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COVID-19 AND RULE 10b-5

Allan Horwich *

The COVID-19 pandemic presented wide-ranging challenges for businesses. Not the least of these is compliance with federal securities laws, including the prohibition—most notably under SEC Rule 10b-5—on materially deceptive statements made to the public. Both the SEC, in its role as enforcer of the law, and private parties, seeking to represent classes of aggrieved investors, have filed complaints asserting that corporations and others have engaged in deception of investors regarding matters pertaining to COVID-19. Some of these claims relate to disclosures regarding testing kits for the virus as well as development of vaccines. Other complaints allege faulty disclosure on the effect of the pandemic on the market for a company’s products and services that are not themselves related to the pandemic, such as claims against cruise lines that suspended operations.

This article presents the legal framework for claims based on Rule 10b-5, SEC guidance on how COVID-19 affects compliance with disclosure requirements for public companies, and the issues that have emerged in the claims already filed. This analysis demonstrates that almost any public reporting company faces the risk of inadequate disclosure and the temptation to withhold or misstate material facts in a time of financial stress.

I. INTRODUCTION

COVID-19 needs little introduction.

In 2019, a new coronavirus was identified as the cause of a disease outbreak that originated in China.

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The virus is now known as the severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The disease it causes is called coronavirus disease 2019 (COVID-19). In March 2020, the World Health Organization (WHO) declared the COVID-19 outbreak a pandemic.¹

From the onset, the COVID-19 pandemic presented myriad challenges to businesses seeking to comply with the Securities Act of 1933² and the Securities Exchange Act of 1934³ and the rules of the Securities and Exchange Commission (SEC) that implement those statutes.⁴ These legal challenges are the subject of this article.

The focus here is on issues surrounding possible deceptive disclosure and, in particular, claims arising under SEC Rule 10b-5.⁵ This rule is the most common, though not the only, provision of the federal securities laws used by the SEC and by private parties to call to account persons who engage in deceptive conduct in connection with the purchase or sale of a security.⁶

1. *Coronavirus Disease 2019 (COVID-19)*: MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963> [https://perma.cc/K2KK-P 2JH].

2. 15 U.S.C. §§ 77a–bbbb (Securities Act).

3. 15 U.S.C. §§ 78a–qq (Exchange Act).

4. The focus here is on issues confronted by public reporting companies. A public company is one with a class of securities registered under Section 12 of the Exchange Act (15 U.S.C. 78l), or that is required to file reports under Section 15(d) of the Exchange Act (15 U.S.C. 78o(d)). These are companies whose common stock is listed for trading on a registered securities exchange, exceed a minimum number of stockholders of record, or have sold securities in a public offering registered under the Securities Act. *See, e.g.*, Rules 13a-1, 13a-11, 13a-13, 17 C.F.R. §§ 240.13a-1, -11, -13 (requiring filing of Forms 10-K, 8-K, and 10-Q, respectively, for companies with a class of securities registered pursuant to Section 12 of the Exchange Act). SEC Rule 10b-5 (17 C.F.R. § 240.10b-5 (2020)), discussed in detail here, however, also applies to companies that are *not* required to file public reports. *See, e.g.*, RSMCFH, LLC v. FareHarbor Holdings, Inc., 361 F. Supp. 3d 981, 985–86, 992 (D. Haw. 2019) (granting in part and denying in part motion to dismiss Rule 10b-5 complaint involving private company sale of securities),

5. Rule 10b-5 states in its entirety:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

¶ Rule 10b-5, 17 C.F.R. § 240.

6. Issues regarding alleged breaches of fiduciary duty arising out of the challenges to company management presented by COVID-19 are beyond the scope of

II. THE FRAMEWORK OF RULE 10B-5 CLAIMS AND SIMILAR LITIGATION

A private investor may sue for damages, including a class action on behalf of other investors alleged to have been similarly affected,⁷ from a person who allegedly violated Rule 10b-5.⁸

“In a typical § 10(b) private action a plaintiff must prove: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.”⁹

The SEC may bring a civil enforcement action for a violation of the rule.¹⁰ The SEC is not required to satisfy elements 4, 5, or 6.¹¹

this article.

7. Issues peculiar to securities class actions are beyond the scope of this article.

8. For a comprehensive discussion of the causes of action under Rule 10b-5, see MARGARET SACHS, DONNA NAGY & GERALD RUSSELLO, *SECURITIES LITIGATION AND ENFORCEMENT IN A NUTSHELL* ch. 2 (2d ed. 2021). The private cause of action is implied by the courts. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014).

9. *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008). On the issue of whether the element of scienter includes not only intentional deception but also reckless conduct, the Court stated, “Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007) (reserving the question whether scienter includes reckless conduct).

In a seminal case, recklessness in violation of Rule 10b-5 was defined as:

highly unreasonable [conduct], involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.

Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1045 (7th Cir. 1977) (quoting *Franke v. Midwestern Okla. Dev. Auth.*, 428 F. Supp. 719, 725 (W.D. Okla. 1976)). Some Courts of Appeal have adopted slightly different formulations, such as requiring “severe recklessness.” *See, e.g., Nathenson v. Zonagen Inc.*, 267 F.3d 400, 408 (5th Cir. 2001).

10. *See* Securities Exchange Act of 1934, Pub. L. No. 73-291, § 21(e), 48 Stat. 881, 900 (codified as amended at 15 U.S.C. § 78u(d)) (empowering the SEC to seek remedies for a violation of the Securities & Exchange Act and the rules thereunder).

11. *See SEC v. Wolfson*, 539 F.3d 1249, 1256 (10th Cir. 2008) (holding that in an enforcement action the SEC must prove that the defendant “(1) made a misrepresentation or omission (2) of material fact, (3) with scienter, (4) in connection with the purchase or sale of securities, and (5) by virtue of the requisite jurisdictional means”; and stating that there is no requirement to prove reliance or injury). The

Clause (b) of the rule reaches only those who “make” a deceptive statement.¹² Clauses (a) and (c) have a broader reach.¹³ This article concentrates on an element of these causes of action that is likely to require attention in the context of COVID-19 related claims—what is materially deceptive.

Two other provisions of the federal securities laws are pertinent when evaluating the potential for claims for COVID-19 related deception.¹⁴ Section 17(a) of the Securities Act, prohibiting deception in connection with the offer or sale of securities, is enforceable by the SEC.¹⁵ Section 11 of the Securities Act provides a cause of action for persons who purchase securities sold in a public offering

extent to which the elements of a criminal charge for a violation of Rule 10b-5, pursued under Section 32 of the Exchange Act (15 U.S.C. § 78ff), differ from what must be pleaded or proven in a civil action is beyond the scope of this article. *See* SACHS ET AL., *supra* note 8, at ch. 11 for a discussion of criminal prosecutions in connection with securities transactions. The core test of what is materially deceptive addressed here, however, is the same as in a civil action.

12. *Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142–43 (2011):

[T]he maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. . . . One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances is strong evidence that a statement was made by—and only by—the party to whom it is attributed.

13. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1100-01 (2019)

[D]issemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5, as well as the relevant statutory provisions. In our view, that is so even if the disseminator did not ‘make’ the statements and consequently falls outside subsection (b) of the Rule.

14. In addition to the sections and rule mentioned here, there are two infrequently used provisions that provide for a private cause of action based on deception. Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) is narrowly construed (*see Gustafson v. Alloyd Co.*, 513 U.S. 561, 584 (1995) (construing the word “prospectus” in Section 12(a)(2) to be “a term of art referring to a document that describes a public offering of securities by an issuer or controlling shareholder”), and Section 18(a) of the Exchange Act, 15 U.S.C. § 77r(a), is generally held not to be suitable for class action treatment. *See* MARC I. STEINBERG, WENDY GERWICK COUTURE, MICHAEL J. KAUFMAN & DANIEL J. MORRISSEY, *SECURITIES LITIGATION LAW, POLICY, AND PRACTICE* 472 (2016).

15. Section 17(a), 15 U.S.C. § 77q(a), provides:

(a) Use of interstate commerce for purpose of fraud or deceit

It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement (as defined in section [3(a)(78) of the Securities Act] by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

registered under the Securities Act. It provides for claims against the issuer, persons who signed the registration statement, directors of the issuer, and the underwriters of the offering, among other persons, where the registration statement was deceptive on its effective date.¹⁶ In particular, claims can be brought under Section 11 where the registration statement was used to accomplish an initial public offering (IPO).¹⁷

These provisions have several common elements. First, as expressed in the text of the law, the deception must be material. Generally under the federal securities laws an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding whether to buy or sell securities “[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”¹⁸ “[W]ith respect to contingent or speculative information or events . . . materiality ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”¹⁹

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Unlike Rule 10b-5, there is no implied cause of action for a violation of Section 17(a). *See* LOUIS LOSS, JOEL SELIGMAN & TROY PARADES, *SECURITIES REGULATION* 577–78 (5th ed. 2018) (“The more recent trend among the circuits . . . is decisively against implying a private cause of action under § 17(a).” (footnote omitted)).

16. Section 11(a), 15 U.S.C. § 77(a), provides in part:

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue [the persons enumerated in subsections (1)–(5)].

17. *See, e.g.,* *City of Omaha Police & Fire Ret. Sys. v. Evoqua Water Techs. Corp.*, 450 F. Supp. 3d 379, 400 (S.D.N.Y. 2020).

18. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

19. *Id.* at 238 (quoting *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 849 (2d Cir. 1968)).

One dimension of the “total mix” test may play a role in COVID-19 deception litigation. A defendant may argue that an alleged failure to make certain disclosures about the status or potential impact of COVID-19 on its business was not a material *omission* to the extent the facts were already known to the public. For example, companies are not required to disclose general business conditions in their disclosure documents because “the securities laws do not require issuers to disclose the state of the world, as opposed to facts about the firm.”²⁰

A statement that is mere “puffery”—that is so vague that it is not something a reasonable shareholder would rely on—is not material.²¹ On the other hand, a misrepresented fact may be material to the reasonable investor even if it is not statistically significant.²²

The provisions addressed here reach both affirmative misrepresentations and half-truths.²³ Section 17(a) and Rule 10b-5 do not expressly prohibit pure omissions, the failure to state something where that omission does not create a half-truth.²⁴ Generally, the pure omission is not wrongful under these provisions. There is, for example, no general requirement that a public company disclose a

20. *Asher v. Baxter Int'l, Inc.*, 377 F.3d 727, 729 (7th Cir. 2004).

21. *See, e.g., Carvelli v. Ocwen Fin. Corp.*, 934 F. 3d. 1307, 1320 (11th Cir. 2019) (affirming dismissal of complaint on grounds of puffery, among other deficiencies):

[T]he [puffery] defense seems a particularly good fit in the securities context. Rule 10b-5 prohibits untrue statements of a material fact, with “material” defined to mean something that a reasonable investor would view “as having significantly altered the ‘total mix’ of information made available.” [Citation omitted]. Excessively vague, generalized, and optimistic comments—the sorts of statements that constitute puffery—aren’t those that a “reasonable investor,” exercising due care, would view as moving the investment-decision needle—that is, they’re not material.

22. *See Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 43 (2011) (applying the “total mix” test, stating, “[g]iven that medical professionals and regulators act on the basis of evidence of causation that is not statistically significant, it stands to reason that in certain cases reasonable investors would as well.”).

23. The half-truth is a “statement that is literally true but omits some material fact, thereby making it misleading.” Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences By Investors and Others*, 52 STAN. L. REV. 87, 88 (1999).

24. Section 11(a) does reach the “omi[ssion] to state a material fact required to be stated” in the registration statement, referring to a disclosure required by the form of registration statement used to make the public offering. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186 n.3 (2015) (“Section 11’s omissions clause also applies when an issuer fails to make mandated disclosures—those ‘required to be stated’—in a registration statement.”).

material event immediately upon the occurrence of the event.²⁵ “Silence, absent a duty to disclose, is not misleading under Rule 10b-5.”²⁶ While a comprehensive analysis of when the breach of a duty to disclose can trigger liability under Rule 10b-5 is beyond the scope of this article, one dimension of the issue of duty is important. That is whether the failure to make a disclosure required of a public company in an Exchange Act report is actionable under Rule 10b-5.²⁷

The annual report on Form 10-K for example, requires a public company to provide the information required by Item 303 of Regulation S-K.²⁸ Item 303 is the MD&A disclosure, Management’s Discussion and Analysis of Financial Condition and Results of Operations, which currently²⁹ includes, among other mandates:

Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations. If the registrant knows of events that will cause a material change in the relationship between costs and revenues (such as known

25. *See, e.g.*, *Gallagher v. Abbott Labs.*, 269 F.3d 806, 809 (7th Cir. 2001) (holding that under the system of “periodic,” not “continuous,” reporting imposed on public companies, they are not required to make disclosure “when something ‘material’ happens, but on the next prescribed filing date”).

26. *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988).

27. The SEC need not rely solely on Rule 10b-5 for an enforcement action for that failure. The SEC has sweeping powers to bring actions for noncompliance with the reporting requirements. *See, e.g.*, Section 15(c)(4) of the Exchange Act, 15 U.S.C. § 78o(c)(4):

If the Commission finds, after notice and opportunity for a hearing, that any person subject to the provisions of [the sections regarding the public company reporting requirements] has failed to comply with any such provision, rule, or regulation in any material respect, the Commission may publish its findings and issue an order requiring such person, and any person who was a cause of the failure to comply due to an act or omission the person knew or should have known would contribute to the failure to comply, to comply, or to take steps to effect compliance, with such provision or such rule or regulation thereunder upon such terms and conditions and within such time as the Commission may specify in such order.

28. Form 10-K, Part II, Item 7, <https://www.sec.gov/files/form10-k.pdf> [<https://perma.cc/HGE7-PZGU>] requires that the company “[f]urnish the information required by Item 303 of Regulation S-K.”

29. Item 303 has been amended effective February 10, 2021, with the changes applicable to a reporting company’s reports beginning with the first fiscal year ending on or after August 9, 2021. Earlier compliance is optional. Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, 86 Fed. Reg. 2080 (Jan. 11, 2021). The nature of these changes is beyond the scope of this article.

future increases in costs of labor or materials or price increases or inventory adjustments), the change in the relationship shall be disclosed.³⁰

Courts are split on whether the failure to provide information required by the MD&A is a breach of a duty to speak for which there is a remedy under Rule 10b-5.³¹

Claims may also be made that statements of opinion are materially false. The scope of liability for a statement of opinion was addressed comprehensively in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*.³² That case involved a Section 11 claim. Courts have since applied the principles developed there to cases under Rule 10b-5.³³ The Court first concluded that an honestly held belief that turns out to be incorrect is *not* a misstatement of “fact.”³⁴ A statement of belief, however, which the speaker knows to be false *is* a misstatement of fact which, if material, would be actionable because it misstates the *fact* of the person’s belief.³⁵ A statement of belief that contains an embedded statement of fact may be deceptive.³⁶ The half-truth dimension of

30. 17 C.F.R. § 229.303(a)(3)(ii) (2020). SEC guidance for complying with this requirement is addressed later in this article. *See infra* text accompanying notes 43–46. “In addition, Form 10-K requires the risk factor disclosures specified by Item 105 of Regulation S-K. *See* Form 10-K, Part II, Item 1A, <https://www.sec.gov/files/form10-k.pdf> [<https://perma.cc/HGE7-PZGU>] (requiring that the company “Set forth, under the caption ‘Risk Factors,’ where appropriate, the risk factors described in Item 105 of Regulation S-K (§ 229.105 of this chapter) applicable to the registrant.”).

31. *Compare* *Stratte-McClure v. Stanley*, 776 F.3d 94, 101 (2d Cir. 2015) (“Item 303’s affirmative duty to disclose in Form 10-Qs can serve as the basis for a securities fraud claim under Section 10(b).”), *with* *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1054 (9th Cir. 2014) (“We have never directly decided whether Item 303’s disclosure duty is actionable under Section 10(b) and Rule 10b-5. We now hold that it is not.”). The Supreme Court granted a petition for certiorari to resolve the circuit split. *Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 137 S. Ct. 1395, *cert. granted*, 2016 WL 6472615 (No. 16-581). (Question Presented: “Whether the Second Circuit erred in holding - in direct conflict with the decisions of the Third and Ninth Circuits - that Item 303 of SEC Regulation S-K creates a duty to disclose that is actionable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.”). After the case was settled the petition was dismissed. *Leidos, Inc. v. Indiana Pub. Ret. Sys.*, 138 S. Ct. 2670 (2018).

32. 575 U.S. 175, 176 (2015).

33. *See, e.g.*, *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 616 (9th Cir. 2017).

34. *Omnicare*, 575 U.S. at 184.

35. *Id.* at 184–85.

36. *Id.* at 185–86 (holding that the statement “I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access” may “be read to affirm not only the speaker’s state of mind . . . but also an underlying fact: that the company uses a patented technology.”).

Section 11, and thus of Rule 10b-5(b), may apply if a statement of belief “omits material facts about the issuer’s inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself.”³⁷

One other substantive matter pertaining to litigation under Rule 10b-5 merits consideration. The Exchange Act affords a defense in a private damage claim to a company that makes a forward-looking statement, such as an earnings projection,³⁸ that proves to be inaccurate. Section 21E(c) of the Exchange Act provides in pertinent part:

[I]n any private action arising under this title that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person referred to in subsection (a) shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that—

(A) the forward-looking statement is—

(i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement.³⁹

37. *Id.* at 188–89. These concepts were summarized in *Align Technology* as follows:

First, when a plaintiff relies on a theory of material misrepresentation, the plaintiff must allege both that “the speaker did not hold the belief she professed” and that the belief is objectively untrue. Second, when a plaintiff relies on a theory that a statement of fact contained within an opinion statement is materially misleading, the plaintiff must allege that “the supporting fact [the speaker] supplied [is] untrue.” Third, when a plaintiff relies on a theory of omission, the plaintiff must allege “facts going to the basis for the issuer’s opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.”

856 F.3d at 615–16 (citations to *Omnicare* omitted).

38. A “forward-looking statement” in this context is broadly defined in Exchange Act Section 21E(i)(1), 15 U.S.C. § 78u-5(i)(1), to include, for example, a “statement of future economic performance” (subsection C) and “any statement of the assumptions underlying or relating to” (subsection D) any forward-looking statement as defined there.

39. 15 U.S.C. § 78u-5(c). This defense applies only in a private action, not in an SEC civil enforcement action. § 78u-5(c)(1). There is a comparable provision in the Securities Act. 15 U.S.C. § 77z-2. This defense is not available to defend, among other specified claims, one that arises out of disclosures in an initial public offering. § 78u-5(b)(2)(D). The bespeaks caution doctrine provides comparable protection, however, where the statutory safe harbor is not available or not relied on. *See, e.g., Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 319–20 (4th Cir. 2019) (applying bespeaks caution to claim of deception in a proxy statement, without reference to the statutory safe harbor). The principal bespeaks caution

This defense is often applied to dismiss a complaint at the outset.⁴⁰

Someone with knowledge of material nonpublic negative information about a public company who trades in the stock of the company may have engaged in insider trading in violation of Rule 10b-5.⁴¹

Finally, the SEC has alerted investors to investment scams surrounding the promotion of COVID-19-related products:

Fraudsters often use the latest news developments to lure investors into scams. We have become aware of a number of Internet promotions, including on social media, claiming that the products or services of publicly-traded companies can prevent, detect, or cure coronavirus, and that the stock of these companies will dramatically increase in value as a result. The promotions often take the form of so-called “research reports” and make predictions of a specific “target price.” We urge investors to be wary of these promotions, and to be aware of the substantial potential for fraud at this time.⁴²

With this framework, the analysis now turns to the application of the liability provisions to COVID-19 related disclosures.

III. SEC GUIDANCE ON COVID-19 RELATED DISCLOSURES

Before COVID-19 the SEC had provided general guidance on complying with the known trend disclosure requirement in the MD&A. The SEC instructed companies to engage in a two-prong test when complying with that requirement:

case is *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993).

40. Among recent cases, *see Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1326–29 (11th Cir. 2020) (affirming grant of motion to dismiss on grounds including application of the statutory safe harbor for forward-looking statements). For a more complete discussion of the statutory safe harbor, *see SACHS ET AL.*, *supra* note 8, at § 2.3.8.

41. The elements of unlawful insider trading are beyond the scope of this article. For a comprehensive discussion of that topic, *see* 18 DONALD C. LANGEVOORT, *INSIDER TRADING: REGULATION, ENFORCEMENT & PREVENTION* (2020). No case asserting a claim for insider trading as such pertaining to undisclosed information regarding the impact of COVID-19 on the affairs of a company has been found. Unlawful insider trading, however, has been alleged in several complaints as a component of the allegation of scienter. *See, e.g.*, *Class Action Complaint for Violations of the Federal Securities Laws*, at 8-11, *Himmelberg v. Vaxart, Inc.*, No. 3:20-cv-05949-VC (N.D.C.A. Aug. 24, 2020).

42. *Look Out for Coronavirus-Related Investment Scams—Investor Alert*, INVESTOR.GOV (Feb. 10, 2021), <https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-alerts/look-out> [<https://perma.cc/JQ3K-KVJQ>]. The initial version of this alert was issued on February 4, 2020. *Id.*

(1) Is the known trend, demand, commitment, event or uncertainty likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.

(2) If management cannot make that determination, it must evaluate objectively the consequences of the known trend, demand, commitment, event or uncertainty, on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect on the registrant's financial condition or results of operations is not reasonably likely to occur.⁴³

The SEC emphasized that this standard is not the same as the core test of materiality under the federal securities laws:

MD&A mandates disclosure of specified forward-looking information, and specifies its own standard for disclosure—*i.e.*, reasonably likely to have a material effect. This specific standard governs the circumstances in which Item 303 requires disclosure. The probability/magnitude test for materiality approved [in *Basic Inc. v. Levinson*] is inapposite to Item 303 disclosure.⁴⁴

Developments arising out of COVID-19 undoubtedly present a “known trend” or an “uncertainty” triggering the need for many public companies to include disclosures in their required reports.⁴⁵

The SEC Division of Corporation Finance (Corp Fin) is the division of the SEC that, among other things, provides guidance for compliance with reporting company disclosure obligations. Corp Fin issued guidance early on, supplemented several months later, expressly addressing considerations to take into account in meeting disclosure obligations with respect to issues related to COVID-19.⁴⁶

Corp Fin first urged companies to consider the following issues, among others, when preparing disclosure documents:

43. Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures, Securities Act Release No. 6,835, 54 Fed. Reg. 22427, 22430 (May 24, 1989).

44. *Id.* at 22430 n.27.

45. Finding references to COVID-19 in Exchange Act reports filed with the SEC is like shooting fish in a barrel, even though the disclosure may not be expressed in terms of a “known trend.”

46. See Div. of Corp. Fin., *Coronavirus (COVID-19) CF Disclosure Guidance: Topic No. 9*, Sec. and Exch. Comm'n (Mar. 25, 2020), <https://www.sec.gov/corpfin/coronavirus-COVID-19> [https://perma.cc/AV4B-24YX] [hereinafter *Topic No. 9*]; Div. of Corp. Fin., *Coronavirus (COVID-19)—Disclosure Considerations Regarding Operations, Liquidity, and Capital Resources, CF Disclosure Guidance: Topic No. 9A*, Sec. Exch. Comm'n (June 23, 2020), <https://www.sec.gov/corpfin/covid-19-disclosure-considerations> [https://perma.cc/2BXR-4YTG] [hereinafter *Topic 9A*].

How has COVID-19 impacted your financial condition and results of operations? How has COVID-19 impacted your capital and financial resources, including your overall liquidity position and outlook? Have you experienced challenges in implementing your business continuity plans or do you foresee requiring material expenditures to do so? Do you expect COVID-19 to materially affect the demand for your products or services?⁴⁷

Three months later Corp Fin included more factors to consider:

How and to what extent have you altered your operations, such as implementing health and safety policies for employees, contractors, and customers, to deal with these challenges, including challenges related to employees returning to the workplace? To the extent COVID-19 is adversely impacting your revenues, consider whether such impacts are material to your sources and uses of funds, as well as the materiality of any assumptions you make about the magnitude and duration of COVID-19's impact on your revenues. Are you at material risk of not meeting covenants in your credit and other agreements? Are there conditions and events that give rise to the substantial doubt about the company's ability to continue as a going concern? For example, have you defaulted on outstanding obligations? Have you faced labor challenges or a work stoppage?⁴⁸

Perhaps the greatest challenge in this respect is to assure that when a statement is made about the impact of COVID-19—or the lack thereof—the statement does not omit material facts necessary to make the statements made not misleading, the half-truth issue. As Corp Fin warned on March 25, 2020:

[W]here COVID-19 has affected a company in a way that would be material to investors or where a company has become aware of a risk related to COVID-19 that would be material to investors, the company, its directors and officers, and other corporate insiders who are aware of these matters should refrain from trading in the company's securities until such information is disclosed to the public.⁴⁹

In a separate statement, the Director of Corp Fin and the chairman of the SEC reminded companies:

Company disclosures should reflect [the state of affairs and outlook surrounding COVID-19] and, in particular, respond to investor interest in: (1) where the company stands today, operationally and financially, (2) how the company's COVID-19 response, including its efforts to protect the health and well-being of its workforce and its customers, is progressing, and (3) how its operations and financial condition may

47. See *Topic No. 9, supra* note 46. The statements in the text are a selection of verbatim questions in that guidance.

48. See *Topic 9A, supra* note 46. The statements in the text are a selection of verbatim questions and comments in that guidance.

49. *Id.*

change as all our efforts to fight COVID-19 progress. Historical information may be relatively less significant.⁵⁰

The challenges posed by COVID-19 impacts a range of issues regarding the accuracy and completeness of the mandatory disclosures required of public companies. Many companies have already borne the brunt of claims that their COVID-19 related disclosures have fallen short, in one case resulting in the settlement of an SEC enforcement action by a well-known company.⁵¹

Notwithstanding the disclosure challenges posed by the pandemic, the SEC has *not* relaxed the substance of the disclosure requirements that might be triggered by the impact of COVID-19 on a public company.⁵² The SEC has also not taken any action on a petition filed by the U.S. Chamber of Commerce requesting adoption of a rule to restrict the scope of private litigation attacking the sufficiency of COVID-19-related disclosures.⁵³ The petitioner asked the SEC to “bar liability for statements about a company’s plans or prospects for getting back to business, resuming sales or profitability, or other statements about the impacts of COVID-19, whether forward-looking or not—as long as suitable warnings were attached;” to “consider limiting liability for all such statements to circumstances in which the plaintiff can prove that the speaker had actual (subjective) knowledge of its falsity;” and to bar liability for claims based on statements that satisfy proposed warnings re-

50. Jay Clayton & William Hinman, *The Importance of Disclosure—For Investors, Markets and Our Fight Against COVID-19*, Sec. Exch. Comm’n (Apr. 8, 2020), <https://www.sec.gov/news/public-statement/statement-clayton-hinman> [https://perma.cc/4RS8-RF2P].

51. See, e.g., *infra* text accompanying notes 66–72.

52. In the early days of the pandemic, the SEC granted blanket relief for timely filing of certain Exchange Act report filing deadlines. See, e.g., SEC Exchange Act Release No. 34-88318, Order Under Section 36 of the Securities Exchange Act of 1934 Granting Exemptions From Specified Provisions of the Exchange Act and Certain Rules Thereunder (Mar. 4, 2020), <https://www.sec.gov/rules/other/2020/34-88318.pdf>.

53. Letter from Harold Kim, President, U.S. Chamber Inst. for Legal Reform, and Tom Quadman, Exec. Vice President, Center for Capital Markets Competitiveness, to Vanessa Countryman, Sec’y, U.S. Sec. and Exch. Comm’n, Petition for Rulemaking on COVID-19 Related Litigation (Oct. 30, 2020), <https://instituteforlegalreform.com/petition-for-rulemaking-on-covid-19-related-litigation/> [perma.cc/E4ZG-GC8Y] [hereinafter *Chamber Petition*]; see SEC File No. 4-766 (Nov. 2, 2020), <https://www.sec.gov/rules/petitions/2020/petn4-766.pdf> [hereinafter *Chamber Petition*]. Public comments on the petition are available at <https://www.sec.gov/comments/4-766/4-766.htm> [https://perma.cc/9U89-7M6U]. See 17 C.F.R. § 201.192 (2020) (SEC rule governing petitions for rulemaking).

garding the increased variability of statements in financial statements based on “projections of future business or market conditions.”⁵⁴

IV. SEC ENFORCEMENT ACTIONS

The SEC has filed actions alleging that public reporting companies failed to meet the disclosure challenges presented by COVID-19—or, worse, deliberately lied about matters involving a company’s effort to commercially exploit the potential presented by COVID-19. This Part IV includes a summary of all SEC enforcement actions pertaining to COVID-19, presented in chronological order. Part V discusses the private damages claims; those are summarized in the Appendix.

In April 2020, the SEC announced that it had formed a COVID-19 Market Monitoring Group to assist the Commission and its staff in “actions and analysis related to the effects of COVID-19 on markets, issuers, and investors—including our Main Street investors.”⁵⁵ Soon after, the first COVID-19 related SEC enforcement action was filed. In *SEC v. Praxsyn Corp.*, the SEC sued a company and its CEO for allegedly issuing false and misleading press releases claiming the company was able to acquire and supply large quantities of N95 or similar masks to protect wearers from the COVID-19 virus.⁵⁶

The SEC sued the president and chief science officer of Arrayit Corporation for, among other alleged wrongs, making allegedly false and misleading statements concerning Arrayit’s development of a COVID-19 blood test.⁵⁷ The complaint alleged that the defendant falsely claimed that Arrayit had developed a COVID-19 blood

54. *Chamber Petition*, *supra* note 53, at 9–10.

55. Press Release, SEC Forms Cross-Divisional COVID-19 Market Monitoring Group (Apr. 24, 2020), <https://www.sec.gov/news/press-release/2020-95> [<https://perma.cc/5MJM-UZCW>].

56. Complaint at 1, *Sec & Exch. Comm’n v. Praxsyn Corp.*, No. 9:20-cv-80706-RAR (S.D. Fla. Apr. 28, 2020). *See* Press Release, *Sec & Exch. Comm’n, SEC Charged Company and CEO for COVID-19 Scam* (Apr. 28, 2020), <https://www.sec.gov/news/pressrelease/2020-97> [<https://perma.cc/65YR-K4WN>]. *Sec & Exch. Comm’n, Praxsyn Corporation, File No. 500-1, Order of Suspension of Trading*, (Mar. 25, 2020), <https://www.sec.gov/litigation/suspensions/2020/34-88479-o.pdf> [<http://perma.cc/7JBP-ETDX>].

57. Complaint at 1, *SEC v. Schena*, No. 5:20-cv-06717 (N.D. Cal. Sept. 25, 2020). *See* Press Release, *SEC, SEC Charges Top Executive of California Microcap Company for Misleading Claims Concerning COVID-19 Test and Financial Statements* (Sept. 25, 2020), <https://www.sec.gov/news/press-release/2020-224>. The

test when it had not yet purchased materials to make the test, falsely asserted that the test had been submitted for emergency approval, and falsely boasted to investors that there was a high demand for the test.⁵⁸

In *SEC v. Applied Biosciences Corp.*, the SEC alleged the defendant violated Rule 10b-5 by issuing a materially false press stating that it was offering and shipping a COVID-19 home test kit to the general public, when in fact it neither offered nor intended to offer test kits for home use and had not begun shipping any.⁵⁹ Rather, the SEC alleged, the company intended to allow purchases only by nursing homes, schools, and others only in consultation with a medical professional, and it knew, or was reckless in not knowing, that kits of the type it described were subject to FDA approval, which it had not obtained.⁶⁰ The false announcement caused the stock price “to soar.”⁶¹ The case was settled six months after filing. The company consented, without admitting or denying the allegations in the complaint, to the entry of a final judgment enjoining it

SEC had earlier suspended trading in the stock of the company “because of questions regarding [among other matters] . . . information in the marketplace since at least March 2, 2020, claiming the Company developed an approved COVID-19 blood test.” *Arrayit Corporation*, File No. 500-1, *Order of Suspension of Trading* (Apr. 13, 2020). The defendant in the enforcement action is also the subject of a criminal complaint for violating Rule 10b-5 in connection with statements regarding the company’s COVID-19 test. Criminal Complaint at 2, *U.S. v. Schena*, No. CR 20-70721-MAG (N.D. Cal. June 8, 2020).

Separately, the SEC sued the company itself and another officer. Complaint, *SEC v. Arrayit Corp.*, No. 21-cv-01053 (N.D. Cal. Feb. 11, 2021). Those defendants settled the case. Press Release, SEC, SEC Charges California Company and Its CEO with Misleading Investors About Covid-19 Blood Test and Financial Reports, Litigation Release No. 25029 (Feb. 11, 2021), <https://www.sec.gov/litigation/litreleases/2021/lr25029.htm> (complaint attached).

58. Complaint, *supra* note 57, at ¶¶ 36–45. The company involved in this case is the one that was the subject of the alleged pump-and-dump scheme alleged in *SEC v. Nielsen*. See *infra* text accompanying note 76.

59. Case No. 20 Civ. 3729 (S.D.N.Y. May 14, 2020). See Press Release, SEC Charges Company for Misleading Covid-19 Claims, Litigation Release No. 24819 (May 14, 2020) (attaching complaint), <https://www.sec.gov/litigation/litreleases/2020/lr24819.htm>; see Complaint ¶¶ 1, 18. The SEC had previously suspended trading in the company’s stock “because of questions regarding the accuracy and adequacy of information in the marketplace since at least March 31, 2020.” *Applied Biosciences Corp.*, File No. 500-1 *Order of Suspension of Trading* (Apr. 13, 2020), <https://www.sec.gov/litigation/suspensions/2020/34-88627-o.pdf>.

60. Complaint, *supra* note 59, at ¶¶ 2, 21–26.

61. *Id.* ¶ 3, 30. A significant stock price movement after a disclosure is often evidence of the materiality of the statement. See, e.g., *Detroit Gen. Ret. Sys. v. Medtronic, Inc.*, 621 F.3d 800, 807 (8th Cir. 2010).

from future violations of Rule 10b-5 and ordering it to pay a \$25,000 civil penalty.⁶²

The SEC sued Turbo Global Partner, Inc. and its CEO Robert Singerman, alleging a Rule 10b-5 violation for issuing press releases, drafted by the CEO, which contained materially false statements.⁶³ The press releases referred to a purported “multi-national public-private-partnership” to sell thermal scanning equipment to detect individuals with fevers. The company claimed in its press releases that this technology could be instrumental in “breaking the chain of virus transmission through early identification of elevated fever, one of the key early signs of COVID-19.” The press releases claimed that the technology “is 99.99% accurate” and was “designed to be deployed IMMEDIATELY in each State.” In fact, according to the SEC, the company had no agreement to sell the product, there was no partnership involving any government entities, and the CEO of the company’s claimed corporate partner did not make or authorize the statements attributed to him in the press releases.⁶⁴ Both defendants have settled the case, though there has been no announcement to that effect from the SEC. The company and Singerman, the CEO, respectively agreed to an injunction against making false and misleading disclosures and to a civil penalty.⁶⁵

62. See Press Release, Sec. & Exch. Comm’n, SEC Obtains Final Judgment Against Company for Misleading Covid-19-Related Claims Litigation Release No. 24977 (Dec. 7, 2020), <https://www.sec.gov/litigation/litreleases/2020/lr24977.htm> [NEEDS PERMACC].

63. Complaint, SEC v. Turbo Glob. Partners, Inc., No. 8:20-CV-01120 (M.D. Fla. May 14, 2020). Press Release, Sec. & Exch. Comm’n, SEC Charges Penny Stock Company and Its CEO for Misleading Covid-19 Claims, Litigation Release No. 24820 (May 14, 2020) (attaching complaint). <https://www.sec.gov/litigation/litreleases/2020/lr24820.htm>. See Complaint *supra* note 63, ¶¶ 18–31. The SEC had previously suspended trading in the company’s stock “because of questions regarding the accuracy and adequacy of information in the marketplace since at least March 2020.” Order of Suspension of Trading at 1, In re Turbo Global Partners, Inc., File No. 500-1 (Apr. 9, 2020), <https://www.sec.gov/litigation/suspensions/2020/34-88609-o.pdf>.

64. Complaint at ¶¶ 19, 22, 24, 25, 27, SEC v. Applied Biosciences Corp., No. 1:20-cv-03729 (S.D.N.Y. May 14, 2020).

65. Judgment as to Defendant Robert W. Singerman, SEC v. Turbo Glob. Partners, Inc., No. 8:20-cv-1120-T-30TGW (M.D. Fla. Aug. 10, 2020); Judgment as to Defendant Turbo Global Partners, Inc., SEC v. Turbo Glob. Partners, Inc., No. 8:20-cv-1120-T-30TGW (M.D. Fla. Aug. 10, 2020). A Magistrate Judge’s detailed recommendation that the company pay a penalty of \$700,000 and that Singerman pay a penalty of \$150,000 (SEC v. Turbo Glob. Partners, Inc., No. 8:20-cv-1120-T-30TGW, 2020 U.S. Dist. LEXIS 243897, at *2 (M.D. Fla. Dec. 9, 2020)) was adopted by the district court. SEC v. Turbo Glob. Partners, Inc., No. 8:20-cv-1120-T-30TGW, 2020 U.S. Dist. LEXIS 243258, at *1–2 (M.D. Fla. Dec. 29, 2020).

The SEC initiated an administrative proceeding involving The Cheesecake Factory restaurant chain that alleged disclosure violations, though it was not based on Rule 10b-5.⁶⁶ The action was, instead, based on noncompliance with the public company reporting requirements.⁶⁷ There was no claim of intentional deception. The deception found, however, was the kind of misrepresentation or half-truth within the scope of Rule 10b-5. The order instituting proceedings reflected the settlement of the case, in which the SEC found that the company, facing an unprecedented challenge to its business arising from the impact of the COVID-19, issued disclosures regarding the effect of, and its response to, the pandemic, which failed to adequately inform investors of the extent of COVID-19's impact on the company's operations and financial condition.⁶⁸ In particular, while the company disclosed in a press release that its "restaurants are operating sustainably at present under this [off-premise] model," it failed to disclose that it was excluding expenses attributable to corporate operations from its claim of sustainability; that the company was, in fact, losing approximately \$6 million in cash per week; and that it had only approximately 16 weeks of cash remaining, even after taking into account a revolving credit facility. In addition, the company's disclosure that it was "evaluating additional measures to further preserve financial flexibility" did not disclose that it had written its landlord that the company would not make an upcoming rent payment.⁶⁹

In the settlement, the company agreed to cease and desist from violating its reporting obligations and to pay a civil penalty of \$125,000.⁷⁰ In a statement released with the settlement, the SEC Director of the Division of Enforcement stated:

66. Cheesecake Factory, Order Instituting Cease-And-Desist Proceedings, Exchange Act Release No. 90565 (Dec. 4, 2020), <https://www.sec.gov/litigation/admin/2020/34-90565.pdf>.

67. The company was found to have violated Exchange Act Rules 13a-11. *See* 17 C.F.R. § 240.13a-11 (2020); 17 C.F.R. § 240.12b-20 (2020); Cheesecake Factory, *supra* note 66, ¶ A. The first rule imposes the obligation to file the quarterly report on Form 10-Q. The second rule provides: "In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading." This language parallels Rule 10b-5(b). *See* 17 C.F.R. § 240.12b-20 (2020).

68. Cheesecake Factory, *supra* note 66, ¶ 3.

69. *Id.* ¶¶ 11–13.

70. *See id.* Part IV. The relatively modest size of the penalty took into account the company's cooperation in the investigation, according to the SEC. Press Release,

When public companies describe for investors the impact of COVID-19 on their business, they must speak accurately. . . . The Enforcement Division, including the Coronavirus Steering Committee, will continue to scrutinize COVID-related disclosures to ensure that investors receive accurate, timely information, while also giving appropriate credit for prompt and substantial cooperation in investigations.⁷¹

The Cheesecake Factory was notable in that it involved a large public company, in contrast to other cases brought by the SEC discussed here, which involved penny or microcap stocks.⁷²

In *SEC v. Berman*, the SEC sued Decisions Diagnostics Corp. and its CEO for violating Rule 10b-5, alleging that the CEO

went on a publicity blitz to portray the Company as having created a working, breakthrough technology that could accurately test for [Covid-19] using just a finger-prick of blood and provide results in less than a minute. . . . [T]he truth was the Company did not have a test, only an idea that had not materialized into a product.⁷³

The SEC has also brought enforcement actions against persons not directly affiliated with a company that allegedly made false statements about their own business. In *SEC v. Gomes*, the SEC sued several individuals and entities alleging that they made sales of stock in a number of companies where they had allegedly boosted the stock price by promotional campaigns that, in some instances,

Sec. & Exch. Comm'n, SEC Charges The Cheesecake Factory For Misleading COVID-19 Disclosures (Dec. 4, 2020), <https://www.sec.gov/news/press-release/2020-306> [<https://perma.cc/9MJU-3BQY>]; see STEPHEN CHOI ET AL., CORNERSTONE RESEARCH, SEC ENFORCEMENT ACTIVITY: PUBLIC COMPANIES AND SUBSIDIARIES (2020), <https://www.cornerstone.com/Publications/Reports/SEC-Enforcement-Activity-FY-2020-Update.pdf> [<https://perma.cc/69V8-82TX>] (reporting that “[t]he median monetary settlement imposed in a public company or subsidiary action in FY 2020 was \$4 million”).

71. Press Release, Sec. & Exchange. Comm'n, SEC Charges The Cheesecake Factory For Misleading COVID-19 Disclosures (Dec. 4, 2020), <https://www.sec.gov/news/press-release/2020-306> [<https://perma.cc/9MJU-3BQY>].

72. As noted in the footnotes containing citations to the cases filed by the SEC, several of the companies sued by the SEC regarding COVID-19 disclosure deficiencies had trading in their stock suspended because of questions about the integrity of their financial statements.

73. Complaint at 1–2, *SEC v. Berman*, No. 1:20-CV-10658 (S.D.N.Y. Dec. 17, 2020); see Press Release, Sec. & Exch. Comm'n, SEC Charges Biotech Company and CEO With Fraud Concerning COVID-19 Blood Testing Device (Dec. 18, 2020) <https://www.sec.gov/news/press-release/2020-327> [<https://perma.cc/QT3-RA2L>]. Criminal charges were also filed against the CEO, according to the SEC's press release. Press Release, Sec. & Exch. Comm'n, *supra* note 73. The SEC had earlier suspended trading in the stock of the company “because of questions regarding the accuracy and adequacy of information in the marketplace since at least March 3, 2020.” *Decisions Diagnostics Corp.*, File No. 500-1, (Apr. 23, 2020) (order of suspension of trading), <https://www.sec.gov/litigation/suspensions/2020/34-88735-o.pdf> [<https://perma.cc/ZG2S-PL9D>].

included alleged false and misleading information designed to fraudulently capitalize on the COVID-19 pandemic.⁷⁴ In a default judgment, the court enjoined some of the defendants from further violations and ordered disgorgement and civil penalties.⁷⁵

In *SEC v. Nielsen*, the SEC sued a stock trader, alleging that he had conducted a fraudulent pump-and-dump scheme in the stock of a biotechnology company by making hundreds of misleading statements in an online investment forum, including a false assertion that the company had developed an “approved” COVID-19 blood test.⁷⁶

V. PRIVATE DAMAGE CLAIMS

A number of investor class actions have been brought alleging Rule 10b-5 violations related to COVID-19 disclosure issues.⁷⁷ The appendix to this article lists the cases with a brief statement of the nature of the alleged material deception. There are some cases, not described here, that make tangential reference to COVID-19. The purpose of this section is to provide a sense of the nature and scope

74. Complaint at 1–2, *SEC v. Gomes*, No. 20-cv-11092; (D. Mass. June 9, 2020); see Press Release, Sec. & Exch. Comm’n, SEC Charges Microcap Fraud Scheme Participants Attempting to Capitalize on the Covid-19 Pandemic (June 18, 2020), <https://www.sec.gov/litigation/litreleases/2020/lr24839.htm> [<https://perma.cc/ZC27-2SSJ>].

75. See Press Release, Sec. & Exch. Comm’n, Five Defendants in a Microcap Fraud Scheme Attempting to Capitalize On the Covid-19 Pandemic Ordered to Pay Over \$12 Million (Dec. 9, 2020), <https://www.sec.gov/litigation/litreleases/2020/lr24979.htm> [<https://perma.cc/T3RW-NHHW>].

76. Complaint at 1–2, *SEC v. Nielsen*, No. 5:20-CV-03788 (N.D. Cal. June 9, 2020); see Press Release, Sec. & Exch. Comm’n, SEC Charges California Trader Engaged in Manipulative Trading Scheme Involving COVID-19 Claims (June 9, 2020), <https://www.sec.gov/news/press-release/2020-128> [<https://perma.cc/Y8KJ-AH7D>].

77. The Stanford Law School Class Action Clearinghouse maintains a database by category of securities law class action filings. Securities Class Action Clearinghouse, Stanford Law Sch., <http://securities.stanford.edu/current-topics.html> [<https://perma.cc/QQP9-DE36>]. The ones identified by it as relating to COVID-19 are found at *id.* (click on COVID-19) (“The Clearinghouse is tracking and highlighting cases involving (1) misrepresentation or failure to disclose risks associated with COVID-19; or (2) statements about how COVID-19 is impacting the business operations of the company; or (3) false statements about COVID-19.”). That data includes summaries of each case. Other research was conducted in an effort to identify any cases that might not have been included in the Stanford database. Some of the cases included in the Stanford database are at best tangential to COVID-19 disclosure issues; those cases have not been included here.

of class actions alleging faulty disclosures that focused on the impact of COVID-19 on the financial condition or business activities of the company.

All of the COVID-19 private damage cases are at a very early stage of litigation. Rule 10b-5 class actions start slowly. After the complaint is filed—and there may be more than one case filed against the same company—defendants invariably move to dismiss the complaint, contending that the complaint “fail[s] to state a claim upon which relief can be granted.”⁷⁸ These motions typically assert that the complaint fails to allege the essential elements of material deception⁷⁹ and scienter,⁸⁰ among other necessary elements. Furthermore, in a Rule 10b-5 class action the plaintiff who files the first case must, within twenty days of filing, publish notice of the filing to the effect that “not later than 60 days after the date on which the notice is published, any member of the purported class may move the court to serve as lead plaintiff of the purported class.”⁸¹ Then the court must determine who, if anyone, among the movants is designated “lead plaintiff,” to litigate the case on the plaintiff’s side.⁸² Commonly, after determination of the lead plaintiff, an amended complaint is filed, a renewed motion to dismiss is

78. FED. R. CIV. P. 12(b)(6); *see* Exchange Act § 21D(b)(3)(A), 15 U.S.C. § 78u-4(b)(3)(A) (providing that “the court shall, on the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) [described *infra* in notes 79–80] are not met”).

79. Section 21D(b)(1) of the Exchange Act (requiring that in any action based on Rule 10b-5 alleging an untrue statement of a material fact or a half-truth “the complaint shall specify *each statement* alleged to have been misleading [and] the *reason or reasons why* the statement is misleading” 15 U.S.C. § 78u-4(b)(1) (emphasis added)). This imposes a significant burden of specificity on the plaintiff. *See, e.g.,* Police & Fire Ret. Sys. of Detroit v. Plains All American Pipeline, L.P., 777 F. App’x 776 (5th Cir. 2019) (evaluating, one by one, seventeen statements alleged by plaintiff to have been materially deceptive).

80. Section 21D(b)(2)(A) of the Exchange Act requiring that in any action based on Rule 10b-5 seeking damages “the complaint shall, *with respect to each act or omission* alleged to violate [Rule 10b-5], state *with particularity* facts giving rise to a *strong inference* that the defendant acted’ with scienter. 15 U.S.C. § 78u-4(b)(2)(A) (emphasis added); *see* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007) (explaining the heightened scienter pleading requirement).

81. Section 21D(a)(3)(A) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(A).

82. Section 21D(a)(3)(B)(i) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(B)(i), provides:

Not later than 90 days after the date on which a notice is published under subparagraph (A)(i), the court shall consider any motion made by a purported class member in response to the notice, including any motion by a class member who is not individually named as a plaintiff in the complaint or complaints, and shall appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to

filed, and the pace of proceedings on the motion will depend on the calendar of the presiding judge. When a motion to dismiss is filed, discovery is stayed.⁸³

A review of the numerous cases that have been filed provides insight into the potential pitfalls of making disclosure during the pandemic.

1. A number of companies were alleged to have mis- or overstated the status of development or performance of products related directly to the pandemic, such as test kits (Chembio Diagnostics, Inc., Co-Diagnostics, Inc., Decision Diagnostics Corp., SCWorx

be most capable of adequately representing the interests of class members (hereafter in this paragraph referred to as the “most adequate plaintiff”) in accordance with this subparagraph.

15 U.S.C. § 78u-4(a)(3)(B)(i).

The early phase process may be contested and protracted, with discovery allowed on the issues pertinent to determining the lead plaintiff. Section 21D(a)(3)(B)(iv) of the Exchange Act, 15 U.S.C. § 78u-4(a)(3)(B)(iv); *see, e.g.*, In re Allergan PLC Sec. Litig., No. 18 Civ. 12089, 2020 U.S. Dist. LEXIS 179371, at *9, *17–19 (S.D.N.Y. Sept. 29, 2019) (rejecting proposed lead plaintiff as inadequate, after first deciding between two contestants for the role, in case originally filed on December 20, 2018, and leaving open the possibility that another plaintiff would come forward).

Many class actions are disposed of in a few years:

A review of the cases filed between 1 January 2002 and 31 December 2016 . . . reveals that at the time from the filing of the first complaint through the resolution of the case, whether a dismissal or a settlement, shows that more than 80% of suits are resolved within four years, and 65% within the first three years. The most common resolution periods in the data are between one and two years (28% of cases) and between two and three years (23% of cases). Within the first year of filing, 14% of cases are resolved.

JANEEN MCINTOSH & SVETLANA STARYKH, NERA ECONOMIC CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2020 FULL-YEAR REVIEW 14 (2021), https://www.nera.com/content/dam/nera/publications/2021/PUB_2020_Full-Year_Trends_012221.pdf [<https://perma.cc/L8K9-QWH7>] (footnote omitted). A case can, however, be protracted. For example, in *Smilovits v. First Solar, Inc.*, the final award of attorneys’ fees was made and a settlement for \$350 million was approved on June 30, 2020 (No. CV-12-00555, 2020 U.S. Dist. LEXIS 115982 (D. Ariz. June 30, 2020)), where the case had been filed more than eight years earlier and there had been an intervening appeal from a partial grant of summary judgment in favor of the defendant *sub nom.* *Mineworkers’ Pension Scheme v. First Solar Inc.*, 881 F.3d 750 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2741 (2019).

83. Section 21D(b)(3)(B) of the Exchange Act, provides that “all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.” 15 U.S.C. § 78u-4(b)(3)(B).

Corp., Sona Nanotech Inc.) and vaccines (AstraZeneca PLC, Inovio Pharmaceuticals, Inc., Vaxart, Inc.).⁸⁴

2. No industry is immune. COVID-19 can affect the operations of any company in any industry. A notable example is the suits against three cruise lines, whose operations were essentially halted by the pandemic. (Carnival Corporation, Norwegian Cruise Lines, and Royal Caribbean Cruises Ltd.).

3. COVID-19 can affect other companies in myriad ways, each of which presents disclosure challenges—and, allegedly, the temptation to be less than truthful. For example, if the pandemic affects a consumer of the company's products or services, the company's revenue stream or earnings may in turn be affected. The decline in demand for a company's products or services may require an assessment of its reserves, such as for loan losses, or of impairment of goodwill. The failure to make the necessary adjustments may result in false financial statements (Elanco, Lizhi, K12, Phoenix Tree, Tyson, United States Oil).

4. COVID-19 can impair a company's ability to maintain its internal controls, accounting functions, or other aspects of its operations that are necessary for the preparation of timely and accurate financial reports, even if the pandemic does not otherwise affect the demand for the company's products or services. (Harborside)

VI. CONCLUSION

The COVID-19 pandemic has presented disclosure challenges for many, perhaps most, public reporting companies. In some cases, according to the SEC and private plaintiffs, a company has deliberately falsified disclosures to the public regarding some aspect of its business (1) that relates to an effort to benefit from the pandemic, such as by selling products needed to address the pandemic, or (2) that is affected by the pandemic, such as the demand for its products or services or its ability to generate accurate financial information. The wide array of cases already filed suggests that public companies must continue to be vigilant in their disclosure compliance—remaining mindful of SEC guidance in the area—and that more cases may be filed as companies may fail to meet the disclosure challenges created by the pandemic.

84. The parenthetical references to companies in this paragraph and ones immediately following refer to defendants in the complaints summarized in the Appendix.

APPENDIX

Issuers Sued under the Federal Securities Laws for
COVID-Related Deception

The principal source for the cases described in this appendix is The Stanford Law School Class Action Clearinghouse.⁸⁵ Additional research did not identify additional cases. The following list may not be exhaustive, but is undoubtedly representative of the COVID-19-related Rule 10b-5 claims by investors. In many instances more than one case has been filed against the entity defendant. Unless the subsequent case is otherwise noteworthy, the additional cases are not cited here. In many situations multiple cases have been consolidated, particularly where a class action lead plaintiff has been selected, followed by the filing of an amended consolidated complaint.⁸⁶ The focus here is on core allegations of alleged deception regarding COVID-19—the complaints are typically 25 to 60 pages long—without regard to the details of the claims against defendants other than the issuer of the securities involved in the claim and without regard to the attempt to plead the element of scienter in Rule 10b-5 cases. Some complaints allege disclosure deficiencies unrelated to COVID-19 or make only passing reference to COVID-19 or “the pandemic”; those claims are not summarized here. The cases are listed in alphabetical order by the name of the entity defendant. Only three cases have thus far have resulted in rulings on motions to dismiss; in many instances a lead plaintiff has been appointed to represent the putative class.

A. *AstraZeneca PLC*⁸⁷

AstraZeneca PLC, a large pharmaceutical company, sought to develop a COVID-19 vaccine.⁸⁸ The company announced agreements to produce a vaccine, announced the preliminary results of clinical trials of its vaccine, AZD1222, and announced the practices

85. STANFORD LAW SCHOOL, CURRENT TOPICS IN SECURITIES CLASS ACTION FILINGS, SECURITIES CLASS ACTION CLEARING HOUSE, <http://securities.stanford.edu/current-topics.html#collapse1> [<https://perma.cc/9JCD-8W3Y>].

86. See *supra* text accompanying notes 81–83 (describing early-stage procedural steps in securities law class actions).

87. Complaint for Violations of the Federal Securities Law, *Monroe Cty. Emps.’ Ret. Sys. v. AstraZeneca PLC et al.*, No. 1:21-cv-722 (S.D.N.Y. Jan. 26, 2021).

88. *Id.* ¶ 17.

it would follow to address the safety and well-being of persons vaccinated.⁸⁹ In contrast to the positive statements made by the company, the complaint alleges that the company:

failed to disclose the following adverse facts pertaining to the Company's business, operations and financial condition, which were known to or recklessly disregarded by defendants:

(a) that initial clinical trials for AZD1222 had suffered from a critical manufacturing error, resulting in a substantial number of trial participants receiving half the designed dosage;

(b) that clinical trials for AZD1222 consisted of a patchwork of disparate patient subgroups, each with subtly different treatments, undermining the validity and import of the conclusions that could be drawn from the clinical data across these disparate patient populations;

(c) that certain clinical trial participants for AZD1222 had not received a second dose at the designated time points, but rather received the second dose up to several weeks after the dose had been scheduled to be delivered according to the original trial design;

(d) that AstraZeneca had failed to include a substantial number of patients over 55 years of age in its clinical trials for AZD1222, despite this patient population being particularly vulnerable to the effects of COVID-19 and thus a high priority target market for the drug;

(e) that AstraZeneca's clinical trials for AZD1222 had been hamstrung by widespread flaws in design, errors in execution, and a failure to properly coordinate and communicate with regulatory authorities and the general public;

(f) that, as a result of (a)-(e) above, the clinical trials for AZD1222 had not been conducted in accordance with industry best practices and acceptable standards and the data and conclusions that could be derived from the clinical trials was of limited utility; and

(g) that, as a result of (a)-(f) above, AZD1222 was unlikely to be approved for commercial use in the United States in the short term, one of the largest potential markets for the drug.⁹⁰

B. *Bluebird Bio, Inc.*⁹¹

The company “engages in researching, developing, and commercializing transformative gene therapies for severe genetic diseases and cancer. The Company’s gene therapy programs include, among others, LentiGlobin . . . for the treatment of sickle cell disease (“SCD”).”⁹² The company announced that it expected to submit a U.S. Biologics Licensing Application (BLA) for that product in the

89. *Id.* ¶¶ 17–32.

90. *Id.* ¶ 33.

91. Class Action Complaint, *Leung v. Bluebird Bio, Inc.*, No.1:21-cv-00777 (E.D.N.Y. Feb 12, 2021).

92. *Id.* ¶ 2.

second half of 2021.⁹³ The complaint alleges, among other deception, that “Defendants downplayed the foreseeable impact of disruptions related to the COVID-19 pandemic on the Company’s BLA submission schedule for LentiGlobin for SCD, particularly with respect to manufacturing,” including with respect to the ability to conduct the necessary clinical trial of the drug and to manufacture it.⁹⁴ Defendants are alleged to have “downplayed the foreseeable impact of disruptions related to the COVID-19 pandemic on the Company’s BLA submission schedule for LentiGlobin for SCD, particularly with respect to manufacturing.”⁹⁵

C. *Carnival Corp.*⁹⁶

In summary, the complaint alleges with respect to the cruise line entity:

Throughout the Class Period, Defendants made materially false and/or misleading statements, and/or failed to disclose material adverse facts about the Company’s business, operations, and prospects. Specifically, Defendants failed to disclose to investors that: (1) the Company’s medics were reporting increasing events of COVID-19 illness on the Company’s ships; (2) Carnival was violating port of call regulations by concealing the amount and severity of COVID-19 infections on board its ships; (3) in responding to the outbreak of COVID-19, Carnival failed to follow the Company’s own health and safety protocols developed in the wake of other communicable disease outbreaks; (4) by continuing to operate, Carnival ships were responsible for continuing to spread COVID-19 at various ports throughout the world; and (5) as a result of the foregoing, Defendants’ positive statements about the Company’s business, operations, and prospects, were materially misleading and/or lacked a reasonable basis.⁹⁷

D. *Chembio Diagnostics, Inc.*⁹⁸

The complaint alleges:

3. Chembio purports to be a leading point-of-care (“POC”) diagnostics company focused on detecting and diagnosing infectious diseases.

93. *Id.* ¶¶ 2–3.

94. *Id.* ¶¶ 4, 22–30.

95. *Id.* ¶ 32.

96. Complaint for Violation of the Federal Securities Laws, *Serv. Lamp Corp. Profit Sharing Plan v. Carnival Corp. et al.*, Case No. 1:20-cv-22202 (S.D. Fla. May 27, 2020). *Id.* ¶ 9.

97. *Id.* at ¶ 8.

98. Class Action Complaint, Special Stipulations Fund III QP, *L.P. et al. v. Chembio Diagnostics, Inc. et al.*, No. 2:20-cv-03753 (E.D.N.Y. Aug. 17, 2020).

The Company claims its patented Dual Path Platform (“DPP”) technology platform, which uses a small drop of blood from the fingertip, provides high-quality, cost-effective results in approximately 15 minutes.

4. Furthermore, the Company asserts that its products “meet the highest standards for accuracy and superior performance to help prevent the spread of infectious diseases” and that its “innovative solutions, like the Chembio Dual Path Platform (DPP®), make POC testing faster, more accurate, and more cost effective.”

5. In light of the COVID-19 pandemic, the Company announced it was focusing on the development and commercialization of a serological or antibody test. Chembio’s antibody test was one of the first antibody tests authorized by the FDA during the COVID-19 public health emergency. .)[sic] The Company secured expedited regulatory approvals for its DPP antibody test from the U.S. Food and Drug Administration (a so-called “Emergency Use Authorization” or “EUA”), along with other countries’ regulators.

6. Throughout the Section 10(b) Class Period, the Company represented that its DPP COVID-19 serological POC test for the detection of IgM and IgG antibodies aided in determining current or past exposure to the COVID-19 virus, that its test provides high sensitivity and specificity, and was 100% accurate. Test sensitivity is the ability of a test to correctly identify those with the disease (true positive rate), whereas test specificity is the ability of the test to correctly identify those without the disease (true negative rate).⁹⁹

On June 19, 2020, however, the FDA revoked the approval due to performance concerns with the accuracy of the test, including the rate of inaccurate results.¹⁰⁰ The complaint alleges that the prior statements made by Chembio were materially false when made.¹⁰¹

E. *Co-Diagnostics, Inc.*¹⁰²

The company developed and marketed a test for COVID-19. The complaint alleges that during relevant times

Co-Diagnostics, its Chief Technology Officer, and its other officers and directors made unequivocal statements to the market *that its Covid-19 tests were 100% accurate*—a staggering claim that appeared to set Co-Diagnostics apart from other competitors developing Covid-19

99. *Id.* ¶¶ 3–6.

100. *Id.* ¶ 9.

101. *Id.* ¶ 25.

102. Class Action Complaint (Proposed Class Action), *Gelt Trading, Ltd. v. Co-Diagnostics, Inc. et al.*, 2021 U.S. Dist. LEXIS 45963 (No. 20-cv-00368) (D. Utah Mar. 10, 2021).

tests. As was later revealed, however, this was not true: Co-Diagnostics' Covid-19 tests are materially less than 100% accurate—a discrepancy that can have momentous adverse consequences if Co-Diagnostics' tests are used on a widespread basis, as intended. Nonetheless, Co-Diagnostics' market-first test, together with its claims that its tests were perfectly accurate, allowed Co-Diagnostics to sign lucrative contracts with state governments in the U.S. and governments around the world. (footnote omitted).¹⁰³

F. *CytoDyn Inc.*¹⁰⁴

According to the complaint, the company “CytoDyn is focused on the development and commercialization of a drug named ‘Leronlimab’ which has long been promoted as a potential therapy for HIV patients. Since the beginning of the global COVID-19 pandemic, however, CytoDyn has made an about-face and has begun to aggressively tout Leronlimab as a treatment for COVID-19.”¹⁰⁵ After hyping the stock – and insiders allegedly sold their stock – “The market has learned that CytoDyn’s development and marketing of Leronlimab as a treatment for COVID-19 was not commercially viable for CytoDyn.”¹⁰⁶ In particular, while the company announced that it had sought emergency use authorization from the SEC for the drug, allegedly it had not done so.¹⁰⁷

F. *Decision Diagnostics Corp.*¹⁰⁸

The company sold a COVID-19 test. According to the complaint:

Throughout the Class Period, Defendants made materially false and misleading statements regarding the Company’s business, operations, and compliance policies. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (i) Decision Diagnostics had not developed any viable COVID-19 test, much less a test that could detect COVID-19 in less than one minute; (ii) the Company could not meet the FDA’s EUA testing requirements for its purported COVID-19 test; (iii) accordingly, Defendants had misrepresented the timeline within which it could realistically bring its COVID-19 test to market; (iv) all the foregoing subjected Defendants to an increased risk of regulatory oversight and enforcement; and (v)

103. *Id.*

104. Class Action Complaint For Violations Of The Federal Securities Laws, Lewis v. CytoDyn, Inc., et al., No. 21-cv-05190-BHS (W.D.Wash. Mar. 17, 2021).

105. *Id.* at ¶¶ 3-4.

106. *Id.* at ¶¶ 4-8.

107. *Id.* at ¶¶ 33-34.

108. Complaint for Violations of the Federal Securities Laws, Sanchez v. Decision Diagnostics Corp. et al., No. 2:21-cv-00418 (C.D. Cal. Jan. 15, 2021).

as a result, Defendants' public statements were materially false and misleading at all relevant times.¹⁰⁹

The filing of this action followed the SEC's enforcement action.¹¹⁰ This is a curious case for plaintiff's counsel to pursue, inasmuch as the stock dropped \$0.06 per share, from \$0.10 to \$0.04, when the truth emerged.¹¹¹

G. *Eastman Kodak Company*¹¹²

This action does not deal directly with the impact of COVID-19 on the company. As summarized on the Stanford site (not classified, however, among the COVID-19 securities suits):

The Complaint alleges Defendants failed to disclose that the Company had granted an individual defendant and several other Company insiders millions of dollars' worth of stock options, immediately prior to the Company publicly disclosing that it had received a \$765 million loan from the DFC to produce drugs to treat COVID-19, which Defendants knew would cause Kodak's stock to immediately increase in value once the deal was announced. It is further alleged that while in possession of this material non-public information, individual defendant and other Company insiders purchased tens of thousands of the Company's shares immediately prior to the announcement, again at prices that they knew would increase exponentially once news of the loan became public. As a result of the foregoing, Defendants' statements about Kodak's business, operations, and prospects were false and misleading and/or lacked a reasonable basis when made. As a result of this fraudulent scheme, Defendants artificially inflated the Company's stock price throughout the Class Period and made investment decisions based on material, nonpublic information derived from their positions at Kodak.¹¹³

As questions emerged about the possible insider trading and the company announced it had commissioned an investigation, the entity that was to provide financing to the company announced, "Recent allegations of wrongdoing raise serious concerns. We will not proceed any further unless these allegations are cleared."¹¹⁴

109. *Id.* ¶ 4.

110. *See supra* text accompanying note 73.

111. *Id.* ¶ 6. Complaint for Violations of the Federal Securities Laws at ¶ 6, *Decision Diagnostics Corp.*, No. 2:21-cv-00368.

112. Complaint for Violations of the Federal Securities Laws, *Tang v. Eastman Kodak Co.*, No. 3:20-cv-10462 (D.N.J. Aug. 13, 2020).

113. *Eastman Kodak Company: Case Summary*, Stanford Law Sch. Sec. Class Action Clearinghouse, <http://securities.stanford.edu/filings-case.html?id=107486> [<https://perma.cc/8VBW-CYGA>].

114. Complaint for Violations of the Federal Securities Laws at ¶ 13, *Eastman*

H. *Elanco Animal Health Incorporated*¹¹⁵

“Elanco is an animal health company that develops, manufactures, and markets products for companion and food animals.¹¹⁶ The allegations in the complaint generally allege “fail[ures] to disclose material adverse facts about the Company’s business, operations, and prospects,” including the impact of COVID-19 on its lines of business, as the company ultimately disclosed a decline in revenue “driven by factors resulting from the COVID-19 pandemic” and withdrew 2020 earnings guidance “due to uncertainty of the duration and magnitude of impacts from the COVID-19 pandemic.”¹¹⁷

I. *Forescout Technologies, Inc.*¹¹⁸

The company announced a merger agreement, ultimately terminated, allegedly without disclosing the adverse impact of COVID-19 on its business, most notably its operations in Asia Pacific and Japan, which posed a risk that the merger would not close, and that the impact of COVID-19 was disproportionately greater on the company than on other entities.¹¹⁹

J. *The GEO Group, Inc.*¹²⁰

The complaint alleges that the company, “purportedly the first fully integrated equity real estate investment trust specializing in the design, financing, development, and operation of secure facilities, processing centers, and community reentry centers in the U.S., Australia, South Africa, and the United Kingdom”¹²¹ allegedly

made false and/or misleading statements and/or failed to disclose that:
(i) GEO Group maintained woefully ineffective COVID-19 response

Kodak Co., No. 3:20-cv-10462.

115. Class Action Complaint for Violations of the Federal Securities Laws, *Hunter v. Elanco Animal Health Inc. et al.*, No. 1:20-cv-01460 (S.D. Ind. May 20, 2020).

116. *Id.* ¶ 16.

117. *Id.* ¶¶ 17–22.

118. Class Action Complaint for Violations of the Federal Securities Laws, *Arbitrage Fund v. Forescout Techs., Inc. et al.*, No. 3:20-cv-03819 (N.D. Cal. June 10, 2020).

119. *Id.* ¶¶ 1–3, 11.

120. Class Action Complaint, *Hartel v. GEO Grp., Inc. et al.*, No. 9:20-cv-81063-RS (S.D. Fla. July 7, 2020).

121. *Id.* ¶ 2.

procedures; (ii) those inadequate procedures subjected residents of the Company's halfway houses to significant health risks; (iii) accordingly, the Company was vulnerable to significant financial and/or reputational harm; and (iv) as a result, the Company's public statements were materially false and misleading at all relevant times.¹²²

K. *Harborside, Inc.*¹²³

The Canadian company, purportedly “a vertically-integrated cannabis company,”¹²⁴ touted that it maintained continuing operations during the pandemic.¹²⁵ Ultimately the company disclosed that because of the pandemic the filing of reports required under Canadian law would be delayed.¹²⁶ These allegations related to alleged broad ranging deficiencies in financial reporting that predated the pandemic.¹²⁷

L. *Inovio Pharmaceuticals, Inc.*¹²⁸

The company “focuses on the discovery, development, and commercialization of . . . medicines to treat, cure, and protect people from diseases associated with human papillomavirus (“HPV”), cancer, and infectious diseases.”¹²⁹ With the onset of the coronavirus epidemic, the Company's primary focus has been on the development of the vaccine.¹³⁰ The company is alleged to have made misleading statements about its progress in developing a vaccine for COVID-19.¹³¹ In particular, the complaint alleges

Defendants lied to investors about creating a vaccine within three hours in February and March 2020, and those lies were exposed almost immediately. Defendants lied again to investors between March and May 2020 regarding Inovio's ability to produce certain doses of the INO-4800 vaccine, and then those lies were exposed in a series of

122. *Id.* ¶ 4.

123. Class Action Complaint for Violations of the Federal Securities Laws, *Shahrohkimanesh v. Harborside, Inc. et al.*, No. 3:20-cv-01551-MO (D. Or. Sept. 8, 2020).

124. *Id.* ¶ 8.

125. *Id.* ¶ 37.

126. *Id.* ¶¶ 38, 41.

127. *Id.* ¶ 39.

128. First Amended Consolidated Class Action Complaint for Violation of the Federal Securities Laws, *McDermid v. Inovio Pharm., Inc.*, 2021 U.S. Dist. LEXIS 28203, (No. 2:20-cv-01402) (E.D. Pa. Feb. 16, 2021).

129. *Id.* ¶ 4.

130. *Id.*

131. *Id.* ¶ 7.

partial disclosures over the next few months. Undeterred, Defendants lied yet again in the end of June 2020 about being selected for Operation Warp Speed, and the full extent of that lie was exposed in August and September 2020.¹³²

On February 16, 2021, the court granted in part, with prejudice, and denied in part defendant's motion to dismiss the complaint, finding the allegations surrounding statements about Inovio constructing a vaccine in three hours and about Inovio's progress toward producing one million vaccine doses in 2020 to satisfy the elements of a Rule 10b-5 cause of action.¹³³

M. *K12, Inc.*¹³⁴

According to the complaint, "K12 Inc. . . . is a technology-based education company that provides proprietary and third-party educational curriculum, teacher training, administrative support, information technology support, software systems and educational services" which "operates virtual learning systems worldwide."¹³⁵ K12 sought to take advantage of the shift to on-line teaching brought about by the pandemic. The complaint continues:

In reality, however—and unbeknownst to the investing public—K12 was not ready to take on the increased load and lacked the technological capabilities to support and service the massive increase in traffic on its website and its learning platforms. Indeed, K12 lacked adequate infrastructures to enable thousands of students and teachers to logon to their systems and utilize the audio and video features necessary for remote instruction. Additionally, despite K12's representations to the contrary, its cybersecurity measures and protocols were so weak that a 16-year-old high school junior successfully breached the network on which K12 was critically dependent, and thereby crippled K12's online platform, and the provision of its services for hundreds of thousands of students for several days. The issues relating to the functionality and support of K12's platforms were only compounded by the lack of

132. *Id.* ¶ 18.

133. *McDermid v. Inovio Pharm., Inc.*, No. 20-01402, 2021 U.S. Dist. LEXIS 28203, at *2 (E.D. Pa. Feb. 16, 2021).

134. Complaint for Violations of Federal Securities Laws, *Lee v. K12, Inc. et al.*, No. 1:20-CV-01419 (E.D. Va. Nov. 19, 2020).

135. *Id.* ¶ 2. K12 had been a defendant in another Rule 10b-5 class action. *Tarapara et al. v. K12 Inc. et al.*, No. 16-cv-4069-PJH, 2017 U.S. Dist. LEXIS 140037, at *2 (N.D. Cal. Aug. 30, 2017). *In re K12 Inc. Sec. Litig.*, No. 4:16-cv-04069-PJH, 2019 WL 3766420 (N.D. Cal. July 10, 2019). *See Stride, Inc. Form 8-K* (Dec. 16, 2020).

training and instruction provided to teachers and parents, who received little support and insufficient hands-on experience and training prior to the platform's launch.¹³⁶

Further:

Defendants made false and/or misleading statements and failed to disclose to investors that: (i) K12 lacked the technological capabilities, infrastructures, and expertise to support the increased demand for virtual and blended education necessitated by the global pandemic; (ii) K12 lacked adequate cyberattack protocols and protections to prevent the disabling of its computer system; (iii) K12 was unable provide the necessary levels of administrative support and training to teachers, students, and parents; and (iv) based on the foregoing, Defendants lacked a reasonable basis for their positive statements about the Company's business, operations, and prospects and/or lacked a reasonable basis and omitted facts.¹³⁷

N. *LexinFintech Holdings, Ltd.*¹³⁸

The company is an on line lending institution that operates in the People's Republic of China.¹³⁹ The complaint focuses on the company's IPO, alleging that "the Registration Statement made false and/or misleading statements and/or failed to disclose that:

(i) LexinFintech overstated its growth prospects; (ii) LexinFintech engaged in undisclosed related party transactions; and (iii) as a result, the Registration Statement was materially false and/or misleading and failed to state information required to be stated therein."¹⁴⁰

There is only one reference to COVID-19, suggesting that the company may have used a technique to reduce the reported delinquency rates on loans due to the effects of COVID-19 on borrowers.¹⁴¹

136. Complaint for Violations of Federal Securities Laws, at ¶ 5, K12, Inc., No. 20-CV-01419.

137. *Id.* ¶ 14.

138. The complaint was brought under Section 11 of the Securities Act regarding its IPO as well as Rule 10b-5. Amended Class Action Complaint for Violations of the Federal Securities Laws, *Solis v. LexinFintech Holdings, LTD. et al.*, No. 3:20-cv-01562-SI (D. Or. Sept. 9, 2020).

139. *Id.* ¶ 7.

140. *Id.* ¶ 25.

141. *Id.* ¶¶ 50, 54.

O. *Lizhi, Inc.*¹⁴²

The complaint alleges the company, which “operates a social audio platform for user-generated content in China,” in its registration statement for the company’s IPO to sell American Depositary Shares “failed to disclose Lizhi’s direct and escalating exposure to the devastating coronavirus epidemic, then already raging in China and engulfing its business, customers, and employees at the time of the IPO.”¹⁴³ Contrary to a generic statements about risks to which the company “may” be subject, plaintiff alleged:

Defendants made false and/or misleading statements and/or failed to disclose that: (1) at the time of the IPO, the coronavirus was already ravaging China, the home base, principal market, and significant hub for Lizhi, its employees, and its customers; (2) the complications associated with the coronavirus were already negatively affecting Lizhi’s business, as employees and customers contracted the virus, lost employment, or otherwise experienced difficulty in generating, publishing, and monetizing the content critical to Lizhi’s platform; (3) even prior to the IPO, Lizhi employees and customers complained of, and to, Lizhi, which harmed the Company’s reputation and financial condition and prospects; and (4) as a result, Defendants’ public statements were materially false and/or misleading at all relevant times.¹⁴⁴

P. *Norwegian Cruise Lines*¹⁴⁵

As summarized on the Stanford site:

The Complaint alleged that Defendants throughout the Class Period:

made false and/or misleading statements and/or failed to disclose that: (1) [Norwegian] was employing sales tactics of providing customers with unproven and/or blatantly false statements about COVID-19 to entice customers to purchase cruises, thus endangering the lives of both their customers and crew members; and (2) as a result, Defendants’ statements regarding [Norwegian]’s business and operations

142. This complaint was brought only under Section 11 of the Securities Act regarding its IPO. Class Action Complaint for Violation of the Federal Securities Laws, *Gutman v. Lizhi Inc. et al.*, No. 1:21-cv-00317 (E.D.N.Y. Jan. 20, 2021).

143. *Id.* ¶¶ 7, 42.

144. *Id.* ¶ 44.

145. Class Action Complaint for Violations of the Federal Securities Laws, *Douglas v. Norwegian Cruise Lines et al.*, 2020 U.S. Dist. LEXIS 109896, No. 1:20-cv-21107-RNS (S.D. Fla. May 12, 2020).

were materially false and misleading and/or lacked a reasonable basis at all relevant times.¹⁴⁶

[This should be text out to the left margin.] On April 10, 2021 the court granted defendants' motion to dismiss with prejudice, ruling that the alleged deception was puffery and that plaintiffs had failed to alleged scienter.¹⁴⁷

Q. *Phoenix Tree Holdings Limited*¹⁴⁸

The company is a Cayman Islands holding company that leases and manages apartments in China.¹⁴⁹ The complaint alleges that the company was “uniquely exposed to fallout from the worsening coronavirus pandemic, especially in Wuhan. And the Company faced serious complaints from renters” of its properties.¹⁵⁰ In particular, the materials used in its offering of ADRs failed to disclose that the company’s “technological capabilities were unable to enable the Company to overcome the complications and erosion of business resulting from the spread of the coronavirus throughout China at the time” of the offering.¹⁵¹

R. *Royal Caribbean Cruises LTD*¹⁵²

The complaint alleges a number of misstatements about the company’s cruise business. For example:

[R]egarding global bookings, Royal Caribbean made statements that: (1) misled investors to believe that any issue related to COVID-19 was relatively insignificant; (2) falsely assured investors that bookings outside China were strong with no signs of a slowdown; and (3) failed to disclose that the Company was experiencing material declines in bookings globally due to customer concerns over COVID-19. Additionally, regarding safety procedures, the Company made statements that: (1) falsely assured investors that it implemented rigorous safety protocols; (2) such protocols were expected to ultimately contain the

146. *Id.* ¶ 21.

¹⁴⁷ Order Granting Motion to Dismiss, 2021 WL 1378296 (Apr. 10, 2021).

148. This complaint was brought only under Section 11 of the Securities Act in connection with the initial public offering of the company’s American Depositary Shares. *Id.* ¶ 2. Complaint for Violations of the Securities Act of 1933, *Wandel v. Phoenix Tree Holdings Ltd. et al.*, No. 1:20-cv-03259 (S.D.N.Y. Apr. 24, 2020).

149. *Id.* ¶ 2.

150. *Id.* ¶ 3.

151. *Id.* ¶ 35(c).

152. Class Action Complaint for Violation of the Federal Securities Laws, *City of Riviera Beach Gen. Emps.’ Ret. Sys. V. Royal Caribbean Cruises LTD et al.*, No. 1:20-cv-24111-KMW (S.D. Fla. Oct. 7, 2020).

spread of the virus; and (3) failed to disclose that its ships were following grossly inadequate protocols that would foster the spread of COVID-19 and pose a substantial risk to passengers and crews.¹⁵³

On February 25, 2021, the plaintiff moved voluntarily to dismiss the action, stating, “Based on additional information recently discovered during Lead Counsel’s investigation, Lead Plaintiff hereby voluntarily dismisses all claims in the Action without prejudice.” The case was dismissed without prejudice on March 1, 2021. Case 1:20-cv-24111-KMW, Documents 44 and 46.

S. *SCWorx Corp.*¹⁵⁴

The Consolidated Amended Complaint alleges that the company announced a deal to sell COVID-19 test kits to a healthcare provider.¹⁵⁵ However, according to the complaint

Throughout the Class Period, Defendants’ statements about the COVID-19 test kit deal were materially false and misleading because Defendants knew or recklessly disregarded that: (i) the Company’s customer, Rethink My Healthcare, was a small company that was unlikely to be able to pay for or handle the hundreds of millions of dollars in test kit orders provided for in the purchase order; (ii) the Company’s COVID-19 test kit supplier, ProMedical, could not supply the quantity or quality of tests described in the purchase order or supply agreement; and (iii) as a result, the Company’s disclosures regarding the purchase order were either materially misstated or entirely fabricated and the Company’s business prospects were materially misstated.¹⁵⁶

T. *Sona Nanotech Inc.*¹⁵⁷

According to the complaint, the company is a Canadian company “engaged in researching and developing gold nanorod products for

153. *Id.* ¶ 47.

154. Consolidated Class Action Complaint for Violation of Federal Securities Laws, *Yannes v. SCWORX Corp.*, No. 1:20-cv-03349-JGK (S.D.N.Y. Oct. 19, 2020). The SEC had suspended trading in the company’s stock “because of questions and concerns regarding the adequacy and accuracy of publicly available information in the marketplace” about its COVID-19 test since at least April 13, 2020. *SCWorx Corp.*, File No. 500-1, (Apr. 21, 2020) (order of suspension of trading), <https://www.sec.gov/litigation/suspensions/2020/34-88712-o.pdf> [<https://perma.cc/7AVN-HXUE>].

155. Consolidated Class Action Complaint for Violation of Federal Securities Laws at ¶ 5, *SCWORX Corp.*, No. 1:20-cv-03349-JGK.

156. *Id.* ¶ 16.

157. Class Action Complaint for Violations of the Federal Securities Laws, *Alperstein v. Sona Nanotech Inc.*, No. 2:20-cv-11405 (C.D. Cal. Dec. 17, 2020).

diagnostic test and medical treatment applications.”¹⁵⁸ The company announced the successful testing of a COVID-19 antigen test. The complaint continues that the statements the company made about its product

were materially false and/or misleading because they misrepresented and failed to disclose the following adverse facts pertaining to the Company’s business, operations and prospects, which were known to Defendants or recklessly disregarded by them. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (1) it was unreasonable for Sona to represent that it could receive results from field studies of its COVID-19 antigen test within a month; (2) Sona’s positive statements about its COVID-19 antigen test were unfounded as the FDA would deprioritize EUA approval of Sona’s antigen test finding it did not meet “the public health need” criterion; (3) it was unreasonable for Sona to believe that data gathered over such a short period of time would be sufficient for approval of its antigen test by either the FDA or Health Canada; (4) Sona would have to withdraw its submission for Interim Order (“IO”) authorization from Health Canada for the marketing of its COVID-19 antigen test as it lacked sufficient clinical data to support approval; and (5) as a result, defendants’ statements about its business, operations, and prospects, were materially false and misleading and/or lacked a reasonable basis at all relevant times.¹⁵⁹

U. *Sorrento Therapeutics, Inc.*¹⁶⁰

According to the complaint, the company “is a biopharmaceutical company . . . [that] researches human therapeutic antibodies for the treatment of cancer, inflammation, and metabolic and infectious diseases . . . [and] announced a collaboration with Mount Sinai Health System for the purpose of generat[ing] antibody products that would act as a “protective shield” against SARSCoV-2 coronavirus infection, potentially blocking and neutralizing the activity of the virus in naïve at-risk populations as well as recently infected individuals.¹⁶¹ The company “announced that it had discovered an antibody that had ‘demonstrated 100% inhibition of SARS-CoV-2 virus infection.’”¹⁶² However, the complaint continued, “[d]efendants misrepresented and/or failed to disclose that: (i)

158. *Id.* ¶ 7.

159. *Id.* ¶ 16.

160. Class Action Complaint for Violations of the Federal Securities Laws, *Wasa Med. Holdings v. Sorrento Therapeutics, Inc.*, No. 3:20-cv-00966-AJB-AGS (S.D. Cal. May 26, 2020).

161. *Id.* ¶ 2.

162. *Id.* ¶ 3.

the Company's initial finding of "100% inhibition" in an in vitro virus infection will not necessarily translate to [sic] success or safety in vivo, or in person; (ii) the Company's finding was not a "cure" for COVID-19;"¹⁶³

V. *United States Oil Fund, LP*¹⁶⁴

The company is an exchange traded fund, or ETF, purportedly designed to track the daily changes in percentage terms of the spot price of West Texas Intermediate ("WTI") light, sweet crude oil.¹⁶⁵ The price of oil was adversely affected by the impact of the pandemic on operations of businesses and an excess of oil supply.¹⁶⁶ The complaint alleged that the principals of the fund possessed inside knowledge about the negative consequences to the Fund as a result of the converging adverse impacts of the pandemic. "However, rather than disclose the known impacts and risks to the Fund as a result of these exceptional threats, defendants instead conducted a massive offering of USO shares, ultimately selling billions of dollars' worth of USO shares to the market."¹⁶⁷ As summarized on the Stanford site:

The Complaint alleges that numerous representations to investors in the Registration Statement were materially false and misleading when made and that the Registration Statement also failed to provide any specifics regarding the effects of the COVID-19 pandemic, instead merely listing "pandemics such as COVID-19" among a laundry list of general market "events or conditions" that "may adversely impact the demand for crude oil."¹⁶⁸

W. *Tyson Foods, Inc.*¹⁶⁹

The complaint alleges that the company's public disclosures about the impact of COVID-19 on the operations of the company—

163. *Id.* ¶ 10 (emphasis omitted).

164. Complaint for Violations of the Federal Securities Laws, *Lucas v. United States Oil Fund, LP et al.*, 2020 U.S. Dist. LEXIS 169684, No. 1:20-cv-04740 (S.D.N.Y. Sept. 16, 2020).

165. *Id.* ¶ 2.

166. *Id.* ¶ 3.

167. *Id.* ¶ 4.

168. *Case Summary: United States Oil Fund, LP Securities Litigation*, STAN. L. SCH. SEC. CLASS ACTION CLEARINGHOUSE, <https://securities.stanford.edu/filings-case.html?id=107442> [<https://perma.cc/Ae7L-WA5P>].

169. Class Action Complaint for Violations of the Federal Securities Laws, *Guo v. Tyson Foods, Inc. et al.*, No. 1:21-cv-00552 (E.D.N.Y. Feb. 2, 2021).

alleged to be “the largest U.S. producer of processed chicken, beef, pork, and protein-based products”¹⁷⁰—were deficient. The core allegation asserts:

Defendants made false and/or misleading statements and/or failed to disclose that: (1) Tyson knew, or should have known, that the highly contagious coronavirus was spreading throughout the globe; (2) Tyson did not in fact have sufficient safety protocols to protect its employees in its facilities; (3) as a result, Tyson employees contracted and spread the coronavirus within the facilities; (4) as a result of the foregoing, Tyson would face negative impact to its production, including complete shutdowns of certain facilities; (5) due to the failure to protect its employees, Tyson would suffer financial harm related to its lowered production; and (6) as a result, Defendants’ public statements were materially false and/or misleading at all relevant times.¹⁷¹

X. *Vaxart, Inc.*¹⁷²

The company’s business included the development of oral vaccines, which announced that it had entered into an agreement to enable production of a billion or more tablets of a COVID-19 vaccine doses annually.¹⁷³ In fact, the complaint alleges

Vaxart exaggerated the prospects of its COVID-19 vaccine candidate, including its purported role or involvement in OWS [Operation Warp Speed]. Contrary to Defendants’ statements, Vaxart’s COVID-19 vaccine candidate had no reasonable prospect for mass production and marketing and was not among” the companies selected to receive significant financial support from OWS to produce hundreds of millions of vaccine doses. Instead, Vaxart’s COVID-19 vaccine candidate was merely selected to participate in preliminary U.S. government studies to determine potential areas for possible OWS partnership and support. At the time of making the statements, those studies were ongoing, and no determination had been made.¹⁷⁴

Y. *Velocity Financial, Inc.*¹⁷⁵

According to the complaint, the company “is a real estate finance company . . . that originates and manages loans issued to borrowers nationwide to finance the purchase of small residential rental

170. *Id.* ¶ 8.

171. *Id.* ¶ 27.

172. Class Action Complaint for Violations of the Federal Securities Laws, *Himmelberg v. Vaxart, Inc. et al.*, No. 3:20-cv-05949-VC (N.D. Cal. Aug. 24, 2020).

173. *Id.* ¶¶ 3, 7.

174. *Id.* ¶ 33.

175. Amended Complaint for Violations of the Securities Act of 1933, *Berg v.*

and commercial real estate investment properties. It also securitizes and sells some loans and holds others for investment purposes.”¹⁷⁶ The complaint alleges:

6. Defendants also failed to disclose the potential impact of a brewing pandemic on Velocity’s business and operations, despite the fact that the international spread of the novel coronavirus had already been confirmed at the time of the IPO. Instead, the Offering Materials contained generic warnings that market turmoil could eventually erupt and affect Velocity’s business and told investors that Velocity “operate[s] in a large and highly fragmented market with substantial demand for financing and limited supply of institutional financing alternatives.”

* * *

8. The failure to disclose the substantial and growing proportion of the Company’s loans that were non-performing and/or on non-accrual status as of the IPO rendered the statements contained in the Offering Materials regarding the quality of the Company’s loan portfolio and underwriting practices materially misleading. Moreover, the failure to disclose information concerning the onset of the coronavirus pandemic, or its actual and potential implications for the Company’s operational and financial condition and prospects, rendered the Offering Materials’ positive descriptions of the market, demand for investor loans for commercial real estate, and the Company’s business materially incomplete and misleading. These developments, risks, and uncertainties, which existed at the time of the IPO but were not disclosed to investors in connection with the IPO, had a material adverse effect on Velocity’s business, operations, and financial results.¹⁷⁷

On January 25, 2021, the court granted defendants’ motion to dismiss, analyzing the principal allegations of misrepresentation, which were summarized as follows:

[V]arious statements in Velocity’s offering materials were false or materially misleading. First, Defendants extolled the virtues of its underwriting practice through its use of “disciplined due diligence” and propriety data. (FAC ¶ 28). Although Velocity asserted that its underwriting practices would position the company for “sustainable, long-term growth” and offer the company key “competitive advantages,” in reality, Velocity had begun issuing loans to high-risk borrowers. (FAC ¶ 37). This caused its percentage of nonperforming loans—loans that are 90 or more days past due, in bankruptcy, or in foreclosure—to be higher than other lenders. It was therefore misleading for Defendants to tout Velocity’s underwriting practice, but not disclose that “those

Velocity Financial Inc. et al., No. 2:20-cv-06780-RGK-PLA (C.D. Cal. Nov. 6, 2020). This complaint was brought only under Section 11 of the Securities Act regarding the company’s IPO. *Id.* ¶¶ 1–2.

176. *Id.* ¶ 4.

177. *Id.* ¶¶ 6, 8.

same practices were allowing riskier loans than the Company had historically issued to be made, resulting in a higher, and growing percentage of non-performing loans in Velocity’s portfolio.” (FAC ¶ 38).

Second, it was misleading for Defendant to laud the overall growth of its loan portfolio, but not disclose that the growth was fueled by riskier short-term interest loans—and that a significant portion of the portfolio had become nonperforming. Finally, the offering materials misleadingly touted the favorable market conditions that Velocity could seize upon, even though the coronavirus was set to disrupt the entire real estate market.¹⁷⁸

The court found the first and third categories to be nonactionable puffery.¹⁷⁹ The court found that the second, conclusory allegations were not supported by the specific facts pleaded, among other deficiencies.¹⁸⁰

With respect to the alleged inadequacies of disclosures regarding COVID-19, the court stated:

Plaintiff also argues that Velocity “did not adequately disclose COVID risks.” At minimum, Defendants disclosed that its business may be affected by “changes in national, regional or local economic conditions or specific industry segments,” which may be caused by “acts of God.” (S-1 at 36). And as discussed above, Plaintiff has not adequately alleged how Defendants would have known about the coronavirus risks at the time of the IPO [in January 2020] to include a more specific warning. Thus, Defendants did not need to include more specific disclosures about the coronavirus pandemic.¹⁸¹

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178. *Berg v. Velocity Fin. Inc. et al.*, No. 2:20-cv-06780-RGK-PLA, 2021 U.S. Dist. LEXIS 17933, at *1-3 (C.D. Cal. Jan. 25, 2021).

179. *Id.* at *8–11, 20–21.

180. *Id.* at *14–20.

181. *Id.* at *25.