Non-U.S. issuers targeted in securities class actions filed in the U.S.

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Introduction

Despite being headquartered abroad or having at times a minimal connection with the U.S., non-U.S. issuers have become targets in securities class actions filed in the U.S., even if the crux of the allegations occurs abroad. Although 2018 saw a slight decrease in securities class action litigation on the whole, non-U.S. issuers, those companies with headquarters located outside of the U.S., were popular targets of such suits. Non-U.S. issuers should therefore take heed of the results of last year's decisions and filings to ensure that they are aware of the recent filing trends and take steps to reduce and mitigate against risks associated with such suits.

In 2018, plaintiffs filed a total of 54 class action securities lawsuits against non-U.S. issuers:[1]

- The majority of 54 lawsuits were filed in courts located in the U.S. Court of Appeals for the Second (35 filings), Ninth (7 filings), and Third (6 filings) Circuits. In particular, plaintiffs brought 29 actions in the U.S. District Court for the Southern District of New York.

1 The number of securities fraud class actions filed in 2018, as well as the number of those brought against non-U.S. issuers, are based on information reported by the Securities Class Action Clearinghouse in collaboration with Cornerstone Research, Stanford University. *Securities Class Action Clearinghouse: Filings Database*, Securities Class Action Clearinghouse (last visited Feb. 23, 2019), http://securities.stanford.edu/filings.html. The totals included herein include cases involving deal litigation and Section 14 claims. A "non-U.S. issuer" filing was based on those companies headquartered outside of the United States. To the extent a company is listed as having both a non-U.S. headquarters and a U.S. headquarters, that filing was also included as a non-U.S. issuer.

– Three law firms were associated with more than half of the initial first filings against non-U.S. issuers: The Rosen Law Firm, P.A (12), Pomerantz LLP (9), and Glancy Prongay & Murray LLP (6).[2]
– The filings covered a diverse range of industries, and no single industry stood out in the filings against non-U.S. issuers. The software and programming industry had the most non-U.S. issuer suits filed against companies within that sector, with four complaints.
– Of the 18 filings against companies headquartered in Asia, 15 different filings were against companies headquartered in China.
– Of the 18 filings against companies headquartered in Europe, six different filings were against companies headquartered in Ireland.

An examination of the types of cases filed in 2018 reveals the following:[3]

– About 33% of the cases involved alleged misrepresentations regarding transactions, including mergers and acquisitions, takeovers, related party transactions, proposed sales, and Initial Public Offerings ("IPOs").[4]
– About 30% of the cases involved alleged misrepresentations regarding business practices and operations, including allegations such as labor relations, operational results, safety conditions, protecting customer information, compliance, and misstatements and/or omissions regarding the actual end product.[5]
– About 21% of the cases involved alleged misrepresentations regarding accounting issues, including allegations involving financial results, improper accounting, inaccurate financial reporting and financial statements (including overstating profits and understating or improperly delaying expenses).[6]
– About 13% of the cases involved alleged misrepresentations regarding bribery or a Ponzi scheme.[7]

In 2018 and early 2019, courts continued the trend of issuing a number of dispositive securities fraud decisions—including in cases involving non-U.S. issuers. As of March 22, 2019, dispositive decisions were rendered in 16 of the 57 2017 filings and one of the 54 2018 filings, for a total of 17 decisions from the 2017 and 2018 filings. Of the 17 decisions that Dechert reviewed, eight were dismissed in full. These 17 decisions fall into one of three broad categories:

(i) cases involving claims that a company issued materially false and misleading statements regarding the company's key business operations or product such as a pharmaceutical drug;

(ii) cases involving claims that a company issued materially false and misleading statements regarding an acquisition or a proposed transaction such as a merger or an initial public offering; and

(iii) cases involving claims that a company issued materially false and misleading statements regarding the company's actions related to its financial reporting, internal control systems or efforts to promote its stock.

In addition, two significant cases sought review by the U.S. Supreme Court in 2018, indicating not only the substantial liability exposure for multinational companies, but also the importance of these cases, which have even piqued the interest of international entities outside of the U.S.

2 The Rosen Law Firm, Pomerantz LLP, and Glancy Prongay & Murray LLP have been responsible for the majority of first identified complaints since 2014. *Securities Class Action Filings 2018 Year in Review*, Cornerstone Research, Stanford University.

3 A filing against a non-U.S. issuer for misrepresentations regarding business practices and operations as well as for accounting issues may fall into more than one category referenced herein. To the extent that the crux of the complaint involved bribery or transactions, the authors did not include them in any other category.

4 18 of 54 is 33%.

5 16 of 54 is 30%.

6 11 of 54 is 21%.

7 7 of 54 is 13%.

Non-U.S. companies remain popular targets for securities fraud litigation

In recent years, non-U.S. issuers have become targets of securities fraud lawsuits, and 2018 was no exception. This survey is intended to provide an overview of securities lawsuits against non-U.S. issuers in 2018. First, we analyze the number of cases filed, including trends relating to location of the courts, types of companies that are targeted, and underlying claims. Next, we analyze some securities decisions rendered against non-U.S. issuers in 2018 and how they may impact the legal landscape of these types of claims.

Filing trends

In 2018, 13 percent of securities fraud class action suits (54 of 403) were brought against non-U.S. issuers headquartered outside of the U.S.[8] After five consecutive years of steady growth, the total number of securities fraud class action lawsuits filed in 2018 took a slight downturn, topping out at 403—nine less than the 412 securities fraud suits filed by the end of 2017.[9] However, the 2018 total is still 236 more than the 167 total class action securities complaints filed in 2013, a mere five years ago.[10] Of this amount, a total of 54 class action securities lawsuits were filed against non-U.S. issuers in 2018.[11] Common patterns from these filings emerged, particularly in relation to when and where suits were filed, and the claims involved, as described below:

- The majority of suits were filed in the U.S. Court of Appeals for the Second (35 filings), Ninth (7 filings), and Third (6 filings) Circuits, and in particular, the Southern District New York with 29 actions. In addition to the 29 actions filed in Southern District of New York, an additional suit that was initially brought in the Central District of California[12] was later transferred to Southern District New York.
- The majority of suits were filed against companies headquartered in China (15), Canada (8) and Ireland (6).
- Of the suits filed against companies headquartered in China, none of these companies were incorporated in China; instead, the majority were incorporated in the Cayman Islands.
- The suits cover a diverse range of industries with no particular industry containing the majority of suits filed; non-U.S. companies in the software and programming industry had the most suits filed against them (4), all of which were headquartered in China.
- Of the 18 filings against companies headquartered in Asia, 15 were against companies headquartered in China.
- Of the 18 filings against companies headquartered in Europe, six were against companies headquartered in Ireland.

Causes of action

Many of the complaints filed in 2018 allege misrepresentations regarding transactions including mergers and acquisitions, takeovers, proposed sales and IPOs. In addition, there were groups of cases alleging misrepresentations regarding accounting, business practices and operations, and bribery. The following summarizes the various types of cases filed against non-U.S. issuers and each group is discussed in more detail below.

- About 33% of the cases involved alleged misrepresentations regarding transactions including mergers and acquisitions, takeovers, related party transactions, proposed sales and IPOs.
- About 30% of the cases involved alleged

8 *See* Cornerstone Research, Securities Class Action Filings: 2018 Year in Review; Cornerstone Research, *supra* note 2.

9 *Id.*

10 403 represents an increase of 141.3% from 2013's 167 filings; see Cornerstone Research, *supra* note 2.

11 *See* Cornerstone Research, Stanford Univ., Securities Class Action Clearinghouse: Filings Database, Securities Class Action Clearinghouse, *supra* note 1.

12 *Schmitt v. Micro Focus Int'l PLC, et al,* 18-cv-03066 (N.D. Cal. May 23, 2018).

misrepresentations regarding business practices and operations, including allegations involving labor relations, operational results, safety conditions, protecting customer information, compliance, and statements and/or omissions regarding the actual end product.

- About 21% of the cases involved alleged misrepresentations regarding accounting, including allegations involving financial results, improper accounting, inaccurate financial reporting and financial statements.
- About 13% of the cases involved alleged misrepresentations regarding bribery or a Ponzi scheme.

As shown below, within the different categories of allegations in the cases filed against non-U.S. issuers, a common trend was that many involved events that transpired outside of the U.S. Accordingly, non-U.S. issuers should be aware that events or government-related issues outside the U.S. can trigger the filing of securities class actions in U.S. federal courts.

Transactions. Most of the class action securities lawsuits filed against non-U.S. issuers allege misrepresentations regarding transactions including mergers and acquisitions, takeovers, proposed sales, and IPOs. In *Panther Partners Inc. v. Jianpu Technology Inc., et al.,*[13] for example, the plaintiff filed a complaint, alleging that the company (incorporated in Cayman Islands and headquartered in China), its parent company, the joint book running underwriters for the IPO, and certain of its directors and officers violated Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 (the "Securities Act").[14] The allegations relate to Jainpu Technology Inc.'s IPO, which raised net proceeds of approximately US$164.9 million.[15] Just two business days after the IPO, several news sources announced that Chinese regulators had issued an urgent notice to provincial governments urging them to suspend regulatory approval of new internet micro-loan companies, which resulted in Jainpu's ADS's to fall.[16] The complaint alleges, among other things, that the company failed to disclose in its Registration Statement and Prospectus that the China Banking Regulatory Commission and three other Chinese regulators had issued rules relating to peer-to-peer ("P2P") lending companies that would likely impact the primary source of the company's revenue.[17]

In *Schmitt v. Micro Focus International PLC, et al.,*[18] the plaintiff filed a complaint alleging that the UK-based infrastructure software company, its officers, its directors and the U.S. representative of the company at the time of the merger, violated Sections 11, 12(a)(2), and 15 of the Securities Act.[19] The allegations pertain to Micro Focus' merger with HPE Software, in which the transaction was valued at US$8.8 billion.[20] Specifically, the allegations include, among other things, that the value for the merger was inflated due to software disruptions, employee attrition, worsening revenue trends, significant sales execution problems, and that the defendants did not have operational capabilities, a loyal customer base, and products or key personnel to justify its purchase price.[21] On September 6, 2017, just days after the completion of the merger, and on January 8, 2018, Micro Focus provided financial and operating results showing a decrease in revenue and in its January 8, 2018 statements stated it suffered sales execution issues in its North America region stemming from the loss of key sales personnel.[22] Later, on March 19, 2018, Micro Focus filed a trading update and management change revealing that

About 33 percent of cases filed against non-U.S. issuers involved alleged misrepresentations regarding transactions, including mergers and acquisitions, takeovers, related party transactions, proposed sales and IPOs.

13 *Panther Partners Inc. v. Jianpu Tech. Inc., et al.,* 18-cv-09848 (S.D.N.Y. Oct. 25, 2018).

14 *Id.* ¶¶ 6-13, 15, 49, 57, 65.

15 *Id.* ¶ 18.

16 *Id.* ¶¶ 33-34.

17 *Id.* ¶¶ 18-19, 27, 36.

18 *Schmitt v. Micro Focus Int'l PLC, et al,* 18-cv-03066 (N.D. Cal. May 23, 2018).

19 *Id.* ¶¶ 7-20, 67, 72, 78, 81.

20 *Id.* ¶¶ 24.

21 *Id.* ¶ 47.

22 *Id.* ¶¶ 50-51.

the revenue declines had been significantly accelerated stemming from disruption of HP global accounts, ongoing sales execution issues, and significant employee attrition.[23] Days later, the price of the ADS's declined by more than 54%.[24]

Key Business Operations or Product. Another group of complaints related to alleged misrepresentations regarding non-U.S. issuers' business practices, operations and end product, many of which involved events that transpired outside of the U.S. For instance, in *Holtan v. Pretium Resources, Inc., et al.,*[25] the plaintiff alleges that the metal mining company (both headquartered and incorporated in Canada), and its officers, violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act").[26] The complaint alleges, among other things, that the Brucejack Project, located in Canada, was vital to Pretium Resources' business and to the valuation of the business, but that the defendants made false and/or material statements as well as failed to disclose material adverse facts about the company's business operations, and prospects.[27] Specifically, the defendants failed to disclose to investors: (i) that the Brucejack Project is not a high-grade, high-output mine; and (ii) that, as a result of the foregoing, the defendants' statements about the company's business, operations and prospects were materially false and misleading.[28] The company later disclosed lower gold production for the Bluejack Mine than previously projected, and delayed achievement of a steady state gold production and operation of the grade control program.[29] In addition, an analyst published a report alleging that the company's reported grades and reserves were significantly inflated, and that management was scrambling to find consistent, high-grade ore.[30] As a result of this news, the company's share price fell.[31]

Additionally, in *Ferrare v. Vodafone Group Public Limited Company, et al.,*[32] the plaintiff alleges that the company, both incorporated and headquartered in the UK,[33] and its officers violated Sections 10(b) and 20(a) of the Exchange Act through the defendants' alleged failure to disclose its contravention of Australian law.[34] This information purportedly came to light when the Australian Communications and Media Authority announced that an investigation into the company's subsidiary Vodafone Network Pty Limited revealed that the company had contravened Australian law by permitting customers to purchase pre-paid mobile phones without first verifying their identifies through Vodafone Australia's website.[35] As a result, Vodafone's ADRs declined by approximately 3.5% over two trading days.[36]

Furthermore, other complaints filed against non-U.S. issuers involve other events that transpired outside of the U.S., including misrepresentations regarding country conditions, labor relations, and safety conditions. For instance in *Ema Garp. Fund, L.P, et al. v. Banro Corporation, et. al.,*[37] the complaint alleges that defendant Banro, a Canadian mining company, and an individual defendant residing in the UK, made misrepresentations to investors regarding country conditions in the Democratic Republic of Congo that affected the company's business operations.[38] Specifically, the complaint alleges that the defendants made false and/or misleading statements and/or failed to disclose that: (i) the company's operating segments in the Eastern Congo were subject to a critical threat by the local populations claiming specific grievances against the company; (ii) the threat had in fact materialized and was disrupting its operations; (iii) consequently, the

23 *Id.* ¶ 52.
24 *Id.* ¶ 53.
25 *Holtan v. Pretium Res., Inc., et al.,* 18-cv-08199 (S.D.N.Y. Sept. 7, 2018).
26 *Id.* ¶¶ 10, 15-18.
27 *Id.* ¶¶ 3-4, 6-9, 20.
28 *Id.* ¶ 8.
29 *Id.* ¶ 4.
30 *Id.* ¶ 35.
31 *Id.* ¶ 36.
32 *Ferrare v. Vodafone Grp. Pub. Ltd. Co., et al.,* 18-cv-00466 (S.D.N.Y. Jan. 18, 2018).
33 The Complaint also lists an American regional headquarters in New York, New York. Id. at ¶ 11.
34 *Id.* ¶¶ 3, 7, 11-13.
35 *Id.* ¶ 4.
36 *Id.* ¶ 5.
37 Ema Garp. Fund, L.P, et al. v. Banro Corp. et al., 18-cv-01986 (S.D.N.Y. Mar. 5, 2018).
38 *Id.* ¶¶ 7-10, 51-53.

company's operating environment was unstable; and (iv) the company intentionally missed investors regarding its relationship with the local communities and the stability of its business operations—all events that occurred abroad.[39] And, in *Brandel v. Sibanye Gold Limited, et al.,*[40] the complaint, filed in the U.S. District Court for the Eastern District of New York, alleges that defendant Sibanye, a precious metals mining company in Zimbabwe and incorporated in the Republic of South Africa, and its officers made purportedly false and misleading statements relating to the company's failure to disclose the safety conditions of mining operations in South Africa, including fatalities.[41] Again, the allegations do not involve events that occurred in the U.S.

Accounting. Another group of complaints involves allegations of misrepresentations regarding accounting issues. This includes false statements regarding financial results, improper accounting, inaccurate financial reporting and financial statements (including overstating profits and understating or improperly delaying expenses). For example, in *Lea v. Tal Education Group, et al.,*[42] the complaint alleges an educational services company (incorporated in Cayman Islands and headquartered in China), which mainly serves students in China, and its officers failed to disclose that the company overstated its net income and that the net income was deteriorating.[43] Specifically, the plaintiff alleges that the defendants violated Sections 10(b) and 20(a) of the Exchange Act.[44] The allegations pertain to the company's fiscal year 2018 financial statements that were issued on April 26, 2018.[45] Later, an analyst issued a report accusing the company of issuing fraudulent profits through overstating net income, net income margin and other accounting figures.[46] As a result, the company's share price fell more than 15% that same day.[47]

In *Long v. Fanhua, Inc., et al.,*[48] the plaintiff alleges that online-to-offline financial services provider Fanhua (incorporated in the Cayman Islands and headquartered in China), and its CEO and CFO violated Sections 10(b) and 20(a) of the Exchange Act by misrepresenting and/or failing to disclose that Fanhua engaged in improper business practices, including irregular accounting to benefit company insiders and overstate financial assets and performance metrics.[49] According to the plaintiffs, the purported truth emerged when an analyst published a report indicating that he or she was concerned about the company's accounting practices, which allegedly caused the stock to drop.[50]

About 13% of cases filed involved alleged misrepresentations regarding bribery or a Ponzi scheme.

Bribery. Lastly, another group of complaints involves allegations of bribery or a Ponzi scheme. For example, in *Kline, et al. v. BitConnect, et al.,*[51] the plaintiffs allege in their class action complaint that the company (incorporated and headquartered in the UK), its affiliate/recruiter, and its directors violated Sections 5, 12(a)(1), 15 of the Securities Act; Sections 17(a)(2), (a)(3), 20(a) of the Exchange Act, and state law.[52] Specifically, the complaint alleges that BitConnect held itself out as "the cryptocurrency revolution" and stated that the BitConnect platform was a safe way to earn a high rate of return on investments, but in reality the company used

39 *Id.* ¶¶ 50-54.
40 *Brandel v. Sibanye Gold Ltd., et al.,* 18-cv-03721 (E.D.N.Y. June 27, 2018).
41 *Id.* ¶¶ 7-9, 19.
42 *Id.* ¶¶ 2, 5, 12-16.
43 *Id.* ¶ 7.
44 *Id.* ¶ 7.
45 *Id.* ¶ 18.
46 *Id.* ¶ 20.
47 *Id.* ¶ 21.
48 *Long v. Fanhua, Inc., et al.,* 18-cv-08183 (S.D.N.Y. Sept. 7, 2018).
49 *Id.* ¶¶ 1-2, 4, 8, 13-15, 18.
50 *Id.* ¶ 27.
51 *Kline, et al. v. BitConnect et al.,* 18-cv-00319 (M.D. Fla. Feb. 7, 2018).
52 *Id.* ¶¶ 16-22, 80, 87-88, 100, 102, 107.-125, 129, 136

cryptocurrency as a cover for running its Ponzi scheme.[53]

In *Schiro v. Cemex, S.A.B. de C.V., et al.,*[54] the plaintiff alleges that the company, "a global building materials company that produces, distributes, and markets cement, ready-mix concrete, aggregates, and building related materials" (both incorporated and headquartered in Mexico), and its officers violated Sections 10(b) and 20(a) of the Exchange Act.[55] Specifically, the complaint alleges that Cemex executives engaged in an unlawful bribery scheme in connection with the company's business dealings in Colombia through its indirect subsidiary.[56] The information purportedly came to light when Cemex disclosed that the company dismissed two senior executives after an internal probe found payments worth US$20 million related to a land deal in Colombia had breached company protocols.[57] In addition, Cemex later disclosed a receipt of a subpoena from the SEC and the U.S. Department of Justice investigation into the relating the alleged bribery in Colombia.[58] As a result of this news, Cemex's ADR price fell.[59]

53 *Id.* ¶¶ 8, 38, 71, 76.

54 *Schiro v. Cemex, S.A.B. de C.V,. et al.,* 18-cv-02352 (S.D.N.Y. Mar. 16, 2018).

55 *Id.* ¶¶ 1-3.

56 *Id.* ¶4.

57 *Id.* ¶ 5.

58 *Id.* ¶¶ 7-8.

59 *Id.* ¶ 9.

Motion to Dismiss decisions

In 2018 and early 2019, courts continued the trend of issuing a number of dispositive securities fraud decisions. Dispositive decisions were rendered in 16 of the 57 cases filed in 2017 and one of the 54 cases filed in 2018, for a total of 17 decisions.[60]

Breakdown of the 17 decisions entered in cases filed in 2017 and 2018

Of the 57 cases filed in 2017, seven courts granted defendants' motions to dismiss and dismissed the cases in their entirety.[61] These cases were largely dismissed on the ground that plaintiffs' allegations were conclusory and failed to allege specific facts as to an essential element of their claims, e.g. material misstatement or omission or scienter.[62] In seven cases of the 2017 filings, courts granted defendants' motions to dismiss in part and either dismissed some of the claims[63] or dismissed the claims as to certain defendants.[64] Like the courts that entirely dismissed an action, the courts in these eight cases focused primarily on the plaintiffs' pleadings and whether these pleadings sufficiently stated a material element of their claims, e.g. a false and misleading statement or scienter.[65] Furthermore, in two of the 2017 filings, the court denied a motion to dismiss.[66] Of the 54 cases filed in 2018, one court granted a motion to dismiss and dismissed the case on the grounds of international comity.[67] Specifically, the court held that a federal court can grant comity to and enforce a foreign bankruptcy reorganization on the basis of common law comity principles.[68]

Furthermore, two of the 17 cases in which a dispositive decision was rendered also involved parallel investigations brought by either U.S. or foreign government officials.[69]

60 Please note that in this 17-decision count, Dechert LLP did not include two recent final judgments entered in two of the 2017 filings. In *Aude v. Kobe Steel, Ltd., et al.,* the court entered final judgment and dismissed the litigation in its entirety with prejudice, upon determining that the parties' proposed settlement was fair, reasonable and adequate. No. 1:17-cv-10085, ECF No. 36 (S.D.N.Y. Mar. 12, 2019). Additionally, in *Hodges et al. v. Monkey Capital, LLC et al.,* the court entered final judgment awarding damages in favor of plaintiffs. No. 9:17-cv-81370, ECF No. 69 (S.D. Fla. Feb. 26, 2019). Prior to that, however, the court had already granted default judgment against the corporate defendants. *Id.* at ECF No. 44 (Aug. 20, 2018). The court later granted summary judgment in plaintiffs' favor against one of the individual defendants as to certain counts, and plaintiffs then dismissed the remaining counts against that same defendant. Id. at ECF No. 64 (Feb. 8, 2019). No other 2017 filing, however, has entered a similar summary judgment decision.

61 *Holbrook v. Trivago N.V., et al.,* No. 17 CIV. 8348, 2019 WL 948809 (S.D.N.Y. Feb. 26, 2019); *Patel v. Zoompass Holdings, Inc.,* No. CV 17-3831, 2019 WL 316014 (D.N.J. Jan. 24, 2019); *In re Barrick Gold Corp. Sec. Litig.,* 341 F. Supp. 3d 358 (S.D.N.Y. 2018); *Freedman v. magicJack Vocaltec Ltd.,* et al., No. 9:17-CV-80940, 2018 WL 6110996 (S.D. Fla. Nov. 21, 2018), appeal reinstated, No. 18-15303 (11th Cir. Mar. 20, 2019); *In re Willis Towers Watson PLC Proxy Litig.,* No. 117CV1338, 2018 WL 3423859 (E.D. Va. July 11, 2018); Masterson v. Cheetah Mobile Inc. et al., 2018 U.S. Dist. LEXIS 221793 (C.D. Ca. June 27, 2018); *Goldsmith v. Weibo Corp.,* No. CV 17-4728 2018 WL 2733694 (D.N.J. June 7, 2018).

62 *See id.*

63 *Prause v. Technipfmc, PLC, et al.,* No. 4:17-CV-02368, ECF. No. 58 (S.D. Tex. Jan. 18, 2019) (WestLaw and LexisNexis citations unavailable); *Wang Yan v. ReWalk Robotics Ltd.,* 330 F. Supp. 3d 555 (D. Mass. 2018); *Shanawaz v. Intellipharmaceutics Int'l Inc.,* 348 F. Supp. 3d 313 (S.D.N.Y. 2018); *In re Toronto-Dominion Bank Sec. Litig.,* No. CV 17-1665, 2018 WL 6381882 (D.N.J. Dec. 6, 2018).

64 *City of Birmingham Ret. and Relief Sys., et al. v. Credit Suisse Grp. AG, et al.,* No. 17 CIV. 10014, 2019 WL 719751 (S.D.N.Y. Feb. 19, 2019); *SEB Inv. Mgmt. AB v. Endo Int'l, PLC,* 351 F. Supp. 3d 874 (E.D. Pa. 2018); *Cohen v. Kitov Pharm. Holdings, Ltd.,* No. 17 CIV. 0917, 2018 WL 1406619 (S.D.N.Y. Mar. 20, 2018).

65 *See id.*; *see also supra* note 56.

66 *Desta v. Wins Fin. Holdings Inc. et al.,* No. 17-cv-02983, ECF No. 80 (C.D. Cal. Nov. 9, 2013) (WestLaw and LexisNexis citations unavailable); In re Novo Nordisk Sec. Litig., No. 3:17-CV-209, 2018 WL 3913912 (D.N.J. Aug. 16, 2018).

67 *EMA GARP Fund v. Banro Corp.,* No. 18 CIV. 1986, 2019 WL 773988 (S.D.N.Y. Feb. 21, 2019) (dismissing lawsuit against corporation headquartered in Canada that underwent a restructuring proceeding in Ontario Superior Court of Justice pursuant to Canada's Companies' Creditors Arrangement Act Companies' Creditors Arrangement Act).

68 *Id.*

69 *SEB Inv. Mgmt. AB v. Endo Int'l, PLC,* No. 17-cv-03711, EFC No. 1, at ¶ 53 (E.D. Pa. Aug. 18, 2017) (referencing settlement

Plaintiffs in these two actions cited such investigations in their complaints to buttress their claims.[70]

Trends distilled from the 17 decisions Entered in the 2017 and 2018

The 17 decisions that Dechert reviewed include decisions falling into one of three broad categories: (i) cases involving claims that a company issued material false and misleading statements regarding the company's key business operations or product such as a pharmaceutical drug[71]; (ii) cases involving claims that a company issued material false and misleading statements regarding an acquisition or a proposed transaction such as a merger or an initial public offering[72]; and (iii) cases involving claims that a company issued material false and misleading statements regarding the company's actions related to its financial reporting, internal control systems or efforts to promote its stock.[73] Most of these decisions addressed claims based on Sections 10(b) and 20(a) of the Exchange Act, while a few cases included additional claims brought under Sections 11 and 15 of the Securities Act.

– **Of the 17 decisions, the six cases involving claims that a company issued material false and misleading statements regarding the company's key business operations or product such as a pharmaceutical**

between Endo International and the Office of the Attorney General of the State of New York regarding Endo's marketing of its drug); *Cohen v. Kitov Pharm. Holdings, Ltd.,* No. 17 CIV. 0917, ECF No. 1, at ¶ 8 (S.D.N.Y. Feb. 7, 2017) (referencing the Israeli Securities Authority's investigation of Kitov's Chief Executive Officer regarding the publication of misleading information in connection with the clinical trials of the company's lead drug candidate).

70 *See id.*

71 *Goldsmith v. Weibo Corp.,* No. CV 17-4728 2018 WL 2733694 (D.N.J. June 7, 2018) (company allegedly failed to disclose that it lacked a requisite internet license and posted certain content on its site in violation of Chinese government regulations); *SEB Inv. Mgmt. AB v. Endo Int'l, PLC,* 351 F. Supp. 3d 874 (E.D. Pa. 2018) (company allegedly issued false statements regarding the properties of its reformulated opioid drug); *Cohen v. Kitov Pharm. Holdings, Ltd.,* No. 17 CIV. 0917, 2018 WL 1406619 (S.D.N.Y. Mar. 20, 2018) (company allegedly issued false statements related to the clinical trials of its lead drug candidate); *Shanawaz v. Intellipharmaceutics Int'l Inc.,* 348 F. Supp. 3d 313 (S.D.N.Y. 2018) (company allegedly issued false statements regarding its New Drug Application filed with the FDA to market its product); *EMA GARP Fund v. Banro Corp.,* No. 18 CIV. 1986, 2019 WL 773988 (S.D.N.Y. Feb. 21, 2019) (company allegedly issued false statements regarding the country conditions of the Democratic Republic of the Congo where its mining operations were located); *In re Barrick Gold Corp. Sec. Litig.,* 341 F. Supp. 3d 358 (S.D.N.Y. 2018) (company allegedly issued false statements regarding the country conditions of Argentina where its mining operations were located).

72 *Holbrook v. Trivago N.V., et al.*, No. 17 CIV. 8348, 2019 WL 948809 (S.D.N.Y. Feb. 26, 2019) (company allegedly issued false statements in connection with an initial public offering); *In re Willis Towers Watson PLC Proxy Litig.,* No. 117CV1338, 2018 WL 3423859 (E.D. Va. July 11, 2018) (company allegedly issued false statements regarding a proposed merger); *Freedman v. magicJack Vocaltec Ltd.,* No. 9:17-CV-80940, 2018 WL 6110996 (S.D. Fla. Nov. 21, 2018) (company allegedly issued false statements regarding the true value of acquisition and its future prospects), *appeal reinstated,* No. 18-15303 (11th Cir. Mar. 20, 2019); *Wang Yan v. ReWalk Robotics Ltd.,* 330 F. Supp. 3d 555 (D. Mass. 2018) (company allegedly issued false statements regarding an initial public offering by failing to disclose that it was unable to company with certain FDA requirements to maintain ongoing sales of its products).

73 *Patel v. Zoompass Holdings, Inc.,* No. CV 17-3831, 2019 WL 316014 (D.N.J. Jan. 24, 2019) (company allegedly engaged in a fraudulent scheme to promote its stock, conduct of which could subject the company to potential criminal sanctions); *City of Birmingham Retirement and Relief Systems, et al. v. Credit Suisse Group AG, et al.,* No. 17 CIV. 10014, 2019 WL 719751 (S.D.N.Y. Feb. 19, 2019) (company allegedly failed to disclose that its risk protocols and control systems were routinely disregarded and that the company was accumulating risky, highly illiquid securities in violation of such protocols); *In re Toronto-Dominion Bank Sec. Litig.,* No. CV 17-1665, 2018 WL 6381882 (D.N.J. Dec. 6, 2018) (company's performance management system allegedly led its employees to break laws to meet sales targets); *In re Novo Nordisk Sec. Litig.,* No. 3:17-CV-209, 2018 WL 3913912 (D.N.J. Aug. 16, 2018) (company allegedly engaged in collusive price-fixing of its insulin drugs); *Prause v. Technipfmc, PLC, et al.,* No. 4:17-CV-02368, ECF. No. 58 (S.D. Tex. Jan. 18, 2019) (company allegedly failed to disclose its material weakness in its internal control over rates used in calculations of foreign currency effects on its engineering and construction projects); *Desta v. Wins Finance Holdings Inc. et al.,* 17-cv-02983, ECF No. 80 (C.D. Cal. Nov. 9, 2013) (company allegedly issued false statement regarding the location of principal executive offices to be included in the Russell Index); *Masterson v. Cheetah Mobile Inc. et al.,* 2018 U.S. Dist. LEXIS 221793 (C.D. Ca. June 27, 2018) (company allegedly used company-controlled accounts to inflate and overstate its revenue).

drug[74] were either dismissed entirely or dismissed in part (or as to certain defendants). For example, in *Cohen v. Kitov Pharmaceutical Holdings, Ltd.,* where plaintiffs alleged that Kitov Pharmaceutical Holdings, Ltd.—a corporation headquartered in Israel—and certain of its executives made false and misleading statements regarding the clinical trials of a lead drug candidate, the the court dismissed the plaintiffs' Sections 10(b) and 20(a) claims as to Kitov's chief financial officer, but denied the claims as to Kitov and its chief executive officer.[75] There, plaintiffs had failed to plead scienter with respect to Kitov's chief financial officer under Section 10(b) because the only allegations concerning him were that he was Kitov's CFO at all relevant times and signed the Registration statement, which taken together did not support the requisite inference of scienter.[76] Additionally, in *Ema Garp Fund, L.P. et al. v. Banro Corporation et al.,* the court, on February 21, 2019, granted defendants' motion to dismiss a first amended complaint that set forth claims under Sections 10(b) and 20(a).[77] As explained above, the plaintiffs alleged that Banro Corporation, a mining company headquartered in Canada and that operated in the Democratic Republic of the Congo, made false and misleading statements regarding the stability of the company's business and operations in the region.[78] However, Banro Corporation had recently undergone a restructuring proceeding in a Canadian court and the district court determined that this bankruptcy proceeding was proper and provided a procedurally fair forum for plaintiffs' claims. Accordingly, the district court dismissed the securities action.[79]

– **Of the 17 decisions, the four cases involving claims that a company issued material false and misleading statements regarding an acquisition or a proposed transaction such as a merger or an initial public offering[80] were either dismissed entirely or dismissed in part (or as to certain defendants).** For example, in *Freedman v. magicjack Vocaltec Ltd.,* where plaintiffs alleged that magicjack Vocaltec Ltd.—a corporation headquartered in Israel—and several of its board members misrepresented material facts regarding the valuation and prospects of an acquisition, the court dismissed the action because the claims were actually derivative in nature.[81] The court, turning to both Israeli and Florida law, determined that the complaint was actually a derivative action. Specifically, the court explained that claims relating to excessive compensation and corporate waste routinely are found to be derivative in nature, and pointed out that the relief sought would be the same for all shareholders. The district court ultimately granted the motion to dismiss, also explaining that the plaintiff failed to plead demand futility and had made no demand on the company, as required by Israeli law, Florida law or the Federal Rules of Civil Procedure.[82]

– **Of the 17 decisions, the seven cases involving claims that a company issued material false and misleading statements regarding the company's actions related to its financial reporting, internal control systems or efforts to promote its stock[83] include two that were dismissed entirely; three that were dismissed in part as to certain claims or defendants; and two that survived a motion to dismiss.** For example, in *Prause v. Technipfmc, PLC,* plaintiffs alleged that Technipfmc—a corporation headquartered in the United Kingdom—and certain of its executives made materially false misleading statements regarding their calculations of the foreign currency effects on its engineering and construction projects as well as the effectiveness of their internal controls over financial reporting. In ruling on defendants' motion to dismiss, the court dismissed the plaintiff's Sections 10(b),

74 *See supra* note 71.

75 No. 17 CIV. 0917, 2018 WL 1406619, at *1, *9 (S.D.N.Y. Mar. 20, 2018). Soon thereafter, Plaintiffs eventually filed a motion for final approval of class action settlement, the approval of which is pending. See No. 1:17-cv-000917, ECF No. 81 (S.D.N.Y. July 27, 2018).

76 2018 WL 1406619, at *8.

77 No. 18 CIV. 1986, 2019 WL 773988, at *1, *8 (S.D.N.Y. Feb. 21, 2019).

78 *Id.* at *1-2.

79 *Id.* at *4-8.

80 *See supra* note 72.

81 No. 9:17-CV-80940, 2018 WL 6110996, at *1, *7 (S.D. Fla. Nov. 21, 2018), *appeal filed* (11th Cir. 2018).

82 *Id.* at *6.

83 *See supra* note 73.

20(a), and 15 claims, and denied defendants' motion to dismiss the Section 11 claim.[84] There, the plaintiff pled a plausible Section 11 claim, because he alleged that the defendants' registration statement continued a 16.3% overstatement in net income—an amount that the court could not discount as immaterial as a matter of law.[85] Additionally, in *Desta v. Wins Finance Holdings Inc. et al.,* the court denied defendants' motion to dismiss a first amended complaint that contained a Section 10(b) and a Section 20(a) claim.[86] Defendants allegedly falsely stated that the principal executive offices of Wins Finance Holdings Inc., a corporation headquartered in China, were located in the U.S. to meet the criteria for being included in the Russell 2000 Index.[87] Defendants argued, among other things, that the fraud allegations were conclusory and that plaintiffs failed to allege scienter. However, the court found that plaintiffs sufficiently pled scienter with respect to the Section 10(b) claim and denied defendants' motion to dismiss the Section 20(a) claims as defendants failed to refute plaintiffs' allegations that the individual defendants signed the SEC filings containing the false statement at issue.[88]

84 No. 4:17-CV-02368, ECF. No. 58, at 2-3, 11 (S.D. Tex. Jan. 18, 2019).

85 *Id.* at 9-10.

86 17-cv-02983, ECF No. 80, at 10 (C.D. Cal. Nov. 9, 2013).

87 *Id.* at 1-2.

88 *Id.* at 9.

Recent decisions inviting review by the U.S. Supreme Court

Furthermore, two significant cases sought review by the U.S. Supreme Court in 2018. Specifically, in 2018, the Ninth Circuit issued a decision in *Stoya v. Toshiba Corp.,*[89] which opened courtroom doors to U.S. securities litigation claims against foreign issuers based on third-party transactions in the U.S. In 2015, plaintiff Mark Stoyas filed the action in the U.S. District Court for the Central District of California on behalf of a putative class of plaintiffs that purchased, in over-the-counter ("OTC") transactions in the U.S., *unsponsored* ADRs referencing Toshiba stock listed in Japan.[90] The district court dismissed the case on the grounds that the OTC market by which ADRs are sold was not a "national exchange" within the meaning of the U.S. Supreme Court's decision in *Morrison v. National Australia Bank Ltd.*[91], and that the plaintiff had failed to identify any domestic transaction between ADR purchasers and Toshiba.[92]

On July 17, 2018, the Ninth Circuit reversed and remanded the case so that the plaintiffs could have the opportunity to attempt to plead facts establishing that the securities laws applied even though the ADRs were unsponsored.[93] First, the Ninth Circuit concluded that Toshiba's ADRs are "securities" under the Exchange Act.[94] Next, the court held that the over-the-counter market on which Toshiba's ADRs trade is not an "exchange" under the Exchange Act."[95] Citing *Morrison,* the Court also concluded that an "amended complaint could almost certainly allege sufficient facts to establish that [the lead plaintiff] purchased [its] Toshiba ADRs in a

89 *Stoyas v. Toshiba Corp.,* 896 F.3d 933 (9th Cir. 2018), *petition for cert. filed,* No. 18-486 (U.S. Oct. 15, 2018).

90 896 F.3d at 937, 941.

91 *Morrison v. Nat'l Austl. Bank Ltd.,* 130 S. Ct. 2869 (2010), *superseded by statute,* Dodd-Frank Wall Street Reform and Consumer Protection Act 2010, Pub. L. No. 111-203, 124 Stat. 1376, *as recognized in, U.S. v. Vasquez,* 899 F.3d 363 (5th Cir. 2018).

92 *Id.* at 937.

93 *Id.* at 933.

94 *Id.* at 939-40.

95 *Id.* at 945-47.

domestic transaction."[96] Indeed, the Ninth Circuit explained that the lead plaintiff purchased ADRs in the US; the lead plaintiff is a U.S. entity, located in the U.S. and that coordinates activities in the U.S.; the OTC platform on which the ADRs were traded is located in the U.S.; and four Toshiba ADR depositary banks where ADR holders can exchange their ADRs for Toshiba common shares are in the U.S.[97] As such, the Ninth Circuit ultimately determined that, under *Morrison,* Section 10(b) would apply to claims against Toshiba based on domestic transactions involving OTC purchases in the U.S. of unsponsored ADRs referencing Toshiba stock listed in Japan. The Ninth Circuit departed from Second Circuit case law reached this decision, despite the fact that Toshiba had not created the ADRs or entered the U.S. securities market, because Toshiba's allegedly fraudulent conduct occurred in Japan, and Toshiba was investigated by Japanese authorities.[98]

A petition for writ of certiorari was filed on October 15, 2018, whereby the question presented is "whether the Exchange Act applies, without exception, whenever a claim is based on a domestic transaction, as the Ninth Circuit held below, or whether in certain circumstances the Exchange Act does *not* apply, despite the claim being based on a domestic transaction, because other aspects of the claim make it impermissibly extraterritorial, as the Second Circuit has held."[99] Amicus briefs, advocating for not only Supreme Court review, but also reversal of the Ninth Circuit decision were submitted, and included entities such as the U.S. Chamber of Commerce, Ministry of Economy, Trade and Industry of Japan, the Government of the United Kingdom of Great Britain and Northern Ireland, and European Issuers, Économiesuisse, International Chamber of Commerce Switzerland, and Association Française des Entreprises Privées, showing the importance of this closely-watched matter.[100]

Additionally, in *In re Petrobras Securities Litigation,* the Second Circuit opened a new chapter in Morrison jurisprudence, clarifying class certification requirements.[101] By way of background, Petrobras is an oil and gas company whose operations are centered in Brazil. It has ADRs listed on the New York Stock Exchange ("NYSE"). Amidst the wake of an investigation involving a multi-year, multi-billion dollar bid-rigging and kickback scheme, Petrobras delayed issuing financial statements, causing the prices of certain of its securities to fall.[102] In October 2015, plaintiffs moved to certify two broad classes of Petrobras investors—an Exchange Act class and a Securities Act class—covering anyone who purchased Petrobras securities in "domestic transactions."[103] In addressing an issue of first impression, on July 7, 2017, the Second Circuit affirmed in part and vacated in part the district court's decisions to certify plaintiffs' class certification motion. The Second Circuit held in part that the District Court "committed legal error by finding that

96 *Id.* at 949.

97 *Id.*

98 *Id.* at 149-50 (distinguishing *Parkcentral Global Hub v. Porsche Automobile Holdings,* 763 F.3d 198 (2d Cir. 2014).

99 Pet. for Writ of Cert., *Toshiba Corp. v. Automotive Indus. Pension Trust Fund,* No. 18-486 (U.S. Oct. 15, 2018).

100 Br. of *amicus curiae* The Chamber of Commerce of the U.S., *Toshiba Corp. v. Automative Indus. Pension Trust Fund*, No. 18-486 (U.S. Dec. 6, 2018); Br. *amicus curiae* of The Ministry of Econ., Trade and Indus. of Japan, *Toshiba Corp. v. Automative Indus. Pension Trust Fund*, No. 18-486 (U.S. Nov. 2, 2018); Br. amici curiae of EuropeanIssuers, Économiesuisse, Int'l Chamber of Commerce Switz., & The Assoc. Française des Entreprises Privées, *Toshiba Corp. v. Automative Indus. Pension Trust Fund,* No. 18-486 (U.S. Dec. 6, 2018); Br. *amicus curiae* of The Gov't of the U.K. of Great Britain and N. Ir., *Toshiba Corp. v. Automative Indus. Pension Trust Fund,* No. 18-486 (U.S. Dec. 4, 2018).

101 *In re Petrobras Sec. Litig.,* 862 F.3d 250 (2d Cir. 2017), petition for cert. filed (Nov. 1, 2017).

102 *Id.*

103 *In re Petrobras Sec. Litig.,* 312 F.R.D. 354 (S.D.N.Y. 2016), aff'd in part, vacated in part, 862 F.3d 250 (2d Cir. 2017).

Rule 23(b)(3)'s predominance requirement was satisfied without considering the need for individual Morrison inquiries regarding domestic transactions."[104] The Second Circuit therefore vacated the predominance portion of the certification order and remanded the case to the District Court for consideration of that issue.[105] A petition for writ of certiorari was filed in November 2017, urging the Supreme Court to take up the matter because the "rulings in this case [would] have a significant impact on the global financial markets, the ability of issuers to utilize those markets, and the due process rights of both plaintiffs and defendants in federal class actions."[106] Instead of continuing to litigate the matter, on June 28, 2018, the District Court granted final approval of a US$3 billion settlement, and entered judgment approving the settlement over a handful of objections; the objectors claimed that class counsel's request for fees was excessively high. Certain objectors have appealed the settlement.[107]

As shown above, non-U.S. companies face continued uncertainty regarding whether they will be subject to potential liability under the U.S. securities laws. Accordingly, cases involving non-U.S. companies that have survived dismissal may result in significant settlements in the U.S.

104 *In re Petrobras Sec. Litig.,* 862 F.3d at 257.

105 *Id.* s

106 Pet. for Writ of Cert. at 2, *Petrobras v. Universities Superannuation Scheme Ltd.,* No. 17-664 (U.S. Nov. 1, 2017).

107 Opinion and Order, *In re Petrobras Sec. Litig.,* No. 1:14-cv-09662, ECF No. 834 (S.D.N.Y. June 25, 2018); Clerk's Judgment, *In re Petrobras Sec. Litig.,* No. 1:14-cv-09662, ECF No. 835 (S.D.N.Y. June 26, 2018). *See In re Petrobras Securities,* 862 F.3d 250 (2d Cir. 2017).

Conclusion

There is no question that while securities class action filings continue at a heightened pace and as securities litigation becomes more global, it is unsurprising that non-U.S issuers may now become targets of event-driven litigation, even if those events occurred abroad. Furthermore, as the motion to dismiss decisions demonstrate, courts are willing to entertain such claims against non-U.S. issuers with mixed outcomes. As such, non-U.S. issuers need to be aware that their companies may face substantial liability, not just in their home jurisdictions but in the U.S. as well.

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