

A photograph of the United States Capitol building in Washington, D.C. The image shows the iconic white dome and the surrounding stone architecture. In the foreground, a large American flag is flying on a tall pole. The flag is partially obscured by a larger, semi-transparent American flag graphic that covers the top half of the image. The overall scene is brightly lit, suggesting a clear day.

MAYER | BROWN

# SECURITIES LITIGATION & ENFORCEMENT ROUNDTABLE

January 30, 2025



# AGENDA

1. SEC Enforcement
2. Securities Class Action
3. Shareholder Derivative Action



01

SEC ENFORCEMENT PANEL

## PRESENTERS



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# KEY ADMINISTRATION PERSONNEL



**Scott Bessent**  
Treasury



**Paul Atkins**  
SEC Chair



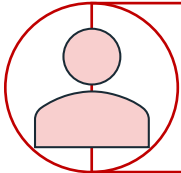
**Pam Bondi**  
Attorney General



**Jay Clayton**  
U.S. Attorney,  
SDNY



**Howard Lutnick**  
Commerce



**CFTC Chair**  
(\*acting named)



**Todd Blanche**  
Deputy Attorney  
General



**Stephen Miller**  
White House,  
Deputy Chief of  
Staff for Policy



**Jay Powell**  
Federal Reserve  
Board Chair



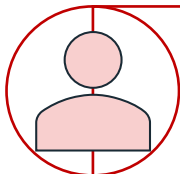
**Andrew Ferguson**  
FTC Chair



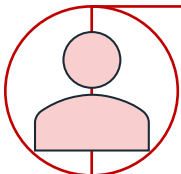
**Gail Slater**  
DOJ Antitrust  
Division



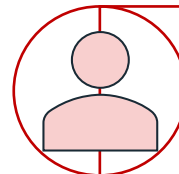
**Kevin Hassett**  
Nat'l Economic  
Council



**Federal Reserve  
Board Vice Chair**



**Comptroller of  
the Currency**



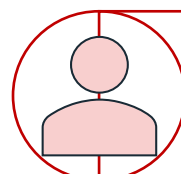
**DOJ Criminal  
Division**  
(\*acting named)



**Russ Vought**  
OMB Director



**Michael  
Faulkender**  
Deputy Treasury  
Sec'y



**FDIC Chair**  
(\*acting named)



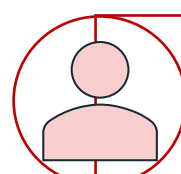
**Brett Shumante**  
DOJ Civil Division



**David Sacks**  
White House,  
AI/Crypto Czar



**David Warrington**  
White House  
Counsel



**CFPB Director**



**Kash Patel**  
FBI



## POST-GENSLER SEC

- Acting Chair Uyeda
- Paul Atkins confirmation process
- Impact of executive orders
- Status of pending crypto cases & rulemaking challenges
- Changes to enforcement procedures & priorities



## Background

- CPA: Former PwC Partner
- Chief Executive, Patomak Global Partners
- SEC Commissioner, 2002 - 2008

## PAUL ATKINS

### Key Enforcement Issues

- Congressional Oversight Panel for the Troubled Asset Relief Program, 2009 - 2010
- SEC staffer, 1990 - 1994
- Co-Chair, Token Alliance, Chamber of Digital Commerce
- As a Commissioner, spoke out against use of novel legal theories and favored use of “open jacket” policy for enforcement

## PAUL ATKINS: ENF

### Key Enforcement Issues

- New Enforcement Director
- Focus on investor protection and market integrity
- Emphasis on transparency, predictability, fairness
- Move away from regulation by enforcement and broken windows approach
- No action relief for controversial rules
- More favorable environment for digital assets
- Concerns about high penalties against public companies that penalize shareholders
- Shift away from recordkeeping, crypto, broad materiality determination cases
- A new Wells Committee?





## WHAT TO LOOK FOR?

**Who will be the enforcement director?**

***Will there be a change in current Senior Leadership***

- ***Associates, Trial Unit Chief and Chief Accountant of Enforcement?***
- ***Headwinds? Priorities?***

**As cases are published, get a good understanding of the underlying facts as the staff will try to replicate those matters.**

**Potential elimination of certain task forces/groups, and the creation of new ones.  
Regional Offices?**

## WHAT MORE TO LOOK FOR?

***What happens with or to the Division or Corporation Finance could provide early insights into the Commissions priorities.***

**Look for the restructuring or eliminations of Divisions.**

**Measurement of Success**

**Stats: Primarily remains the same**

## CURRENT SEC ENFORCEMENT VS. OUTLOOK

<b><i>Delegated Authority</i></b>	The Commission returns to more traditional delegations
<b><i>Wells Process</i></b>	How will the Wells process change?
<b><i>Preliminary Investigations</i></b>	NOW: Staff can send voluntary requests and open preliminary investigation without commission approval  Will this change?

## CURRENT SEC ENFORCEMENT VS. OUTLOOK

***Disclosure only or Nobel disclosures cases  
(Solarwinds)***

Fraud is always fraud:

- Likely not approved unless the staff has the proof to bring a 10(b)(5) charge

***Nobel accounting or Valuation cases***

Remember: Atkins was a PwC Partner and a CPA, could still see something being done here

***Corporate Penalties/Individual liability***

Changes? What about individual liability?

## CURRENT SEC ENFORCEMENT VS. OUTLOOK

<b><i>FCPA/AML Matters</i></b>	Likely an increased focus on FCPA and AML <ul style="list-style-type: none"><li>• Bribery puts American businesses at a disadvantage</li></ul>
<b><i>China or China Auditor Matters</i></b>	Again, Atkins was a PwC Partner and a CPA – with an America First policy, could see increased scrutiny
<b>Crypto/Blockchain/ATS Markets based on Blockchain</b>	Might see some rulemaking and a reduction in enforcement actions (Actually already beginning)

## WHAT TO LOOK FOR? INVESTIGATIONS

<b><i>Sweeps</i></b>	Certain significant sweeps will wain, others may rise <ul style="list-style-type: none"><li>• Off-Channel (electronic communication) will likely end or significantly dip</li></ul>
<b><i>Timing</i></b>	Likely sped up investigations as majority doesn't like long, unfocused investigations with little outcome
<b><i>Technical Violations</i></b>	Fraud – always; expect a significant decrease in technical violations
<b>Individual Liability</b>	Atkins expects individual liability when there is fraud



02

SECURITIES CLASS ACTION PANEL

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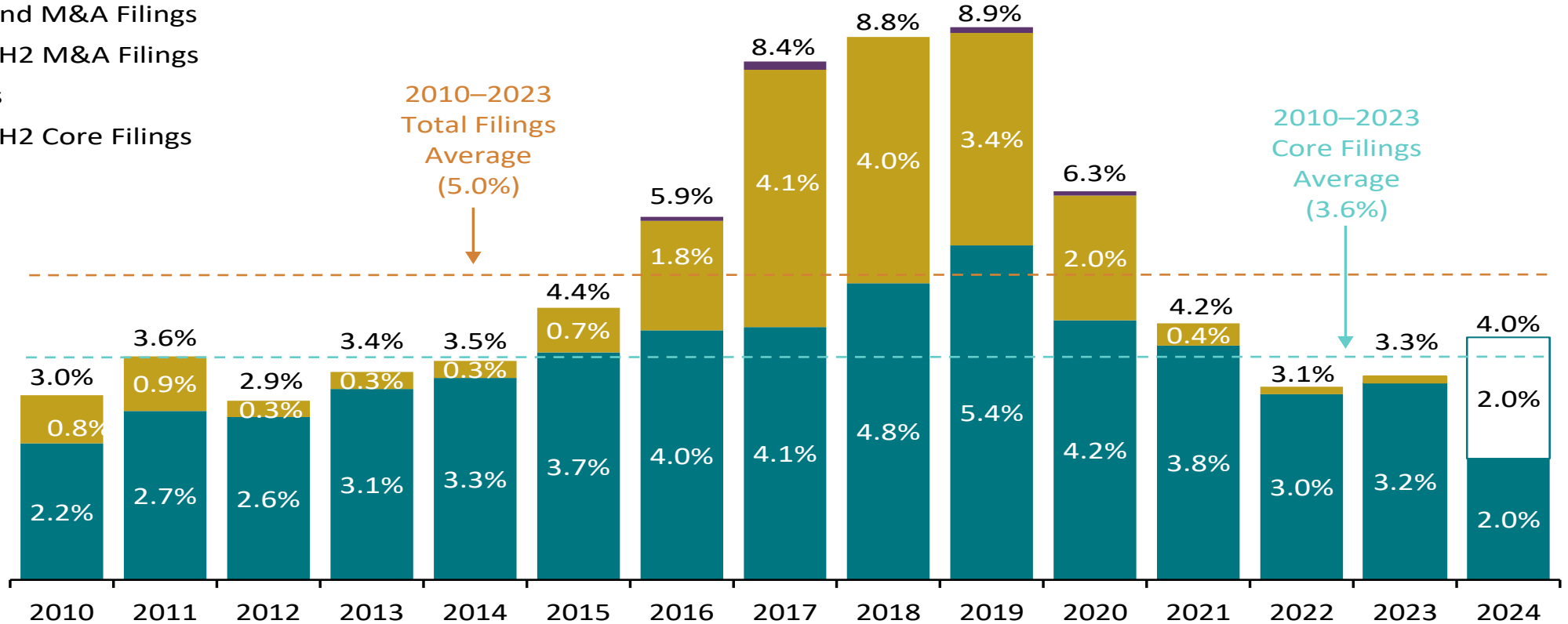
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# SECURITIES CLASS ACTIONS REMAIN AT SIGNIFICANT LEVELS

- Both Core and M&A Filings
- Annualized H2 M&A Filings
- M&A Filings
- Annualized H2 Core Filings
- Core Filings



	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023	2024
Number of Firms	4,764	4,660	4,529	4,411	4,416	4,578	4,593	4,411	4,406	4,318	4,514	4,759	5,741	5,688	5,316
Percent Change	(5.5%)	(2.2%)	(2.8%)	(2.6%)	0.1%	3.7%	0.3%	(4.0%)	(0.1%)	(2.0%)	4.5%	5.4%	20.6%	(0.9%)	(6.5%)

Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse

## OVERVIEW

- Class certification is an important inflection point in a securities class action that survives a motion to dismiss and moves past the pleadings stage.
- If the presiding court declines to certify a class, plaintiffs' firms lose the incentive to proceed with the litigation. Defeating class certification can be a huge victory for defendant issuers.
- In 2023, the Second Circuit decertified an investor class action lawsuit following more than a decade of litigation around the issue. *See Arkansas Teacher Retirement System v. Goldman Sachs Group Inc.*, 77 F.4th 74 (2d Cir. 2023).
- In doing so, the Second Circuit endorsed the defendants' "price impact" defense to class certification, a defense that was only rarely successful until that point.
- The *Goldman* decision is widely considered to be a helpful tool for defendants in putative class actions seeking to defeat class certification.
- Today we are going to discuss whether and to what extent the *Goldman* case has affected the trajectory of securities class actions since it was decided.

## WHAT IS THE PRICE IMPACT DEFENSE?

- The required elements of a Rule 10b-5 claim are: (i) a material misrepresentation or omission by defendant, (ii) scienter (intent to deceive); (iii) reliance on the misstatement by plaintiffs; (iv) economic loss, and (v) loss causation.
- With respect to the reliance element, plaintiffs typically are not required to demonstrate that each class member individually relied upon a defendant's alleged misrepresentation.
- Instead, plaintiffs invoke a “fraud-on-the-market” theory of reliance, which presumes that stock trading in an efficient market incorporates into its price all public, material information and that investors rely on the integrity of the market price when they buy or sell stock. Courts also assume that an alleged misrepresentation caused stock to trade at or maintain an inflated price. This is called the *Basic* presumption.
- Defendants can rebut the *Basic* presumption and defeat class certification by demonstrating that the misrepresentations did not actually affect, or impact, the market price of the stock.
- “*Basic* explains that defendants may rebut the presumption of reliance if they ‘show that the misrepresentation in fact did not lead to a distortion of price’ by making ‘[a]ny showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff.’” (*Goldman*)

## THE *GOLDMAN* FACT PATTERN

- Before the class action was initiated, Goldman acknowledged, in an SEC settlement, that its marketing materials for CDO transaction were 'incomplete' because they failed to disclose that a hedge fund client of the bank played a role in selecting the assets underlying the CDO that the bank sold to other clients.
- Private plaintiffs filed a class action complaint for violations of Rule 10b-5, alleging that defendants made material misstatements about the bank's business practices and management of conflicts of interest, as revealed by the facts underlying the SEC settlement. By doing so, defendants artificially maintained an elevated Goldman share price.
- Examples of the alleged misstatements are:
  - "We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard."
  - "Integrity and honesty are at the heart of our business."
  - "We have extensive procedures and controls that are designed to identify and address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses."

## ***GOLDMAN PROCEDURAL HISTORY***

The case survived a motion to dismiss in **2012**. From that point, a decade of litigation ensued over class certification.

- 2015: the district court certified a class and defendants appealed
- 2018: the Second Circuit vacated and remanded; the district court again certified a class and defendant appealed
- 2020: the Second Circuit affirmed class certification and the defendants petitioned the U.S. Supreme Court
- 2020: the Supreme Court granted certiorari
- 2021: the Supreme Court vacated and remanded to the Second Circuit, which also vacated and remanded
- 2021: the district court certified a class for a third time
- 2023: the Second Circuit reversed the district court's decision and decertified the class

## THE DISPUTE AT CLASS CERTIFICATION

- At class certification, plaintiffs must establish that their case meets the “predominance” requirement of FRCP 23(b), which demands that common questions of law or fact predominate over individual questions that pertain only to certain class members.
- With respect to reliance, the “predominance” question is whether class plaintiffs can establish class-wide reliance upon the alleged misrepresentation or omission through the “fraud on the market” theory. If not, individual questions of reliance would predominate, making class action treatment improper.
- In *Goldman*, the court was asked to consider whether plaintiffs could show class-wide reliance based on generic alleged misstatements, *e.g.*, “Integrity and honesty are at the heart of our business.”
- Defendants argued that the misrepresentations alleged were too generic and lacked a sufficient connection to the alleged “corrective disclosures” to have impacted Goldman’s stock price.

## SUPREME COURT GUIDANCE TO LOWER COURTS

- The Supreme Court held that: “[t]he generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly in cases proceeding under the inflation-maintenance theory.”
- The Supreme Court remanded to the Second Circuit “because it is unclear whether the Second Circuit properly considered the generic nature of [the bank]’s alleged misrepresentations.”
- The Court further laid out a “match vs. mismatch” framework for considering the relationship between the misrepresentation and the corrective disclosure:
  - **Clean match:** “an automobile manufacturer’s earlier statement to the market that its best-selling vehicle passed all safety tests is followed by later news that, in fact, the car failed several crash tests.”
  - **Potential mismatch:** an automobile manufacturer “strives to ensure that all its vehicles are road-ready, that it has an elaborate testing protocol to that effect, but that the task is tall, the goal difficult to achieve.”

## SECOND CIRCUIT HOLDING

- On remand, the Second Circuit found that generic alleged misstatements were not sufficiently tethered to specific corrective disclosures.
- The court noted that none of the corrective disclosures identified by plaintiffs expressly referred to the alleged misstatements regarding business-principles or conflict-of-interest. Thus, there was “a considerable gap in specificity between the corrective disclosures and alleged misrepresentations.”
- The appropriate question was not simply “what would have happened if the company had spoken truthfully,” but “what would have happened if the company had spoken truthfully at an equally generic level.”
- The Second Circuit concluded that the district court erred by focusing on how investors would have reacted had the bank originally disclosed the “details and severity of [its] misconduct,” rather than had it issued a truthful, but generic, statement.
- “Defendants have demonstrated, by a preponderance of the evidence, that the misrepresentations did not impact Goldman’s stock price, and, by doing so, rebutted *Basic’s* presumption of reliance. The district court clearly erred in concluding otherwise, and therefore abused its discretion in certifying the shareholder class.”



## PRICE IMPACT ARGUMENTS POST *GOLDMAN*

- The ruling was quickly adopted by defendants with mixed success.
- **Defense Successful; Class Certification Denied:**
  - ***In re Kirkland Lake Gold Ltd. Securities Litig.*, 2024 WL 1342800 (S.D.N.Y. March 29, 2024):** The court considered two statements, one regarding defendant's focus on organic growth and one describing the production levels and costs targets that defendant would apply in assessing a potential asset acquisition. The corrective disclosure to these two statements was an announcement by defendant of an acquisition of another company. The court found that the statement on organic growth was "fairly broad and generic" pertaining to the company's growth strategy, and the gap between the generic nature of that statement and the specificity of a statement announcing an acquisition was too wide to support price impact. In looking at the statement about production levels and costs targets, the court found that those metrics were intended to apply over the life of defendant's mine, leading to a mismatch in content between the statement and the acquisition announcement. The court also used evidence of market commentary during the time to support defendant's rebuttal of price impact. Accordingly, the court denied plaintiff's motion for class certification.
  - ***Shupe v. Rocket Companies, Inc.* 2024 WL 4349172 (E.D. Mich. Sept. 30, 2024):** Defendants successfully argued there was a considerable mismatch between the generic nature of the alleged misrepresentations and the specific revelation. The court held that defendants showed no price impact because (1) of the generic nature of the alleged misrepresentations and (2) no analyst report referenced the alleged misrepresentation during the class period.
  - ***In re Vaxart, Inc. Sec. Litig.*, 2024 WL 3269448 (N.D. Cal. July 2, 2024):** Plaintiffs alleged a corrective disclosure but failed to assess the possibility that the market had learned the truth earlier because of (1) fine-print in the original alleged misstatement and (2) a SEC filing. Accordingly, the court concluded that issues of liability and damages could not properly be dealt with on a class-wide basis.

## PRICE IMPACT ARGUMENTS POST *GOLDMAN*

- **Class certification granted in part and denied in part:**
- ***In re Apache Corp. Securities Litig.*, 2024 WL 532315 (S.D. Tex. Feb. 9, 2024):** Defendants put forth a three-pronged attack to rebut price impact, attempting to show that: (i) there was no front-end price impact attributable to 15 misrepresentations made during the relevant period; (ii) there was no back-end price impact attributable to the three corrective disclosures alleged during the relevant period; and (iii) these facts are “buttressed” by the market’s perception of their stock remaining unchanged during the relevant period. The court agreed that there was no front-end price impact for the alleged misrepresentations during the relevant period. The court used “common sense” in determining that the back-end stock price fluctuation was due to uncertainty about low gas prices generally, not by corrective disclosures. The court found that defendants had rebutted the *Basic* presumption by a preponderance of the evidence, opting to certify the class but for a more narrowly tailored time period than requested by plaintiffs.
- ***Sjunde AP-Fonden v. Goldman Sachs Grp., Inc.*, 2024 WL 1497110 (S.D.N.Y. Apr. 5, 2024):** Defendants attempted to rebut price impact by arguing that (1) pre-corrective disclosure reports of analysts showed that the alleged misstatements and corrective disclosure were unimportant to investors and (2) the alleged corrective disclosure did not cause the price drop. The court rejected defendants’ arguments, reasoning that (1) plaintiffs had offered statistical persuasive evidence of price impact, (2) plaintiffs cited financial news articles and analyst reports tying the drop in stock price to the corrective disclosure, (3) there was a sufficient match between the corrective disclosure and two of the misstatements, and (4) defendants could not fully explain the drop in stock price.

## PRICE IMPACT ARGUMENTS POST *GOLDMAN*

- **Defense Unsuccessful; Class certification granted:**
- *Int'l Bhd. of Elec. Workers Loc. 98 Pension Fund v. Deloitte & Touche LLP*, 2024 WL 4750812 (D.S.C. Nov. 12, 2024)
- *Jaeger v. Zillow Grp., Inc.*, 2024 WL 3924557 (W.D. Wash. Aug. 23, 2024)
- *Pardi v. Tricida, Inc.*, 2024 WL 4336627 (N.D. Cal. Sept. 27, 2024)
- *City of Birmingham Relief and Retirement System v. Acadia Pharmaceuticals Inc.*, 2024 WL 1060079 (S.D. Cal. March 11, 2024)
- *Crews v. Rivian Automotive Inc.*, 2024 WL 3447988 (C.D. Cal. July 17, 2024)
- *Homyk v. Chemocentryx Inc.*, 2024 WL 1141699 (N.D. Cal. March 6, 2024).

## CASE STUDY: *SHUPE v. ROCKET COMPANIES*

- The plaintiffs alleged the defendants made false and misleading statements regarding Rocket's mortgage business between February 25, 2021 and May 5, 2021. Plaintiffs also alleged certain defendants committed insider trading while possessing material non-public information.
- In September 2024, the judge denied class certification. The court's opinion cited the defense expert Professor Starks' analysis many times, including stating that "Dr. Starks's findings are largely dispositive," and in finding that "Plaintiffs have not shown that common questions predominate, because...Defendants have rebutted [the *Basic* presumption of class-wide investor reliance] by proving [Defendants'] alleged misrepresentations had no impact on the price of Rocket stock."
- The judge found that "fatally for Plaintiffs here, like in *Goldman*, Defendants have produced expert testimony suggesting that no analyst referenced [Defendants'] alleged misrepresentations in reports issued throughout the Class Period.... This 'sever[s] the link between' Plaintiffs' alleged 'back-end price drop' and their alleged 'front-end misrepresentation[s].'"

## KEY TAKEAWAYS

- **“Fairly broad and generic” disclosures**
  - More difficult for Plaintiffs to sustain cases based on generic initial disclosures
- **Mismatch between generic disclosure and specific announcement alleged to be corrective disclosure**
  - The greater the gap between the original and corrective disclosure the harder to sustain a claim.
- **Importance of market commentary**
  - Analyst report commentary
    - The lack of commentary noted as consistent with no impact.
  - Earlier news (fine print or in other disclosures)
    - Both fine print and other disclosures lend support to later no impact.
- **Impact on summary judgement and merits**
  - Moving arguments into class certification where judges are more skeptical carries risk
- **Impact on Section 11 cases**
  - Some risk 10b5 precedent increases skepticism for Section 11



# 03

SHAREHOLDER DERIVATIVE ACTION PANEL

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## RECENT DEVELOPMENTS IN DELAWARE

- ***In re Oracle Corp. Derivative Litigation, No. 2017-0337 (Del. Ch.)***
  - Following ten-day trial, V.C. Sam Glasscock found that Oracle's acquisition of NetSuite was subject to business judgment review notwithstanding the fact that Larry Ellison was a substantial equity owner in both corporations. Delaware Supreme Court affirmed last week.
- ***Tornetta v. Musk, No. 2018-0408 (Del. Ch.)***
  - Following trial, Chancellor Kathaleen McCormick found that Elon Musk's 2018 compensation award was subject to review under entire fairness and that defendants did not satisfy their burden of proving entire fairness. The Court granted rescission of the award. The Court later found that a subsequent stockholder vote approving the award did not provide a basis to revise the Court's judgment. Currently on appeal.
- ***In re BGC Partners, Inc. Derivative Litigation, No. 2018-0722 (Del. Ch.)***
  - Complete victory for director defendants after a week-long trial. Vice Chancellor Lori Will found that despite imperfections in the deal process negotiating a related-party transaction, the directors acted in the best interests of BGC stockholders, and the deal process and price were fair.



## WHAT MAKES THE *BGC* TRIAL A GOOD CASE STUDY?

- Shareholder Derivative Actions, like the BGC case, rarely go to trial.
  - Typically either get dismissed at Motion to Dismiss phase or settle
  - Typically involve high damages numbers, so both plaintiffs and defendants have significant incentive to settle
- These shareholder actions implicate recurring corporate governance and best practice issues that companies, directors, and executives face frequently.
  - What does it mean, in practice, for directors of a public company to fulfill their fiduciary duties, e.g., in negotiating and approving a significant acquisition, or serving on a Special Committee?
- Defendant Howard Lutnick is President Trump's selection for Secretary of Commerce.



## THE KEY PLAYERS

### **BGC Partners, Inc.**

- Global brokerage and financial services company
- BGC owned Newmark, a major commercial real estate advisory firm
- Howard Lutnick is Chairman and CEO of BGC
- Cantor Fitzgerald, LP is BGC's parent company and controlling stockholder

### **Cantor Fitzgerald, L.P.**

- Financial services firm specializing in institutional equity, fixed income sales and trading, and serving the middle market with investment banking services, prime brokerage, and commercial real estate financing
- Howard Lutnick is also the CEO and controller of Cantor
- Cantor affiliate CCRE owned Berkeley Point, a "DUS" (designated underwriting and servicing) lender for multi-family and commercial mortgages



**NEWMARK**



## THE PROPOSED TRANSACTION AND THE PROBLEM

- **Proposed Transaction**

- BGC to acquire Berkeley Point for \$875 million and integrate it with Newmark's suite of services, making Newmark a more complete real estate company to compete with its peers and later go public in an IPO.
- BGC to invest \$100 million in Cantor's MBS business to acquire proprietary data

- **Problem**

- Howard Lutnick, the controller of both BGC and Cantor, is on both sides of the transaction and was alleged to have improperly taken advantage of his position on both sides of the deal.

# Special Committee of Independent Directors

BGC Partners, Inc.



Secretary  
John Dalton

Dr. Linda  
Bell

Stephen  
Curwood

William  
Moran

## Dr. Linda Bell

- Provost, Dean of Faculty, Claire Tow Professor of Economics – Barnard College
- Provost, John B. Hurford Professor of Economics – Haverford College
- Senior Economist – Federal Reserve Bank of NY
- Visiting Professor – Harvard, Princeton, Stanford

## Stephen Curwood

- Pulitzer Prize winner
- Renowned investigative journalist – NPR, CBS, Boston Globe
- Businessman

## Secretary John Dalton

- Secretary of US Navy
- President – Ginnie Mae
- Chairman of the Board – Federal Home Loan Bank
- President – Housing Policy Council of Financial Services Roundtable

## William Moran

- Executive Vice President – JPMorgan Chase
- General Auditor – JPMorgan Chase

# FIRMS

Plaintiffs

**BLB&G** Bernstein Litowitz  
Berger & Grossmann LLP

**GE**  
Grant & Eisenhofer

Independent Directors

**MAYER | BROWN**

**RICHARDS  
LAYTON &  
FINGER**

**BGC (Nominal Defendant)**

 Potter  
Anderson  
Corroon LLP  
YOUR DELAWARE ADVANTAGE

Lutnick & Cantor  
Fitzgerald

**LATHAM &  
WATKINS** LLP

**YC  
ST** YOUNG CONAWAY  
STARGATT & TAYLOR, LLP  
*Attorneys at Law*

## ALLEGATIONS

### BGC Partners Special Committee of Independent Directors

- The Independent Directors' history of board service on BGC- and Cantor-related boards, and the money they made from that board service, made them beholden to Howard Lutnick.
- The Independent Directors' various social ties and history with Howard Lutnick made them beholden to him.
- The deal was a "fait accompli" from the outset—the Special Committee did not engage in real negotiations or win meaningful concessions.

After three years of discovery and eighteen depositions (all during the early days of COVID), four experts, one failed mediation, and a number of significant wins on summary judgment . . .

*In re  
Cornerstone Therapeutics  
Stockholder Litigation*, 115  
A.3d 1173 (Del. 2015)

## TRIAL: ONLY ONE WAY PLAINTIFFS CAN ADVANCE NON-EXCULPATED CLAIMS

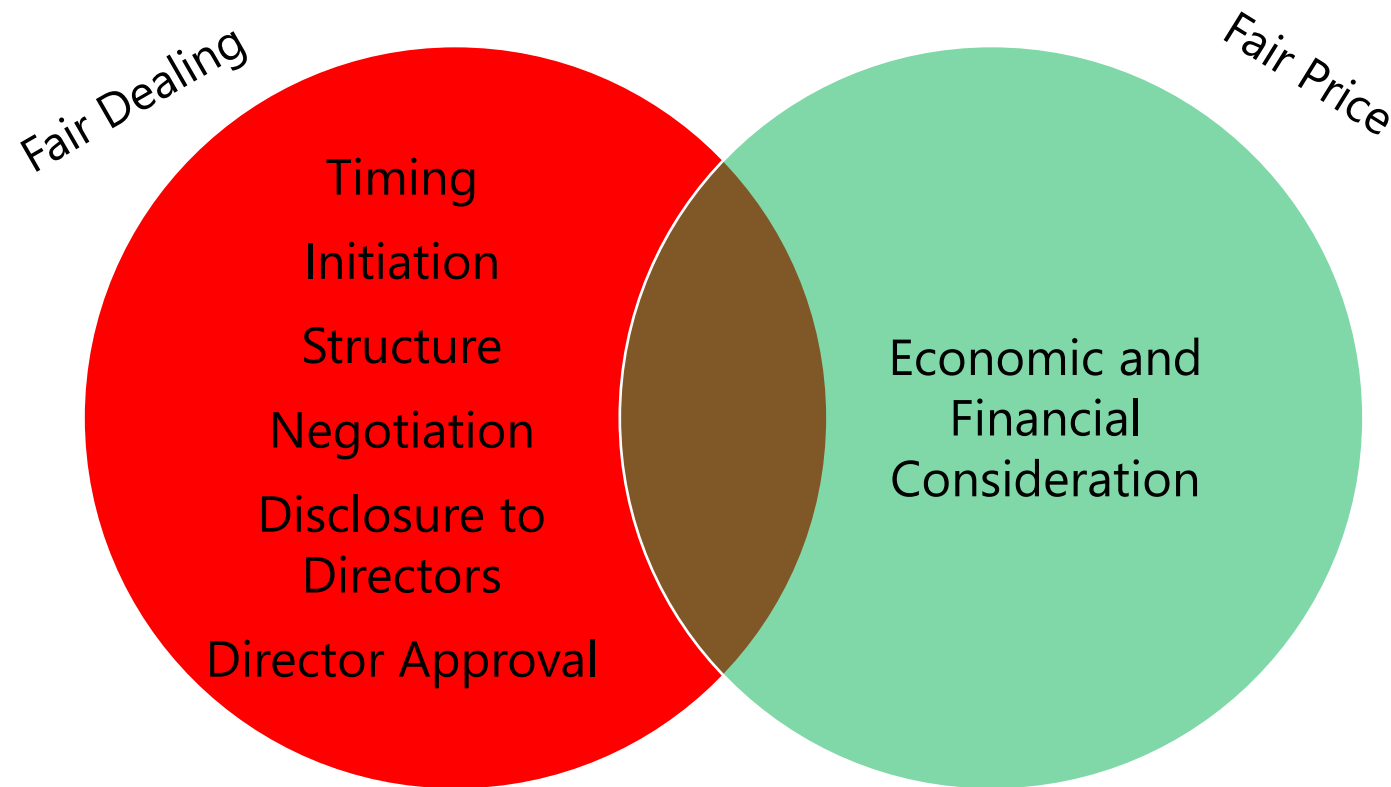
**Because the Independent Directors are protected by a Section 102(b)(7) exculpatory provision, plaintiffs must show that they:**

- 1** Harbored self-interest adverse to BGC's stockholders' interests;
- 2** Acted to advance the self-interest of an interested party; or
- 3** Acted in bad faith



## ENTIRE FAIRNESS: DEFENDANTS' STEEP BURDEN

"The concept of entire fairness has two basic aspects: fair dealing and fair price." *Weinberger*, 457 A.2d at 711.



## KEY ISSUES HEADING INTO TRIAL

- Were Curwood and Moran independent of Howard Lutnick?
  - Vice Chancellor Will wants to hear live testimony from Curwood on his compensation, and from Moran on his “respect for and admiration of” Lutnick
- Did Moran do anything during the deal process to actively further Lutnick’s interests?
- Did the Special Committee, led by Brian Sterling of Sandler O’Neill and Bill Regner of Debevoise, run a process that was fair and negotiate to achieve a deal price that was fair?



# STEPHEN CURWOOD

- BGC Partners Special Committee of Independent Directors
- Curwood's BGC Board membership provided a large proportion of his 2010 –17 income, allegedly making him beholden to Lutnick and his BGC board seat
- Lutnick and Curwood served together on the Haverford College Board of Managers, and "shared a common affiliation with a Haverford committee involved in '[m]oney-raising.'"
- Other personal ties

## STAR WITNESS: STEVE CURWOOD

- Day 3 of trial
- Goals for testimony
  - Keep direct short and sweet
  - Establish credibility with the judge regarding Curwood's compensation and the Special Committee's process.
- "So when management is out of the room, **John Dalton**, who, among other things, aside from being Secretary of the Navy, had run Ginnie Mae and was leading a housing lobbying agency, said—**started pounding, metaphorically, his shoe on the table, saying that this deal makes no sense...**"
- "Q: Mr. Curwood, **would you compromise your integrity and reputation for the compensation you earned at BGC?**
  - A: I certainly would not"



## KEY TAKEAWAYS FROM CURWOOD AND BGC TRIAL

- Testifying at trial is a unique skill that we must teach our witnesses no matter how accomplished they are in their respective fields. It is important to prepare them for both direct and cross examinations.
- Developing a good rapport with your witness pre-trial is critical.
- Resist the temptation to lead the witness, including on redirect examination. Judges know when the lawyer is testifying and not the witness, which undermines the witness' credibility.
- Just as there is no such thing as a perfect transaction process, there is no such thing as a perfect witness.



# LINDA BELL

- BGC Partners Special Committee of Independent Directors
- Lutnick supported Bell's promotion to the role of Haverford provost
- "Fundraising was embedded in Bell's responsibilities as provost, and Bell was made aware early in her Haverford career of that Lutnick was a large donor to Haverford."
- Other personal ties



## STAR WITNESS: LINDA BELL

- Day 2 of trial, second longest cross examination of any witness
- Goal: As co-chair of the Special Committee, and having already been found independent by Vice Chancellor Will at SJ, Dr. Bell was crucial to telling the Special Committee's story
- Q. "How would you grade [the process]?"
- A. "So from soup to nuts, from process to valuation, [] probably an A minus."
- Q. "[W]hy the minus?"
- A. "Because, you know, there were several blurred procedural issues, . . . many of which have been pointed out. I think the important point is that they were not definitive to the ultimate outcome. So when you submit drafts of the paper, there's mistakes in the draft. . . . [A]t the end of the day, to keep the analogy going, the product that was produced and the diligence that was produced and the information that was used to back it up and the meetings that we had and the work that we did all confirmed that we had done a thorough job on behalf of the BGC shareholders, and we were very confident in the valuation that was provided by our financial advisors on our behalf."

## KEY TAKEAWAYS FROM BELL AND BGC TRIAL

- Credibility of your strongest witness is critical.
  - We successfully highlighted Linda's very impressive background, educational pedigree, knowledge of economics, etc.
  - The court had already endorsed her credibility and independence at SJ.
  - More effective to tell the special committee's story through a witness that the judge "knew."
  - Linda acknowledged that the process was not perfect but was not flawed in a way that compromised the fairness of the transaction.
- Plaintiffs' counsel made poor strategic decisions in their approach to cross examining Bell.
  - Condescending attitude, focusing on issues that were no longer in the case to taint credibility, cutting off answers.
  - Plaintiffs were not able to damage Bell's credibility, but may have lost some credibility with the judge themselves.





# WILLIAM MORAN

- BGC Partners Special Committee of Independent Directors
- “Except for the break between [2005 and 2009], Moran continuously served on the boards of Lutnick-controlled companies between 1999 and the 2017 Transaction.”
- “Moran and Lutnick often corresponded by email and text message about personal matters, including vacations and holidays.”
- “In 2012, Moran told Lutnick that he was an ‘inspiration’ to him and that Lutnick’s ‘courage and kindness’ were ‘above anything [Moran had] seen in [his] lifetime.’”
- “Moran also testified that Lutnick ‘deserves recognition as a great human being’ and described their relationship as ‘sort of like a great marriage.’”



## STAR WITNESS: BILL MORAN

- Day 3 of trial, two hours on the stand
- Goals:
  - Establish that Moran's alleged "reverence for Lutnick" did not prevent him from acting only on BGC stockholders' behalf
  - Establish that some flaws in the deal process did not mar the Special Committee's work or focus on getting the best deal for BGC's stockholders
- "[W]hen leaving [my interview with Lutnick I said this -- and I remember this vividly because of the years I spent dealing with directors, right -- **my job someday may be to say 'no' to you as an independent director. . . . And from time to time I have said no to Howard.**"
- "[I] could have been in the tower at a board meeting that morning and would be dead. Okay? I only lost one friend . . . Howard lost -- Howard -- we lost, the firm, 680-something people. . . . Once in a lifetime, unique, people jumping out of windows -- I can still see them now. It marked me for life. But it didn't mark me with Howard for life. All right? I was an independent person, not as a director now. . . . That affects me as a person. . . . **That has nothing to do with my judgment and my dealings with Howard or anybody at the firm. . . . I think there's substantial evidence that Howard and I worked together, respected each other, but it didn't influence my judgment.**"
- "I think what I said, . . . it's like a great marriage where you fight and you make up at the end of the day. **'Fight and make up' was the important part of the marriage in that example.**"



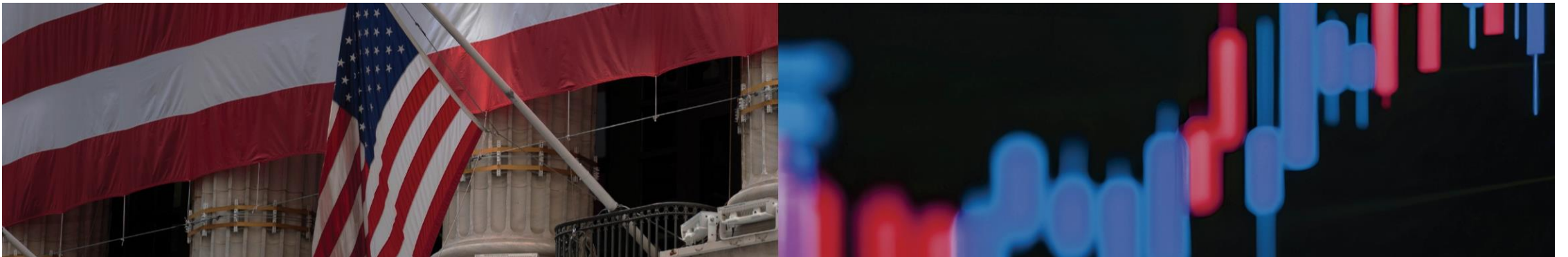
## STAR WITNESS: BRIAN STERLING

- Days 1-2 of trial, longest direct examination and cross examination of any witness
- Goal: Crucial to telling the Special Committee's story of substantial due diligence and negotiation, resulting in a good deal.
- "Q. What, if anything, did the committee tell you about the potential tone of the upcoming meeting on June 6 . . .?"
  - A. You know, from the first conversation with **Bill Moran**, my—, . . . we should take strong positions." **our instructions were that it was going to be a hard negotiation. That we should expect it to be hard, that we should go at it hard**
  - "Mr. Lutnick is very smart. He's very persuasive, very well prepared, very determined. But I don't think he sits in a lot of meetings for a couple of hours where people tell him that, you know, he's 20 percent off on price, and for all these reasons, you know, **he's not going to get the deal that he proposed**, and on his structure. So I think he was—you know, he expressed a great deal of frustration, and that was anticipated."

## KEY TAKEAWAYS FROM MORAN, STERLING, AND BGC TRIAL

- Trial in Delaware Court of Chancery versus other Courts
  - Factfinder is a business-savvy Vice Chancellor or Chancellor (not a jury). VCs often actively question witnesses.
  - Trials kept to a tight timeline.
    - Highest priorities for testimony and exhibits. Culling from mountains of evidence.
    - Requires extensive practice with witnesses and lawyers.
  - Importance of local counsel
  - Coordination with co-defense counsel
- Trying a case during COVID
- Technology in the Chancery Courtroom
- Preparing a Witness for Deposition v. Trial in a Shareholder Derivative Case

# QUESTIONS?



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