the POMERANTZ MONITOR

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Another *Wynn* Win

By the Editors

INSIDE THIS ISSUE

Pomerantz is Lead Counsel in a high-profile securities fraud class action against Wynn Resorts alleging a decades-long pattern of sexual abuse and harassment by the company's founder and former Chief Executive Officer, Stephen (Steve) Wynn that was unchecked, tacitly permitted, and eventually covered up by defendants. Partner Murielle Steven Walsh leads the litigation.

Wynn Resorts owns and operates luxury hotels and destination casino resorts, including Wynn Las Vegas and Encore in Las Vegas, Nevada, Wynn Boston Harbor in Everett, Massachusetts, and Wynn Macau and Wynn Palace in Macau, China.

When, in July 2021, U.S. District Judge Andrew P. Gordon of the District of Nevada denied, in part, the defendants' motions to dismiss the Second Amended Complaint, he stated:

> At this stage, the plaintiffs have sufficiently alleged that Wynn, Maddox, Sinatra and Cootey were aware of information contradicting their statements that denied misconduct allegations. The inference that these defendants were aware of Wynn's alleged misconduct at the time of their statements is cogent and compelling.

On March 2, 2023, Pomerantz secured a major victory for defrauded Wynn investors when Judge Gordon granted plaintiffs' motion for class certification.

Particularly noteworthy is the court's analysis of the defendants' price impact arguments. First, defendants claimed that there was no front-end price impact because the stock price did not increase after the fraudulent statements. The court agreed with Pomerantz that front-end price impact is irrelevant in a price maintenance case such as ours. The theory of price maintenance, or inflation maintenance as it is also called, asserts that defendants' fraud prevented the stock price from falling by misrepresenting or concealing bad news. In 2021, in *Arkansas Teacher Retirement System, et al. v. Goldman Sachs Group, Inc.*, a Second Circuit panel endorsed the inflation-maintenance theory of securities fraud. Second, defendants raised "mismatch" arguments, i.e., that there is a "mismatch" between the alleged misstatements and the corrective disclosures. The court rejected these arguments too, noting that a corrective disclosure need not be a mirror image of the prior fraudulent statements, and that it is sufficient that the disclosure renders "some aspect" of the prior statements false or misleading. This decision is therefore a clear plaintiffs' win. Also highly important is the court's rejection of defendants' efforts to narrow the class period.

Finally, the court rejected the defendants' garden-variety attacks on the lead plaintiffs and found our proposed representatives to be typical and adequate. Two of the lead plaintiffs are a married couple; only one of them actually executed the trades. The court, however, found that the other spouse was nonetheless typical and adequate to represent the class.

Murielle Steven Walsh, Partner

The first complaint was dismissed by Judge Navarro, who granted Pomerantz leave to replead. Our second amended complaint was later upheld in part by Judge Gordon.

The case suffered a slight setback when Magistrate Judge Youchah effectively stayed merits discovery until class certification was decided. Pomerantz subsequently discovered that Judge Youchah had previously represented the Wynn defendants in a case arising out of the same allegations as in our case but did not disclose that fact. Pomerantz moved for her recusal, which she reluctantly granted.

On March 16, 2023, defendants petitioned the district court for permission to file an appeal of the court's Order Granting Plaintiffs' Motion to Certify Class.

"We are gratified that the court granted our certification

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motion," stated Murielle Steven Walsh. "Plaintiffs will now proceed with merits discovery into the alleged misconduct by Stephen Wynn against Wynn's female employees and the enabling actions by Wynn management that allowed it to go on for years. This case continues to demonstrate that corporate integrity and accountability are important issues to investors." ■

Omar Jafri, Partner

Pomerantz Wins Ninth Circuit Reversal of *Forescout* Dismissal

By Omar Jafri

On March 16, 2023, the Ninth Circuit Court of Appeals reversed, in part, the dismissal of Pomerantz's securities fraud class action against Forescout Technologies, Inc. and its senior officers. In so doing, the Ninth Circuit also set important precedents that significantly strengthen investor rights.

Forescout specializes in providing network security from malware and potential infiltrators for large computer networks. The operative complaint alleges that the defendants misled investors about the strength of the company's sales pipeline to falsely support a bullish guidance and otherwise justify poor financial results when the company repeatedly failed to meet its touted objectives.

For its initial public offering in October 2017, Forescout reported growth averaging more than 30% a year in revenues for the fiscal years prior to the IPO. This steady growth continued in fiscal year 2018, with a 32% increase in reported revenues. However, as the company entered FY 2019, it encountered heightened competition from other industry players, primarily because Forescout's products were not as well suited as theirs to providing solutions for cloud-based cybersecurity and remote working. Nonetheless, defendants provided revenue guidance to investors of 24% annual growth in revenue for FY 2019, despite the fact that a large amount of Forescout's deals that were identified as "committed" in its sales pipeline had only a 50% chance of closing, according to a confidential witness ("CW") in the case.

In 2020, Forescout's alleged deception on the market continued, following its announcement that it had entered into a merger agreement with Advent International, Inc., a private equity firm. Under the terms of the agreement, Advent would acquire Forescout for $33 per share. However, Advent soon learned that the 2020 revenue projections Forescout had provided were inconsistent with the serious deterioration in the sales pipeline that the company had already experienced.

Just three months after Forescout's announcement of the merger, Advent privately notified the company that it was terminating its acquisition, but defendants withheld these material facts from investors. Following litigation initiated by Forescout to force Advent to proceed with the merger, both parties entered into an agreement providing for Advent to acquire Forescout for $29 per share – a $300 million discount.

In 2021, the U.S. District Court for the Northern District of California dismissed the investors' securities fraud lawsuit twice, ruling that the plaintiffs had insufficiently alleged that the statements made by the defendants were knowingly or recklessly false and misleading when made.

Plaintiffs appealed that decision to the United States Court of Appeals for the Ninth Circuit. The Court's decision not only allows the plaintiffs to proceed with their complaint, but it also clarifies and establishes important standards regarding pleading falsity, misleading statements, and the use of information provided by confidential witnesses.

Regarding falsity, the Ninth Circuit's decision confirms that:

- No "dual pleading" standard exists where courts can "comingle" the lower standard for falsity with the higher standard for scienter unless the facts pleaded to support both elements are exactly the same.
- Plaintiffs can rely on an expert opinion to bolster allegations of falsity.

Regarding misleading statements, the Ninth Circuit's decision established that:

- Defendants cannot ask courts to disregard the plain words of their own statements at the pleading stage, while instead crediting their attorney's reimagination of what the statement said or meant.
- "Concrete" statements of material fact do not need to consist of "hard numbers" and "benchmarks." Even vague claims like "we have a very large pipeline" can mislead investors, and the law in the Ninth Circuit has not held otherwise since at least the 1990s.
- Misleading statements in direct response to specific analyst questions concerning the alleged fraud itself cannot be mischaracterized as puffery.
- A defendant cannot rely on the disclosure of hypothetical risks to escape liability for a failure to disclose that he or she already has information suggesting that an event "might not" occur.
- A risk does not need to *actually* materialize for cautionary language to be ineffective. A defendant's awareness of

a "significant likelihood" that the risk would materialize is enough.

- Awareness of omitted facts that render a statement misleading is sufficient to demonstrate "actual knowledge" and overcome the PSLRA's safe harbor.

While investigating the claims in this case, Pomerantz found twenty CWs who provided information that supported the allegations made in the complaint but who had no direct contact with any individual defendant. We successfully argued that this lack of direct contact was not dispositive even though many lower courts had previously dismissed securities class actions on this very ground. As a result, regarding CWs, the Ninth Circuit's decision clarified that:

- In pleading securities fraud, CWs do not need to talk to, hear from, or present information directly to an individual defendant.

- When a defendant quibbles that a CW does not provide evidentiary minutia, a plaintiff can cite this decision to state that the defendant is attempting to create an "impossible" standard that the PSLRA never even contemplated.

- In securities fraud cases related to misrepresentations regarding sales pipelines, a CW need not provide information about the "guidance" or "corporate level trends."

- Courts can consider even an "estimate" provided by a single CW.

- A CW's factual representations cannot be mischaracterized as presumed "disagreements" of "opinion" with higher level managers when the CW is reporting facts as opposed to merely expressing his or her own beliefs and opinions.

- Plaintiffs can rely on a lower-level CW who hears from a third person that a defendant did something wrong or had awareness of certain facts that rendered his or her statements materially misleading.

- Plaintiffs can rely on a CW who prepares reports for a mid-level manager, who is then alleged to have provided pertinent information to the individual defendant even if the CW did not directly present the information to the individual defendant or talk to or hear from the individual defendant.

- If CWs state that a defendant did something or knew something during the Class Period, it is not necessary for the CWs to state that any of this happened before a particular statement was made.

With the Ninth Circuit holding that plaintiffs adequately stated claims under Section 10(b) and reversing the district court's dismissal of the Section 20(a) claims for control person liability, Pomerantz's *Forescout* class action has been remanded to the district court for further proceedings.

The Firm's *Forescout* litigation team is led by Partner Omar Jafri and includes Senior Counsel Patrick V. Dahlstrom and Associate Brian O'Connell. ■

The Sacrosanct Right to Vote

By Gustavo F. Bruckner and Henry Tan

Among the most important rights belonging to a stockholder is the right to vote. Alongside the rights to sue and sell, the right to vote is treated by the Delaware Chancery Court as "sacrosanct." Therefore, any challenge to a free and fair election is rigorously scrutinized by the Court as are challenges to the accuracy of information provided to stockholders in advance of an election. One issue that periodically emerges is whether a board has set out the correct voting standard, in particular as it pertains to the treatment of broker non-votes.

Today, most stockholders are no longer "stockholders of record" but rather "beneficial shareholders." That is, they do not hold stock certificates and do not own their shares directly. Instead, they hold their shares in "street name," while their brokerage firms act as the "stockholders of record." During stockholder meetings, brokers have full discretion on how to vote these shares on routine matters, such as the approval to hire an independent accounting firm. However, for non-routine matters, beneficial shareholders must give instructions to their brokers on how to cast their vote. Beneficial shareholders who fail to instruct their brokers will have their shares recorded as "broker non-votes."

Broker non-votes are not considered "votes cast" under Delaware law, so any vote that requires a majority of votes cast will not include broker non-votes in the "denominator" for purposes of tallying votes. However, if the vote requires a majority of "outstanding shares," then broker non-votes will be included in the denominator because they are included within outstanding shares. In this situation, a broker non-vote essentially amounts to a vote against the proposal. Because broker non-votes raise the number of "yes" votes that will be needed to pass proposals, some companies have sought to circumvent the issue by failing to tabulate broker non-votes or lumping the broker non-votes with "yes" votes.

The *Astrotech* case illustrates the issue. On May 12, 2020, Astrotech Corporation filed a proxy soliciting

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stockholder approval for various proposals, including a Certificate Amendment that would authorize 35,000,000 new shares. Under the company's rules, approval of the Amendment required a majority of outstanding shares. Since 7,575,464 shares of common stock were outstanding, approval of the proposal required 3,787,733 "For" votes. The Certification Amendment was a non-routine matter, meaning a stockholder's failure to vote on the proposal would create a broker non-vote, effectively a vote against the Amendment.

On June 29, 2020, Astrotech held its annual shareholder meeting and released the results of the vote. The Certificate Amendment was approved by 5,306,464 "For" votes to 1,030,210 "Against" votes; however, not a single broker non-vote was tabulated. This omission was even more glaring considering that broker non-votes were correctly tabulated for the other two non-routine proposals – the votes on the directors and the vote on the Plan Amendment. All five directors and the Plan Amendment proposal received exactly 3,500,819 broker non-votes. The discrepancy suggests that Astrotech improperly counted the broker non-votes as "For" votes to pass the Certificate Amendment.

Properly tabulated, the Certificate Amendment received 1,805,645 "For" votes, 1,030,210 "Against" votes, 35,509 abstentions, and 3,500,819 broker non-votes. The voting standard required a majority of outstanding shares, and because only 1,805,645 of the 7,575,464 outstanding shares voted "For," the Certificate Amendment failed to pass. By tacking the broker non-votes to the "For" votes, Astrotech had circumvented the will of its stockholders and improperly approved the issuing of 35,000,000 new shares.

The voting error raised new problems when the company scheduled its next shareholder meeting in 2021. Specifically, Astrotech improperly issued 9,596,206 shares over the 15,000,000 authorized limit. These unauthorized shares represented approximately 40 percent of the proper voting power. If the 2021 shareholder meeting were allowed to proceed, the unauthorized shares would have rendered the outcome invalid because it would have been impossible to tell whether the proposals were approved by valid or invalid shares. At this point, Pomerantz intervened on behalf of an Astrotech stockholder and initiated litigation in the Delaware Chancery Court to void the 2019 Certificate Amendment.

The company admitted its error and negotiated a settlement whereby Astrotech agreed to file a motion for approval under the Delaware General Corporation Law § 205, which allows the Chancery Court to approve and remedy corporate actions that were tainted by technical errors that may result in accidental harm. In this case, the Court used § 205 to approve the 2019 Certification Amendment and the shares issued under the Amendment's authorization.

Gustavo F. Bruckner, Partner

Astrotech also agreed to implement certain corporate governance policies. Specifically, the Audit Committee Charter was amended to require proxy review procedures, such as requiring an outside advisor to aid the Board in evaluating proxies for errors and omissions. Such a third-party review would likely have caught the error in the applied voting standard.

Given the opportunity for mischief that surrounds broker non-votes, shareholders can expect to see more cases concerning defective proxies due to broker non-vote issues.

The Slippery Status of NFTs

By Brandon M. Cordovi

Non-fungible tokens ("NFTs") have become scorching hot commodities, which has led the largest and most powerful brands across various industries to mint their own. Like cryptocurrencies, the surge in popularity of NFTs has raised difficult questions concerning whether they function as securities, which would subject them to regulation by the U.S. Securities and Exchange Commission ("SEC") and compliance with securities laws.

NFTs are digital assets whose authenticity and ownership are recorded, or minted, on a blockchain. These assets may range from digital artwork created by a known artist, such as Alec Monopoly, to an NBA video highlight of Jalen Brunson draining a game-winning shot for the

CORPORATE GOVERNANCE ROUNDTABLE

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October 23, 2023
Rome, Italy

WITH SPECIAL GUEST SPEAKER

Former Prime Minister Sir Tony Blair

Pomerantz is pleased to announce that on October 23, 2023, it will host its next Corporate Governance Roundtable in Rome, Italy. This will be the Firm's first Roundtable in Europe. With offices in New York, Chicago, Los Angeles, Paris, Tel Aviv – and most recently, London – Pomerantz is committed to serving its clients wherever they are based.

Pomerantz is known for presenting remarkable special guest speakers at its Roundtables and this year is no exception. Speaking at Pomerantz's Roundtable in Rome will be the former British Prime Minister, the Right Honourable Sir Tony Blair.

Sir Tony was born in Edinburgh, Scotland and, after studying law at Oxford University, he practiced law in the U.K. as a Barrister. Sir Tony served as Prime Minister of Great Britain and Northern Ireland from 1997 to 2007, the only Labour leader in the party's 100-year history to win three consecutive elections. As Prime Minister, Sir Tony helped bring peace to Northern Ireland, securing the historic *Good Friday Agreement* in 1998. A passionate advocate of an interventionist foreign policy, Sir Tony created the Department for International Development, tripled the UK's foreign aid to Africa, and introduced landmark legislation to tackle climate change.

Since leaving office, Sir Tony devotes most of his time to helping governments deliver effectively for their people, working for peace in the Middle East, and countering extremism. In 2016, he established the Tony Blair Institute for Global Change, whose global team works in more than 20 countries across four continents to support leaders with strategy, policy and delivery. They contribute fresh analysis, practical policy solutions and embedded support in response to such challenges as Covid-19, the war in Ukraine, the tech revolution and the net-zero transition.

Pomerantz's Roundtables gather institutional investors from around the world to share knowledge and engage with leading experts in the areas of corporate governance, ESG, regulatory policies, and other issues that affect the value of the funds they represent.

Seating at the Rome Corporate Governance Roundtable is limited. To express interest in this one-day event, kindly email:
pomerantzroundtable2023@pomlaw.com

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Brandon M. Cordovi, Associate

Knicks. The unique identification code and metadata assigned to each NFT is baked into its token and makes it non-fungible. NFTs can be traded and exchanged for money, cryptocurrencies, or other NFTs. NFTs, like cryptocurrency, are stored in digital wallets. Although the image linked to one NFT may be identical to the image linked to another NFT, the tokens themselves are not interchangeable. This distinguishes NFTs from cryptocurrencies. Cryptocurrencies are interchangeable, or fungible, tokens. A digital crypto coin on one blockchain is equal in value to any other digital crypto coin on the same blockchain, in the same way one dollar equals, and is exchangeable with, any other dollar. On the other hand, there may be countless NFTs of the same image – a baseball card, for example – but each NFT has its own unique identifier, akin to a numbered series of the same baseball card, and although it can be traded, it is not interchangeable with any other NFT.

Significantly, when an NFT is purchased, the purchaser only acquires the NFT. Generally, ownership rights over the image attached to the NFT remain with the creator of the work. NFTs derive their perceived value based on their scarcity. Thus, NFT developers often issue their NFTs in limited drops, making them more difficult to obtain. The rarer in NFT is, the higher its value. Additionally, the work attached to the NFT also impacts its value.

A blockchain, on which an NFT's authenticity and ownership are recorded, provides a unique decentralized method of digitally storing information. The information is collected and stored in blocks which are linked together via cryptography. The key perceived benefit of a blockchain is that it is more secure and trustworthy than centralized authorities because it stores its information in multiple locations and intentionally makes it more difficult to add, change or remove information.

The definition of a security in the Securities Act is broad and includes the term "investment contract" within it. However, the Securities Act itself does not clarify what constitutes an "investment contract." The Supreme Court addressed this issue and provided a framework for determining what is an investment contract, and, therefore, a security that must be registered with the SEC, in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Based on the definition set forth in *Howey*, courts have applied a three-pronged test to determine what constitutes an investment contract. To satisfy the *Howey* test, the moving party must demonstrate: (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profits derived from the efforts of the promoter.

The manner in which NFTs are acquired should satisfy the first prong of the *Howey* test without opposition. To obtain an NFT, an individual or entity must purchase it in exchange for money.

The second prong of the *Howey* test, establishing a common enterprise, is a little trickier. A common enterprise can be demonstrated through a showing of either horizontal or vertical commonality. Plaintiffs will likely focus on horizontal commonality to satisfy this prong as it is more favorable, given how NFTs function. Horizontal commonality requires: (1) the sharing or pooling of the funds of investors; and (2) that the fortunes of each investor in a pool of investors are tied to one another and to the success of the overall venture.

To demonstrate the sharing or pooling of funds, the movant must first demonstrate that the funds received by the promoter through an offering are reinvested by the promoter into the business or, more broadly, are tied to an improvement of the ecosystem as a whole. Whether a particular NFT offering meets this requirement may vary on a case-by-case basis, based on the amount of entanglement and dependence there is between the developer of the NFT and the operator of the blockchain on which it is recorded. In a recent decision in the Southern District of New York ("S.D.N.Y."), Judge Marrero found that this requirement was met where the defendant was the owner and operator of the NFT platform and also the creator, developer and operator of the blockchain on which it ran. Because the success of the NFT was entirely dependent upon the success of the blockchain, it could be plausibly alleged that the company operating both would use funds generated to grow the totality of its network. For similar reasons, the court found that the second requirement – that the investors and enterprises' fortunes be tied – was also met.

However, the S.D.N.Y. decision was narrow and explicitly limited to the particular facts of that case. Many NFT platforms are structured differently, with separation between the owner and operator of the NFT platform and the blockchain on which it relies. Without the overt substantial entanglement between the two, it will be more challenging to establish horizontal commonality, which will largely turn on just how close the relationship between the two is. Additionally, this prong may turn on whether plaintiffs make specific allegations regarding how the funds at issue are being used in conjunction with both the NFT platform and its infrastructure.

The third prong of the *Howey* test is also subject to debate, presenting another hurdle to clear for plaintiffs looking to establish that NFTs are securities. It requires the expectation of profits derived from the efforts of a promoter. Courts have consistently held that this is an objective test.

The expectation-of-profits prong likely turns on the public statements disseminated by the developer of a particular NFT in conjunction with the totality of the circumstances surrounding its issuance. Public statements that explicitly tout the ability to generate profit through the purchase of a particular NFT should easily satisfy the first portion of

this prong. Further, Judge Marrero, in the S.D.N.Y., recently rejected an argument that statements that do not explicitly reference gains or losses do not give rise to the expectation of profits. Consistent with this decision, statements, such as those touting record sales of a particular NFT, may give rise to the expectation of profits when considering the cost of acquiring NFTs on that platform.

Another argument related to the third prong, which may prove more difficult for plaintiffs to overcome, is whether purchasers of NFTs do so based on their desire to collect and consume them. For example, a die-hard New York Mets fan may purchase Mets-affiliated NFTs, with no intention on turning a profit, because of their strong passion for the team and their personal enjoyment. Drawing this distinction may pose a difficult challenge. However, one court has already determined that drawing this distinction is not necessary at the dismissal stage, despite such challenges.

Whether profits are derived from the efforts of the promoter poses similar questions to those assessed when evaluating horizontal commonality. This will require a case-by-case assessment of how the particular operation is organized and functions to determine how dependent those who purchase a particular NFT are on the efforts of its developer.

Since the *Howey* test depends on a wide range of factors that are unique to both the NFT platform being assessed and the blockchain on which it operates, determining whether an NFT is a security requires a case-by-case analysis. Given NFTs' recent rise to prominence, as more class action litigation is brought against NFT developers, it will become clearer what plaintiffs must plead to establish that an NFT is a security subject to the securities laws. Additionally, it will be important to track whether the SEC takes a particular interest in NFTs, as it has identified the regulation of emerging technologies and crypto assets as one of its 2023 priorities. The landscape of NFTs is ever-evolving and more clarity regarding whether they are securities, subject to regulation by the SEC, should be obtained as courts and relevant agencies hone in on them. ■


Jennifer Pafiti


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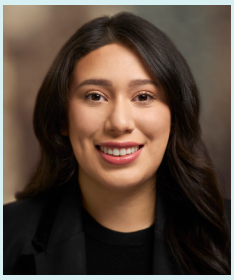
Kaylan Perez


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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

JORDAN LURIE will be a panelist at the **ABA Tort Trial & Insurance Practice Motor Vehicle Product Liability Conference** in Scottsdale, Arizona from April 19-21.

On April 21, **MARC GROSS** will participate in **Loyola University Chicago School of Law's** conference on **Financial Regulators Under Siege** in Chicago, Illinois.

KAYLAN PEREZ will attend the **SACRS Spring Conference** in San Diego, California from May 9-12.

From May 21-24, **JENNIFER PAFITI** and **JANALEE SPENCER** will be attending the **NCPERS Annual Conference & Exhibition** in New Orleans, Louisiana. During the event, **JENNIFER** will participate on a May 22 panel titled, **"Securities Litigation: How to Protect Plan Assets."**

JANALEE will attend the **FPPTA 39th Annual Conference** in Orlando, Florida from June 25-28.

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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.

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