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CORNERSTONE RESEARCH

Economic and Financial Consulting and Expert Testimony

Update on COVID-19-Related Developments in Securities Litigation and Corporate Best Practices

December 15, 2020

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Securities Litigation and SEC Enforcement Actions Trends

The COVID-19 Pandemic Is Unlike the 2008 Market Crash

“The underpinnings of the COVID-19 crisis are fundamentally different, the lawyers said, than those of the 2008 crash.... This time, said Toll, Leviton, Bleichmar and Darren Robbins of Robbins Geller Rudman & Dowd, there’s no analogous systemic deception. Fraud claims will be idiosyncratic....”

Alison Frankel, “Shareholders’ class action lawyers: We’re not rushing to bring COVID-19 cases,” *Reuters*, 3/17/20

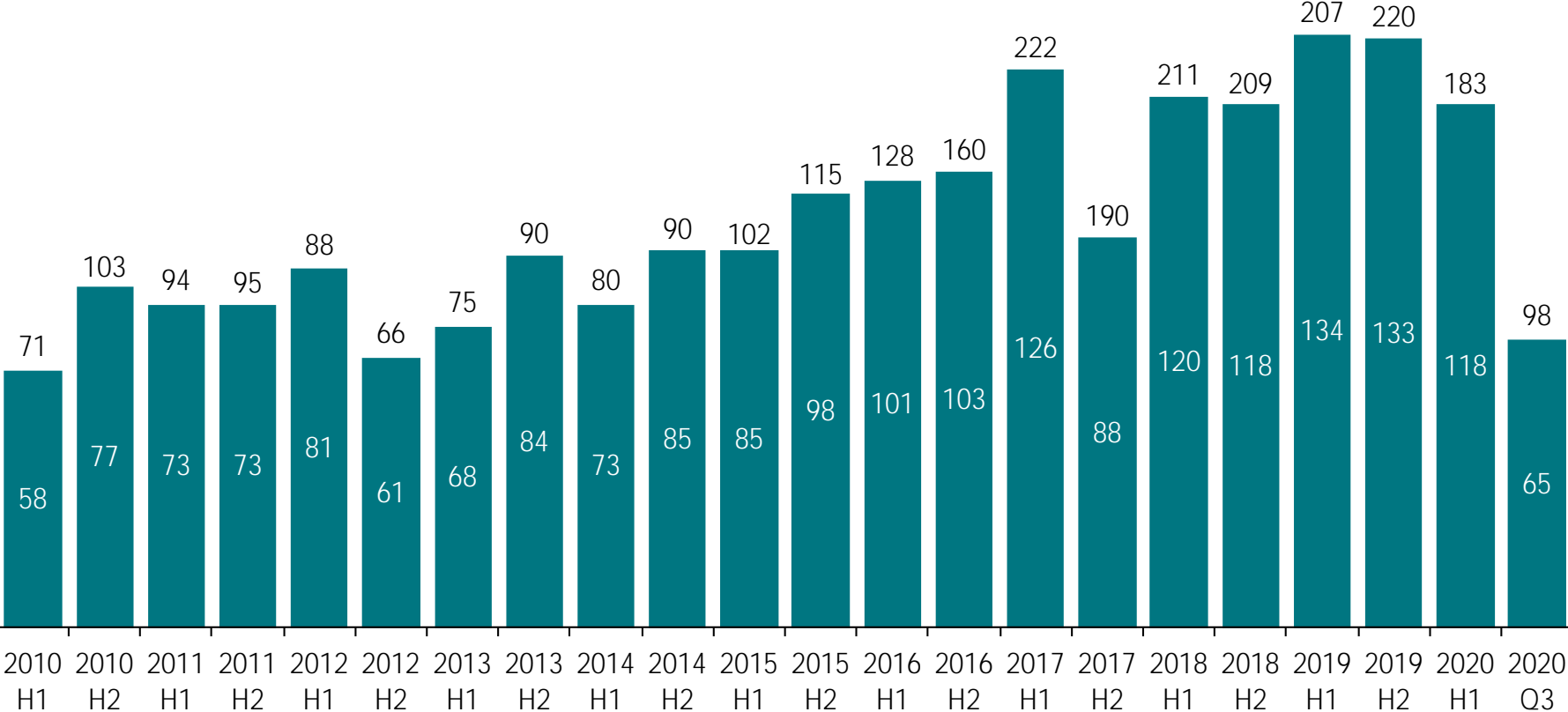
“While there may be more volatility during a global crisis, companies revealing corrective disclosures will see their stocks continuing to move downward ‘net of market- or industry related volatility,’ according to Bernstein Litowitz Berger & Grossmann LLP partner Salvatore Graziano. ***‘We saw this in the 2008 crisis on a company-by-company basis where we had no issue demonstrating loss causation... Bottom line, if you are committing fraud, you should be more worried now than ever,’*** Graziano said. ***‘There will be no place to hide in market volatility.’***”

Dean Seal, “As Investor Suits Tick Up, Loss Causation May Be A Hard Sell,” *Law360*, 5/4/20

Class Action Filings Index® (CAF Index®)

Semiannual Number of Class Action Filings

2010 H1–2020 Q3



Source: Cornerstone Research and Stanford Law School Securities Class Action Clearinghouse; Bloomberg Law; Institutional Shareholder Services' Securities Class Action Services
 Note: Data are updated through 9/30/20. This figure begins including state 1933 Act filings in the semiannual counts in 2010. Parallel class actions are only reflected as a single filing. When parallel cases are filed in different years, the earlier filing is reflected in the figure above. Accordingly, counts that include parallel filings may differ from counts of state filings because a parallel filing may be counted in a prior year.

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First Wave of Securities Lawsuits

The initial batch of COVID-related securities lawsuits targeted select industries most directly impacted by the pandemic. The travel and healthcare industries were on the front lines.

- *Douglas v. Norwegian Cruise Lines*, No. 20-cv-21107 (S.D. Fla. Mar. 12, 2020) (accusing company and two executives of falsely downplaying seriousness of COVID-19 in public filings and communications with prospective customers)
- *Service Lamp Corp. Profit Sharing Plan v. Carnival Corp.*, No. 20-cv-22202 (S.D. Fla. May 27, 2020) (accusing company of concealing COVID-19 infections on its ships and spreading the virus “at various ports throughout the world”)
- *McDermid v. Inovio Pharm. Inc.*, No. 20-cv-1402 (E.D. Pa. Mar. 12, 2020) (alleging that Inovio’s CEO made false and misleading statements about a potential vaccine for COVID-19)
- *Yannes v. SCWorx Corp.*, No. 20-cv-03349 (S.D.N.Y. Apr. 29, 2020) (claiming SCWorx misled investors by announcing it was able to sell millions of COVID-19 rapid testing kits when its supplier had misrepresented its operations and the buyer it was working with was unable to support the purported volume of orders)

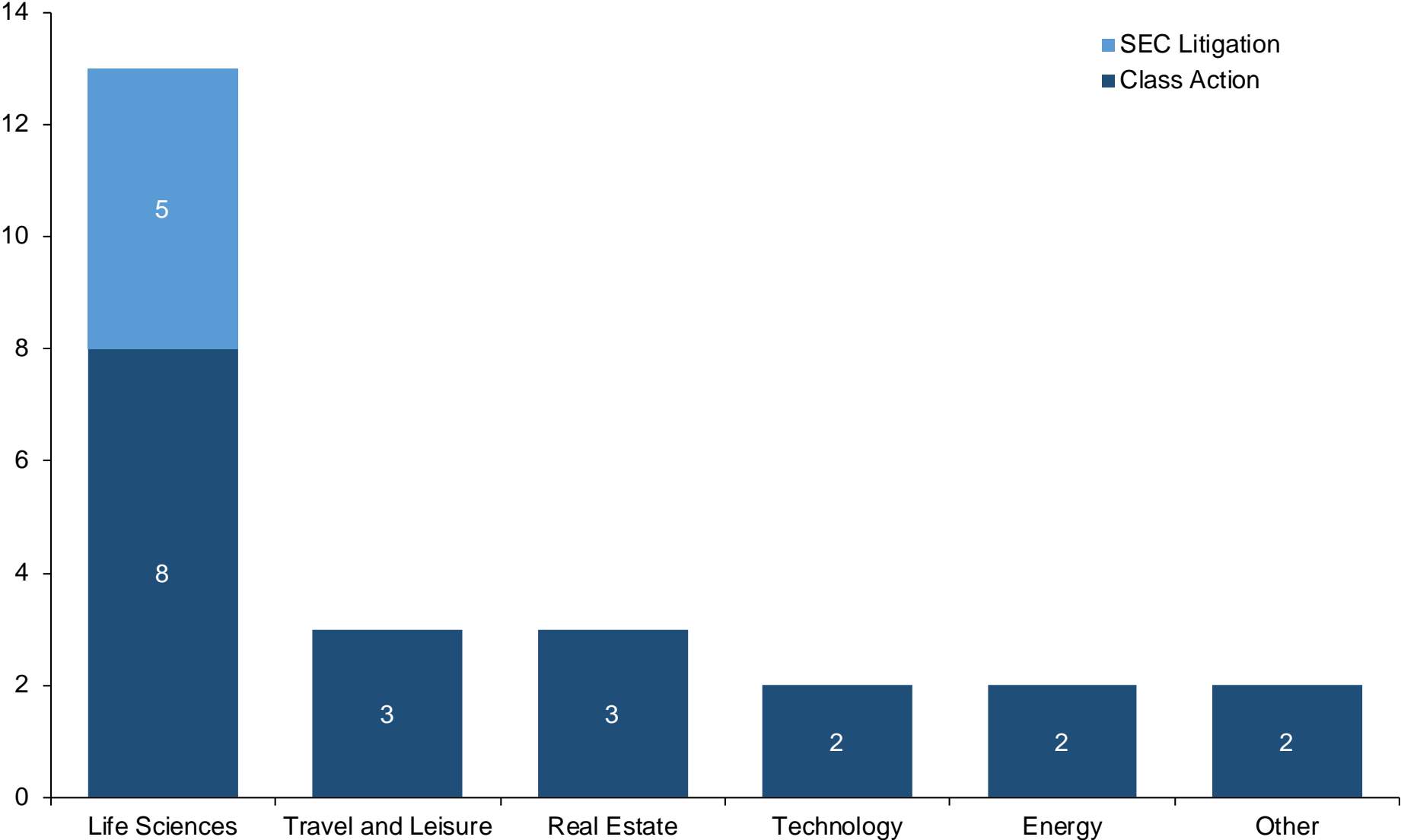
Second Wave of Securities Lawsuits

Despite the steady stock-market recovery, COVID-19-related securities fraud litigation has far from flickered out. Plaintiffs have continued to bring suits against companies in the travel and healthcare industries but have also branched out and targeted a wider range of companies.

- *Arbitrage Fund v. Forescout Techs.*, No. 20-cv-03819 (N.D. Cal. June 10, 2020) (accusing software company of failing to disclose impact COVID-19 outbreak was having on its financial performance before announcing that a planned merger would not close)
- *Berg v. Velocity Financial, Inc.*, No. 20-cv-06780 (C.D. Cal. July 29, 2020) (alleging real estate finance company failed to disclose that its non-performing loans had dramatically increased in size from the figures provided in the IPO offering materials)
- *Tang v. Eastman Kodak Company*, No. 20-cv-10462 (D.N.J. Aug. 13, 2020) (accusing company of failing to disclose that it granted company insiders millions of dollars worth of stock options immediately prior to publicly disclosing that it had received a \$765 million loan to produce drugs to treat COVID-19).
- *City of Riviera Beach General Employees Ret. Sys. v. Royal Caribbean Cruises LTD*, No. 20-cv-24111 (S.D. Fla. Oct. 7, 2020) (alleging company made misleading statements about its bookings and safety protocol relating to COVID-19)

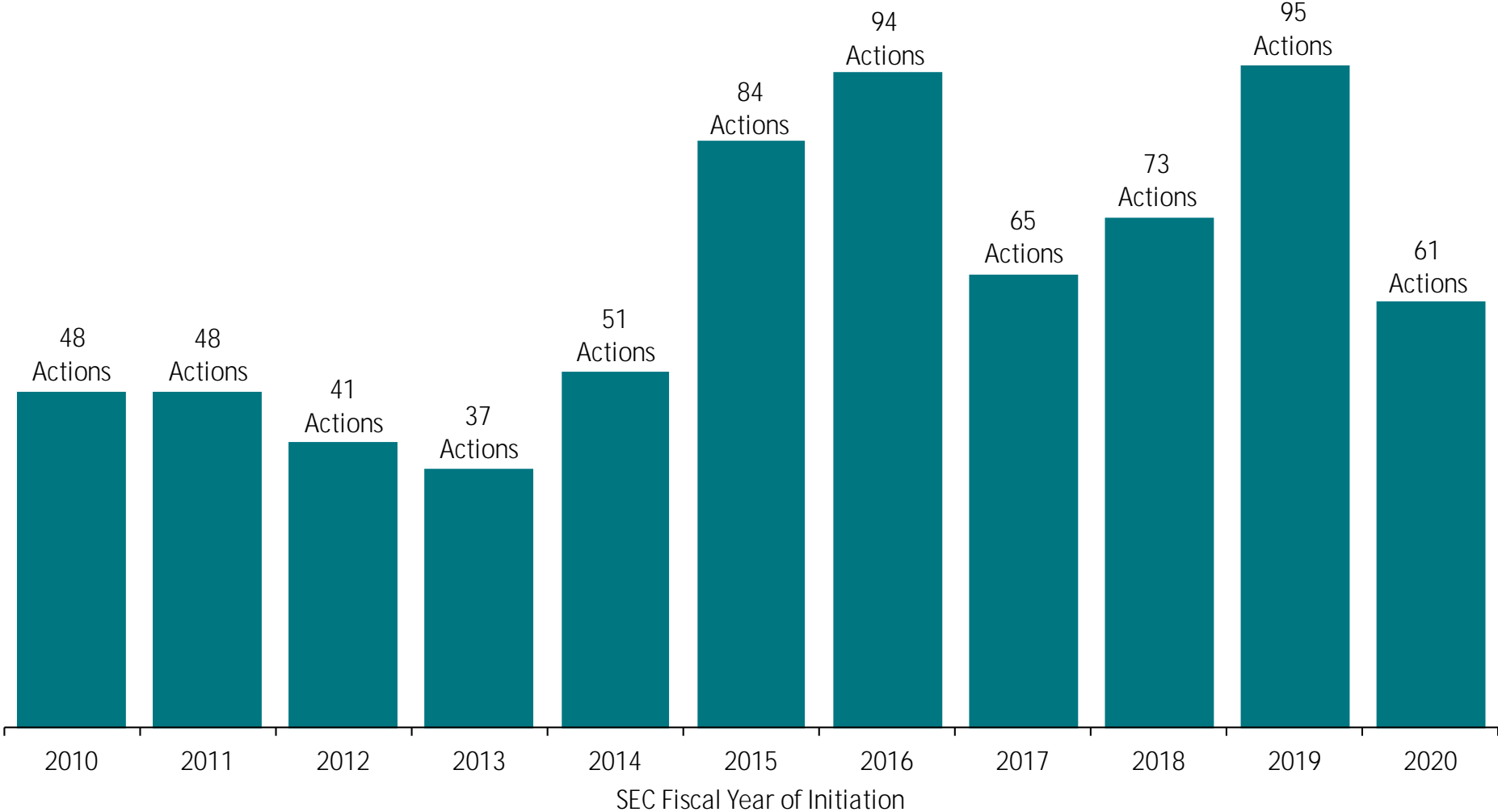
COVID Securities Litigation Trend

Number of Cases by Industry, 3/12/20 – 10/7/20



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All Independent SEC Actions FY 2013–FY 2020



Source: Securities Enforcement Empirical Database (SEED)

Note: Relief defendants are not considered.

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Key Trends in Public Company and Subsidiary Actions FY 2010–FY 2020

	FY 2010–FY 2019 <i>Average</i>	1H FY 2020	2H FY 2020	FY 2020 <i>Total</i>
New Actions	64	20	41	61
Issuer Reporting and Disclosure Allegations	36%	60%	44%	49%
Investment Adviser/Investment Company Allegations	15%	15%	27%	23%
Defendants with Settlements Noting Cooperation	54%	45%	70%	62%
Defendants with Monetary Settlements Imposed	86%	86%	95%	92%
Average Monetary Settlements Imposed by the SEC	\$28 million	\$59 million	\$13 million	\$28 million
Median Monetary Settlements Imposed by the SEC	\$4 million	\$2 million	\$5 million	\$4 million
Disgorgement and Prejudgment Interest Imposed by the SEC in Civil Actions	\$285 million	\$540 million	\$25 million	\$565 million

SEC Enforcement Activity: Public Companies and Subsidiaries – FY 2020 Update, Figure 1. © 2020 NYU | © 2020 Cornerstone Research. All rights reserved.

Covid-19-Related SEC Enforcement Actions

Apr 28, 2020

SEC v. Praxsyn Corp., et al. (S.D.Fla. 20-cv-80706) for allegedly issuing false and misleading press releases claiming the company was able to acquire and supply large quantities of N95 or similar masks to protect wearers from the COVID-19 virus. The SEC had suspended Praxsyn trading on March 25, 2020.

May 14, 2020

SEC v. Applied BioSciences Corp. (S.D.N.Y. 20-cv-03729) for allegedly making false statements that the company had begun offering and shipping finger-prick COVID-19 tests to the general public.

May 14, 2020

SEC v. Turbo Global Partners, Inc. at al. (M.D.Fla. 20-cv-01120) for allegedly making false and misleading statements regarding a purported “multinational public-private-partnership” to sell thermal scanning equipment to detect individuals with fevers.

Jun 9, 2020

SEC v. Nelson Gomes et al. (D.Mass. 20-cv-11092) for allegedly conducting a fraudulent scheme that generated more than \$25 million from illegal sales of multiple microcap companies’ stocks, often boosted by false and misleading information designed to fraudulently capitalize on the COVID-19 pandemic.

Sep 25, 2020

SEC v. Mark Schena (N.D.Cal. 20-cv-06717) for allegedly making false and misleading statements about biotech company Arrayit’s delinquent financial reports and for making false and misleading statements that the company had a COVID-19 test ready to market before it had received FDA approval.

Dec 4, 2020

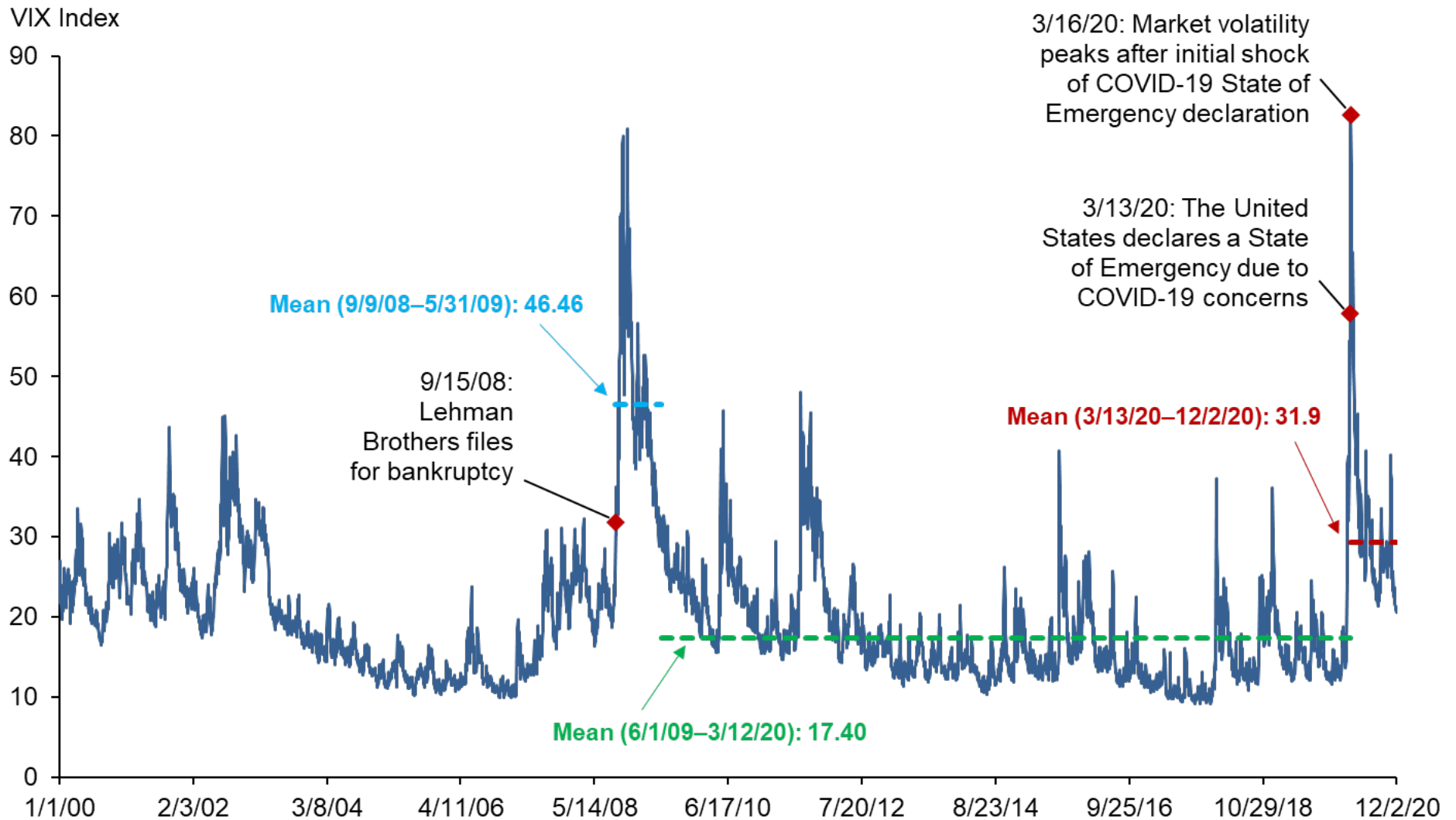
Cheesecake Factory, Inc. (settled enforcement action) – Company submitted filings to the SEC on 3/23/20 and 4/3/20 that claimed company operating “sustainably” but did not disclose: (i) liquidity issues due to COVID-19, which led to \$6 million cash loss per week, (ii) that it had only 16 weeks of cash remaining, and (iii) that it had informed its landlord that it would not pay April rent.

2

COVID-19 Market Uncertainty

The VIX Index Measures Expected Volatility

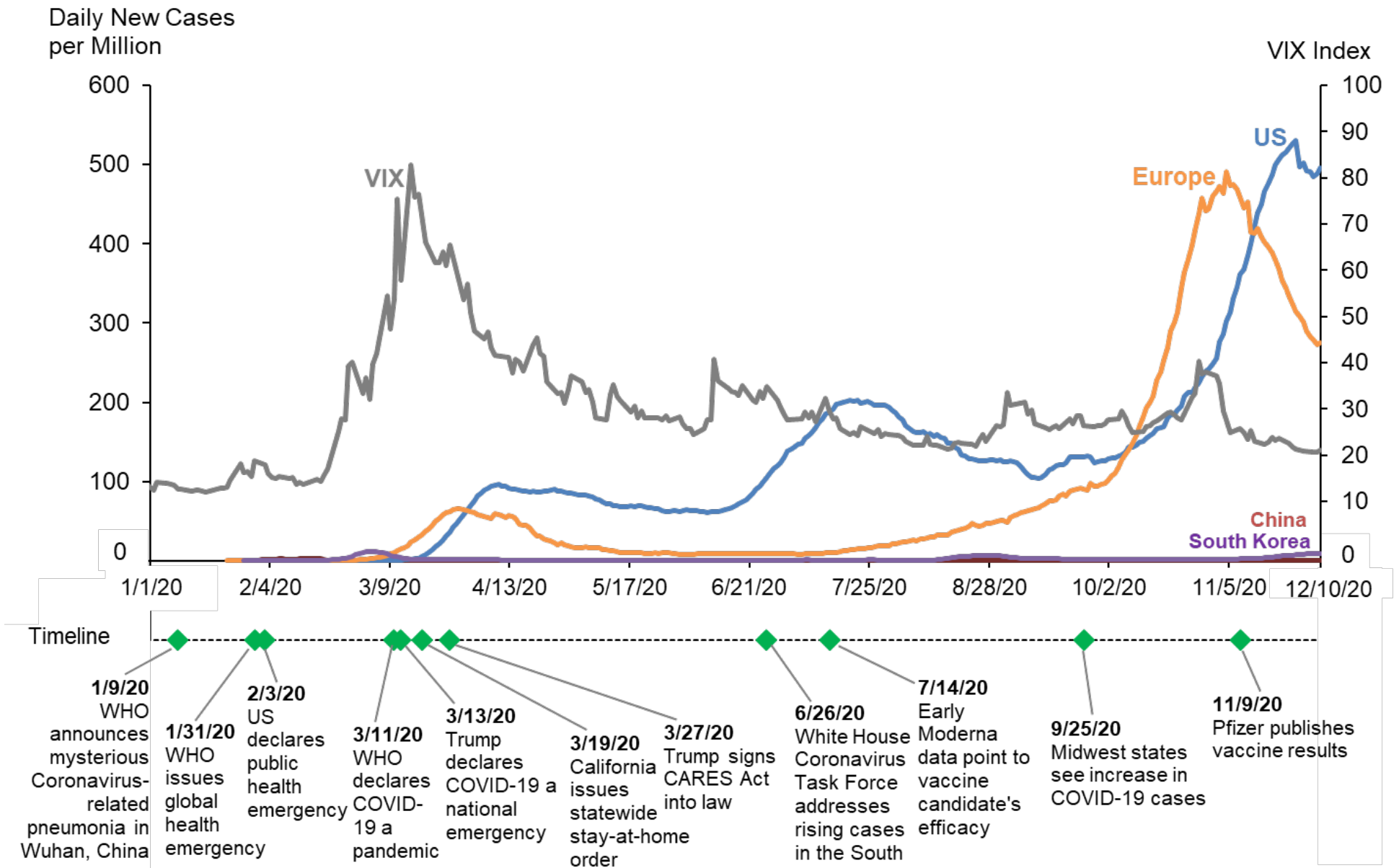
VIX Index: 1/1/00 – 12/2/20



Source: Thomson Reuters Eikon

Note: The "VIX Index" axis reflects the daily close prices of the CBOE Market Volatility Index.

Extreme Volatility Driven by Public Health Uncertainty

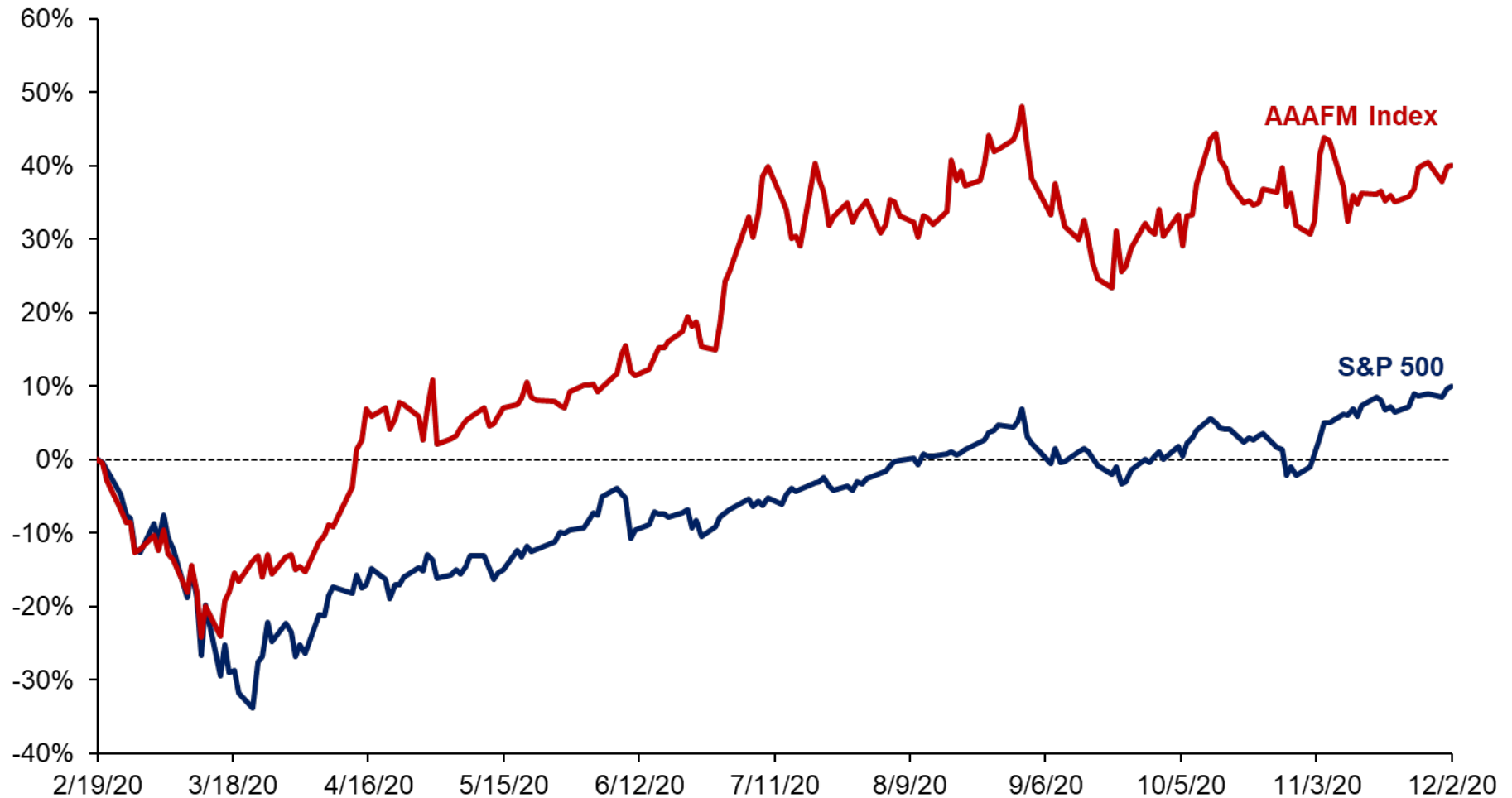


Source: Johns Hopkins University Center for Systems Science and Engineering; *The New York Times*; *The American Journal of Managed Care*

Industries Have Been Affected Differently

S&P 500 and Index of Alphabet, Amazon, Apple, Facebook, and Microsoft

2/19/20 – 5/8/20



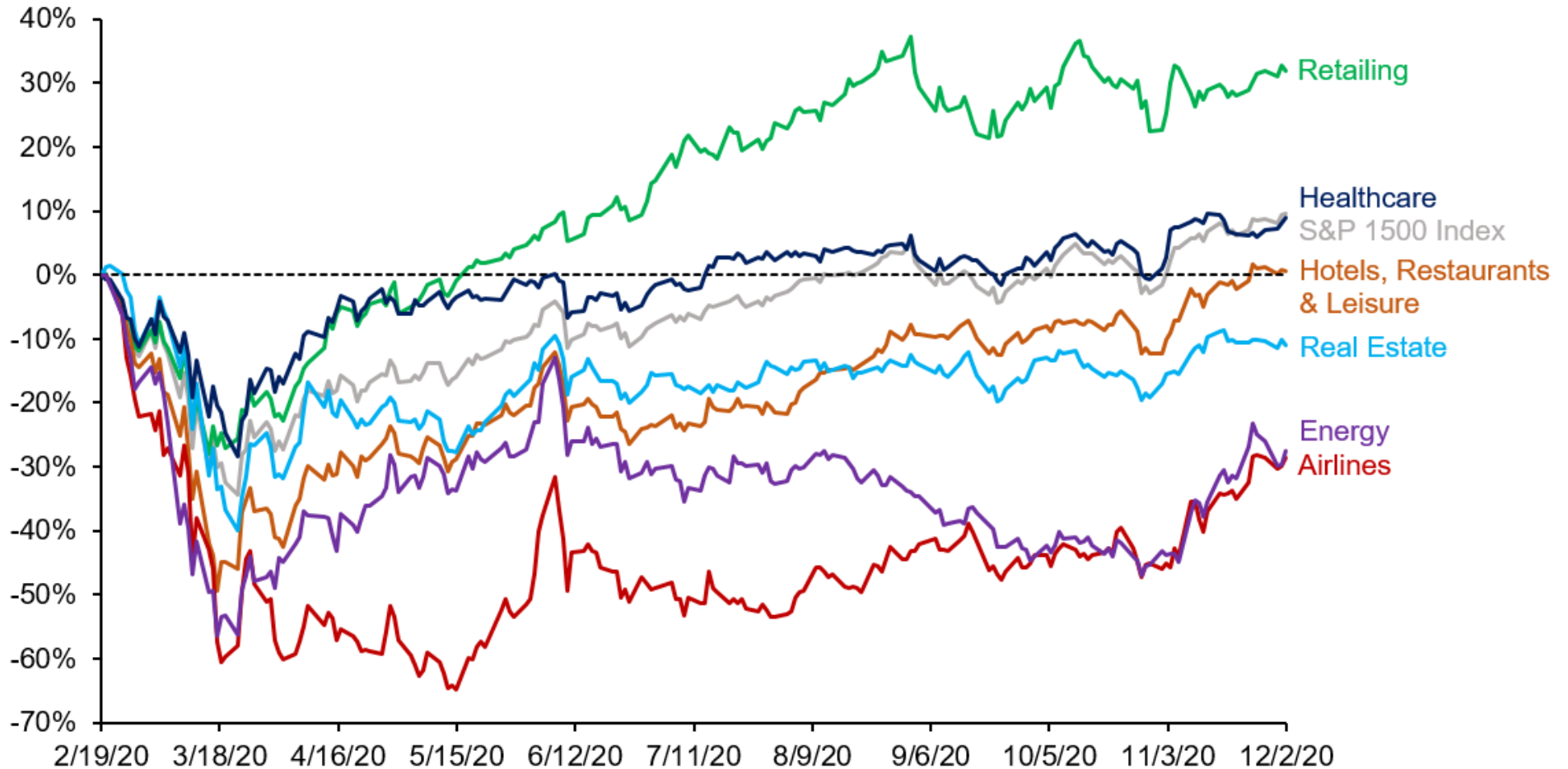
Source: Thomas Reuters Eikon

Note: The AAAFM Index is a market capitalization-weighted index of the stock price of Alphabet, Amazon, Apple, Facebook, and Microsoft. Both the AAAFM index and the S&P 500 are pegged to 0% on 2/19/20, the date on which the S&P 500 Index reached its maximum value prior to the U.S. declaring a national emergency concerning COVID-19 on 3/13/20.

Industries Have Been Affected Differently

S&P 1500 and Select Industry Indices

2/19/20 – 5/8/20



Source: Thomas Reuters Eikon

Note: All sector indices are pegged to 0% on 2/19/20, the date on which the S&P 1500 Index reached its maximum value prior to the U.S. declaring a national emergency concerning COVID-19 on 3/13/20.

3

Disclosure Issues

Recent Cases Have Alleged Failure to Adequately Disclose Impact of COVID-19

Arbitrage Fund v. Forescout Techs.,
No. 20-cv-03819 (N.D. Cal. June 10, 2020)

- Ø Purported class-action against Forescout Technologies, a computer and network security company, and its CEO and CFO, claiming violations of Sections 10(b) and 20(a) of the '34 Act, alleging that:
 - Ø When Forescout announced a merger with Advent International Corporation on February 6, 2020, it “knew that its business had begun to suffer a dramatic and undisclosed downturn, including in its fast-growing Asia Pacific and Japan (‘APJ’) region that was impacted by COVID-19 starting in January.”
 - Ø Forescout’s fourth quarter 2019 revenues were inflated through what a whistleblower later alleged to be the result of a “channel stuffing scheme” relating to one of its largest resale customers.
 - Ø While Forescout was experiencing, but not disclosing, dramatic downturn in Q1 revenues, other peer companies were reporting significant growth.
 - Ø Forescout therefore “knew that the consummation of the [Merger] was exceptionally risky at the time it announced the Merger Agreement.”

Recent Cases Have Alleged Failure to Adequately Disclose Impact of COVID-19

Ø Alleged misrepresentations and omissions:

- Ø February 6, 2020 announcements relating to the merger and positive earnings that did not “mention COVID-19” nor “the significant and disproportionate impact COVID-19 was having on its business.”
- Ø February 28, 2020 2019 Form 10-K’s risk factor disclosures that failed to disclose that the Company knew it was “experiencing a significant financial collapse, especially in the APJ region,” and therefore there was a heightened risk the transaction wouldn’t close.
- Ø March 24, 2020 proxy statement to approve merger that failed to disclose that COVID-19 was “severely and disproportionately impacting Forescout’s business.”
- Ø On May 15, 2020, Advent advised Forescout that it would not be consummating the merger because of the “materially disproportionate effect” that COVID-19 had on Forescout’s business “relative to companies of similar size operating in the industries in which [Forescout] conducts business.”
- Ø The stock plummeted over 23% in the days following this announcement.

Recent Cases Have Alleged Failure to Adequately Disclose Impact of COVID-19

Berg v. Velocity Financial, Inc.,
No. 20-cv-06780 (C.D. Cal. July 29, 2020)

- Ø Purported class-action against Velocity Financial, a real estate finance company, certain of its directors and officers, and its underwriters, claiming violations of Sections 11 and 15 of the '33 Act, alleging that:
 - Ø Defendants failed to disclose that non-performing loans held by Velocity had “nearly doubled year over year” by the time of its January 16, 2020 IPO.
 - Ø Defendants also “failed to provide any information to investors regarding the potential impact of the novel coronavirus on Velocity’s business and operations, despite the fact that the international spread of the virus had already been confirmed by the time of the IPO.”
 - Ø Purported demand for Velocity’s loans was temporary as borrowers took advantage of declining interest rates as COVID-19 continued to spread. And U.S. regions where Velocity originated most of its loans were “among the most vulnerable to-and ultimately the hardest hit-by the virus.”

Recent Cases Have Alleged Failure to Adequately Disclose Impact of COVID-19

Ø Alleged misrepresentations and omissions:

- Ø Offering materials were misleading because by January 16, 2020 “the coronavirus was already quickly spreading around the world and invading the United States, threatening to disrupt the locations where Velocity maintained offices and had historically originated most of its loans.”
- Ø “It was misleading for the Offering Materials to describe a robust market and strong demand for real estate investor loans” given the “fast-spreading coronavirus.”
- Ø Offering Materials failed to disclose “whether the coronavirus was adversely impacting the real estate market or the Company’s business, operations or financial condition.”
- Ø Plaintiffs allege the undisclosed facts and circumstances constituted “known trends, uncertainties and risks” requiring disclosure under **Item 303 of SEC Reg S-K**.
- Ø On March 31, Velocity announced that it would delay filing its 2019 annual report “due to the current economic environment,” including the impact of COVID-19. On April 8, Company announced it had suspended all loan originations.
- Ø By May 15, 2020, Velocity’s share price had declined over 80% below the IPO price.

Recent Cases Have Alleged Failure to Adequately Disclose Impact of COVID-19

City of Riviera Beach Gen. Employees Ret. Sys. v. Royal Caribbean Cruises Ltd.,
No. 20-cv-24111 (S.D. Fl. Oct. 7, 2020)

- Ø Purported class-action against Royal Caribbean Cruises and certain officers, claiming violations of Sections 10(b) and 20(a) of the '34 Act, alleging that:
 - Ø Defendants “made false and/or misleading statements and failed to disclose material adverse facts about the Company’s decrease in bookings outside China, and its inadequate policies and procedures to prevent the spread of COVID-19 on its ships.”
 - Ø February 4, 2020 earnings release and statements that Company was “very encouraged about the demand environment for 2020” and wasn't “seeing a big impact” of COVID-19 on bookings were misleading.
 - Ø Defendants misled about safety protocols they claimed would “massively minimize” risk.
 - Ø Feb. 13, 2020 press release and Feb. 25, 2020 Form 10-K began to report greater COVID-19-related impact on overall bookings.
 - Ø On March 13, 2020, Company announced 30 day suspension of U.S. cruises; on March 14, 2020, announced suspension of global operations for 30 days.
 - Ø By March 16, 2020 full impact of COVID-19 was revealed, causing analysts to downgrade the Company’s stock and slash their price targets.

Disclosure Considerations: Forward-Looking Statements

- Ø **The Private Securities Litigation Reform Act** (“PSLRA”) provides for a “safe harbor” from liability for certain forward-looking statements:
 - Ø Identified as forward-looking and accompanied by “meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement”; or
 - Ø They are “immaterial”; or
 - Ø Where plaintiff fails to prove that the statements were made with *actual knowledge* that they were false or misleading.
- Ø **The “bespeaks caution” doctrine** is a judicially created doctrine that protects issuers from securities fraud claims based on forward-looking statements if those statements contain adequate risk disclosures to caution readers about specific risks that may materially impact the forecasts.

Disclosure Considerations: Statements of Opinion

- Ø An **opinion statement** is actionable only if (1) “the speaker did not hold the belief she professed,” (2) “the supporting fact she supplied was untrue,” or (3) the speaker omits information whose omission makes the statement misleading to a reasonable investor. ***Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 575 U.S. 175, 186, 194 (2015).***
- Ø For liability, it is not enough to show a statement is objectively false. To allege an opinion is false, need to allege particular facts regarding the inquiry the issuer did or did not undertake or the knowledge it did or did not have and that the omission of those facts made issuer’s opinion misleading.
- Ø May be liable if a statement omits material facts about knowledge and would conflict with what reasonable investor would believe.

Disclosure Considerations: Item 303 of Regulation S-K

- Ø Item 303 requires a company to “describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.”
- Ø Disclosure “is necessary where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects” on financial condition or results.
- Ø Circuit courts are split as to whether Item 303’s duty to disclose can be a basis for a securities fraud claim under Section 10(b) of the Exchange Act.
- Ø The Second Circuit has held that such omissions can be actionable under Rule 10b-5.
See Indiana Public Retirement System v. SAIC, 818 F.3d 85 (2d Cir. 2016).
- Ø The Ninth Circuit has held that they are not.
See In re NVIDIA Securities Litigation, 768 F.3d 1046, 1054-56 (9th Cir. 2014).

Takeaways: Disclosures in the COVID-19 Environment

- **Forward-looking statements** are protected where risks are addressed explicitly and specifically.
- **Companies should update risk factors** to include discussions of:
 - Business operations impacted by COVID-19, including disruption of production, supply chain or distribution systems, closure of stores or places of business;
 - Decreased demand for products or services, loss of contracts, impact on human resources;
 - Other potential impacts of COVID-19, including increased expenses.
- **Opinion statements** are not actionable if expression of sincerely held belief and any material underlying conflicting facts are disclosed.
- **Companies should enhance MD&A discussions** of “known trends or uncertainties” and their impact on financial performance, liquidity, and capital resources.
 - To the extent that KPIs are used to track the impact of COVID-19, provide explanations for why these metrics are helpful.

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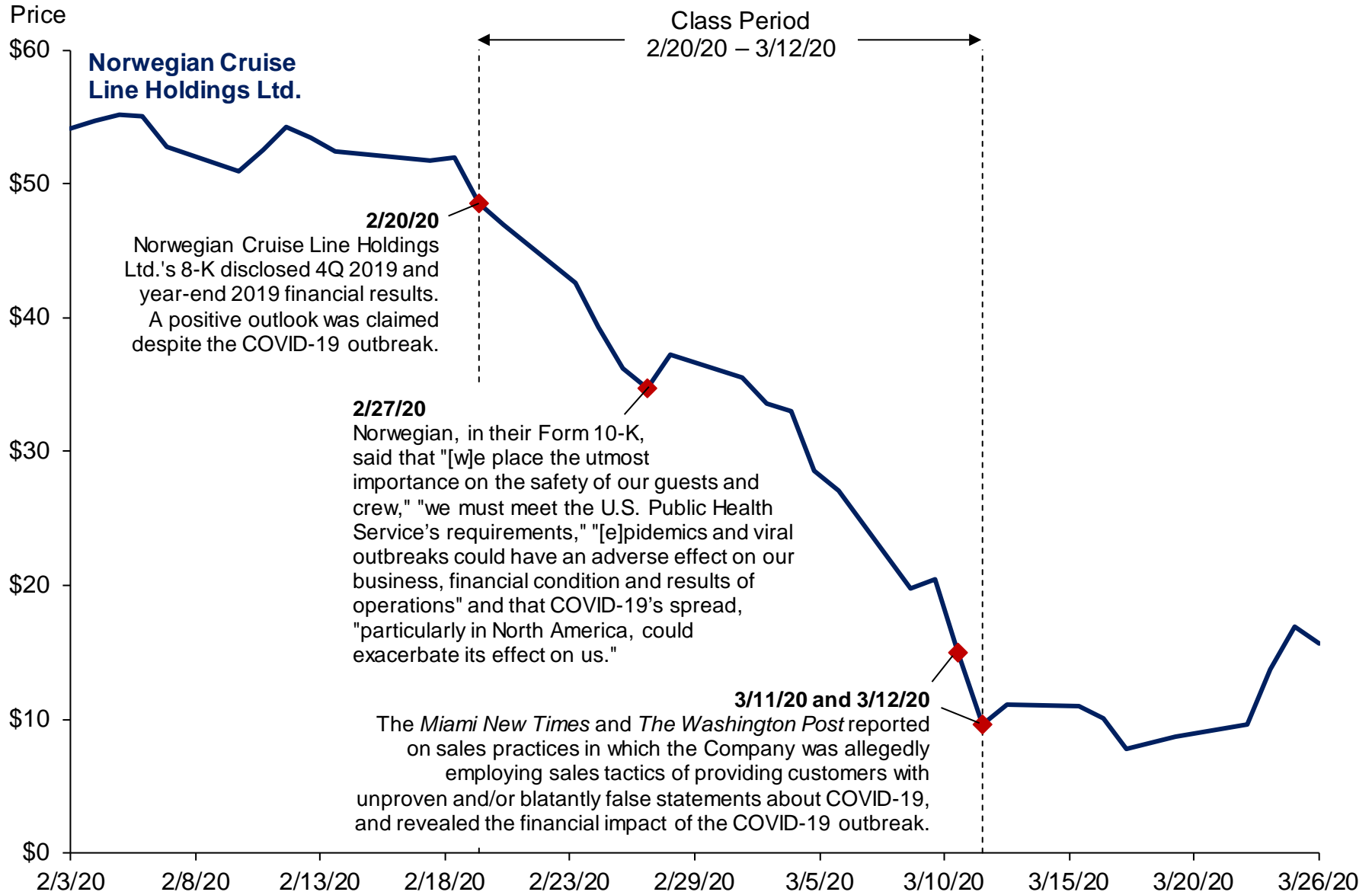
Issues in Potential Economic Analysis for Loss Causation and Damages

Key Economics Questions in Loss Causation and Damages Analysis

- Is there a statistically significant price decline?
 - How to properly control for market/industry factors and changing volatility?
- What was “corrective” in the alleged corrective disclosure?
 - Any collateral effects induced by heightened uncertainty?
 - Were stock price declines caused by materialization of disclosed risk?
- Can one “back-cast” stock price declines in estimating price inflation and damages?
 - Rapidly evolving situation means corrective disclosure may not match “but-for” disclosure.

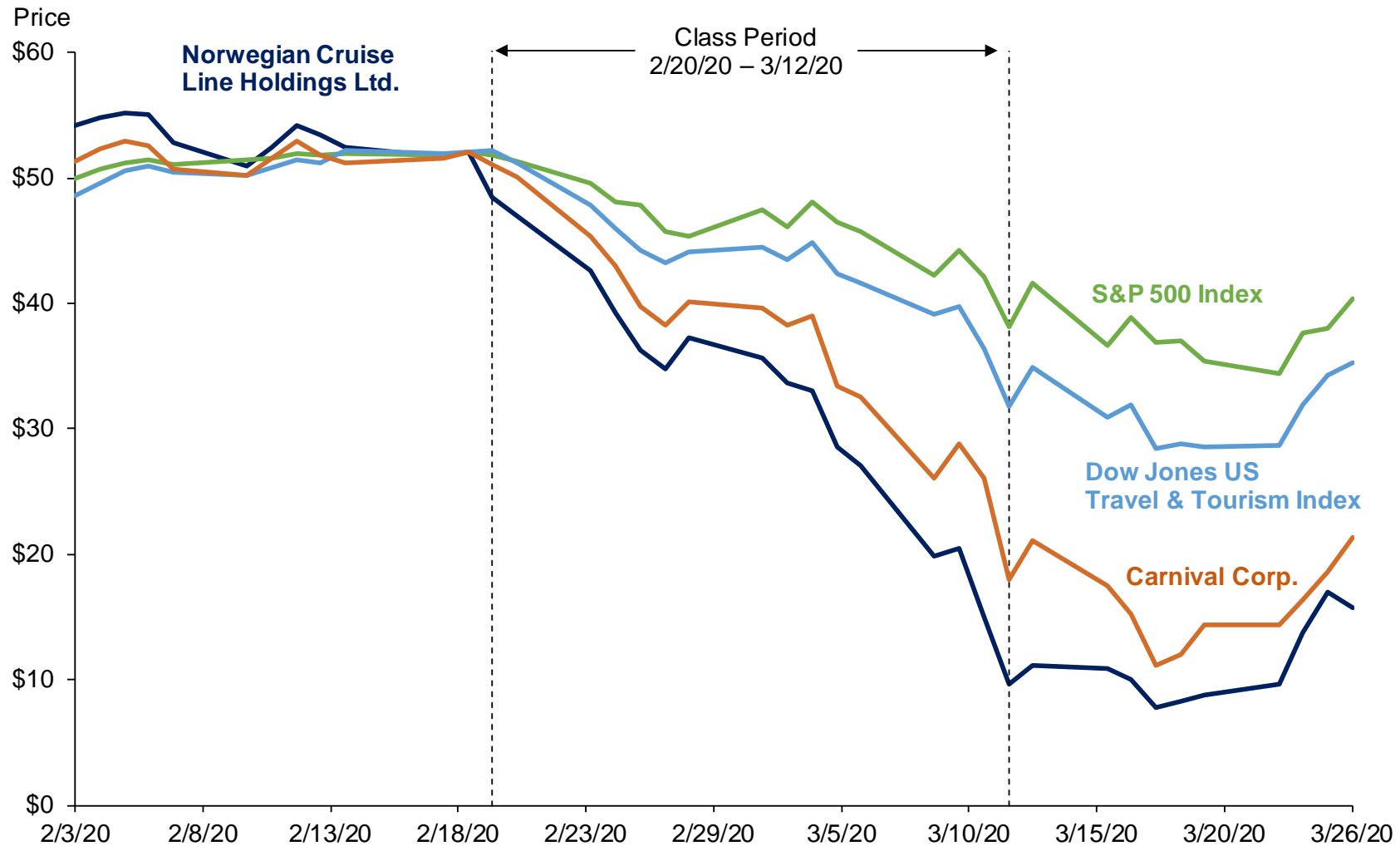
Was Price Decline Statistically Significant?

Norwegian Cruise Line Holdings Ltd. Closing Stock Price 2/3/20 – 3/26/20



Source: Thomson Reuters Eikon; Complaint dated 3/12/20

Norwegian Cruise Line Holdings Ltd. Closing Stock Price vs. Selected Indices 2/3/20 – 3/26/20

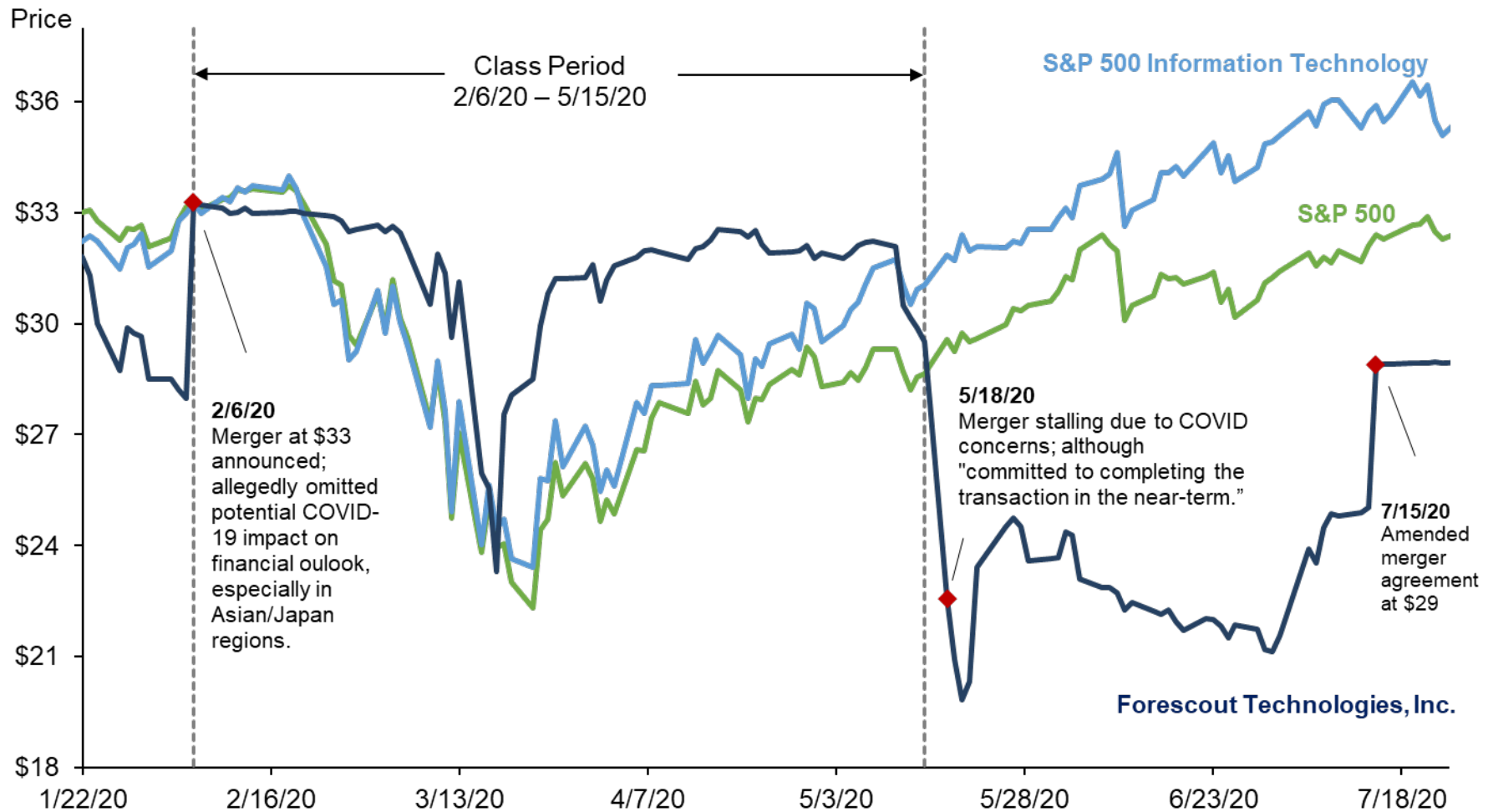


Source: Thomson Reuters Eikon; Complaint dated 3/12/20

Note: Indices and Carnival Corp. are pegged to Norwegian Cruise Line Holdings Ltd. closing stock price of \$52.02 on 2/19/20, the trading day before the Class Period begins.

Price Decline Due to Uncertainty and Unforeseeable Factors? Forescout Technologies, Inc.

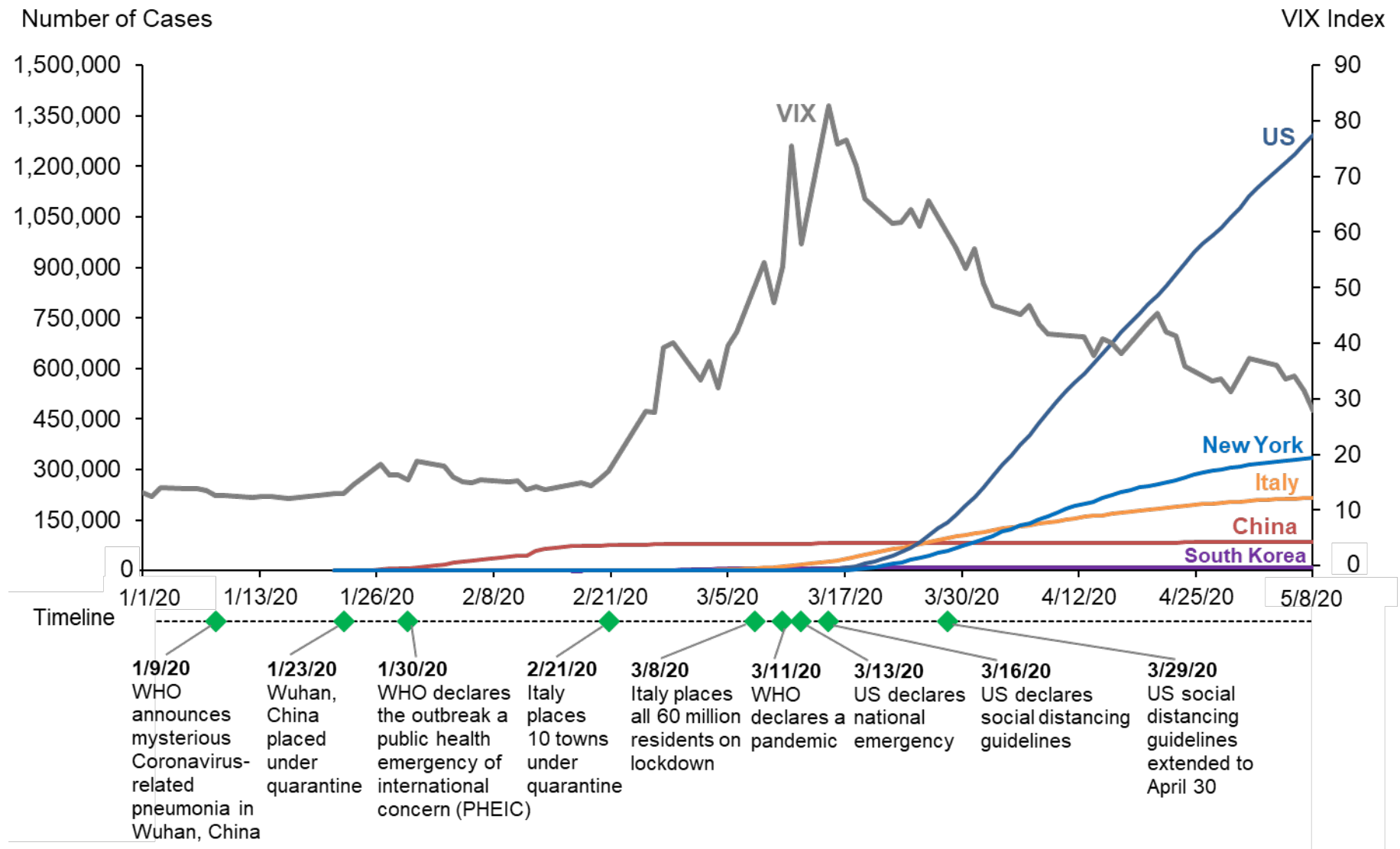
Closing Stock Price and Key Events 12/3/19 – 8/14/20



Source: Thomson Reuters Eikon; Complaint dated 6/10/20; Business Wire

Note: The industry and market indices are pegged to Forescout Technologies, Inc.'s closing stock price of \$33.28 on 2/6/20, the trading day on which the Class Period begins.

Extreme Level of Uncertainty at Early Period of Pandemic Crisis



Source: Johns Hopkins University Center for Systems Science and Engineering; *The New York Times*; *Business Insider*; *Yahoo News*

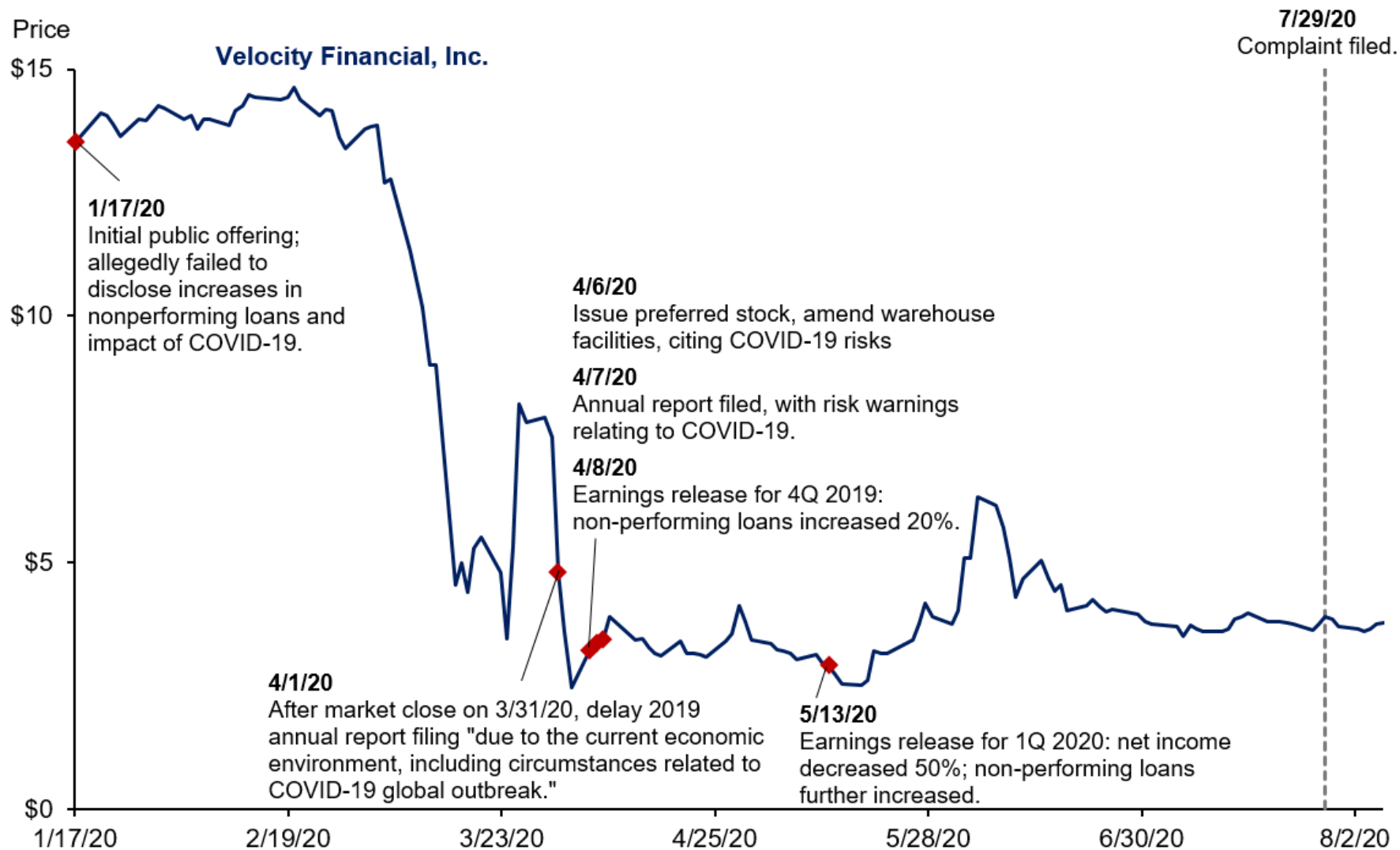
Price Decline Due to Uncertainty and Unforeseeable Factors? Fore Scout Technologies, Inc. (Cont'd)

- Does the price drop on 5/18/20 reflect the correction of the allegations or mostly the uncertainty of the merger, a risk factor that was disclosed?
 - Forescout's price rebounded to \$29 after the amended merger agreement was announced
 - “Consummation of the Merger is subject to several conditions beyond our control that may prevent, delay, or otherwise adversely affect its completion...” (2019 10-K, 2/28/20)
- Does the price drop also reflect the unforeseeable impact of COVID-19?
 - Impact was difficult to predict even in May: “We are unable to predict the extent to which the pandemic and related impacts will continue to adversely affect our business operations, financial performance, results of operations, and financial position.” (Q1 2020 10-Q, 5/11/20)

How to Analyze Negative Causation?

Velocity Financial, Inc.

Closing Stock Price and Key Events: 1/17/20 – 9/8/20

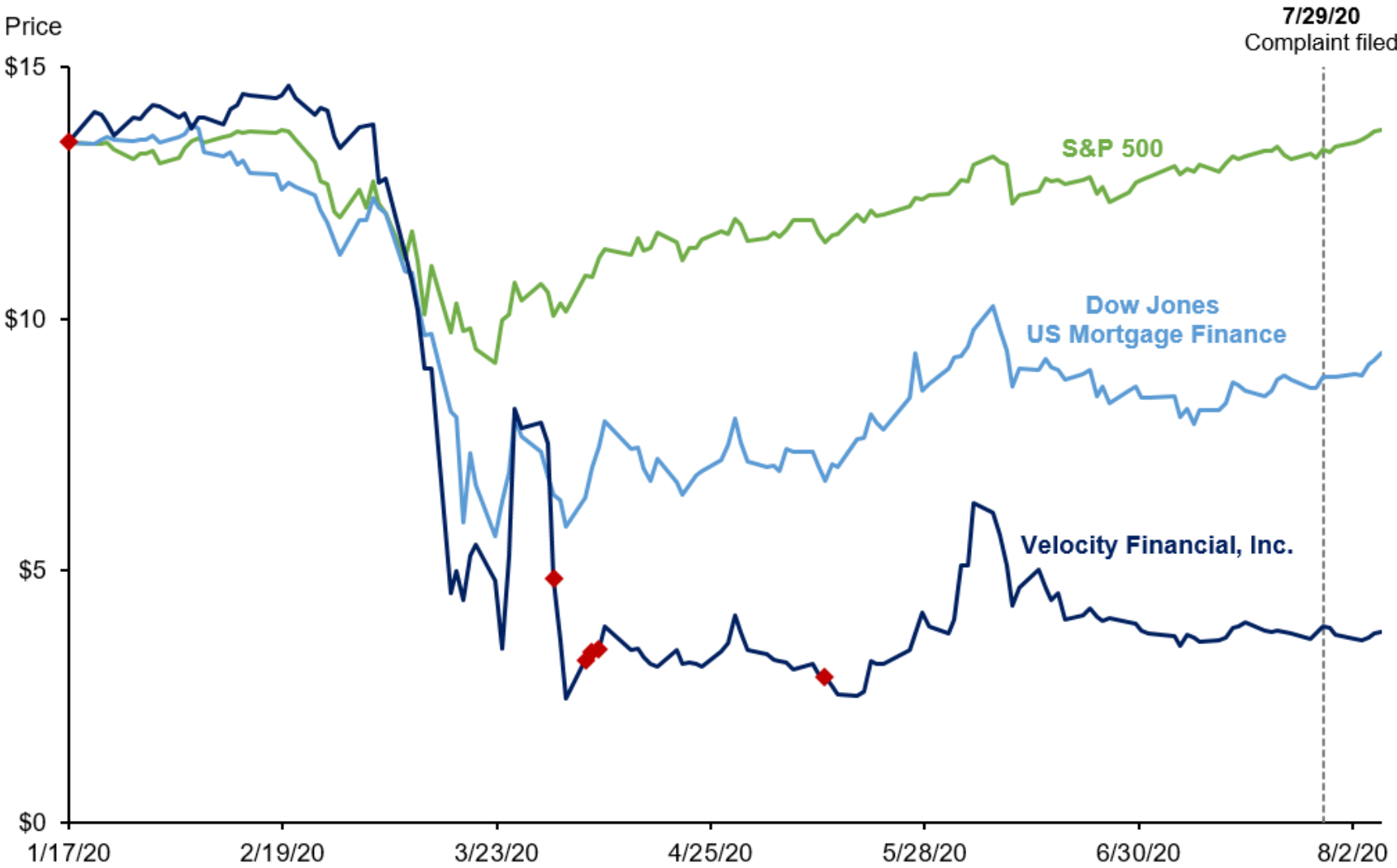


Source: Thomson Reuters Eikon; Complaint dated 7/29/20

Note: The industry and market indexes are pegged to Velocity Financial, Inc.'s closing stock price of \$13.51 on 1/17/20, the date of Velocity's initial public offering.

Velocity Financial, Inc.

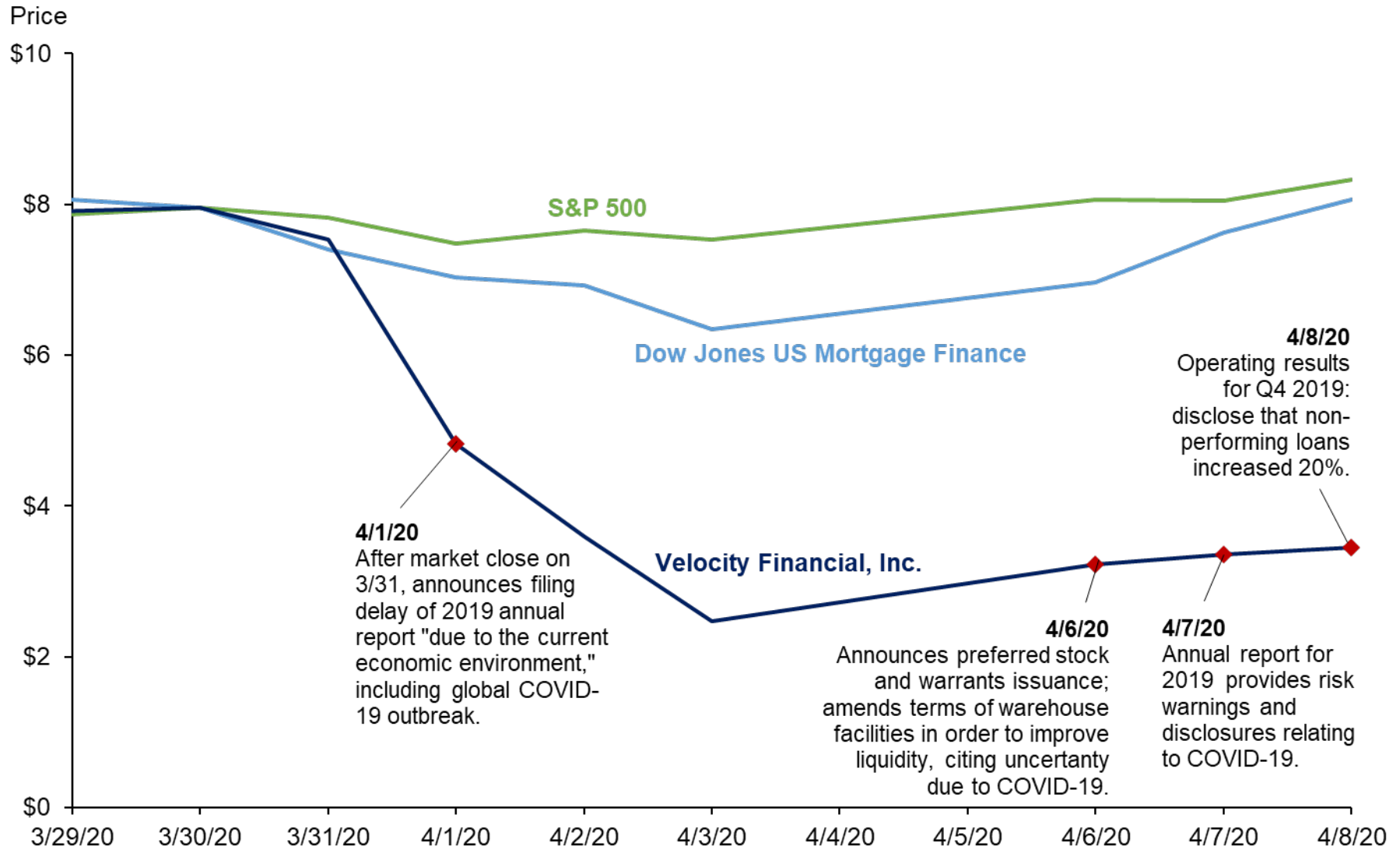
Closing Stock Price vs. Selected Indices: 1/17/20 – 9/8/20



Source: Thomson Reuters Eikon; Complaint dated 7/29/20
Note: The industry and market indexes are pegged to Velocity Financial, Inc.'s closing stock price of \$13.51 on 1/17/20, the date of Velocity's initial public offering.

Velocity Financial, Inc.

Closing Stock Price vs. Selected Indices: 3/29/20 – 4/8/20



Source: Thomson Reuters Eikon; Complaint dated 7/29/20

Note: The industry and market indexes are pegged to Velocity Financial, Inc.'s closing stock price of \$7.95 on 3/30/20.

How to Analyze Negative Causation?

Velocity Financial, Inc. (Cont'd)

- Could a portion of the price drop after IPO be attributed to the unforeseeable market and industry factors?
 - How to properly control for these factors?
 - High percentage of the Company's loans are located in NY, CA, NJ, Florida, where the pandemic impact was severe
- Was the price drop following 3/31/20 caused by correction of the alleged omission versus other factors?
 - The only disclosure made after market close on 3/31/20 was that the company needed time to complete its filing due to “the current economic environment, including circumstances related to the novel coronavirus (COVID-19) global outbreak.”
- Has the allegedly omitted risk been fully disclosed by 4/8/20, so that further price drops beyond that date (e.g., on 5/13/20) cannot be attributed to the allegations?
 - The company disclosed various risk factors related to the pandemic in its 2019 10-K, such as recessionary economic trends, public spending, government support for mortgage loans markets, interest rate environment, long-term shifts toward telecommuting, and geographic severity of the pandemic.

5

Fiduciary Duties and Best Practices

Directors' Fiduciary Duties of Care and Loyalty

Corporate directors generally owe certain fiduciary duties to the corporation, including the duty of loyalty and the duty of care.

Ø Duty of Care

- Directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available
- Directors must act with requisite care in discharge of duties

Ø Duty of Loyalty

- The best interests of the company and shareholders takes precedence over any interest of a director
- Breach of a duty of loyalty can relate to “self dealing,” insider trading or usurping a corporate opportunity for personal benefit.

Oversight Liability

- Under Delaware law, where most companies are incorporated, “a director must make a good faith effort to oversee the company’s operations. Failing to make that good faith effort breaches the duty of loyalty and can expose a director to liability.” *Marchand v. Barnhill*, 212 A.3d 805, 820 (Del. 2019) (citing *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996)).
- Such claims for oversight liability generally encompass two different types:
 - directors utterly failed to implement any reporting or information system or controls; *or*
 - having implemented such a system or controls, directors consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. *See Stone ex rel. AmSouth Bancorp. v. Ritter*, 911 A.2d 362, 370 (Del. 2006).
- To mitigate the risk of oversight liability directors should confirm that information reporting or control systems are in place in the first instance and act in good faith when responding to “red flags.”

Recent Derivative Actions

Fettig v. Kim (Inovio Pharmaceuticals),
No. 2:20-cv-03316 (E.D. Pa. July 7, 2020)

- Ø Derivative action against certain directors and officers of Inovio Pharmaceuticals claiming breach of fiduciary duty and other claims, alleging that:
 - Ø Defendants breached their fiduciary duties by making and causing the Company to make misrepresentations in February and March 2020 “that Inovio developed a COVID-19 vaccine in three hours” and “may be ready to begin human clinical trials in the United States in April 2020.”
 - Ø At the time, Inovio had not developed a working vaccine, but only an early stage prototype.
 - Ø Defendants also failed to “exercise reasonable and prudent supervision over the management, policies, practices and controls of the financial affairs of the Company.”
 - Ø On March 9, 2020, Citron Research posted on Twitter that Inovio’s claims were false and urged the SEC to investigate.
 - Ø Although Inovio denied Citron’s allegations, it clarified that the purported vaccine was not actually a “vaccine,” but a “vaccine construct.” As a result, Inovio’s stock price plummeted.

Recent Derivative Actions

Wong v. Eberly (Chembio),

No. 1:20-cv-04269 (E.D.N.Y. Sept. 11, 2020)

- Ø Derivative action against directors and officers of Chembio claiming breach of fiduciary duty, among other claims, alleging that:
 - Ø Defendants made or caused the Company to make misleading statements and omissions about Chembio’s rapid COVID-19 antibody tests, including that they “were 100% accurate 11 days following the onset of symptoms.”
 - Ø After FDA expressed concerns, May 2020 prospectus supplements for a secondary public offering repeated claims about tests’ accuracy and further “flaunted the Company’s overall prospects, representing that the Company acquired, among other regulatory approvals, an EUA [Emergency Use Authorization] from the FDA for its rapid COVID-19 antibody test.”
 - Ø Directors also breached their fiduciary duties by “fail[ing] to maintain an adequate system of oversight, disclosure controls and procedures, and internal controls.”
 - Ø On June 16, 2020, the FDA wrote the Company a letter stating that its “COVID-19 antibody test was far less effective than the Individual Defendants purported” and revoked Chembio’s EUA for its tests, effectively barring their distribution. After the announcement, the stock price plummeted by over 60%.

Recent Derivative Actions

Jaquith v. Latour (Vaxart), No. 2020-0904 (Del. Ch. Oct. 23, 2020)

- Ø Derivative action against Vaxart’s directors and controlling stockholder, Armistice Capital LLC. Plaintiffs claim breaches of fiduciary duties and unjust enrichment, alleging that:
 - Ø Directors breached their fiduciary duties by approving warrant amendments allowing Armistice to trade on material, non-public information relating to Vaxart’s participation in Operation Warp Speed (“OWS”), and increasing the value of their own Company equity and stock options.
 - Ø Armistice, Vaxart’s controlling stockholder, sold 70% of its stock between April 28, 2020 and June 1, 2020. On June 3, 2020, a *Bloomberg* article disclosed that the White House was working with seven pharmaceutical companies on OWS—but did not name Vaxart. Armistice stopped selling its shares that same day.
 - Ø Armistice and the Board agreed to amend warrant agreements to permit Armistice to acquire up to 19.99% of Vaxart’s total shares at deflated prices and then sell them in the market immediately. Three weeks after the amendments, on June 26, Vaxart publicly disclosed that it was selected to be part of OWS. Shortly after Vaxart’s stock price skyrocketed, Armistice exercised its warrants and sold its shares for nearly \$200M profit.
 - Ø Directors also awarded themselves spring-loaded stock options under plan approved by uninformed stockholder vote before OWS selection announced.

Fiduciary Duties: Best Practices

- Directors should ensure proper internal controls are in place, including robust oversight of corporate disclosures. Companies should maintain complete and accurate board minutes to carefully document directors' consideration of, and response to, the impact of COVID-19 on their business.
- Additional steps that directors and officers may consider taking include:
 - Forming a COVID-19 pandemic board subcommittee to address urgent issues, and ensure the audit committee and disclosure committees coordinate with the auditors, investor relations/communications teams and risk management teams, so as to provide the most accurate reporting and effective disclosures;
 - Ensuring that information and reporting systems remain adequate by preparing written materials prior to any board meeting and requiring management to deliver updates about the business to the board on a continuous basis; and
 - Implementing business continuity contingency plans that address the reduced access to company premises, prepare for the event senior management becomes ill or incapacitated, and enhance cybersecurity protection for the increase in remote-access.

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Professional Profiles

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Jennifer L. Conn is a litigation partner in the New York office of Gibson, Dunn & Crutcher. She is a member of Gibson Dunn's Litigation, Securities Litigation, Securities Enforcement, Appellate, and Privacy, Cybersecurity and Consumer Protection Practice Groups.

Ms. Conn is a commercial litigator, who has extensive experience in a wide range of complex commercial litigation matters, including those involving securities, financial services, accounting, business restructuring and reorganization, antitrust, contracts, and information technology. Prior to joining Gibson Dunn, Ms. Conn was an associate with Cravath, Swaine & Moore in New York. She also was a law clerk for the Honorable Lawrence M. McKenna, United States District Judge for the Southern District of New York.

Ms. Conn received her Juris Doctor from Columbia University School of Law in 1995, where she was a Harlan Fiske Stone Scholar. She graduated, *cum laude* with distinction in all subjects, from Cornell University, College of Arts and Sciences, in 1992, with a Bachelor of Arts in Government.

Ms. Conn regularly writes and speaks on various subjects, particularly those relating to securities litigation. She is the co-editor and a co-author of the Firm's Practising Law Institute Treatise, *Securities Litigation: A Practitioner's Guide*.

In addition, Ms. Conn is an Adjunct Professor of Law at Columbia University School of Law, lecturing on securities litigation.

Ms. Conn is admitted to practice in the State of New York, the District of Columbia (inactive status), the United States District Courts for the Southern and Eastern Districts of New York and the Eastern District of Wisconsin, the United States Courts of Appeal for the Second and Eighth Circuits, and the United States Supreme Court.

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Avi Weitzman is a litigation partner in the New York office of Gibson, Dunn & Crutcher. He is a member of the White Collar Defense and Investigations, Crisis Management, Securities Enforcement and Litigation, and Media, Entertainment and Technology Practice Groups. Mr. Weitzman is a nationally recognized trial and appellate attorney, with experience handling complex commercial disputes in diverse areas of law, white-collar and regulatory enforcement defense, internal investigations, and securities litigations.

In the last few years at Gibson Dunn, Mr. Weitzman has had leading roles in several of the Firm's most high-profile matters, including representing Chevron Corporation in a ground-breaking two-month federal RICO trial barring the enforcement of a \$9 billion Ecuadorian judgment against Chevron that *The American Lawyer* called "The Case of the Century"; representing the Office of the Governor of New Jersey in connection with the George Washington Bridge toll lane realignment; representing VOOM HD Holdings in its multi-billion dollar trial against DISH Network, which resulted in a mid-trial settlement valued at well over \$1 billion; representing Rio Tinto in an SEC enforcement action and related securities class action related to a \$3.5 billion impairment of coal assets in Mozambique.

Before joining Gibson Dunn, from 2005 to 2012, Mr. Weitzman served as an Assistant United States Attorney in the Southern District of New York, where he tried twelve federal criminal jury trials to verdict. As a member of the Securities and Commodities Fraud Task Force, Mr. Weitzman investigated and prosecuted a wide range of federal securities fraud offenses, and coordinated parallel civil proceedings with the Securities and Exchange Commission. Mr. Weitzman played a leading role in many of the government's highest-profile insider trading cases, including the Raj Rajaratnam insider trading case, serving as lead counsel in the first "expert network" insider trading trial (*United States v. Winifred Jiau*), and leading the Government's investigation of SAC Capital and portfolio manager Mat Martoma, which resulted in the largest single-trade insider trading scheme ever charged.

Mr. Weitzman has received national recognition and awards for his achievements and litigation skills. In 2012, Mr. Weitzman received the Attorney General's Distinguished Service Award from Attorney General Eric Holder for his work on the Raj Rajaratnam insider trading case. He has been named a "Rising Star" by the *New York Law Journal* and by *Law360* in the White Collar category. In addition, Mr. Weitzman is recognized by *The Best Lawyers in America*® as a leading lawyer in the area of Criminal Defense: White-Collar.

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Lori Benson is the head of Cornerstone Research's New York office. Over the course of her more than twenty years with the firm, she has prepared strategy and expert testimony in all aspects of litigation, including trials, arbitrations, settlements, and regulatory inquiries. She has worked on a broad range of cases in financial economics including securities, valuation, bankruptcy, and asset management.

Ms. Benson has extensive experience in fixed income, structured finance and derivatives litigation. She has worked on cases involving municipal bonds, asset-backed securities, residential mortgage-backed securities, repurchase agreements, treasuries and corporate debt. She has valued portfolios of derivatives, commodities, foreign exchange, swaps and collateralized debt obligations (CDO). She has assessed trading strategies, risk management, disclosure issues, ISDA contracts and market conditions. Ms. Benson has also analyzed the appropriateness of margin calls along with securities lending and financing arrangements. She has analyzed various financial markets for collusion and market manipulation claims including financial benchmarks and OTC markets.

Ms. Benson has 20-plus years of experience in securities cases and has analyzed the impact of news on stock price, valuation, liquidity, volatility, and trading behavior. Ms. Benson has addressed, class actions, opt-out case, ADRs, Insider Trading claims and market manipulation claims.

Ms. Benson has performed valuations of companies and assets in a wide range of industries. She has applied her valuation expertise in the context of mergers and acquisitions, contract disputes, and trademark infringement. She has valued intangibles such as brands, licensing rights, and trademarks.

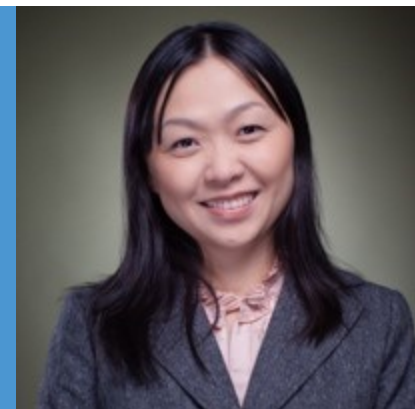
One industry focus of Ms. Benson is financial institutions. She has worked on cases involving banks, hedge funds, insurers, broker-dealers, mutual funds, and asset management firms. Ms. Benson has evaluated: antitrust claims, NAV, suitability of investments, risk management, disclosure requirements, portfolio performance, trading algorithms and lending practices.

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Yan Cao is a Vice President at Cornerstone Research's New York office. Dr. Cao specializes in issues related to financial economics and financial reporting across a range of complex litigation and regulatory proceedings. Her experience covers securities, market manipulation, M&A, and bankruptcy matters. Dr. Cao's case experience spans a wide range of industries, with a focus on financial institutions. She has led large teams and worked with multiple experts in all stages of the litigation process. Dr. Cao's work includes substantial trial experience. Dr. Cao is a Chartered Financial Analyst (CFA) and a Certified Public Accountant (CPA).

Dr. Cao had fifteen years of experience consulting on securities class actions that cover a wide variety of industries. Dr. Cao has experiences analyzing issues related to market efficiency, price formation, price impact, loss causation, and damages. She worked on notable securities class action cases such as *In re Moody's Securities Litigation*, in which the court denied class certification and granted summary judgment for defendants; and *IBEW Local 90 Pension Fund v. Deutsche Bank AG et al.*, in which the court denied class certification.

She also focuses on regulatory investigation and enforcement matters led by the SEC, the CFTC, the DOJ, the NY Fed, and state AGs. She has presented analysis before the regulatory enforcement staff on behalf of clients. She has extensive experience analyzing alleged market manipulation and disruptive trading violations such as spoofing, wash trades, barrier options, front running, benchmark manipulation claims in various financial markets (fixed income, FX, equity, commodity futures, structured products, and derivatives) for broker-dealer and individual clients. She has also assisted counsel on issues related to valuation, financial reporting, internal control, and disclosures in the context of internal and regulatory inquiries, including cross-border and multi-jurisdiction investigations.

In a number of restructuring and bankruptcy-related proceedings, Dr. Cao has consulted on matters involving solvency, business forecasts, contract disputes, risk management, credit rating and credit risk. She has also analyzed a range of issues such as corporate governance, deal process, valuation, and damages on matters related to corporate transactions such as M&A, hedge fund activism, and going-private transactions.