

**VII. *Comparing Unprofitable Companies to SPAC Investments Following AMG Capital Management, LLC v. Federal Trade Commission***

**A. Introduction**

On April 22, 2021, the Supreme Court ruled on *AMG Capital Management, LLC v. FTC (AMG v. FTC)*.<sup>1</sup> In this ruling, the Court left a crushing blow to the FTC's proverbial muscles, prohibiting the agency's ability to obtain equitable monetary relief in federal court.<sup>2</sup>

The effects of this decision will be felt throughout the corporate world, but maybe no more influential than in the headquarters of currently unprofitable companies. The MoviePass debacle warned of the dangers investing in companies who have yet to turn a profit.<sup>3</sup> Many of today's most popular brands have found themselves in similar situations, having spent years building their brand without becoming profitable. The *AMG v. FTC* ruling, while not all inclusive, lifts a huge burden off the shoulders of these companies.<sup>4</sup>

Contrary to unprofitable companies, SPAC investments provide an alternative way to get in the higher risk, potentially high reward game. SPACs can similarly target exciting new companies with the goal of bringing them public and eventually turning that initial investment into a profit.

This article will first examine the *AMG v. FTC* ruling, looking at the case's immediate impact as well as potential fallout from the decision. Specifically dissecting the new enforcement powers, or lack thereof, of the FTC. This analysis is followed by a case study into MoviePass. Following along with the company's stratospheric rise and subsequent fall, this article will look at the risks of running such a volatile company along with potential ramifications following the court's ruling in *AMG v. FTC*. Following MoviePass, this article will

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<sup>1</sup> *AMG Cap. Mgmt. v. FTC*, 141 U.S. 1341, 1341 (2021). (“Holding: The Supreme Court, Justice Breyer, held that the section of the FTC Act ...”).

<sup>2</sup> *Id.* (“[D]oes not authorize the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement ...”).

<sup>3</sup> See Eriq Gardner, *MoviePass Shareholders Were Told of Risks of Failure*, HOLLYWOOD REP. (Feb. 26, 2019), <https://www.hollywoodreporter.com/business/business-news/moviepass-says-shareholders-were-told-risks-failure-1190752/> (“[T]here was no reasonable basis to even imply that the MoviePass business model could lead to profitability.”).

<sup>4</sup> See *AMG v. FTC*, *supra* note 1 at 1341.

examine SPACs, a relatively new yet extremely powerful player in the current investment market. SPACs have a lot of potential but carry with them a significant number of risks as well.<sup>5</sup> Which leads to the final section, and analysis comparing risks and rewards of SPAC investments against the potential risks and rewards of focusing on investing in unprofitable companies.

### **B. *AMG v. FTC* Analysis and Fallout**

§ 13(b) of the Federal Trade Commission Act allows the FTC to issue a permanent injunction if the FTC “has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission.”<sup>6</sup> Based on this wording, the FTC spent over four decades bringing wrongdoers to federal courts and seeking, and receiving, monetary relief.<sup>7</sup> Without diving headfirst into a *Chevron* debate of administrative law, it is fair to say that the FTC believed they had this power for decades and nobody challenged them on it.<sup>8</sup> The FTC relied on § 13(b) in obtaining monetary relief for those who were harmed in any number of ways.<sup>9</sup>

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<sup>5</sup> See generally Stephen Guilfoyle, *The Biggest Risks of Investing in SPACs*, THE STREET (Mar. 25, 2021), <https://www.thestreet.com/investing/biggest-risks-of-investing-in-spacs> (highlighting some of the key risks around SPACs and how they are far from a no risk investment).

<sup>6</sup> Federal Trade Commission Act, 15 U.S.C. §53(b) (1914) (“Whenever the Commission has reason to believe that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission ...”).

<sup>7</sup> Anna B. Naydonov, *SCOTUS: FTC Has No Authority to Obtain Monetary Relief Under Section 13(b) of the FTC Act*, NAT’L L. REV. (May 14, 2021), <https://www.natlawreview.com/article/scotus-ftc-has-no-authority-to-obtain-monetary-relief-under-section-13b-ftc-act> [https://perma.cc/BU5J-Z9N5] (“For over four decades the Commission has relied on this Section to bring consumer protection and antitrust actions before federal courts seeking injunctions and monetary relief, such as restitution and disgorgement ...”).

<sup>8</sup> Statement by Fed. Trade. Comm’n. Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in *AMG Capital Management LLC v. FTC*, FTC (April 22, 2021), <https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us> [https://perma.cc/Z4FW-EHXQ].

<sup>9</sup> *Id.* (“Over the past four decades, the Commission has relied on Section 13(b) of the Federal Trade Commission Act to secure billions of dollars in relief for consumers in a wide variety of cases ...”).

In *AMG v. FTC*, the FTC alleged that Scott Tucker, the founder of AMG, violated the FTC Act for issues such as payday loans.<sup>10</sup> The FTC sought a permanent injunction and restitution and disgorgement for deceptive, short-term payday lending practices.<sup>11</sup> The District Court, relying on § 13(b), approved a \$1.27 billion payment from Tucker.<sup>12</sup> On appeal, the Ninth Circuit affirmed this ruling, of which the Supreme Court has now unanimously reversed.<sup>13</sup> In an opinion written by Justice Breyer, the court held that § 13(b) should be construed narrowly, addressing current harm through injunctive relief only.<sup>14</sup> “Taken as a whole, the provision focuses upon relief that is prospective, not retrospective,” wrote Justice Breyer.<sup>15</sup>

Acting Chairwoman of the FTC, Rebecca Kelly Slaughter, made clear of her stance vehemently against this ruling.<sup>16</sup> She stated, “With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most.”<sup>17</sup> Slaughter goes on to call on Congress to rectify this ruling, citing a need to protect consumers who will be hurt by this decision in the future.<sup>18</sup>

### I. *MoviePass*

MoviePass, created in 2011, rose to prominence in 2017 after it was purchased by Helios and Matheson Analytics (Helios).<sup>19</sup> Helios

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<sup>10</sup> *AMG*, 141 U.S. at 1343 (“The Federal Trade Commission filed a complaint against Scott Tucker and his companies alleging deceptive payday lending practices ...”).

<sup>11</sup> *Id.* (“[F]or a permanent injunction to prevent Tucker from committing future violations of the Act ...”).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1348 (“Taken as a whole, the provision focuses upon relief that is prospective, not retrospective.”).

<sup>16</sup> Statement by FTC Acting Chairwoman, *supra* note 6. (“With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most.”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (“We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole.”).

<sup>19</sup> Nick Statt, *Why MoviePass Really Failed*, THE VERGE (Sept. 19, 2019, 10:00 AM), <https://www.theverge.com/2019/9/19/20872984/moviepass-shutdown-subscription-movies-helios-matheson-ted-farnsworth-explainer>

[<https://perma.cc/3JBJ-DTCK>] (“As the CEO of Helios and Matheson, however, Farnsworth set his sights on

was founded by Ted Farnsworth, a financier with a lengthy track record of legal disputes.<sup>20</sup> After struggling for years, Farnsworth drastically reduced the service's prices.<sup>21</sup> Working with MoviePass CEO Mitch Lowe, Farnsworth believed in a business plan that Bloomberg described as "crazy" in their headline.<sup>22</sup>

The plan was simple on the surface, drop prices so significantly that anyone who enjoyed going to the movie theater would be reckless not to become a member.<sup>23</sup> In fact, the plan was to drop prices so significantly that to become profitable one day, MoviePass would be reliant on alternative revenue streams beyond its subscription service.<sup>24</sup> Having received an initial venture capital investment, MoviePass focused on increasing its user base as quickly as possible first and worry on making money second.<sup>25</sup> MoviePass wanted to leverage its large and committed user base into actual revenue.<sup>26</sup>

One way to use this leverage, or so MoviePass thought, was to strongarm theaters such as AMC into a cut of concession sales in return for an increase in moviegoers.<sup>27</sup> MoviePass also attempted to acquire discount tickets to redistribute to its subscribers.<sup>28</sup> MoviePass dreamed of dealing in every part of the movie experience and using its leverage to do so.<sup>29</sup> While these negotiations were going on, MoviePass was bleeding money.<sup>30</sup> With a monthly subscription price of just \$9.95, they

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Hollywood, and he decided to acquire the six-year-old-film-subscription service MoviePass in summer 2017.”).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Isabelle Gottlieb, *Netflix Co-Founder's Crazy Plan, Pay \$10 a Month, Go to the Movies All You Want*, BLOOMBERG (Aug. 15, 2017), <https://www.bloomberg.com/news/articles/2017-08-15/netflix-co-founder-s-crazy-plan-pay-10-a-month-go-to-the-movies-all-you-want> [https://perma.cc/TC5Q-Z6EG].

<sup>23</sup> Statt, *supra* note 15 (“Many MoviePass subscribers who were attracted to the new service by the lower price began using it frequently.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (“There were many ways MoviePass could have gone about becoming a bigger player in Hollywood, but Farnsworth and Lowe seized on the idea of acquiring as many new users as possible, even if it meant burning through their venture capital.”).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

were losing money on nearly all subscribers who attended one movie a month.<sup>31</sup> While MoviePass's venture capital money was running out, AMC announced its own version of MoviePass with the AMC Stubs A-List program.<sup>32</sup> This left MoviePass with a massive base of users, limited funds, limited options to stop the bleeding, and no partnership with America's largest movie chain.<sup>33</sup>

This is when MoviePass got desperate. They dumped new shares onto the market to raise money.<sup>34</sup> They blocked out popular movies from its subscribers, forcing them to buy a ticket if they wanted to see many new releases, a stark difference from its original business plan.<sup>35</sup> MoviePass could try and raise prices, but they would lose the only thing they still had left, its subscribers.<sup>36</sup> Sometimes, MoviePass would take its service entirely offline, preventing all movie ticket purchases as nearly every single one was costing them money.<sup>37</sup> At one point, MoviePass was losing \$20 million a month.<sup>38</sup>

Tying this story back to *AMG v. FTC*, MoviePass faced an FTC investigation for its deceptive business practices and straight up lies.<sup>39</sup>

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.* (“All of that came crashing down when AMC refused to play ball, and MoviePass’ ever-changing survival scheme was laid bare. By the time AMC announced its MoviePass alternative, AMC Stubs A-List, in June 2018, MoviePass’ fate was all but sealed.”).

<sup>33</sup> *Id.*

<sup>34</sup> See generally Jonathan Greig, *Supreme Court Ruling Stifles FTC Effort to Penalize MoviePass for Data Mismanagement and User Throttling*, ZDNET (June 10, 2021), <https://www.zdnet.com/article/supreme-court-ruling-stifles-ftc-effort-to-penalize-moviepass-for-data-mismanagement-and-user-throttling/> [https://perma.cc/K8LD-ZH4A].

<sup>35</sup> *Id.* (“The FTC also alleged that MoviePass created “trip wires” that allowed them to block users who saw more than three movies a month from using the service.”).

<sup>36</sup> See *Id.*

<sup>37</sup> See, e.g., Dan Seitz, *MoviePass Temporarily Shuts Down For the Second Time in Weeks After Running Out of Money*, UPROXX (July 28, 2018), <https://uproxx.com/movies/moviepass-outage-money/> (providing an example of one of the times MoviePass shut down).

<sup>38</sup> See Greig, *supra* note 34.

<sup>39</sup> Matt Levin, *Money Stuff: MoviePass Changed Some Passwords*, BLOOMBERG (Sept. 21, 2021), <https://www.bloomberg.com/news/newsletters/2021-06-08/money-stuff-moviepass-changed-some-passwords> [https://perma.cc/K898-H5Z9] (describing the investigation opened by the FTC and how they will “continue

MoviePass went as far as locking out its most consistent users to prevent them from costing the company any more money.<sup>40</sup> The FTC accused Farnsworth and Lowe of targeted schemes to disrupt account usage.<sup>41</sup> Prior to the *AMG v. FTC* decision, all this behavior would have led to a significant monetary relief claim against MoviePass at the hands of the FTC (ignoring MoviePass' bankruptcy filing and the question of if that money would have ever actually reached those who were harmed).<sup>42</sup>

However, the *AMG v. FTC* decision essentially handicapped the FTC's ability to obtain any of those funds from MoviePass.<sup>43</sup> In a settlement agreement with the FTC, MoviePass was not ordered to pay any sort of restitution for their shady business practices.<sup>44</sup> Rather, they were only ordered to not commit the same violations again, along with a few other compliance and security requirements.<sup>45</sup> FTC commissioner Noah Joshua Phillips, the lone dissenter against the settlement, did not mince words.<sup>46</sup> Phillips called on Congress to amend the statute while expressing his feelings against the weak penalty.<sup>47</sup>

As a result of the Supreme Court's decision, MoviePass will get away essentially scot-free. Yes, the company has gone bankrupt, but as far as restitution is concerned, there will be none. At this point, it is unclear whether the FTC will get this enforcement power back, or how they could get it. Until then, companies that recklessly take on risks

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working to protect consumers from deception and to ensure that businesses deliver on their promises.”).

<sup>40</sup> *Id.* (“The way MoviePass ignored its customers by changing their passwords so they couldn’t log into their accounts.”).

<sup>41</sup> *Id.* (“In its complaint, the FTC alleges MoviePass, Inc.—along with its CEO, Lowe, as well as Helios and Farnsworth, CEO of Helios—deceptively marketed its “one movie per day” service promised to subscribers who paid for its \$9.95 monthly service.”).

<sup>42</sup> *Id.*

<sup>43</sup> Greig, *supra* note 30

<sup>44</sup> *Id.*

<sup>45</sup> *MoviePass v. FTC*, 192 3000, *Agreement Containing Consent Order*, [https://www.ftc.gov/system/files/documents/cases/192\\_3000\\_-\\_moviepass\\_order\\_no\\_signatures.pdf](https://www.ftc.gov/system/files/documents/cases/192_3000_-_moviepass_order_no_signatures.pdf) [https://perma.cc/7ZRG-PW7B] (holding that MoviePass should not engage in any activity similar to what they did before and ordering them to make timely submissions to the FTC regarding compliance reporting).

<sup>46</sup> Noah Joshua Phillips, *In the Matter of MoviePass, Inc.* (June 7, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1590712/moviepass\\_statement\\_phillips\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1590712/moviepass_statement_phillips_final.pdf) [https://perma.cc/S47G-QGKN].

<sup>47</sup> *Id.*

without a steady stream of net revenue, like MoviePass, are temporarily safe from FTC restitution and disgorgement penalties.

### C. SPAC Investments and Litigation

The Covid-19 pandemic had brought many changes to all of our lives. Working from home, wearing masks, and beginning around May of 2020, just weeks after Covid-19 shut down the world as we know it, came the SPAC boom.<sup>48</sup> SPACs, or special purpose acquisition companies, have quickly become an appealing option for how to finance private companies looking to go public.<sup>49</sup> Often referred to as “Blank Check Companies,” SPACs are created for the purpose of merging with another company.<sup>50</sup> SPACs raise money and conduct their own IPOs prior to zeroing in on a merger target.<sup>51</sup> The SPAC investment funds generated through their IPO often sit in a trust account until a merger can be completed, or the funds are released after a specified date.<sup>52</sup> These SPACS are often a quicker and more efficient way to take a company public than going through the traditional IPO process.<sup>53</sup> As

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<sup>48</sup> See generally Elliot Bentley, *The SPAC Boom, Visualized*, WALL ST. J. (Feb. 10, 2021, 4:21 PM), <https://www.wsj.com/articles/the-spac-boom-visualized-in-one-chart-11612962000> [<https://perma.cc/D2TR-DLQW>].

<sup>49</sup> *Id.* (“These “special-purpose acquisition companies” have raised \$38.3 billion since the start of 2021, compared with \$19.8 billion by traditional IPOs.”).

<sup>50</sup> Max H. Bazeman & Paresh Patel, *SPACs: What You Need to Know*, HARV. BUS. REV. (July 2021), <https://hbr.org/2021/07/spacs-what-you-need-to-know> (“A SPAC is a publicly traded corporation with a two-year life span formed with the sole purpose of effecting a merger . . .”).

<sup>51</sup> SPAC 101, WINSTON & STRAWN LLP (2020), <https://www.winston.com/images/content/1/3/v2/135061/Winston-Strawn-SPAC-Basics-Presentation-2018.pdf> [<https://perma.cc/PF43-UDZX>] (“SPAC conducts an IPO to raise capital primarily from institutional investors, and also from retail investors.”).

<sup>52</sup> *Id.*

<sup>53</sup> Firm Memoranda, QUINN EMANUEL TRIAL LAW., <https://www.quinnemanuel.com/the-firm/publications/litigation-risk-in-the-spac-world/> [<https://perma.cc/P523-KKBZ>] (“SPACs are vehicles for taking companies public in a way that is potentially more efficient and quicker than a conventional direct or underwritten public offering.”).

SPACs are now raising significantly more money than traditional IPOs, an increase in SPAC litigation is following.<sup>54</sup>

There are a few main catalysts for SPAC litigation. First, a SPAC can focus on a target, but negotiations stall and eventually fail, the target company, or even the SEC, can have a say in rejecting the merger, and the merged companies can fail together.<sup>55</sup> After a company has been targeted and negotiations begun, there is always the risk of these negotiations breaking down.<sup>56</sup> Deals on this scale are rarely, if ever, simple, and until everything is signed, sealed, and delivered there is a risk of everything coming crashing down.<sup>57</sup> When negotiations break down, the SPAC and target companies may shift from partners to adversaries, suing for breach of contract.<sup>58</sup> Those who invested in the SPAC may sue for breach of fiduciary duty, as the shareholders have sacrificed their time and money to receive little to nothing in return.<sup>59</sup> Additionally, investors such as banks may sue for unpaid fees.<sup>60</sup> When a deal breaks down, it is not uncommon to see what is called “accordion litigation,” where one claim spurs a series of lawsuits.<sup>61</sup>

One type of lawsuit often seen comes after the merger has been completed, when stockholders may sue the SPACs for breach of duties in something such as misrepresentation of their due diligence efforts towards finding the best possible target company.<sup>62</sup> One example from New York, where SPAC investors sued the SPAC and its managers for

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<sup>54</sup> *Id.* (“The massive amount of SPAC capital being raised has created a huge demand for suitable acquisition targets. This dynamic—more capital chasing a fixed pool of deployment opportunities—presents heightened litigation for SPAC sponsors, investors, and targets alike.”).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (“Investment banks or investment advisors may sue for unpaid fees.”).

<sup>61</sup> *Id.*

<sup>62</sup> Glen Kopp, et al., *Mitigating SPAC Enforcement and Litigation Risks*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 18, 2021), <https://corpgov.law.harvard.edu/2021/05/18/mitigating-spac-enforcement-and-litigation-risks/> [<https://perma.cc/6AH4-VYGJ>] (“Over the past year, SPAC shareholders have filed several lawsuits alleging material statements in or omissions from proxy statements and other disclosures in connection with de-SPAC transactions, with shareholders claiming, for example, that SPACs and their managers fraudulently misrepresented due diligence efforts with respect to target companies and otherwise misled investors ...”).



providing false and misleading proxy statements related to their due diligence on the target pharmaceutical company.<sup>63</sup> Because the investors put so much faith in the SPAC itself from the outset, there is a higher risk of unhappy investors than a situation where the investors know exactly where their money is going from the get go.<sup>64</sup>

Another major concern with SPACs is SEC regulations.<sup>65</sup> Due to the SPAC boom, the SEC has placed an increased focus on these types of deals.<sup>66</sup> The SEC is working to protect investors from those associated with the SPAC itself. Furthermore, the SEC can bring their own SPAC enforcement actions.<sup>67</sup> Unlike the FTC following *AMG v. FTC*, the SEC can properly hold the SPAC managers and target company leaders accountable through civil actions.<sup>68</sup>

Despite the risks of SPACs, it is the successes that continue to drive the market. One example of a successful SPAC is DraftKings, known for their sports gambling and daily fantasy gaming services.<sup>69</sup> DraftKings CEO cited recent subpar IPOs, such as Uber and Lyft, as reasons for choosing the SPAC path instead.<sup>70</sup> The SPAC, Diamond Eagle Acquisition Corporation, IPO-ed in May 2019 and raised a total of \$704 million, with \$400 million raised through Diamond Eagle's offering and another \$304 million equity investment coming from institutional investors.<sup>71</sup> On April 24, 2020, Diamond Eagle merged

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<sup>63</sup> *Pitman v. Immunovant, Inc.*, No. 1:21-cv-00918, 2021 WL 668546 (E.D.N.Y. Feb. 19, 2021) (providing example where investors into the SPAC sued the SPAC managers for misrepresentation as previously described in prior sentence).

<sup>64</sup> See Kopp, et al. *supra* note 62 (May 18, 2021) (describing the unpredictability of SPAC investments and how investors incur a higher risk by investing in them).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Defiance ETFs Case Study for DraftKings: Making Sports Betting Mainstream*, DEFIANCE ETFs (Sept. 30, 2020), <https://www.defianceetfs.com/defiance-etfs-case-study-for-draftkings-making-sports-betting-mainstream/> [https://perma.cc/WU2T-9HXE] (describing generally the success of DraftKings as a SPAC investment).

<sup>70</sup> *Id.* (“Cofounder and CEO Jason Robins cited concerns about the unknown outcome of a lengthy, expensive IPO process, having seen major Unicorns Uber, Lyft, Slack, and Peloton falter in their public launches.”).

<sup>71</sup> *Id.* (“On April 24, 2020, DraftKings merged with gaming technology firm SBTech and Diamond Eagle Acquisition Corporation ... which IPO-ed in May

with DraftKings in a deal worth \$3.3 billion.<sup>72</sup> The market immediately responded as shares rose 10% within a week, from \$16.95 to \$19.35, and more than doubled before the end of the year to over \$55.<sup>73</sup>

SPACs certainly are not going away and neither is the SEC. Over the next few years, it will be interesting to monitor SPAC growth and regulation as SPACs continue to push out the market for IPOs. There is a risk of litigation with SPACs that may not be as common with other investment strategies, but seeing the results for a company such as DraftKings has kept the money flowing with no signs of slowing down.

### *1. Investing in Unprofitable Companies*

Adjacent to SPACs are unprofitable companies. These often represent newer companies that have a strong idea and user base but lack the ability to begin turning a profit. Everyone wants to be the investor who gets in on the ground floor of Amazon, but nobody wants to dump their money into MoviePass for the same reasons. For starters, the shares of unprofitable companies tend to underperform profitable companies, despite their potential.<sup>74</sup> Unprofitable companies are also more volatile as their business model hinges on more going right to stay afloat.<sup>75</sup>

A popular example of an unprofitable company is Uber. So common in modern lingo that the term “Uber” is often interchangeable with “rideshare.”<sup>76</sup> Despite 68% of the rideshare market in the U.S., and

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2019 ... raised in its offering the previous year, and a \$304 million equity investment from several institutional investors.”).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> Derek Horstmeyer, *Is It Worth Investing in Unprofitable Companies? We Ran the Numbers*, WALL ST. J. (Mar. 8, 2020, 10:07 PM), <https://www.wsj.com/articles/the-allure-and-risk-of-unprofitable-companies-11580843071> [<https://perma.cc/VCC7-NT78>] (highlighting in a chart the breakdown of unprofitable and profitable companies by return performance).

<sup>75</sup> *Id.* (“Unprofitable companies as a group were far more volatile than their profitable counterparts.”).

<sup>76</sup> Justin Pope, *Are Investors Overlooking Uber’s Potential Profit Problems?*, THE MOTLEY FOOL (Jul. 28, 2021, 9:30 AM), <https://www.fool.com/investing/2021/07/28/investors-overlook-uber-potential-profit-problem/> [<https://perma.cc/R2SY-8NBM>] (“With 68% of the rideshare market in the U.S., Uber has become a verb—consumers now “Uber” to their destinations instead of taking a taxi.”).

nearly destroying the taxi industry, Uber is yet to make a profit.<sup>77</sup> Two recent events showed why Uber, as an unprofitable company, is such a risky investment and potentially open to litigation.

First, the Covid-19 pandemic seriously affected Uber's business.<sup>78</sup> As people were not going places and definitely not going in a stranger's car, Uber's revenue dipped.<sup>79</sup> The company's business model was in limbo and it was unclear if or when the demand would ever return.<sup>80</sup> Despite Uber's massive user base, they were unprofitable.<sup>81</sup> Now, their user base had dwindled to a fraction of what it was.<sup>82</sup>

In the middle of the pandemic, Uber, along with companies such as Lyft and DoorDash, coordinated a \$200 million campaign in favor of Prop. 22 in California.<sup>83</sup> This extremely expensive undertaking was to prevent a company like Uber from having to classify their drivers as employees.<sup>84</sup> This fight represented a larger battle between Uber and their workforce.<sup>85</sup> As an unprofitable company, keeping costs as low as possible, and not allowing their drivers to become employees, is vital to keep Uber alive.<sup>86</sup> As independent contractors and not employees, Uber can avoid being on the hook for traditional employee benefits.<sup>87</sup> What they may still be on the hook for though is litigation from their drivers and a constant fight from their drivers.<sup>88</sup> Although the California vote

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<sup>77</sup> *Id.* (“Uber is the premier name in U.S. ridesharing, but its business model has investors wondering if profits will ever come.”).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (Currently, 49% of people are fully vaccinated in the U.S., and the effort continues. However, the virus is still a threat to the economy, with new delta variant causing COVID-19 cases to again rise through the country. Uber could continue to be affected as long as the pandemic persists.”).

<sup>83</sup> Andrew J. Hawkins, *Uber, Lyft Drivers Aren't Employees After All, California Voters Say*, THE VERGE (Nov. 4, 2020, 2:58 AM), <https://www.theverge.com/2020/11/4/21546037/prop-22-california-uber-lyft-ballot-measure-result> [<https://perma.cc/ZYB9-FJ49>] (“California voters approved Prop. 22 ... The \$200 million campaign in support of the measure was the most expensive in state history.”).

<sup>84</sup> *Id.* (“California voters approved Prop. 22, which would exempt companies such as Uber and Lyft from having to classify their workers as employees ...”).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

was certainly a massive win for Uber, it was also an expensive win and a frightening encounter.<sup>89</sup> As long as Uber is not turning a profit, the company, and their investors, are consistently living on the edge, just waiting for the next crisis to push them over.

#### **D. Conclusion**

The *AMG v. FTC* decision left potentially more questions than it answered for the corporate world and its regulators. Companies such as MoviePass now seem free to employ whatever shady business tactics they desire without pressure from the FTC. SPACs provide an alternative to traditional investment strategies and IPOs, but that does not mean they are without their own risks and regulations. Comparing SPACs with unprofitable companies provides a glance at competing investment strategies when weighing the pros and cons of each. As a relatively new strategy, it will be vital to follow the progress of SPACs and see if the current trend continues or if the risks are too much to bear.

Matthew Rosen<sup>90</sup>

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<sup>89</sup> *Id.* (“The company declared victory tonight, thanking Prop 22 supporters.”).

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