020, the Second and Third Circuits issued important decisions addressing when a statement of opinion may be actionable under the *Omnicare* framework.

In *Abramson v. NewLink Genetics Corporation*, the Second Circuit vacated in part the dismissal of a securities action alleging that a drug manufacturer made misstatements about a clinical trial for a pancreatic cancer drug.[9] The case is notable for its analysis of what is required under Rule 10b-5 and *Omnicare* for a plaintiff to adequately allege that a defendant's statements of opinion are materially misleading.

Following the failure of a Phase 3 clinical trial for NewLink's pancreatic cancer drug and a consequent decline in NewLink's stock price, the plaintiffs filed suit alleging the defendants materially misrepresented the treatment's efficacy, the scientific literature related to pancreatic cancer, and the design of the clinical trial. The district court dismissed the complaint after finding that the challenged statements were not plausibly alleged to be false or materially misleading.

On appeal, the Second Circuit affirmed the dismissal of claims relating to statements about the efficacy of the treatment as mere "puffery" because such "generic, indefinite statements of corporate optimism typically are not actionable" unless the speaker knew they were untrue, and the plaintiffs had failed to plausibly allege such knowledge.[10] However, the court vacated the dismissal of claims attacking the defendants' opinion statements about the scientific literature and the design of the clinical trial, holding that when a statement of opinion implies facts or the absence of contrary facts, and the speaker knows or reasonably should know that contrary material facts were omitted, then liability under Rule 10b-5 may follow.

The plaintiffs' claims regarding the scientific literature and design of the clinical trial focused on statements by a NewLink co-founder that: (i) in "all the major studies, pancreatic cancer … survival rates come between 15 to 19, 20 months. That's it." ("September Statement"); and (ii) "[i]t is our belief that in our study today we don't have any reason to believe that median survival for these patients will be more than low 20s" ("March Statement").[11] The Second Circuit analyzed these statements using the *Omnicare* framework. It held that whether a statement of opinion implies facts is based on the perspective of a reasonable investor, and the expectations of a reasonable investor should be assessed in context, including the customs and practices of the relevant industry.

With respect to the September Statement, the court found that it plausibly conveyed to a reasonable investor the supposed fact that no credible studies had shown resected pancreatic cancer patients to have survival rates longer than 20 months. The context and specificity of the statement could lead a reasonable person to think that the speaker had investigated his comments and that no meaningful evidence contradicted the life-span claim. The court noted that half of the American studies alleged by the plaintiffs in the complaint showed significantly longer survival rates—from 25 to 43 months. While the court acknowledged that a speaker "has no obligation to disclose *all* contrary facts irrespective of their significance, a jury could conclude that the speaker's confident statement and his omission of the noted studies' findings were a bridge too far."[12] When omitted contrary facts substantially undermine the conclusion a reasonable investor would draw from a statement of opinion, that statement is misleading and actionable.

Likewise, the court held that the plaintiffs plausibly alleged that the March Statement was misleading. In response to a question whether analysts could assume that the control [group survival rate] is "24 or 25 months," a NewLink cofounder stated, "it is our belief that in our study today we don't have 'any reason' to believe that the median survival [rate] for these patients will be more than low 20s."[13] The court held that by stating that NewLink did not have "any reason" to believe the control group's survival rate would be longer than "the low 20s" in months, the speaker implied that there were no competing facts on survival rates, not just that he deemed competing facts less persuasive. Because several studies cited in the complaint contradicted this statement of opinion, a jury could conclude that the March Statement was misleading, and so the district court erred in dismissing the claim.

In *Jaroslawicz v. M&T Bank Corporation*, the Third Circuit reversed the dismissal of a putative securities class action against M&T Bank Corporation and Hudson City Bank following their merger. This was because the discussion of material risk factors in the joint proxy statement failed to include company-specific details about the condition of M&T's regulatory compliance program as required by Item 105 of Regulation S-K, despite the bank's awareness that the program was the subject of extensive review by federal regulators and that failure to pass regulatory scrutiny could sink the merger.[14] Item 105 requires issuers to include "Risk Factors" discussing the most significant factors that make an investment in the registrant or offering speculative or risky. While acknowledging that registrants need not list speculative facts or unproven allegations to satisfy Item 105, the court concluded

that the bank had a duty to disclose more than generic or boilerplate information about the regulatory scrutiny that lay ahead in order to adequately explain the potential risks to the merger; it thus held that the shareholders had met their burden of pleading actionable omissions. The court also affirmed the district court's ruling that the plaintiff had failed to adequately allege that the defendants' opinion statements were misleading. Finally, in *dicta*, the court called for a "more searching inquiry" into the upward trend of the number of securities class actions, which persist "despite reams of academic study, steady questions from the courts, and periodic Congressional attention."[15]

The joint proxy was declared effective on February 22, 2013, with a shareholder vote scheduled for April 2013. A few days before the vote, the banks announced that they needed additional time to obtain regulatory approval. In a supplemental prospectus, M&T disclosed that the Federal Reserve Board had identified concerns about M&T's anti-money laundering compliance program and that the closing would be pushed back pending regulatory approval. While awaiting that approval, the Consumer Financial Protection Bureau ("CFPB") announced an enforcement action against M&T for offering customers free checking accounts before switching them to fee-based accounts without notice. This practice allegedly had been in place at the time the merger was announced; M&T ultimately agreed to pay more than $2 million to settle the CFPB action. Regulatory approval of the merger did not occur until approximately two and a half years later.

The operative complaint alleged two theories of omissions to establish liability under Section 14(a): First, the joint proxy failed to discuss material risk factors related to M&T's noncompliant anti-money laundering practices and deficient consumer checking program, as required by Item 105. Second, the failure to discuss those material risk factors rendered the bank's opinion statements about its adherence to regulatory requirements and the prospects for prompt regulatory approval of the merger misleading. Based on its review of prior SEC guidance regarding disclosure of risk factors, the Third Circuit held that "while Item 105 seeks a concise discussion, free of generic and generally applicable risks, it requires more than a short and cursory overview and instead asks for a full discussion of the relevant factors."[16] The court held that the risk disclosures regarding M&T's anti-money laundering practices and its consumer checking program failed to meet this standard. While M&T "offered breadth where depth is required" to comply with Item 105, the court concluded that the bank should have specifically linked its general statements of each risk to its industry, company, or investment using details that connected the pending merger review to its existing and anticipated business lines.[17] Accordingly, the shareholders were allowed to proceed with their suit on this theory.

In contrast, the court affirmed the district court's ruling that the plaintiffs had failed to allege actionably misleading opinion statements regarding when the merger might close or the state of M&T's anti-money laundering compliance program. Citing *Omnicare*, the court noted that the plaintiffs cannot state a claim simply by alleging that an opinion proved to be wrong. In the absence of any allegation that M&T offered an insincere opinion, "it is not an untrue statement of material fact regardless of whether an investor can ultimately prove the belief wrong."[18] The court also held that the joint proxy adequately disclosed the duration of the due diligence efforts prior to the merger and that general allegations of negligence in conducting due diligence do not suffice to state a claim that opinion statements were misleading.

Tweets Give Rise to an Actionable Securities Fraud Claim

In a case highlighting the securities litigation risks attendant to social media posts, the Northern District of California denied the defendants' motions to dismiss a consolidated securities class action alleging that Tesla cofounder and CEO Elon Musk misled investors by tweeting about a potential going-private transaction.[19] On August 7, 2018, Musk tweeted, "Am considering taking Tesla private at $420. Funding secured."[20] On August 13, 2018, Musk tweeted that he was working with specifically named financial advisers and legal counsel "on the proposal to take Tesla private."[21] Tesla's stock price increased significantly after the tweets, related public statements, and colloquy with Twitter users, but over the following weeks, as it became clear that Tesla would remain public, its shares fell 15%. Later, several securities class action complaints were filed, and the SEC commenced an enforcement action.

In support of its motion to dismiss, Tesla argued that Musk's August 7, 2018, tweet was not false but merely an aspirational statement of opinion. The court disagreed, noting that the tweet "included the highly-specific price of $420 at which shares would be bought for the going-private transaction, and because his tweet followed with 'funding secured,' a

reasonable investor would have interpreted it as something more than a speculative amorphous opinion about future possibilities."[22] The court also noted that the complaint alleged that investors and analysts, as well as Tesla's Senior Director of Investor Relations, did not read the tweet as aspirational opinion but rather treated the statement seriously. The court concluded that the tweet could have been read by a reasonable investor to mean that Tesla had unconditionally secured complete funding for the transaction, which was not true according to the complaint.

As a result, the court held that the plaintiff had adequately pled that the tweet was false or misleading. The court likewise held that the plaintiff adequately pled that the August 13, 2018, tweet was false or misleading. The court concluded that nothing in the statement naming specific financial advisers and legal counsel to assist with the proposal to take Tesla private suggested it was merely aspirational. Rather, the statement appeared factual and, according to the complaint, was untrue.

In addition, the court rejected the defendants' argument that Musk was tweeting as a potential bidder rather than as Tesla's CEO, because the company had formally notified investors in 2013 that it would use Musk's personal Twitter account as a means of communicating additional information about the company to investors. While the case is still in the preliminary stages, the ruling underscores that the securities laws apply in the social-media realm and that companies and their leaders should exercise appropriate caution when making social-media statements that could affect the market.

SCIENTER

First Circuit Holds Disclosures Not Cited in Complaint Preclude Inference of Scienter

In *Mehta v. Ocular Therapeutix, Inc.*, the First Circuit considered whether shareholders in a securities class action adequately pled facts giving rise to a strong inference that defendants acted with scienter in a case involving alleged misstatements by Ocular Therapeutix, Inc. relating to its manufacture of an optical drug product.[23] The case provides guidance that in determining whether a plaintiff has met the pleading standard, a court must consider the complaint in its entirety and not just whether an individual allegation, scrutinized in isolation, meets the standard. The case is also a reminder that informative or cautionary disclosures that are omitted from a complaint may undercut any inference of scienter.

In 2015, Ocular submitted a new drug application to the U.S. Food and Drug Administration for Dextenza, a treatment for ocular pain following ophthalmic surgery. In February 2016, the FDA inspected Ocular's manufacturing facility for compliance with current Good Manufacturing Practice ("cGMP") regulations and provided a number of "inspectional observations" on Form 483 detailing its findings. In its Form 10-K filed in March 2016, Ocular stated that it used cGMP in the development and production of its products and also disclosed receipt of the Form 483. In July 2016, Ocular disclosed that the FDA had rejected its new product application for Dextenza based on deficiencies in the manufacturing process. Ocular's stock price dropped 14.5%.

In January 2017, Ocular submitted a second new product application for Dextenza. Two months later, its Form 10-K repeated the statements from its prior annual report regarding cGMP and the receipt of the February 2016 Form 483. In May 2017, the FDA issued a new Form 483 following reinspection of Ocular's manufacturing facility that again provided observations relating to compliance with cGMP. In a May 2017 call with analysts, a senior executive twice stated that Ocular had a "fully developed manufacturing process."[24] After Ocular issued a press release on the same day disclosing the new Form 483, its stock price dropped 16.15%. On July 12, 2017, Ocular announced that the FDA had rejected the new product application for Dextenza based on issues observed during reinspection of the manufacturing facility, and its stock price dropped 12.24%.

Thereafter, several shareholders filed securities fraud complaints against Ocular and two senior executives. The district court granted the defendants' motion to dismiss. On appeal, the plaintiffs argued that Ocular's statements in its annual reports that it manufactured Dextenza using current cGMP and the statements during the May 2017 analyst call that Ocular's manufacturing process was "fully developed" were materially false and misleading. The plaintiffs also contended that a strong inference of scienter could be drawn from those alleged misrepresentations because defendants had received the Forms 483 in February 2016 and May 2017 that specifically apprised them of Ocular's manufacturing problems.

The First Circuit disagreed, holding that the complaint, viewed "holistically," failed to allege facts giving rise to a strong inference of scienter. The court held that the Form 10-K statements that Ocular used current cGMP at its facility did not support a strong inference of scienter because those annual reports also contained extensive disclosures regarding, among other things, the company's receipt and response to the February 2016 Form 483 as well as the relevance and implications of the FDA's observations regarding Ocular's manufacturing capability.

The court also pointed out the extensive discussion of the Form 483 in the "Risk Factors" section of the Form 10-K disclosures, which addressed not only Ocular's proposed responses to the observations but also the potential penalties and consequences if the issues could not be resolved. Likewise, the court rejected the plaintiff's argument that two references to a "fully developed" manufacturing process during the May 2017 analyst call supported an inference of scienter simply because Ocular had previously received the February 2016 and May 2017 Forms 483.[25] The court found that other statements during the call made clear that the FDA considered Ocular's manufacturing process to be deficient and that those disclosures contravened the plaintiff's characterizations. Instead, the court concluded that the more reasonable and compelling inference to be drawn was that the executive spoke with nonfraudulent intent when describing Ocular's manufacturing process as "fully developed."[26] Accordingly, the court affirmed dismissal of the complaint with prejudice.

Hindsight Allegations About Failed Business Expansion Fail to Support Scienter

In *In re Target Corporation Securities Litigation*, the Eighth Circuit considered whether the plaintiffs' complaint was pled with sufficient particularity to meet the heightened pleading standards under the Private Securities Litigation Reform Act. Specifically at issue was whether the complaint contained "facts giving rise to a strong inference" that the defendants acted with scienter.[27]

The allegations of the complaint arose from alleged misstatements made by Target, through certain of its executives, regarding its failed expansion into Canada through its wholly owned subsidiary Target Canada. According to the plaintiffs—Target shareholders—these misstatements included "descriptions of Target's supply chain and IT infrastructure in annual 10-K filings with the SEC, as well as early descriptions of Target Canada's efforts to prepare for and open its first stores … the response to problems with Target Canada's supply chain and IT infrastructure as they became more apparent … [and] several earnings updates paint[ing] an overly optimistic picture of Target Canada's profitability."[28] Considering these allegations, the court held that none satisfied the Private Securities Litigation Reform Act's ("PSLRA") heightened scienter requirement.

The court highlighted a series of representative alleged misstatements that typified the deficiencies of the plaintiffs' complaint. For example, the alleged March 28, 2013, misstatement—"[g]oing into the last year … [Target Canada] needed to build out the supply chain [and] build the technology…. We achieved all … of those objectives.…We're right where we want to be right now"—was not actionable because the plaintiffs failed to allege *when* Target's executives became aware that this statement was false.[29]

The same problem thwarted the plaintiffs' claims with respect to alleged misstatements regarding the proposed solution to problems involving Target Canada's inventory replenishment systems. Indeed, the court noted that the plaintiffs' complaint alleged that the solution was "inadequate in hindsight," but claims alleging "fraud by hindsight" are not cognizable under the PSLRA. Overall, the court concluded, the allegations of the complaint underscored the conclusion that "Target executives did not understand the magnitude of the problems they faced," and this conclusion was fatal to the plaintiffs' fraud claims.[30] The court also noted that statements like "[w]e're right where we want to be right now" and "we feel really good about where we are today" constituted inactionable puffery because they could not be confirmed or rebutted by objective proof.

Corporate Scienter Requires a Showing that Alleged Misstatement Was "the Product of Collective Fraudulent Conduct"

The Second Circuit's opinion in *Jackson v. Abernathy* clarified the heightened burden facing plaintiffs attempting to plead scienter with respect to a corporate defendant in the absence of allegations of scienter by an individual attributable to the corporation.[31] In that case, the plaintiff alleged that Kimberly-Clark Corporation and Avanos Medical Inc., manufacturers of personal protective equipment, violated Section 10(b) and Rule 10b-5 based on alleged misrepresentations by senior executives relating to the quality and infection-prevention capabilities of a particular surgical gown that allegedly

failed numerous quality-control tests. The plaintiff had abandoned claims against the executives and relied instead on statements of three mid-level employees that the product's performance problems were "well known" at the companies to meet his burden of pleading corporate scienter.

The court disagreed, holding that a strong inference of corporate scienter cannot be pled by reliance on statements of employees who never communicated their knowledge directly to senior executives or whose knowledge cannot fairly be imputed to the corporation. This case is a reminder that where the defendant is a corporation, a plaintiff must show that the alleged misstatement was not a case of mere mismanagement or misconduct by lower-level employees, but rather the product of collective fraudulent intent.

As the Second Circuit explained, the most straightforward way to raise a strong inference of corporate scienter is to impute scienter from an individual who made an alleged misrepresentation or to identify an officer or director who was involved in the dissemination of the fraud and whose conduct may be imputed to the corporation. In this case, the plaintiff's allegations failed to identify any individual whose scienter could be imputed to the corporate defendants. The complaint failed to identify any specific senior executives who had actually received warnings about the product's alleged performance problems described by the three mid-level employees, and included only general allegations that warnings that had been made available to unidentified senior executives. The court stated: "In short, [the] proposed amended complaint sets forth allegations that three employees knew of problems with the [product], but it provides no connective tissue between those employees and the alleged misstatements."[32]

The Second Circuit also acknowledged that in "exceedingly rare instances, a statement may be so 'dramatic' that collective corporate scienter may be inferred."[33] However, the court concluded that the plaintiff's mere allegation that the product in question was a "key product" for the corporate defendants was plainly insufficient to satisfy that higher standard of particularly egregious wrongdoing warranting an inference of collective corporate scienter.

This decision will likely make it more difficult for plaintiffs in the Second Circuit to rely solely on reports from confidential witnesses or former employees regarding their general awareness of or discussions about allegedly misrepresented facts in order to meet their heightened burden of pleading corporate scienter in the absence of specific allegations that the relevant reports were provided to the individuals who allegedly made the misrepresentations.

Ninth Circuit Holds that Plausibility Matters in Analyzing Scienter Allegations

In *Nguyen v. Endologix, Inc.*, the Ninth Circuit affirmed dismissal of a putative securities fraud class action against a medical device manufacturer, holding that the plaintiff failed to allege facts creating a strong inference of scienter in support of claims that Endologix misled investors about the likelihood of FDA approval of a new aneurysm sealing product.[34] Applying the PSLRA's "strong inference" standard, the court held that the complaint came up short. The court rejected the plaintiff's core theory of liability—that the defendants knew the FDA would not approve the product or at least not on the timeline the company had promised, due to problems experienced in Europe by patients using the device—as having no basis in logic or common experience. Rather, the court concluded that the more plausible inference was that the defendants made optimistic statements about the prospects for FDA approval based on the results of a clinical trial in the United States and modulated that optimism when later results raised questions. The case is an important reminder that plausibility matters in assessing the strength of a proposed scienter inference under the PSLRA.

In 2013, Endologix received approval from European regulators to introduce its new device in Europe and also sought premarket approval from the FDA to conduct a clinical trial in the United States. Over the next several years, Endologix allegedly learned that patients in Europe experienced problems with "migration," movement from the location within the body where the device had been placed. Despite these results, Endologix executives allegedly made several "optimistic statements" in earnings calls regarding the likelihood of FDA approval of the device sometime in 2017.

By late 2016, Endologix announced that it would not receive approval of its product on the company's projected timeline because the FDA had requested an additional two years of clinical data about patients in the clinical trial. After the announcement, the company's stock price fell by over 20%. Several months later, Endologix announced that it no longer intended to seek FDA approval for the device and would focus

on developing a second generation device that would not be available until 2020, resulting in a stock price drop of more than 36%.

Following the second stock drop, the plaintiff brought suit, alleging that at the time of the optimistic statements about likely FDA approval of the device in 2017, company management knew—based on the migration experienced by patients in Europe—that obtaining FDA approval was not feasible. To support her claims, the plaintiff relied heavily on statements by a confidential witness, purportedly the company's former Director of Research and Development. The trial court granted the defendants' motion to dismiss on grounds that the plaintiff had not adequately alleged scienter.

On appeal, the Ninth Circuit affirmed on the same grounds. The court held that it "[did] not make a whole lot of sense" that defendants would tout the likelihood of FDA approval when "defendants knew the FDA would not approve [the device], or at least that it would not do so on the timeline defendants were telling the market."[35]

Considering the economic realities underlying the allegations, the court noted that the plaintiff's theory "depends on the supposition that defendants would rather keep the stock price high for a time and then face the inevitable fallout once [the device's] 'unsolvable' migration problem was revealed," and found that that theory "does not resonate in common experience."[36] The court explained that the plaintiff's theory was particularly implausible because there were no allegations that Endologix intended to artificially inflate the stock price and later sell off its stock or sell the company at a premium.

The court held that to the extent the plaintiff's allegations raised any inference of scienter, it could not conclude that the inference was at least as compelling as an opposing inference to be drawn from the same alleged facts; namely, that the defendants' optimistic statements were based on the results of the U.S. clinical trial and were modulated when problems arose in later testing. Moreover, the court held that the plaintiff's reliance on a confidential witness—whose statements were filled with "alarming adjectives" but did not contain "any detail about the supposed device migration problems … encountered in the European channel"—did not overcome the absence of facts giving rise to a strong inference of scienter.[37]

Second Circuit Holds Knowing Disclosure of Incomplete and Misleading Information Raises "Strong Inference" that Defendant Acted Recklessly

The Second Circuit upheld a Section 10(b) complaint alleging that a REIT fraudulently failed to disclose a loan to a major tenant that was struggling to pay rent. In *Setzer v. Omega Healthcare Investors, Inc*., investors in Omega Healthcare Investors, Inc. alleged that the defendants misled investors by failing to disclose a loan of $15 million to Omega's second largest tenant, Orianna Health Systems.[38]

The district court dismissed the complaint on scienter grounds, even though it held that the omitted information about the loan was material. The district court noted that the plaintiffs did not adequately allege a GAAP violation or other accounting irregularity, which would bear on the issue of recklessness. The district court also focused on the fact that Omega generally disclosed Orianna's weak financial condition to investors, holding that an inference of scienter was not as compelling as the opposing inference that the defendants provided investors with the information they believed was sufficient to make the market aware of Orianna's deteriorating financial situation.

The Second Circuit reversed, holding that the complaint raised a strong inference that the defendants acted at least recklessly in choosing to disclose incomplete and misleading information about Orianna's financial condition. The court noted that a scienter inference can arise from specific allegations about the defendants' knowledge of facts or access to information contradicting their public statements. Thus, the analysis should focus on the defendants' degree of knowledge and the seriousness of the impact that resulted from their conduct.

The court reasoned that Orianna was one of Omega's top tenants, representing 7% of Omega's investment portfolio, and therefore Orianna's inability to pay rent without a loan from Omega was material. Because Orianna's performance plainly impacted Omega's overall financial health, "Omega had to know that revealing the full extent of Orianna's performance problems would have been troubling news to its investors."[39]

Moreover, while Omega knew that its loan effectively would be going directly back into its pocket, the defendants chose to represent Orianna's payments as "partial monthly payments" of rent, suggesting that Orianna was on the road to recovery. The court

concluded that the alleged facts created a compelling inference that the defendants consciously decided not to disclose the loan in order to play down Orianna's financial difficulties.

This opinion demonstrates that a strong inference that a defendant acted recklessly can arise even in the absence of facts suggesting a motive to mislead (such as insider trading), especially where allegedly incomplete facts that were concealed were both material and known to the defendants.

LOSS CAUSATION

Ninth Circuit Holds that Whistleblower Allegations May Constitute Corrective Disclosures

In *In Re BofI Holding, Inc. Securities Litigation,* the Ninth Circuit reversed dismissal of a putative securities class action, holding that—contrary to the district court—a whistleblower suit could serve as a corrective disclosure for the purpose of pleading loss causation—a required element of a cause of action under Section 10(b) of the Exchange Act and Rule 10b-5.[40] In so holding, the court joined the Sixth Circuit in rejecting a categorical rule that "allegations in a lawsuit, standing alone, can never qualify as a corrective disclosure."[41]

The plaintiffs in this case alleged that executives of BofI Holding, Inc. exaggerated the extent to which BofI was a safe investment, specifically alleging that BofI made material misstatements regarding its "conservative loan underwriting standards, its effective system of internal controls, and its robust compliance infrastructure."[42] The plaintiffs alleged that these misstatements inflated the price at which the plaintiffs purchased their shares and caused the plaintiffs to suffer economic loss when the misstatements were corrected by a former employee's whistleblower lawsuit alleging "rampant and egregious" internal controls violations within the company. According to the plaintiffs, this corrective disclosure caused BofI's stock price to drop by 30%. The district court rejected this argument—holding that mere allegations in another lawsuit could not be "corrective" because allegations are "unconfirmed" and, therefore, not "truth"—and granted BofI's motion to dismiss on the grounds that the plaintiffs failed to plead loss causation.

On appeal, the Ninth Circuit reversed. Rejecting the district court's reasoning that the allegations in the whistleblower lawsuit were not confirmed, the court concluded that "[i]f the market treats allegations in a lawsuit as sufficiently credible to be acted upon as truth, and the inflation in the stock price attributable to the defendant's misstatements is dissipated as a result, then the allegations can serve as a corrective disclosure."[43] The Ninth Circuit held that the 30% stock price drop when the whistleblower's allegations became public "would not be expected in response to whistleblower allegations perceived as unworthy of belief," and that "the drop is not readily attributable to non-fraud-related factors that might have moved BofI's stock price that day."[44] Accordingly, the court held that the plaintiffs had plausibly pled a "causal connection between the defendant's misstatements and the plaintiff's economic loss" such that the plaintiffs' claims could survive a motion to dismiss.[45]

Ninth Circuit Holds that Information from FOIA Request May Be a Corrective Disclosure but Publicly Available Information Published in a Short-Seller's Blog Post Is Not

In *Grigsby v. BofI Holding, Inc.*, the Ninth Circuit reversed the dismissal of a securities action on loss causation grounds.[46] The court considered whether information obtained through the Freedom of Information Act ("FOIA") can constitute a corrective disclosure for purposes of alleging loss causation, and determined that it can.

The case involved securities fraud claims alleging that BofI Holding, Inc. and its senior executives falsely denied that BofI was the subject of a money laundering investigation and a whistleblower's claims that BofI had made undisclosed loans to criminals. To establish a causal connection between the alleged misstatements and the decline in the company's stock price, the plaintiffs pointed to two articles that allegedly revealed the falsity of the statements: (i) a *New York Post* article containing information obtained from the SEC through a FOIA request; and (ii) a blog post on the website Seeking Alpha. The district court held that the *New York Post* article did not reveal new information to the market, and thus was not "corrective." It also held that the Seeking Alpha post disclosed only information that was already public. On appeal, the Ninth Circuit reversed the district court's conclusion with respect to the *New York Post* article but affirmed with respect to the Seeking Alpha post.

In concluding that the information obtained through FOIA and reported in the *New York Post* article was plausibly alleged to be a corrective disclosure, the Ninth Circuit rejected BofI's argument that the information was not "corrective" because any market participant could have obtained the information through the FOIA process. The court held that FOIA information was not necessarily already known to the market, because "the fact that a market actor lodges a FOIA request on a given date does not allow the conclusion that the information became publicly available on that date because FOIA requests do not always result in disclosures—and even when they do, the disclosures are not instantaneous. At a minimum, there must be some indication that the relevant information was requested and produced *before* the information contained in a FOIA response can be considered publicly available for purposes of loss causation."

In other words, information that is subject to FOIA does not "simply reside on a shelf somewhere, ready for the taking."[47] Further, the Ninth Circuit held that it was not necessary for the plaintiffs to allege that no one else had obtained the same information through FOIA prior to its disclosure in the *New York Post*. It therefore held that the plaintiffs' complaint sufficiently alleged that "the Post article disclosed BofI had been the subject of a formal SEC investigation, that the article revealed the falsity of BofI's prior statement [that it was not], and that the revelation caused BofI's stock price to drop."[48]

In contrast, the Ninth Circuit affirmed the district court's ruling that the Seeking Alpha post was not a corrective disclosure, because it was written by an anonymous short-seller who did not possess any expertise or specialized skills beyond what a typical market participant would have, and the short-seller admittedly drew his conclusions solely from publicly available documents. In addition, the author included a disclaimer that he made "no representation as to the accuracy or completeness of the information" on which the article was based.

Second Circuit Holds that Short-Seller's Blog Post Was a Corrective Disclosure

In contrast with the Ninth Circuit's ruling in *Grigsby* that a short-seller's blog post on the Seeking Alpha website was not a corrective disclosure, the Second Circuit reached a contrary conclusion in an unpublished summary order in *Lea v. TAL Education Group*.[49] In that case, a report published on the short-seller website Muddy Waters alleged that the defendant had engaged in sham transactions for the purpose of fraudulently inflating its income, and the company's stock price plunged nearly 10% the same day. Reversing the district court, the Second Circuit concluded that the short-seller report was a corrective disclosure for purposes of pleading loss causation, notwithstanding statements in the report that it was based on generally available information and documents obtained from public sources.

The Second Circuit has previously held that information in the public domain cannot qualify as a "corrective disclosure." On appeal, the defendant argued that the plaintiff failed to adequately allege loss causation because the operative complaint pointed to no "previously concealed" facts and solely relied instead on the Muddy Waters report, which expressly stated that "all information contained herein … has been obtained from public sources."[50]

While similar disclaimer language was dispositive in *Grigsby*, it was not in *Lea.* Rather, the court agreed with the plaintiffs that "much of the information in the report … was not readily accessible to investors," including interviews with former TAL employees, filings of multiple entities with regulators in China, and judgments from court proceedings in China.[51] Citing cases holding that "buried" information and financial filings in the Chinese language were not necessarily "readily available" to investors, the court held that the plaintiffs had plausibly pled loss causation and remanded the case to the district court.

CLASS CERTIFICATION

Second Circuit Rejects Bid to Narrow Price Maintenance Theory, and Supreme Court Grants Certiorari

In *Arkansas Teacher Retirement System v. Goldman Sachs Group, Inc*., the Second Circuit considered class certification in a case involving alleged misstatements by Goldman Sachs about its corporate ethics standards and the measures it took to avoid conflicts of interest in dealings with its customers.[52] The case offers important guidance about class certification in so-called "price maintenance" cases—cases where the plaintiffs allege that misstatements maintained a company's stock price at an artificially inflated level—and what rebuttal evidence is necessary for a defendant to overcome the presumption of reliance under *Basic Inc. v. Levinson*.[53]

The plaintiffs' claims were based on Goldman's role in creating and marketing several collateralized mortgage obligations ("CMOs"). The complaint alleged that Goldman's statements about its business ethics and alignment of interests with its customers were misrepresentations because Goldman knew that it had undisclosed conflicts of interest relating to the CMOs. Specifically, the plaintiffs alleged that while the CMOs were marketed as ordinary asset-backed securities, Goldman permitted a hedge fund to play an undisclosed role in selecting risky mortgages for the CMOs, and that the hedge fund sought to profit by betting against the CMOs. The plaintiffs claimed that the falsity of Goldman's statements about its ethical standards was revealed when it ultimately admitted its failure to disclose the hedge fund's role and reached a $550 million settlement in an SEC enforcement action, which caused a material decline in Goldman's stock price. The plaintiffs moved for class certification and invoked the *Basic* presumption that the shareholders had relied on the alleged misstatements when purchasing shares at the market price.[54] The district court certified the class after concluding that Goldman failed to rebut the *Basic* presumption by a preponderance of the evidence.[55]

A divided panel of the Second Circuit affirmed, rejecting Goldman's argument that its general statements about corporate ethics and compliance practices did not have a "price impact" and that class certification was therefore not permitted under *Halliburton Co. v. Erica P. John Fund, Inc.* ("*Halliburton II*").[56] Crucially, the court held that the defendants had not carried their burden under *Halliburton II* because they had not proved that those statements had *no* impact on Goldman's stock price.[57]

The court held that the plaintiffs could pursue a "price maintenance" theory, rejecting the defendants' argument that "price maintenance" claims are permitted only for specific types of alleged misstatements, such as: (i) "unduly optimistic statement[s] about specific, material financial or operational information made to stop[ ] a [stock] price from declining"; and (ii) statements "falsely convey[ing] that the company ha[s] met market expectations about a specific, material financial metric, product, or event."[58] Instead, the court held that "general statements" such as those relied upon by the plaintiffs could be legally sufficient to evidence price impact.[59]

In dissent, Judge Sullivan stated that "the district court misapplied the *Basic* presumption in its analysis of price impact, essentially turning the presumption on its head."[60] The dissent focused on what rebuttal evidence is necessary to overcome the *Basic* presumption and specifically pointed to the "hard evidence" presented by the defendants that "severed the link" between the alleged misrepresentation and the price paid by the plaintiffs.[61] The dissent also disagreed with the majority's view that considering the nature of the alleged misstatements in assessing whether and why the misrepresentations did not in fact effect the market price of Goldman stock amounts to "smuggling materiality into Rule 23."[62]

This decision is significant because it reflects the heavy burden a defendant must carry to make a showing of no price impact to defeat class certification under *Halliburton II*, and for endorsing a broad conception of "price maintenance" claims in Section 10(b) cases.

On December 11, 2020, the Supreme Court granted Goldman's petition for certiorari seeking review of two questions: (i) whether the presumption of class-wide reliance in a securities class action can be rebutted by challenging the "generic" nature of the alleged misstatements to demonstrate a lack of price impact; and (ii) whether a defendant seeking to rebut the *Basic* presumption has the ultimate burden of persuasion.[63] The petition, which describes the case as "the most important securities case to come before the Court since *Halliburton II*," will provide the Court an opportunity to clarify the standards to be applied by courts when defendants seek to rebut the fraud-on-the-market presumption of class-wide reliance.

Seventh Circuit Holds Defendants Must Be Permitted to Present Price Impact Evidence at Class Certification Stage Under *Halliburton* II

In *In re The Allstate Corporation Securities Litigation*, the Seventh Circuit addressed the scope of evidence that district courts are permitted and required to admit at the class certification stage when securities fraud plaintiffs invoke the fraud-on-the-market theory of reliance established in *Basic* and reaffirmed in *Halliburton II*.[64]

In *Allstate*, the court held that when a district court decides whether the *Basic* fraud-on-the-market presumption applies, it

must also consider evidence offered by the defendant to show that the alleged misrepresentations did not actually affect the price of the securities, because such evidence could effectively rebut the presumption of reliance. However, the court cautioned that under settled Supreme Court precedent, the district court must also resist deciding the closely related issues of materiality and loss causation, which must be left to the merits stage, even though the underlying evidence presented by the defendants may overlap. Finally, the court held that a plaintiff who is part of an original putative class and who seeks to take on a new role as class representative in an existing class action is not time barred or required to have filed his own action because the statute of limitations was already tolled by the filing of the initial class complaint.

In early 2013, Allstate announced a growth strategy to attract more new customers by "softening" its underwriting standards. Allstate disclosed that the new growth strategy "could cause 'some pressure' on its auto claims 'frequency'—that is, new and potentially riskier customers might file more auto claims. [The] Allstate CEO … said that the company was aware of this potential and would monitor it and adjust business practices accordingly."[65]

On August 4, 2015, Allstate's stock price dropped by more than 10% after the company disclosed that the higher claims rates it had experienced for the past three quarters were caused in part by the company's new growth strategy and that Allstate was "tightening some of [its] underwriting parameters."[66] The plaintiffs filed their lawsuit shortly after, alleging that between 2013 and 2015, Allstate affirmatively misled the market by falsely attributing its rising claims to other external factors, such as miles driven and inclement weather. The plaintiffs invoked the *Basic* fraud-on-the-market presumption that reliance was established because Allstate's stock traded in an efficient market.

Allstate argued that class certification was improper by offering expert witness testimony demonstrating Allstate's stock price did not change after the alleged misrepresentations, attempting to "sever the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price."[67] The district court declined to address defendant's expert evidence and granted class certification.

The Seventh Circuit granted leave for defendants to pursue an interlocutory appeal of class certification because reliance, also known as "transaction causation," may properly be addressed at the class certification stage.[68] The court held that the Supreme Court's decision in *Halliburton II* requires district courts to resolve factual disputes regarding transaction causation at the class certification stage, even if evidence offered by the defendant to show the absence of transaction causation also speaks directly to "the forbidden merits inquiries of materiality and loss causation," which cannot be decided at class certification.[69]

In order to rebut the *Basic* presumption, defendants can present any direct or indirect evidence that the plaintiffs did not rely on the market's integrity when making their purchase, or that the market itself is inefficient, or a lack of price impact. Unlike the "truth on the market defense" to materiality, which can be decided only at the merits stage, price impact analyzes "the level of specificity of the information the market would have understood the price of Allstate's common stock to transmit at the time of the purchase transaction."[70]

The Seventh Circuit held that the proper class certification inquiry on remand is not the truthfulness or materiality of any of Allstate's representations but whether the would-be class claims are susceptible of common proof. Because the *Basic* presumption is the "linchpin" of the plaintiff's predominance argument—because without the presumption, individual questions of reliance would overwhelm the case—the district court was required to find relevant facts as to whether the plaintiff may invoke the presumption. If the plaintiffs establish an efficient market, the burden of production and persuasion then shifts to the defendants who must rebut the presumption by a preponderance of the evidence.

Additionally, the court affirmed the district court's decision granting leave to amend the complaint to name a new class representative more than two years after the original stock drop, even though that individual had not previously filed a complaint or sought to be lead plaintiff. Rejecting Allstate's argument that adding a new class representative after the statute of limitations had run was precluded by the Supreme Court's decision in *China Agritech, Inc. v. Resh*, the court held that the plaintiffs who were part of the original putative class were not required to have filed their own action because the statute of limitations had already been tolled by the filing of the initial class complaint.[71]

The court also rejected the argument that failure to file a complaint at the outset of the case amounted to waiver, holding

that Allstate's position would be "arbitrary and unfair" and "[a]s a practical matter, that rule would commit the fate of class certification claims inexorably to the initial class representative, regardless of issues that might arise concerning the initial representative's ability or willingness to continue serving in that role."[72] Rather than switching the class representative for the purpose of overcoming a denial of class certification or dismissal, the court held that the plaintiffs in *Allstate* "sought only to rearrange the seating chart within a single, ongoing action."[73]

AMENDMENTS TO THE COMPLAINT

"Four Bites at the Apple Is More Than Enough": Second Circuit Affirms Denial of Request to File Another Amended Complaint

In *Metzler Investment Gmbh v. Chipotle Mexican Grill, Inc*., the Second Circuit affirmed the district court's denial of leave to file a third amended complaint based on alleged new evidence.[74] The court held that the district court did not abuse its discretion in finding that the plaintiffs were not entitled either to post-judgment relief under Rules 59(e) or 60(b) of the Federal Rules of Civil Procedure or to file a third amended complaint pursuant to Rule 15(a). The court noted that a plaintiff afforded "attempt after attempt—and consequently, additional time to investigate—might one day succeed in stating a claim," but that the Civil Rules do not permit limitless repleading.[75]

This securities class action was triggered by a decline in Chipotle's stock price following several food-borne illness outbreaks that occurred after Chipotle transitioned to preparing food in individual restaurants rather than at centralized facilities. The plaintiffs alleged that the defendants made misstatements about Chipotle's quality controls and failed to disclose the decision to switch from preparing and testing food in centralized plants to individual restaurants.

The district court dismissed the amended complaint and the second amended complaint, finding that the plaintiffs had failed to allege the defendants knew and failed to disclose that the transition would result in an increased risk of food-borne illnesses. The district court also denied the plaintiffs' request for leave to file a third amended complaint on the grounds that: (i) any amendment would be futile since the plaintiffs could not demonstrate that ongoing investigation would cure the deficiencies; (ii) the plaintiffs already had ample opportunity to state a claim; and (iii) the defendants would suffer undue prejudice as a consequence of further amendment given their interest in finality and repose.

The plaintiffs then moved for relief from judgment pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) and for leave to file a third amended complaint pursuant to Rule 15(a)(2), based on alleged new information from their investigations after the filing of the second amended complaint and from recently unsealed pleadings in related litigation. The district court denied the motion, holding that the information was not "new" for the purposes of Rule 59(e) and 60(b). The district court further noted that, even if it were to consider the purported new information, the result would not change and thus the proposed amendment would be futile.

On appeal, the plaintiffs contended that the correct legal standard for their motion for relief from judgment was the same one applicable to pretrial motions for leave to amend under Rule 15(a)(2), which directs a court to "freely give leave when justice so requires."[76] The Second Circuit disagreed, holding that a plaintiff "seeking to file an amended complaint post-judgment must first have the judgment vacated or set aside pursuant to Rules 59(e) or 60(b)," and that the district court correctly applied the standards under those rules.[77] It agreed with the district court that the plaintiffs' proffered evidence was not "new" under Rule 59(e). And it held that there were no "extraordinary circumstances" that would justify relief under Rule 60(b), because there was no clear error of law by the district court and "four bites at the apple is more than enough."[78]

SHORT-SWING TRADING

Investor Who Delegated Discretionary Authority to Investment Advisor Held Not Liable for Short-Swing Trading Under Group Liability Theory

In *Rubenstein v. International Value Advisers, LLC*, the Second Circuit clarified the limits of "group" liability for short-swing trading.[79] The court held that an investor who delegated discretionary authority to an investment advisor did not thereby enter into an agreement to trade in the securities of a specific issuer and thus did not become part of a Section 16 "group." Nor did the investor become a member of an insider group simply because

its investment advisor filed a Schedule 13D and was considered an insider for purposes of the short-swing trading rules.

Section 16(b) of the Securities Exchange Act of 1934 requires insiders to disgorge to the issuer any short-swing profits—that is, profits from sales and purchases that occur within six months of each other. In addition to directors and officers, Section 16(b) also applies to "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security" of the issuer.[80] Under Section 13(d) of the Exchange Act of 1934, a group of two or more people can be considered a "person" (and thus subject to Section 16(b)) if they "act as a … group for the purpose of acquiring, holding, or disposing of securities of an issuer."[81]

In *Rubenstein*, the plaintiff alleged that International Value Advisers, LLC, two of its portfolio managers, and an unnamed investor ("Doe") constituted an insider group because they collectively owned more than 10% of the common stock of DeVry Education Group. The investor had delegated discretionary authority over a brokerage trading account to IVA, which invested some of Doe's funds along with the funds of other clients in DeVry, collectively amounting to more than 10% of DeVry's common stock. IVA filed required Schedule 13D reports disclosing that through its voting and investing power over advisee-client accounts, it owned more than 10% of the common stock and that it had formed a group for a "control purpose" relating to DeVry. IVA ultimately traded the DeVry shares owned by Doe within a six-month period, and Doe reaped a profit.

The plaintiff alleged that this trade violated Section 16(b)'s short-swing profit rule and sought to recover the proceeds. The plaintiff alleged that the investment management agreement between Doe and IVA qualified as an agreement to trade in the securities of an issuer under Section 13(d) and that IVA's filing of a Schedule 13D with respect to DeVry caused Doe to become a member of the insider group by "silent acquiescence."

The defendants moved to dismiss the complaint, and the district court granted the motion, holding that the plaintiff had not plausibly pled the existence of a Section 13(d) agreement and that Doe had not become a member of an insider group. The district court held that the complaint did not plausibly allege: (i) a common objective between the IVA defendants, who had a control purpose, and the Doe investor, whose DeVry shares had been purchased for his account on a discretionary basis by his investment manager; or (ii) that the IVA defendants and the Doe investor acted together for the purpose of acquiring the securities of a specific issuer.

The Second Circuit affirmed and held that the Doe investor was not a member of an insider group. Specifically, the court held that the investment management agreement was not an agreement to trade in DeVry securities under Section 13(d) and that the Doe investor did not become a member of a Section 13(d) group simply because IVA caused other clients to invest in DeVry securities. The court reasoned that since the "group liability" definition in the Exchange Act of 1934 rules applies to groups formed to trade in the securities of a *specific* issuer, an investor who delegates *discretionary* investment authority to his investment advisor does not enter into such a group.

Additionally, the court noted that the purpose of Section 16(b) is to prevent a group of people, each owning less than a 10% stake, from working together to evade the disclosure obligations of Section 13(d). Since IVA managed the Doe investor's funds at its own discretion, Doe was not working with IVA or IVA's other clients to evade the insider disclosure requirements.

The court also rejected the plaintiff's argument that the Doe investor implicitly joined an insider group by silently acquiescing to trades in DeVry stock after the advisor filed Schedule 13D forms, because such a requirement would impose impractical obligations on investors to monitor their advisors' activities and assess whether their advisors had adopted a control purpose as to a particular issuer. Likewise, if a purported group liability defendant has not entered into an issuer-specific trading agreement, the court concluded it need not determine whether IVA had satisfied the exemption available to registered investment advisors for certain beneficial owners. The Doe investor therefore did not violate Section 16(b)'s short-swing rules and was not required to disgorge his profits.

FEDERAL FORUM PROVISIONS

Delaware and California Courts Uphold Exclusive Federal Forum Selection Provisions for Securities Act Claims

In 2018, the Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund* that state courts have concurrent jurisdiction over lawsuits asserting violations of the Securities Act of 1933 and that those lawsuits cannot be removed to

federal court.[82] In response, plaintiffs increasingly brought Securities Act claims in state court and, in some instances, companies were forced to defend overlapping Securities Act suits in both state and federal courts because there is no procedure or mechanism to consolidate or coordinate such cases. To avoid the risk of inconsistent judgments and rulings, several companies incorporated in Delaware adopted forum selection provisions in their certificates of incorporation requiring that any claims alleging violations of the Securities Act be brought exclusively in federal court.

In 2020, two important decisions by the Delaware Supreme Court and a California Superior Court analyzed federal forum provisions ("FFPs") and concluded that they are valid and enforceable under Delaware, California, and federal law.

In *Salzberg v. Blue Apron Holdings, Inc.*, the Delaware Supreme Court held that FFPs are valid under Delaware law and are consistent with federal and Delaware public policy.[83] This decision overturned an earlier Delaware Court of Chancery ruling, *Sciabacucchi v. Salzberg*, which held that FFPs in certificates of incorporation were invalid.[84]

The Delaware Supreme Court concluded that FFPs are presumptively valid under Section 102(b)(1) of the Delaware General Corporation Law—which describes the matters that may be addressed in a certificate of incorporation—because they concern several topics listed in Section 102(b)(1), including the "management of the business"; the "conduct of the affairs of the corporation"; and "the powers of the corporation, the directors and the stockholders."[85] The court also concluded that FFPs are not inconsistent with Delaware public policy or with federal securities law. The court noted that Delaware courts attempt "to achieve judicial economy and avoid duplicative efforts among courts in resolving disputes" and FFPs advance those goals.[86]

Though the court considered only the validity of an FFP in a certificate of incorporation, the court's reasoning likely would apply with equal force to an FFP adopted in a corporation's bylaws pursuant to DGCL Section 109(b). First, the broad scope of Section 109(b) is virtually identical to that of Section 102(b)(1). Second, an FFP under Section 109(b) would provide a company with the same litigation-management efficiencies as one under Section 102(b)(1). Third, Section 115, which authorizes exclusive-forum provisions for internal corporate claims (such as shareholder derivative lawsuits), expressly states that such provisions may be in either the certificate of incorporation or the bylaws. We therefore anticipate that the Delaware courts would uphold an FFP adopted through an amendment to a company's bylaws.

Two important issues remained after *Salzberg*. First, because *Salzberg* involved only a facial challenge to an FFP—not an "as-applied" challenge—it does not foreclose a shareholder from challenging an FFP by arguing that the provision should not be enforced under the facts of a specific case. Second, *Salzberg* expressly invited the courts of other states to determine whether FFPs violate the law or policies of other jurisdictions.

Following the Delaware Supreme Court's decision in *Salzberg*, the California Superior Court of San Mateo County addressed the issue as a matter of first impression in *Wong v. Restoration Robotics*.[87] The court granted a motion to dismiss a class action brought under the Securities Act against Restoration Robotics, a Delaware corporation, and some of its officers and directors, applying an FFP in the company's certificate. The court determined that the FFP was analogous to a forum selection clause and, because it had been approved by shareholder vote and was not being applied retroactively, the burden of proof was on the plaintiffs to establish that it was unenforceable, unconscionable, unjust, or unreasonable. The court held that the plaintiffs failed to show that the FFP violated California law or policy or that the FFP was unconstitutional or illegal under federal law.

In an exhaustive opinion, the court examined federal precedents regarding release and settlement of claims, mandatory arbitration provisions, and mandatory forum selection clauses. Finding mandatory forum selection clauses to be most analogous to the FFP, the court noted that under California precedent, the party contesting enforcement of a mandatory forum selection clause bears the burden of demonstrating that enforcement is unreasonable.

The court further held that the FFP did not undermine the substantive protections afforded to the plaintiffs under the Securities Act but affected only the procedural issue of a

state versus a federal forum. The court also concluded that the shareholders' due process rights were not infringed because they still could present their Securities Act claims in federal court, seek discovery, and receive a jury trial. As a result, the court exercised its discretion to decline jurisdiction over the plaintiffs' Securities Act claims and granted the motion to dismiss based on the FFP.

ATTORNEY–CLIENT PRIVILEGE

Delaware Chancery Court Says Privilege Did Not Apply When Representative Used Email Account of Different Company

In a recent decision, the Delaware Court of Chancery held that attorney-client privilege did not apply to a company's communications with representatives when those individuals were also employees of a different company and used the email accounts of their employer. The court held that the individuals did not have a reasonable expectation of privacy in the communications because their employers retained the right to monitor use of their email systems, and thus the communications were not protected by attorney-client privilege. While this case did not involve director communications, the key takeaway is that, to preserve privilege, companies should ensure that their outside directors do not use the email accounts of their employers or accounts that are otherwise monitored or subject to third-party access when conducting business relating to the board of directors.

The ruling arose out of a discovery dispute in *In re WeWork Litigation*, an action brought by The We Company, Adam Neumann, and We Holdings LLC (together, "WeWork") against SoftBank Group Corp. and SoftBank Vision Fund (AIV M1) L.P. (together, "SoftBank"), alleging that SoftBank breached an agreement to complete a tender offer to purchase up to $3 billion of WeWork stock.[88] WeWork moved to compel the production of approximately 90 documents that were withheld or redacted by SoftBank on the basis of attorney-client privilege.

The documents in question were emails sent or received by individuals who served in roles at SoftBank and were also employees of Sprint, Inc., which were transmitted using their Sprint email accounts. Sprint is not involved in the litigation, but SoftBank owned 84% of the company until April 1, 2020, and thus certain individuals held roles at both companies. For instance, SoftBank's COO was the Chairman for both WeWork and Sprint, Sprint's CEO assisted SoftBank's COO on WeWork-related matters, and two Sprint employees were seconded to SoftBank and were working for SoftBank's COO.

Using their Sprint email accounts, Sprint's CEO and one of the Sprint secondees at Softbank sought and received legal advice from SoftBank's internal and external counsel regarding WeWork. Although these emails were responsive to WeWork's discovery requests, SoftBank withheld or redacted them on the basis of attorney-client privilege. In response, WeWork filed a motion to compel their production, arguing that the emails were not "confidential communications," and thus not protected by attorney-client privilege, because the Sprint employees did not have a reasonable expectation of privacy when using their Sprint email accounts for SoftBank-related purposes.

The court applied the four-factor test from *In re Asia Global Crossing, Ltd*. and held that the Sprint employees did not have a reasonable expectation of privacy in their work email accounts.[89] The four *Asia Global* factors are whether: (i) the corporation maintains a policy banning personal or other objectionable use of its computer systems; (ii) the company monitors the use of the employee's computer or email; (iii) third parties have a right of access to the computer or emails; and (v) the corporation notified the employee, or the employee was aware, of the use and monitoring policies. The court found that each of these factors weighed in favor of SoftBank producing the documents.

With regard to the first factor, the court held that Sprint's Code of Conduct expressly warned that employees should have no expectation of privacy in information they send, receive, access, or store on any Sprint computer system or network, and that Sprint reserves the right to review workplace communications, including emails, at any time. This, the court held, outweighed the lack of an express ban on personal use of email.

For the second factor, the court held that neither party provided evidence regarding Sprint's monitoring practices, which weighed against SoftBank, given that SoftBank had the burden to prove that the privilege applies. In addition, the court found

that Sprint expressly reserved the right to monitor work email, and that when a company does so, the fact that it has not monitored email in the past, or has only done so intermittently or as needed, does not undermine that reservation.

On the third factor, the court found that SoftBank had not provided evidence that the two Sprint employees had taken significant and meaningful steps to defeat access to their email by Sprint. The court specifically noted that they had not shifted to a webmail account or encrypted their communications, as examples of such steps.

Lastly, as to the fourth factor, the court held that SoftBank had not submitted any evidence that the two Sprint employees were unaware of Sprint's policies regarding email monitoring, finding it hard to imagine that they would not have been aware, given their positions at Sprint. Thus, the court found that knowledge of Sprint's email policies could be imputed to them. Accordingly, the court held that they could not have had a reasonable expectation of privacy when using their Sprint email accounts to discuss SoftBank matters completely unrelated to Sprint.

The court also addressed two arguments made by SoftBank that were outside of the *Asia Global* framework. First, the court rejected the position that agreements requiring the Sprint employees to keep SoftBank information confidential created a reasonable expectation of privacy in their Sprint email when using it for non-Sprint matters. Second, the court rejected SoftBank's argument that the *Asia Global* factors should not apply because the suit was brought by outsiders. It noted that other courts have applied them in that context, and that SoftBank could not credibly argue that the use of Sprint email accounts was inadvertent, given that both Sprint employees had alternative email accounts for conducting SoftBank business, and both still failed to ensure the confidentiality of SoftBank's information on numerous occasions.

In light of this decision, companies should assess their policies and practices relating to communications with outside directors. If a company does not already have a policy in place prohibiting outside directors from using employer email accounts, it should consider enacting one. In addition, the company should consider requiring outside directors to use email addresses provided by the company for board-related communications.

SETTLEMENT/ATTORNEYS' FEES

Settlement Objectors in Class Action and Derivative Case May Be Eligible for Attorneys' Fees for Causing Nonmonetary Improvements to Settlement

In *In re S.S. Body Armor I, Inc.*, the Third Circuit held that courts may consider nonmonetary improvements to settlements when assessing whether to award attorneys' fees and expenses to objectors in class and derivative actions.[90]

In 2005, public revelations that Body Armor, a manufacturer of body armor sold to law enforcement agencies and the U.S. military, had allegedly used substandard materials in its products caused its stock price to plummet. Numerous lawsuits followed and were consolidated into a securities class action and a related derivative action.

In 2006, the parties entered into a global settlement that included a provision under which the company agreed to release and indemnify the company's founder and former CEO from any liability should the SEC commence an action against him under the "clawback" provisions of Section 304 of the Sarbanes-Oxley Act. A former general counsel of the company who was also a shareholder objected to the proposed settlement on the grounds that the indemnification provision benefiting the former CEO was unlawful; the objector also sought attorneys' fees and expenses.

The district court approved the settlement and rejected the objector's request for attorneys' fees. The objector then appealed the district court's approval of the settlement, and the Second Circuit vacated the settlement and remanded the case to the district court.

While the case was before the district court on remand, Body Armor restated its financial reports, the SEC sued the former CEO seeking disgorgement of $186 million under Section 304, the former CEO was indicted for various alleged criminal offenses, and the company filed for bankruptcy. Thereafter, the parties proposed a second global settlement that provided for distribution of approximately $142 million from the former CEO to his victims, including the company (now the debtor in the bankruptcy proceeding). The former general counsel objected to the settlement, requested attorneys' fees and expenses of $1.86 million (representing 1% of the potential Section 304

liability he had preserved), and further requested that $25 million be placed in a reserve for payment of attorneys' fees.

The bankruptcy court agreed to establish a reserve of $5 million but conditioned any payment of attorneys' fees on Body Armor's recoupment of funds on account of the Section 304 claims against the former CEO. The general counsel appealed to the district court and ultimately moved to stay all distributions pursuant to the second settlement, pending resolution of his fee appeals to the district court including establishment of a reserve. The district court denied the motion for a stay. The Third Circuit reversed, holding that meritorious objections to settlements play an important role in ensuring fair and adequate settlements by giving courts access to important information in situations where the court no longer has the benefit of the adversarial process.

The case is important because the court clarified that in both class actions and derivative actions, trial courts may, in their discretion, consider nonmonetary factors in determining whether an objecting party has improved a settlement.

The Third Circuit held that a settlement objector is entitled to attorneys' fees and expenses where he improves a settlement, and that it is not necessary that the objection created, preserved, or contributed to a common fund. The court further held that trial courts have broad discretion to consider both pecuniary and nonpecuniary factors in evaluating whether an objector has improved a settlement.

The court concluded that the former general counsel was entitled to an award of attorneys' fees and expenses because his objection to the first proposed settlement and his subsequent appeal ensured that the ultimate settlement did not contain an illegal provision as one of its "essential" terms and removed the indemnification obligation to the former CEO that would have negated any recovery by Body Armor under Section 304. In addition, because the appeal prevented the first global settlement from being effectuated, there was no distribution of escrow funds. The Third Circuit noted that those escrow funds ultimately were used to fund, in part, the settlement and Body Armor's plan to exit Chapter 11, obviating the need for the company to undertake the expense of seeking outside financing.

The court concluded that allowing the former general counsel to recover fees and expenses aligned with the court's interest in ensuring fair and adequate settlements and encouraging meritorious objections in situations where courts may not have the benefit of a full adversarial process.

District Court Slashes Fee Award to Lead Counsel for Submitting False Statements and Analyzes Standards for Determining Fee Awards in Megafund Class Cases

In *Arkansas Teacher Retirement System v. State Street Bank and Trust Company*, the district court held that a fee award to three firms representing the lead plaintiff in a consolidated securities class action that settled for $300 million should be reduced by $15 million because those firms submitted false or misleading statements in support of their fee requests.[91] The case is notable for its analysis of the role of the court, the obligations of the plaintiff's counsel, and the standards to be applied in determining fee awards in megafund class actions.

Lead plaintiff Arkansas Teachers Retirement System ("ATRS") alleged that State Street Bank and Trust engaged in unfair and deceptive practices by overcharging clients for foreign currency exchange transactions. Several pension plans represented by separate counsel alleged that State Street breached its fiduciary duties under ERISA as a result of the same transactions.

In 2016, following denial of State Street's motion to dismiss, all parties agreed to a settlement that included State Street's payment of $300 million into a common fund, certification of a single class for settlement purposes, and authorization for the plaintiffs' counsel to seek an award of attorneys' fees in the amount of 25% of the common fund, or $75 million, to be apportioned among ATRS's counsel and counsel in the ERISA case. After the court approved the settlement, allegations of misconduct surfaced in the media suggesting errors in the calculation of the lodestar and misrepresentations in the fee applications.

Because the allegations raised concerns about the reasonableness of the fee award, the court appointed a special master to conduct an investigation. After a thorough investigation, the special master found misconduct by three firms representing the class but recommended that the court again award

$75 million in attorneys' fees while reallocating $14 million from ATRS's counsel to the class and the ERISA plaintiffs' counsel. The district court accepted the special master's factual findings, including his finding that an undisclosed payment of $4.1 million, or 5.5% of the $75 million fee award, to a Texas firm that did no work on the case was an ethically impermissible finder's fee to influence ATRS to hire one of the firms.

The court also found that the fee applications double-counted more than 9,000 hours in staff attorney time, thereby overstating the requested lodestar by more than $4 million; included a misleading fee declaration that billing rates attributed to staff attorneys and another attorney used to compute the lodestar were the same as the regular rates for those attorneys; and mischaracterized an expert study regarding the percentage of common funds awarded as attorneys' fees in megafund cases.

The court declined, however, to adopt the special master's recommendation as to the proper fee award. It held that a fee award based on 25% of the common fund was no longer reasonable. Instead, relying on public policy considerations and reconsideration of the work performed and risk undertaken, the court determined that an award of 20% of the common fund was reasonable, thereby reducing the fee award from $75 million to $60 million, of which approximately $14 million was to be returned to the class. Class counsel was also ordered to pay $5 million toward the reasonable fees and expenses of the special master.

This case is noteworthy for its analysis of the role of judges as protectors of the class when class actions settle and for the court's admonition that judges should carefully scrutinize motions to appoint class representatives and lead counsel as well as motions for attorneys' fees whenever such motions are unopposed.

DEVELOPMENTS IN DIRECTORS AND OFFICERS LIABILITY INSURANCE

One economic consequence of the COVID-19 pandemic has been a spike in commercial insurance rates. In the second quarter of 2020, global commercial insurance rates rose 19%—the highest increase since commercial insurance rates were first surveyed by Marsh in 2012.[92] Even before the pandemic, premiums for directors and officers ("D&O") insurance were on the rise. D&O coverage costs rose 44% in the first quarter of 2020,[93] on the heels of 13 consecutive quarters of double-digit increases.[94]

A combination of factors has contributed to the unrelenting rise in D&O costs. First, as noted in the Introduction, the number of securities class action filings has increased over the last three years,[95] reaching a 20-year high in 2018 and remaining at elevated levels in 2019 and 2020.[96] Second, as a result of the Supreme Court's *Cyan* decision[97] holding that cases arising under the Securities Act of 1933 are not removable to federal court, companies have faced increased securities litigation filings in unfriendly state-court venues.[98] Third, increased settlements of securities class actions have led to underwriting losses for D&O insurers and resulting upward pressure on premiums.[99] Finally, new categories of underwriting risk have emerged in recent years, including claims against directors and officers resulting from data breaches and other cyber-related incidents.[100] As a result of all of these factors, D&O premiums continued to increase in 2020—for some companies, by as much as 2,000%.[101]

As discussed at the outset of our Review, the global COVID-19 pandemic contributed to ongoing elevated levels of securities litigation in 2020 that shows no signs of abating in 2021. D&O premiums will likely continue to rise into 2021.[102] Special purpose acquisition companies, or SPACs, will likely face particular pressure on premiums, reflecting their increased scrutiny by the SEC and their unique risks for the D&O insurance market.[103] Only a few insurance carriers are willing to underwrite D&O insurance coverage for SPACs, and the number of SPACs has increased so rapidly that the market has been unable to keep up with the demand.[104]

Faced with an unsettled and increasingly expensive market for D&O insurance, one company pursued an unconventional approach in response to rising premiums. Electric vehicle manufacturer Tesla opted to forego the purchase of D&O insurance during a portion of 2020 and instead paid its CEO Elon Musk $3 million for him to provide a personal promise of indemnification to Tesla's directors and officers; the company cited "disproportionately high" D&O insurance premiums as its reason for this unorthodox measure.[105] Tesla has since returned to a more traditional model and purchased

D&O insurance coverage from a commercial carrier,[106] joining the many other companies that have had little choice but to accept eye-popping increases in D&O insurance premiums.

CONCLUSION

The extreme volatility of the U.S. financial markets and the economic consequences of the COVID-19 pandemic adversely impacted many companies across a variety of industries. As noted, the impact of the COVID-19 pandemic on securities filings in 2020 was likewise substantial. This trend shows no signs of abating this year, with two securities class actions relating to COVID-19 already filed as of mid-January 2021.

Notably, one of those cases is the first COVID-related securities class action following the filing of an SEC enforcement action against the same company. Both the SEC enforcement action and the securities case related to alleged misrepresentations made by a diagnostic test company early in the pandemic that it had developed a finger-prick test that could detect COVID-19 in less than one minute and its progress in obtaining emergency-use authorization from the FDA.[107]

In another important development, the SEC recently announced its first-ever charges against a public company for making misleading disclosures about the impact of COVID-19 on its business operations and financial condition.[108] The charges followed numerous public statements from the SEC since the beginning of the pandemic that COVID-related disclosures would be an enforcement priority and that a task force had been established to address a variety of potential COVID-related violations of the securities laws.[109]

We believe that the filing of follow-on securities cases in the wake of SEC enforcement actions is likely to recur in 2021. The Biden administration is expected to take a more aggressive approach to both regulation and enforcement. Its nominee for Chair of the Securities and Exchange Commission Chair served as a former Chair of the Commodities Futures Exchange Commission during the Obama administration, where he helped implement a number of new rules in the wake of the 2010 Dodd-Frank regulatory reforms enacted following the 2008 financial crisis and pursued an aggressive enforcement program.[110]

Another potential area of securities litigation activity in 2021 is SPACs—entities with no commercial operations that are formed to raise capital for acquisitions, often through reverse mergers with private companies. The amount of SPAC funds raised in 2020 was substantial, and nearly half of all IPOs in 2020 were SPAC-related companies. One recent securities class action was filed against electric vehicle company Nikola, which had been acquired by a publicly traded SPAC, and the complaint alleged material misrepresentations in the offering documents. Given the sheer volume of SPAC transactions and the SEC's recently issued disclosure guidance for SPACs,[111] it would not be surprising to see more securities litigation involving SPACs and SPAC-acquired companies in 2021.

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Jones Day lawyers are available to assist in addressing any questions you may have about this annual review. Please contact any of the members of the Securities Litigation & SEC Enforcement Practice listed below.

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ENDNOTES

1 Three hundred and twenty-four securities class action cases were filed in 2020 versus 402 cases filed in each of 2018 and 2019, but the number of filed cases was well above the annual average from 1997–2017. Securities Class Action Clearinghouse, http://securities.stanford.edu/index.html.

2 ISS, "2020 Securities Related Settlements Exceed $5.8 Billion—A Large Increase Over 20219," (Jan. 6, 2021).

3 Valeant Pharmaceuticals ($1.21 billion) and American Realty Capital ($1.025 billion).

4 First Solar ($350 million), Signet Jewelers ($240 million), and SCANA Corporation ($192.5 million).

5 All but one of the five securities cases filed in 2020 against companies in the cannabis industry involved Canada-based companies. Stanford Securities Class Action Clearinghouse, "Current Topics—Cryptocurrency Litigation." Cannabis-based products were legalized in Canada in 2018, and securities litigation involving cannabis companies has risen in tandem with the growing number of companies in the sector.

6 *Cohen v. Luckin Coffee, Inc.*, No. 20-CV-01293 (S.D.N.Y. Feb. 13, 2020).

7 *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 583 U.S. _____ (2018).

8 *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015).

9 *Abramson v. NewLink Genetics Corp.*, 965 F.3d 165 (2d Cir. 2020).

10 *Id.* at 173.

11 *Id.* at 170.

12 *Id.* at 177.

13 *Id.* at 178.

14 *Jaroslawicz v. M&T Bank Corp.*, 962 F.3d 701 (3d Cir. 2020), petition for cert. denied, 2021 WL 231655 (U.S. Jan. 25, 2021).

15 *Id.* at 718.

16 *Id.* at 712.

17 *Id.* at 714.

18 *Id.* at 718.

19 *In re Tesla Inc. Secs. Litig.*, No. 3:18-cv-04865, 2020 WL 1873441 (N.D. Cal. Apr. 15, 2020).

20 *Id.* at *14.

21 *Id.* at *16.

22 *Id.*

23 *Mehta v. Ocular Therapeutix, Inc.*, 955 F.3d 194 (1st Cir. 2020).

24 *Id.* at 203.

25 *Id.* at 205.

26 *Id.* at 210.

27 *In re Target Corp. Sec. Litig.*, 955 F.3d 738, 740 (8th Cir. 2020).

28 *Id.* at 742.

29 *Id.*

30 *Id.* at 743.

31 *Jackson v. Abernathy*, 960 F.3d 94 (2d Cir. 2020).

32 *Id.* at 99.

33 *Id.*

34 *Nguyen v. Endologix, Inc.*, 962 F.3d 405 (9th Cir. 2020).

35 *Id.* at 415.

36 *Id.*

37 *Id.* at 416.

38 *Setzer v. Omega Healthcare Inv'rs, Inc.*, 968 F.3d 204 (2d Cir. 2020).

39 *Id.* at 215.

40 *In re Bofl Holding, Inc. Secs. Litig.*, 977 F.3d 781 (9th Cir. Oct. 8, 2020).

41 *Id.* at 792.

42 *Id.* at 786.

43 *Id.* at 792.

44 *Id.*

45 *Id.* at 794.

46 *Grigsby v. Bofl Holding, Inc.*, 979 F.3d 1198 (9th Cir. 2020).

47 *Id.* at 1205.

48 *Id.* at 1206.

49 *Lea v. TAL Educ. Grp.*, No. 19-3549, 2020 WL 6937475 (2d Cir. Nov. 25, 2020).

50 *Id.* at *5.

51 *Id.*

52 *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254 (2d Cir. 2020).

53 *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

54 *Id.*

55 *Id.*

56 *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014) ("*Halliburton II*").

57 *Id.*

58 *Ark. Teacher Ret. Sys.*, 955 F.3d at 266.

59 *Id.*

60 *Id.* at 275.

61 *Id.* at 278.

62 *Id.*

63 *Id.* at 275.

64 *In re The Allstate Corp. Secs. Litig.*, 966 F.3d 595 (7th Cir. 2020); *Basic, supra* note 46; *Halliburton II, supra* note 49.

65 *Allstate*, 966 F.3d at 601.

66 *Id.*

67 *Id.* at 602.

68 *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011) ("*Halliburton I*"); *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455 (2013); *Halliburton II, supra* note 49.

69 *Allstate*, 966 F.3d at 611.

70 *Allstate*, 966 F.3d at 613-14.

71 *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018).

72 *Allstate*, 966 F.3d at 615.

73 *Id.* at 616.

74 *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133 (2d Cir. 2020).

75 *Id.* at 147.

76 *Id.* at 142.

77 *Id.* at 145.

78 *Id.* at 147.

79 *Rubenstein v. Int'l Value Advisers, LLC*, 959 F.3d 541 (2d Cir. 2019).

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81 *Id.* at 544.

82 *Cyan, supra* note 7.

83 *Salzberg v. Blue Apron Holdings, Inc*., No. 346,2019, 2020 WL 1280785 (Del. Mar. 18, 2020).

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86 *Id.* at *23.

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89 *In re Asia Global Crossing, Ltd*., 322 B.R. 247 (Bankr. S.D.N.Y. 2005).

90 *In re S.S. Body Armor I, Inc*., 961 F.3d 216 (3d Cir. 2020).

91 *Ark. Teacher Ret. Sys. v. State St. Bank & Tr. Co.*, No. 11-10230-MLW, 2020 U.S. Dist. LEXIS 33552 (D. Mass. Feb. 27, 2020)

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