

## The Future of Section 10(b) Claims Premised on Violations of Item 303 Looks Uncertain

By Austin P. Van

On January 16, 2024, the Supreme Court held oral argument in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, in which the Court has been asked to decide whether “a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b) [of the Securities Exchange Act], even in the absence of an otherwise misleading statement.” During the argument, nearly all of the justices voiced skepticism that a Section 10(b) claim can be based solely on a violation of Item 303. If the justices decide violations of Item 303 cannot independently support a Section 10(b) claim, an important basis for such claims, previously available in the Second Circuit, will no longer be available to securities plaintiffs.

SEC Regulation Item 303 requires publicly traded companies to disclose in their annual reports on Form 10-K all known trends or risks that are reasonably likely to materially affect the company's income. The respondent, investor Moab Partners LP, alleges that the petitioner, Macquarie Infrastructure Corp., was required under Item 303 to disclose in the management discussion and analysis (“MD&A”) section of its 10-K filing that a proposed international ban on certain sulfur fuels would have a devastating impact on its oil storage business. Moab claims that in failing to make this disclosure, Macquarie made a misleading omission that is actionable under Section 10(b) of the Exchange Act. The Second Circuit found that such an omission of a known material risk, required to be disclosed under Item 303, is indeed actionable, in a decision that contradicted a prior holding of the Ninth Circuit on this issue. The Supreme Court granted certiorari to resolve the circuit split.

At oral argument, Justice Kagan aptly summarized the dispute between the parties as one over “how narrow or how capacious we should understand the requirement [of Section 10(b)] that there needs to be another statement that’s rendered misleading” by an omission of a risk required to be disclosed under Item 303. The U.S. Solicitor General, represented at oral argument by Ephraim McDowell and arguing on behalf of the U.S. Securities and Exchange Commission as intervenor, argued that the

entire MD&A section filed to satisfy Item 303 disclosure requirements may be viewed as a single statement that may be rendered misleading by the omission of a material known risk. McDowell argued by analogy that the section of an annual report disclosing the directors of a company would be misleading if it disclosed some of the directors yet omitted one of them. Under this theory, a defendant’s MD&A section can be a misleading “half-truth” if it discloses some material risks but fails to disclose other material known risks. David Frederick of Kellogg Hansen, arguing on behalf of respondent Moab, likewise took the position that an entire MD&A section that omits a risk required to be disclosed under Item 303 is a misleading statement. Frederick also argued in the alternative that the complaint at issue pleaded that specific misstatements within the MD&A section were misleading by omission.

Petitioner Macquarie, represented by Linda Coberly of Winston & Strawn, argued in contrast that Section 10(b) and the PSLRA require that a more specific statement than the entire MD&A section of a company’s 10-K be rendered misleading by an omission. Coberly argued that a material known risk omitted from a 10-K must be “like in kind in both subject matter and specificity” to a risk disclosed in that filing in order to be actionable.

In their questioning, the justices appeared skeptical of the government’s and respondent’s argument that the entire MD&A section of a company’s 10-K may constitute a statement that may be rendered misleading by the omission of a material known risk. Only one justice, Justice Kagan, hinted at a favorable view of this theory when she noted, “if you have a set of paragraphs . . . which paints a very rosy picture of the prospects of a company, and then it turns out that you’ve omitted the thing that is actually going to crater the company next month, that



Austin P. Van, Partner

### INSIDE THIS ISSUE

- 1 The Future of Section 10(b) Claims Premised on Violations of Item 303 Looks Uncertain
- 2 Court Denies Motion to Dismiss Claims Against Nikola Corporation
- 4 Artificial Intelligence in Public Stock Trading
- 5 Pomerantz Resolves Opt-Out Actions with Teva Pharmaceuticals
- 7 Notable Dates on the Pomerantz Horizon

The *Pomerantz Monitor* may be considered to be attorney advertising under applicable rules of the State of New York

*Continued on page 2*

Continued from page 1

rosy picture seems to be rendered misleading.”

The remaining justices floated two potential approaches for resolving the issue presented. **First**, several justices suggested that the parties appeared to agree on the answer to the question presented, as written: the parties appeared to agree that an omission that does not render some other statement misleading—a “pure omission”—is not actionable. Chief Justice Roberts noted that the dispute as presented turned on a distinction between “half-truths and pure omissions,” and asked whether respondent was “giving up on that distinction” and conceding that a pure omission of a risk required to be disclosed under Item 303 is not actionable. Justice Kavanaugh asked pointedly whether the justices “can . . . just say that an omission alone is not good enough, you have to identify a statement as well, and send it back?” Justice Gorsuch likewise asked, “do you want us to just go ahead and answer the narrow question presented about omissions?” Justice Alito stated, “I don’t really see a disagreement between you and Ms. Coberly on the narrow question that the Court agreed to take.”

In response, counsel for both the government and respondent rejected this offer by the justices to punt. Frederick argued for respondent that a holding that pure omissions cannot form the basis of a Section 10(b) violation would be worthless because “[t]he Second Circuit has never decided this [issue] on the basis of pure omissions.” McDowell similarly argued that “I don’t think it would do any good . . . to just basically vacate and remand and let them take another look because [the Second Circuit already] decided” that Item 303 omissions are actionable because they render the financial statements as a whole misleading.

**Second**, perhaps a majority of justices appeared to favor petitioner’s view that a plaintiff must identify a specific statement within the MD&A section of a 10-K, rather than the section as a whole, that is rendered misleading by the omission of a risk required to be disclosed under Item 303 in order for that omission to be actionable. Justice Kavanaugh stated, “to say that the MD&A as a whole is misleading, really kind of waters down the statement requirement,” and asked, “how can the MD&A section as a whole be misleading but not any single statement within it?” Justice Gorsuch understood Frederick to have conceded in the alternative that a more specific statement may be required and asked why, if the parties agree that such a standard is acceptable, the justices should not apply that standard? Justice Jackson similarly seemed inclined to require a more specific statement and reasoned that “it writes out of the statute something about the statement being rendered misleading to interpret that to mean anytime you are required to disclose certain information in a statement and it isn’t there, you have a misleading statement.”

A holding that securities plaintiffs must identify a specific statement within the MD&A section of a 10-K that is rendered

misleading by an Item 303 omission would effectively eliminate the pleading advantage plaintiffs previously enjoyed in the Second Circuit by pleading Item 303 omissions. However the Court rules, the justices seemed unlikely to write an opinion favorable to securities plaintiffs. Tellingly, Justice Roberts framed his broad view of the Court’s role with respect to Section 10(b) cases: “we don’t want to get any further into the business of implying private rights of action,” and the Court should be disinclined to “extend the existing private right of action” found in Section 10(b). This case may turn into another cautionary tale, like *Morrison*, the lesson of which is that the plaintiffs’ bar, in seeking to maximize investors’ rights, should be cautious when considering whether securities cases should proceed to this Court. ■

## Court Denies Motion to Dismiss Claims Against Nikola Corporation

By Michael J. Wernke

On December 8, 2023, Judge Steven P. Logan of the District of Arizona sustained Pomerantz’s claims against Nikola Corporation and certain of its officers and directors. The action is brought on behalf of investors who purchased stock in Nikola, an electric vehicle manufacturer that went public on June 4, 2020 via a special purpose acquisition company (SPAC) transaction. The complaint alleges that Nikola, its founder and chairman, Trevor Milton, and other officers and directors violated section 10(b) of the Securities Exchange Act as well as section 20(a), the “control person” provision, by issuing false statements concerning essentially every aspect of the company’s business. In addition to allowing investors to pursue recovery relating to one of the best-known instances of securities fraud in recent years, the court’s upholding of our claims of scheme liability open new avenues for future securities litigation.

During the relevant period, Nikola purported to be a producer of zero emissions vehicles, including hydrogen fuel cell electric vehicles (FCEVs) and battery electric vehicles (BEVs), as well as hydrogen fuel for FCEVs. While our complaint alleges that the defendants’ fraud spanned numerous topics touching on every aspect of Nikola’s business, in essence the fraud can be broken down into five main categories of misrepresentations.

**First**, Nikola claimed it had developed a fully operational “zero-emissions” tractor trailer truck powered by hydrogen fuel cell technology: the Nikola One. However, the Nikola One was neither a “zero-emissions” truck nor operational. It was nothing more than an empty shell. Nevertheless, at the instruction of Milton, Nikola staged a press event

specifically to dupe investors into believing the vehicle was operational. Nikola also created a video purporting to show the Nikola One driving down a road under its own power. In reality, Nikola had towed the inoperable truck to the top of a hill and then filmed it as it rolled down to make it appear as if it were operational. Nikola secretly abandoned the Nikola One project prior to going public.

**Second**, Nikola claimed it had over 14,000 binding purchase orders for its trucks, which represented “billions and billions” in revenue. In truth, essentially all the orders were non-binding and were for the inoperable, and since abandoned, Nikola One.

**Third**, Milton repeatedly asserted that Nikola was producing hydrogen at less than a quarter of the cost industry experts believed was possible. In truth, Nikola had never produced any hydrogen at all, let alone at the low prices claimed.

**Fourth**, Nikola claimed it had single-handedly developed a FCEV/BEV pick-up truck, the Badger, for which pre-orders had sold out. However, Nikola never built the Badger. Months after Nikola announced the completed production of the Badger, Nikola had created nothing more than preliminary digital renderings of the vehicle.

**Fifth**, Nikola claimed that all of its vehicles’ key components, including inverters and batteries, were created and manufactured “in-house” by Nikola. In reality, Nikola did not develop any components in-house.

We allege that the defendants were motivated by greed. Milton – the architect of the fraud – aimed to inflate the expectations and stock price of Nikola, utilizing the resulting excitement to secure partnerships with top auto companies, which would further inflate Nikola’s share price. As Nikola’s single largest shareholder, Milton openly admitted within the company that he planned to dump his shares as soon as he was contractually permitted to do so, which was only six months after Nikola went public and before the market could discover that the company, like the Nikola One, was an empty vessel. The other defendants encouraged Milton to utilize social media to directly engage with retail investors. Despite knowing of his propensity to lie, they championed his self-described “media blitzes” of misinformation because they too were large shareholders who stood to gain millions, if not billions, from Milton’s fraud.

Investors began to learn the truth when Nikola’s stock price plummeted following a September 10, 2020 Hindenburg Research report. Having gathered “extensive evidence—including recorded phone calls, text messages, private emails and behind-the-scenes photographs,” Hindenburg identified “dozens of false statements by [Milton],” which had led Hindenburg to conclude that Nikola “is an intricate fraud built on dozens of lies over the course of . . . Milton’s career.” Thereafter, the DOJ and SEC began investigations, Nikola’s partners pulled out and Milton was forced to

resign and was later indicted for (and convicted of) fraud. Nikola’s stock price plummeted 76% over the course of these disclosures.

Our claims against Nikola, Milton and certain officers and directors were sustained following two rounds of motion to dismiss briefing. While the court readily agreed following the first round that Milton intentionally misled investors, it was only after we amended the complaint to add additional facts revealed during Milton’s criminal trial that the court found that we sufficiently alleged fraudulent intent against the other officers and directors for their misstatements. On this critical issue, the other defendants argued that Milton was the actual perpetrator of the fraud and that even if certain of their statements were false and misleading, they did not intend to mislead investors the way Milton did. The court rejected the defendants’ argument based on the newly added allegations, including that they were present during meetings in which abandonment of the Nikola One was discussed.

This opinion is particularly significant because the court held that the complaint independently alleged liability against the other defendants under the less frequently utilized “scheme liability” theory. Whereas Rule 10b-5(b) imposes liability against only those who “make any untrue statement of a material fact,” subsections (a) and (c) make it unlawful “to employ any device, scheme, or artifice to defraud” or “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” That is, the person need not be a “maker” of a false statement to be held liable for fraud. Analyzing our scheme liability allegations, the court acknowledged that while the defendants were correct that they had no duty to correct Milton’s own false statements and there is no liability for aiding and abetting fraud under the federal securities laws, the court held that the complaint adequately alleged each defendant “engaged in conduct with the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme.” For example, we adequately alleged that the CEO and CFO were told by others in the company about Milton’s false statements, said they would address the issue, but never did. The court also noted that the officers praised Milton’s performance following his misstatement-filled interviews and they participated in videos with Milton that were designed to mislead investors. The court found these allegations sufficient to allege scheme liability.

The court’s ruling on scheme liability opens new avenues for future securities litigation. While a few courts previously sustained scheme liability claims, those claims usually involved market manipulation (i.e., “pump and dump” schemes) or were entirely duplicative of the Rule 10-b false statement claims. Our victory here creates a precedent for reference in future litigations where what defendants may



Michael J. Wernke, Partner

*Continued on page 4*

*Continued from page 3*

characterize as non-actionable “aider and abettor” claims cross over into actionable scheme liability claims. ■

## Artificial Intelligence in Public Stock Trading

By Ari Y. Basser



Ari Y. Basser, Of Counsel

The financial world is witnessing a technological revolution fueled by the rise of Artificial Intelligence (AI). In public stock trading, AI has not only redefined conventional methodologies but has also introduced innovative tools for market analysis and decision-making. In an era of information overload and rapid market shifts, this transformation is considerable. AI has the potential to reshape the landscape of trading and upend power dynamics. This article explores the impact of AI on securities litigation through the lens of public stock trading. Beyond merely informing trading strategies, artificial intelligence has the capacity to enhance the accuracy and transparency of public disclosures, providing a direct benefit to shareholders. This, in turn, opens new avenues to pursue, analyze, and resolve securities litigation, while simultaneously presenting new challenges for prospective plaintiffs.

### Impact of AI on Public Stock Trading

The advent of AI has revolutionized stock trading through the development of advanced automated trading algorithms. These algorithms are designed to process and analyze vast arrays of data, including historical market trends, global economic indicators, and detailed corporate financial statements, at speeds and at a level of accuracy unattainable by human traders. This advancement has empowered traders with more nuanced and better-informed strategies, optimizing the timing and selection of stock trades.

AI also plays a pivotal role in enhancing risk management strategies in stock trading. Utilizing advanced predictive analytics, AI algorithms can quickly decipher complex market patterns and potential risks, offering traders and investment firms a more profound understanding of future market behaviors. This foresight is invaluable for devising robust risk mitigation strategies, ensuring investments are better shielded against market fluctuations and unforeseen economic events.

One of AI's most significant contributions is its ability to enhance market efficiency. By rapidly processing vast quantities of information, AI systems can react to market changes almost instantaneously, a feat that significantly reduces the latency in decision-making within human capabilities. This efficiency is not only advantageous for individual traders but also beneficial for the overall health and functioning of financial markets, as it leads to more accurate pricing and allocation of resources.

Real-world examples of AI's impact on stock trading include the success of quantitative hedge funds like Renaissance Technologies and Two Sigma. These firms utilize sophisticated AI models to predict price changes in securities, leveraging vast amounts of market data. Their ongoing success, often outperforming traditional investment strategies, highlights AI's potential in providing substantial returns for investors.

### Positive Impacts for Shareholders

AI promotes transparency in financial reporting. Sophisticated AI tools are now capable of thoroughly analyzing corporate reports and financial statements, identifying inconsistencies, and flagging potential misrepresentations. This enhanced scrutiny ensures that shareholders have access to more accurate and honest representations of a company's financial status, which is vital for making informed investment decisions.

A significant advantage of AI in finance is its role in ensuring the accuracy of public disclosures. AI algorithms, with their advanced data processing capabilities, can detect anomalies, patterns, and potential errors in financial data that might otherwise go unnoticed. By highlighting these discrepancies, AI can aid companies in upholding the integrity of financial information, ensuring that what is disclosed to the public and investors is both accurate and reliable. The precision and timeliness of information provided by AI significantly enhance investor confidence. In an environment where accurate information is key to investment decisions, AI's ability to provide timely and reliable data is invaluable. This dependability encourages greater market participation, as investors are more likely to engage with companies that demonstrate a commitment to transparency and accuracy in their financial reporting.

The integration of AI in stock trading and financial reporting contributes to the creation of long-term shareholder value. By providing comprehensive and reliable market analyses, AI enables investors to make more informed decisions, fostering sustainable investment strategies. Ultimately, these innovations lead to enhanced shareholder value, as investments are grounded in robust and accurate market insights.

### Challenges and Ethical Considerations

Despite these advantages, the application of AI in stock trading is not without challenges. One significant concern is the potential for inherent biases in AI algorithms, which can stem from skewed data sets or flawed programming. Such biases can result in misleading analyses and poor decision-making. Ensuring the reliability and objectivity of AI systems, therefore, becomes paramount in maintaining the credibility and effectiveness of AI in stock trading.

The increasing reliance on AI for stock trading and financial reporting necessitates the establishment of comprehensive regulatory frameworks. These frameworks should ensure

that AI applications in the financial sector comply with legal standards, particularly in areas like market manipulation and insider trading. The development of such regulations is crucial in maintaining fair and transparent financial markets. There are several notable examples of such regulations. Various countries, including the United States, have regulations and guidelines specific to algorithmic trading. For example, the U.S. Securities and Exchange Commission (SEC) has issued rules regarding the use of algorithms in trading, including risk controls, market access, and record-keeping requirements. Regulations such as the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FHA) also apply to AI-driven lending and ensure that lending decisions are made without discrimination. AI used in lending should comply with these regulations. Additionally, exchanges and regulatory bodies often have specific rules and regulations related to market surveillance and the use of AI for detecting market manipulation and insider trading.

The ethical implications of AI in finance, including concerns over privacy and independent decision-making, are increasingly significant. As AI systems become more advanced and widespread, addressing these ethical challenges becomes imperative to maintaining trust and integrity in financial markets. This involves a careful balance between leveraging AI for enhanced efficiency and safeguarding the ethical principles that govern financial practices.

#### **Impact of Artificial Intelligence on Securities Litigation**

The use of AI in the financial sector has not only transformed stock trading and financial reporting but has also significantly impacted securities litigation. AI's influence in this realm is multifaceted, impacting how cases are approached, analyzed, and resolved. AI has become an indispensable tool in securities litigation, providing attorneys and legal teams with advanced methods for analyzing complex financial data. Through AI algorithms, legal professionals can swiftly sift through vast amounts of financial documents, emails, and transaction records, identifying patterns and irregularities that could indicate fraudulent activities or misrepresentations. This capability allows for more precise and efficient case preparation, aiding legal teams in constructing more robust arguments and identifying key areas of focus.

In securities litigation, the discovery process is often overwhelming due to the sheer volume of financial data and communications that need to be examined. AI can streamline this process. By employing natural language processing and machine learning, AI can quickly parse extensive datasets, extracting relevant information and flagging potential evidence. This not only expedites the discovery phase but also ensures a more thorough and accurate examination of the data, which is crucial in complex securities cases.

AI's predictive analytics are also increasingly being used

to forecast litigation outcomes. By analyzing data from previous securities cases, AI can provide insights into the likelihood of success for certain legal strategies, the potential responses of opposing parties, and even the inclinations of specific judges or arbitrators. This predictive capability enables legal teams to make more informed decisions regarding case management and strategy.

AI's impact extends to regulatory compliance and the resolution of securities cases. Regulatory bodies are beginning to utilize AI to monitor market activities and identify potential violations, leading to more proactive and efficient enforcement actions. In the courtroom, AI-enhanced analytics are contributing to more informed judicial decisions, potentially leading to swifter resolutions of securities disputes.

#### **Conclusion**

The integration of AI into public stock trading marks a significant advancement in the financial sector. Its ability to enhance market efficiency, effectively manage risks, and bolster the accuracy of public disclosures is transforming the landscape of stock trading. AI's role in securities litigation represents a significant shift in how legal cases in the financial sector are handled. From enhancing the discovery process to providing predictive insights, AI is not only streamlining legal proceedings but also contributing to more informed and equitable outcomes. As AI continues to evolve, its impact on the financial sector and securities litigation is expected to deepen, marking a new era in public stock trading and in the legal practice within the financial industry. ■

## **Pomerantz Resolves Opt-Out Actions with Teva Pharmaceuticals**

### **The Editors**

In January, Pomerantz resolved a shareholder litigation against Teva Pharmaceuticals Ltd., in which the firm represented 22 Israeli institutional investors who had opted out of a previous securities class action. The case concerned an alleged price-fixing scheme as well as Teva's role in the devastating U.S. opioid crisis. In addition to overcoming the defendants' motion to dismiss, during the litigation, Pomerantz convinced the court to exercise supplemental jurisdiction over the firm's clients' Israeli law claims, opening a new avenue for investors to pursue recovery for losses from dual-listed shares.

Headquartered in Tel Aviv, Teva is one of the world's largest manufacturers of generic drugs. Between July 2013 and April 2016, Teva raised the prices of its generic drugs 76 times. Pomerantz's suit alleged that Teva enacted these

*Continued on page 6*

Continued from page 5

price increases in collusion with its competitors in the generic drug market, forming part of what Connecticut Assistant Attorney General Joseph Nielsen would later call “most likely the largest cartel in the history of the United States.” This alleged price fixing scheme led to massive profits for Teva, driving the company’s share price to an all-time high of \$72 per share in 2015. In the years that followed, the generic drug industry came under increasing scrutiny, culminating in May 2019 with the attorneys general of 47 states, the District of Columbia, and Puerto Rico filing a 524-page antitrust complaint detailing Teva’s collusive activity. Pomerantz’s suit alleged that throughout the class period Teva attributed its soaring profits to good business practice, concealing from investors the price-fixing scheme that was the true driver of the company’s financial success.

Pomerantz’s suit also made claims relating to Teva’s role in the opioid crisis that has swept across the United States. Teva has faced criminal liability for its involvement in this crisis, and recently moved forward on a \$4.25 billion deal to resolve a multi-district litigation that claimed Teva contributed to the opioid epidemic by misrepresenting the risks of addiction. Pomerantz’s suit was unique in addressing Teva’s role in the opioid crisis as part of its shareholder litigation, as this issue was not taken up by either the class action or any of the other opt outs.

Among Teva’s products are the drugs Actiq and Fentora, opioids used for the treatment of breakthrough cancer pain. According to the complaint filed by Pomerantz, Teva was aware that opioids are highly addictive and prone to abuse when prescribed for chronic pain and should be used only as a treatment of last resort. The suit alleges that, in spite of this knowledge, Teva engaged in a coordinated, and illegal, campaign to change the opinion of the medical community and the public at large in order to expand the use of opioids to treat common forms of pain like arthritis, lower back pain, and headaches. Teva’s efforts included disseminating materials that misrepresented the risks and benefits of opioid use, recruiting physicians as paid speakers in order to secure “brand loyalty,” and directing doctors to present scripted talks supporting opioid therapy, among other actions. According to the complaint, Teva’s campaign was part of the “aggressive marketing” that the National Institutes of Health identified as one of the key drivers of the opioid epidemic, leading to soaring profits for Teva while laying waste to communities across the United States.

Over the course of the class period, the truth about Teva’s actions eventually came to light. Approximately 3,500 lawsuits were filed against Teva and its affiliates; however the company assured investors that it had never engaged in improper marketing. In May 2019, Teva agreed to an \$85 million settlement with the State of Oklahoma and the market began to reconsider the extent of Teva’s potential liability in opioid-related litigation. In response

to these revelations, Teva’s share price plummeted to \$8.84 on May 30, 2019, marking a 19-year low. These opioid claims were sustained by the court when Pomerantz overcame the defendants’ motion to dismiss.

Pomerantz has a strong record of expanding the rights of investors in dual-listed shares, particularly shares listed on both the New York Stock Exchange (“NYSE”) and Tel Aviv Stock Exchange (“TASE”). In a previous class action against the Israeli pharmaceutical company Perrigo plc,

“WE ARE VERY PROUD OF THE FIRM’S ACCOMPLISHMENTS IN THIS ACTION.”

Jeremy A. Lieberman,  
Pomerantz Managing Partner

Pomerantz convinced the court to exercise supplemental jurisdiction over claims brought under Israeli law by investors who had purchased shares of Perrigo’s common stock on the TASE. Supplemental jurisdiction was, in securities litigation, a novel legal theory advanced by Pomerantz to vindicate its Israeli clients in the wake of the U.S. Supreme Court’s landmark ruling in *Morrison v. National Australia Bank Ltd* (2010), which barred foreign plaintiffs from suing foreign issuers under U.S. federal securities laws to recover losses from transactions on foreign exchanges. *Morrison*, on its face, would seem to prevent Pomerantz’s clients from pursuing recovery for losses related to their Perrigo common stock purchases. Notably, the court held that supplemental jurisdiction was correctly applied over the claims of the TASE purchasers as they applied the same standards as the claims brought under U.S. law by Pomerantz’s investor clients who had purchased Perrigo shares on the NYSE. Pomerantz moved the court to certify three classes of Perrigo investors: a U.S. purchaser class, a TASE purchaser class, and a class of investors who held Perrigo shares at the expiration of a hostile tender offer from Mylan N.V. Pomerantz presented expert evidence that TASE trading satisfied the criteria for market efficiency, resulting in U.S. District Court Judge Madeline Arleo certifying all three proposed classes. This marked the very first time since *Morrison* that a U.S. court had independently analyzed the market of a security traded on a non-U.S. exchange.

In the course of the litigation against Teva, Pomerantz built on the strategy it had successfully developed for *Perrigo* and convinced the court to exercise supplemental jurisdiction over Israeli law claims. Pomerantz’s clients had purchased both Teva’s American Depositary Shares, which are listed on the NYSE and Teva’s common stock

listed on the TASE. In a major victory for investors, U.S. District Judge Stefan Underhill denied the motion to dismiss the Israeli law claims and exercised supplemental jurisdiction over the Israeli securities law claims, stating that Pomerantz's clients' "federal securities law and Israeli securities law claims seem to me, in every important respect, identical."

"We are very proud of the Firm's accomplishments in this action," said Pomerantz's Managing Partner, Jeremy Lieberman, who led the firm's litigation team with Partner Michael Wernke. "The case included cutting-edge claims on behalf of investors of Teva on both the TASE and NYSE. In holding that there was

supplemental jurisdiction over the TASE claims, Judge Underhill conducted a thorough analysis of Israeli Supreme Court precedent and jurisprudence, finding that it was appropriate for a U.S. District Court to adjudicate the case on behalf of defrauded shareholders."

The ruling in the Teva opt-out actions bolsters the precedent set in the case against Perrigo, providing a possible road map for future claims concerning dual-listed shares and broadening the path for global investors to pursue recovery for losses incurred through securities fraud. ■



Jeremy A. Lieberman



Jennifer Pafiti



Dr. Daniel Summerfield



Janalee Spencer

## NOTABLE DATES ON THE POMERANTZ HORIZON

IF YOU WILL BE ATTENDING ANY OF THESE EVENTS AND WOULD LIKE TO MEET WITH US, SEND US A MESSAGE AT: [EVENTS@POMLAW.COM](mailto:EVENTS@POMLAW.COM)

**DR. DANIEL SUMMERFIELD** will present a lecture on **Class Actions – International Perspectives** to the **Assogestioni Board Academy** in Rome, Italy on February 16. From February 27–29, **DANIEL** will also attend the **PLSA Investment Conference** in Edinburgh, Scotland.

**JENNIFER PAFITI** and **JANALEE SPENCER** will participate in the **CALAPRS General Assembly** from March 2–5 in Rancho Mirage, CA.

**JEREMY LIEBERMAN**, **JENNIFER**, and **DANIEL** will attend the **CII 2024 Spring Conference** in Washington, DC from March 4–6.

**JEREMY** and **DANIEL** will participate in the **2024 ICGN Conference** from March 7–8 in Washington, DC. **JEREMY** will speak at an ICGN hosted session.

**JENNIFER** and **DANIEL** will attend the **2024 ACSI Conference** from March 12–14 in Melbourne, Australia.

**JANALEE** will attend the **GAPPT 15th Annual Conference** in Savannah, GA from March 24–27 and the **TEXPERS Annual Conference** from April 7–10 in Dallas, TX.

On April 18, **DANIEL** will attend the **Pensions Age Spring Conference** in London, UK.

From May 7–10, **JENNIFER** and **JANALEE** will attend the **SACRS Spring Conference** in Santa Barbara, CA.

**JEREMY**, **JENNIFER**, and **JANALEE** will attend the **NCPERS Annual Conference** in Seattle, WA from May 19–22.

**JEREMY** will participate in the **Perfect Law Global Class Actions and Mass Torts Conference** from May 22–24 in London, UK.

**THE POMERANTZ MONITOR**  
**A BI-MONTHLY PUBLICATION OF POMERANTZ LLP**

600 Third Avenue, New York, NY 10016



Postnet Standard  
U.S. Postage  
Paid  
New York, NY  
Permit No. 757

# POMERANTZ LLP

## **THE LAW FIRM THAT INSTITUTIONAL INVESTORS TRUST FOR SECURITIES LITIGATION AND PORTFOLIO MONITORING**

Pomerantz is acknowledged as a global leader in securities and corporate governance litigation. Pomerantz monitors the portfolios of some of the most influential institutional investors and financial institutions worldwide, monitoring assets in excess of \$9 trillion. Founded by Abraham L. Pomerantz, who was known as the “dean of the class action bar,” the Firm pioneered the field of securities class actions. For 85 years and counting,

Pomerantz has continued the tradition that Abe Pomerantz established, fighting for the rights of victims of securities fraud, breaches of fiduciary duty, and corporate misconduct. Prior results, however, do not guarantee a similar outcome in future cases.

### **NEW YORK**

600 Third Avenue, New York, NY 10016 Tel: +1 212 661 1100 Fax: +1 917 463 1044

### **CHICAGO**

10 South LaSalle Street, Suite 3505, Chicago, IL 60603 Tel: +1 312 377 1181 Fax: +1 312 377 1184

### **LOS ANGELES**

1100 Glendon Avenue, 15th Floor, Los Angeles, CA 90024 Tel: +1 310 405 7190

### **LONDON**

Central Court, 25 Southampton Buildings, London WC2A 1AL, United Kingdom Tel: +44 (0)20 3709 9345

### **PARIS**

68, rue du Faubourg Saint-Honoré, 75008 Paris, France Tel: +33 (0) 1 53 43 62 08

### **TEL AVIV**

HaShahar Tower, Ariel Sharon 4, 34th Floor, Givatayim, Israel 5320047 Tel: +972 (0) 3 624 0240

### **CONTACT US:**

We welcome input from our readers. If you have comments or suggestions about *The Pomerantz Monitor*, or would like more information about our firm, please visit our website at [www.pomlaw.com](http://www.pomlaw.com) or contact:

**Jennifer Pafiti, Esq.** OR **Jeremy A. Lieberman, Esq.**  
[jpafiti@pomlaw.com](mailto:jpafiti@pomlaw.com) +1 310 432 8494 [jalieberman@pomlaw.com](mailto:jalieberman@pomlaw.com) +1 212 661 1100