2019 YEAR IN REVIEW

Securities Litigation Against Technology Companies

GOODWIN

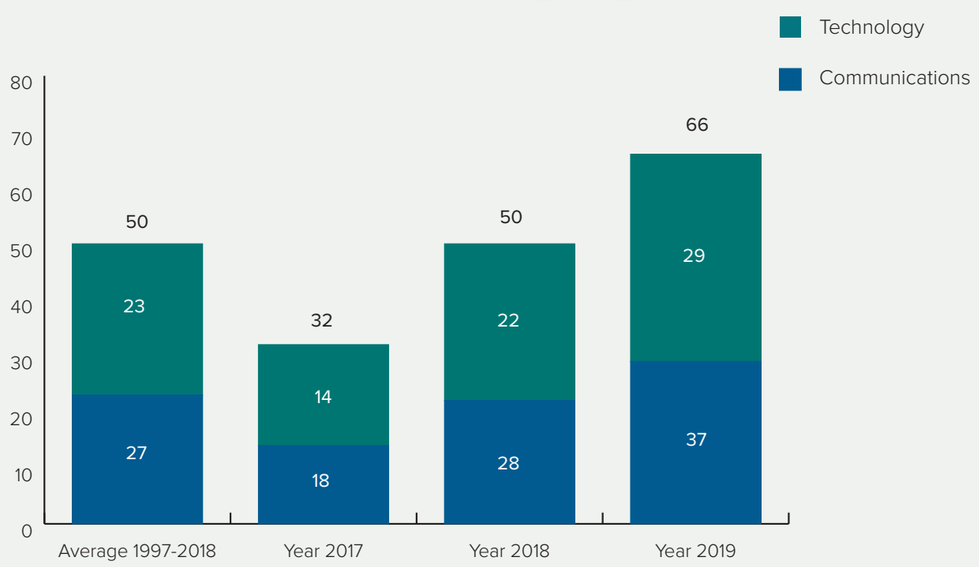
TABLE OF CONTENTS

INTRODUCTION

As we reported in last year's publication, the number of securities class actions filed nationally against publicly traded companies in the Technology and Communications sectors (together, "technology companies") has steadily grown over the last several years. In 2019, that trend continued, as securities class actions across all sectors reached an all-time record level, with a total of 428 federal and state class actions filed, 268 of which were "core filings"[1]—the highest number on record and a 13% increase over 2018.[2] In 2019, 5.5% of U.S. exchange-listed companies were the subject of core filings, and core filings against non-U.S. companies (primarily companies in China, Canada, the United Kingdom, and other European countries) rose to 57, which is the most on record.[3]

Once again, technology companies had the second highest number of securities class action filings in 2019 as compared to other sectors.[4] As depicted in **Figure 1** below, the number of filings against publicly traded technology companies increased by 32%, from 50 in 2018 to 66 in 2019.[5] That represents a 106% increase in such filings since 2017. 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.

(Figure 1) Core Federal Filings for the Technology and Communications Sector 2017-2019



Note: [1] Sectors and subsectors are based on the Bloomberg Industry Classification System.

These cases are typically filed by shareholders seeking to recover investment losses after a company's stock price drops following a corporate disclosure. 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").

In 2019, we saw a significant uptick—40%—from 2018 in the filing of cases alleging 1933 Act claims in state courts,[6] as the effect of United States Supreme Court's March 2018 decision in *Cyan*, which held that class actions under the 1933 Act can be brought in state court and are not removable to federal court, continues to reverberate.[7] The majority of the 1933 Act cases filed in 2019 were filed in state courts in New York and California, but the number of such filings in other state courts almost tripled from 2018 to 2019.[8] Almost half of these 1933 Act state court cases had a parallel federal court action, often forcing defendants to defend such actions on two fronts simultaneously.[9] While the majority (31 of 49) of 1933 Act state court class actions filed in 2019 related to initial public offerings (despite a drop in IPO activity during this period), there has been a significant increase in 2018 and 2019 in 1933 Act class actions relating to issuances of securities for mergers or spin-offs.[10]

Following three years of decline, the percentage of cases filed in 2019 that were dismissed by year-end remained steady. Specifically, as detailed in **Figure 2**, only approximately 11% of federal core filings against technology companies were dismissed by December 31, 2019, as compared to a 10% year-end dismissal rate in 2018 and a 19% year-end dismissal rate in 2017. Looking back, an additional 20%—and 30% total—of the 2018 cases, and 41% of the 2017 cases were dismissed before the end of 2019. While it is more difficult to track 1933 Act cases pending in state court, the available data indicates that the year-end dismissal rate is even lower in 1933 Act state court cases. These dismissal timelines are not surprising given that the typical life cycle of securities class actions is approximately 18 months from the filing of the initial complaint through the disposition of defendants' motion to dismiss the consolidated complaint and that a high percentage of these cases are brought in the California District Courts where plaintiffs typically get more than one opportunity to amend their complaints.

Our 2019 Year in Review was expanded to include additional 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 technology companies: the Ninth Circuit and California and Nevada District Courts; the Second Circuit and New York and Connecticut District Courts; and the First Circuit and District of Massachusetts. In 2019, federal courts in these jurisdictions have 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, 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 a perceived product defect and revised guidance. The Ninth Circuit agreed with the district court's conclusion that the issuer had no duty to disclose a customer's alleged abandonment of one of the issuer's products, and therefore the non-disclosure of this abandonment could not serve as the basis for

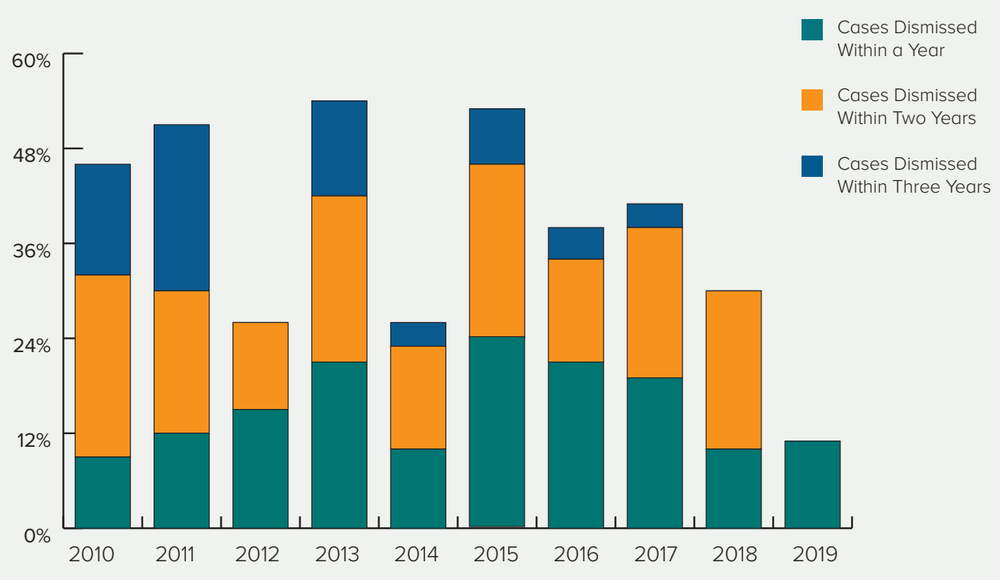
[1] "Core filings" are defined by Cornerstone Research as class actions excluding M&A filings.
[2] Source: Cornerstone Research Securities Class Action Filings – 2019 Year In Review ("Cornerstone Report"), at 1, 5, Figures 1 and 4, Appendix 1.
[3] Cornerstone Report, at 30, Figures 29 and 30.
[4] Cornerstone Report, at 29, Figure 30.
[5] Cornerstone Report, at 36, Figure 35. Sectors and subsectors are based on the Bloomberg Industry Classification System.
[6] Cornerstone Report, at 4, Figure 3.
[7] See Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061, 583 U.S. ___ (2018).
[8] Cornerstone Report, at 19, Figure 18. More specifically, 33 of the 49 1933 Acts cases filed in 2019 were filed in New York and California.
[9] Cornerstone Report, at 4, 22.
[10] Cornerstone Report, at 23, 27; Figure 22.

an actionable omission claim. The court also agreed that "statements regarding continued industry leadership were the sorts of 'vague, optimistic statements' that constitute nonactionable 'puffery.'" The California District Courts were very active and several case were dismissed, typically 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). Although the majority of the resolved motions to dismiss were granted, the California courts continue to demonstrate more patience with plaintiffs bringing these cases, allowing them multiple opportunities to amend their complaints.

The Second Circuit and New York and Connecticut District Courts also delivered a number of interesting decisions in 2019. 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. In the two matters decided by the Second Circuit, the court affirmed the district courts' dismissals with prejudice, agreeing with the district courts' reasoning in each case.

The First Circuit and the District of Massachusetts did not issue any relevant decisions in 2019. However, three new cases were filed in the District of Massachusetts and are highlighted as cases to watch in the coming year.

(Figure 2) Percentage of Technology and Communications Cases Dismissed Within Three Years of Filing Date Core Federal Filings 2010–2019



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 filed each year.
[2] Sectors are based on the Bloomberg Industry Classification System.
[3] The outlined portions of the stacked bars for years 2017 through 2019 indicate the percentage of cases dismissed through 12/31/19. The outlined portions of these stacked bars therefore present only partial-year observed resolution activity, whereas their counterparts in earlier years show an entire year.

NINTH CIRCUIT, CALIFORNIA, AND NEVADA DISTRICT COURTS

***Public Employees Retirement System of Mississippi v. Qualcomm, Inc.*, Case No. 18-55005, 773 F. App'x 987 (9th Cir. July 23, 2019) – Revised Guidance Due to Product Defect**

Qualcomm, Inc. ("Qualcomm") is a multinational semiconductor and telecommunications equipment company that designs and markets wireless telecommunications products and services. During a November 19, 2014 analyst meeting, Qualcomm represented that it would "be able to maintain [its] leadership position in the premium-tier" and implied that smartphone manufacturers would continue to utilize the Snapdragon 810 phone chip, which had been widely reported as having overheating problems. Qualcomm continued to imply that smartphone manufacturers would use the phone chip in a December 2, 2014 article posted to its website and made statements that the chip was "on track" on December 8, 2014 and January 5, 2015. Prior to making these statements, however, Qualcomm was allegedly informed that Samsung, one of its largest customers, abandoned the Snapdragon 810 due to the overheating issues. On January 28, 2015, Qualcomm announced in a press release that it expected a large customer would not use the Snapdragon 810 in its flagship device, causing Qualcomm to lower outlook for the second half of fiscal 2015 in its semiconductor business. However, during a same-day investor call following this press release, Qualcomm's CEO stated, "the 810 is actually doing quite well. Any concerns about the 810 terms of design traction really are probably limited to one OEM versus anything else." He further noted, "we are quite pleased with how [the chip] is performing" and "I think the 810…is going to be quite strong in terms of design traction, and it will be in a lot of devices. As I said, it will be over 60 devices." The following day, the price of Qualcomm common stock declined by $7.30 per share, or 10.28%.

An investor filed a lawsuit against Qualcomm and its executives alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder on the grounds that the aforementioned statements were misleading because they implied that smartphone manufacturers would continue to utilize the Snapdragon 810 despite overheating problems. Defendants moved to dismiss, and the district court granted in part and denied in part that motion. The district court held that the majority of these statements were not actionable but allowed the case to proceed against Qualcomm and one individual defendant on the grounds that plaintiff had sufficiently pleaded a material misrepresentation or omission as to statements made on the date of the corrective disclosure. However, on November 16, 2017, the parties filed a joint motion for relief from the order, explaining "[b]ecause the Court's holdings in the MTD Order make it such that Lead Plaintiff will be unable to prove reliance or loss causation for the two alleged misrepresentations that the MTD Order found adequately pled, the parties respectfully request entry of judgment for Defendants." In response, on November 29, 2017, the court dismissed the case in its entirety, with prejudice, holding that plaintiff will be unable to make a showing of reliance or a causal connection between the material misrepresentation and the loss.

Plaintiff appealed the dismissal order, which the Ninth Circuit affirmed. With respect to falsity, the Ninth Circuit agreed with the district court that Qualcomm had no affirmative duty to disclose to investors Samsung's

alleged abandonment of the Snapdragon 810, and therefore it could not serve as the basis for an actionable omission claim. It also agreed that the "statements regarding continued industry leadership were the sorts of 'vague, optimistic statements' that constitute nonactionable 'puffery.'" It further concluded that Qualcomm's representation that manufacturers generally would use the Snapdragon 810 chip despite the overheating problems could not be found to be misleading because plaintiff alleged that other smartphone manufacturers did, in fact, use the chip to some extent. Finally, it held that the various "on-track" and similar "no delay" statements made between December 2014 and January 2015 were nonactionable because they were demonstrably accurate.

The appellate court further agreed with the district court that plaintiff did not adequately plead loss causation as to the alleged misstatements made after the corrective disclosure because plaintiff failed to allege the necessary "causal connection" between the purported misrepresentations and the resulting loss.

City of Sunrise Firefighters' Pension Fund v. Oracle Corp., Case No. 5:18-cv-04884-BLF, 2019 WL 6877195 (N.D. Cal. Dec. 17, 2019) – Slowed Cloud-Related Revenue Growth

Oracle Corporation ("Oracle") is a software company that develops database software and technology, cloud engineered systems, and enterprise software products, offering on-premise and cloud solutions to a variety of end users. Historically, Oracle's revenues were derived from the company's on-premise software services, but in 2015 the company shifted its focus to cloud-based software which allows users to store and access data over the internet. Throughout 2017, the company made public statements at conferences and through press releases that reported significant increases in cloud-related revenues. On September 14, 2017, Oracle issued a press release announcing that results for its first fiscal quarter ended August 31, 2017 were "up 51% to $1.5 billion." On September 18, 2017, Oracle filed a Form 10-Q attributing its cloud revenue growth to "increased. . . investments in and focus on the development, marketing and sale of our cloud-based applications, platform and infrastructure technologies." The company made similar statements promoting the cloud business at an October 5, 2017 OpenWorld Financial Analyst conference, and on December 14, 2017, Oracle issued a press release stating that cloud revenues were "up 44% to $1.5 billion." Thereafter, on March 19, 2018, the company disclosed that cloud revenue growth had stagnated and forecasted significantly slower sales growth for its cloud business relative to its competitors. Following the announcement, Oracle's stock price declined by nearly 9.5%, representing the Company's largest single-day stock drop in more than five years.

Investors filed a federal securities class action asserting claims under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder against Oracle and three of its executives. Plaintiff alleged that Oracle engaged in coercive sales practices of cloud products, which resulted in deals that were not "true sales," but which defendants allegedly touted as such. Plaintiffs alleged that this misled investors, because the revenues generated by these deals were "artificial and unstable." Specifically, the complaint alleged that Oracle's cloud revenues were driven by unsustainable and coercive practices, including: (1) the "Audit, Bargain, Close" strategy whereby Oracle would audit customers' use of non-cloud software licenses and "threaten to impose large penalties unless the customer agreed to purchase a short-term cloud subscription"; and (2) making "attached deals" whereby Oracle offered its customers "a significant discount" on its on-premises products, provided the customer also purchased a short-term cloud subscription "even if the customer neither wanted nor intended to use the attached cloud product."

On December 17, 2019, the court dismissed the consolidated amended complaint, with leave to amend, holding that each of the challenged statements was either verifiably true, inactionable puffery, or forward-looking and cabined with meaningful cautionary language and thus protected by the PSLRA's safe harbor provision. The court also held that plaintiff failed to plead scienter (fraudulent intent). The court focused on statements regarding cloud revenue growth. The court held that "Oracle's concededly accurate financial reporting and projections is a tough hurdle for Plaintiff to overcome" and thus, when defendants discussed Oracle's cloud revenue growth generally without reference to its sales practices, they had no duty to disclose the allegedly coercive sales practices. It also disagreed with plaintiff's case theory, explaining that "[s]hort-term subscriptions are not 'fake' sales—they are short-term subscriptions."

The court also deemed statements that the company's products were "better," and that cloud adoption was "very strong" and "going well," as inactionable because they were "subjective and unverifiable assessments." And the court held that statements regarding Oracle's bullish expectations and what "should" happen regarding growth, cloud sales, renewal rates, and revenue were inactionable forward-looking statements because Oracle's risk statements "were specific and on-point with respect to Plaintiff's allegations."

Plaintiff also relied on various confidential witness statements which the court deemed deficient because plaintiff's confidential witness allegations lacked in particularity as to time, and because "employees who left Oracle before the alleged misstatements were made cannot substitute for reports during the Class Period, required to establish each statement was false when made." Although the court seemed open to plaintiff's argument that failure to disclose the sales practices could have rendered statements about drivers of cloud revenue misleading, it held that, although confidential witness allegations provided a "plausible picture" of the wide-spread nature of Oracle's sales practices in various regions, they lacked facts to establish the materiality of Oracle's sales practices (i.e., that they had a significant impact on Oracle's overall revenue).

While the court agreed with defendants that the challenged statements regarding defendants' explanation for the deceleration in the company's cloud revenue growth, did not paint the picture that plaintiff described, but noted that "additional facts might be alleged to support Plaintiff's claim that Oracle's professed reasons for deceleration of its cloud revenue were misleading."

With respect to scienter, the court held that the confidential witness allegations did not support an inference of scienter. The court noted that some the witnesses lacked direct contact with defendants and therefore their accounts could not provide reliable insight into defendants' states of mind. And while others did allegedly have direct contract, their purported statements lacked sufficient specificity of defendants' knowledge. The court also rejected plaintiff's attempt to plead defendants' scienter by asserting that cloud operations were part of the company's "core operations," reasoning that although moving to cloud may have been important for Oracle, that did not make every piece of information within the company regarding its cloud business critical to the company's core operations. Finally, the court held that the alleged stock sales by only one of the six defendants during the class period was not enough to establish a strong inference of scienter. Plaintiff filed a second amended complaint on February 17, 2020, and defendants have not yet responded to that amended complaint.

Kim v. Advanced Micro Devices Inc., Case No. 5:18-cv-00321-EJD, 2019 WL 2232545 (N.D. Cal. May 23, 2019) – Design Vulnerabilities

Advanced Micro Devices ("AMD") is a publicly traded manufacturer of computer microchip processors that are integral to desktop and laptop computers, mobile devices, and server processors. On June 1, 2017, a Google security team which specializes in searching for potential vulnerabilities in publicly deployed computer systems notified AMD of a design flaw in its processor microchips, known as Spectre Variant 1, which could allow a bad actor to gain access to areas of an affected computer's memory. Throughout 2017, AMD made several SEC filings that included general risk disclosures about cyber-security and data privacy, such as "Data breaches and cyber-attacks could compromise our intellectual property or other sensitive information, be costly to remediate and cause significant damage to our business and reputation." On January 3, 2018, the Google team that had discovered these vulnerabilities publicly disclosed that it had identified them in certain products, including Spectre Variant 1, Spectre Variant 2, and a Meltdown product that did not affect AMD processors. A group of researchers also published on January 3 the "Kocher Report," which reported similar vulnerabilities. Later on January 3, AMD posted a message on its website representing that Variant 2 posed a "near zero risk" to AMD processors. An AMD spokesperson represented the same during an investor meeting later that day. AMD's stock price from January 2 to January 3, 2018 rose approximately ten percent. During a televised interview on January 8, 2018, AMD's CEO reassured viewers that the risk to AMD's processors of a Variant 2 vulnerability was "rare." On January 8, AMD's stock price again rose. On January 11, 2018, just three days later, AMD issued a press release titled "An Update on AMD Processor Security" which provided, among other things, that the Variant 2 vulnerability "is applicable to AMD processors." Later on January 11,

AMD's CEO reported in a televised interview that its processors were, in fact, susceptible to a Variant 2 vulnerability. That day AMD's stock price fell by .99% from $12.24 to $12.02.

On January 18, 2018, investors filed a putative securities class action lawsuit against AMD, its CEO, and its CFO, alleging that AMD misrepresented its chip security and performance in order to artificially increase AMD's stock price in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Plaintiffs asserted that AMD's statements were false and/or misleading because AMD allegedly knew its chips were affected by the Variant 2 flaw. Plaintiffs also claimed that AMD's inclusion of risk factors concerning potential cyber-attacks and data breaches in its SEC filings created a duty to fully disclose the discovery of the design flaw.

Defendants moved to dismiss plaintiffs', and on May 23, 2019, the court granted that motion, with leave to amend. The court held that plaintiffs failed to sufficiently allege falsity, a duty to disclose, and scienter. With respect to falsity, the court found that AMD's representations that there was a "rare" chance AMD's processors would be impacted did not conflict with what AMD knew, namely, that its chips were vulnerable to some extent, and thus these representations were not false or misleading.

Regarding AMD's alleged failure to disclose that its chips were vulnerable, the court held that AMD did not have a duty to disclose that it had discovered the Variant 1 vulnerability by virtue of its risk disclosure warning of cyber-attacks and data breaches. Rather, the court held that the alleged vulnerability and the risks identified in AMD's public statements related to two different things, and that plaintiffs had not identified, for example, any actual data breaches that arose by virtue of the vulnerability. The court further held that the January 3, 8 and 11 statements that Variant 2 posed a "near zero risk" to AMD's processors due to their architecture, and that Variant 2 was "rare" and "difficult to access," were not false or misleading and, to the extent that they could be deemed as such, plaintiffs failed to allege that defendants had any knowledge of the Variant 2 vulnerability until after the release of the Kocher Report.

The court also held that plaintiffs failed to plead any factual allegations sufficient to create a strong inference of scienter. The court held that the more compelling inference based on AMD's failure to disclose vulnerabilities it discovered, was that AMD was trying to prevent public disclosure of the issues until it could implement corrective action rather than to deceive investors. The court also rejected plaintiffs' attempt to use the core operations doctrine to impute defendants, holding that susceptibility of AMD's processors was not so prominent that it would be absurd for the defendants to not know about it. Lastly, the court found the eight days between AMD's January 3 announcement that the there was a "near zero risk" and the January 11 disclosure that AMD's processors were susceptible did not support an inference of scienter because there was no indication that AMD knew of vulnerabilities before the January 3 "Kocher Report," no explanation of how AMD would benefit from disclosing it eight days later, and no allegations about how this affected AMD's stock price.

Plaintiffs opted not to amend their complaint and the case was dismissed with prejudice on June 14, 2019.

In re Intel Corporation Securities Litigation, Case No. 18-CV-00507-YGR, 2019 WL 1427660 (N.D. Cal. Mar. 29, 2019) – Design Vulnerabilities

Intel Corporation ("Intel") designs and manufactures computer components, including microprocessors, chips, digital imaging products, and systems management software. Like the AMD case discussed above, on June 1, 2017, a Google security team which specializes in searching for potential vulnerabilities in publicly deployed computer systems notified Intel of a "CPU security issue that affects processors," later known as "Spectre." Later in June, Google identified a second vulnerability that became known as "Meltdown." While the two vulnerabilities present different security risks, they both allow a hacker to gain access information stored on a computer, including secret keys, passwords, and any other sensitive information. After Google informed Intel of the Spectre and Meltdown vulnerabilities, the company conducted a "detailed analysis" of the vulnerabilities in June and July of 2017 that confirmed their existence on nearly all of Intel's processors produced since 1995.

In 2017 and 2018, Intel made numerous statements on its website, quarterly filings on Form 10-Q, in articles, and during conferences relating to its processor chips' security features and performance. These included statements that Intel's products are "optimized particularly for data protection," provide "optimal data security," and "add[] a critical layer of protection" making them "safe and simple,.. and rock-solid." Intel represented that its chips' security did not compromise performance, including by stating that its products used "hardware-enhanced security to protect data and system operations without compromising performance."

On January 2, 2018, a news outlets reported a design flaw in Intel's processor chips that could make a computer's operating system vulnerable to outside attacks. The online publication The Register reported that researchers had identified Meltdown and that the operating system updates necessary to address this flaw would result in a significant slowdown for Intel-based computing devices. As discussed above, on January 3, 2018, Intel's share price fell $1.59 per share, or approximately 3%. On January 3, 2018, after trading hours, the Google team responsible for discovering the flaws publicly disclosed them. A group of researchers also published on January 3 the "Kocher Report," which reported similar vulnerabilities. Later on January 3, Intel issued a publication on its website admitting that it had previously been made aware of Spectre and Meltdown but explained that, due to its "commit[ment] to the industry best practice of responsible disclosure of potential security issues," it "had planned to disclose the issue next week when more software and firmware updates w[ould] be available." On January 4, 2018, Intel's share price fell $0.83, or approximately 2%.

On January 23, 2018, an investor filed a putative class action lawsuit against Intel and its officers under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder, alleging that defendants made false or misleading statements concerning the company's products' vulnerabilities.

Defendants moved to dismiss the consolidated amended complaint, and on March 29, 2019, the court granted that motion on the grounds that the challenged statements were not false or misleading. Specifically, the court held that all of the challenged statements regarding chip security and chip performance were nonactionable because they either constituted puffery or were non-verifiable. Although the court found that certain statements regarding product safety and security, were more definitive than others, the court reiterated that the context in which a statement is made is crucial to whether the statements would mislead a reasonable investor. The court identified several factors, which it held, when viewed holistically with the challenged statements regarding chip-security, did not create a false impression regarding the security of Intel's processors, nor would they mislead reasonable investors regarding the potential for security threats. These factors included: (i) the marketing setting in which the statements were made; (ii) Intel's disclaimer that "[n]o computer system can be absolutely secure"; (iii) Intel's product and website security disclosures; (iv) Intel's then-ongoing efforts to develop a solution to these vulnerabilities; (v) risk warnings about security vulnerabilities in Intel's SEC filings; and (vi) the "inherently risky nature of the computer industry." Similarly, the court held that, with respect to the few other specific statements regarding chip performance that plaintiff challenged, plaintiff failed to allege facts that show they were inaccurate. Because plaintiff failed to allege falsity, the court did not address scienter.

In re Facebook, Inc. Securities Litigation, Case No. 5:18-cv-01725, 2019 WL 4674347 (N.D. Cal. Sept. 25, 2019) – Data Breach

Facebook, Inc. ("Facebook") operates a social networking website. Between 2016 and early 2018, Facebook warned in its 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 time, Facebook maintained a data privacy policy, which stated that "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 from Facebook without permission or proper disclosures. 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 Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Defendants moved to dismiss plaintiffs' consolidated amended complaint. On September 25, 2019, the court dismissed the consolidated complaint on the grounds that only one of thirty-six alleged misstatements or omissions was actionable, but plaintiffs failed to allege scienter as to that statement.

The court found the remaining thirty-five statements not actionable for three primary reasons. First, the court held that two statements concerning defendants' anticipation and predictions of how a new European data privacy law (GDPR) would impact Facebook were inactionable forward-looking statements with meaningful cautionary language protected by the PSLRA's safe harbor provision.

Second, the court found three statements inactionable because they constituted corporate optimism or puffery. The court held in particular that statements such as, "we are very pleased with our progress to date," and, "we're optimistic about what we're seeing here," were the typical "vague, generalized assertions" constituting puffery or corporate optimism. Because no reasonable investor would rely on such statements, they are not actionable.

Third, the court found thirty statements inactionable because plaintiffs failed to plead facts establishing that the statements were false. For example, plaintiffs claimed that Facebook's risk disclosures were materially misleading because they warned investors of "potential risks" without revealing the fact that the exact risk Facebook was warning about already existed. In rejecting this argument, the court held that for a risk disclosure to be false, plaintiffs must allege facts indicating that the risk factor was already affecting the business at the time the risk factor was disclosed. The court held that because plaintiffs failed to allege that the Cambridge Analytica data breach was already affecting Facebook at the time these risk disclosures were made, plaintiffs failed to plead falsity.

Finally, the single statement that the court held plaintiffs sufficiently pled was false was the following 2017 statement by Facebook's COO: "when you share on Facebook, you need to know that no one's going to steal our data. *No one is going to get your data that shouldn't have it … you are controlling who you share with."* The court found that plaintiffs adequately pleaded falsity with respect to this statement based on particularized allegations, including allegations that Facebook purportedly had overdriven users' privacy settings to provide access to users' data to third parties without consent (known as "whitelisting").

Nonetheless, the court found that plaintiffs failed to adequately plead scienter. The court held that plaintiffs' reliance on witnesses' alleged warnings of "privacy vulnerabilities" and "data misuse" a year or more before the COO's challenged statement (which was in essence forward-looking) was insufficient to establish that the COO knew her statement was false when she made it. Moreover, Facebook addressed security improvements following Russian interference in the Trump election, which the COO discussed during the same interview in which she made the challenged statement. Thus, the court reasoned, that the stronger inference was that Facebook had already addressed the issue raised to the COO a year before she made the challenged statement. The court further held that alleged "widespread privacy misconduct" was insufficient to establish scienter, explaining that plaintiffs failed to allege that the COO knew about whitelisting or was provided detailed information about it. Likewise, the court held that plaintiffs' bare allegations that Facebook's business model depends on users freely sharing their information and thus incentivizes misuse of data was insufficient to plead scienter. Finally, the court rejected plaintiffs' theory that an FTC Consent Decree from years before the challenged statement was made allegedly put "Facebook on notice" that "its representations concerning its privacy practice needed to be completely accurate." The court reasoned that, the FTC Consent Decree alone was insufficient to establish scienter as plaintiffs provided no particularized coupling the FTC Consent Decree with the COO's later statements from which the court could infer that the COO consciously lied.

On November 15, 2019, plaintiffs filed their second amended complaint attempting to address the deficiencies highlighted in the court's dismissal order. On January 15, 2020, defendants moved to dismiss the second amended complaint, which is set to be heard on July 16, 2020.

McGovney v. Aerohive Networks, Inc., 36 (N.D. Cal. Aug. 7, 2019) – Missed Guidance

Aerohive Networks, Inc. ("Aerohive") designs and develops a cloud networking platform and produces hardware, such as routers and switches, network management and data collection applications, and maintenance and support services. Aerohive works with channel providers to reach most of its customer base. While historically having strong revenue, Aerohive never achieved profitability from 2013-2016. In 2017, facing pressure to become profitable, Aerohive announced an overhaul of its sales organization and strategy, including installing new sales leadership, unbundling Aerohive's product and service offerings, and growing its business with a key strategic partner, Dell. On January 16, 2018, after markets closed, Aerohive announced its preliminary 4Q17 results. Its expected net revenue for the fourth quarter was $3 million short of previous guidance. On January 17, 2018, Aerohive's stock price fell approximately 29% to close at $4.07.

Eight days later, investors filed a class action lawsuit, alleging violations of Sections 10(b), 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934 by the company and certain of its officers. Plaintiffs alleged that defendants made eight false and misleading statements in Aerohive's quarterly report for 3Q17 on Form 10-Q and during an earnings call with investors for 3Q17 regarding (1) sales personnel issues; (2) Aerohive Connect, Aerohive Select, and HiveManager; (3) sales execution and business with Dell; (4) projected revenues; and (5) Aerohive's attempt to blunt the impact of bad news.

After the court dismissed plaintiffs' amended complaint with leave to amend, plaintiffs filed a second amended complaint, which defendants also moved to dismiss. On August 7, 2019, the court dismissed the second amended complaint, with prejudice, holding that plaintiffs' allegations failed to allege a false or misleading statement or plead scienter. The court held that plaintiffs failed to plead falsity for seven of the eight statements at issue, because those seven statements, including statements about issues with sales personnel, sales strategy failures, and leadership restructuring, were neither inaccurate nor misleading. The remaining challenged statement related to Aerohive's revenue expectations for 4Q17, which the court deemed inactionable forward-looking statement accompanied by meaningful cautionary statements protected by the PSLRA's safe harbor provision. Plaintiffs' allegations of scienter were based on confidential witness statements and the core operations doctrine. The court deemed plaintiffs' confidential witness allegations inadequate. Specifically, the court held that the complaint lacked allegations that the confidential witnesses had direct personal knowledge of matters at issue in this case, namely, company-wide financials, the forecasting process, 4Q17 guidance and events, and the state of mind of the individual defendants at the time the challenged statements were made. The court further deemed the core operations doctrine inapplicable because it requires a false or misleading statement which was absent from the second amended complaint. The court further held that allegations that an individual defendant was a "hands-on manager," were inadequate to plead that he had access to the disputed information, and thus that he acted with scienter. It further held that plaintiffs did not plead that the nature of the relevant facts about which defendants made allegedly false or misleading statements were of such prominence that it would be "absurd" to suggest that management was without knowledge of them. Finally, it held that a holistic evaluation of the various allegations did not establish scienter because "Aerohive's repeated disclosure of negative information on the very topics [defendants] supposedly concealed undermines an inference of a deliberate omission."

Wochos v. Tesla, Inc., Case No. 17-cv-05828-CRB, 2019 WL 1332395 (N.D. Cal. Mar. 25, 2019) – Delayed Production

Tesla, Inc. ("Tesla") manufactures luxury electric vehicles. In 2016, the company announced plans to produce an affordable, mass-market electric vehicle called the "Model 3." The Model 3 was well-received by consumers, attracting deposits from over 500,000 potential customers after its launch in 2017. Tesla consistently stated that it planned to use automated production lines and to ramp up production to a rate of 5,000 finished vehicles per week by the end of 2017 to support this high demand. However, production did not proceed as expected. On October 2, 2017, the company issued a press release stating that Tesla failed to meet its Model 3 production goals for the third quarter of 2017 because of "production bottlenecks." Four days later, the Wall Street Journal published an article entitled, "Behind Tesla's Production Delays: Parts of Model

3 Were Being Made by Hand," reporting that the few Model 3s were being constructed by hand rather than on an automated production line. On October 9, 2017, Tesla's stock price dropped $13.94, or 3.91%, to close at $342.94. On November 2, 2017, Tesla moved its production goal of 5,000 Model 3s per week to the end of the first quarter of 2018.

In October 2017, plaintiffs brought claims against Telsa and its officers under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, alleging that defendants issued materially misleading statements about the production timeline for Tesla's Model 3. Specifically, plaintiffs alleged that the company told investors that production of the Model 3 was "on track" when it was actually suffering from production delays that put the company behind schedule. Plaintiffs later amended the complaint to change their theory, alleging that Tesla stated it would begin producing the Model 3 by July 2017, even though Tesla had a purported "plan" to begin mass producing the Model 3 no earlier than December 2017. Defendants moved to dismiss the second amended complaint.

On March 25, 2019, the court dismissed the second amended complaint, with prejudice, identifying two fundamental problems with plaintiffs' claims. First, the court found that plaintiffs' allegations regarding the existence of a plan were deficient because they were based only on the statement of a former employee that mass production could not begin earlier than December 2017. As there was no plan, the court held that Tesla could not misrepresent that plan. Second, the court found that the allegations "conflate[d] production with automated mass production." Specifically, the court held that defendants' statements could not be reasonably interpreted to mean that Tesla would be able to successfully automate mass production in July 2017, especially in light of contextual statements by Tesla's CEO that "[n]ow, will we actually be able to achieve volume production on July 1 next year? Of course not."

Hamano v. Activision Blizzard, Inc. et al., Case No. 2:19-cv-03788-SVW-AFM, 2019 WL 7882076 (C.D. Cal. Oct. 17, 2019) – Termination of Major Contract

Activision Blizzard, Inc. ("Activision") is a leading worldwide developer, publisher and distributor of video games. On April 16, 2010, Activision entered into a Licensing Agreement with Bungie, LLC ("Bungie"), a company known for developing the acclaimed Halo franchise of video games and, more recently, the Destiny franchise of video games. Under the terms of the Licensing Agreement, Bungie agreed to develop four major installments in the Destiny franchise, as well as four expansions (i.e., add ons), with the last expansion to be released in 2020. Activision agreed to handle publication and distribution of the product.

Throughout 2018, Activision made numerous bullish statements regarding its expectations for Destiny and its relationship with Bungie. However, on January 10, 2019, Activision announced that it would no longer control or derive profits from the Destiny franchise. On January 11, 2019, Activision's stock price fell $4.77 or 9%.

Investors filed a class action lawsuit on March 12, 2019, alleging violations of Sections 10(b), 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934 against Activision and three of its officers for allegedly making false and misleading statements regarding Activision's relationship with Bungie. Specifically, plaintiff alleged that Activision materially misled investors by failing to disclose the companies' "negotiations to end the licensing agreement" and the "problems with the[ir] relationship" in public statements and filings in the second and third quarters of 2018. Defendants moved to dismiss, arguing that plaintiff failed to allege sufficient facts to support a strong inference of fraudulent intent, or scienter, required under the PSLRA.

In September 2018, the court denied that motion to dismiss, holding that defendants' arguments raised issues which were not resolvable at the pleadings phase and thus it was more appropriate to resolve the issues at the summary judgment stage. Activision sought reconsideration of that decision, asserting that the court had not determined whether plaintiff met the heightened pleading standard for scienter required by the PSLRA. On October 18, 2019, the court reversed its prior decision and dismissed the consolidated complaint, with leave to amend, on the grounds that it misapplied the heightened pleading standard and, when properly applied, plaintiff's allegations that defendants knew the relationship with Bungie was ending at the time it issued the allegedly misleading statements failed to establish the requisite strong inference of scienter. The court reasoned that each of plaintiff's factual allegations had "equally-plausible non-culpable explanations." For instance, a shift of development resources away from Bungie's products could have been motivated by non-nefarious reasons. Similarly, a contentious call between Activision and Bungie did not show an intent to end the relationship, particularly where tension about the quality and financial performance of a particular franchise "could support an equally plausible inference that both Bungie and Activision were still seriously invested in [that franchise's] future." Further, the court held that Bungie's own actions in securing investments from other sources, which could be evidence of Bungie's preparation to leave the relationship, were irrelevant to Activision's own intent to terminate. Thus, the court concluded that "[i]nferring scienter from these sparse allegations would require impermissible speculation," and dismissed the complaint without prejudice.

On December 30, 2019, plaintiffs filed their first amended complaint. On January 21, 2020, defendants filed a motion to dismiss, which is scheduled to be heard on March 9, 2020.

Sgarlata v. Paypal Holdings, Inc., Case No. 17-cv-06956, 2019 WL 4479562 (N.D. Cal. Sept. 18, 2019) – Customer Data Security Breach

PayPal Holdings, Inc. ("PayPal") 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 Securities Exchange Act of 1934 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 focused on defendants' knowledge that privacy of 1.6 million customers had been potentially compromised – not merely knowledge of the breach – because that is the information that correlated with plaintiffs' loss causation argument. Plaintiffs attempted to support their scienter theory with alleged statements from three former employees who allegedly stated that they learned of, or had reason to suspect, the breach in November of 2017, and an expert witness who concluded that "PayPal and TIO's conduct in response to the breach indicates that they were likely aware that all customer data had been potentially compromised as of November 10th." The court held that these 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.

Azar v. Yelp, Inc., Case No. 18-cv-00400, 2019 WL 285196 (N.D. Cal. Jan. 22, 2019) – Missed Guidance & 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–$900 million to $850–865 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 Securities Exchange Act of 1934 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 August 2, 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."

On December 17, 2018, defendants sought leave to file a motion for reconsideration of the court's loss causation ruling, contending that the court erred by linking the decline in stock price to the forward-looking earnings projections it had dismissed as non-actionable. On January 22, 2019, the court denied defendants' motion for leave. The court reasoned that defendants mistakenly assumed that plaintiffs' loss causation theory relied solely on the market's reaction to the discrepancy between non-actionable statements and the subsequent revision in defendants' revenue projections. Instead, the court held that plaintiffs argued that the revenue revision revealed not only that a nonactionable statement was misleadingly optimistic, but also that defendants' other challenged statements were also misleading. Thus, the court held that plaintiffs adequately pleaded the necessary causal link between Yelp's actionable misrepresentations and the drop in Yelp's stock price.

Irving Firemen's Relief & Retirement Fund v. Uber Technologies, Case No. 17-cv-05558, 398 F. Supp. 3d 549 (N.D. Cal. July 31, 2019) – Reputational Risks Threatening Growth

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, Travis Kalanick, resigned.

On September 26, 2017, an investor filed a class action lawsuit against Uber and Kalanick, alleging one violation of California Corporations Code Sections 25400(d) and 25500, provisions that derived from substantively identical language in the Securities Exchange Act of 1934. 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 was 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. Defendants again moved to dismiss. The district court dismissed the second amended complaint, with prejudice, on two grounds. First, the court held that plaintiff failed to adequately allege materially false or misleading statements or omissions. The court acknowledged 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 further 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.

EB Investment Management AB v. Symantec Corporation et al., Case No. 18-cv-02902, 2019 WL 4859099 (N.D. Cal. Oct. 2, 2019) — Revenue Recognition Issues

In 2016, Symantec Corporation ("Symantec"), a cybersecurity company acquired Blue Coat Systems, Inc. ("Blue Coat"), a privately held network-security firm, for $4.65 billion. Thereafter, Blue Coat's management team took control of Symantec, with Gregory Clark and Nicholas Noviello taking over as Symantec's CEO and CFO, respectively. Mark Garfield, Symantec's Chief Accounting Officer before the Blue Coat acquisition, continued in his role until August 7, 2017, when he resigned. The company stated that his "decision to leave the Company was not due to any disagreement relating to the Company[']s management, policies, or practices." Later that year, Symantec acquired LifeLock, Inc., a consumer identity-protection company. In fiscal years 2017 and 2018, Symantec reported strong financial performance based on, in part, the success of the Blue Coat and LifeLock acquisitions.

On May 10, 2018, Symantec announced that its Audit Committee commenced an internal investigation and voluntarily contacted the Securities and Exchange Commission, after a former employee raised unspecified concerns. Following the announcement, Symantec's stock price declined by over 33 percent. On May 14, 2018, Symantec released an updated statement regarding the investigation, which explained that the investigation related to concerns raised by the 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." The company also stated that it did not expect the investigation to have a "material adverse impact on its historical financial statements," but acknowledged that its financial results and guidance were "subject to change."

On May 17, 2018, investors filed a putative class action lawsuit alleging violations of Sections 10(b), 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934.

On August 2, 2018, Symantec announced that the internal investigation was "ongoing," and its stock price dropped another 8% the following day. 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 it 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 separate Chief Accounting and Chief Compliance Officers, clarified and enhanced its Code of Conduct and related policies,

and adopted "certain enhanced controls and policies related to the matters investigated."

On November 15, 2018, the lead plaintiff filed a consolidated amended complaint containing purported allegations from various former employees—including a former Vice President and Chief Security Officer—that the leadership change following the Blue Coat acquisition resulted in negative changes in Symantec's financial reporting policies and practices. Specifically, these alleged "confidential witnesses" purportedly reported that Symantec improperly recognized revenue in violation of GAAP by failing to defer revenue, double booking sales, and recognizing revenue for sales before a purchase order was even issued. Symantec also allegedly improperly recorded ordinary operating expenses as "transition costs." And Garfield's resignation from Symantec in August 2017 was allegedly because of his concerns surrounding these improper practices. Defendants moved to dismiss.

On June 14, 2019, the court dismissed the consolidated complaint, without prejudice. First, the court held that, even if defendants violated GAAP by improperly recognizing revenue, plaintiff failed to allege sufficient facts to show how these violations were material to Symantec's overall financial situation, explaining that the single example provided by plaintiff showed the deferral of only $12 million from the fourth quarter of fiscal year 2018, which only reduced Symantec's fourth quarter revenue by less than one percent. While the court made clear that materiality is not just the number but also the "despicability" of the practice, it held that the allegations were too vague to allege such a despicable practice.

Although the court held that plaintiff plausibly alleged that defendants made materially false and misleading statements through the inflation of transition costs, it further held that plaintiff failed to plead facts giving rise to a strong inference that the individual defendants acted with scienter in connection therewith. Instead, it held that plaintiff, at best, alleged that the "misclassification of expenses *resulted* from 'pressure from Defendants Clark and Noviello,' not that the accounting manipulations were *directed* by [them]." The court came to a similar conclusion with respect to statements that internal controls over financial reporting were effective, holding that, even if these statements were false, plaintiff failed to allege that these internal controls were known to be ineffective (or that the individual defendants were deliberately reckless in not knowing) at the time the disclosures were made.

The court further held that plaintiff failed to plead facts showing that statements regarding Symantec's executive compensation practices were misleading. It also held that plaintiff's allegations regarding falsity of the statement that Mr. Garfield's resignation was not due to any disagreement regarding the company's management, policies or practices, based entirely on purported confidential witnesses, were purely speculative because the complaint lacked facts describing with particularity the confidential witnesses' personal knowledge of the circumstances surrounding the departure.

Finally, the court held that neither the individual defendants' stock sales, compensation incentives, nor other miscellaneous allegations gave rise to an inference of scienter. With respect to the stock sales, the court held that the fact that Clark and Noviello held more stock at the end of the class period than at the beginning "strongly rebuts an inference of scienter." And the fact that Mr. Garfield's stock sales were made pursuant to a 10b5-1 plan also rebutted an inference of scienter. The court allowed plaintiff to move for leave to file an amended pleading but required plaintiff to "clearly explain how the amendments cure the deficiencies identified in this order, as well as any others raised in defendants' motions . . . not addressed" in the order.

Plaintiff filed such a motion, and 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. With respect to allegedly false statements regarding revenue recognition, the court held that new allegations that, among other things, the $12 million deferral from the fourth quarter of 2018 caused Symantec to lower its operating income by 20% for the 2018 fiscal year and 67% for its 2018 fourth quarter financials was a sufficiently material impact on the company's overall financial position. It further held that plaintiff adequately pled scienter with respect to such statements through allegations that Clark was made aware of when certain orders were booked and the corresponding effect this had on revenue depending on when such revenue was booked.

With respect to allegedly false statements about transition costs, the court held that plaintiff added sufficient allegations to allege scienter as to those statements. The court held that the timing of executive departures, and that at least eleven executives departed following the Audit Committee investigation, was uncharacteristic and thus contributed to scienter. It further held that allegations that Clark was directly and personally involved in approving the transition costs at issue and that he attended meeting discussing these costs and their impact on other financial measures were sufficient to plead scienter.

Defendants answered on November 7, 2019. Plaintiff moved for class certification on January 17, 2020, which remains pending. Fact and expert discovery are set to close in December 2020 and March 2021, respectively. Dispositive motions are due by April 30, 2021 and trial is estimated to begin in October 2021.

Mingbo Cai v. Switch, Inc., Case No. 2:18-CV-1471-JCM-VCF, 2019 WL 3065591 (D. Nev. July 12, 2019) – Reduced Guidance

Switch, Inc. ("Switch") hosts data centers and provides its customers colocation, telecommunications, cloud, and content ecosystems services. In 2002, just two years after its founding, Switch purchased a recently-constructed facility during the bankruptcy proceedings of Enron. Having acquired a state-of-the-art facility at a heavily discounted rate, Switch saw rapid profitability and growth. During its initial years, Switch was primarily focused on colocation services – the leasing of information technology infrastructure, such as servers and storage hardware. In October 2017, Switch completed a successful initial public offering. Switch's registration statement discussed plans for developing new facilities in the U.S., but 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 – or that the new facilities lacked the unique market advantages that made its Las Vegas data center successful.

Beginning in April 2018, investors began filing suits against Switch and others in Nevada state court, alleging violations of Section 11 of the Securities Act of 1933. Thereafter, on June 11, 2018, an investor filed in Nevada federal court a parallel putative class action against Switch its officers, its directors, and its IPO underwriters, alleging violations of Sections 11 and 15 of the Securities Act of 1933 on the grounds that defendants owed a duty to disclose to investors that Switch was changing its sales strategy and that the new data centers it planned to open lacked the unique market advantages that made Switch's first location so successful.

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%; it had dropped over 47% since its IPO. Defendants moved to dismiss. On July 12, 2019, the court dismissed claims based on two of three allegedly misleading statements or omissions, but allowed the case to proceed based on omissions in Switch's IPO registration statement regarding Switch's shift in sales strategy.

The court held that statements concerning the proposed openings of new locations were inactionable because the registration statement adequately warned that revenue from the new data centers was uncertain. It also found that plaintiff failed to plead that defendants' inclusion in the registration statement of $9.4 million in recurring revenue from eBay in 2017 was false or misleading because he failed to provide any authority that this was improper and it was irrelevant that eBay was not going to use colocation services until 2018 because it became obligated to pay for the licensed space in the first six months of 2017.

However, the court held that plaintiff sufficiently pled that Switch's decision to change sales strategy should have been disclosed pursuant to Items 303 and 503 of regulation S-K. In so ruling, the court noted that more than 80% of Switch's total revenue in the year preceding its IPO derived from colocation services, and therefore, Switch's decision to move away from that service was material. Additionally, the court held boilerplate disclaimers failed to sufficiently warn investors of the risks associated with its new strategy, as required under Section 503.

On December 20, 2019, defendants moved for judgment on the pleadings based on a "negative causation defense," contending that it is evident on the face of the operative complaint that the stock drop resulted from something other than the alleged omission in the registration statement. Specifically, defendants contend that the August 13, 2018 stock price decline could not have impacted the stock price at the time the first "suit

was brought" in April 2018, nor could it have impacted the price at the time the later-filed parallel federal lawsuit was filed in June 2018 and thus cannot support a Section 11 damages claim. A hearing on this motion has not yet been scheduled. On February 14, 2020, plaintiffs filed a motion for class certification. A hearing on this motion has not yet been scheduled.

In re Alphabet Securities Litigation, Case No. 4:18-cv-06245-JSW (N.D. Cal. Feb. 5, 2020) – Data Breach

Alphabet, Inc. ("Alphabet"), the parent company of Google, is a multinational technology conglomerate that is a holding company of several former Google subsidiaries. Among its products are web-browser Google, webmail Gmail, and the now defunct social media platform Google+. Google discovered a software glitch in the application programming interface in Google+ which exposed hundreds of thousands of users' personal data in spring 2018, 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+.

Shareholders filed federal securities class action complaints 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) and Rule 10b-5 of the 1934 Act. The district court consolidated the lawsuits and appointed a lead plaintiff in January 2019. A consolidated complaint was filed on April 26, 2019, which defendants moved to dismiss on May 31, 2019.

On February 5, 2020, the court dismissed the complaint, with leave to amend, holding that plaintiffs failed to state 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 futurelooking 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.

In holding scienter was not plead, the court rejected 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.

Plaintiffs have until March 13, 2020 to amend their complaint.

2020 CASES TO WATCH

In re Slack Technologies, Inc. Shareholder Litigation, Case. No. 19-CIV-05370 (San Mateo Superior Court); *Dennee v. Slack Technologies, Inc. et al.,* Case No. 3:19-cv-05857-SI (N.D. Cal.) – Slowed Growth/Service Disruptions After Direct Listing

Slack Technologies, Inc. ("Slack") 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 lieu of an IPO, on April 26, 2019, the company filed a Registration Statement with the SEC in conjunction with a direct listing of its Class A stock on the New York Stock Exchange. The final pre-effective amendment to the Registration

Statement was filed on May 31, 2019, and on June 20, 2019, the company filed its prospectus registering up to 18.4 million shares at a reference price of $26 per share.

On September 4, 2019, Slack reported its Q2 2019 financial results, which beat guidance, and provided Q3 2019 guidance. Slack's share price dropped approximately 12% over the next two trading days.

On September 12, 2019, investors filed a putative class action lawsuits against Slack, its officers, and its directors in two different California state courts alleging violations of Sections 11, 12(a) and 15 of the Securities Act of 1933 based on different theories. One was based on a theory that statements in the Registration Statement regarding the company's go-to-market strategy were allegedly false or misleading. The other complaint was based on a theory that statements in the Registration Statement about Slack's connectivity for its users, were false or misleading. A similar complaint was subsequently filed in federal court and similar additional complaints were also subsequently filed in California state court adding certain of Slack's institutional shareholders as defendants.

The federal and state actions have been proceeding simultaneously. With respect to the federal action, on January 6, 2020, the presumptive lead plaintiff filed an amended complaint and was formally appointed lead plaintiff by the court on January 8, 2020. On January 21, 2020, defendants moved to dismiss the amended complaint, which is set for hearing on March 6, 2020.

Defendants argue for dismissal on various grounds, including certain grounds unique to the fact that the claims are based on a direct listing. First, they contend that the lead plaintiff does not—and cannot—plead that the purchased Slack shares that are traceable to the Registration Statement, which is necessary to have standing to bring Section 11 and 12(a) claims. Specifically, they contend that plaintiff will never be able to establish standing because both registered and unregistered Slack shares were available for sale when Slack went public. Indeed, there were far more unregistered shares available (164,932,646) than registered ones (118,429,640), which could be sold regardless of whether Slack filed the Registration Statement. Second, defendants contend that it is essentially impossible for Plaintiff to plead that defendants sold shared directly to him, as required by Section 12(a), because the sales were made through brokerage transactions. Third, they argue that there can be no damages because there was no offering price. Defendants also assert the more traditional ground for dismissal that plaintiff failed to plead that any of the challenged statements were false or misleading.

Meanwhile, the state court cases were consolidated and co-lead counsel were appointed on November 25, 2019. A consolidated complaint was filed on December 20, 2019. On December 30, 2019, defendants moved to stay the state court proceedings on the ground that Section 11 and 15 claims based on a direct listing is a novel question under federal law and the federal court should be the first to speak on it. That motion was heard and denied on February 25, 2020 and a demurrer hearing is set for April 17, 2020.

Stirratt v. Uber Technologies, Inc., Case No. 19-CV-06361 (N.D. Cal.) — Post-IPO Losses, Stagnating Growth, and Cost-Cutting

As noted above, Uber Technologies, Inc. ("Uber") offers app-based services including peer-to-peer ridesharing, ride service hailing, and food delivery. On May 10, 2019, Uber held an initial public offering and issued approximately 180 million shares of common stock at $45 per share. Since the IPO, Uber's shares have consistently traded below their IPO price. Indeed, in the last few months, Uber's shares have traded at approximately $11 to $20 below their initial price.

On October 4, 2019, investors filed a putative class action lawsuit against Uber, certain of its officers, its directors and its IPO underwriters alleging violations of Sections 11, 12(a)(2), and 15 of the 1933 Act and Section 20(a) of the 1934 Act. Plaintiffs claim Uber's registration statement and prospectus included false and misleading statements, such as failing to disclose Uber's allegedly ballooning losses, stagnating growth rate, and cost-cutting measures that purportedly undercut its key growth initiatives. On January 3, 2020, the court appointed a lead plaintiff and lead counsel. Lead plaintiff filed an amended complaint on March 3, 2020 with defendants' motion to dismiss due April 4, 2020. The hearing on the anticipated motion to dismiss is set for July 2, 2020.

In re Tesla, Inc. Securities Litigation, Case No. 3:18-cv-04865-EMC (N.D. Cal.) – Twitter Posts Concerning Potential Go-Private Transaction

As noted, Tesla, Inc. designs, develops, manufactures, and sells high-performance electric vehicles and solar energy generation and energy storage products. On August 7, 2018, the Twitter handle associated with Tesla's CEO 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. Later that day, Tesla's CEO 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."

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), and Rule 10b-5. A consolidated complaint was filed in January 2019. On November 22, 2019, after a brief stay, defendants moved to dismiss the operative complaint which is set was heard on March 5, 2020. On December 27, 2019, plaintiffs 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, which will be heard at the same time as the motion to dismiss.

Lopes v. Fitbit, Inc., Case No. 4:18-cv-06665-JST (N.D. Cal.) - Reduced Revenue Projections

Fitbit, Inc. ("Fitbit") is a technology company focused on health-related devices including wearable health and fitness activity trackers. In an August 2016 earnings release, Fitbit projected that its revenue for the full year of 2016 would be in the range of $2.5 to $2.6 billion. During a conference call the same day, Fitbit's officers explained that Fitbit continued to be the leader in the worldwide wearable market by units as of the end of the first quarter of 2016, and that Fitbit saw opportunities to continue expanding its market share in the U.S., including by potentially attracting customers who also used smartphones. During an October 2016 interview with Jim Cramer on CNBC, Fitbit's CEO differentiated the company from Apple, Inc., explaining that Fitbit is a fitness social network coupled with hardware. In November 2016, Fitbit issued an earnings release in which it lowered its full year 2016 revenue guidance to between $2.32 and $2.345 billion, representing growth of approximately 25-26%, and fourth quarter revenues of between $725 and $750 million. Thereafter, in January 2017, Fitbit announced its preliminary fourth quarter 2016 financial results, stating that its anticipated fourth quarter revenues were approximately $572 to $580 million, and that its annual revenue growth for the full year of 2016 was anticipated to be 17%, not 25-26%.

Shareholders filed federal securities class actions against Fitbit and its officers, asserting claims under Sections 10(b) and 20(a), and Rule 10b-5 alleging that Fitbit made materially false and misleading statements about the company's attempts to differentiate itself from Apple, the competition that Fitbit was facing, and Fitbit's

operations, business, financial results and prospects. On April 25, 2019, a lead plaintiff was appointed and the cases were consolidated. On June 24, 2019, the lead plaintiff filed a consolidated amended complaint. On August 23, 2019, defendants moved to dismiss the complaint. The court has taken that motion under submission.

In re Apple Inc. Securities Litigation, Case No. 4:19-cv-02033 (N.D. Cal.) – Missed Guidance

Apple Inc. ("Apple") designs, develops, and sells computer software, online services, and consumer electronics, including its flagship product the iPhone. In response to reports in late 2016 of unexpected iPhone shutdowns, Apple released an operating system upgrade designed to prevent the shutdowns. In December of 2017, Apple disclosed that the operating system upgrade had the effect of slowing down some iPhones. Apple then stated that it would offer a substantial price reduction for out-of-warranty battery replacements throughout 2018 to address the slow down. On January 2, 2019, Apple's CEO disclosed that revenues for Q1 2019 were expected to be $84 billion – below the guidance range of $89 billion to $93 billion the company announced on November 1, 2018. Apple's CEO blamed the miss on fewer iPhone upgrades than anticipated, a discounted battery replacement program, and emerging market issues – primarily in Greater China. On January 3, 2019, Apple's stock price fell by more than $15 per share, or approximately 10 percent, closing at $142.19.

On April 16, 2019, investors filed a putative class action against Apple, its CEO, and CFO, alleging violations of Sections 10(b) and 20(a), and Rule 10b-5 of the 1934 Act. In their 190-page consolidated amended complaint, plaintiffs allege that, in order to keep the price of Apple's stock artificially inflated, defendants intentionally misrepresented Apple's iPhone sales and business in China.

The court appointed a lead plaintiff and lead counsel on August 14, 2019. And, on December 16, 2019, defendants moved to dismiss the operative complaint. Defendants argue that plaintiffs failed to adequately allege any actionable misstatement or omission because, among other reasons, many of the challenged statements are accurate statements of historical facts or simply inactionable. Similarly, defendants argue that plaintiffs failed to adequately plead scienter because the complaint is devoid of allegations regarding any defendant's state of mind and Apple purchased $88 billion of its own stock through a stock buyback program during the class period, undermining any inference that defendants then knew the stock value was artificially inflated. The hearing on the motion to dismiss is set for March 10, 2020.

Azar v. Yelp, Inc., Case No. 18-cv-00400 (N.D. Cal.) – Optimistic Revenue Expectations

As noted above, 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 businesses. 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–$900 million to $850–865 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 Securities Exchange Act of 1934 against Yelp and three of its officers by making false and misleading statements regarding Yelp's expected revenues for fiscal year 2017, particularly in relation to its advertising program with local businesses. On January 22, 2019, the court denied defendants' motion for leave to file a motion for reconsideration. The class has since been certified, fact discovery is scheduled to close on May 8, 2020, and expert discovery is scheduled to close on September 25, 2020. A trial date has not been set.

Irving Firemen's Relief & Retirement Fund v. Uber Technologies, Case No. 17-cv-05558 (N.D. Cal.) – Reputational Risks Threatening Growth

As noted above, Uber Technologies Inc. ("Uber") offers app-based services including peer-to-peer ridesharing, ride service hailing, and food delivery. Between June 2014 and May 2016, Uber completed four preferred stock offerings, Series D-G Offerings, raising more than $10 billion in capital. 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, Travis Kalanick, resigned.

On September 26, 2017, an investor filed a class action lawsuit against Uber and Kalanick, alleging one violation of California Corporations Code Sections 25400(d) and 25500, sections derived from substantively identical language as the Securities Exchange Act of 1934. 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 cutthroat business practices.

Although on July 31, 2019, the court dismissed the second amended complaint, with prejudice, the case is likely to remain active. Indeed, on August 26, 2019, plaintiff filed a notice of appeal of the district court's dismissal with the Ninth Circuit Court of Appeals. Plaintiff's opening brief was filed on January 3, 2020.

EB Investment Management AB v. Symantec Corporation, Case No. 18-cv-02902 (N.D. Cal.) – Revenue Recognition Issues

As noted above, in 2016, Symantec Corporation ("Symantec"), a cybersecurity company acquired Blue Coat Systems, Inc. ("Blue Coat"), a privately held network-security firm, for $4.65 billion. On May 10, 2018, Symantec announced that its Audit Committee commenced an internal investigation and voluntarily contacted the Securities and Exchange Commission, after a former employee raised unspecified concerns. Following the announcement, Symantec's stock price declined by over 33 percent.

On May 17, 2018, before the conclusion of Symantec's internal investigation, investors filed a class action lawsuit alleging violations of Sections 10(b), 20(a) and Rule 10b-5 of the Securities Exchange Act of 1934. 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.

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. On January 17, 2020, plaintiff filed a motion for class certification, which will be fully briefed by March 13, 2020. Fact and expert discovery are set to close in December 2020 and March 2021, respectively. Dispositive motions are due by April 30, 2021 and trial is estimated to begin in October 2021.

Hasan v. Twitter, Inc., Case No. 19-cv-07149 (N.D. Cal.) – Missed Analyst Estimates Due To Software Defect

Twitter is an online, globally recognized social media platform that allows users to self-express and converse via "Tweets" in real time. Twitter generates the substantial majority of its revenue from advertising by enabling its advertisers to target an audience based on a variety of factors, including a user's interests. The "interest graph" maps, among other things, shows interests based on users followed and actions taken on Twitter's platform, such as Tweets created and engagement with Tweets. Additionally, when a user joins Twitter, the user is asked for permission to use their device settings and data—additional information which helps Twitter and its advertisers target consumers.

On August 6, 2019, Twitter publicly disclosed through a Tweet that it "recently discovered *and fixed* issues related to your settings choices for the way we deliver personalized ads, and when we share certain data with trusted measurement and advertising partners." (Emphasis added). On October 24, 2019, before the market opened, Twitter disclosed that its Q3 2019 revenue was over 5% or approximately $50 million lower than analysts' estimates because of weaker-than-expected advertising revenue. During the conference call, Twitter's CEO Jack Dorsey disclosed that software defects caused by changes implemented before August 6, 2019 negatively affected Twitter's Q3 financial results and that the negative effects on advertising revenue would continue through at least Q4 2019. On this news, Twitter's stock price declined over 20% from $38.83 per share to $30.73 per share.

On October 29, 2019, an investor filed a putative class action lawsuit against Twitter and its executives alleging violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The complaint asserts that Twitter's "fix" announced on August 6, 2019 was materially false and misleading and defendants failed to disclose that the "fix" adversely affected Twitter's ability to target advertising, including the targeting of advertising through its Mobile App Promotion product, which caused a material decline in advertising revenue. A lead plaintiff was appointed on February 12, 2020. A consolidated amended complaint is due to be filed by March 30, 2020, and motions to dismiss are expected to be briefed over the summer.

SECOND CIRCUIT AND CONNECTICUT AND NEW YORK DISTRICT COURTS

***Shetty v. Trivago N.V.*, Case No. 19-0766, 2019 WL 68343250 (2d Cir. Dec. 16, 2019) – Modification To Advertising Algorithm**

Trivago NV ("Trivago") is a global hotel search platform that allows users to search for and compare deals from a variety of different hoteliers and online travel agencies. Trivago charges advertisers—primarily hoteliers and online travel agencies—a cost-per-click fee in exchange for listing the advertisers' offerings on its platform. The size of the fee is determined by a bidding process through which advertisers compete for prominence within Trivago's search results; the higher an advertiser bids to pay per click, the more likely it is that Trivago will display the advertiser's offer at the top of its users' search results.

When a Trivago user clicks on a hotel offer on Trivago's site, the user is directed to the advertiser's landing page. Trivago has an interest in ensuring that landing page is convenient for the user. Before December 2016, Trivago sought to ensure that advertisers' landing pages satisfied Trivago's standards by retaining the right to exclude advertisers whose landing pages failed to satisfy Trivago's standards. Trivago did not exclude certain of its larger advertisers, including Priceline.com ("Priceline"), despite the fact that some of these advertisers did not satisfy Trivago's landing page standards.

Trivago launched an IPO on December 16, 2016. At around the same time as Trivago's IPO, Trivago revamped its strategy for ensuring that advertisers' landing pages satisfied Trivago's standard. Specifically, Trivago implemented "relevance assessments" to issue advertisers scores based on the quality of their landing pages. Advertisers that received low scores were required to bid higher (*i.e.,* pay "penalties") in order to maintain their position in Trivago's search results displays. Trivago's IPO offering documents did not disclose the relevance assessment implementation, or that Priceline and other advertisers were not in compliance with Trivago's landing page policies leading up to the IPO.

Beginning on February 24, 2017, when Trivago announced its Q4 2016 earnings and its executives spoke to investors on an earnings call, and for the next two quarters, Trivago reported an increase in revenue. Trivago attributed this increase to its "improved commercialization" and efforts to "optimize [its] marketplace algorithm" through the relevance assessment, which resulted in certain advertisers paying penalties for receiving low scores. In September 2017, however, Trivago disclosed that it was reducing its projected 2017 revenue growth from 50% to 40%, citing among other things the fact that certain advertisers had "optimized" their "bidding strategies," and avoided paying penalties by modifying their landing pages to meet Trivago's standards. Trivago's share price fell $2.44 per share (or 16.3%) on this news to close at $12.49 on September 6, 2017. Thereafter, on October 25, 2017, Trivago announced unfavorable third quarter results, and further downgraded its expected annual revenue growth to between 36% and 39%, again citing advertisers' advertisers' optimization of their websites and bidding strategy in response to the relevance assessment adjustments. Trivago's share price fell $2.42 per share (or 22.5%) on this news to close at $8.34 on October 25, 2017.

Alleged investors filed a putative class action lawsuit against Trivago and its CEO and CFO, the underwriters for Trivago's IPO, and Trivago's authorized U.S. representative which signed its Form F-6 registration statement, forming part of the Registration Statement. Plaintiffs asserted claims under Sections 11 and 15 of the 1933 Act, and Sections 10(b) and 20(a) of the 1934 Act, on behalf of all purchases of Trivago common stock between December 16, 2016 and October 25, 2017. Defendants moved to dismiss all of plaintiffs' claims for failure to state a claim, which the district court granted, with prejudice, in an order dated February 26, 2019. See *Holbrook v. Trivago N.V.,* No. 17 CIV. 8348 (NRB), 2019 WL 948809 (S.D.N.Y. Feb. 26, 2019).

As to the Section 11 claims, defendants argued that plaintiffs did not plead that the allegedly omitted facts (*i.e.,* the implementation of the relevance assessment, and Priceline's prior non-compliance with Trivago's landing page standards) actually existed at the time of the IPO. To the contrary, defendants argued that plaintiffs pleaded only with "conspicuous uncertainty" the timing of the relevance assessment's implementation. The district court rejected this argument, holding that it was undisputed that the relevance assessment was introduced in December 2016 and that it was in place long enough to have a non-negligible effect on Trivago's Q4 2016 financial results, given Trivago's attribution of increased revenue in that quarter to the relevance assessment. The district court thus concluded that there were "sufficient grounds for inferring that the existence of the relevance assessment was ascertainable prior to the" IPO. The district court also rejected defendants' argument that plaintiffs failed to allege Priceline's non-compliance with Trivago's standards before the IPO, reasoning that this argument was contingent on defendants' failed argument concerning plaintiffs' failure to allege the timing of the relevance assessment's implementation.

Although the district court concluded that plaintiffs adequately had alleged that defendants omitted from the IPO offering documents the relevance assessment implementation and Priceline's prior non-compliance with Trivago's standards, the district court also concluded that plaintiffs had not adequately alleged that Trivago had a duty to disclose this information in the IPO offering documents. Plaintiffs argued that such a duty to disclose existed because the omitted facts were part of a material trend that defendants reasonably expected would have a material impact on Trivago's revenues, and thus that these facts were required to be disclosed pursuant to Item 303 of Regulation S-K. In holding that plaintiffs failed to plead an Item 303 violation, the district court first concluded that Priceline's pre-IPO non-compliance was not "of the scope and magnitude necessary to impute knowledge of likely materiality" to defendants, "even considering Priceline's status as Trivago's largest advertiser." To the contrary, Priceline's non-compliance appeared to be "pedestrian," based on defendant's contemporaneous and pre-suit statements that they thought certain advertisers were "finding ways around" Trivago's standards and had just "started to test around with different designs" at the end of 2016. Likewise, the district court declined to find an Item 303 violation based on a statement that Trivago's CFO made 11 months after the IPO, in which he stated that Priceline's pre-IPO standards non-compliance was the impetus for one of Trivago's "biggest changes." Rather, the district court held: "The mere fact of a change in policy does not render the impetus for that change material for purposes of Item 303, and [the CFO's] post hoc description of the extent of the ultimate impact of the relevance assessment does not speak to what the Company knew or should have known at the time of the Offering."

"The mere fact of a change in policy does not render the impetus for that change material for purposes of Item 303, and [the CFO's] post hoc description of the extent of the ultimate impact of the relevance assessment does not speak to what the Company knew or should have known at the time of the Offering."

The district court also held that plaintiffs failed adequately to allege an Item 303 violation based on the omission from Trivago's IPO offering documents of facts concerning the company's implementation of the relevance assessment. Specifically, the district court concluded that whether advertisers later paid penalties as a result of the relevance assessment was "paradigmatic hindsight" that was "insufficient" to support a claim. Nor did plaintiffs' allegation that Trivago had observed

increased revenue attributable to the relevance assessment for (at most) 15 days in early December establish any Item 303 violation, as "[t]he payment of penalties of unspecified scale and significance over such a brief period of time simply does not support conclusions about how or when advertisers would react to the relevance assessment going forward from the time of the [IPO]." Moreover, the stated purpose of the new policy was to incentivize advertisers to conform landing pages, not to extract penalties. Therefore, the district court explained, "unless Trivago doubted the efficacy of its own policy within days of its implementation, the Company in all likelihood reasonably believed that its advertisers would endeavor to pay as few penalties as possible, and accordingly that any pre-Offering increases in revenue attributable to the relevance assessment were ephemeral."

Defendants also argued that the omission from Trivago's IPO offering document of a description of the relevance assessment and advertiser's historical non-compliance with Trivago's policies did not render materially false any statements that Trivago made in the offering documents. The district court agreed, holding that the alleged failure to disclose the existence of the relevance assessment (or any other detail of Trivago's competitive bidding process) did not render materially misleading any of Trivago's broad, non-specific descriptions of pricing. In particular, the district court held, "[t]here are no allegations that Trivago made any representations whatsoever about its prior approach to regulating the landing page policies of its advertisers, and a duty to disclose does not spring solely from plaintiffs' interest in that omitted fact." Moreover, plaintiffs' mere observation that Trivago's revenue was influenced by how much its advertisers were willing to pay "simply [did] not trigger a generalized duty to disclose all of the details of how Trivago regulates the landing pages of its advertisers."

As to plaintiffs' claims under Section 10(b), defendants argued that there was no material misstatement or omission alleged. The district court adopted defendants' argument that the company's February 24, 2017 disclosures concerning the company's algorithm change and annual revenue growth projection were not rendered misleading because the company failed to identify by name the relevance assessment or that this new policy presented a risk that advertisers would conform their landing pages and stop paying penalties. In particular, the district court reasoned that defendants had attributed Trivago's Q4 2016 revenue growth to a change in the company's algorithm and disclosed that the sustainability of the resulting "improved commercialization" was contingent upon how advertisers reacted to the change, meaning that the "allegedly omitted facts were either disclosed or implied."

Lastly, the district court held that even if plaintiffs had adequately alleged actionable misstatements or omissions, they still failed to plead facts giving rise to "any inference of scienter, let alone a strong one." Instead, plaintiffs relied exclusively on generalized allegations that defendants "knew facts or had access to information suggesting that their public statements were not accurate," without identifying with particularity any reports or statements containing adverse facts to which any defendants had access. Nonetheless, plaintiffs argued that defendants' scienter could be presumed because the revenue impact of the relevance assessment was calculable. The district court rejected this argument, holding that the "mere fact that the impact of the relevance assessment was calculable is woefully inadequate grounds for purposes of scienter, particularly where, as here, plaintiffs fail to adequately allege motive." Plaintiffs also argued that scienter should be presumed because the relevance assessment constituted a "core operation" of Trivago. The district court disagreed, holding that the Second Circuit had not adopted the "core operations" doctrine for purposes of imputing scienter and, even if it had, the doctrine is meant to supplement an inference of scienter, rather than be an independent ground to establish scienter.

Plaintiffs appealed the district court's dismissal. In a Summary Order dated December 16, 2019, the Second Circuit affirmed the district court's rulings, concluding that dismissal of the 1933 Act claims was proper "[s]ubstantially for the reasons articulated by the [d]istrict court," and "agree[ing]" with the district court's reasoning for dismissing the 1934 Act claims.

Arkansas Public Employees Retirement System v. Xerox Corporation, Case No. 18-CV-1165, 771 F. App'x 51 (2d Cir. June 6, 2019) – Contracts Less Successful Than Anticipated

Xerox Corporation ("Xerox") is a global provider of document management solutions and business process outsourcing services. In 2010, Xerox purchased

Affiliated Computer Services, Inc. ("ACS"), and thereafter sought to develop ACS's Medicaid Management Information system ("MMIS"), known as Health Enterprise, into a platform that Xerox could profitably market to state governments as a solution for state governments' Medicaid-related benefit plan administration, financial management, information storage retrieval, and reporting. As Xerox implemented Health Enterprise in six states in which it had been awarded MMIS contracts, between April 2012 and October 2015, Xerox's officers made statements concerning the company's progress with respect to the implementation. First, Xerox's officers stated that Xerox's MMIS system was a "platform" that was transferrable, reusable, replicable, and scalable, that possessed plug-and-play characteristics, and that gave Xerox a competitive advantage. Second, Xerox's officers stated that the company was "making progress" and "stabilizing more and more" with respect to its government healthcare strategy, and that certain implementations had "gone very well." Third, Xerox's officers made statements predicting that the company's margins on implementation of Health Enterprise would improve over time, leading to increased profitability for the company as a whole. Between October 2014 and October 2015, Xerox and certain of its officers issued a series of disclosures explaining that the company's services business (including Health Enterprise) had been less successful than expected, and that certain of the Health Enterprise contracts were operating at a loss.

Alleged investors filed a putative class action lawsuit against Xerox and certain of its officers, alleging violations of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder. Defendants moved to dismiss. In an order dated March 20, 2018, the district court granted defendants' motion, with prejudice.

First, the district court concluded that plaintiffs failed to adequately allege with particularity why certain statements were false, including defendants' statements that the "sole driver of margin decline had to do with the significant set up in books and growth rates," and that growth rates were "driven almost exclusively by the State of California." The district court concluded that plaintiffs alleged no facts explaining why these statements were false. Likewise, other statements, including defendants' statements describing Health Enterprises as a "platform," were literally true.

The district court next concluded that many of the statements that plaintiffs challenged were non-actionable puffery, including statements concerning defendants' belief in Xerox's "competitive advantage," "great technology," expectations of business success, "successful implementation" of Health Enterprise, and optimism that the Health Enterprise "platform gives us an opportunity to expand." Likewise, other statements at issue were "quintessential" non-actionable opinion, including statements that defendants "feel like we've got a good handle on this executive the handful of states." The district court concluded that such opinions were not actionable because plaintiffs did not allege facts establishing that defendants did not subjectively believe such statements, or that these opinions were rendered materially misleading by defendants' omission of information concerning issues that Xerox was having with respect to its state contracts.

In addition, the district court held that several of defendants' statements were immune from liability under the PSLRA's safe harbor because they were forward-looking and accompanied by meaningful cautionary language, including defendants' statements that future implementation of the platform would be "a pretty replicable process," and statements concerning further investments into the Health Enterprise contracts.

Plaintiffs appealed the district court's dismissal. On June 6, 2019, the Second Circuit affirmed the district court's dismissal "substantially for the reasons stated by" the district court.

Oklahoma Firefighters Pension and Retirement System v. Lexmark International, Inc., Case No. 17-CV-5543, 367 F. Supp. 3d 16 (S.D.N.Y. 2019) – Alleged Short-Term Oversaturation Of Company's Product In Key Markets

Lexmark International, Inc. ("Lexmark") is a global manufacturer of laser printers and imaging products. The company's primary focus is on the sale of printer supplies, including in Europe, the Middle East, and Africa ("EMEA"). Lexmark sells its laser printer supplies to a channel of distributors and resellers, who in turn sell the supplies to end-user customers. Lexmark's channel inventory is measured by the number of weeks it takes for its distributors and resellers to sell the supplies to end-users. On an earnings call on July 21, 2015, Lex-

mark disclosed a decrease in revenue during the second quarter of 2015, which the company attributed to a decline in sales of printer supplies and elevated EMEA channel inventory. On this news, Lexmark's stock price fell by 20%.

Alleged investors filed a putative class action lawsuit against the company and several of its senior executives, asserting violations of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder. Plaintiffs alleged that, contrary to defendants' public statements, between 2014 and 2015, the company began engaging in "channel stuffing" by flooding the EMEA markets with printing supplies in order to fund the company's plan to shift towards higher-end laser printers and printing software. Plaintiffs alleged that as a result of defendants oversaturating channels, Lexmark could not continue generating revenue. Defendants moved to dismiss.

First, defendants argued that plaintiffs failed to adequately allege that defendants made any actionable misstatements. Defendants argued that their generalized statements over time that Lexmark's channel inventory worldwide was "flat," and that estimated changes in channel inventory would have only a "minimal impact" on revenue growth rates, were literally true and thus not actionable. The court rejected these arguments, focusing on the alleged importance of the EMEA markets to Lexmark, and holding that plaintiffs adequately alleged that defendants' statements concerning Lexmark's channel inventory were rendered materially misleading by defendants' omission of information bearing on Lexmark's "swollen" EMEA channel inventory. Likewise, the court held that plaintiffs adequately alleged that defendants' statements during the class period attributing revenue growth to increases in end-user demand were materially misleading by the omission of the fact that Lexmark had been allegedly oversaturating its channel inventory. Additionally, the court held that defendants' affirmative disclosure of Lexmark's price increases, and related increases in channel inventory in advance of such price increases, "could be materially misleading" based on defendants' alleged failure to disclose the high "rate of occurrence" of such price increases and the inflationary impact they had on Lexmark's channel inventory. In addition to holding that defendants made affirmative statements that were rendered actionably misleading by defendants' omission of information concerning Lexmark's saturated channel inventory, the court also held that plaintiffs had adequately alleged that defendants had an independent duty to disclose such information pursuant Item 303 of SEC Regulation S-K. In particular, the court held that plaintiffs had alleged facts establishing that for a period of nine months leading up to the end of Q1 2015, defendants were aware from information presented in monthly meetings of a trend showing that their channel inventory levels in the EMEA markets were steadily rising above Lexmark's preferred range, and that such increasing channel inventory would have a material impact on the company's financial condition because of the importance of that market to Lexmark's business.

"the court held that plaintiffs had alleged facts establishing that for a period of nine months leading up to the end of Q1 2015, defendants were aware from information presented in monthly meetings of a trend showing that their channel inventory levels in the EMEA markets were steadily rising above Lexmark's preferred range, and that such increasing channel inventory would have a material impact on the company's financial condition"

After concluding that plaintiffs had adequately alleged actionable misstatements and omissions, the court then held that plaintiffs adequately alleged that defendants acted with scienter, relying on plaintiffs' sufficiently particularized allegations that defendants participated in monthly discussions concerning rising EMEA channel inventory levels. The court also concluded that plaintiffs' scienter assertions were "buttressed" by plaintiffs' allegations that the EMEA markets accounted for 35% of a Lexmark division, which in turn accounted for 83% of Lexmark's business overall. The court concluded that the alleged cumulative effect of Lexmark's channel stuffing was an inventory drawdown of between $50 million and $70 million as Lexmark subsequently endeavored to reduce excess channel inventory levels, especially in EMEA, and that "the magnitude of the aftershock suggests more than a careless mistake or trivial miscalculation by Lexmark and its executives." The case is currently stayed while the parties focus on mediation.

City of Warwick Municipal Emps. Pension Fund, v. Rackspace Hosting, Inc., Case No. 17 Civ. 3501, 2019 WL 452051 (S.D.N.Y. Feb. 5, 2019) – Loss Of Large Customer & Reduced Guidance

Rackspace Hosting, Inc. ("Rackspace") is a managed cloud computing company, which offers a number of services, including data storage services. In 2007, Vodafone, a major customer of Rackspace, partnered with Vodafone's partially-owned subsidiary, Safaricom, to create a mobile phone application in Kenya called M-Pesa, which allowed customers to send and receive money. Vodafone contracted with Rackspace to host the application. In August 2010, Rackspace disclosed that Vodafone had contracted with Rackspace to host M-Pesa until April 2015. Soon after Vodafone launched M-Pesa, M-Pesa expanded into other African countries and experienced significant user growth. As M-Pesa expanded, its users began to experience service delays, interruptions, and outages. In 2013, Safaricom attempted to minimize these issues by migrating the M-Pesa infrastructure from Germany to Africa. Rackspace at all relevant times lacked Africa-based data centers and, accordingly, Safaricom's move of M-Pesa infrastructure to Africa jeopardized Rackspace's ability to persuade Vodafone to renew the parties' contract upon expiration in April 2015. Between November 2014 and April 2015, Rackspace and certain of its officers made statements that they were "encouraged by the momentum" they were seeing in their business, that they had "seen good growth" and projected certain revenue growth in the future, that they were "executing our model," and that the company's churn rate (i.e., rate of loss of customers) was "remarkably stable." On May 11, 2015, Rackspace disclosed that it had lowered its second-quarter revenue growth expectations and attributed the adjustment to a one-time revenue headwind due to one of the company's "largest and longest-tenured customers" transferring its data to Africa where the company lacked a data center. On this news, the company's stock price fell more than 17%.

Alleged Rackspace investors brought a putative securities class action against Rackspace, as well as its CEO and CFO, 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, with prejudice..

First, the court held that many of the statements that plaintiffs challenged were immune from liability under the PSLRA because they were forward-looking and cabined by meaningful cautionary language, including in particular defendants' statements concerning revenue expectations. Notably, the court held that plaintiffs did not adequately allege that defendants' positive revenue growth projections were unachievable, even though plaintiffs relied on a confidential witness who allegedly attested to the fact that Vodafone was the type of customer for which the company "did not typically compete," reasoning that "companies are regularly pushed into taking non-typical actions in response to challenging conditions and many do so successfully." The court also held that many of the challenged statements were non-actionable puffery or opinion, including in particular defendants' statements about making "good progress."

The court also concluded that plaintiffs failed to adequately allege that defendants had a duty to disclose pursuant to Items 303 and 503 of Regulation S-K that Vodafone likely would not renew its contract with the company. As to Item 303, the court concluded that plaintiffs failed to plead facts establishing that it was "reasonably likely" that Vodafone's non-renewal would have had a material impact on Rackspace's financial condition, "in light of the totality of Rackspace's activity." As to Item 503, the court similarly held that plaintiffs failed to adequately allege that the loss of Vodafone as a customer "necessarily put Rackspace's revenue or profits at risk or made the stock more 'speculative and risky.'"

Lefkowtiz v. Synacor, Inc., Case No. 18 Civ. 2979 (LGS), 2019 WL 4053956 (S.D.N.Y. Aug. 28, 2019) – Loss Of Major Partner

Synacor, Inc. offers multiplatform services to communications providers. In 2016, the company announced a partnership with AT&T to host web and mobile services, from which Synacor projected that it would earn $100

million in revenue after full deployment of the hosting portal, and $300 million in annual revenue by 2019. After this announcement, the company's stock price increased 158% to $3.64 per share. Later, in April 2017, the company raised $18.5 million in a secondary public offering. On an August 9, 2017 Q2 2017 earnings call, Synacor's CEO stated that AT&T "had decided to prioritize engagement over monetization and we now anticipate that much of the ramp up in revenue that we were expecting in the second half of 2017 would get delayed to 2018," and revised the company's 2017 revenue projection from $170-$160 million to $150-$140 million. Following this call, Synacor's share price fell 32.39% and closed at $2.40 per share on August 10, 2017. On March 18, 2018, Synacor's CEO further disclosed on a Q4 2016 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 had anticipated. On this news, the company's stock price dropped by approximately 15%, from $2.40 to $1.75 per share.

Alleged investors filed a putative securities class action against Synacor, in addition to the company's CEO and CFO, alleging violation of Sections 10(b) and 20(a) of the 1934 Act, and Rule 10b-5 promulgated thereunder. Plaintiffs alleged that defendants made false and misleading statements regarding the company's projected revenue from the AT&T partnership, AT&T's control over monetizing the web and mobile services, and the company's internal controls over financial reporting. Defendants moved to dismiss the complaint, which the district court granted with leave to amend.

The court first concluded that defendants' revenue projections were non-actionable forward-looking statements and/or statements of opinion. The court explained that plaintiffs did not challenge the facts defendants supplied in support of their projections, which included reports that Yahoo! had earned $100 million in revenue from a similar partnership with AT&T, which gave rise to the inference that Synacor could do the same. The court also held that plaintiffs had not adequately alleged that the revenues that defendants predicted were unachievable, as opposed to simply delayed. The court also concluded that plaintiffs' allegations that confidential witnesses "viewed the projections as unrealistic" were "not tantamount to Defendants' knowledge that the projections were false."

The court next addressed plaintiffs' allegations that the individual defendants' SOX certifications attesting to the adequacy of the company's internal controls over financial reporting were false in view of the fact that the company's outside auditor subsequently identified three material weaknesses concerning the company's financial reporting. The court held that plaintiffs' claims predicated on these certifications failed because plaintiffs did not adequately allege that any defendants acted with scienter when making them. In particular, plaintiffs attempted to plead scienter by relying on confidential witness accounts that defendants were aware of turnover and understaffing in the company's control functions. The court held that such allegations 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."

On October 2, 2019, plaintiffs sought leave to file a third amended complaint. Although the court allowed plaintiffs to move to amend their complaint, on November 15, 2019, the court ultimately denied the motion, 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 filed a notice of appeal, and the appeal is pending.

In re Longfin Corp. Securities Class Action Litigation, Case No. 18-cv-2933 (DLC), 2019 WL 1569792 (S.D.N.Y. Apr. 11, 2019) – NASDAQ Listing Requirements

Longfin Corp. ("Longfin") is a finance and technology company that provides foreign exchange and finance solutions. Longfin offered shares of its common stock for the first time in an offering purportedly conducted pursuant to SEC Regulation A+ ("Reg A+"). In connection with the offering, Longfin retained Network 1 Financial Securities Inc. ("Network 1") as its lead underwriter. In the underwriter's agreement, Longfin represented that its offering documents "present[ed] fairly, in all material respects, the financial condition of [Longfin]." Longfin also agreed with Network 1 that Longfin would "use its reasonable best efforts to ensure" that its shares were listed for trading on NASDAQ. Network 1's obligations under the agreement were subject to "Longfin furnishing certain certificates to Network 1, including any certificates 'reasonably requested as to the accuracy and completeness' of statements made by the company in connection with its offering."

On August 11, 2017, Longfin submitted an application for listing on NASDAQ. Under NASDAQ Listing Rule 5505(a), a company must have at least 1 million publicly held shares, i.e., shares not held by any company insider. Longfin began issuing shares under its Reg A+ offering on September 1, 2017. On November 15, 2017, NASDAQ approved Longfin's listing. On November 22, 2017, the SEC qualified Longfin's offering. Longfin informed NASDAQ on November 29, 2017 that it anticipated that listing its Class A stock on December 11, 2017.

By December 6, 2017, Longfin had not yet met NASDAQ's listing requirement of 1 million publicly held shares. Longfin thus issued 409,360 shares to 24 individuals for no consideration in order to meet the threshold. Among the 24 individuals were a former director of two Longfin affiliates, and the head of Longfin's U.K. operations, both of whom subsequently sold a portion of these shares. Between December 13, 2017 and March 22, 2018, Longfin issued a series of press releases announcing its acquisition of a "[b]lockchain technology empowered solutions provider" named Ziddu.com, after which Longfin's stock price increased substantially.

The SEC initiated an investigation into Longfin in early 2018 concerning Longfin's Reg A+ offering. After Longfin disclosed this investigation, its stock price fell over 83% between March 26, 2018 and April 3, 2018, from $59.28 to $9.89. On April 6, 2018, the SEC announced that it had acquired a court order freezing $27 million in trading proceeds from allegedly illegal sales of Longfin stock. That same day, NASDAQ halted the trading of Longfin's stock, and on May 24, 2018, NASDAQ delisted Longfin's stock.

In July 2018, putative investors filed a class action lawsuit on behalf of those who purchased Longfin's stock between December 13, 2017 and April 6, 2018, asserting claims against Longfin, its executives and certain alleged insiders who traded in Longfin stock, and Network 1. Plaintiffs' claims included claims for alleged violations of Section 12(a)(1) of the 1933 Act for the sale of unregistered securities, related control person claims under Section 15 of the 1933 Act, claims under Section 10(b) of the 1934 Act and Rule 10b-5 based on the allegedly manipulative scheme to improperly list Longfin's shares on NASDAQ, related control person claims under Section 20(a) of the 1934 Act, and claims under Section 20A against alleged Longfin insiders based on alleged insider trading.

Initially, Longfin and two of the individual defendants moved to dismiss. After the motion was fully briefed, but before it was heard, counsel for those defendants withdrew. The court ordered those defendants to procure new counsel, but they did not, so the court entered default judgment against them and deemed their motion moot. Two of the individual defendants domiciled abroad moved to dismiss for lack of personal jurisdiction. The district court denied that motion, holding that the individual defendants had sufficient minimum contacts with the U.S. given that they were associated with Longfin (a New York issuer) or its affiliates, received Longfin shares as part of an alleged market manipulation scheme, profited from the sale such shares that were listed on NASDAQ, and allegedly participated with knowledge in securities fraud rooted in the U.S. The district court further held that exercising jurisdiction over these defendants was reasonable because, even though "both reside far from the United States," both of them already were "parties to the related SEC action, which is also before this Court."

Network 1 moved to dismiss the Section 12(a)(1) claim against it. The district court granted Network 1's motion to dismiss the Section 12(a)(1) claim, holding that plaintiffs failed to adequately allege that Network 1 was a statutory seller. Specifically, although plaintiffs alleged that Network 1 acted as lead underwriter for its Reg A+ offering and was instrumental in getting Longfin shares listed on NASDAQ, on which plaintiffs alleged purchases were made, plaintiffs made "no allegation that Network 1 acted as a broker for plaintiff's' purchases, owned the shares sold to plaintiffs, or solicited those purchases." In short, the court held, Network 1's alleged assistance with the offering and listing "did not make it a seller of Longfin shares on the open market."

Network 1 also moved to dismiss the Section 10(b) and Rule 10b-5 claims against it, arguing that plaintiffs failed to allege that Network 1 made any false statements. The district court denied this motion, concluding that Net-

work 1 may be liable under Section 10(b) and Rule 10b-5 regardless of whether it made any misrepresentations or omissions, if it facilitated an offering and exchange listing despite knowing that the shares were issued outside the ambit of Regulation A+'s requirements. The district court reasoned that if Network 1 "played a significant role in getting Longfin listed," knowing that "a significant number of" the listed shares were invalidly issued, then it violated Section 10(b) and Rule 10b-5.

Network 1 also argued that plaintiffs did not adequately allege scienter. Although the district court acknowledged that this was a "closer question," the court held that plaintiffs' scienter allegations sufficed. In particular, the district court held that plaintiffs adequately alleged that Network 1 knew based on information provided by Longfin (including bank records and stockholder lists) that on December 6, 2017, Longfin had sold shares to insiders for no consideration, and thus that these shares were ineligible for listing on NASDAQ.

On April 24, 2019, Network 1 moved for reconsideration of the district court's scienter ruling. On July 29, 2019, the court granted Network 1's reconsideration motion. *In re Longfin Corp. Sec. Class Action Litig.*, No. 18-cv-2933 (DLC), 2019 WL 3409684 (S.D.N.Y. July 29, 2019). Specifically, the Court held that the inference that Network 1 acted with scienter based on plaintiffs' allegations was not nearly as cogent or compelling as the inference that Network 1 was lied to by Longfin, given plaintiffs' allegations that Network 1 asked Longfin three times to confirm that the December 6, 2017 shares were validly purchased, and Longfin so confirmed each time.

On January 3, 2020, plaintiffs moved for class certification defendants did not oppose. Close of fact discovery is set for May 29, 2020, summary judgment motions are due September 4, 2020. No trial date has been set.

Plumbers and Pipefitters National Pension Fund, v. Tableau Software, Inc., Case No. 17-CV-5753, 2019 WL 2360942 (S.D.N.Y. Mar. 4, 2019) – Competitive Harm

Tableau Software, Inc. ("Tableau") is a software company that produces easy-to-use software products to help people query, analyze, and visualize data more. Throughout 2015, Tableau and its officers made statements that they did not forecast any decline in technology deployment, and that there had been no major competitive shifts since Tableau went public. 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 prevent the company from generating income sufficient to realize its deferred tax assets. Later that day, during an analyst and investor call, the company announced that the competitive dynamic in the field had become more crowded and difficult over the years. Tableau's stock price dropped by almost 50 percent.

On July 28, 2017, investors filed a putative class action against Tableau and certain of its officers alleging that by making statements suggesting a lack of problems from competition while knowing that increased competition from companies, such as Microsoft and Amazon, was causing customers to delay and cancel pending license orders, defendants intentionally misrepresented how this would affect Tableau's revenue, in violation of Sections 10(b) and 20(a) of the Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

Defendants moved to dismiss. The court denied defendants' motion to dismiss, holding that the operative complaint adequately alleged false or misleading statements, scienter, and loss causation.

The court held that defendants' statements suggested no real threat or adverse effects from competition when, in reality, increased competition was causing the company to lose expected licenses. The court further held that risk statements in the company's Form 10-K of "potential risks" rather than "existing risks" misrepresented current problems as potential problems.

With respect to scienter, the court held that plaintiffs had sufficiently pleaded that the individual defendants had the motive and opportunity to commit fraud by allegedly selling between 13 and 100 percent of their stock holdings during the class period. The court explained that, to plead scienter, "it is sufficient for the plaintiffs to allege that the value of sales was higher during the class period than the preceding year." It reasoned that the sales were unusual, even with the 10b5-1 trading plans the individual defendants presented, because there was no long trading history to show that this was a historically normal trading pattern and it was unclear when the plans were entered. The court noted that although it was "noteworthy" that some of

defendants retained some stock after the stock price dropped, this was not dispositive, because they might have been trying to avoid drawing attention to their stock sales. The court also held that allegations from confidential witnesses that two officer defendants could access sales data and occasionally attended sales meetings where the competitive threats were made clear during the class period sufficiently pled "circumstantial evidence of conscious behavior or recklessness".

Finally, the court held that plaintiffs' allegation that the February 4, 2016 announcements disclosing the previously concealed negative information caused Tableau's stock price to immediately drop from $81.75 to $41.33, was sufficient to plead loss causation. The court noted that other factors that might have caused the stock price drop are fact issues and need not be developed at the motion to dismiss stage.

In re Xunlei Limited Securities Litigation, Case No. 18-CV-0467 (PAC), 2019 WL 4276607 (S.D.N.Y. Sept. 10, 2019) – Potentially Unlawful Activity

Xunlei Limited ("Xunlei") is a Chinese internet company whose stock is traded on the U.S. stock exchange, that primarily provides services such as download, video, and gaming acceleration, content delivery, and cloud storage. Xunlei's main service is OneThing Cloud, a network linked storage device that utilizes blockchain technology to allow multiple users to share online storage remotely. In October 2017, Xunlei introduced a rewards program which allowed owners of OneThing Cloud to "mine" a cryptocurrency called OneCoin and use a Wallet application to send and receive OneCoin. After the launch of this rewards program, Xunlei's stock price skyrocketed from $5 per share to $27 per share. While Xunlei only set up its OneCoin to be used through its rewards program for its own services, in late 2017, owners of OneCoin began to trade them for hard currency and other cryptocurrencies, using Xunlei's Wallet application.

On November 28, 2017, Chinese news outlets reported that Xunlei's recently-terminated Senior Vice President described OneCoin as a disguised Initial Coin Offering ("ICO") and an illegal fund-raising scam, and on that same day, the company's stock price dropped from $21.01 to $18.58. Xunlei then announced on November 29, 2017 that OneCoin should not be traded on external transaction platforms, and on the same day, the stock price dropped to $12.80. Following a rebranding of OneCoin to LinkToken on December 9, 2017, the price of the company's stock increased to $22.90 on December 11, but on January 12, 2018, one day after the National Internet Finance Association of China ("NIFA") issued a risk alert about LinkToken and referred to it a "disguised ICO", the stock price decreased again to $16.63.

On April 12, 2018, investors in Xunlei filed a putative class action against Xunlei and its CEO, alleging that by failing to disclose the illegality of the OneCoin rewards program in China, Xunlei induced American investors to buy Xunlei shares when they otherwise would not have, in violation of Sections 10(b) and 20(a) of the Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Defendants moved to dismiss.

The court dismissed the first amended complaint, with prejudice, holding that plaintiffs had not sufficiently pleaded a material misstatement or omission, scienter or loss causation to state a Section 10(b) violation, and that without a primary violation of the Exchange Act, there could be no Section 20(a) claim.

The court held plaintiffs failed to plead an actionable omission or misstatement, because without any underlying illegality, Xunlei had no duty to accuse itself of wrongdoing. Specifically, the court found that all alleged misstatements or omissions stemmed from investors' allegations that Xunlei's OneCoin offering violated Chinese regulations, a Chinese ban on token-based financing, and/or operated like a disguised ICO—but if the claim as to the underlying illegal conduct failed, any claim as to misstatement or omission would also fail. Here, because there was no conclusive authority on the legality of Xunlei's Rewards Program under Chinese law, the court concluded that it must make its own assessment and ultimately determined that Xunlei's Rewards Program did not violate Chinese law.

The court also held that the investors failed to allege scienter because the first amended complaint lacked allegations that Xunlei had a motive and opportunity to defraud and contained merely speculative and conclusory allegations. And the 2017 ICO Notice could not support an inference of scienter because that notice was publicly available and thus investors were just as

capable as interpreting it as the company and its officers. Furthermore, while the investors claimed that the former Senior Vice President's statements that OneCoin was a disguised ICO supports an inference of scienter, the court noted that she made those comments after her position was terminated, leading to a more compelling inference that she made those comments in retaliation against Xunlei.

In re Kandi Technologies Group, Inc. Securities Litigation, Case No. 17 Civ. 1944, 2019 WL 4918649 (S.D.N.Y. Oct. 4, 2019) – Financial Restatement

Kandi Technologies Group, Inc. ("Kandi") designs, produces, manufactures and distributes electric vehicles ("EV"), EV parts, and off-road vehicles, mostly in China. In September 2013, the Chinese government announced that government subsidies for EV manufacturers and purchasers would increase. Kandi developed a strategy and business model to maximize its benefit from these subsidies whereby (i) it sold EV parts to a joint venture company ("JV company") in which it holds 50 percent interest, (ii) the JV company received EV subsidies to manufacture EVs, and (iii) the JV company then sold the EVs to the Zhejiang ZuoZhongYou Vehicle Service Company (the "ZZY Company"), in which Kandi indirectly held 9.5 percent interest through its ownership in the JV company. By 2015, Kandi's annual revenues and profits had doubled, a majority of which came from its sale of EV parts and products. In its 2014 and 2015 Forms 10-K, Kandi reported increased revenue, increased receipt of cash as repayment of notes receivable, and increased payment of notes receivable.

In early 2016, the Chinese government suspended EV subsidies for vehicles sold in 2015 and 2016, negatively impacting Kandi's ability to pay its vendors and suppliers. In March 2017, Kandi restated its 2014 and 2015 financial statements, reclassifying half of its previously reported cash from repayment of notes as notes receivable or assignments thereof.

On March 16, 2017—the same day as the restatement—investors filed a putative securities class action against Kandi and its current and former executives, asserting violations of Sections 10(b) and 20(a) of the Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. Plaintiffs alleged that Kandi "mislabeled hundreds of millions of dollars' worth of accounts receivable as cash activity and improperly included them in Kandi's statement of cash flows," and that Kandi misrepresented that it had effective internal controls in place. Defendants moved to dismiss.

The court dismissed the consolidated amended complaint, with prejudice, holding that plaintiffs did not adequately plead scienter or falsity.

With respect to falsity, the court rejected plaintiffs' contention that the restatement itself is an admission of falsity, noting that there was no impact on Kandi's income. The court held that plaintiffs failed to allege that statements regarding internal controls were false when made because there are no allegations that defendants were aware of contradictory facts at that time. It further held that plaintiffs' allegations regarding defendants' misclassifications of Kandi's notes receivable also failed for substantially the same reasons.

With respect to scienter, first, the court—like other courts in the Second Circuit—rejected plaintiffs' theory that defendants had a "motive and opportunity" to "artificially inflate and maintain the market price of Kandi securities," noting that there were no allegations that the individual defendants personally benefited (e.g., by selling shares at a relevant time). Second, the court rejected plaintiffs' alternative theory that the restatement in and of itself shows scienter due to recklessness, because the restatement did not impact Kandi's income. Third, the court examined scienter with a specific view towards each allegedly false statement and held that plaintiffs failed to allege that the individual defendants "knew or should have known" that Kandi was misclassifying its accounts receivable or that it had ineffective internal controls. Fourth, the court rejected plaintiffs' contention that they pled scienter because Kandi's related-party transactions and their cash flows therein constitute a core operation of Kandi, explaining that this is not sufficient to establish scienter.

Porwal v. Ballard Power Systems, Inc., Case No. 1:18-cv-01137-GBD, 2019 WL 1510707 (S.D.N.Y. Mar. 21, 2019) – Bullish Outlook on Joint Venture

Ballard Power Systems Inc. ("Ballard") is a clean-energy company that develops, manufactures, and sells hydrogen fuel cell products. In 2015, Ballard began to focus on the Heavy Duty Motive market, which includes bus, truck, rail, and marine applications of fuel cell systems. To further this strategy, in mid-2016 Ballard entered into a joint venture with Guangdong Synergy Hydrogen Power Technology Co., Ltd. ("Synergy") to create minimum annual membrane electrode assemblies ("MEAs") and entered into a purchase agreement with Zhongshan Broad-Ocean Motor Co., Ltd. ("Broad-Ocean") which it announced would lead to the purchase of 10,000 fuel-cell vehicles and a $28.3 million equity investment in Ballard by Broad-Ocean. Throughout 2016 and 2017, Ballard made numerous bullish public statements about contemplated revenue and minimum value from the joint venture: predicting that the joint venture could produce 6,000 fuel cell stacks annually; announcing the commissioning and deployment of over 100 fuel cell-powered buses; and touting the strength of its Order Backlog and Order Book numbers. On January 25, 2018, Spruce Point Capital Management ("Spruce Point") released a report stating and/or suggesting that: (i) Ballard significantly overstated the production capacity of fuel cell stacks and that "industry insiders" believed the joint venture could only produce a few hundred per year; (ii) Ballard inflated the number of fuel cell-powered buses deployed; and (iii) Ballard's statements regarding potential for growth were inaccurate.

On February 8, 2018, investors brought a putative class action for securities fraud against Ballard, claiming violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The amended complaint alleges that Ballard misrepresented the value and operational progress of the joint venture, the trajectory of the joint venture in its Order Backlog and Order Book, its number of buses deployed, and the financial condition of Broad-Ocean. Ballard moved to dismiss.

The court dismissed the amended complaint, with prejudice, holding that plaintiffs failed to allege actionable misrepresentations or scienter.

The court held that Ballard's statements that the Synergy transaction had a "contemplated minimum value to Ballard of $168 million," increased in later press releases to a "contemplated or estimated minimum value of $170 million," were inactionable because Ballard made clear that these were merely predictions, not firm statements. It further held that these statements about value of the joint venture as well as statements about strategic collaboration, MEA volume commitments, and production capacity, were inactionable under the PSLRA's safe harbor provision. Although the court held that disclaimers that identify "risks and uncertainties that may cause Ballard's actual results to be materially different" were too general to provide safe harbor protection, it held that the safe harbor negated the claims because plaintiffs did not plead knowledge of falsity by the speaker when the statements were made. In particular, the court noted that a risk regarding "detrimental reliance on third parties," was too vague and referred to a "generally applicable risk factor," not one that was specific to the joint venture or strategic collaboration. Nonetheless, in finding these statements inactionable based on failure to plead knowledge of falsity, the court rejected plaintiffs' attempt to equate "no reasonable basis" for believing the statements were true and something that "could have easily been discovered through basic due diligence" with actual knowledge of falsity. As to Ballard's Order Backlog and Order Book, the court held that Ballard's prediction as to an overall positive trajectory for the year is not an actionable misstatement simply because Ballard knew about decreased revenue in one quarter. The court further held that while Ballard publicized Broad-Ocean's commitment to fulfill its purchase orders, it did not make any specific assurances as to the commitment, and as such, there is no actionable misstatement. Various other statements were deemed inactionable because they were mere puffery, not actually alleged to be false, or made by a third party—Broad-Ocean—rather than by Ballard.

Although the court held that Ballard's statements about the number of buses deployed were false, it determined that plaintiffs did not adequately allege that those statements were made with scienter. The court held that even if one could infer that defendants knew the numbers of buses reported were inaccurate, there was an equally compelling competing inference that the statements resulted from careless mistakes by defendants based on false information fed to them by factory employees, undermining scienter.

Barilli v. Sky Solar Holdings, Ltd., Case No. 17-CV-4572, 389 F. Supp. 3d 232 (S.D.N.Y. May 23, 2019) – Changed Sales Strategy and Questionable CEO Ethics

Sky Solar Holdings, Ltd. ("Sky") is a solar power company incorporated in the Cayman Islands with its principal place of business in Hong Kong. Sky primarily develops and operates solar projects. Sky was founded by Weili Su—also its CEO and largest shareholder, with 49.5% of voting shares as of 2014. From 2011 until June 2014, Chinese courts levied at least seven judgments against Su for a cumulative liability of $44 million for avoiding civil debt. Meanwhile, Sky was developing solar projects in Japan and Chile. In Japan, feed-in-tariffs ("FITs") provided subsidies to solar power companies, but these FITs decreased yearly from 2012 to 2014, which in addition to too-rapid overdevelopment of solar power and government policy favoring nuclear and coal, decreased the demand for solar projects. Between 2014 and 2016 in Chile, demand for solar projects also decreased due to lack of grid capacity.

On April 15, 2014, Sky filed its first draft registration statement and draft prospectus, which were finalized on November 14, 2014, in connection with its IPO in the United States. The prospectus described Su as a "successful businessman" and stated his history with other solar companies. It also described Sky's broad geographic reach, its experience with financing, and its expectation for increased profitability. The prospectus stated that Sky would allot $40 million for projects in Japan, $40 million for projects in Latin America, and $10 million for projects elsewhere, with remaining funds allocated to general corporate purposes. The prospectus also described various risks, such as a decrease in FITs, government regulations, and the requirement for continued confidence of financial institutions in the solar industry. In the prospectus, Sky identified certain weaknesses in internal controls and its plan to remediate those. Along with the prospectus, Sky promulgated a code of ethics to be adopted upon the filing of its registration statement.

On December 22, 2014, Sky announced through a press release that it planned to expand into the Chinese solar market, which it reiterated in March and May 2015. Between 2014 and 2016, Sky repeatedly reiterated the statements from the prospectus, even as the stock price decreased from $14 per share on December 22, 2014 to $1.12 per share on March 28, 2016. Following an investigation and the resignation of several directors, Sky announced, on June 6, 2017, that several transactions and fund transfers undertaken by Sky with business entities controlled by Su had not been approved by the board or the audit committee, and that Su was ousted from the company and would repay $15 million in connection with rescinded transactions. Between May 15 and June 20, 2017, five more judgments were entered against Su in Chinese courts, resulting in approximately $14.6 million in frozen assets.

On June 16, 2017, investors filed a class action alleging violations of Section 11 and Section 15 of the Securities Act and Sections 10(b) and 20(a) of the Exchange Act based on a plethora of alleged misrepresentations over a 3 year period. Defendants moved to dismiss, and the court granted that motion. Plaintiffs then filed a second amended complaint, and defendants again moved to dismiss.

The court dismissed the second amended complaint, with permission to seek leave to amend, on the following grounds.

First, the court held that plaintiffs failed to plead a false or misleading statement or a material omission to support their Securities Act claims. The court held that the absence of disclosures as to Su's past business relationships did not render Sky's statements misleading, and that Sky's positive statements about Su were at most inactionable puffery because Sky did not affirmatively represent that Su never engaged in improper transactions. As to the adequacy of Sky's internal controls, the court held that Sky's business code of ethics and its stated goals for internal controls were aspirational, must be considered in the context of Sky's disclosures about the weaknesses in its internal controls, and as such were not misleading. The court further held that Sky's positive characterizations of the Japanese and Chilean markets were not false or misleading because they were opinions, plaintiffs did not plead facts to support an inference that Sky did not believe those opinions, and any negative information about those markets was available in the public domain and equally available to Sky and its investors. Likewise, it held that Sky's prediction that it would remain profitable even if FIT subsidies were to decrease, was an inactionable forward-looking statement accompanied by meaningful cautionary language protected by the PSLRA's safe harbor provision. The court also rejected plaintiffs' contention that Sky violated Section 11 by failing to disclose the state of the Japanese regulatory environment required by Items 303 and 503 of SEC Regulation S–K, holding that Sky adequately made these disclosures in its prospectus.

With respect to Sky's statements as to geographic reach and projects , the court held that no reasonable investor would rely on those statements and, regardless, such statements were based on other accurate information disclosed in the prospectus and thus did not alter the total mix of information. The court further held that Sky's statements about its access to financing and expected future growth and expansion were not actionable because they constituted forward-looking statements accompanied by appropriate cautionary language and/or were puffery. The court also found that plaintiffs failed to allege an actionable misstatement in Sky's disclosure of its reasons for shifting to an independent power producer model, explaining that such disclosure would not have significantly altered the total mix of relevant information available to investors. The court also disagreed with plaintiffs that purported statements by a confidential witness either demonstrated that Sky's disclosure of its exposure to lawsuits or the transfer of stock in Sky's predecessor were false or misleading, because (i) the company's statements about lawsuits were consistent with the alleged statements by the confidential witness and (ii) the witness statements regarding the transaction were too conclusory. Finally, the court held that with respect to statements about Sky's financing in Chile, even if actionable, plaintiffs' claims related to such statements were time-barred.

Second, as to the Exchange Act claims, the court deemed inactionable all additional misstatements not yet evaluated through its Securities Act analysis—specifically Sky's post-IPO statements that in acquiring Chinese assets, including those held by or affiliated with Su, it would adhere to its "strong" and "rigorous" internal control process to evaluate and approve related-party transactions. The court explained that the 2016 transactions were properly approved by the Board which was consistent with the statement. And although the 2017 related-party transactions were not subjected to prior review, rigorous or otherwise, the court held that even assuming statements concerning this transaction were false, plaintiffs failed to allege scienter. In particular, the complaint lacked factual allegations that defendants had advance knowledge of the 2017 transactions or knew that Su would engage in transactions by circumventing the approval process.

Plaintiffs sought reconsideration of the court's dismissal, which the court denied. On June 14, 2019, plaintiffs sought leave to file a third amended complaint, which remains pending.

In re Sequans Comms. S.A. Securities Litigation, Case No. 17-CV-4665, 2019 WL 4805072 (E.D.N.Y. Sept. 30, 2019) – Cancellation Of Major Customer Order

Sequans Communications S.A. ("Sequans") is a French company specializing in designing integrated circuit modules, which Sequans sells to manufacturers of cell phones, tablets, and other products. In early 2016, Sequans entered into an agreement with Yifang, a Chinese company specializing in the manufacture of tablets, and booked at least $740,000 in revenue associated with this deal. Yifang subsequently cancelled its order. Sequans agreed to accept the return of Yifang's unused modules, and began searching for new buyers in the second quarter of 2016. The company issued earnings announcements in June 2016 and September 2016 that did not disclose Yifang's cancelled order. On March 31, 2017 the company filed an annual report with the SEC, which the company's CEO and CFO signed. Therein, Sequans stated that its products were not "sold with a right of return but are covered by a warranty," and that "the company had internal controls in place to provide reasonable assurance that transactions [were] recorded" in accordance with "generally accepted accounting principles." In May 2017, Sequans stated that its estimated revenue for the upcoming quarter would be in the range of "$13.5 to $15.5 million," but did not disclose Yifang's cancelled order. Although the company found another buyer to purchase the integrated circuit modules, the buyer was unable to take immediate delivery. In August 2017, the company reported revenue of $13.2 million, and attributed this lower-than-estimated revenue in part to a $740,000 reduction from a customer (i.e., Yifang) return in early 2016. On this news, the company's stock price fell 18%.

Alleged investors filed a class action lawsuit against Sequans, its CEO, and its CFO, alleging violations of Sections 10(b) of the 1934 Act and Rule 10b-5. Defendants moved to dismiss the complaint, arguing that plaintiffs failed to adequately plead falsity, scienter, and loss causation. The district court granted the motion in part, and denied the motion in part.

With respect to falsity, the court held that the complaint sufficiently alleged that defendants' representation that it complied with GAAP was "at least misleading" given that defendants left revenue associated with the Yifang deal on its books for more than one year after Yifang reneged on the parties' deal, without accounting for the likelihood that such revenue would not be collected.

The court further held that plaintiffs' allegations with respect to loss causation were sufficient given that the alleged revelation of Yifang's cancelled order allegedly led to a drop in the company's stock price.

The court held that plaintiffs did not adequately allege scienter on the part of the Company's CFO, reasoning that plaintiffs did not allege particularized facts establishing that the CFO "consciously hid the problem from investors" or was even aware of Yifang's canceled order. By contrast, the court concluded that plaintiffs adequately alleged scienter on the part of the company's CEO, reasoning that plaintiffs' allegations reflected "strong circumstantial evidence of conscious misbehavior or recklessness." In particular, the court held that plaintiffs alleged facts establishing that the CEO "was personally involved in the attempt to find a new buyer for the modules," and "regularly" told "a former vice president of sales to find another buyer for the modules sold to Yifang." The court concluded that these allegations "supported the inference that [he] was aware that the company could no longer rely on the original buyer for payment," while failing to disclose that the original buyer had cancelled its order.

Audet v. Fraser, Case No. 3:16-cv-0940 (MPS), 332 F.R.D. 53 (D. Conn. June 21, 2019) – Acquisition Of Securities Without Purchasing, And Certification Of International Class

GAW Miners LLC ("GAW Miners") and ZenMiners LLC ("ZenMiners") are cryptocurrency mining companies. Among GAW Miners' products and services offerings was "Hashlets." Hashlets purportedly provided investors "the right to profit from a slice of" the companies' cryptocurrency mining power by receiving "shares of the payout earned" through the company's cryptocurrency "mining activity." GAW Miners represented to investors that they could direct their Hashlets to mine in particular "pools," and receive in turn a share of payouts made from the company's mining in those pools. After investors who had purchased Hashlets began to question where their hashing power was being used, GAW Miners' CEO admitted that the company was not, in fact, sending its computing power to the pools that investors had selected, and instead was devoting its computing power to mine in the company's own private pools. As the company's revenue from Hashlet sales decreased during the fall of 2014, GAW Miners pivoted and announced the future launch of a new investment opportunity, a virtual currency called "Paycoin." In conjunction with that announcement, GAW Miners offered to sell to investors "Hashpoints," which were promissory notes that could be used to purchase Paycoin upon its launch, and "HashStakers," which were digital wallets designed to store Paycoin. GAW Miners also allowed customers to convert Hashlets into Hashpoints. The company promised customers that the price of Paycoin after launch "would not drop below a $20 per coin floor" because the company was backing Paycoin with a $100 million reserve. Likewise, GAW Miners stated that Paycoin was backed by financial institutions, and would be accepted by major merchants such as Wal-Mart and Amazon. After Paycoin was launched, its price dropped below $20 per coin, contrary to what GAW Miners had promised. At around the same time, the SEC began an investigation into GAW Miners and its CEO, and the CEO later pled guilty to criminal wire fraud charges, admitting that he had "operated a scheme to defraud victims out of money in connection with the procurement of virtual currency."

Alleged investors brought a class action lawsuit against the companies, Homero Garza, the founder and CEO of GAW Miners, and Stuart Fraser who served as the lone director of each company, asserting violations of Section 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder, violations of the Connecticut Uniform Securities Act, and common law fraud. Plaintiffs alleged, among other things, that defendants fraudulently marketed their products, and oversold their mining capacity "such that they did not engage in mining."

Plaintiffs voluntarily dismissed Garza from the case and default was entered against GAW Miners. Fraser moved to dismiss the complaint, and the court denied that motion. Plaintiffs subsequently moved for certification of a class comprised of all persons or entities (excluding defendants and certain other persons) who purchased or acquired Hashlets, Hashpoints, HashStakers, and Paycoin between August 1, 2014 and December 1, 2015 Fraser defendant opposed.

The district court granted plaintiffs' class certification motion, clarifying that persons who acquired the four offerings at issue "by converting, upgrading, or exchanging" them were class members.

In certifying the class, the district court first considered Fraser's argument that class certification was improper because certain members of the putative class lacked standing under Article III of the U.S. Constitution. In particular, Fraser argued that members of the putative class lacked Article III standing because the class would include members that did not suffer any injury traceable to defendants' conduct, given that some of the putative class members broke even or profited from their alleged investments. The district court rejected this argument, reasoning that this was an issue of damages rather than standing, and did not preclude class certification.

Fraser also argued that the proposed class included members who lacked statutory standing to sue under Section 10(b) of the 1934 Act, and under Connecticut Uniform Securities Act, because certain potential class members may have acquired certain of the four products at issue by "mining" them, or obtaining them by "converting" a different product, as opposed to buying them. The district court disagreed, reasoning that statutory standing under the 1934 Act broadly extends to those who "purchase" or "sell" securities, including by contracting to "otherwise acquire" or "sell or otherwise dispose of" a security. Likewise, statutory standing under the Connecticut Uniform Securities Act broadly extends to those who "exchange something of value for a security."

The district court next concluded that the numerosity, commonality, typicality, and adequacy requirements for class certification under Federal Rule of Civil Procedure 23(a) were satisfied. Of note, in concluding that the numerosity of the proposed class members militated in favor of class certification, the court credited purchase records for the securities at issue, which showed that there were "well over 40 class members." The district court also rejected Fraser's argument that typicality was lacking given that the named plaintiffs potentially acquired the securities at issue by means different than other class members, holding that typicality was established given that all of the class members purchased or otherwise acquired the securities based on the same misrepresentations.

The district court also concluded that the remaining requirements for class certification were satisfied. Of particular note, the district court rejected Fraser's argument that the "number of foreign putative class members weighs against" class certification "because the Plaintiffs have not established 'that courts in each of the many foreign jurisdictions where customers of the Companies reside would recognize the validity and binding effect of a final determination in a class action in the United States." The district court found this argument unavailing, holding that "[b]y itself, the existence of some foreign putative class members does not weigh against superiority."

In re Frontier Communications, Corp. Stockholders Litigation, Case No. 3:17-cv-1617 (VAB), 2019 WL 1099075 (D. Conn. Mar. 8, 2019) – Challenges With Acquisition Integration

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 its plans to acquire Verizon's California, Texas, and Florida wireline operations, 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 an unsuccessful acquisition that the company had conducted in West Virginia, which led to thousands of customer complaints. The company subsequently acquired the wireline operations on April 1, 2016. The company and its officers continued to tout the success of the acquisition over the next several weeks.

In May 2016, however, 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 had cost 66% more than the $450 million it previously had reported. On this news, the company's stock price fell 13.7% from $58.95 on November 1, 2016 to $50.85 on November 2, 2016. Later, on May 2, 2017, Frontier announced a revenue decline of $53 million from the previous quarter, in part due to "clean-up of" nonpaying accounts obtained in the acquisition. Frontier also announced that it was cutting its dividends by 62%. On this news, Frontier's stock price fell 16.6% the next day. Frontier later announced on October 31, 2017, that it would miss EBITDA guidance for 2017, and, on this news, 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. On this news, Frontier's stock price fell 23.9% to $7.03.

Alleged Frontier investors filed a securities class action lawsuit against Frontier, several of Frontier's executives, Frontier's board of directors, and the underwriters of Frontier's June 2015 offerings, asserting claims under Sections 11, 12(a)(2) and 15 under the 1933 Act, and Sections 10(b), 20(a) of the 1934 Act and Rule 10b-5. Defendants moved to dismiss.

The district court agreed with defendants' argument that defendants' touting of the acquisition as a "success" was nonactionable corporate puffery. Likewise, the court held that plaintiffs failed to adequately allege falsity with respect to defendants' pre-acquisition statements concerning Frontier's proven track record, seasoned integration team, and ability to deliver a smooth transition, particularly in light of the fact that these optimistic statements were cabined by cautionary warnings about potential risks with the acquisition.

The court next held that defendants' pre-acquisition statements concerning anticipated integration costs were non-actionable forward-looking statements accompanied by numerous cautionary statements warning of potential difficulties with respect to the acquisition, and thus were protected under the PSLRA's "safe harbor" provision.

The district court also held that plaintiffs failed to adequately allege that defendants' post-acquisition statements concerning the "success" of the acquisition was materially false or misleading. To the contrary, the court held, it was literally true that the acquisition closed successfully, and defendants' touting of this "success" was corporate puffery on which no reasonable investor would rely. The court recognized that defendants' post-acquisition statements that only 1% of the acquired customers reported service issues was a "closer call," but held that plaintiffs failed to adequately allege that such statements were false. In particular, the court rejected plaintiffs' conclusory assertion that defendants had engaged in "funny math" by manipulating the calculation of the percentage of acquired customers who reported issues, reasoning that plaintiffs failed to present any credible confidential witness account identifying the total number of acquired customers and the total number of such customers who reported issues. And the court held that plaintiffs failed to adequately allege falsity with respect to defendants' allegedly undisclosed post-acquisition revisions to Frontier's accounting practices and alleged misattribution of revenue declines to non-paying customers acquired from Verizon. The court reasoned that plaintiffs' allegations were inadequate because, although purportedly based on confidential witness accounts, plaintiffs did not allege that their confidential witnesses had first-hand knowledge sufficient to prove plaintiffs' allegations.

Separately, the district court held that plaintiffs failed to plead loss causation because the facts they alleged suggested that investors may have sold Frontier stock based on "broad company-wide losses" bearing no relation to the alleged acquisition misrepresentations, and that the connection between Frontier's alleged acquisition-related corrective disclosures and the decline in the company's stock price was "too tenuous."

Beyond these deficiencies, the court also concluded that plaintiffs did not adequately allege scienter. In so holding, the court reasoned that any inference of scienter was undermined by the fact that the acquisition's success accounted for only 5% of several of the individual defendants' annual bonuses, that plaintiffs alleged no insider trading by any defendant, and that Frontier "faced constant oversight by regulators" that likely served as a fraud deterrent. The court further held that many of plaintiffs' claims were barred by the two-year statute of limitations applicable to 1934 Act claims.

With respect to plaintiffs' claims under Sections 11 and 12(a)(2) based on Frontier's statements in the offering materials for its June 2015 offerings, the court explained that plaintiffs failed to allege any actionable misstatement or omission concerning Frontier's then-anticipated acquisition for the same reasons that plaintiffs failed to adequately allege any actionable misrepresentations or omissions for purposes of their 1934 Act claims.

Although the court granted defendants' motion to dismiss, it also ordered that plaintiffs could seek leave to amend. Plaintiffs' motion for leave to amend has been fully briefed, and the parties are awaiting the court's decision.

2020 CASES TO WATCH

In Re Nokia Corporation Securities Litigation, Case No. 19-CV-03509 (S.D.N.Y.) – Compliance Issues

Nokia Corporation ("Nokia") is a network and technology company that provides hardware, software, and services for telecommunications operators and enterprises and provides fixed networking services. In November 2016, Nokia acquired Alcatel-Lucent S.A. ("Alcatel"), which offers fixed, IP, optical applications and analytics technologies, after which they began to operate as a combined company. On March 21, 2019, Nokia announced that certain compliance issues existed at the former Alcatel business. On March 22, 2019, Nokia's stock price fell over 6%, to $5.88 per share.

On April 19, 2019, an investor filed a putative class action against Nokia and two of its officers, alleging violations of Sections 10(b) and 20(a) of the Exchange Act and Rule 10b-5 promulgated thereunder. The investor claimed that Nokia reported strong financial results in 2018, despite knowing about Alcatel's former compliance issues that could lead to regulatory scrutiny, penalties, and/or fines.

On July 16, 2019, lead plaintiff and counsel were appointed. On December 27, 2019, the lead plaintiff requested permission to file a second amended complaint, which the court granted on January 3, 2020. On January 8, 2020, the lead plaintiff filed the second amended complaint ("SAC") which alleges the same violations, but expands upon the alleged misstatements and omissions made. In the SAC, investors allege that Nokia made materially false and misleading statements about Nokia's readiness for the transition to 5G wireless technology and that Nokia made false assurances that its integration with Alcatel was complete. Defendants must respond to the SAC by March 9, 2020.

Plumbers and Pipefitters Nat'l Pension Fund, et. al., v. Tableau Software, Inc., et. al., Case No. 17-CV-5753, 2019 WL 2360942 (S.D.N.Y.) – Competitive Harm

As noted above, Tableau Software, Inc. ("Tableau") is a software company that produces easy-to-use 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 they went public. 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. Tableau's stock price dropped by almost 50 percent.

Investors filed a securities class action against Tableau and its officers alleging that by making statements suggesting a lack of problems from competition while knowing that increased competition from companies such as Microsoft and Amazon was causing customers to delay and cancel pending license orders, defendants intentionally misrepresented how this would affect Tableau's revenue, in violation of Sections 10(b) and 20(a) of the Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. The court denied defendants' motion to dismiss holding that the second amended complaint adequately alleged false or misleading statements, scienter, and loss causation. Fact discovery in the case is complete and plaintiffs' motion for class certification has been fully briefed but the court has not yet issued a ruling. Summary judgment and Daubert motions are to be fully briefed by June 5, 2020, with the trial date to be set 44 days after the court rules on such motions.

DISTRICT OF MASSACHUSETTS

2020 CASES TO WATCH

Miller v. Sonus Networks, Inc., Case No. 1:18-cv-12344 (D. Mass.) – Undisclosed Change in Revenue Forecasting Methodology

Sonus Networks, Inc. ("Sonus") provides communication solutions that allow businesses to secure their communications infrastructures. In 2014, Sonus changed the way in which it forecasted revenue—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 then filed a putative class action complaint in federal court in November 2018, and filed an amended complaint in July 2019. The amended complaint named Sonus and three officers as defendants, alleging that they issued false and misleading statements about Sonus's revenue during a class period spanning from January 8, 2015 to March 24, 2015. The amended complaint alleged violations of Sections 10(b) and 20(a) of the 1934 Act, as well as 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 in August 2019, 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. *See Sousa v. Sonus Networks, Inc.,* 261 F. Supp. 3d 112 (D. Mass. 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.

Feng v. Carbonite, Inc., Case No. 1:19-cv-11808 (D. Mass.); *Luna v. Carbonite, Inc.*, 1:19-cv-11662 (D. Mass.); *Randolph v. Ali,* Case No. 1:19-cv-12212 (D. Mass.); *Cosgrove v. Carbonite, Inc.*, Case No. 1:19-cv-12124 (D. Mass.) – Discontinuance Of New Service

Carbonite, Inc. ("Carbonite") is a software company that provides cloud-based backup services. In October 2018, Carbonite launched its "Server Backup VM Edition" 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. But in July 2019, Carbonite announced that it was withdrawing its VM Edition product from the marketplace and significantly lowered its financial projections for fiscal years 2019 and 2020. That same day, the company's CEO announced his departure from Carbonite, and the following day, the company's stock price fell 26%.

Investors filed two class action lawsuits against Carbonite, its CEO, and its CFO. Seeking to represent a class of purchasers of the company's stock between February 7, 2019 and July 25, 2019, plaintiffs alleged violations of Section 10(b) and 20(a) of the 1934 Act, as well as Rule 10b-5 promulgated thereunder. Plaintiffs claimed that various statements issued by defendants projecting the VM Edition's value to the company were materially misleading, and that defendants failed to disclose that the VM Edition was of poor quality and technologically flawed, received poor reviews from customers, and had been a "disruptive" factor for the company's salesforce and prevented Carbonite from closing on several deals during 2019. The complaints also asserted additional scienter allegations by pointing to sales of Carbonite shares executed by company officers and directors during the class period.

In addition, two derivate complaints *(Cosgrove and Randolph)* were filed against Carbonite's CEO, CFO, and directors. Relying on similar allegations, the derivative complaints alleged claims based on breach of fiduciary duty, corporate waste, unjust enrichment, and violation of Section 14(a) of the 1934 Act.

The district court consolidated the actions and appointed a lead plaintiff in November 2019. On January 15, 2020, Plaintiffs filed an amended complaint reasserting the allegations in the prior complaint, but with more detail. The amended complaint also alleges that the CEO's resignation and defendants' stock sales during the class period are indicative of scienter. Defendants' motion to dismiss is due in March 2020, and the motion will be fully briefed in June 2020.

Toussaint v. Care.com, Inc., Case No. 1:19-cv-10628 (D. Mass.) – 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 frequently distinguishes itself from other platforms, such as "Craigslist," based on the company's screening and vetting procedures for the 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, 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 and "quality control" measures and its "trusted brand." The company also stated in public filings 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." And the company warned in those filings of the business risk of "negative publicity" affecting its "brand."

In March 2019, the Wall Street Journal published a piece 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 piece further reported that it had "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 had stated that it adds listings based on "publicly available data." Before the markets opened the following business day, 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 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 approximately 13% that day. Later that month, 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, or about 46,594 businesses, listed on its site . . . Those businesses were listed on the site as recently as March 1." The company's stock price fell more than 6% the following day, and it fell another 10% after stock market analysts downgraded the company.

A class action complaint was filed in the District of Massachusetts in April 2019, and the court appointed a lead plaintiff in July 2019. Plaintiffs filed an amended complaint in September 2019 naming Care.com, its CEO, and its former CFO as defendants. The amended complaint alleged violations of Sections 10(b) and 20(a) of the 1934 Act and Rule 10b-5 promulgated thereunder, on behalf of a class of all purchasers of the company's stock between May 23, 2016 and April 2, 2019. Relying on purported confidential witnesses statements, the amended complaint alleged that: defendants made misleading statements regarding Care.com's distinction from competitors regarding safety and security measures; that defendants misleadingly suggested that the company listed only daycare centers that wished to market their services through the website, whereas the company in fact listed centers unilaterally; and, that defendants misrepresented the company's vetting processes and failed to disclose that some centers were not pre-screened. Defendants moved to dismiss the amended complaint in November 2019, arguing that plaintiffs pleaded no actionable misstatements in light of defendants' disclosures, and also that the amended complaint did not allege particularized facts sufficient to support a strong inference of scienter. Plaintiffs filed their opposition to the motion to dismiss in December 2019. The court heard oral argument on the motion to dismiss on February 7, 2020, and took the motion under submission.

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Michael Jones is a partner in Goodwin's Securities + Shareholder Litigation and Business + Commercial Litigation practices. He represents individuals and companies in shareholder and derivative lawsuits alleging violations of the Securities Exchange Act, as well as regulatory, civil and criminal investigations by the SEC, SROs and state attorneys general in allegations of accounting fraud, insider trading, disclosure and other violations. Mr. Jones advises public Technology and Life Sciences companies on compliance and risk management issues. This includes internal compliance processes and procedures, handling whistleblower complaints, process and disclosure issues related to mergers and acquisitions, and intellectual property litigation matters involving trademark and trade dress, copyright and patent claims, and general commercial disputes. He is recognized by The Legal 500 U.S. as a "Next Generation Lawyer" for M&A Litigation Defense, a Super Lawyers "Rising Star", and was recognized by the Daily Journal as one of California's top 40 Under 40 lawyers.

NICOLE CHESSARI

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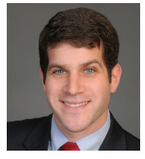
Nicole Chessari is a Counsel in the firm's Litigation Department and a member of its Securities Litigation, White Collar Defense & Business Litigation group, with a focus on working with technology and life sciences companies and venture capital firms. Ms. Chessari specializes in defending companies, directors, and executives against securities class actions, derivative lawsuits, and M&A litigation and representing companies and individuals in complex commercial disputes.



NICK REIDER

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Nick Reider is a senior associate in Goodwin's Securities Litigation and White Collar Defense group. He represents officers, directors, and corporate clients in securities and shareholder derivative actions, complex commercial disputes, and criminal and regulatory proceedings.

WILLIAM EVANS

Will Evans is an associate in the firm's Litigation Department. His practice focuses on securities and shareholder litigation, complex commercial litigation, and government and internal investigations.

ANDREW IGLESIAS

Andrew Iglesias is a law clerk in Goodwin's Litigation Department, based on the firm's Los Angeles office.

DANIEL MELLO

Daniel Mello is an associate in the firm's Litigation Department. He is based in Goodwin's Silicon Valley office. His experience includes assisting technology and life sciences clients in complex commercial disputes.

GALEN PHILLIPS

Galen Phillips, an associate in Goodwin's Securities Litigation & White Collar Defense group, focuses his practice on white collar criminal defense and complex litigation. He has represented clients in class actions as well as civil and criminal matters by the Department of Justice, the Internal Revenue Service, the Securities and Exchange Commission, and prosecutors from across California.

ILANA SALTZ

Ilana Saltz is a law clerk in Goodwin's Litigation Department, resident in the New York office.

IAN STEARNS

Ian Stearns is an associate in Goodwin's Securities, White Collar and Business Litigation group. His practice focuses on securities litigation, including class action and derivative litigation defense principally on behalf of life sciences, healthcare, and technology companies; M&A-related litigation and post-closing disputes; and white collar criminal defense and internal investigations.

ADANNA UWAZURIKE

Adanna Uwazurike is an associate in the firm's Litigation Department. She is based in Goodwin's New York office. Her practice focuses on securities litigation, white collar criminal defense and federal and state complex business litigation.

INDUSTRY RANKINGS AND LEAGUE TABLES

Chambers USA

22 attorneys recognized across **50 practice areas nationwide,** including Securities Litigation, Capital Markets, Corporate/M&A and Startups and Emerging Companies

U.S. News Best Law Firms

National Tier 1 rankings in 23 practice areas including Technology Law, Commercial and Securities Litigation, Regulatory Enforcement, Venture Capital, and Mergers & Acquisitions

Mergermarket

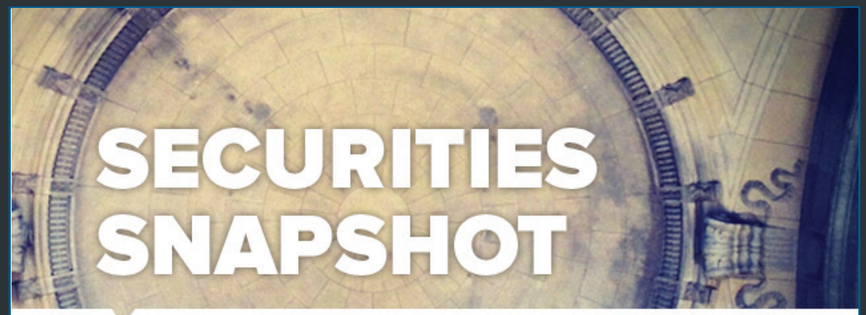
#2 Most Active Law Firm for U.S. Equity IPOs (Issuer)
#3 Most Active Law Firm for U.S. Equity Offerings (Issuer)

Bloomberg

#2 Most Active Law Firm for both Global and U.S. Buyouts + Exits
Top 5 Most Active Law Firm for U.S. M&A Deals and Global M&A

Pitchbook

Top 3 Most Active Law Firm for venture-backed exits (Deal Count)
Top 5 Most Active Law Firm for both Global + U.S. PE Deals (Deal Count)



Attorneys in Goodwin's Securities + Shareholder Litigation and White Collar Defense practices have extensive experience before federal and state courts, legislative bodies, and regulatory and enforcement agencies. We continually monitor notable developments in these venues to prepare the Securities Snapshot — a bi-weekly compilation of securities litigation news delivered to subscribers' via email. This publication summarizes news from the civil and criminal securities law arenas in a succinct, easy-to-read format. Topics covered include litigation and enforcement matters, legislation, rulemaking, and interpretive guidance from regulatory agencies.

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