2020 Year In Review

Securities Litigation Against Technology Companies

GOODWIN

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Introduction

In many ways, 2020 was an unprecedented year. In mid-March, the United States abruptly went into lockdown as coronavirus cases began to spike; a national emergency was declared, travel bans and gathering restrictions were imposed, schools, workplaces, and restaurants were closed, and professional and college sports seasons were cancelled. The United States and the world came to recognize COVID-19 as a potentially unprecedented global catastrophe, a realization that "nearly broke the financial markets."[1] On March 16, 2020, the Dow Jones Industrial Average plunged nearly 13% (3,000 points) — the largest single-day drop in United States history — while the S&P 500 plummeted 12%, its worst day since 1987. Meanwhile, as "coronavirus fears ripped through Wall Street," the VIX, a gauge of stock market volatility, spiked 43%, breaking the record set at the height of the 2008 financial crisis.[2] CNN's index of market sentiment was "flashing 'extreme fear,'" while the *Wall Street Journal's* so-called "fear gauge" (the CBOE Volatility Index) closed above 80 for only the third time in history (the first two occasions occurring during the 2008 financial crisis).[3] The pandemic brought many global changes, and one of the broadest effects has been accelerated adoption of technology at work and at home. As a result, the technology sector received a significant boost.

It is against this extraordinary backdrop that we present our third annual Securities Litigation Year in Review publication, in which we analyze securities class actions filed nationally against publicly traded companies in the technology and communications sectors (together, "technology companies") and summarize important decisions issued by courts in key jurisdictions during 2020. These cases are typically filed by shareholders seeking to recover investment losses after a company's stock price drops following the disclosure of negative news. Plaintiffs typically assert claims under Sections 10(b), 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "1934 Act") based upon allegedly false and misleading statements or omissions made by the company and its officers, and, if the alleged misstatements or omissions are made in connection with a securities offering, under Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 (the "1933 Act").

Despite the turmoil and disruption of 2020, plaintiffs' lawyers and courts appear to have adapted readily to the "new normal" of 2020, as plaintiffs' firms continued to file securities class actions, albeit at lower rates than in prior years, and courts continued to issue detailed, substantive decisions in these actions. Specifically, as detailed in our prior Year in Review publications, the number of securities class actions filed nationally grew steadily over the last several years, reaching an all-time record level (427 actions) in 2019. In 2020, the number of class action filings in state and federal courts fell below 400 — to 334 actions (a 22% decline from 2019) — for the first time since 2016, but that figure is still far higher than the 1997-2019 average.[4] "Core" class action filings — which excludes M&A-related filings — fell 12%, to 234 actions.[5] As in prior years, three law firms were responsible for the majority of class action filings in 2020, but complaints first filed by these three law firms

1 Justin Baer, *The Day Coronavirus Nearly Broke the Financial Markets*, THE WALL STREET JOURNAL (May 20, 2020), **https://www.wsj.com/articles/the-day-coronavirus-nearly-broke-the-financial-markets-11589982288**.

2 CNN, Market Volatility Spikes to Record High, Taking Out 2008 Crisis Peak (Mar. 16, 2020), *available at* https://www.cnn.com/business/live-news/stock-market-news-today-031620/index.html; CNBC, S&P Fell More Than 11 CNBC, Stock Market Live Monday: Dow Drops 13%, Trump Says Recession Possible, Trading Halted At Open (Mar. 16, 2020), *available at* https://www.cnbc.com/2020/03/16/stock-market-today-live.html.

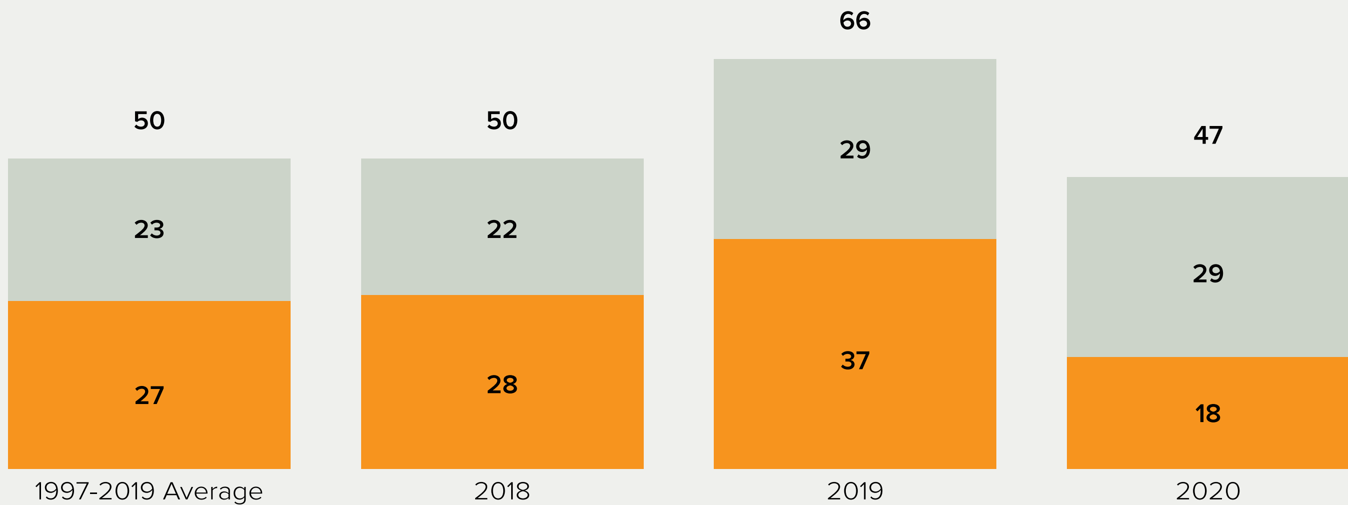
3 *Id.*

4 Cornerstone Research, Securities Class Action Filings 2020 Year in Review (the "Cornerstone Report"), *available at* **https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2020-Year-in-Review.pdf**, at 1.

5 *Id.*

Core Federal Filings for the Technology and Communications Sectors 2018–2020

Technnology
Communication



Note:

1 Sectors are based on the Bloomberg Industry Classification System.

2 Counts may not match previous publications due to case consolidations.

have been dismissed more frequently than those filed by other law firms.[6]

While the overall number of cases in all industries declined, as in past years, technology companies had the second highest number of securities class action filings against them in 2020 as compared to other sectors.[7] The plaintiffs' bar has focused on technology companies in recent years likely due to the number of companies in the sector and the potential volatility in stock prices. However, as depicted in **Figure 1** above, the number of filings against technology companies actually *decreased* for the first time in several years from 66 securities class actions in 2019 to 47 actions in 2020. This 29% decrease is likely attributable to largely positive market performance by the technology sector following the initial market reaction to the pandemic.

As we reported in last year's Year in Review, 2019 saw a significant uptick — 40% — from 2018 in the filing of cases alleging 1933 Act claims in state courts, following the U.S. Supreme Court's March 2018 decision in *Cyan* that class actions under the 1933 Act can be brought in state court and are not removable to federal court. In 2020, however, the total number of 1933 Act filings dropped dramatically (from 66 in 2019 to 33 in 2020), despite the fact that the number of traditional initial public offerings increased by 47% from 2019 to 2020.[8] Plaintiffs largely shifted away from filing these actions in state courts only (*i.e.*, with no parallel federal action), resulting in a 68% drop in the number of 1933 Act cases filed in state courts only from 2019 to 2020 and an increase in 1933 Act filings in federal courts only.[9] This shift back to federal courts is primarily due to the

6 *See* Cornerstone Report, at 34.

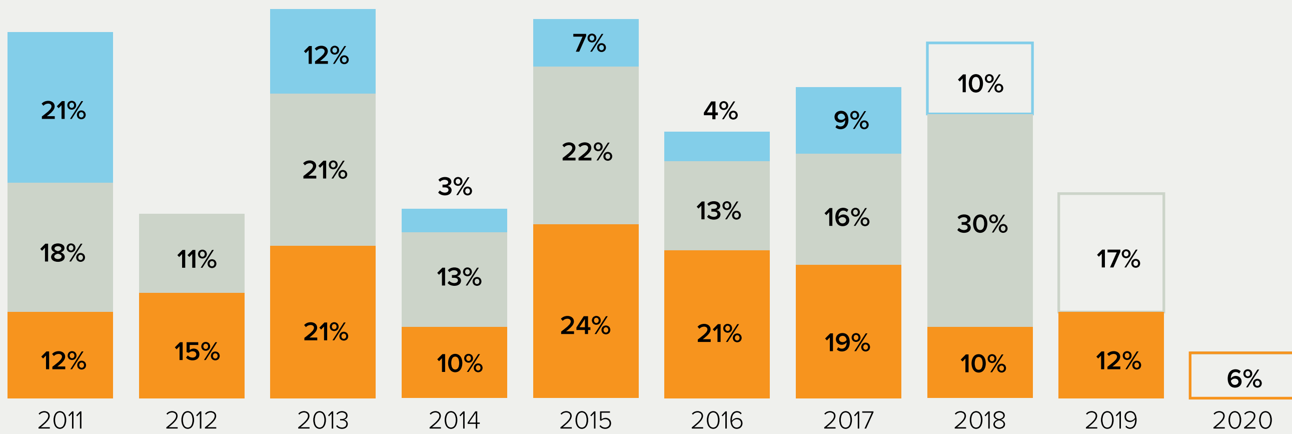
7 Cornerstone Report, at 32, Figure 31.

8 *See* Cornerstone Report, at 4, 19, 21; *see also id.* at 23 (165 operating company IPOs in 2020, a 47% increase from 2019). The number of SPAC IPOs dramatically increased in 2020 as well, from 59 in 2019 to 248 in 2020. *Id.*

9 *Id.* at 4, 21. New York remained the preferred venue for 1933 Act cases filed in state courts, with seven of the 19 filings that were only filed in state court (i.e., with no parallel federal action). *Id.* at 4, 19.

Percentage of Cases Dismissed Within Three Years of Filing Date
Core Technology and Communications Federal Filings 2011–2020

- Cases Dismissed after Two Years but before Three Years of Filing Date
- Cases Dismissed after One Year but before Two Years of Filing Date
- Cases Dismissed within One Year of Filing Date



Note:

1 Percentages of cases in each category is calculated as the number of cases involving firms in the technology or communications sectors that were dismissed within one, two, or three years of the filing date divided by the total number of cases involving firms in the technology or communications sectors filed each year.

2 Sectors are based on the Bloomberg Industry Classification System.

3 The empty portions of the stacked bars for years 2018 through 2020 indicate the percentage of cases dismissed through 3/15/21. The empty portions of these stacked bars therefore present only partial-year observed resolution activity, whereas their counterparts in earlier years show an entire year.

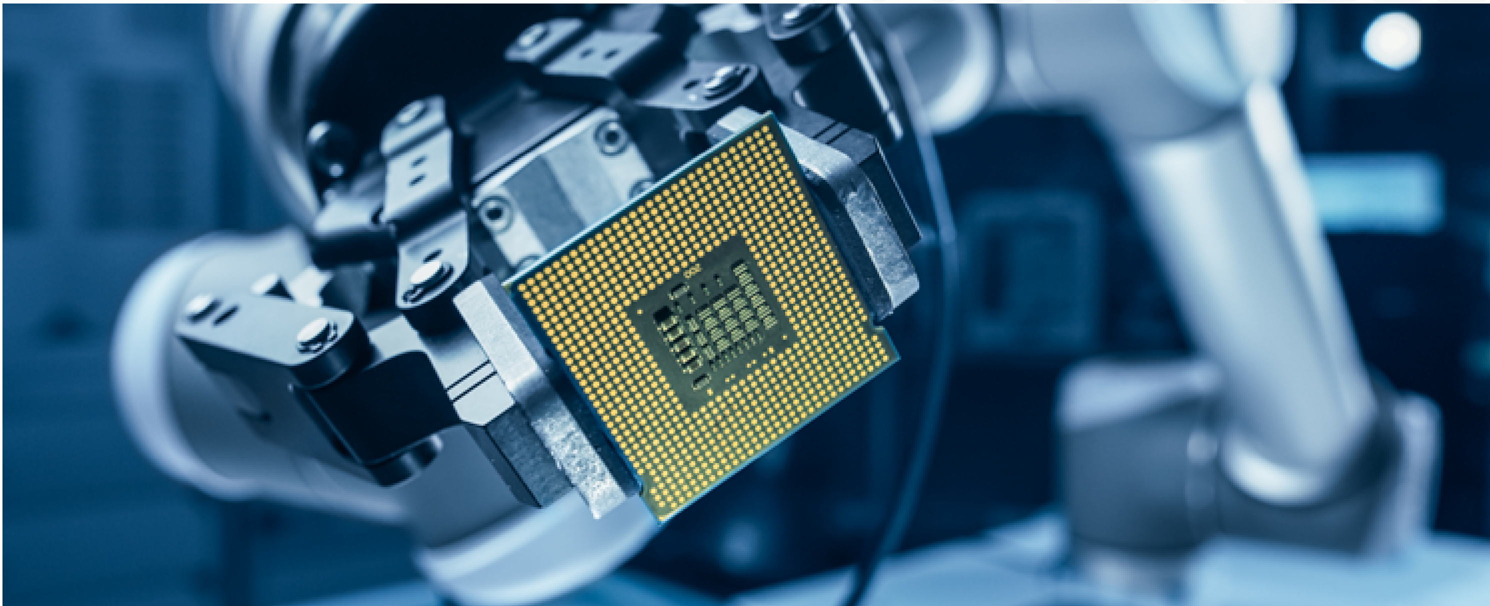
4 Counts may not match previous publications due to case consolidations.

Delaware Supreme Court's March 2020 decision in *Salzberg v. Sciabacucchi*, in which the Court upheld the validity and enforceability of federal forum selection provisions in corporate charters or bylaws that many Delaware corporations have implemented post-*Cyan* requiring 1933 Act claims against them to be filed in federal court.[10] It is also perhaps due to the fact that market declines and disruption in early 2020 were caused by the unanticipated COVID-19 pandemic, followed by overall favorable market conditions beginning in April 2020.[11]

Unfortunately, the percentage of cases against technology companies dismissed within one year of the filing date continued the downward trend observed from 2015 to present. Specifically, as detailed in **Figure 2**, only 6% of federal core filings against technology companies were dismissed by December 31, 2020, as compared to a 12% year-end dismissal rate in 2019 and a 11% year-end dismissal rate in 2018. Thus, there is little chance of obtaining dismissal of a class action against a technology company within the first twelve months after filing. Similarly, as **Figure 2** demonstrates, dismissal rates for cases filed in 2019 as of the end of 2020 are relatively low at 17% as compared to year-end dismissal rates for prior years. The slower speed of obtaining a dismissal is due in part to a slowing of court dockets in 2020 as a result of the COVID-19 pandemic. Courts were either shut down to civil cases for a significant amount of time, or civil cases progressed more slowly in light of a need to attend to criminal dockets. The percentage may increase as courts work through the substantial backlog of cases and jury trials.

10 Since the *Sciabacucchi* decision, four California state courts likewise have enforced these federal forum selection provisions. *See Wong v. Restoration Robotics, Inc.*, No. 18-CIV-02609 (Cal. Super. Ct. Sept. 1, 2020); *In re Uber Technologies, Inc. Securities Litigation*, No. CGC-19-579544 (Cal. Super. Ct. Nov. 16, 2020); *In re Dropbox, Inc. Securities Litigation*, No. 19-CIV-05089 (Cal. Super. Ct. Dec. 4, 2020); *In re Sonim Technologies Inc. Securities Litigation*, No. 19-CIV-05564 (Cal. Super. Ct. Dec. 7, 2020).

11 Cornerstone Report, at 23.



This year, we once again focused our Year in Review on three jurisdictions, which include the most active technology hubs in the country and, thus, have been among the most active jurisdictions for securities class actions filed against such companies: the U.S. Court of Appeals for the Ninth Circuit and California and Nevada District Courts; the U.S. Court of Appeals for the Second Circuit and New York and Connecticut District Courts; and the U.S. Court of Appeals for the First Circuit and District of Massachusetts. Courts in the Second and Ninth Circuits were particularly active in 2020, accounting for 70% of all core federal class action filings (across all industries) in 2020; filings in the Ninth Circuit alone increased by 52% to 79 filings, the highest number on record for that circuit.[12] The perceived defendant-friendly First Circuit, by contrast, experienced a decrease of 67% in core class action filings.[13]

In 2020, federal courts in these jurisdictions once again issued several significant, detailed decisions in securities class actions against technology companies in various growth stages and their directors and officers. As in prior years, these cases involve disclosures concerning issues that technology companies most often face, including revised or missed financial guidance, slowed growth, regulatory compliance, operational risks, performance of products and services, and design vulnerabilities.

Once again, there were several decisions and cases to watch coming out of the Ninth Circuit and the California and Nevada District Courts. In the only Ninth Circuit decision, the court affirmed the district court's dismissal of plaintiffs' claims concerning alleged misstatements and omissions related to data security vulnerabilities, agreeing with the district court's conclusion that plaintiffs failed to plead scienter. California District Courts were very active and several cases were dismissed on grounds that plaintiffs failed to adequately allege that defendants made actionable false or misleading statements and/or that plaintiffs failed to allege particularized facts — as required under Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act ("PSLRA") — that the defendants made any such statements or omissions with scienter (i.e., intentionally or recklessly). The Ninth Circuit is likely to be very active in the coming year and we have summarized ten cases to watch that have been filed against technology companies.

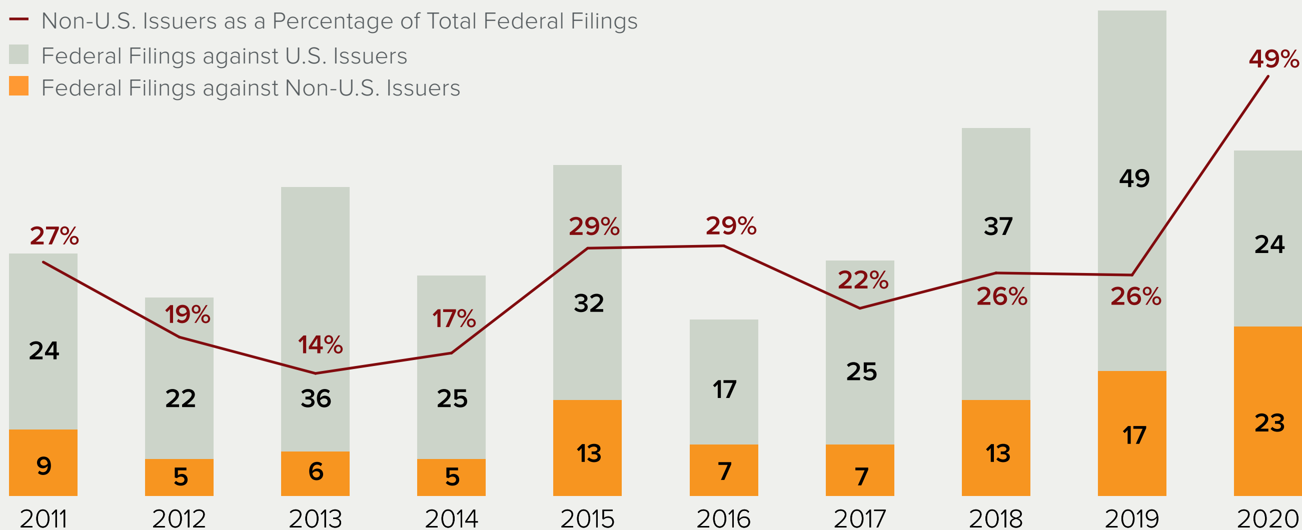
The Second Circuit and New York and Connecticut District Courts also delivered a number of interesting decisions in 2020. In the lone Second Circuit decision captured in this report, the court affirmed the district court's dismissal of plaintiffs' second amended complaint and its denial of plaintiffs' motion for leave to file a third amended complaint. The Second Circuit agreed with the district court's holdings that the

12 Cornerstone Report, at 33.

13 *Id.*

CAF Index™ — Annual Number of Class Action Filings by Location of Headquarters

Core Technology and Communications Federal Filings 2011–2020



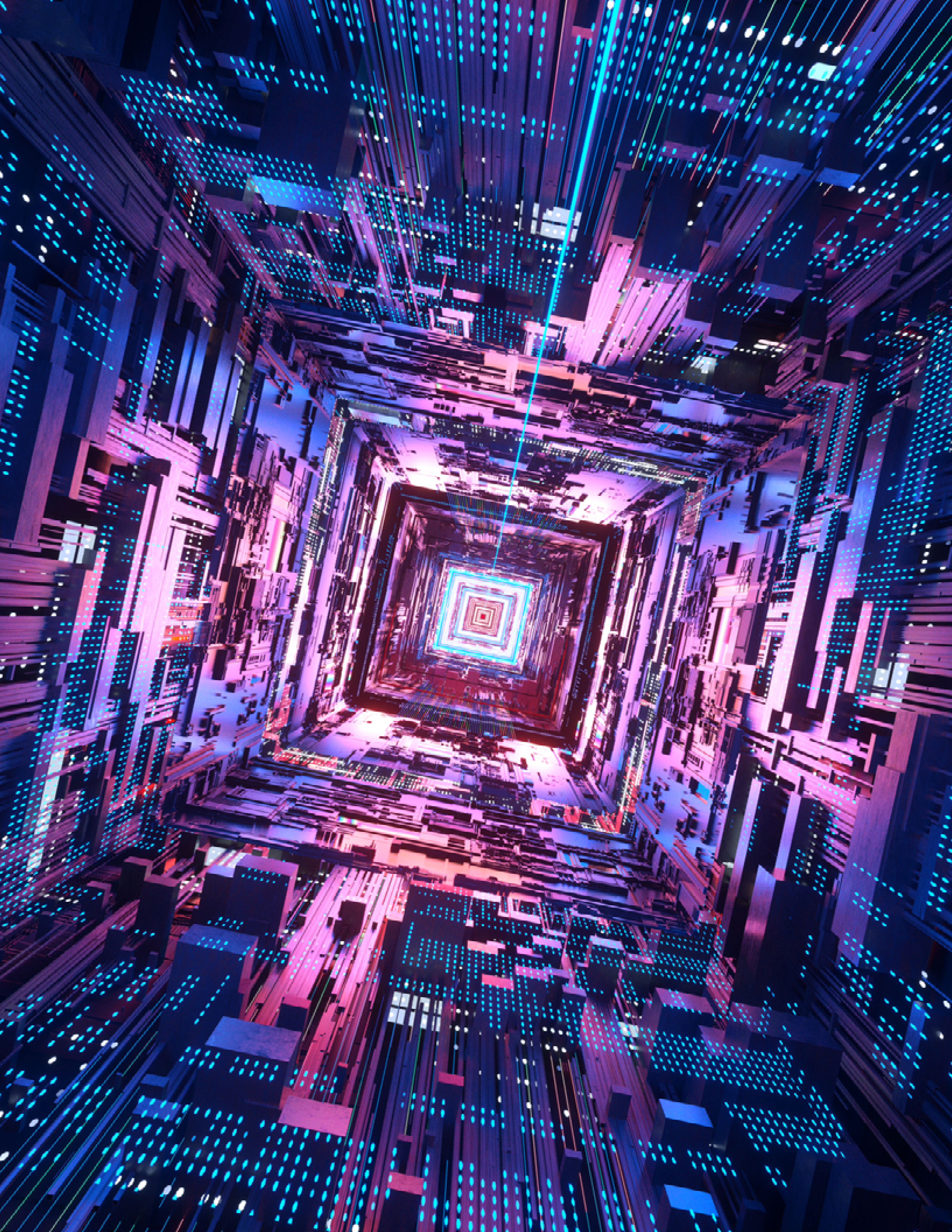
Note:

1 Counts may not match previous publications due to case considerations.

challenged statements amounted to inactionable statements of opinion about the company's future earnings goals, and that plaintiffs failed to demonstrate in their motion for leave to amend the existence of information alleged to be in the defendants' possession that was actually inconsistent with their statements of opinion regarding estimated future financial performance. The district courts proved to be relatively defendant-friendly in these matters, dismissing approximately half of these cases with prejudice on the first motion to dismiss. Notably, many of the cases decided in the New York District Courts were brought against non-U.S. issuers (i.e., companies headquartered outside the United States). In 2020, the number of core filings against non-U.S. issuers across all industries reached a record high of 74, comprising 33% of total core filings.[14] As depicted in **Figure 3**, the percentage of cases against non-U.S. issuers in the technology space was even higher at 49%.

The First Circuit did not issue any relevant decisions in 2020; however, District of Massachusetts issued decisions in four cases concerning technology companies. Each case was dismissed on grounds that plaintiffs failed to adequately allege actionable misstatements or omissions, scienter, or loss causation. Three of the four were dismissed with prejudice on the first motion to dismiss, and the plaintiffs in the fourth case were permitted limited leave to amend.

14 *Id.*, at 28.



Ninth Circuit

***Eckert v. Paypal Holdings, Inc.*, Case No. 19-16869, 831 Fed. Appx. 366 (9th Cir. Dec. 17, 2020)**
Customer Data Security Breach

PayPal Holdings, Inc. operates an online payments system that supports money transfers and serves as an electronic alternative to traditional payments methods, such as checks and money orders. On November 10, 2017, PayPal announced that TIO Networks ("TIO"), a bill-pay management company it acquired a few months earlier, suspended operations to protect TIO's customers from vulnerabilities on the TIO platform and issues with TIO's security platform. On December 1, 2017, the companies announced that a breach of TIO's systems occurred and that confidential information of 1.6 million users was potentially compromised. The following trading day, December 4, 2017, PayPal's share price dropped 5.75%, closing at $70.97.

Investors filed a class action lawsuit on December 6, 2017, asserting violations of Sections 10(b), 20(a) and Rule 10b-5 of the 1934 Act by the company and certain of its officers, on the basis that the November 2017 press release was allegedly false and misleading because PayPal and TIO did not merely discover a vulnerability, but in reality discovered an actual data breach. After defendants moved to dismiss plaintiffs' consolidated amended complaint, and the court granted that motion, plaintiffs filed a second amended complaint. Defendants again moved to dismiss. Although the court determined, that plaintiffs adequately pled falsity of the November announcements because "[t]his disclosure could plausibly have created an impression that only a potential vulnerability and not an actual breach had been discovered, and a vulnerability differs considerably from a breach that actually threatens the privacy of 1.6 million users", it dismissed the second amended complaint, with prejudice, on the ground that plaintiffs failed to plead a strong inference of scienter. The court held that plaintiffs' allegations were insufficient because none of the purported statements showed that defendants knew of the magnitude of the data breach when the November 2017 statement was made. The court further found that the weakness of any inference of scienter was underscored by the lack of any obvious incentive to mislead, explaining there was no allegation of motive (e.g., no stock sales) or any explanation of what benefit defendants hoped to gain by delay disclosure of the full scope of the breach by three weeks.

Plaintiffs appealed the dismissal to the U.S. Court of Appeals for the Ninth Circuit, which affirmed the district court's decision. Specifically, the Ninth Circuit rejected plaintiffs' contention that they pled scienter by alleging that the defendant knew, in November 2017, that PayPal had discovered an actual security breach, not just security vulnerabilities. The court explained that "the defendant publicly disclosed at that time that the issue was serious enough to merit suspending TIO's operations entirely. Under such circumstances, we cannot conclude that Plaintiffs have shown a cogent and compelling inference that the defendant's November announcement was intentionally misleading or so obviously misleading that he must have been aware of its potential to mislead." The Ninth Circuit also concurred with the district court that the lack of scienter was underscored by plaintiffs failure to allege any stock sales by defendants during the relevant time period or a motive to mislead investors in November but not in December.

***Stoyas v. Toshiba Corp.*, Case No. 15-cv-04194 DDP, 424 F. Supp. 3d 821 (C.D. Cal. Jan. 1, 2020)**
False Profit Reports

Toshiba Corporation is a Tokyo-based corporation that develops, manufactures, and sells a broad range of electronic and energy products and services such as semiconductors, computers, appliances, nuclear power plants, and medical equipment. On September 7, 2015, Toshiba restated six years of financial results admitting substantial institutional fraud related to its

use of a “percentage of completion” (“POC”) method of accounting. In restating its results, Toshiba reduced its total reported pre-tax profits for the years 2008 through 2014 by roughly a third and restated its shareholder equity, eliminating $9.9. billion in equity value. The restatement followed a months-long investigation by the Financial Services Agency (“FSA”) and Securities Exchange and Surveillance Commission (“SESC”) of Japan which began on February 12, 2015 when Toshiba received an order for inspection of Toshiba accounting methods.

On April 3, 2015, Toshiba issued a press release announcing the establishment of a “Special Investigation Committee” (“SIC”) to investigate Toshiba’s use of POC accounting. The SIC was comprised of Toshiba’s chairman, a member of its Audit Committee, one member each from its legal and audit departments, one outside lawyer, and one outside auditor. After the SIC identified improper use of POC accounting, Toshiba announced in a press release on May 8, 2015 that the SIC would be re-formed as an “Independent Investigation Committee” (“IIC”) consisting entirely of outside independent experts and that the investigation had expanded to include other accounting areas beyond POC accounting involving several Toshiba infrastructure projects and could extend farther back in time than 2013. Toshiba also announced it would be withdrawing its FY14 earnings guidance and cancelling payment of its FY14 dividend. Following these press releases, Toshiba’s stock declined 16.6%.

On May 13, 2015, Toshiba announced it would be restating its FY11 to FY13 financial results to reduce operating income by ¥50 billion (approximately $420 million) as a result of the improper accounting methods, cautioning this reduction was “only the current expected amount” which could change pending completion of the IIC investigation. Throughout May and June 2015, Toshiba issued press releases expanding the scope of the IIC investigation and announcing preliminary results of that investigation.

On July 20 and 21, 2015, Toshiba issued press releases announcing it received the IIC report and summarizing in Japanese the report conclusions, noting Toshiba expected to restate its FY08 through FY13 financial results, including reducing its operating income by ¥151.8 billion. Toshiba also noted the IIC’s findings that “pointed to the involvement of top management” and announced the resignation of nine senior executives related to the “substantial amount of inappropriate accounting over a long period of time.” On August 8, 2015, Toshiba announced the formation of a Management Revitalization Committee to address reform to its governance and internal controls.

On September 17, 2015, following its September 7 restatement of six years of financials, Toshiba issued a press release announcing the formation of an Executive Liability Investigation Committee (“ELIC”) to investigate potential wrongdoing related to the “inappropriate accounting practices” at Toshiba and senior executives’ involvement. Following the announcement, Toshiba stock price declined more than 40%, constituting a loss of $7.6 billion in market capitalization.

On November 7, 2015, Toshiba announced it had investigated 98 individuals and filed suit against five former executives on November 10, 2015 as well as announcing it would discipline 26 additional management employees referenced in the IIC as being suspected of involvement in the improper accounting.

Investors filed a putative class action against Toshiba and two of its executives alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. The case was brought on behalf of a class of all persons who acquired American Depository Shares or Receipts (“ADRs”) from Toshiba during the class period, and alleged that class members had acquired Toshiba ADRs “in reliance upon the truth and accuracy” of Toshiba’s financial statements and suffered economic loss when the company’s fraud was revealed. The complaint also included a claim on behalf of the ADR class and a class of “all citizens and residents of the United States who otherwise acquired shares of Toshiba common stock during the Class Period” based on alleged violations of the Financial Instruments and Exchange Act of Japan (“JFIEA”), claiming that Toshiba’s material false information and

omissions artificially inflated the value of its common stock, harming purchaser class members when the fraudulent accounting was revealed.

The district court dismissed the first amended complaint with prejudice on May 20, 2016. Applying *Morrison v. Nat'l Australia Bank Ltd.* (561 U.S. 247 (2010)), the district court found that the over-the-counter market where class members purchased Toshiba ADRs was not a "stock exchange" within the meaning of the Exchange Act, which *Morrison* defined as a domestic exchange. The district court further held that the first amended complaint had failed to adequately allege Toshiba's involvement in the alleged securities transactions, making Section 10(b) inapplicable. The district court subsequently dismissed the Japanese law claims on the basis of comity and *forum non conveniens*.

Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. In a July 17, 2018 opinion, the three-judge panel reversed the district court's dismissal, finding that it had misapplied *Morrison*. While the Ninth Circuit agreed that "[t]he over-the-counter market on which Toshiba ADRs trade is simply not an 'exchange' under the Exchange Act," it found that the Toshiba ADRs did fall under the category of "domestic transactions in other securities" covered by Section 10(b). Adopting the Second Circuit's irrevocable liability test, the Ninth Circuit held that the presence of a domestic transaction is sufficient to meet the standard set by *Morrison*, rejecting Second Circuit precedent that a domestic transaction was necessary, but not sufficient, to bring a securities transaction under Section 10(b). The Ninth Circuit concluded that while plaintiffs' first amended complaint did not, as pled, sufficiently allege a domestic violation of the Exchange Act, "allowing leave to amend would not be futile." It therefore reversed and remanded to permit plaintiffs to amend their complaint.

Toshiba petitioned the Supreme Court for *certiorari* and was denied, after which plaintiffs filed a second amended complaint on August 8, 2019 which Toshiba again moved to dismiss, arguing plaintiffs had failed to allege a domestic transaction under the Exchange Act and failed to allege that its conduct "was in connection with [plaintiffs'] purchase of ADRs. Toshiba also argued that comity and *forum non conveniens* compelled dismissal.

The district court denied the motion to dismiss the second amended complaint, holding that plaintiffs plausibly alleged that they had irrevocable liability to purchase Toshiba's ADRs in the United States, satisfying the Ninth Circuit's standard. Defendants argued that plaintiffs could not allege a domestic transaction because "Plaintiffs' conversion of their form of ownership interest from title holder of Toshiba common stock to beneficial owner through unsponsored ADRs does not qualify as a purchase" and that because the ADRs were issued by Citibank, the court could infer that plaintiffs actually first purchased Toshiba stock in a foreign transaction and then deposited those shares with Citibank in a second transaction in exchange for the ADRs. The court rejected Toshiba's contention on the basis that, at the pleading stage, it could not "accept Defendant's proposed inference" of no domestic transaction "based solely on the allegation that [the ADRs]" were issued by Citibank, as doing so "would necessarily disregard Plaintiffs' numerous allegations explaining the nature of the ADR transaction that occurred here" including the placement of the ADR buy order, the payment of the purchase price, the transfer of the securities title, the direction of the purchase by outside investment managers, the use of the OTC trading platform, the use of Citibank, and the recording of title, all of which had been alleged to have occurred in the United States. The court noted that "[w]hile the court agrees that the location of the broker alone does not necessarily demonstrate" irrevocable liability, "the allegations, taken together, provide sufficient indicia" and that discovery would ultimately reveal the nature of the original transaction.

The court also found that plaintiffs had sufficiently alleged Toshiba's involvement in the establishment of the ADRs by showing Toshiba's "plausible consent to the sale of its stock in the United States as ADRs." Moreover, the court held plaintiffs had sufficiently alleged that Toshiba's "fraudulent conduct concealed the true condition of the company and risks associated with its stock" as it related to purported omissions regarding the value of the ADRs and the concealment of the improper accounting methods in its various financial reports. Addressing Toshiba's comity argument, the district court concluded that "comity and *forum non conveniens* do not compel dismissal of Plaintiffs' JFIEA claim" because plaintiffs had sufficiently alleged conduct "in connection with a domestic transaction" and because plaintiffs and the identified class were U.S. nationals. The district court accordingly denied Toshiba's motion to dismiss on January 28, 2020. Toshiba filed its answer on February 11, 2020 and plaintiffs filed for class certification on February 29, 2020 which is set for hearing on August 2, 2021. Close of fact discovery is set for September 23, 2021 and close of expert discovery is set for January 19, 2022. Dispositive motions are due February 17, 2022 and trial is set for September 27, 2022.

Karinski v. Stamps.com, Inc., Case No. 19-cv-1828-MWF, 2020 WL 281716 (C.D. Cal. Jan. 17, 2020)

Termination of Supplier Partnership

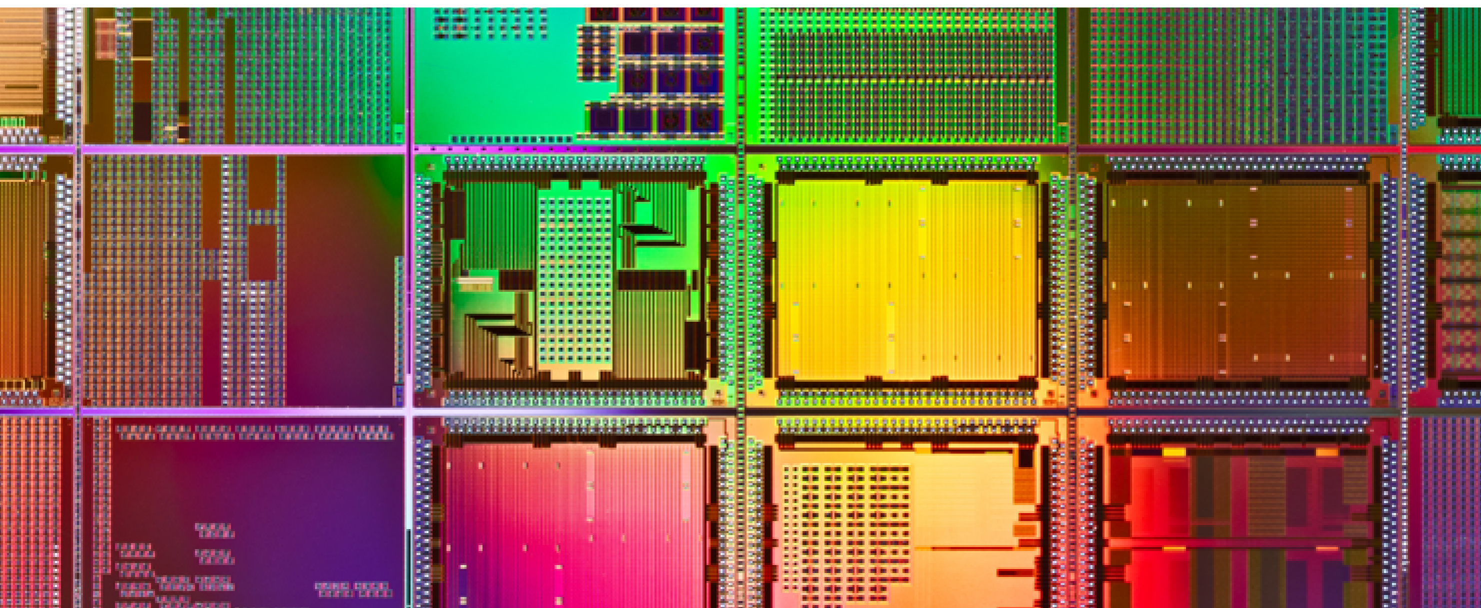
Stamps.com, Inc. provides internet-based mailing and shipping solutions to customers in the U.S. and Europe. Stamps.com offers United States Postal Service ("USPS") products to its customers at discounted rates, allowing customers to print postage onto envelopes, paper, and labels using their own computer, printer, and internet connection. This business model was made possible by Stamps.com's partnership with USPS, which accounted for 87% of the company's revenue. USPS granted the company exclusive access to its postage and delivery market, while Stamps.com would generate new sales and customers for USPS through its online interface. USPS also permitted Stamps.com to purchase postage in bulk from USPS at lower-than-advertised rates and resell to its customers below market price, with the caveat that such discounted rates would only be offered to companies that would ship in large volumes and thus warrant bulk postage discounts. Between May 3, 2017 and May 8, 2019, Stamps.com reported strong financial results each quarter, including revenue and earnings growth, which it largely attributed to its partnership with USPS. For example, during a first quarter 2017 conference call, its CEO stated that "[t]he USPS has always been one of our most important partners" and that Stamps.com "continue[s] to enjoy a great partnership with the USPS and feel that we have created a sustainable win-win model for both of us, which will result in the continued growth of USPS packages, in e-commerce and more generally." He also stated that "the USPS is very happy with the very successful partnership."

On February 21, 2019, Stamps.com held a conference call to discuss quarterly financial results and revealed that the company was discontinuing its partnership with USPS in order to fully embrace partnerships with other carriers and that 2019 revenue was expected to decline. Stamps.com's stock price dropped over 57%. On February 26, 2019, a news outlet reported that, contrary to the company's representations, it was USPS that elected to terminate the partnership with Stamps.com because it was abusing the reseller program. The company subsequently lowered its profit outlook for the full year, which it attributed to potential unfavorable short- and long-term amendments, renegotiations, and termination of certain Negotiated Service Agreements (whereby USPS offered discounted postage rates to high-volume end users) between the USPS and the company's reseller partners.

Investors filed a putative class action complaint against Stamps.com and several of its executives, alleging violations of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder. Plaintiffs alleged that during the relevant Class Period, defendants repeatedly touted Stamps.com's strong financial performance, which it linked to its partnership with USPS. Plaintiffs alleged these statements were false and misleading because, according to multiple confidential witnesses, Stamps.com's positive performance was built on manipulation of its contractual relationship with USPS and thus its financial results were both misleading and unsustainable. Plaintiffs also alleged that the individual defendants and other Stamps.com insiders, knowing that the company's manipulation would be discovered by USPS, sold hundreds of millions of dollars of company stock at artificially inflated prices during the Class Period, an amount far greater than that sold by the same individuals in the two years prior to the Class Period.

Defendants moved to dismiss the consolidated complaint which the court denied on January 17, 2020. The court rejected plaintiffs' claims that the challenged statements regarding growth were misleading due to defendants' failure to disclose their low-volume shipper program and secretly converted existing USPS customers, because defendants adequately disclosed the low-volume shipper and preexisting customer discounts. The court also held that plaintiffs failed to adequately allege that Stamps.com's statements about past and future financial results were misleading where plaintiffs had not "demonstrated that any of Defendants' sources of income were illegal" and Stamps.com accurately reported its revenue. The court did, however, find that defendants' alleged statements about the strength of Stamps.com's partnership with USPS were misleading. The court noted that "[n]ormally, Defendants' statements that USPS was 'very happy' with Stamps and their business model and that Stamps had a 'great partnership with USPS' would be considered general statements of optimism that constitutes corporate puffery." However, in this context, when USPS was allegedly investigating Stamps.com resellers and implementing changes in its partnership with the company to reduce Stamps.com's reseller practice, the court found that plaintiffs "sufficiently alleged that Defendants' statements 'affirmatively create[d] an impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed].'"

Addressing scienter, the court held that "[p]erhaps none of the individual allegations alone would be sufficient to establish scienter. However, taken together, they gave rise to a strong inference of scienter." Those collective allegations included allegations that the defendants regularly referenced conversations they had with USPS regarding their partnership, which the court held supported an inference that defendants were aware that the USPS was not happy with Stamps, and in particular, its reseller business practice. The allegations



also included significant stock sales, former employees' allegations that defendants were aware of or recklessly disregarded the fact that Stamps' reseller business practices were unsustainable, and allegations that defendants lied about the reason for the termination of Stamps.com's relationship with USPS.

Finally, the court held that plaintiff sufficiently alleged that defendant's misstatements (regarding the strength of its relationship with USPS and USPS's approval of Stamps reseller products), as opposed to some other fact, foreseeably caused the plaintiffs' loss. It noted that other reasons offered by defendants for the stock price drops were factual disputes better suited for a later stage in the case.

Defendants filed their answer on January 31, 2020. On June 22, 2020, defendants filed a Motion for Clarification asking the court to specify which alleged statements remained actionable. On July 14, 2020, the court issued an order addressing defendants' motion, and dispensing with two disputed statements as "no longer actionable." The remaining seven statements, however, remain, as "these statements could represent that that [sic] Stamps had a strong partnership with the USPS or that the USPS fully approved Stamps' use of the reseller program." The court certified the class on November 9, 2020. Fact discovery is set to close on May 7, 2021, expert discovery is set to close on July 16, 2021, dispositive motions and *Daubert* motions are due by July 23, 2021, and trial is set for March 1, 2022.

***In re Alphabet, Inc. Securities Litigation*, Case No. 18-cv-06245-JSW, 2020 WL 2564635 (N.D. Cal. Feb. 5, 2020)**
Google+ Data Breach

Alphabet, Inc., the parent company of Google, is a multinational technology conglomerate comprised of several former Google subsidiaries. Among its products are web-browser Google, webmail Gmail, and the now defunct social media platform Google+. In March 2018, Google discovered a software glitch in the application programming interface in Google+ which exposed hundreds of thousands of users' personal data, which it promptly remedied, but did not disclose the breach at that time. Meanwhile, in its April and July 2018 Form 10-Q's, it stated that there were no changes to its prior risk factors. Such risk factors included warnings that privacy concerns could cause reputational damage and deter users, that breaches of Alphabet's security measures could cause significant legal and financial exposure, and that any compromise of security that results in the release of users' data could seriously harm the business. On October 8, 2018, the *Wall Street Journal* reported on the software glitch and data breach. Citing an internal Google memorandum, the *Wall Street Journal* stated that Google had not disclosed the data breach in part because of concerns about drawing regulatory scrutiny and suffering reputational damage. Later that day, Google issued a blog post conceding that it discovered and remediated the bug in March 2018. Subsequently, Google's stock price declined by nearly 6%. Thereafter, Google announced plans to shut down Google+.

Investors filed putative securities class actions against Alphabet and its officers, alleging that between the discovery of the breach and its announcement, defendants made materially false and misleading statements regarding the extent of the breach and users' data security in violation of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Defendants filed a motion to dismiss the consolidated amended complaint, which the court granted, with leave to amend, holding that plaintiffs failed to plead a misrepresentation, omission of material fact, or scienter. Specifically, the court held that the bug was fixed before the challenged risk factor disclosures were made and thus they were not false. The court explained "[t]here is no support for the position that a remediated technological problem which is no longer extant must be disclosed in the company's future looking disclosures." The court further held that plaintiffs failed to show that the alleged software defect was material to Alphabet's overall business or that it materially affected its earnings. The court deemed the remaining challenged statements inactionable puffery.

The court also held that plaintiffs failed to plead scienter, rejecting plaintiffs' theory that the representations made by Alphabet were intentionally misleading so that their officers could avoid testifying before Congress at a time when Facebook was facing severe scrutiny for its privacy policies and flaws. In reaching this conclusion, the court relied on the allegations that Alphabet created a privacy task force consisting of "over 100 of Google's best and brightest engineers, product managers, and lawyers," that this task force discovered the bug during an audit, and that after discovering the bug, Alphabet remediated it. The court held that this rendered the allegations insufficient to plead scienter.

***Iron Workers Local 580 Joint Funds, et al. v. Nvidia Corporation, et al.*, Case No. 18-cv-07669, 2020 WL 1244936 (N.D. Cal. Mar. 16, 2020); 2021 WL 796336 (Mar. 2, 2021)**

Crypto Volatility Triggers Reduced Guidance

NVIDIA Corporation ("NVIDIA") designs and produces graphic processing units ("GPUs"). The gaming market is NVIDIA's largest market as gamers utilize graphics cards featuring NVIDIA GPUs. NVIDIA's GPUs are also used in the original equipment manufacturer ("OEM") market in devices such as tablets and phones. In 2016, prices for certain cryptocurrencies began to rise and demand for NVIDIA's GeForce Gaming GPUs rose as crypto-miners turned to NVIDIA GPUs. However, demand for GPUs is tied, in part, to volatile cryptocurrency prices, and thus demand for GPUs can likewise fluctuate dramatically.

In May 2017, NVIDIA developed a GPU designed specifically for cryptocurrency mining ("Crypto SKUs") and reported revenues for its Crypto SKUs in its OEM segment — not its gaming segment. The Crypto SKUs were designed especially for mining and made without video display ports, and thus lacked a secondary market for gamers. From May 2017 to May 2018, NVIDIA reported solid revenue growth each quarter from its gaming segment. Throughout that period, defendants made various statements about the impact of crypto-mining on the company. For example, they stated (i) that NVIDIA monitored the cryptocurrency market closely and knew its dynamics, (ii) cryptocurrency was "small … because our overall GPU business is so large[,]" for NVIDIA, but was "a real part of our business," while noting that Gaming, Professional Visualization, Datacenter, and Automotive "core growth drivers" were other areas of the business"[,] and (iii) "we serve the vast … majority of the cryptocurrency demand out of [the Crypto SKU,]" but acknowledged "there probably is some residual amount or some small amount in terms of" cryptocurrency-related sales in the gaming GPU segment.

On August 16, 2018, NVIDIA announced on an earnings call that it lowered its revenue guidance for its third quarter of 2018 by 2.2%. Thereafter, NVIDIA's CFO and CEO disclosed that guidance was revised because prior guidance "anticipated cryptocurrency to be meaningful for the year [and] we are now projecting no contributions going forward." The next day, NVIDIA's stock price fell by 4.9%, from a close of $257.44 per share on August 16, 2018, to a close of $244.82 per share on August 17, 2018. On November 15, 2018, NVIDIA announced that it missed its lowered 3Q 2018 revenue by under 2% and announced guidance for the fourth quarter of 2018 which was a 7% less than the 4Q 2017. The CFO noted that in 3Q 2018, "[g]aming was short of expectations as post crypto channel inventory took longer than expected to sell through. Gaming card prices, which were elevated following the sharp crypto falloff, took longer than expected to normalize." She also noted that inventory levels of gaming GPUs "remained higher than expected." NVIDIA's stock price then fell 28.5% over two trading sessions, from a close of $202.39 per share on November 15, 2018, to close at $144.70 per share on November 19, 2018.

On December 21, 2018 investors filed a putative class action lawsuit against NVIDIA and certain of its executives alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder based on the theory that defendants falsely represented that gaming revenues were largely unrelated to sales to crypto-miners. The defendants moved to dismiss the consolidated amended complaint, which the court granted, with leave to amend.

First, the court held that plaintiffs' falsity allegations relied entirely on a purported expert's analysis that NVIDIA underreported revenues from crypto-mining by approximately $1.126 billion, because "Plaintiffs failed to describe [the expert's] assumptions and analysis with sufficient particularity to establish a probability that its conclusions are reliable." In particular, the court focused on the expert's key assumption that NVIDIA's crypto-mining market share mirrored its gaming market share — something critical to its analysis — but failed to provide the alleged source for this assumption. Indeed, the court noted that this assumption was "clouded" by allegations in the amended complaint that NVIDIA's primary competitor, Advanced Micro Devices, Inc. ("AMD"), was the preferred provider of GPUs by crypto-miners — meaning NVIDIA had a smaller share of this market — but that the amended complaint lacked similar allegations that gamers or the gaming industry generally preferred AMD GPUs.

Second, the court concluded that plaintiffs failed to plead sufficient facts alleging scienter because "[t]aking all the allegations provided by the confidential witnesses together, they fail to plausibly establish that any particular statement by any Individual Defendant was knowingly or recklessly false or misleading when made." The court reasoned that none of the alleged confidential witnesses were alleged to have sufficient contact with the individual defendants or personal knowledge sufficient to show that any individual defendant knew of information that allegedly contradicted the statements attributed to them. The court further held that plaintiffs failed to meet the "heavy burden" necessary to rely on the core operations theory for scienter — that is, because the alleged misstatements concerned NVIDIA's core business, the individual defendants essentially must have known that they were false when made. The court reasoned that, contrary to plaintiffs' contention, the challenged statements quantifying NVIDIA's cryptocurrency-related gaming sales were not "specific admissions...of detailed involvement in the minutia" of NVIDIA's operations required for the core operations theory to prevail. And the conclusory allegation that "gaming is NVIDIA's core business" was not enough. Finally, the court rejected plaintiffs' motive argument that the CEO's sale of 111,000 shares during the class period supported scienter because it was not suspicious under the circumstances. The court explained that, although the sale was not pursuant to a 10b5-1 plan like most of the CEO's stock sales, the sale was insignificant (less than half a percent) given the overall amount of stock the CEO owned, and he sold the stock well before the peak stock price during the class period.

Finally, the court rejected plaintiffs' motive argument that the CEO's sale of 111,000 shares during the class period supported scienter because it was not suspicious under the circumstances. The court explained that, although the sale was not pursuant to a 10b5-1 plan like most of the CEO's stock sales, the sale was insignificant (less than half a percent) given the overall amount of stock the CEO owned, and he sold the stock well before the peak stock price during the class period.

Although the court determined that plaintiffs failed to plead scienter and falsity, it held that plaintiffs sufficiently pled loss causation. Notwithstanding its earlier conclusion that falsity was not pled, the court found that "Defendants' alleged misstatements were the proximate cause of Plaintiffs' loss." The court explained that plaintiffs successfully tied NVIDIA's August and November 2018 disclosures "puncturing the[] allegedly misleading impressions" drawn from the challenged statements to their loss by alleging that the market was concerned about whether crypto-mining was behind the surge in NVIDIA's gaming revenues and that defendants' assurances caused the stock to trade at artificially high prices.

Plaintiffs filed an amended complaint on May 13, 2020, which defendants again moved to dismiss and the court granted, with prejudice. The court focused its analysis on plaintiffs' failure to plead scienter, without addressing falsity. It held, again, that the four confidential witness allegations reiterated in the amended complaint and new allegations from a fifth confidential witness "fail[ed] to raise a strong inference of scienter largely because Plaintiffs do not adequately tie the specific contents of any of these data sources to particular statements so as to plausibly show that the Defendant who made each specified statement knowingly or recklessly spoke falsely." The court also reiterated its prior holding that the core operations theory was inapplicable here, based on the same rationale as the prior dismissal order.

Judgment was entered for defendants on March 2, 2021. Plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit on March 30, 2021 (Case No. 21-15604).

Hessefort v. Super Micro Computer, Inc., Case No. 18-cv-00838, 2020 WL 1551140 (N.D. Cal. Mar. 23, 2020); 2021 WL 1169906 (N.D. Cal. Mar. 29, 2021)

Aggressive Focus On Revenue

Super Micro Computer, Inc. provides advanced server technology and computing solutions. In 2015, Super Micro failed to meet SEC filing deadlines and issued a prior period adjustment, though the company subsequently assured investors it had implemented a new accounting system to avoid future issues. In October 2017, Super Micro announced that it discovered further accounting irregularities causing its Audit Committee to begin an internal investigation, which would cause the company to fail to meet SEC filing requirements. On January 30, 2018 the company announced that the investigation was complete, but its 2018 filings would be delayed while it analyzed the impact of the investigation on the company's historical financial statements.

Investors filed a putative class action lawsuit against Super Micro and its officers under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder, alleging that defendants made false or misleading statements regarding the company's business, operational, and compliance policies.

On August 23, 2018, the company's stock was delisted by NASDAQ. The company's CFO and senior vice president of international sales both resigned. On May 17, 2019, the company announced that between fiscal years 2013 and 2017, it overstated its revenue by 1.1%, its net income by 6.8%, and earnings per share by 6.8%, requiring a financial restatements for each of those years. And on the same day, Super Micro filed its fiscal year 2017 Form 10-K, restating its 2013 through 2017 financials and revealing "material weaknesses in its internal controls over financial reporting" due to a "culture of aggressively focusing on quarterly revenue without sufficient focus on compliance." The Form 10-K also indicated that certain "officers and managers were aware of, condoned or were involved in actions that reflected an inappropriate tone at the top." The company set forth a remediation plan to address the disclosed issues.

On June 21, 2019, the lead plaintiff filed a second amended consolidated complaint, alleging Super Micro made materially false statements concerning the company's internal operations and controls, its financial performance, its compliance with generally accepted accounting principles ("GAAP"), and its internal audit. Defendants moved to dismiss, which the court granted, with leave to amend, holding that plaintiffs failed to sufficiently allege scienter. First, the court held that the company's Form 10-K for the fiscal year 2017, which stated in part that "[s]ome employees, including officers and managers… failed to raise issues with material accounting consequences to the Audit Committee and our external auditors, and with respect to one transaction, appear to have attempted to minimize material facts about a sales transaction," was insufficient to support an inference of scienter to the specific defendants because plaintiffs had not included enough detail in the operative complaint to show that each defendant had a culpable state of mind. The statements in the Form 10-K generally referred to "[s]enior management" and "officers and managers" and failed to identify specific defendants or provide sufficient context to infer scienter to each individual defendant.

Second, the court found that the magnitude of overstatements and alleged GAAP violations were not significant enough to establish that the defendants "knew or must have been aware of the improper revenue recognition[.]" The court explained that, while "significant violations of GAAP standards" may "provide evidence of scienter," here, the alleged overstatements were merely 1.1% of revenue, 6.8% of net income, and 6.8% of earnings per share for fiscal years 2013 through 2017, which was not significant enough, on its own, to create an inference of scienter. Third, the court held that resignation of some of the defendants did not establish scienter because plaintiffs failed to establish that the resignations were suspicious or uncharacteristic. Fourth, the court rejected plaintiffs' attempt to plead scienter through the "core operations doctrine" (i.e., that the individual defendants had "actual access" to the accounting violations and that the breadth of this misconduct was such that it would be "absurd" to suggest that they did not know about it). The court explained that plaintiffs' allegations of general involvement in day-to-day operations were not particular enough to show actual access, and the complaint lacked "specific admissions" by any defendant of their specific involvement in Super Micro's operations and revenue recognition policies. The court further acknowledged that, even if the complaint had such admissions, it further lacked allegations tying the defendants not only to such policies but also to the allegedly "suspect transactions."

Finally, the court found that, even considering the allegations holistically, plaintiffs did not establish the requisite inference of scienter given that the alleged violations did not constitute a significant percentage of "Super Micro's bottom line" such that scienter could be inferred to the individual defendants. Thus, the court held that the plaintiffs failed to overcome the "opposing innocent inference[.]" Because plaintiffs failed to allege scienter, the court did not address whether any of the challenged statements were actionable.

After the dismissal, plaintiffs filed a third amended consolidated complaint, and then a fourth amended consolidated class action complaint after the SEC issued three cease-and-desist orders to defendants. Defendants in turn filed another motion to dismiss, arguing that Plaintiffs failed to plead scienter. On March 29, 2021,

the motion was granted with prejudice as to the senior vice president of investor relations, but denied as to the other defendants.

The court again rejected plaintiffs' contention that any of the following allegations, alone, created an inference of scienter as to any individual defendant: magnitude of GAAP violations, resignation of some defendants, the Restatement's generalized statements about management, remediation measures, and internal control shortcomings. It similarly held that motive allegations of the CEO's $12.9 million in personal margin loans that were subject to repayment if the stock price declined, did not alone establish an inference of scienter. However, it held that, as to the CEO, these allegations, allegations that he was known to "obsess over every detail of Super Micro's business[,]" and the Restatement's admission of an "inappropriate tone at the top[,]" when considered holistically, created a strong inference of scienter as to the CEO, which was at least as compelling as any opposing innocent inference.

The court also again rejected plaintiffs' attempt to plead scienter through the "core operations doctrine" as to all defendants except the former CFO. The court held that plaintiffs' new allegations as to findings in the SEC's orders detailing the former CFO's involvement in "suspect transactions that contributed to Super Micro's revenue recognition violations" adequately alleged his "actual access" to fraudulent conduct and supported a strong inference of scienter, especially when considering his position as CFO, his departure from the company, the Restatement's criticism of an 'inappropriate tone at the top,' and the fact that the GAAP violations allowed Super Micro to meet or beat guidance and Wall Street consensus expectations when it otherwise would not have.

The court further held that Section 20(a) control liability was adequately pled as to all defendants except the senior vice president of investor relations, explaining that none of the statements attributed to him were analogous to signing financial statements and his title and responsibilities were insufficient to plead control person liability.

The remaining defendants have until April 30, 2021 to answer the complaint.

***In re Tesla, Inc. Securities Litigation*, Case No. 18-cv-04865-EMC, 2020 WL 1873441 (N.D. Cal. Apr. 15, 2020)**
Twitter Posts Concerning Potential Go-Private Transaction

Tesla, Inc. is a publicly-traded company that designs, develops, manufactures, and sells high-performance electric vehicles and solar energy generation and storage products. In late 2017 and early 2018, Tesla experienced production issues with its Model 3 vehicle, which led numerous short-selling investors to target the company, drawing the publicly-expressed animosity of Tesla CEO Elon Musk. In late July, 2018, Musk met with representatives of Saudi Arabia's Public Investment Fund ("PIF)"), and Tesla's Board of Directors subsequently held a conference call in which Musk revealed that PIF was interested in funding a transaction for Tesla to go private. Despite expressing some reservations, the Board authorized Musk to contact investors to gauge their interest.

On August 7, 2018, the Twitter handle associated with Musk sent a series of tweets concerning a take-private transaction involving Tesla, including: "Am considering taking Tesla private at $420. Funding secured"; "I don't have a controlling vote now & wouldn't expect any shareholder to have one if we go private. I won't be selling in either scenario"; "My hope is *all* current investors remain with Tesla even if we're private. Would create special purpose fund enabling anyone to stay with Tesla. Already do this with Fidelity's SpaceX investment"; "Shareholders could either to sell [sic] at 420 or hold shares & go private"; and "Def no forced sales. Hope all shareholders remain. Will be way smoother & less disruptive as a private company. Ends negative propaganda from shorts." Trading volume in Tesla stock rose to 30 million shares that day, and Tesla stock price rose to an intraday high of $387.46/share, approximately $45 above the prior trading day's closing price. The same day, Musk circulated an email to Tesla employees, which was made publicly available on Tesla's blog, and which included statements that "a final decision has not yet been made," but "I think this is the best path forward." Musk offered shareholders the option to stay on in a private Tesla or be bought out at $420/share ("a 20% premium over the stock price following our Q2 earnings call"). Later that day, Musk reaffirmed that he was contemplating a take-private transaction for $420/ share, and that "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote." On August 10, Musk tweeted "Short shorts coming soon to Tesla merch[andise]" and on August 13, 2018, Musk posted on Tesla's blog an "Update on Taking Tesla Private" where he confirmed he was continuing to consider the take-private and providing more detail of his conversations with PIF, stating that he left a meeting with them on July 31st "with no question that a deal with the Saudi sovereign fund could be closed, and that it was just a matter of getting the process moving."

On August 15, 2018, the *Wall Street Journal* reported that the SEC formally subpoenaed Tesla regarding Musk's tweets. In subsequent media interviews, published by the New York Times on August 17, 2018, Mr. Musk stated no one had reviewed his tweets before he posted them and that he had chosen the $420 share price because of "better karma". The same day, Tesla's stock price declined to $305.50, 9% below the previous day. On August 24,

2018, Tesla published a blog post announcing its intention to remain public. On September 27, 2018, the SEC filed a complaint against Musk alleging violations of Section 10(b) of the Exchange Act and Rule 10b-5, followed by a second complaint alleging Musk violated Rule 13a-15. Tesla and Musk consented to judgments of $20 million apiece.

Beginning on August 10, 2018, several investors filed class action complaints, claiming that Tesla and its CEO made false and misleading statements that Tesla had secured funding to take the company private in violation of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Defendants moved to dismiss the consolidated amended complaint on four grounds: (1) that Musk's statements were not misrepresentations; (2) that Tesla itself made no statements because the posts were by Musk in his individual capacity; (3) that plaintiff could not plead loss causation because stock price decline was the result of a corrective disclosure; and (4) that Musk's tweets were not cleared by anyone at Tesla, so the director defendants could not be individually liable. On December 27, 2019, plaintiff opposed the motion to dismiss and filed a motion to strike the motion to dismiss or have it converted into a motion for summary judgment.

On April 15, 2020, the district court denied plaintiff's motion to strike or convert, but also denied defendants' motion to dismiss. The court found that plaintiff had adequately pled the falsity of Musk's August 7 tweets regarding take-private funding, noting that "Mr. Musk's subsequent colloquy with Twitter users confirmed the definitiveness of his representation about the going-private decision being unimpeded by funding conditions." However, the court held plaintiff had not sufficiently pled that the August 13, 2018 blog post was false or misleading, as "it eventually (and truthfully) revealed that the [funding] deal was subject to further scrutiny."

Rejecting defendants' argument that Tesla could not be held liable for Musk acting in his personal capacity, the court held that plaintiff had adequately pled that Musk was speaking as the CEO of Tesla within the scope of his authority when he made the tweets at issue, pointing in particular to a November 2013 statement by Tesla in which Tesla "formally notified investors that it would use Musk's Twitter account as a formal means of communication."

Rejecting defendants' argument that Tesla could not be held liable for Musk acting in his personal capacity, the court held that plaintiff had adequately pled that Musk was speaking as the CEO of Tesla within the scope of his authority when he made the tweets at issue, pointing in particular to a November 2013 statement by Tesla in which Tesla "formally notified investors that it would use Musk's Twitter account as a formal means of communication." Moreover, the court noted the complaint alleged that Tesla adopted Musk's statements when its senior director of investor relations confirmed to analysts email inquiries that funding was secured per Musk's tweets. Addressing scienter, the court rejected defendants' argument that the August 7, 2018 tweet was a good-faith effort to inform shareholders of a potential transaction because of a suspected media leak, and pointed to statements by Musk that confirmed his awareness that the going-private transaction was "far from secure." The court held that plaintiff's use of the temporal proximity between the filing of the SEC complaint and settlement by Musk and Tesla's SEC was permissible as an allegation supporting scienter. The court also held that the August 2, 2018 email "suggested motive to target short-sellers, perhaps by making misleading statements."

The court next addressed plaintiff's loss causation theory that "(1) short-selling investors were forced to prematurely cover their bets because of the artificially inflated prices' and (2) long investors bought at artificially high prices and ultimately suffered losses when the prices declined [sic] as the truth regarding the lack of secured funding became known." With respect to short-sellers, the court held that plaintiff pled facts sufficient to allege that the stock price fluctuations were related to defendants' false and then corrective statements by alleging short-sellers were forced to cover transactions at significant loss following Musk's statements. Regarding long-sellers, the court held plaintiff sufficiently pled "a series of disclosing events — each one having a causal relationship with the decline of stock prices that ties back to the 'funding secured' false statement — that permits a reasonable inference sufficient to survive a motion to dismiss." The court rejected defendants' argument that the August 17 *Wall Street Journal* couldn't be a corrective disclosure, holding that it had injected new information regarding the August 7 tweet into the market and that while it had contained the writer's opinions, it also contained direct quotes from Musk. The court noted this article may not be admissible down the line but declined to make a determination at the pleadings stage.

The court further denied defendants' motion to dismiss the Section 20 claim against the director defendants, holding that plaintiff had pled "in detail how the Director Defendants were involved in the aftermath of the August 7, 2018 tweet, and arguably adopted the false and misleading representations."

Defendants filed their answer to the amended complaint on June 22, 2020. The class was certified on November 25, 2020 and discovery is ongoing.

In re Twitter, Inc. Securities Litigation, No. 16-cv-05314, 2020 WL 4187915 (N.D. Cal. April 17, 2020)

Inconsistent User Engagement, Impact On Growth

Twitter is a social media platform where users can post interactive messages called "tweets" that appear on other users' feeds called "timelines." Twitter monitors its user engagement closely, acknowledging in public filings that both the size and engagement of its user base are critical to its success. User engagement is critical to Twitter's user growth because increased engagement reduces user turnover, or churn. Twitter formerly measured user growth and engagement by evaluating the number of monthly active users ("MAU"), Timeline Views, and Timeline Views per MAU. On November 12, 2014, Twitter hosted an "Analyst Day" event, during which Twitter announced it would no longer measure Timeline Views, and would instead focus on daily active users ("DAU") and the ratio of DAU to MAU ("DAU/MAU"). Twitter's then CFO also stated that "year-to-date DAU to MAU ratio for our top 20 markets is 48%." With respect to Twitter's top 20 markets, the then CFO stated that those markets "account for 80% of [Twitter's] users and 90% of [its] revenue" and that Twitter could generate an additional $500 million in revenue by increasing DAU/MAU to 51%. Following Analyst Day, Twitter closely tracked user-engagement metrics including DAU/MAU, and its executives received pre-earnings call binders that included detailed information about the same.

On February 5, 2015, during fourth quarter 2014 earnings call, the then CFO stated that "[i]n our more mature markets, we have very high DAU to MAU, 50% plus, and in emerging markets we have very low DAU to MAU at 20% range. They all migrate up to a higher rate over time." Twitter's then CEO stated, after disclosing that the net MAUs for 4Q 2014 was 4 million users, "that our MAU trend has *already turned around*, and our Q1 [2015] trend is likely to be back in the range of absolute net adds that we saw during the first three quarters of 2014." On April 28, 2015, the company released its 1Q 2015 results and disclosed that its MAU was 302 million, up from 288 million the previous quarter. At that time, Twitter announced it was reducing its revenue guidance for the remainder of the fiscal year from a previous forecast of $2.3 billion to $2.35 billion to a range of $2.170 billion to $2.270 billion. During the earnings call later that day, the then CFO stated that "DAU to MAU ratios in [Q1 2015] were similar to what they were by market relative to Analyst Day." Following the call, Twitter's stock price declined on April 28 by $9.39 per share to close at $42.27 per share representing a decline of 18% and on April 29 by $3.78 per share closing at $38.49 per share representing a decline of 9%.

On July 28, 2015, Twitter announced its Q2/15 financial results and held an earnings call during which the then CFO revealed that Twitter's DAU/MAU had fallen to 44% and that Twitter "did not expect to see sustained meaningful growth in MAUs [for] a considerable period of time." Twitter's stock price then declined each trading day from July 9, 2015 through August 3, 2015, decreasing by a total of $12.81 per share.

Investors filed a putative class action lawsuit against Twitter and its officers for purported violations of Sections 10(b) and 20(a) of the 1934 Act, alleging that defendants misled investors by making public statements that did not reflect Twitter's actual user engagement, specifically relating to Twitter's DAU and the DAU/MAU. Defendants moved to dismiss, which the court granted in part and denied in part, allowing plaintiffs to proceed with their claims based on the theory that defendants' omissions of certain information about DAU and DAU/MAU rendered their statements about user engagement and growth misleading. The court certified the putative class, and defendants later moved for summary adjudication following discovery.

The court denied defendants' motion for summary adjudication, concluding that, based on the evidence, a trier of fact could determine that four statements made by defendants during the February 5, 2015 and April 28, 2015 earnings calls were securities fraud due to material omissions. Three of the four challenged statements occurred on the February 5, 2015 earnings call. The court first held that the then CFO's statement that "[i] n our more mature markets, we have very high DAU to MAU, 50% plus," may have been misleading because, on Analyst Day, defendants referred to mature markets as including Twitter's top 20 markets, but DAU/MAU for its top 20 markets had declined to 44.4% from the 48% that defendants reported at Analyst Day. In assessing the second challenged statement, that all market's DAU/MAU "migrate up to a higher rate over time," the court held the statement may have been misleading in light of evidence that a 4Q 2014 earnings binder provided to executives before the earnings call showed the DAU/MAU had in fact declined in both Twitter's top 20 markets and in emerging markets. The court in turn rejected defendants' argument that the statement was not misleading as it referred only to emerging markets because, among other things, that was not clear from the statement. The court held that a third statement by the then-CEO "that our MAU trend has *already turned around*," suggested a positive trend in MAU growth and was misleading because defendants simultaneously omitted declining DAU/MAU trends. In analyzing the final challenged statement, from the April 28, 2015 earnings call, that "DAU to MAU ratios in the

quarter were similar to what they were by market relative to Analyst Day," the court held that a genuine dispute of fact existed regarding whether that statement was misleading given that DAU/MAU had fallen to 44.4% from 48% on Analyst Day.

The court also held that plaintiffs' evidence that defendants received binders reflecting that DAU/MAU declined to 44.4% and had access to internal dashboards that included detailed and current user-engagement metrics established that a reasonable jury could conclude defendants were aware of the declining trends and thus acted with scienter. In assessing loss causation, the court acknowledged that the parties agreed Twitter's stock declined at two points, April 28 & 29 and July 28 through August 3, and held that there was a genuine dispute regarding whether a causal connection existed between the defendants' statements and the stock declines. Finally, the court held that because defendants had not shown they were entitled to summary judgment with respect to the Section 10(b) claim, they could not prevail on summary adjudication of plaintiffs' Section 20(a) claim.

On May 18, 2020, the court issued a clarifying order addressing two additional statements from the February 5, 2015 earnings call, relating to ad-engagement and timeline-view growth. Because plaintiffs confined their support for those two statements to a single footnote in their summary judgment opposition without any supporting evidence, the court held that plaintiffs had not adequately raised a genuine dispute regarding the two statements. And, on May 19, 2020, the court granted defendants' motion to preclude from plaintiffs' verdict form unpled allegations regarding statements by Twitter's then-CFO regarding churn during the February 5, 2015 earnings call. While plaintiffs contended that their inclusion of the "churn statements" in their summary judgment opposition was sufficient to warrant leave to amend, the court denied the request because Plaintiffs had not demonstrated good cause for their failure to amend their complaint earlier.

Trial is currently set to begin on September 20, 2021.

***In re Slack Technologies, Inc. Shareholder Litigation*, Case. No. 19-CIV-05370 (San Mateo Superior Court, Aug. 12, 2020); *Dennee v. Slack Technologies, Inc. et al.*, Case No. 3:19-cv-05857-SI (N.D. Cal., Apr. 21, 2020)**

Slowed Growth And Service Disruptions After Direct Listing

Slack Technologies, Inc. offers workplace collaboration software that brings together people, applications and data, often replacing or significantly supplanting the use of email within an organization. The Slack

platform allows users to create team-based channels to maintain a record of conversations, documents, data, and application workflows relevant to a project or specific topic, while also integrating with thousands of third-party applications. Slack offers a free subscription and also sells subscriptions to its technology using a service-as-a-software ("SAAS") model, where customers usually pay monthly or annually based on the number of users. In 2018, Microsoft Teams introduced a free tier and a feature for adding people outside of an organization, and began to compete head-to-head with Slack's freemium model.

In lieu of an IPO, the company pursued a direct listing of its Class A stock on the New York Stock Exchange. Slack was listed for sale on the NYSE as of June 20, 2019. The direct listing followed a 2018 SEC rule change that allowed companies to enter the public market for the first time without a public offering of its securities, but still subjected the company to registration requirements under the 1933 Act. Shares held by early investors were not subject to the same lock-up period as with an IPO, and could instead offer their shares for sale on the same day as the direct listing. In connection with its direct listing, Slack filed a registration statement and a prospectus (collectively the "Offering Materials") with the SEC. The Offering Materials applied to "up to 118,429,640" shares offered for resale to the public. The Offering Materials also disclosed that approximately 164.9 million shares were available for resale and were exempt from registration pursuant to the SEC Rule 144 safe harbor.

In the Offering Materials, Slack disclosed certain information about its service commitments, competitors, performance, and growth strategy. Slack disclosed that it "built [its] technology infrastructure using a distributed and scalable architecture on a global scale." It also indicated that it had Service Level Agreements ("SLAs") with paying customers and the platform could experience "intermittent" outages, for which Slack "could be obligated [under the SLAs] to provide credits for future service…which could harm [its] business, results of operations, and financial conditions" and that "continued growth depends, in part, on the ability of existing and potential organizations on Slack to access Slack 24 hours a day, seven days a week, without interruption or degradation of performance" and that Slack "experienced intermittent connectivity issues and product issues in the past." The Offering Materials identified Microsoft as Slack's primary competitor, but noted that it was "uniquely positioned to more rapidly innovate" than its competitors. The Offering Materials also described "Key Benefits" of the Slack platform, including that it "leads to high levels of engagement," "increases an organization's return on communication," "helps achieve organizational agility," and "organization's archive of data increases over time." The Offering Materials also stated that Slack had a "[d]ifferentiated go-to-market strategy" based on "organic growth… as users realize the benefits of Slack" and that Slack's "user base ha[d] grown rapidly since [its] launch in 2014".

Following its initial listing, in June and July 2019, respectively, Slack experienced two service outages. On September 4, 2019, Slack reported its second quarter 2019 results, which beat guidance, and provided third quarter 2019 guidance, noting that it expected a wider loss than analysts predicted and noting "[r]evenue was negatively impacted by $8.2 million of credits related to service level disruption in the quarter." Slack also disclosed that its operating loss was $363.7 million, compared to $33.7 million in the same quarter of the prior year and other indicators that growth had slowed. During an earnings call later that day, Slack's CEO stated that "uptime was 99.9% or 3 nines in the quarter. But this was below our commitment of 99.99% or 4 nines" and that the outages were caused by "scaling…we continue to hit limits that we didn't realize were built into the system." On that call, he also acknowledged that "we give those service credits to every customer even if they were not specifically affected. So those policies are outrageously customer-centric" and "unusual." On September 5, 2019, Slack's share price dropped by $1.06 or approximately 3%. The shares continued to drop the following day such that the total drop over two consecutive trading days was $3.69 per share, or approximately 12%.

On September 12, 2019, investors filed a putative class action lawsuit against Slack, its officers, directors, and certain institutional shareholders in California state courts alleging violations of Sections 11, 12(a) and 15 of the Securities Act on the grounds that statements in the Registration Statement regarding the company's go-to-market strategy and scalability were allegedly false or misleading because the company was experiencing significant and increasing competition from Microsoft Teams, its attempt to attract enterprise clients was creating vulnerabilities in its platform, and Slack could not and had not been able to support its guaranteed 99.99% uptime resulting in exceptionally generous credits to customers — even unaffected customers — when there was an outage.

On September 19, 2019, investors filed a similar federal action in the U.S. District Court for the Northern District of California. On November 8, 2019, defendants moved to dismiss that complaint arguing that none of the challenged statements were false or misleading and asserting grounds for dismissal unique to the fact that the claims were based on a direct listing. First, defendants contended that the plaintiff did not and could not plead that his Slack shares were traceable to the Registration Statement, which is necessary to have standing to bring Section 11 and 12(a) claims, because

there were far more unregistered shares available (approximately 164.9 million) than registered ones (approximately 118.4 million) when Slack went public that could be sold regardless of whether Slack filed the Registration Statement. Second, defendants contended that it was essentially impossible for plaintiff to plead that defendants sold shares directly to him, as required by Section 12(a), because the sales were made through brokerage transactions. Third, defendants argued that there can be no damages because there was no offering price. Defendants also asserted the more traditional grounds for dismissal that plaintiff failed to plead that any of the challenged statements were false or misleading.

On April 21, 2020, the federal court granted defendants' motion to dismiss in part and denied in part, rejecting defendants' primary argument regarding lack of Section 11 standing. The court noted that, because of the SEC's changes to the direct listing process, this case presented a question of first impression, but acknowledged that many courts, including the U.S. Court of Appeals for the Ninth Circuit, previously required a clearly traceable connection to the Registration Statement for Section 11 standing. But in those circumstances, shares offered in connection with the Registration Statement were not on the market at the same time as shares offered by early investors so a plaintiff had a limited window in which they could feasibly prove traceability. Here, the federal court noted, shares offered in connection with the Registration Statement and unregistered shares held by early investors were offered for sale on the same day, making traceability impossible. As a result, the federal court concluded that in this unique circumstance of a direct listing where unregistered shares are simultaneously sold, there was "good reason" to deviate from longstanding precedent narrowly interpreting Section 11 standing for "any purchaser acquiring such security" in favor of a broader standard where standing exists if the plaintiff purchased securities "of the same nature as that issued pursuant to the registration statement." The federal court explained, "[a]pplying the narrower reading of 'such security' in the context of Slack's direct listing would cause the exemption provision of [the Securities Act] to completely obviate the remedial penalties of Sections 11, 12 and 15" and "would certainly lead to a futile result at variance with the policy of this remedial legislation."

The federal court also disagreed with defendants' argument that dismissal was appropriate because plaintiff could not show an offering price from the direct listing, which is a predicate to damages, holding that damages are not an element of a Section 11 claim.

The federal court rejected defendants' contention that plaintiff lacked standing to bring a Section 12(a)(2) claim because defendants are not "statutory sellers." Instead, relying on U.S. Supreme Court precedent, it held that the defendants could be statutory sellers by actively soliciting the sale of securities, which plaintiff adequately pled as to the individual defendants through allegations that they solicited sales at a Slack-hosted an investor day, signed the Offering Materials, and were financially motivated to solicit sales (many of whom sold stock through the direct listing).

Turning to the alleged misstatements and omissions, the federal court found that plaintiff adequately alleged material misstatements or omissions as to challenged statements relating to Slack's service outages and the SLAs, agreeing with plaintiff that defendants' failure to disclose the "unusual" SLA terms may have been misleading because that could be a "significant factor[ ] that make[s] an investment … risky." It further held that, "although the question of whether the seven months of outages in 2018 constitute a 'trend'" required to be disclosed by Items 105 and 303 of Regulation S-K "is a factual inquiry for a later stage of these proceedings, it is plausibly pled that Slack was aware of those outages at the time of its disclosures, and that future outages would have an 'unfavorable impact … on revenues' due to the SLA terms." The federal court also rejected defendants' argument that omission of SLA terms from the Offering Materials was immaterial because they were already publicly available on Slack's website, holding that the substantial stock price following the September 4 announcement "indicate[d] the materiality of this information to investors" sufficient to survive at the pleading stage.

The federal court deemed the rest of the challenged statements inactionable. The court concluded that the Offering Materials provided sufficient information regarding competitors and Slack had no duty to disclose data or comparisons of Microsoft's metrics. Likewise, the court found that defendants' statements regarding its key benefits and scalability were not misleading. In particular, the court noted that general statements, such as that Slack "buil[t] [its] technology infrastructure using a distributed and scalable architecture" were not misleading purely because the company experienced difficulty scaling, especially where it disclosed in its Offering Materials that it "may not be able to scale our technology to accommodate" increased requirements. Finally, the court stated that plaintiffs failed to plead facts contradicting statements about key benefits and Slack's growth strategy and that they were inactionable puffery.

In light of its ruling that at least the statements concerning SLAs and outages were actionable, the federal court concluded that plaintiff's Section 15 claim survived because control was also adequately pled. Specifically, the court held that the following allegations

of control by the institutional investor defendants were sufficient to state a claim at this stage of the proceedings: infused capital into Slack before its direct listing; owned respectively 23.8%, 13.2%, and 10.1% of Slack's supervoting shares at the time of the direct listing; each had a director on the board, who reviewed and signed the Offering Materials; "caused [Slack] to indemnify them from any liabilities arising from the Securities Act" and "to obtain and maintain a directors and officers insurance policy for them"; "caused Slack to effectuate the Offering" because they "wished to cash in their early investment and stake in [Slack] as soon as possible"; and sold their shares in the direct listing, respectively earning $329 million, $116 million, and $39.6 million. An interlocutory appeal to the Ninth Circuit on this order is set for oral argument on May 13, 2021 and the case has been stayed pending the appeal.

Meanwhile, on February 20, 2020, defendants sought dismissal of the consolidated complaint in state court on the usual grounds that plaintiff failed to plead falsity, but also asserting unique grounds for dismissal specific to the nature of a direct listing. In particular, defendants contended that plaintiff failed to plead standing to pursue his Sections 11 and 12(a) claims, defendants were not statutory sellers under Section 12(a), and plaintiff could not establish Section 11 damages. Although defendants sought to stay the state court case in favor of the federal action before the demurrer was fully briefed, the court denied the request. On August 12, 2020, the state court largely denied defendants' motion concluding that plaintiffs (1) adequately pled standing and misrepresentations regarding outages and penalties to support their Section 11 claims, (2) adequately pled Section 12(a) claims against defendants who sold stock, but not as to Slack or certain individual defendants who did not sell stock through the direct listing, and (3) pled control to support their Section 15 claims.

The state court concluded that whether the particular shares owned by the named plaintiff are traceable to the direct listing (and thus to the Offering Materials) is a disputed factual issue not appropriate for deciding at the pleadings stage; rather, plaintiffs are entitled to prove whether they purchased on the public offering or trace the sale back, even where, as here, there is a mix of registered and unregistered securities on the market. The state court also took the same approach as the federal court when holding that damages were not an element of a Section 11 claim and thus need not be pled, further noting that "the lack of a pre-set public market price does not protect Defendants from being sued under Section 11 for issuance of a Registration Statement and Prospectus containing material misrepresentations or material omissions."

The state court further held that plaintiffs offered adequate facts at this stage regarding the misleading nature of the prospectus concerning Slack's SLAs. It agreed with plaintiffs that words like "may" or "could" did not adequately convey that outages and penalties were known problems. The court deemed it unnecessary to consider the remaining alleged misrepresentations and omissions, given that it found plaintiffs stated a Section 11 claim.

Finally, the state court agreed that plaintiffs adequately pled that certain individual defendants sold shares in the offering and/or solicited sales rendering them statutory sellers under Section 12(a), but held that plaintiffs had not alleged a Section 12(a) claim against Slack itself — which plaintiffs did not allege issued new shares in connection with the listing — or Slack's chief accounting officer and board member, who did not personally register stock for sale. Likewise, the court held that plaintiffs adequately alleged the individual defendants and institutional investor defendants were sufficiently in positions of control to support their Section 15 claim.

Soon after this order issued, defendants again sought to stay the state court action in favor of the federal action contending that the court should wait until the appeal is heard — which would be determinative on the state court action — before litigation proceeds. The state court denied that motion, and defendants filed an answer on November 3, 2020. Discovery is ongoing.

***In re Eventbrite, Inc. Securities Litigation*, Case No. 5:18-cv-02019, 2020 WL 2042078 (N.D. Cal. Apr. 28, 2020)**
Acquisition Difficulties And Platform Success

Eventbrite, Inc. hosts an event management platform that allows event organizers to plan, market, and sell tickets to events across the world. Its core markets are festivals, music, registration events, and endurance events. In September 2017, Eventbrite acquired a competitor, Ticketfly, LLC, from Pandora Media, Inc., for $201.1 million. Eventbrite aimed to acquire Ticketfly's customers for its own platform. Ticketfly differed from Eventbrite's platform in that it focused solely on independent music venue online ticketing, which is a more competitive space, and provided its customers with individualized experiences. After the acquisition, Eventbrite sought to migrate Ticketfly customers onto its own platform.

In September 2018, Eventbrite filed a registration statement and Prospectus in connection with its IPO through which it sold 11.5 million shares of Class

A common stock. In the registration statement, Eventbrite touted its "selective acquisitions," such as Ticketfly, which allowed Eventbrite to "expand and offer new capabilities to existing creators" as well as the "modularity and extensibility of [its] platform" which it claimed allowed it to quickly integrate and migrate creators to its platform, saving costs. However, Eventbrite also warned of risks that creators of acquired companies may not migrate to its platform and that it previously experienced customer loss while integrating and migrating acquired companies.

Following its IPO, in late 2018 and early 2019, Eventbrite repeatedly reiterated the success of its selective acquisitions and integration thereof and touted Eventbrite Music, a new initiative to make Eventbrite more attractive to independent music venues. In particular, during Eventbrite's third quarter 2018 Earnings Results Call, Eventbrite indicated that Ticketfly customers were happy with the shift to Eventbrite, touting the ongoing integration process.

On March 7, 2019, Eventbrite filed its 2018 Form 10-K and reported its fourth quarter 2018 earnings, which disclosed that Eventbrite was still working to migrate Ticketfly customers onto its platform and that it did not expect to complete that migration until the second quarter of 2019. Eventbrite also provided first quarter 2019 revenue guidance which fell short of certain analysts' expectations. Eventbrite's stock immediately fell by $7.96 per share (over 24%). On May 1, 2019, Eventbrite reported its first quarter 2019 earnings, which met its own revenue guidance, but it provided second quarter revenue guidance that again fell short of analysts' expectations. Eventbrite's stock price immediately fell to $6.55 per share (over 27%).

Investors filed several putative class actions against Eventbrite and its officers, directors, and underwriters in the U.S. District Court for the Northern District of California, alleging violations of Sections 11 and 15 of the 1933 Act, Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder, and Item 303 of SEC Regulation S-K. The consolidated amended complaint alleged that Eventbrite's September 2018 Registration Statement contained seven untrue statements of material facts as well as material omissions. Specifically, plaintiffs alleged that the Registration Statement omitted material facts about issues regarding the Ticketfly acquisition and integration and that Eventbrite's post-IPO statements regarding the success of the migration efforts and the positive reaction of Ticketfly users were materially misleading. The consolidated amended complaint relied on several confidential witnesses who asserted Eventbrite's attempts to migrate numerous customers following the Ticketfly acquisition were unsuccessful due to Eventbrite's failure to address customer complaints regarding the new platform. Defendants moved to dismiss the amended complaint, which the court granted in full, with leave to amend.

First, in addressing the Section 10(b) claim, the court held that plaintiffs failed to plead facts sufficient to establish falsity for six of the seven disputed statements. The court noted plaintiffs failed to identify which features of Ticketfly Eventbrite had trouble integrating into its own platform, which was necessary to support plaintiffs' allegation that defendants' statement that "Eventbrite has been able to integrate and migrate creators to the Eventbrite platform" was materially misleading. The court also rejected plaintiffs'

theory that Eventbrite's statement that it "support[s independent music customers], speak[s] their language, and help[s] grow their business," was misleading because it "was inferior to Ticketfly," because Eventbrite's statements did not make any comparison to Ticketfly nor did it tout Eventbrite Music's superiority. With respect to statements regarding customer loss, the court held plaintiffs failed to plead falsity, noting that plaintiffs failed to allege sufficient facts explaining why or how Ticketfly's customers were dissatisfied with Eventbrite's platform. Similarly, the court held that statements from a confidential witness that they lost customers when trying to migrate them did not constitute sufficient facts to support allegations of an atypical trend of customer losses such that Eventbrite's risk warning that it "typically experience[d] moderate customer losses that tend to cluster around the time they deprecate the acquired platform" was misleading. The court noted such a statement only addressed customer losses "at a single point in time" when Eventbrite deprecated the acquired platform and the confidential witness's statements were not sufficiently particularized to support falsity.

The court further held that the statement that Eventbrite's decision to integrate Ticketfly "deliver[ed] the full power of both [companies]" to customers, was inactionable due to its vagueness. The court found the statement merely expressed subjective optimism and explained that "vague, generalized assertions of corporate optimism or statements of mere puffing are not actionable … because no reasonable investor would rely on such statements."

With respect to the Section 11 claim, the court held that this claim (challenging a single disclosure in the Registration Statement about its acquisition of Ticketfly helping Eventbrite "continue 'to expand and offer new capabilities to existing creators'" which plaintiffs also challenged under Section 10(b)) was subject to the heightened pleading standard required for fraud claims, which plaintiffs failed to meet. The court rejected plaintiffs' argument that the heightened standard did not apply because they were not alleging fraud for the Section 11 claim, noting that the "entire complaint" was built around the theory that defendants fraudulently neglected to disclose that the Ticketfly integration was allegedly failing. The court also dismissed the Item 303 claim on the ground that Eventbrite did disclose the risk of possible migration problems, including customer loss, in its offering materials, which adequately addressed problems associated with the Ticketfly migration.

The case settled and was dismissed shortly after this decision.

Roberts v. Zuora, Inc., Case No. 19-cv-03422, 2020 WL 2042244 (N.D. Cal. Apr. 28, 2020)

Product Integration Difficulties, Platform Functionality

Zuora, Inc. is an enterprise software company that provides subscription-based businesses with software that helps manage their operations. It provides five software products and its billing product ("Billing") is one of its core products. In May 2017, Zuora acquired Leeyo Software, Inc. and Leeyo's core product RevPro, a revenue management software product that assists companies with Accounting Standard Codification 606/ International Financial Reporting Standards 15 ("ASC 606") compliance.

In April 2018, in preparation for its IPO, Zuora published its Registration Statement touting Zuora's functionality and integrated features, stating its "solution functions as an intelligent subscription management hub that automates and orchestrates the entire subscription order-to-cash process" and highlighting that the product consolidated data operations into a single system. On April 16, 2018, Zuora sold 12.65 million shares of common stock through its IPO, raising over $162.2 million. Throughout the class period, defendants regularly highlighted the integrated features of Zuora's products, including a May 4, 2018 press release where defendants stated that "the Zuora platform was architected specifically for dynamic, recurring subscription models and acts as an intelligent subscription management hub that automates and orchestrates the entire order-to-cash process, including billing and revenue recognition." Zuora's website and Twitter also continued to highlight its platform's integrated functionality, stating that through "Zuora's subscription management technology … you can quote, order, bill, recognize revenue, report, and automate the entire customer lifecycle from a single platform."

On May 30, 2019, Zuora announced its first quarter 2019 financial results reflecting a $20.6 million or 16% year-over-year loss due to declining large customer growth and corresponding declining quarterly revenue growth. Zuora also lowered its fiscal year 2020 guidance and revealed the departure of its president. On an earnings call that same day, Zuora's CEO attributed the poor financial results to challenges with Billing and RevPro integration, which started late and spanned several months, as well as "sales execution problems." The next day, Zuora's share price fell by nearly 30%.

On June 14, 2019, investors filed a putative class action lawsuit against Zuora, its CEO and CFO in the U.S. District Court for the Northern District of California

asserting claims under Sections 10(b) and 20(a) and Rule 10b-5 of the 1934 Act. Plaintiffs alleged that the functionality of Zuora's platform was "materially misrepresented" by failing to disclose technological challenges with integrating data between Billing and RevPro. Plaintiffs alleged that Zuora and its high-ranking executives knew about RevPro integration failures throughout the class period, relying on confidential witness statements concerning various failed internal integration projects, and negative feedback from customers, with some customers withholding payment.

Defendants moved to dismiss the amended complaint, which the court denied, finding that plaintiffs adequately alleged that defendants' statements would give a reasonable investor the impression of a state of affairs that differed in a material way from the one that actually existed and that the alleged confidential witness statements sufficiently pled scienter.

First, the court held that plaintiffs adequately pled falsity, rejecting defendants' contention that statements about Zuora's integrated features, and the functionality, prospects for upselling and cross-selling and growth of Billing-RevPro were inactionable puffery. Rather, the court found that representations painting the Zuora platform "as a functioning, combined solution," when viewed alongside other statements describing "increasing transactional upsells and cross-sells of additional products" such as "flagship products, [Billing] and [RevPro] as a "a key element" of Zuora's growth strategy, could be interpreted as representations that functionality of Zuora's system would lead to growth. The court also held that plaintiffs adequately alleged that defendants' public statements concerning product integration were contradicted by the alleged internal failures of projects meant to test the product integration and problems customers allegedly faced such that there were "significant issues with major customers refusing to pay Zuora due to integrations problems."

Next, the court found that plaintiffs sufficiently pled scienter based on allegations from four confidential witnesses that defendants possessed contemporaneous information that directly contradicted the disputed statements because defendants knew the product projects failed and customers experienced integration failures and refused to pay. Specifically, the court relied upon alleged confidential witness statements confirming that the individual defendants' management of and direct participation in those projects, the witnesses' direct emails to the individual defendants regarding customer issues, and witness presence during meetings wherein the decision to stop the Zuora product was characterized as a major financial blow "material enough to impact our bonus payments." The court rejected defendants' argument that the confidential witness allegations were deficient because they were not employed throughout the entirety of the class period, noting that their personal knowledge of the product integration projects and customer feedback arose directly from their positions at Zuora as senior managers and project members. The court held that because plaintiffs properly alleged a predicate Section 10(b) claim, their 20(a) claim was likewise sufficient.

On June 11, 2020, defendants answered the consolidated amended complaint. The court certified the class on March 15, 2021.

Veal v. LendingClub Corp., Case No. 18-cv-02599, 2020 WL 3128909 (N.D. Cal. June 12, 2020)

Failure To Disclose Substance of Ongoing Investigations

LendingClub Corporation is an online peer-to-peer lending company that connects borrowers and lenders in the United States. The company operates an online marketplace platform that "matches" borrowers and investors, reviewing a borrower's application for a loan and creditworthiness and then matching the borrower with an appropriate lender. LendingClub's primary issuing bank partner, WebBank, simultaneously originates each loan and sells it to LendingClub at a price that includes fees and interest. LendingClub buys these loans with the money from its "matched" lenders, and services the loans.

In May 2016, LendingClub disclosed that it had engaged in deceptive conduct involving senior executives and managers who had knowingly misled investors as to the characteristics of certain loans. Specifically, the company disclosed in an amended Form 10-K for FY15 that "material weaknesses in internal control over financial reporting" had led to "self-dealing, and sales of non-conforming loans, backdated loan applications" and as a result it would be terminating those senior executives as well as its founder, chairman, and CEO. LendingClub's Form 10-Q for 1Q 2016 likewise disclosed the circumstances related to the internal control weakness, summarizing a "board review" of the circumstances and certain findings. The company also disclosed that it had received a subpoena from the U.S. Department of Justice and that the company was also contacted by the SEC. That same month, the U.S. Federal Trade Commission began an investigation into the company's conduct regarding deceptive practices impacting borrowers on its platform. In its Form 10-Q for Q2/16, LendingClub included a lengthy and detailed discussion regarding the ongoing board review related to the internal control failures and investor fraud, noting the SEC and DOJ inquiries related to that review but made no mention of the FTC investigation.

LendingClub revealed the FTC investigation for the first time on November 9, 2016. In December 2017, the FTC transmitted a draft consent order to LendingClub with proposed injunctive relief that would bring it into compliance with FTC regulations. In its Form 10-K for FY17, LendingClub stated it was continuing to cooperate with all government agencies but did not mention the draft consent order. On April 25, 2018, the FTC issued a press release, disclosing that it had filed a complaint against LendingClub, alleging that the company had engaged in deceptive practices by charging up-front "hidden" fees and misleading borrowers into believing that they had been approved for a loan, in addition to withdrawing more from borrowers' accounts than was authorized and failing to provide sufficient privacy notices. On the day of the FTC's announcement of its complaint, LendingClub's share price fell by over 15%.

Investors filed a putative securities class action lawsuit against LendingClub and its officers under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder, alleging that defendants misled investors by failing to disclose its allegedly deceptive practices with respect to borrowers and the subsequent FTC investigation and consent order. On a May 8, 2018 earnings call, LendingClub's CEO indicated that the allegations in the FTC investigation were self-identified issues and that the company believed it was and had been in compliance with applicable laws and regulations.

Defendants moved to dismiss the first amended complaint on March 8, 2019, and the court granted the motion to dismiss with leave to amend, holding that plaintiffs failed to plead falsity sufficiently for some of the alleged false or misleading statements, that other alleged false or misleading statements were inactionable puffery, and also that the complaint failed to plead sufficient facts establishing a strong inference of scienter.

Plaintiffs filed a second amended consolidated complaint introducing allegations that defendants made false or misleading statements by failing to disclose the "thrust" of the FTC investigation itself and also in lumping the FTC investigation together with the DOJ and SEC investigations in its disclosures. Plaintiffs also alleged defendants knew of the company's practice of charging "hidden fees" as described in the FTC action based on internal compliance reviews, legal counsel alerts, employee compliance warnings, and LendingClub's admission that it tracked consumer complaints on the subject. Defendants moved to dismiss the second amended complaint, which the court granted with leave to amend in part and without leave to amend in part. In its order, the court concluded that plaintiffs' second amended complaint lacked sufficient allegations to establish falsity and scienter and found other statements regarding LendingClub's "transparency and fairness" as a lender were inactionable puffery.

The court concluded that plaintiffs had not sufficiently alleged that defendants knew the substance of the FTC's investigation at the time the allegedly misleading statements referencing government investigations were made in its 2016 financial result reports. The court also held that LendingClub's statements on a May 2018 earnings call that the allegations in the FTC complaint were "self-disclosed" only showed that defendants were aware of the underlying issues ultimately alleged in the FTC complaint — "not that any of the [d]efendants knew the content of the FTC complaint."

The court rejected plaintiffs' claim that LendingClub's risk warnings in its SEC filings and its "safe harbor" statements in press releases were materially false or misleading because, although the statements referenced potential government investigations and issues related to regulatory compliance, the "outcome of the FTC Investigation had not materialized at the time the statements were made." The court also rejected allegations that defendants had made false or misleading statements regarding ongoing legal costs, reasoning that, even assuming the statements related to the investigations, the statements did not contain anything about the substance of the investigations themselves. Rather, the statements merely relayed that LendingClub had incurred legal expenses from "inquiries and private litigation." Addressing the other disputed statements, the court held they were either inactionable puffery, unrelated to the plaintiffs' theory of liability, or plaintiffs had failed to include sufficient facts showing they were false when made. For example, statements the company had made regarding its "transparency and fairness," were not "capable of objective verification," and statements relating to the company's website, business improvements, and its SOX certifications were unrelated to the plaintiff's new theory of liability.

The court concluded plaintiffs had also failed to adequately plead facts to support a strong inference of scienter, holding that plaintiffs failed to plead what defendants knew and when they knew it or that the defendants were aware of the specific substantive details of the FTC investigation. The court explained that the amended complaint improperly lumped all defendants together in attempting to allege scienter and failed to establish each particular defendant's state of mind as it related to the FTC investigation. The court further rejected plaintiffs' attempt to allege scienter by relying on the "core operations doctrine" rejecting plaintiffs argument that because fees were a significant portion of the company's revenue, defendants must have been aware of what the FTC was investigating. The court found that the doctrine did not apply because the issue of hidden fees did not fall within one of the "rare circumstances" where the "nature of the relevant fact" would have been so significant that it would be "absurd" that officers and executives at the company

were not sufficiently aware of the problem. Finally, the court found that even viewing plaintiffs' allegations holistically, they failed to create a sufficient inference of scienter because the allegations were not tethered to any individual defendant.

The court further rejected plaintiffs' attempt to allege scienter by relying on the "core operations doctrine" rejecting plaintiffs argument that because fees were a significant portion of the company's revenue, defendants must have been aware of what the FTC was investigating. The court found that the doctrine did not apply because the issue of hidden fees did not fall within one of the "rare circumstances" where the "nature of the relevant fact" would have been so significant that it would be "absurd" that officers and executives at the company were not sufficiently aware of the problem.

The court did grant leave to amend in part, explaining that because the second amended complaint was predicated on a new theory of liability, the court would follow the well-established Ninth Circuit practice to freely give leave to amend with respect to that claim alone. Plaintiffs notified the court on July 27, 2020 that it would not file a third amended complaint and judgment was entered thereafter. Plaintiffs appealed the case to the U.S. Court of Appeals for the Ninth Circuit in August 2020 (Case No. 20-16603), which is fully briefed and the court is considering dates in August 2021 for oral argument.

In re Pivotal Securities Litigation, Case No. 3:19-cv-03589-CRB (N.D. Cal. July 21, 2020)

Reduced Guidance Due to Lengthening Sales Cycle

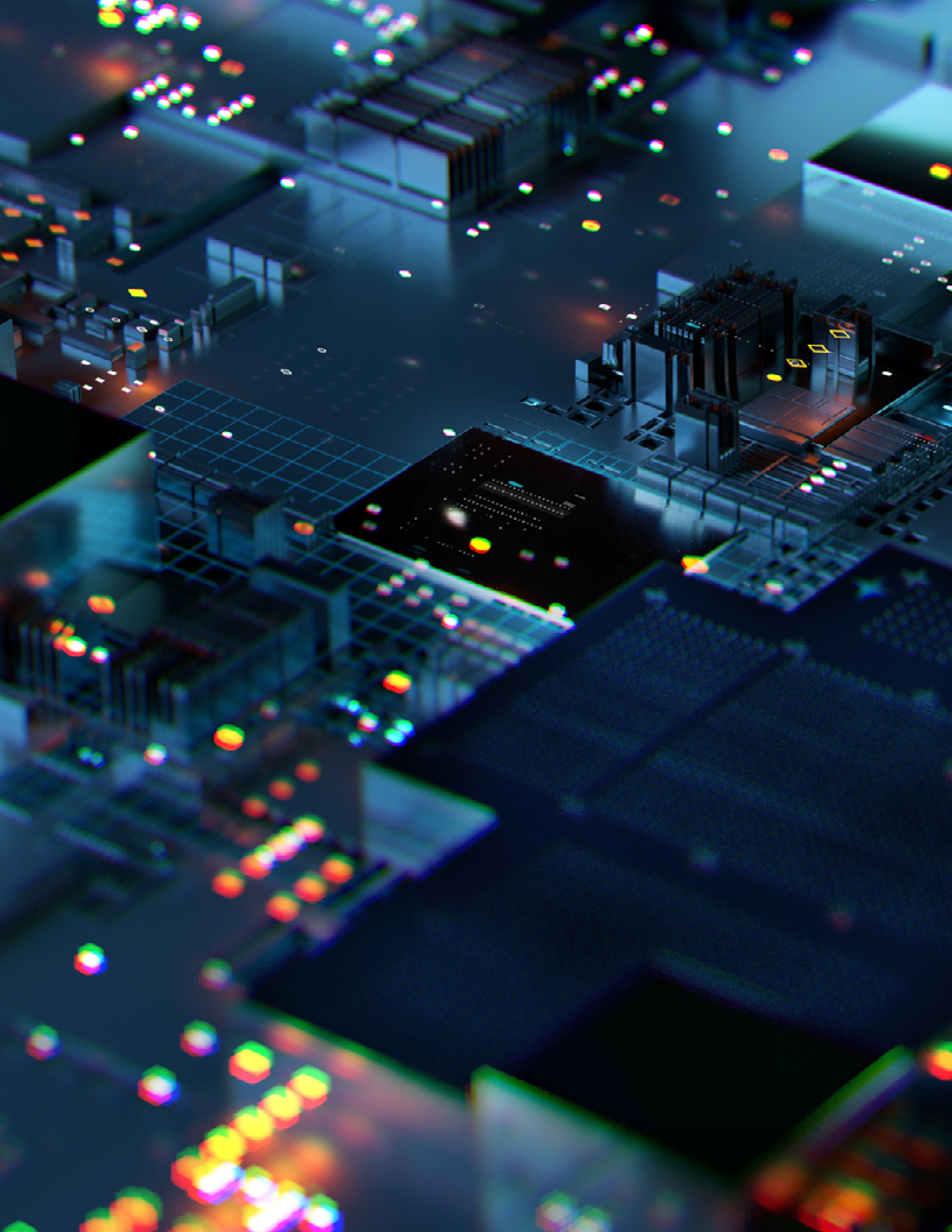
Pivotal is a San Francisco-based information technology and software company founded in 2013. Pivotal provides a cloud-native application platform, Pivotal Cloud Foundry ("PCF"), as well as strategic services. The company's platform enables software developers to accelerate and streamline their processes for modernizing cloud-based applications. Its flagship product is Pivotal Application Service ("PAS"), and in February 2018, Pivotal made a new product, Pivotal Container Service ("PKS"), commercially available. PKS allows customers to "more easily deploy and operate Kubernetes," an open-source system designed for managing containerized workloads and services.

On or about April 20, 2018, Pivotal filed its final Registration Statement with the SEC, followed by the completion of its IPO on April 24, 2018. The Registration Statement included an overview of its products, business operations, financial results, and almost forty pages of risk disclosures — overall, promoting the company's "leading" and "turnkey cloud-native platform," claiming it "combine[d] the latest innovations from open-source projects…" and integrated PCF with Kubernetes. The Registration Statement also emphasized "the Company's sales and customer success model," noting that it "work[s] closely with large public cloud providers[.]" Thereafter, during a January 2019 conference call and June 2018 to March 2019 quarterly earnings reports and calls, the company made various positive statements regarding superiority and adoption of its products. Then, on June 4, 2019, Pivotal reported its first quarter 2020 financial results, advising that it "closed fewer deals than…expected in Q1 due to sales execution and a complex technology landscape that is lengthening [Pivotal's] sales cycle." It also lowered its going-forward fiscal year 2020 revenue guidance from $798 million-$806 million to $756 million-767 million. The next day, Pivotal's share price fell over 40% from $18.54 per share to $10.89 per share.

Investors filed a putative class action lawsuit against Pivotal, its officers, directors, and IPO underwriters, alleging violations of Sections 11, 12(a)(2), and 15 of the 1933 Act based on allegedly false and misleading statements in the Registration Statement, and of Sections 10(b) and 20(a) of the 1934 Act based on allegedly false and misleading statements made after the IPO. Defendants moved to dismiss the consolidated amended complaint, which the court granted, with leave to amend, holding that plaintiffs failed to adequately plead falsity and scienter.

First, the court granted Pivotal's motion to dismiss the Section 11 and 12(a)(2) claims for failing to plausibly allege a false or materially misleading statement based on three defects in the complaint: (a) plaintiffs did not establish contemporaneous falsity, (b) many of the statements were inactionable corporate optimism, and (c) Pivotal did not have a duty to disclose the allegedly omitted information.

As to plaintiffs' failure to sufficiently plead falsity, the court addressed statements in the Registration Statement about Pivotal's products, competition, and risk disclosures. First, the court rejected plaintiffs' claim that statements about Pivotal's product offerings were misleading because



Pivotal's primary software offering, PAS, was outdated and did not incorporate Kubernetes and Pivotal's sales strategy the sales of PKS as a standalone product. The court reasoned that there was no untruth or misleading omission here because the PCF platform contained several components, which included both PAS and PKS, and only the former did not incorporate Kubernetes at the time, and assertions about Pivotal's sales strategy preventing the individual sale of PKS did not render any statements false. Second, the court disagreed with plaintiffs that increased competition for enterprise clients with other cloud providers, not engaging in partnerships and joint selling opportunities rendered statements about working closely with those cloud providers false or misleading, reasoning that Pivotal disclosed that it operated in a "highly competitive industry" and "currently or in the future may compete" with some of those cloud providers. Third, the court disagreed with plaintiffs that any risk disclosures were false or misleading because Pivotal framed the risks as hypotheticals using conditionals like "if," "may," "could" and "possible" rather than as current and past realities, holding that plaintiffs failed to plead anything "beyond conclusory assertions that the risks 'had already materialized.' "

The court disagreed with plaintiffs that any risk disclosures were false or misleading because Pivotal framed the risks as hypotheticals using conditionals like "if," "may," "could" and "possible" rather than as current and past realities, holding that plaintiffs failed to plead anything "beyond conclusory assertions that the risks 'had already materialized.' "

Next, the court held that many of plaintiffs' challenged statements were inactionable, statements of corporate optimism. For example, the court held that statements classifying Pivotal's PAS offering as providing a "cutting-edge," "leading," and "turnkey cloud-native platform" and naming "viral adopting together with C-level focus" as a competitive strength were not actionable because they are "vague assessments that 'represent the 'feel good' speak that characterizes 'non-actionable puffing."

Finally, the court held that alleged violations of Items 303 and 503 of SEC Regulation S-K (which is actually Item 105) could not support plaintiffs' Sections 11 or 12(a)(2) claims because they did not create a duty to disclose any allegedly omitted information. The court explained that plaintiffs failed to show that any trend or uncertainty relating to diminished sales and growth in new customers was known to management requiring disclosure under Item 303, rejecting plaintiffs' contention that pleading negligence on the part of defendants is sufficient. The court further held that Pivotal satisfied its duties under Items 503 and 105 to discuss "the most significant factors that make the Offering risky or speculative and that each risk factor adequately describes the risk[.]" For example, the Registration Statement specifically disclosed that results of operations and prospects will be harmed if its platform does not grow as quickly as anticipated, and that the introduction of third-party solutions utilizing new technologies and new industry standards "could make [Pivotal's] existing and future software offerings obsolete and unmarketable."

The court then dismissed plaintiffs' Section 15 claim for failing to allege an underlying violation of Sections 11 or 12. Similarly, the court dismissed plaintiffs' 1933 Act claims, holding that plaintiffs failed to plead falsity or scienter. First, the court held that plaintiffs failed to plead specific facts indicating why each of the challenged statements were false when made, instead providing a "conclusory litany of reasons for the statements' falsity that are insufficiently supported by vague accounts from seven [confidential witnesses]." For example, without setting forth specific facts detailing the actual length of a sales cycle, plaintiffs simply relied on confidential witness reports alleging that Pivotal's sales cycles had lengthened "substantially" to demonstrate falsity. Similarly, the court held that plaintiffs' allegation that Pivotal failed to disclose, among other things, that its "disjointed product mix" could not satisfy its enterprise customer's needs, failed to meet the heightened pleading standards of the PSLRA because it relied on conclusory confidential witness assertions describing Pivotal's products as "inflexible," "monolithic" and "difficult to implement."

The court also held that many of the challenged opinion statements — for example, "[w]e feel like we're unmatched in the market by any of the competitive solutions … we are pleased with our … outlook for the remainder of the year," etc. — were not actionable because the complaint contained no allegations of subjective falsity, such that there were no "facts to demonstrate that Pivotal Defendants did not hold their stated beliefs." The court pointed out that plaintiffs' confidential sources "[did] not demonstrate with any particularity that the alleged trends were generalizable across the company, nor [did] they suggest that Pivotal Defendants 'must have known' that their statements were misleading." To the contrary, the court recognized that Pivotal's increasing revenue and growing

customer bases supported the company's optimistic statement, as well as the inclusion of sufficient risk factors to curb those statements. Similarly, the court held that statements classifying Pivotal's products and business as "uniquely position[ed]," "strong across sectors," "best-in-class," and "industry-leading" were inactionable puffery. Moreover, the court deemed many statements to be inactionable forward-looking statements, including statements regarding Pivotal's future economic performance, or assumptions underlying its future economic performance. For example, such statements as "[W]e're expecting [our net expansion rate] to come down" and "we expect our existing customers to continue to expand their footprint with PKS" were deemed sufficiently forward looking to escape liability under Section 10(b). And the court held that "[t]he cautions Pivotal provided addressed the very subjects Plaintiffs challenge."

Finally, the court held that plaintiffs failed to adequately allege scienter. The court held that plaintiffs failed to establish reliability of their confidential witnesses because all of them were at least two reporting levels removed from the defendants and "[g]eneral allegations of [defendants'] 'interaction with other officers and employees, their attendance at meetings, and their receipt of weekly or monthly reports are insufficient' to create an inference of scienter 'more cogent or compelling than an alternative innocent inference.'" And, none of the confidential witness statements relied upon by plaintiffs were indicative of scienter, explaining that confidential witness claims of "[a]n unsuccessful sales strategy and disagreement within the company over its approach to selling PKS does not support an allegation that Pivotal was deliberately reckless." Second, the court rejected plaintiffs' contention that the proximity of Pivotal's March earnings statements to its later revised going-forward guidance indicates that those statements were false when made; rather, the court noted that it is well-settled in the Ninth Circuit that "honest optimism followed by disappointment is not the same as lying or misleading[.]" The court rejected plaintiffs' attempt to rely on the core operations doctrine on the ground that "it would not be 'absurd' to suggest that management was without knowledge" of core facts relevant to plaintiffs' claims despite allegations that defendants had generalized access to sales reports and "occasionally" sat in on regular meetings. Finally, the court held that, taking all of the complaint's allegations into consideration, together they do not give right to a strong inference of scienter.

As to plaintiffs' Section 20(a) claim, the court held that because their predicate Section 10(b) claim failed, so too must their Section 20(a) claim.

Plaintiffs opted against amending the complaint and sought dismissal, with prejudice, agreeing not to appeal the dismissal order.

Costanzo v. DXC Technology Company, Case No. 19-cv-05794-BLF, 2020 WL 4284838 (N.D. Cal. July 27, 2020)

Workforce Optimization Effect On Customer Satisfaction

DXC Technology Company ("DXC") is a Fortune 500 company that provides "end-to-end IT services" to its clients. DXC was formed on April 1, 2017, the result of the combination of two large IT service businesses, Computer Sciences Corporation ("CSC") and the Enterprise Services division of Hewlett Packard Enterprise Company ("HPES"). In May 2016, CSC and Hewlett Packard Enterprise Company ("HPE") announced the merger — structured as a "Reverse Morris Trust" wherein HPES was spun off into the new company, DXC, which then purchased CSC and CSC shareholders' stock was converted on a one-to-one basis. After filing several amendments, on February 24, 2017, DXC filed with the SEC a final amendment to the Registration Statement. The Registration Statement stated that DXC expected the merger would "produce first-year synergies of approximately $1 billion post-close and $1.5 billion run rate at the end of year one," calculated "by estimating the expected value of harmonizing policies and benefits between the two companies, supply chain and procurement benefits from expected economies of scale such as volume discounts as well as cost synergies expected from workforce optimization[.]" The Registration Statement noted a "turnaround plan" to "align [DXC's] costs with its revenue trajectory." It also included cautionary language indicating that the "amount of [cost-cutting] synergies actually realized…could differ from the expected synergies" and referenced loss of personnel as "workforce optimization such as elimination of duplicative roles" and warned of the risk of failing to attract and retain qualified personnel.

On April 3, 2017, DXC common stock began publicly trading on the NYSE. Following the merger, CSC's executive vice president became DXC's executive vice president and head of global delivery, but was terminated on July 20, 2018, purportedly following disagreements with the DXC chairwoman, president, and CEO. On February 6, 2019, he sued DXC in New York federal court challenging his termination, and alleging, among other things, that the company had an "internal target" to cut $2.7 billion to the Global Delivery division's annual expenses primarily by workforce reduction, to which he allegedly expressed "reservations concerning the pace of the cuts" to the detriment of customer satisfaction, and that he reduced Global Delivery's workforce by 20% over the next twelve months at the direction of DXC's CEO.

Throughout 2019, DXC reported consistently declining growth. On May 23, 2019, DXC issued a press release announcing its first quarter 2019 earnings, stating that it achieved diluted earnings per share ("EPS") of $4.35, a 17% decline from the year before and disclosing that revenues declined year-over-year. It also provided 2020 revenue guidance of $20.7 billion–$21.2 billion. On August 8, 2019, DXC issued a press release announcing its first quarter 2020 earnings, stating that EPS declined 22% year-over-year and again revised downward its 2020 revenue targets by $500 million. On November 11, 2019, DXC issued a press release announcing its second quarter 2020 earnings, noting a further diluted EPS and decline in revenues year-over-year by 3.2%, and further reducing 2020 revenue guidance from $20.2 billion–$20.7 billion to $19.5 billion–$19.8 billion. That same day, DXC's new CEO acknowledged "delivery and personnel retention problems."

By September 2019, DXC stock was trading at $32.70 per share, a nearly 45% decline from the $59 price of DXC stock at the time of the merger. Investors filed a putative class action lawsuit against DXC and its directors and officers, and HPE and its general counsel and CFO alleging violations of Sections 11 and 15 of the 1933 Act, based on claims that defendants failed to disclose facts and risks that existed at the time of the merger related to DXC's "workforce optimization" plan as to the extent of workforce reductions and its eventual detrimental impact on customer satisfaction and broader revenue growth. Defendants moved to dismiss the amended complaint, which the court granted, with leave to amend, finding plaintiffs failed to plead that DXC's statements regarding its turnaround plan and target in cost cuts were inactionable puffery.

The court held that plaintiffs failed to sufficiently plead their Section 11 claim based on alleged inconsistencies between the Registration Statement and internal cost-cutting goals — rejecting plaintiffs' theory that the Registration Statement was false and misleading because it stated that DXC intended to cut $1 billion in costs when in reality it intended to cut $2.7 billion in costs. The court agreed with defendants that, even assuming DXC internally set a goal of cutting costs by $2.7 billion, such a goal was merely aspirational and that, more importantly, plaintiffs failed to allege that DXC had actually achieved this alleged internal target or cut costs in excess of the disclosed $1 billion.

The court also rejected plaintiffs' argument that, because the merger involved issuance of brand new, never-before publicly traded security of a new company, it should be treated as an IPO — a determination which would have otherwise precluded defendants' protection under the PSLRA safe harbor provisions precluding liability for forward-looking statements accompanied by meaningful cautionary language. The court further rejected plaintiffs' contention that DXC's $1 billion cost-cutting statements were barred from safe harbor protection as "'mixed' statements that both concerned present facts and looked to the future," again noting that plaintiffs failed to allege that such statements were anything more than aspirational. The court next held that the cost-cutting statements were sufficiently accompanied by cautionary language clearly indicating layoffs were to be expected.

Next, with respect to statements touting "net synergies" and "strategic and financial benefits," the court agreed with plaintiffs that such representations, when read in context, were tied to the disclosure of the anticipated $1 billion cost-reduction target, and therefore, were not mere expressions of corporate optimism, but still held the statements were aspirational and inactionable opinions. With respect to statements detailing DXC's "turnaround plan" that would "align [DXC's] costs with its revenue trajectory" and included "initiatives to improve execution in sales performance and accountability," the court agreed with defendants that the challenged statements were inactionable vague descriptions of the company's plans that were "incapable of objective verification." The court also held that representations in the Registration Statement specifying efforts to hire and retain highly skilled employees were adequately paired with warnings to investors of the risk to financial performance, should the company fail to meet these employment goals. The court further held that disclosures warning of eventualities related to reduction in workforce not expected to occur until years later properly disclosed the state of affairs as they were at the time — that DXC planned to optimize its workforce and eliminate duplicative roles.

Finally, the court held that plaintiffs' allegations for violations of Items 303 or 503 of SEC Regulation S-K similarly failed. The court held that plaintiffs failed to allege facts sufficient to lead to a reasonable inference that the undisclosed $2.7 billion internal cost-reduction target was achieved, or meant to be achieved, in the first year after the merger was concluded, and thus failed to allege that this was a known trend, uncertainty, or risk factor that required disclosure in the Registration Statement. Because none of plaintiffs' alleged misstatements or omissions were actionable, the court dismissed plaintiffs' Section 15 claim for failure of a requisite underlying primary violation of the securities law.

On September 25, 2020, plaintiffs filed a second amended complaint, which defendants moved to dismiss on November 12, 2020. The motion is set for hearing on April 29, 2021.

In re Facebook, Inc. Securities Litigation, Case No. 5:18-cv-01725, 2020 WL 4569443 (N.D. Cal. Aug. 7, 2020)

Data Breach

Facebook, Inc. operates the world's largest social networking company. Between 2016 and early 2018, Facebook warned in SEC filings that "[s]ecurity breaches and improper access to or disclosure of our data or user data, or other hacking and phishing attacks on our systems, could harm our reputation and adversely affect our business." During the same period, Facebook maintained a data privacy policy, which stated, "Your trust is important to us, which is why we don't share information we receive about you with others unless we have: received your permission; given you notice, such as by telling you about it in this policy; or removed your name and any other personally identifying information from it." Thereafter, beginning in March 2018, media reports stated that a political consulting firm, Cambridge Analytica, gathered personal information of 50 million Facebook users without permission or proper disclosures to develop user profiles to target Facebook users with pro-Trump and pro-Brexit ads. Further reports of U.S. and foreign government investigations into the matter followed, and Facebook's stock price declined 20.3% between March 19, 2018 and March 27, 2018.

On March 20, 2018, investors filed securities class action lawsuits against Facebook and its officers alleging that defendants made materially false and/or misleading statements about Facebook's handling of user data in violation of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Thereafter, in April and June 2018, Facebook officers testified at government hearings that users control the applications that can use their data and who sees their content, and that it worked hard to ensure compliance with a 2012 FTC consent order requiring it to obtain express consent from users before sharing their data beyond their privacy settings. On April 25, 2018, Facebook released favorable first quarter 2018 earnings and held an earnings call stating that although a "handful" of advertisers had "paused spend" after the Cambridge Analytica news, this did not appear to be a "meaningful trend." It also discussed the potential impact of the General Data Protection Regulation which had recently taken effect and stated that it would not pose an issue because Facebook was already almost compliant.

In its July 25, 2018 Form 10-Q for 2Q 2018 earnings, Facebook announced profitability, user growth, and revenue growth was lower than expected. The following day, Facebook's stock dropped by 19%. On September 5, 2018, pew research center issued a report based on a study it conducted from May 29 to July 11, 2018 indicating users were increasingly disengaging with Facebook in the aftermath of the Cambridge Analytica scandal, with more than half of Facebook users changing their privacy settings to share less with Facebook.

On September 25, 2019, the court granted the defendants' motion to dismiss the consolidated amended complaint, with leave to amend, on the grounds that only one of thirty-six alleged misstatements or omissions was actionable, and that plaintiffs failed to allege scienter as to that statement. The court found the remaining 35 challenged statements to be inactionable because they were either forward-looking with meaningful cautionary language protected by the PSLRA's safe harbor, constituted corporate optimism or puffery, or plaintiffs failed to plead falsity.

On November 15, 2019, plaintiffs filed their second amended complaint — adding new allegations based on allegedly false and misleading statements made after the initial complaints were filed — alleging that defendants made 83 materially misleading statements or omissions and adding an alleged violation of Section 20A of the 1934 Act. Defendants moved to dismiss the second amended complaint, arguing that the disputed statements were not false or misleading or else were puffery or protected forward-looking statements, that the plaintiffs failed to plead a strong inference of scienter, and that plaintiffs failed to plead loss causation. The court dismissed the second amended complaint, with leave to amend, holding that while 26 alleged misstatements or omissions were actionable, plaintiffs failed to plead sufficient facts establishing scienter for one of them and failed to allege facts establishing loss causation for the other 25.

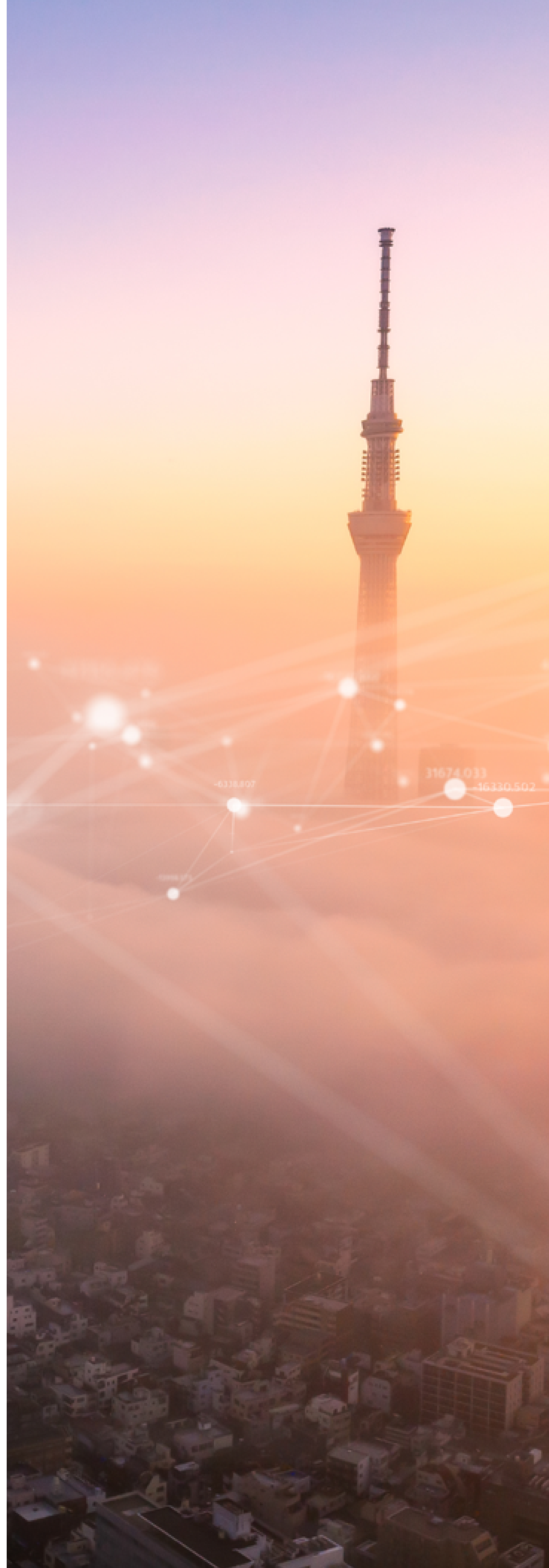
The court found the remaining 57 statements not actionable. For example, the court held that the CEO's statement that Facebook "worked hard to make sure" it was compliant with a Federal Trade Commission consent decree was "the exact type of vague, unverifiable statement" that is typically held to be not actionable because no reasonable investor would rely on such a statement. The court found statements concerning defendants' anticipation and predictions of how the GDPR would impact Facebook were inactionable forward-looking statements protected by the PSLRA's safe harbor provision. The court further found the remaining fifty-four statements not actionable because plaintiffs failed to plead facts establishing that they were false. For example, the court found insufficient plaintiffs' allegations that Facebook's risk disclosures about potential harm from a data breach were materially misleading because plaintiffs failed to allege that the Cambridge Analytica data breach was already affecting Facebook at the time these risk disclosures were made. The court also found

insufficient plaintiffs' allegations that Facebook's March 2017 statements that it had "not uncovered anything that suggests wrongdoing with respect to Cambridge Analytica's work on the [Brexit] and Trump campaigns" was misleading because the allegations "lack[ed] contemporaneous facts from which the [c]ourt [could] infer that as of March 2017 Facebook had determined that the misappropriated data was still being used in connection with the Brexit and Trump campaigns."

For twenty-five statements, the court found plaintiffs' allegations of falsity and scienter sufficient, but held that they were not actionable nonetheless because plaintiffs failed to plead loss causation. More specifically, the court found that plaintiffs adequately alleged that officers at Facebook knew users could not completely control their data based on allegations of internal documents stating Facebook was supplying data to certain "whitelisted" developers, contrary to Facebook's public statements that it "respected the privacy settings that people had in place." The court further concluded that plaintiffs pled sufficient facts to support allegations that defendants had knowledge that Facebook lacked control over deletion of misappropriated data and over the risk that a Cambridge Analytica scandal-type risk could happen again "due to its whitelisting practices" despite representing otherwise in public statements. However, the court found that plaintiffs failed to plead loss causation for these statements, reasoning that the relevant timeframe for statements undermined by these "whitelisting practices" was from February 3, 2017 to June 3, 2018, but no facts were alleged to infer the stock price fell in June 2018 in connection with the disclosure of any information about whitelisting.

The court also found that plaintiffs failed to allege scienter for a single statement by Facebook's CFO that "we think with transparency and control, we're set up well to be in a position where we're compliant with GDPR when it goes into effect" because plaintiffs failed to allege the CFO knew of or was involved in whitelisting. Plaintiffs argued scienter could be inferred because the CFO sold some of his stock during the relevant time period, but the court rejected this argument, holding that "[i]nsider stock sales are not inherently suspicious," unless the "level of trading is dramatically out of line with prior trading practices" in a way to benefit from the undisclosed information.

On October 16, 2020, plaintiffs filed a third amended complaint attempting to address the deficiencies highlighted in the court's dismissal order. Defendants' motion to dismiss the third amended complaint was filed on December 18, 2020 , with briefing to conclude by April 5, 2021. Defendants also moved to strike the third amended complaint on December 18, 2020. Both motions are set for hearing on June 10, 2021.



***Boston Retirement System v. Uber Technologies, Inc.*, Case No. 19-cv-06361, 2020 WL 4569846 (N.D. Cal. Aug. 7, 2020)**

Reputational Risks Threatening Growth, State And Local Law Violations, Financial Instability

Uber Technologies, Inc. is an app-based global transportation company, offering peer-to-peer ridesharing, ride service hailing, and food delivery services. In advance of its May 2019 IPO, Uber filed a Registration Statement with the SEC disclosing that it was "subject to national, state, local, or municipal laws and regulations that are ambiguous in their application or enforcement or that we believe are invalid or inapplicable." Uber also warned that there had been "numerous incidents and allegations worldwide" by customers of sexual assault and other abuse by drivers, and that it would soon release a "transparency report" about such incidents which could cause reputational damage. Uber further expressed that its new CEO was leading Uber down a new path and that, although it was not blemish-free, the company was on a positive trajectory. Finally, the Registration Statement outlined the risk that Uber's operating expenses would increase.

On May 10, 2019, Uber completed its IPO and issued approximately 180 million shares of common stock at $45 per share, generating nearly $8 billion in proceeds. After the IPO, Uber's shares consistently traded at approximately $11 to $20 below the initial IPO price. On May 30, 2019, Uber reported a $1.012 billion loss for the first quarter of 2019 and the slowest quarterly revenue in Uber's history, but stated that it "expected growth to continue." Uber also announced that it was dissolving its chief marketing officer and chief operating officer positions "with the IPO behind us." On August 8, 2019 Uber reported a $5.236 billion loss in the second quarter of 2019 — five times greater than any other quarterly loss in the company's history — and continued declining revenue growth.

On October 4, 2019, investors filed a putative securities class action against Uber, certain of its current and former officers and directors, and its IPO underwriters alleging violations of Sections 11, 12(a)(2), and 15 of the 1933 Act based on purported misleading statements in the Registration Statement related to Uber's financial health.

On November 4, 2019, Uber released its financial results for 3Q 2019, reporting a $1.162 billion loss. Ten days later, on November 14, 2019, news outlets reported that the New Jersey Department of Labor and Workforce Development was seeking $642 million in unpaid unemployment and disability taxes from Uber for past-due taxes from 2015-2018. That day, Uber's stock price fell to an all-time low of $25.99. On December 5, 2019, Uber released it's 84-page "US Safety Report" detailing data and statistics related to passenger safety for rides in the United States, including thousands of instances of passenger safety incidents such as 107 deaths across 97 fatal crashes, 19 fatal physical assaults, and nearly 6,000 sexual assaults for the two calendar years prior to Uber's IPO.

On January 1, 2020, plaintiff filed an amended complaint incorporating allegations related to the US Safety report. Specifically, the plaintiff alleged that defendants misrepresented or omitted material facts regarding Uber's (i) purported reliance on violating state and local anti-competition laws (and bribes to avoid paying associated fines) to sustain growth, (ii) deteriorating passenger safety record and pattern of workplace sexual harassment, and (iii) unstable financial condition and increasing competition. Plaintiff further alleged that defendants misled shareholders by inflating the company's business prospects through false and misleading statements in its Registration Statement while failing to disclose Uber's allegedly ballooning losses, stagnating growth rate, and cost-cutting measures that purportedly undercut its key growth initiatives.

Defendants moved to dismiss the amended complaint, and the court denied the motion holding that plaintiff met its burden to plausibly allege that Uber's Registration Statement "contained an untrue statement of material fact" or "omitted to state a material fact."

As an initial matter, the court applied the lower notice pleading standard under Rule 8 of the Federal Rules of Civil Procedure because "[plaintiff] has made an effort to plead a non-fraudulent basis for Section 11 liability" and instead based its claims against Uber on a strict liability theory and on a negligence theory against the other defendants. Under this lower standard, the court held that plaintiff plausibly alleged that the Registration Statement was misleading by "affirmatively creat[ing] an impression of optimistic state affairs," by stating that Uber had "turned over a new leaf" and failing to "suggest that any of th[e] identified potential risk] scenarios already exist[ed]." The court found plaintiff's amended complaint plausibly alleged that Uber was aware of the existence of concrete risks related to passenger safety record, the legality of its business model, and its financial condition despite the Registration Statement expressing doubt about certain laws and regulations impacting its business. Indeed, the court noted that these risks had been realized well into 2019 as Uber was relying on a "playbook" for growth that the company and its executives knew was "undoubtedly illegal" under state and local laws and that the defendants viewed as "a cost of doing business."

The court rejected defendants' truth-on-the-market defense — that several media articles leading up to Uber's IPO adequately disclosed the relevant risks — holding

that it was "less applicable" in the context of registration statements, IPOs, and Section 11 claims, as opposed to 10(b) claims, as stock prices were privately set in those instances and "the public market has necessarily not had the opportunity to factor in information it may have into the share price." The court explained that the defense is generally not applicable at the pleading stage and requires a "heavy burden" of proof that defendants failed to meet.

The court also rejected defendants' argument that plaintiff relied on impermissible hindsight pleading with respect to statements involving Uber's financial results and risks associated with California labor classification laws, holding that the amended complaint relied on events contemporaneous with the IPO such as a pre-IPO California Supreme Court decision that rendered Uber's classification of its drivers as independent contractors illegal in California. The court also held that alleged misstatements — such as "it's a new day at Uber" — were not inactionable "puffery" when taken in context of allegations that Uber's past tolerance of sexual harassment and failure to comply with local laws remained very much present. Likewise, the court held that alleged misstatements framed as forward-looking opinions were actionable at the pleading stage because the facts known to the defendants during the class period — such as "the facts set forth in the soon-to-be-released transparency report and Q1 2019 results—demonstrated [that defendants] knew otherwise." The court noted that, while defendants were correct that they did not need to disclose their 2Q 2019 results during the 2Q 2019 IPO, they were required to be transparent about the company's financial position, and thus not state, that they "'expected growth to continue' when Uber had sustained (though conveniently, not yet disclosed) its biggest losses to day…and had planned massive restructuring and layoffs for a few weeks after the IPO[.]" Uber's failure, the court held made "defendants' statements [ ] misleading given the information available to them at the time the statements were made."

Plaintiffs moved to certify the class on September 25, 2020 and defendants filed their answer to the amended complaint on September 30. The hearing for class certification is set for May 20, 2021.

In re Lyft Inc. Securities Litigation, Case No. 19-cv-02690, 2020 WL 5366325 (N.D. Cal. Sept. 8, 2020)

Safety Risks and Product Defects During IPO

Lyft Inc. offers app-based services including peer-to-peer ridesharing, and ride service hailing. In November of 2018, looking to expand its service offerings, Lyft acquired the largest bikesharing platform in North America, Bikeshare Holdings LLC ("Motivate"). On March 28, 2019, Lyft completed its IPO at a price of $72 per share, generating proceeds of $2.34 billion. In its Registration Statement, Lyft detailed its commitment to "trust, safety, reliability and privacy," stated its "U.S. ridesharing market share" was up 17% from two years before, grappled with its inability to obtain profitability in the present or potentially "in the future," and disclosed the risk that the company's bikes and scooters might "experience quality problems or defects" in the future. It also disclosed that Lyft was a defendant in multiple litigations related to accidents or other trust and safety incidents involving drivers or passengers. Within weeks of the IPO, news stories arose relating to rider safety, including allegations of riders experiencing sexual assault by drivers. Lyft's stock price subsequently fell more than 20% between April 8 and April 10, 2019.

An investor brought a putative class action against Lyft, its officers, and its directors alleging violations of Sections 11, and 15 of the 1933 Act on the grounds that Lyft's offering documents contained material omissions and misleading statements relating to, among other things: (1) rider safety and related risk factors; (2) the company's market share; (3) first quarter losses; (4) the company's bikeshare program; and (5) driver benefits. Defendants moved to dismiss on May 14, 2020, which the court granted in part and denied in part.

The court further held that plaintiff adequately alleged that hypothetical risks included in the Registration Statement about quality-control problems and defects with shared bikes were materially misleading because, by the time of the IPO, these risks were actually "present realities," as Lyft's bikeshare program was already experiencing severe and pervasive safety issues.

The court denied defendants' motion and allowed the claims to proceed based on allegedly misleading risk factors regarding rider safety and the company's bikeshare program. First, in assessing whether statements about rider safety and related risk factors were misleading, the court noted that, while the Registration Statement disclosed general risks relating to illegal, improper, or otherwise inappropriate activity by drivers and passengers, and pending safety-related litigation against Lyft, it omitted explicit reference to potential liability from sexual assaults by drivers against

riders and related litigation. The court held that “the adequacy of the disclosures is not so obvious that the Court may resolve this dispute at the motion to dismiss stage[,]” and thus, plaintiff’s allegation that the omission of any mention of potential liability from sexual assaults perpetuated by drivers against riders made Lyft’s statements regarding safety materially misleading is sufficient. Though defendants argued that there could not be a material omission because the market knew of sexual assault complaints and ongoing litigation against the company during the IPO, the court disagreed, rejecting defendants’ reliance on exemplary news reports and holding that defendants did not establish as a matter of law that such information was in the public domain.

Second, the court further held that plaintiff adequately alleged that hypothetical risks included in the Registration Statement about quality-control problems and defects with shared bikes were materially misleading because, by the time of the IPO, these risks were actually “present realities,” as Lyft’s bikeshare program was already experiencing severe and pervasive safety issues. Indeed, plaintiff alleged that when Lyft acquired Motivate before the IPO, Lyft obtained full access to an extensive log of user crashes and complaints, and also that Lyft’s own data reflected that 21% of one city’s bike fleet had “simply disappeared” in just a two-week period.

While preserving some of plaintiff’s claims, the court granted defendants’ motion, with leave to amend, as to claims concerning Lyft’s market share, first quarter losses, and driver benefits, among other things. The court reasoned that plaintiff had not adequately alleged that defendants’ market share statements

Plaintiff also faulted defendants for omitting anticipated record losses for the first quarter of 2019 from the Registration Statement, but the court held that defendants had no duty to disclose the magnitude of such losses, emphasizing court’s reluctance to impose liability on companies based on failures to disclose financial data for in-progress fiscal quarters.

were misleading given that the Registration Statement disclosed the source of its data and the assumptions underlying the figures. Furthermore, the Registration Statement stated that Lyft had not independently verified those figures, and acknowledged that other third-party estimates may differ from Lyft’s. Plaintiff also faulted defendants for omitting anticipated record losses for the first quarter of 2019 from the Registration Statement, but the court held that defendants had no duty to disclose the magnitude of such losses, emphasizing court’s reluctance to impose liability on companies based on failures to disclose financial data for in-progress fiscal quarters. Finally, the court granted defendants’ motion as to statements in the Registration Statement about driver benefits that purportedly conflicted with Lyft’s unstated strategy of treating drivers as independent contractors, because such alleged omissions lacked connection to statements

concerning driver benefits like in-app tipping, 24/7 support, and career coaches.

Plaintiff moved for class certification on September 25, 2020, which is fully briefed and heard on March 11, 2021. Defendants answered on October 2, 2020.

Scheller, et al. v. Nutanix, Inc., et al., Case No. 19-cv-01651, 2020 WL 5500422 (N.D. Cal. Sept. 11, 2020)

Reduced Sales Revenue And Marketing Expenditures

Nutanix, Inc. is a cloud-platform provider known for its development of hyper-converged infrastructure software ("HCI") that combines data-center computing into a single machine. Nutanix customers historically purchased HCI for use with hardware platforms either preinstalled on Nutanix hardware or preinstalled on third-party hardware sold by original equipment manufacturers ("OEM"s) that partnered with Nutanix, including Dell Inc. ("Dell"), International Business Machines Corporation, and Lenovo Group, Ltd. In 2016, Dell, Nutanix's largest OEM, acquired VMware, Nutanix's main competitor, resulting in a decline in sales orders Nutanix received through Dell and increasing competitive pressure on Nutanix.

In response to competitive pressure, Nutanix pivoted to a new business model in the first quarter of 2018. First, it transitioned from reselling hardware coupled with software licenses to a software-only model. Second, it shifted away from a hardware-life bounded license sales structure and toward a subscription-based model providing consumers with cloud-based products. Nutanix reported the transition was a success. Indeed, the company repeatedly touted new customers, such as during a March 2018 investor call when Nutanix's CEO stated that the company added a record number of new customers and made a "huge contribution to overall mid market customer acquisition." Similarly, the company also stated that it had grown its sales and marketing personnel, such as in a May 2018 press release in which it stated that "[w]e had strong success in our hiring in the quarter that positions us to deliver on our future growth plans."

On February 28, 2019, the company announced its second quarter 2019 financial results and lower than expected guidance for the third quarter of 2019. The company attributed its guidance to "inadequate marketing spending for pipeline generation and slower than expected sales hiring." Thereafter, the price of Nutanix stock declined 32.7% from a closing price of $50.09 per share on February 28, 2019 to a close of $33.70 per share on March 1, 2019.

Investors filed a putative class action lawsuit against Nutanix, its CEO, and its CFO. Plaintiffs filed a consolidated amended complaint on September 9, 2019 alleging violations of Sections 10-b and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Defendants moved to dismiss, and the court granted the motion on March 9, 2020, with leave to amend, on the grounds that Plaintiffs failed to adequately allege the falsity of Nutanix's statements or that it acted with the requisite scienter.

On April 17, 2020, plaintiffs filed a second amended complaint, alleging that Nutanix made multiple purportedly false statements by (1) misrepresenting its investment in sales and marketing, and in particular overstating its lead generation and sales hiring; (2) concealing its deteriorating relationship with Dell; (3) making false statements about strong product quality; and (4) failing to disclose a purported "pull-in" scheme whereby, according to confidential witnesses, Nutanix masked a declining sales pipeline by "pulling-in" sales from future quarters. Defendants moved to dismiss the second amended complaint on the grounds that plaintiffs failed to cure their deficient scienter allegations and failed to plead an actionable false or misleading statement. The court granted the motion as to some of plaintiffs' claims, but denied the motion in part, allowing the case to proceed as to defendants' statements about new customer growth and the company's sales productivity.

First, while the court acknowledged that plaintiffs adequately alleged that the Nutanix was not investing in lead generation, it held that plaintiffs' challenged statements were not false because they related to "sales and marketing" — not lead generation — which Nutanix did spend more money on. Second, the court rejected plaintiffs' contention that statements regarding customer growth and sales productivity were misleading because Nutanix pulled in sales from existing customers that were supposed to close in future quarters, reasoning that plaintiffs recognized in the second amended complaint that Nutanix regularly pulled in such accounts each quarter, including before the class period, undercutting plaintiffs' claim that the practice by itself rendered the company's statements about new customers and its sales pipeline misleading.

However, the court concluded that plaintiffs adequately pled that defendants' statements that Nutanix "add[ed] a record number of new customers" and made a "huge contribution to overall mid-market customer acquisition" were materially misleading because they alleged through various confidential witness statements that the company was simultaneously facing a decrease in the sales pipeline and sale leads. Finally, the court held that Nutanix's claims regarding its success in hiring could have misled a reasonable investor in light of plaintiffs'

allegations that the Nutanix salesforce was actually experiencing high attrition and poor productivity. The court further held that plaintiffs sufficiently pled scienter with respect to statements regarding customer acquisition through confidential witness allegations that the individual defendants were present at quarterly meetings where the declining sales pipeline was discussed and received regular updates on sales data that would have alerted them to the issues. Similarly, the court held that alleged confidential witness statements that the company's employees regularly discussed at all-hands meetings sales-team attrition problems and the need to hire more salespeople were sufficient to plead scienter as to the well-pled statements regarding success in hiring.

Defendants answered on October 23, 2020. Plaintiffs' motion for class certification is set to be filed by March 10, 2021 and heard on July 21, 2021. Fact and expert discovery are set to close in March 2022 and August 2022, respectively. Dispositive motions are due to be heard by January 18, 2023 and trial is set for May 1, 2023.

***In Re Stitch Fix, Inc. Securities Litigation*, Case No. 18-cv-06208-JD, 2020 WL 5847506 (N.D. Cal. Sept. 30, 2020)**

Changes To Marketing Strategies And Decreased Client Growth

Stitch Fix, Inc. is a publicly traded online retail fashion subscription service self-described on its website as "the world's leading online personal styling service." The company's business model relies on the use of clothing, shoes, and accessories purchased from other manufacturers or made by Stitch Fix itself to curate personalized shipments to customers that are called a "Fix." Customers can try on the items in their Fix, buy what they like, and return the rest and are incentivized to buy all the items in their shipment with a 25% discount applied only if the entire Fix is accepted.

An important metric for Stitch Fix is the number and growth rate of its "active clients," who are users who "check out [i.e. decide to keep all or part of] a Fix in the preceding 12-month period." Stitch Fix's active client growth increased from 261,000 in Fiscal Year 2014, to 2,194,000 in FY17. The company added more than 100,000 active clients in each quarter from Q2/17 through Q2/18. On a June 7, 2018 investor conference call, Stitch Fix's CEO touted the company's active client growth, stating that it grew to 2.7 million active clients as of April 28, 2018, an increase of 614,000 and 30% year-over-year. In its June 8, 2018 Form 10-Q, Stitch Fix stated that its success "depends on our ability to attract new clients in a cost-effective manner" and that in the past, it "reach[ed] clients through paid marketing, referral programs, organic word of mouth and other methods of discovery such as press or internet search engine results." The Form 10-Q further stated that, "[s]tarting in calendar year 2017, we began to increase our paid marketing expenses by investing more in digital marketing and launching our first television advertising campaigns" and that it expected to increase paid marketing spending, but noting it could not "be certain that these efforts will yield more clients or be cost-effective."

On October 1, 2018, Stitch Fix disclosed in a shareholder letter made available on the company's website that for 10 of the 13 weeks during 4Q 2018, Stitch Fix temporarily suspended its national TV advertising to measure the efficacy of such advertising. The same day, Stitch Fix also reported 4Q 2018 financial results, which showed that sequential active client growth fell 70%, from 180,000 new additions in the 3Q 2018 to 54,000 in 4Q 2018. The following day, Stitch Fix's stock price dropped by more than 35%.

Investors filed putative securities class actions against Stitch Fix and certain of its officers alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Plaintiff alleged that defendants made six false and misleading statements regarding Stitch Fix's "advertising and marketing expenses" as well as "active client growth" which were later purportedly revealed to be false in its 4Q 2018 financial results and shareholder letter.

Defendants moved to dismiss the consolidated amended complaint, which the court granted, with leave to amend, holding that plaintiff's "moving-target theory of pleading" in the complaint "does not give defendants fair notice of the allegations for which they are called to account" was sufficient alone to warrant dismissal.

While the court declined to reach the issues of scienter or loss causation, it held that the consolidated amended complaint inadequately pled falsity. First, the court held that none of defendants' statements regarding national TV advertising being an important component of marketing were false, rejecting plaintiff's allegations that statements in Stitch Fix's October 2018 shareholder letter regarding temporarily halting national TV advertising contradicted such statements. Rather, the court noted, even if it were to accept that Stitch Fix temporarily suspended its national TV advertising, that fact did not contradict or undermine the challenged statements because "none of those statements amounted to a representation that national TV was ongoing." The court further held that statements made regarding Stitch Fix's "marketing capabilities" were too vague and not connected to whether Stitch Fix was running national TV campaigns as of June 7, 2018 and were directed to prior marketing efforts when taken in context. The court found other statements like a June 7, 2018 statement "[w]e continue to make strategic and measured marketing investments" were "mildly closer to

addressing ongoing efforts and future plans," but held the allegations were not specific enough to national television campaigns to be deemed false or misleading by Stitch Fix's "dark test" in 4Q 2018, instead referencing radio, local television, and online advertising. The court explained that it was not defendants' burden to specify what type of advertising it was using as plaintiffs had argued, placing the pleading burden squarely on plaintiffs "to plead why, against those facts, defendants' more general, earlier statements about television advertising became misleading because it turned out Stitch Fix had paused national television advertising only, for a period of 10 weeks."

With respect to the challenged statements about Stitch Fix's "active client growth," the court rejected plaintiff's argument that the June 7, 2018 statements that "the 30% active client growth demonstrate[s] Stitch Fix's continued positive momentum," that Stitch Fix was "leveraging our performance, ***marketing capabilities*** and increasing our brand awareness" and that it was "reflecting [*sic*] '***efficiencies*** we've seen with our marketing spend to attract new clients" gave the market the impression that active client growth continued as of June 7, 2018. The court concluded that "[n]one of the challenged statements can be read to give the 'false impression' plaintiff ascribes to them" because the statements reflected observations about what Stitch Fix's "'third quarter results demonstrate[d],' and not a contemporaneous note about how the company was doing at the time of the statement."

On November 6, 2020, plaintiff filed an amended consolidated complaint, and defendants filed a motion to dismiss on December 7, 2020. That motion is fully briefed and set for hearing on April 15, 2021.

In re Dropbox Securities Litigation, Case No. 19-cv-06348, 2020 WL 6161502 (N.D. Cal. Oct. 21, 2020)

Post-IPO Losses, Stagnating Growth

Dropbox, Inc. offers cloud-based storage and collaboration services. Its users can use either a basic, free version of the service or pay for a monthly or annual subscription for an upgraded version. In connection with its IPO, Dropbox filed a Registration Statement explaining that its business model was premised on three core factors: (1) new user sign ups (whether free or paying), (2) increasing the conversion of free users to paying users, and (3) upgrading and expanding the subscriptions used by existing paying users. The Registration Statement contained a table showing the number of paid users each year between 2015 and 2017, disclosed that over 500 million users were registered for its service, and estimated that about 300 million free-version users had characteristics — such as specific email domains, devices, and geographics — that Dropbox believed made them more likely than other users to convert to paying users. Dropbox disclosed in its Registration Statement that its revenue growth rate declined in recent periods and may continue to decline. The Registration Statement also contained risk factors that its business model depends on its ability to retain and upgrade paying users and that its growth could be harmed if the company failed to attract new users or convert existing users to paid subscribers. Dropbox completed its IPO on March 23, 2018, issuing over 26 million shares of common stock for $21.00 per share and generating proceeds of more than $500 million.

Following the IPO, Dropbox's revenue and paying userbase increased each fiscal quarter, but consistent with prior financials disclosed in the Registration Statement, these metrics slowed. On October 4, 2019, investors filed a putative class action lawsuit against Dropbox, certain of its officers and directors, a large institutional shareholder, and Dropbox's IPO underwriters, alleging violations of Sections 11 and 15 of the 1933 Act, contending the Registration Statement misled investors by failing to disclose that Dropbox's rate of converting free users to paying users was dropping, causing Dropbox to experience a material decline and/or slowdown in revenue growth. Defendants moved to dismiss on the grounds that plaintiffs' overall theory of liability failed because, among other things, the amended complaint lacked any factual allegations regarding user conversion, and the disputed statements were not actionable because they were either accurate or statements of opinion. Defendants also argued that plaintiffs' claims were time-barred.

The court granted the motions to dismiss, with leave to amend, agreeing with defendants that it could not "find a single factual allegation about Dropbox's user conversion rate," calling this failure an "elephant-sized hole" in plaintiffs' theory for liability as the entire complaint was premised upon the alleged decline of Dropbox's user conversion rate.

The court granted the motions to dismiss, with leave to amend, agreeing with defendants that it could not "find a single factual allegation about Dropbox's user conversion rate," calling this failure an "elephant-sized

hole" in plaintiffs' theory for liability as the entire complaint was premised upon the alleged decline of Dropbox's user conversion rate. The court explained that, while plaintiffs credited a purported decline in Dropbox's user conversion rate — a metric Dropbox does not disclose — as causing the company's revenue growth rate to decline, this was "nothing more than speculation" and it was "equally plausible" that Dropbox's revenue growth rate decline could be traced to Dropbox's other two revenue drivers or to some combination of all three metrics. The court also agreed with defendants that Dropbox had no duty to disclose free-to-paid user conversion numbers because that number was subsumed within the total number of paying users that Dropbox did disclose. The court thus reasoned that the success of the company's business model was adequately captured through metrics the company disclosed. The court also agreed with defendants that challenged statements of accurate historical data were not misleading, noting plaintiffs failed to allege any facts that directly — or even indirectly — undermined those statements. Finally, the court held that the challenged statement regarding user characteristics was an inactionable opinion, reasoning that plaintiffs failed to allege that Dropbox did not hold the beliefs it stated or that any of the facts supporting Dropbox's stated beliefs were untrue.

Finally, the court granted the motions to dismiss on the alternative ground that plaintiffs' complaint was time-barred by the Securities Act's one-year bar, explaining if plaintiffs knew of the alleged misstatements in the Registration Statement prior to October 4, 2018 — one year before filing the initial complaint — the claim would be time barred. Dropbox made financial announcements showing declining revenue in each of the following two quarters post IPO — both prior to October 2018.

The court employed similar logic in holding that plaintiffs failed to plead violations of Item 303 of Regulation S-K for failure to disclose a known trend of declining growth rate in the Registration Statement, and thus that could not support the Section 11 claim. The court explained that "[a]nyone with basic mathematical skills could discern that while Dropbox's revenue was increasing, it did so at a declining rate." Similarly, the court reiterated that plaintiffs failed to plead facts showing Dropbox's alleged declining user-conversion rate was the direct reason for decreasing revenue as opposed to other factors, rebutting plaintiffs' contention that Dropbox failed to disclose a trend of declining user-conversion rate. The court added that, even taking as true that Dropbox suffered a declining user-conversion rate, plaintiffs failed to allege the trend was material in light of the fact that Dropbox's revenue continued to grow after the IPO. The court also held that plaintiffs failed to allege defendants' knowledge necessary for an Item 303 violation, explaining "[i]t is simply nonsensical for Plaintiffs to contend, on one hand, that the Court should infer Defendants knew of a declining user conversion trend because of a slowing rate of paying user growth and, on the other, that Dropbox's disclosure of this paying user growth statistic was insufficient to relieve them of liability under Item 303."

Finally, the court granted the motions to dismiss on the alternative ground that plaintiffs' complaint was time-barred by the Securities Act's one-year bar, explaining if plaintiffs knew of the alleged misstatements in the Registration Statement prior to October 4, 2018 — one year before filing the initial complaint — the claim would be time barred. Dropbox made financial announcements showing declining revenue in each of the following two quarters post IPO — both prior to October 2018. Thus, the court held that, because the information available to plaintiffs from the IPO through October of 2018 was abundant and largely consistent with the Registration Statement's picture of slowing revenue and paying user growth rates, a reasonably diligent plaintiff would have been on notice of the claims as pled in the consolidated amended complaint before October 4, 2018.

In dismissing plaintiffs' claims with leave to amend, the court reasoned that it was not yet futile for plaintiffs to cure the timeliness deficiency with plaintiffs' claims, noting that to survive dismissal with prejudice "Plaintiffs must, at a minimum, identify some factual circumstance that plausibly distinguishes their state of awareness of these claims in November 2018 that was not disclosed in the August 2018 quarterly report or earlier." The parties reached a settlement thereafter and the case has been stayed while the settlement is finalized.

In re Apple Inc. Securities Litigation, Case No. 4:19-cv-02033, 2020 WL 6482014 (N.D. Cal. Nov. 4, 2020)

Missed Guidance

Apple Inc. is a multinational technology company that sells, among other things, the iPhone, a popular smartphone. Apple has a significant presence in China. China began experiencing slowing economic growth

in 2018 that reportedly led to reduced consumer consumption beginning in mid-2018. Adding to China's economic difficulties, the Trump Administration imposed tariffs on Chinese goods in April, July, and September 2018. In September 2018, Apple released two new expensive iPhones, the iPhone XS (priced up to $1349) and iPhone XS Max (priced up to $1449). In October 2018, Apple released one slightly less expensive iPhone, the iPhone XR (priced up to $899). At the time, analysts questioned whether these iPhones would sell well in the economic climate. Nevertheless, on November 1, Apple released its revenue guidance for 1Q 2019 at "a new all-time record" of $89 billion to $93 billion.

Later that day, Apple hosted a conference call with analysts and investors. An analyst then asked Apple's CEO what trajectory the CEO saw for Apple's business in emerging markets. The CEO responded: "In relation to China specifically, I would not put China in [the category of emerging markets where we are seeing pressure]. Our business in China was very strong last quarter. We grew 16%, which we're very happy with. iPhone, in particular, was very strong double-digit growth there. Our other products category was also stronger, in fact, a bit stronger than even the company — overall company number."

A second analyst asked the CEO about demand for Apple's new iPhones: "With the staggered iPhone launch, were you able to discern any impact on the Xs and Xs Max from buyers potentially waiting for the XR? And what, if anything, can we take away from the December quarter guidance related to what you're seeing for early demand on the XR[?]" The CEO responded "The Xs and Xs Max got off to a really great start, and we've only been selling for a few weeks. The XR, we've only got out there for, I guess, 5—5 days or so at this point and so that it's—we have very, very little data there. Usually, there is some amount of wait until a product shows—another product shows up in look, but in—that—in looking at the data, on the sales data for Xs and Xs Max, there's no obvious evidence of that in the data as I see it."

Four days later, a periodical reported that Apple cancelled its "production boost" for the iPhone XR, indicating a 20-25% reduction in expected sales. On November 12, Wells Fargo issued a report also estimating that Apple had reduced iPhone production. On January 2, 2019, Apple's CEO sent a letter to investors announcing that Apple would miss its earnings guidance by up to $9 billion, representing nearly 10% of the company's guidance. The CEO explained that "[w]hile we anticipated some challenges in key emerging markers, we did not foresee the magnitude of the economic declaration, particularly in Greater China." He continued, "China's economy began to slow in the second half of 2018," and the economic environment in China "has been further impacted by rising trade tension with the United States." This economic deceleration accounted for "most of our revenue shortfall" and "over 100 percent of our year-over-year worldwide revenue decline." And "[l]ower than anticipated iPhone, primarily in Greater China, accounts for all of our revenue shortfall to out [sic] guidance and for much more than our entire year-over-year revenue decline." Subsequently, during a television interview, the CEO explained: "[A] s we look at what's going on in China — it's clear that the economy begins to slow there for the second half .... And so we saw, as the quarter went on, things like traffic in our retail stores, traffic in our channel partner stores, the reports of the smartphone industry contracting, particularly bad in November — I haven't seen the December number yet, but I would guess that would not be good either. And so that's what we've seen." Apple's stock price declined from a close of $157.92 per share on January 2, 2019 to a close of $142.19 per share the next trading day.

Investors filed a putative class action against Apple, its CEO, and CFO under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder, alleging that, in order to keep the price of Apple's stock artificially inflated, defendants intentionally misrepresented Apple's iPhone sales and business in China. Defendants moved to dismiss the consolidated amended complaint, and the court dismissed the majority of the allegations on the basis that the claims were based on inactionable statements and plaintiffs could not show that defendants acted with scienter. The court, however, allowed the statements made on the November 1, 2018 call to proceed based, in part, on a supplemental brief submitted by separate shareholders not represented by lead counsel, which the court subsequently appointed lead plaintiff and lead counsel, respectively. The newly appointed lead plaintiff filed a revised consolidated class action complaint on June 23, 2020.

Plaintiff claimed that defendants misrepresented Apple's business outlook in China and demand for new iPhones on the November 1, 2018 conference call. First, plaintiff alleged that the CEO's statement that he "would not put China in th[e] category" of decelerating emerging markets was false or misleading, in light of the CEO's later admissions that Apple's China business was experiencing pressure at the time. Second, plaintiff alleged that the CEO's statement that "[t]he [iPhone] Xs and Xs Max got off to a really great start" was false or misleading, given that Apple canceled iPhone production lines mere days after the statement was made.

Defendants again moved to dismiss plaintiff's claims, and the court granted in part and denied in part defendants' motion. First, the court held that defendants' China-related statements plausibly referred to the present considering, among other things, that the

statement was in response to a question concerning Apple's business trajectory. Similarly, the court held that the China-related statements were false when made given that the CEO subsequently admitted in an interview that Apple was seeing emerging market pressure in China on November 1, 2018, noting, among other things, that signs of the deceleration of China's economy were "particularly bad" in November. Thus, the court concluded that defendants' China-related statements were actionable.

Second, the court held that plaintiff did not adequately allege that defendants' statement that "[t]he X[S] and X[S] Max got off to a really great start" was false or misleading. Critically, the court reasoned that plaintiff nowhere alleged that the iPhones XS and XS Max "did not launch successfully in September," noting in contrast that defendants reported "a new September quarter record, fueled by … the very successful launch" of both phones, during the November 1, 2018 call. Accordingly, the court dismissed plaintiff's claims predicated on purportedly misleading statements concerning iPhone demand.

Finally, the court held plaintiff adequately pled scienter based on the combination of the core operations doctrine (China presented an important market for Apple to which the CEO paid close attention), post-class admissions that defendants "saw" worrying signs in China during the quarter, and the close temporal proximity between the challenged statements and actions inconsistent with those statements, including cutting production lines and admitting a $9 billion shortfall two months later. In sum, the court held that plaintiff's allegations supported a strong inference that on November 1, 2018: (1) the CEO knew that economic deceleration and trade tensions in China posed a significant risk to Apple's business, (2) Apple possessed data that such risks were materializing in the form of "troubling signs" and weak iPhone demand, and (3) the CEO nevertheless represented to investors that Apple was not experiencing pressure in China. Those inferences in turn plausibly supported that defendants acted with at least deliberate recklessness. Defendants argued that plaintiff's theory of fraud did not make sense because defendants did not profit from the alleged fraud, pointing to the fact that Apple engaged in a $1 billion stock repurchase at supposedly inflated prices. The court dismissed that argument, however, holding that plaintiff did not need to allege defendants' motive at the pleading stage and that, as shareholders, the CEO and CFO stood to benefit from a stock buy-back even if the company did not.

Defendants answered on November 18, 2020. Plaintiff's deadline to move for class certification is May 5, 2021. Fact and expert discovery are set to close in March 2022 and July 2022, respectively. Dispositive motions are due by September 9, 2022. A trial date has not been set.

***Reidinger v. Zendesk, Inc., et al.*, Case No. 19-cv-06968-CRB, 2020 WL 6562335 (N.D. Cal. Nov. 9, 2020); 2021 WL 796261 (Mar. 2, 2021)**

Lower Historical Growth In Non-U.S. Markets And Data Breach

Zendesk, Inc. is a software company that offers scalable customer service products for businesses to conduct sales, customer support, and engagement. Throughout 2018 and 2019, Zendesk continued to grow and achieve strong financials. In February 2019, Zendesk announced its fiscal year 2018 results, noting it had "strong demand" for its products globally in 2018, "growth in 2018 reflects the strength of our products, our ability to execute, and global trends that are driving demand … [w]ith customers in more than 160 countries … we are seeing strong global demand and revenue growth in every region," and that it "matured" enterprise sales and "broadened" sales and "customer success capabilities." Zendesk's CFO attributed Zendesk's performance to "the sales force executing and productivity up all around; strength in our Americas business, particularly with bigger deals this quarter." and "a healthy demand environment overall[.]" She further noted "[w]e're not seeing our pipeline slip in any way." Zendesk also commented on Europe, Middle East, and Africa ("EMEA") growth, noting "we employ the same kind of go-to-market motions in all the regions. EMEA has had a very strong presence across all business sizes." Later that month, Zendesk stated that it was adapting as it began to pursue more enterprise accounts by "putting in the people and activities in place to make that happen," including dedicating its sales reps "to a specific enterprise and making sure that they understand the terminology that those companies use and the concerns that they would have." The following month, Zendesk announced a new managing director for the Australia-New Zealand ("ANZ") subregion of Asia Pacific ("APAC") and with this addition, it was "poised for growth" in the ANZ "mission-critical market."

In April 2019, Zendesk again announced positive growth and financials for 1Q 2019, noting "demand for our products remains strong as companies around the world, large and small, seek to transform their businesses by adopting modern software[.]" Zendesk attributed "broad-based growth" in 1Q 2019, in part, to improved sales and marketing, "and global trends that are driving high demand" and touted the expansion of its leadership operations to support "global growth and momentum." On a conference call with investors that same day, Zendesk's CFO described 1Q 2019 as reflecting "strong and balanced revenue growth across all regions." She remarked that "if there's a place where I'm paying attention to, particularly in APAC, that's a place we're looking at. But other than that, I don't think there's anything different."

The following month, Zendesk continued to make positive statements about its "global footprint" being a "complete advantage," but reiterated that Zendesk was "closely watching APAC[,] noting there was "[n]othing alarming there…just some uneven performance[.]"

Separately, throughout 2019, Zendesk's public filings represented that it maintained a "comprehensive security program designed to help safeguard the security and integrity of customers' data," that it engaged in regular review, including third-party audits of its program, and that it was compliant with EU data security regulations. Its public filings also contained cautionary statements about the risk of unauthorized access or security breaches which could remain undetected, noting that has in fact happened in the past.

On July 30, 2019, Zendesk announced its 2Q 2019 financial results, which were positive and above its own guidance, but overall growth of 37% was slightly below the 38%-41% range in each of the previous eight quarters. Zendesk reduced its overall cash flow outlook and increased its outlook for losses for the remainder of 2019. That same day, Zendesk's CEO stated on an earnings call that growth in EMEA and APAC "although still solid, didn't quite live up to [Zendesk's] expectations, and is lagging in other regions." The CFO reported that growth in EMEA in particular was down to 33% from 38% the previous quarter, noting that "macroeconomic factors" such as deals "taking longer to close" played a role, and stating that the Company needed to invest its leadership in these regions. The following day, Zendesk's stock price dropped from $93.12 to $83.65 per share. Over the ensuing months, Zendesk announced that it would adopt changes to its EMEA and APAC strategies "including implementing 'best practices' from its U.S. Business" and conduct executive hiring to provide adequate leadership in both regions. The CEO also noted, "some of these smaller regions [that] have the same revenues that the entire company had when we went public … there's like three guys and a dog managing that business … we need to do better and we are investing to do a lot better on that."

On October 2, 2019, Zendesk announced that it was recently alerted from a third party of a potential security matter and, on September 24, Zendesk identified a data breach it experienced prior to November 2016 involving personal information of 15,000 customer accounts and authentication information for an additional 7,000 customer accounts. Zendesk's stock fell $2.90 per share to close at $69.81 per share that day.

On November 22, 2019, Zendesk announced that its investigation revealed that the breach was caused by a small number of AWS keys being compromised after being provided to a third party vendor. It further announced various enhancements to its data security since the 2016 breach, including expansion of multifactor authentication in 2016 and 2017 and increased security monitoring and logging.

Investors filed putative class actions against Zendesk and certain of its officers, alleging violations of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder, asserting that Zendesk and its officers made false and misleading statements about performance and capabilities in the EMEA and APAC markets and its data security systems. Defendants moved to dismiss the amended complaint, which the court granted, with leave to amend, holding that the challenged statements were either not pled to be false or misleading when made or were inactionable puffery, and that plaintiffs did not allege

any plausible theory for scienter. In considering plaintiffs' allegations of material misstatements about Zendesk's EMEA and APAC performance, the court first noted that many of the statements plaintiffs alleged about 2018 or 1Q 2019 performance were merely describing performance and were not at all alleged to be false. The court found Zendesk's statements about global and regional demand were "consistent with eventual growth deceleration" in EMEA and APAC. The court disagreed with plaintiffs that Zendesk's statements about adding to its salesforce to grow enterprise business were false, instead concluding that Zendesk had indeed added to its salesforce but had simply "not added enough people, or the right people, to keep growth steady or accelerating," as Zendesk itself acknowledged on its July 30, 2019 earnings call. This, the court held, was not indicative of falsity, particularly because plaintiffs failed to plead facts indicating Zendesk lied about scaling. The court considered the other statements plaintiffs cited as "not factual" in nature, including describing ANZ as a "mission-critical market" or describing Zendesk's "global footprint" as a benefit. The court also held that Zendesk did not make any material omissions in failing to disclose information about the macroeconomic challenges related to Brexit or the U.S.-China trade war, or about Zendesk's sales strategies and leadership structure in EMEA and APAC, concluding that plaintiffs failed to allege what Zendesk should have disclosed as to these factors, or what a reasonable investor may have perceived based on the total mix of information available.

The court also found that, with respect to scienter, "[b] ased on the present allegations, Zendesk's course of conduct was neither deceptive nor manipulative." Instead, the court held that plaintiffs' allegations gave rise to the non-fraudulent inference, that Zendesk "made strategic mistakes that it later examined and began taking steps to fix."

The court next considered whether failure to disclose the 2016 data breach was actionable and concluded that, although plaintiffs "plausibly alleged" a material omission to the extent that the data breach "would have been viewed by the reasonable investor as significant," plaintiffs did not allege that Zendesk was aware of the breach, or recklessly disregarded its occurrence. The court noted that plaintiffs' own allegations show that Zendesk's data security improved between 2016, when the breach occurred, and 2019, when the challenged statements were made, such that the challenged 2019 statements about the strength of Zendesk's security systems at that time were plausibly consistent with having a breach in 2016. The court found that, based on plaintiffs' allegations, Zendesk was unaware of the breach until September 2019, undermining any inference of scienter. Finally, the court concluded that because plaintiffs failed to state a predicate Section 10(a) claim, its 20(a) claim also failed.

Plaintiffs filed a second amended complaint on January 8, 2021, dropping all claims except those relating to the data breach. Defendants again moved to dismiss, which the court granted, with leave to amend. The court again held that plaintiffs failed to plead any false statement or omission of anything that Zendesk had a duty to disclose, focusing on Zendesk's data security improvements between 2016 and 2019 when the challenged statements were made, explaining that "Zendesk's 2019 statements are plausibly consistent with Zendesk having a less robust security program in the past." Clarifying its prior order, the court emphasized that plaintiffs failed to allege a material omission because the challenged statements were not misleading given that, among other things, Zendesk warned it may experience an undetected data breach and implied that, at some point, prior data security measures failed. The court also explained that "Zendesk could not have had any 'duty to disclose' the data breach…because Zendesk was unaware of the breach[,]" plaintiffs failed to allege that any defendant knew or should have known that someone shared AWS keys with a vendor in 2016, and "disclosure of multifactor authentication rollout and past AWS logging practices would have only served to 'bury shareholders in an avalanche of trivial information.'"

The court found plaintiffs' scienter arguments "meritless[,]" holding that they failed to allege that any defendant "had knowledge of falsity or acted with conscious recklessness as to the risk that any statement was misleading without further disclosure." The court explained that plaintiffs' allegations indicate that defendants were simply unaware of the breach until September 2019 which "contradict[s] any inference that Zendesk intended to 'deceive' or defraud' regarding the fact of the breach" and "given Zendesk's lack of knowledge surrounding the data breach, the inference that Zendesk's officers acted with fraudulent intent when failing to disclose Zendesk's past security mistakes rests on a multitude of dubious premises." The court also rejected plaintiffs' core operations theory, holding "it is far from absurd to think that in 2019, Zendesk officers were not aware or consciously ignorant of a single episode in 2016 when someone at Zendesk shared AWS keys with a third-party vendor, let alone that Zendesk had implemented multifactor authentication just after that event." It similarly rejected plaintiffs' "corporate or collective scienter" theory, holding that, "to the extent the Ninth Circuit permits such a theory…[b]ecause Zendesk's public statements were neither false nor misleading, they could not have been 'so dramatically false' as to 'create a strong inference that at least some' Zendesk officials knew of their falsity."

In granting plaintiffs leave to amend, the court noted that it was appropriate given the possibility that plaintiffs relied on the prior order's statements regarding whether the [plaintiffs] had pleaded a material omission. Plaintiffs decided not to amend, judgment was entered on March 23, 2021, and on April 20, 2021 plaintiffs filed a notice of appeal.

In Re Twitter, Inc. Sec. Litig., No. 19-cv-07149, 2020 WL 7260479 (N.D. Cal. Dec. 10, 2020)

Ad Performance Overinflated By Privacy Issues

As noted above, Twitter, Inc. is a well-known social media platform on which members can post interactive messages or "tweets." Twitter generates the majority of its revenue from advertising. Twitter collects personal information about its users based on their usage on the platform, as well as device- and data-specific information in order to more effectively target its ads. Twitter then uses this personalized information in the advertising products it offers its ad customers. One specific product, Mobile Application Promotion ("MAP"), prompts users to install an advertiser's mobile application on their devices, or re-engage with a mobile application that the user has already downloaded. MAP generates advertising revenue by sharing user date with advertisers. MAP is most effective when an advertiser knows information about a user's device settings. Advertisers using MAP only pay for each click on the "install" or "open" buttons in the ad.

On July 26, 2019, Twitter disclosed its financial results for 2Q 2019 in a letter to shareholders. In this letter, as well as on a conference call with investors that day, Twitter, its CEO, and its CFO represented that improvements in MAP's stability, performance, and scale were ongoing and would have a positive impact on revenue. These representations were repeated in Twitter's 2Q 2019 Form 10-Q, which also contained several risk disclosures, including that "[o]ur products and services may contain undetected software errors, which could harm our business and operating results" and that "[c]hanges to existing products, services and initiatives could fail to attract users, content partners, advertisers and platform partners or generate revenue."

On August 6, 2019, Twitter announced to its users that it had "recently discovered and fixed issues related to [] setting choices for the way personalized ads" are delivered and when certain data is shared with "trusted measurement and advertising partners." Twitter disclosed that the issues resulted in Twitter taking certain actions related to personalized advertising and data sharing, even if users had not given permission to do so. Specifically, the issues were that (i) from May 2018 onward, the data of users who clicked through an advertisement for a mobile application to the app itself was shared, and (ii) from September 2018 onward, Twitter showed users personalized ads based on inferences made from the users' devices. Twitter disclosed that the issues were remedied on August 5, 2019.

The following month, at a September 4, 2019 conference, when asked why the roll out of an improved MAP was taking so long, the CFO stated that Twitter's work with MAP was "ongoing" and that while Twitter was making improvements to MAP, it "continued to sell the existing MAP product." The CFO also stated, in response to a question regarding Twitter's *monetization* capabilities outside of the U.S. that Twitter's "strength just varies from one geography to another … Asia, for example, has tended to be more MAP-focused historically."

On October 24, 2019, before the markets opened, the CEO and CFO held an investor call regarding Twitter's 3Q 2019 financial results. During the call, the CFO disclosed that the changes Twitter implemented to address the privacy issues disclosed on August 6, 2019 primarily affected the legacy MAP product, negatively affected 3Q revenue growth by "3 or more points," and that these negative effects would continue through at least 4Q 2019 by "4 or more points." Defendants further disclosed a 1% decline in Japanese revenue due to a "meaningful drop" related to bugs and that CPE "was down 12%, reflecting a mix shift from MAP to video ad formats (which have lower CPEs) and life-for-life price decreases across most ad formats." That day, Twitter's shares declined over 20% from $38.83 per share to $30.73 per share.

The court found that many of the challenged statements were inactionable puffery, explaining "[t]he statements at issue here "are not measurable and not tethered to facts that 'a reasonable person would deem important to a securities investment decision.'"

Investors filed a putative class action lawsuit against Twitter, its CEO and its CFO alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act, and Rule 10b-5 promulgated thereunder, based on various allegedly fraudulent statements or omissions regarding MAP, including statements about (1) MAP progress and revenue prediction, (2) software bugs affecting MAP, and (3) MAP's progress and Asia's historical focus on MAP. Defendants moved to dismiss the consolidated amended complaint, and the court granted the motion, with leave to amend, holding that plaintiffs failed to plead a material misrepresentation or omission and scienter.

The court found that many of the challenged statements were inactionable puffery, explaining "[t]he statements at issue here "are not measurable and not tethered to

facts that 'a reasonable person would deem important to a securities investment decision.'" The court held that statements referring to projected revenue from and progress on the improved MAP product were inactionable forward-looking statements protected by the PSLRA's safe harbor provision. Finally, the court held that plaintiffs failed to plead that any challenged statements were false or misleading, noting plaintiffs do not allege that Twitter was not working on improving MAP and "the fact that MAP may have been experiencing glitches does not demonstrate how the defendants' generalized statement of projected MAP revenue was false or misleading .... [I]t is entirely possible that Twitter was making progress towards improving its MAP product and would generate revenue therefrom at some point." The court also rejected plaintiffs' contention that warnings about harm that could arise if there were undetected software errors or changes to existing products were false or misleading because the risk had already materialized, stating "[g]iven the chronology, plaintiffs cannot plausibly allege that, at the time the risk disclosure was made on July 31, 2019, defendants' decision to stop sharing user data six days later on August 5, 2019 was already affecting Twitter's revenue." The court also held that plaintiffs failed to plead an actionable omission.

The court further held that plaintiffs failed to plead scienter, concluding plaintiffs' allegation that the CEO and CFO monitored key metrics and thus knew about MAP's issues and performance lacked sufficient detail. It also rejected plaintiffs' argument that because MAP was part of Twitter's "core operations" the CEO and CFO would have had knowledge as unsupported by any of the specific admissions or witness accounts necessary to prevail under such a theory. Plaintiffs offered several other allegations as circumstantial evidence of scienter, including that Twitter's privacy policy obligated the CEO and CFO to monitor compliance with privacy obligations, and that the CFO sold roughly 10% of his holdings during the class period, but the court also considered these allegations to be inadequately developed.

The court concluded plaintiffs' 20(a) claim could not survive given the absence of an adequately alleged predicate violation. In dismissing the complaint, the court provided leave to amend "out of an abundance of caution," but stated that it was "not apparent that plaintiffs can amend."

Plaintiffs declined to file an amended complaint and the district court dismissed the action. In lieu of filing an amended complaint, plaintiffs appealed the dismissal order to the U.S. Court of Appeals for the Ninth Circuit (Case No. 20-17465). Plaintiff-appellants' opening brief is currently due on May 3, 2021 and defendant-appellees' answering brief is due on June 2, 2021. The Ninth Circuit has encouraged the parties to pursue mediation.

Camp v. Qualcomm, Inc. et al., Case No. 18-cv-1208, 2020 WL 1157192 (S.D. Cal. March 10, 2020)

Failed Acquisition Negotiations

Qualcomm, Inc. is a chipmaker and developer of mobile technologies. In November 2017, Broadcom Inc., a Singapore-based chipmaker, offered to acquire Qualcomm for $105 billion. Qualcomm rejected Broadcom's offer and Broadcom responded by mounting a hostile takeover, launching a proxy fight on December 4, 2017 in effort to replace Qualcomm's board of directors at the company's annual shareholder meeting on March 6, 2018, and announcing on December 6, 2017 that it started the process of redomiciling in the U.S.

On January 29, 2018, Qualcomm unilaterally requested a review of Broadcom's offer by the Committee on Foreign Investment in the United States ("CFIUS") — a federal interagency panel that reviews certain investments in U.S. businesses to determine whether the investment will threaten national security and makes recommendations regarding such transactions for the President's ultimate determination. At the time, Qualcomm did not publicly disclose it made this request, though it had generally acknowledged that CFIUS might prevent the transaction with statements such as CFIUS "could potentially block the transaction" and that Broadcom's proposal involved "significant regulatory uncertainty." Instead, between January 29, 2018 and March 1, 2018, in SEC filings, press releases, and public statements, despite improved offers from Broadcom, Qualcomm and certain executives and members of its board cited concerns with Broadcom's valuation of Qualcomm, and antitrust risks as reasons why Qualcomm shareholders should vote against Broadcom's proposal, though Qualcomm also expressed a willingness to engage in meaningful negotiations with Broadcom, and met with Broadcom to discuss a potential deal.

On February 26, 2018, Reuters reported on the CFIUS's investigation into the proposed deal, based on information from three confidential sources, and that lawmakers were pressuring CFIUS to review the transaction before Qualcomm's March 6, 2018 shareholder meeting. On March 5, 2018, Qualcomm disclosed that it received an Interim Order from CFIUS the day before ordering Qualcomm to postpone its director elections by thirty days so that CFIUS could conduct a full investigation. That day Qualcomm's stock dropped by 1.13% and on March 6, 2018, the stock fell by 2.92%. On March 12, 2018, the President blocked Broadcom's attempted takeover by executive order, and Qualcomm's stock price dropped 4.95% the next day, closing at $59.70 per share.

Investors filed putative class action lawsuits against Qualcomm and several of its executives and board members alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder

on the grounds that defendants made allegedly false and misleading statements and omissions by publicly expressing a willingness to negotiate with Broadcom about a potential deal while simultaneously seeking to stop the deal by unilaterally seeking CFIUS' review of the proposed transaction. Defendants moved to dismiss the consolidated amended complaint, which the court granted, with leave to amend, holding that (1) many of the challenged statements were inactionable because they were made before plaintiffs owned Qualcomm stock, (2) where plaintiffs adequately alleged actionable misstatements, plaintiffs failed to adequately allege scienter where several disclosures by defendants about regulatory risks to the deal created an opposing inference that defendants did not think that disclosure of the CFIUS review was required, and (3) and the alleged stock drops were so minimal and effected by intervening events as to undermine loss causation. First, the court held that several of the challenged statements — those made on and between February 16 and March 1 — were inactionable because they occurred after plaintiffs last acquired stock in Qualcomm — on February 12, 2018. Though plaintiffs contended that, at the pleading stage, a class period is not confined to plaintiffs' last purchase of stock, the court sided with defendants and followed Ninth Circuit precedent in holding that statements made after plaintiffs last acquired Qualcomm stock could not serve as the basis of a claim under section 10(b) given the stock was not acquired in connection with those statements or omissions.

Second, the court held that plaintiffs sufficiently alleged some actionable misstatements or omissions. Namely, the court explained that defendants' repeated statements that the company was ready to meet with Broadcom in an attempt to reach a negotiated deal may have been misleading by defendants' failure to disclose that the company was simultaneously actively engaged in discussions with CFIUS. While the court acknowledged that defendants disclosed the transaction "may well result in significant national security concerns that could potentially block the transaction[, t]herefore, we believe approval by CFIUS is far from assured[,]" the court reasoned that had Qualcomm disclosed that it initiated a CFIUS review it "plausibly could have resulted in the market evaluating a greater risk of CFIUS blocking this transaction rather than the normal low risk that CFIUS would block a transaction." Additionally, the court determined that plaintiffs adequately alleged defendants engaged in a scheme to mislead by suggesting the company was genuinely open to merger negotiations while not disclosing the company simultaneously unilaterally initiated a CFIUS review, which was an "unusual" move.

Despite holding plaintiffs adequately pled materially false or misleading statements, the court was not persuaded by plaintiffs' scienter and loss causation allegations.

The court held plaintiffs failed to adequately allege scienter by conflating the significance of the individual defendants' awareness of the CFIUS review and their awareness of whether their statements were false and misleading in light of the company's alleged "effort to get CFIUS to preemptively block the deal .... " The court cited "several warnings" by the individual defendants of regulatory scrutiny over the deal and held that those statements created "an opposing inference that Defendants did not think that disclosure [of the CFIUS review] was required" because Qualcomm did disclose the CFIUS risk. The court also disregarded plaintiffs' motive allegations, summarily holding that "'motive and opportunity' is simply inadequate to establish scienter."

The court also held that plaintiffs failed to plead loss causation because the March 5 and 6, 2018, 4.02% stock price reductions at issue "were minimal" and "there is a more plausible explanation that the market reacted to CFIUS' action and not that Qualcomm had provided notice to CFIUS." Similarly, the court held that, with respect to the March 13, 2018 stock price drop, plaintiffs cannot establish loss causation based on an intervening event, explaining "[i]t is quite evident that the stock drop on March 13, 2018 was connected to the President's order rather than a misrepresentation by Qualcomm."

Plaintiffs filed a second amended complaint on May 11, 2020. Defendants moved to dismiss again, which was heard on October 8, 2020, and granted with prejudice at the hearing without issuance of a formal order. Plaintiffs appealed the dismissal on November 7, 2020. The appeal is currently set to be fully briefed by June 2021.

***Cai v. Switch, Inc., et al.*, Case No. 2:18-cv-1471, 2020 WL 3893246 (D. Nev. July 10, 2020)**
Shift In Sales Strategy

Switch, Inc. hosts data centers and provides its customers with colocation, telecommunications, cloud, and content ecosystems services. During its initial years, Switch was primarily focused on colocation services — the leasing of information technology infrastructure, such as servers and data-storage hardware. In 2002, Switch purchased a recently constructed facility through Enron's bankruptcy proceedings. Having acquired a state-of-the-art facility in Las Vegas at a heavily discounted rate, Switch saw rapid profitability and growth. On October 5, 2017, Switch completed a successful IPO and issued approximately 36 million shares of common stock at $17 per share. In its Registration Statement, Switch did not disclose information about Switch's decision to shift its sales strategy away from colocation to focus on selling hybrid cloud solutions — a decision it allegedly made earlier that year.

On June 11, 2018, an investor filed a putative class action against Switch, its officers, its directors, and its IPO underwriters, alleging violations of Sections 11 and 15 of the 1933 Act on the grounds that defendants owed a duty to disclose to investors that Switch was changing its sales strategy and that new data centers it planned to open lacked the unique market advantages that made Switch's first location so successful. That initial complaint based its theories on purported corrective disclosures associated with earnings and guidance announcements on November 13, 2017 and April 2, 2018.

On August 13, 2018, Switch lowered its revenue guidance for the rest of the year, which it attributed to its shift in sales strategy. The next day, Switch's stock dropped 22.3%, and was cumulatively down 47% since its IPO. Plaintiff filed an amended complaint on October 18, 2018, removing challenges to the November 13, 2017 and April 2, 2018 announcements altogether, and instead focusing entirely on the August 13, 2018 announcement as the purported corrective disclosure.

Defendants moved to dismiss, and the court denied in part and granted in part defendants' motion, holding that two of three allegedly misleading statements or omissions were inactionable, but allowing the case to proceed based on alleged omissions in Switch's Registration Statement regarding Switch's shift in sales strategy. On December 20, 2019, defendants moved for judgment on the pleadings based on a "negative causation defense," contending that it was evident on the face of the operative complaint that the stock drop resulted from something other than the alleged omission in the Registration Statement. The court agreed and granted the motion, dismissing the case with prejudice.

Pointing to the statutory damages mandated by the Securities Act, the court reasoned it was required to measure damages as the difference between the amount paid for the security and the value of the security at the time the suit was filed — that is, the delta between the IPO price of $17.00 per share, and the market price of $12.96 per share on June 11, 2018 when the complaint was filed. The court rejected plaintiff's theory that "value" means the "security's true value after the alleged misrepresentations are made public" rather than the stock price when the action was filed, explaining that this theory was "difficult to square with the statute's language on timing" and would require the court to "divine the price of Switch's stock in an alternate reality where the relevant information was divulged." The court further explained that "the statutory formula on damages exists to avoid this breed of judicial analysis." In assessing those damages based on the statutory language, the court reasoned the delta was "indisputably *not* caused by Switch's" alleged omission in its registration statement of its hybrid cloud solution sales technique because the stock price on June 11, 2018 could not have been impacted by an August 13, 2018 statement. The court indicated that plaintiff's allegation of "widespread surprise" that followed Switch's August 13, 2018 announcement, further supported this conclusion.

***City of Warren Police and Fire Retirement System v. Natera Inc.*, Case No. A155613, 46 Cal. App. 5th 946 (Cal. Ct. App., Feb. 28, 2020)**
Slowed Growth Pre-IPO

Natera Inc. is a publicly traded genetic testing company that develops and commercializes noninvasive methods for analyzing DNA. Its primary product, Panorama, is a prenatal screening test for fetal chromosomal abnormalities that is based on blood draw, rather than amniocentesis.

Natera filed its first draft Registration Statement with the SEC, which was finalized on July 1, 2015, in anticipation of its IPO, which included certain financial data for fiscal years 2013, 2014, and 2015, and quarterly financial results from the 2Q 2013 through 1Q 2015. On July 2, 2015, Natera completed its IPO and issued approximately 10.9 million shares of common stock at $18 per share. Although Natera completed its IPO two days after the close of 2Q 2015, the most recent financial results that were available to investors in the Registration Statement were from 1Q 2015.

The Registration Statement characterized Natera as a "rapidly growing" company, citing its revenue growth from $4.3 million in 2010 to $159.3 million in 2014 and its decrease in net losses from $37.1 million in 2013 to $5.2 million in 2014. The Registration Statement also identified certain risk factors, including that Natera derived most of its revenue from Panorama, noting its need for continued expansion of insurance coverage and reimbursements for Panorama and its other tests.

On July 24, 2015, Natera released its preliminary financial guidance for 2015, and on August 12, 2015 it released its 2Q 2015 financial results, reporting revenues of $45.1 million compared to $35.8 million in 2Q 2014, and loss from operations of $15.5 million compared to $1.2 million in 2Q 2014. Natera also reported a $19.7 million net loss and a $29.7 million net loss for the first six months of 2015. Natera reported these losses were the result of increased research, development, selling, and general and administrative expenses due to "an increase in research and development and direct sales headcount" as Natera increased its focus on a direct sales model in the U.S.

Investors filed putative class actions in California state court alleging violations of Sections 11 and 12 of the 1933 Securities Act against Natera, certain of its officers and directors, and its IPO underwriters, as well as violations of Section 15 against various venture capital

firms ("VC Defendants"). Plaintiffs alleged purported misrepresentations in and omissions from the Registration Statement regarding assertions that Natera was "rapidly growing" despite a decline in revenues and an increase in expenses and net loss from 4Q 2014 to 2Q 2015. Plaintiffs alleged defendants knew of the 2Q 2015 financial results before the IPO due to Natera's "cash basis accounting" and its "simplicity and predictability of the costs and expenses that increased," but did not include them in the Registration Statement, thus rendering it misleading.

The trial court sustained VC Defendants' demurrer, with prejudice, as to plaintiffs' Sections 12 and 15 causes of action, resulting in dismissal of the VC Defendants from the case entirely. The trial court also sustained defendants' demurrer with leave to amend as to plaintiffs' Section 11 cause of action. The trial court further directed the remaining defendants to "thereafter file and serve responsive Pleading by way of Answer and Motion for Judgment on the Pleadings," precluding a second round of demurrers.

Plaintiffs filed an amended complaint on November 21, 2017 to which defendants responded by filing answers and moving for judgment on the pleadings, which was entered for defendants on August 21, 2018, dismissing the case with prejudice. Plaintiffs appealed and on February 28, 2020, the California Court of Appeal affirmed, agreeing with the trial court that statements in the Registration Statement that Natera was "rapidly growing" and noting corporation's "rapid growth revenue," were not false or misleading, and the Registration Statement refuted any argument that defendants failed to disclose the negative trend of declining reimbursements and revenues with increasing costs and losses.

First, the court of appeal addressed plaintiffs' alternative theories of liability for their Section 11 claim, dismissing plaintiffs' assertion that Natera's characterizations of "rapid growth" in its Registration Statement, paired with its omission of 2Q 2015 financial results, were false and misleading. In reaching this conclusion, the court focused on the context of each statement's placement within the overall Registration Statement, as well as the Registration Statement as a whole, noting that the phrase "rapid growth of revenues" appeared in a paragraph titled "Quarterly Trends" with data reflecting historical quarterly results over the prior three years. The court reasoned that the at-issue statement's placement "clearly refer[ed] to historical growth of revenue" and did not imply that the growth had been or would continue to be constant. Thus, the statement that Natera was experiencing "rapid growth" was neither false nor misleading because the rest of the Registration Statement clearly stated revenues had declined, and the reasons for that decline, in the previous two quarters, and contained appropriate cautionary language warning of potential future risks to revenue growth. The court also rejected plaintiffs' alternative basis for Section 11 liability that asserted that Natera's failure to include 2Q 2015 financial results in its Registration Statement purportedly constituted a material omission, holding that the Registration Statement properly and accurately forewarned of the now-realized risks disclosed in the 2Q 2015 financial results. The court reasoned that the Registration Statement described the various risk factors, upon which plaintiffs relied, "specifically and in depth" — for example, by incorporating cautions throughout that historical results do not necessarily indicate expected future results. Moreover, the court held that Natera had no obligation to include interim 2Q 2015 results in its Registration Statement as the court could find no regulatory requirement to disclose such interim financials.

The court also held that plaintiffs failed to adequately plead an actionable omission to support a Section 11 violation by broadly alleging a violation of Item 303 of SEC Regulation S-K — which requires the disclosure of known negative trends in a registration statement — based on "[g]eneral and conclusory allegations" of defendants' knowledge. The court explained that "because actual knowledge of omitted information is an essential element of a violation of Item 303[,] it is also an essential element of a Section 11 claim that is based on a violation of Item 303." Thus, plaintiffs' Item 303 theory for liability could not survive because plaintiffs failed to allege sufficient facts to demonstrate defendants had actual knowledge of interim or final results for 2Q 2015 at the time of the IPO. Rather, the Registration Statement "refute[d] any argument that defendants failed to disclose the negative trend[s]" by "disclos[ing] in some depth, outlining and analyzing" the revenue decline upon which plaintiffs based their claim.

Finally, the court affirmed dismissal of plaintiffs' Section 15 claim, holding that plaintiffs' failure to allege a primary violation of the securities laws "was fatal" to their claim.

Ninth Circuit Cases to Watch

***Irving Firemen's Relief & Retirement Fund v. Uber Technologies*, Case No. 19-16667 (9th Cir.)**

Missed Guidance And Revised Projections

Uber Technologies Inc. ("Uber") offers app-based services including peer-to-peer ridesharing, ride service hailing, and food delivery. Founded in 2009, Uber's first decade in business was defined, in large part, by rapid growth. Throughout 2016 and 2017, however, media outlets published stories detailing corporate scandals at Uber. Those stories claimed, among other things, that Uber has a misogynistic corporate culture; pilfered data from its main competitor, Lyft; conspired to steal self-driving technology; bribed foreign officials; and was subject to a data breach that resulted in millions of users' private information being obtained by hackers. In the wake of these scandals, in June 2017, Uber's CEO, resigned.

On September 26, 2017, an investor filed a putative class action lawsuit against Uber and its former CEO, alleging one violation of California Corporations Code Sections 25400(d) and 25500, provisions derived from substantively identical language as in the 1934 Act. The crux of plaintiff's theory is that Uber falsely suggested it was playing by the rules and working with government regulators when it was actually recklessly pursuing growth using improper business practices.

After defendants moved to dismiss the consolidated amended complaint and the court granted that motion, plaintiff filed a second amended complaint on October 17, 2018. Defendants again moved to dismiss, which the district court granted on July 31, 2019, with prejudice, on two grounds. First, the court held that plaintiff failed to adequately allege materially false or misleading statements or omissions, noting that plaintiff's "second amended complaint largely repeats statements that the court previously found were 'not actionable false statements,' in part because they were mere puffery or accurate reports of historical information." It explained that plaintiff's omission theory also failed because defendants were not under "a duty to disclose a 'laundry list' of allegedly fraudulent activities that are unconnected to the actual challenged statements." The court agreed with defendants that plaintiff's attempt to link statements about growth to a reputational risk disclosure "would improperly render every company 'liable to every investor for every act that … harmed reputation,' whenever it acknowledges the prospects of future reputational risks." Second, the court held that plaintiff failed to allege loss causation on the ground that the second amended complaint "shows that every fund maintained or increased its valuation" of Uber in the wake of revelations of Uber's alleged misconduct.

Plaintiff appealed to the U.S. Court of Appeals for the Ninth Circuit on August 26, 2019. Briefing concluded and oral argument was heard on December 7, 2020. The matter is under submission.

***Rhode Island v. Alphabet, Inc.*, Case No. 20-15638 (9th Cir.)**

Google + Data Breach

As discussed above, Alphabet, Inc., the parent company of Google, is a multinational technology conglomerate comprised of several former Google subsidiaries. Among its products are web-browser Google, webmail Gmail, and the now defunct social media platform Google+. In March 2018, Google discovered a software glitch in the application programming interface in Google+ which exposed hundreds of thousands of users' personal data, which it promptly remedied, but did not disclose the breach at that time. Meanwhile, in its April and July 2018 Form 10-Qs, it stated that there were no changes to its prior risk factors. Such risk factors included warnings that privacy concerns could cause reputational damage and deter users, that breaches of Alphabet's security measures could cause significant legal and financial exposure, and that any compromise of security that results in the release of users' data could seriously harm the business. On October 8, 2018, the *Wall Street Journal* reported on the software glitch and data breach. Citing an internal Google memorandum, the *Wall Street Journal* stated that Google had not disclosed the data breach in part because of concerns about drawing regulatory

scrutiny and suffering reputational damage. Later that day, Google issued a blog post conceding that it discovered and remediated the bug in March 2018. Subsequently, Google's stock price declined by nearly 6%. Thereafter, Google announced plans to shut down Google+.

Investors filed putative securities class actions against Alphabet and its officers, alleging that between the discovery of the breach and its announcement, defendants made materially false and misleading statements regarding the extent of the breach and users' data security in violation of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Defendants filed a motion to dismiss the consolidated amended complaint, which the court granted, with leave to amend, holding that plaintiffs failed to plead a misrepresentation, omission of material fact, or scienter. Following the court's order, plaintiffs did not file an amended complaint, and judgment was entered in the case on March 13, 2020. On April 9, 2020, plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit. Briefing has been completed and oral argument is expected in spring of 2021.

***Pirani v. Slack Technologies, Inc. et al.*, Case No. 20-16419 (9th Cir.)**
Slowed Growth / Service Disruptions After Direct Listing

As discussed above, Slack offers workplace collaboration software that brings together people, applications and data, often replacing or significantly supplanting the use of email within an organization. In lieu of an IPO, the company pursued a direct listing of its Class A stock on the New York Stock Exchange. Slack was listed for sale on the NYSE as of June 20, 2019. The direct listing followed a 2018 SEC rule change that allowed companies to enter the public market for the first time without a public offering of its securities, but still subjected the company to registration requirements under the 1933 Act. Shares held by early investors were not subject to the same lock-up period as with an IPO, and could instead offer their shares for sale on the same day as the direct listing. In connection with its direct listing, Slack filed a registration statement and a prospectus (collectively the "Offering Materials") with the SEC.

Investors filed a putative class action lawsuit against Slack, its officers, directors, and certain institutional shareholders in the U.S. District Court for the Northern District Court of California alleging violations of Sections 11, 12(a) and 15 of the Securities Act on the grounds that statements in the Registration Statement were false and misleading. Defendants moved to dismiss that complaint and, on April 21, 2020, the court granted defendants' motion in part and denied it in part, rejecting defendants' primary argument that plaintiff lacked Section 11 standing.

On June 5, 2020, the court, upon motion by defendants, issued an order certifying its April 21, 2020 order on defendants' motion to dismiss for interlocutory appeal to consider the propriety of its holdings with respect to standing. The U.S. Court of Appeals for the Ninth Circuit granted defendants' petition for permission to appeal on July 23, 2020. Briefing is complete and oral argument is set for May 13, 2021.

***Azar v. Yelp, Inc.*, Case No. 18-cv-00400-EMC (N.D. Cal.)**
Missed Guidance And Revised Projections

Yelp, Inc. ("Yelp") provides an online platform for business reviews. Yelp derives revenue from businesses advertising on its platform. In 2016, Yelp prioritized increasing and retaining local business advertising, using promotional offers to increase the number of local businesses advertising on Yelp. The company also used cancellation fees to discourage early contract terminations by those same business. A significant portion of the businesses that signed up in 2016 experienced low engagement with their advertising and, thus, cancelled their contracts by late 2016 and early 2017. Despite these cancellations, in early 2017, Yelp and its executives trumpeted the local business advertising program's strong retention rate

and optimistic growth projections in a press release, on conference calls, at conferences, and in Yelp's Form 10-K for the 2016 fiscal year. Then, on May 9, 2017, Yelp issued a press release announcing its financial results for the first quarter of 2017 and lowering its revenue projection for fiscal year 2017, from $880 million–$900 million to $850 million - 865 million. The next day, Yelp's stock price dropped by more than 18%.

Investors filed a class action lawsuit on January 18, 2018, alleging violations of Sections 10(b), 20(a) and Rule 10b-5 of the 1934 Act against Yelp and three of its officers for allegedly making false and misleading statements regarding Yelp's expected revenues for fiscal year 2017, particularly in relation to its advertising program with local businesses. According to plaintiffs, Yelp allegedly touted the program's strong advertiser retention rate and optimistic growth projections through early 2017, despite knowing that a significant number of the local advertisers were not renewing their contracts.

On November 27, 2018, the court dismissed, in part, the first amended complaint, including claims based on forward-looking projections accompanied by meaningful cautionary language protected by the PSLRA's safe harbor provision, but held that other statements were actionable because they painted a promising picture of continued and increased investment in Yelp's advertising program, without disclosing the risk that growth could be limited or acknowledging that revenue growth was already showing signs of being short-lived. The court held that plaintiffs adequately alleged scienter based on defendants' statements regarding when they became aware of the advertiser-retention issues, an officer's stock sales during the proposed class period, and plaintiffs' allegations that local advertising is a core operation for Yelp. Finally, the court held that plaintiffs adequately alleged loss causation because "there is no dispute that the revelation of the retention problems was a substantial factor in causing the drop in Plaintiffs' Yelp shares."

The class was certified on October 22, 2019 and fact discovery has been completed. Expert discovery is set to close April 2, 2021. On February 11, 2021, the court ordered the parties to meet and confer to identify a mediator.

Drieu v. Zoom Video Communications, Inc., Case No. 20-cv-2353 (N.D. Cal.)

Misleading Statements About Data Privacy and Security

Zoom Video Communications, Inc. ("Zoom") provides a video communications app that enables face-to-face video experiences and connects users across various devices and locations in a single meeting. Zoom filed a prospectus on April 18, 2019, and, on the same day, conducted its IPO and began trading publicly. In its offering documents, Zoom touted its security capabilities, including end-to-end encryption.

On July 8, 2019, a security researcher published an article identifying a security vulnerability in the Mac Zoom Client that would allow malicious websites to enable computer cameras without owner permission. Three days later, the Electronic Privacy Information Center ("EPIC") filed a complaint against Zoom before

the U.S. Federal Trade Commission alleging that Zoom had "intentionally designed their web conferencing service to bypass browser security settings and remotely enable a user's web camera without the consent of the user." EPIC's complaint further alleged that Zoom had not acted on this information until it was made public, and charged the company with unfair and deceptive practices under Section 5 of the FTC Act. Despite these accusations, Zoom continued to advertise the security of its communications platform.

Then, on March 26, 2020, a media outlet reported that Zoom's iOS app was sending analytics to Facebook, even if users didn't have a Facebook account. The following day, the *New York Times* reported that Zoom was under scrutiny by the New York State Attorney General's (AG) office related to its data privacy and security practices, and *Bloomberg* reported a lawsuit by a Zoom user who claimed the company was illegally disclosing personal information. On March 31, 2020, the FBI issued a warning about "Zoom-bombing," in which hackers would take over video conferences on the Zoom app. Numerous publications followed scrutinizing and critiquing Zoom's security practices. Ultimately, on April 1, 2020, Zoom's CEO issued a blog post admitting that the company had "fallen short of the community's — and our own — privacy and security expectations." Between March 27, 2020 and April 6, 2020, Zoom's stock price fell from $151.70 a share to $121.93 per share.

On April 7, 2020, investors filed a putative class action lawsuit against Zoom and several of its executives, alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. The initial complaint claimed that Zoom made false or misleading statements or otherwise failed to disclose the company's inadequate data privacy and security measures, including that, contrary to company assertions, Zoom's video communications service was not end-to-end encrypted. Plaintiffs also alleged that Zoom's offering documents contained merely "generic, boilerplate representations concerning Zoom's risks related to cybersecurity, data privacy, and hacking." It was foreseeable, plaintiffs alleged, that use of the company's product would decline and its stock price would drop when Zoom's misrepresentations about data privacy and security came to light and the weaknesses of its security were revealed.

Lead plaintiff and lead counsel were appointed on November 4, 2020, but on November 18, 2020, an investor group sought reconsideration of that order, which the court denied on April 12, 2021, ordering the parties by April 26, 2021, to jointly propose a schedule for defendants to respond to the consolidated complaint.

Lamartina v. VMware, Inc., Case No. 20-cv-2182 (N.D. Cal.)

Allegedly Deceptive Backlog Records

VMware, Inc. ("VMware") is a California-based software and technology firm providing application modernization, cloud computing, and virtualization software and services for customers worldwide. VMware reports revenue from two line items: licenses and services. This revenue is recognized as the company performs obligations on existing deals. Thus, a sale made in one quarter might be delivered and recognized as revenue in the next quarter. These types of sales were included in VMware's "backlog": a representation of sales made but not yet fulfilled. On February 27, 2020, VMware revealed that its total backlog had declined 96% from its height one year back, in part due to the industry shift from licensing deals to subscription and Software-as-a-Service ("SaaS") products, and that the company would not meet the fourth quarter 2020 or Fiscal Year 2020 guidance it issued three months prior. On the same day, VMware also announced that the SEC had been investigating VMware's backlog and associated accounting practices since December 2019. The next day, VMware's stock dropped 11%, closing at a 52-week low of $120.52.

On March 31, 2020, investors filed a putative class action lawsuit against VMware, the company's CEO, and its CFO, alleging violations of Sections 10(b), 20(a) and 20A of the 1934 Act and Rule 10b-5 promulgated thereunder. A lead plaintiff was appointed on July 20, 2020 and it filed a consolidated complaint on September 18, 2020. The main thrust of plaintiff's argument is that, throughout 2019, VMware artificially inflated its backlog by recording sales that exceeded market expectations in the backlog, as opposed to in the quarter in which they were actually fulfilled, "smoothing" the company's revenue to create the impression of steady sales. In reality, plaintiff claimed, VMware was "plagued by weaknesses" as it headed into 2020, driven by internal reorganization and trouble managing the shift away from licensing products towards subscriptions and SaaS. VMware allegedly treated its backlog as a "slush fund" in order to conceal the impact of these adverse business conditions and continued to issue predictions of strong performance in the upcoming year. In addition, plaintiff alleged that, "[k]nowing that the Company's massive backlog reported at the close of FY 2019 would be drawn upon and not replenished," VMware executives began selling large quantities of company stock while the share price was inflated to record highs.

On November 17, 2020, defendants moved to dismiss the consolidated complaint, arguing, among other things, that VMware's backlog cannot support a claim

of fraudulent concealment when the backlog is publicly disclosed to investors, and noting that a backlog, "by its nature, is fulfilled in future quarters." Nor, defendants contended, had plaintiff alleged any facts — "as opposed to conclusory assertions" — indicating that the backlog was inflated or inaccurate. Plaintiff opposed the motion to dismiss on January 15, 2021, and a hearing on the motion is scheduled for April 22, 2021.

***SEB Investment Management AB v. Symantec Corporation et al*, Case No. 3:18-cv-02902-WHA (N.D. Cal.)**

Revenue Recognition And Internal Controls Issues

Symantec Corporation ("Symantec") is a publicly traded company that provides cybersecurity solutions worldwide. On May 19, 2017, Symantec filed its annual report on Form 10-K for the fiscal year ended March 31, 2017 ("2017 10-K") with the SEC. The 2017 10-K provided the company's annual financial results and position, as well as signed certifications by Symantec's CEO and CFO attesting to the accuracy of financial reporting, the disclosure of any material changes to the company's internal control over financial reporting, and the disclosure of all fraud. On August 16, 2017, Symantec filed a Schedule 14A ("proxy statement") with the SEC, which set forth the company's executive compensation practices and philosophy.

On May 10, 2018, Symantec reported that it would likely have to delay filing of its annual report for the fiscal year ended March 30, 2018 because its Audit Committee "commenced an internal investigation in connection with concerns raised by a former employee." Following this news, Symantec shares fell $9.66 per share, or over 33%, from its previous closing price at $19.52 per share on May 11, 2018. Three days later, after market-close, Symantec provided an updated statement regarding the internal investigation, disclosing that the "internal investigation [is] in connection with concerns raised by a former employee regarding the Company's public disclosures including commentary on historical financial results, its reporting of certain Non-GAAP measures including those that could impact executive compensation programs, certain forward-looking statements, stock trading plans and retaliation."

On May 17, 2018, before the internal investigation was completed, investors filed a putative class action against Symantec and its officers alleging violations of Sections 10(b) and 20(a) of the 1934 Act, as well as Rule 10b-5 promulgated thereunder, based primarily on alleged misrepresentations and/or omissions made by defendants in connection with the above-mentioned public filings and internal investigation. Specifically, plaintiff alleged that defendants made false and/or misleading statements and/or failed to disclose that: "(1) Symantec's internal controls over financial reporting were materially weak and deficient; (2) Symantec's later disclosed "reporting of certain Non-GAAP measures including those that could impact executive compensation programs" would lead to heightened regulatory scrutiny by the SEC; and (3) as a result, Symantec' public statements were materially false and misleading at all relevant times."

In September 2018, the investigation concluded and the Audit Committee reported that it found "'relatively weak and informal processes' with respect to some aspects of the review, approval and tracking of transition and transformation expenses" and identified "behavior inconsistent with the Company's Code of Conduct." The investigation also uncovered that $12 million of a $13 million transaction previously recognized as revenue in the fourth quarter of fiscal year 2018 should have been deferred to the following quarter. Symantec thereafter revised its preliminary financial results to take into account this deferral, appointed new officers, and improved certain internal controls.

In October 2018, the court appointed lead plaintiff and lead counsel, which filed a consolidated amended complaint on November 15, 2018, adding a Section 20A cause of action and multiple confidential witness allegations. On June 14, 2019, the court dismissed the consolidated complaint, without prejudice on the grounds that the complaint failed to allege a material misrepresentation or scienter. On October 2, 2019, the court granted plaintiff's motion for leave to file a first amended complaint on the grounds that plaintiff now met the requirements for pleading materiality and scienter. The court ordered plaintiff to file an amended complaint by October 17, 2019, which defendants answered on November 7, 2019. The court certified the class on May 8, 2020. Discovery is largely complete, dispositive motions are due March 4, 2021, and trial is set for June 14, 2021.

***In Re Intel Corp. Securities Litigation*, Case No. 5:20-cv-5194 (N.D. Cal.)**

Production Delay

Intel Corporation ("Intel") provides global communication solutions, networking, data storage, and computing. Intel's 7-nanometer central processing unit ("CPU") technology is its self-described "next generation."

The 7-nanometer CPU technology purportedly offers double the efficiency and 20% higher performance per watt than its 10-nanometer products. In May 2019, Intel projected that it would begin shipping its 7-nanometer products in 2021. In April 2020, Intel released its first quarter 2020 financial results revealing that revenue was up, and its Form 10-Q affirmed its strong financial results while disclosing that its success depended on a variety of factors including time-to-market and reliable product roadmap execution. Company risk factors, Intel disclosed, include "production timing delays, lower-than anticipated manufacturing yields, longer manufacturing throughput times, and product defects and errata" among other risk factors.

On July 23, 2020, Intel publicly announced that it identified a defect mode in its 7-nanometer process "that resulted in yield degradation" and that it had invested in a contingency plan but that its product timing would shift by about six months. Part of the contingency plan, Intel revealed, was that it would begin outsourcing production to third-party foundries with greater production capabilities. Intel's stock price declined 17.93% the next trading day.

On July 28, 2020, an investor filed a putative class action lawsuit against Intel and its officers alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. The complaint asserts that Intel failed to timely disclose it had identified the defect mode in its 7-nanometer process that would cause a six-month delay in its production schedule, that Intel was "reasonably likely" to rely on third-party foundries for manufacturing its 7-nanometer products, and that this reliance was "reasonably likely" to result in a loss of market share. On September 16, 2020 the case was consolidated with two other cases and on October 20, 2020 the court appointed a lead plaintiff, which filed a consolidated amended complaint on January 15, 2021. Defendants' motion to dismiss is due by March 16, 2021, and the hearing on that motion to dismiss is tentatively set for June 10, 2021.

In re Fastly, Inc. Securities Litigation, Case No. 4:20cv6024 (N.D. Cal.)
Regulatory Risks of Biggest Customer

Fastly, Inc. ("Fastly") is a cloud-computing service provider. The company purportedly enables "customers to create digital experiences quickly, securely, and reliably by processing, serving, and securing [its] customers' applications as close to their end-users as possible[.]" Fastly's largest customer is ByteDance, a Chinese company that operates TikTok. Since at least late 2019, the U.S. government has subjected TikTok to heavy scrutiny due to alleged fears that the Chinese government could access the data TikTok collects from its users. Specifically, in October 2019, U.S. lawmakers warned that TikTok could pose a national security risk and called on regulators and intelligence agencies to investigate TikTok's ties to China.

On August 5, 2020, after the market closed, Fastly hosted an earnings call for its 2Q 2020 results, during which Fastly's CEO revealed for the first time that ByteDance was the company's largest customer. Fastly's CEO then admitted that "[a]ny ban of the TikTok app by the US would create uncertainty around our ability to support this customer. While we believe we are in a position to backfill the majority of this traffic in case they are no longer able to operate in the US, the loss of this customer's traffic would have an impact on our business." Fastly's share price fell $19.28, from $108.92 at the close of the previous trading day to $89.64 on August 6, 2020. The same day, former president Trump issued an executive order that would prohibit any U.S. company or person from transacting with ByteDance. Fastly's stock price dropped another $10.31 per share from the closing price on August 6, 2020 to close at $79.33 on August 7, 2020.

On August 27, 2020, a shareholder filed a putative class action alleging violations of Sections 10(b) and 20(a) of the 1934 Act, as well as Rule 10b-5 promulgated thereunder, by Fastly and certain of its officers. At core, plaintiff alleged that defendants made false and misleading statements in violation of the PSLRA by failing to disclose Fastly's business relationship with "ByteDance," which, at the subject time period, served as the operating entity of "TikTok." On September 15, 2020 another investor filed a putative class action naming the same defendants and asserting similar legal theories.

On October 27, 2020, the court consolidated the two related actions. On February 10, 2021, the court appointed a lead plaintiff and lead counsel.

Second Circuit

Shreiber v. Synacor, Inc, et al., Case No. 19-4232-CV, 832 Fed. Appx. 54 (2d Cir. Oct. 22, 2020)

Unsuccessful Partnership

Synacor, Inc. is a cloud-based software and services company that provides managed portals and apps, advertising, email, and authentication services. In 2016, the company announced a partnership with AT&T to host web and mobile services. In a series of public statements between May 2016 and March 2017, Synacor announced future annual revenue goals of $100 million from the AT&T hosting portal by 2017, and $300 million in total revenue by 2019.

On August 9, 2017, Synacor announced revised revenue guidance for fiscal year 2017 from $170 million–$160 million to $150 million–$140 million, which its CEO attributed to "the joint AT&T Synacor team [ ] deci[sion] to prioritize engagement over monetization" such that "much of the ramp up in revenue that we were expecting in the second half of 2017 would get delayed to 2018." The next day Synacor's share price fell 32.39% and closed at $2.40 per share.

On March 15, 2018, Synacor's CEO disclosed on a fourth quarter 2017 earnings call that the partnership with AT&T ultimately generated approximately $25 million in revenue in 2017, below the $100 million that the company previously anticipated, and noted "AT&T has chosen, at least for the near term, to prioritize consumer experience and engagement, and we are collaboratively working with them in achieving that goal." The CFO also announced that the company's auditor discovered three material weaknesses in Synacor's internal controls over financial reporting. The next day, the company's stock price dropped approximately 15%. A few months later, the company announced that AT&T delivered a notice of non-renewal of the contract to Synacor.

Investors filed a putative securities class action against Synacor, its CEO, and CFO, alleging violations of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder based on purported false and misleading statements regarding the company's projected revenue from the AT&T partnership, Synacor's and AT&T's joint control over monetizing the web and mobile services, and adequacy of the company's internal controls over financial reporting.

Defendants moved to dismiss the second amended complaint and the district court granted the motion in full, holding that plaintiffs failed to plead falsity and scienter. The court permitted plaintiffs to seek leave to replead. Specifically, the district court concluded that defendants' revenue projections were inactionable forward-looking statements and/or statements of opinion and plaintiffs did not challenge the disclosed facts supporting of the projections, including reports that Yahoo! earned $100 million in revenue from a similar partnership with AT&T, causing Synacor to believe that it could do the same. The court further held that plaintiffs had not adequately alleged that the company's revenue guidance was unachievable, as opposed to simply delayed, and allegations that confidential witnesses "viewed the projections as unrealistic" were "not tantamount to Defendants' knowledge that the projections were false." The court also rejected plaintiffs' claim that SOX certifications attesting to the adequacy of the company's internal controls over financial reporting were actionable,

> The court further held that plaintiffs had not adequately alleged that the company's revenue guidance was unachievable, as opposed to simply delayed, and allegations that confidential witnesses "viewed the projections as unrealistic" were "not tantamount to Defendants' knowledge that the projections were false."

holding that confidential witness accounts that defendants were aware of turnover and understaffing in the company's control functions did "not raise an actionable inference that Defendants knew that the SOX certifications were false; an equally plausible inference is that Defendants believed that any deficiencies were not so acute as to rise to the level of an internal control weakness."

Plaintiffs sought leave to file a third amended complaint, which the district court denied, holding that the proposed complaint failed to cure the deficiencies noted in the court's dismissal order. It further explained that new confidential witness allegations did not add anything to show that defendants did not hold the beliefs they professed. On December 16, 2019, plaintiffs appealed the dismissal.

The Second Circuit affirmed the district court's rulings, stating that the challenged statements "were quintessential opinion statements about Synacor's future earnings and revenue goals." In supporting this conclusion, the court held that plaintiffs failed to plausibly allege that defendants did not actually believe the AT&T contract would yield future annual revenues of $100 million; rather plaintiffs' allegations indicate that the company's CEO and CFO "honestly held" their opinions about the company's future revenue. Second, the Second Circuit held that plaintiffs failed to allege untrue facts that Synacor used in support of its opinions, noting that AT&T's alleged control of monetization decisions and its prioritizing user experience over advertising could not constitute "supporting facts" embedded within any opinion statement because plaintiffs simultaneously claimed that this information was omitted altogether. Third, the Second Circuit agreed with the district court that "Synacor's statements of opinion regarding its expectations for its future revenues from the AT&T portal, viewed in context, were not rendered misleading by any allegedly omitted fact." Namely, the Second Circuit held that Synacor's revenue estimates fairly aligned with the company's statements that the revenue would result only after successfully deploying the product and migrating AT&T customers. Finally, the Second Circuit agreed that the district court properly denied leave to amend because plaintiffs' new allegations did not resolve the fundamental issue with their case — that is, plaintiffs' failure to identify information alleged to be in the defendants' possession that was actually inconsistent with their statements of opinion regarding estimated future revenue.

Frontier Comms., Corp. Stockholders Litigation, Case No. 3:17-cv-1617 (VAB), 2020 WL 1430019 (D. Conn. Mar. 24, 2020)
Higher Than Expected Acquisition Costs

Frontier Communications Corp. ("Frontier") is a telecommunications company that offers local, long-distance, and digital telephone services, and is one of the largest providers of broadband internet in the United States. In February 2015, Frontier announced plans to acquire Verizon's California, Texas, and Florida wireline operations ("CTF Acquisition"), which was the largest purchase in the company's history. The company and its officers stated that the company expected the integration costs to be approximately $450 million, and that the company had a "proven track record of achieving and exceeding acquisition cost savings" while "creating a smooth transition for customers with no disruption to service." Between March and May 2015, the company's officers made optimistic statements about being "the only ones that have successfully" conducted acquisitions of this type, having a "playbook written" based on the company's recent acquisitions, and taking "comfort" in the company's "ability to do heart and lung transplants in a weekend." In order to finance a portion of the acquisition, Frontier launched two offerings of preferred and common stock in June 2015, from which Frontier ultimately raised $2.75 billion. Between June 2015 and April 2016, the company and its officers continued making optimistic statements about the company's ability to successfully complete the acquisition, notwithstanding the company's $160 million settlement

with the West Virginia Attorney General arising out of a prior unsuccessful acquisition, which led to thousands of customer complaints. The company subsequently acquired the wireline operations on April 1, 2016, and continued to tout the success of the acquisition over the next several weeks.

In May 2016, the chair of the California State Assembly's Utilities & Commerce Committee cited several "alarming … problems" with the acquisition that left cities "unable to live stream council meetings" and residents unable to dial 911, and announced that the Committee would hold formal hearings concerning Frontier. Thereafter, on November 1, 2016, Frontier disclosed that the integration cost 66% more than the $450 million it projected. The company's stock price fell 13.7% the next day.

On May 2, 2017, Frontier announced a revenue decline of $53 million from the previous quarter, in part due to "cleanup of" nonpaying accounts obtained in the acquisition. Frontier also announced that it was cutting its dividends by 62%. Frontier's stock price fell 16.6% the next day. Frontier later announced on October 31, 2017, that it would miss 2017 EBITDA guidance, and Frontier's stock price fell 26.8% the next day. Finally, on February 27, 2018, Frontier announced, among other things, that "the total cost of integrating the CTF Acquisition was $962 million," and that Frontier was suspending its dividends completely. Frontier's stock price fell 23.9% to $7.03.

Investors filed a putative class action asserting claims under Sections 11, 12(a)(2), and 15 of the 1933 Act and Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder against Frontier, several of its executives, its directors, and the underwriters of the June 2015 offerings. Defendants moved to dismiss, and the court granted the motion with leave to file a motion to amend to address deficiencies the court identified.

Plaintiffs moved to amend the class action complaint only as to their two claims against Frontier and four corporate officers for alleged violations of the 1934 Act. Defendants opposed the motion for leave to amend, arguing that the proposed second amended complaint did not remedy any of the deficiencies outlined by the court in dismissing the first amended complaint, including a failure to plead loss causation, failure to allege any of the statements were materially false when made, and a failure to plead scienter. The court denied plaintiffs' motion for leave to amend, dismissing plaintiffs' claims with prejudice.

The court held that statements that only 1% of customers experienced service problems, if untrue, could be "material misrepresentations of existing fact"; however, that the company's public statements were not false but rather were puffery and forward-looking statements of optimism.

The court also held that plaintiffs failed to plead a viable claim as to statements related to billing issues because plaintiffs did not adequately allege when the statements were made, that the statements were false, or "that knowledge of billing issues would have made a difference to a reasonable investor at the time these statements were made."

As to defendants' statements about the viability of their video on demand service, the court held that plaintiffs' allegations lacked the particularity required to be actionable. The court noted that some alleged misrepresentations regarding defendants' video indexing processes and third-party vendors were "based only on information from a single confidential former employee," but plaintiffs had failed to allege any facts with "sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." Plaintiffs' allegations as to Frontier's vice president's statement that Frontier had "quickly been able to adapt, get the video library rapidly up" were "more robust," but they also ultimately lacked the particularity required to be actionable because plaintiffs similarly failed to allege with sufficient particularity that a person in the position of plaintiffs' confidential informants' positions "would possess the information alleged." Finally a text message attributed to Frontier's Southeast area president, which stated "steve g [CTO Steve Gable] tells me 6/6 for USA TV FX on demand," was not actionable because the message could not support the allegation that the vice president's statement was false or misleading.

With respect to statements about the progress of CTF Integration, the court rejected plaintiffs' allegations that defendants "misrepresented their progress in resolving" the integration by "speaking optimistically about the wrap-up of integration spending and the Company's imminent return to normal operations," holding that such statements were not actionable because plaintiffs did not make any allegations that would disprove the statements, and plaintiffs did not describe with particularity how the former employees who reported the information had personal knowledge of the statements.

Finally, the court held that plaintiffs did not address the concerns it identified in its initial motion to dismiss regarding defendants' statements that they had "changed their accounting practices in a fashion that benefited their EBITDA," stating that plaintiffs "still fail[ed] to allege with particularity that the former employees on whose reports they rely had access to specific information disproving Defendants' statements, and they have not added allegations as to where or when the former employees learned about such a policy change." Additionally, the court agreed with defendants that the complaint lacked sufficient particularity to show that any omissions were material.

The court concluded that plaintiffs failed to allege loss causation, noting that although plaintiffs alleged defendants' corrective disclosures caused stock prices to drop substantially, plaintiffs had again failed to allege facts sufficient to demonstrate that those corrective disclosures revealed the prior statements regarding the 1% figure were false. Because none of the corrective disclosures specifically referred to "the number or percent of customers that experienced service issues" following the transition, the court held plaintiffs had failed to allege those corrective disclosures "directly contributed to Plaintiffs' loss."

The court dismissed the case with prejudice because it had already granted plaintiffs leave to amend their complaint three times, but plaintiffs had not demonstrated that they could cure the deficiencies in their claims. Plaintiffs filed a notice of appeal on April 6, 2020. On April 14, 2020, Frontier and its subsidiaries filed voluntary petitions for relief under Chapter 11 of the United States Code. Consequently, the case has been stayed pursuant to Section 362(a) of the Bankruptcy Code.

***Oklahoma Law Enforcement Retirement System et al. v. Telefonaktiebolaget LM Ericsson et al.*, Case No. 18-cv-3021, 2020 WL 127546 (S.D.N.Y. Jan. 10, 2020)**

Contracting and Accounting Practices

Telefonaktiebolaget LM Ericsson ("Ericsson") is a public company headquartered in Sweden that provides hardware and services for telecommunications networks. The company's primary customers are telecom and network operators, such as AT&T and Verizon. Two thirds of Ericsson's business results from large, multi-year contracts.

Over the years, Ericsson regularly stated in its financial reports that it complied with International Financial Reporting Standards ("IFRS"), including by recognizing revenue "when the services have been provided, generally pro rata over the contract period," and that "provisions for any estimated losses are made immediately when losses are probable." However, on July 17, 2016, a Swedish news outlet published an article claiming that Ericsson used undisclosed, aggressive accounting techniques. For instance, the article claimed that the company prematurely recognized revenue to the point that revenue from existing long-term contracts had been so fully recognized that the contracts were virtually empty — that is, that most of the company's long-term contracts had already been accounted for as sales. Ericsson denied the article's allegations the next day in an official statement. Ericsson's stock price dropped 9% from $7.77 on July 18, 2016 to $7.08 on July 19, 2016.

On March 28, 2017, Ericsson announced that it anticipated a write-down of asset value of between $900 million and $1.16 billion in its first quarter financial report because, as the company's officers explained on a conference call the same day, a "few," "specific and certain" large contracts encountered "negative developments, which could be lower [sic] expected revenues or higher costs to complete those projects … due to specific events during the first quarter." By the close of business on March 28, 2017, Ericsson's share price fell 3.59% from $6.69 to $6.45.

On April 25, 2017, Ericsson released its quarterly results for the first quarter of 2017, including the $1.08 billion write-down. Ericsson explained that the write-down was the result, in part, of "additional project costs … which due to recent negative developments are not expected to be covered by future project revenues." On July 18, 2017, Ericsson released its results for the second quarter of 2017, reporting "[w]e are not satisfied with our underlying performance with continued declining sales and increasing losses," and disclosed forty-two contracts accounting for $892 million in revenue in 2016 would have to be "exit[ed], renegotiate[d], or transform[ed]." Ericsson further reported an "increased risk of further market and customer project adjustments, which would have a negative impact on results, estimated to [$386 million–$643 million U.S. dollars] for the coming 12 months." The same day, Ericsson's share price fell 16.62% from $7.28 to $6.07.

An investor filed a putative securities class action lawsuit against Ericsson and several of its officers and directors alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Defendants moved to dismiss the amended complaint on December 21, 2018, and on December 27, 2018, the court ordered plaintiff to either file a second amended complaint to address defendants' arguments in their motion to dismiss, or to complete briefing on the motion to dismiss.

Plaintiff opted to file a second amended complaint on January 25, 2019 alleging that, during the class period, Ericsson's reported financial metrics, including its sales, margins, income, and revenue, were materially false and misleading because Ericsson failed to disclose two alleged contracting practices and two alleged accounting practices, each affecting the company's long-term service contracts. First, plaintiff alleged the company entered into unprofitable, or "loss-leading," contracts in attempt to gain greater market share. The company allegedly encouraged loss-leading contracts by an internal policy that began in 2016 that allegedly prioritized signing contracts at any cost, without concern for whether project costs ultimately exceeded revenues. Second, plaintiff claimed the company under-estimated, or under-scoped, contract

costs, by accepting "open-ended commitment[s]" to fulfill any service needs that arose and failing to accurately estimate such costs," such as in 2012, when Ericsson estimated that costs for a project at Grand Central Terminal would be $5 million-6 million but they ultimately grew to $157 million by March 2018. Ericsson allegedly encouraged its employees to scope contracts "as 'slim and lean' as possible" through a "corporation-wide initiative" that lasted until 2014. Third, plaintiff alleged the company delayed cost recognition by "pushing" incurred costs onto the accounting books for later quarters. For example, plaintiff alleged that a former project manager at Ericsson stated that "Ericsson would bill AT&T for projects in advance but wait until the project was completed before recognizing the costs." Finally, plaintiff alleged the company prematurely recognized revenues, including examples where the company allegedly convinced customers to prematurely sign off on contract milestones in order to record the revenue early. According to plaintiff, each of these four undisclosed practices "tainted" the company's financial results during the class period.

Defendants moved to dismiss, and the court dismissed the second amended complaint, holding plaintiff failed to adequately plead falsity or scienter. First, the court held that plaintiff's claims relating to Ericsson's purported contracting practices failed because plaintiff failed to adequately allege what, if any, financial "data" was tainted by Ericsson's alleged failure to accurately report loss-leading contracts or to accurately project the costs associated with its contracts. Plaintiff's failure was compounded by the fact that plaintiff did not adequately allege how the "data" at issue in the second amended complaint — costs, revenues, and other financial results for past periods — could be "tainted" by allegedly incorrect estimates of future project costs. The court thus held plaintiff failed to adequately allege falsity.

Second, the court held that plaintiff failed to adequately allege scienter because it did not allege what information or knowledge would have alerted defendants that their initial project cost estimates, such as those for the Grand Central Terminal project, were wrong "from the start." Instead, plaintiff's allegations showed that a former employee purportedly acknowledged that Ericsson would not have known about cost overruns until "six to twelve months after starting a project," disproving that defendants could have known their project estimates were wrong when made. Thus, the court held that plaintiff's claim that Ericsson's historical financial reports were false or misleading due to Ericsson's allegedly improper contracting practices was really a claim of fraud by hindsight, and not actionable.

Turning to plaintiff's claims that Ericsson's historical financial reports were false or misleading due to Ericsson's allegedly improper accounting practices, the court held that plaintiff failed to adequately allege defendants' fraudulent intent, because the second amended complaint did not even establish that Ericsson's actual accounting practices deviated from its publicly stated practices. To the contrary, the court stated that the company's publicly stated accounting practices — namely, recognizing revenue "when the services have been provided, generally pro rata over the contract period," and making provisions for estimated losses "immediately when losses are probable" — inherently involved an exercise of judgment and plaintiff failed to allege when defendants contravened those practices. Second, the court held that alleged statements from nine former employees included in the second amended complaint did not reflect any knowledge by any individual defendant of the two allegedly improper accounting practices, let alone identify with specificity how contrary information was communicated to them. Finally, the court rejected plaintiff's argument that the core operations doctrine provided an inference of scienter because plaintiff did not adequately allege that long-term contracts constituted nearly all of Ericsson's business, particularly when considering that the company also provided hardware and short-term services.

Although the court expressed skepticism about plaintiff's ability to cure the second amended complaint's defects, it granted plaintiff thirty days to amend. Plaintiff waived its right to amend on February 10, 2020, and the court dismissed the case with prejudice.

***Asay, et al. v. Pinduoduo Inc., et al.*, Case No. 18-cv-7625, 2020 WL 1530745 (S.D.N.Y. Mar. 30, 2020)**

Anti-Counterfeit Measures And Marketing Spend

Pinduoduo, Inc. operates an online marketplace that sells consumer products in China. On July 26, 2018, Pinduoduo completed an IPO in the U.S., selling 85.6 million American Depository Shares ("ADSs") at a price of $19 per share, netting more than $1.7 billion in proceeds. In its registration statement, the company stated "[a]lthough we have adopted strict measures to protect against [liabilities arising from the sale of counterfeits], including proactively verifying the authenticity and authorization of products sold on our platform through working with brands and conducting offline investigations, immediately taking down any counterfeit or illegal products or misleading information found on our platform, and freezing the accounts of merchants in violation of the platform policies, these measures may not always be successful." The offering documents further explained that the company could face claims from customers, brands, or government entities if counterfeit products were sold through

Pinduoduo, adding that the site's 1.7 million merchants were ultimately responsible for the sourcing of their products, and that the company had historically been subject to claims related to the sale of counterfeit goods and could continue to be subject to such claims in the future.

The offering documents also discussed the company's marketing efforts. Specifically, they stated that users were encouraged to share product information over social networks and to make "team purchases" at discounted prices. The Registration Statement added that as a result of team purchases, "buyers on our platform actively introduce us to and share products offered on our platform and their shopping experiences with their friends, family and social contacts. New buyers in turn refer our platfrom [sic] to their broader family and social networks, generating low-cost organic traffic and active interactions and leading to exponential growth of our buyer base. In the twelve-month periods ended December 31, 2017 and June 30, 2018, the number of active buyers on our platform reached 245 million and 344 million, respectively." The registration statement also disclosed that company's marketing expenses had increased more than sixteen-fold over the period of a year, providing that "sales and marketing expenses increased from RMB 73.9 million in the three months ended March 31, 2017 to RMB 1,217.5 million (US $194.1 million) in the three months ended March 31, 2018, while sales and marketing expenses as a percentage of our revenues decreased from 199.5% in the three months ended March 31, 2017 to 87.9% in the three months ended March 31, 2018." Further, the prospectus disclosed that the company's "results of operations depend on our ability to manage our costs and expenses. We expect our costs and expenses to continue to increase as we grow our business and attract more buyers and merchants to our platform," and "[i]f we continue to incur substantial marketing expenses without being able to achieve anticipated buyer and merchant growth, our operating results may be materially and adversely affected. As a result we may fail to improve our operating margin and may continue to incur net losses in the future."

On July 28, 2018, Skyworth, a major television manufacturer, published a statement demanding that Pinduoduo remove all counterfeit Skyworth products from its platform. Other major Chinese brands followed suit, including book publishers and manufacturers of electronics and mobile phones. On August 1, 2018, China's State Administration for Market Regulation ("SAMR") ordered an investigation into Pinduoduo for its sales of counterfeit products, and publicly summoned Pinduoduo to a formal meeting. The same day, the price of the Company's ADSs dropped from $22.59 to $20.31. On August 3, 2018, SAMR posted a

statement on its website stating that Pinduoduo should react “properly” to media reports and consumer complaints, and should not “tolerate and support” infringement. The price of the company’s ADSs dropped the same day from $19.66 to $19.07.

Investors filed putative securities class actions against Pinduoduo and its executives and directors alleging violations of the 1933 Act. On August 30, 2018, “news leaked” that the company’s sales and marketing expenses had increased in the second quarter of 2018. That day, the value of the company’s ADSs dropped from $21.15 to $17.99. On January 19, 2019, the court consolidated the cases and appointed a lead plaintiff. On February 22, 2019 plaintiffs filed a consolidated amended complaint alleging defendants violated Sections 11 and 15 of the 1933 Act and adding claims under Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Plaintiffs claimed defendants materially misrepresented the company’s anti-counterfeiting efforts in its offering documents because Pinduoduo actually “did little” to address counterfeiting, ignored complaints from brands like Skyworth, performed “desultory” offline investigations, and sold large volumes of counterfeit goods in certain product categories. Plaintiffs also alleged that the offering documents omitted material information about the company’s marketing expenses from the second quarter of 2018, claiming Pinduoduo’s interim financial results for the second quarter of 2018 “sharply differed from the existing trends as Pinduoduo engaged in a massive but fruitless marketing campaign,” with marketing expenses jumping from RMB 1,217,458 to RMB 2,970,734, while the number of new users only increased from 25.2 million to 28.8 million, with the per-user acquisition costs going from RMB 24 to RMB 64. Plaintiffs alleged that the increased customer-acquisition costs were a trend known to the defendants that should have been disclosed under Item 303 of Regulation S-K. Plaintiffs relied on allegations from an accountant who purportedly previously worked for one of Pinduoduo’s subsidiaries and stated that Pinduoduo “would have had access to data on its quarterly and monthly marketing expenses in advance of the IPO.”

Defendants moved to dismiss, and the court granted the motion in full. First, the court held that the company adequately disclosed its issues with, and efforts to limit, counterfeits, noting the company’s disclosures depicted its anti-counterfeiting efforts as an “ongoing battle,” involving continuing litigation and claims over third-party infringement, warned that its anti-counterfeiting measures “may not always be successful,” and explained that its 1.7 million merchants had ultimate responsibility for the sourcing of products. The court further stated that the challenged statement in the registration statement was in fact “phrased as an express warning about the potential ineffectiveness of the [c]ompany’s anti-counterfeiting policies,” noting the registration statement “explained that ‘[a]lthough’ Pinduoduo had adopted ‘strict measures’ against counterfeiting, ‘these measures may not always be successful.’” Thus, the court determined that, after reading the challenged statement in context, a reasonable investor would have understood that counterfeiting remained an ongoing problem for the company, and that the high volume of merchants and sales on the platform were an obstacle to enforcement.

Second, the court held that plaintiffs did not allege an actionable misstatement or omission concerning the company’s marketing expenses because Pinduoduo provided purchasers with “ample warnings and disclosures” about the growth of marketing expenses. Pinduoduo’s prospectus disclosed that its operating expenses had “increased substantially” based “primarily” on its sales and marketing expenses. It stated that, over the course of a year, quarterly marketing expenses rose from RMB 73.9 million to RMB 1,217.5 million. In short, the court reasoned that the doubling of marketing expenses in the second quarter of 2018 was consistent with the trend disclosed by Pinduoduo, and plaintiffs failed to allege how further disclosure would have significantly altered the total mix of information available to a reasonable investor or disclosed a trend not otherwise explained in the offering documents.

Finally, the court held that plaintiffs’ 1934 Act claims separately failed because plaintiffs failed to adequately allege scienter. The court determined that plaintiffs’ allegations “[fell] far short of ‘strong circumstantial evidence’ of a reckless state of mind approximating actual intent” because the company’s description of its “strict” anti-counterfeiting measures was accompanied by the qualification that its efforts “might not always be successful,” a recitation of the company’s potential liabilities, and descriptions of claims and actions previously asserted against it. The court also reasoned that plaintiffs did not allege a cogent and compelling inference that defendants acted with a reckless intent by omitting the marketing expenses incurred in the second quarter of 2018 because plaintiffs did not assert that management or any specific defendant should reasonably have been aware of those expenses, explain the basis for the knowledge of confidential informants, or assert that the confidential informant had any knowledge or connection to the marketing expenses in the second quarter of 2018.

Plaintiffs appealed the district court’s dismissal to the U.S. Court of Appeals for the Second Circuit on April 29, 2020 (Case No. 20-1423). The appeal is fully briefed.

Jiajia Luo v. Sogou, Inc., Case No. 19-cv-230 (LJL), 465 F. Supp. 3d 393 (S.D.N.Y. June 8, 2020)

Potential Violations Of Chinese Internet Content Laws

Sogou Inc. is a China-based technology company that, as of September 2017, was China's fourth largest Internet company based on monthly active users. By mobile queries, the company's Sogou Search engine, which is powered by artificial intelligence, is the second largest search engine in China. Sogou Search provides unique services, such as a cross-language search service which eliminates the Chinese-English language barrier by enabling users to locate English content on the Internet by querying searches in Chinese and then reading content for which Sogou provides a Chinese translation.

Sogou is subject to China's Advertising Law which provides that advertisements may not include material prohibited by the laws and regulations of the People's Republic of China ("PRC"). Additionally, since December 2013, the Administrative Measures for Content Self-Review by Internet Culture Business Entities have required Sogou "to review the content of products and services to be provided prior to providing such content and services to the public." Sogou is also subject to the Measures for the Administration of Internet Information Services, which indicate that entities that provide information to Internet users must obtain an operating license from the Ministry of Industry and Information Technology or its local branch and are required to police their Internet platforms and remove certain prohibited content.

On November 9, 2017, Sogou completed an IPO of 45 million American Depositary Shares at a price of $13 per share. In connection with the IPO, Sogou filed a Registration Statement and a Prospectus (together, the "Offering Documents") with the SEC. On April 27, 2018, the PRC enacted Article 22 of the Law of the PRC on the Protection of Heroes and Martyrs, which makes it "forbidden to distort, smear, desecrate, or deny the deeds and spirit of heroes and martyrs" and provides that "[t]he names and likenesses of heroes and martyrs must not be used, or covertly used, by any organization or individual for … commercial advertisements, damaging the reputation and honor of heroes and martyrs."

In early June 2018, Douyin, a Chinese short-form video platform company, produced advertisements containing jokes about an individual characterized as a "martyr" dying in combat which were displayed on Sogou Search. Shortly thereafter, the Beijing Municipal Cyberspace Affairs Commission and the Beijing Municipal Administration of Industry and Commerce ("AIC") launched an investigation into Douyin and Sogou. During the investigation, the Beijing AIC determined that Sogou failed to include a keyword blacklist of the three words in its automated content control system, which caused Sogou to miss blocking the publication of ads containing that illegal keyword combination. Although there was never a finding by the Chinese authorities that Sogou's procedures prior to the IPO were deficient or in breach of any statute or law, Sogou agreed to revise its advertising policies and audit procedures to ensure compliance with relevant regulations. Specifically, Sogou established a team devoted to improving its advertisement screening mechanisms and enhancing its use of AI technology to ensure that unlawful advertisements were blocked in a timely manner, and it suspended part of its advertising business for ten days beginning on July 1, 2018.

On July 2, 2018, J.P. Morgan issued a research report estimating that Sogou's suspension of search advertising instituted after the investigation would have a "6% negative impact to Sogou's quarterly revenue" and a "31–44% negative impact" on Sogou's third quarter non-GAAP operating profit. On July 30, 2018, Sogou filed its second quarter earnings press release with the SEC which discussed the investigation and the ten-day advertising suspension. Sogou also announced it would "phase out hardware products that [were] not AI-enabled, such as some legacy models of Teemo Smart Watch, and transition to products that integrate[d] [Sogou's] leading AI technologies." Sogou expressly anticipated that the new strategy would "result in a reduction in hardware revenues in the second half of 2018." Following these disclosures, the price of Sogou's ADS fell by 19%. By October 30, 2018, approximately one year after the IPO, the price of Sogou's ADS had fallen to $5.50 — a 57% decrease from its share price at the time of the IPO.

Investors filed a putative class action asserting claims under Sections 11 and 15 of the 1933 Act against Sogou, seventeen individual defendants including several of its officers and directors, and the underwriters of the IPO. Plaintiffs filed a second amended complaint on September 12, 2019, which defendants moved to dismiss on September 17, 2019.

On October 22, 2019, plaintiffs filed a third amended complaint alleging that Offering Documents "fail[ed] to disclose that Sogou's controls over advertising contents" and were "materially inadequate to meet [Sogou's] obligations to review the content for which it was responsible and to prevent Sogou from allowing dissemination of prohibited content." Plaintiffs also asserted that the Offering Documents were false and misleading and omitted material information about Sogou's smart hardware products and Sogou's strategy to better leverage AI technologies. Additionally,

plaintiffs alleged that "the Offering Documents failed accurately to … disclose that it had changed strategies in a way that would adversely impact revenue and earnings within a year from the IPO." Further, plaintiffs claimed that Sogou failed to disclose that its screening mechanisms at the time of the IPO were inadequate to screen out content that *new* Chinese law (passed after the IPO) would prohibit.

The defendants moved to dismiss the third amended complaint which the court granted with prejudice. The court held that plaintiffs' claim could not survive because plaintiffs failed to allege a false or misleading statement or an actionable omission because they "[did] not allege that any single one of the statements Sogou made regarding any PRC regulation or Sogou's compliance efforts was false or misleading at the time it was made," noting that "the Offering Documents provided no assurance to investors that Sogou's procedures would be sufficient to guarantee compliance with PRC law or to prevent the dissemination of illegal content. To the contrary, the Offering Documents warned that Sogou 'may have difficulty determining the type of content that may result in liability' and that, if Sogou was 'wrong,' the company might 'be prevented from operating [its] Internet platforms.'" Additionally, the court held that plaintiffs failed to allege an actionable omission because "Sogou did not disclose any particular steps it was taking to comply with PRC law such that the omission of facts regarding those measures made the description of the measures misleading." Moreover, the court concluded plaintiffs did not allege that Sogou was in violation of PRC law or regulation at the time the Registration Statement became effective but rather had "warned of the exact risk that was threatened and later materialized — that the PRC would issue a new law or regulation, that Sogou might have difficulty policing the content that was prohibited, and that the failure to detect prohibited content would prevent Sogou from operating its Internet platform and impact its revenues." The court concluded that plaintiffs' "allegations simply do not aver that Sogou's controls at the time of the IPO were insufficient under the PRC law that existed at the time of the IPO."

The court also concluded that plaintiffs failed to state a claim for relief based on Sogou's statements about its hardware and its strategic shift, holding that plaintiffs' allegations that Sogou failed to disclose at the time of the IPO that the company had decided to transition to smart hardware with better-connected AI capabilities and to phase out hardware that was not AI-enabled failed to identify any statement about hardware in the Offering Documents that was false or misleading when it was made. The court noted that Sogou disclosed that it "intend[ed] to grow [its] business and improve [the] results of operations by … continu[ing] to pursue innovations in AI technologies" and "broaden[ing] the application of [its] AI technologies" and also disclosed that "[n]ew Internet-enabled smart hardware" would "leverage AI technologies." Further, the court rejected plaintiffs' assertion that Sogou wrongly implied that all of its smart hardware was AI enabled, holding that plaintiffs' theory relied "on a plain misreading of Sogou's Registration Statement," because "Sogou did not state that all of its smart hardware had AI capabilities," but instead merely described two products and stated that one of the two "integrates… Q&A technology and supports various other AI-powered applications." Thus, the court concluded that plaintiffs failed to "state any 'concrete facts' showing that any statement Sogou made was false."

Plaintiffs appealed the district court's decision but subsequently withdrew the appeal. Thereafter, the parties reached a settlement, and their joint motion for settlement approval is pending.

***Bratusov v. Comscore, Inc., et al.*, Case No. 19-cv-3210, 2020 WL 3447989 (S.D.N.Y. June 24, 2020)**

Strategy To Establish Cross-Platform Measurement Currency

Comscore, Inc. ("Comscore") is an information and analytics company that provides marketing data and analytics to enterprises; media and advertising agencies; and publishers. On February 28, 2019, Comscore announced its financial results for the fourth quarter of 2018 and fiscal year 2018 and the company's then-CEO stated that the company continued to expand customer relationships, drive revenue growth, and improve its cost structure while investing in product development. He further stated that the results showed that the company's "strategy of becoming a trusted currency for planning, transacting[,] and evaluating media cross-platforms [wa]s working." On March 31, 2019, Comscore announced the resignations of its then-CEO and its then-president and that it expected first quarter 2019 revenue to be between $100 million and $104 million, falling short of analysts' estimates of approximately $106 million in revenue. Comscore's stock price fell nearly 30% the next trading day.

On April 2, 2019, a periodical published an article stating that the resignations resulted from a disagreement between the executives and the company's board over Comscore's strategic direction.

The article elaborated that, while the former CEO "painted a vision for a multichannel measurement company and wanted to invest more in product development," the board was risk-averse and sought ways to cut costs. The former CEO acknowledged the sentiment in a LinkedIn post in which he noted his departure resulted from "irreconcilable differences" with the board "over how to execute the company's strategy."

On May 8, 2019, Comscore released its 1Q 2019 financial results. Though the company hit the revised lowered guidance, its $102.3 million revenue represented a 3.4% year-over-year revenue decline, and the company also announced an adjusted EBITDA loss of $2.5 million compared to positive $3.6 million for the first quarter of 2018. The next day, the company's stock price declined to close at $11.34 per share.

An investor filed a putative class action lawsuit alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder against Comscore and its executives on the grounds that they purportedly misled investors by failing to disclose the company's struggle to implement its business strategy and instead painting an optimistic outlook.

On August 6, 2019, Comscore released its second quarter 2019 financial results revealing a further decline in revenue and resulting in analysts lowering Comscore's revenue and EBITDA expectations for fiscal year 2019. On August 12, 2019, a member of Comscore's board resigned, stating "I do not believe the Company's go-forward operating strategy, in general, is progressing fast enough and specifically in innovation and development." Comscore's stock price closed on August 12, 2019, at $1.61 per share, down from its high of more than $23 per share on February 25, 2019.

On September 30, 2019, plaintiff filed an amended complaint adding allegations regarding a fundamental disagreement between the company's executives and its board of directors regarding the strategy and direction of the company.

Defendants moved to dismiss the amended complaint, and the court granted the motion, with leave to amend. First, the court held that plaintiff failed to allege that the challenged statements were false, explaining that historical statements about the company's expanded customer relationships, revenue growth, improved cost structure, product development investment, or strong foundation were not "render[ed] false" by an alleged disagreement between the board and management "regarding the best means of implementing, on a going forward basis, a shared vision for a cross-platform measurement currency." Similarly, the court held that Comscore's statement that it "anticipated mid-single digit revenue growth, a slight improvement in gross margins over 2018 and generally flat non-GAAP operating expenses relative to 2018," was not actionable because the plaintiff did not allege that the company disbelieved any aspect of the statement or that it was false when made.

Second, the court held that the plaintiff failed to allege a material omission because the company did not have a duty to reveal disagreements over corporate strategy. The court noted that the challenged statements simply showed that Comscore "was attempting to expand its business and capitalize on changes in the media landscape to increase revenue and expand margins over time. The statements did not "commit Comscore to a particular strategy for achieving its goal of creating a cross-platform measurement currency."

Third, the court held that the plaintiff failed to allege that the challenged statements were misleading, explaining "[a]t most, the Complaint suggests that [former] Executives and the Board had different strategies to achieve a shared goal of creating a cross-platform measurement currency." However, "nothing in the Complaint indicates that the Company ever abandoned its strategy of establishing a cross-platform measurement currency ..., even if the prioritization of means to achieve that goal may have shifted over time." The court concluded that "at bottom, Plaintiff fails to explain how a reasonable investor would have been misled by the Alleged Misstatements."

The court also held that plaintiff failed to adequately allege scienter through sole reliance on the core operations doctrine (that is, that developing a cross-platform measurement currency was at the core of Comscore's business, so defendants must have known representations regarding the company's focus on establishing a cross-platform measurement currency were misleading given the board's insistence upon cost-control measures). The court reasoned that plaintiff failed to allege any facts suggesting that defendants had any knowledge of information contradicting the challenged statements and, "[a]t best ... allegations regarding core operations may factor into a court's holistic assessment of scienter allegations, but are not independently sufficient to raise a strong inference of scienter."

Plaintiff voluntarily dismissed the case soon after this order issued.

Marcu v. Cheetah Mobile Inc., Case No. 18-CV-11184 (JMF), 2020 WL 4016645 (S.D.N.Y. July 16, 2020)

Undisclosed "Click Injection" Code In Apps To Increase Revenue

Cheetah Mobile Inc. ("Cheetah") is a China-based developer of mobile apps, including both games and utility apps, which are available for download through various channels, including Google Play, the official app store for Google's Android mobile operating system. Some of Cheetah's apps rank among the most popular apps on the Google Play store. Because many of Cheetah's apps are free to users, the company generates revenue primarily through advertising. Many of these advertisements are for other mobile apps. When someone using a Cheetah app clicks on an advertisement for a different app, they are brought to the Google Play store. If the consumer downloads the different app and opens it, the developer of that other app makes a small payment, known as "install bounties" — typically between fifty cents and three dollars — to Cheetah.

In public disclosures between April 21, 2015 and November 21, 2018, Cheetah reported total revenue, which was largely attributed to "online marketing services," which was generated "primarily by referring user traffic and selling advertisements on [ ] mobile and PC platforms." It also generally described its core apps and success of those apps, including certain statistics about those apps, such as where they ranked in total downloads or popularity. Cheetah warned "[i]f Google Play… terminate[s] their existing relationship with us, our business, financial condition and results of operations may be materially and adversely affected."

On November 26, 2018, Buzzfeed published an article related to a "click injection" scheme in seven of Cheetah's apps. The scheme was premised on a feature where newly installed applications perform a "lookback" to see where the last click came from and provide a referral bonus to the developer at that click. According to the article, Cheetah apps required its users to give permissions for Cheetah to see when new apps are downloaded, along with the ability to launch other apps. The article reported that Cheetah's apps used those permissions to search for "bounties" and inject fake clicks to make it appear as though the users had clicked through an ad published by Cheetah and downloaded the newly added application on Cheetah's referral, thus prompting referral payments to Cheetah.

In a statement responding to the Buzzfeed article, Cheetah insisted that "[a] third-party … [was] responsible for the click injection." Regardless, upon the publication of the article, some of Cheetah's apps were removed from the Google Play Store. Moreover, after the article's publication, Google conducted its own investigation, and on December 3, 2018, it reported that one of the seven apps contained code used to execute ad fraud techniques known as click injection and Google removed the app from the Google Play store. Because Google Play was an important … means of distribution for its apps, the allegations in the article posed a significant risk to Cheetah's business. In response to the Buzzfeed article, Cheetah's American depositary share price fell nearly 37%, over the next two trading days.

Investors filed a putative securities class action against Cheetah and certain of its officers asserting claims under Sections 10(b) and 20(a) of the 1934 Act. Plaintiffs' complaint alleged that Cheetah's failure to disclose its

click injection scheme rendered several statements by the company misleading, including (1) Cheetah's public statements regarding the popularity and functionality of its applications generally, (2) statements regarding Cheetah's revenue and sources and drivers of revenue, and (3) the company's risk disclosures.

Defendants moved to dismiss the amended complaint, which the court granted with prejudice. First, the court concluded that "none of the disclosures challenged by Plaintiffs were rendered false or misleading by virtue of Defendants' failure to admit that they had engaged in the alleged click injection scheme." The court observed that many of the statements alleged by plaintiffs to be misleading were about general topics concerning Cheetah's apps that were completely unrelated to any scheme to garner referral bonuses from advertisers, such as statements about the user's experience, an app's popularity on Google Play, or similar topics. For example, one of the alleged misstatements indicated that "Cheetah Mobile remained the third largest global publisher in Google Play's non-game category." Such statements, the court held, were not rendered misleading by the alleged omissions. The court explained that "functions that the apps perform for users are unaffected by silent signals intended to capture referral bonuses." The court also rejected plaintiffs' claims that revenue-related statements were misleading for "fail[ing] to reveal" that Cheetah had earned revenue from fraudulent techniques, reasoning that the revenue-related statements at issue were limited to true statistical facts. The court highlighted the fact that the disclosures at issue "did not, explicitly or implicitly, rule out other factors playing a role in generating revenue. To the contrary, by using words such as 'primarily' and 'most significant,' Defendants overtly acknowledged that other factors might play a role." And plaintiffs did not allege the significance of the click and injection scheme to Cheetah's overall revenues. As a result, the court held that none of the statements at issue were the kind of "half-truth" necessary to state a securities law claim. The court held that statements explaining drivers or revenues and profits from mobile apps, like Cheetah "generate[d] online marketing revenues primarily by referring user traffic and selling advertisements on our mobile and PC platforms," came closer to the mark, but still were not false or misleading because they expressly implied other sources of revenue.

The court also rejected plaintiffs allegation that Cheetah's risk disclosures were misleading, noting "'cautionary statements of potential risk have only rarely been found to be actionable by themselves.'" The court further explained that the possibility of Google Play terminating its relationship with Cheetah remained a hypothetical when the challenged statements were made. The court also noted that it was unclear whether plaintiffs were alleging that the risk disclosures themselves were actionable or if they were merely arguing that they do not cure otherwise misleading statements.

Second, the court held that plaintiffs "fail[ed] entirely to plead scienter." The court held that plaintiffs' heavy reliance on circumstantial evidence was insufficient, and "[e]ven taken together and construed in the light most favorable to Plaintiffs, [their allegations] do not establish that it is at least as likely that Defendants acted with scienter as that they did not." The court explained that "a defendant's position does not, without more, support a conclusion that the defendant had access to information contradicting an alleged misrepresentation." Also plaintiffs failed to specifically identify any reports or statements containing contradictory information, and the confidential witness statements did not show that the defendants knew the challenged statements were false. Additionally, the court rejected the core operations doctrine, noting that "it is far from clear that the core operations doctrine remains valid in light of the PSLRA." Nonetheless, even assuming it is a valid means to plead scienter, the court determined that the complaint failed to plead facts giving rise to a strong inference that the company's executives should have known about the alleged click injection scheme, by virtue of being accused of click fraud in October 2017 (culminating in a different securities fraud lawsuit in November 2017), after all but a few of the challenged statements were made. The court held that "the mere fact that Cheetah Mobile had been sued — which is all that Plaintiffs allege — does not establish that Defendants knew or should have known about the click injection scheme at issue here."

***In re AT&T/DirecTV Now Securities Litigation*, Case No. 19-CV-2892, 2020 WL 4909718 (S.D.N.Y. Aug. 18, 2020); *Hoffman v. AT&T Incorporated*, Case No. 650797/2019, 126 N.Y.S. 3d 854 (N.Y. Sup. Ct. 2020)**
Underperformance Of New Product

AT&T is a global provider of telecommunications, media, and technology services. During the relevant time period, its business was divided into four major segments: business solutions, entertainment, consumer mobility, and international. In an effort to expand its entertainment segment, AT&T acquired satellite-based TV provider, The DirecTV Group, Inc. ("DirecTV") even though DirecTV's business was in decline as increasing numbers of subscribers transitioned from traditional television subscriptions to internet-based streaming services. On October 22, 2016, AT&T announced that it entered into a merger agreement with Time Warner, a media company with a vast amount of video content and production capacity. About a month later (and two-and-a-half months before the scheduled Time Warner shareholders' vote on the deal), AT&T launched DirecTV Now ("DTVN"), a new streaming product to help offset the loss of traditional satellite customers.

Because the Time Warner acquisition contemplated offering Time Warner shareholders AT&T stock, in November 2016 AT&T filed a draft Registration Statement, which was subsequently amended and became effective on January 6, 2017. The Registration Statement and January 9, 2017 Prospectus ("Offering Documents") described the DTVN business as "strong" noting growth by approximately 1.5 million subscribers, and incorporated by reference various of the company's prior and subsequent SEC filings containing information about DTVN, including a January 20, 2017 announcement that DTVN added 200,000 net paid subscribers in the fourth quarter of 2016. On February 13, 2017, Time Warner's shareholders voted to approve the merger, but the closing was delayed until June 14, 2018 by the U.S. Department of Justice's unsuccessful effort to enjoin the merger on antitrust grounds.

From DTVN's inception, AT&T announced net additions of paid subscribers every quarter through the third quarter of 2018, made various positive statements about DVTN, and repeatedly stated that growth in DTVN subscribers largely offset the loss of satellite customers. Throughout this period, AT&T also ran several promotions to attract DTVN subscribers. On October 24, 2018, the company announced that in 3Q 2018 it had 49,000 net additional subscribers — an 85% decrease from the 342,000 net additional subscribers reported by the company for the prior quarter. The company explained that in 3Q 2018 it scaled back promotions and special offers to optimize profitability because it discovered a group of low-value, high churn customers, and it expected this to lead to a decline in net additions but that the 3Q 2018 figure was more positive than expected. That day, AT&T's stock price decreased 8%. Then, on January 9, 2019, AT&T further disclosed that, in 2018, about one third of its DTVN subscribers (approximately 500,000 customers) were on three-month promotions and that the company stopped doing one such promotion in 3Q 2018. That day, AT&T's stock price fell 3.77%. On January 30, 2019, the AT&T's stock price dropped an additional 4.3% when it announced that it had lost 267,000 DTVN subscribers in the 4Q 2018.

Former Time Warner shareholders (converted to AT&T shareholders) filed a putative class action against AT&T, its officers and directors in New York state court alleging violations of Sections 11, 12(a), and 15 of the 1933 Act through purported misleading statements in the Registration Statement regarding the "strong" launch of DTVN with impressive subscriber growth without disclosing that those subscriptions resulted from unsustainable promotional and sales practices that defendants cracked down on leading up to the acquisition, which caused subscription rates to fall.

Subsequently, investors filed a similar putative securities class action in federal court against AT&T and several of its executives and directors alleging the same 1933 Act Claims as well as violations of Sections 10(b) and 20(a), of the 1934 Act and Rule 10b-5 promulgated thereunder. Plaintiffs alleged that defendants knew but failed to disclose that there was a significant risk of technical problems with DTVN, likely unprofitability, promotion-related churn, and overly aggressive sales tactics which they failed to disclose while trumpeting successes of and growth of subscribers to DVTN.

Defendants moved to dismiss the state court action and the New York State Supreme Court granted the motion in full, holding that plaintiff failed to plead that any statement in the Registration Statement was false or misleading as of the effective date. As a preliminary matter, the court agreed with defendants that the effective date of the Registration Statement was the applicable date to assess Section 11 liability, rejecting plaintiff's argument that defendants had a duty to file a post-effective amendment to the Registration Statement regarding alleged changes in subscriber trends between its effective date and the transaction close date which would change the relevant period for Section 11 liability. The court reasoned that there were no "specific representations" in the Registration Statement about the "viability or success of [the sector] of AT&T's business" that included DTVN and "there can be no duty to update information that was not contained in the Registration Statement in the first place." It further reasoned that declining DTVN subscription rates did not represent a "fundamental change" to trigger a duty to issue a post-effective amendment because DTVN represented less than 1% of AT&T's video-subscriber business, which itself was only a small part of AT&T's overall business.

Next, the state court held that the Registration Statement did not contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading, as of the effective date. Specifically, it held that defendants had no "obligation to disclose [AT&T's] various promotions for increasing DTVN subscriptions, even if they were flawed as plaintiff alleges," that defendants' description of its DTVN launch and subscriber growth as "strong" was inactionable corporate puffery, and the remaining allegations were improper fraud-by-hindsight. Likewise, the court concluded that statements by AT&T directors post-close suggesting they knew about the risks of their promotional practices related to DTVN and thought they might ultimately cause a drop in subscriptions "does not render anything in the Offering Documents misleading as of the effective date." The court also dismissed the Section 12 and 15 claims given its finding that the Offering Documents did not contain any material misstatements or omissions. Plaintiff appealed the state court dismissal, which they voluntarily dismissed on March 24, 2021.

On November 18, 2019, defendants moved to dismiss the federal action on the grounds that plaintiffs failed to plead a material misrepresentation or scienter for the 1934 Act

claims and failed to plead a material misrepresentation or omission (and that one claim was time barred) for the 1933 Act claims. On August 18, 2020, the court granted the motion, but permitted plaintiffs to seek leave to file a second amended complaint.

With respect to the 1934 Act claims, the court first held that the majority of the challenged statements were non-actionable puffery. Among plaintiffs' twenty-five challenged statements, the court distilled a few factual assertions that were potentially actionable, but that it ultimately determined were not, namely statements that (i) DTVN subscriptions yielded positive margins; (ii) subscribers predominantly enrolled online; (iii) the reported subscription numbers reflected real customers and not fraudulently created accounts; (iv) subscriber churn was being reduced; and (v) DTVN subscriptions were offsetting losses in satellite TV customers. First, the court determined that plaintiffs failed to allege that statements regarding DTVN's margins were false or misleading because plaintiffs relied on alleged statements from a single confidential witness who was not alleged to have access to nationwide cost and profit data to support this claim. Second, the court disagreed that statements that DTVN subscribers could and did enroll online and through low-cost means were misleading even if many customers enrolled in stores, explaining that the only plausible conclusion from the statements is that DTVN, as an internet-based TV platform, did not require installation of a satellite dish, a visit from a technician, or the need for a set-top box, which meant DTVN growth was not subject to traditional physical constraints and costs; this was true irrespective of some customers enrolling in physical stores. Third, though the court accepted as true plaintiffs' claim that some sales associates created accounts without customers' knowledge, plaintiffs failed to plausibly allege the practice was widespread and thus material to a reasonable investor because none of the confidential witnesses on whom plaintiffs relied had a companywide view of the business. Fourth, the court rejected plaintiffs' challenges to statements that customer churn rate was declining in May 2017, because plaintiffs failed to allege any contradictory facts and a drop in subscriber growth in 3Q 2018 "smacks of hindsight." Fifth, the court reasoned that, given plaintiffs' deficient pleading as to profit margins and churn, the challenged statements regarding DTVN subscriptions offsetting losses in satellite TV customers were equally unavailing.

The district court also rejected plaintiffs' theory of scienter, holding that plaintiffs' allegation that the failure of DTVN would undermine the Time Warner acquisition and damage defendants' personal reputations "failed to demonstrate a remotely possible, personalized motive" to defraud, and that plaintiffs' other circumstantial evidence was not as compelling as the obvious, non-culpable explanation that AT&T invested heavily in DTVN and believed it could have been the next generation of TV but it was ultimately unsuccessful. In particular, the court held that "[w]hile Defendants' optimism may have proven to be unwarranted, Plaintiffs have not alleged that Defendants reviewed any contemporaneous information that should have undermined the optimism in their strategies." Furthermore, general allegations attributed to confidential witnesses about an investigation into sales practices and that 100 of 260,000+ employees did not lead to an inference that the individual defendants knew of fraudulent sales practices. Finally, the court gave short shrift to the core operations doctrine, explaining that "[c]ourts within and beyond this circuit have cast doubt on the continued viability of the doctrine, which pre-dates the PSLRA by several years" and "courts in this circuit have generally invoked the doctrine only to bolster other evidence of scienter, rather than relying on it as an independently sufficient basis." Thus, because the court held that the amended complaint lacked any other allegations of scienter, it rejected the core operations doctrine.

The court similarly dismissed plaintiffs' 1933 Act claims because plaintiffs did not adequately allege any material misstatement or omission, rejecting plaintiffs' allegation that AT&T's Offering Document were misleading because defendants failed to disclose unprofitability and the use of aggressive promotional sales tactics, explaining that these allegations were virtually identical to plaintiffs' 1934 Act claims, without any additional facts, and thus are equally inactionable. The court further held that, even if news articles relied on exclusively by plaintiffs regarding technical problems with DTVN were true, plaintiffs failed to allege that the technical problems were material and thus should have been disclosed in the Offering Documents.

On September 25, 2020, plaintiffs sought leave to file a second amended complaint, which defendants opposed. The motion is now fully briefed and remains pending.

***In re Mindbody, Inc. Securities Litigation*, Case No. 19-CV-8331, 489 F. Supp. 3d 188 (S.D.N.Y. Sept. 25, 2020)**

Privatization Allegedly Tainted By Self-Interest

Mindbody, Inc. is a software company that provides business management and payment software to approximately 67,000 fitness and beauty businesses, such as gyms and yoga studios. In early 2018, MindBody acquired FitMetrix, Inc., which helps gyms track customer data across locations, and Booker Software Inc., a competitor, for $150 million. During the company's first quarter 2018 earnings call in May 2018, the CEO described efforts to integrate the software and personnel of the acquired companies as a "nontrivial matter," and said that, even though efforts "will begin almost immediately," the hope was to "exit 2018 with a

truly unified and aligned business, capable of returning to profitability and growing strongly for years to come."

During the company's second quarter 2018 earnings call on July 31, 2018, the CEO reported "solid progress on [Mindbody's] integration," though he cautioned that integration remained a "massive project that touche[d] every aspect of [Mindbody's] business" and would affect the "outlook for the balance of the year." Because of an anticipated "slight net reduction in sales productivity during this integration period," the CEO stated, "we have lowered the midpoint of our [2018] full year revenue guide by $1 million …"

On November 6, 2018, Mindbody reported its 3Q 2018 earnings and again reduced its 4Q 2018 guidance from $66.8 million–$70.8 million to $65 million to $67 million, citing unexpected operational challenges, including with the Booker integration. During the 3Q 2018 earnings call that day, the CEO and CFO were each asked about their prior optimism regarding integration. The CEO responded that the company's last update concerned results as of the end of August 2018, and at that point, Mindbody was optimistic about the integration, but operational difficulties surrounding the sales teams and the integration reportedly did not become apparent until October 2018. The CFO added that the biggest surprise from 3Q 2018 was "the delay and the elongated deployment [of Mindbody's applications] to the Apple App Store," noting Apple had implemented a new rule in May that Mindbody "had very little data on" and that created a longer timeline than anticipated. On November 7, 2018, Mindbody's stock price fell approximately 20%, from $32.63 to $26.18. Mindbody's 4Q 2018 revenue ultimately outperformed the revised midpoint by $2.3 million.

Meanwhile, in early August 2018, the company's CEO began exploring the possibility of selling Mindbody, meeting with Qatalyst Partners LP, an investment bank, and then with Vista Equity Partners ("Vista"), a private equity firm. On December 24, 2018, Mindbody and Vista announced a proposed privatization of Mindbody, whereby shareholders would receive $36.50 per share, a "significant" "68% premium to the unaffected closing price as of December 21, 2018," which was $21.72. Mindbody filed a preliminary and definitive proxy statement on January 9 and 23, 2019, respectively, both of which reiterated the 68% premium, and stated that accepting Vista's offer was "in the best interests of the Company and its shareholders," and claimed that "Vista and Mindbody had not engaged in any employment or retention-related discussions with regard to Mindbody management." Two weeks after the definitive proxy statement, on February 7, 2019, Mindbody filed supplemental proxy materials that revised the employment statement to reflect that "certain of [Mindbody's] executive officers may already have had, or may have discussions, and following the closing of the Merger, may enter into agreements … regarding employment with, or the right to purchase or participate in the equity of, the Surviving Corporation." On February 14, 2019, shareholders voted to approve the transaction, which closed the next day.

On September 6, 2019, investors filed a putative class action lawsuit against Mindbody, its CEO, its CFO, and a member of its board of directors alleging violations of Sections 10(b), 14(a), and 20(a) of the 1934 Act and Rules 10b-5 and 14a-9 promulgated thereunder on the grounds that defendants falsely depressed the company's stock price by announcing an unwarranted

negative outlook for 4Q 2018 to facilitate privatization at a below-market price, and failed to disclose, before shareholders voted on the deal, that 4Q 2018 results exceeded expectations or their intentions to continue working for Mindbody after the company went private.

Defendants moved to dismiss the first amended complaint, which the court granted in part, holding that plaintiffs pleaded actionable statements or omissions based on defendants' alleged failure to disclose 4Q 2018 revenue figures after January 5, 2019, and based on defendants' denials of employment discussions with Vista prior to the signing of the merger agreement, but dismissing plaintiffs' claims in all other respects.

First, the court held that plaintiffs adequately pleaded a Section 10(b) claim based on allegations of defendants' purported failure to disclose better-than-expected 4Q 2018 revenue figures after January 5, 2019, because the unexpectedly positive performance was substantially likely to affect shareholders' assessment of share value and defendants were aware of the over-performance before the shareholder vote on the Vista transaction. The court stated there was "no serious question" that plaintiffs pleaded scienter, reasoning that alleged emails from the CEO and CFO on January 5 and 8, 2019, discussing preliminary 4Q 2018 revenue of $68.3 million which was a "massive beat" against the 4Q 2018 "consensus midpoint of $66 million" established that defendants knew then that Mindbody had beaten its reduced 4Q 2018 revenue guidance and realized the significance. The court further held that allegations that the CFO emailed the audit committee on January 24, 2019, recommending that this information be disclosed, but that it was not before the shareholders voted on the transaction, adequately pleaded that defendants deliberately (or, at minimum, recklessly) withheld the information from shareholders prior to their vote.

Second, the court held that plaintiffs adequately pleaded that defendants misrepresented the extent to which Mindbody and Vista discussed employment and other incentives for Mindbody's management in attempt to portray Mindbody's management as neutral arbiters of Vista's proposal. The court reasoned that plaintiffs' allegations that the CEO told Qatalyst in early August 2018 that his condition for selling Mindbody to a private equity fund was the retention of existing management, that the CEO emailed the CFO and others that the a sale to Vista "would not be an automatic 'exit' for any of us or our princip[als,]" and that Vista's offer letter emphasized its interest in "partner[ing] with superior management teams," taken together, "paint a compelling picture of a CEO who minimized and hid the extent to which he made his own employment prospects a top priority," rendering misleading defendants' statements concerning Mindbody's personal interests and discussions with Vista, including the preliminary and definitive proxy statements' indication that "[a]t the time of the signing of the Merger Agreement, Vista and M[indbody] had not engaged in any employment or retention related discussions …" The court next held plaintiffs pleaded scienter because the CEO "was undoubtedly aware of his own discussions with Vista…." Finally, the court determined the misrepresentation was material on the basis that investors may have considered the CEO's interest in his own employment as an indication "that his priorities were misplaced, and that his evaluation of the benefits to shareholders was less than rigorous."

The court rejected plaintiffs' remaining allegations of misstatements or omissions, on the grounds that they were inactionable forward looking statements or otherwise immaterial. The court held that defendants' 4Q 2018 guidance reduction was not actionable because the statements were forward looking and plaintiffs failed to allege that defendants knew that their statements were inaccurate, reasoning that defendants' early optimism about integration was not inconsistent with integration issues emerging in October 2018 and resulting in the company altering its 4Q 2018 expectations. The court also rejected plaintiffs' allegation that defendants' proxy materials were misleading because they failed to disclose Vista's interest in acquiring Mindbody in 2015 before the company went public, stating that it could not "conceive of why Mindbody's apparent rejection of Vista's offer (if there was one) in 2015 would be material to shareholders deciding in 2019 whether to sell to Vista." The court similarly rejected plaintiffs' assertion that defendants misstated or omitted the fact that they gave Vista preferential treatment during the deal process, acknowledging that "absent a misleading statement to the contrary[,]" which plaintiffs did not allege, "there is no duty under federal securities law to disclose that a potential buyer received preferential treatment during the bidding process."

The court summarily disposed of plaintiffs' Section 10(b) claim premised on "scheme liability," pleaded as a separate count, reasoning the entire "conduct" or "scheme" plaintiffs complained of was the dissemination of misleading information rendering it "indistinguishable from the misstatements and omissions alleged," in support of plaintiffs' other Section 10(b) count. The court did, however, hold that plaintiffs adequately alleged violations of Sections 14(a) and 20(a) of the Exchange Act and Rule 14a-9 promulgated thereunder, based on the same reasons the court held plaintiffs adequately alleged a Section 10(b) claim based on defendants' post-January 5, 2019, statements or omissions about Mindbody's share price and defendants' misstatements about the CEO's pre-signing employment discussions with Vista.

Defendants answered on October 30, 2020. On February 24, 2021, plaintiffs moved for leave to file a second amended complaint. The court stayed discovery and vacated other case deadlines pending resolution of that motion.

Panther Partners Incorporated v. Jianpu Technology Inc., Case No. 18 CIV. 9848 (PGG), 2020 WL 5757628 (S.D.N.Y. Sept. 27, 2020)

Noncompliance With Chinese Regulations

Jianpu Technology Inc. ("Jianpu"), is a Beijing-based holding company whose stock is traded on the U.S. stock exchange, that, through its subsidiaries, operates an online platform that provides users with research and recommendations on financial products in the People's Republic of China ("PRC"). The company's revenues are primarily generated from fees paid by financial service providers for loan recommendation services.

Beginning in August 2016, the China Banking Regulatory Commission ("CBRC") began issuing interim regulations ("the Interim Measures") prohibiting peer-to-peer ("P2P") companies from engaging in certain business activities, capping the amounts they can lend, and requiring them to obtain operating licenses and to deposit investor funds in escrow accounts at qualified custodial banks. Specifically, in April 2017, the CBRC issued interim regulations prohibiting annualized interest rates and fees in excess of 36% and stating local authorities and regulators should strictly enforce the Interim Measures.

On October 20, 2017, Jianpu filed its first draft foreign entity Registration Statement and draft Prospectus ("Offering Documents"), in connection with its IPO in the United States. The Registration Statement acknowledged that while a major growth factor was its favorable positioning in the Chinese regulatory environment, and the "proliferation of new financial service providers," its business, financial condition, and results of operations could be negatively affected by "regulatory uncertainties to online consumer finance in China" and the possibility that Jianpu could be subjected to new Chinese laws and regulations targeting financial service providers engaging in loan recommendation services on its platform. The Registration Statement stated that the Chinese government had not yet adopted "a clear regulatory framework" but warned the CBRC might adopt "a more stringent regulatory framework" and could enhance existing regulations related to fees and interest charged by financial service providers and the prohibition of unlicensed providers. The Registration Statement did not disclose the extent of Jianpu's existing liability, such as whether and how many of its platform users charged excessive interest rates or were unlicensed, in violation of the Interim Measures.

On November 17, 2017, Jianpu filed its final IPO Registration Statement and Prospectus and sold 22.5 million American Depository Shares at $8.00 per share, raising net proceeds of approximately $164.9 million. On December 1, 2017, the CBRC issued a series of financial regulations officially prohibiting loans with interest rates above 36% and banning unlicensed organizations and individuals from engaging in the lending business. On December 8, 2017, Chinese regulators issued further regulations that required P2P companies to comply with the 2016 Interim Measures to qualify for licensing.

On December 12, 2017, Jianpu's top executives disclosed on a conference call that "non-licensed financial institutions" were responsible for "around 12% of [Jianpu's] total revenue in November." On May 29 2018, Jianpu issued a press release announcing its first quarter 2018 financial results, showing growth in revenue from loan recommendation services slowed to an increase of 46.5% year-over-year from 429% year-over-year in the previous quarter. This trend continued throughout fiscal year 2018, resulting in a 9.3% year-over-year decrease in revenue from loan recommendation services. Jianpu stated that the decrease in annual revenue was "primarily due to the decrease in the number of loan applications of the Company's platform" which was attributable in part to "adjustments pertaining to the new regulatory framework since December 2017." Jianpu's share price continued to decline. As of the filing date of plaintiff's complaint, Jianpu's ADSs traded at $4.75 — a 40% decline from its IPO share price.

An investor brought a putative class action against Jianpu, its parent company Rong360 Inc., its directors, its designated New York agents for service, and its IPO underwriters, alleging violations of Sections 11, 12(a)(2) and 15 of the 1933 Act. Plaintiff alleged that the IPO Offering Documents "failed to disclose the extent to which existing regulations in China, as well as the risk of heightened regulatory enforcement, threatened Jianpu's revenues from loan recommendation services — the source of 80% of its revenues at the time of the IPO." The complaint alleged two categories of misstatements: (1) that the Registration Statement failed to disclose Jianpu's exposure to service providers utilizing its platform that would be subject to the Interim Measures and (2) that the Registration Statement failed to disclose that "a material portion" of the loans offered on Jianpu's platforms had interest rates above 36%, as prohibited by the Interim Measures.

Defendants moved to dismiss, and the court denied the motion in full, holding that plaintiff adequately pled actionable omissions as to pre-IPO violations

of the PRC's Interim Measures and the 36% APR cap by financial services providers operating on Jianpu's platform. The court held that plaintiff sufficiently alleged that there was material information available to defendants, which they did not disclose in Jianpu's Offering Documents, but were obligated to disclose under Items 303 and 503 of Regulation S-K, about "(1) financial services providers' non-compliance with the Interim Measures; (2) the fact that many of these financial services providers used Jianpu's platform; and (3) the possible effects of their non-compliance on Jianpu's business."

The court rejected defendants' argument that Jianpu had no duty to disclose a pre-IPO market-wide decline in P2P lenders because plaintiff failed to allege an impact on Jianpu, noting that a pre-IPO report by a China-based financial web portal stated "75% to 90% of the participants" in the P2P market were in violation of the Interim Measures, which "ma[de] plausible Plaintiff's allegation that…many of the 746 financial services providers operating on Jianpu's platform were also violating the Interim Measures." Coupled with Jianpu's own acknowledgement just a few weeks after the IPO that around 12% of Jianpu's total revenue resulted from non-licensed financial institutions — which exceeded the 5% threshold for presumptive materiality under prior securities law precedence — the court concluded that plaintiff adequately pled facts to further support the inference that "a significant portion of financial service providers operating on Jianpu's platform were violating the Interim Measures."

The court also concluded that plaintiff sufficiently alleged that defendants failed to adequately disclose the existence and extent of the P2P financial service providers operating on Jianpu's platform that were violating the Interim Measures and the effect that those violations would have on Jianpu's financial returns. The court noted that although the Registration Statement specifically mentioned licensing requirements and warned that the PRC government regulates the conduct of licensing and permit requirements for companies in the internet industry, these disclosures "[did] nothing to inform investors that financial services providers operating on Jianpu's platform do not currently hold such licenses" as the risk disclosures were "general statements" that were "all framed as hypotheticals." In evaluating the Prospectus as a whole, the court held that defendants did not adequately disclose the risks associated with the Interim Measures, as the disclosures portrayed a "bullish" P2P lending market without disclosing that the PRC already adopted the regulatory framework and without disclosing the complete context of the financial services market, which would have included the existing rapid contraction of the P2P market.

With respect to the Interim Measures' prohibition on interest rates exceeding 36%, the court concluded that plaintiff adequately pled the pre-IPO existence of material risks associated with such prohibitions, noting that defendants' dispute with the precise date in which the cap was instituted precluded dismissal of the claims based on "material factual disputes" which could not be resolved at the motion to dismiss stage. The court also found defendants' risk disclosures insufficient and too vague because they were framed as hypotheticals and failed to explain the nature and magnitude of the risk that violations of the 36% APR cap posed to Jianpu's business.

The court also concluded that the doctrine of negative loss causation did not bar plaintiff's claims because, as an affirmative defense, defendants failed to meet their burden of proof. The court held that plaintiff plausibly alleged defendants' concealment of the "then-existing" business risks associated with pre-IPO Interim Measures violations and 36% APR cap, and the adverse effect to Jianpu's revenue from loan recommendation services. The court explained "that Jianpu's business did not decline until after the IPO [was] not inconsistent with Plaintiff's allegation that the risk posed by pre-IPO violations materialized in the face of greater enforcement."

On November 12, 2020, defendants answered the amended complaint. Fact discovery is set to close on September 30, 2021, and expert discovery is set to close February 1, 2022. A trial date has not been set.

In re Micro Focus International PLC Securities Litigation, Case No. 1:18-CV-06763-ALC, 2020 WL 5817275 (S.D.N.Y. Sept. 29, 2020)

Post-Merger Integration Issues

Micro Focus International ("Micro Focus") is a publicly traded UK-based infrastructure software company that develops, sells, and supports software products and solutions to businesses and various governmental entities. Micro Focus' software helps customers build, operate and secure IT systems that bring together existing business logic and applications with emerging technologies to meet increasingly complex business demands.

On September 7, 2016, Micro Focus announced that it would purchase HPE Software, an enterprise and software operating unit of Hewlett Packard Enterprises, which would be spun out and merged into Micro Focus. On August 4, 2017, Micro Focus filed its Registration Statement and issued approximately 222 million American Depositary Shares of the combined company, which would continue to operate under the name

Micro Focus. The Registration Statement included risk factors stating that customer and salesperson attrition, among other things, might derail the merger. Micro Focus issued several post-merger corrective disclosures concerning problems within HPE's software after the spinoff, the company's difficulty executing sales, and significant employee attrition. After each of these corrective disclosures, Micro Focus' ADS value dropped, ultimately dropping more than 55% from the date of the merger. In its August 29, 2019 disclosure, Micro Focus announced it was undertaking a strategic review of its operations. The following day, Micro Focus' stock price dropped 31% from $18.89 to $12.98.

Investors filed a putative class action against Micro Focus, certain executives, and its directors alleging violations of Sections 11, 12, and 15 of the 1933 Act and Sections 10(b) and 20(a) of the 1934 Act based on allegedly false and misleading statements made in the Registration Statement and throughout the alleged three-year class period, including in corrective disclosures following completion of the merger. Plaintiff amended the complaint on November 9, 2018, which defendants moved to dismiss on January 22, 2019. This motion was mooted when plaintiff filed the second amended complaint on September 30, 2019, which defendants moved to dismiss on November 4, 2019, which the court granted on September 29, 2020, holding plaintiff failed to plead falsity.

First, the court dismissed plaintiff's Section 10(b) claims in full for repeated failure to plead falsity and materiality, and also dismissed plaintiff's Section 20(a) and 15(a) claims given the failure to plead a primary violation. Regarding Micro Focus' pre-merger statements on September 7-8, 2016 in a press release, SEC filing, presentation, and M&A call, including that the merger "had the potential to deliver shareholder returns superior to those likely to be achieved on an organic basis" and the "scope to improve HPE Software's profitability through the application of our disciplined operating model," the court held that these statements were inactionable, immaterial puffery. Similarly, statements that the merger was "a huge opportunity for efficiency improvement" that presented "a mix of opportunities to consolidate, to create scale in key segments that we operate in on products which are often adjacent to what we currently do" and offered "a significant operational efficiency opportunity" were statements of optimism and were too vague such that no reasonable investor would find them material. The court also held that plaintiffs pled no facts showing Micro Focus did not plan to integrate their system with the HPE Software system following the merger and thus had failed to plead falsity to the extent plaintiffs alleged the pre-merger statements contained statements of present facts regarding post-merger integration. The court held that plaintiff also failed to plead facts showing the statements of opinion about the merger were disbelieved by Micro Focus when made.

The court also rejected plaintiff's allegations that Micro Focus' risk disclosures that HPE Software may experience significant disruptions in global customer accounts from its de-merger from HP, and HPE Software and Micro may experience employee attrition, were misleading because plaintiff failed to plead facts that the warned-of risks had already materialized in August 2017 when the statements were made. In doing so, the court also held that the plaintiff failed to plead facts showing the risks of customer attrition had transpired and was widely known throughout the company, and declined to rely on confidential witness statements, noting the statements of former employees relayed their "personal experiences" which were inactionable, "unremarkable circumstances short of fraud." The court also held that defendant had no duty to disclose alleged adverse trends because plaintiff had failed to plead such trends had emerged at the time of the August 2017 statements.

In dismissing plaintiff's claims that post-merger misstatements regarding revenue performance, financial reporting, and customer and employee attrition were false or misleading, the court reiterated that (similar to the pre-merger statements) these statements were inactionable forward-looking statements of opinion and optimism and puffery — not materially false and misleading to investors. The court also dismissed plaintiff's Section 11 and Section 12(a)(2) claims on the basis that plaintiff failed to plead actional misstatements and omissions.

Uxin Limited Securities Litigation, Case No. 650427, 125 N.Y.S. 3d 537 (N.Y. Sup. Ct. Mar. 9, 2020)

Sufficient Disclosures Of Business Risk

Uxin Limited ("Uxin"), a Beijing-based company, operates a used car e-commerce platform in China. The platform's two main services are Uxin Used Car (the "2C Business"), which provides consumers with customized car recommendation, financing, title transfer, delivery, insurance referral, warranty, and other related services; and Uxin Auction (the "2B Business"), an application that helps business buyers to source vehicles online either from consumers (the "C2B" component) or from other dealers (the "B2B" component).

On June 27, 2018, Uxin completed a $200+ million IPO, selling 25 million American Depository Shares at $9 per ADS. In conjunction with its IPO, Uxin filed a Prospectus and Registration Statement ("Offering Documents") with the SEC, which detailed its two main service revenue sources, including its partnership with third party

inspection and C2B services. The Prospectus also warned that a failure to provide "a differentiated and superior customer service" could have a material and adverse effect on Uxin's business and that Uxin "cannot guarantee" that it can provide such an experience to its customers as its business continued to evolve.

In an August 22, 2018 press release, Uxin announced that it was shrinking the scope of its 2B Business and ceasing to provide inspections and ancillary services to consumers with car-selling needs in connection with the C2B sales. That day, Uxin's stock price increased by 6%. Thereafter, on November 20, 2018, Uxin issued a press release following its third quarter 2018 earnings — the first quarter reflecting the new exclusion of certain C2B services from the 2B Business — reporting that Uxin's transaction volume associated with its 2B Business declined 8.5% year-over-year and the associated gross merchandise value ("GMV") declined 14.8% year-over-year. That day, Uxin's ADS price fell 11%.

Investors filed a putative class action against Uxin, certain of its senior executives and directors, and its IPO underwriters, alleging violations of the 1933 Act, contending that the Registration Statement misleadingly touted Uxin's existing business model and services without disclosing that it was likely to stop providing certain C2B services and risks to the business therefrom. Meanwhile, the decreased transaction volume for the 2B Business continued into the fourth quarter 2018, which Uxin stated was due to its change of approach to its C2B services.

On April 16, 2019, a short-seller entity called J Capital Research ("J Capital") issued a report claiming that Uxin grossly inflated its revenues, transaction volumes, car values and inventories, and understated its debt load. That day, Uxin's stock closed at $1.95 per ADS — a 78% decline from the IPO price. On April 22, 2019, Uxin publicly denied the allegations in the J Capital report.

Investors filed a consolidated amended complaint thereafter, adding allegations based on the J Capital report that the Offering Materials were materially misleading because they overstated Uxin's revenues, price of cars sold on Uxin's platform, and automobile listing inventory, and understated Uxin's debt load. Defendants moved to dismiss the complaint which the court denied in part and granted in part. Specifically, in a March 9, 2020 order, the court dismissed the Sections 11 and 12(a)(2) claims predicated upon the 2B Business change, but allowed the claims to proceed based on alleged misstatements regarding Uxin's financial condition.

As an initial matter, the court refused to apply a heightened pleading standard arising under New York state law, explaining that the Sections 11 and 12(a)(2) claims are essentially negligence claims — the defendants' state of mind was not relevant, as scienter is not required. The court concluded that statements in the Registration Statement were neither false nor misleading simply because the 2B Business change occurred. The court reasoned that the consolidated amended complaint failed to allege "that [ ] anything concerning the inspections and/or the B2 Business was known or should have been known to be false at the time of the IPO, and to the extent that the plaintiffs claim that the offering documents did not disclose that dropping these services would result in a corresponding decrease in transactions on its 2B platform or disclose the magnitude that such a change would have on the company's business, this claim is directly contradicted by the offering documents[.]" The court also rejected plaintiffs' contention that Item 303 of SEC Regulation S-K required Uxin to disclose its post-IPO decision to change its 2B Business, reiterating that the consolidated amended complaint failed to allege any actual facts to support an inference that defendants knew of the alteration to Uxin's 2B Business or thought it was reasonably likely at the time of the IPO. The court reiterated that, as the "Second Circuit has explained, statements in offering materials simply reflect company policy at the time that they are made, and are 'not promises to maintain that policy in the future' or 'rendered misleading by the company's subsequent consideration of an alternative plan.'" The court further held that such a "business strategy decision" is not the type of decision Item 303 requires, and nonetheless, the Prospectus disclosed that changes in services and business strategy was a material risk.

The court reiterated that, as the "Second Circuit has explained, statements in offering materials simply reflect company policy at the time that they are made, and are 'not promises to maintain that policy in the future' or 'rendered misleading by the company's subsequent consideration of an alternative plan.'"

However, the court allowed plaintiffs' claims to proceed with respect to alleged misleading statements about Uxin's financial condition based on the J Capital report. Applying Second Circuit precedent, the court noted that federal courts allowed securities claims to go forward at the pleadings stage based on short seller reports. Although it acknowledged that short seller

reports can be unreliable and that Uxin denied the J Capital report allegations, the court held that this was a question of fact that could not be decided at this phase. The court further supported this decision by adopting plaintiffs' position advanced in its opposition papers that certain of Uxin's own later disclosures tended to corroborate claims made in the J Capital report regarding Uxin's inflated sales volumes.

In March 2020, defendants filed a notice of appeal regarding the surviving claims. In May 2020, plaintiffs filed a notice of cross-appeal regarding the dismissed claims. The appeal has been adjourned until the September term because the parties have agreed to a settlement in principle of all claims, and are awaiting court approval.

In re Netshoes Securities Litigation, Case No. 157435/2018, 126 N.Y.S. 3d 856 (N.Y. Sup. Ct. June 2, 2020)

Improper Revenue Recognition Spurs Write-Downs

Netshoes Cayman Limited ("Netshoes") is a Brazilian-based online retailer focused on the sports, fashion, and beauty ecommerce markets. On April 12, 2017, Netshoes successfully completed an IPO, issuing approximately 8.25 million shares of common stock at $18 per share and raising approximately $148.5 million in gross proceeds. The Registration Statement and Prospectus filed in conjunction with the IPO (the "Offering Documents") contained financial projections and Netshoes' 2016 financial statements and represented that they were prepared in accordance with the International Financial Reporting Standards ("IFRS"). The Offering Documents also promoted Netshoes' new business-to-business ("B2B") strategy — selling and distributing nutrition supplements and vitamins to drugstores and supermarkets in Brazil — as a growth vehicle. Between August 2017 and May 2018, the company reported issues with its B2B segment each quarter. For instance, on August 14, 2017, the company reported that net sales, gross profit, and EBITDA were negatively impacted by significant returns recorded in its B2B segment. On November 13, 2017, the company reported that net sales were once again adversely impacted by, among other things, returns in the B2B business. And on May 14, 2018, Netshoes posted an increased operating loss with nearly half coming from B2B returns. The next day, the company's stock dropped 44%.

An investor filed a putative class action against the company, its officers and its directors, alleging that the company's Offering Documents included misrepresentations and omissions in violation of Sections 11, 12, and 15 of the 1933 Act. Specifically, plaintiff alleged that Netshoes' post-IPO write-downs proved the company's B2B segment "must have had" a returns policy that Netshoes failed to disclose in its Offering Documents, resulting in misstated financial statements and contradicting representations that such financials complied with IFRS. The court granted defendants' motion to dismiss, with leave to amend, ruling that plaintiff failed to plead contemporaneous facts to support that Netshoes' income was overstated and instead relied on a fraud-by-hindsight theory, positing the existence of an undisclosed policy based on the post-IPO write-downs.

Plaintiff filed a second amended complaint based on the same claims and theories, but added more specific allegations that Netshoes negotiated rights of return on purported sales to businesses such that the "sales" were wholly contingent on the customers' resale of the goods to end-user consumers. Plaintiff supported this claim with various new factual allegations, including statements from a sworn declaration of an executive of a Netshoes' distributor filed in separate litigation, stating that, in 2016, Netshoes representatives directly negotiated "special terms such as deferred payment and the right to return any product that did not sell in a timely manner" with its B2B customers. The executive further attested that Netshoes negotiated those terms in exchange for its clients' agreement to take increased deliveries on products. Thus, plaintiff alleged, the Offering Documents' financial statements, analysis and projections relied on misstated revenue and accounts receivable that was improper under IFRS. Defendants again moved to dismiss, though this time the court denied the motion.

> The court further held that the financial projections in the Offering Documents were not protected forward looking statements, because, based on plaintiff's allegations, they were "based on an improper factual predicate" and thus did not actually depend on any future events.

After determining that the heightened pleading standard does not apply to plaintiff's 1933 Act claims because they sound in negligence rather than fraud, the court held that, unlike the conjecture in the prior complaint, plaintiff now sufficiently alleged falsity. The court explained that allegations that Netshoes representatives negotiated rights of return prior to the IPO, if true, supported plaintiff's theory that defendants

had a reason to know the financial information in the Offering Documents' was materially false and misleading and that the speaker did not genuinely or reasonably believe it. The court further held that the financial projections in the Offering Documents were not protected forward looking statements, because, based on plaintiff's allegations, they were "based on an improper factual predicate" and thus did not actually depend on any future events.

The court further held that plaintiff adequately pled an actionable omission. It reasoned that Netshoes' omission of information in its Offering Documents regarding its B2B revenue and returns policy was sufficiently important to Netshoes' statements about revenue to render those statements and accompanying financials misleading. The court was not persuaded by defendants' argument that the alleged accounting misstatements were immaterial because Netshoes' B2B segment represented only 4.3% of overall revenue, stating that defendants' argument "misse[d] the point," as Netshoes' B2B segment was an unproven business defendants specifically promoted as a growth vehicle during the IPO without acknowledging that the segment was losing money. It held that this was "unquestionably material" under the circumstances because the "revenue figures are the *sine qua non* of what investors are interested in when they make this type of investment."

After allowing the Sections 11 and 12(a)(2) claims to proceed, the court similarly allowed the Section 15 claim to proceed. The court held that allegations that the defendants reviewed, contributed to and signed the Offering Documents, and that they were controlling persons based on their positions within the company, was sufficient at this stage of the pleadings.

On July 2, 2020, defendants filed a notice of appeal. The case subsequently settled.

Second Circuit Cases to Watch

***In re Micro Focus International PLC Securities Litigation*, Case No. 20-3686 (2d Cir.)**

Post-Merger Integration Issues

As discussed above, Micro Focus is an infrastructure software company that develops, sells, and supports software products and solutions to businesses and various governmental entities. Micro Focus' software helps customers build, operate, and secure IT systems that bring together existing business logic and applications with emerging technologies to meet increasingly complex business demands.

On September 7, 2016, Micro Focus announced that it would purchase HPE Software, an enterprise and software operating unit of Hewlett Packard Enterprises, which would be spun out and merged into Micro Focus. On August 4, 2017, Micro Focus filed its Registration Statement and issued approximately 222 million American Depositary Shares of the combined company, which would continue to operate under the name Micro Focus. The Registration Statement included risk factors stating that customer and salesperson attrition, among other things, might derail the merger. Micro Focus issued several post-merger corrective disclosures concerning problems within HPE's software after the spinoff, the company's difficulty executing sales, and significant employee attrition. After each of these corrective disclosures, Micro Focus' ADS value dropped, ultimately dropping more than 55% from the date of the merger. In its August 29, 2019 disclosure, Micro Focus announced it was undertaking a strategic review of its operations. The following day, Micro Focus' stock price dropped 31% from $18.89 to $12.98.

Investors filed a putative class action against Micro Focus, certain executives, and its directors alleging violations of Sections 11, 12, and 15 of the 1933 Act and Sections 10(b) and 20(a) of the 1934 Act based on allegedly false and misleading statements made in the Registration Statement and throughout the alleged three-year class period, including in corrective disclosures following completion of the merger. On September 29, 2020, the U.S. District Court for the Southern District of New York dismissed the complaint, holding plaintiff failed to plead falsity. On October 27, 2020, plaintiff appealed that decision to the U.S. Court of Appeals for the Second Circuit on October 27, 2020. The opening brief was filed on February 4, 2021, with the responsive brief due May 6, 2021.

***Gray v. Alpha and Omega Semiconductor Limited et al.*, Case No. 1:20-cv-02414-RA (S.D.N.Y.)**

DOJ Investigation Into Regulatory Violations

Alpha and Omega ("Alpha") designs, develops, and supplies power semiconductors to a variety of markets, including the consumer, communications and industrial markets. Alpha primarily sells its products to distributors in the Asia Pacific region who in turn sell the products to original equipment and design manufactures that incorporate Alpha's products into their end applications.

Huawei Technologies Co., Ltd ("Huawei"), a China-based telecommunications provider, was one of Alpha's largest customers since, at least, 2016 through 2020. On May 15, 2019, President Trump issued an Executive Order banning U.S. companies from conducting business or using information and communications with companies considered a "national security threat," which included Huawei and 68 of its affiliates. In August 2019, 46 additional Huawei affiliates were added to the list of banned companies. It was possible, however, to apply for special licenses to continue shipping to companies subject to the Executive Order.

In August 2019 — the first financial announcement since the restrictions were imposed on Huawei — Alpha issued an earnings press release, held an

earnings call, and filed its Form 10-K with the SEC announcing strong sales performance and expected future sales performance for the fourth quarter and fiscal year 2019. Alpha's Form 10-K also contained risk disclosures warning of harm it could face from trade restrictions and other regulatory restrictions applicable to China-exported products. In November 2019, Alpha again reported strong financial results for its first quarter of fiscal year 2020 and issued solid guidance for its second quarter 2020. During a related investor call, Alpha's EVP of Marketing acknowledged "some softness in the 5G telecom business during the September quarter in the midst of trade tensions" but that the company "expect[ed] to maintain this segment's revenue in the December quarter." Alpha also reiterated the prior risk disclosures in its November 2019 Form 10-Q filed with the SEC.

On February 5, 2020, Alpha issued a press release announcing financial results for its second quarter of 2020 and disclosed that the U.S. Department of Justice recently began investigating Alpha for compliance with export control regulations relating to certain business transactions with Huawei and requested that the company suspend shipments of its products to Huawei. Alpha also disclosed that its financial performance in the March 2020 quarter would be negatively impacted by around $4 million to $5 million in revenue due to the shipment interruption, and it expected to incur $1 million to $2 million in professional and legal fees that quarter associated with the investigation. On February 6, 2020, Alpha's stock fell 12%.

On February 10, 2020, Alpha disclosed in its Form 10-Q that from May 2019 through December 2019 its estimated revenue from shipments to Huawei was $11 million to $13 million, and approximately $9 million of that (2% of total revenues) was during the fiscal year ending June 30, 2019.

Investors filed a putative class action lawsuit against Alpha and certain of its officers alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder based on alleged false and misleading statements and material omissions about the company's positive business, operations, and prospects in connection with Huawei and Alpha's vulnerability and adherence to federal regulations. On June 1, 2020 a lead plaintiff was appointed and on August 28, 2020, the lead plaintiff filed a consolidated amended complaint. On October 27, 2020, defendants moved to dismiss the amended complaint which the court has taken under submission.

***Plumbers and Pipefitters Nat'l Pension Fund, et. al., v. Tableau Software, Inc., et. al.*, Case No. 17-CV-5753 (S.D.N.Y.)**

Competitive Harm

Tableau Software, Inc. ("Tableau") is a company that produces software products to help people query, analyze, and visualize data more easily. Throughout 2015, the company issued projections which did not account for any decline in technology deployment, and made public statements that there had been no major competitive shifts since its 2013 IPO. On February 4, 2016, the company announced in its Form 10-K that an income tax expense due to recognition of a $46.7 million valuation allowance would likely disallow the company from generating income sufficient to realize its deferred tax assets. Later that day, during an analyst call, the company announced that the competitive dynamic in the field had become more crowded and difficult over the years. The next day Tableau's stock price dropped by almost 50% from $81.75 per share to $41.33 per share.

Investors filed a putative class action against Tableau and its officers alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder in connection with statements in which defendants claimed a lack of problems from competition despite being aware that increased competition from companies such as Microsoft

and Amazon was causing customers to delay and cancel pending license orders, which would impact Tableau's revenue. On March 4, 2019, the court denied defendants' motion to dismiss the second amended complaint, holding that plaintiffs adequately alleged false or misleading statements, scienter, and loss causation.

On January 16, 2020, the court certified the class. Discovery is ongoing and deadlines to file Summary Judgment and *Daubert* motions have been stayed as discovery proceeds.

POST

First Circuit

***In re Wayfair Inc. Sec. Litig.*, Case No. 1:19-cv-10062-DPW, 471 F. Supp. 3d 332 (D. Mass. 2020)**

Wayfair Inc. ("Wayfair") is a global online home goods retailer. On July 1, 2019, certain Wayfair shareholders filed an amended consolidated class action complaint against Wayfair, its CEO, board co-chair, and CFO alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. In the complaint, plaintiffs alleged that as online retail has grown and as Wayfair has faced increasing competition, Wayfair needed to spend more and more money on advertising to leverage revenue. Plaintiffs alleged that, as a result, during the class period (August 2, 2018 — October 31, 2018), Wayfair's advertising-revenue leverage was "worse" (i.e., deleveraged) than in previous years, and, more specifically, contended that Wayfair's November 1, 2018 third quarter 2018 Form 10-Q "revealed" that the company narrowly missed its advertising-revenue leverage financial projection. Plaintiffs asserted that the defendants knew but concealed from investors that their advertising leverage would decrease and made false statements regarding Wayfair's advertising-revenue leverage and the company's overall financial position. Plaintiffs also alleged that the individual defendants capitalized on an artificial increase in stock price over the class period by collectively selling $69 million of their own shares in transactions from August to October 2018.

On August 30, 2019, defendants moved to dismiss the amended complaint. The court granted the motion to dismiss with prejudice on July 8, 2020, noting in its first sentence that the amended complaint was filed by "several individuals who say they [] lost money" because Wayfair "missed its quarterly financial projection by .002% one quarter." In sum, the court concluded that (i) the challenged statements were either inactionable puffery, forward looking statements accompanied by meaningful cautionary language which were protected by the PSLRA's safe harbor, or bare allegations of omissions; (ii) allegations of general knowledge of finances and stock sales were insufficient to plead scienter; and (iii) plaintiffs failed to plead loss causation.

The court further rejected plaintiffs' allegations that Wayfair misled investors by omitting that it was significantly increasing ad spending in the face of competition, that its increase in operating expenses reduced the company's margins, that the company was unable to drive positive revenue growth, and that the company was becoming increasingly less profitable due to escalating advertising and operating expenses needed to maintain revenue growth. In doing so, the court noted that it was "obvious" from Wayfair's public statements "and [from] the fact that it increased advertising spending year to year over the most recent years" that Wayfair's ad spending increased.

The court also rejected plaintiffs' scienter arguments. First, the court disagreed that, because defendants were intimately involved in Wayfair's finances and operations, they knew Wayfair's financial position was worse than disclosed to the market, holding such argument was "akin to saying that any time a company's financial projection is wrong, the speaker has engaged in securities fraud." Second, the court rejected plaintiffs' argument that the individual defendants' trading activity throughout the class period evidenced scienter, concluding that the trades appeared to be evenly spaced throughout the period, and none were suspiciously close to the class period high. The court observed that the CEO and the board co-chair both had significant trades just two days before the disappointing Q3 2018 financial results were announced, but held that plaintiffs failed to plead that the stock trades were abnormal or unusual, which was necessary to support scienter. Instead, the court held that the evidence suggested the opposite given that the trades were executed pursuant to 10b5-1 trading plans, the CEO and board co-chair only decreased their holdings by 2% overall, and the CFO actually increased his holdings by 22%.

Finally, the court concluded that plaintiffs had not adequately pled loss causation because the loss emanated only from the disclosure of negative information without a prior false or misleading statement. The court concluded plaintiffs' Section 20(a) claim also failed in the absence of a predicate Section 10(b) violation.

Toussaint v. Care.com, Inc., Case No. 1:19-cv-10628, 2020 WL 5751527 (D. Mass. Sept. 25, 2020)

Background Checks And Verification Of Information On Marketplace Platform

Care.com, Inc. ("Care.com") is an online marketplace for finding and managing family care. The company distinguishes itself from other platforms, such as Craigslist, based on the company's screening and vetting procedures for caregivers listed on its website. On May 23, 2016, the company's founder and CEO stated at an investor conference: "We have [ ] about 7 million caregivers that we have vetted.... [W]e continue to invest [in safety] and it has been the baseline product from day one, [we have] invested in background checking that include[s] national criminal record [and] sexual offender registry." At other industry conferences, in numerous investor presentations, and in SEC filings from 2016 through early 2019, the company and its officers frequently made similar statements promoting the company's trustworthiness and reliability relative to competitors based on the company's security, "quality control" measures, and its "trusted brand." The company also stated in its Forms 10-K and 10-Qs for 2016, 2017, and 2018 that it served "day-care centers" that "wish to market their services to our care-seeking families," and described its "proactive screening of certain member information." The company warned in its Forms 10-K for 2016, 2017, and 2018 of the business risk of "negative publicity" affecting its brand.

In March 2019, the *Wall Street Journal* published an article in which the company's CEO stated that "Care.com is a marketplace platform, like Indeed or LinkedIn. Like those services, we do not generally verify the information posted by users, interview users or conduct employment-level background checks." She also stated that the company relied on a model of "shared responsibility," meaning customers could either conduct their own background checks or pay Care.com to do so. The article further reported that it "found hundreds of instances in which day-care centers appeared to be falsely listed on Care.com as being licensed," that some listed centers appeared not to exist, and that a spokesperson for the company stated that it adds listings based on "publicly available data."

On March 11, 2019, the company issued a Form 8-K stating that it would change its caregiver screening practices and that it would "no longer release any applications or permit those caregivers to send messages on the platform until the completion of its preliminary screening processes." The Form 8-K also stated that Care.com "had used publicly available data to create directory listings for small and medium-sized businesses that provide childcare services." The company's stock price fell by 12.6% that day. On March 31, 2019, the Wall Street Journal further reported that, just before the release of its March 8 story, "Care.com... removed about 72% of day-care centers, over 46,594 businesses, listed on its site[.]" Those businesses were listed on the site as recently as March 1. On April 1, 2019, the company's stock declined again by 6.6%.

Investors filed a putative class action against Care.com, its CEO, and CFO alleging that they violated Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder through misleading statements regarding Care.com's screening and vetting processes of individual providers or "caregivers," safety and security measures in comparisons to competitors, and manner of marketing to daycare centers, and their failure to disclose that daycare centers were not pre-screened.

Defendants moved to dismiss on November 1, 2019, asserting that plaintiffs failed to plausibly allege any materially false or misleading statements, noting that plaintiffs' allegations of falsity were refuted by Care.com's public disclosures and that any other statements

were inactionable puffery or immaterial. Defendants also argued plaintiffs failed to plead facts sufficient to establish a strong inference that defendants had actual knowledge that the challenged statements were materially false or misleading. The court granted the motion to dismiss on September 25, 2020, finding that plaintiffs had failed to allege facts sufficient to support an inference of scienter and that all of the challenged statements were either not false, were accompanied by appropriate risk disclosures, or were inactionable puffery.

The court rejected plaintiffs' argument that defendants' statements regarding the company's screening and vetting processes related to its caregivers were misleading "given the mix of public information available." The court held that statements like a May 2016 remark at a conference by the CEO that Care.com has "about 7 million caregivers that we have vetted[ ]" were not false in light of remarks made that same day by the company that families had a shared role in the vetting process and "encourag[ing] families not to take shortcuts and to make sure that they are screening and using the background checks that make them feel comfortable." The court also pointed to Care.com's 2016 Form 10-K as making clear that the platform "'allow[s] families to search for, connect with, qualify, vet, and ultimately select caregivers in a low-cast, reliable and easy way." The court also found that statements about Care's screening and vetting of daycare centers were not misleading because the company made representations only about its process for vetting or screening caregivers, and treated day care centers and other "care related businesses," as a separate category and made no representations about screening and vetting those providers. The court further held that Care.com's statements comparing itself favorably to its competitors and distinguishing itself based on "scale, trusted brand experience and member experience" were inactionable generalizations which lacked sufficient particularity. The court next concluded that defendants' risk disclosures regarding the impact of negative publicity related to misconduct by its member caregivers on its brand were inactionable forward-looking warnings, highlighting that the company specifically disclosed it had been the subject of negative media reports regarding its services and allegations of criminal conduct by member caregivers.

The court found that the only allegation which approached a material misrepresentation or omission was plaintiffs' allegation that Care.com unilaterally listed childcare centers on the site without consent, noting that the company's Forms 10-Q and 10-K during the class period indicated that Care.com served care-related businesses that wished to market their services through the platform. The court held that the statement was partially true, as some number of businesses later "claimed" their listings on the site, indicating their wish to market on Care.com, but as the Wall Street Journal stated, nearly 72% of daycare centers listed were removed after Care.com changed its listing policy. The court held that, even if this statement about daycare centers wishing to market on Care.com was materially misleading, it could not survive dismissal as plaintiffs had not alleged facts to support a strong inference of scienter. The court reasoned that it did not find plaintiffs' allegations as to the individual defendants' roles (and thus knowledge of operations) or statements attributed to three purported confidential witnesses persuasive, particularly in light of the opposing, more compelling inferences defendants offered, that Care.com undertook immediate remedial actions in the wake of the Wall Street Journal's reporting and that there were inherent, but disclosed, risks to Care.com's business model. The court concluded that, because plaintiffs failed to plead a Section 10 claim, the Section 20(a) claim also failed.

***Wasson v. LogMeIn, Inc.*, Case No. 18-cv-12330, 2020 WL 5946813 (D. Mass. Oct. 7, 2020); 2021 WL 1080201 (D. Mass. Mar. 18, 2021)**

Issues With Customer Retention After Acquisition Of Competitor

LogMeIn, Inc. is a Boston-based software as a service ("SaaS") provider of cloud-based software services used by mobile professionals to work remotely and IT service providers to manage computers and servers. On July 26, 2016, LogMeIn announced it was acquiring GetGo — a subsidiary of its largest competitor, Citrix Inc. — and GetGo's "GoTo" products. Prior to the merger, LogMeIn's customer base was primarily comprised of annual subscriptions that required customers to pay upfront by credit card and subscriptions automatically renewed unless terminated in advance. By contrast, GetGo offered its customers monthly subscriptions which required only thirty days' notice for termination, allowed payment by invoice, and provided termination for convenience. When it announced the acquisition, LogMeIn stated its intention to transition GetGo customers to its billing model, while acknowledging in a December 13, 2016 SEC filing that integration of GetGo's customers could prove challenging.

LogMeIn's acquisition of GetGo closed on January 31, 2017 and in mid-2017 LogMeIn began transitioning GetGo customers to its billing model. On a July 27, 2017 earnings call, LogMeIn's CFO stated that gross renewal rate for all products was approximately 75%, consistent with LogMeIn's pre-merger performance. In October 2017, during a conference call with investors

and analysts, LogMeIn communicated that it "made very good progress" on converting GetGo customers. In December 2017, LogMeIn's CEO acknowledged to investors that "converting people from monthly to annual payments … has somewhat of a dampening effect on retention" but reiterated that the Company remained "optimistic."

On July 26, 2018, the Company announced its second quarter 2018 earnings results, disclosing that the business segment that absorbed the majority of the GoTo suite of products experienced a 3.5% decline in renewal rate. The CEO acknowledged during a shareholder conference call that day that "[a]ggressively moving customers from monthly to annual payments, changing business terms and conditions and barriers we created to the auto-renewal process all contributed to friction for our customers and made us harder to do business with." The day after these disclosures, LogMeIn's share price declined 25.47%.

On August 20, 2018, investors filed a putative class action lawsuit in the U.S. District Court for the Central District of California, later transferred to the U.S. District Court for the District of Massachusetts, against LogMeIn and certain of its officers alleging violations of Sections 10(b) and 20(a) of the 1934 Act, on the grounds that defendants purportedly made fraudulent misrepresentations and omissions to shareholders regarding the post-merger conversion of GetGo customers to the LogMeIn billing model. In support of their allegations, plaintiffs included allegations of confidential witness statements from alleged LogMeIn employees claiming that LogMeIn management botched the transition and engaged in underhanded billing and business practices to convert customers to LogMeIn's annual subscription-based model, which the CEO knew or should have known would result in lost customers.

Defendants moved to dismiss the amended complaint arguing that plaintiffs' puzzle pleading (requiring the court to figure out why various statements were false) failed to allege falsity with requisite particularity, and that it alleged fraud by hindsight. Although the court disagreed with defendants' puzzle pleading and "fraud by hindsight" argument, it agreed that the amended complaint fell short on other grounds and dismissed it with limited leave to amend. Specifically, the court held that plaintiffs failed to allege facts that would make statements regarding financial projections, gross renewal rates, growth or expected growth, or cautionary disclaimers false or misleading. And the court held that the company's forward-looking growth expectations, accompanied by appropriate cautionary language, were protected by the PSLRA's safe harbor. Similarly, the court found that statements regarding the process of the transition, such as "initial efforts are encouraging" and that the CFO was "impressed" that the transition moved forward in conjunction with the company's "announced synergy plan" were inactionable statements of corporate optimism.

The court did analyze two of the alleged misstatements or omissions as "close calls." Plaintiffs alleged that the CEO and vice president of investor relations each made false statements at separate analyst technology conferences that LogMeIn was not forcing customers to either move to an annual subscription or pay higher subscription fees. The court held that plaintiffs failed to plead falsity because the alleged confidential witness statements "indicate that the Company was employing aggressive techniques but do not indicate the Company was unilaterally transitioning customers from monthly to annual payment plans against their will or without other options." The court noted that each of plaintiffs' confidential witnesses "stops short of saying that the Company was transitioning customers against their will. What they do say is that the Company was creating frustrating hoops for customers to jump through and being overly aggressive. Making it challenging for customers or otherwise aggravating them is not the same as transitioning unwilling customers."

As to these two "close calls," the court held plaintiffs failure to plead scienter further supported dismissal. The court explained that none of the confidential witnesses were alleged to have ever even interacted with the individual defendants, general conclusory statements about discussions at "senior leadership meetings" did not establish that the individual defendants attended those meetings, and that even if the individual defendants were told that they could lose customers because of transition efforts does not mean they knew customers were allegedly being forced to transition. Having found plaintiffs failed to adequately plead an actionable Section 10(b) claim, the court concluded that the Section 20(a) claim must also be dismissed.

In its ruling, the court limited plaintiffs' leave to amend only as to the two "close call" statements. Plaintiffs filed a second amended complaint on November 11, 2020, which defendants moved to dismiss on December 16, 2020. On March 18, 2021, the court dismissed the second amended complaint, with prejudice, holding "[i]n granting Defendants' motion to dismiss the [first amended complaint], the Court made observations intended to guide Plaintiffs' efforts to amend … The [second amended complaint] does not cure these deficiencies and although Plaintiffs' new allegations paint a more detailed picture of potential corporate mismanagement and poor customer service, they still do not make out a claim for securities fraud."

Focusing on those "close call" statements, the court held that the allegations do not suggest that they were

false or misleading, explaining that the allegations and documents referenced therein demonstrated that customers were not forced to transition and defendants "had no duty to disclose the aggressive, abrasive, and aggravating techniques" allegedly employed by the company or customer reactions to those techniques. The court further held that allegations the defendants paid close attention to risk of customer churn from transitions to annual payment plans and conversion tactics employed to manage those risks did not plead scienter, noting plaintiffs failure to identify any statement from the defendants describing such conversion tactics with any specificity or that they participated in any such discussions. The court rejected plaintiffs' allegations seeking to imply that defendants must have made statements with scienter by mere virtue of their positions in the company and receipt of data. The court also rejected plaintiffs' reliance on the "core operations" doctrine, explaining "Plaintiffs have alleged that the transition was important but have not alleged that it was central to the Company's survival (nor could they credibly do so given their allegation that the transition was completely bungled, and the fact that the Company nonetheless survived)."

Luna v. Carbonite, Inc., Case No. 1:19-cv-11662, 2020 WL 6205786 (D. Mass. Oct. 22, 2020)

Discontinuance Of New Service

Carbonite, Inc. ("Carbonite") is a software company that provides cloud-based backup services. In October 2018, Carbonite announced the launch of its Server Backup VM Edition ("VME") for managed services providers ("MSPs"). The new service was designed to allow MSPs to protect their virtual data both locally and in their own cloud. Carbonite called the launch "the culmination of one of our largest cross-functional efforts, led by our exceptional engineering organization," and projected that it would add "meaningfully" to Carbonite's revenue for fiscal year 2019.

During a November 1, 2018 investor call, Carbonite's CEO told analysts that VME "significantly improves [Carbonite's] performance for backing up virtual environments and makes us extremely competitive going after that market." At an investor conference on November 15, 2018, Carbonite's CFO stated that while Carbonite had not been particularly strong in the virtual-environment security market before, "I think we have completely overhauled the product and we have put out something that we think is just completely competitive and just a super strong product…." The CEO called VME "a really important product for us" on a December 6, 2018 conference call, stating he thought it would "help us address a pretty big segment of the market" while Carbonite's CEO stated in a press release on February 7, 2019 that Carbonite had "significantly strengthened our product platform" without naming VME specifically.

On May 2, 2019, Carbonite reported higher-than-forecasted financial results for the first quarter of 2019. On an investor call that day, Carbonite's CEO did not reference VME, but stated that Carbonite had "the right product portfolio to serve the broader set of businesses…and we have the incredible product, ease of use that businesses have come to know and

expect," noting Carbonite's goal was to unify all its products under its data protection platform.

When asked about macroeconomic changes at a June 10, 2019 analyst conference, the CFO stated he was "not seeing any dramatic changes" while touting Carbonite's data protection business and "competitive advantage certainly in enterprise" because of Carbonite's data storage efficiency.

On July 25, 2019, Carbonite announced its second quarter 2019 financial results, significantly lowered its guidance for fiscal years 2019 and 2020, and that its CEO was resigning. Later that day, the CFO announced on an investor call that VME was "not at the level of quality" customers expected, Carbonite was withdrawing its VME product from the marketplace and, that "maybe a third" of the guidance reduction was due to VME's failure. The following day, Carbonite's stock price fell 24%.

In August 2019, investors filed putative class action lawsuits against Carbonite, its CEO, and CFO alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Plaintiffs' amended consolidated complaint alleged that defendants knew or should have known that their projections of VME's value and statements about VME's performance were materially misleading, and that defendants failed to disclose that VME was of poor quality and technologically flawed, received poor reviews from customers, and had been a "disruptive" factor for the company's salesforce, preventing Carbonite from closing on several deals during 2019.

On March 10, 2020, defendants moved to dismiss the amended consolidated complaint, asserting that plaintiffs failed to plead any particularized facts demonstrating a strong inference of scienter as to the individual defendants and failed to allege any actionable material misrepresentation or omission on the basis that the challenged statements were not false, statements of optimism or opinion, or forward-looking accompanied by meaningful cautionary language protected by the PSLRA's safe harbor.

On October 22, 2020, the court granted defendants' motion, with prejudice, holding that plaintiffs failed to allege scienter, and as such did not address the defendants' other asserted grounds for dismissal. Specifically, the court rejected plaintiffs' contention that numerous challenged statements, including that VME would make Carbonite "extremely competitive" and that it was a "really important product," were made with knowledge or reckless disregard that such statements were false or misleading, noting that many of these statements were made at or near the launch of VME in October 2018 and that no facts suggested that the defendants did not reasonably believe that VME's problems could be fixed at that time.

The court further rejected plaintiffs' theory that defendants recklessly disregarded that they were making false or misleading statements about VME's capability. Relying on First Circuit precedent, the court noted that "[f]or Plaintiff to plead scienter by high degree of recklessness, he must show 'not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care.'" Under that standard, the court rejected plaintiffs' assertion that an intent to defraud could be inferred from Carbonite's "troubleshooting mechanism," finding instead that "a competing inference — that Carbonite believed VME was fixable — is more cogent and compelling than Plaintiff's inference of extreme departure from the standards of ordinary care[,]" particularly given plaintiffs' own allegations of Carbonite's "tiger team" of engineers who met daily to address VME's functionality, an internal chat group of engineering employees "dedicated to fixing the many problems with the product[,]" and Carbonite's numerous "patches and repair efforts." The court also observed that Carbonite's statements that VME was "expected to meaningfully contribute to revenue" later in 2019 and 2020 suggested defendants did not anticipate meaningful revenue from VME until much later, and held that "[g]oing forward with the product launch may have been a poor business decision, especially with the benefit of hindsight, but allegations of corporate mismanagement are not actionable under Rule 10b5."

The court also held that plaintiffs failed to allege any facts that Carbonite's CEO and CFO were on notice prior to VME's withdrawal that the product "had no hope of working," and that "[w]ithout that allegation, Plaintiff cannot show that [defendants'] statements were sufficiently reckless to prove scienter." Plaintiffs' assertion that the CFO's statement formally withdrawing VME indicated his access to VME information likewise did not sufficiently allege he knew the product did not and could never work, noting plaintiffs failed to allege any direct evidence that the individual defendants knew of alleged internal employee reports regarding VME's problems.

The court also rejected plaintiffs' argument that the individual defendants' stock sales supported an inference of scienter, instead finding that they traded pursuant to 10b5-1 trading plans and ended the class period with the same or more shares than held at the beginning of the class period, negating any inference of a motive to defraud. And the court rejected plaintiffs' assertion that the CEO's resignation reflected evidence of scienter because it was "suspiciously timed," concluding that plaintiffs' failure to assert any other facts about the resignation coupled with the fact that he was named the CEO of another technology company that same day was not enough to establish scienter.

First Circuit Cases to Watch

Luna v. Carbonite, Inc., Case No. 20-2110 (1st Circuit)

Discontinuance Of New Service

As discussed above, Carbonite is a software company that provides cloud-based backup services. In October 2018, Carbonite announced the launch of its Server Backup VM Edition ("VME") for managed services providers, which it touted as "the culmination of one of our largest cross-functional efforts, led by our exceptional engineering organization," and projected that it would add "meaningfully" to Carbonite's revenue for fiscal year 2019. This did not go as expected and, in August 2019, investors filed putative class action lawsuits against Carbonite, its CEO, and CFO alleging violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder. Plaintiffs' amended consolidated complaint alleged that defendants knew or should have known that their projections of VME's value and statements about VME's performance were materially misleading, and that defendants failed to disclose that VME was of poor quality and technologically flawed, received poor reviews from customers, and had been a "disruptive" factor for the company's salesforce, preventing Carbonite from closing on several deals during 2019.

Although on October 22, 2020, the court dismissed the operative complaint, with prejudice, the case is likely to remain active. Plaintiffs appealed the decision to the U.S. Court of Appeals for the First Circuit, and filed their opening brief on March 2, 2021.

Miller v. Sonus Networks, Inc., Case No. 1:18-cv-12344 (D. Mass.)

Change In Revenue Forecasting Methodology

Sonus Networks, Inc. ("Sonus") provides communication solutions that allow businesses to secure their communications infrastructures. In 2014, Sonus changed its revenue forecasting methodology — whereas the company had previously used an employee's "commit number," a more conservative estimate of total sales by an employee, for its revenue estimates, Sonus elected to use an employee's "stretch number," an aspirational figure, in its estimates. Sonus used those "stretch numbers" in its forecast for the first quarter of 2015 and projected $74 million in revenue for that quarter during an October 2014 earnings call.

In March 2015, Sonus released its first quarter 2015 results, announcing $50 million in revenue, missing its estimate by $24 million. Consequently, the company's stock price fell by 33%. In October 2017, Sonus merged with GENBAND US LLC, each becoming a wholly own subsidiary of Sonus Networks, Inc., and Sonus began doing business under the name of Ribbon Communications, LLC ("Ribbon").

In August 2018, the SEC disclosed an administrative proceeding and that it had issued an order instituting cease-and-desist proceedings pursuant to Section 8A of the 1933 Act and Section 21C of the 1934 Act. The cease-and-desist order stated that the SEC had charged Ribbon, a vice president of sales, and its CFO with making negligent misstatements in 2015

concerning Sonus's quarterly revenue estimates and guidance for the first quarter of 2015. The company and two officers consented to entry of the cease-and-desist order, agreeing, without admitting liability, to pay civil penalties totaling $1.97 million to settle the charges.

Investors filed a putative class action, alleging violations of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder. Plaintiffs alleged that defendants knew that the company's revenue would fall short of its forecast even as defendants repeated that projection throughout the first quarter of 2015. Relying on internal communications and documents disclosed in the cease-and-desist order, the amended complaint alleged that sales personnel warned defendants, among other things, that the "stretch numbers" remained unrealistic based on then-existing sales figures.

Defendants moved to dismiss the amended complaint, arguing that plaintiffs had "cut and paste" the SEC's cease-and-desist order into a complaint in order to effectively revive a suit that plaintiffs' attorneys had filed earlier against the company based on the same alleged misstatements, and which had been dismissed with prejudice in 2017. Defendants argued that the combination of plaintiffs' earlier deficient allegations and the SEC's cease-and-desist order based on negligent conduct did not support a strong inference of scienter. Defendants further contended that the amended complaint was time-barred, and that the alleged misstatements were immunized as forward-looking projections. Briefing on the motion to dismiss was completed in November 2019, and oral argument was heard on February 12, 2020. The motion to dismiss is still under submission.

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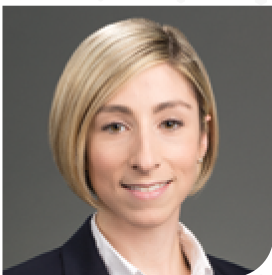

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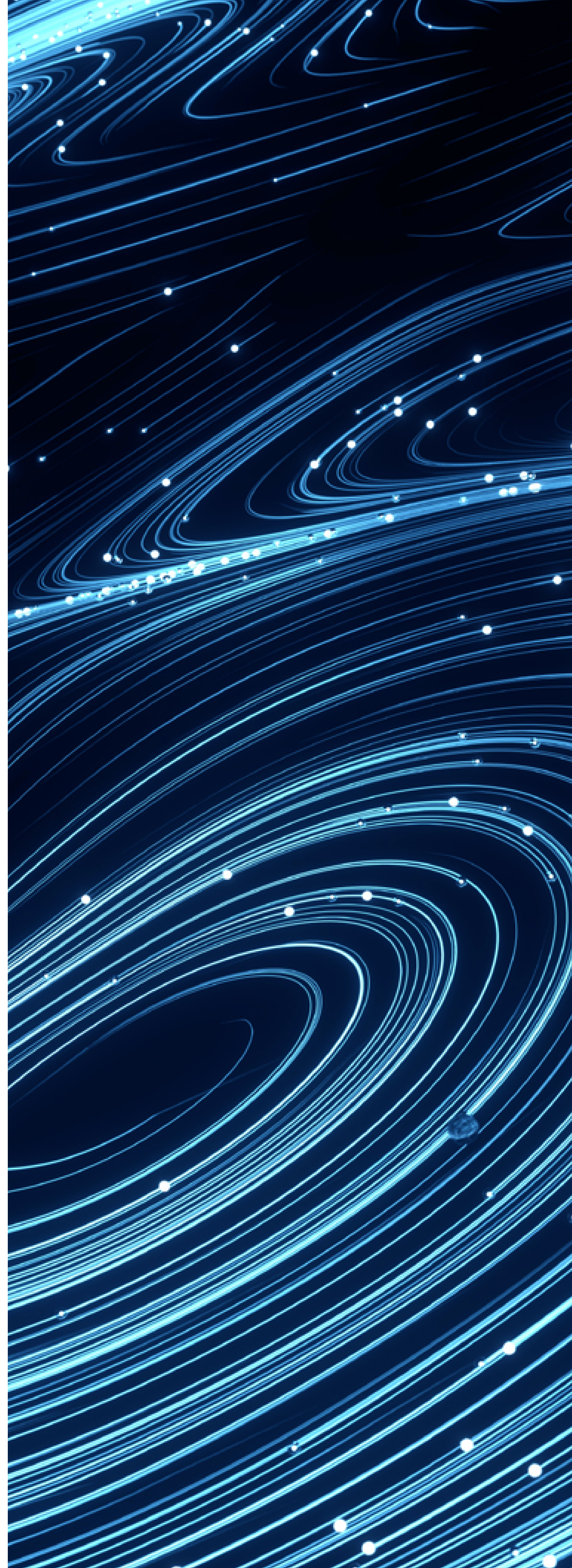

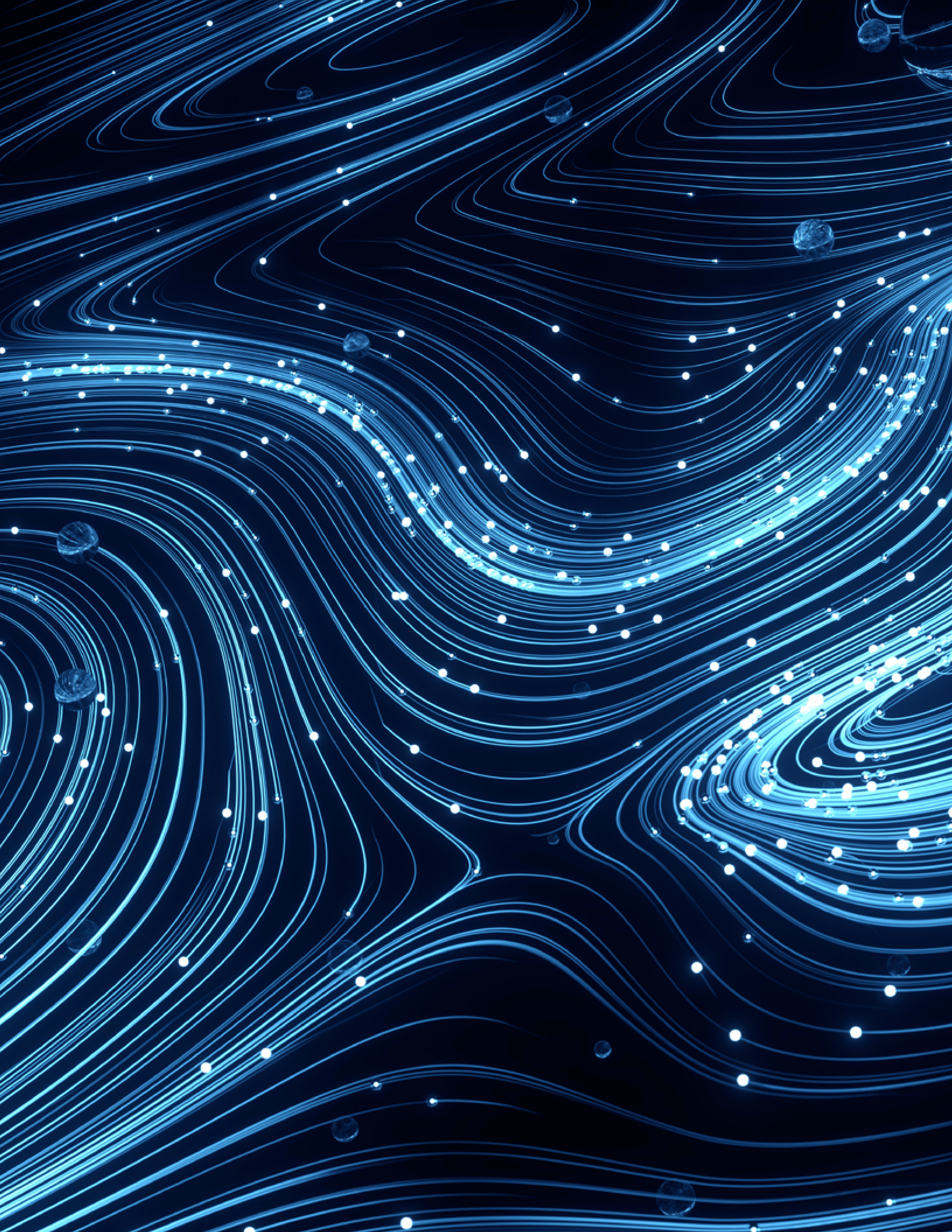

Industry Rankings and League Tables

- Securities Litigation Nationwide (2021)

- National Top Tier Firm for Securities Litigation (2021)
- National Top Tier Firm for Venture Capital (2021)

- Securities Litigation: Defense (2021)
- Capital Markets: Equity Offerings (2021)
- Technology Transactions (2021)
- Venture Capital and Emerging Companies (2021)
- Fintech (2021)
- Venture Capital UK (2021)

2020 by deal count

- #2 Most Active Law Firm for VC Exits
- #3 Most Active Law Firm for U.S. M+A
- #3 Most Active Law Firm for Global VC (company)
- #3 Most Active Law Firm for Global VC (investor)

- Securities Litigation Nationwide (2021)
- Securities Litigation New York (2021)
- Capital Markets: Equity: Issuer Representation Nationwide (2021)
- Startups & Emerging Companies Nationwide (2021)
- Corporate M&A Nationwide (2021)
- Capital Markets: Equity: Manager Representation Nationwide (2021)
- Technology Sector International & Cross-Border (2021)
- Technology Massachusetts (2021)
- FinTech Legal Nationwide (2021)
- Venture Capital California (2021)

2020 by deal count

- #1 Most Active Law Firm for Global M+A (announced + completed)
- #1 Most Active Law Firm for U.S. M+A (completed)
- #1 Most Active Law Firm for Global Mid-Market M+A (up to $500M)
- #1 Most Active Law Firm for U.S. Target Mid-Market M+A (up to $500M)

2020 by deal count

- #2 Most Active Law Firm for Global and U.S. PE Exits
- Top 5 Most Active Law Firm for Global, U.S., and Europe PE Buyouts
- Top 5 Most Active Law Firm for Global and U.S. M+A

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