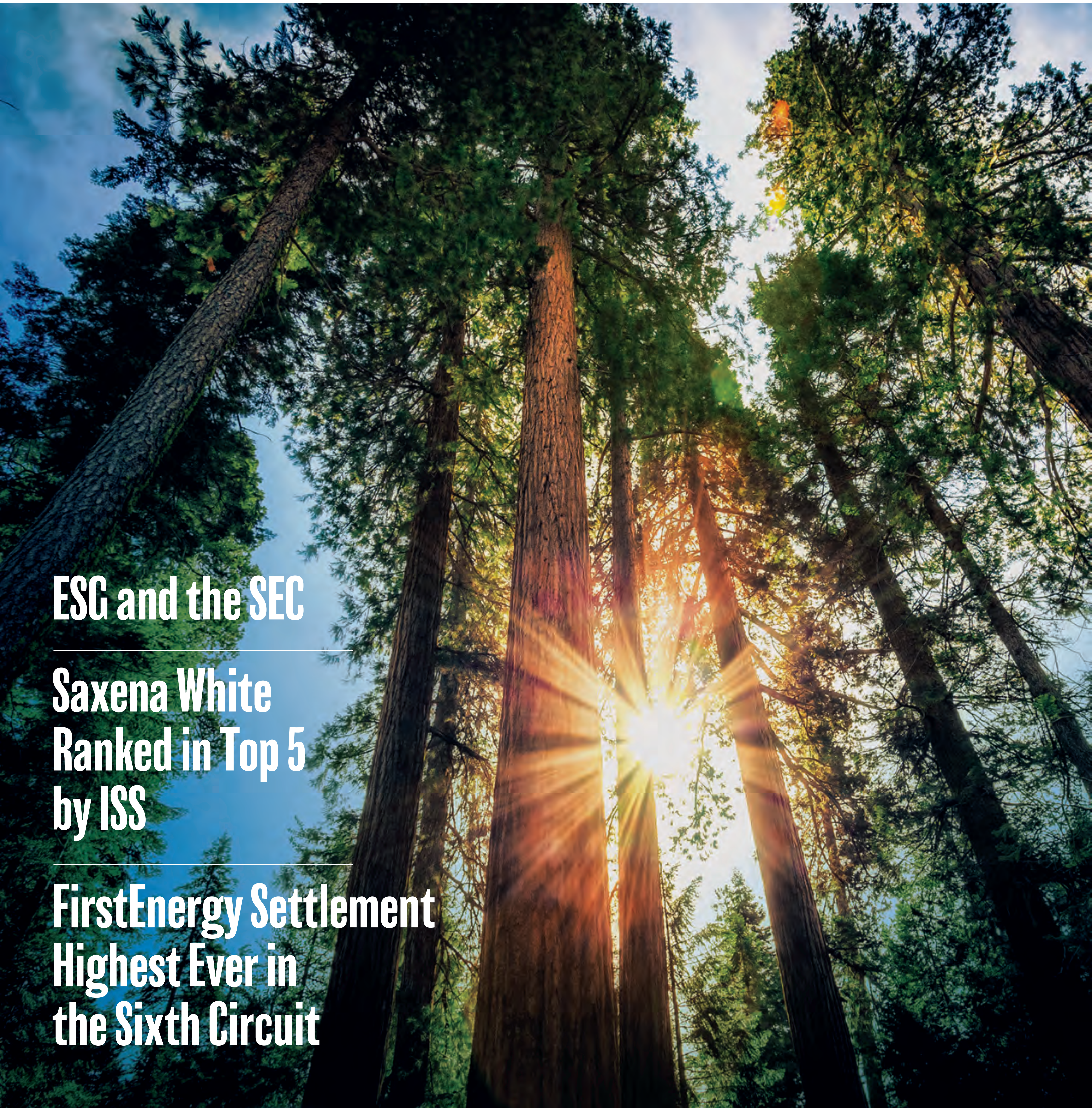
FALL 2022

Saxena White EXCHANGE



ESG and the SEC

Saxena White Ranked in Top 5 by ISS

FirstEnergy Settlement Highest Ever in the Sixth Circuit

FALL 2022

Saxena White EXCHANGE

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FirstEnergy Derivative Litigation Settles for $180 Million

Lobbyists, Bribes, and a Landmark Settlement

In July 2020, federal prosecutors filed criminal charges against one of the most powerful political figures in Ohio—Speaker of the Ohio House of Representatives Larry Householder—as well as two lobbyists for FirstEnergy Corp., in connection with a massive, years-long bribery scheme to procure favorable legislation for the company. Commenting on the indictments, U.S. Attorney David DeVillers stated, "This is likely the largest bribery, money laundering scheme ever perpetrated against the people of the state of Ohio."

The indictments made national headlines and triggered multiple related lawsuits filed by FirstEnergy investors and consumers. In a major victory for FirstEnergy shareholders, Saxena White recently secured a landmark settlement of a shareholder derivative action against the company's board of directors and certain officers, which included a cash payment of $180 million and unprecedented corporate governance reforms.[1] The settlement is the largest shareholder derivative recovery in the history of the Sixth Circuit and is among the highest derivative recoveries ever achieved, in any forum, in the history of the U.S. The litigation was led by Co-Lead Plaintiffs Employees Retirement System of the City of St. Louis and Electrical Workers Pension Fund, Local 103, I.B.E.W.

As one of the largest investor-owned utility companies in the country, FirstEnergy was struggling financially, sinking hundreds of millions of dollars into two of its aging nuclear plants while demand for nuclear power was diminishing. Faced with these difficulties, FirstEnergy's board and senior management sought "legislative solutions" to the company's financial woes, in the form of bribes to secure passage of favorable legislation. The allegations in Plaintiffs' 117-page complaint focused on the FirstEnergy board's failure to

[1] *See Employees Retirement System of the City of St. Louis, et al., v. Jones, et al.*, No. 2:20-cv-4813 (S.D. Ohio). Defendants have denied and continue to deny any wrongdoing alleged in the action.

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exercise oversight of the company's corporate political activities, allowing FirstEnergy personnel and lobbyists to bribe elected officials with corporate funds.

Beginning in 2017, First Energy funneled over $60 million to Householder and other public officials to support House Bill 6 ("HB6"), a billion-dollar bailout for FirstEnergy's uncompetitive power plants funded by monthly ratepayer surcharges. HB6 also removed incentives to build renewable energy projects, canceled statewide energy conservation efforts, and allowed FirstEnergy to up-charge Ohio customers for their energy. HB6 was criticized in media reports as the "worst energy bill of the 21st century" and was overwhelmingly opposed by ratepayer groups, business groups, free market conservative groups, environmental groups, and Ohioans generally. After its passage, the bill faced an immediate statewide ballot referendum seeking to repeal it. FirstEnergy funneled an additional $38 million in just a few months to oppose the initiative, going so far as to bribe an employee of a signature collection firm to sabotage the referendum. FirstEnergy's efforts paid off: the referendum was defeated. A year later, the criminal charges were filed.

On July 20, 2021, FirstEnergy's board entered into an historic Deferred Prosecution Agreement ("DPA") with the U.S. Department of Justice ("DOJ"). In connection with the DPA, FirstEnergy admitted that it had engaged in blatant criminal misconduct, "conspir[ing] … to pay millions of dollars to and for the benefit of public officials in exchange for specific official action" and agreed to pay $230 million, the largest federal criminal penalty in Ohio history.

Plaintiffs aggressively pursued the derivative litigation over the course of more than 18 months, spanning multiple trial courts and the United States Court of Appeals for the Sixth Circuit. Plaintiffs defeated several motions to dismiss or stay the litigation in two separate trial courts, defeated a motion to certify an interlocutory appeal of an order denying defendants' motions to dismiss, defeated appeals denying motions to stay the litigation, won orders compelling the production of discovery, and ultimately secured an extensive documentary record that was broader than even the production secured by the DOJ before it entered into the DPA with FirstEnergy.

In addition to the $180 million monetary recovery, FirstEnergy agreed to implement corporate governance reforms of a magnitude that we believe to be unprecedented. The reforms included the departures of six defendants from the company's board of directors, wresting control of the company from directors who served during the alleged scheme and placing it in the hands of a new board comprised of a supermajority of independent directors who joined after the scheme's revelation. The settlement also required the board to enact new reforms designed to ensure that the company's political and lobbying activities comply with the law, including a requirement that the company's political and lobbying plan be reviewed by an independent third-party auditor, and enhancements to public disclosures to allow for shareholder oversight. In approving the settlement, the federal court overseeing the litigation noted that the reforms achieved by Saxena White and its co-counsel are broader and more comprehensive than even those reforms imposed on the company by the DOJ.

We believe that the settlement of the FirstEnergy litigation constitutes a substantial victory for public shareholders, demonstrating the significant benefits that can be achieved by engaged public investors and their counsel who step forward to investigate and challenge fiduciary misconduct through shareholder derivative actions.

For more information on the FirstEnergy case, please contact Tom Curry at tcurry@saxenawhite.com.

A Note to Our Clients & Friends

As we move into fall in South Florida, I can personally attest that it's hot. Very, very hot. Is it the result of global warming or a typical summer in Florida? Globally, this summer was one of the hottest on record. Not surprisingly, climate change and ESG are once again hot topics in the financial world.

This newsletter examines some of the proposed rule changes the Securities and Exchange Commission is contemplating with respect to climate change. But these changes are the tip of the iceberg when it comes to the current ESG debate. In August, 19 state attorneys general wrote a letter to BlackRock CEO Laurence Fink accusing BlackRock of "rampant violations" of their fiduciary obligations to investors. These attorneys general believe that it is the imperative of public fund trustees to invest in stocks for the purpose of maximizing financial returns, not for the "greater good."

As expected, several attorneys general on the other side of the discussion responded by noting an "evolving divide" and criticized the authors for refusing "to acknowledge, in the face of sweltering heat, floods, tornados, snowstorms and other extreme weather, that climate change is real and is a true business threat to all of us."

Whether or not public plans will face restrictions in their ESG investing practices, there has long been a convergence between social issues and securities fraud. When companies lie about their safety, environmental, discrimination or other governance related policies and those falsehoods are exposed—as they were in notable examples like the BP oil spill, Wells Fargo's cross-selling scheme, and Activision Blizzard's rampant harassment—investors are harmed. Shareholders should continue to hold corporations accountable for misrepresenting material aspects of their safety practices, workplace conditions, or environmental footprints. In the long term, it's good for business *and* the planet.

Maya Saxena

The SEC's Proposed Climate Change Disclosure Rule for Public Companies

THE ESG DEBATE HEATS UP

Written by
Rachel A. Avan

Regulators are finally beginning to recognize the materiality investors assign to the environmental practices of public companies. On March 21, 2022, the U.S. Securities and Exchange Commission voted 3 to 1 to implement sweeping rule changes that require companies to disclose climate-related risks, greenhouse gas emissions, and carbon footprints—metrics that were, until now, only reported voluntarily and without standardization.

Pursuant to the proposed rule,[1] companies will need to disclose information about: (1) their governance of climate-related risks and related risk management processes; and (2) any actual or likely "material impact[s]" of climate risks on their business, strategy, expenditures, and outlooks, and an explanation of how they arrived at the metrics they are reporting. The rule would require that a company report direct and indirect emissions if they are deemed material to investors or if a company has pledged to reduce emissions going forward. These include "Scope 1" and "Scope 2" emissions, which are generated from a company's own operations and purchases of energy, and for larger companies, "Scope 3" emissions, which are generated by a company's supply chain. The SEC's Acting Chief Accountant, Paul Munter, has noted that the rule would also require an attestation report from an independent provider, which would offer an "additional degree of reliability" about emissions and provide the "key assumptions" and data informing a company's analysis.

The proposed rule was originally scheduled to be subject to public comment for 60 days, but due to significant public interest, the comment period was extended to June 17, 2022. Perhaps unsurprisingly, both sides of the aisle have criticized the rule. For example, Rep. Patrick McHenry (R-NC) claimed the rule mandated disclosure of information that "is not material for most companies," and Sen. Sheldon Whitehouse (D-RI) took issue with the rule's failure to require disclosures about "climate-related lobbying and influencing activities . . . the single most material disclosures a company could make to achieve climate safety."

Then, on April 11, 2022, a group of 40 members of Congress joined other Republicans in arguing the rule is "extremely burdensome," presents insurmountable compliance challenges, and exceeds the SEC's authority. The group urged the SEC to "immediately table th[e] rule" because it "would drastically disrupt the current disclosure regime." In response, SEC Chair Gary Gensler emphasized that the SEC has "over the generations" always been a "disclosure-based" regulator that "step[s] in when there's a significant need for the disclosure of information relevant to investors' decisions." Gensler further noted that the proposed rule would benefit both investors and public companies by offering "consistent [and] comparable . . . information" for investors and "provid[ing] consistent and clear reporting obligations for issuers."

U.S. public companies may not yet be ready to comply with the SEC's new climate-risk disclosure requirements. According to a report released on April 21, 2022 by Bain & Company, a management consulting firm, more than half of finance executives reported they are not ready to measure environmental, social, and governance ("ESG") outcomes and report metrics, two-thirds reported they have no plan or were just beginning to form a plan to comply with the proposed rule, and only 7% of companies globally reported they were on track to achieve their ESG objectives. The report explained that issues relating to organizational alignment, digital systems, and prioritization were the most common reasons for companies' lack of preparation.

By the end of the comment period in June, the SEC had received more than 14,000 comment letters—many more than the Commission typically receives upon announcing a proposed rule. Given the volume of public feedback, the politically charged subject of the rule, and likely court challenges, the final rule may ultimately differ, perhaps substantially, from the proposed rule. Saxena White will continue to follow this issue, as significant changes to the SEC's disclosure requirements will undoubtedly impact securities litigation going forward.

[1] "SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors" (Mar. 21, 2022), available at https://www.sec.gov/news/press-release/2022-46; *see also* Release Nos. 33-11042, 34-94478.

Saxena White Once Again Ranked in Top 5 by ISS

For the second straight year, Institutional Shareholder Services ("ISS"), the world's leading proxy advisory firm, ranked Saxena White fifth in its list of the top 50 plaintiffs' law firms in 2021, based on the dollar value of final securities class action settlements. The firm recovered over $228 million in total settlement funds for investors in 2021, led by class actions against DaVita Inc. ($135 million) and GTT Communications, Inc. ($25 million). The DaVita settlement was the third highest North American securities settlement in 2021. "We are honored to have achieved such outstanding results for shareholders and to be ranked fifth for the second year in a row," said firm co-founder Maya Saxena. "We have an extremely talented team of attorneys and professionals who have worked extremely hard to obtain these results on behalf of our clients, and we look forward to continued success in 2023."

The firm's notable settlements included the following:

DaVita Inc.[1] After more than four years of litigation, the U.S. District Court for the District of Colorado approved a $135 million settlement against one of the country's largest dialysis providers, DaVita, and three of its top executives. The settlement represented the second largest all-cash federal securities class action settlement ever obtained in the Colorado federal district court and is among the top five such recoveries in Tenth Circuit history. The case involved allegations that defendants made materially false and misleading statements and omissions regarding DaVita's alleged scheme to "steer" all patients eligible for and enrolled in Medicare or Medicaid away from government insurance and into high-cost commercial insurance plans. The alleged scheme allowed DaVita to obtain dialysis reimbursement rates that were up to ten times higher than the rates that government plans paid for the same dialysis treatments. The complaint further alleged that the scheme was facilitated though DaVita's relationship with the American Kidney Fund—a charitable organization to which DaVita purportedly "donated" over $100 million in annual charitable contributions.

GTT Communications, Inc.[2] Litigating on an expedited schedule—the so-called "rocket docket"—in the Eastern District of Virginia, Saxena White achieved a $25 million settlement against cloud networking company GTT and several of its top executives. The case involved GTT's $2.3 billion acquisition of Interoute, a telecommunications company that operated Europe's largest cloud services platform. As alleged in the complaint, the acquisition was a substantial departure from GTT's typical strategy of acquiring smaller companies, essentially doubling GTT's size. The complaint alleged that the integration of Interoute was highly problematic for GTT, with substantial delays and an ineffective sales strategy, leading to a steep decline in its stock price. The firm's investigation of the claims involved consultation with multiple experts and interviews of over a dozen confidential witnesses from across the globe, whose statements were critical in successfully pleading the plaintiff's claims.

Universal Health Services, Inc.[3] The firm's $17.5 million settlement with Universal Health Services, Inc., an owner and operator of health care facilities, was especially noteworthy considering that the action had been dismissed with prejudice by the U.S. District Court for the Eastern District of Pennsylvania *twice* and was on appeal to the Third Circuit Court of Appeals at the time of the settlement. The case involved a disturbing fact pattern first reported by Buzzfeed News, whereby UHS allegedly engaged in a scheme to increase its bottom line by coaxing unwitting patients through its doors, manipulating and fabricating patient testimonials to make them appear dangerous to themselves or others, and then admitting them into the company's facilities – often involuntarily – for as many days as their insurance would provide reimbursement.

Health Insurance Innovations, Inc. ("HIIQ").[4] A developer and distributor of short-term "medical discount plans," "limited benefit indemnity plans," and other "health insurance products," HIIQ marketed supplemental health plans that were not comprehensive health insurance and did not comply with the Affordable Care Act. The complaint alleged that HIIQ held itself out to investors as a company that had "best in class compliance" and that its call centers had "incredibly low" rates of complaints. The truth emerged, according to the complaint, when the Federal Trade Commission announced an enforcement action against HIIQ's most lucrative third-party call center, Simple Health. According to the FTC's complaint, Simple Health was a "classic bait and switch scam" whereby consumers were led to believe they were buying ACA-compliant insurance policies but instead were sold non-compliant, limited plans. In reaction to the news of the FTC complaint, HIIQ's stock price plummeted, falling from a class period high of $63.13 to a class period low of $23.83 per share—a decline of more than 60%. The securities class action, helmed by Lead Plaintiffs Oklahoma Municipal Retirement Fund and the City of Birmingham Retirement and Relief System, settled for $11 million.

[1] Case No. 1:17-cv-00304-WJM-MJW (D. Col.).

[2] Case No.: 1:19-cv-00982-CMH-MSN (E.D. Va.).

[3] Case No. 2:17-cv-02817-LS (E.D. Pa.).

[4] Case No. 8:19-cv-00421-WFJ-CPT (M.D. Fla.).

Class Periods In Initial Complaints

Activision and General Electric Cases Offer Tough Lessons for Potential Lead Plaintiffs

Written by
Scott Koren

When a securities class action complaint is filed, the Private Securities Litigation Reform Act ("PSLRA") requires that the plaintiff publish a notice advising potential class members of the claims asserted and the purported class period. The publication requirement creates a 60-day period for interested class members to move to serve as lead plaintiff.[1] But what should a prospective lead plaintiff do if the class period listed in the notice appears to be artificially long or short, limiting that shareholder's financial loss? Two recent cases arrive at two different results on the issue.

Last August, an investor filed a securities class action complaint against Activision Blizzard Inc. in the Central District of California with a class period of August 4, 2016 through July 27, 2021, and the required PSLRA notice was issued the same day.[2] On the deadline for investors to move for appointment as lead plaintiff, only one investor, Jeff Ross, moved for lead plaintiff with an alleged loss of nearly $11,400, Ross was appointed as lead plaintiff after his motion went unopposed. When Ross filed his amended complaint, he shortened the class period to February 28, 2017 through November 16, 2021.

Consequently, a number of institutional investors who had not moved for lead because they had an overall gain during the original class period realized that, with the shorter class period, they had now suffered a loss. Thus, on January 3, 2022, the German institutional investor Union Investment Privatfonds GmbH ("Union" or "UIP"), filed a motion to intervene in the action and establish a new deadline for investors to seek lead plaintiff status based on the re-defined class period. In its motion, UIP argued that the original PSLRA notice was improper because the initial complaint contained an overbroad class period that included seven months where no actionable securities fraud claims or recoverable damages could arise. UIP alleged that Ross's counsel manipulated the class period to exclude institutional investors who had net gains in the original class period,[3] arguing that it had been precluded from serving as lead plaintiff in the original class period, since it had a gain of almost $2 million compared to a loss of nearly $11 million in the re-defined class period.

In response, Ross stated that the initial class period was filed to preserve claims under the 5-year statute of repose period, given that the misconduct alleged predated even the original class period start date and that the earlier period did not affect UIP. Even if the initial class period started on February 28, 2017, as in Ross's amended complaint, Union would still not have any losses, as it did not purchase Activision stock until May 22, 2018.

On January 30, 2022, Judge Percy Anderson denied the motion to intervene, stating that UIP should have participated earlier by either filing its own complaint or by moving for lead plaintiff before the deadline set in the original PSLRA Notice. In the order, Judge Anderson noted that UIP acknowledged it had notice of the original complaint, stating that "Union was not prevented from participating in the lead plaintiff selection process and the responsibility rests on its shoulders for its decision as a 'sophisticated institutional investor' with 'extensive experience prosecuting complex securities actions.'" Judge Anderson noted that UIP "slept on its rights as a putative class member" by not filing its own complaint or moving for lead, and rather than follow the established procedure set forth in the PSLRA, Union, on its own initiative, decided that it had no chance of securing the lead plaintiff role. The court declined to reopen the lead plaintiff selection process by concluding that "putative class members, including Union, had adequate notice regarding the claims and class period asserted by Plaintiffs and had the opportunity to identify themselves and present themselves for the Court's consideration."

This ruling could set a dangerous precedent by incentivizing smaller shareholders to manipulate class periods and file cases early, before the merits of a case

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[1] *See* 15 U.S.C. §78u.

[2] *Gary Cheng v. Activision Blizzard Inc. et al.*, No. 2:21-cv-06240 (C.D. Cal.).

[3] Notably, neither the original filing plaintiff, nor the appointed Plaintiff, had any purchases during that same 7-month period

FIBROGEN SECURITIES LITIGATION:

Plaintiffs Overcome Defendants' Motion to Dismiss

On July 15, 2022, Judge Edward M. Chen of the Northern District of California rejected nearly all of the Defendants' arguments in their motions to dismiss the complaint in *In re FibroGen, Inc., Securities Litigation*.[1] Out of the 96 alleged false statements in the complaint, Judge Chen found 91 statements, or 95%, to adequately allege falsity. Saxena White is serving as Lead Counsel for Plaintiffs, the Employees' Retirement System of the City of Baltimore, the City of Philadelphia Board of Pensions and Retirement, and the Plymouth County Retirement Association.

FibroGen is a biopharmaceutical company whose experimental flagship drug, Roxadustat, is designed to treat anemia in patients with chronic kidney disease ("CKD"). The current standard treatment for anemia in CKD patients, Epogen, is only used in severe cases for patients already dependent on dialysis because it leads to an increased risk of major adverse cardiac events. Thus, the key to securing critical FDA approval for Roxadustat was to demonstrate, through Phase 3 clinical trial data, that Roxadustat was at least as effective as Epogen, while avoiding the safety issues that prevented Epogen from being used to treat patients who have just begun dialysis and non-dialysis dependent patients. Defendants repeatedly asserted that Roxadustat's critical Phase 3 trial results showed that the drug was superior to Epogen and safer than the placebo—positive signs for the critical FDA approval.

The alleged false and misleading statements generally pertained to (1) Roxadustat's efficacy and safety, (2) statements about whether Roxadustat would receive a "black box" (the FDA's most severe safety warning) label if approved, (3) the non-infringement margin FibroGen used in its safety analysis, and (4) statements about Roxadustat's potential and the likelihood of FDA approval.

On March 1, 2021, Defendants' fraud began to unravel. On that day, FibroGen shocked investors by announcing that the FDA would hold an Advisory Committee ("AdCom") meeting to review Roxadustat's new-drug-application ("NDA")—a surprising setback that late in the FDA approval timeline. On this news, FibroGen's stock price fell $16.18 per share, or over 32%, to close at $34.35 per share. Additional damaging information was revealed on April 6, 2021, which triggered an almost 50% reduction in the company's share price.

On July 15, 2021, the FDA's AdCom met to review Roxadustat's NDA, and the AdCom revealed that the drug's issues were even worse than what Defendants had previously represented. The AdCom voted virtually unanimously against approval for Roxadustat for any patient population, even with a "Black Box" warning. On this news, trading in FibroGen stock was halted; the following day, the company's stock price plummeted over 42%, or $10.49 per share, from $24.84 per share to $14.35 per share. All told, the revelation of Defendants' fraud eviscerated FibroGen's stock price by over 75% from its class period high, wiping out billions in the company's market capitalization.

With the denial of Defendants' motion to dismiss, the case is now in the discovery phase.

For more information on the FibroGen case, please contact Maya Saxena at msaxena@saxenawhite.com.

[1] Case No. 3:21-cv-02623-EMC (N.D. Cal.).

PERRIGO SECURITIES LITIGATION:

Plaintiffs Achieve $31.9 Million Settlement on Behalf of Class

On February 16, 2022, the U.S. District Court for the Southern District of New York approved a $31.9 million settlement for the class in *In re Perrigo Company plc Securities Litigation*,[1] a securities fraud class action against Perrigo Company plc ("Perrigo") and certain of its top executives. Saxena White served as lead counsel for the court-appointed Lead Plaintiffs, the City of Boca Raton General Employees' Pension Plan and Palm Bay Police and Firefighters' Pension Fund.

Perrigo is a U.S.-headquartered pharmaceutical company that, for tax purposes, re-domiciled itself in Ireland in 2013. On October 31, 2018, Ireland's tax authority sent Perrigo an "Audit Findings Letter" concluding that Perrigo's tax treatment of revenue from the sale of its interest in the drug Tysabri was incorrect, and that, consequently, Perrigo faced an unpaid tax liability of roughly $2 billion (1.6 billion euros). Lead Plaintiffs alleged in the complaint that Perrigo made false and misleading statements about their receipt of the Audit Findings Letter and its contents, while failing to disclose the highly material tax liability in the letter. The complaint alleged that the truth came out on December 20, 2018, when defendants finally disclosed that they had received a "Notice of Amended Assessment" from the Irish tax authority and, for the first time, disclosed the amount of the $2 billion tax liability. As a result, the complaint alleged that Perrigo's stock price declined by nearly 30%, falling from $52.36 on December 20, 2018 to $37.03 on December 21, 2018, a drop of $15.33 per share.

Saxena White achieved numerous significant victories throughout the litigation. Among other things, Lead Plaintiffs survived defendants' motion to dismiss, obtained thousands of otherwise attorney-client privileged documents during discovery, defeated defendants' motions for summary judgment, achieved summary judgment on multiple elements of Plaintiffs' claims (a rare victory for Plaintiffs in a securities fraud class action), and excluded the testimony of defendants' accounting expert. The case was weeks away from trial when the parties agreed to the settlement.

In approving the $31.9 million settlement, Judge Denise Cote noted, among other things, that the settlement was a substantial percentage of the maximum available damages, that Lead Plaintiffs had litigated the case extensively and vigorously, and that proceeding to trial carried meaningful risks. In light of these factors, Judge Cote found that the settlement was "very reasonable and indeed, an excellent recovery for the class."

Distribution of the settlement proceeds to the class is now underway.

For more information on the Perrigo case, please contact Lester Hooker at lhooker@saxenawhite.com.

[1] No. 19-cv-70 (DLC) (S.D.N.Y.)

Saxena White Stands Up for Shareholder Democracy In Palantir Litigation

In recent years, corporate planners have become increasingly aggressive in devising multiple-class stock structures designed to entrench the voting control of corporate founders and other insiders over public companies. Many of these structures allow insiders to sell the vast majority of their stockholdings, bringing their ownership interest far below 50% while allowing them to nevertheless cast a majority of the votes in each corporate election. We view this as a pernicious practice contrary to fundamental principles of stockholder democracy. In our view, shareholder voting power should be closely tied to economic ownership of public companies. When public shareholders own the majority of a company, we believe they should cast the majority of shareholder votes in any election.

The corporate laws of Delaware—where two thirds of public companies are incorporated—are flexible, and it is an open question to what extent, and in what manner, voting power may lawfully be divorced from economic ownership. Delaware courts have to-date largely blessed the decisions of companies to, for example, issue public shareholders stock having a single vote per share while issuing certain insiders "high-vote" stock with five, ten, or even more votes per share. Even this, however, has not been enough for some corporate insiders. Accordingly, we have seen a new trend of companies adopting increasingly complex insider-entrenching structures going far beyond even the aforementioned "high-vote" stock.

One of the most aggressive such companies has been Palantir Technologies. In 2020, Palantir went public with a stock structure whereby the company's three founders, including Peter Thiel, were given exclusive ownership over a novel "Class F" stock. This stock could only be held by the three founders and effectively endowed the founders with a guaranteed 49.999999% of any shareholder vote, largely untethered from their economic interest in the company. Saxena White represented a Palantir shareholder in pushing back against this arrangement, filing suit in the Delaware Court of Chancery to challenge the Class F stock.[1]

On behalf of our public investor client, we argued that Palantir's novel Class F arrangement, and certain voting procedures related thereto, violated numerous provisions of Delaware corporate law. Following significant litigation efforts, we ultimately secured a settlement of the litigation whereby Palantir agreed to adopt numerous corporate reforms that increased transparency in the company's corporate elections and imposed numerous significant new limitations on the founders' ability to use the Class F stock to force through corporate actions without an independent check. The settlement requires many types of corporate actions—in particular, those in which the founders have a personal interest—to now be approved not only by the founders, but by independent directors and/or a vote of the company's unaffiliated public shareholders. The settlement was approved by the Delaware Court of Chancery in September 2022.

We view the corporate reforms achieved in the Palantir litigation as a significant victory for public shareholders and principles of shareholder democracy. Because the litigation was settled rather than litigated through a final judgment, however, it did not result in a final decision from the Court addressing the legal validity of the Class F structure adopted by Palantir. Accordingly, questions persist concerning the outer-limits of what is permissible under Delaware law in terms of insider-entrenching stock structures. Saxena White is now involved in representing multiple investors in challenging similar structures at other companies, and we hope to achieve additional victories bolstering principles of shareholder democracy for public investors.

For more information about the Palantir case, please contact Tom Curry at tcurry@saxenawhite.com.

[1] *In re Palantir Technologies Inc. Class F Stock Litigation*, No. 2021-0275 (Del. Ch.).

States Take Differing Views on ESG Investing

Written by
Jonathan Lamet

An increasingly popular investment trend asks market-participants to consider a company's environmental, social and governance ("ESG") factors when deciding where to deploy capital. The ESG movement was initially sparked over 20 years ago by a United Nations initiative to highlight corporate responsibility by encouraging investment in companies that have policies addressing issues like climate change, human rights, and racial injustice.

And while ESG factors do not take into consideration "bottom line" corporate metrics like profits and losses, many in the investing community consider ESG investments sound business policy. A recent public letter from Larry Fink, CEO of Blackrock, Inc.—the world's largest asset manager—explained to companies that ESG investing "is not a social or ideological agenda" but rather "is capitalism, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper."

But not all agree. On August 2, 2022, eighteen state Attorneys General signed a letter to Mr. Fink contending that BlackRock's stated plan to pressure companies to phase out fossil fuels conflicts with its fiduciary duty to maximize investment returns. BlackRock replied on September 7, 2022 arguing its belief that companies with a "forward-looking position with respect to climate risk and its implications for the energy transition will generate better long-term financial outcomes." On September 14, 2022, thirteen state treasurers and New York City's comptroller got in the mix by signing a letter defending ESG practices and noting how they lead to "more innovative, creative and more financially successful" companies that are "consequently better investments for long term investors."

The recent spat is indicative of the growing divide—mainly along political lines—regarding whether pension funds' assets can or should be deployed based on ESG factors. A number of states have implemented ESG focused criteria for their pension systems, either through legislation or executive position statements. For example, in 2019, Illinois passed legislation that requires public investment decision makers to incorporate ESG factors—including sustainability—into their investment criteria. In September 2020, the Oregon Investment Council encouraged decision makers to incorporate ESG factors by releasing a statement noting "consideration of ESG factors within the investment decision-making framework is important in understanding the near-term and long-term impacts of investment decisions."

Other states have gone even further, mandating that the funds divest from companies in certain industries. Connecticut pension funds cannot invest in civilian firearm manufacturing companies, and Massachusetts has introduced similar legislation requiring pension

funds to divest from gun and ammunition companies. California proposed legislation requiring pension funds to divest from the 200 largest publicly traded fossil fuel companies. Similarly, the New York State Common Retirement Fund announced a plan to transition its portfolio to net zero greenhouse gas emissions by 2040—a process which will require divestment from companies that fail to meet minimum standards.

On the other end of the spectrum, states such as Texas, North Dakota, Oklahoma, and Alaska have adopted or proposed laws or policies limiting transactions with financial companies—such as Credit Suisse and UBS Group—who themselves have called for divestment from the fossil fuel industry. Idaho recently passed

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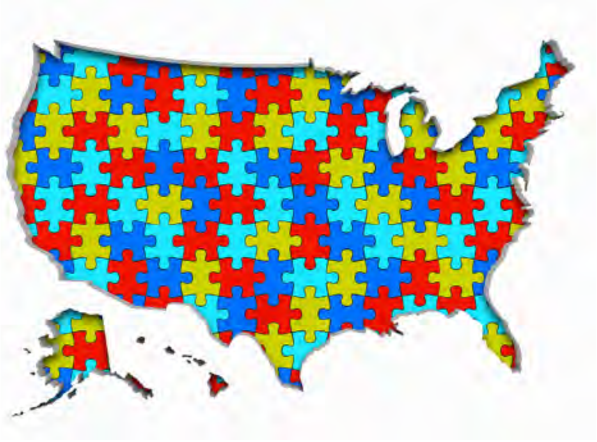
legislation noting that ESG factors are "disfavored state investments," and public fiduciaries in that state cannot consider such factors in a manner that could override the prudent investor rule (which requires trustees to prudently manage a portfolio to achieve financial gains for the trust). In addition, Idaho public fiduciaries may offer ESG investments, "but such investments shall not be required and sufficient alternatives must be also offered." Similarly, the Kentucky Attorney General issued an opinion statement noting that an investment manager's consideration of ESG factors may violate Kentucky law as it "introduce[s] mixed motivations to investment decisions" which is "inconsistent with Kentucky law governing fiduciary duties owed by investment management firms to Kentucky's public pension plans."

Florida is the latest state to pick a side on the ESG debate. On August 23, 2022, Florida's State Board Administration ("SBA") passed a resolution directing that fund managers must invest all state funds based solely on "pecuniary factors," which expressly "do not include the consideration of the furtherance of social, political, or ideological interests." According to a press release from Governor Ron DeSantis, under the resolution, "ESG considerations will not be included in the state of Florida's pension investment management practices." Instead, investment managers "may not sacrifice investment return or take on additional investment risk to promote any non-pecuniary factors." The resolution clarifies, however, that in instances where Florida law contradicts with the resolution, Florida law prevails. Thus, Florida statutes relating to public investment in companies who boycott Israel or who have operations in Sudan or Iran are unaffected by the new resolution.



Although new, the resolution merely formalizes the SBA's historic practice of not considering ESG metrics, and thus may have little impact on Florida's pension fund investments. A March 2018 position statement titled

"Accomplishing Change, Divesture vs. Engagement" previously explained that the "SBA's duty is to act in the sole interest of participants, strengthening their retirement security, not invest to make statements." According to the statement, the SBA was already operating under the belief that, rather than divest (or threaten to divest) from companies, "[e]ngagement or formal dialog with corporate boards and management is a better approach to advancing desired policy change." The statement added that "[e]ngagement is foreclosed by divesture, which eliminates ownership and with it any standing to vote on directors, access proxy statements or motivation for management to listen to our concerns." Citing to Alicia Munnell, a former assistant U.S. Treasury Secretary, the position statement concludes, "While social investing raises complex issues, public pension funds are not suited for this activity. The effectiveness of social investing is limited, and it distracts plan sponsors from the primary purpose of pension funds – providing retirement security for employees."

Governor DeSantis has indicated that he will work with the state legislature to codify the SBA resolution into law and that he expects other states to follow Florida's lead. Saxena White will continue to follow this issue, as the growing divide amongst states may create additional complexities for pension funds and their asset managers.

RECENT TRENDS
IN SECURITIES LITIGATION

Written by
Don Grunewald

With the S&P 500 down over 15% for the year (as of this writing), most investors would prefer to forget about 2022. So let's look back to a much happier time for the stock market: 2021, when the S&P 500 returned nearly 27% for the year. 2021 began with the rise of the so-called "meme stock," where heavy trading on new, commission-free trading platforms like Robin Hood helped drive stocks like GameStop, which catapulted from $18.84 at the end of 2020 to over $340 by January 27, 2021. Cryptocurrencies and technology stocks showed strength and likewise experienced large increases during the year. The NASDAQ returned 27.5% in 2021, reaching all-time highs, and one Bitcoin fetched over $65,000 by November 2021.

While stock prices in 2021 were generally up, securities litigation filings were down. Total federal securities filings (including merger actions) declined to 205 in 2021, down from 321 in 2020 and 420 in 2019.[1] Even excluding merger cases, total 10b-5 and/or Section 11 filings declined to 187, down from 209 in 2020 and 244 in 2019.[2] Interestingly, Section 11 filings in state courts dropped to just 13 in 2021, compared to 23 in 2020 and 52 in 2019, although if the Supreme Court were to find that the PSLRA's discovery stay provision did not apply to such actions, these filings would likely increase markedly. (A Supreme Court case, *Pivotal Software, Inc. v. Superior Court of CA*, 20-1541 was removed from the 2021-2022 argument calendar pending settlement proceedings, leaving the issue unresolved for now.)

And while the number of settlements in 2021 increased to a 10-year high of 87 (up from 77 in 2020), three other metrics underscore the decline in the monetary value of settlements during year. First, the median settlement size declined to $8.3 million from $10.6 million in 2020 (and from $9.9 million across 2016-2020).[3] Second, the total valuation of all settlements plummeted to $1.79 billion, down from $4.40 billion in 2020.[4] Third, the largest settlement was $187.5 million in 2021, compared to $1.27 billion in 2020, $413 million in 2019, and $3.24 billion across 2016-2020.[5] There were just three settlements for more than $100 million (including the DaVita[6] case, in which Saxena White served as lead counsel), or a little more than 3% of the total.[7] Comparatively, for the period 2012-2020, 10% of settlements in a given year on average exceeded $100 million.[8]

Many of the same trends that featured prominently in securities class action filings in 2020 also continued in 2021. For example, the Second and Ninth Circuits were again the most common venues for securities flings, comprising approximately 43% and 30% respectively of total filings.[9] As many as 20 filed actions involved allegations related to the pandemic,[10] and at least 11 actions involved allegations related to cryptocurrency.[11] Cases involving cybersecurity and cannabis continued, albeit at a substantially lower pace for the latter.[12] Finally,

[1] Janeen McIntosh and Svetlana Starykh, "Recent Trends in Securities Class Action Litigation: 2021 Full-Year Review" (NERA, Jan. 25, 2022) ("NERA Report") at 3, available at https://www.nera.com/publications/archive/2022/recent-trends-in-securities-class-action-litigation--2021-full-y.html.

[2] *Id.* at 3.

[3] Laarni T. Bulan and Laura E. Simmons, "Securities Class Action Settlements, 2021 Review and Analysis" (Cornerstone Research, Mar. 24, 2022) ("Cornerstone Settlements Reports") at 1, available at https://www.cornerstone.com/wp-content/uploads/2022/03/Securities-Class-Action-Settlements-2021-Review-and-Analysis.pdf.

[4] *Id.* at 1.

[5] *Id.* at 1, 3.

[6] *Peace Officers' Annuity and Benefit Fund of Georgia, et al. v. DaVita Inc., et al.*, No. 17-cv-0304 (D. Colo.).

[7] Cornerstone Settlements Report at 4.

[8] *Id.* at 4.

[9] "Securities Class Action Filings, 2021 Year in Review" (Cornerstone Research, Feb. 2, 2022) ("Cornerstone Filings Report") at 30, available at https://www.cornerstone.com/wp-content/uploads/2022/02/Securities-Class-Action-Filings-2021-Year-in-Review.pdf.

[10] NERA Report at 10.

[11] Cornerstone Filings Report at 5.

[12] *Id.* at 5.

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Recent Trends in Securities Litigation... *continued from previous page*

the surge in popularity of special purpose acquisition companies ("SPACs") in 2020 and into the earlier part of 2021 (discussed in the prior edition of the Exchange) led to a concomitant surge in securities fraud cases, with securities filings involving SPACs increasing more than six-fold to 32 in 2021.[13] Another trend on Wall Street is the pursuit of initial public offerings through the direct listing of shares. In *Pirani v. Slack Technologies, Inc.*, 13 F.4th 940 (9th Cir. 2021), a divided panel of the Ninth Circuit decided on interlocutory appeal that the plaintiff had standing to sue under Sections 11 and 12(a)(2) of the Securities Act, despite arguments that it was impossible to determine whether plaintiff had purchased registered shares traceable to the offering, as opposed to unregistered shares. The majority held that a contrary finding would "essentially eliminate Section 11 liability for misleading or false statements made in a registration statement." Such a holding would have incentivized companies to go public through direct listings and "file overly optimistic registration statements [] to increase their share price, knowing that they would face no shareholder liability under Section 11 for any arguably false or misleading statements."[14] Litigation involving these issues is likely to continue.

While the year 2021 saw a markedly lower number of new filings and settlement valuations, 2022 looks to reverse the pattern. The once buoyant stock and cryptocurrency markets have dropped significantly; the NASDAQ declined nearly 29% in the first half of 2022 (with some former technology high-flyers down over 90% from their highs) and Bitcoin traded at below $20,000 by September 2022 (with the total collapse of certain stablecoins and cryptocurrency exchanges). Moreover, several very large settlements were announced in 2021 and early 2022, including cases involving Twitter ($809.5 million) and Teva Pharmaceutical Industries ($420 million).

[13] *Id.* at 5.

[14] *Slack Technologies*, 13 F.4th at 948.

Class Periods In Initial Complaints... *continued from page 6*

have been fleshed out and the proper class period identified. This scenario would result in fewer large institutions moving for lead plaintiff.

On the other hand, in another recent securities fraud action involving General Electric,[4] a court in the Southern District of New York came to the exact opposite conclusion in response to an investor's motion to intervene. In the GE case (which alleged that that GE misrepresented results and trends concerning its Power Segment business division), the initial contained a 3-month class period (July 21, 2017 through October 20, 2017). Following the publication of the required PSLRA notice, the court appointed a lead plaintiff and approved its selection of counsel. But just one month after the lead plaintiff order, a new complaint was filed against GE for a class period of February 26, 2013 to January 24, 2018, which alleged the same misrepresentations related to the Power Segment but also included new misstatements concerning GE's long-term care insurance business. Subsequently, the filer of the new complaint moved to intervene and to vacate the court's initial order appointing lead plaintiff, and the court was tasked with answering the question of whether expanded claims and an extended class period in a newly filed action warrant republication of the notice pursuant to the PSLRA and the reopening of the lead plaintiff motion process.

On April 12, 2018, Judge Jesse M. Furman entered an order "reluctantly" concluding that republication of the notice was warranted and that the lead plaintiff process must be reopened. In reaching that decision, Judge Furman noted, "Courts have held that republication is warranted where, in light of changes in either or both the class period or the nature of the claims asserted, it is likely that individuals who could now be considered potential lead plaintiffs would have disregarded the earlier notice." In comparing the initial three-month class period to the expanded class period of almost five years, Judge Furman noted this dramatic expansion of the class period without publishing a new notice meant that qualified movants may be excluded from the lead plaintiff selection process, as their purchases in GE stock may not have occurred during the initial class period.

Taken together, the rulings in Activision and GE should encourage investors to carefully examine all potential claims and class periods that could be asserted to determine whether the class period in an initial complaint is improperly extended or truncated. If a stockholder does not agree with the class period on file, it should file its own initial complaint and move for lead plaintiff in order to preserve its rights as a putative class member going forward, even if they do not believe they have the largest financial interest of all potential lead plaintiff movants. Fortunately, specialized software used by Saxena White and other top securities firms helps calculate losses in various class periods and identifies other metrics considered by courts, such as the total number of shares and net shares purchased during the class period and the total net funds expended (to assess potential unique defenses that could be raised). These tools are essential in screening potential cases and determining whether an institution should seek to actively participate in a securities fraud action.

[4] *Hachem v. General Electric Inc.*, 2018 WL 1779345, at *1 (S.D.N.Y. Apr. 12, 2018).

Saxena White Welcomes New Attorneys

David Wales

David L. Wales is Senior Counsel at Saxena White, focusing on corporate governance litigation. Mr. Wales is an experienced securities litigator and trial attorney, and a former Assistant United States Attorney for the Southern District of New York.

Prior to joining Saxena White, Mr. Wales was a partner for 12 years at a nationally recognized securities litigation firm, where he served as one of the leaders of their corporate governance litigation practice.

During his career, Mr. Wales has led numerous significant corporate governance actions, including the derivative action against the board of directors of Pfizer Inc., arising out of the off-label marketing of pharmaceuticals, resulting in a $75 million recovery and the first case requiring the establishment of a board-level regulatory compliance committee. Mr. Wales has been a leader in the fight against corporate abuse in the sale of opioids, including a derivative action on behalf of McKesson Corporation, achieving a $175 million recovery and substantial corporate governance reforms. He was a leader in the action against the board and senior management of Twenty-First Century Fox, Inc., arising out of workplace harassment, obtaining a $90 million recovery and ground-breaking corporate governance reforms. Mr. Wales has successfully litigated numerous actions arising out of mergers and acquisitions, as well as conflicted transactions, including *In re New Senior Investment Group, Inc. Derivative Litigation*, a $53 million recovery arising out of a conflicted transaction, and *In re Jefferies Group, Inc. Shareholders Litigation*, a $70 million settlement on behalf of shareholders in the sale of the company.

Mr. Wales has extensive experience successfully prosecuting class actions under the federal securities laws, including *In Re Merck & Co., Inc. Securities Litigation,* achieving a $1.06 billion settlement weeks before trial; *Public Employees' Retirement System of Mississippi v. Merrill Lynch & Co. Inc.*, obtaining a $315 million settlement after arguing the first successful class certification motion in an RMBS action; and *In re Sepracor Corp. Securities Litigation*, a $52.5 million recovery in a certified securities fraud class action.

Mr. Wales has been consistently recognized for his legal excellence. He is AV rated, the highest rating from *Martindale-Hubbell*. He has also been named a top practitioner by *Legal 500,* a "New York Super Lawyer" in securities litigation by *Thomson Reuters*, and as one of the "500 Leading Plaintiff Financial Lawyers" by *Lawdragon*. Mr. Wales is a frequent speaker on corporate governance, including ESG and securities fraud matters.

Mr. Wales graduated *magna cum laude* from the State University of New York at Albany and *cum laude* from the Georgetown University Law Center.

Omar D. Davis

Omar D. Davis has an extensive background as a retirement plan legal advisor and manager that has provided him with a deep understanding of the issues and challenges facing institutional investors. Mr. Davis has served in various capacities for several large retirement plans. Most recently, Mr. Davis was the Director of Employer Services at the Public School and Education Employee Retirement Systems of Missouri (PSRS/PEERS), a $50+ billion pension plan serving retired educators and school employees across the State of Missouri. His public retirement plan background extends to earlier roles at the Missouri Department of Transportation & Missouri State Highway Patrol Employees' Retirement System (MPERS), where he was General Counsel, and the Missouri State Employees' Retirement System (MOSERS), where he served as Investment Legal & Compliance Counsel.

Prior to his retirement system background, Mr. Davis worked for more than a decade in Missouri state government as an agency leader, including as the Director of the Department of Revenue and the Director of the Department of Labor & Industrial Relations. He has been recognized for his leadership and service numerous times throughout his career.

Prior to joining Saxena White, Mr. Davis offered client organizations a wealth of public sector experience as an executive search consultant, focusing on the public retirement, public agency, asset owner and manager sectors.

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Alec T. Coquin

Alec T. Coquin is an attorney practicing out of Saxena White's New York office, where he represents institutional investors in complex securities fraud cases.

Prior to joining Saxena White, Mr. Coquin was an associate with a nationally recognized securities litigation firm. Mr. Coquin supported the firm team that helped recover a $140 million settlement against Barrick Gold Corporation, one of the world's largest gold mining companies, in *In re Barrick Gold Securities Litigation*. Alec was also an integral part of the firm teams that helped recover $15.75 million in a securities class action against Prothena Corporation, $39 million in a securities class action against World Wrestling Entertainment, $39.5 million in a securities class action against Intuitive Surgical, and $29.5 million in a securities class action against Advanced Micro Devices.

Mr. Coquin earned his Juris Doctor from St. John's University School of Law, where he was the Associate Managing Editor of the *St. John's Law Review*, and his Bachelor of Arts from Wesleyan University.

Craig C. Maider

Craig C. Maider is an attorney in Saxena White's New York office, where he represents institutional investors in large scale class actions in federal court.

Mr. Maider has represented investors in commodity futures manipulation cases, including as lead counsel in a certified class action against Kraft Foods Group and Mondelez Global for manipulation of the wheat futures market (*Ploss v. Kraft Foods Group, Inc. et al.*, Case No. 15-cv-2937 (N.D. Ill.)) and against Lansing Trade Group, LLC in a separate manipulation of the wheat futures market (*Budicak Inc. et al. v. Lansing Trade Group, LLC et al.*, Case No. 19-cv-2449 (D. Kan.)). Mr. Maider has also represented a class of indirect purchasers alleging that the nation's largest chemical manufacturers conspired to inflate the price of caustic soda, a chemical commodity used in industrial processes (*In re Caustic Soda Antitrust Litigation*, Lead Case Docket No. 1:19-CV-00385 (W.D.N.Y.)).

Mr. Maider received his J.D. from the Benjamin N. Cardozo School of Law in 2016, where he graduated with honors. While at Cardozo, he also participated in the Securities Arbitration Clinic, recovering damages on behalf of investors. He received a B.S. in Finance from Rutgers University, with honors, in 2011 and previously held Series 7 and 63 licenses.

Emily R. Bishop

Emily R. Bishop is an attorney in Saxena White's California office, where she focuses her practice on prosecuting securities fraud class and direct actions, as well as shareholder derivative and corporate governance matters. Prior to joining Saxena White, Ms. Bishop was an associate at a law firm in San Diego where she represented individual and institutional shareholders in a variety of complex shareholder litigation.

Ms. Bishop received her Juris Doctor degree from the University of San Diego School of Law in 2017, graduating *cum laude*, and a Masters of Laws in Taxation in 2018. While attending law school, Ms. Bishop served as an editor of the *San Diego International Law Journal* and was president of Phi Delta Phi, the international legal honor society and the oldest legal organization in continuous existence in the United States. She graduated from the University of San Diego in 2014, where she received a Bachelor of Business Administration degree, double majoring in Business Economics and Real Estate, and a Bachelor of Arts degree in Political Science.

Justin Krumper

Justin Krumper is a first-year attorney in Saxena White's New York office, where he prosecutes complex securities fraud matters.

Mr. Krumper received his J.D. from the George Washington University Law School in 2022, where he graduated with honors. While at GW, he was an Associate Editor of the American Intellectual Property Law Association Quarterly Journal, where he had his note published. He received a B.S. in Finance and Political Science from Florida State University, cum laude, in 2019 and was a Presidential Scholar.

Women's Alliance First Annual Diversity Investing Symposium

On May 5, 2022, the Women's Alliance hosted its First Annual Diversity Investing Symposium in Delray Beach, Florida. The symposium was attended by men and women from across the hemisphere (including Chicago, Los Angeles, Washington, D.C., Mexico City, and Bogota) who came together for a day to share their experiences and express their continued commitment to diversity, equity, and inclusion (DEI) initiatives. Chaired by Director Marisa N. DeMato, the event featured three panels of leading women in the pension and investment spaces in the U.S. and Latin America.

The U.S. Asset Allocator panel, which included Angela Miller-May, Chief Investment Officer of the Illinois Municipal Retirement Fund (IMRF), and Gina Sanchez, Board member with the Los Angeles County Employees Retirement Association (LACERA), explored the role of allocators in creating diverse manager programs, the progression of diversity investing initiatives and recent trends, and the challenges faced by diversity investing initiatives, among other topics.

Following that, the U.S. Diverse Manager panel discussed the current state of diversity investing, best practices when seeking mandates from allocators, and the role of the consultant in developing and fostering diversity programs.

Rounding out the program, the Latin America Investment panel discussed investment opportunities in Latin America and managing macro investment risk, the rise of ESG and impact investing in the region, and the status of women in Latin American business and investment.

The event also provided a spotlight presentation by Maura Cunningham, CEO of Rock the Street, Wall Street, a financial and investment literacy program designed to bring both gender and racial equity to the financial markets and spark the interest of high school girls in careers in finance.

In closing remarks, Maya Saxena, President and Co-Founder of Saxena White, focused on the importance of supporting DEI initiatives throughout the pension, investment, and legal communities. The symposium concluded with a cocktail reception on a private rooftop, where attendees networked and discussed opportunities to collaborate.

We look forward to hosting future Women's Alliance events, and we hope you can join us next year for the Second Annual Diversity Investing Symposium!

To join the mailing list for future Women's Alliance events, please email womensalliance@saxenawhite.com.

Saxena White Names Chief Diversity Officer

Saxena White P.A. is pleased to announce that Marisa N. DeMato has been appointed the firm's first Chief Diversity Officer. A sought-after speaker and advocate on women's issues and diversity planning, Marisa is one of the industry's leading advocates for institutional investing in women- and minority-owned firms and chairs the firm's Women's Alliance, which fosters women-centered development and leadership in the pension, investment, and legal communities. The firm's commitment to diversity, equity and inclusion has drawn praise from clients and courts, and its focus on building diverse legal teams has become a model for the legal industry.