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Socially Acceptable Securities Fraud

Christine Hurt

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Socially Acceptable Securities Fraud

Christine Hurt*

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I. INTRODUCTION

Jury Note No. 7 . . . : “. . . Are publicly traded companies required to be truthful on all forms of communication[s, e.g.] press release, email, tweets[?] Is the bar lower for one form of communication (e.g. tweet) vs another form (e.g. press release or email)[?]”¹

What is a lie? Moreover, *where* is it a lie?

Lies are bad. Both the Securities Act of 1933 and the Securities Exchange Act of 1934 create liability for issuer firms and individuals who make “an untrue statement of a material fact or omit[] . . . a material fact required to be stated therein or necessary to make the statements therein not misleading.”² Though some provisions focus on falsity in particular documents filed with the Securities and Exchange Commission (SEC), Rule 10b-5 of the Exchange Act prohibits false or misleading statements generally, without limitation as to the format of the statement; the platform that publishes the statement, or the speaker.³ Civil and criminal liability may attach, therefore, to materially false statements made anywhere, at any time, as long as the statement is made “in connection with” the purchase and sale of a security.⁴ In the ninety years since the passage of the Securities Act and the Securities Exchange Act, however, the number of ways in which market participants may publicly disseminate statements that will be consumed by investors has exploded; does 10b-5 really apply to all these statements? To answer the *United States v. Schena* jury question above, do we distinguish between a tweet⁵ and a press release?

1. *United States v. Schena*, No. 20-cr-00425, 2023 WL 3170050, at *5 (N.D. Cal. Apr. 29, 2023) (alterations in original) (quoting jury question submitted to the trial court during deliberations in which jury unanimously found defendant guilty of securities fraud).

2. Securities Act of 1933 § 11, 15 U.S.C. § 77k; *accord* Securities Act of 1933 § 12, 17, *id.* §§ 77l, 77q; Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j.

3. *See generally* Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. IRVINE L. REV. 1331 (2022) (discussing the wide scope of securities regulation and its role in the prevalence of securities fraud litigation).

4. *See* Eric Goldman, *A Single Emoji Could Constitute Securities Fraud—In re Bed Bath & Beyond*, TECH. & MKTG. L. BLOG (July 28, 2023), <https://blog.ericgoldman.org/archives/2023/07/a-single-emoji-could-constitute-securities-fraud-in-re-bed-bath-beyond.htm> [<https://perma.cc/HK6R-KANK>] (discussing the role of an emoji in a tweet in the context of securities litigation).

5. At the time of this writing, the social media website formerly known as Twitter has been rebranded “X,” but no consensus has been reached on what to call “tweets” after the rebrand. *See* Kate Conger, *So, What Do We Call That Bird App Now?*, N.Y. TIMES, Aug. 3, 2023, at B1 (noting that the Associated Press stylebook suggests

In the 1930s, corporate issuers and the investors who bought and sold securities had extremely limited outlets for communicating with the public or with potential purchasers. Information regarding registered offerings of securities were communicated (and to a large extent still are) with potential investors solely through personal conversations, bare-bones announcements,⁶ and documents following a prescribed format⁷ and filed with the SEC. Publicly traded issuers complied with requirements to file periodic reports with the SEC,⁸ supplemented with the occasional press release and article in the financial press. Presently, the number of ways in which issuers and officers communicate with the wider public and in which buyers and sellers communicate with each other is almost too long to list:⁹ social media such as TikTok,¹⁰ Instagram, Twitter, Discord, and Facebook;¹¹ investor message boards such as InvestorHub, Motley Fool Community, r/WallStreetBets,¹² and Seeking Alpha;¹³ company websites; YouTube; conference calls open to the public aimed at

“X, formerly known as Twitter”). For purposes of this Article, the Author refers to the platform as “Twitter” and posts as “tweets” to avoid confusion.

6. Notice of Proposed Registered Offerings, 17 C.F.R. § 230.135 (2024); Communications Not Deemed a Prospectus, 17 C.F.R. § 230.134 (2024).

7. Prospectus for Use Prior to Effective Date, 17 C.F.R. § 230.430 (2024).

8. Securities Exchange Act of 1934 § 13(a), 15 U.S.C. § 78m(a).

9. See Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Wireless Investors & Apathy Obsolescence*, 100 WASH. U. L. REV. 1653, 1656 (2023) (“Wireless investors tend to invest using app native trading platforms and gather information about investing via social media and online fora.”); see also 2023 Digital Investor Survey: The Age of Information Without Limitation, BRUNSWICK GRP., <https://www.brunswickgroup.com/media/10867/brunswick-digital-investor-survey-2023-summary.pdf> [https://perma.cc/K5MR-5S92] (finding that “81% of investors surveyed stated that they have made a recommendation or decision after initially sourcing information on digital or social media” and “88% have investigated a company based on information posted on digital or social media”).

10. See Sue S. Guan, *The Rise of the Finfluencer*, 19 N.Y.U. J.L. & BUS. 489, 514 (2023) (citing to a study that “found that more than fifty percent of millennials and Gen Z report obtaining financial advice on social media sites such as TikTok and Instagram” (citing *Gen Z Turns to TikTok and Instagram for Financial Advice and Actually Takes It, Study Finds*, CREDIT KARMA (July 13, 2021), <https://www.creditkarma.com/about/commentary/gen-z-turns-to-tiktok-and-instagram-for-financial-advice-and-actually-takes-it-study-finds> [https://perma.cc/T9MG-HXE9])).

11. See Shu Zhang, Jordy F. Gosselt & Menno D.T. de Jong, *How Large Information Technology Companies Use Twitter: Arrangement of Corporate Accounts and Characteristics*, 34 J. BUS. & TECH. COMM’N 364, 365 (2020) (finding that “Twitter is one of the prominent social media platforms in business contexts” because it is “suitable for companies to disseminate information, build relationships, interact with stakeholders, and monitor public opinions”); Michael J. Jung, James P. Naughton, Ahmed Tahoun, Clare Wang, *Do Firms Strategically Disseminate? Evidence from Corporate Use of Social Media*, 93 ACCT. REV. 225, 229 (2018) (finding that by early 2013, more Fortune 1500 companies were creating Twitter accounts than Facebook account).

12. See Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 NEV. L.J. 51, 52–53 (2022) (chronicling the rise of the WallStreetBets subreddit forum on Reddit as a place for camaraderie, entertainment, and exchange of investment information and opinions).

13. Hailiang Chen, Prabuddha De, Yu (Jeffery) Hu, Byoung-Hyoun Hwang, *Wisdom of Crowds: The Value of Stock Opinions Transmitted Through Social Media*, 27 REV. FIN. STUD. 1367, 1368 (2014) (designating SeekingAlpha as “one of the biggest investment-related social media websites in the U.S.” with up to 1 million unique visitors a day as of August 2013).

analysts and investors; webinars; investor and industry conferences;¹⁴ and of course, SEC filings. Some of these communications are scripted; some are vetted by legal counsel; and some are crafted with cautionary language that insulates otherwise rosy forward-looking statements from liability. Some of these communications, however, are extemporaneous, unvetted, and uncrafted. Some are not widely circulated; others are republished everywhere.¹⁵ Yet all of these types of statements have formed the basis for private investor litigation, civil enforcement, and criminal enforcement.

The securities fraud trial of the century between Tesla investors and Elon Musk based on two tweets garnered substantial attention from scholars and pundits.¹⁶ This 2023 case, however, is not an isolated securities fraud case involving social media; in fact, in *United States v. Schena*¹⁷ and *United States v. Milton*,¹⁸ two different CEOs were convicted of criminal securities fraud based on tweeting activity. Though defendants question the role of social media in enforcement actions, courts are treating these marketplace statements just like formal corporate statements. In addition, social media communications of false statements are ubiquitous in enforcement actions against promoters involving unregistered offerings and “pump-and-dump” manipulation cases¹⁹ and have been since the advent of the internet. More timely is whether issuers and their officers who engage with stakeholders via social media are creating litigation risk for their corporations.

This Article presents an empirical analysis of 2022 10b-5 class action lawsuits and of 10b-5 enforcement actions by the SEC that suggests that though social media statements are not yet rich fodder for securities fraud allegations, social media statements are the basis of some lawsuits and prosecutions.²⁰ In a few cases, the social media statement takes center stage; in some cases, allegedly false statements are repeated in multiple venues, including social media. Other types of extemporaneous speech, however, are quite prevalent in class

14. See generally Brian J. Bushee, Michael J. Jung & Gregory S. Miller, *Do Investors Benefit from Selective Access to Management?*, 2 J. FIN. REPORTING 31 (2017) (analyzing potential trading gains from selective access to invitation-only investor conferences).

15. Complaint at 4, SEC v. Berliner, No. 08-cv-03859 (S.D.N.Y. Apr. 24, 2008) (alleging that false statements defendant sent by instant messages to “31 traders and other securities professionals” were picked up by “[t]he media and certain subscriber-based news services”).

16. Order Denying Plaintiff’s Motion for Judgment as a Matter of Law or New Trial, and Denying Defendants’ Motion for Costs, *In re Tesla Inc., Sec. Litig.*, 477 F. Supp. 3d 903 (N.D. Cal. 2020) [hereinafter *Tesla JNOV*].

17. *United States v. Schena*, No. 20-cr-00425, 2023 WL 3170050 (N.D. Cal. Apr. 29, 2023) (denying defendant’s motion for a JNOV and motion for a new trial).

18. See *United States v. Milton*, No. 21-cr-478, 2023 WL 5609098, at *1 (S.D.N.Y. Aug. 30, 2023) (alluding to Milton’s conviction in 2021); Corinne Ramey, *Inside a Jury’s Five-Hour Journey to Convict Nikola’s Trevor Milton*, WALL ST. J. (Oct. 27, 2022), <https://www.wsj.com/articles/inside-a-jurys-five-hour-journey-to-convict-nikolas-trevor-milton-11666863002> (on file with the *Journal of Corporation Law*).

19. See, e.g., Press Release, Sec. & Exch. Comm’n, SEC Charges Eight Social Media Influencers in \$100 Million Stock Manipulation Scheme Promoted on Discord and Twitter (Dec. 14, 2022), [sec.gov/news/press-release/2022-221](https://www.sec.gov/news/press-release/2022-221) [<https://perma.cc/K2PV-FXAW>] (“[S]even of the defendants promoted themselves as successful traders and cultivated hundreds of thousands of followers on Twitter and in stock trading chatrooms on Discord. These seven defendants allegedly purchased certain stocks and then encouraged their substantial social media following to buy those selected stocks . . . without ever having disclosed their plans to dump the securities while they were promoting them.”). Another variation of a pump-and-dump scheme is for investors to purchase control of a thinly traded over-the-counter issuer, encourage others to purchase and increase the quoted price, then sell without disclosing that they controlled the issuer.

20. See *infra* Part VII.

action lawsuits: analyst calls, conference presentations, and interviews. Given myriad channels for communications with analysts, investors, industry participants, and the general public, revisiting traditional jurisprudence regarding the materiality and relevance of false statements made by issuers and their agents is timely. Currently, courts decide on a case-by-case basis if particular statements should be actionable under traditional rules for falsity, materiality, and nexus to issuer securities.

An analysis of recent cases attempting to apply traditional Rule 10b-5 jurisprudence to untraditional corporate speech and investor speech illustrates the need for a new framework going forward as to what types of speech, delivered in what types of formats, concerning what topics, should be the basis for action under Rule 10b-5. This Article argues that this approach may lead to vastly different outcomes within a single federal securities law regime and should be reformed. Ultimately, this Article argues that there may be a level of socially acceptable securities fraud that must be tolerated in an information society.

Part II provides an overview of the ways in which the federal securities laws prohibit false statements made in connection with the purchase and sale of securities, and Part III investigates how courts limit access to Rule 10b-5 litigation by dismissing cases in which the statements are not “false,” or “material,” or “in connection with” the purchase and sale of a security. Part IV attempts to briefly examine the ways in which various non-issuer marketplace participants engage with each other online and how federal securities law has been applied to false statements in those information channels. Part V provides a thorough taxonomy of the channels in which issuers communicate with investors outside of SEC filings and the EDGAR database, and Part VI provides two case studies of completed trials focusing on false statements posted on Twitter: *In re Tesla* and *United States v. Schena*. Part VII presents the findings from an empirical analysis of 10b-5 class actions brought by investors in 2022 alleging that the issuer, alone or in conjunction with officers and shareholders, made false statements to the market. Part VIII explores potential frameworks for determining whether marketplace statements are actionable under 10b-5, and Part IX concludes.

II. BACKGROUND: THE LAW OF FALSE STATEMENTS

A. *The Securities Act of 1933*

The Securities Act contains several provisions that create liability for false statements. Section 11 creates a private cause of action for “any person acquiring such security” if the registration statement, as declared effective, “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”²¹ Plaintiffs may bring this cause of action against any of the individuals listed in Section 11(a), including officers signing the registration statement, directors, underwriters, and accounting experts.²² Though the defendants have a “due diligence” defense,²³ plaintiffs have the burden of proving only a small set of elements: the statement was false when made and it was material. Plaintiffs do not have to

21. Securities Act of 1933 § 11(a) (codified as amended at 15 U.S.C. § 77k(a)).

22. *Id.*

23. *Id.* § 11(b).

prove scienter, reliance, or causation.²⁴ This light burden is balanced by requiring plaintiffs to trace their shares to the registration statement and to file claims within a one-year limitations period.²⁵

Section 12(a)(2) of the Securities Act acts similarly to Section 11, but it creates liability only for untrue statements and omissions in “a prospectus or oral communication.”²⁶ This language is not interpreted to include all kinds of written communications, even though the definition of “prospectus” is extremely broad in the Securities Act,²⁷ but has been cabined to prospectuses in “public offerings.”²⁸ The defendant retains a “due diligence” defense for Section 12 claims and can also avoid liability by proving a lack of loss causation between the false statement and the decline in the price of the security.²⁹

B. The Securities Exchange Act of 1934

The Securities Exchange Act of 1934 contains additional provisions creating liability for false statements and misleading omissions. Similar to Sections 11 and 12 of the Securities Act, Section 14(e) prohibits misstatements in tender offers and solicitations.³⁰ In addition, Rule 14a-9 focuses on the documents created to solicit shareholder votes, including proxy statements, and creates liability for false or misleading statements and omissions in those documents or oral solicitations.³¹

The vast majority of private causes of action brought for securities fraud, however, are brought under Section 10(b) of the Exchange Act.³² The SEC and the DOJ also bring civil and criminal actions under Section 10(b) and accompanying Rule 10b-5. Rule 10b-5(b) echoes Sections 11, 12, and 17 of the Securities Act, making it unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order

24. See JAMES D. COX, ROBERT W. HILLMAN, DONALD C. LANGEVOORT & ANN M. LIPTON, *SECURITIES REGULATION: CASES AND MATERIALS* 426 (10th ed. 2022) (“There is no requirement than the purchaser show any sort of reliance on the registration statement or the statutory prospectus . . . [n]or is it the plaintiff’s burden to show causation or injury.”).

25. Securities Act of 1933 § 13 (codified as amended at 15 U.S.C. § 77m).

26. *Id.* § 77l(a)(2) (“[B]y means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits 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.”).

27. *Id.* § 77b(a)(10) (“The term ‘prospectus’ means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security. . . .”).

28. See *Gustafson v. Alloyd Co.*, 513 U.S. 561, 578 (1995).

29. Securities Act of 1934 § 12(b) (codified as amended at 15 U.S.C. § 78l(b)).

30. Securities Act of 1934 § 14 (codified as amended at 15 U.S.C. § 77n).

31. 17 C.F.R. § 240.14a-9 (2024); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (establishing the “total mix” test for materiality in the context of a Rule 14a-9 claim); see also John C. Friess, Note, *Board Diversity Shareholder Suits: Diverging Materiality Tests Under Rules 10b-5 and 14a-9*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 155, 155 (2021) (arguing that though materiality tests have generally been applied similarly in 10b-5 cases and 14a-9 cases, statements about diversity may be material in the shareholder voting context even if not material in the context of an investor deciding about buying or selling shares).

32. See CORNERSTONE RSCH., *SECURITIES CLASS ACTION FILINGS: 2022 YEAR IN REVIEW* 18 (2023) <https://www.cornerstone.com/wp-content/uploads/2023/05/Securities-Class-Action-Filings-2022-Year-in-Review.pdf> [<https://perma.cc/4B5F-BS3V>] (reporting that among class action complaints filed in 2022, 83% alleged a violation of Rule 10b-5, down from 91% in 2021).

to make the statements made, in the light of the circumstances under which they were made, not misleading.”³³

Importantly for this analysis, 10b-5(b) claims are not limited in the statute to false statements in certain documents or situations, unlike Section 11 and Section 12. In addition, 10b-5 does not specify a certain set of defendants, whether a list of issuer representatives or “sellers” or “offerors.”³⁴ Any “maker” of a statement may be liable under Rule 10b-5 if the false statement is made “in connection with the purchase or sale of any security,” including the issuer, officers, agents or the issuer, shareholders, short-sellers, and others.³⁵

III. POLICING THE BOUNDARIES OF ACTIONABLE FALSE STATEMENTS

To aid in an analysis of how false statements should be treated in securities law based upon the forum in which the statement appears, existing securities law provides us with an existing framework with which to determine if a statement is “actionable”: Is it false? Is it material? Is it made in connection with the purchase and sale of a security? These questions serve to limit the number of cases that survive a motion to dismiss³⁶ and to guard against the perceived abuse of plaintiffs observing a price drop in an issuer and then poring over the issuer’s public statements for signs of statements that do not match the current state of affairs.³⁷ The paucity of trials means that jurors are almost never called upon to determine what a reasonable investor would want to know,³⁸ leaving that speculation to courts at the motion to dismiss stage.³⁹

33. 17 C.F.R. § 240.10b-5(b). Subsections (a) and (c) of 10b-5 prohibit deceptive devices, schemes, practices, and courses of business and is referred to as “scheme liability.” 17 C.F.R. § 240.10b-5(a), (c).

34. 17 C.F.R. § 240.10b-5(b).

35. *Janus Cap. Grp., Inc. v. First Deriv. Traders*, 564 U.S. 135, 137, 142 (2011).

36. See Stephen M. Bainbridge & G. Mitu Gulati, *How do Judges Maximize? (The Same Way Everybody Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L.J. 83, 102–05, 119 (2002) (hypothesizing that federal judges deciding securities fraud cases “are under severe resource and expertise constraints” and therefore use heuristics to limit the number of cases that survive, later using “materiality” and “scienter” as examples).

37. See Gideon Mark, *Event-Driven Securities Litigation*, 24 U. PA. J. BUS. L. 522, 526–27 (2022) (“In a typical event-driven case the defendant company’s stock price drops following the disclosure or occurrence of a negative event which plaintiffs link to prior soft statements by the issuer that it was in regulatory compliance, its internal controls were effective, or it adhered to its corporate code of conduct or ethics.”).

38. See Hillary A. Sale & Donald C. Langevoort, *“We Believe”: Omnicare, Legal Risk, Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 776 (2016) (“The underlying problem—which courts have never fully addressed—is that there are conflicting visions of the reasonable investor.”).

39. Stefan J. Padfield, *Immaterial Lies: Condoning Deceit in the Name of Securities Regulation*, 61 CASE W. RES. L. REV. 143, 165 (2010) (describing the “overdependence on materiality as a judicial safety valve for frivolous suits” as conflicting with the rationale of a disclosure regime).

A. Falsity

To be an actionable statement, a statement must be not only false⁴⁰ but also material.⁴¹ A threshold question to any securities fraud case, therefore, is whether the statement, as it is worded, is actually false.⁴² The falsity of a statement may be clear on its face, or the words may create a factual inference that the statement is false given other, omitted facts. Moreover, given the informality of some statements in various types of social media, and the inclusion of photographs, memes, and videos,⁴³ determining whether a particular statement is “false” may be challenging. To better understand the ways in which a statement, wherever it appears, can be false, this Article will attempt to sort types of statements into various categories: clearly false statements; contextually false (misleading) statements; opinions about the present; forward-looking statements; and general or vague statements of optimism.

1. Clearly False: *X is Y, but X is not-Y*

A clearly false statement is false on its face and communicates to the audience a state of affairs that is different from the real state of affairs. The statement declares that “X is Y,” when X is not Y. The most common example of a clearly false statement is a false accounting statement in which entries in financial statements are inflated or otherwise incorrect.⁴⁴ Non-numerical statements can also be clearly and facially false as well.⁴⁵ For

40. Securities and Exchange Act of 1934 § 21D(b)(1) (codified as amended at 15 U.S.C. 78u-4(b)(1)(B)) (“[T]he complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.”).

41. *Lord Abnett Affiliated Fund, Inc. v. Navient Corp.*, 363 F. Supp. 3d 476, 487 (D. Del. 2019) (explaining that “materiality goes to why a statement is important, and falsity goes to why a statement is untrue or misleading”).

42. *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1109 (9th Cir. 2010) (“[A] statement is misleading if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists.” (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008))). The exact phrasing of the allegedly false or misleading statement, however, may not lend itself to easy falsification. *See In re Marriott Int’l, Inc.*, 31 F.4th 898, 902 (4th Cir. 2022) (holding that the existence of an arguably weak data security system did not make the statement “the integrity and protection of customer, employee, and company data is critical to us as we use such data for business decisions and to maintain operational efficiency” misleading).

43. *See also Friel v. Dapper Labs, Inc.*, 657 F. Supp. 3d 442, 443 (S.D.N.Y. 2023) (holding that the third prong of the *Howey* test, expectation of profits, was sufficiently alleged where promoter’s tweets included rocket ship emojis, stock chart emojis, and money bags emojis, which to the court “objectively mean one thing: a financial return on investment”).

44. *See, e.g., In re Valeant Pharms. Int’l, Inc. Sec. Litig.*, No. 15-7658, 2017 WL 1658822, at *8 (D.N.J. Apr. 28, 2017) (“Valeant improperly recognized Philidor revenue by recognizing sales to Philidor (i.e., when Valeant delivered products to Philidor) and recorded revenue again for delivering those products to patients.”). *But see Ortiz v. Canopy Growth Corp.*, 537 F. Supp. 3d 621, 667 (D.N.J. 2021) (holding that valuations of inventory or revenue are opinions and not mere accounting facts).

45. *See, e.g., In re Boeing Co. Aircraft Sec. Litig.*, No. 19-cv-02394, 2022 WL 3595058 at *17 (N.D. Ill. Aug. 23, 2022) (holding that a Boeing statement that MCAS was not used in “normal flight” would be false if, as plaintiff alleges, MCAS were used in the “normal operating envelope”); *In re Facebook, Inc. Sec. Litig.*, 477 F. Supp. 3d 980, 1029 (N.D. Cal. 2020) (holding that statements by CEO Mark Zuckerberg in multiple interviews, including congressional testimony, that it did not “sell data” were not actionable, but statements that Facebook did not “share” or “give” user data to third parties was actionable, given that Facebook did not receive cash in return for allowing access to data).

example, Energy Transfer, L.P. stated that the company had “engaged security on Lisa Drive at the request of the impacted homeowners to restrict access to their property,”⁴⁶ even though homeowners were apparently ignorant of this fact.⁴⁷

Market participants often argue that particular statements that seem clearly false are actually not false based on creative interpretations of the literal words. For example, counsel argued in the foundational *Basic v. Levinson*⁴⁸ securities fraud case that the statement “no negotiations were underway with any company for a merger” was not false because the meetings between Basic and prospective acquirer Combustion were not “negotiations.”⁴⁹ The appellate court did not seem persuaded that the statements were not facially false, but determined they were at a minimum “misleading, if not totally false.”⁵⁰

2. Contextually False (Misleading): X is Y, but what about Z?

Some statements may not be patently false, but they are contextually false.⁵¹ Though the words of the statement are literally true, the statement is misleading given the actual state of affairs relevant to the statement.⁵² The issuer declares “X is Y,” and X is indeed Y. The actual state of affairs, however, is more complicated.

For example, the reality may be that “X is Y, but only because of Z.” Z is known to the issuer, but not to the audience, and the state of affairs presumed from the first statement is inconsistent with the state of affairs presumed from the second statement.⁵³ This type of “half-truth” is misleading under securities laws, provided Z is material.

Relatedly, an issuer may say “X is Y because of Z.” X is indeed Y, but the real cause is A, a fact unknown to the audience. If an issuer puts the cause of Y at issue, then it is misleading not to disclose a material source.⁵⁴ For example, in a case involving

46. *Allegheny Cnty. Emps.’ Ret. Sys. v. Energy Transfer LP*, 532 F. Supp. 3d 189, 226 (E.D. Pa. 2021).

47. *Id.* (quoting homeowners as finding the presence of security guards “mysterious” and unwanted).

48. *Basic Inc. v. Levinson*, 485 U.S. 224, 249–50 (1988) (articulating the test for whether statements about speculative merger negotiations are “material”).

49. *Levinson v. Basic Inc.*, 786 F.2d 741, 747 (6th Cir. 1986) (rejecting counsel’s arguments that “no negotiations” was “technically correct” because “[a] statement that ‘no negotiations’ were occurring could reasonably be read to state that *no* contacts of any kind whatsoever regarding merger had occurred”). In addition, counsel argued that the statement “we remain unaware of any present or pending developments which would account for the high volume of trading and price fluctuations in recent months” was not false because management did not “know” with certainty what was causing the fluctuations. *See id.* at 745–47.

50. *Id.* at 747.

51. *City of Coral Springs Police Offs.’ Ret. Plan v. Farfetch Ltd.*, 565 F. Supp. 3d 478, 491–92 (S.D.N.Y. 2021) (“Even if statements are not literally false, the veracity of a statement or omission is measured not by literal truth, but by its ability to accurately inform rather than mislead prospective buyers.” (internal quotation marks omitted)).

52. *See SEC v. Tex. Gulf Sulfur Co.*, 401 F.2d 833, 860–62 (2d Cir. 1968) (discussing Congressional intent on policing misleading statements under 10b-5).

53. *In re Par Pharm., Inc. Sec. Litig.*, 733 F. Supp. 668, 678 (S.D.N.Y. 1990) (holding that Par’s statements touting its ability to obtain FDA approvals more quickly and easily than rivals survived summary judgment because a jury could find the statements were misleading because an investor would presume the ability was due to some expertise and not due to Par’s bribery scheme); *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 11-cv-4665, 2014 WL 4832321, at *18 (S.D.N.Y. Sept. 29, 2014) (“If the success of direct selling was made possible—as Plaintiffs allege—by the bribery of foreign officials, then a reasonable fact finder could conclude that attributing Defendants’ success to direct selling without disclosing the bribery scheme was misleading.”).

54. *See City of Sterling Heights Police & Fire Ret. Sys. v. Reckitt Benckiser Grp.*, 587 F. Supp. 3d 56, 86–88 (S.D.N.Y. 2022) (holding that plaintiffs had adequately pled that defendants’ statements that strong sales and

CenturyLink, Inc.,⁵⁵ disclosures touted that “bundling” of services for customers was driving up revenue, without disclosing that revenue was increasing because of unlawful cramming being investigated by the Federal Communications Commission.⁵⁶

Another example of a contextually false statement occurs when an issuer says “X may occur” when X is in fact, already occurring. The otherwise true statement suggests that X is not occurring presently but may occur in the future. Specifically, an issuer might warn investors of a “Risk Factor” of a potential negative occurrence in the future. If that possibility has already come to fruition when the statement is made, then the statement is false.⁵⁷

3. *Opinions: I believe X is Y*

A false statement must be a statement that is false regarding a fact; therefore, mere opinions are generally not considered to be false or misleading statements under federal securities laws.⁵⁸ If a speaker states “I believe X is Y,” the statement is an opinion, and not factually misleading, even if a more full statement would be “I believe X is Y, even though

growth of its products due to physician and patient preference were misleading when growth was due in part to “an anticompetitive scheme that misled reasonable investors and the public”); *Boston Ret. Sys. v. Alexion Pharms., Inc.*, 556 F. Supp. 3d 100, 121 (D. Conn. 2021) (“Courts in this circuit have found that statements which speak specifically about the source of a company’s financial or other success are misleading when they fail to disclose illegal or unethical conduct that is a source of that success.”); *Diehl v. Omega Protein Corp.*, 339 F. Supp. 3d 153, 165 (S.D.N.Y. 2018) (“Courts in this district have held that ‘[w]here a company puts at issue the cause of its financial success, it may mislead investors if the company fails to disclose that a material source of its success is the use of improper or illegal business practices.’” (alteration in original)).

55. *In re CenturyLink Sales Pracs. & Sec. Litig.*, 403 F. Supp. 3d 712 (D. Minn. 2019); see also Press Release, Fed. Comm’n Comm’n, FCC Reaches \$550,000 Cramming Settlement with CenturyLink (Aug. 13, 2019), www.fcc.gov/document/fcc-reaches-550000-cramming-settlement-centurylink-0 [<https://perma.cc/929B-SEY4>] (“[CenturyLink] has agreed to pay \$550,000 to the U.S. Treasury and has committed to a compliance plan designed to protect consumers and prevent future cramming.”).

56. *In re CenturyLink*, 403 F. Supp. 3d at 725–26; see also *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479, 2018 WL 1070116, at *6, *15 (N.D. Cal. Feb. 27, 2018) (holding that plaintiffs adequately alleged that Defendants’ statements about credit card metrics were false because of the prevalence of fake products that were created by forgery and other illegal means).

57. *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1181 (9th Cir. 2009) (holding that a risk factor in a Form 10-Q regarding the possibility of product liability litigation was misleading because the litigation had already begun); *In re Van der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 400 (S.D.N.Y. 2005) (“[T]o warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit.” (quoting *Voit v. Wonderware Corp.*, 977 F. Supp. 363, 371 (E.D. Pa. 1997)). But see *In re Marriott Int’l, Inc.*, 31 F.4th 898, 905 (4th Cir. 2022) (holding that a risk factor warning of future security breaches was not misleading, even though the company had already experienced a security breach, because the company had disclosed the earlier breach).

58. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 188 (2015) (“[A] statement of opinion is not misleading just because external facts show the opinion to be incorrect. Reasonable investors do not understand such statements as guarantees, and § 11’s omissions clause therefore does not treat them that way.”); *Allegheny Cnty. Emps.’ Ret. Sys. v. Energy Transfer LP*, 532 F. Supp. 3d 189, 225 (E.D. Pa. 2021) (“Statements of opinion, unlike statements of fact, are generally not actionable under the PSLRA.”). Though *Omnicare* involved opinion statements in a registration statement and liability under Section 11, *Omnicare* has been applied generally to 10b-5 claims and 14(a) claims. *City of Warren Police & Fire Ret. Sys. v. Prudential Fin., Inc.*, 70 F.4th 668, 685 (3d Cir. 2023).

A and B exist and are troubling.”⁵⁹ The omission of A and B from the statement does not make the statement false, as long as the speaker sincerely believes X is Y.⁶⁰ Opinions may only be actionable if the opinion is not sincerely held at the time it is made.⁶¹ In other words, if the speaker states “I believe that X is Y,” but in the actual state of affairs, the speaker does not believe X is Y, then the statement is false.⁶² Courts have warned, however, that an opinion that includes facts that are false or that imply a false state of affairs may be actionable.⁶³ If a speaker is in possession of a fact that is incompatible with the stated opinion, even if the opinion is sincerely held, then not disclosing that fact makes the opinion misleading.⁶⁴

4. Forward-Looking Statements: X will be Y

Statements about the future cannot be verified or falsified as of the date the statement is made and so present some challenges. If the speaker says X will be Y in one year, then the statement has no value for truth or falsity at the time it is made unless the speaker knows of facts A or B that make it highly unlikely or impossible for X to be Y in one year. Investors, however, do ask and want to know what issuer management believes will happen in the future, but allowing issuers to make outlandish absolute claims about the future with impunity would be illogical. Securities law, therefore, creates a space and a format for issuers to make statements about the future in such a way that the market understands that the statement is forward-looking and that ensures issuers will not be liable for future developments inconsistent with responsible statements.⁶⁵

59. *Boykin v. K12, Inc.*, 54 F.4th 175, 184 (4th Cir. 2022) (holding that “[a]s an innovator in K-12 online education, we believe we have attained distinctive core competencies that allow us to meet the varied needs of our school customers and students” was nonactionable opinion and also puffery); *Prudential Fin.*, 70 F.4th at 686 (holding that the opinion that reserves were adequate was not false statement, even though the issuer knew part of its portfolio was experiencing “negative mortality”).

60. *Omnicare*, 575 U.S. at 189 (“An opinion statement, however, is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way.”).

61. See Wendy Gerwick Couture, *False Statements of Belief as Securities Fraud*, 43 SEC. REGUL. L.J. 351, 358–59 (2015) (analyzing rejected arguments that (1) sincere opinions of false facts are material because they suggest the speaker is incompetent and (2) false opinions of immaterial facts are still material because absolute candor is material to investors).

62. *Kleinman v. Elan Corp., PLC*, 706 F.3d 145, 153 (2d Cir. 2013) (“Subjective statements can be actionable only if the ‘defendant’s opinions were both false and not honestly believed when they were made.’” (quoting *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 113 (2d Cir. 2011))).

63. *Omnicare*, 575 U.S. at 188–89 (discussing how some opinion statements imply meaningful investigation and inquiry, leading to a sincere opinion, if completely baseless, to be false). The Court refers to the Restatement (Second) of Torts § 539 for the premise that opinions may be tortious misrepresentations if the opinion implies that the speaker knows of supporting facts or at least does not know of facts incompatible with the opinion. *Id.* at 191; see also *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016) (holding that opinions are actionable if the speaker did not sincerely believe the opinion, facts given in the opinion for support were false, or the opinion implied omitted facts that were misleading); *Allegheny Cnty.*, 532 F. Supp. 3d at 225 (“[S]tatements of opinion are only actionable if (1) the opinion professed is not actually believed by the speaker or (2) if the opinion contains an ‘embedded statement of fact’ that is untrue.” (quoting *Omnicare*, 575 U.S. at 185))).

64. *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 779 (9th Cir. 2023) (holding that a statement that management “currently expect[s]” a merger to close was actionable when the speaker engaged in conversations with the prospective acquirer that it was considering not closing the merger).

65. Prior to the creation of the forward-looking statement safe harbor in the PSLRA, courts used the “bespeaks caution” doctrine to assess whether forward-looking statements were actionable as false statements. *In*

Specifically, the Private Securities Litigation Reform Act (PSLRA)⁶⁶ amended the Securities Act and the Securities Exchange Act to insulate reporting issuers from liability for forward-looking statements⁶⁷ as long as these statements are identified as forward-looking statements and are accompanied by meaningful cautionary statements identifying important facts that could cause actual results to differ materially from those in the forward-looking statement.⁶⁸ These cautionary statements must not be boilerplate and must identify the principal risks that come to fruition and make the forward-looking statement seem false.⁶⁹ Statements that are a mixture of present facts and future forecasts are not entitled to the PSLRA safe harbor⁷⁰ but may be severed and treated as different statements.⁷¹ In the absence of cautionary statements, a forward-looking statement still may not be actionable if the speaker had no knowledge that it was false or misleading.⁷²

re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 371 (3d Cir. 1993) (“[W]e can state as a general matter that, when an offering document’s forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the ‘total mix’ of information the document provided investors.”).

66. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995).

67. Statements considered to be forward-looking include financial projections, such as revenues, income, earnings per share, capital expenditures, and dividends; plans for future operations, products, and services; and future economic performance. *See* Golesorkhi v. Green Mt. Coffee Roasters, Inc., 973 F. Supp. 2d 541, 553 (D. Vt. 2013) (discussing what constitutes “forward-looking statements”).

68. *In re* Quality Sys., Inc. Sec. Litig., 865 F.3d 1130, 1142 (9th Cir. 2017) (“The PSLRA’s safe harbor is designed to protect companies and their officials from suit when optimistic projections of growth in revenues and earnings are not borne out by events.”).

69. *See* Wochos v. Tesla, Inc., 985 F.3d 1180, 1183 (9th Cir. 2021) (affirming dismissal of plaintiff’s claims that defendants’ repeated prediction of manufacturing 5,000 vehicles a month were false statements because the statements were forward-looking and accompanied by meaningful cautionary language); *In re* Weight Watchers Int’l Inc. Sec. Litig., 504 F. Supp. 3d 224, 255 (S.D.N.Y. 2020) (holding that the cautionary language at issue disclosed “the exact risk” that occurred); Plumbers & Pipefitters Loc. Union No. 630 Pension-Annuity Tr. Fund v. Allscripts-Misys Healthcare Sols., Inc., 778 F. Supp. 2d 858, 874 (N.D. Ill. 2011) (holding that safe harbor requires language that is “substantive and tailored to the specific predictions made in the allegedly misleading statement”).

70. *See In re Quality Sys.*, 865 F.3d at 1142 (surveying decisions from other circuit courts and finding consensus that “where defendants make mixed statements containing non-forward-looking statements as well as forward-looking statements, the non-forward-looking statements are not protected by the safe harbor of the PSLRA.”). Statements comparing future expectations with present facts, however, are still forward-looking statements. *See* Ortiz v. Canopy Growth Corp., 537 F. Supp. 3d 621, 642 (D.N.J. 2021).

71. Iowa Pub. Emps.’ Ret. Sys. V. MF Glob., Ltd., 620 F.3d 137, 144 (2d Cir. 2010) (“A statement may contain some elements that look forward and others that do not. . . . [T]he forward-looking elements and the non-forward-looking [statements] are severable.”).

72. *W. Palm Beach Firefighters’ Pension Fund v. Conagra Brands, Inc.*, 495 F. Supp. 3d 622, 654 (N.D. Ill. 2020) (“The parties do not dispute that the safe harbor is disjunctive, meaning it applies if either the statement was accompanied by sufficient meaningful cautionary statements or it was made without actual knowledge of the statement’s falsity or misleading nature.”). The standard for scienter for forward-looking statements is “actual knowledge,” which is a higher standard of proof than ordinary false statements. *In re Weight Watchers Int’l*, 504 F. Supp. 3d at 253 (“The PSLRA safe harbor also ‘specifies an “actual knowledge” standard for forward-looking statements,’ which means that ‘the scienter requirement for forward-looking statements is stricter than for statements of current fact.’” (quoting *Slayton v. Am. Express Co.*, 604 F.3d 758, 773 (2d Cir. 2010))).

5. General or Vague Statements (Puffery): *X is the absolute best!*

Statements that are general or vague are not actionable because they are hard to falsify.⁷³ These optimistic and rosy statements are categorized as “puffery,” a term often used for unenforceable generic statements not to be taken literally in various aspects of the law.⁷⁴ For example, if a grocery store issuer files SEC documents with language that the stores are “clean and convenient,”⁷⁵ proving that all stores are unclean and inconvenient would devolve into arguments about what “clean” means and what “convenient” means.⁷⁶ A statement, therefore, making a claim about some positive quality of an issuer’s operations will rarely be actionable without specific false facts.⁷⁷ Some courts combine the falsification inquiry with the materiality inquiry by positing that market participants ignore general and vague optimistic statements from issuers that are factually nonspecific and predictably positive.⁷⁸ Puffery, therefore, is both not false and immaterial.⁷⁹ Generally, puffing statements do not contain many facts and instead focus on general adjectives to describe operations and events.⁸⁰

73. *Macomb Cnty. Emps.’ Ret. Sys. v. Align Tech., Inc.*, 39 F.4th 1092, 1098–99 (9th Cir. 2022) (“Corporate ‘puffing’ involves ‘expressing an opinion’ that is not ‘capable of objective verification.’” (quoting *Retail Wholesale & Dep’t Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir. 2017))).

74. Padfield, *supra* note 39, at 161 (listing several areas of the law that espouse a puffery doctrine, including “mail fraud, securities fraud, common-law fraud, legal ethics, common-law contracts, Uniform Commercial Code warranty cases, promissory misrepresentation, [and] false advertising” (alteration in original)). Professor Padfield cites to one of the best-titled articles ever; David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006).

75. *Longman v. Food Lion, Inc.*, 197 F.3d 675, 685–86 (4th Cir. 1999) (holding that public statements about “service levels” and “cleanliness” were “no more than soft, puffing statements about clean and conveniently located stores that no reasonable investor could rely upon in buying or selling Food Lion stock”).

76. See *In re Adient plc Sec. Litig.*, No. 18-CV-9116, 2020 WL 1644018, at *22 (S.D.N.Y. Apr. 2, 2020) (describing statements such as “big improvement” and “a little bit of improvement” as inactionable puffery when the statements did not reference specific improvements that were false), *aff’d sub nom.* *Bristol Cnty. Ret. Sys. v. Adient PLC*, No. 20-3846, 2022 WL 2824260 (2d Cir. July 20, 2022).

77. *Boykin v. K12, Inc.*, 54 F.4th 175, 183 (4th Cir. 2022) (holding that statements touting “academic experience,” “core competency,” “expertise,” and “flexibility” without “quantitative metrics, qualitative comparisons, or other specifics” were unactionable puffery). But see *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005) (finding that the statement “[w]e continually monitor the performance of all our tire lines, and the objective data clearly reinforces our belief that these are high-quality, safe tires” implies that objective data exists to make this opinion).

78. See Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 112 (2017) (noting that puffery is often “defined as a species of immaterial statement” that reflects a sense that “bad news was announced, attorneys searched for false statements, and, frequently in the absence of anything more concrete, seized upon banal, vaguely optimistic representations” and that this practice should not be condoned).

79. *City of Monroe Emps. Ret. Sys.*, 399 F.3d at 670–71 (statements to the effect that Bridgestone sold “the best tires in the world” and similar were nonactionable puffery because reasonable investors to not find such statements material given the total mix of information available).

80. *Emps.’ Ret. Sys. of the City of Baton Rouge v. MacroGenics, Inc.*, 61 F.4th 369, 386 (4th Cir. 2023) (“Defendants’ use of the words ‘positive,’ ‘excited,’ and ‘promising’ are textbook examples of puffing statements that reasonable investors cannot rely upon in the hopes of a grand slam, when the bases aren’t even fully loaded.”); *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 708 (9th Cir. 2021) (holding that repeated statements such as “Google has a longstanding commitment to ensuring both that our users share their data only with developers they can trust, and that they understand how developers will use that data” were “vague and generalized corporate commitments” and puffery); *Macomb Cnty. Emps.’ Ret. Sys. v. Align Tech., Inc.*, 39 F. 4th 1092, 1099–1100

In addition, whether statements are puffery depends on the specific context. The mortgage lender issuer in *In re Countrywide Financial Corp. Securities Litigation* repeatedly spoke of having “underwriting standards” and a “quality control process” that guided its lending practices, but evidence showed that fraud was rampant and loan applications were almost never denied.⁸¹ In determining whether those general statements were materially false, the court reasoned:

For example, descriptions such as “high quality” are generally not actionable; they are vague and subjective puffery not capable of being material as a matter of law. On an individual level, this is because a reasonable person would not rely on such descriptions; on a macro scale, the statements will have little price effect because the market will discount them. However, the CAC adequately alleges that Countrywide’s practices so departed from its public statements that even “high quality” became materially false or misleading; and that to apply the puffery rule to such allegations would deny that “high quality” has any meaning.⁸²

Unfortunately, not every court uses the same criteria for what is “puffery,”⁸³ leading to a patchwork of inconsistent cases⁸⁴ and a definition that may be result-oriented.⁸⁵

B. Materiality

False or misleading statements, however, must be misleading as to a *material* fact.⁸⁶ In determining whether a particular statement is “actionable,” courts often determine falsity and materiality together or substitute one of the elements as the test for the other. In other words, a statement is not a false statement because it’s not material or a statement is not

(9th Cir. 2022) (holding that statements such as “China is a great growth market for us” were non-actionable puffery); *Lord Abbett Affiliated Fund, Inc. v. Navient Corp.*, 363 F. Supp. 3d 476, 487 (D. Del. 2019) (holding that statements that issuer had a “robust compliance driven culture” and a “very, very strong compliance culture” were inactionable puffery).

81. *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1153 (C.D. Cal. 2008) (“It cannot be emphasized enough that in the vast majority of cases such statements would be nonactionable puffery.”).

82. *Id.* at 1144 (citation omitted). *But see* *Wachovia Equity Sec. Litig. v. Wachovia Corp.*, 753 F. Supp. 2d 326, 354 (S.D.N.Y. 2011) (holding that similar statements about lending practices were puffery).

83. *Compare* *Glazer Cap. Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 770–71 (9th Cir. 2023) (holding that remarks made on an earnings call that committed projects were “tracking very well” and that the company had a “very large pipeline” were actionable false statements), *with* *City of Taylor Police & Fire Ret. Sys. v. Zebra Techs. Corp.*, 8 F.4th 592, 595 (7th Cir. 2021) (holding that a statement that integration was “progressing as planned” was puffery because it “did not make any concrete assertion; it expressed only vague optimism”).

84. *See* Lipton, *supra* note 78, at 113 (“The puffery doctrine has been heavily criticized by commentators, partly for the notorious inconsistency with which it is applied, and partly for representing a kind of armchair market psychology.” (footnote omitted)). Professor Lipton argues that an alternative to current puffery doctrine is to weigh “the generality of the statement, the tone of the statement, and the generality and severity of the underlying problem.” *Id.* at 140.

85. *See* Bainbridge & Gulati, *supra* note 36, at 91–92.

86. *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988) (“[I]n order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were *misleading* as to a *material* fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.”).

material because it is not false.⁸⁷ This type of analysis is often used with opinions and statements of puffery—an opinion or puffing statement is not false because a reasonable investor discounts opinions and puffing statements.⁸⁸

The well-accepted, but not particularly useful, test for whether a particular fact about an issuer is material is whether a reasonable investor would find the fact important given the “total mix” of information available about the issuer.⁸⁹ The test purports to be an objective one,⁹⁰ just as the “reasonable person” test for determining negligent breaches of reasonable care is an objective test.⁹¹ In negligence, what a reasonable investor would do under any given set of circumstances is not self-evident, which creates difficulty in using the reasonable person as a useful construct.⁹² Therefore, the law looks to evidence in the real world of how a reasonable person acts in certain circumstances: reasonable persons obey safety laws,⁹³ so we look to relevant statutes; reasonable persons in a specific industry adhere to industry norms, so we look to industry customs;⁹⁴ reasonable persons may engage in cost-benefit analysis, so we do the same.⁹⁵

Likewise, what a reasonable investor would want to be disclosed is not self-evident, so courts often look to evidence in the real world to determine what reasonable investors believe is material.⁹⁶ Courts sometimes look to see if the stock price of an issuer in a capital market increases upon disclosure of false positive news; if so, then reasonable investors must have thought the information material and purchased more shares than were sold,

87. See Couture, *supra* note 61, at 358–59 (“[A] statement of belief, if not independently material, does not become so merely because it is false.”).

88. ECA & Loc. 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 206 (2d Cir. 2009) (holding that statements were “puffery” because they were “too general to cause a reasonable investor to rely upon them”).

89. Basic, 485 U.S. at 232 (adopting the “total mix” test from *TSC Industries*); *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (articulating the “total mix” test).

90. See Alexandra Qingning Li, *The Unreasonableness of Reasonable: Rethinking the Reasonable Investor Standard*, 117 NW. U.L. REV. 1707, 1712 (2023) (explaining that *Basic* “crystallized” the test as an objective test that did not focus on a particular investor and that determined materiality in a particular context, creating an amorphous test).

91. See generally Christopher Brett Jaeger, *The Empirical Reasonable Person*, 72 ALA. L. REV. 887 (2021).

92. *Id.* at 898–901 (explaining that courts could look to what actual persons do empirically or devise how a person would act in a cost-efficient manner).

93. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 (AM. L. INST. 2010) (“An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”).

94. *Id.* § 13 cmt. b (“Evidence that the actor has complied with custom in adopting certain precautions may bear on whether there were further precautions available to the actor, whether these precautions were feasible, and whether the actor knew or should have known of them” because “‘ordinary care’ has at least some bearing on ‘reasonable care.’”).

95. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (establishing the “Hand Formula” for determining whether failure to take some precaution is a breach of the duty of care). The “Hand Formula” attempts to calculate whether the costs of taking additional precautions is justified when balanced against the probability of accidents multiplied by the magnitude or gravity of those harms. *Id.*

96. See Joan MacLeod Heminway, *Female Investors and Securities Fraud: Is the Reasonable Investor a Woman?*, 15 WM. & MARY J. WOMEN & L. 291, 301 (2009) (asserting that a reasonable investor should “understand time-value of money, diversification and risk, and the securities compensation structure”).

moving the stock price.⁹⁷ Another objective criterion that courts may use as a pseudo-quantitative test is whether the false statement represents a small or large proportion of the issuer's operations, revenues, or assets.⁹⁸ One empirical study of materiality cases lists the most prevalent reasons courts give for finding a statement or omission immaterial as puffery, forward-looking statements with adequate cautionary language, statements that caused no change in stock price, and statements as to trivial matters.⁹⁹ In addition, courts may declare false statements immaterial if the market already knew the statement was false because of other facts in the "total mix."¹⁰⁰ Courts may also weigh various factors devised by the SEC to determine whether certain types of facts are material.¹⁰¹

Additionally, just as the reasonable person is not average and is probably more careful than the average person, the reasonable investor is probably not the average retail investor¹⁰² and may be an aspirational model of a rational investor.¹⁰³

97. *In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 270–71 (3d Cir. 2005) (holding that false statement was not material because disclosure of its falsity was not accompanied by a price drop when analysts following Merck would have been able to calculate how much the disclosure would affect Merck's financials). This approach, however, seems to be used only by courts in the Third Circuit. *See* No. 84 Emp.-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Co., 320 F.3d 920, 934 (9th Cir. 2003) (rejecting plaintiffs' argument for adopting a bright-line rule that immediate stock price impact upon corrective disclosure is evidence of materiality); *In re Greenlane Holdings, Inc. Sec. Litig.*, 511 F. Supp. 3d 1283, 1302 (S.D. Fla. 2021) (rejecting plaintiffs' argument in favor of materiality based on a price drop accompanying corrective disclosures under this "controversial theory about the correlation between stock prices and materiality, which no court—besides the Third Circuit—has adopted"). Some courts may be looking at stock price without using it as a bright-line rule, however. *See also In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145, 1191 (D. Ore. 2015) (noting that the court already found the statements were "material" as "demonstrated by the increase in the price of Galena stock that allegedly occurred after the articles were published").

98. *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 719–20 (2d Cir. 2011) (discussing a "presumptive 5% threshold of materiality" but ultimately finding omissions material because they related to a significant aspect of Blackstone's operations, even though the net effect on the overall financial picture was small).

99. David A. Hoffman, *The 'Duty' to Be a Rational Shareholder*, 90 MINN. L. REV. 537, 575 *tbl.2* (2006).

100. Padfield, *supra* note 39, at 163 (criticizing a case for holding that omissions relating to the real estate market collapse in 2007 were not material because this fact was well-known at the time).

101. SEC Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999) (advising accountants not to exclusively rely on quantitative benchmarks—such as the 5% rule of thumb—but to weigh listed qualitative factors as well). Among those qualitative factors listed are whether the misstatement masks a change in earnings or other trends; whether the misstatement hides a failure to meet analysts' consensus expectations for the enterprise; whether the misstatement concerns a segment or other portion of the registrant's business that has been identified as playing a significant role in the registrant's operations or profitability; and whether the misstatement has the effect of increasing management's compensation. *Id.*

102. Heminway, *supra* note 96, at 301 ("For better or for worse, the foregoing conceptions of the reasonable investor indicate expressly or impliedly that the reasonable investor is a sophisticated trader, an experienced participant in securities markets who researches investment prospects and has the ability to understand what the research reveals.").

103. Hoffman, *supra* note 99, at 546–48 (presenting empirical findings that courts presume the reasonable investor to make completely rational decisions, unburdened by cognitive biases). *See also* Heminway, *supra* note 96, at 295 ("[I]t is relevant to ask whether these female investors, with their different investment behaviors and outcomes, reflect existing conceptions of the reasonable investor or suggest the need for a change in current conceptions of the reasonable investor.").

C. “In Connection With”

A materially false statement is actionable under Rule 10b-5 only if it is “in connection with the purchase or sale of a security.”¹⁰⁴ In most cases, the connection is clear. Issuers make statements in publicly filed documents or widely disseminated press releases, and investors purchase or sell the publicly traded securities of the same issuer. This Article’s larger goal, however, is to situate statements made through nontraditional channels in Rule 10b-5 jurisprudence, and the application of the “in connection with” standard to other types of statements is not as clear.

Part of the jurisprudence surrounding the “in connection with” language analyzes whether a transaction that is at issue has a nexus to something that would be considered a security,¹⁰⁵ thereby coming under the auspices of the federal securities laws.¹⁰⁶ Some cases involve frauds and misdeeds that are “securities-adjacent,” but litigants choose to bring the cause of action under Section 10(b) and Rule 10b-5.¹⁰⁷ Though these cases usually involve some sort of deceit, the false statements are not made regarding an issuer or to manipulate the stock price of an issuer.¹⁰⁸ Courts, however, repeatedly cite the Supreme Court as promoting “an expansive reading of the ‘in connection with’ requirement,”¹⁰⁹ bringing cases with very different facts in under the securities fraud umbrella.¹¹⁰

104. 17 C.F.R. § 240.10b-5 (2024).

105. See generally Thomas J. Molony, *Making a Solid Connection: A New Look at Rule 10b-5’s Transactional Nexus Requirement*, 53 SANTA CLARA L. REV. 767 (2013).

106. In *Chadbourne & Parke LLP v. Troice*, the Supreme Court had to determine whether the federal securities laws applied to a Ponzi scheme run by Alan Stamford whereby victims purchased certificates of deposit under false pretenses. *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014). The claims were brought under state law, but the Securities Litigation Uniform Standards Act of 1998 would require the claims to be brought under federal law if the fraud were “in connection with the purchase or sale of a covered security.” *Id.* at 396. Because CDs are not “covered securities,” plaintiffs made creative arguments that funds invested in the CDs were then invested by the banks in covered securities. *Id.* at 394. The Court held that the fraud was not in connection with the purchase or sale of a security and stated that this reasoning was also in line with Rule 10b-5 jurisprudence. *Id.* at 387. In other cases involving SLUSA, the connection is closer. *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 297–98 (3d Cir. 2005) (holding that case was in connection with covered securities when SSM produced research reports with false statements designed to inflate issuer stock prices and “curry favor with Defendant’s existing and potential investment banking clients”).

107. See, e.g., *SEC v. Terry’s Tips, Inc.*, 409 F. Supp. 2d 526 (D. Vt. 2006) (holding that statements on website and in newsletters encouraging subscribers to subscribe to “Terry’s Tips” and follow recommendations to earn 100% returns was in connection with a security); *New York v. Bankers Life & Cas. Co.*, 404 U.S. 6 (1971) (involving a case in which defendants engaged in complicated check kiting scheme that resulted in their purchase of Manhattan Casualty stock, electing one of their own as President, and using Manhattan’s assets to pay for the purchase). The Supreme Court remanded to the trial court for resolution on the merits, holding that “Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor.” *Id.* at 12–13.

108. *SEC v. C. Jones & Co.*, 312 F. Supp. 2d 1375, 1381 (D. Colo. 2004) (holding that the SEC had adequately pled that principal’s false statements to broker that enabled broker to win NASD approval to trade the company’s securities on OTCBB was in connection with the purchase and sale of a security); *SEC v. Zandford*, 535 U.S. 813, 820 (2002) (holding that misappropriating funds by liquidating securities held in the victim’s investment account was in connection with the purchase or sale of a security).

109. *SEC v. Jacoby*, No. 17-3230, 2021 WL 351176, at *16 (D. Md. Feb. 2, 2021) (noting that “the analysis is ‘a flexible one’ that is best conducted on a ‘case-by-case basis’”).

110. See, e.g., *SEC v. Woolf*, 835 F. Supp. 2d 111, 119 (E.D. Va. 2011) (holding that promoters who misrepresented their experience and background at hotel seminars and in informercials to sell “Teach Me to Trade” products were liable under 10b-5 because the false statements were in connection with the purchase and sale of securities by purchasers of TTMT products). But see *SEC v. McCabe*, No. 13-CV-161, 2013 WL 6185035,

In *Semerenko v. Cendant Corp.*,¹¹¹ a prospective acquirer made allegedly false statements regarding its financial position, and disclosure of the truth then negatively affected the stock price of a target corporation as it became clear the acquisition would not take place.¹¹² The appellate court revived claims brought by purchasers of the target's stock, holding the lower court should apply a broader test to decide whether the alleged misstatements were in connection with the purchase and sale of the target's stock.¹¹³ The test that the *Cendant* court adopted was whether the "misrepresentations in question were disseminated to the public in a medium upon which a reasonable investor would rely, and that they were material when disseminated."¹¹⁴ The court also made clear that the acquirer defendants did not have to foresee that the purchasers of the target stock would rely on their statements when making the decision to invest in the target stock.¹¹⁵ This test will be used to determine whether all kinds of marketplace speech in various scenarios can be actionable under 10b-5.

IV. MARKETPLACE SPEECH AND THE RISE OF THE INVESTOR

The ways in which issuers communicate with the public have changed dramatically in the past thirty years due to an explosion in the number of users on the internet. The ability of retail investors to invest online¹¹⁶ and to find one another in various places in cyberspace transformed retail investing.¹¹⁷ Investors who earlier had only limited access to investing, investment professionals, and other investors, very quickly were able to find communities online and trade shares from anywhere.¹¹⁸ Not only are some marketplace participants consumers of this information,¹¹⁹ but others become creators and publishers

at *6 (D. Utah Nov. 26, 2013) (holding that, even though the "Supreme Court has consistently embraced an expansive reading," the statements at issue, appearing on a website advertising investment research newsletters were not in connection with the purchase and sale of a security when the false statements were on the website but not in the newsletters).

111. *Semerenko v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000).

112. *See id.* at 170–71.

113. *See id.* at 187.

114. *Id.* at 176.

115. *Id.* *See also In re Volkswagen AG Sec. Litig.*, 661 F. Supp. 3d 494, 529 (E.D. Va. 2023).

116. *See Christine Hurt, Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 411–12 (2006) (describing the evolution of online retail investing); Caroline Bradley, *Information Society Challenges to Financial Regulation*, 37 U. TOL. L. REV. 307, 307 (2006) (noting the disconnect between securities regulation, which is aimed at professional broker-dealer and issuer information disclosure with online information provided by nonprofessionals).

117. *See Robert A. Robertson, Personal Investing in Cyberspace and the Federal Securities Laws*, TEX. J. BUS. L. Fall 1995, at 1, 22 (describing the 1995 landscape of internet-based "newsgroups" and "bulletin boards" in which "small investors have a way to rapidly exchange information" and learn "nitty-gritty details that are prized by professional money managers").

118. *See Alina Lerman, Individual Investors' Attention to Accounting Information: Evidence from Online Financial Communities*, 37 CONTEMP. ACCT. RSCH. 2020, 2024 (2020) (noting that Yahoo!, SeekingAlpha, RagingBull, MotleyFool, and Reddit were the dominant early players, but Twitter and StockTwits have gained in popularity).

119. *See 2023 Digital Investor Survey*, *supra* note 9 (finding that "81% of investors surveyed stated that they have made a recommendation or decision after initially sourcing information on digital or social media" and "88% have investigated a company based on information posted on digital or social media").

of this information, the “finfluencers.”¹²⁰ This marketplace speech, which takes place outside of traditional SEC filings and press releases, can be interactive, community-based, and produced by anyone, from professional investment advisors¹²¹ to anonymous agents of chaos.¹²² Most importantly, social media marketplace speech can influence investors and move stock prices either toward fundamental value or away from it.¹²³ Though 10b-5 can be used to police this speech if it is false, misleading, or part of a fraudulent scheme, and Section 9(a)(2) is a tool against market manipulation,¹²⁴ regulation can do little to battle or protect the ignorant, misguided, or overconfident.¹²⁵

A. Marketplace Speech and the Evolution of the Scam

The ease with which investors can obtain information and trade on that information also creates an opportunity for fraudsters to recruit investors with false information under false names.¹²⁶ One early avenue for scamming investors online was the mass email campaign from purported trading “experts” selling tips and strategies or even stock; courts had to examine false statements in blast emails to see if they were “in connection with” the purchase and sale of a security.

In *Pirate Investor*, the Fourth Circuit applied the *Cendant* test¹²⁷ to determine that mass email blasts were actionable, even though a reasonable investor would not rely on an email blast from a stranger with purported confidential information; however, because of the presence of other factors linking the trades and the statements, the statements had a

120. See Guan, *supra* note 10, at 493 (“The term ‘finfluencer’ refers to a person or entity that has outsized impact on investor decisions through social media influence.”). Professor Guan gives a thorough snapshot of the field of finfluencers, from ordinary investors to celebrities. See *id.* at 501–08.

121. See PUTNAM INVS., PUTNAM SOCIAL ADVISOR SURVEY 2023: KEY FINDINGS, at 4, 6 (2023), Putnam.com/static/pdf/Putnam-Social-Advisor-Survey-2023.pdf [https://perma.cc/3MHV-VLFA] (stating that according to its survey, “94% of financial advisors are using social media for business,” but using LinkedIn more than others). The survey shows that since 2021, Facebook use declined from over 60% to 38%; Twitter from over 50% to 23%, and Instagram from over 40% to 10%. *Id.* at 7.

122. See Sue S. Guan, *Meme Investors and Retail Risk*, 63 B.C. L. REV. 2051, 2087 (2022) (“Due to the importance of social media ‘signalers’ in mediating disclosure and public information, those with less accurate or valuable information may have more incentives to post information that targets investing heuristics, directly adding to the noise that retail investors must sift through, especially for thinly traded stocks.”).

123. See Guan, *supra* note 10, at 535–36 (providing examples of finfluencers moving the market for their own advantage).

124. Section 9(a)(2) of the Exchange Act prohibits persons from effecting transactions that create actual or apparent active trading in a security, or raise or depress the price of such security, for the purpose of inducing the purchase or sale of such security by others. To have standing the plaintiff would have to show that they bought or sold a security at a price which was affected by such act or transaction and that the defendant had a specific intent to manipulate the stock price. See Jack Ruello, Comment, *Insurgent Intentions: Are Retail Investors on Social Media Subject to Federal Market Manipulation Laws?*, 83 LA. L. REV. 1017, 1045–48 (2023) (analyzing 9(a)(2) cases that suggest that “open market manipulation” is not actionable under Section 9(a)(2) if there is no manipulative act).

125. See Jill E. Fisch, *GameStop and the Reemergence of the Retail Investor*, 102 B.U. L. REV. 1799, 1825 (2022) (arguing that “[r]egulating with the objective of preventing unwise investment decisions is paternalism,” which is misplaced with respect to reporting companies with publicly traded stocks).

126. See Jayne W. Barnard, *Securities Fraud, Recidivism, and Deterrence*, 113 PENN. ST. L. REV. 189, 212–13 (2008) (describing the different types of online securities fraud schemes in 2008).

127. SEC v. Pirate Inv. LLC, 580 F.3d 233, 251 (4th Cir. 2009).

sufficient nexus.¹²⁸ In their holding, the Fourth Circuit listed types of documents that are publicly disseminated and relied on by investors: “a press release, annual report, investment prospectus or other such document.”¹²⁹ The email blast at issue was not any of these things, but the court found that the false statements therein met the “in connection with” test regardless, noting other types of documents that courts have held were publicly disseminated and reliable: “sales and marketing materials at brokerage houses and other points of sale,” SEC filings, and “detailed drug advertisements published in sophisticated medical journals.”¹³⁰

B. Marketplace Speech and the Online Boiler Room

Another early technology that was adopted by bad actors was investor message boards.¹³¹ These primitive bulletin boards and chat rooms have evolved into a very large ecosystem, with Seeking Alpha at its core.¹³² Market participants intent on manipulating stock prices in a traditional “pump-and-dump”¹³³ scheme can make the jump from

128. *Id.* at 252; see also *SEC v. Norstra Energy Inc.*, 202 F. Supp. 3d 391, 398 (S.D.N.Y. 2016) (following *Pirate Investor* by holding that stock promotional materials distributed by someone other than the issuer may meet the “in connection with” standard even though sophisticated investors would not rely on the “over-the-top” promotions).

129. *Pirate Inv.*, 580 F.3d at 249 (quoting *SEC v. Rana Rsch., Inc.*, 8 F.3d 1358, 1362 (9th Cir. 1993)); see also *SEC v. Subaye, Inc.*, No. 13 Civ. 3114, 2014 WL 448414, at *7 (S.D.N.Y. Feb. 4, 2014) (“Statements made in official SEC filings are routinely relied upon by investors making investment decisions regarding the securities of a public company, and are therefore made ‘in connection with’ securities transactions.”); *SEC v. Perkins*, No. 19-CV-243, 2022 WL 4703335, at *13 (E.D.N.C. Sept. 30, 2022) (holding that false statements in private offering documents “were provided to investors for the purposes of inducing the investors to purchase the securities offerings” and “were thus clearly made ‘in connection with’ the sale of securities”).

130. *Pirate Inv.*, 580 F.3d at 249.

131. See Lyrissa Barnett Lidsky & Michael Pike, *Cybergossip or Securities Fraud? Some First Amendment Guidance in Drawing the Line*, 5 WALLSTREETLAWYER.COM: SEC. ELEC. AGE 15, 16 (2001) (“Message boards have ‘democratized’ financial discourse” and are a “valuable back channel for shareholders to communicate their discontent”).

132. See generally SEEKINGALPHA, about.seekingalpha.com [https://perma.cc/65AC-2JRQ] (stating on its “About Us” page that it “is the world’s largest investing community. Our investors connect daily to discover and share new investing ideas, discuss the latest news, debate the merits of stocks, and make informed investment decisions”). SeekingAlpha is mentioned in many securities fraud lawsuits, both as the forum for the false statement and the forum for the corrective disclosure. See e.g., *Grigsby v. BofI Holding, Inc.*, 979 F.3d 1198, 1208 (9th Cir. 2020) (stating an article on SeekingAlpha was not a corrective disclosure because it was written by an anonymous short seller with no expertise beyond that of a typical market participant); *In re Neurotrope, Inc. Sec. Litig.*, 315 F. Supp. 3d 721, 736 (S.D.N.Y. 2018) (holding that article on SeekingAlpha was “not authoritative or reliable” because it was “crowd-sourced content,” so article was not a corrective disclosure). But see *SEC v. Lemelson*, 57 F.4th 17, 20 (1st Cir. 2023) (calling SeekingAlpha a credible “non-subscription and open-forum resource”); *In re Health Ins. Innovations Sec. Litig.*, No. 17-cv-2186, 2019 WL 3940842 (M.D. Fla. June 28, 2019) (holding article on SeekingAlpha was sufficient for pleading corrective disclosure because it was widely disseminated).

133. See *Infographic: The Anatomy of a Pump and Dump*, FINRA (Oct. 4, 2016), finra.org/investors/insights/anatomy-pump-and-dump [https://perma.cc/EE3N-QZNS] (“Fraudsters Begin False Rumors: Once the shares are in their account, the fraudsters begin flooding email, social media accounts and the internet with false rumors or fake promotions about how this company has developed some breakthrough technology or just signed a big deal.”); *Avoid Fraud: This On-Ramp Could Lead You to a Dump*, FINRA (Mar. 30, 2023), finra.org/investors/insights/ramp-and-dump-schemes [https://perma.cc/65WJ-4Q6W] (labeling a social media and messaging app-based pump and dump scheme as “ramp-and-dump”).

traditional “cold calling” via telephone to posting on investor message boards and forums very easily.¹³⁴ Posting anonymously, insiders can post falsely optimistic messages in an attempt to sell their own shares at higher prices, even CEOs.¹³⁵

Likewise, traditional scammers can easily recruit “investors” online into various Ponzi-like schemes¹³⁶ and abscond with the cash. From investor message boards to websites to social media, fraudsters can easily find victims,¹³⁷ but the SEC and DOJ can find the “pump-and-dump” promoters,¹³⁸ the “short and distort” schemers,¹³⁹ the Ponzi

134. See Robertson, *supra* note 117, at 49 (describing how the “pump-and-dump” scheme is much more easily carried out in a newsgroup online than from a boiler room finding targets via telephone); see also Michael Lewis, *Jonathan Lebed’s Extracurricular Activities*, N.Y. TIMES MAG. (Feb. 25, 2001), <https://www.nytimes.com/2001/02/25/magazine/jonathan-lebed-s-extracurricular-activities.html> (on file with the *Journal of Corporation Law*) (describing the crimes of 15 year-old Jonathan Lebed who purchased stock online and then “posted hundreds of messages on Yahoo Finance message boards recommending that stock to others,” profiting \$800,000). But see Lidsky & Pike, *supra* note 131, at 15 (arguing that most of Lebed’s statements were “when read in context, constitutionally protected opinion”).

135. See Complaint for Injunctive and Other Relief, Securities and Exchange Commission v. Pereira, 1:24-cv-20757 (S.D. Fla. Feb. 27, 2024) (alleging that the CEO of Alfi, Inc. posted on Stocktwits under the alias “uptix12” to express falsely positive views about Alfi to increase the stock price); Superseding Indictment at 1–2, United States v. Berman, No. 20-CR-00278 (D.D.C. May 11, 2021) (charging Keith Berman, CEO of Decision Diagnostics Corp. with making false statements in numerous press releases and posing as “Matthew Steinmann” to post messages about Decision Diagnostics on message boards such as InvestorsHub (iHub) and Investors Hangout); Sanchez v. Decision Diagnostics Corp., No. 21-cv-00418, 2022 WL 18142518, at *1 (C.D. Cal. Dec. 5, 2022) (granting motion for default judgment against Decision Diagnostics and Berman).

136. See Jayne W. Barnard, *Creative Sanctions for Online Investment Fraud*, 76 MISS. L.J. 949, 952–53 (2007) (“Thus, we find [in 2007] issuers selling securities from corporate websites that misrepresent their assets, revenues, and realistic prospects for the future; issuers purporting to sell securities then absconding with the proceeds of the offering; issuers selling unregistered securities from their websites; issuers selling interests in ‘Ponzi schemes’ or ‘pyramid’ schemes; issuers promoting so-called ‘risk-free’ investments when in fact the investments are risky or even fictitious; and issuers engaged in a modern version of the ‘pump-and-dump’ or stock price manipulation scheme.” (footnotes omitted)).

137. See Gramitto Ricci & Sautter, *supra* note 9, at 1684 (“Social media and online forums carry an inherent risk of inaccurate or deceptive information . . .”).

138. See Complaint at 1–2, S.E.C. v. Sabo, No. 23-cv-01935 (S.D. Tex. May 25, 2023) (charging Francis Sabo (a/k/a Ricky Bobby) for his part in a scheme in which participants used stock-trading forums on Discord, Twitter, and even podcasts to encourage others to buy certain stocks and then selling them as the prices increased); Complaint at *1–2, SEC v. Fassari, No. SACV 21-403 (C.D. Cal. Mar. 2, 2021) (detailing how Fassari purchased a dormant website for a failed company, created a fake Twitter account as CEO, and posted on Twitter and under a pseudonym on iHub to create demand for its thinly traded stock). Both the SEC and the DOJ have instituted proceedings against Edward Constantin, Perry Matlock, Thomas Cooperman, Gary Deel, Stefan Hrvatin, Tom Cooperman, Daniel Knight, and John Rybarczyk for also perpetuating pump-and-dump schemes through Discord’s stock trading forums (Sapphire Trading and Atlas Trading), the podcast “Pennies: Going in Raw,” and Twitter. See Complaint at 1–2, S.E.C. v. Constantin, 22-CV-04306 (S.D. Tex. Dec. 13, 2022); United States’ Unopposed Motion to Intervene and Stay Proceedings at 3–6, *Constantin*, 22-CV-04306 (S.D. Tex. Jan. 20, 2023) (moving to stay civil proceedings for the duration of the criminal prosecution against same defendants).

139. See SEC v. Lemelson, 57 F.4th 17, 20 (1st Cir. 2023) (affirming jury verdict that Lemelson violated 10b-5 by making material damaging misrepresentations about an issuer’s stock on the investor website Seeking Alpha while simultaneously holding short positions in the stock); Joshua Mitts, *Short and Distort*, 49 J. LEGAL STUD. 287, 288 (2020) (arguing empirically that “pseudonymity undermines reputational accountability in financial markets” by analyzing articles on Seeking Alpha and comparing the timing of the articles with price movements and corrections in the subject stocks).

schemes,¹⁴⁰ the professional touters,¹⁴¹ and the celebrity touters.¹⁴² Holding bad actors to their intentionally false statements on the internet, whether outrageous or riddled with exclamation marks or emojis, may seem necessary to maintain confidence in the capital markets, but publicly traded issuers with sophisticated analyst followings and voluminous public information may be held to an exacting standard on social media as well.

In a recent criminal securities fraud case, a district court dismissed the indictment in a fact pattern that is similar to many securities fraud cases in which courts have found a securities fraud cause of action.¹⁴³ In *United States v. Constantinescu*, defendants purchased stock in various companies, then posted false and misleading positive information about those companies on “social media platforms including Twitter and Discord.”¹⁴⁴ Then, in a classic pump-and-dump scheme, the defendants sold their own shares without divulging that information to their followers as they were continuing to tout the same securities. The court found that no crime had been stated under 18 U.S.C. 1348¹⁴⁵ because a “scheme to defraud” must include an intent to deprive victims of money or property, not accurate information on which to base economic decisions.¹⁴⁶ Mere

140. See, e.g., *SEC v. Dalius*, No. 18-cv-08497, 2023 WL 3988425 (C.D. Cal. May 24, 2023) (denying summary judgment to plaintiffs where a dispute of material fact existed as to the falsity of promoter’s claims on YouTube and Facebook); Indictment at 3–4, *United States v. Okhotnikov*, No. 23-cr-00057 (D. Ore. Feb. 22, 2023) (describing Ponzi scheme in which promoters marketed Forsage, “an international community of the global decentralized ecosystem and the first ever smart contract marketing matrix of the Ethereum and Tron networks . . . through Forsage’s website, YouTube channel, Instagram, and other social-media platforms”). The SEC brought an enforcement action against the same promoters in 2022, and several defendants have consented to settlement. See, e.g., Plaintiff’s Agreed Motion for Entry of Judgments By Consent as to Defendants Samuel D. Ellis and Sarah L. Theissen, *SEC v. Okhotnikov*, No. 22 C 3978, 2022 WL 3043116 (N.D. Ill. Aug. 2, 2022).

141. See *SEC Charges Online Stock Promotion Firm and Its Owner for Failing to Disclose Touting Compensation*, SEC (June 30, 2021), [sec.gov/enforce/33-10953-s](https://www.sec.gov/enforce/33-10953-s) [<https://perma.cc/SPS2-AHER>] (“The Securities and Exchange Commission today announced settled charges against Reuben Robert Goldman and his online stock promotion firm, Two Triangle Consulting Group LLC, which does business under the name Goldman Small Cap Research, for failing to disclose that they had been paid to create and distribute tweets promoting the securities of ten issuers.”).

142. The SEC has recently charged numerous celebrities with violations of Section 17(b) of the Securities Act, which makes it unlawful for any person to “give publicity to” or “offer a security for sale” without fully disclosing any fee that the person receives as consideration. See, e.g., *Matthew Goldstein, Kim Kardashian to Pay \$1.26 Million to Settle S.E.C. Charges Over Crypto Promotion*, N.Y. TIMES (Oct. 3, 2022), <https://www.nytimes.com/2022/10/03/business/kim-kardashian-sec-crypto.html> (on file with the *Journal of Corporation Law*) (settling charges that Kardashian had promoted a crypto token sold by EthereumMax on Instagram in return for \$250,000); *Frances Coppola, SEC Fines Floyd Mayweather and DJ Khaled for Illegally Promoting a Fraudulent ICO*, FORBES (Nov. 29, 2018), <https://www.forbes.com/sites/francescoppola/2018/11/29/floyd-mayweather-and-dj-khaled-were-paid-to-promote-a-fraudulent-ico/?sh=3f17032e4665> [<https://perma.cc/LL7K-EDRL>].

143. *United States v. Constantinescu*, 2024 WL 1221579 (S.D. Tex. Mar. 20, 2024).

144. See *id.* at *2.

145. Passed as part of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1348 creates criminal liability for defrauding any person in connection with securities of a publicly held issuer and was intended to broaden the scope of existing Section 10(b). See Sandra Moser and Justin Weitz, *18 U.S.C. 1348—A Workhorse Statute for Prosecutors*, 66 DOJ J. FED. L. & PRAC. 111 (explaining that “[c]ongress passed section 1348 with full knowledge that securities fraud was already a criminal offense prior to 2002” but wanted “to streamline and broaden securities fraud prosecutions, which Congress feared were unnecessarily complicated by regulations and technical requirements.”).

146. See *id.* at *5–6. The court relied on *Ciminelli v. United States*, 598 U.S. 306 (2023), which held that a criminal fraud allegation must involve intent to deprive a victim of a “traditional property interest.” In so

knowledge that some stock traders will incidentally incur losses does not satisfy the intent requirement, according to the opinion. This case is on appeal; even if affirmed, its holding may be limited to criminal cases and not civil actions under Rule 10b-5. However, this case potentially affects many such cases involving social media pump-and-dump schemes.¹⁴⁷

V. MARKETPLACE SPEECH AND THE ISSUER

The rise in marketplace speech,¹⁴⁸ particularly in social media, is also driven by issuers, who use the internet and social media platforms as part of “integrated marketing communications (IMC) strategies.”¹⁴⁹ The SEC has approved the posting of material information to social media channels as long as investors have appropriate notice that such channels will be used in that manner.¹⁵⁰ Not only do issuers communicate in real time to consumers, investors, and competitors, but these audiences communicate with them, either by sending direct messages or by tagging the issuer in their own posts.¹⁵¹ Though increased

holding, *Ciminelli* rejected a Second Circuit theory that fraud included the intent to deprive someone of the “right to control its assets by depriving it of information necessary to make discretionary economic decisions.” See *id.* at 316.

¹⁴⁷ See Matt Levine, Opinion, *Pump and Dumps Are Legal Now*, BLOOMBERG (Mar. 21, 2024), [Bloomberg.com/opinion/articles/2024-03-21/pump-and-dumps-are-legal-now](https://www.bloomberg.com/opinion/articles/2024-03-21/pump-and-dumps-are-legal-now) (on file with the *Journal of Corporation Law*) (“It’s not fraud to lie about stocks and make money trading them, as long as you are only trading on the stock market and not directly with the people you’re lying to. . . . If that’s right, the stock market, and social media, are going to get pretty weird.”).

¹⁴⁸ See Marisa Papenfuss, Note, *Inflated Private Offering: Regulating Corporate Insiders and Market-Moving Disclosures on Social Media*, 73 VAND. L. REV. 311, 331 (2020) (citing to a study that showed in 2018, 91% of Fortune 500 companies used Twitter, 98% used LinkedIn, and 89% used Facebook).

¹⁴⁹ Kunal Swani, George R. Milne, Cory Cromer & Brian P. Brown, *Fortune 500 Companies’ Use of Twitter Communications: A Comparison Between Product and Service Tweets*, 5 INT’L J. INTEGRATED MKTG. COMM’NS 47, 47–48 (2013) (finding in 2013, 64% of Fortune 500 companies already had a Twitter presence). The authors looked at one week in 2011 and found 3,982 tweets from 277 official Fortune 500 Twitter accounts. *Id.* at 50; see also Michael North, *How Does the Fortune 500 Use Twitter to Engage Stakeholders? An Examination of Interactivity, Message Valence, and Company Type* (Aug. 2015) (Ph.D. dissertation, University of Miami), <https://scholarship.miami.edu/esploro/outputs/doctoral/How-Does-the-Fortune-500-Use/991031447681902976> [https://perma.cc/LVK9-4G3Y].

¹⁵⁰ Report of Investigation Pursuant to Section 21(A) of the Securities Exchange Act of 1934: Netflix, Inc. and Reed Hastings, Exchange Act Release No. 69279, 2013 WL 5138514 (Apr. 2, 2013) (using Hasting’s posting of material information on his personal Facebook page as an opportunity to provide guidance on use of social media channels in compliance with Regulation FD). But see Papenfuss, *supra* note 148, at 340 (arguing that “Regulation FD currently is too inflexible to keep pace with the evolution of social media and communication technologies”); Susan B. Heyman, *Rethinking Regulation Fair Disclosure and Corporate Free Speech*, 36 CARDOZO L. REV. 1099 (2015) (raising First Amendment concerns regarding Regulations FD).

¹⁵¹ See generally Gregory D. Saxton, Charlotte Ren & Chao Guo, *Responding to Diffused Stakeholders on Social Media: Connective Power and Firm Reactions to CSR-Related Twitter Messages*, 172 J. BUS. ETHICS 229 (2021) (studying firms’ voluntary “micro-reporting” on sustainability goals by analyzing messages originating from the public on social media to the issuer and the issuer’s response, if any).

communication with stakeholders can be very valuable,¹⁵² CEOs¹⁵³ or other officers grabbing the microphone to interject themselves in public discourse can be strategically manipulative,¹⁵⁴ thoughtlessly self-centered,¹⁵⁵ and unintentionally inept.¹⁵⁶

However, the jurisprudence concerning what types of issuer statements on what types of platforms will be false, material, or “in connection with” an issuer’s security for the purpose of 10b-5 has been developing slowly and by using traditional frameworks. The end result is somewhat contradictory and inconsistent.

Though courts acknowledge that statements in SEC filings, press releases, and other traditional channels have a sufficient nexus to an issuer’s security to be actionable,¹⁵⁷ courts must address new channels under the same *Cendant* framework case by case. As discussed above in Section II.E, the *Cendant* court looked to whether materially false statements “were disseminated to the public in a medium upon which a reasonable investor

152. See Jana Bornman, *Social Media Crisis Averted, Well Done Southwest.*, MEDIUM (Nov. 3, 2018), <https://www.medium.com/@janabornman/social-media-crisis-averted-well-done-southwest-d18ece47b940> [<https://perma.cc/L59V-XR8D>] (describing the use of Twitter and Facebook by Southwest Airlines to provide updates on a minor runway incident).

153. See Hailiang Chen, Byoung-Hyoun Hwang, Baixiao Liu & Yi Tang, *Tweeting Away Firm Value: How Investors Evaluate CEOs’ Use of Social Media* 14 (Nanyang Tech. Univ., Working Paper Series, 2013), ssrn.com/abstract=2318094 (finding that 249 CEOs (out of 5,242) have “authentic, active personal Twitter accounts”).

154. See Ciaran Heavy, Zeki Simsek, Christina Kyprianou, & Marten Risius, *How Do Strategic Leaders Engage with Social Media? A Theoretical Framework for Research and Practice*, 41 STRAT. MGMT. J. 1490, 1492 (2020) (discussing how strategic leaders could use social media for “overwhelm[ing] stakeholders with a proliferation of extraneous information designed to distract from the core issue”); Jung, Naughton, Tahoun & Wang, *supra* note 11, at 248 (analyzing tweets by S&P 1500 firms and finding that firms were less likely to disseminate earnings information via Twitter when the news was bad).

155. See Chen, Hwang, Liu & Tang, *supra* note 153, at 27–28 (citing survey respondents as believing that given the legal, reputational, and financial risks to the firm, “CEOs’ use of Twitter despite these substantial risks [is] self-serving” and not in line with shareholder interests); Zhichuan (Frank) Li, Claire Y.C. Liang & Zhenyang (David) Tang, *CEO Social Media Presence and Insider Trading* 5 (J. Bus. Rsch., Working Paper, 2022), ssrn.com/abstract=3909886 (“Using a hand-collected sample of the online social media presence of 637 CEOs of public firms in the U.S., we find that CEOs with online social media presence (i.e. with an account on at least one social networking site such as Facebook, Twitter and LinkedIn) are more likely to conduct open market purchases of their companies’ stocks.”).

156. In 2012, Netflix CEO Reed Hastings posted on his personal Facebook page that Netflix monthly viewing exceeded 1 billion hours for the first time ever without consulting the CFO, general counsel, or investor relations. Because this information was given only to “friends” of Hastings, it prompted the SEC to investigate whether it ran afoul of Regulation Fair Disclosure by disclosing material information selectively. See Hala Touryalai, *Don’t Blame the SEC, Netflix CEO’s Facebook Post Is Questionable*, FORBES (Dec. 7, 2012), <https://www.forbes.com/sites/halahtouryalai/2012/12/07/dont-blame-the-sec-netflix-ceos-facebook-post-is-questionable> [<https://perma.cc/6ZBZ-UYMT>] (discussing these disclosures).

157. See, e.g., SEC v. Rana Rsch., Inc., 8 F.3d 1358, 1362 (9th Cir. 1993) (“Where the fraud alleged involves public dissemination in a document such as a press release, annual report, investment prospectus or other such document on which an investor would presumably rely, the ‘in connection with’ requirement is generally met by proof of the means of dissemination and the materiality of the misrepresentation or omission.”); Sanders v. Realreal, Inc., No. 19-cv-07737, 2021 WL 1222625, at *4 (N.D. Cal. Mar. 31, 2021) (“Transcripts of earnings calls and investor presentations are publicly available documents and are thus matters of public record not subject to reasonable dispute.”); SEC v. Subaye Inc., No. 13 Civ. 3114, 2014 WL 448414, at *7 (S.D.N.Y. Feb. 4, 2014) (“Statements made in official SEC filings are routinely relied upon by investors making investment decisions regarding the securities of a public company, and are therefore made ‘in connection with’ securities transactions.”).

would rely, and that they were material when disseminated.”¹⁵⁸ Courts have applied this test in various ways, including as a stand-alone test¹⁵⁹ and also by balancing this inquiry with other factors.¹⁶⁰ Those other nonexhaustive, nonmandatory factors are (1) whether a securities sale was necessary for the completion of the fraudulent scheme;¹⁶¹ (2) whether the parties’ relationship was such that it would necessarily involve trading in securities;¹⁶² and (3) whether the defendant intended to induce a securities transaction.¹⁶³ Inevitably, discussion of the medium in which the statement is disseminated and then digested by investors becomes central to the inquiry.

A. Conference Calls, Investor Calls, and Earnings Calls

The oldest and most common type of “nontraditional” corporate speech is the group telephone call. Though these telephonic conferences may be called “earnings calls,” “investor calls,” or “analyst calls,” they are generally open to the public and involve officers of the issuer speaking to the investment community.¹⁶⁴ Though originally just audio calls, they are now often video calls or webcasts, with slides and other materials on a shared screen.¹⁶⁵ These calls usually include a “question-and-answer” period, and this format can be problematic because the questions often invite forward-looking statements without an easy way for speakers to couch their answers in meaningful cautionary language.¹⁶⁶ Statements or omissions made during these calls are actionable as long as they are false and material;¹⁶⁷ because of the public dissemination of these calls and the nature of the audience, these statements are clearly in connection with the issuer’s securities.

158. *Semerenco v. Cendant Corp.*, 223 F.3d 165, 176 (3d Cir. 2000).

159. *In re Sinclair Broad. Grp., Inc. Sec. Litig.*, No. CCB-18-2445, 2020 WL 571724, at *5 (D. Md. Feb. 4, 2020) (stating that “the Fourth Circuit applies a standard formulated by the Second Circuit,” but using only the “public dissemination” prong in determining that investors would rely on public documents, Sinclair filed with the FCC regarding a proposed merger under antitrust review).

160. *SEC v. Pirate Inv. LLC*, 580 F.3d 233, 252 (4th Cir. 2009) (holding that email blast promising to reveal the name of a would-be takeover target for \$1000 and subsequent revelation of false facts was “in connection with” the purchase or sale of a security given several factors from four cases).

161. *SEC v. Zandford*, 535 U.S. 813, 824–25 (2002).

162. *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 302 (3d Cir. 2005).

163. *United Int’l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1221 (10th Cir. 2000), *aff’d* 532 U.S. 588 (2001).

164. See Andrew K. Jennings, *Disclosure Procedure*, 82 MD. L. REV. 920, 959 n.192 (2023) (citing the Society for Corporate Governance as reporting that 100% of public companies surveyed issued earnings press releases and 97% hold earnings calls).

165. See, e.g., Walt Disney Co., Current Report (Form 8-K) exhibit 99.1, at 14 (May 10, 2023) (“In conjunction with this release, The Walt Disney Company will host a conference call today, May 10, 2023, at 4:30 PM EDT/1:30 PM PDT via a live Webcast. To access the Webcast go to www.disney.com/investors. The discussion will be archived.”).

166. See, e.g., *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 708 (9th Cir. 2021) (holding that statements during earning calls were false and material and did not qualify for the forward-looking safe harbor even with the oral statement from Alphabet: “[s]ome of the statements that we make today may be considered forward looking . . . [t]hese statements involve a number of risks and uncertainties that could cause actual results to differ materially” (alterations in original)).

167. See, e.g., *W. Va. Pipe Trades Health & Welfare Fund v. Medtronic, Inc.*, 57 F. Supp. 3d 950 (D. Minn. 2014).

B. Advertising

Cases regarding whether deceptive advertisements might be actionable under securities fraud reflect the reality that not all ads are the same. Depending on the content and placement of the ad, it may be actionable as “in connection with” the seller’s securities or not. Promotional language might be on seller websites, social media, emails, texts, and other channels created almost every day. One factor courts look to is whether the ad is placed “in publications reasonably used by market professionals to evaluate” the issuer’s stock.¹⁶⁸ Though one court held that lengthy ads placed in medical journals about a pharmaceutical were actionable,¹⁶⁹ another court initially held that sales brochures posted on the issuer’s website were not.¹⁷⁰ After the plaintiffs amended the complaint, the court held that the plaintiffs pled a “plausible inference” that “[i]nvestors rely on statements made on websites and brochures as market information, particularly as it relates to compliance and legal issues that have the potential to significantly increase a company’s risk of liability.”¹⁷¹ When wrestling with this issue in *In re Intel Corp. Securities Litigation*, the Northern District of California ultimately decided that the plaintiffs had not alleged that website product statements were targeted to the investment community, but also noted that “the Court agrees with plaintiff that ‘there is no rule that only market-related documents, such as regulatory filings, public presentations, or press releases can contain actionable misstatements under Section 10(b).’”¹⁷² Statements about products may also be too general to be “in connection with” the security, mixing the falsity, materiality, and nexus tests together.¹⁷³

C. Company Websites & Company Policies, Codes of Conduct, and Commitments

Most, if not all, publicly traded companies have websites that communicate with the public at all times; accordingly, the SEC published guidance in 2008 on the use of websites by issuers.¹⁷⁴ Issuer websites have multiple audiences: customers, clients, vendors,

168. *Bien v. LifeLock Inc.*, No. CV-14-00416, 2015 WL 12819154, at *9 (D. Ariz. July 21, 2015); *accord In re Carter-Wallace, Inc. Sec. Litig.*, 150 F.3d 153, 156–57 (2d Cir. 1998) (holding that false advertisements placed in medical journals and relating to the drug Felbatol were made in connection with the pharmaceutical company’s stock).

169. *In re Carter-Wallace*, 150 F.3d at 156–57.

170. *Howard v. Arconic Inc.*, 395 F. Supp. 3d 516, 539 (W.D. Pa. 2019) (“The goal of the brochures is to persuade a customer to purchase Arconic’s products, not its stocks. The brochures are not directed at the financial community.”).

171. *Howard v. Arconic Inc.*, No. 17-cv-1057, 2021 WL 2561895, at *14 (W.D. Pa. June 23, 2021) (alteration in original).

172. *In re Intel Corp. Sec. Litig.*, No. 18-cv-00507, 2019 WL 1427660, at *11 n.14 (N.D. Cal. Mar. 29, 2019).

173. *See In re Mylan N.V. Sec. Litig.*, No. 20-cv-955, 2023 WL 3539371, at *9 (W.D. Pa. May 18, 2023) (holding that the statements on Mylan’s general website were “too general” for a reasonable investor to rely on them and were “puffery,” so they were not in connection with Mylan’s securities). *But see In re Facebook, Inc. Sec. Litig.*, 405 F. Supp. 3d 809, 834 (N.D. Cal. 2019) (“But the question here is *not* whether an investor would find the information in the privacy statements material, *but* if they are the types of documents that a reasonable investor would look at while making purchasing decisions. These questions, while remarkably similar, are distinct.”).

174. *See* Commission Guidance on the Use of Company Web Sites, Exchange Act Release No. 58288, 73 Fed. Reg. 45862, 45867 (Aug. 7, 2008) (focusing on guidelines to determine whether a company’s website is sufficiently “public” to avoid violating Regulation FD by posting relevant information on the website). This

employee applicants, competitors, and investors. A website for a shoe company, for example, may have public pages devoted to its products, its history, and its mission. Many statements on websites are generally not actionable for being “puffery” and either not false or immaterial or both.¹⁷⁵ Occasionally, however, statements on a website are sufficiently specific and false to be actionable.¹⁷⁶ Discussions of products on the website, particularly with attention to sales and demand for products, may be targeted more at investors than customers.¹⁷⁷

Company websites also may have public pages recruiting employees, industry partners, and influencers. Even more importantly, websites may also have pages meant for investors with SEC documents, corporate governance documents, DEI and ESG statements,¹⁷⁸ and its code of conduct.¹⁷⁹ To the extent that 10b-5 lawsuits implicate false statements on company websites, statements in the general public-facing pages of a website may not meet the “in connection with” standard,¹⁸⁰ but information found on the investor pages may be more likely to have a sufficient nexus, but still must be false and material.¹⁸¹ In addition, some policy statements, like privacy statements, may appear on the more

release encourages issuers who wish to communicate with investors through their website to make investors and markets aware they will use their website in that way and ensuring “the information is prominently disclosed on the web site in the location known and routinely used for such disclosures.” *Id.*

175. 3226701 Can., Inc. v. Qualcomm, Inc., No. 15-cv-2678, 2017 WL 4759021, at *14 (S.D. Cal. Oct. 20, 2017) (holding the website statements were “statements of belief or unspecific statements of puffery”).

176. *In re Plains All Am. Pipeline, L.P. Sec. Litig.*, 245 F. Supp. 3d 870, 900 (S.D. Tex. 2017) (holding one of three alleged website statements was not puffery and actionable, by stating that the company made all necessary repairs and replacements “on all of our pipeline systems.”).

177. *SEC v. StratoComm Corp.*, 2 F. Supp. 3d 240, 251, 251, 259 (N.D.N.Y. 2014), *aff’d* 652 Fed. App’x 35 (2d Cir. 2016) (holding that “Executive Informational Overview” posted on company website touting “a product that does not exist and sales that never occurred” were publicly disseminated with an intent to influence investors).

178. *Edgar v. Anadarko Petrol. Corp.*, No. 17-1372, 2018 WL 3032573, at *14–15, (S.D. Tex. June 19, 2018) (holding that statement that company was “in compliance with the applicable laws and associated regulations” found on website article “Health, Safety, Environmental and Sustainability Overviews for 2015 and 2016” was sufficiently specific and false to be material, but the plaintiffs did not adequately allege scienter for those statements).

179. See generally Yaron Nili & Cathy Hwang, *Shadow Governance*, 108 CALIF. L. REV. 1097 (2020) (presenting data relating to the prevalence of corporate governance documents on company websites, including charter documents, committee charters, codes of conduct, ESG statements, political participation policies, and anti-corruption policies).

180. *In re Mylan N.V. Sec. Litig.*, No. 20-cv-955, 2023 WL 3539371, at *9 (W.D. Pa. May 18, 2023) (“To start, the alleged misstatements appeared on Mylan’s general website, not its investor-relations page. While certainly not dispositive, this fact suggests that investors visiting Mylan’s website would view the information contained on the separate investor-relations page to have more value to them, since it was specifically targeted to them.”).

181. See *Allegheny Cnty. Emps.’ Ret. Sys. v. Energy Transfer LP*, 532 F. Supp. 3d 189, 223 (E.D. Pa. 2021) (noting that generally departures from a Code of Ethics are not actionable as securities fraud unless the statements go “beyond generalized expressions of commitment to high corporate standards” and “address[] concrete steps” (quoting *City of Brockton Ret. Sys. v. Avon Prods., Inc.*, No. 11-4665, 2014 WL 4832321, at *16 (S.D.N.Y. Sept. 29, 2014)); *Holwill v. AbbVie Inc.*, No. 18-cv-06790, 2020 WL 5235005, at *4 (N.D. Ill. Sept. 1, 2020) (holding that even though “statements in a business’s ethics code are not actionable *when* they are inherently aspirational or do not imply compliance,” the statement at issue “contains a plausibly material misrepresentation”).

general pages of a website but may be more connected to the issuer's securities than other types of general information.¹⁸²

D. Speeches and Presentations

False statements in oral speeches and presentations can also be categorized as being in connection with the purchase and sale of a security. Though statements may be made "in public," different settings seem more likely than others to have a sufficient nexus, depending on the topic, the size of the audience, and the ability to record or republish the statements.¹⁸³ In *In re Equifax Inc. Securities Litigation*,¹⁸⁴ the district court held that statements made by Equifax's CEO during a presentation at the Terry College of Business at the University of Georgia in response to an audience question were in connection with the purchase and sale of Equifax stock.¹⁸⁵ The court pointed out that the statements involved a "core business operation" and "could be highly relevant to analysts."¹⁸⁶

E. News Articles and Interviews

Articles written by third parties raise two issues: whether the article is "in connection with" the security at issue and whether the issuer or an officer of the issuer is the "maker" of the article.¹⁸⁷ An article may look like it is written by an unrelated party, but it may be paid for by the issuer. Several lawsuits were brought in the late 2010s against issuers who contracted with stock promotion companies specifically to create investor demand for their securities by publishing articles under pseudonyms on investor websites.¹⁸⁸ Though federal securities law does not prohibit paying third parties to promote one's stock,¹⁸⁹ the promoter

182. *In re Facebook, Inc. Sec. Litig.*, 405 F. Supp. 3d 809, 834 (N.D. Cal. 2019) (holding that "Facebook's privacy policies are more like the detailed drug advertisements of *Carter-Wallace* and less like the 'simple' advertisements discussed in *Lifelock*").

183. *In re Plains All Am. Pipeline, L.P. Sec. Litig.*, 245 F. Supp. 3d 870, 900 (S.D. Tex. 2017) (holding that neither oral statements or statements on slide deck were sufficiently false or material to be actionable).

184. *In re Equifax Inc. Sec. Litig.*, 357 F. Supp. 3d 1189 (N.D. Ga. 2019).

185. *Id.* at 1251 ("The fact that Smith made this statement at a presentation at a college, and not in some other setting, does not change this conclusion.").

186. *Id.* The court also pointed out that the presentation had been recorded and uploaded to YouTube.

187. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 142 (2011); 3226701 Can., Inc. v. Qualcomm, Inc., No. 15-cv-2678, 2017 WL 4759021 (S.D. Cal. Oct. 20, 2017) (reasoning that Qualcomm is the maker of statements on Qualcomm's website that aren't attributed to any particular officer, and Qualcomm is the maker of statements in industry publications attributed to Qualcomm or an agent of Qualcomm).

188. Multiple issuers were clients of the same stock promotion companies. See, e.g., *Rabkin v. Lion Biotechs, Inc.*, No. 17-cv-02086, 2018 WL 905862 (N.D. Cal. Feb. 15, 2018) (Lavos and Lidingo Holdings, LLC); *In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145 (D. Or. 2015) (DreamTeam Group LLC & Lidingo Holdings, LLC); *In re CytRx Corp. Sec. Litig.*, No. CV 14-1956, 2015 WL 5031232 (C.D. Cal. July 13, 2015) (DreamTeamGroup LLC and Mission Investor Relations); *In re ForceField Energy Inc. Sec. Litig.*, 15 Civ. 3020, 2017 WL 1319802 (S.D.N.Y. Mar. 29, 2017) (DreamTeam Group LLC and Mission Investor Relations). The SEC charged Lidingo with publishing promotional articles without disclosing payment from five publicly traded issuers). Amended Complaint, *SEC v. Bjorlin*, No. 17-cv-01600, 2018 WL 3647977 (W.D. Wash. May 25, 2018).

189. *In re Galectin Therapeutics, Inc. Sec. Litig.*, 843 F.3d 1257, 1272 (11th Cir. 2016) ("[N]othing in the securities laws prohibits Galectin as a company (issuing a regulated security) from hiring analysts to promote Galectin, circulating positive articles about its drug development, or recommending the purchase of Galectin's stock."). Omission of the size and scale of a promotional campaign, however, may be material if other statements

has a duty to disclose payment.¹⁹⁰ Sometimes the issuer or an officer gives a journalist a quote, and that allegedly false statement is quoted in the article.¹⁹¹ Generally, the dissemination and the targeting of the article should be considered important,¹⁹² but with the availability of most publications online, and with the incentive of market professionals to read relevant publications that are readily available, the nexus to trading decisions seems fairly clear.

F. Social Media

Many issuers maintain a substantial presence on social media outlets, including Facebook, Instagram, Twitter, and now Threads. In addition to an official “page” or “handle,” CEOs or other officers may maintain separate accounts.¹⁹³ Even particular products may have their own page.¹⁹⁴ Though most cases involving official company tweets or officer tweets are still few in number, courts seem to be willing to treat social media statements as potentially actionable if they are false, material, and in connection with the company’s securities,¹⁹⁵ and whether the statements are eligible for the forward-looking safe harbor. Even more so than with live conference calls and presentations, labeling tweets and posts as forward-looking and including meaningful cautionary language seems very challenging.¹⁹⁶

then are misleading. *See* *Stephens v. Uranium Energy Corp.*, No. H-15-1862, 2016 WL 3855860 (S.D. Tex. July 15, 2016) (declining to determine whether omission was material when the complaint did not sufficiently plead scienter or loss causation).

190. Securities Act of 1933 § 17(b) (codified as amended at 15 U.S.C. § 77q(b)) (“It shall be unlawful for any person . . . to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received . . . from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.”).

191. *Di Donato v. Insys Therapeutics Inc.*, No. CV-16-00302, 2017 WL 3268797, at *16 (D. Ariz. Aug. 1, 2017) (holding that quotation appearing in news article was not made “in connection with” when “[t]he complaint does not say when, where, or to whom Burlakoff made this statement, only that it was published in the article”). *But see In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 479–480 (S.D.N.Y. 2018) (holding that quotation from SunEdison’s CEO in *Bloomberg* was actionable when six days before the article was published, CEO attended meetings contradicting projection in the quoted statement). The *SunEdison* court did not speculate as to when the CEO made the statement, but it did note that the article did not have any meaningful cautionary language. *Id.* at 480.

192. *Di Donato*, 2017 WL 3268797, at *16 (holding that the Southern Investigative Reporting Foundation news article was a “far cry” from examples of actionable statements).

193. For example, the current CEO of Disney Corporation may be found on Twitter at @RobertIger.

194. For example, searching “Amazon” on Twitter returns Twitter handles for Amazon (@amazon), Kindle (@AmazonKindle), Amazon Video Games (@AMZNVideoGames), Amazon Books (@amazonbooks), Amazon News (@amazonnews), Amazon Studios (@AmazonStudios), Amazon Publishing (@AmazonPub), and Amazon Help (@AmazonHelp). *See also* Zhang et al., *supra* note 11, at 373 tbl.1 (showing IBM as having 16 verified accounts, Microsoft with 38, HP with 14, and Intel with 13).

195. *SEC v. Dropil, Inc.*, No. 20-cv-00793, 2020 WL 7348021, at *6 (C.D. Cal. Oct. 23, 2020) (denying motion to dismiss as to material misrepresentations on website “and various social media accounts” because the intent of the posts was public dissemination for purposes of “in connection with” inquiry); *see also* *SEC v. Blockvest, LLC*, No. 18-cv-2287, 2018 WL 4955837 (S.D. Cal. Oct. 5, 2018) (ordering a temporary restraining order based on false social media claims regarding the companies compliance regarding securities).

196. *Weston v. DocuSign, Inc.*, 669 F. Supp. 3d 849 (N.D. Cal. Apr. 18, 2023) (denying motion to dismiss as to all false statements, including Chief Revenue Officer’s forward-looking tweet, several earnings calls, and several technology conferences).

Though securities fraud cases surrounding false statements made by issuers and their officers in social media are by no means the norm, several cases are currently being litigated, and some have proceeded to dismissal or judgment. The following Part provides three case studies of private and governmental litigation involving publicly traded corporations, their CEOs, and Twitter.

VI. THREE TWITTER CASE STUDIES

A. *In re Tesla*

The most famous Twitter case is the January 2023 trial in which a class of plaintiffs, led by an investor who had shorted Tesla, Inc. stock, sued Tesla and its CEO, Elon Musk, for securities fraud¹⁹⁷ surrounding two tweets posted by Musk in August 2018.¹⁹⁸ This case was groundbreaking for several reasons. First, following an intense lead plaintiff fight, Judge Edward Chen selected as lead plaintiff a short-seller who had taken a position with regard to Tesla stock that would be profitable if the stock price decreased.¹⁹⁹ Second, the case centered around two short tweets made by the CEO, not traditional issuer statements in publicly filed documents, press releases, or earnings calls.²⁰⁰ Third, the *Tesla* case was tried to a jury verdict, with the parties not choosing to settle even after the plaintiffs were granted summary judgment on two elements of their claim, in contravention of the

197. Consolidated Complaint for Violations of the Federal Securities Laws, *In re Tesla, Inc. Sec. Litig.*, No. 18-cv-04865, 2019 WL 254954 (N.D. Cal. Jan. 16, 2019).

198. The SEC filed an enforcement action against Musk for the same tweets, and that action was settled less than a month later, with Musk paying a \$20 million fine, stepping down as Chairman of the Tesla Board of Directors, and agreeing to have his press releases, comments on earnings calls, and posts on social media and the company's website approved by a representative of the Company prior to publication. *See* Consent Motion for Entry of Final Judgment, *SEC v. Musk*, No. 18-cv-08865 (S.D.N.Y. Sept. 29, 2018). Musk has recently attempted, unsuccessfully, to have the latter condition of the settlement struck down on constitutional grounds. *See SEC v. Musk*, No. 22-1291, 2023 WL 3451402, at *3 (2d Cir. May 15, 2023) ("Musk's argument that the consent decree is effectively a 'prior restraint' on his speech does not change this conclusion. Parties entering into consent decrees may voluntarily waive their First Amendment and other rights. Indeed, every consent decree by definition involves waiver of the right to trial." (citation omitted)).

199. *Isaacs v. Musk*, No. 18-cv-04865, 2018 WL 6182753, at *5–6 (N.D. Cal. Nov. 27, 2018). The court explained its decision further after other prospective lead plaintiffs filed a Writ of Mandamus to the Ninth Circuit for the Northern District of California to reconsider its order. *See* District Court's Response Re Petition for Writ of Mandamus at 5–6, *In re Bridgestone Inv. Corp. Ltd.*, No. 18-cv-04865 (N.D. Cal. Apr. 2, 2019) (confirming that a lead plaintiff with only long positions in Tesla stock would not have an incentive to represent both types of traders in the class, but a lead plaintiff with both long and short positions would); *see also* Christine Hurt & Paul Stancil, *Short Sellers, Short Squeezes, and Securities Fraud*, 47 J. CORP. L. 105, 129–30 (2021) (arguing that allowing short sellers to be part of a class of investors in private securities fraud cases is problematic for establishing class-wide reliance).

200. *In re Tesla, Inc. Sec. Litig.*, 477 F. Supp. 3d 903, 922 (N.D. Cal. 2020) ("Plaintiff alleges the three false statements are: (1) the August 7, 2018 tweet (and follow-up tweets shortly thereafter); (2) the August 13, 2018 tweet; and (3) the August 13, 2018 blog post:").

conventional wisdom that securities fraud trials pose a dangerous risk to defendants.²⁰¹ Tesla and Musk did the unexpected; they won.²⁰²

Early in the day on August 7, 2018, Musk posted two tweets. First: “Am considering taking Tesla private at \$420. Funding secured.”²⁰³ Second: “Investor support is confirmed. Only reason why this is not certain is that it’s contingent on a shareholder vote.”²⁰⁴ Over the next few days, the status of discussions within Tesla and with investors was revealed, making the term “secured” seem less and less true. Leading up to trial, the court granted summary judgment to the plaintiff class as to the falsity of the two tweets,²⁰⁵ and as to scienter. The case went to trial in front of a jury on the remaining elements, including reliance, materiality, and loss causation.²⁰⁶

In a hearing to reconsider the grant of summary judgment, the court seemed to narrow this win by reiterating that the tweets were false statements “in a literal sense, not in a legal sense.”²⁰⁷ Typically, courts make a distinction between “literally false” and “misleading,”²⁰⁸ noting that even if a statement is not literally false, it is still actionable because if it is misleading.²⁰⁹ Being “literally false” is not necessary. Here, the court says something different: that even though the tweets were literally false, they may not be actionable, or “legally false.”²¹⁰ Being “literally false” is necessary, but not sufficient to

201. See Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357, 1407 (2003) (arguing that defendants in securities fraud cases should not feel pressured into a settlement because the likelihood of an outsized jury verdict is close to zero); Hurt & Stancil, *supra* note 199, at 113 (“Though 1,849 post-PSLRA securities fraud class actions settled between 1996 and 2019, only fourteen such actions were tried to a verdict between 2016 and 2019.” (footnote omitted)). The Tesla verdict would be the fifteenth jury verdict in a securities fraud class action since 1996.

202. See Rebecca Elliott & Meghan Bobrowsky, *Elon Musk Found Not Liable in Trial Over Tweets Proposing to Take Tesla Private*, WALL ST. J. (Feb. 3, 2023), <https://www.wsj.com/articles/elon-musk-found-not-liable-in-trial-over-tweets-proposing-to-take-tesla-private-11675464951> (on file with the *Journal of Corporation Law*).

203. *In re Tesla, Inc. Sec. Litig.*, No. 18-cv-04865, 2022 WL 1497559, at *5 (N.D. Cal. Apr. 1, 2022).

204. *Id.* at *6.

205. *Id.* at *16 (“Based on the evidence of record, the Court finds that no reasonable jury could find the statement ‘Funding secured’ accurate and not misleading.”). The court had already opined in denying the defendant’s motion to dismiss that, even if the tweet was a mere opinion about a future event, it conveyed facts that were misleading. *In re Tesla, Inc. Sec. Litig.*, 477 F. Supp. 3d 903, 923–24.

206. See *infra* Part IV.

207. See *Tesla JNOV*, *supra* note 16, at *2.

208. See, e.g., *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1251 (10th Cir. 2022) (holding that statement using approximating language may make the statement not “literally false,” but it was misleading); *City of Coral Springs Police Offs.’ Ret. Plan v. Farfetch Ltd.*, 565 F. Supp. 3d 478, 492–93 (S.D.N.Y. 2021) (“Even if statements are not literally false, the veracity of a statement or omission is measured not by its literal truth, but by its ability to accurately inform rather than mislead prospective buyers.” (quoting *In re BioScrip, Inc. Sec. Litig.*, 95 F. Supp. 3d 711, 727 (S.D.N.Y. 2015) (internal quotations omitted))).

209. *In re Galectin Therapeutics, Inc. Sec. Litig.*, 843 F.3d 1257, 1274 (11th Cir. 2016) (“Nevertheless, Rule 10b-5(b) does prohibit[] not only literally false statements, but also any omissions of material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” (quoting *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1305 (11th Cir. 2011) (alteration in original) (internal quotations omitted))).

210. Case law research does not find securities fraud cases using the term “legally false,” but jurisprudence under the False Claim Act distinguishes between “factually false” and “legally false” claims. E.g., *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 382 (1st Cir. 2011) (describing “factually false” claims

plead “falsity.” One interpretation of Judge Chen’s formulation is that the court is saying that the statements may be false, but not material and that to be “legally false,” the statement must be both false and material. Under this interpretation, the end result would be the same because materiality is an essential element of the claim; however, the two elements of “falsity” and “materiality” become even more entwined in the court’s Order Denying Plaintiff’s Motion for Judgment as a Matter of Law or New Trial.²¹¹

At the conclusion of the trial, the jury found for Musk that the plaintiffs had not proven that he violated Rule 10b-5. Unfortunately, as the court points out, “[b]ecause the jurors used a general verdict form, the jurors did not make any findings as to particular elements of the claims.”²¹² Therefore, the litigants do not know if the jurors felt that the plaintiffs did not meet their burden on the elements of materiality, reliance, loss causation, or a combination. In upholding the jury verdict, however, Judge Chen held that substantial evidence demonstrated that the tweets were not material and cited the jury instructions that restated the “total mix” test,²¹³ but also stated that plaintiffs needed to prove that the “misrepresentation gives a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists.”²¹⁴ Arguably, Judge Chen instructed the jury that they were to determine both materiality (total mix) and falsity (false state of affairs),²¹⁵ even though he had earlier held that plaintiffs proved falsity as a matter of law.²¹⁶ In fact, Judge Chen stated that the defendants presented substantial evidence to establish that the two tweets were “not *materially* false”²¹⁷ because the actual state of affairs was that funding was “sufficiently close” to “secured” and that Musk knew of some “shareholder support.”²¹⁸

The important takeaway from the verdict probably does not lie in the boundaries between the elements of falsity and materiality; however, future courts will wrestle with whether a shorthand tweet, emoji, or other social media post is “materially false.” During Musk’s trial testimony, counsel for plaintiffs and Musk had the following colloquy:

Q: You understand that you’re under the same obligation to be accurate in a tweet about Tesla as you are in an SEC filing or press release?

as statements about the company’s products, whereas “legally false” claims are statements related to the company’s compliance with state or federal law).

211. *Tesla JNOV*, *supra* note 16, at *3.

212. *Id.* at *4.

213. *See id.* at *7 (discussing that context and evidence demonstrates that the tweets were not material).

214. *Id.*

215. *See, e.g.,* Berson v. Applied Signal Tech., Inc., 527 F.3d 982 (9th Cir. 2008) (using this formulation to define “false or misleading”).

216. Plaintiffs also unsuccessfully challenged three jury instructions. *Tesla JNOV*, *supra* note 16, at *5. In two of them, jurors were told “[y]ou must also assume Mr. Musk acted with reckless disregard for whether the statements were true. But you must still decide whether he knew that the statements were untrue.” *Id.* at *2. Plaintiffs argued that this wording invited the jurors to determine scienter as a necessary step to determining liability, but Judge Chen was unpersuaded. *See id.* at *11 (discussing the Court’s jury instructions in relations to falsity and scienter as a matter of law).

217. *See id.* at *8 (detailing Musk’s statements and related testimony).

218. The court also pointed to the fact that when Musk disclosed that funding was not completely secure, the stock price did not decline dramatically, suggesting that shareholders might have found his consideration of taking Tesla private material, but not the details. *Id.* Plaintiffs have filed an appeal in the Ninth Circuit. *In re Tesla, Inc. Sec. Litig.*, 477 F. Supp. 3d 903, *appeal docketed*, No. 23-16010 (9th Cir. July 18, 2023).

A: Yes. But, obviously, there is a limit, if you've got 240 characters, to what you can say. You can obviously be far more verbose in a filing, and everyone on Twitter understands that.

Q: Nonetheless, the character constraints in Twitter does not—there is no exception under the SEC rules based on the character limitation in Twitter, is there?

A: There isn't, but I think one cannot ignore the character limitation, and everyone on Twitter is aware of the character limitation.

Q: You don't—when you're composing a tweet about Tesla, do you think about whether you can accurately and fully and truthfully communicate information in the constraints of Twitter?

A: I think you can absolutely be truthful, but can you be comprehensive? Of course not.²¹⁹

The basic question of whether the context of Twitter or other social media changes the understanding of the audience as to what is false and what is material lies unanswered as courts and regulators have not articulated the fact that statements made in various forums may not be digested by the public in the same way.

B. United States v. Mark Schena

Not only are social media posts being cited in private securities litigation and SEC enforcement actions, but officers of issuers may also face criminal prosecution for false statements in these campaigns, in addition to SEC enforcement action²²⁰ and investor claims.²²¹ In *United States v. Schena*, a criminal defendant was convicted by a jury on nine counts, including two counts of securities fraud,²²² and sentenced to ninety-six months of imprisonment.²²³ According to the criminal complaint,²²⁴ Mark Schena was the president of Arrayit Corporation, a microcap medical technology company publicly traded on OTCBB with a Twitter account (@arrayit), which the company alerted would be used as

219. [3] Transcript of Trial Proceedings at 685–86, *In re Tesla, Inc. Sec. Litig.*, No. 18-cv-04865 (Jan. 20, 2023).

220. Complaint at 2, SEC v. Schena, No. 20-cv-06717 (N.D. Cal. Sept. 25, 2020) (describing Arrayit as a company “which purports to focus on the discovery, development, and manufacture of proprietary life science technologies”).

221. Complaint, *Taub v. Arrayit Corp.*, No. 15-cv-01366, 2015 WL 1928777 (S.D.N.Y. Mar. 31, 2015) (alleging that Arrayit and Arrayit Chief Executive Officer misled investors in financial reports).

222. *United States v. Schena*, No. 20-cr-00425, 2023 WL 3170050, at *1 (N.D. Cal. Apr. 29, 2023) (denying Defendant's Motion for Judgment of Acquittal and Motion for New Trial).

223. Amended Judgment in a Criminal Case, *Schena*, No. 20-cr-00425 (N.D. Cal. Dec. 5, 2023) (reporting that Schena was found guilty on all nine counts in the indictment and ordered to pay restitution of \$24,289,540.95 and to surrender for service of sentence on Jan. 10, 2024). Schena has appealed his conviction. Notice of Appeal from a Judgment or Order of a United States District Court, *Schena*, No. 20-cr-00425 (N.D. Cal. Oct. 20, 2023). The United States has also appealed the sentence. Notice of Appeal, *Schena*, No. 20-cr-00425 (N.D. Cal. Dec. 5, 2023).

224. Complaint, *USA v. Schena*, No. 20-cr-00425 (N.D. Cal. Nov. 12, 2020).

an informational channel.²²⁵ Schena was the author of these posts, including false and misleading posts about lengthy delays in providing financial statements to shareholders and the SEC,²²⁶ and about its allergy²²⁷ and COVID-19 tests.²²⁸

Though the private investor suit alleged violations of Rule 10b-5 with respect to personal communications with Schena and his wife, both in-person and via telephone and email, that suit did not mention the false and misleading tweets. The SEC and DOJ actions, however, centered on the tweets, suggesting that because governmental actors do not have to prove loss causation or reliance, short false statements without any context or nuance present an attractive opportunity around which to build a securities fraud case.

C. United State v. Milton

In *Borteanu v. Nikola Corp.*,²²⁹ investors brought a class action case against a publicly traded company promising to bring battery-electric trucks and hydrogen-powered vehicles to market. Among the many allegedly false statements the District Court held were actionable and misleading as a matter of law were numerous tweets by Trevor Milton, the CEO of Nikola on his Twitter account.²³⁰ Noting that other individual defendants could not be liable for Milton's tweets and had no duty to correct his tweets,²³¹ the court rejected Milton's arguments that he "had no obligation to add paragraphs of detailed disclaimers and specifications" about tweets referring to "orders" and being "sold out," when the company had no binding orders, just indications of interest.²³² Though investor claims were dismissed with leave to amend on loss causation grounds, the court denied a motion to dismiss claims related to these statements based on the Second Consolidated Amended Class Action Complaint.²³³

Perhaps even more telling is the fact that Milton was convicted of criminal securities fraud in 2022 for making the same and other false and misleading statements "through, among other things, tweets and other social media posts, and television, print media, and

225. *Id.* at 7–8. ("This summary of our regular bi-weekly press releases, reinforced with our daily Twitter feed and popular VIP shareholder tours, illustrates our commitment to providing shareholders with an exciting real-time view of Arrayit Corporation").

226. *Id.* at 8–9.

227. *Id.* at 13–17; *see also* Superseding Indictment at 8, *Schena*, No. 20-cr-00425 (N.D. Cal. May 18, 2021) (citing the following false tweet: "Arrayit clinical team commences \$240,000,000 test kit manufacturing run to build inventory for our rapidly expanding physician-ordered finger stick allergy testing services empowering clinic network doctors to identify, manage and treat allergy and asthma.").

228. Complaint, *supra* note 220, at 20–23. These statements were sent to investors via email and were reposted on iHub and Twitter.

229. *Borteanu v. Nikola Corp.*, No. 20-cv-01797, 2023 WL 1472852 (D. Ariz. Feb. 2, 2023) (granting motion to dismiss as to some defendants on scienter grounds and to all defendants on loss causation with leave to amend the complaint). The plaintiffs filed a Second Consolidated Amended Class Action Complaint on April 3, 2023. *See Borteanu v. Nikola Corp.*, No. 20-cv-01797, 2023 WL 4622604 (D. Ariz. Apr. 3, 2023).

230. *Borteanu*, 2023 WL 1472852, at *26–27.

231. *Id.* at *23 ("Plaintiff alleges no specific agreement among the Individual Defendants to boost Defendant Milton's credibility to the public or to otherwise permit him to continue making misrepresentations.").

232. *Id.* at *27.

233. *See* Order, *Borteanu*, No. 20-cv-1797 (D. Ariz. Dec. 8, 2023) (denying motion to dismiss as to Milton's tweets based on amended complaint tying the tweets to specific corrective disclosures by Hindenberg Research).

podcast interviews.”²³⁴ Prior to trial, Milton had made the argument that the securities fraud allegation should be dismissed because his “tweets, social media posts, podcasts, and television or print interviews” were not made “in connection with” Nikola securities but concerned Nikola’s products, not its securities.²³⁵ The court must not have agreed, as Counts One and Two were presented to the jury, and the jury was given jury instructions on the meaning of the language “in connection with.”²³⁶ Milton was sentenced to four years of imprisonment,²³⁷ which he is currently appealing.²³⁸ Nikola Corporation settled similar charges with the SEC in relation to Milton’s misstatements in 2021 for \$125 million.²³⁹

VII. MARKETPLACE SPEECH AS ACTIONABLE FALSE STATEMENT: SURVEYING THE FIELD

How prevalent are marketplace statements in the private investor 10b-5 landscape? Are issuers being tripped up at every turn by off-the-cuff statements on Twitter? These questions can be answered only by looking at complaints, not court opinions to get a sense of how statements in nontraditional channels are changing, or should be changing, companies’ 10b-5 prevention strategies.

A. Private Securities Litigation involving Rule 10b-5 Claims

For purposes of determining the prevalence of cases alleging false statements disseminated through nontraditional channels, this Article uses a dataset of class action cases filed in federal court alleging violations under the federal securities laws in 2022.²⁴⁰ These cases are in the early stages of litigation, so this Article makes no claim as to the relative strength of these allegations. Working from a list of 197 complaints compiled by the Stanford Class Action Clearinghouse, the Author hand-collected complaints from

234. Memorandum of Law of the United States of America in Opposition to the Defendant’s Post-Trial Motions at 2, *United States v. Milton*, No. 21-cr-00478, 2021 WL 9508232 (S.D.N.Y. Jan. 20, 2023); see also Jack Ewing, *Founder of Electric Truck Maker is Convicted of Fraud*, N.Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/2022/10/14/business/trevor-milton-nikola-fraud.html> (on file with the *Journal of Corporation Law*).

235. Memorandum of Law in Support of Defendant’s Motion to Dismiss Counts One and Two of the Indictment for Failure to Allege the Requisite Connection with a Security, *Milton*, No. 21-cr-00478, 2021 WL 9508232 (S.D.N.Y. Dec. 15, 2021) (emphasizing that his case “unlike the typical securities fraud case that focuses on alleged misstatements made in offering documents, filings with the [SEC], financial statements, and earnings reports—communications targeted to investors using media typically relied upon by investors,” “focuses on Mr. Milton’s tweets, social media posts, podcasts, and television or print interviews”).

236. Transcript, *Milton*, 21-cr-00478 (S.D.N.Y. Oct. 21, 2022) (“The requirement that the fraudulent conduct be ‘in connection with’ a purchase or sale of securities is satisfied so long as there was some nexus or relation between the allegedly fraudulent conduct and the sale or purchase of securities.”).

237. *United States v. Milton*, 21-cr-00478, 2024 WL 779210 (S.D.N.Y. Feb. 26, 2024) (denying motion for a new trial and recounting that Milton had been sentenced “to forty-eight months of imprisonment on each count, to be served concurrently, and three years of supervised release on each count, also to be served concurrently”).

238. Notice of Appeal, *United States v. Milton*, 21-cr-00478 (S.D.N.Y. Jan. 30, 2024).

239. Press Release, Sec. & Exch. Comm’n, Nikola Corporation to Pay \$125 Million to Resolve Fraud Charges (Dec. 21, 2021), [sec.gov/news/press-release/2021-267](https://www.sec.gov/news/press-release/2021-267) [<https://perma.cc/S2DD-TT3B>] (“Milton’s statements in tweets and media appearances falsely gave investors the impression that Nikola had reached certain product and technological milestones.”).

240. *Securities Class Action Clearinghouse*, STANFORD L. SCH., <https://securities.stanford.edu/list-mode.html?filter=2022> [<https://perma.cc/8ZRQ-AY7Y>].

Bloomberg Law. In cases in which a lead plaintiff was appointed following a lead plaintiff contest, the consolidated amended complaint was used. In cases in which a second or third amended complaint had been filed prior to publication, the most recent complaint was used. From this set of 197 cases, forty-one were eliminated because they did not contain allegations under Section 10(b) and Rule 10b-5.²⁴¹ In addition, one 10b-5 case was eliminated because it was an insider trading case, not a false statement case,²⁴² and one because it did not allege issuer or shareholder liability, just auditor liability.²⁴³ Another case, by a pro se plaintiff, was not considered because the stream-of-consciousness allegations of conspiracy were not representative of a federal securities class action complaint.²⁴⁴ Another case was alleging violations of Regulation FD,²⁴⁵ one involved exchange-traded funds,²⁴⁶ and one involved exchange-traded notes.²⁴⁷ Of the dataset comprising the remaining 150 complaints (the “2022 dataset”),²⁴⁸ most issuer defendants were publicly traded, but three were traded over-the-counter and seven were not publicly traded reporting companies. The complaints in the dataset were then coded according to the context in which the false statements²⁴⁹ at issue were made.

Complaint allegations included statements made in the following channels that are readily available on the SEC website through EDGAR (collectively, “EDGAR documents”): (a) Annual Reports on Form 10-K; (b) Quarterly Reports on Form 10-Q; (c)

241. *Id.* Of these cases, five alleged violations of Section 14, ten alleged violations of Section 11, nine alleged violations of Section 12(a)(1) for the sale of unregistered securities, one alleged a violation of Section 15 only, and thirteen alleged violations of some combination of the above. One case did not involve any violation of securities laws. *Id.*

242. Amended Class Action Complaint, *Lee v. Goldman Sachs Grp. Inc.*, No. 22-cv-00169 (S.D.N.Y. June 13, 2022).

243. Class Action Complaint, *Formby v. Deloitte & Touche, LLP*, No. 22-cv-00670 (N.D. Ga. Feb. 17, 2022).

244. Complaint and Request for Injunction and Class Action Complaint for Damages, Equitable, Declaratory and Injunctive Relief, *Trivedi v. Gen. Elec. Co.*, No. 22-cv-10630 (S.D.N.Y. Dec. 14, 2022).

245. Complaint at 13–15, *McGowan v. Stanley*, No. 22-cv-06971 (S.D.N.Y. Aug. 16, 2022).

246. Amended Complaint, *Xu v. Direxion Shares ET Tr.*, No. 22-cv-5090 (S.D.N.Y. Aug. 26, 2022).

247. Class Action Complaint, *Gomez v. Credit Suisse AG*, No. 22-cv-115 (S.D.N.Y. Jan. 6, 2022).

248. Appendix A (containing information gleaned from court documents from 151 cases filed in 2022) (on file with author).

249. “Statements” is plural here because virtually all, or 96.03%, of the complaints alleged the issuer and/or officers made false statements in multiple channels. Four issuers were alleged to have made multiple false statements in multiple documents of the same type. *See* Class Action Complaint for Violation of the Federal Securities Laws at 5–12, *Schaub v. Mullen Auto., Inc.*, No. 22-cv-03026 (C.D. Cal. May 5, 2022) (multiple press releases and a tweet); Class Action Complaint for Violations of the Federal Securities Laws at 4–7, *Zhang v. Gaotu Techedu Inc.*, No. 22-cv-07966 (E.D.N.Y. Dec. 30, 2022) (two investor calls); Class Action Complaint for Violations of the Federal Securities Laws at 9–15, *Chow v. Enochian Biosci. Inc.*, No. 22-cv-01374 (C.D. Cal. July 26, 2022) (2020 10-K and 2021 10-K); Complaint, *Cole v. Allianz Glob. Invs. U.S. LLC*, No. 22-cv-00747 (S.D. Cal. May 24, 2022) (multiple prospectuses for mutual funds). Only one issuer in the dataset faced allegations relating to a single statement, and that was an isolated Twitter post. *See* Consolidated Complaint for Violations of the Federal Securities Laws, *Toole v. Affirm Holdings, Inc.*, No. 22-cv-01243 (N.D. Cal. July 5, 2022). One nonreporting issuer was alleged to have made multiple false statements in unspecified “offering documents.” *See* Class Action Complaint for Violations of Federal and State Securities Laws, *Cruz v. Resolute Cap. Partners LTD*, No. 22-cv-02349 (N.D. Tex. Oct. 19, 2022).

proxy materials;²⁵⁰ (d) press releases;²⁵¹ (e) Continuous Report on Form 8-K;²⁵² (f) shareholder filings on Form 13D or 13G; and (g) registration statements and prospectuses (public offering documents).²⁵³ Complaint allegations also included statements made in the following channels that are not readily available on EDGAR unless filed with the SEC either on Form 8-K or as an exhibit to a required document: (a) investor calls;²⁵⁴ (b) company websites; (c) private offering documents;²⁵⁵ (d) advertisements; (e) presentations;²⁵⁶ (f) interviews;²⁵⁷ (g) YouTube; (h) Twitter; (i) Reddit; (j) Facebook; and (k) Instagram.

1. General Observations

All complaints except for one²⁵⁸ allege multiple false statements and almost all allege false statements across multiple categories. The average number of categories in which alleged false statements appeared was [4.41]. The highest number of categories appearing in one complaint was [eleven]. The complaints were not coded for multiple statements within one category.

The universe of 10b-5 securities fraud claims can be divided into claims against two standard defendants: the issuer and those speaking on behalf of the issuer, including officers, underwriters, auditors, and non-issuer market participants who make statements that are disseminated publicly in connection with the securities of the issuer. Though the former category contains by far the most common defendants, the second category has

250. Statements were coded as appearing in proxy materials if the statements were part of a proxy solicitation for an annual shareholder vote or for a special shareholder vote, such as in connection with a merger or acquisition.

251. Some of the issuers in the dataset are not reporting companies, and therefore press releases regarding their operations are not available on EDGAR. Reporting companies generally file press releases with the SEC on Form 8-K.

252. This category overlaps with many other categories and may be both overcounted and undercounted. For example, many press releases are filed on 8-K; if the complaint mentions both “press release” and “8-K,” the complaint was coded for both categories. If the complaint does not mention that the press release was filed as an 8-K, then only one category was coded. In addition, transcripts of earnings calls and presentations may also be filed as an 8-K, but that fact may not be mentioned in the complaint.

253. Some of the complaints in the dataset contained claims both under 10b-5 and also Section 11 and/or Section 12(a)(2). Therefore, some of the false statements may be contained in a registration statement or prospectus in connection with an IPO or a follow-on offering. Public Offering Documents may also include free writing prospectuses and road show videos.

254. This category contains statements made by issuer officers during a public telephonic or video call hosted by the issuer. The call may be referred to as an earnings call, to explain an earnings release, an investor call, or an analyst call. These calls generally have a scripted portion and a “question-and-answer” portion.

255. Some of the issuers in the dataset were not public or “in registration” at the time of the false statements, including issuers of unregistered cryptocurrencies. Private offering documents would include formal selling documents, such as private placement memoranda.

256. The presentation category is wide and varied. Many statements alleged to have been false were made in the context of prepared presentations by issuer officers and employees at industry conferences and investor conferences.

257. Statements in the interview category might be made by an issuer officer on a podcast, during a webinar hosted by a third-party, or a panel presentation at a conference. This category may also contain quotes from issuer officers in a news article published online or in print.

258. Consolidated Complaint for Violations of the Federal Securities Laws, *Toole v. Affirm Holdings, Inc.*, No. 22-cv-01243 (N.D. Cal. July 5, 2022) (alleging that a tweet from Affirm’s official Twitter account that was deleted sixteen minutes after posting was materially false and misleading).

been enlarged by the existence and rapid adoption of the internet and social media platforms, which allow statements of investors and prospective investors to be amplified beyond private conversations into the public realm. Generally, market participants who are not issuers or their agents speak to the public in only a few formal documents, such as Schedule 13D and 13G,²⁵⁹ tender offer documents,²⁶⁰ and proxy solicitations;²⁶¹ however, market participants can make statements about an issuer's securities in many informal channels. Courts have traditionally distinguished between market participants on the one hand who are trading in the issuer's securities and nonparticipating journalists on the other,²⁶² but the ability of anyone to inject analysis, opinion, facts, and mere chaos into the "total mix" blurs the distinction.²⁶³ The 2022 dataset contains two prominent cases against shareholders "tweeting and trading" in the issuer's securities.²⁶⁴

2. 10-Ks, 10-Qs, Press Releases and Earnings Calls

In the 2022 dataset, the most frequent context in which an allegedly false statement is made is a press release (106 cases), followed closely by a 10-K (102 cases), an investor call (99), and a 10-Q (91).²⁶⁵ For cases that have a longer class period, multiple 10-Ks, 10-Qs, press releases, and investor calls may be at issue. Roughly 22% percent of cases (33) do not involve at least one 10-K or 10-Q (collectively, "periodic filing"), though many of those cases involve issuers that were nonreporting issuers at the time.²⁶⁶ Only a handful of cases (14) involve a reporting issuer in which no false statements are alleged to have appeared in periodic filing, proxy documents, or public offering documents. Though one might surmise that a particular false statement about a company's operations would be repeated throughout all periodic filings, press releases, and an accompanying investor call, many cases do not cite all four types of statements. Fourteen complaints contain allegations

259. Securities Exchange Act of 1934 § 13(d) (codified as amended at 15 U.S.C. § 78m(d)); Filing of Schedules 13D and 13G, 17 C.F.R. § 240.13d-1 (2024); *see also* COX, HILLMAN, LANGEVOORT & LIPTON., *supra* note 24, at 900 (explaining that Section 13(d) requires persons who become the beneficial owner of more than five percent of an issuer's securities to file Schedule 13D to disclose "any plans or proposals regarding possible exercise of control over the issuer" or Schedule 13G if the investor intends to remain a passive investor).

260. *See id.* at 911 (discussing the requirement under Section 14(d) to file a Schedule TO in connection with any tender offer).

261. Securities Exchange Act of 1934 § 14(a) (codified as amended at 15 U.S.C. § 78n(a)) ("It shall be unlawful for any person . . . 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, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to Section 78l of this title."); 17 C.F.R. § 240.14A-101 (2024) (mandating certain information to be disclosed on Schedule 14A).

262. Lidsky & Pike, *supra* note 131, at 5.

263. *Id.* (arguing that the SEC should maintain sufficient "breathing space" between online investing speech that is protected by the First Amendment and securities fraud).

264. *See infra* Part VII.A.5(b).

265. *See* Appendix A (on file with author).

266. Seven issuers were nonreporting issuers selling unregistered securities or cryptocurrencies. One issuer's securities were traded on OTCBB. Eight complaints alleged issuer false statements in registration statements or proxy documents. One complaint alleged market manipulation under Section 9 and also 10(b) by a controlling shareholder.

of false statements heard in an investor call, but not in a periodic filing,²⁶⁷ and nineteen complaints contain allegations that appeared in a press release but did not appear in a periodic filing. One interesting question that the 2022 dataset raises is whether periodic filings are prepared and vetted in a way different from an accompanying press release or a contemporaneous investor call.²⁶⁸ An alternative theory may be that because of the question-and-answer format of the call, officers may have to speak on topics that are not covered in an earnings press release or a 10-Q. Even in cases in which allegations were aimed at periodic filings, calls, and press releases, the statements were not identical.²⁶⁹

3. Marketplace Speech: Presentations and Interviews

Prospective plaintiffs not only scrutinize periodic filings and other EDGAR documents; they also bring allegations of false and misleading statements appearing in nontraditional channels as well. Seventy-two complaints (48%) made allegations of false statements disseminated during one or more presentations, in conjunction with other allegations.²⁷⁰ Some of these presentations were at industry conferences or investor conferences, and whether they were recorded, available online, or filed with the SEC as an exhibit to an 8-K is not specified in most instances. Thirty complaints (20%) made allegations of false statements given by an issuer spokesperson in some type of interview. These types of forums are good examples of quasi-formal situations in which the speaker should be thoughtful about their choice of words but also have an incentive to promote the issuer's products or services in a relatable manner. These situations are also both well-suited to talk about future prospects and ill-suited for orally conveying meaningful cautionary language to insulate such forward-looking statements.

4. Marketplace Speech: Company Websites

In twenty-three of the cases in the dataset, plaintiffs point to false and misleading statements that appear on company websites.²⁷¹ As discussed above, websites might include original statements about products, mission, sustainability, and management, but they may also host or republish other types of communications.

267. Five of these fifteen cases involved an investor call and public offering documents, whether for an initial public offering or a follow-on offering.

268. See Caleb Rawson, Brady J. Twedt & Jessica C. Watkins, *Managers' Strategic Use of Concurrent Disclosure: Evidence from 8-K Filings and Press Releases*, ACCT. REV., July 2023, at 345, 351 (finding that 33% of the time that a press release is issued concurrently with an 8-K filing, the press release relates to a distinct event other than the filing, hypothesizing that the press release is meant to obfuscate the filing and increase investor processing costs); see also Jennings, *supra* note 164, at 964 (noting that earnings disclosure had less review intensity than periodic disclosures, based on interview responses).

269. See, e.g., Plaintiffs' Second Amended Class Action Complaint for Violations of the Federal Securities Laws, *Armbruster v. Gaia, Inc.*, No. 22-cv-3267, (D. Colo. Oct. 20, 2023) (alleging false statements around disclosure controls and procedures from a Form 10-Q and false statements around when the company reinstated a free trial period announced in the accompanying earnings call).

270. Appendix A (on file with author).

271. *Id.*

In the 2022 dataset, nonreporting companies used websites and social media to communicate with potential investors,²⁷² and public companies used their websites as online newsrooms, investor relations, or venues to respond to criticism,²⁷³ and those positive statements in the face of criticism were alleged to have been false. Four cases involved presentations and webcasts posted on company websites,²⁷⁴ and one involved press releases published on the website.²⁷⁵ One case involved detailed technical claims about a biotechnology company's core two products for testing for health conditions.²⁷⁶ Two cases involved letters written by the CEO to investors posted on the company website.²⁷⁷ Two cases involved ethical statements and other governance reports.²⁷⁸ One

272. Three issuers represented in the 2022 dataset were not publicly traded at the time and communicated with prospective investors through their websites. *See, e.g.*, Amended Class Action Complaint, *Picha v. Gemini Tr. Co. LLC*, No. 22-cv-10922 (S.D.N.Y. Mar. 16, 2023) (alleging misrepresentations about Gemini's cryptocurrencies on its website).

273. *See, e.g.*, First Amended Class Action Complaint for Violations of the Federal Securities Laws, *Tchrs. v. Ret. Sys. of N.Y.C. v. Coupang, Inc.*, No. 22-cv-07309 (S.D.N.Y. May 22, 2023) (alleging that issuer posted false statement on its online newsroom concerning fire safety, regulation, and operations); Consolidated Class Action Complaint for Violations of the Federal Securities Laws, *Joyce v. Amazon.com, Inc.*, No. 22-cv-00617 (W.D. Wash. Sept. 20, 2022) (alleging false statements in various channels, including three statements posted on Amazon's official website regarding its practices with third-party sellers).

274. Amended Class Action Complaint for Violations of the Federal Securities Laws, *Rose v. Butterfly Network, Inc.*, No. 22-cv-00854 (D.N.J. Nov. 1, 2022) (alleging false and misleading statements during a live webcast at the 39th Annual J.P. Morgan Healthcare Conference, which was both filed on the company's website and with the SEC); First Amended Class Action Complaint for Violations of the Federal Securities Laws, *In re Spero Therapeutics Inc. Sec. Litig.*, No. 22-cv-03125 (E.D.N.Y. Dec. 5, 2022) (alleging false statements in numerous presentations that were posted on the website, along with two scientific articles authored by the issuer and republished press releases); Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws, *Leacock v. IonQ, Inc.*, 22-cv-01306 (D. Md. Nov. 22, 2022) (alleging misleading claims about IonQ's 32 qubit quantum computer on its website); Consolidated Amended Class Action Complaint for Violations of the Federal Securities Laws, *In re Digit. Turbine, Inc.*, No. 22-cv-00550 (W.D. Tex. Feb. 17, 2023) (alleging false misrepresentation of financial information that was repeated in various documents, including investor presentations that were posted on the issuer website).

275. Amended Class Action Complaint, *In re Volkswagen AG Sec. Litig.*, No. 22-cv-00045 (E.D. Va. June 3, 2022).

276. Amended Class Action Complaint for Violations of the Federal Securities Laws, *Schneider v. Natera, Inc.*, No. 22-cv-00398 (W.D. Tex. Oct. 7, 2022) (alleging that scientific claims comparing Natera's products against competitor products in brochures, videos, and pages on its website were false and misleading).

277. Class Action Complaint for Violation of the Federal Securities Laws, *Okla. Firefighters Pension & Ret. Sys. v. Biogen Inc.*, No. 22-cv-10200 (D. Mass. June 27, 2022) (alleging that letter from CEO that was posted on website about FDA approval was false and misleading); Amended Consolidated Class Action Complaint for Violations of the Federal Securities Laws, *In re Silvergate Cap. Corp. Sec. Litig.*, No. 22-cv-01936 (S.D. Cal. May 11, 2023) (alleging false statements, including statements in a signed public letter from Silvergate's CEO posted on its website in response to concerns about FTX, Silvergate's most important customer).

278. Amended Complaint for Violations of the Federal Securities Laws at 41–42, *Buhrke Fam. Revocable Tr. v. U.S. Bancorp.*, No. 22-cv-09174 (S.D.N.Y. May 5, 2023) (alleging false statements contained on its website under the title "Ethics at U.S. Bank" and subtitled "Trust" from the CEO); Amended Class Action Complaint at 36–42, *Pembroke Pines Firefighters & Police Offs. Pension Fund v. Abbott Laboratories*, No. 22-cv-04661 (N.D. Ill. Apr. 21, 2023) (alleging false statements in "The Abbott Quality Promise" infographic posted to the website's online newsroom, "Our Global Policy on the Marketing of Infant Formula" and "Comprehensive Ethics and Compliance Program" on the "Policies" section of the website, Abbott's annual Global Sustainability Reports, and the "Code of Business Conduct" posted in the "Investor" section of the website).

case involved blog posts on the company website,²⁷⁹ and two involved “Fact Sheets” posted on company websites.²⁸⁰

5. Marketplace Speech: Social Media

The motivation behind building the 2022 dataset was to see if the growing importance of social media in the dissemination of information was affecting the securities fraud landscape. Social media channels are represented in the dataset, but the relative importance of social media compared to periodic filings, calls, press releases, and presentations should not be overstated. Though the 2022 dataset contains instances of allegations specifically citing social media platforms, these instances are few in number. In fact, only one complaint cited to Reddit, Facebook, or Instagram, and that complaint involved a nonreporting issuer selling unregistered cryptocurrencies to the public via websites and multiple social media outlets.²⁸¹ YouTube videos were cited in nine cases. Though X, the website formerly known as Twitter, has fewer users than Facebook and Instagram,²⁸² tweets were cited as false statements in fourteen complaints in the dataset, the most of any form of social media.

a. Issuer and Officer Tweets

Only one of the complaints in the dataset alleges that a tweet, and no other communication by the issuer, contains a false statement. In *Toole v. Affirm Holdings, Inc.*,²⁸³ plaintiffs alleged they were harmed by a tweet that appeared for sixteen minutes on Affirm’s official Twitter account, encouraging the public to “[t]une in today at 2pm” to learn about Affirm’s earnings announcement and “[a]nother great quarter is in the books,” but omitting overall negative news in the upcoming earnings announcement.²⁸⁴

279. Second Amended Consolidated Class Action Complaint, *In re Coinbase Glob., Inc. Sec. Litig.*, 22-cv-04915 (D.N.J. July 20, 2023) (alleging false statements in a number of channels, including blog posts hosted on the company website responding to SEC investigations and uncertainty surrounding cryptocurrencies as securities).

280. Lead Plaintiff’s First Amended Class Action Complaint for Violations of the Federal Securities Laws at 80–84, *In re Inotiv, Inc. Sec. Litig.*, No. 22-cv-00045 (N.D. Ind. Nov. 23, 2022) (alleging false statements in “fact sheet” posted regarding treatment of animal subjects in scientific testing); Consolidated Complaint at 54–56, *In re Meta Materials*, No. 21-cv-07203 (E.D.N.Y. Aug. 29, 2022) (alleging false statements in website “fact sheets” about transparent thin film products).

281. First Amended Complaint at 2, 22, 38, 40, 43, 61, *In re SafeMoon LLC*, No. 22-cv-00642 (D. Utah Mar. 17, 2023).

282. See Shradha Dinesh & Meltem Odabaş, *8 Facts About Americans and Twitter as it Rebrands to X*, PEW RSCH. CTR. (July 26, 2023), <https://www.pewresearch.org/short-reads/2023/07/26/8-facts-about-americans-and-twitter-as-it-rebrands-to-x> [https://perma.cc/44WK-MKXJ] (reporting survey results that in 2021, 23% of adults in the U.S. said they used Twitter, compared to 69% who used Facebook, 40% who used Instagram, and 81% who used YouTube).

283. Consolidated Complaint for Violations of the Federal Securities Laws, *Toole v. Affirm Holdings, Inc.*, No. 22-cv-01243 (N.D. Cal. July 5, 2022).

284. *Id.* at 2 (alterations in original). This case is one of the few in the dataset in which the trial court has already granted a motion to dismiss. Order Granting Motion to Dismiss, *Toole*, No. 22-cv-01243 (N.D. Cal. Sept. 28, 2022) (“The complaint does not even come close to satisfying the PSLRA’s scienter requirement. Indeed, the context (quickly taking down the tweet and accelerating the earnings release) creates a far more compelling inference that the company reacted quickly to correct a mistake that was embarrassing but not nefarious.”). In fact, though it is customary for plaintiffs to be given leave to amend following a post-PSLRA motion to dismiss,

One of the complaints in the dataset references a tweet that was an unfortunate attempt at a joke.²⁸⁵ On March 29, 2021, Volkswagen Group of America posted on its website a “draft” press release announcing a name change from “Volkswagen” to “Volsswagen,” which it then took down the same day. When reporters called VWGoA, however, spokespersons declined to comment on the name change.²⁸⁶ Additionally, the press release was reposted the next day, and a tweet conveyed the same name change, with a video attached.²⁸⁷ After the markets closed on March 30, Volkswagen removed the press release, and the Wall Street Journal reported that the press release “was originally intended as an early April Fools’ Day stunt.”²⁸⁸

Four cases involve publicly traded issuers who made statements in multiple channels, including on Twitter, that were not mistakes or jokes. These issuers, CareDx, Inc.,²⁸⁹ Coinbase,²⁹⁰ Amazon,²⁹¹ and Enviva,²⁹² used their official Twitter accounts frequently to engage with the public, tout their services, and respond to criticisms.

b. Investor Tweets: Tweeting and Trading

Two cases in the dataset were aimed at a shareholder of a publicly traded issuer allegedly making false statements via tweets to influence the stock price of the issuer. Unsurprisingly, one of those cases attacks nine of Elon Musk’s tweets during his announced acquisition of Twitter, Inc. that the deal was “temporarily on hold” and speculating as to the number of “bot” users on the platform.²⁹³ Musk argued in a motion to dismiss that none of the five tweets were false or material.²⁹⁴ The district court, however,

the court remarked, “[a]rguably, this is the rare PSLRA case where dismissal with prejudice would be appropriate at the outset, because it is so difficult to imagine that the plaintiffs will ever be able to state a claim.” *Id.*

285. Amended Class Action Complaint, *supra* note 275, at 3–4.

286. See William Boston, *No, Volkswagen Isn’t Rebranding Itself Volsswagen*, WALL ST. J. (Mar. 30, 2021), [wsj.com/articles/messaging-says-vw-usa-to-rebrand-itself-volsswagenheadquarters-says-not-so-fast-11617120111](https://www.wsj.com/articles/messaging-says-vw-usa-to-rebrand-itself-volsswagenheadquarters-says-not-so-fast-11617120111) (on file with the *Journal of Corporation Law*).

287. *Id.*

288. *Id.*

289. Second Amended Class Action Complaint for Violations of the Federal Securities Laws at 68 & n.30, *Plumbers & Pipefitters Loc. Union #295 Pension Fund v. CareDx, Inc.*, No. 22-cv-03023 (N.D. Cal. June 28, 2023).

290. Second Amended Consolidated Class Action Complaint, *supra* note 279, at 77, 79, 123, 129, 136–37 (alleging false statements in a number of channels, including multiple tweets by the CEO and CLO).

291. Consolidated Class Action Complaint for Violations of the Federal Securities Laws, *supra* note 273, at 97, 110–11.

292. Class Action Amended Complaint for Violations of the Federal Securities Laws at 26–28, 31–32, 35, *Fagen v. Enviva Inc.*, No. 22-cv-2844 (D. Md. Apr. 3, 2023) (alleging false statements that were repeated in several tweets on the company’s official Twitter page about its lumber practices).

293. The 2022 dataset contains two cases arising out of this same set of facts. One complaint, filed in the Northern District of California, focuses on the tweeted statements. See First Amended Class Action Complaint for Violations of the Federal Securities Laws at 9, 31–32, *Pampena v. Musk*, No. 22-cv-05937 (N.D. Cal. June 8, 2023). The complaint also mentions, without making an allegation, that Musk made false statements and omissions in Musk’s Form 13G, stating he was a passive investor not interested in taking control of Twitter. *Id.* at 16, 19–20. The other complaint, filed in the Southern District of New York, focuses on the contemporaneous statements in Musk’s Schedule 13G, but not the tweets. See Class Action Complaint for Violations of the Federal Securities Laws at 38, *Rasella v. Musk*, No. 22-cv-03026 (S.D.N.Y. Nov. 18, 2022).

294. Defendant Elon Musk’s Motion to Dismiss the First Amended Complaint at 11–17, *Pampena v. Musk*, No. 22-cv-05937 (N.D. Cal. July 10, 2023).

denied that motion as to four of those tweets, holding that they were materially misleading because a reasonable investor would have understood the tweets to mean that Twitter was obligated to provide Musk with more information and that Musk could terminate the acquisition without that information, which was false.²⁹⁵

The other tweeting shareholder case involves Ryan Cohen, former founder of Chewy.com who used photos and emojis in tweets in his successful campaign to become the Chairman of GameStop's board by touting the stock as a "meme stock."²⁹⁶ In 2022, Cohen attempted to create the same Twitter and Reddit buzz for Bed Bath & Beyond, but when his campaign faltered, plaintiffs allege he drummed up a last-minute price increase via Twitter so he could sell much of his 9.8% stake.²⁹⁷ On August 12, Cohen tweeted an emoji known as "moon face," which his heavy following on Twitter and Reddit interpreted and reposted as a sign to buy Bed Bath & Beyond shares "to the moon," coinciding with a one-day stock price increase of 21.83%.²⁹⁸ Cohen, however, began selling, not buying, even though traders continued to purchase the stock, pushing the price even higher. Cohen argued in a motion to dismiss that "emojis can *never* be actionable because they have no defined meaning," but the court disagreed, stating the tweet was not ambiguous and was plausibly material because "meme stock investors conceivably understood Cohen's tweet to mean that Cohen was confident in Bed Bath and that he was encouraging them to act."²⁹⁹

c. Nonreporting Issuers

Six complaints were filed against nonreporting issuers selling unregistered securities, including cryptocurrency.³⁰⁰ These issuers necessarily relied on social media and websites to promote their securities.

295. Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, *Pampena v. Musk*, 22-cv-05937 (N.D. Cal. Dec. 11, 2023) (allowing cause of action as to those tweets to proceed, plaintiffs having additionally adequately alleged scienter and loss causation).

296. See Guan, *supra* note 122, at 2061 & n.41 (chronicling the rally of GameStop shares fueled by retail investors communicating with each other on WallStreetBets on Reddit and Cohen's role).

297. Amended Complaint at 2–3, *Si v. Bed Bath & Beyond Corp.*, No. 22-cv-2541 (D.D.C. Nov. 2, 2022).

298. *Id.* at 59–61 (giving examples of Cohen's social media followers reposting his tweet and interpreting it as Cohen increasing his ownership and being bullish on the stock).

299. *In re Bed Bath & Beyond Corp. Sec. Litig.*, 2023 WL 4824734, at *5–6 (D.D.C. July 27, 2023) (dismissing claims against the issuer, and a Section 9(a)(2) claim against Cohen but denying the motion to dismiss as to 10b-5 claims against Cohen, which included one claim surrounding the August 12 tweet and two false statements in SEC documents).

300. The six cryptocurrency firms were BlockFi, SafeMoon LLC, Humbl, LLC, TerraForm Labs, Celsius Network LLC, and Gemini Trust Co. See First Amended Class Action Complaint and Demand for Jury Trial at 31–36, *Mangano v. Blockfi*, No. 22-cv-01112 (D.N.J. July 28, 2022); First Amended Complaint, *supra* note 281, at 131–59; Amended Class Action Complaint for Violations of the Federal Securities Laws at 91–94, 95–98, *Pasquinelli v. Humbl, LLC*, No. 22-cv-723 (S.D. Cal. Sept. 22, 2022); Third Amended Class Action Complaint for Violations of the Federal Securities Laws, *Patterson v. TerraForm Labs* at 61–75, No. 22-cv-03600 (N.D. Cal. Jan. 25, 2024); First Amended Class Action Complaint and Demand for Jury Trial at 98–113, *Goines v. Celsius Network, LLC*, No. 22-cv-04560 (D.N.J. June 19, 2023); Amended Class Action Complaint, *supra* note 272, at 38–39.

B. SEC Civil Enforcement

An attempt to investigate and code similar false statements in cases brought by the SEC, and not private litigants, revealed interesting results. Litigation releases posted on the SEC website during the first six months of 2022 were examined for mentions of false statements violating 10b-5 and whether the statements appeared in nontraditional channels.³⁰¹

One interesting fact the litigation releases reveal is how rarely the SEC brings charges against publicly traded issuers. Between January 1, 2022, and July 1, 2022, class-action lawsuits were filed against ninety-nine issuers in U.S. federal courts alleging false or misleading statements,³⁰² with ninety-six of those issuers being publicly traded. During the same period, the SEC posted 135 Litigation Releases, but only five litigation releases involved publicly traded issuers being investigated for making fraudulent statements under 10b-5. Four of these enforcement actions involved fraudulent financial statements included in SEC filings.³⁰³ The remaining enforcement action involved an officer in a Brazilian company that spread rumors in meetings with investors and analysts that Berkshire Hathaway was a shareholder in the company.³⁰⁴ None of the five fraudulent statement enforcement actions brought between January 1 and July 1, 2022, involved statements made in nontraditional channels, though the SEC does bring enforcement actions based on social media statements, as evidenced in the *Tesla*, *Schena*, and *Milton* cases.

In the first two quarters of 2022, the SEC mostly filed charges or settled charges with individual fraudsters.³⁰⁵ In the remaining 130 litigation releases, the SEC characterized fifteen schemes as Ponzi schemes and twelve schemes as pump-and-dump schemes.³⁰⁶

301. The SEC issues a litigation release when it files a complaint against an issuer or an individual, and it may issue a separate litigation release when the litigation is concluded, or another relevant milestone is reached. In this group of 135 litigation releases, it is possible that more than one release relates to the same set of facts. See Appendix B (on file with author).

302. Of the 105 issuers sued in a class-action securities fraud lawsuit during that time-period, six lawsuits did not involve false statements but alleged violations of Section 5, Section 12(a)(1), or insider trading.

303. Complaint at 2, SEC v. iFresh, No. 22-cv-03200 (E.D.N.Y. May 31, 2022); Complaint and Demand for Jury Trial at 17, SEC v. Sirotko, No. 22-cv-00348 (M.D. Fla. June 2, 2022); Complaint at 2, SEC v. United Health Prods., Inc., No. 22-cv-03612 (D.N.J. June 8, 2022); Complaint at 2–3, 5, SEC v. Korb, No. 22-cv-4031 (C.D. Cal. June 13, 2022).

304. See Complaint for Injunctive and Other Relief at 1, SEC v. Passos, 22-cv-03156 (S.D.N.Y. Apr. 18, 2022).

305. See RACHITA GULLAPALLI, SEC. & EXCH. COMM’N, MISCONDUCT AND FRAUD IN UNREGISTERED OFFERINGS: AN EMPIRICAL ANALYSIS OF SELECT SEC ENFORCEMENT ACTIONS 13, <https://www.sec.gov/files/misconduct-and-fraud-unregistered-offerings.pdf> [<https://perma.cc/AL59-NGRY>] (presenting data from SEC Litigation Releases in 2014 and 2015, which showed 111 cases brought for violations of Section 5, 202 for violations of Rule 10b-5, 194 cases for violations of Section 17(a), 48 for violations of the Advisers Act, and 57 other types of cases). Individual defendants were present in 204 of 210 cases brought. *Id.* at 15.

306. See, e.g., SEC v. Biller, 654 F. Supp. 3d 212, 213, 216 (E.D.N.Y. Feb. 6, 2023) (denying default judgment in case against individuals running a “boiler room” from Colombia, which was “hired by groups of people secretly controlling at least eighteen foreign issuers”). Those working for the control group then recruited U.S. investors by phone to purchase stocks in the company, creating “demand from investors so they would have buyers for their shares, and to increase the price of the stock, thereby increasing their profits”. See Complaint, SEC v. Biller, No. 22-cv-01406, 2022 WL 782441 (E.D.N.Y. Mar. 14, 2022); see also GULLAPALLI, *supra* note 305, at 14 (noting that Ponzi schemes and Pyramid schemes were highly represented in the 2014 and 2015 cases brought by the SEC).

Other common enforcement actions were against financial advisors under the Investment Advisers Act of 1940,³⁰⁷ insider trading,³⁰⁸ and outright scams.³⁰⁹

VIII. TOWARD A NEW “MATERIALLY FALSE” ANALYSIS FOR MARKETPLACE SPEECH

Rule 10b-5 anticipates that any statement about a publicly held company could be actionable in whatever format it is composed, on whatever platform it is published, and against anyone who makes it. The limitations of 10b-5 come not from format, platform, or speaker, but from traditional jurisprudence that requires the statement to be false, material, and have a nexus to the issuer securities. However, this does not have to be the rule.

Given the explosion in formats, platforms, and speakers—Congress, or the SEC, could help courts in this gatekeeping function by determining *ex ante* that certain formats or platforms do not produce statements that are sufficiently material or connected to an issuer’s securities. Creating bright-line rules would aid all marketplace participants in understanding what types of speech would be scrutinized under the federal securities law lens. Certainty could lead to more participation and even more truthful information.

Setting limits on securities fraud is not without precedent; Section 11 and Section 12 liability is cabined to a particular set of defendants and statements that appear in a registration statement or a prospectus, and Section 14 liability is limited to proxy materials. State securities acts limit liability for false statements to particular documents as well.³¹⁰ Section 10(b) itself has certain limitations imposed by the PSLRA, including no aiding-and-abetting liability. Rule 10b-5 does not have to be unlimited, particularly with the rapidly expanding information landscape.

After determining that limitations are possible and perhaps desirable, regulators should determine which types of marketplace speech are problematic and whether private actors or government actors are better suited to enforcing 10b-5 in particular forums. Consider the following examples mentioned above:

1. Individuals on social media who are posting about issuers in which they have no substantial position (less than 2% of public float, for example) and are not officers or directors.
2. Individuals on social media who are posting about issuers in which they have a substantial position (more than 2% of the public float, for example) or are an officer or director.
3. Individuals on social media and via email who are recruiting investors and then misappropriating their money.

307. Appendix B (on file with author). Twenty-five of the litigation releases listed violations of the Advisers Act.

308. *Id.* Twenty of the litigation releases referenced insider trading violations.

309. *Id.* Fourteen of the enforcement actions in the litigation releases involved misappropriation of investor funds or other type of fraudulent scheme.

310. *See, e.g.,* TEX. GOV’T CODE ANN. § 4008.052 (West 2022) (providing a private right of action for offerees and buyers of securities for untrue statements of material fact made by the offeror or seller or nonselling issuer in a registration statement); *id.* § 4007.024 (limiting criminal liability to statements in a document filed with the Commissioner or in a proceeding under the Texas Securities Act).

4. Publicly held issuers who are posting on social media but also are current in their periodic filings.
5. Private companies who are nonreporting who are posting on social media while selling unregistered securities.

The situations in Number 2, Number 3, and Number 5 seem the most problematic. The situations in Number 1 and Number 4 seem the least problematic,³¹¹ and it may be that most of these cases would eventually be dismissed because the statements are not false, are not material, or do not have a sufficient nexus with the issuer's security. Creating a rule, however, could save judicial resources and shareholder wealth by insulating the unrelated individual and the publicly held issuer from SEC enforcement or private causes of action that ultimately go nowhere.

Such a rule could be supported by resorting to the total mix test. Given the explosion of information about publicly held issuers, the social media posts or internet messages of an unrelated individual would not alter the total mix. Relatedly, for a reporting issuer, a social media post, standing alone, should not outweigh SEC filings and professional investment analysis. These types of statements may be literally false or misleading, but socially acceptable.

Investors should be trusted to understand the difference between information channels.³¹² Through the lens of a reasonable investor, it is challenging to say whether a reasonable investor would rely on various types of statements, which might be anonymous, on various websites, during webinars, investor calls, or presentations. These new forms of media may grow more reliable over time, as more users visit them, and the sites become more professionalized.³¹³ On the other hand, certain types of social media may become less reliable to a reasonable investor as we learn more about algorithms, bots, and general disinformation in social media.

IX. CONCLUSION

Information is everywhere. Securities fraud cases are not decreasing, and issuer statements are appearing in more places, not fewer. Both issuer speech and investor speech are being disseminated more frequently and more quickly than ever before. For securities fraud jurisprudence to keep up, reform is necessary. Rule 10b-5 cases should focus on statements that are the most problematic; and problematic because reasonable investors would believe them to be true, authoritative, and reliable. To that end, private causes of action against issuers should be narrowed to documents and speech that is formal, vetted,

311. See Fisch, *supra* note 125, at 1852–54 (arguing that social media chatter is not inherently worse than information from professional intermediaries). Encouraging communication within online communities may have advantages for shareholder participation and engagement. See Gramitto Ricci & Sautter, *supra* note 9, at 1671–75.

312. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 190 (2015) (“Registration statements as a class are formal documents, filed with the SEC as a legal prerequisite for selling securities to the public. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life.”).

313. See Lidsky & Pike, *supra* note 131, at 5 (arguing that “readers understand that Internet posters are, like themselves, not trained financial analysts and that their opinions should be taken for what they are—just opinions, and perhaps biased or uninformed ones”).

and publicly filed. Moreover, regulators should shift their focus away from online investors who are trading and talking for entertainment, in a socially acceptable way.
