THE SECOND CIRCUIT'S WANING CONTROL OVER SECURITIES CLASS ACTIONS

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The Second Circuit's preeminence in the field of securities litigation has given it the title of "the mother court." It has cultivated this reputation across time, judges, and case law such that its legacy cannot soon be rivaled. However, as with many things, cyclical trends have led to a new development—the Second Circuit no longer has the highest share of class action securities litigation filings in any given year. What has caused this shift in plaintiff filing habits is yet to be determined. In response, this Column suggests one possible cause. The Second Circuit's case law has taken a relatively pro-defendant tune in recent years, ultimately suggesting that prospective class action plaintiffs would do well to reevaluate their decisions to file within the Second Circuit.

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INTRODUCTION

Long known as the "mother court" of securities litigation, the Second Circuit has consistently stood at the forefront of Rule 10(b)-5 litigation.[1] Despite various interludes, the Second Circuit has developed this preeminence over securities lawsuits by presiding over the largest share of such suits of any federal circuit court.[2]

Yet this trend may soon be bucked as prospective plaintiffs begin filing elsewhere, namely the Ninth Circuit. In three of the last five years, securities class action filings in the Ninth Circuit have surpassed those of the Second Circuit.[3] While Ninth Circuit filings have at times in the past exceeded those in the Second Circuit,[4] class action plaintiffs may be in the process of anointing a new mother court.

In its cursory inspection of this trend, this Column suggests one possible cause—Second Circuit case law increasingly appears pro-defendant relative to other circuits. Whether through Supreme Court or Second Circuit jurisprudence, it seems Second Circuit case law may be slowly closing the door on class action plaintiffs. In the face of these and other potential explanations, prospective class action plaintiffs and their attorneys would do well to reevaluate their Second Circuit filing decisions.

Section II of this Column will scope the historical growth of Second Circuit securities litigation and its importance to the development of securities litigation jurisprudence nationally, before detailing the change in the filing behavior of plaintiffs over the last half-decade. Then, Section III will argue that it is in fact the Second Circuit's recent case law that is driving prospective plaintiffs from the district courts therein. In Section IV, the closing section, the Column preliminarily suggests that class action plaintiffs reevaluate their filing decisions before subjecting their fellow class members to the potentially more onerous standards of the Second Circuit.

I. THE RISE (AND FALL?) OF THE SECOND CIRCUIT'S SECURITY CLASS ACTION DOMINANCE

The Second Circuit has played host to many of the most consequential developments in securities litigation, developing its reputation as the "mother court" of securities litigation. Recently, however, there has been a growing trend among securities class action plaintiffs; increasingly, they are filing their cases outside of the Second Circuit.

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[1] *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting).

[2] Between 1997 and 2023, the Second Circuit averaged 55 securities class action filings per year, representing more than 25% of the total securities class action filings in any given year. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2024 YEAR IN REVIEW 23 fig.22 (2025) [hereinafter *2024 Year in Review*].

[3] *See id.*; CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2020 YEAR IN REVIEW 33 fig.32 (2021) [hereinafter *2020 Year in Review*]; CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2023 YEAR IN REVIEW 27 fig.26 (2024) [hereinafter *2023 Year in Review*].

[4] *See* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS 2009: A YEAR IN REVIEW 25 fig.24 (2010) [hereinafter *2009 Year in Review*] (from data collected between 1997 and 2008, the Ninth Circuit had higher average yearly filings than the Second Circuit); *see also* CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2015 YEAR IN REVIEW 27 fig.25 (2016) [hereinafter *2015 Year in Review*] (68 filings in the Ninth Circuit compared to just 50 in the Second Circuit).

A. The Second Circuit's Historic Monopoly of Securities Litigation

Since the dawn of securities regulation and the private right of action under Section 10 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b),[5] the Second Circuit has played host to an incredible share of all securities litigation in the U.S. The Second Circuit's reputation as the "mother court" of securities litigation has spanned from judge-to-judge, year-to-year, and case-to-case since the inception of U.S. securities litigation. Even looking at one judge, Judge Henry Friendly, we can get a preliminary sense of the Second Circuit's importance in developing securities law. Known to have done "more to shape the law of securities regulation than any judge in the country,"[6] Judge Friendly was a leader in securities litigation jurisprudence. Between 1961 and 1977, Judge Friendly wrote 56 of the Second Circuit's 411 securities opinions.[7]

Yet Judge Friendly's reputation is not the only evidence of the Second Circuit's dominance in securities litigation. Anecdotally, many of the most high-profile securities litigation cases come directly from the Second Circuit. Consider *United Housing Foundation, Inc. v. Forman*, which established that a "stock" is determined by the economic realities of the transaction and not simply the name of the instrument;[8] *Santa Fe Industries v. Green*, which limited § 10(b) claims to only those situations alleging actual manipulation or deceit and not mere breaches of fiduciary duty;[9] or *Chiarella v. U.S.*, which established the classical theory of insider trading.[10] All of these cases began in the Southern District of New York.

However, the Second Circuit's reputation as the "mother court" is not only anecdotal; it is also empirical. Just as the Second Circuit was the dominant securities circuit during Judge Friendly's tenure, handing down 411 of the 1262 Appellate Court opinions between 1961 and 1977,[11] so too has it continued to be in the 21st century. On average, between 1997 and 2023, the Second Circuit was home to 55 of the 189 "core" *federal* securities filings each year, totaling nearly 30% of the yearly federal securities lawsuits.[12] But, that record is not without caveats. Importantly, the Ninth Circuit averaged higher yearly filings between 1997

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[5] Superintendent of Ins. of State of New York v. Bankers Life & Casualty Co., 404 U.S. 6, 13 n.9 (1971) ("It is now established that a private right of action is implied under § 10(b)."); *see also* Birnbaum v. Newport Steel Corp., 193 F.2d 461 (2d Cir. 1952) (the first circuit court to recognize a private right of action under Rule 10b-5 and Section 10(b) in 1952).

[6] Bruce A. Ackerman et al., *In Memoriam: Henry J. Friendly*, 99 HARV. L. REV. 1709, 1723 (1986) (comments of Prof. Louis Loss).

[7] Margaret V. Sachs, *Judge Friendly and the Law of Securities Regulation: The Creation of a Judicial Reputation*, 50 SMU L. REV 777, 791 n.134, 792 tbl.1, 810 tbl.3 (1997).

[8] United Housing Foundation Inc. v. Forman, 421 U.S. 837, 848 (1975).

[9] Santa Fe Indus. v. Green, 430 U.S. 462, 474 (1977).

[10] Chiarella v. U.S., 445 U.S. 222, 232 (1980).

[11] *See* Sachs, *supra* note 8, at 792 tbl.1.

[12] *2024 Year in Review*, *supra* note 2, at 23 fig.22, 34 app.6. "Core" filings "are all state 1933 Act class actions and all federal securities class actions excluding those defined as M&A filings." *Id.* at 3 fig.2. "Core federal filings are all federal securities class actions excluding those defined as M&A filings." *Id.* at 12 fig.11.

and 2008.[13] However, as seen above, the Second Circuit led average filings once again throughout the 2010s.[14]

B. A New Trend in Securities Class Action Filings

While the Second Circuit's historic role as the "mother court" of securities litigation is not in doubt, we may see it displaced by the Ninth Circuit in the future. As late as 2019, the Second Circuit outpaced other circuits with respect to securities class action filings. In 2019, there were 103 filings in the Second Circuit compared to just 52 in the Ninth Circuit, the next closest circuit.[15] And, even in the long term, between 1997 and 2018, the Second Circuit averaged 50 filings a year while the Ninth Circuit averaged 48.[16]

However, since 2020, that trend has seemingly reversed. At the end of 2020, securities class actions filed in the Ninth Circuit surpassed the number of filings in the Second Circuit, with 79 and 77 cases filed, respectively.[17] Although the number of filings in the Second Circuit did rebound in 2021 and 2022,[18] in each of the last two years, Ninth Circuit filings have outpaced those of the Second Circuit.[19] While, in previous years, Ninth Circuit filings have surpassed the number of Second Circuit filings,[20] it appears a trend is reemerging: the Ninth Circuit is again approaching parity with—or even surpassing—the Second Circuit.[21]

[13] *2009 Year in Review*, *supra* note 4, at 25 fig.24 (48 and 47 filings per year per circuit respectively).

[14] *2024 Year in Review*, *supra* note 2, at 23 fig.22.

[15] CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2019 YEAR IN REVIEW 38 fig.37 (2020).

[16] *Id.*

[17] *2020 Year in Review*, *supra* note 3, at 33 fig.32.

[18] In 2021, there were 82 securities class actions filed in the Second Circuit and 57 filed in the Ninth Circuit. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2021 YEAR IN REVIEW 30 fig.29 (2022). In 2022, there were 73 securities class actions filed in the second circuit compared to 59 filed in the Ninth Circuit. CORNERSTONE RESEARCH, SECURITIES CLASS ACTION FILINGS: 2022 YEAR IN REVIEW 31 fig.30 (2023).

[19] *See 2023 Year in Review*, *supra* note 3, at 27 fig.26 (Second Circuit: 50 filings, Ninth Circuit: 67, and Third Circuit: 36); *2024 Year in Review*, *supra* note 2, at 23 fig.22 (Second Circuit: 64, Ninth Circuit: 69, and Third Circuit: 19).

[20] *See 2015 Year in Review*, *supra* note 4, at 27 fig.25 (Second Circuit: 50, Ninth Circuit: 68, and Third Circuit 19).

[21] One caveat, however, is that the District Courts of the Ninth Circuit receive roughly two times the number of civil filings than the Second Circuit courts generally. *See Caseload Statistics Data Table: U.S. District Courts – Civil Cases Filed, Terminated, and Pending*, U.S. Courts (last visited September 29, 2025) (collecting data from all U.S. District Courts on the number of filed, pending, and terminated civil cases within each district for the 12-months ending June 30, 2025), https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables.

II. ONE POSSIBLE EXPLANATION: THE SECOND CIRCUIT'S GROWING PRO-DEFENDANT JURISPRUDENCE

What then explains class action plaintiffs' growing preference for courts outside the Second Circuit? While there are undoubtedly several explanations for the Second Circuit's declining market share of securities class actions, including the changing location of defendants or the changing composition of the courts,[22] this Column focuses on but one possible explanation:[23] Second Circuit jurisprudence has become relatively more pro-defendant when compared to other circuits.

Before discussing the developments in case law that have formed a relatively pro-defendant environment within the Second Circuit, it is necessary to explain why the old justifications for Second Circuit dominance are no longer applicable. Those justifications—(1) the Second Circuit's geographic coverage of New York City predisposes it to a large share of the securities actions filed in Federal Court, and (2) the sophistication of the local bar eases the burdens of litigation[24]—fail to carry weight in the interstate context of modern securities litigation.

As the Ninth Circuit's brief interlude as the securities class action leader shows,[25] these justifications are no longer relevant. As to the sophistication of the local bar, consider that the top five securities class action plaintiff side firms by total settlement value in 2023 all had a significant national presence.[26] Further, as to the geographic coverage of New York City, modern transportation has eased the burdens of litigating out of state, and the advent of the internet and digital transactions has exponentially increased the jurisdictions in which defendants are susceptible to litigation.[27] Thus, neither local attorney competency nor geography is sufficient to maintain plaintiffs' fealty to filing within the Second Circuit.

[22] One particularly powerful alternative explanation might be a result of the shifting demographics of class action defendants. In 2024, 37 filings were brought against defendants in the tech industry, a substantial increase from the 1997-2023 average of 24. *2024 Year in Review*, *supra* note 2, at 22 fig.21.

[23] As a brief aside, it may be helpful to understand that personal jurisdiction and venue are likely irrelevant to plaintiff's securities class action filing decisions. The Securities Exchange Act of 1934 authorizes service of process and venue in any "district wherein any act or transaction constituting the violation occurred." 15 U.S.C § 78aa(a) (2010). "[C]ase law uniformly supports the proposition that the alleged transmission of the misleading materials into the district is a venue-sustaining" and jurisdiction-sustaining act under Section 27. *In re* AES Corp. Sec. Lit., 240 F. Supp. 2d 557, 559 (E.D. Va. 2003); *see also* Mariash v. Morrill, 496 F.2d 1138, 1142-43 (2d Cir. 1974) ("It is simply too late in the day to argue that Section 27 does not authorize nationwide service of process on any individual named in the complaint"; however, such service "must be reasonably calculated to inform he defendant of the pendency of the proceedings . . . .").

[24] Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225, 226 (2016).

[25] *See 2009 Year in Review*, *supra* note 4, at 25 fig.24.

[26] SEC. CLASS ACTION SERVS., INSTITUTIONAL S'HOLDER SERVS., TOP PLAINTIFF LAW FIRMS OF 2023, 6 (Jarett Sena, Esq., et al eds., 2024) (Bernstein Litowitz Berger & Grossman, Labaton Keller Sucharow, Robbins Geller Rudman & Dowd, Quinn Emanuel Urquhart & Sullivan, and Cohen Milstein Sellers & Toll comprising the top five plaintiff side firms respectively).

[27] *See supra* note 24; *see also* Washington Pub. Util. Grp. v. U.S. District Court W.D. Wash., 843 F.2d 319, 328 (9th Cir. 1988) (The Ninth Circuit upheld venue in D. Az., where "[t]he allegedly misleading financial statements, which are the basis of the claims of federal securities violations and are discussed below, were sent to all fifty states, including Arizona.").

A. Recent Second Circuit Jurisprudence has become Relatively Pro-Defendant Compared to Other Circuit Courts

The Second Circuit's case law has begun to disincentivize plaintiffs from seeking relief in the Second Circuit district courts. Originally, while the home to securities litigation in the U.S. following the '33 and '34 Act's enactment, the Second Circuit might have been seen as garnering a pro-plaintiff vision for the future of securities litigation. In fact, the Second Circuit was the first circuit court to recognize the private right of action under Section 10(b) and Rule 10b-5.[28]

However, recent Second Circuit and Supreme Court opinions have changed course, making Second Circuit precedent relatively pro-defendant. One of the Second Circuit's more recent pro-*plaintiff* precedents came in *Stratte-McClure v. Morgan Stanley*.[29] There, plaintiffs in part claimed that Morgan Stanley violated Section 10(b) of the '34 Act by failing to disclose the company's long position in its sale of credit default swaps as a "known trend[], or uncertainty that have had, or might reasonably be expected to have, a[n] . . . unfavorable material effect" on the company, as required by Item 303 of Regulation S-K.[30] In agreement with the plaintiffs, the Second Circuit determined that the pure omission of an item required by Item 303 "can serve as the basis for a securities fraud claim under Section 10(b)" alleging material omissions.[31] The court arrived at this conclusion because "a reasonable investor would interpret the absence of an Item 303 disclosure to imply the nonexistence of" any known trends or uncertainties on the topic.[32] Thus, within the Second Circuit, plaintiffs could file Section 10(b) actions based on "pure omissions" by the defendants, a low bar to plead.

However, the Second Circuit's relaxed pleading standard for "pure omissions" ended in 2024 with the Supreme Court's decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*[33] In a concise opinion from Justice Kagan, the Supreme Court rejected the Second Circuit's "pure omission" theory of liability.[34] Instead, relying on the text of Section 10(b), the Court determined that "failure to disclose information required by Item 303 can support a Rule 10b–5(b) claim *only if the omission renders affirmative statements made misleading*."[35] Thus, the low bar for 10(b) pleading established by the Second Circuit, which incentivized filing class actions within the Second Circuit, was eliminated in favor of interpretations previously adopted by the Ninth and Third Circuits. [36]

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[28] *See, e.g.*, Birnbaum v. Newport Steel Corp., 193 F.2d 461, (2d Cir. 1952) (recognizing and delimiting a private right of action under Rule 10b-5 in 1952).

[29] Stratte-McClure v. Morgan Stanley, 776 F.3d 94 (2d Cir. 2015).

[30] *Id.* at 98.

[31] *Id.* at 101–02.

[32] *Id.* at 102.

[33] Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257 (2024).

[34] *Id.* at 264.

[35] *Id.* at 265 (emphasis added).

[36] *Id.* at 262 n.1.

Macquarie represents just one of the recent cases that have seemingly shifted the Second Circuit to a pro-defendant court. In fact, the Second Circuit itself has begun taking relatively pro-defendant stances in multiple recent securities cases, ultimately suggesting that plaintiffs look elsewhere for jurisdictions more receptive to their actions.

One such decision came in the wake of *Lorenzo v. SEC*, in which the Supreme Court determined that a defendant could be held liable under Rule 10b-5(a) ("scheme liability") and 10b-5(c) for disseminating false and misleading statements with the intent to defraud, even where he could not be held liable for a "making" such statements under Rule 10b-5(b).[37] In *Lorenzo*, the defendant could not be charged under Rule 10b-5(b) because the defendant did not "make" the email.[38] Instead, he merely sent an email, of which his boss had the "ultimate authority."[39] However, the Court concluded from the plain language of the statute that by merely knowingly sending the misleading email, the defendant had "'employed' a 'device,' 'scheme,' and 'artifice to defraud'" under Rule 10b-5(a).[40]

While *Lorenzo* potentially increased the actions for which plaintiffs could file Rule 10b-5 cases for, the Second Circuit soon cut back on the Court's holding. In *SEC v. Rio Tinto PLC*, the Second Circuit offered a limited reading of the Supreme Court's decision in *Lorenzo* by declining to overrule a prior Circuit precedent requiring something more than mere misstatements and omissions to create scheme liability under Rule 10b-5(a).[41] Instead, the Second Circuit determined that *Lorenzo* did not abrogate the prior precedent because the something more in *Lorenzo* was the "dissemination" that transformed the conduct at issue into a Rule 10b-5(a) violation.[42] This decision contradicted more plaintiff-friendly decisions in the Ninth and Tenth Circuits, which had determined that considerable overlap existed between 10b-5(a), (b), and (c), such that a plaintiff could plead scheme liability by merely alleging the existence of false and misleading statements.[43]

In two other high-profile cases at the Supreme Court, the Second Circuit was again on the opposite side of prospective securities class action plaintiffs. The Supreme Court was set to review two securities cases during its 2024 Term, *NVIDIA Corp. v. E. Ohman J:or Fonder AB* and *Facebook, Inc. v. Amalgamated Bank*, but ultimately dismissed each case as improvidently granted.[44]

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[37] Lorenzo v. SEC, 587 U.S. 71, 78 (2019); *see also* Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142 (determining that an individual only "make[s]" a statement under Rule 10b-5(b) if they had "ultimate authority over the statement, including its content and whether and how to communicate it").

[38] Lorenzo, 587 U.S. at 76.

[39] *Id.* at 76; *see also* Janus, 564 U.S. at 142.

[40] Lorenzo, 587 U.S. at 81. Additionally, the Court determined that the conduct also satisfied the requirements of Rule 10b-5(c). *Id.*

[41] SEC v. Rio Tinto PLC, 41 F.4th 47, 49 (2d Cir. 2022).

[42] *Id.* at 53.

[43] In re Alphabet, Inc. Sec. Litig., 1 F.4th 687, 709 n.10 (9th Cir. 2021) (acknowledging Lorenzo abrogated Ninth Circuit precedent requiring something more than false and misleading statements) (citing WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F.3d 1039, 1057–58 (9th Cir. 2011)); Malouf v. SEC, 933 F.3d 1248, 1259–60 (10th Cir. 2019) ("The Court expressly held that a person could incur liability under [10b-5(a) and (c)] when the conduct involves another person's false or misleading statement.").

[44] NVIDIA Corp. v. E. Ohman J:or Fonder AB, 604 U.S. 20, 20 (2024); Facebook, Inc. v. Amalgamated Bank, 604 U.S. 4, 4 (2024).

Yet, in each case, the Second Circuit's precedent over the issues presented was staunchly pro-defendant in the pleading requirements that it demanded. For instance, in *NVIDIA*, the Court was presented with the questions (1) "[w]hether plaintiffs seeking to allege scienter under the [Private Securities Litigation Reform Act] based on allegations about internal company documents must plead with particularity the contents of those documents" and (2) "[w]hether plaintiffs can satisfy the PSLRA's falsity requirement by relying on expert opinion to substitute for particularized allegations of fact."[45]

The Second Circuit's two most recent decisions on these issues substantially favor defendants. In *In re Scholastic Corp. Securities Litigation*, the Second Circuit determined that "unreported general claim[s] that confidential company [] reports existed to contradict public statements" was insufficient to plead scienter under Rule 10b-5.[46] Notably, the Ninth Circuit took the opposite view in *NVIDIA*, determining that scienter was sufficiently pled where the defendant was alleged to have received detailed sales reporting data that would have given him knowledge that much of the company's GPU sales were to crypto miners.[47]

Further, as to the second issue, the Second Circuit in *Arkansas Public Employees Retirement System v. Bristol-Myers Squibb Co.* soundly rejected the idea that expert opinions within the complaint could form the basis for the alleged falsity of the statements.[48] The Second Circuit concluded, "[the expert's] opinion cannot rescue the Investors' claims, unless that opinion was based on particularized facts sufficient to state a claim for fraud."[49] Again, the Ninth Circuit progressed in a pro-plaintiff direction, allowing expert analysis of public market data to prove that NVIDIA understated its GPU sales to crypto-miners by $1 billion.[50] Likewise, the Second Circuit's precedent before *Facebook* took an equally anti-plaintiff stance. In *Facebook*, the question presented to the Supreme Court was, "Are risk disclosures false or misleading when they do not disclose that a risk has materialized in the past, even if

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[45] Petition for Writ of Certiorari at i, *NVIDIA*, 604 U.S. 20 (No. 23-970).

[46] In re Scholastic Corp. Sec. Litig., 252 F.3d 63, 72-73 (2d Cir. 2001) (determining that internal sales reports were alleged with sufficient detail to prove scienter); *see also* Meitav Dash Provident Funds & Pension Ltd. v. Spirit AeroSystems Holdings, Inc., 79 F.4th 1209, 1220 (10th Cir. 2023); California Pub. Emps.' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 147-48 (3d Cir. 2004); ABC Arbitrage Plaintiffs Grp. v. Tchuruk, 291 F.3d 336, 356 (5th Cir. 2002); Arazie v. Mullane, 2 F.3d 1456, 1467 (7th Cir. 1993).

[47] E. Ohman J:or Fonder AB v. NVIDIA Corp., 81 F.4th 918, 940 (9th Cir. 2023) (determining that confidential witness statements alleging that the defendant CEO received weekly sales data from department heads and that such statements would have shown that the primary sales data was driven by crypto-mining operations was sufficient to plead scienter with particularity); *see also* In re Stone & Webster, Inc., Sec. Litig., 414 F.3d 187, 210 (1st Cir. 2005) (determining that regular reports on overdue accounts were being produced for two of the defendant's review that would have given them knowledge that the company would have been unable to pay its contractors).

[48] Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co., 28 F.4th 343, 354 (2d Cir. 2022) (Expert witness statements regarding the meaning of "strong expression" as having an industry consensus of 50% was insufficient to plead falsity regarding Bristol-Myers use of "strong expression" without indicating its view that strong expression was 5%); *see also* Fin. Acquisition Partners LP v. Blackwell, 440 F.3d 278, 285–86 (5th Cir. 2006).

[49] Arkansas Pub. Emps. Ret. Sys., 28 F.4th at 354.

[50] E. Ohman J:or Fonder AB, 81 F.4th at 930–32.

that past event presents no known risk of ongoing or future business harm?"[51] Although taking the middle position, the Second Circuit in *Set Capital LLC v. Credit Suisse Group AG* determined that failure to acknowledge the occurrence of a previously identified risk could constitute falsity if the defendants "knew with virtual certainty that," upon the risk materializing again, the events would harm the business.[52] Thus, the Second Circuit determined that disclosures would be false under the circumstances only if there was a risk of harm to the company in the future. Again, in opposition, the Ninth Circuit in *In re Facebook, Inc. Securities Litigation* determined that the risk statements regarding only hypothetical risk of data misuse by third parties were materially false where Facebook knew of prior acts of data misuse by Cambridge Analytica, regardless of whether the harm from the prior breach had materialized.[53] Thus, while taking an intermediate position on the issue in *Facebook*, the Second Circuit still developed case law that was relatively more pro-defendant than the Ninth Circuit's decision in *In re Facebook*.

While these cases represent only a small fraction of the Second Circuit's pleading requirements with respect to 10b-5 actions, they demonstrate the possibility of a new jurisprudential trend: the Second Circuit's caselaw on 10b-5 pleading standards is making it harder for plaintiffs to state their class action claims, while the Ninth Circuit and others are opening their arms to prospective plaintiffs. Importantly, this relative change in stance by the Second Circuit has occurred primarily over the past few years, coinciding with the increasing prevalence of securities class actions filed in the Ninth Circuit.

CONCLUSION

It is now clear that there is a growing trend among securities class action plaintiffs to file their claims outside of the Second Circuit. Whether this trend suggests the end of the Second Circuit's status as the "mother court" is yet to be seen; however, the trend suggests that there is a growing sentiment among plaintiffs that filing elsewhere will be beneficial in the long run. This Column outlined one possible reason, a growing body of relatively pro-defendant caselaw within the Second Circuit. However, this is but one of several potential explanations for plaintiffs' shift in filing habits. Yet, whatever the ultimate causes of this trend may be, plaintiffs would do well to ask themselves whether the Second Circuit should remain their default filing jurisdiction in the future.

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[51] Petition for Writ of Certiorari at i, Facebook, Inc. v. Amalgamated Bank, 604 U.S. 4 (2024) (No. 23-980).

[52] Set Capital LLC v. Credit Suisse Group AG, 996 F.3d 64, 85-86 (2d Cir. 2021) (allegations that acknowledged risks of defendants hedging activity had previously injured the company and that the defendants knew that a future materialization of the risk would harm the company was sufficient to plead falsity with respect to risk statements).

[53] In re Facebook, Inc. Sec. Litig., 87 F.4th 934, 948-50 (9th Cir. 2023).