SPRING 2025

*The Bulletin* is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay

# FULLY INFORMED

## HIGHLIGHTS



## KESSLER TOPAZ DEFEATS MOTION TO DISMISS IN SECURITIES FRAUD CASE AGAINST NORFOLK SOUTHERN

Johnston Whitman, Esquire, Nathan Hasiuk, Esquire, and Farai Shawa, Esquire

On March 24, 2025, U.S District Judge Steven D. Grimberg of the Northern District of Georgia denied in its entirety Defendants' motion to dismiss securities fraud claims against Norfolk Southern Corporation ("Norfolk" or the "Company") and its most senior executives.[1] The decision is a significant victory for Norfolk common stock investors, particularly in light of the recent dismissal of similar claims brought in the Southern District of New York on behalf of investors in Norfolk bonds.[2]

### Allegations in the Amended Complaint

Norfolk is a rail transportation company that operates a rail network of over 19,000 miles in 22 U.S. states and the District of Columbia. The amended complaint

*(continued on page 10)*

[1] *Bucks Cnty. Emps. Ret. Sys. v. Norfolk S. Corp.*, No. 1:23-CV-04175-SDG, 2025 WL 897540 (N.D. Ga. Mar. 24, 2025). Defendants are Norfolk's former CEOs Alan Shaw and James Squires and former COO Cynthia Sanborn. Lead Plaintiffs are AkademikerPension and Ironworkers Local 40, 361 & 417 Union Annuity, Pension and Topping Out Funds. Kessler Topaz serves as Co-Lead Counsel in the action.

[2] *In re Norfolk S. Corp. Bond/Note Sec. Litig.*, 2025 WL 641089, at *10 (S.D.N.Y. Feb. 27, 2025) ("*Norfolk Bond*").

## U.S. SLIMMING DOWN SEC ENFORCEMENT OF WHITE COLLAR CRIME

Joshua S. Keszczyk, Esquire, and Geoffrey C. Jarvis, Esquire

Since returning to the Oval Office, President Donald Trump has sought to curtail the prosecution of certain white collar criminal activity through the use of executive orders and by changing the leadership at agencies like the U.S. Securities and Exchange Commission ("SEC"). The Trump Administration asserts that such changes are necessary to spark business growth and innovation.

This article outlines and summarizes the Trump Administration's initial efforts to limit the scope of enforcement activities in two key areas: cryptocurrency and the Foreign Corrupt Practices Act of 1977

*(continued on page 6)*

# *STANDARD CHARTERED AND BARCLAYS:* LESSONS FOR INVESTORS FROM APPARENTLY CONFLICTING ENGLISH COURT DECISIONS

Emily N. Christiansen, Esquire

In the United Kingdom, the Financial Services and Markets Act 2000 ("FSMA") provides the statutory basis to bring actions to recover losses suffered as a result of false or misleading statements, omissions, or delayed disclosures by publicly listed companies. Among the three categories of claims available under the FSMA, only Omission/Misstatement Claims (which arise under Section 90A of the FSMA) require claimants to prove reliance, a requirement that has generated considerable debate but little caselaw precedent until recently. Similarly, there has been little caselaw regarding the establishment of Delay Claims (which arise under Section 90A and paragraph 5 of Schedule 10A to the FSMA), which do not require proof of reliance and which provide potential liability for issuers who delay the publication of information to the market, sometimes indefinitely. Until two recent significant court decisions, U.K. courts had provided limited guidance on the extent and scope of evidence required to prove reliance for Omission/Misstatement Claims, as well as on whether Delay Claims are a viable alternative and how they should be proven. However, despite these two recent decisions, the seemingly conflicting approaches taken by the courts have left continued uncertainty for investors seeking to bring either type of claim.

In late 2024, an interlocutory judgment in *Allianz Fund Multi-Strategy Trust & Ors. v. Barclays plc* [2024] EWHC 2710 (Ch) granted the defendant's application to strike-out claims and dismissed 241 claims brought by "passive" index fund-based investors, holding that in order to prevail in Omission/Misstatement Claims, the investors need to prove that they relied on something more than price in making their investment decisions. The court also ruled that Delay Claims were inapplicable because the company had never actually published the relevant information, and it could not impose liability on the issuer for a delay when no publication had taken place.

In contrast, in March 2025, an interlocutory judgment in *Various Claimants v. Standard Chartered plc* [2025] EWHC 698 (Ch) saw the court dismiss Standard Chartered's application to strike-out shareholders' Omission/Misstatement Claims based on price/market reliance as well as the claimants' Delay Claims holding that both were issues to be decided at trial and not in an interim summary decision. *Standard Chartered* thus resulted in more claimant-friendly rulings on these issues than *Barclays*.

## On Reliance

Section 90A of the FSMA provides the statutory framework for Omission/Misstatement claims that investors can bring in relation to any published information. It states, "An issuer of securities… is liable to pay compensation to a person who… acquires, continues to hold or disposes of the securities in reliance on published information…". However, the statutory language is silent on what is needed to prove reliance, and as noted above, there has been limited guidance from the courts on this issue. Unlike in the United States, where the "fraud-on-the-market" doctrine eases the burden of proving direct reliance by creating an assumption that all material information is available to investors and built into the price of the security, no comparable mechanism has yet been adopted in the United Kingdom.

Claimants in *Barclays* argued for a presumption of reliance, similar to the U.S. fraud-on-the-market theory. For index-based investors, this would imply price/market reliance would be sufficient. Specifically, because Barclays shares traded in an efficient market, with share price movements reflecting all published information about the company (including misstatements or omissions), an index-based investor's decision to buy, sell, or hold Barclays stock, based on price movements, would be considered indirectly made in reliance on the omission or misstatement in the published information. Barclays opposed the presumption of reliance and argued that a claim could only succeed if the investor had actually

*(continued on page 12)*

## UPDATE: *EWTF V. UNITED STATES* (U.S. COURT OF CLAIMS) KTMC Completes Distributions from $169 Million Settlement, with 100% Participation Rate

Jonathan Neumann, Esquire

KTMC recently secured a landmark settlement agreement of approximately $169 million on behalf of a class of self-administered, self-insured group health plans (the "Class"). The case dates back to 2014, when the lead plaintiff, Electrical Welfare Trust Fund, and other Class members were forced by the U.S. Government to contribute to the Affordable Care Act's ("ACA") newly-created Transitional Reinsurance Program, in contravention to the ACA's express statutory language.

The $169 million settlement equates to 91.25% of all available damages and the individual recoveries were significant:

- The average Class member received more than $350,000.
- More than half of the Class received payments in excess of $100,000.
- Roughly 10% of the Class received over $1 million.

As one Class member put it, "the Settlement represents a truly exceptional recovery for the Class and, candidly, one we did not think possible when this litigation began."

Between November 2024 and April 2025, KTMC worked closely with the claims administrator, JND Legal Administration, to alert Class members of the upcoming distribution, collect and verify the required information necessary to process these sizeable payments, and ultimately mail checks and process secure wire transfers.

Through KTMC's diligence and persistence, ***every single Class member*** participated in the settlement and ultimately received 100% of their allocated sum. KTMC and our litigation team are incredibly proud to have reached this settlement and grateful for the overwhelmingly positive reaction from the Class. ■

## RECENT DECISIONS IN *SCHNEIDER V. NATERA, INC.*

*Aubrie Kent, Esquire and Josh D'Ancona, Esquire*

### Introduction

On March 21, 2025, Judge David A. Ezra of the Western District of Texas issued an order denying defendants' motion for judgment on the pleadings, and a separate order granting plaintiffs' motion to certify a class, in *Schneider v. Natera, Inc.*, a federal securities fraud class action against clinical genetic testimony company Natera.[1] The plaintiffs in the case are Lead Plaintiff British Airways Pension Trustees Limited ("BAPTL"), represented by Kessler Topaz, and additional plaintiff Key West Police & Fire Pension Fund ("Key West" and together with BAPTL, "Plaintiffs"). Plaintiffs filed the operative complaint on October 7, 2022, bringing claims under Sections 11, 12(a)(2), and 15 of the Securities Act and Sections 10(b), 20(a), and 20A of the Exchange Act, and Rule 10b-5 promulgated thereunder. The complaint alleges that Natera made false representations that the demand for its Panorama prenatal genetic test was organic and sustainable, when in reality the demand was propped up by fraudulent sales and billing practices, including automatically opting patients into expensive and unnecessary testing through a deceptively designed order form, and the inappropriate use of third-party company My Genome My Life's ("MGML") prior authorization services.

Plaintiffs allege that MGML, founded in 2017, submitted prior authorization (advance approval from a health insurer for coverage) requests for Panorama tests without regard for the medical necessity of those tests or whether insurers would ultimately approve the request for coverage, allowing Natera to increase its revenue. In contravention of anti-kickback guidelines for medical billing, and unbeknownst to investors, Natera maintained intimate ties with MGML, including an undisclosed personal relationship between Natera's VP of Commercial Sales and MGML's founder. This information was first

(continued on page 16)

[1] *Schneider v. Natera, Inc.*, No. 1:22-CV-398-DAE, Dkt. Nos. 177, 178 (W.D. Tex. March 21, 2025).

# SEC CLIMATE DISCLOSURE RULES ENTER LEGAL LIMBO

Karissa Sauder, Esquire

In March 2024, the United States Securities and Exchange Commission (the "SEC") adopted new rules requiring extensive disclosure of climate-related risks, data, and costs. The implementation of these rules, however, has been paused while legal challenges proceeded.

Recently, the Trump Administration announced that it would end its defense of these rules in court, leaving the rules in legal limbo that may continue indefinitely — thereby providing investors with less information about the climate-related risks facing the companies in which they invest.

## The March 2024 Climate Disclosure Rules

In recent years, the SEC increasingly turned its attention to companies' responsibilities to disclose information about climate change and other environmental, social, and governance ("ESG") issues that impacted reporting companies' businesses. As early as 2010, the SEC suggested that companies might be required under some circumstances to disclose certain climate-related risks.[1]

The SEC's interest in increased climate reporting grew substantially during the Biden Administration. Among other things, under the Biden Administration, the SEC created a Climate and ESG Task Force intended to "develop initiatives to proactively identify ESG-related misconduct," including "any material gaps or misstatements in issuers' disclosure of climate risks under existing rules."[2] The SEC's Division of Examinations also announced that it would review registrants' business continuity and disaster recovery plans with an eye to the impact of climate risk.[3]

In March 2024, these and other efforts culminated in a new set of rules (the "Climate Disclosure Rules") that required public companies to make much more extensive climate-related disclosures, including:

- Climate-related risks that had or were reasonably likely to have a material impact on the company's business strategy, operations, or finances.
- The company's efforts to identify, assess, mitigate, and adapt to material climate-related risks.
- Information about the company's climate-related targets or goals, including material expenditures.
- Data regarding certain emissions.
- Capitalized costs, expenditures, and losses resulting from severe weather events, carbon offsets, renewable energy credits, and other climate-related factors.[4]

Though the final Climate Disclosure Rules were less expansive than the version of the rules originally proposed by the SEC in 2022, they effectively responded to investors' desire for more consistent, reliable, and transparent information about the effects of climate-related risks on companies' businesses.

## Legal Challenges to the Climate Disclosure Rules Result in a Pause

Adopted on March 6, 2024, the Climate Disclosure Rules were set to become effective on May 28, 2024, with reporting obligations to be phased in over several years.

Immediately after the SEC announced the final Climate Disclosure Rules, however, the rules faced a series of legal challenges by Republican state attorneys general, the United States Chamber of Commerce, energy companies, and others. Opponents of the

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1 *See Commission Guidance Regarding Disclosure Related to Climate Change*, U.S. Securities and Exchange Commission (Feb. 8, 2010), https://www.sec.gov/rules/interp/2010/33-9106.pdf.

2 *See SEC Announces Enforcement Task Force Focused on Climate and ESG Issues*, U.S. Securities and Exchange Commission (Mar. 4, 2021), https://www.sec.gov/news/press-release/2021-42.

3 *See SEC Division of Examinations Announces 2022 Examination Priorities*, U.S. Securities and Exchange Commission (Mar. 30, 2022), https://www.sec.gov/news/press-release/2022-57.

4 *See SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, U.S. Securities and Exchange Commission (Mar. 6, 2024), https://www.sec.gov/newsroom/press-releases/2024-31.

# FEDERAL JUDGE GREENLIGHTS BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING CLAIMS AGAINST ROBINHOOD IN "CASH SWEEP" CLASS ACTION

Justin Swofford, Esquire

On October 25, 2024, KTMC filed a class action complaint in the United States District Court for the Northern District of California against Robinhood Markets, Inc. ("Robinhood"), an online trading platform, on behalf of investors who participated in Robinhood's "Deposit Sweep" program. Under the Deposit Sweep program, Robinhood transferred uninvested cash in customers' brokerage accounts into interest-bearing accounts at other institutions. However, rather than fulfill its duties, Robinhood used the Deposit Sweep program to enrich itself by pocketing nearly all of the interest generated.

Although Robinhood claims that Deposit Sweep provides additional value to its brokerage customers, the numbers tell a different story. The company nets millions in revenue each year from the program and provides its customers with an astonishingly low interest rate on cash deposits — currently just 0.01% and as much as *450 times lower* than comparable returns. What's more, Robinhood's customers are bound by agreements stating that the rates are "based upon prevailing economic and business conditions," but customers' returns have remained at levels far below federal and other comparable rates.

Seeking to hold Robinhood accountable for years of self-dealing at the expense of its customers, KTMC's complaint asserts several common law and statutory claims under California law. Judge Rita F. Lin heard oral argument on Robinhood's motion to dismiss the case on March 25, 2025.

On April 28, 2025, the Court denied Robinhood's motion to dismiss Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, also granting leave to file an amended complaint to include additional allegations regarding the remaining claims. Significantly, the Court recognized that Robinhood's statements that "interest rates on the Deposit Accounts will vary based upon prevailing economic and business conditions," and that "the interest rates on the Deposit Accounts will be determined by the amount the Program Banks are willing to pay on the Deposit Accounts minus the fees, if any, paid to Robinhood," were plausibly alleged to be false and misleading.

The Court has scheduled a case management conference for June 2025. KTMC is now pursuing fact discovery and stands ready to proceed toward trial if necessary. ■

## U.S. SLIMMING DOWN SEC ENFORCEMENT OF WHITE COLLAR CRIME

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("FCPA").[1] This pull-back in enforcement by the federal government likely will result in fewer enforcement actions under the federal securities laws involving cryptocurrency and underlying FCPA violations. Most significantly, these emerging changes could reduce investor access to information regarding illegal corporate behavior — information that otherwise would have been publicly disclosed in connection with the investigative and enforcement activities of the SEC and other executive agencies. The absence of aggressive government prosecutions will put more burden on investors to use civil litigation to police improper corporate behavior. Such cases will necessarily require more pre-complaint investigation by private investors and their attorneys in order to be successful.

## I. CRYPTOCURRENCY

On March 9, 2022, President Joe Biden issued an executive order ("Order 14067") requiring several agencies and departments to assess the risks and benefits of cryptocurrency and its impact on the stability of the financial markets, consumers, investors, and businesses, as well as the potential for creating a central bank digital currency ("CBDC").[2] Following Order 14067, the U.S. Department of the Treasury published its "Framework for International Engagement of Digital Assets," which outlined the United States's commitment to continue engaging with regional and international partners on issues surrounding digital assets and the associated risks.[3]

Just days after retaking office, however, President Trump signed an executive order ("Order 14178") that revoked Order 14067 and the Treasury Department's framework, and prohibited any agency from developing "any ongoing plans or initiatives . . . related to the creation of a CBDC" in order to "protect Americans from the risks of [CBDCs], which threaten the stability of the financial system, individual privacy, and the sovereignty of the United States."[4] A few weeks later, President Trump promoted the use of Bitcoin (as opposed to the creation of a CBDC) when he ordered the creation of a "Strategic Bitcoin Reserve" whereby the United States would stockpile digital assets "to meet governmental objectives."[5] The difference in these two plans is that the creation of a CBDC involves a country's government issuing its own digital currency that has its value fixed by the central bank issuing the currency (and which is essentially equivalent to that country's currency), while a Strategic Bitcoin Reserve would stockpile existing digital assets (the valuation of which can wildly fluctuate based on supply and demand).[6] In essence, the primary purpose of a CBDC would be to provide citizens with an online form of currency that could provide greater access to the financial and banking systems for some, while the primary purpose of a Strategic Bitcoin Reserve would be to provide a means for the United States to diversify the assets on its balance sheet, and potentially provide financial flexibility and hedge against inflation.[7]

President Trump's actions, in combination with the recent U.S. Senate confirmation of Paul Atkins as Chair of the SEC, signal

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1 The SEC has also recently sought to reverse certain Biden-era rules regarding corporate disclosures related to climate change by declining to support such rules in on-going litigation regarding their validity. The impact of the Trump Administration's actions in this area are the subject of a separate article in this newsletter.

2 Exec. Order No. 14,067, 87 Fed. Reg. 1413 (Mar. 9, 2022).

3 U.S. Dept. of Treas., *Fact Sheet: Framework for International Engagement on Digital Assets*, (July 7, 2022), https://home.treasury.gov/news/press-releases/jy0854.

4 Exec. Order No. 14,178, 90 Fed. Reg. 8647 (Jan. 23, 2025).

5 Exec. Order No. 14,233, 90 Fed. Reg. 11789 (Mar. 6, 2025).

6 Shobhit Seth, *What Is a Central Bank Digital Currency (CBDC)?*, Investopedia, (June 14, 2024), https://www.investopedia.com/terms/c/central-bank-digital-currency-cbdc.asp#toc-cbdcs-vs-cryptocurrencies.

7 *See id.*; Gertrude Chavez-Dreyfuss & Lisa Pauline Mattackal, *How would a US crypto strategic reserve work?*, Reuters, (Mar. 3, 2025), https://www.reuters.com/technology/how-would-us-bitcoin-strategic-reserve-work-2025-01-24/#:~:text=WHAT%20ARE%20THE%20BENEFITS%20OF,China%20and%20Russia%2C%20proponents%20say.

the emergence of a crypto-friendly environment. Atkins, an SEC Commissioner from 2002 to 2008, is expected to bring "a lighter touch on crypto enforcement."[8] Though Atkins has only recently been sworn into his post, his likely policy objectives were seemingly already playing out through the actions of SEC Acting Chair Mark Uyeda, who worked closely with Atkins during his first tenure at the SEC. For example, upon being named Acting Chair on January 21, 2025, Uyeda launched "a task force dedicated to developing a comprehensive and clear regulatory framework for crypto assets" that was focused on reining in the "hostile" environment that he asserted had been created by the SEC under the previous administration.[9] The task force is headed by SEC Commissioner Hester Pierce, a known supporter of digital assets who, like Uyeda, previously worked closely with Atkins at the SEC.[10] As a result of the changed viewpoint regarding cryptocurrency, several SEC actions that had been brought against cryptocurrency companies, such as those against Coinbase Inc. and Coinbase Global, Inc. (collectively, "Coinbase"), and Ripple Labs, Inc. ("Ripple"), have recently been dismissed (without any penalties levied against the target companies to date but also without addressing the companies' conduct or disclosures) as the SEC shifts its "focus from crypto enforcement to guidance, rulemaking and deregulation."[11]

For example, the SEC previously alleged that Coinbase was operating an unlawful trading platform where investors could buy, sell, and trade cryptocurrencies and digital assets without registering as a securities broker with the SEC.[12] On February 28, 2025, Coinbase and the SEC filed a joint stipulation to dismiss the allegations against Coinbase based on "the [SEC's] exercise of its discretion and as a policy matter" in light of the creation of the crypto task force.[13] Similarly, the SEC previously alleged that Ripple had engaged in an illegal securities offering by selling over 14 billion units of its "XRP" cryptocurrency to investors without filing a registration statement or providing investors with material information about the investment. On April 10, 2025, Ripple and the SEC filed a joint motion to hold Ripple's and the SEC's appeals in abeyance while the parties formalize their agreement to settle the case.[14] Given that the court had ordered Ripple to pay a $125 million fine, the remaining penalties to be enforced against Ripple (if any) in light of the SEC's decision to settle the appeals of both parties prior to a decision are unknown at this time.

Additionally, the SEC also has rebranded its "Crypto Assets and Cyber Unit" as the agency's "Cyber and Emerging Technologies Unit," which will look to "prioritize fraud cases that leverage novel tech including crypto, artificial intelligence, machine learning and social media," but, consistent with new SEC crypto policies, will "deploy enforcement resources judiciously" to "protect investors" and "facilitate capital formation and market efficiency by clearing the way for innovation to grow."[15] While the SEC has offered only limited guidance as to what conduct will be permitted or prohibited, the recent dismissals of the actions against Coinbase, Ripple, and others suggest that the SEC is likely to be cautious in bringing enforcement actions against cryptocurrency companies.

The SEC also recently began efforts to modify its oversight of cryptocurrency by issuing guidance regarding two classes of digital assets — "meme coins" and U.S. dollar-backed, fully reserved, nonyield bearing stablecoins. Meme coins, which the SEC describes as "a type of crypto asset inspired by internet memes, characters, current events, or trends" that are typically purchased for entertainment (like a collectible), are deemed to have "limited or no use or functionality" by the agency.[16]

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8 Jessica Corso, *Senate Confirms Trump Pick Atkins To Lead A Leaner SEC*, Law360.com, (Apr. 9, 2025), https://www.law360.com/articles/2323363/senate-confirms-trump-pick-atkins-to-lead-a-leaner-sec.

9 Patrick Donachie, *New Acting SEC Chair Uyeda Launches Crypto Task Force*, WealthManagement.com, (Jan. 21, 2025), https://www.wealthmanagement.com/regulation-compliance/new-acting-sec-chair-uyeda-launches-crypto-task-force.

10 *See id.*

11 Aislinn Keely, *Red State AGs' SEC Suit Paused Amid Crypto Policy Shift*, Law360.com, (Apr. 16, 2025), https://www.law360.com/articles/2326586/red-state-ags-sec-suit-paused-amid-crypto-policy-shift. The SEC has also dismissed actions against other cryptocurrency companies, such as Kraken, Consensys, and Cumberland DRW, and is evaluating the viability of its actions or potential actions against others. *See* Aislinn Keely, *SEC Dismissed Kraken, Consensys, Cumberland Crypto Suits*, Law360.com, (Mar. 28, 2025), https://www.law360.com/articles/2317295.

12 *SEC v. Coinbase, Inc., et al.*, No. 23 Civ. 4738 (KPF) (S.D.N.Y.), *interlocutory appeal granted,* 2025 WL 40782 (S.D.N.Y. Jan. 7, 2025).

13 *Id.*, ECF No. 177.

14 *See SEC v. Ripple Labs, Inc., et al.*, No. 20 Civ. 10832 (AT) (SN) (S.D.N.Y.), *appeals filed,* Nos. 14-2648(L), *et al.*, (2nd Cir. Oct. 3, 2024); *SEC v. Ripple Labs, Inc., et al.,* No. 14-2648(L), ECF No. 60 (2nd Cir. Apr. 10, 2025).

15 Aislinn Keely, *New SEC Enforcement Unit Shows Drift From Crypto Focus*, Law360.com, (Feb. 20, 2025), https://www.law360.com/articles/2300570/new-sec-enforcement-unit-shows-drift-from-crypto-focus.

16 U.S. Sec. Exchange Comm'n, *Staff Statement on Meme Coins*, (Feb. 27, 2025), https://www.sec.gov/newsroom/speeches-statements/staff-statement-meme-coins.

## U.S. SLIMMING DOWN SEC ENFORCEMENT OF WHITE COLLAR CRIME

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According to the SEC's February 27, 2025 statement, which does not have legal force or effect, meme coins do not meet the *Howey* test for identifying "investment contracts" under the federal securities laws because, typically, "[t]he offer and sale of meme coins does not involve an investment in an enterprise nor is it undertaken with a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others."[17] At least one federal court has found a meme coin to qualify as a "security" under the *Howey* test based on the facts of that civil litigation for the purposes of issuing a ruling on defendants' motion to dismiss.[18]

On April 4, 2025, the SEC issued its guidance on U.S. dollar-backed, fully reserved, nonyield bearing stablecoins and concluded that such assets also fall outside the definitions of the Securities Act of 1933 and Securities Exchange Act of 1934 because these types of stablecoins are essentially cash-equivalent payments redeemable in a 1:1 ratio and therefore are not considered "securities" under the *Reeves* or *Howey* definitions.[19] Specifically, these stablecoins purportedly fail to meet the *Reeves* test because they "function like demand deposits or stored-value notes used in commerce, not like notes offered for investment."[20] Similarly, the *Howey* test is not met because "purchasers are acting as consumers using a dollar substitute, not investors seeking profits from others' entrepreneurial or managerial efforts."[21] For example, the SEC recently declined to bring an enforcement action against PayPal Holdings, Inc. after an investigation into its "PYUSD" stablecoin.[22] Despite providing some level of certainty in these areas of cryptocurrency enforcement, this guidance is not currently backed by formal rulemaking.

Even more recently, on April 10, 2025, the SEC's Division of Corporation Finance issued a statement "clarifying how federal securities laws apply to some offerings and registrations in cryptocurrency asset markets" by outlining that cryptocurrency offerings, just as with conventional securities offerings, must include certain necessary disclosures about material aspects of the issuer's business and various risk factors.[23] Despite the Division of Corporate Finance's statement, there still is no clear guidance regarding whether cryptocurrencies in general are considered "securities."

## II. THE FCPA

On February 10, 2025, President Trump signed an executive order ("Order 14209") directing the U.S. Attorney General to halt enforcement actions brought under the FCPA for 180 days to review existing FCPA actions and potentially issue new guidance regarding FCPA enforcement in order to promote

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[17] *Id.*; *see also*, *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946) ("The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others.").

[18] *See De Ford v. Koutoulas*, No. 6:22-cv-652-PGB-DCI, 2023 WL 2709816, at *13-15 (M.D. Fla. Mar. 30, 2023) (noting that "it is at least plausible that LGBCoin is a security"); *De Ford v. Koutoulas*, No. 6:22-cv-652-PGB-DCI, 2024 WL 1346942, at *8 (M.D. Fla. Mar. 29, 2024).

[19] *See* Dario de Martino, *et al.*, *SEC's Noteworthy Stablecoin Guidance Comes With Caveats*, Law360.com, (Apr. 23, 2025), https://www.law360.com/articles/2327081/sec-s-noteworthy-stablecoin-guidance-comes-with-caveats; *see also*, *Reeves v. Ernst & Young*, 494 U.S. 56 (1990) (adopting the "family resemblance test," which begins with a presumption that "every note is a security" but which may be rebutted upon a showing that the note "bears a strong resemblance," based on several factors, to one of several types of notes deemed not to be a "security" (e.g. mortgage note)); *Howey*, 328 U.S. 293.

[20] Dario de Martino, *et al.*, *SEC's Noteworthy Stablecoin Guidance Comes With Caveats*, Law360.com, (Apr. 23, 2025), https://www.law360.com/articles/2327081/sec-s-noteworthy-stablecoin-guidance-comes-with-caveats;

[21] *Id.*

[22] Hailey Konnath, *SEC Abandons Investigation Into Paypal's Dollar Stablecoin*, Law360.com, (Apr. 29, 2025), https://www.law360.com/articles/2332064/sec-abandons-investigation-into-paypal-s-dollar-stablecoin.

[23] Sarah Jarvis, *SEC Takes 'Small Step' On Corporate Crypto Disclosures*, Law360.com, (Apr. 11, 2025), https://www.law360.com/articles/2324549/sec-takes-small-step-on-corporate-crypto-disclosures.

American economic competitiveness abroad and national security.[24] Order 14209 asserts that the FCPA — which makes it unlawful to pay foreign government officials for the purpose of obtaining or retaining business and requires business to maintain accurate books and records, as well as effective internal control over financial reporting — "has been systematically, and to a steadily increasing degree, stretched beyond proper bounds and abused in a manner that harms the interests of the United States" by impacting the competitiveness of American companies.[25] Specifically, Order 14209 specifies that "overexpansive and unpredictable FCPA enforcement against American citizens and businesses . . . for routine business practices in other nations not only wastes limited prosecutorial resources . . . but actively harms American economic competitiveness and, therefore, national security."[26] Notably, while Order 14209 was not directed specifically at the SEC, the agency has indicated that it would mimic the actions of the Justice Department.[27] This is especially likely given that both the Justice Department and the SEC jointly publish a resource guide for public companies, practitioners, and others containing detailed information on the FCPA.[28]

If the SEC follows the Justice Department's FCPA's policies, FCPA enforcement by the SEC will likely decline. Notably, the Justice Department recently dropped FCPA charges against former executives of Cognizant Technology Solutions Corp. ("Cognizant"), a cybersecurity risk management company, related to an alleged bribery scheme to obtain construction permits in India.[29] Despite its decision to dismiss the action against Cognizant's former executives, the Justice Department has proceeded with prosecuting alleged FCPA violations in several other cases, even though enforcement of the FCPA in those cases does not appear to be consistent with President Trump's limited goals of promoting American economic competitiveness and national security. Thus, the potential impact of Order 14209 remains unclear.[30]

While there is no private right of action under the FCPA, class actions brought under the federal securities laws can often allege underlying fraudulent conduct that ties into potential FCPA violations, such as undisclosed fraudulent schemes involving the bribing of foreign officials, to allegations that the company and its executive officers misled investors about a company's internal control over financial reporting, compliance protocols and procedures, or legality of its business practices.

## III. CONCLUSION

Although greater clarity on these issues is not expected until late-Summer 2025 when the various agencies are supposed to deliver their reports and recommendations to the White House, all indications are that the SEC will pull back on its enforcement efforts in these areas consistent with President Trump's stated goals. As such, private litigation brought by active and interested investors will be more important to protect the rights of injured investors in the absence of agency enforcement actions. ■

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[24] Exec. Order No. 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025).

[25] *See id.*; *see also* 15 U.S.C. §§ 78dd-1, *et seq.*

[26] Exec. Order No. 14,209, 90 Fed. Reg. 9587 (Feb. 10, 2025).

[27] Both the Justice Department and SEC have jurisdiction to enforce the FCPA. Specifically, the Justice Department may bring criminal or civil actions pursuant to the FCPA, while the SEC may only bring civil enforcement actions under the FCPA involving "issuers" as defined by the federal securities laws. *See* U.S. Sec. Exchange Comm'n, *Foreign Corrupt Practices Act (FCPA)*, (updated Sept. 13, 2023), https://www.sec.gov/enforcement/foreign-corrupt-practices-act; Dept. of Just., *Foreign Corrupt Practices Act Unit*, (updated Jan. 9, 2025), https://www.justice.gov/criminal/criminal-fraud/foreign-corrupt-practices-act.

[28] *See* U.S. Dept. of Just. & U.S. Sec. Exchange Comm'n, *A Resource Guide to the U.S. Foreign Corrupt Practices Act (2d. Ed.)*, (July 2020), https://www.justice.gov/criminal/criminal-fraud/file/1292051/dl?inline.

[29] *See U.S. v. Coburn, et al.*, No. 19-cr-00120 (KM) (D.N.J.); Carla Baranauckas, *Feds Drop FCPA Case Against Ex-Cognizant Execs*, Reuters (Apr. 2, 2025), https://www.law360.com/pulse/articles/2320023/feds-drop-fcpa-case-against-ex-cognizant-execs. Cognizant, without admitting or denying the SEC's findings, agreed to resolve these claims with the SEC prior to official action being filed against it for $25 million. *See* Mike Koehler, *The DOJ Enforcement Action Against Former Cognizant Executives Is Highly Unusual – Why Is It Going Forward After The Executive Order?,* The FCPA Professor, (Feb. 25, 2025), https://fcpaprofessor.com/the-doj-enforcement-action-against-former-cognizant-executives-is-highly-unusual-why-is-it-going-forward-after-the-executive-order/.

[30] Holly Barker, *DOJ Review of Foreign Bribery Cases Leaves Defendants Baffled*, Bloomberg Law, (May 1, 2025), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/business-and-practice/BNA%2000000196-61e4-d238-a397-f1e512140000?utm_source=Email_Share.

## KESSLER TOPAZ DEFEATS MOTION TO DISMISS IN SECURITIES FRAUD CASE AGAINST NORFOLK SOUTHERN

*(continued from page 1)*

("Complaint"), filed in April 2024 following an exhaustive investigation by Kessler Topaz, alleges that Defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 by repeatedly misrepresenting the purported safety of the Company's operations while implementing its version of the cost-cutting strategy "Precision Scheduled Railroading" or "PSR." Kessler Topaz's thorough investigation included interviewing 22 well-placed former Norfolk employees. These former employees described the Company's de-prioritization of safety in pursuit of profits during the Class Period (October 28, 2020 through March 3, 2023), and their accounts were included in the Complaint. In addition, the Complaint compiled accounts from numerous witnesses interviewed by the National Transportation Safety Board, and cited extensive regulatory findings regarding Norfolk's deficient safety practices during the Class Period.

The relevant truth concealed by Defendants' false or misleading statements was allegedly revealed beginning when a Norfolk train carrying hazardous materials derailed in East Palestine, Ohio on February 3, 2023. Consistent with Norfolk's "cut-to-the-bone" PSR practices, the train was staffed by an inexperienced skeleton crew and subject to abbreviated inspections. Additionally, Norfolk failed to detect a dangerous mechanical failure that led to the crash due to its extensive cost-cutting measures that eliminated key safety systems and personnel. Immediately after the derailment, Norfolk again elevated profits over safety by claiming that the derailed cars containing toxic vinyl chloride had to be detonated in a process called "vent-and-burn." The Complaint alleges that in reality, Defendants knew that the derailed cars posed no further risk of combustion, and instead detonated the cars filled with toxic chemicals to clear the train tracks so that Norfolk could resume its railroad service as quickly as possible.

### The Court's Opinion Denying Defendants' Motion to Dismiss

The Court sustained all 35 alleged false or misleading statements, including those relating to both the safety of Norfolk's PSR operations and the vent-and-burn procedure, concluding, among other things, that the Complaint: (i) sufficiently alleges that Defendants' prioritization of profit and efficiency over safety was part of Norfolk's PSR business model; (ii) that Norfolk implemented its version of PSR through a series of top-down, railroad-wide policies attributable directly to its top executives; and (iii) that the dramatic erosion of safety measures was "discoverable by anyone who cared to look."[3] These undisclosed facts, among others, rendered false or misleading Defendants' statements regarding Norfolk's purportedly safe implementation of PSR, assurances regarding employee safety and training, the Company's handling of hazardous materials, and the vent-and-burn procedure following the East Palestine derailment.

#### *False or Misleading Statements*

In denying Defendants' motion to dismiss, the Court stated it was "hesitant to declare" certain safety statements, which Defendants contended were opinions, as "non-actionable as a matter of law at this stage," considering the "substantial allegations in the complaint indicating that Defendants' safety statements were made in bad faith."[4] The Court similarly rejected Defendants' contention that the bulk of the alleged statements about safety were unimportant to investors, finding that (i) "[t]he heightened importance of safety in inherently dangerous industries" (ii) "the sheer number of public statements about safety made by Norfolk," and (iii) "the fact that Defendants' safety statements occurred as Norfolk was implementing a new operating plan" all contributed to the materiality of the statements to investors.[5] Moreover, the Court held that the extensive allegations in the Complaint sufficiently pled that Defendants misleadingly omitted material facts by "failing to inform investors of the myriad ways in which safety at Norfolk was not being valued and prioritized."[6]

#### *Defendants' Knowledge or Recklessness*

The Court also concluded that the Complaint's allegations gave rise to a strong inference that Defendants acted with scienter, or intent to defraud, which can be shown through allegations

[3] *Id.*, at *11.

[4] *Id.*, at *6.

[5] *Id.*, at *7-8.

[6] *Id.*, at *8.

that Defendants acted either knowingly or with severe recklessness. The Court held: "the inference of scienter raised by the allegations here is not only strong, but overwhelming."[7] The Court found that that the Complaint was "replete with allegations about the pervasiveness of Norfolk's safety violations that bolster the inference of scienter."[8] These allegations include: (i) "the sheer scale" of the company-wide de-prioritization of safety, (ii) "the existence of various mechanisms through which knowledge of Norfolk's safety failures could and should have percolated up to its executives," (iii) Defendants' lies to the public during the vent-and-burn operation, which were solely aimed at restoring freight service, and (iv) Defendants' compensation structure, which provided a "financial incentive to pursue policies that prioritized profitability and efficiency, even when those policies came at the expense of safety."[9] In addition to these allegations, the Court considered Defendant Shaw's admission before the U.S. Senate that Norfolk's "pre-derailment operational posture was a 'near-term focus' . . . 'solely on profits'" a "smoking-gun" evidencing Defendants' scienter.[10] In the Court's view, this statement was "effectively, a concession of scienter."[11]

## Next Steps for Norfolk Southern Litigation

The Court's motion to dismiss decision highlights Kessler Topaz's commitment to thorough and relentless investigations. Importantly, even though the *Norfolk Bond* matter involved the less demanding pleading standards for claims under the Securities Act of 1933 (where Defendants' state of mind, or scienter, is not an element), the court dismissed those claims in their entirety, finding that the complaint "[did] not allege that anyone in senior management was aware of a particular increase in risk."[12] Here, despite the far more demanding pleading standards governing Section 10(b) fraud claims, Kessler Topaz was able to demonstrate that Defendants' statements were not only materially false or misleading, but also made with scienter, by compiling evidence of the "myriad ways in which safety at Norfolk was not being valued and prioritized" and "the sheer scale" of the Company-wide de-prioritization of safety, which made the inference that Defendants committed fraud "overwhelming."[13]

As this case is now proceeding into the discovery phase, Kessler Topaz looks forward to developing proof for the Norfolk Class's claims. ■

[7] *Id.*, at *9.

[8] *Id.*

[9] *Id.*, at *10-11.

[10] *Id.*, at *9.

[11] *Id.*

[12] *Norfolk Bond*, 2025 WL 641089, at *10.

[13] *Norfolk S. Corp.*, 2025 WL 897540, at *8-11.

### *STANDARD CHARTERED AND BARCLAYS:* LESSONS FOR INVESTORS FROM APPARENTLY CONFLICTING ENGLISH COURT DECISIONS

*(continued from page 2)*

read the specific published information they alleged to be untrue, misleading, or omitted.

The court agreed with the defendant that reliance required something more than just price/market reliance, but it did not go as far as requiring proof that the investor itself had directly read or relied on the information. Instead, the Court in *Barclays* indicated that reliance could be established based on factors beyond price. It suggested that claims could succeed if investors could show that the published information (or its gist) was communicated to them, that they read it or a summary of it, or that they relied on an agent or third party who had read and relied on it. The Court noted:

> "It may well be argued that there is no real reason of policy or principle to draw the line between the Claimant who relied on a broker's report or a 'buy' recommendation (which were based on published information) and a Claimant who relied solely on movement in price (which was also influenced by that same information). That may be so, but it is clear that this is where [the legislature] chose to draw the line, and that line must be respected."

The Court also left open the possibility that claimants using AI or algorithm-driven investment strategies could succeed in Omission/Misstatement claims, provided they plead and produce evidence showing that the information was material and that the AI or algorithm incorporated the published information (or omission). However, it further noted that the claimants in the case had plead no such evidence of reliance beyond price/market reliance. Although this decision may have benefited from the clarity offered by an appellate court decision, the parties reached a settlement shortly after the decision was issued and further guidance will be left to courts in other cases.

Based on the decision *Barclays,* the defendant in *Standard Chartered* filed an application to strike-out the reliance claims of the claimants, which would have led to the dismissal of 949 funds (approximately 68% of the total case). Standard Chartered argued that the claims in *Barclays* were "indistinguishable from the present claims" and that the Court was bound to follow *Barclays* unless convinced it was wrong. In contrast, the claimants argued that *Barclays* was either incorrect or distinguishable from the current case and that the Court should not follow it.

The Court in *Standard Chartered* concluded that proving reliance remains a developing area of law and held that it would be inappropriate to resolve such matters in a strike-out or other summary determination. The Court emphasized that "such disputed legal questions should be resolved on the basis of actual facts established at a trial, and not on assumed or hypothetical facts." In the Court's view, the claimants should be allowed the opportunity to present their claims at trial, with the final decision based on all factual and expert evidence.

While the Court did not directly criticize the approach taken in *Barclays*, it did note that the statutory language may allow for a broader test of reliance than what was applied in that case. The Court also acknowledged that the line between conduit/indirect reliance and price/market reliance is "not easy to draw." Furthermore, the Court emphasized that it was not bound to follow *Barclays* in deciding whether to defer the legal question to trial. It explained that the *Barclays* Court issued summary judgment based on its own legal conclusions and the specific facts and evidence presented in that case. In other words, the Court in *Standard Chartered* maintained its discretion to manage the case before it as it saw fit, with certain issues to be decided at trial rather than through an interlocutory decision, was not impacted by the interlocutory decision in *Barclays*.

#### On Delay Claims

Delay Claims are often presented as an attractive alternative to typical Omission/Misstatement Claims because they do not require an investor to prove reliance. Delay Claims arise under Paragraph 5 of Schedule 10A of the FSMA, which provides that an issuer is liable to pay compensation to a person who buys, sells, or holds securities and suffers a loss due to a delay by the issuer in publishing information. Delay Claims are typically alleged in situations where a public company's wrongdoing is ongoing, and published information fails to disclose the full truth or only publishes partial information on multiple occasions.

In *Barclays*, the defendant, relying on the dictionary definition of the word "delay," argued that Delay Claims could only apply where a company had actually published information but did so late. The defendant contended that if no information had been published, it could not be considered delayed. The claimants, also relying on dictionary definitions, pointed out that "delay" can also mean "procrastination" or "waiting," and they cited the example of a recipient who could complain about a delayed delivery even if the parcel had not yet been, or never was, delivered. The claimants also emphasized the absurdity of adopting Barclays' position, where a defendant could avoid liability simply by not publishing information at all.

Unfortunately, the Court found in favor of Barclays and ruled that no liability for a Delay Claim could arise if no publication had occurred. In the Court's opinion, Delay Claims could only arise once the truth is published by the listed company. The Court also clarified that there is no right to compensation for a Delay Claim if the truth—or part of it—is revealed by other sources like journalists or prosecuting authorities. As the Court explained, "…there can be no liability for delay in publishing information—unless or until it…has been published."

In *Standard Chartered*, the defendant argued that the claimants could not plead Delay Claims in an "abbreviated fashion" or as an alternative to the reliance-based claims. The defendant also contended that the Court was bound to follow the *Barclays* decision unless convinced it was wrong. As with the reliance issue, the *Standard Chartered* Court ruled that this matter should be decided at trial. The Court expressed doubt about whether the *Barclays* Court was correct in concluding that Delay Claims are dependent on the issuer publishing corrective information at some stage. As the Court explained:

"I have more doubts about whether [the Barclays Court] was correct to conclude that dishonest delay claims are dependent on the issuer publishing corrective information at some stage. I do not think that such a requirement necessarily fits with the objective of imposing liability in respect of a dishonest delay and doubt whether it serves any useful purpose."

The Court continued, stating:

> "I have said above that it is better to decide this novel point of law—and this really was a novel point of law—on the basis of actual facts, rather than assumed or hypothetical facts. That is consistent with the position I adopted in relation to the Common Reliance Claims, and it holds good for the Delay Claims too. Without Barclays, I would definitely have left this matter to be determined at trial. Because of my doubts about the correctness of Barclays in this respect, I do not think my judgment should change…"

The Court concluded:

> "In all the circumstances, it would be inappropriate to strike out or grant summary judgment in respect of the Delay Claims, and I refuse to do so."

## Conclusion

The decisions in *Barclays* and *Standard Chartered* highlight the ongoing uncertainties and evolving legal principles under the FSMA regarding the proof of reliance in Omission/Misstatement Claims and the viability of Delay Claims as an alternative for passive investors. While the *Barclays* judgment established a more restrictive approach to proving reliance, limiting it to some form of direct proof rather than purely price/market reliance, the *Standard Chartered* court determined it inappropriate to determine these issues at an interim stage and deferred resolution until all evidence and experts were presented at trial. Similarly, the *Barclays* court's narrow interpretation of Delay Claims, requiring the actual publication of information by the issuer, was contrasted by the *Standard Chartered* court's willingness to question the correctness of the *Barclays* Court's approach and to further emphasize its view that such claims should not be struck out at an early stage before the court had the benefit of all evidence before it.

These seemingly conflicting judgments highlight the challenges investors face when navigating the complex global landscape of securities claims, particularly in jurisdictions like the U.K., where much of the case law is still developing. As the courts continue to address these issues, the need for clear and consistent guidance becomes increasingly critical for both investors and issuers. Investors seeking to bring claims under the FSMA will need to carefully consider the evolving legal framework and the implications of these judgments when evaluating the strategies of U.K. lawyers handling future shareholder cases. ■

## SEC CLIMATE DISCLOSURE RULES ENTER LEGAL LIMBO

*(continued from page 4)*

Climate Disclosure Rules generally argued that compliance with the rules would be too onerous and expensive, that the data requested was overly speculative, and that the SEC did not have the authority to require these disclosures — though certain environmental groups also challenged the rules on the basis that they did not go far enough in requiring disclosures. These lawsuits were consolidated in the United States Court of Appeals for the Eighth Circuit.[5]

In April 2024, the SEC announced that it would voluntarily pause its implementation of the Climate Disclosure Rules in order to avoid regulatory uncertainty while litigation proceeded.[6]

### The SEC Abandons Its Defense of the Climate Disclosure Rules

The legal battle over the Climate Disclosure Rules continued throughout 2024, with the SEC defending the disclosure requirements and completing the case's briefing before the Eighth Circuit.

Following President Trump's second inauguration and the resulting change in SEC leadership and policy, the SEC announced on March 27, 2025, that it was ending its legal defense of the Climate Disclosure Rules.[7] Specifically, the SEC stated that its counsel were "no longer authorized to advance the arguments in the brief the Commission had filed" and that "the Commission yields any oral argument time back to the court."[8]

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[5] *See Iowa v. SEC*, No. 24-1522 (8th Cir.).

[6] *See Amid legal challenges, SEC pauses its climate rule*, Associated Press (Apr. 5, 2024), https://apnews.com/article/sec-climate-disclosure-rule-climate-change-lawsuits-35f464a554a5173e76c279e6ce399592.

[7] *See SEC Votes to End Defense of Climate Disclosure Rules*, U.S. Securities and Exchange Commission (Mar. 27, 2025), https://www.sec.gov/newsroom/press-releases/2025-58.

[8] *Id.*

## Current Status of the Climate Disclosure Rules and Implications for Investors

The SEC's decision to stop defending the Climate Disclosure Rules leaves the rules in an unusual legal limbo. Notably, the SEC did not actually rescind the rules — which would require a lengthy process under the Administrative Procedure Act ("APA") — or formally end the litigation. As a result, the litigation may continue, with the Eighth Circuit either upholding or setting aside the Climate Disclosure Rules without the ongoing input of the SEC.

Following the SEC's announcement, some commentators suggested that the SEC's decision sounded a death knell for the Climate Disclosure Rules, with the Eighth Circuit likely to strike down the rules given the lack of an ongoing legal defense for them. Indeed, a dissenting SEC Commissioner, Caroline A. Crenshaw, publicly criticized the SEC's decision as an attempt to dismantle the Climate Disclosure Rules through a "backdoor" or "shortcut" instead of the legal process set forth in the APA.[9]

Days after the SEC announced the withdrawal of its defense, an intervenor group of Democratic state attorneys general moved to hold the litigation in abeyance, arguing that a formal pause in the litigation would "maintain the status quo and preserve judicial resources while SEC evaluates its course of action so that this Court does not devote the time and energy to hearing oral argument and writing a potentially unnecessary opinion on the legality of securities regulations that SEC may soon amend or rescind."[10] In effect, the intervenors' motion sought to preserve the Climate Disclosure Rules — even without implementation, for the time being — and prevent them from being struck down due to the SEC's abandonment of its legal defense.

On April 24, 2025, the Eighth Circuit granted the intervenors' motion, ordering that the litigation regarding the Climate Disclosure Rules would be held in abeyance until further order of the court.[11] The court further ordered the SEC to file a status report by July 23, 2025, regarding "whether the Commission intends to review or reconsider the rules at issue in this case."[12] Moreover, the court said, if the SEC "has determined to take no action" regarding the Climate Disclosure Rules, then its status report "should address whether the Commission will adhere to the rules if the petitions for review are denied and, if not, why the Commission will not review or reconsider the rules at this time."[13]

The Eighth Circuit's order suggests that the court — perhaps heeding Commissioner Crenshaw's warning — may be disinclined to allow the SEC to effectuate the end of the Climate Disclosure Rules by default. Indeed, by requiring the SEC to state whether it intends to implement the rules if they are upheld in court or otherwise to amend or rescind the rules, the Eighth Circuit has forced the SEC to take a position on the legality and status of the Climate Disclosure Rules (which may affect whether the court proceeds with the litigation or dismisses it on other grounds), rather than simply withdrawing its defense and allowing the process to play out without the SEC.

While we await the SEC's status report in July, the litigation is paused and the fate of the Climate Disclosure Rules remains uncertain. If the Eighth Circuit ultimately proceeds with the litigation — perhaps appointing the intervenors to defend the Climate Disclosure Rules in place of the SEC — the court could still choose to uphold the Climate Disclosure Rules in whole or in part. Though the Trump Administration may decline, if possible, to implement the rules in that instance, the Climate Disclosure Rules would remain in place for a future presidential administration to potentially enforce. If, however, the court strikes down the rules, future administrations may be unable to implement similar rules (depending upon the basis for the court's decision).

While the Climate Disclosure Rules would substantially enhance investors' knowledge and power with respect to climate issues, investors can continue to urge the companies they invest in to be more transparent and forthcoming about their climate-related risks and actions, as well as to seek opportunities to bring litigation against companies that have materially misled the market about the effects of climate change on their businesses. ■

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9 *Statement Regarding Climate-Related Disclosures Rule Litigation: The commission has Left the Building* (Mar. 27, 2025), https://www.sec.gov/newsroom/speeches-statements/crenshaw-statement-climate-related-disclosures-032725.

10 Intervenor States' Motion to Hold Cases in Abeyance at 2, *Iowa v. SEC*, No. 24-1522 (8th Cir. Apr. 4, 2025).

11 *See* Order, *Iowa v. SEC*, No. 24-1522 (8th Cir. Apr. 24, 2025).

12 *Id.*

13 *Id.*

## RECENT DECISIONS IN *SCHNEIDER V. NATERA, INC.*

*(continued from page 3)*

revealed to the market on March 9, 2022, when the research firm Hindenburg Research published a report (the "Hindenburg Report") exposing details of Natera's deceptive practices in its sales of Panorama. Natera confirmed its relationship with MGML in a special investor call on March 10, 2022. Defendants admitted that Natera routed roughly 450,000 prior authorizations for its Women's Health tests through MGML, and that in 2021 alone, 11% of its Women's Health prior authorizations were submitted through MGML. However, Defendants refused to confirm or deny their knowledge of the relationship between MGML's founder and Natera's VP of Commercial Sales. The revelations caused Natera's stock price to tumble 52%. Judge Ezra denied Defendants' motion to dismiss the complaint on September 11, 2023.

### Plaintiffs' Motion for Class Certification

On June 4, 2024, Plaintiffs filed a motion for class certification under Federal Rule of Civil Procedure 23, which the Court referred to Magistrate Judge Dustin M. Howell. Defendants' opposition to the motion primarily argued that Plaintiffs could not demonstrate "trade timing," or, "that they had purchased stock between the time of Natera's alleged misrepresentations and when the 'truth' was revealed to the market."[2] Defendants argued that the information revealed by the Hindenburg Report on March 9, 2022 was previously disclosed in reports published by *The Capitol Forum*, a costly subscription-based reporting service[3]. Defendants' argument sought to undermine the typicality requirement of Rule 23(a) — the requirement that the claims or defenses of the representative parties be typical of the claims or defenses of the class. Defendants argued that if Plaintiffs had not purchased Natera stock before relevant information was revealed in *The Capitol Forum*, Plaintiffs would be subject to a unique defense that the truth had already been revealed to the market and they were not defrauded, making them atypical of the class.[4]

Defendants also argued that, because the information had supposedly already been revealed to the market when Plaintiffs purchased the stock, Plaintiffs could not rely on the *Basic v. Levinson*[5] fraud-on-the-market presumption of reliance, which is typically necessary for certification in securities fraud suits.[6] Defendants attempted to rebut the *Basic* presumption by arguing that the alleged false or misleading statements had no impact "at either the time the statement was made ("front end" price impact) *or* the time the statement was corrected ("back end" price impact)."[7] On front-end price impact, Defendants asserted that the statements, as omissions, could not have caused Natera's stock price to rise.[8] On back-end price impact, Defendants pointed to the lack of stock price movement on the day *The Capitol Forum* articles were released — not the day the Hindenburg Report was released — as evidence that there was no price impact.[9] Finally, Defendants argued that the Hindenburg Report was not a true corrective disclosure because the report did not "take a position about whether Natera's prior statements were false or misleading."[10] After the parties submitted full briefing on the motion, Judge Howell heard oral argument on November 19, 2024.

Judge Howell issued his Report and Recommendation ("R&R") that the district court certify the class on January 28, 2025. The R&R rejected Defendants' trade timing argument, finding that even if some corrective information had issued prior to the Hindenburg Report, a purchase of stock after a partial or limited corrective disclosure would not "categorically bar a finding of typicality."[11] Moreover, the R&R found that questions of trade timing were not proper for resolution under Supreme Court precedent holding that issues of materiality, including whether the "truth was on the market" at a given point in time, are not to be resolved at the class

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[2] *Schneider v. Natera,* Dkt. No. 170, 3 (W.D. Tex. Jan. 28, 2025).

[3] *Id.*

[4] *Id.* at 8-9.

[5] 485 U.S. 224 (1988).

[6] *Schneider v. Natera*, Dkt. No. 154, 6 (W.D. Tex. Aug. 16, 2024).

[7] *Id.* at 12.

[8] *Id.* at 13.

[9] *Id.*

[10] *Id.* at 16.

[11] *Schneider v. Natera*, Dkt. No. 170 at 10.

certification stage.[12] Defendants' attempt to rebut the presumption of reliance under the fraud-on-the-market theory also failed for this reason.[13] The R&R rejected the attempt to argue materiality at the class certification stage, finding that "a rose by any other name would smell as sweet, and a truth-on-the-market defense by any other name goes to materiality."[14] The R&R went on to find that Plaintiffs had satisfied Rule 23(a) and Rule 23(b)(3)'s requirements for class certification. For these reasons, the R&R recommended that the District Court grant Plaintiffs' motion.[15]

Under Federal Rule of Civil Procedure 72(b)(2), a party may file specific objections to the findings of a magistrate judge's report and recommendations within fourteen days. The Underwriter Defendants (Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Cowen and Company, LLC, SVB Leerink LLC, Robert W. Baird & Co., BTIG, LLC, and Craig-Hallum Capital Group, LLC) filed limited objections to the R&R on February 21, 2025, objecting only to additional plaintiff Key West's standing under Section 12(a)(2) of the Securities Act.[16] Declining to file independent objections, Natera and the Executive Defendants (the "Natera Defendants") joined in the Underwriter Defendants' objections.[17] The Underwriter Defendants argued that Key West had not provided sufficient evidence of its purchases of Natera stock to support its standing under Section 12(a)(2) because Key West had not demonstrated that it purchased its Natera stock directly from *each* underwriter of the July 2021 SPO. There were no challenges to the grant of class certification on the claims against the Natera Defendants. Plaintiffs filed a response to the objections on March 7, 2025.

On March 21, 2025, the District Court adopted the R&R in full and granted Plaintiffs' motion to certify a class of "[a]ll persons and entities who purchased or otherwise acquired Natera common stock between February 27, 2020, and March 8, 2022," naming BAPTL and Key West as class representatives, and appointing Kessler Topaz and Bernstein Litowitz Berger & Grossman LLP as class counsel.[18] The Court reviewed the portions of the R&R to which the Underwriter Defendants specifically objected under a *de novo* standard, and the remaining portions under a clearly erroneous or contrary to law standard.[19] The Court agreed with Judge Howell's finding that Plaintiffs had adequately shown that Key West purchased shares directly from Morgan Stanley in the July 2021 SPO. The Court did not agree with the Underwriter Defendants that standing had to be established through additional evidence at the class certification stage, or that it was required for Plaintiffs to have purchased from each Underwriter to establish standing.[20] The Court noted that Defendants admitted at the hearing on the motion for class certification that they had affirmatively chosen not to seek discovery from Key West as to proof of its purchases, and possessed no evidence controverting Key West's sworn certification and allegations that it purchased from Morgan Stanley.[21]

## Natera's Motion for Judgment on the Pleadings

Separately, on May 30, 2024, the Natera Defendants filed a motion for judgment on the pleadings. Plaintiffs opposed the motion on June 21, 2024.[22] Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed but early enough to not delay trial. A motion for judgment on the pleadings is designed to dispose of cases where the material facts are not in dispute and a decision on the merits can be made from an examination of the pleadings.[23] On a motion for judgment on the pleadings, the court reviews the complaint in the light most favorable to the plaintiff to determine if the complaint states a valid claim for relief. A judgment on the pleadings is only appropriate if questions of law, not fact, remain.[24] On this review, the complaint must meet two standards. First, the complaint must allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Second, a securities fraud case must also must meet the requirements of Section 10(b) of the Exchange Act and Rule 10b-5 thereof by specifying each alleged misleading statement, when it was made and by whom, the misrepresentations made, what the speaker gained by making the misrepresentations, and why the statement was misleading. The plaintiff must also provide a factual basis for the allegations.[25]

In their motion, the Natera Defendants argued that new facts

*(continued on page 18)*

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12 *Id.* at 9, n.4.

13 *Id.* at 10.

14 *Id.* at 19.

15 *Id.* at 20-24.

16 *Schneider v. Natera*, Dkt. No. 172 (W.D. Tex. Feb. 21, 2025).

17 *Schneider v. Natera*, Dkt. No. 173 (W.D. Tex. Feb. 21, 2025).

18 *Schneider v. Natera*, Dkt. No. 178, 9 (W.D. Tex. March. 21, 2025).

19 *Id.* at 4-5.

20 *d.* at 7.

21 *Id.* at 7-8, n.3. On the findings for which there were no specific objections, the Court found them to be neither clearly erroneous nor contrary to law and adopted the findings. *Id.* at 9.

22 *Schneider v. Natera,* Dkt. No. 133 (W.D. Tex. May 30, 2025); Dkt. No. 134 (W.D. Tex. June 21, 2024).

23 *Hebert Abstract Co. v. Touchstone Props., Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990).

24 *Schneider v. Natera*, Dkt. No. 177, 10 (W.D. Tex. March. 21, 2025).

25 *Id.* at 11-12.

## RECENT DECISIONS IN *SCHNEIDER V. NATERA, INC.*

*(continued from page 17)*

had emerged to "undermine the reliability of the Hindenburg Report," meaning that Plaintiffs' claims based on the report no longer supported that Natera's revenue was "artificially inflated by improper billing practices."[26] The Natera Defendants also argued that Plaintiffs had sufficiently pled neither the required state of mind for a securities fraud claim, nor loss causation.[27] Their argument was premised on two events that occurred following the filing of the motion to dismiss: the SEC's conclusion of its investigation into the claims made in the Hindenburg Report and subsequent issuance of a no-action letter, and Ernst & Young's issuance of two audit reports certifying Natera's financial results.[28] In opposition, Plaintiffs pointed out that the motion's arguments were recycled from the Natera Defendants' motion to dismiss, which the Court had previously heard and found unconvincing, and further argued that numerous material facts remained in dispute, including whether the Panorama requisition form deceived patients into costly extra testing and whether Natera's deceptive business practices contravened Office of Inspector General opinions or other industry norms.[29]

The Court was similarly unpersuaded by the Natera Defendants' argument that Plaintiffs' allegations failed because Plaintiffs did not plead that Natera "violated a specific law or accounting standard" that resulted in the inflation of its revenue.[30] Again, Plaintiffs responded that a similar argument had already been considered at the motion to dismiss stage, and that Plaintiffs' claims "are not predicated upon an assertion that Defendants misstated their reported financial results or violated an accounting rule," but that Natera "repeatedly told investors that Panorama was a key source of revenues" while concealing "the material fact that Panorama revenues were inflated by deceptive practices."[31] The Court agreed with Plaintiffs that this argument was an attempt "to take a second bite at the apple," and that there was no "real basis" in the motion to depart from the prior decision.[32] In the same vein, the Court declined to reconsider its findings on scienter as to Executive Defendants Brophy, Chapman, and Rabinowitz, or its findings on loss causation, on the grounds that the Natera Defendants failed to raise their new arguments on the motion to dismiss, and had presented no compelling reason for reconsideration on the motion for judgment on the pleadings.[33]

For these reasons, the Court denied the Natera Defendants' motion for judgment on the pleadings in its entirety.

### Conclusion

Following the March 21, 2025 decisions adopting the R&R and granting Plaintiff's motion to certify the class and denying the Natera Defendants' motion for judgment on the pleadings, the case has moved into discovery on the merits.

On April 4, 2025, the Underwriter Defendants filed a Petition for Permission to Appeal under Federal Rule of Civil Procedure 23(f) with the Fifth Circuit.[34] Plaintiffs opposed the petition on April 17, 2025.[35] As part of their petition, the Underwriter Defendants requested a stay of discovery related to the Underwriters while the appeal is resolved. Regardless of the outcome of the Underwriter Defendants' appeal, there has been no challenge to class certification of the claims against the Natera Defendants and discovery in the remainder of the case will proceed. ■

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26 *Id.* at 12.

27 *Id.*

28 *IId.* at 16.

29 *IId.*, at 12; *Schneider v. Natera*, Dkt. No. 140, 14-15 (W.D. Tex. June 21, 2024).

30 *IId.* at 18; *Schneider v. Natera*, Dkt. No. 133, 14 (W.D. Tex. May 30, 2024).

31 *Schneider v. Natera*, Dkt. No. 140, 14; Dkt. No. 104, 15-16 (W.D. Tex. Sept. 9, 2023).

32 *Schneider v. Natera*, Dkt. No. 140, 19.

33 *Id.* at 20-22.

34 *Schneider v. Natera, Inc.*, Case No. 25-90009, Dkt. No. 2 (5th Cir. April 4, 2025).

35 *Id.*, Dkt. No. 9 (5th Cir. April 9, 2025).

# WHAT'S TO COME

## JUNE 2025

### Florida Public Pensions Trustees Association (FPPTA) 41st Annual Conference

**June 22 – 25**

Orlando, FL ■ Renaissance Orlando Hotel

## JULY 2025

### Pennsylvania State Association of County Controllers (PSACC) 2025 Annual Conference

**July 27 – 31**

Erie, PA ■ Sheraton Erie Bayfront Hotel

## AUGUST 2025

### County Commissioners Association of Pennsylvania (CCAP) Annual Conference & Trade Show

**August 17 – 20**

Somerset County, PA
Seven Springs Mountain Resort

## SEPTEMBER 2025

### Council of Institutional Investors CII Fall Conference 2025

**September 8 – 10**

Westin St. Francis San Francisco Union Square
San Francisco, CA

### Michigan Association of Public Employee Retirement Systems (MAPERS) 2025 Fall Conference

**September 13 – 16**

Amway Grand Plaza Hotel ■ Grand Rapids, MI

### Georgia Association of Public Pension Trustees (GAPPT) 11th Annual Trustee School

**September 15 – 17**

Edgar H. Wilson Convention Center ■ Macon, GA

### Benelux Investors Shareholder Rights, Asset Recovery and Litigation

**September 15**

Sofitel Luxembourg Europe

### Nordic Investors Shareholder Rights, Asset Recovery and Litigation

**September 17**

Copenhagen Marriott Hotel ■ Denmark

## OCTOBER 2025

### Illinois Public Pension Fund Association (IPPFA) 2025 Mid-America Pension Conference

**October 1 – 2**

Oak Brook Hills Resort ■ Oak Brook, IL

### Florida Public Pensions Trustees Association (FPPTA) Fall Trustee School

**October 5 – 8**

Sawgrass Marriott Golf & Spa Resort
Ponte Vedra Beach, FL

## NOVEMBER 2025

### International Foundation of Employee Benefit Programs (IFEBP) 71st Annual Employee Benefits Conference

**November 9 – 12**

Hawaii Convention Center ■ Honolulu, HI

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