Chapter 1

Securities Litigation

1-1 INTRODUCTION

The primary objective of the securities laws is to maintain the integrity of and the public's confidence in the financial marketplace. This is accomplished, in part, by deterring fraud through private securities fraud actions. Litigation in the area of securities fraud has increased significantly as a result of recent unprecedented financial frauds adversely affecting the financial markets.[1] Persuasive argument can be made that at no other time has there been a greater need to address potential misconduct through the implementation of the remedial purpose and objective of the securities laws. As the United States Supreme Court has recognized, the securities laws seek to maintain confidence in the market by "deterring fraud, in part, through the availability of private securities fraud actions."[2]

[1.] In addition to private civil litigation, regulator enforcement—including the Securities and Exchange Commission, state securities regulators, and criminal prosecutions by the Department of Justice—likewise add to the integrity of the financial markets. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1104 (2019) ("Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job.").

[2.] *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005); *see also Lorenzo v. SEC*, 139 S. Ct. 1094, 1103 (2019) (stating the purpose behind the securities laws is "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry") (internal quotation marks omitted).

1-2 SECURITIES EXCHANGE ACT OF 1934—SECURITIES FRAUD

1-2:1 Section 10(b) and Rule 10b-5 Generally

Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) makes it unlawful for any person

> To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[3]

Rule 10b-5, in turn, was promulgated under Section 10(b) by the United States Securities and Exchange Commission (SEC), making it unlawful for any person, directly or indirectly,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[4]

Accordingly, Section 10(b) and Rule 10b-5, which implements Section 10(b), expressly prohibit the use of any manipulative or deceptive contrivance in connection with the purchase or sale of any security.[5]

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3. 15 U.S.C. § 78j(b).

4. 17 C.F.R. § 240.10b-5.

5. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983) ("Section 10(b) makes it unlawful to use '*any* manipulative or deceptive device or contrivance' in connection with the purchase or sale of any security.") (emphasis in original); *see Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261-62 (2010) (discussing that Rule 10b-5 was promulgated under § 10(b) and "does not extend beyond conduct encompassed by § 10(b)'s prohibition") (quoting *United States v. O'Hagan*, 521 U.S. 642, 651 (1997)).

While Section 10(b) and Rule 10b-5 do not expressly provide for a private right of action, the United States Supreme Court has "long recognized an implied private cause of action to enforce the provision and its implementing regulation."[6] To establish a claim of securities fraud in violation of Section 10(b) and Rule 10b-5, a plaintiff must prove "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[7]

To prevail on a claim for securities fraud under Section 10(b), a plaintiff must prove a violation by a preponderance of the evidence.[8] In addition, federal district courts have exclusive jurisdiction over alleged violations of the federal securities laws, including claims brought under Section 10(b) and Rule 10b-5.[9]

1-2:2 Material Misrepresentation or Omission

Rule 10b-5 declares it unlawful, in pertinent part, for any person "[t]o make any untrue statement of a material fact" in connection with the purchase or sale of securities.[10] The United States Supreme Court held in *Janus Capital Group, Inc. v. First Derivative Traders*[11] that "the maker of a statement is the entity with authority over the content of the statement and whether and how

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6. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (*Halliburton II*); *see also Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011) (holding that "a private right of action is implied under § 10(b)") (internal quotation marks omitted) (quoting *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971)); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (recognizing that federal courts have implied a private right of action under § 10(b) and Rule 10b-5 and that the "existence of this implied remedy is simply beyond peradventure").

7. *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)); *see, e.g.*, *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) *(Halliburton II); Singh v. Cigna Corp*., 918 F.3d 57, 62 (2d Cir. 2019); *Arkansas Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc*., 879 F.3d 474, 480 n.4 (2d Cir. 2018); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100 (2d Cir. 2015); *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 69 (D. Conn. 2016).

8. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 328-29 (2007); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983).

9. 15 U.S.C. § 78aa(a); *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010).

10. 17 C.F.R. § 240.10b-5(b). Subsections (a) and (c) of Rule 10b-5 address scheme liability. *SEC v. Knight*, 694 F. App'x 853, 856 (2d Cir. 2017).

11. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).

to communicate it."[12] An entity that assists in the preparation of a statement which is under the ultimate control of another does not "make" a statement for purposes of liability under Rule 10b-5.[13] In *Lorenzo v. SEC*,[14] the Supreme Court clarified that a person or entity who *disseminates* false or misleading statements with the intent to defraud can also violate Rule 10b-5, even if that person or entity is not the "maker" of the untrue statement of material fact as defined in *Janus Capital*.[15] The Supreme Court explained that Subsections (a) and (c) of Rule 10b-5 are sufficiently broad to include within their scope the dissemination of false or misleading statements with the intent to defraud, "even if the disseminator did not 'make' the statements and consequently falls outside Subsection (b) of the Rule."[16]

It should be noted that the *Janus Capital* decision called into question the continued viability of the group pleading doctrine. The group pleading doctrine affords a plaintiff seeking to impose liability on individual corporate insiders a presumption that statements in group-published information (e.g., SEC filings, prospectuses, annual reports, or press releases) are attributable to all individuals with direct involvement in the everyday affairs of the company.[17] While *Janus Capital* does not imply that there can be only one "maker" of a statement under Section 10(b), it rejected

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12. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144 (2011); *Blank v. TriPoint Glob. Equities, LLC*, 338 F. Supp. 3d 194, 210 (S.D.N.Y. 2018).

13. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142, 147-48 (2011) ("Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker."); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 477 n.16 (S.D.N.Y. 2013) ("In *Janus Capital,* the Court limited the scope of liability for false statements to those who had ultimate authority for the content of the statement.").

14. *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019).

15. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1099 (2019).

16. *Lorenzo v. SEC*, 139 S. Ct. 1094, 1001 (2019).

17. *Blank v. TriPoint Glob. Equities, LLC*, 338 F. Supp. 3d 194, 211 (S.D.N.Y. 2018); *In re Cannavest Corp. Sec. Litig.*, 307 F. Supp. 3d 222, 240-41 (S.D.N.Y. 2018); *SEC v. Collins & Aikman Corp.*, 524 F. Supp. 2d 477, 489 (S.D.N.Y. 2007) ("A common situation arises where a false or misleading statement is contained in a document . . . that has no single author. In this circuit, the 'group pleading doctrine' creates a presumption that statements in . . . group-published information are the collective work of those individuals with *direct involvement* in the everyday business of the company.") (emphasis in original) (internal quotation marks omitted); *see also SEC v. Espuelos*, 699 F. Supp. 2d 655, 662 (S.D.N.Y. 2010) (discussing that the group pleading doctrine creates a presumption that, where misleading information is conveyed in group published information, it is the collective action of the officers).

the imposition of primary liability for those that assisted in the preparation of the statement.[18] Accordingly, some district courts have subsequently held that the group pleading doctrine was implicitly abrogated by the Supreme Court because "a theory of liability premised on treating corporate insiders as a group cannot survive a plain reading of the *Janus* decision."[19] The majority of district courts in the Second Circuit, however, have held that the group pleading doctrine remains "alive and well," reasoning that the *Janus Capital* decision addressed only the issue of whether a third-party corporate entity could be held liable for statements made by another entity "and has no bearing on how corporate officers who work together in the same entity can be held jointly responsible on a theory of primary liability."[20]

The Private Securities Litigation Reform Act of 1995 (PSLRA) imposed a heightened pleading requirement with respect to allegations of false or misleading statements or omissions.[21] Specifically, a plaintiff must "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading . . . ."[22] Thus, to satisfy this pleading standard, a plaintiff must "(1) specify the statements that the plaintiff contends

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18. *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 373 (S.D.N.Y. 2012).

19. *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *10 (S.D.N.Y. Sept. 28, 2012) (citing decisions that have recognized that application of the group pleading doctrine is barred by *Janus Capital*).

20. *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 71-72 (D. Conn. 2016); *In re Cannavest Corp. Sec. Litig.*, 307 F. Supp. 3d 222, 241 (S.D.N.Y. 2018); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012); *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 477 n.16 (S.D.N.Y. 2013) (applying the group pleading doctrine because defendants were corporate insiders alleged to have responsibility for the statements made by the company itself and thus distinguishable from *Janus Capital*); *see Blank v. TriPoint Glob. Equities, LLC*, 338 F. Supp. 3d 194, 211 (S.D.N.Y. 2018) (discussing that it is unclear whether the group pleading doctrine survived *Janus Capital*, but declining to decide the matter given that the doctrine only applies to collectively authored written documents and not to oral statements which were at issue in the case).

21. 15 U.S.C. § 78u-4(b)(1); *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 458, 462 (2d Cir. 2019); *Steamfitters' Indus. Pension Fund v. Endo Int'l PLC*, 771 F. App'x 494, 495 (2d Cir. 2019); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 106 (2d Cir. 2015); *see Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) (noting that Congress enacted the PSLRA as a check against abusive litigation by private parties); *Novak v. Kasaks*, 216 F.3d 300, 306 (2d Cir. 2000) (noting that the PSLRA seeks to curtail the filing of meritless lawsuits by imposing stringent procedural pleading requirements).

22. 15 U.S.C. § 78u-4(b)(1); *see Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 n.4 (2011); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 321 (2007); *In re World Wrestling*

were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent."[23] When a claim for securities fraud under Section 10(b) and Rule 10b-5 is asserted on the basis that statements were rendered false or misleading through the non-disclosure of an illegal activity, the facts of the underlying illegal acts must also be pled with particularity.[24]

Also, under the PSLRA, forward looking statements (e.g., projections of future results) are not actionable if accompanied by appropriate cautionary language.[25] The PSLRA provides a safe harbor for forward looking statements if they are identified as such and are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement . . . ."[26] Courts have held, however, that generalized boilerplate disclaimers do not constitute the "meaningful cautionary" language required by the PSLRA to invoke its safe harbor.[27]

Ent., Inc. Sec. Litig., 180 F. Supp. 3d 157, 174 (D. Conn. 2016); *In re Weight Watchers Int'l, Inc. Sec. Litig.*, No. 14-CV-1997, 2016 WL 2757760, at *3 (S.D.N.Y. May 11, 2016).

23. *Gamm v. Sanderson Farms, Inc*., 944 F.3d 455, 462 (2d Cir. 2019) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)); *Singh v. Cigna Corp*., 277 F. Supp. 3d 291, 307 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019); *see also Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 265 (D. Conn. 2012) (holding a plaintiff "must do more than say that the statements were false and misleading; they must demonstrate with specificity why and how that is so.") (internal quotation marks omitted) (quoting *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004)).

24. *Gamm v. Sanderson Farms, Inc*., 944 F.3d 455, 465, 466-67 (2d Cir. 2019).

25. *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 166 (D. Conn. 2019) ("A forward-looking statement is one that contains a projection of income or earnings, or one of future economic performance.") (internal alterations and quotation marks omitted).

26. 15 U.S.C. § 78u-5(c)(1)(A); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd*., 432 F. Supp. 3d 131, 166 (D. Conn. 2019) (quoting *Slayton v. Am. Express Co*., 604 F.3d 758, 766 (2d Cir. 2010)); *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 83 (D. Conn. 2016); *see City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 365 (S.D.N.Y. 2012) (discussing that the PSLRA's safe harbor provision was derived from the judicially created bespeaks doctrine which provides that "a complaint fails to state a claim of securities fraud if no reasonable investor could have been misled about the nature of the risk when he invested") (quoting *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 359 (2d Cir. 2002)).

27. *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 84 (D. Conn. 2016) (noting that boilerplate language "does not suffice to insulate a defendant from a claim of fraud"); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *18 (D. Conn. Mar. 23, 2013) (holding that to avail themselves of PSLRA's safe harbor, "defendants must demonstrate that their cautionary language was not boilerplate and conveyed substantive information") (quoting *Slayton v. Am. Express Co.*, 604 F.3d 758, 772 (2d Cir. 2010)); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed*

1-2:2.1 Opinions

As a general matter, statements of reasons, opinions, or beliefs can be actionable as a violation of the securities laws if they are "knowingly false or misleadingly incomplete, even when stated in conclusory terms."[28] In its decision *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[29] the U.S. Supreme Court refined the standard for analyzing whether statements of opinion are materially misleading for purposes of securities fraud liability.[30] A defendant may be liable for making a false statement of opinion if, at the time the statement was made, either the speaker did not hold the belief professed or the supporting facts supplied were untrue.[31] Additionally, opinions, even though sincerely held and otherwise true as a matter of fact, may nonetheless be actionable if the speaker omits information whose omission makes the statement misleading to a reasonable investor.[32] However, given that

Martin Corp., 875 F. Supp. 2d 359, 365 (S.D.N.Y. 2012) (holding boilerplate language was insufficient and that the language must convey substantive information).

28. *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095 (1991); *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1131 (2d Cir. 1994); *Baum v. Harman Int'l Indus., Inc.*, 408 F. Supp. 3d 70, 86-87 (D. Conn. 2019).

29. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015). While the *Omnicare* decision considered whether and when statements of opinion or belief can give rise to liability under Section 11 of the Securities Act, courts within the Second Circuit have applied its reasoning to Section 10(b) and Rule 10b-5 claims. *Martin v. Quartermain*, 732 F. App'x 37, 40 (2d Cir. 2018); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 129 F. Supp. 3d 48, 55 n.3 (S.D.N.Y. 2015) (citing *City of Omaha Civilian Emps.' Ret. Sys. v. CBS Corp.*, 679 F.3d 64, 67-68 (2d Cir. 2012)) (discussing that *Omnicare*'s "reasoning applies with equal force to other provisions of the federal securities laws," including Section 10(b) and Rule 10b-5).

30. *Tongue v. Sanofi*, 816 F.3d 199, 209 (2d Cir. 2016).

31. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 185-86 (2015); *Martin v. Quartermain*, 732 F. App'x 37, 40 (2d Cir. 2018); *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 175 (D. Conn. 2016); *see also Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1131 (2d Cir. 1994) (holding that statements of opinion or belief "can be actionable under the securities laws if the speaker knows the statement to be false").

32. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 194 (2015); *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016); *see Martin v. Quartermain*, 732 F. App'x 37, 40 (2d Cir. 2018) ("*Omnicare* identified three ways in which a statement of opinion can be false or misleading: (1) the speaker does not hold the belief professed; (2) the facts supplied in support of the belief professed are untrue; or (3) the speaker omits information that makes the statement misleading to a reasonable investor.") (internal alterations and quotation marks omitted); *see also In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 176 (D. Conn. 2016) ("A reasonable investor, upon hearing a statement of opinion from an issuer, expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time.") (internal quotation marks omitted).

"reasonable investors understand that opinions sometimes rest on a weighing of competing facts," a statement of opinion "is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way."[33]

In addition, the *Omnicare* decision further clarified that allegations concerning making a misleading statement of material fact and allegations concerning the omission of a material fact present distinct issues.[34] In the context of an omission, a plaintiff "must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."[35]

1-2:2.2 Materiality

As discussed, the alleged false misstatement or omission of fact at issue in an action for securities fraud must be material for liability to be imposed under Section 10(b) and Rule 10b-5. The determination of materiality is a fact-specific inquiry that depends upon whether there is a substantial likelihood that a reasonable investor or shareholder would consider the information important in deciding whether to act.[36] As such, the requirement of materiality is satisfied when there is "a substantial likelihood

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33. *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016) (quoting *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 189 (2015)); *In re Express Scripts Holdings Co. Sec. Litig*., 773 F. App'x 9, 13 (2d Cir. 2019); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 176 (D. Conn. 2016).

34. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 181-82 (2015) (instructing that allegations of untrue statements of material fact and allegations of the omission of a material fact present different issues); *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 129 F. Supp. 3d 48, 66 (S.D.N.Y. 2015) ("Rule 10b-5 distinguishes between untrue *statements* of material fact and certain kinds of material *omissions.* That distinction is not trivial.") (emphasis in original).

35. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 194 (2015); *see Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016) (noting that the *Omnicare* analysis applies to statements or omissions of opinion).

36. *Singh v. Cigna Corp*., 918 F.3d 57, 63 (2d Cir. 2019); *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 240 (1988)); *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 266 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010); *Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 310-11 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019); *see also Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 102 (2d Cir. 2015) ("Significantly, Rule 10b-5 makes only 'material' omissions actionable.").

that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[37]

The "total mix" of information includes all information that is reasonably available to the shareholders, including data sent to the shareholders by the company.[38] The relevant inquiry is "whether a *reasonable* investor would have viewed the nondisclosed information 'as having *significantly* altered the 'total mix' of information made available.'"[39] Materiality is measured at the time of the alleged misrepresentation or omission.[40] Allegations of materiality must satisfy the heightened pleading requirements of both Rule 9(b) of the Federal Rules of Civil Procedure and the PSLRA.[41]

1-2:2.3 Omission—Duty to Disclose

Rule 10b-5 also makes it unlawful for any person "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . ."[42] An omission is actionable under Section 10(b) only when there exists a duty to disclose the omitted facts, which duty arises when a disclosure is necessary

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37. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988)); *see, e.g.*, *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 157-58 (D. Conn. 2019); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 175 (D. Conn. 2016); *see also Singh v. Cigna Corp.*, 918 F.3d 57, 63 (2d Cir. 2019) ("An alleged misrepresentation is material if 'there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell shares of stock.'") (quoting *Operating Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 92-93 (2d Cir. 2010)).

38. *Starr v. Georgeson S'holder, Inc.*, 412 F.3d 103, 110 (2d Cir. 2005) (quoting *Press v. Quick & Reilly, Inc.*, 218 F.3d 121, 130 (2d Cir. 2000)).

39. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (emphasis in original) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 232 (1988)); *Singh v. Cigna Corp.*, 918 F.3d 57, 63 (2d Cir. 2019); *In re Express Scripts Holdings Co. Sec. Litig.*, 773 F. App'x 9, 14 (2d Cir. 2019); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 157-58 (D. Conn. 2019); *see also In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 177 (D. Conn. 2016) (holding plaintiffs failed to allege material misstatements because, given the context, there was not a substantial likelihood that a reasonable investor would find the representations at issue to have significantly altered the total mix of information available).

40. *First N. Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 276 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010).

41. *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 157-58 (D. Conn. 2019). *See* § 1-2:3.1 below for a discussion on pleading with particularity.

42. 17 C.F.R. § 240.10b-5(b).

to render the affirmative statement not misleading.[43] As stated by the Supreme Court, "it bears emphasis that § 10(b) and Rule 10b-5 do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'"[44]

1-2:3 Scienter

In a private action for securities fraud under Section 10(b) and Rule 10b-5, a plaintiff must establish the requisite scienter, a mental state that requires a showing of "intent to deceive, manipulate, or defraud."[45] Scienter is measured at the time of the alleged misrepresentation or omission.[46] The intent of a corporate executive acting with scienter may be imputed to the company itself.[47]

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43. *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100-01 (2d Cir. 2015) ("The Supreme Court has instructed that '[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5.'") (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 157 (D. Conn. 2019) (providing that an omission "is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts") (quoting *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016)); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 265 (D. Conn. 2012) (discussing that an omission is actionable only when there is a duty to disclose, which duty "may exist when disclosure is necessary to render affirmative statements not misleading").

44. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44-45 (2011) (quoting 17 C.F.R. § 240.10b-5(b)); *see also Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 309-10 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019) (discussing that § 10(b) and Rule 10b-5(b) do not create and affirmative duty but, rather, a registered company's duty to disclose arises when laws and regulations require disclosure or a statement would otherwise be rendered inaccurate, incomplete, or misleading); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 182 (D. Conn. 2016) (discussing that there is no affirmative duty to disclose "any and all material information," rather, an omission is actionable only when disclosure is required when necessary to make statements not misleading).

45. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 (2007) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976)); *see, e.g.*, *In re Express Scripts Holdings Co. Sec. Litig.*, 773 F. App'x 9, 14 (2d Cir. 2019); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 n.3 (2d Cir. 2007); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 168 (D. Conn. 2019); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 185 (D. Conn. 2016); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 268 (D. Conn. 2012).

46. *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 276 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010).

47. *In re EZCorp, Inc. Sec. Litigs.*, 181 F. Supp. 3d 197, 210 (S.D.N.Y. 2016); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 369 (S.D.N.Y. 2012) (citing *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Cap., Inc.*, 531 F.3d 190, 195 (2d Cir. 2008)).

However, the group pleading doctrine cannot be used to allege the requisite state of mind of a defendant.[48]

1-2:3.1 Pleading with Particularity

A complaint alleging securities fraud under Section 10(b) must satisfy the heightened pleading requirements of both Rule 9(b) of the Federal Rules of Civil Procedure[49] and the PSLRA.[50] If it fails to do so, the complaint will be dismissed. The PSLRA heightened the pleading requirement for scienter by requiring that a plaintiff "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind."[51]

While the PSLRA does not define "strong inference," the United States Supreme Court has held that to qualify as strong, "an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[52] That is, a plaintiff

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48. *DeAngelis v. Corzine*, 17 F. Supp. 3d 270, 281-82 (S.D.N.Y. 2014); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 477-78 (S.D.N.Y. 2013) (citing *In re Citigroup, Inc. Sec. Litig.*, 330 F. Supp. 2d 367, 381 (S.D.N.Y. 2004) ("Although the group pleading doctrine may be sufficient to link the individual defendants to the allegedly false statements, [p]laintiff must also allege facts sufficient to show that the [d]efendants had knowledge that the statements were false at the time they were made.")). The group pleading doctrine is discussed at § 1-2:2.

49. Rule 9(b) of the Federal Rules of Civil Procedure requires that allegations of fraud must be pled with particularity. Specifically, a complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 458, 462-63 (2d Cir. 2019) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *24 (D. Conn. Mar. 23, 2013) (quoting *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 108 (2d Cir. 2012)); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 265 (D. Conn. 2012) (internal quotation marks omitted).

50. *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 458, 462 (2d Cir. 2019); *Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 304 (2d Cir. 2015); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007); *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 168 (2d Cir. 2000); *see Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 313 (2007) (noting that Congress enacted the PSLRA as a check against abusive litigation by private parties).

51. 15 U.S.C. § 78u-4(b)(2)(A) (emphasis added); *see Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007); *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 458, 462 (2d Cir. 2019); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 168-69 (D. Conn. 2019); *see also Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 304 (2d Cir. 2015) (explaining the "PSLRA builds on Rule 9's particularity requirement").

52. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007); *see, e.g.*, *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 89 (D. Conn. 2016); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 268 (D. Conn. 2012); *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 266 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010); *see also South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 111

"must plead facts rendering an inference of scienter *at least as likely* as any plausible opposing inference."[53] In determining whether a plaintiff has pled a strong inference of scienter, courts must evaluate if the allegations, when accepted as true and taken collectively, support an inference of scienter that may reasonably be deemed "at least as strong as any opposing inference."[54]

As discussed, to establish liability under Section 10(b) and Rule 10b-5, a plaintiff must demonstrate that the defendant acted with scienter, i.e., with intent to deceive, manipulate, or defraud.[55] A strong inference of scienter may be established by alleging particularized facts that either (1) demonstrate that the defendant had both motive and opportunity to commit fraud or (2) constitute strong circumstantial evidence of conscious misbehavior or recklessness by the defendant.[56]

The Second Circuit Court of Appeals has recognized four circumstances where allegations in a complaint may sufficiently

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(2d Cir. 2009) ("An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct.") (internal quotation marks omitted).

53. *South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 111 (2d Cir. 2009) (emphasis in original) (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 328 (2007)); *see, e.g.*, *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 267 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010); *see also Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 305 (2d Cir. 2015) (discussing that the PSLRA's strong inference requirement involves "taking into account plausible opposing inferences and considering plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff") (internal quotation marks omitted).

54. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 326 (2007); *Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 306 (2d Cir. 2015); *Meridian Horizon Fund, LP v. KPMG*, 487 F. App'x 636, 639-40 (2d Cir. 2012); *see also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011) (noting that the PSLRA requires courts to consider "plausible opposing inferences" in determining a strong inference of scienter); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 106 (2d Cir. 2015) (discussing that a complaint is to be considered in its entirety and all plausible opposing inferences taken into account).

55. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319 (2007) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193-94 n.12 (1976)); *Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 305 (2d Cir. 2015); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 n.3 (2d Cir. 2007); *Singh v. Cigna Corp*., 277 F. Supp. 3d 291, 316 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019).

56. *Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 306 (2d Cir. 2015); (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007)); *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 106 (2d Cir. 2015); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd*., 432 F. Supp. 3d 131, 169 (D. Conn. 2019); *Singh v. Cigna Corp*., 277 F. Supp. 3d 291, 316 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 186 (D. Conn. 2016) (quoting *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009)).

give rise to the requisite strong inference of scienter: where the defendants

> (1) benefitted in a concrete and personal way from the purported fraud; (2) engaged in deliberately illegal behavior; (3) knew facts or had access to information suggesting that their public statements were not accurate; or (4) failed to check information they had a duty to monitor.[57]

1-2:3.2 Motive and Opportunity

Motive requires the existence of some concrete and personal benefit to be gained by engaging in the purported fraudulent conduct. "Motive must be 'concrete and personal,' and 'motives that are common to most corporate officers, such as the desire for the corporation to appear profitable and the desire to keep stock prices high to increase officer compensation, do not constitute 'motive' for purposes of this inquiry."[58] For instance, while the general desire to keep stock prices high is insufficient motive, by contrast, corporate insiders' alleged misrepresentations for purposes of selling their own shares at a profit may be sufficiently concrete and personal to adequately allege motive.[59]

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[57] *Saltz v. First Frontier, L.P.*, 485 F. App'x 461, 464 (2d Cir. 2012) (quoting *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 199 (2d Cir. 2009)); *see, e.g.*, *Employees' Ret. Sys. of Gov't of the V.I. v. Blanford*, 794 F.3d 297, 306 (2d Cir. 2015); *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 168 (D. Conn. 2019); *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 90 (D. Conn. 2016); *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 267 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010).

[58] *Saltz v. First Frontier, L.P.*, 485 F. App'x 461, 464 (2d Cir. 2012) (quoting *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009)); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 169 (D. Conn. 2019); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 186 (D. Conn. 2016); *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 268 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010); *see also Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 54 (2d Cir. 1995) (holding that incentive compensation was insufficient motive to support allegations of securities fraud).

[59] *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009) (citing *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000)); *Iowa Pub. Emp.'s. Ret. Sys. v. Deloitte & Touche LLP*, 919 F. Supp. 2d 321, 331 (S.D.N.Y. 2013) (citing *Kalnit v. Eichler*, 264 F.3d 131, 138, 139 (2d Cir. 2001)); *see also Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 318 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019) ("The motive and opportunity element is generally met when corporate insiders misrepresent material facts to keep the price of stock high while selling their own shares at a profit.") (internal quotation marks omitted); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 187

While motive involves the realization of concrete benefits by the alleged false statements or wrongful nondisclosure, opportunity entails "the means and likely prospect of achieving concrete benefits by the means alleged."[60] Courts often presume that corporations and corporate officers and directors have the opportunity to commit fraud if they so desire.[61]

1-2:3.3 Conscious Misbehavior or Recklessness

If a plaintiff is unable to sufficiently plead motive, the requisite strong inference of scienter may nonetheless be pled by alleging the defendant's conscious misbehavior and recklessness, although "the strength of the circumstantial allegations must be correspondingly greater if there is no motive."[62]

Conscious misbehavior or recklessness for purposes of establishing scienter is a state of mind that approximates actual intent, and is not merely a form of heightened negligence.[63] Such conduct is,

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(D. Conn. 2016) (noting that "motive" is generally shown "when corporate insiders allegedly make a misrepresentation in order to sell their *own* shares at a profit") (emphasis added) (internal quotation marks omitted).

60. *Novak v. Kasaks*, 216 F.3d 300, 307 (2d Cir. 2000) (quoting *Shields v. Citytrust Bancorp., Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994)); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 169 (D. Conn. 2019); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *32 (D. Conn. Mar. 23, 2013).

61. *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *12 (S.D.N.Y. Sept. 28, 2012) (citing *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 181 (S.D.N.Y. 2006)); *see also Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 169 (D. Conn. 2019) ("The opportunity to commit fraud is generally assumed where the defendant is a corporation or corporate officer.") (internal quotation marks omitted); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *32 (D. Conn. Mar. 23, 2013) (citing cases that company directors and others holding high positions of power and authority have opportunity to commit fraud and manipulate company stock).

62. *ECA & Local 134 IBEW Joint Pension Tr. of Chi. v. JPMorgan Chase Co.*, 553 F.3d 187, 198-99 (2d Cir. 2009) (internal quotation marks omitted); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *33 (D. Conn. Mar. 23, 2013); *see also South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) ("[T]he scienter element can be satisfied by a strong showing of reckless disregard for the truth."); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 478 (S.D.N.Y. 2013) ("In this Circuit, recklessness is a sufficiently culpable state of mind for securities fraud claims.").

63. *South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (quoting *Novak v. Kasaks*, 216 F.3d 300, 312 (2d Cir. 2000)); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 187 (D. Conn. 2016); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *33 (D. Conn. Mar. 23, 2013); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 478 (S.D.N.Y. 2013).

> at the least, conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.[64]

Scienter based on a defendant's conscious recklessness may be established through specific allegations of the defendant's knowledge of facts or access to information that contradicts public statements.[65] Recklessness also may be satisfied by evidence that the defendant failed to review information that it had a duty to monitor or ignored obvious signs of fraud such that it should have known that it was misrepresenting material facts.[66] "An *egregious* refusal to see the *obvious*, or to *investigate the doubtful*, may in some cases give rise to an inference of recklessness."[67]

Courts, however, routinely reject a "fraud by hindsight" approach to securities claims.[68] "Corporate officials need not be

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64. *In re Carter-Wallace Inc. Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000) (quoting *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978)); *see, e.g.*, *South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98 (2d Cir. 2009); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 170 (D. Conn. 2019); *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 369 (S.D.N.Y. 2012).

65. *In re Express Scripts Holdings Co. Sec. Litig.*, 773 F. App'x 9, 14 (2d Cir. 2019); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 170 (D. Conn. 2019); *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 90 (D. Conn. 2016) (quoting *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000)); *NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *33 (D. Conn. Mar. 23, 2013).

66. *South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (quoting *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000)); *see also Iowa Pub. Emp.'s Ret. Sys. v. Deloitte & Touche LLP*, 919 F. Supp. 2d 321, 334 (S.D.N.Y. 2013) (holding that strong indicators of recklessness are that the defendants "(1) possessed knowledge of facts or access to information contradicting their public statements or (2) failed to review or check information that they had a duty to monitor, or ignored obvious signs of fraud") (quoting *Tabor v. Bodisen Biotech, Inc.*, 579 F. Supp. 2d 438, 449 (S.D.N.Y. 2008)).

67. *South Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 109 (2d Cir. 2009) (emphasis in original) (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 269 (2d Cir. 1996)); *In re Carter-Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 40 (2d Cir. 2000); *see also NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc.*, No. 3:09-CV-01740, 2013 WL 1188050, at *33 (D. Conn. Mar. 23, 2013) (discussing that strong circumstantial evidence of recklessness may be pled by "showing conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendants or so obvious that the defendants must have been aware of it.") (internal quotation marks omitted).

68. *In re Express Scripts Holdings Co. Sec. Litig.*, 773 F. App'x 9, 14-15 (2d Cir. 2019); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 188 (2d Cir. 2014) ("We do not recognize allegations of 'fraud by hindsight.'"); *Meridian Horizon Fund, LP v.*

clairvoyant; they are only responsible for revealing those material facts reasonably available to them."[69] Thus, for example, a plaintiff may not establish a claim through the use of hindsight to second-guess a defendant's forward-looking opinion about the future value of stock.[70] Also, many courts within the Second Circuit have rejected as insufficient fraud by hindsight claims of recklessness based upon a failure to uncover Bernard Madoff's now-infamous Ponzi scheme.[71]

Additionally, it is well settled that claims of mismanagement cannot serve as the basis for securities fraud. Section 10(b) does not apply to "instances of corporate mismanagement . . . in which the essence of the complaint is that shareholders were treated unfairly by a fiduciary."[72]

KPMG, 487 F. App'x 636 (2d Cir. 2012) (affirming dismissal of plaintiff's claims because they were "an archetypical example of impermissible allegations of fraud by hindsight") (internal quotation marks omitted); *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000) ("[W]e have refused to allow plaintiffs to proceed with allegations of 'fraud by hindsight.'"); *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 939 F. Supp. 2d 360, 392 (S.D.N.Y. 2013) (granting motion to dismiss and denying leave to amend because the amended complaint suffered from the principal defect of fraud by hindsight); *Iowa Pub. Emp.'s Ret. Sys. v. Deloitte & Touche LLP*, 919 F. Supp. 2d 321, 334 (S.D.N.Y. 2013) ("A crucial limitation to this recklessness-based scienter is the insufficiency of allegations of 'fraud by hindsight.'") (quoting *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000)).

69. *Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000) (citing *Denney v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978)); *see also In re Express Scripts Holdings Co. Sec. Litig.*, 773 F. App'x 9, 15 (2d Cir. 2019) (affirming dismissal of securities fraud claim because defendants need not be clairvoyant and much of what plaintiff alleged was fraud by hindsight); *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 96 F. Supp. 3d 325, 344 (S.D.N.Y. 2015), *aff'd*, 645 F. App'x 72 (2d Cir. 2016) ("[F]raud by hindsight is not a cognizable theory of relief; indeed, fraud is always obvious in retrospect, but it is not reckless to lack clairvoyance.") (internal quotation marks omitted).

70. *Podany v. Robertson Stephens, Inc.*, 318 F. Supp. 2d 146, 154, 156 (S.D.N.Y. 2004) (noting that courts do not engage in the second-guessing of forward-looking opinions about the future value of stock which are "made all too easy with the benefit of hindsight").

71. *R.W. Grand Lodge of Free & Accepted Masons of Pa. v. Meridian Cap. Partners, Inc.*, 634 F. App'x 4, 7-8 (2d Cir. 2015) (affirming dismissal of Section 10(b) claim for failure to plead a strong inference of scienter in recklessly ignoring red flags "which in hindsight arguably should have called attention to Madoff's illegal conduct"); *DeLollis v. Friedberg, Smith & Co., P.C.*, 600 F. App'x 792, 796 (2d Cir. 2015) ("Numerous actions brought against auditors and investment advisors by victims of Madoff's fraud have been dismissed despite the presence of 'red flags,' which in hindsight arguably should have called attention to Madoff's illegal conduct.").

72. *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 477 (1977); *see also Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 311 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019) ("[M]ismanagement alone does not constitute fraud.") (quoting *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 55 (2d Cir. 1995)); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 268 (D. Conn. 2012) ("Claims of mismanagement and failures to disclose such mismanagement do not state claims for fraud.") (citing *Leykin v. AT&T Corp.*, 423 F. Supp. 2d 229, 241 (S.D.N.Y. 2006)); *but see FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52,

1-2:4 Purchase and Sale of Securities

To establish violations of Section 10(b) and Rule 10b-5, the conduct complained of must have occurred in connection with the purchase[73] or sale[74] of securities.[75]

> Section 10(b) does not punish deceptive conduct, but only deceptive conduct '*in connection with the purchase or sale of any security*' . . . . Those purchase-and-sale transactions are the objects of the statute's solicitude. It is those transactions that the statute seeks to 'regulate . . . .'[76]

Further, Section 10(b) does not apply extraterritorially, but only governs transactions in securities listed on domestic stock exchanges and the purchase or sale of any other security in the United States.[77]

75-76 (D. Conn. 2016) ("[T]he mere fact that conduct arguably constitutes mismanagement will not preclude a claim if the defendant made a statement of material fact wholly inconsistent with known existing mismanagement or failed to disclose a specific material fact resulting from that mismanagement.") (quoting *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 192 (S.D.N.Y. 2010)).

73. 15 U.S.C. § 78c(13) (defining the terms "buy" and "purchase" as including "any contract to buy, purchase, or otherwise acquire").

74. 15 U.S.C. § 78c(14) (defining the terms "sale" and "sell" as including "any contract to sell or otherwise dispose of").

75. *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 470 (S.D.N.Y. 2013) (discussing that the Exchange Act defines a security to include, *inter alia*, notes, stocks, investment contracts, and any put, call, straddle, option, or privilege on a security).

76. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266-67 (2010) (emphasis added) (quoting 15 U.S.C. § 78j(b)) (internal citations omitted); *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 470 (S.D.N.Y. 2013) (holding that the anti-fraud provision of the Exchange Act requires that the allegedly fraudulent statement occur in connection with the sale, offer to sell, or purchase of a security); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 270 (D. Conn. 2012) (providing that a plaintiff must establish a connection between the alleged misrepresentation or omission and the purchase or sale of a security) (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011) (*Halliburton I*)).

77. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266-68, 273 (2010) ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States."); *In re Petrobas Sec.*, 862 F.3d 250, 262 (2d Cir. 2017); *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE,* 763 F.3d 198, 210-11 (2d Cir. 2014); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 470 (S.D.N.Y. 2013). It should be noted, however, some courts outside of the Second Circuit have held that, as a result of Dodd-Frank Wall Street Reform and Consumer Protection Act amendments to the jurisdictional provisions of the securities laws, Congress intended that the substantive antifraud provisions of the Exchange Act should apply extraterritorially. *SEC v. Scoville*, 913 F.3d 1204, 1215-18 (10th Cir. 2019) (citing 15 U.S.C. §§ 77v(c), 78aa(b)) (holding that the antifraud provisions of the Exchange Act applies extraterritorially when

The implied private right of action under Section 10(b) affords a cause of action to purchasers or sellers of securities injured by a violation of the statute. As such, standing to bring a claim is limited to actual purchasers or sellers of the securities at issue.[78] While the classic Section 10(b) case involves a plaintiff who decides to purchase or sell stock in reliance on a defendant's prohibited conduct, "an owner of securities who is forced to sell them against his will has standing as a 'seller' for purposes of Rule 10b-5."[79]

1-2:5 Reliance or Transaction Causation

1-2:5.1 Generally

Reliance is also known and referred to as "transaction causation."[80] To establish transaction causation, a plaintiff must prove that, but for the defendant's alleged misrepresentations or omissions, the plaintiff would not have entered into the

significant steps are taken in the United States to further a violation or when conduct outside the United States has foreseeable substantial effects within the United States); *SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1292-93 (D. Utah 2017) (discussing the timing of Dodd-Frank and the *Morrison* decision, and that Congress intended that § 10(b) be applied to extraterritorial transactions); *but see Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE,* 763 F.3d 198, 211 n.11 (2d Cir. 2014) (noting that the import of the amendment is unclear).

78. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 318 (2007); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730-31, 749 (1975); *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 470 (S.D.N.Y. 2013) ("The cardinal rule of section 10(b) standing is that a plaintiff seeking to assert such a claim must be either a purchaser or seller of the securities at issue.").

79. *Madison Consultants v. FDIC*, 710 F.2d 57, 60-61 (2d Cir. 1983) (holding that pledgers of stock that was sold at the direction of the Federal Deposit Insurance Corporation have standing to sue as sellers under Rule 10b-5); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 634-35 (2d Cir. 1967) (holding that minority shareholder divested of shares through a short form, or freeze out, merger was a seller of securities, albeit a forced seller, for purposes of maintaining an action for securities fraud); *Veleron Holding, B.V. v. Stanley*, 117 F. Supp. 3d 404, 429 (S.D.N.Y. 2015) (holding plaintiff was a "forced seller" and therefore satisfied the "purchaser-seller" requirement of Rule 10(b)); *Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, Nos. 01 Civ. 2946, 01 Civ. 7670, 2004 WL 444554, at *4 (S.D.N.Y. Mar. 10, 2004) (holding that the forced sale and compulsory acquisition of shares satisfied the purchase or sale of securities requirement of Section 10(b)); *but see Isquith by Isquith v. Caremark Intern., Inc.*, 136 F.3d 531, 535-36 (7th Cir. 1998) (criticizing the forced seller doctrine).

80. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 812 (2011) (*Halliburton I*) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341-42 (2005)); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 106 (2d Cir. 2007); *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, No. 11 Civ. 3658, 2012 WL 2512280, at *8 (S.D.N.Y. June 29, 2012).

detrimental securities transaction.[81] Characterized by courts as the "critical element" in private securities fraud actions, proof of reliance serves to ensure that there is a proper connection between the defendant's misrepresentation and the plaintiff's injury.[82]

Without reliance on a material misstatement or omission, there can be no liability under Section 10(b). A rebuttable presumption of reliance is found, and thus a plaintiff need not provide specific proof of reliance, in circumstances where there is an omission of a material fact by a defendant with a duty to disclose or pursuant to the fraud-on-the-market doctrine.[83]

1-2:5.2 Fraud-on-the-Market

Under a fraud-on-the-market theory of reliance, the market price of shares of stock traded on a well-developed market reflects all publicly available information, including any material misrepresentations that may have occurred.[84] Thus, under the doctrine, it can be presumed that investors rely on public misstatements whenever they buy or sell

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81. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 106 (2d Cir. 2007) (quotation omitted); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005) ("Transaction causation is akin to reliance, and requires only an allegation that 'but for the claimed misrepresentations or omissions, the plaintiff would not have entered into the detrimental securities transaction.'") (quoting *Emergent Cap. Inv. Mgmt. LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003)); *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 92 n.59 (D. Conn. 2016) (same).

82. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) *(Halliburton II)* (quoting *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds,* 568 U.S. 455, 461 (2013)); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008); *Arkansas Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 482 (2d Cir. 2018) (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 810 (2011) (*Halliburton I*)); *Saltz v. First Frontier, L.P.*, 485 F. App'x 461, 465 (2d Cir. 2012) (quoting *Pacific Inv. Mgmt. Co. LLC v. Mayer Brown LLP*, 603 F.3d 144, 156 (2d Cir. 2010)).

83. *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54 (1972)); *Arkansas Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 483 (2d Cir. 2018); *see also Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 267 (2014) (*Halliburton II*) (discussing that because direct proof of actual reliance would impose an "unnecessarily unrealistic evidentiary burden," the fraud-on-the-market theory permits invocation of a rebuttable presumption of reliance on material misrepresentations made to the general public).

84. *Halliburton* Co. v. Erica *P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) (*Halliburton II*); (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)); *Arkansas Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 483 (2d Cir. 2018); *see also Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 461 (2013) (explaining that the fraud-on-the-market theory of reliance rests on the premise that well developed markets are efficient processors of information and, thus, market price of shares will reflect all publicly available information) (internal quotation marks omitted); *Youngers v. Virtus Inv. Partners, Inc.*, No. 15cv8262, 2017 WL 2062986, at *2 n.2 (S.D.N.Y. May 15, 2017) (holding the fraud-on-the-market presumption did not apply because the mutual funds at issue were not traded on an efficient market).

stock at a price set by the market.[85] Based on this theory, reliance will be presumed so long as (1) the alleged misrepresentation was publicly known, (2) the alleged misrepresentation was material, (3) the stock traded in an efficient market, and (4) the plaintiff traded the stock between the time the misrepresentation was made and when the truth was revealed.[86]

Once established, a defendant may rebut the presumption of reliance by appropriate evidence demonstrating that there was "no price impact" resulting from the misrepresentations. "[A]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."[87]

1-2:6 Loss Causation

In addition to and distinct from transaction causation (i.e., reliance), a plaintiff must also prove loss causation to establish a claim under Section 10(b) and Rule 10b-5.[88] "Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff."[89]

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85. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) (*Halliburton II*) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 244, 247 (1988)); *see also Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 159 (2008) ("[U]nder the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public. The public information is reflected in the market price of the security. Then it can be assumed that an investor who buys or sells stock at the market price relies upon the statement.") (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988)).

86. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 268 (2014) (*Halliburton II*) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 248 n.27 (1988)).

87. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 269 (2014) (*Halliburton II*) (citing *Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988)); *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, No. 11 Civ. 3658, 2012 WL 2512280, at *8 (S.D.N.Y. June 29, 2012) (same).

88. 15 U.S.C. § 78u-4(b)(4) (setting forth that the plaintiff has the burden of proving that the alleged violation "caused the loss for which the plaintiff seeks to recover damages"); *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 106 (2d Cir. 2007) (providing that a plaintiff must establish both transaction and loss causation); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 172 (D. Conn. 2019) (noting that the PSLRA codified the loss causation requirement of establishing that defendant's securities violation caused the loss for which plaintiff seeks damages); *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, No. 11 Civ. 3658, 2012 WL 2512280, at *8 (S.D.N.Y. June 29, 2012) ("A securities fraud plaintiff is required to prove both transaction causation (also known as reliance) and loss causation.") (internal quotation marks omitted).

89. *Robertson v. MetLife Sec., Inc.*, 779 F. App'x 783, 786 (2d Cir. 2019) (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 172 (2d Cir. 2005)); *see, e.g.*, *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 172 (D. Conn. 2019); *Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 322 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019);

A defendant's misrepresentation or omission is the proximate cause of the plaintiff's investment loss, or economic loss, "if the risk that caused the loss was within the zone of risk concealed by the misrepresentations or omissions alleged by a disappointed investor."[90] Thus, to establish loss causation, a plaintiff must show that the *subject* of the misrepresentation or omission was the cause of the actual loss suffered.[91] To that end, the loss must have been both foreseeable and caused by the materialization of the risk that was concealed by the fraud.[92]

1-2:7 Control Person Liability

Section 20(a) of the Exchange Act imposes joint and several liability upon any person who directly or indirectly controls another found to be in violation of the Exchange Act, i.e., control person liability.[93] "Controlling person liability 'is a separate inquiry from that of primary liability and provides an alternative basis of culpability.'"[94] However, if a plaintiff fails to establish a primary

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Poptech, L.P. v. Stewardship Inv. Advisors, LLC, 849 F. Supp. 2d 249, 274 (D. Conn. 2012) (quoting *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 157 (2d Cir. 2007)); *see also ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 106 (2d Cir. 2007) (providing that loss causation is the "proximate causal link between the alleged misconduct and the plaintiff's economic harm").

90. *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 274 (D. Conn. 2012) (quoting *Lattanzio v. Deloitte & Touche LLP*, 476 F.3d 147, 157 (2d Cir. 2007)); *see Charney v. Wilkov*, 734 F. App'x 6, 10 (2d Cir. 2018); *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005); *FIH, LLC v. Found. Cap. Partners, LLC*, 176 F. Supp. 3d 52, 92 (D. Conn. 2016).

91. *Robertson v. MetLife Sec., Inc.*, 779 F. App'x 783, 786 (2d Cir. 2019) (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173, 175 (2d Cir. 2005)); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 172 (D. Conn. 2019); *In re Xerox Corp. Sec. Litig.*, 935 F. Supp. 2d 448, 493 (D. Conn. 2013), *aff'd sub nom. Dalberth v. Xerox Corp.*, 766 F.3d 172 (2d Cir. 2014); *see Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 322 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019) (discussing that loss causation is akin, though not identical, to proximate cause in tort law).

92. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 107 (2d Cir. 2007); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 172 (D. Conn. 2019); *Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 322 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019); *In re Xerox Corp. Sec. Litig.*, 935 F. Supp. 2d 448, 493 (D. Conn. 2013), *aff'd sub nom. Dalberth v. Xerox Corp.*, 766 F.3d 172 (2d Cir. 2014) ("[T]he misstatement or omission [must have] concealed something from the market that, when disclosed, negatively affected the value of the security. Otherwise, the loss in question was not foreseeable.") (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 173 (2d Cir. 2005)).

93. 15 U.S.C. § 78t(a).

94. *STMicroelectronics v. Credit Suisse Grp.*, 775 F. Supp. 2d 525, 535 (E.D.N.Y. 2011) (quoting *Suez Equity Investors LP v. Toronto-Dominion Bank*, 250 F.3d 87, 101 (2d Cir. 2001)).

violation of the securities laws, a claim for control person liability must also fail.[95]

A plaintiff establishes a prima facie case of control person liability by demonstrating "(1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud."[96] Liability under Section 20(a) requires that a determination be made as to each individual defendant's control of the primary violator, as well as the defendant's particular culpability.[97]

Control means "the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[98] Liability under Section 20(a) requires control over the primary violator, but also actual control over the transaction in question.[99] The mere status or position of a defendant as a director or committee member, without more, is insufficient to demonstrate actual control over a company or an alleged fraudulent transaction.[100] Rather,

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95. *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 189 (D. Conn. 2016) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007)); *see Altayyar v. Etsy, Inc.*, 731 F. App'x 35, 38 (2d Cir. 2018) (affirming dismissal of secondary liability under Section 20(a) because claim depends on a primary violation of Section 10(b)); *In re Xerox Corp. Sec. Litig.*, 935 F. Supp. 2d 448, 496 (D. Conn. 2013), *aff'd sub nom. Dalberth v. Xerox Corp.*, 766 F.3d 172 (2d Cir. 2014) (granting summary judgment as to the Section 20(a) claims in defendants' favor because plaintiffs failed to establish underlying violation of federal securities laws).

96. *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 236 (2d Cir. 2014) (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 108 (2d Cir. 2007)); *see, e.g.*, *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 170 (2d Cir. 2000); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 175 (D. Conn. 2019); *Singh v. Cigna Corp.*, 277 F. Supp. 3d 291, 324 (D. Conn. 2017), *aff'd*, 918 F.3d 57 (2d Cir. 2019); *In re World Wrestling Ent., Inc. Sec. Litig.*, 180 F. Supp. 3d 157, 188-89 (D. Conn. 2016); *First N.Y. Sec. LLC v. United Rentals, Inc.*, 648 F. Supp. 2d 256, 266 (D. Conn. 2009), *aff'd*, 391 F. App'x 71 (2d Cir. 2010).

97. *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 481-82 (S.D.N.Y. 2013) (quoting *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998)).

98. *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 482 (S.D.N.Y. 2013) (quoting 17 C.F.R. § 240.12b-2); *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 524 (S.D.N.Y. 2016) ("The mere exercise of influence is not sufficient to establish control.") (internal quotation marks omitted).

99. *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 175 (D. Conn. 2019)

100. *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 524 (S.D.N.Y. 2016); *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 482 (S.D.N.Y. 2013) (citing *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 436 (S.D.N.Y. 2001)); *see Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 176 (D. Conn. 2019)

the requisite control over a primary violator may be established by demonstrating that the "controller possessed the power to direct or cause the direction of the management and policies of a person."[101] Also, the signing of a financial statement generally serves to establish control over both those who wrote the statement as well as the contents of the statement itself.[102]

1-2:8 Aiding and Abetting

The United States Supreme Court has expressly held that Section 10(b) does not provide for a private right of action for aider and abettor liability.[103] While the SEC may bring an action against an entity that "knowingly or recklessly provides substantial assistance" to another in violation of the federal securities laws, a private party may not pursue such a claim for aider and abettor liability.[104]

("Officer or director status alone does not constitute control.") (internal quotation marks omitted).

101. *JHW Greentree Cap., L.P. v. Whittier Tr. Co.*, No. 05 Civ. 2985, 2006 WL 1080395, at *4 (S.D.N.Y. Apr. 24, 2006) (internal quotation marks omitted); *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 482 (S.D.N.Y. 2013) (holding that actual control, not mere control person status, is required to sufficiently plead control) (quoting *In re Scottish Re Sec. Litig.*, 524 F. Supp. 2d 370, 386 (S.D.N.Y. 2007)); *see also Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 176 (D. Conn. 2019) (noting that control may be established by showing defendants were members of the core management team).

102. *In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 482 (S.D.N.Y. 2013); *see also City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, 928 F. Supp. 2d 705, 721 (S.D.N.Y. 2013) ("Directors and officers who sign registration statements or other SEC filings are presumed to control those who draft those documents.").

103. *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 395 (2014); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 191 (1994); *see also Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 151 (2011) ("Rule 10b-5's private right of action does not include suits against aiders and abettors."); *Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (discussing that the Court in *Central Bank* held that there is no private right of action for aiding and abetting a violation of Section 10(b)).

104. 15 U.S.C. § 78t(e); *Lorenzo v. SEC*, 139 S. Ct. 1094, 1103 (2019); *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 143 (2011); *see In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 151 n.22 (2d Cir. 2015) (explaining that Congress, as part of the PSLRA, specifically authorized *the SEC* to bring civil actions against aiders and abettors after the Supreme Court's holding in *Central Bank* that Section 10(b) does not provide for aider and abettor liability).

1-2:9 Statute of Limitations

1-2:9.1 Generally

The statute of limitations governing the commencement of a securities fraud action was extended by the Sarbanes-Oxley Act of 2002. A claim for securities fraud may not be brought later than the earlier of (1) two years after the discovery of the facts constituting the violation or (2) five years after the violation.[105] As the Supreme Court held, the limitations period for securities fraud claims begins to run "once the plaintiff did discover or a reasonably diligent plaintiff would have discovered the facts constituting the violation—whichever comes first."[106]

1-2:9.2 Inquiry Notice

Inquiry notice, often referred to as "storm warnings," triggers a duty of inquiry on the part of the plaintiff when there is sufficient information to suggest to an investor of ordinary intelligence the probability that she has been defrauded.[107] However, "the 'discovery' of facts that put a plaintiff on 'inquiry notice' does not *automatically* begin the running of the limitations period."[108] Rather, the Supreme Court in *Merck & Co., Inc. v. Reynolds*[109] held that "a cause of action accrues (1) when the plaintiff did in fact discover, or (2) when a reasonably diligent plaintiff would have discovered, 'the facts constituting the violation'—whichever comes first."[110] As the Second Circuit Court of Appeals explained,

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105. 28 U.S.C. § 1658(b).

106. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 653 (2010) (internal quotation marks omitted).

107. *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005) (quoting *Levitt v. Bear Stearns & Co., Inc.*, 340 F.3d 94, 101 (2d Cir. 2003)); *see also Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 119 (2d Cir. 2017) (discussing storm warnings in connection with the statute of limitations of Section 13 of the Securities Act).

108. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 653 (2010) (emphasis added). Prior to the *Merck* decision, the law was such that the statute of limitations began to run once there were sufficient "storm warnings" to trigger the duty to inquire. *Shah v. Meeker*, 435 F.3d 244, 249 (2d Cir. 2006), *overruled by Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010); *see also In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 370-71 (S.D.N.Y. 2011) (discussing that the Court in *Merck* "disparaged the use of inquiry notice and altered the applicable statute of limitations analysis for securities fraud claims").

109. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010).

110. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 653 (2010); *see also* 28 U.S.C. § 1658(b)(1) (providing that the limitations period begins to run upon "discovery of the facts constituting the violation").

"the limitations period commences not when a reasonable investor would have begun investigating, but when such a reasonable investor conducting such a timely investigation would have uncovered the facts constituting a violation."[111] In this context, a fact is not "discovered" until a reasonably diligent plaintiff would have sufficient information concerning the fact to be able to adequately plead it in a complaint.[112]

1-2:10 Remedies

A plaintiff's recovery in an action for a violation of securities fraud under the Exchange Act is limited to actual damages.[113] Typically, damages recoverable on a claim for securities fraud are measured by a plaintiff's out-of-pocket losses.[114] "Under that measure, 'a defrauded buyer of securities is entitled to recover only the excess of what he paid over the value of what he got.'"[115] Out-of-pocket damages are calculated by taking the difference between the price paid and the "value" of the stock when purchased.[116]

Aside from the recovery of out-of-pocket losses, courts have also awarded relief in securities fraud cases under other varying theories of relief, including gross economic loss damages, benefit of the

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111. *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 174 (2d Cir. 2011); *see Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 119 (2d Cir. 2017) (discussing that after the *Merck* decision, the limitations period begins only when, in the course of investigation, a reasonable plaintiff would have discovered sufficient information to adequately plead a securities law violation).

112. *Gavin/Solmonese LLC v. D'Arnaud-Taylor*, 639 F. App'x 664, 666-67 (2d Cir. 2016); *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011) ("[T]he reasonably diligent plaintiff has not 'discovered' one of the facts constituting a securities fraud violation until he can plead that fact with sufficient detail and particularity to survive a 12(b)(6) motion to dismiss.").

113. 15 U.S.C. § 78bb(a)(1) (providing that no person shall recover "a total amount in excess of the actual damages to that person on account of the act complained of").

114. *Acticon AG v. China N. E. Petrol. Holdings Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012); *In re Puda Coal Sec. Inc. Litig.*, No. 11 Civ. 2598, 2017 WL 65325, at *11 (S.D.N.Y Jan. 6, 2017); *Camofi Master LDC v. Riptide Worldwide, Inc.*, No. 10 Civ. 4020, 2012 WL 6766767, at *13 (S.D.N.Y. Dec. 17, 2012) (quoting *In re Crazy Eddie Sec. Litig.*, 948 F. Supp. 1154, 1165 (E.D.N.Y. 1996)).

115. *Acticon AG v. China N. E. Petrol. Holdings Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012) (quoting *Levine v. Seilon*, 439 F.2d 328, 334 (2d Cir. 1971)).

116. *Acticon AG v. China N. E. Petrol. Holdings Ltd.*, 692 F.3d 34, 38 (2d Cir. 2012) (quoting *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156, 168 (2d Cir. 1980)); *In re Mylan N.V. Sec. Litig.*, 379 F. Supp. 3d 198, 210 (S.D.N.Y. 2019); *Mazuma Holding Corp. v. Bethke*, 21 F. Supp. 3d 221, 235 (E.D.N.Y. 2014).

bargain damages, disgorgement, and rescissionary damages.[117] Regardless of the theory, however, Section 28(a) of the Exchange Act limits a plaintiff's recovery to actual damages.[118]

The PSLRA further limits a plaintiff's potential recovery through a "bounce back" provision in cases involving open-market transactions.[119] Essentially, the provision prohibits the calculation of damages based on a single-day price decline; rather, it provides that damages are to be calculated by the average share price over a 90-day period after the information that corrects the misstatement or omission is disseminated to the market.[120] The intended purpose of the provision is to "limit[ ] damages to those losses caused by the fraud and not by other market conditions."[121]

In sum and as articulated by the Second Circuit, "[s]ubject to the bounce-back limitation imposed by the PSLRA, a securities fraud action attempts to make a plaintiff whole by allowing him to recover his out-of-pocket damages, that is, the difference between what he paid for a security and the uninflated price."[122]

1-3 THE SECURITIES ACT OF 1933

The Securities Act of 1933 (Securities Act) and the Exchange Act have been described by the United States Supreme Court as "interrelated components of the federal regulatory scheme governing transactions in securities."[123] The Securities Act protects

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117. *Mazuma Holding Corp. v. Bethke*, 21 F. Supp. 3d 221, 235 (E.D.N.Y. 2014) (noting that "out-of-pocket damages are not the only permissible measure of recovery" and citing examples of various forms of recovery awarded) (quoting *Camofi Master LDC v. Riptide Worldwide, Inc.*, No. 10 Civ. 4020, 2012 WL 6766767, at *14 (S.D.N.Y. Dec. 17, 2012)).

118. 15 U.S.C. § 78bb(a)(1); *Mazuma Holding Corp. v. Bethke*, 21 F. Supp. 3d 221, 236 (E.D.N.Y. 2014); *see also Camofi Master LDC v. Riptide Worldwide, Inc.*, No. 10 Civ. 4020, 2012 WL 6766767, at *14 (S.D.N.Y. Dec. 17, 2012) (noting that this limitation serves to bar speculative recoveries, but otherwise contemplates that the appropriate measure of damages will be fashioned by the court).

119. 15 U.S.C. § 78u-4(e)(1).

120. 15 U.S.C. § 78u-4(e)(1); *Acticon AG v. China N. E. Petrol. Holdings Ltd.*, 692 F.3d 34, 39 (2d Cir. 2012) (citing *In re Veritas Software Corp. Sec. Litig.*, 496 F.3d 962, 967 n.3 (9th Cir. 2007)); *In re Mylan N.V. Sec. Litig.*, 379 F. Supp. 3d 198, 210 (S.D.N.Y. 2019); *In re Puda Coal Sec. Inc. Litig.*, No. 11 Civ. 2598, 2017 WL 65325, at *120 (S.D.N.Y Jan. 6, 2017).

121. *Acticon AG v. China N. E. Petrol. Holdings Ltd.*, 692 F.3d 34, 39 (2d Cir. 2012) (internal quotation marks omitted).

122. *Acticon AG v. China N. E. Petrol. Holdings Ltd.*, 692 F.3d 34, 41 (2d Cir. 2012) (citing *Levine v. Seilon*, 439 F.2d 328, 334 (2d Cir. 1971)).

123. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 206 (1976)).

investors by requiring that companies issuing securities, i.e., issuers, make full and fair disclosure of information relevant to the public offering.[124] While the judiciary found an implied private right of action to pursue violations of securities fraud under Section 10(b) of the Exchange Act, Sections 11 and 12(a)(2) of the Securities Act expressly provide purchasers of securities private causes of action arising out of material misrepresentations or omissions made in connection with registered securities offerings. Specifically, Section 11 governs registration statements, and Section 12(a)(2) applies to prospectuses and oral communications.[125]

1-3:1 Section 11

Section 11 of the Securities Act prohibits materially misleading statements or omissions in registration statements filed with the SEC.[126] Section 11 provides a private right of action to a purchaser of a registered security, whether purchased directly from the issuer or in the aftermarket, if the registration statement filed with the SEC contained either material misstatements or omissions of material facts.[127] To state a claim under Section 11, a plaintiff must establish that:

> (1) she purchased a registered security, either directly from the issuer or in the aftermarket following the offering; (2) the defendant participated in the offering in a manner sufficient to give rise to liability under [S]ection 11; and (3) the registration statement contained an untrue statement of a

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124. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 178-79 (2015); *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc*., 873 F.3d 85, 98 (2d Cir. 2017).

125. 15 U.S.C. §§ 77k(a), 77*l*(a)(2); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 182-83 (2d Cir. 2014); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 367 (S.D.N.Y. 2011).

126. 15 U.S.C. § 77k(a); *see Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 192 (2015) ("Congress adopted § 11 to ensure that issuers tell the whole truth to investors.") (internal quotation marks omitted).

127. *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2047 (2017); *Hutchison v. Deutsche Bank Sec., Inc.*, 647 F.3d 479, 484 (2d Cir. 2011) (citing 15 U.S.C. § 77k(a)); *see also Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 179 (2015) ("Section 11 . . . creates two ways to hold issuers liable for the contents of a registration statement—one focusing on what the statement says and the other on what it leaves out."); *In re Frontier Commc'ns Corp. Stockholders Litig.*, No. 3:17-cv-1617, 2019 WL 1099075, at *28 (D. Conn. Mar. 8, 2019) (noting that aftermarket purchasers able to trace their shares to a misleading registration statement have standing under Section 11).

> material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.[128]

A claim under Section 11 may be maintained only against one of the following five categories of persons expressly enumerated in the statute: (1) those who signed the registration statement, (2) directors of or partners in the issuer at the time of the filing of the allegedly deceptive registration statement, (3) those named in the registration statement, with consent, as about to become a director or partner, (4) accountants, engineers, or appraisers, or anyone whose profession gives authority to statements made by him, who are named as having prepared or certified the registration statement or any report or valuation used in connection therewith, and (5) underwriters of the security.[129] Additionally, to prevail on a claim, a plaintiff must be able to "trace" his shares to the allegedly deceptive registration statement.[130]

In 2015, the Supreme Court clarified that statements of opinion are not beyond the purview of Section 11. In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*,[131] the Court held that liability for making a false statement of opinion in a registration statement may be found if material and if either the speaker did not hold the belief professed or the supporting fact supplied by the speaker were untrue.[132] Additionally, an opinion,

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128. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358-59 (2d Cir. 2010) (internal quotation marks omitted); *see, e.g.*, *In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 462 (S.D.N.Y. 2018); *New Jersey Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, No. 08-CV-5310, 2016 WL 7409840, at *7 (S.D.N.Y. Nov. 4, 2016); *Scott v. Gen. Motors Co.*, 46 F. Supp. 3d 387, 393 (S.D.N.Y. 2014), *aff'd*, 605 F. App'x 52 (2d Cir. 2015); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 367 (S.D.N.Y. 2011).

129. 15 U.S.C. § 77k(a)(1)-(5); *see also Ho v. Duoyuan Global Water, Inc.*, No. 10-CV-7233, 2012 WL 3647043, at *23 (S.D.N.Y. Aug. 24, 2012) (dismissing Section 11 claim against defendants because "there are only five statutorily enumerated parties subject to liability under § 11: signatories, directors/partners, future directors/partners, preparers, and underwriters").

130. *Perry v. Duoyuan Printing, Inc.*, No. 10 Civ. 7235, 2013 WL 4505199, at *10 (S.D.N.Y. Aug. 22, 2013); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 372-73 (S.D.N.Y. 2011) (citing *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 31 n.1 (2d Cir. 2006)); *see also In re Fine Host Corp. Sec. Litig.*, 25 F. Supp. 2d 61, 66 (D. Conn. 1998) ("[A] plaintiff who can trace [its] securities to a registered offering has standing to sue under the Securities Act for a defect in that registration.") (internal quotation marks omitted).

131. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015).

132. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 185-86 (2015); *see also Tongue v. Sanofi*, 816 F.3d 199, 209-12 (2d Cir. 2016) (discussing the *Omnicare* decision in the context of Section 10(b) claim).

even if sincerely held, may be actionable if the speaker omits information "whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."[133] However, the Court cautioned that a statement of opinion "is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way" because a "reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement."[134]

1-3:2 Section 12(a)(2)

Section 12(a)(2) of the Securities Act imposes liability on issuers or sellers of securities that were sold using a prospectus or an oral communication containing a material misstatement or omission.[135] To state a claim under Section 12(a)(2), a plaintiff must establish that: "(1) the defendant is a 'statutory seller;' (2) the sale was effectuated 'by means of a prospectus or oral communication;' and (3) the prospectus or oral communication 'included an untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading.'"[136]

While liability under Section 11 is expressly limited to the specific participants involved in the offering enumerated in the statute, the scope of the potential defendants in an action under Section 12(a)(2) is governed by the statutory seller requirement. A "statutory seller" under Section 12(a)(2) is one who "(1) passed title, or other interest in the security, to the buyer for value, or (2)

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133. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 194 (2015).

134. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 190 (2015) (emphasis in original).

135. 15 U.S.C. § 77*l*(a)(2); *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc*., 873 F.3d 85, 98 (2d Cir. 2017); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 182-83 (2d Cir. 2014) (citing *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010)); *Hutchison v. Deutsche Bank Sec., Inc.*, 647 F.3d 479, 484 (2d Cir. 2011) (citing 15 U.S.C. § 77*l*(a)(2)).

136. *New Jersey Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, No. 08-CV-5310, 2016 WL 7409840, at *8 (S.D.N.Y. Nov. 4, 2016) (quoting *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010)); *see, e.g.*, *In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 463 (S.D.N.Y. 2018); *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 520 (S.D.N.Y. 2016); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *24 (S.D.N.Y. Sept. 28, 2012); *see In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 367 (S.D.N.Y. 2011).

successfully solicited the purchase of a security, motivated at least in part by a desire to serve his own financial interests or those of the securities' owner."[137] Liability under Section 12(a)(2) may be imposed only upon the "immediate seller" of the securities at issue. Unlike Section 11, "Section 12(a)(2) does not apply to a private contract for a secondary market sale of securities . . . . [and] a Section 12(a)(2) action 'cannot be maintained by a plaintiff who acquires securities through a private transaction, whether primary or secondary.'"[138] Stated another way, to have standing to pursue a claim under Section 12(a)(2), the plaintiff must have purchased the securities directly from the issuer in the initial public offering.[139]

1-3:3 Section 11 and Section 12(a)(2) Liability

Given the similarities and somewhat parallel elements between claims under Sections 11 and 12(a)(2), courts have characterized them as "Securities Act siblings" and generally evaluate the claims together.[140] Sections 11 and 12(a)(2) collectively provide

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137. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010) (internal quotation marks omitted); *Emerson v. Mut. Fund Series Tr.*, 393 F. Supp. 3d 220, 258-59 (E.D.N.Y. 2019); *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 521 (S.D.N.Y. 2016); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *24 n.25 (S.D.N.Y. Sept. 28, 2012); *see also In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 463 (S.D.N.Y. 2018) (noting that a statutory seller includes "those who successfully solicited the purchase of the security in service of their own financial interests").

138. *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 373 (S.D.N.Y. 2011) (quoting *Yung v. Lee*, 432 F.3d 142, 149 (2d Cir. 2005)) (internal citation omitted); *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 744 (S.D.N.Y. 2015); *see also In re Smart Techs., Inc. S'holder Litig.*, 295 F.R.D. 50, 57 (S.D.N.Y. 2013) ("It is well-settled that a plaintiff may maintain a section 12(a)(2) claim only where the plaintiff purchased securities directly in the initial public offering; so-called 'aftermarket' or 'secondary market' purchasers do not have standing to maintain a section 12(a)(2) claim.").

139. *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *25 (S.D.N.Y. Sept. 28, 2012) (providing that liability under Section 12(a)(2), unlike Section 11, attaches only when a plaintiff purchases shares directly from the initial public offering and not in the aftermarket) (quotation omitted); *In re Fine Host Corp. Sec. Litig.*, 25 F. Supp. 2d 61, 67 (D. Conn. 1998) (providing that Section 12(a)(2) limits recovery to purchasers who bought their shares directly from a seller in a public offering).

140. *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 182-83 (2d Cir. 2014) (noting the standard for claims under Sections 11 and 12(a)(2) is the same); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010) (noting that Sections 11 and 12(a)(2) are "Securities Act siblings with roughly parallel elements, notable both for the limitations on their scope as well as the *interrorem* nature of the liability they create"); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 182 (D. Conn. 2019) (providing that a plaintiff who fails to plead a Section 11 claim likewise fails to plead a Section 12 claim given their "roughly parallel elements"); *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 520 (S.D.N.Y. 2016) (noting that Sections 11 and 12(a)(2) are Securities Act siblings with roughly parallel elements); *In re UBS AG Sec. Litig.*, No. 07

three bases to impose liability for misstatements or omissions contained in registration statements or prospectuses filed with the SEC: "(1) a material misrepresentation; (2) a material omission in contravention of an affirmative legal disclosure obligation; or (3) a material omission of information that is necessary to prevent existing disclosures from being misleading."[141] Only those who have actually purchased or acquired the securities at issue may pursue claims under Sections 11 and 12(a)(2).[142]

The definition of materiality is the same as is utilized in connection with Section 10(b) and Rule 10b-5 claims, i.e., whether the alleged misrepresentation or omission, when considered in context, would have misled a reasonable investor.[143] While a plaintiff must establish the materiality of a purported misstatement or omission, a plaintiff need not allege scienter, reliance, or loss causation.[144]

Civ. 11225, 2012 WL 4471265, at *24 (S.D.N.Y. Sept. 28, 2012) (noting that Sections 11 and 12(a)(2) are "Securities Act siblings" and are usually evaluated by courts in tandem).

141. *In re Barclays Bank PLC Sec. Litig.*, 756 F. App'x 41, 44 (2d Cir. 2019) (quoting *Hutchison v. Deutsche Bank Sec. Inc.*, 647 F.3d 479, 484 (2d Cir. 2011)); *see, e.g., Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 140 (2d Cir. 2017); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 182 n.38 (2d Cir. 2014) (quoting *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715-16 (2d Cir. 2011)); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360 (2d Cir. 2010) (citing 15 U.S.C. §§ 77k(a), 77*l*(a)(2)); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 181-82 (D. Conn. 2019).

142. *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 369 (S.D.N.Y. 2011); *see also In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 390-92 (E.D.N.Y. 2013) (dismissing claim with prejudice for lack of standing because Section 11 specifically requires that plaintiff must have purchased the securities that are traceable to the allegedly misleading registration statement).

143. *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 151 (2d Cir. 2017); *Hutchison v. Deutsche Bank Sec., Inc.*, 647 F.3d 479, 484 (2d Cir. 2011); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360 (2d Cir. 2010); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 376 (S.D.N.Y. 2011); *see also In re ProShares Tr. Sec. Litig.*, 728 F.3d 96, 105 (2d Cir. 2013) ("[W]e review documents holistically and in their entirety. The literal truth of an isolated statement is insufficient; the proper inquiry requires an examination of defendants' representations, taken together and in context.") (internal quotation marks omitted).

144. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 179 (2015); *In re Barclays Bank PLC Sec. Litig.*, 756 F. App'x 41, 45 (2d Cir. 2019); *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 182 (2d Cir. 2014) (citing *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010)); *Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 520 (S.D.N.Y. 2016); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *24 (S.D.N.Y. Sept. 28, 2012); *see also Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 192 n.9 (2015) (discussing that Section 11 establishes a "stringent standard of liability" that is not dependent upon proof of fraud).

If one of the above three bases for liability is established, then a defendant issuer's liability is "virtually absolute."[145] Unlike Section 10(b) of the Exchange Act, the liability imposed under Sections 11 and 12(a)(2) is narrowly defined and thus is typically more readily available.[146] Specifically, "[i]ssuers are subject to 'virtually absolute' liability under [S]ection 11, while the remaining potential defendants under [S]ections 11 and 12(a)(2) may be held liable for mere negligence."[147] Notwithstanding this stringent standard of liability, however, defendant issuers are afforded a reasonable care defense and may avoid liability by demonstrating that, in the exercise of reasonable care, could not have known that the statements at issue were true.[148]

1-3:3.1 Section 13

Section 13 of the Securities Act sets forth two limitations periods for Section 11 and 12(a)(2) claims.[149] The first, a statute of limitations, provides that claims brought for violations of Section 11

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145. *Hutchison v. Deutsche Bank Sec., Inc.*, 647 F.3d 479, 484 (2d Cir. 2011) (quoting *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 715-16 (2d Cir. 2011)); *see, e.g.*, *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 742 (S.D.N.Y. 2015); *In re UBS AG Sec. Litig.*, No. 07 Civ. 11225, 2012 WL 4471265, at *24 (S.D.N.Y. Sept. 28, 2012).

146. *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 368 (S.D.N.Y. 2011); *see also In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359-60 (2d Cir. 2010) ("[I]n contrast to their catchall cousin in the Exchange Act—section 10(b), 15 U.S.C. § [78] j(b)—sections 11 and 12(a)(2) of the Securities Act apply more narrowly but give rise to liability more readily.") (citing *In re Fuwei Films Sec. Litig.*, 634 F. Supp. 2d 419, 433-34 (S.D.N.Y. 2009)).

147. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010) (quoting *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983)); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 182 (D. Conn. 2019); *see also In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 378-79 (S.D.N.Y. 2011) (discussing that Section 11's stringent standard of liability reflects Congress' view that underwriters, issuers, and accountants who play a direct role in a registered offering bear a heavy moral responsibility to the public).

148. 15 U.S.C. § 77*l*(a)(2); *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 99 (2d Cir. 2017); *see also In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360 n.7 (2d Cir. 2010) (discussing the availability of due diligence and reasonable care defenses); *In re OSG Sec. Litig.*, 971 F. Supp. 2d 387, 401 n.94 (S.D.N.Y. 2013) (discussing affirmative defense where defendant "did not know, and in the exercise of reasonable care could not have known, of such untruth or omission" contained in the prospectus or oral communication) (citing 15 U.S.C. §§ 77k(b)(3)(C), 77*l*(a)(2)).

149. 15 U.S.C. § 77m; *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2047 (2017); *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013).

and 12(a)(2) are subject to a one-year statute of limitations.[150] This limitations period begins to run upon "the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence."[151] In accordance with the Supreme Court's pronouncement concerning inquiry notice in *Merck & Co., Inc. v. Reynolds*,[152] a fact is not "discovered" until a reasonably diligent plaintiff has sufficient information about that fact to survive a motion to dismiss.[153]

The second limitations period contained in Section 13 is a statute of repose that bars any action for violations under Sections 11 and 12(a)(2) more than three years after the bona fide offering of the security, or under Section 12(a)(2) more than three years after its sale.[154] The three year statute of repose under Section 13 is an absolute limitation that serves to extinguish claims after the three-year period.[155]

1-3:4 Section 15

Section 15 of the Securities Act provides for control person liability in connection with violations of Sections 11 and 12(a)(2).[156] Specifically, Section 15 "creates liability for individuals or entities that 'control any person liable' under [S]ection 11 or 12."[157] As such,

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150. 15 U.S.C. § 77m; *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 107 (2d Cir. 2013).

151. *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 119 (2d Cir. 2017); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 370 (S.D.N.Y. 2011) (quoting 15 U.S.C. § 77m); *see Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 520-21 (S.D.N.Y. 2016).

152. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010).

153. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 652 (2010); *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 119 (2d Cir. 2017); *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011); *see also Youngers v. Virtus Inv. Partners Inc.*, 195 F. Supp. 3d 499, 520 (S.D.N.Y. 2016) ("[I]nquiry notice applies to Section 11 claims.").

154. 15 U.S.C. § 77m; *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 101 n.1, 107 (2d Cir. 2013); *see California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2055 (2017) ("The 3-year time bar in § 13 of the Securities Act is a statute of repose. Its purpose and design are to protect defendants against future liability.")

155. *California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050, 2052 (2017); *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 109 (2d Cir. 2013) (holding that the statute of repose in Section 13 creates a substantive right that is not subject to tolling).

156. 15 U.S.C. § 77*o*.

157. *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010) (citing 15 U.S.C. § 77*o*); *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 99 (2d Cir. 2017); *see also Emerson v. Mut. Fund Series Tr.*, 393 F. Supp. 3d

a plaintiff seeking to hold control persons liable must first prove primary liability under Sections 11 or 12(a)(2).[158]

1-4 INVESTMENT COMPANY ACT OF 1940

1-4:1 Generally

The Investment Company Act of 1940 (ICA) governs and regulates investment companies, i.e., entities primarily engaged in the business of investing, reinvesting, or trading securities, including mutual funds.[159] The ICA was enacted to protect shareholders from the potential for abuse that is inherent in the structure of investment companies. A typical investment company or mutual fund, unlike most corporations, is created and managed by an outside investment advisor who, in turn, generally supervises daily operations, manages investments, and often selects affiliated persons to serve on the investment company's board of directors.[160] As such, the "relationship between investment advisers and mutual funds is fraught with potential conflicts of interest."[161]

220, 260 (E.D.N.Y. 2019) ("To plead a control person violation, a plaintiff must allege that the defendant had actual control over the wrongdoer and the transactions in question.") (internal alterations and quotation marks omitted); *Ontario Tchrs.' Pension Plan Bd. v. Teva Pharm. Indus. Ltd.*, 432 F. Supp. 3d 131, 182 (D. Conn. 2019) (noting that "control" under Section 15(a) is the same as "control" under Section 20(a)).

158. *Federal Hous. Fin. Agency for Fed. Nat'l Mortg. Ass'n v. Nomura Holding Am., Inc.*, 873 F.3d 85, 99 (2d Cir. 2017); *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010) (citing *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1472-73 (2d Cir. 1996)); *Emerson v. Mut. Fund Series Tr.*, 393 F. Supp. 3d 220, 260 (E.D.N.Y. 2019); *see also Scott v. Gen. Motors Co.*, 46 F. Supp. 3d 387, 398 (S.D.N.Y. 2014), *aff'd*, 605 F. App'x 52 (2d Cir. 2015) ("A claim under Section 15 . . . can only succeed if a plaintiff can first demonstrate liability under Section 11.").

159. 15 U.S.C. §§ 80a-1 to 80a-64; *see also* 15 U.S.C. § 80a-3(a) (setting forth definition of investment company); *Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 338 (2010) (defining a mutual fund as "a pool of assets, consisting primarily of a portfolio of securities, and belonging to the individual investors holding shares in the fund") (quoting *Burks v. Lasker*, 441 U.S. 471, 480 (1979)); *Chill v. Calamos Advisors LLC*, 175 F. Supp. 3d 126, 128 (S.D.N.Y. 2016) (same).

160. *Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 338 (2010); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 537 (1984) (citing *Burks v. Lasker*, 441 U.S. 471, 481 (1979)); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 216 (S.D.N.Y. 2019).

161. *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 537 (1984) (citing *Burks v. Lasker*, 441 U.S. 471, 481 (1979)); *see also Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 338 (2010) ("[T]he forces of arm's-length bargaining do not work in the mutual fund industry in the same manner as they do in other sectors of the American economy.") (internal quotation marks omitted); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 216 (S.D.N.Y. 2019) (same).

Accordingly, the ICA regulates most transactions between investment companies and their investment advisors. Section 42 of the ICA provides for the enforcement of its provisions by the SEC through investigation and the commencement of actions for injunctive relief and civil penalties.[162] The sole private right of action afforded to investors by the ICA is for breach of fiduciary duty under Section 36(b) concerning the receipt of excessive fees.[163] Until 2007, courts have refused to imply additional private rights of action under the ICA and, thus, have routinely dismissed claims brought under any other of its provisions.[164] In *Oxford University Bank v. Lansuppe Feeder, LLC*,[165] the Second Circuit Court of Appeals in 2019 held there does exist an implied private right of action under Section 47(a) for a party to a contract violative of the ICA to seek rescission of the illegal contract.[166]

1-4:2 Section 36(b)—Fiduciary Duty

Section 36(b) of the ICA expressly imposes a fiduciary duty on a fund's investment advisor "with respect to the receipt of compensation for services" paid by the fund.[167] Section 36(b) further provides for a private right of action by "a security holder" to redress a breach of that duty.

In determining whether there has been a breach of fiduciary duty under Section 36(b) with respect to compensation received by an investment advisor, "the test is essentially whether the fee schedule represents a charge within the range of what would have been negotiated at arm's-length in the light of all of the

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162. 15 U.S.C. § 80a-41; *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 116 (2d Cir. 2007).

163. 15 U.S.C. § 80a-35(b).

164. *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 117 (2d Cir. 2007) (holding that there is no private right of action under Section 34(b) prohibiting false statements and omissions of material fact, Section 36(a) prohibiting breach of fiduciary duty involving personal misconduct, or Section 48(a) imposing control person liability); *Alexander v. Allianz Dresdner Asset Mgmt. of Am. Holding, Inc.*, 509 F. Supp. 2d 190, 194 (D. Conn. 2007) (same); *In re Solomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 592 (S.D.N.Y. 2006) ("[E]very court in this District that has considered whether §§ 34(b) and 48(a) provide a private right of action has concluded that they do not.").

165. *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99 (2d Cir. 2019).

166. 15 U.S.C. § 80a-46(b); *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 105-06 (2d Cir. 2019).

167. 15 U.S.C. § 80a-35(b).

surrounding circumstances."[168] More specifically, "to face liability under § 36(b), an investment adviser must charge a fee that is so disproportionately large that it bears no reasonable relationship to the services rendered and could not have been the product of arm's length bargaining."[169]

To violate Section 36(b), the alleged fees must be *excessive*, not merely improper.[170] In determining whether there has been a breach, courts consider six factors:

> (1) the nature and quality of the services provided by the advisers to the shareholders; (2) the profitability of the mutual fund to the adviser-manager; (3) 'fall-out' benefits; (4) the economies of scale achieved by the mutual fund and whether such savings were passed on to the shareholders; (5) comparative fee structures with other similar funds; and (6) the independence and conscientiousness of the mutual fund's outside trustees.[171]

The scope and demand of the fiduciary duty at issue is contextual and depends upon the above factors. Allegations of underperformance alone are insufficient to establish that an investment

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168. *Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 344 (2010) (quoting *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 928 (2d Cir. 1982)); *see, e.g., Pirundini v. J.P. Morgan Inv. Mgmt. Inc.*, 765 F. App'x 538, 540 (2d Cir. 2019); *R.W. Grand Lodge of Free & Accepted Masons of Pa. v. Salomon Bros. All Cap Value Fund*, 425 F. App'x 25, 30 (2d Cir. 2011).

169. *Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 346 (2010); *see, e.g., Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 344 (2d Cir. 2006) (quoting *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 928 (2d Cir. 1982)); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 218 (S.D.N.Y. 2019); *Alexander v. Allianz Dresdner Asset Mgmt. of Am. Holding, Inc.*, 509 F. Supp. 2d 190, 195 (D. Conn. 2007).

170. *Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2007) (citing *Gartenberg v. Merrill Lynch Asset Mgmt., Inc.*, 694 F.2d 923, 928 (2d Cir. 1982)); *Alexander v. Allianz Dresdner Asset Mgmt. of Am. Holding, Inc.*, 509 F. Supp. 2d 190, 195 (D. Conn. 2007); *see also Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 352 (2010) ("Section 36(b) is sharply focused on the question of whether the fees themselves were excessive.") (internal quotation marks omitted).

171. *Alexander v. Allianz Dresdner Asset Mgmt. of Am. Holding, Inc.*, 509 F. Supp. 2d 190, 195 (D. Conn. 2007) (quoting *In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 237 (S.D.N.Y. 2005), *aff'd sub nom. Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110 (2d Cir. 2007)); *see, e.g., Pirundini v. J.P. Morgan Inv. Mgmt. Inc.*, 765 F. App'x 538, 540 (2d Cir. 2019) (quoting *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 340, 344 (2d Cir. 2006)); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 216 (S.D.N.Y. 2019); *In re Davis N.Y. Venture Fund Fee Litig.*, No. 14 CV 4318, 2015 WL 7301077, at *4 n.3 (S.D.N.Y. Nov. 18, 2015).

advisor's fees are excessive.[172] A plaintiff bears the burden of establishing a breach.[173]

Notably, however, while an action may be brought by an investor, any recovery will inure to the benefit of the fund—not to the plaintiff investor. The fiduciary duty imposed upon the investment advisor by Section 36(b) is owed to the investment company itself as well as to the shareholders, and "[a]n action may be brought . . . by a security holder of such registered investment company *on behalf of such company*, against such investment adviser . . . ."[174] As such, any recovery that is obtained for a violation of Section 36(b) will be paid to the company, and not to the plaintiff investor.[175] Yet, despite its derivative nature, Section 36(b) provides for a direct cause of action and need not be procedurally brought as a derivative claim.[176]

An action under Section 36(b) may be maintained only against the actual recipient of the compensation or payments.[177] The amount

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172. *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 208, 277 (S.D.N.Y. 2019) (quoting *Amron v. Morgan Stanley Inv. Advisors, Inc.*, 464 F.3d 338, 340, 344 (2d Cir. 2006)).

173. 15 U.S.C. § 80a-35(b)(1); *Jones v. Harris Assocs., L.P.*, 559 U.S. 335, 347 (2010); *Chill v. Calamos Advisors LLC*, 175 F. Supp. 3d 126, 129 (S.D.N.Y. 2016) (providing that Section 36(b) places the burden on the plaintiff to prove a breach of fiduciary duty by the investment advisor).

174. 15 U.S.C. § 80a-35(b) (emphasis added).

175. *Operating Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 97-98 (2d Cir. 2010) (citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523 (1984)); *see also In re Davis N.Y. Venture Fund Fee Litig.*, No. 14 CV 4318, 2015 WL 7301077, at *3 (S.D.N.Y. Nov. 18, 2015) (providing that a Section 36(b) cause of action is brought for the benefit of the fund, with any recovery going to the company rather than for the benefit of any individual shareholder); *In re Solomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 596 (S.D.N.Y. 2006) ("The fiduciary duty imposed on advisers by § 36(b) is owed to the company itself as well as its shareholders and any recovery obtained in a § 36(b) action will go to the company rather than the plaintiff. In this respect, a § 36(b) action is undeniably 'derivative' in a broad sense of that word.") (internal citation omitted).

176. *Operating Local 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 98 (2d Cir. 2010) ("[U]nder § 36(b), a claimant brings a 'direct' suit in name only and a 'derivative' one with respect to the recovery of any damages . . . . Congress explicitly provided in § 36(b) of the ICA for a private right of derivative action for investors.") (quoting *Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 433 (2d Cir. 2002)) (internal quotation omitted).

177. 15 U.S.C. § 80a-35(b)(3); *see also Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 117-18 (2d Cir. 2007) ("[I]t is clear from the language of § 36(b)(3) that no action may be brought under this section 'against any person other than the recipient of such compensation or payments.'") (quoting 15 U.S.C. § 80a-35(b)(3)); *In re Solomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 598-99 (S.D.N.Y. 2006) (holding that to state a claim the proper defendants (i.e., an investment advisor or its affiliated person as defined in 15 U.S.C. § 80a-2(a)(3)) must have received compensation violative of the ICA).

of any award is limited to the actual damages resulting from the breach of fiduciary duty and, further, may not exceed the amount of compensation or payment actually received by the advisor.[178] Additionally, no award is recoverable for any period prior to one year before the action was commenced.[179]

1-5 THE INVESTMENT ADVISERS ACT OF 1940

The Investment Advisers Act of 1940 (IAA) was enacted by Congress to address the various abuses which existed in the investment advisors industry.[180] The IAA provides for SEC enforcement of its provisions and regulations promulgated thereunder, and the statute does not expressly allow for a private right of action to redress violations of the IAA.[181]

The United States Supreme Court, however, has implied a private right of action under Section 215(b), which provision renders void any investment contract that violates the IAA.[182] In *Transamerica Mortgage Advisors, Inc. v. Lewis*,[183] the Court expressly held that "there exists a limited private remedy under the [IAA] to void an investment adviser[']s contract, but that the [IAA] confers no other private causes of action, legal or equitable."[184] The Court reasoned that a person with the power to void a contract ordinarily has the ability to seek relief from the court for rescission of the contract and for restitution of consideration paid. Thus, "when

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178. 15 U.S.C. § 80a-35(b)(3); *In re Solomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 598-99 (S.D.N.Y. 2006).

179. 15 U.S.C. § 80a-35(b)(3); *Chill v. Calamos Advisors LLC*, 417 F. Supp. 3d 218 n.1, (S.D.N.Y. 2019); *In re Solomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 598 (S.D.N.Y. 2006).

180. 15 U.S.C. §§ 80b-1 to 80b-21; *see Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 12-13 (1979).

181. *Hennesey v. Dawson*, No. 09-CV-2170, 2010 WL 3310713, at *1 (E.D.N.Y. Aug. 17, 2010) (citing *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-21 (1979)).

182. 15 U.S.C. § 80b-15(b); *see also Omega Overseas Partners, Ltd. v. Griffith*, No. 13-CV-4202, 2014 WL 3907082, at *3 (S.D.N.Y. Aug. 7, 2014) ("Put simply, § 215(b) is merely a codification of the common-law principle that illegal contracts are invalid.").

183. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

184. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979); *Tobia v. United Grp. of Cos., Inc.*, No. 115CV1208, 2016 WL 5417824, at *20 n.17 (N.D.N.Y. Sept. 22, 2016); *see also SEC v. Cohen*, 332 F. Supp. 3d 575, 594 (E.D.N.Y. 2018) (noting the IAA provides only for a private right of action to rescind an advisory contract); *Hennesey v. Dawson*, No. 09-CV-2170, 2010 WL 3310713, at *1 (E.D.N.Y. Aug. 17, 2010) (providing that the IAA's private right of action is limited to claims seeking rescission of an investment contract).

Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission . . . and for restitution."[185]

Accordingly, under Section 215(b), a party to an investment advisory contract that violates the IAA may seek the limited remedy of rescission. Only a party to the investment contract at issue may bring an action for rescission under Section 215(b).[186] Where rescission is awarded, the rescinding party may also be entitled to restitution of the consideration it provided under the contract, less any value that may have been conferred by the other party.[187] However, as damages are not recoverable under the IAA, restitution may not include compensation for any alleged investment losses resulting from the investment advisor's misconduct.[188]

1-6 CONNECTICUT UNIFORM SECURITIES ACT

1-6:1 Generally

The Connecticut Uniform Securities Act (CUSA)[189] is a remedial statute enacted "to institute comprehensive registration requirements and thereby improve surveillance of securities trading."[190] The overall goal of CUSA, which governs the purchase and sale of securities, is to protect the investing public from fraud.[191]

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185. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979); *GPIF-I Equity Co. v. HDG Mansur Inv. Servs., Inc.*, No. 13CIV547, 2014 WL 1612004, at *3 (S.D.N.Y. Apr. 21, 2014); *Lawrence v. Richman Grp. Cap. Corp.*, No. 3:03CV850, 2005 WL 1949864, at *2 (D. Conn. Aug. 11, 2005).

186. *Clark v. Nevis Cap. Mgmt., LLC*, No. 04 Civ. 2702, 2005 WL 488641, at *13 (S.D.N.Y. Mar. 2, 2005).

187. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 25 n.14 (1979); *Clark v. Nevis Cap. Mgmt., LLC*, No. 04 Civ. 2702, 2005 WL 488641, at *13 (S.D.N.Y. Mar. 2, 2005).

188. *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 25 n.14 (1979); *Clark v. Nevis Cap. Mgmt., LLC*, No. 04 Civ. 2702, 2005 WL 488641, at *13 (S.D.N.Y. Mar. 2, 2005).

189. Conn. Gen. Stat. §§ 36b-2 to 36b-34.

190. *Papic v. Burke*, No. HHBCV054008511, 2007 WL 1019000, at *4 (Conn. Super. Ct. Mar. 22, 2007), *aff'd*, 113 Conn. App. 198 (2009) (quoting *State v. Andreson*, 256 Conn. 313, 329 (2001)).

191. *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 31 (1997); *see also Pearsall Holdings, LP v. Mountain High Funding, LLC*, No. 3:13CV437, 2014 WL 7270334, at *5 (D. Conn. Dec. 18, 2014) (noting that CUSA was "designed for the protection of Connecticut investors").

CUSA establishes a comprehensive scheme governing securities transactions to prevent fraud and abuses in the investment industry. Much like its federal counterpart, this goal may be accomplished, in part, by deterring securities fraud through private actions seeking to enforce CUSA's various provisions, including the antifraud provisions set forth in § 36b-4.[192] Section 36b-4(a) prohibits any person, in connection with the offer, sale, or purchase of any security, from (1) employing any device, scheme or artifice to defraud, (2) making any untrue statement of material fact or omitting to state a material fact necessary to make the statements not misleading, or (3) engaging in any act, practice, or course of business that would operate as a fraud or deceit upon a person.[193] CUSA § 36b-4(b) also prohibits any person from engaging in any dishonest or unethical practice in connection with the offer, sale, or purchase of any security.[194]

1-6:2 Liability

1-6:2.1 Generally

CUSA provides remedies to purchasers of securities for injuries caused by deceptive conduct in connection with the purchase and sale of securities.[195] To establish a cause of action for a violation of CUSA § 36b-4(a) and a primary violation of § 36b-29(a)(2),[196] a party must demonstrate

> (1) that the violator offered or sold a security by means of either an untrue statement of a material

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[192] *Morowitz v. Mantell*, No. CV156058868S, 2016 WL 3768961, at *4 (Conn. Super. Ct. June 14, 2016) ("CUSA unequivocally provides a private cause of action for injuries caused by deceptive purchases and sales of securities."). Connecticut is not precluded from exercising enforcement authority with respect to covered securities, which include, *inter alia*, federally registered securities traded on national exchanges or securities issued by an investment company registered under the ICA. 15 U.S.C. § 77r(b). States retain the jurisdiction and ability to protect investors through the police power and enforcement of their own state anti-fraud laws. 15 U.S.C. § 77r(c)(1); *Papic v. Burke*, 113 Conn. App. 198, 208-10 (2009).

[193] Conn. Gen. Stat. § 36b-4(a).

[194] Conn. Gen. Stat. § 36b-4(b). CUSA applies so long as there was an offer to sell made in Connecticut or an offer to buy made and accepted in Connecticut. Conn. Gen. Stat. § 36b-33(a); *Pearsall Holdings, LP v. Mountain High Funding, LLC*, No. 3:13CV437, 2014 WL 7270334, at *4 (D. Conn. Dec. 18, 2014).

[195] Conn. Gen. Stat. § 36b-29.

[196] Aider and abettor liability under CUSA is discussed at § 1-6:3.1.

> fact, or an omission to state a material fact necessary to make any statements made, in the circumstances of their making, not misleading; and (2) that the buyer did not know of the untruth or omission.[197]

In evaluating a CUSA claim, Connecticut courts deem it appropriate to look to federal securities law for guidance and interpretation of analogous statutory language.[198] A party who sufficiently pleads a violation of the federal securities laws has also sufficiently pled a cause of action under CUSA.[199]

1-6:2.2 Statute of Limitations

The relevant statute of limitations governing an action for securities fraud under CUSA is set forth in § 36b-29(f) of the Connecticut General Statutes. It provides that no action may be brought more than two years from the date when the alleged misrepresentation or fraud is discovered or, in the exercise of reasonable care, should have been discovered.[200] However, in no event may an action be brought more than five years from the date of that misrepresentation or fraud.[201]

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197. *IM Partners v. Debit Direct Ltd.*, 394 F. Supp. 2d 503, 518 (D. Conn. 2005) (quoting *Lehn v. Dailey*, 77 Conn. App. 621, 630-31 (2003)); *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 46 (1997).

198. *Demiraj v. Uljaj*, 137 Conn. App. 800, 806-07 (2012) (citing *National Bank v. Giacomi*, 233 Conn. 304, 322 (1995)); *Papic v. Burke*, No. HHBCV054008511, 2007 WL 1019000, at *11 (Conn. Super. Ct. Mar. 22, 2007), *aff'd*, 113 Conn. App. 198 (2009) (citing *Lehn v. Dailey*, 77 Conn. App. 621, 628-29 (2003)).

199. *IM Partners v. Debit Direct Ltd.*, 394 F. Supp. 2d 503, 518-19 (D. Conn. 2005) (relying upon analysis of the sufficiency of allegations asserted in support of a Rule 10b-5 violation to determine sufficiency of cause of action under § 36b-4); *Flynn v. Bank of Am.*, No. FSTCV155014831S, 2016 WL 7148362, at *14 (Conn. Super. Ct. Oct. 31, 2016) (evaluating federal securities law to determine timeliness of CUSA claim); *Rota v. Colonial Realty/USA Corp.*, No. CV 920505840, 1996 WL 434228, at *4 (Conn. Super. Ct. July 17, 1996) ("Although CUSA and the federal securities laws are not identical, in interpreting CUSA it is instructive to look to rulings of the federal courts interpreting federal securities law, particularly where the language of CUSA is similar to that of the federal law.").

200. Conn. Gen. Stat. § 36b-29(f).

201. Conn. Gen. Stat. § 36b-29(f); *see also Milo v. Galante*, No. 3:09cv1389, 2012 WL 2716416, at *8 (D. Conn. July 9, 2012) (dismissing CUSA claim as time-barred by the five-year limitations period); *see also Slainte Invs. Ltd. P'ship v. Jeffrey*, 142 F. Supp. 3d 239, 265 (D. Conn. 2015) ("As a statute of repose, CUSA's five-year limitations period is not subject to tolling . . . . This is entirely consistent with how federal courts interpret the 1933 Act's analogous three-year statute of repose.") (internal citations omitted).

1-6:3 Secondary Liability

CUSA § 36b-29 expressly creates two types of secondary liability for securities fraud: aiding and abetting liability[202] and control person liability.[203] Prior to the imposition of secondary liability, however, a primary violation of CUSA must first have been established.[204]

1-6:3.1 Aider and Abettor Liability

Section 36b-29(a)(2) prohibits any person from materially assisting another from offering or selling a security by fraudulent means. For conduct to constitute "material assistance," also known as aiding and abetting, a plaintiff must prove that "the aider or abettor materially assisted the primary violator: (1) in the offer or sale; and (2) in the violation by which the primary violator accomplished the offer or sale."[205]

In addition, a plaintiff also has the "burden of production concerning the issue of whether the aider and abettor knew or should have known of the untruth or omission."[206] Upon satisfying this burden of proof, the burden then shifts to the defendant aider and abettor to persuade the fact finder that "it did not know, and in the exercise of reasonable care could not have known, of the untruth or omission."[207]

1-6:3.2 Control Person Liability

Section 36b-29(c) provides, in pertinent part, that every person who directly or indirectly controls a person primarily liable under

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202. Conn. Gen. Stat. § 36b-29(a)(2).

203. Conn. Gen. Stat. § 36b-29(c); *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 61 (1997); *Retirement Program for Emps. v. Madoff*, No. X08 CV09 5011561, 2011 WL 7095186, at *13 (Conn. Super. Ct. Dec. 29, 2011).

204. *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 46 (1997) (setting forth the contours of aider and abettor liability and holding that "[f]irst, there must be a primary violator"); *Retirement Program for Emps. v. Madoff*, No. X08 CV09 5011561, 2011 WL 7095186, at *12 (Conn. Super. Ct. Dec. 29, 2011) (discussing the *Giacomi* decision); *see also Pearsall Holdings, LP v. Mountain High Funding, LLC*, No. 3:13CV437, 2014 WL 7270334, at *6 n.9 (D. Conn. Dec. 18, 2014) (declining to reach the issue of control person liability because plaintiff failed to satisfy elements to state a claim).

205. *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 47 (1997); *see Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 277-78 (D. Conn. 2012).

206. *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 47 (1997); *see Audet v. Fraser*, 332 F.R.D. 53, 76 n.9 (D. Conn. 2019); *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 277-78 (D. Conn. 2012).

207. *Connecticut Nat'l Bank v. Giacomi*, 242 Conn. 17, 47 (1997); *see Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 278 (D. Conn. 2012).

§ 36b-29(a) or (b), who materially aids in the conduct constituting the violation, is also jointly and severally liable to the same extent as the primary violator.[208] A party who sufficiently pleads control person liability under Section 20(a) of the Exchange Act has also sufficiently pled control person liability under CUSA § 36b-29(c).[209] Additionally, given the remedial purposes of CUSA, a plaintiff that has demonstrated aider and abettor liability need not also establish control person liability.[210]

1-6:4 Remedies

A purchaser of securities may pursue an action either at law or in equity to recover the consideration paid for the security, plus eight percent interest per year from the date of payment.[211] CUSA § 36b-29(a) also provides for potential recovery of costs and reasonable attorney's fees.

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208. Conn. Gen. Stat. § 36b-29(c).

209. *Poptech, L.P. v. Stewardship Inv. Advisors, LLC*, 849 F. Supp. 2d 249, 278 (D. Conn. 2012); *see also JHW Greentree Cap., L.P. v. Whittier Tr. Co.*, No. 05 Civ. 2985, 2006 WL 1080395, at *7 (S.D.N.Y. Apr. 24, 2006) (holding that a plaintiff who adequately pleads control person liability under Section 20(a) of the Exchange Act has pled "as much or more than that which is required to plead control person liability under CUSA section 36b-29(c)").

210. *Retirement Program for Emps. v. Madoff*, No. X08 CV09 5011561, 2011 WL 7095186, at *13 (Conn. Super. Ct. Dec. 29, 2011).

211. Conn. Gen. Stat. § 36b-29(a).