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Goldman Sachs Cert Redux

By Justin D. D'Aloia

On August 10, 2023, the Second Circuit issued its highly anticipated decision in the long-running *Goldman Sachs* class certification saga. This action, begun almost eight years ago, has traveled on repeat visits through the federal judicial system, producing a series of interesting appellate rulings, including a 2021 decision by the Supreme Court. The current Second Circuit appeal arose from the district court's decision to grant class certification for the third time following remand from the Supreme Court in 2021 and resulted in the Second Circuit decertifying the class based on the "mismatch" test established by the Supreme Court for cases premised on an "inflation maintenance" theory, like this one. In so ruling, the Second Circuit became the first federal court of appeal to apply the Supreme Court's test, paving the way for a new body of law to emerge around this novel analytical framework.

The issue before the Second Circuit was whether defendants produced sufficient evidence to rebut the presumption of reliance established by the Supreme Court in its seminal 1988 decision, *Basic Inc. v. Levinson*. To gain class certification, plaintiffs must prove that common questions of law or fact predominate over individual questions. *Basic* dispensed with the need to prove, in securities class actions, that individual investors relied on a defendant's misrepresentations when buying or selling securities. Instead, it established a legal presumption that the price of a stock trading on an efficient market like the NYSE or Nasdaq reflects all the company's material public statements, including any misrepresentations, and, therefore, investors rely on the integrity of the market price when they decide to buy or sell that stock. *Basic* emphasized that a plaintiff's claim to its presumption of reliance can be rebutted by defendants with competent evidence, and the Supreme Court has made clear in subsequent decisions that one way to do so is to show that the alleged misrepresentations did not actually affect the market price of the stock. Consequently, this has become a common battleground for parties litigating such cases.

The *Goldman* case presented a unique backdrop for this battle. The lawsuit was first filed in 2010 after it came to light that Goldman paid a $550 million fine to the SEC for allegedly failing to disclose conflicts of interest tied to several collateralized debt obligation transactions. The plaintiffs alleged that Goldman misled investors by making several statements in its SEC filings claiming to have robust conflicts of interest procedures. It was undisputed that the challenged statements did not cause any cognizable *increase* in Goldman's stock price, however that alone was not enough to rebut the *Basic* presumption of reliance. Even before *Goldman* was first filed, courts around the country had begun to accept the view that it is possible for misstatements to *maintain* inflation already existing in a stock price or, stated differently, prevent the stock from declining, depending on the nature of the misstatement, including, for example, if the misstatements align with market expectations. In such cases, the price drop that occurs when the truth is revealed serves as indirect evidence to infer that there was inflation present in the stock price at the time of the misstatements.

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After surviving a motion to dismiss the case in 2012, the plaintiffs moved to certify a class. Goldman opposed the motion, seeking to rebut the *Basic* presumption by proving a lack of price impact. The trial court disagreed and certified a class in September 2015. In 2018, the Second Circuit overruled that decision and remanded for further proceedings. The Second Circuit held that defendants seeking to rebut the *Basic* presumption bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence, and the district court's decision left unclear whether it applied that standard or not. It also held that the district court erred by failing to consider evidence that there was no decline in Goldman's stock price in response to media coverage which reported on Goldman's conflicts of interest on 36 different dates before the first corrective disclosure in 2010.

On remand, the district court again certified a class, finding that Goldman's evidence—including the pre-disclosure media reports—failed to prove a lack of price impact by a preponderance of the evidence. The Second Circuit affirmed. After accepting the case for review, the Supreme Court agreed that a defendant must carry the burden of proving a lack of price impact by a preponderance of the

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evidence to overcome the *Basic* presumption, but it declined to decide whether Goldman did so. Instead, it held that courts should consider "*all* probative evidence" that bears on the question of price impact, including the generic nature of the misstatements themselves, and remanded for further proceedings because it was unclear if the Second Circuit considered that evidence. In doing so, the Supreme Court observed that the generic nature of a misrepresentation can be important evidence of a lack of price impact in cases proceeding on an inflation maintenance theory because the probative value of a back-end price drop begins to break down when there is a "mismatch" between the specificity of a corrective disclosure and earlier misstatements. Because it is less likely that a *specific* disclosure actually "corrects" a generic misrepresentation, reasoned the Supreme Court, the ability to infer front-end inflation from the back-end drop becomes weaker.

Applying the Supreme Court's mismatch test, the district court certified a class for the third time in late 2021, and the Second Circuit once again agreed to review the decision.

In its recent ruling, the Second Circuit first determined that the district court was not wrong to reject Goldman's attempt to present the 36 pre-disclosure reports as "alternative corrective disclosures" in an effort to blunt or negate the corrective nature of the corrective disclosures from 2010 set forth in the complaint. Among other things, the Second Circuit credited the district court's findings that the pre-disclosure reports did not reveal many of the facts in the 2010 disclosure that detailed the conflicts of interest, including "incriminatory emails and memoranda," and, unlike the 2010 disclosure, their corrective impact was mitigated by repeated denials by Goldman.

However, the Second Circuit disagreed with the district court that several of the misstatements were not too generic when read in conjunction with the other less generic, more specific, misstatements. The panel highlighted that the two sets of statements at issue were made in *separate* SEC filings, and while an otherwise generic statement can be misleading based on its "context," that refers to the state of a company's affairs at the time of the statement, not to other statements made in separate SEC filings.

The Second Circuit also faulted the district court for using the specific facts revealed in the 2010 corrective disclosure as a basis to determine how the market would react if the company had spoken truthfully instead of making a misstatement. After reviewing its previous decisions on the inflation maintenance theory and the Supreme Court's recent guidance, it explained that, in cases where there is a mismatch and the corrective disclosure does not directly refer to the earlier generic statements, the proper inquiry focuses on whether an *equally generic* truthful statement would have dissipated the inflation maintained by the generic misstatement. This, the Second Circuit said, can take the form of evidence that (i) the generic statement was capable of maintaining inflation in the stock price; or (ii) that an equally generic truthful statement would have had a negative effect on the stock price. Citing a recent class certification win by Pomerantz in *Ferris v. Wynn Resorts Ltd.* as an example, the Second Circuit explained that "pre- or post-disclosure discussion in the market regarding a generic front-end misstatement" can provide powerful evidence of this sort. But it cautioned that commentary merely focusing on the "topic" of the disclosure is insufficient; the commentary must address the generic statements themselves to bear on the question of price impact.

Applying these principles, the Second Circuit decided that decertification of the class was warranted because Goldman successfully severed the link between the specific disclosures that precipitated the back-end drop and the generic front-end misstatements. It highlighted that Goldman came forward with 880 analyst reports issued before the 2010 corrective disclosure which made no reference to those statements, and that the market commentary advanced by the plaintiffs only addressed the "subject matter" of Goldman's conflicts without touching on any of the misstatements on that topic.

There is something for everyone in the *Goldman* decision. But whether its logic extends to stages of litigation other than class certification, or its unique facts will merely reinforce the distinctive nature of this case, remains to be seen. Even the Second Circuit recognized that "whatever analytical approaches might be warranted in future cases" remains an open question. At the very least, it offers new guidance for parties litigating price impact in mismatch cases, particularly with respect to evidence of market commentary, and demonstrates just how challenging the issues that arise in connection with that seemingly straightforward inquiry can be. What this decision means for plaintiffs going forward is still unknown, but it has certainly imposed obstacles to attaining class certification and, thus, will likely lead to an increase in mismatch disputes at the class certification stage. As such, plaintiffs may focus their challenge on more specific misstatements to avoid such disputes altogether or otherwise increase their reliance on other forms of evidence beyond market commentary which have the potential to bear on the question of price impact. ■

Pomerantz Defeats Motion to Dismiss in *In re Bed Bath and Beyond Sec. Litig.*

By Omar Jafri

In a significant victory for investors, Pomerantz defeated an attempt to dismiss a securities fraud complaint against Ryan Cohen ("Cohen") and his investment entity, RC Ventures LLC, in connection with a scheme

to pump and dump the securities of Bed Bath and Beyond, Inc. ("BBBY"). While the Firm often prevails at the pleading stage of securities fraud actions, this case is unique because we convinced a federal court that misleading emoji can be actionable misrepresentations under the federal securities laws. We also showed that claims for scheme liability are viable even if there is significant overlap between a defendant's statements and his overt acts, and that liability for market manipulation under Section 9 of the Securities Exchange Act of 1934 can extend to professional traders.

Cohen, a billionaire investor, took control of GameStop Corp. ("GameStop") in 2021 at or around the time that an online community of retail investors used their collective power to drive up GameStop's stock price and squeeze short sellers. This cemented Cohen's role as one of the principal leaders of the meme stock movement. An army of retail investors began to follow his every move, purchasing shares of companies that Cohen invested in or otherwise endorsed. In 2022, Cohen followed the GameStop blueprint to purchase a large stake in BBBY. Retail investors immediately reacted with enthusiasm, causing BBBY's stock price to experience the largest intraday percentage increase since the company went public in June 1992.

When Cohen bought nearly 10% of BBBY's stock in March 2022, he claimed that he alone could turn the company around and save it from a downward spiral of sky-high debt and lethal liquidity concerns. Cohen believed that a sale or spin-off of BBBY's crown jewel asset, buybuy BABY, would reverse a decade-long decline in profitability. Pursuant to a cooperation agreement with BBBY, three of Cohen's handpicked Directors were placed on the Board, including two chosen to serve on a newly formed Strategy Committee specifically charged with exploring Cohen's turnaround strategy of selling or spinning off buybuy BABY.

We alleged a strong basis to infer that Cohen knew, no later than the summer of 2022, that a sale or spin-off of buybuy BABY was impossible. In particular, the company entered into a new loan agreement in August 2022 in which it specifically pledged buybuy BABY as collateral to secure loans. Because of the time required to negotiate the complex loan agreement, the number of parties involved in the negotiations, and the company's admission that it had been working on the expanded loan package for weeks before it was finalized at the end of August 2022, it is inconceivable that Cohen was not informed by BBBY's management that his turnaround strategy was doomed before he dumped his holdings in August 2022. The district court accepted these logical inferences as compelling to deny Cohen's motion to dismiss.

Knowing that his turnaround strategy for BBBY was impossible to implement, Cohen searched for a way to end his investment in the company without suffering a significant loss. We allege that Cohen leveraged his leadership position in the meme stock movement to encourage investors to buy BBBY securities while he secretly planned to sell his own shares. On August 12, 2022, Cohen sent a misleading tweet with a moon emoji, which is a rallying cry in the meme stock subculture to take the stock price "to the moon." A few days later, Cohen filed a Schedule 13D disclosing that he had amassed over 10% of the company's shares, a fact that he knowingly or recklessly failed to disclose months earlier as required by SEC rules. Consistent with Cohen's past experiences, BBBY's stock price exponentially rose again in response, as investors were led to believe that Cohen not only held but increased his holdings in BBBY. On the same day, Cohen also filed a Form 144, which misleadingly described any future transactions in BBBY securities as "potential" even though Cohen had used material, nonpublic information to sell millions of shares hours before filing the form. On August 18, 2022, the market learned that Cohen had sold all his BBBY shares and options on the previous day, converting a loss of over $80 million into a profit of over $68 million. As a result, the company's stock price collapsed over the next three trading days.

Rejecting Cohen's argument that the tweet was mere puffery, the district court became the second federal court in the country to conclude that emoji can be actionable misrepresentations. The court reasoned that emoji are symbols that can be used to effectively communicate powerful ideas. Here, the moon emoji symbolized Cohen's confidence in BBBY and acted as a catalyst to drive up the stock price and trading volume in BBBY securities. Given Cohen's leadership role in the meme stock movement, his access to inside information at BBBY, and his influence on BBBY's management, the court found that retail investors took Cohen's message as an "expert insider's direction to buy or hold" BBBY's securities, and that Cohen's subsequent SEC filings were misleading because he failed to disclose a predetermined plan to sell all his shares.

Scheme liability, a notoriously difficult claim to plead, was also sustained. The scheme liability provisions under SEC Rule 10b-5(a) and (c) broadly prohibit "any device, scheme, or artifice to defraud" and any "act, practice, or course of business" that operates as a fraud on the market. Although scheme liability can extend to overt acts that are separable from a defendant's statements, it is unclear which acts can qualify to assert a claim. A further complication is that many courts refuse to allow a scheme liability claim to proceed if a complaint primarily alleges a collection of misstatements and omissions. Here, the court correctly recognized that Cohen's conduct went beyond making misrepresentations. Cohen not only made false statements, but also

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strategically delayed filing a form documenting that his total interest in BBBY exceeded 10% to stimulate demand and drive up the company's stock price. Further, Cohen slow walked filing a form showing that he sold all his BBBY securities in order to keep the company's stock price elevated while he secretly exited his position. The court ruled that we properly pled a claim for scheme liability because Cohen's actions constituted a premeditated course of conduct that included more than just misrepresentations or omissions.

Finally, Pomerantz broke new ground in convincing the court that market manipulation claims under Section 9 of the Exchange Act are not confined to brokers and dealers, but also extend to professional traders such as Cohen. Case law on Section 9 is sparse and claims brought under this provision rarely succeed. There is no case law interpreting Section 9(a)(3). Cohen argued that Section 9(a)(3) should be limited to brokers and dealers since they are identified in the statute as individuals to whom liability may attach. We argued that Cohen ignored other provisions of Section 9(a)(3) that applied to him. In particular, the statute imposes liability for market manipulation claims on "any person" who disseminates information "in the ordinary course of business." The court concluded that this catchall provision of Section 9(a)(3) applied to professional traders like Cohen, agreeing that we had the better reading of the law.

The case is now in discovery. Plaintiff and the purported Class expect to develop substantial evidentiary support for their allegations. ■

Emoji and the Law

By Brett Lazer,
an Editor of *The Pomerantz Monitor*

Pomerantz's recent victory overcoming the defendants' motion to dismiss in *In re Bed Bath and Beyond Securities Litigation* (discussed above by Omar Jafri) constitutes a win not only for shareholders, but also for one of the most ubiquitous forms of modern communication: the emoji. A key point in the case turns on a tweet sent by the defendant, Ryan Cohen, in which Cohen allegedly used the "smiling moon" emoji to encourage his legions of followers to buy Bed Bath and Beyond stock before he sold his investment. In denying Cohen's motion to dismiss, Washington DC district judge Trevor McFadden became the second federal judge to hold that an emoji could be considered an actionable misrepresentation. Emoji are a relatively new subject for the courts, and this ruling highlights the issues at play in bringing novel forms of digital communication in line with the U.S. legal system.

In the meme stock subculture, in which Cohen, a billionaire investor, is a well-known influencer, the "smiling moon" emoji is common shorthand for "to the moon," an indication that a stock's price will rise. Cohen's followers got the message of his tweet, buying Bed Bath and Beyond stock and driving up its share price. Four days later, Cohen sold his shares in Bed Bath and Beyond for a $68 million profit. When the market learned of the sale, Bed Bath and Beyond stock lost more than half its value, leaving investors with staggering losses.

This is the classic mechanism of a pump-and-dump scheme: drive up the stock price and then sell your shares before everyone else finds out. The question is whether Cohen's tweet, and specifically the use of the "smiling moon," could legally be considered part of the "pump." In his motion to dismiss, Cohen claimed that the emoji could have any number of meanings, asserting that, "there is no way to establish objectively the truth or falsity of a tiny lunar cartoon." However, the court rejected this line of reasoning, declaring that, just like spoken or written language, symbols constitute a mode of communication that can have clear meanings given context clues.

In so ruling, the court cited several precedents on the use of language and symbols. The first is *West Virginia State Board of Education v. Barnette* (1943), in which the U.S. Supreme Court held that the Free Speech Clause of the First Amendment protects students from having to salute the American flag in public schools. Discussing the power of the flag as a symbol, Justice Robert Jackson, writing for the majority, states that, "[s]ymbolism is a primitive but effective form of communicating ideas." Even if his description of symbolism as "primitive" has not held up well, Jackson cites numerous examples of the efficacy of symbolic communication: "The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment." The emoji in Cohen's tweet was not just a visual flourish, but a key part of the message.

The second case cited in the Bed Bath and Beyond ruling is *Spence v. Washington* (1974). If the *Barnette* ruling affirmed the power of symbols to communicate, *Spence* held that context can resolve symbolic communication into a clear meaning. *Spence v. Washington* concerned a student who, in May of 1970, displayed an upside-down American flag with a peace sign affixed to it in his dorm room window. Coming on the heels of the U.S. invasion of Cambodia and the killings at Kent State, the student claimed his act was meant to convey that "America stood for peace." In upholding the student's flag display as a form of protected expression, the Supreme Court's *per curiam* decision stated that, "the context in which a symbol is used for purposes of expression is important." The decision continues, "In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, [both] issues of great

public moment . . . A flag bearing a peace symbol and displayed upside down by a student [in 1974] might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it."

Taken together, the *Barnette* and *Spence* decisions reflect the Court's acceptance that symbols have the power to communicate ideas, and that context can render a symbol's meaning clear for most viewers. Therefore, it is not surprising that the court in *Bed Bath and Beyond* rejected Cohen's argument that the meaning of the emoji was ambiguous. As Judge McFadden stated in his ruling, "meme stock investors conceivably understood Cohen's tweet to mean that Cohen was confident in Bed Bath and that he was encouraging them to act."

In summing up its position, the court declared: "A fraudster may not escape liability simply because he used an emoji." However, this pronouncement opens a glaring question: Why would Cohen have thought any differently? It is here that the peculiarities of communication in the digital age come into play. First, emoji are often viewed as an unserious form of communication. They are brightly colored, stylized, and often whimsical. It is a lexicon that features smiling ghosts, snorkeling gear, and a rainbow lollipop. Cohen's description of the moon emoji as a "tiny . . . cartoon" underscores this perspective, rhetorically diminishing emoji and relegating them to the realm of children's entertainment.

Second, there is a tongue-in-cheek quality to the discourse surrounding the meme stock subculture. *Investopedia* notes that r/wallstreetbets, the main internet hub of meme stock activity, is "known for its unconventional and often irreverent tone." Interest in the first successful meme stock, GameStop, was sparked by a YouTube persona using the moniker Roaring Kitty, and people in the meme stock world are known to refer to stocks using the ironic misspelling "stonks." Even the term "meme stock," which brings to mind humorous viral internet images, suggests frivolity.

For these reasons, it can be tempting to write off any activity in the meme stock world as no more than an ironic prank perpetrated by anonymous internet denizens with unorthodox usernames who communicate in acronyms and smiley faces. The *Bed Bath and Beyond* ruling demonstrates that underneath this veneer of flippancy lies a well-defined system of symbolic communication with a relevant discourse that informs its meaning. These are elements governed by a robust body of case law, which is capable of piercing any attempts to rhetorically diminish them. It has been estimated that 10 billion emoji are sent every day. They are more than just "tiny cartoons," they are a powerful form of contemporary communication, and deploying them offers their user no special protection from the full force of the law. ■

Priorities for CEOs and Directors Implementing AI

By Dean P. Ferrogari

Trailing behind the rapid progress of artificial intelligence (AI) are companies struggling to effectively implement the technology into everyday operations. Artificial intelligence is an umbrella term that covers a variety of capabilities such as machine learning, deep learning, natural language processing, voice recognition, and text analytics. AI technology aims to mimic human thinking by making assumptions, learning, reasoning, problem solving, or predicting with a high degree of autonomy. In the future, legal precedents will be instructive when navigating the implementation of AI in the corporate sphere, but in the interim, AI systems are being deployed without the legal guard rails of bright line rules. Environmental, social, and governance (ESG) protocols are a natural starting point for AI governance and risk mitigation. Corporate boards will become increasingly accountable for the legal compliance associated with implementing AI systems, and at this stage, the perspectives of CEOs both provide a picture of how legal regulations are taking shape as well as best practices for integrating AI into company operations in the absence of clear governmental guidance.

Dean P. Ferrogari, Associate

Board directors are uniquely positioned to ensure their companies are reaping the benefits of AI while avoiding the risk of litigation. As the impact of artificial intelligence becomes clearer, recent litigation trends indicate that directors are more likely to face personal liability for problematic incidents caused by AI. Board members owe a fiduciary duty of care and loyalty to their companies, which requires members of the board to make educated decisions in the best interest of the company. Directors will expose not only their businesses but also themselves to legal liability if they fail to uphold their fiduciary duty and mitigate preventable harms from AI systems implemented at their companies. However, implementing AI into pivotal company operations leads to the inevitable risk of legal liability. Thus, the responsible deployment of a company's artificial intelligence falls directly within the board's purview.

ESG considerations provide a starting point to combat the potential harms generated by AI. The environment, or "E," will continue to be a hot topic as AI amasses a significant carbon footprint. Corporate leadership has already begun focusing on the "S," or societal implications, where harms are pervasive and liability is imminent. Boards must ensure that AI does not perpetuate discrimination, physical harm, or liability to those utilizing the technology. If tailored correctly, AI can combat harms and support best practices for board governance, or "G." For example, board members must avoid blindly deploying AI systems that have been trained on data sets comprised predominately of Caucasian male users, as these systems tend to perpetuate bias.

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By operating transparently, user equity can be enhanced by noting when AI programs have only been tested and trained on small subset populations.

There are three key steps that board members should consider in anticipation of installing AI governance programs. First, directors must understand how extensive AI bias is—both in the context of a person's willingness to trust the technology as well as the biases embedded within AI. Humans find it difficult to comprehend how AI reaches a decision, and even after developers deliver AI to the user, the system continues to learn based on the data it absorbs. Thus, consumers are unconvinced that the decisions purportedly made by AI are not manipulated by the provider of the service deploying the AI, which may result in a distrust of both the technology and the company.

Second, directors must comprehend how human bias naturally infiltrates AI. Artificial intelligence is neither neutral nor infallible. The mathematical formulas supporting AI algorithms are encoded with opinions and presented—or disguised—as empirical fact, which can reinforce injustices that quietly inflict harm. Biases can infiltrate artificial intelligence through human touch points during the AI's lifecycle. From the initial framing of a problem deemed worthy of AI solutions, to product design, data collection, development, and testing—human biases can enter throughout the process. Each stage of the AI lifecycle is limited by the experience of the overseeing team and reinforced in the data through the team's learned biases.

Each touchpoint, however, can act as an opportunity to identify and eliminate harmful biases. For example, Isabelle Bousquette from the *Wall Street Journal* recently reported that Levi Strauss & Co. faced public backlash when announcing that it would be testing the use of AI to generate images of more body-inclusive models. Levi Strauss's AI testing was part of an effort to create a more inclusive and diverse consumer experience; however, critics argued that this initiative deprived diverse models of work while solely addressing calls for the company to boost diversity. Levi Strauss stated that the company did not see the effort as a substitute for actions that must be taken to deliver on its diversity goals and added that it is committed to testing new technology while being mindful of feedback from consumers and stakeholders. Based on this criticism, Levi Strauss is now developing ethical guidelines for the responsible deployment of AI. Risk management should occur at each stage of the AI lifecycle. Training internal and external teams to identify AI biases will enable board members to implement the necessary precautions at different stages of the AI lifecycle.

Finally, directors need to develop the strategy they intend to deploy. When a company fails to institute AI governance, shareholders will likely hold liable those who were in a position to act during the time the harm became visible. Recent studies show that an overwhelming number of executives are not currently in a position to respond to a call to action from board members. Most companies now implement AI in an ad hoc manner that poses a significant risk to their commercial health. Boards must ensure that executives get up to speed with regard to responsible AI governance.

While each company will craft a message that reflects its unique business and culture, there are five basic principles that CEOs can embrace: (1) Trust; (2) Inclusivity; (3) Data Protection; (4) Transparency; and (5) Accountability. **Trust.** Companies continuously work at gaining and maintaining the trust of their customers, employees, and communities. Generative AI threatens to undermine trust by replacing a human voice with an automatically generated one. However, promoting a human voice at the top is essential for companies to maintain trust with clients. Any use of generative AI must be carefully reviewed for accuracy and reliability. **Inclusivity.** As a result of algorithms and the data they draw upon, generative AI includes inherent biases. Companies need to review AI tools and the information they generate for inclusivity and fairness. **Data Protection.** Data security has become a focal point for companies. Companies need to be equally mindful of safeguarding privacy and protecting their intellectual property, both of which are threatened by AI. CEOs should reinforce their company's data protection principles with employees and strengthen existing policies. **Transparency.** Companies must be transparent about their use of AI. By acknowledging in plain language how the company intends to use AI, they will not only build trust but mitigate unforeseen problems from miscommunications. **Accountability.** The issues and liability that arise with generative AI will fall on the humans responsible for deploying the technology. Companies must ensure that they are using generative AI carefully, ethically, and within the parameters of applicable law and regulation. In the event of misuse or error, companies need to take corrective action and have predetermined protocols in place for reporting breaches.

Proactive mitigation measures must be taken to effectively prevent AI biases from infiltrating company operations and becoming the subject of litigation and front-page stories in the media. Companies and their governing boards are likely to face increased liability if they use AI in furtherance of critical business operations. Corporate management should decide how the AI systems are used, and to what extent its decision-making process is explained. In making these critical decisions, management must assess the risks of deploying AI against its potential benefits. AI-related liabilities, litigation, and regulation are coming, and companies must prepare by establishing AI governance with the goal of reducing both the risks and harms associated with artificial intelligence while benefiting from the advantages it offers. ■

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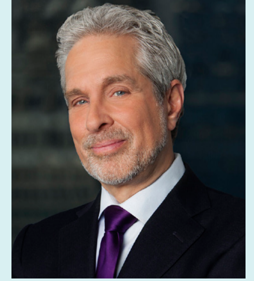
Marc I. Gross

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

KAYLAN PEREZ will attend the **SACRS Annual Fall Conference** in Rancho Mirage, CA from November 7-10.

JENNIFER PAFITI will host an **institutional investor lunch** on November 7 in London, UK with guest speakers Alastair Campbell and Rory Stewart, hosts of the hit podcast **"The Rest is Politics."**

From November 9-10, **MARC GROSS** will be hosting the **ILEP-University of Pennsylvania Carey Law *Journal of Business Law* Symposium: The Future of ESG** in Philadelphia, PA. On November 10, **EMMA GILMORE** will moderate a panel at the symposium titled **ESG & Disclosure Practices.**

From November 28-29, **JEREMY LIEBERMAN, JENNIFER,** and **DR. DANIEL SUMMERFIELD** will be in Dubai for the **IGN-Hawkamah Conference; JEREMY** and **DANIEL** will participate in a panel at the conference on November 28.

On December 6, **DANIEL** will present **Understanding Securities Litigation for Trustees** via Zoom as part of **Quietroom's Wednesday Wisdom series.**

In light of the tragic events taking place in the Middle East, Pomerantz will postpone this year's Corporate Governance Roundtable. We look forward to welcoming you at a future date.

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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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