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INSIDER TRADING & DISCLOSURE UPDATE

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Editors' Remarks

Welcome to the latest issue of the Insider Trading & Disclosure Update, Debevoise's periodic update focusing on recent legal, compliance and enforcement developments in the areas of insider trading, the management of material nonpublic information and disclosure-based matters.

In this Update, we highlight the potentially significant Supreme Court cases *Emulex* and *Lorenzo,* and their bearing on tender offer and "scheme" liability under the Securities Exchange Act is 1934, respectively. Also figuring prominently in this Update are two cases hailing from the Delaware Chancery Court—*Sciabacucchi,* which invalidated forum selection provisions for claims under the Securities Act of 1933, and *In re Fitbit, Inc.,* in which the court refused to dismiss a derivative litigation that included allegations of breaches of fiduciary duty based, in part, on alleged insider trading—as well as a bi-partisan Congressional effort to force the SEC to consider restrictions on the use of 10b5-1 plans.

We hope that you find this Update useful and informative, and we look forward to bringing you further news and analyses in future issues.

Sincerely,

The Editorial Board

Case Law & Market Updates

Tender Offer and "Scheme" Liability on U.S. Supreme Court Docket

The Supreme Court under Chief Justice Roberts has shown a consistent willingness to review securities-related cases, hearing more than two dozen securities-related cases since 2005. This fact is all the more remarkable given the overall decline in the number of cases granted *certiorari* by the Supreme Court. In this term, the Supreme Court wades into two very different securities-related issues that could have wide-ranging impacts for litigants.

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Tender Offer and "Scheme" Liability on U.S. Supreme Court Docket

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Emulex Corp. et al., v. Varjabedian

In *Emulex Corp*., the Supreme Court will decide whether proof of a negligent omission (as opposed to intentional or reckless conduct) in connection with a tender offer is sufficient to impose liability in privately-litigated actions under Section 14(e) of the Securities Exchange Act of 1934 ("Exchange Act").[1]

To mergers and acquisitions practitioners, the facts giving rise to *Emulex* will be familiar. In 2015, Emulex Corp. ("Emulex") was slated to be acquired by Avago Technologies Wireless (USA) Manufacturing Inc. ("Avago") pursuant to a jointly-announced tender offer.[2] Shareholders of Emulex were to receive $8.00 per share, representing a 26.4% premium on Emulex's then-prevailing market price. Despite Goldman Sachs' favorable fairness opinion, which Emulex filed with the SEC as part of its "Recommendation Statement," Gary Varjabedian filed a putative class action to enjoin the merger in the Central District of California following initiation of the tender offer.

In the course of open-book discovery, Varjabedian learned that Goldman Sachs had prepared a chart of comparable transactions that did not accompany Emulex's Recommendation Statement. The chart indicated that the premium being offered to Emulex's shareholders, while falling within the normal range of premiums offered to shareholders in semiconductor transactions similar to the proposed merger, fell below the mean and median of those premiums. Varjabedian amended his complaint to allege that, in violation of Section 14(e) of the Exchange Act, Emulex's omission of the comparable transactions page in its SEC filing materially misled investors because it made Avago's 26.4% premium offer appear to be more generous than it otherwise would have been in context.

The district court dismissed the case with prejudice, citing a litany of cases requiring plaintiffs to show *scienter* to establish liability under Section 14(e). Having decided that *scienter* was required, the court ruled that Varjabedian's amended complaint "failed to establish a strong inference of *scienter*," as required by the PSLRA,[3] because it did not state that Emulex intentionally omitted the chart.[4] Varjabedian appealed to the Ninth Circuit, arguing that mere negligence was sufficient to establish Section 14(e) liability. Relying on legislative history, the Ninth Circuit agreed with Varjabedian, and held that the Exchange Act "places more emphasis on the quality of information shareholders receive . . . than on the state of mind harbored by those issuing a tender offer. Such a purpose supports a negligence standard."[5] In so holding, the Ninth Circuit departed from the analysis of the Second, Third, Fifth, Sixth, and Eleventh Circuit Courts.

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Tender Offer and "Scheme" Liability on U.S. Supreme Court Docket
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In taking up the *Emulex* case, the Supreme Court has the opportunity to resolve the significant Circuit split on whether a Section 14(e) private action can be based on a negligent misstatement or omission made in connection with a tender offer rather than the higher scienter pleading standard for fraud claims under Section 10(b). Although the issue before the Court is a narrow one, petitioners and the U.S. Chamber of Commerce, through an *amicus* brief, put the "more fundamental issue" of whether Section 14(e) supports an inferred private right of action at all squarely before the Court.[6]

Lorenzo v. SEC

Lorenzo v. SEC presents the Supreme Court with an opportunity to revisit and clarify its seminal decision *Janus Capital Group, Inc. v. First Derivative Traders*,[7] which held that the "maker" of a statement for purposes of 10b-5(b) liability is the person with "ultimate authority" over its content, and to provide much-needed guidance as to what type of conduct suffices to establish scheme liability under Rules 10b-5(a) and (c) post-*Janus*.

In the underlying administrative action against Francis Lorenzo, the SEC found that Lorenzo, an investment banker at a registered broker-dealer, violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 in connection with emails he sent to investors concerning a bond offering. The emails, which allegedly omitted information concerning massive write-downs on the issuer's assets, were drafted by Lorenzo's boss but mailed from Lorenzo's email account. The SEC charged Lorenzo with violating Rule 10b-5 by sending the emails out to investors from his own account. Under *Janus*, however, Rule 10b-5(b)'s prohibition against "mak[ing] any untrue statement of material fact" only applies to the person, fund, or entity that was the "maker" of the statement—in other words, "the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it," and not merely "[o]ne who prepares or publishes a statement on behalf of another."[8]

Consistent with *Janus*, the D.C. Circuit concluded on appeal that Lorenzo had not "made" the misstatements but the divided panel nevertheless held that the SEC properly imposed liability on Lorenzo for employing a "device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security."[9] In doing so, the Circuit expressly rejected Lorenzo's argument that "*Janus* would effectively be rendered meaningless" by such a decision, and found instead that "Rules 10b-5(a) and (c), as well as Sections 10(b) and 17(a)(1), may encompass certain conduct involving the dissemination of false statements even if the same conduct lies beyond the reach of Rule 10b-5(b)."[10] In his petition for *certiorari*, Lorenzo argued

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Tender Offer and "Scheme" Liability on U.S. Supreme Court Docket

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that the outcome in the D.C. Circuit authorizes the SEC to simply "repackage" inadequate 10b-5(b) misstatement claims as fraudulent schemes.

The outcome at the Supreme Court may pivot on the participation of then-D.C. Circuit judge Brett Kavanaugh in the case below. Kavanaugh's dissenting opinion derided the majority's decision to "create[] a circuit split by holding that mere misstatements, standing alone, may constitute the basis for so-called scheme liability under the securities laws… even if the defendant did not make the misstatements."[11] His participation in the case at the Circuit Court level ensured his recusal from the Supreme Court's review and decision on the appeal. Of the remaining eight Justices, four (Justices Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor) dissented in the original *Janus* decision on the grounds that "[n]either common English nor this Court's earlier cases limit the scope of [the word 'make'] to those with 'ultimate authority' over a statement's content."[12] Unless one or more of the prior dissenters embraces a broad application of *Janus*, the majority's decision in the D.C. Circuit may be affirmed, and the practical limitations imposed by *Janus* significantly weakened.

Delaware Court of Chancery Invalidates Exclusive Federal Forum Provisions for '33 Act Claims

On December 19, 2018, the Delaware Court of Chancery in *Sciabacucchi v. Salzberg et al*. invalidated forum selection provisions in the certificates of incorporation of three Delaware corporations[1] that required any claim under the Securities Act of 1933 (the "Securities Act") to be filed in federal court.[2]

The Delaware General Corporation Law (DGCL) expressly permits corporations to adopt charter provisions and bylaws designating Delaware as the exclusive forum for "internal corporate claims" based on fiduciary duty violations and certain civil actions over which the DGCL grants the Court of Chancery jurisdiction.[3] However, in its *Boilermakers Local 154 Retirement Fund v. Chevron Corp*. decision in 2013, the Court of Chancery mused that a corporation's bylaws could not regulate external claims, such as by selecting Delaware as the exclusive forum to bring tort or contract claims.[4]

In *Sciabacucchi*, the Court of Chancery endorsed the *Boilermakers* reasoning and distinguished between forum selection

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Delaware Chancery Court Invalidates Exclusive Federal Forum Provisions for '33 Act Claims

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provisions that relate to internal affairs of a corporation and those that relate to external relationships.[5] In drawing this distinction, the Court of Chancery noted that Securities Act claims do not "turn on the rights, powers, or preferences of the shares, language in the corporation's charter or bylaws, a provision in the DGCL, or the equitable relationships that flow from the internal structure of the corporation."[6] As a result, the Court of Chancery determined that claims brought under the Securities Act are "external to the corporation" and, therefore, the forum selection provisions in question were invalid under the DGCL.[7]

Securities Act forum selection provisions initially gained popularity as a result of varying judicial interpretation of the federal jurisdiction provisions included in the Securities Litigation Uniform Standards Act of 1998. More recently, adoption of federal forum selection provisions accelerated in the wake of the U.S. Supreme Court's 2018 decision in *Cyan, Inc. v. Beaver County Employees Retirement Fund*, in which the Court held that state courts have concurrent jurisdiction, without the possibility of removal, over class actions asserting Securities Act claims. Many commentators predicted that *Cyan* would ignite a race to file Securities Act claims in state courts.[8] According to data compiled in the Cornerstone Research Securities Class Action Filings 2018 Year in Review, the number of securities class actions filings in state courts equaled or outstripped the combined number of federal-only and parallel state/federal filings during both the third and fourth quarters of 2018.[9] In contrast, the same data reveal that the combined number of federal-only and parallel state/federal filings exceeded state-only filings in all but one quarterly period between January 2015 and the *Cyan* decision in March 2018.[10] The Court of Chancery's decision in *Sciabacucchi* will likely accelerate this emerging trend.

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Bipartisan Bill Directs SEC to Study Restrictions on 10b5-1 Plans

Insider trading remains a subject of interest for Congress, as evidenced by the recent passage by the House of Representatives of a bipartisan bill directing the Securities and Exchange Commission ("SEC") to explore amendments to Rule 10b5-1 relating to insider trading plans. The bipartisan bill, entitled *Promoting Transparent Standards for Corporate Insiders*, H.R. 624, sponsored by House Financial Services Committee Chairwoman Maxine Waters (D-Calif.) and Ranking Member Patrick McHenry (R-N.C.), calls for the SEC to conduct a yearlong study of whether restrictions should be placed on Rule 10b5-1 trading plans to curtail perceived abuses of those plans by corporate insiders.

Company insiders have long been a primary focus of laws barring individuals from buying or selling securities on the basis of material nonpublic information. Under Rule 10b5-1, as interpreted by the SEC and many courts, any trade made while in possession of material nonpublic information would be considered to have been made "on the basis" of that information and thus a violation of the prohibition on insider trading. The position that "possession" and not "use" of material nonpublic information is sufficient to establish insider trading liability raises significant concerns for company insiders, who often are in possession of information that may be considered to be material nonpublic information. In recognition of the potential challenges raised by the possession standard, the SEC added to Rule 10b5-1 an affirmative defense to insider trading allegations for insiders who often have much of their wealth tied up in company stock. Under Rule 10b5-1(c)(1), an insider who is in possession of material nonpublic information concerning his or her company's securities may purchase or sell those securities so long as the transactions are executed under a plan adopted at a time when the insider did not possess material nonpublic information.

The new legislation would direct the SEC to conduct a one-year study to evaluate several proposed changes to Rule 10b5-1, including limiting the ability of insiders to adopt multiple trading plans and requiring a delay between the creation of a trading plan and the first trade under the plan. In addition, the SEC would be directed to consider whether insiders should be limited in how often they can modify or cancel 10b5-1 trading plans and whether such trading plans should be filed with the SEC when they are adopted, amended and terminated.

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In Re Fitbit, Inc. Sends Delaware Court's Pulse Racing

On January 30, 2019, the Delaware Supreme Court affirmed the Delaware Court of Chancery's decision in *In Re Fitbit, Inc.*,[1] in which the court refused to dismiss a derivative suit alleging two claims for breach of fiduciary duty. Stockholders of Fitbit Inc. ("Fitbit" or the "Company") alleged that members of the board of directors as well as the Company's CEO and CFO breached their fiduciary duties to the Company in connection with the sale by certain of the defendants of shares of Fitbit stock in the Company's IPO in June 2015 and secondary offering in November 2016. Of particular note was the plaintiffs' second cause of action alleging a derivative claim for breach of fiduciary duty against certain defendants under *Brophy v. Cities Service Co.*[2] which permits a corporation to recover from its fiduciaries for harm caused as a result of insider trading.

The key allegations related to the "PurePulse™" technology used in Fitbit products, which was designed to calculate and record the heart rates of its users. Prior to and following its IPO, Fitbit focused advertising efforts on promoting its proprietary PurePulse technology, which drove a significant portion of the Company's revenue. Plaintiffs alleged that the technology consistently failed accuracy tests and that efforts were underway at the Company to remedy the technologies' accuracy failures. Defendants were purportedly aware of these facts but nevertheless failed to include any information about the alleged issues with PurePulse technology in either the IPO prospectus or the prospectus relating to the 2016 secondary offering.

In denying the defendant's motion to dismiss, the Chancery Court found that the plaintiffs had alleged particularized facts sufficient to support a claim of demand futility inasmuch as the Company's board could not properly exercise its independent and disinterested business judgment in responding to a demand by the plaintiffs.[3] The court made clear that, under relevant Delaware law, to the extent that a majority of a board faces "a 'substantial likelihood' of personal liability,"[4] a board will be deemed interested in a transaction and unable to make an impartial decision in response to a demand.[5]

In considering whether a majority of the Fitbit board was so implicated, the Chancery Court considered whether the sales of shares by two private equity investors (True Ventures and Softbank)

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should disable such investors' director representatives from responding to a shareholder demand. Ruling against the defendants on this point, the court recognized that permitting a "director to trade on inside material information without consequence just because the director did not trade personally but rather passed the information to an entity with which he is affiliated (and over which he exercised control)"[6] would contravene the policy underlying Delaware's insider trading law. The court noted that a separate federal securities class action—in which all defendants were named, which was based on similar facts, and which survived a motion to dismiss and ultimately settled after the plaintiffs filed their original complaint—was relevant to the question of whether the selling defendants face a substantial likelihood of personal liability on the *Brophy* claims.

While the facts of the case are somewhat egregious, the court's analysis regarding potential derivative exposure for directors designated by significant stockholders is worth noting. In addition, the plaintiffs' *Brophy* claim is consistent with the increasing prevalence of fiduciary duty claims brought in addition to, or in tandem with, more traditional securities class actions.

Cato Institute Cries Foul Over SEC's "Gag Rule"

On January 9, 2019, the Cato Institute, a libertarian think tank, sued the SEC alleging that the SEC's "gag rule" violates the First Amendment of the U.S. Constitution. The Cato Institute argues that the gag rule stifles public discourse and is antithetical to principles of accountability and transparency—guiding principles of the SEC's mission to protect investors.[1]

The gag rule is an SEC policy which provides that "in any civil lawsuit brought by the SEC or any administrative proceeding of an accusatory nature," the SEC does "not…permit a defendant or respondent to consent to a judgment or order that imposes a sanction while denying the allegations in the complaint or order for proceedings."[2] Adopted in 1972, the gag rule is meant to "avoid creating, or permitting to be created, an impression that a decree is being entered or a sanction imposed, when the conduct alleged did not, in fact, occur."[3] The SEC applies the gag rule in perpetuity, prohibiting those who settle charges with the SEC from ever publicly denying any allegations in the complaint.

The Cato Institute brought the lawsuit because it is unable to publish a memoir

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Cato Institute Cries Foul Over SEC's "Gag Rule"

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that it believes illustrates issues with SEC enforcement actions, including the coercive nature of the SEC's behavior in connection with enforcement proceedings and settlements. The author of the memoir is subject to a gag order as a result of settling charges with the SEC and therefore cannot make any public statements denying any allegation from his settlement.[4] The Cato Institute's complaint, which contends that this type of gag is standard in all or nearly all SEC civil and administrative settlements for the past forty years, states, "[T]he government uses its extraordinary leverage in civil litigation to extract from settling defendants a promise to never tell their side of the story, no matter how outrageous the government's conduct may have been and no matter how strong the public's interest may be in knowing how the government conducts itself in high-stakes civil litigation."[5] At its core, the Cato Institute's complaint alleges that the SEC's routine use of gag orders in securities settlements, including the specific gag order in question, results in content-based restrictions on free speech that violates the First Amendment.

The Cato Institute is not the only organization to argue that the SEC's gag rule is unconstitutional. In October 2018, the New Civil Liberties Alliance ("NCLA"), a public interest law firm focused on administrative agency overreach, filed a petition with the SEC to amend its gag rule to eliminate the perpetual gag as a condition of settlement. The NCLA argues that the gag rule violates a number of constitutional protections, from free speech to due process, and that the gag rule allows the SEC to "immunize themselves from criticism and scrutiny of their actions," contrary to public policy.[6]

It remains to be seen whether the Cato Institute's lawsuit or the NCLA petition will affect the SEC's use of gag orders in securities settlements. In a Banking Committee hearing on December 11, 2018, Senator Tom Cotton (R-AR) asked SEC Chairman Jay Clayton to reconsider the gag rule, believing it to be an unconstitutional, content-based prior restraint on speech. Chairman Clayton noted that it has been an effective means of reaching settlements but conceded that wasn't necessarily the right approach in all situations.[7]

Removing the requirement of a gag as a condition of settlement could incentivize defendants to settle by lessening the repercussions of doing so. On the other hand, the SEC could be less inclined to settle charges if defendants could later deny the allegations publicly and cast doubt on the SEC's enforcement actions, thereby effectively litigating in the court of public opinion. The Cato Institute's lawsuit presents important questions about how to protect First Amendment ideals while maintaining legitimacy and efficiency in resolving SEC enforcement actions.

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Making Non-GAAPs Prominent Again: SEC Brings Enforcement Action for Violation of "Equal or Greater Prominence" Requirement

On December 26, 2018, the SEC settled an enforcement action against ADT Inc. ("ADT") for failure to comply with the "equal or greater prominence" requirement in Item 10(e) of Regulation S-K. ADT was ordered to pay a $100,000 civil penalty and to cease and desist from further violations of Section 13(a) of the Exchange Act and Rule 13a-11 thereunder.

Item 10(e) of Regulation S-K requires reporting companies, when presenting a non-GAAP financial measure, to include "with equal or greater prominence" the most directly comparable GAAP financial measure. The SEC found that ADT failed to do so in its earnings releases for fiscal year 2017 and for the first quarter of 2018. For example, in the headline of its fiscal year 2017 earnings release, ADT stated that adjusted EBITDA had increased 8 percent year-over-year, without mentioning ADT's net income or loss (the comparable GAAP financial measure). The SEC also objected to ADT's non-GAAP financial measure "highlights" section in its first quarter 2018 earnings release, which appeared prior to the paragraphs containing comparable GAAP financial measures.

It appears that the SEC took its enforcement action against ADT without first engaging with the company through a comment letter process. Further, ADT had only a relatively short history as a public reporting company, having closed its IPO in January 2018. Given these two observations, it is likely that the SEC viewed ADT's noncompliance as a serious violation. In light of the SEC's attention to the presentation of non-GAAP financial measures in recent years, reporting companies should carefully review disclosures to ensure compliance with SEC rules and guidance.[1]

Puma Biotechnology: Rare Securities Class Action Trial Ends with Mixed Verdict

In early February, a securities class action case went to a rare trial and final verdict in the Central District of California. In *Hsu v. Puma Biotechnology Inc. et al.*, plaintiffs alleged that Puma Biotechnology and certain senior executives made four allegedly misleading statements about the results of a clinical trial for one of Puma's breast cancer drugs.[1] On February 4, after a three-week trial, the jury found for plaintiffs on just one of the four alleged misstatements,

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Puma Biotechnology: Rare Securities Class Action Trial Ends with Mixed Verdict

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holding that defendants knowingly misrepresented the disease-free survival rate for the drug Neratinib.[2] Although the jury could have awarded damages worth as much as $87.20 per share according to the verdict form, jurors instead awarded investors damages of $4.50 per share.[3]

Since the passage of the Private Securities Litigation Reform Act in 1995, fewer than 25 securities class actions have gone to trial. *Puma Biotechnology* is perhaps a good example of why that is the case—neither plaintiffs nor defendants in the *Puma Biotechnology* matter can really claim complete victory and such incomplete victories nonetheless come with significant costs. Both sides undoubtedly expended significant resources on the case, including attorney's fees. Litigation of this type inevitably presents a material distraction to management and, as such, proves derivatively costly to shareholders. Further, if the final judgment in favor of the plaintiffs stands after any appeals, the company may face the prospect of having to reimburse their D&O insurance carrier amounts paid out under the policy to defend the case if the carrier invokes their policy's fraud exclusion which would, again, derivatively affect shareholder value. Consideration of these costs and benefits associated with this type of litigation often pushes companies (and plaintiffs) to settle securities class actions either after the motion to dismiss or class certification stage.

Bad Apple: Former Apple, Inc. In-House Lawyer Charged with Insider Trading

The SEC, in a highly publicized case, charged a former senior attorney at Apple, Inc. with insider trading. The attorney, Gene Levoff, served as Apple's global head of corporate law and was a member of the disclosure committee. In that role, Levoff's responsibilities allegedly included reviewing and approving the company's insider trading policy and notifying employees of their obligations not to trade around quarterly earnings announcements. In fact, Levoff allegedly sent an email to employees—in all capital letters—in 2011 reminding them that they were not permitted to trade shares based on nonpublic information.

The SEC asserts that Levoff used material nonpublic information he learned from his role on the disclosure committee to trade Apple securities ahead of three quarterly earnings announcements in 2015 and 2016, reaping approximately $382,000 in profits made and losses avoided. Levoff was placed on leave and then fired by Apple in September 2018 after an internal investigation into the insider trading allegations. The SEC's case was filed in the U.S. District Court in New Jersey.[1]

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Notes

Tender Offer and "Scheme" Liability on U.S. Supreme Court Docket

1. 15 U.S.C. § 78n(e) (2012). Section 14(e) provides that it is "unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation." *Id.*
2. Petition for Writ of Certiorari at 6-11, *Emulex Corp. v. Varjabedian* (2019) (No. 18-459).
3. Requiring plaintiffs to state with particularity facts giving rise to a strong inference that the defendant acted with the applicable mental standard pertaining to the violation alleged. 15 U.S.C. § 78u–4(b)(2) (2012).
4. *Varjabedian v. Emulex Corp., et al.*, 152 F. Supp. 3d 1226, 1238-43 (C.D. Cal. 2016).
5. *Varjabedian v. Emulex Corp., et al.*, 888 F.3d 399, 408 (9th Cir. 2018).
6. Brief of Amicus Curiae Chamber of Commerce of the United States in Support of Petitioners at 3, *Emulex* (2019) (No. 18-459).
7. 564 U.S. 135 (2011).
8. *Janus Capital Group*, 564 U.S. at 142.
9. *Lorenzo v. SEC*, 872 F.3d 578, 589 (D.C. Cir. 2017) (quoting Rule 10b-5(a)).
10. *Id.* at 590, 592.
11. *Id.* at 600 (Kavanaugh, J., dissenting).
12. *Janus Capital Group*, 564 U.S. at 149-50 (Breyer, J., dissenting).

Delaware Chancery Court Invalidates Exclusive Federal Forum Provisions for '33 Act Claims

1. The nominal defendant corporations were Blue Apron Holdings, Inc., Stitch Fix, Inc. and Roku, Inc.
2. *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 WL 6719718 (Del. Ch. Dec. 19, 2018).
3. 8 Del. C. § 115.
4. *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 952 (Del. Ch. 2013).
5. *Sciabacucchi*, 2018 WL 6719718 at *1.
6. *Id.*
7. *Id.* Since the *Sciabacucchi* court's decision, several public companies have disclosed that, in light of the decision, they do not intend to enforce the forum selection provisions set forth in their constituent documents, and that they may amend their constituent documents to remove forum selection provisions in the future. *See, e.g.*, Kodiak Sciences Inc., Form 8-K (January 22, 2019).
8. *See* Debevoise & Plimpton LLC, "*Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*: Supreme Court's Decision Raises Spectre of more Item 303 Disclosure Claims in State Court," *Insider Trading & Disclosure Update* vol. 4, pp. 1–6 (Oct. 2018), *available at* https://www.debevoise.com/~/media/files/insights/publications/2018/10/20181024_insider_trading_update_oct2018_v9.pdf.
9. Cornerstone Research, *Securities Class Action Filings: 2018 Year in Review* at 21 (2019), *available at* https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2018-Year-in-Review.
10. *Id.*

In re Fitbit, Inc. Sends Delaware Court's Pulse Racing

1. *Fitbit v. Agyapong*, C.A. No. 2017-0402, 2019 WL 366812 (Del. Jan. 30, 2019).
2. *Brophy v. Cities Service Co.*, 31 Del. Ch. 241, 70 A.2d 5 (Del. Ch. Dec. 14, 1949).
3. *Fitbit v. Agyapong*, C.A. No. 2017-0402-JRS, 2018 WL 6587159 (Del. Ch. Dec 14, 2018).
4. *Id*, at 153.
5. *Id.*
6. *Id.* at 170.

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Cato Institute Cries Foul Over SEC's "Gag Rule"

1. Clark Neily, *Cato Sues SEC Over Gag Orders*, CATO INSTITUTE (Jan. 9, 2019, 10:32 AM), https://www.cato.org/blog/cato-sues-sec-over-gag-orders.
2. 17 C.F.R. § 202.5(e).
3. *Id.*
4. Complaint, *Cato Institute v. Sec. Exch. Comm'n*, No. 1:19-cv-00047 (D.D.C. filed Jan. 9, 2019).
5. *Id.* at 2.
6. Petition to Amend, *In re SEC Rule Imposing Speech Restraints in Consent Orders* 17 C.F.R. § 202.5(e) (filed October 30, 2018).
7. Senator Tom Cotton, *December 11, 2018: Senator Tom Cotton Q&A During Banking Committee Hearing*, YouTube (Dec. 11, 2018), https://www.youtube.com/watch?v=NOk_OalgXiw.

Making Non-GAAPs Prominent Again: SEC Brings Enforcement Action for Violation of "Equal or Greater Prominence" Requirement

1. The enforcement action and its implications are discussed further in our client update issued on January 10, 2019: Failure to Present GAAP Measures with "Equal or Greater Prominence" Brings Swift SEC Enforcement Action.

Puma Biotechnology: Rare Securities Class Action Trial Ends with Mixed Verdict

1. *Hsu v. Puma Biotechnology, Inc.* (8:15-cv-00865) (C.D. Cal. February 4, 2019).
2. *Id.*
3. *Id.*

Bad Apple: Former Apple, Inc. In-House Lawyer Charged with Insider Trading

1. Complaint, *Sec. Exch. Comm'n v. Levoff*, No. 2:19-cv-05536 (D.N.J. filed Feb. 13, 2019).

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Debevoise & Plimpton LLP

New York
919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
801 Pennsylvania Avenue N.W.
Washington, D.C. 20004
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

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Contributors

Maeve O'Connor
Paul M. Rodel

Capital Markets Practice Group Partner/Counsel

All lawyers based in New York, except where noted

Katherine Ashton - London
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Steven J. Slutzky

White Collar & Regulatory Defense/Whistleblower Investigations and Litigation Practice Group Partner/Counsel

All lawyers based in New York, except where noted

James B. Amler
Matthew L. Biben
Alexandre Bisch - Paris
Kara Brockmeyer - D.C.
Helen V. Cantwell
Andrew J. Ceresney
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Courtney M. Dankworth
Luke Dembosky - D.C.
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John Gleeson
Lord (Peter) Goldsmith QC, London & Hong Kong - PC
Mark P. Goodman
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