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Inside the Courts

An Update From Skadden Securities Litigators

CONTENTS

June 2013 | Volume 5 | Issue 2

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CONTENTS

June 2013 | Volume 5 | Issue 2

AUDITOR LIABILITY

In re Winstar Commc'ns Sec. Litig., No. 01 Civ. 3014 (GBD) (S.D.N.Y. Apr. 17, 2013)

Click here to view the opinion.

S.D.N.Y. Certifies Class on Claims That Accounting Firm Allegedly Helped Company Hide Losses and Overstate Revenue

Judge George B. Daniels of the U.S. District Court for the Southern District of New York certified a class on claims that an accounting firm violated Section 10(b) of the Securities Exchange Act by allegedly helping a telecommunications company hide losses and overstate revenue. The numerosity and commonality requirements were satisfied because the class consisted of more than 26,000 shareholders and bondholders who allegedly suffered the same injury from the same alleged misrepresentations. The decision follows the U.S. Court of Appeals for the Second Circuit's recent opinion in *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145 (2d Cir. 2012), which held that a lead plaintiff had standing to bring claims on behalf of investors in mortgage-backed securities it did not own so long as those claims implicated the same set of concerns as claims arising from securities it did own. In addition, the lead plaintiff — a mutual fund — was typical and adequate, even though it purchased stock only on behalf of its investors, because the fund was a fiduciary for its shareholders and the fund's shareholders could not have brought suit themselves. Further, the defendants did not show that the lead plaintiff traded on material nonpublic information (allegedly gained during a road show). Finally, investors were entitled to the fraud-on-the-market presumption of reliance because the company's common stock and bonds traded on an open and active market and the challenged statements were publicly made, and thus, individual issues of reliance did not predominate.

In re Longtop Fin. Techs. Ltd. Sec. Litig., No. 11 Civ. 3658 (S.D.N.Y. Apr. 8, 2013)

Click here to view the opinion.

S.D.N.Y. Dismisses Claims That Auditor Allegedly Issued Unqualified Opinions Regarding a China-Based Company That Falsified Financial Documents

Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York dismissed claims that an auditor violated Section 10(b) of the Securities Exchange Act by allegedly issuing unqualified audit opinions regarding a China-based company that falsified financial documents. Claims based on audit opinions issued more than five years before the amended complaint was filed were barred by the statute of repose if those claims were not identified in the original complaint, and therefore could not relate back to it. In addition, the complaint failed to adequately allege scienter through recklessness because direct confirmation of revenue contracts is not required by GAAS and the contracts were not individually material, were not long-term and were allegedly with large companies who monitored for fraud. Further, reports from analysts and other third parties were not enough to put the auditor on notice of the fraud because the concerns were "artfully addressed" by the company, continued to fool the investing public and were not reliable enough to require further investigation. In addition, the auditor sufficiently investigated and reported identified weaknesses in the company's internal controls, and the fraud risk-factors associated with the internal control findings are accounting concepts and did not place the auditor on notice of the company's actual fraud.

CLASS ACTIONS

Certification

Erica P. John Fund, Inc. v. Halliburton Co., No. 12-10544 (5th Cir. Apr. 30, 2013)

Click here to view the opinion.

Fifth Circuit Rebuffs Attempt to Rebut the Presumption of Reliance at Class Certification With Evidence Alleged Misstatements Caused No 'Price Impact'

On remand from the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth Circuit affirmed the certification of a class action alleging violations of Section 10(b) of the Securities Exchange Act, holding that Halliburton could not defeat the presumption of reliance at the class certification stage by presenting evidence that alleged misrepresentations had a negligible effect on the price of Halliburton stock. In so holding, the court aligned itself with recent U.S. Supreme Court precedent that applies the fraud-on-the-market presumption of *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), but rejects many attempts to rebut that presumption at the class certification stage.

In September 2007, plaintiffs moved to certify a class of shareholders who were purportedly defrauded by Halliburton understating the company's asbestos liability, overstating the company's income following an undisclosed change in revenue-recognition policies and exaggerating the cost savings associated with a merger. Denying the motion, the district court found that the plaintiffs failed to satisfy the predominance requirement because they did not prove loss causation, *i.e.*, that the alleged misconduct was the cause of the plaintiffs' economic loss. On appeal, the Fifth Circuit affirmed, holding that class certification in actions alleging federal securities fraud required a showing of loss causation.

The plaintiffs petitioned the Supreme Court for relief, and in *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S. Ct. 2179, 2184 (2011), a unanimous Supreme Court reversed the judgment of the Fifth Circuit, concluding that it was improper to require proof of loss causation at the class certification stage of private securities litigation. The Supreme Court remanded the case for review of any other arguments Halliburton had preserved against certification.

On remand to the district court, Halliburton argued that the court should not certify a class because the company had submitted evidence that the alleged fraud had not affected the price of its stock. According to Halliburton, this information about so-called "price impact" rebutted the presumption of reliance by severing the link between the alleged misconduct and the market price of Halliburton stock. Nonetheless, the district court refused to consider the evidence, reasoning that it did not bear upon the central inquiry under Rule 23(b)(3), namely, whether common issues predominated within the putative class.

In affirming the judgment of the lower court, the Fifth Circuit cited the Supreme Court's earlier opinion in this case, noting that the issue of common-question predominance under Rule 23(b)(3) was distinct from the burden of proving the elements of Section 10(b) on the merits. *See Erica P. John Fund*, 131 S. Ct. at 2184. Left unanswered by the Supreme Court's earlier opinion, however, was whether Halliburton was entitled at the class certification stage to rebut the presumption of reliance through other means, such as showing the statements or omissions had no price impact. To answer that question, the court applied the two-part test recently articulated by the Supreme Court in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 133 S. Ct. 1184, 1194-99 (2013): (i) whether resolution of the issue would apply to the entire class, and (ii) whether setting aside the issue would pose the risk of a subsequent predominance of individual questions of fact or law. The court concluded that evidence of price impact was common to the class and posed no risk of a subsequent predominance of individual issues. Moreover, because the issue was inextricably linked to the element of loss causation, it was ill-suited to disposition at class certification. Accordingly, it would be improper to rebut the presumption of reliance using evidence of price impact. Therefore, the Fifth Circuit affirmed the district court's decision to certify a class.

Levitt v. J.P. Morgan Sec., Inc.,
No. 10-4596-cv
(2d Cir. Mar. 15, 2013)

Click here to view the opinion.

Second Circuit Reverses Certification of Class on Claims That Bear Stearns Allegedly Participated in a Market Manipulation Scheme

The U.S. Court of Appeals for the Second Circuit reversed an order certifying a class on claims that Bear Stearns (now a J.P. Morgan subsidiary) violated Section 10(b) of the Securities Exchange Act by allegedly participating in a market manipulation scheme involving another broker-dealer. The plaintiffs, customers of the broker-dealer principally responsible for the fraud, claimed that Bear Stearns knew of the broker-dealer's allegedly improper trade requests, and continued to process the trades without disclosing the fraud to customers. Although Bear Stearns processed the trades as the clearing broker and allegedly had knowledge of the market manipulation, a clearing broker is not liable under Section 10(b) for trades in which it performed a routine clearing function and does not owe a duty of disclosure to the plaintiffs. Absent a duty of disclosure, the plaintiffs were not entitled to a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), and class certification was improper because individual issues of reliance predominated.

Anwar v. Fairfield Greenwich Ltd.,
No. 09 Civ. 0118 (VM)
(S.D.N.Y. Feb. 25, 2013)

Click here to view the opinion.

S.D.N.Y. Certifies Class of Investors in Action Alleging That a Feeder Fund To Madoff Misrepresented Its Investment Strategies and Due Diligence Process

Judge Victor Marrero of the U.S. District Court for the Southern District of New York certified a class of investors in an action alleging that a feeder fund to Bernard Madoff's Ponzi scheme misrepresented its investment strategies and due diligence process. In addition to satisfying Rule 23(a)'s numerosity, commonality, typicality and adequacy requirements, common questions predominated over individual issues, even though the representations relied upon by investors were not identical, because if the alleged statements are uniformly misleading, those variations are immaterial. However, the court excluded foreign investors from the class whose home country courts were unlikely to recognize and enforce a U.S. class action judgment, and the parties would be required to relitigate in the foreign country.

In re Merck & Co. Sec., Derivative & "ERISA" Litig.,
MDL No. 1658 (SRC)
(D.N.J. Jan. 30, 2013)

Click here to view the opinion.

District of New Jersey Certifies Class of Shareholders Claiming That Company Allegedly Misrepresented the Safety and Expected Success of Vioxx

In an opinion marked "Not for Publication," Judge Stanley R. Chesler of the U.S. District Court for the District of New Jersey certified a class of shareholders claiming that a pharmaceutical company violated Section 10(b) of the Securities Exchange Act by allegedly misrepresenting the safety and expected economic success of Vioxx. Rule 23(a)'s commonality requirement was satisfied because each investor relied on the challenged statements, which were reflected in the company's stock price, and allegedly suffered a loss after the disclosure of alleged corrective information. Rule 23(a)'s typicality requirement also was satisfied, even though the class included investors in derivatives of the company's stock and none of the lead plaintiffs owned derivatives, because the price of the derivatives responded in the same manner as the underlying company stock to the challenged statements and alleged corrective disclosures. Further, the lead plaintiff's claim was typical of the class, even though it was subject to certain unique defenses, because the claims of class representatives need not be identical to those of the other class members so long as they arise from the same alleged course of conduct. Finally, the court determined that there were grounds to proceed on a fraud-on-the-market basis, and therefore common issues predominated.

Settlements

Radcliffe v. Experian Info. Solutions Inc., No. 11-56376 (9th Cir. Apr. 22, 2013)

Click here to view the opinion.

Ninth Circuit Reverses Class Settlement Approval Because Incentive Awards to Class Representatives Conditioned Upon Support of the Settlement Created Conflicts

The U.S. Court of Appeals for the Ninth Circuit reversed a class action settlement of Fair Credit Reporting Act claims previously approved by a district court, and reversed the attorneys' fees award the district court had approved under the settlement. The settlement provided that the class representatives' incentive payments were expressly conditioned on their support of the settlement, creating a conflict between the class representatives and the class, rendering the representatives inadequate and the class counsel conflicted.

Judge Ronald M. Gould, writing for the panel, noted that district courts must carefully scrutinize class representative incentive awards because such awards, while not uniformly improper, can cause class representatives' interests, as well as their counsel's, to diverge from absent class members who may stand to recover less from the settlement. The settlement agreement reached between the parties produced such divergent interests because the incentive awards were conditioned upon the representatives' support of the settlement, and because "[t]here is a serious question whether class representatives could be expected to fairly evaluate whether awards ranging from $26 to $750 is a fair settlement value when they would receive $5,000 incentive awards. Under the agreement, if the class representatives had concerns about the settlement's fairness, they could either remain silent and accept the $5,000 awards or object to the settlement and risk getting as little as $26 if the district court approved the settlement over their objections." Accordingly, the district court abused its discretion in approving the settlement, and the panel remanded the case for further proceedings: "Although this case does not go back to square one, the settlement cannot be approved."

U.S. District Judge Sam E. Haddon, sitting by designation, concurred but wrote separately to emphasize his view that class counsel's conflict should render them disqualified from participating in any future attorney fee award ultimately approved by the district court.

CONFIDENTIAL WITNESSES

City of Livonia Emps.' Ret. Sys. v. Boeing Co., No. 12-1899 (7th Cir. Mar. 26, 2013)

Click here to view the opinion.

Seventh Circuit Affirms Dismissal of Securities Action and Remands for Determination of Sanctions Following the Revelation of Apparent Attorney Misconduct

The U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal with prejudice of a putative securities class action following the revelation of apparent attorney misconduct with respect to a key confidential witness. The case dated to 2009, when the plaintiffs, represented by Robbins Geller Rudman & Dowd, filed a putative class action claiming that the Boeing Company and two of its senior officers had violated Section 10(b) of the Securities Exchange Act by allegedly misleading investors about delays in the production schedule for Boeing's highly anticipated 787 Dreamliner aircraft. The district court initially dismissed the amended complaint (without prejudice) for failure to adequately plead scienter. In response, the plaintiffs filed a second amended complaint, in which they bolstered their allegations of scienter with facts they attributed to a single confidential witness, a "Boeing Senior Structural Analyst Engineer" whom they claimed had first-hand knowledge of the Dreamliner production delays. In express reliance on these new allegations, the district court denied a motion to dismiss the second amended complaint, and the case proceeded to discovery.

The defendants quickly identified and deposed the witness, who denied most of the allegations in the complaint. The witness stated that he was a Boeing contractor, and

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not an employee, during the relevant period and that he never worked on the Dreamliner model at issue. The defendants also learned that the witness did not meet representatives of Robbins Geller until his deposition, which was six months after the plaintiffs filed their second amended complaint. The plaintiffs instead had relied upon a report by a third-party investigator. In light of these revelations, the defendants moved for reconsideration and the district court dismissed the case with prejudice.

On appeal, the Seventh Circuit affirmed the dismissal, and citing apparent misconduct by Robbins Geller, remanded for a determination of sanctions under Rule 11. In affirming the dismissal, the Seventh Circuit added to a growing body of precedent regarding the proper treatment of confidential witnesses in private securities litigation, suggesting that there may be circumstances in which courts will be willing to assess the veracity of anonymous allegations at the pleadings stage. Holding that the complaint failed to plead sufficient facts to give rise to a strong inference of scienter, the court noted that the only positive support for scienter had been the now-questionable allegations attributed to the confidential witness. Reviewing those allegations, the court repeated the rule from *Higginbotham v. Baxter International, Inc.*, 495 F.3d 753, 756-57 (7th Cir. 2007), that harmful statements by confidential sources "require a heavy discount." Moreover, the court identified no motive for the defendants to commit securities fraud in this case, reasoning that lying about the aircraft schedule would have only invited a lawsuit. The more plausible inference was that the defendants had hoped they could resolve any significant delays in the aircraft's production. Accordingly, the Seventh Circuit agreed that the defendants were unlikely to have acted with scienter and affirmed dismissal of the case.

DEMAND FUTILITY

King v. Terwilliger,
No. H-12-2182
(S.D. Tex. Feb. 26, 2013)

Click here to view the opinion.

Texas Federal Court Dismisses Shareholder Derivative Suit Against Officers and Directors of Delaware Corporation

Judge Gray H. Miller of the U.S. District Court for the Southern District of Texas dismissed a shareholder derivative action against Houston America Energy Corp. (as nominal defendant) and several of Houston America's officers and directors, holding that the plaintiff failed to establish that a presuit demand on the board would be futile. The plaintiff alleged breach of fiduciary duty, waste of corporate assets and unjust enrichment related to a board vote awarding pay raises and lucrative change-in-control agreements to key insiders. The plaintiff objected to those actions because they followed a substantial drop in the price of the company's stock — from $10.84 to $1.67 per share — and the launch of an SEC investigation into the company.

The court invoked the law of Delaware, the state of Houston America's incorporation, to assess whether presuit demand would be futile. The court applied the two-part test articulated by the Delaware Supreme Court in *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), asking whether the plaintiff had alleged particularized facts creating reasonable doubt: (i) that the directors are disinterested and independent, or (ii) that the challenged transaction falls within the protections of the business judgment rule, *i.e.*, the presumption that corporate boards act on an informed, good-faith basis. The court concluded that the plaintiff did not satisfy either prong of *Aronson*. First, the court rejected the plaintiff's attempt to establish that a director was interested merely by alleging that the individual received increased compensation as a result of a contested vote or that the individual was not identified as "independent" in a company proxy. Second, the plaintiff's "conclusory" allegation that no reasonable board would have approved the vote in light of the company's poor performance did not establish that the directors' actions fell outside the protections of the business judgment rule. Accordingly, the plaintiff did not establish demand futility. The court therefore dismissed the suit without prejudice.

DERIVATIVE LITIGATION

Pyott v. La. Mun. Police Emps.' Ret. Sys., No. 380, 2012 (Del. Apr. 4, 2013)

Click here to view the opinion.

Delaware Supreme Court Reverses Denial of a Motion to Dismiss in Which Court of Chancery Refused to Give Collateral Estoppel Effect to a California Court's Dismissal

The Delaware Supreme Court, en banc, reversed the Court of Chancery's 2012 denial of a motion to dismiss a derivative action. In 2010, derivative actions were commenced on behalf of Allergan, Inc. in both the Delaware Court of Chancery and the U.S. District Court for the Central District of California. Shortly before Vice Chancellor J. Travis Laster of the Court of Chancery held argument on a motion to dismiss, the California court dismissed with prejudice the action before it pursuant to Rule 23.1. Nevertheless, the Court of Chancery denied the defendants' motion to dismiss the Delaware complaint. In so doing, the court refused to give collateral estoppel effect to the California court's dismissal.

The Delaware Supreme Court held that the Court of Chancery erred in refusing to give preclusive effect to the California court's dismissal. First, the Delaware Supreme Court explained that the trial court's holding as a matter of Delaware law that the stockholder plaintiffs in the two jurisdictions were not in privity was erroneous because California law controlled the issue. Under California law, "derivative stockholders are in privity with each other because they act on behalf of the defendant corporation." The Delaware Supreme Court explained that the U.S. Supreme Court has held "that a state court is required to give a federal judgment the same force and effect as it would be given under the preclusion rules of the state in which the federal court is sitting." Although the Court of Chancery recognized this settled law, it failed to apply it because it "conflated collateral estoppel with demand futility." The Delaware Supreme Court explained that "[o]nce a court of competent jurisdiction has issued a final judgment ... a successive case is governed by the principles of collateral estoppel, under the full faith and credit doctrine, and not by demand futility law, under the internal affairs doctrine."

Second, the Delaware Supreme Court explained that the trial court's adoption of a "fast filer" presumption in analyzing the adequacy of the California plaintiffs' representation was erroneous. The court found that, without the erroneous presumption that a fast-filing stockholder with a nominal stake is an adequate representative, there was "no basis on which to conclude that the California plaintiffs were inadequate."

FEDERAL TORT CLAIMS ACT

Dichter-Mad Family Partners, LLP v. United States, No. 11-55577 (9th Cir. Feb. 12, 2013)

Click here to view the opinion.

Ninth Circuit Affirms the Dismissal of Claims Alleging That The SEC Breached Duties to the Public by Failing to Stop Madoff

The U.S. Court of Appeals for the Ninth Circuit, in a per curiam opinion, affirmed the district court's dismissal of claims against the SEC under the discretionary functions exception of the Federal Tort Claims Act. Under the discretionary functions exception, federal courts lack subject matter jurisdiction for claims against the government arising out of the discretionary acts of federal officers.

The plaintiffs, who allegedly were investors in Bernard Madoff's Ponzi scheme, sued the Securities and Exchange Commission and the government alleging that the SEC owes the general public a duty of reasonable care to oversee the financial markets. The plaintiffs asserted that the SEC breached that duty by failing to stop Madoff's scheme, causing them to invest in reliance on the SEC's "implied stamp of approval." The complaint incorporated by reference the SEC Office of Inspector General's 450-page report purportedly detailing several shortcomings in the SEC's handling of the Madoff affair. The plaintiffs alleged, based in part on the report, examples of the SEC's non-action against Madoff and his scheme, and a general failure to investigate in the face of repeated warning signs beginning as early as 1992.

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The district court's dismissal order, adopted by the Ninth Circuit as its own holding, credited the allegations and remarked that, if true, they revealed the SEC's regrettable failure to properly regulate Madoff's broker-dealer, market-making and investment-management operations. Nevertheless, the Ninth Circuit held that, under the discretionary functions exception, each alleged wrong was done in the course of "the SEC's exercise of its discretion, both in terms of conducting its investigations and deciding whether or not to bring enforcement proceedings." The FTCA protects the government from liability in such situations, when its agencies' actions are based on discretionary consideration of public policy. Subject matter jurisdiction was therefore lacking.

The Ninth Circuit also affirmed the dismissal with prejudice because the plaintiffs' proposed amended allegations that the SEC acted pursuant to its mandatory, not discretionary, duties were ineffective. According to the court, the alleged harm flowed not from the SEC's mandates, but from the SEC's exercise of its discretion not to act against Madoff under those mandates.

FOREIGN CORRUPT PRACTICES ACT

Sec. & Exch. Comm'n v. Straub,
No. 11 Civ. 9645 (RJS)
(S.D.N.Y. Feb. 8, 2013)

Click here to view the opinion.

S.D.N.Y. Upholds Claims in SEC Enforcement Action That Executives of a Hungarian Company Violated the FCPA by Allegedly Bribing Macedonian Officials

In an SEC enforcement action, Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York upheld claims that executives of a Hungarian telecommunications company violated the Foreign Corrupt Practices Act by allegedly bribing Macedonian government officials to avoid the effects of recently passed legislation. Although *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), limited the geographic scope of U.S. securities, it does not apply to personal jurisdiction. The defendants had sufficient minimum contacts with the United States to establish personal jurisdiction because their alleged conduct directly violated U.S. securities laws, the company's American depositary receipts were traded on an American exchange, and defendants signed letters to the company's auditors allegedly containing material misrepresentations. In addition, the defendants used (although unintentionally) an instrumentality of interstate commerce by sending emails that were routed through the U.S. and stored on U.S. servers. The court also found that the statute of limitations did not bar the SEC's claims because the defendants were not physically located within the U.S. during the time period regardless of whether the defendants could have been properly served abroad. Further, the FCPA claims were sufficiently pleaded. The alleged conduct involved foreign officials because the defendants allegedly obtained an intermediary to facilitate negotiations with Macedonian officials (and one defendant allegedly communicated directly with an official), the officials were in high positions and capable of helping the defendants avoid the effects of the unfriendly legislation, and certain documents were signed by the officials agreeing to provide assistance in contravention of their official duties.

INSIDER TRADING CLAIMS

Mercer v. Gupta,
No. 12-3393
(2d Cir. Apr. 5, 2013)

Click here to view the opinion.

Second Circuit Affirms Dismissal of Derivative Suit on Behalf of Goldman Sachs Relating to Defendant's Alleged Profits From Short-Swing Trades by Fund Manager

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of a derivative suit on behalf of Goldman Sachs alleging that Rajat Gupta violated Section 16(b) of the Securities Exchange Act by allegedly profiting from short-swing trades by a fund manager in Goldman stock while he was an insider at the firm. Gupta was allegedly paid to provide inside information to Raj Rajaratnam, who then traded in Goldman stock. Although Gupta was not a direct

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shareholder of Goldman stock when he allegedly received the payments, the plaintiff alleged that Gupta was a beneficial owner based on the payments received from Rajaratnam, his financial interest in the hedge fund and his opportunity to profit only because of his relationship with Rajaratnam. The court rejected all three theories because the alleged payments for inside information did not constitute profit from trades in stock, and Gupta's financial interest in the hedge fund was not a controlling interest. In addition, the court held that Section 16(b) was not intended to apply to persons who only provide inside information in exchange for payment.

INTERPRETING *JANUS*

Fezzani v. Bear, Stearns & Co., Inc., No. 09-4414-cv (2d Cir. May 7, 2013)

Click here to view the opinion.

Second Circuit Affirms Dismissal of Claims in Connection With Individual Defendant's Alleged Participation in Broker-Dealer's Market Manipulation Scheme

The U.S. Court of Appeals for the Second Circuit affirmed the dismissal of claims that an individual defendant violated Section 10(b) of the Securities Exchange Act by allegedly participating in a broker-dealer's market manipulation scheme. Only the broker-dealer, not the individual defendant, communicated the allegedly fraudulent price information to the market. Therefore, under the U.S. Supreme Court's decisions in *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), and *Stoneridge Investment Partners, L.L.C. v. Scientific-Atlanta*, 552 U.S. 148 (2008), the individual defendant was not liable for a primary violation of Section 10(b) because the plaintiffs failed to allege acts that amounted to more than knowingly participating in or facilitating the broker-dealer's fraudulent acts. Further, because aiding and abetting liability is not available under Section 10(b) in a private action, the only basis for liability in this action would be as a primary violator. However, the defendant's alleged involvement in the scheme adequately supported state law claims for conspiracy to defraud and aiding and abetting fraud. The court additionally noted that a modified presumption of reliance may apply in class action market manipulation suits (but did not decide either way because this case was not brought as a class action). Although a truly efficient market would be difficult to manipulate because of its size (and thus investors would likely be unable to prove market efficiency and market manipulation at the same time), investors may still be entitled to a presumption of reliance, at least where the seller misrepresented the price of a security as being set by an efficient market.

LOSS CAUSATION

Meyer v. Greene, No. 12-11488 (11th Cir. Feb. 25, 2013)

Click here to view the opinion.

Eleventh Circuit Affirms Dismissal of Securities Class Action for Failure to Adequately Plead Loss Causation

The U.S. Court of Appeals for the Eleventh Circuit affirmed dismissal of the plaintiff's complaint for securities fraud, holding that neither a presentation by regarded short-seller David Einhorn suggesting the defendant company's assets were significantly overvalued nor the announcement of two SEC investigations constituted corrective disclosures for the purpose of proving loss causation.

The plaintiff filed a class action suit against St. Joe Company and various individuals in the Northern District of Florida claiming that the company failed to take impairment charges for certain real estate investments, which the plaintiff alleges resulted in material overstatements of the value of those holdings. The district court dismissed the plaintiff's first complaint without prejudice, finding that it failed to adequately plead loss causation, among other things. St. Joe subsequently disclosed two SEC investigations, after which the plaintiff filed an amended complaint that the district court also dismissed, this time with prejudice because the plaintiff failed to plead scienter and because there was no indication that St. Joe

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purposefully misrepresented the value of its assets or acted with reckless disregard as to their veracity. Finally, after St. Joe then announced impairment charges for the previous fiscal quarter, the plaintiff moved to amend the prior judgment under Rule 59. The district court denied the plaintiff's motion, and the plaintiff appealed to the Eleventh Circuit.

The Eleventh Circuit agreed there was no sufficient allegation that St. Joe intentionally or recklessly misrepresented the value of its assets. Further, the Eleventh Circuit found that even if St. Joe had misrepresented the value of its assets, neither Einhorn's presentation nor the disclosure of the two SEC investigations constituted corrective disclosures for the purpose of proving loss causation. With regard to Einhorn's presentation, the Eleventh Circuit held that it did not contain any relevant nonpublic information and thus could not qualify as a corrective disclosure. The Eleventh Circuit reasoned that because the plaintiff relied on the fraud-on-the-market theory in pleading reliance, it was barred from later arguing, for the purpose of claiming loss causation, that certain public information — such as the information in Einhorn's presentation — was not absorbed into the share price. The Eleventh Circuit stated that "[h]aving based their claim of reliance on the efficient market theory, the Investors must now abide by its consequences." With regard to the disclosure of the SEC investigations, the Eleventh Circuit held that disclosure of SEC investigations, on their own, cannot constitute corrective disclosures because investigations reveal nothing more than the fact of the investigation and not whether the subject of that investigation made any material misstatements or committed fraud.

MISREPRESENTATIONS

Sec. & Exch. Comm'n v. Syron, No. 11 Civ. 9201 (RJS) (S.D.N.Y. Mar. 28, 2013)

Click here to view the opinion

S.D.N.Y. Upholds Claims in SEC Enforcement Action That Executives Misrepresented Freddie Mac's Exposure to the Subprime Lending Market

In an SEC enforcement action, Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York upheld claims that two executives violated Section 10(b) of the Securities Exchange Act by allegedly misrepresenting Freddie Mac's exposure to the subprime lending market. The complaint adequately alleged that the challenged statements were material because investors could have reasonably interpreted statements that Freddie Mac had an insignificant exposure to the subprime market as referring to Freddie Mac's total amount of subprime exposure, rather than a narrow piece of the entire portfolio. In addition, the company's contemporaneous disclosure of quantitative data reflecting on the company's subprime risk was not informative enough to render the alleged statements immaterial. Further, the complaint adequately pleaded that the defendants were reckless because they allegedly attended internal meetings in which each defendant could have learned of the company's true exposure to the subprime market, and the company's subsequent disclosures of negative information about its subprime exposure were not enough to negate scienter. The SEC also sufficiently alleged that an individual defendant aided and abetted the company's violation of Section 10(b) because he had actual knowledge of the misrepresentations, and the defendant's certification of misleading disclosures was enough to constitute substantial assistance.

Crown Cork & Seal Co., Inc. Master Ret. Trust v. Credit Suisse First Boston Corp., No. 12-cv-05803-JLG (S.D.N.Y. Jan. 30, 2013)

Click here to view the opinion.

S.D.N.Y. Denies Requests by Credit Suisse to Sever Claims Against the Bank's Former CEO in Action Relating to the Alleged Withholding of Information About an Offering

Judge James L. Graham of the U.S. District Court for the Southern District of New York denied requests by Credit Suisse to sever claims against the bank's former CEO. The action accused both defendants of violating Section 10(b) of the Securities Exchange Act by withholding information about a securities offering. The court held that those claims were similar enough that a single trial would serve judicial economy, as each claim arose from the same

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securities offering, involved the same offering documents and shared some common legal elements. According to the court, this holding was warranted even though there were material differences in the potential proofs at trial (the case against the CEO involved proof of the alleged fraudulent representations whereas the case against the bank hinged on the bank's alleged knowledge of the fraud).

PRIVATE SECURITIES LITIGATION REFORM ACT

Discovery Stay

Monk v. Johnson & Johnson, No. 10-4841 (FLW) (D.N.J. Feb. 5, 2013)

Click here to view the opinion.

New Jersey Federal Court Applies PSLRA Discovery Stay to Claims That Survived Motion to Dismiss

After the motion to dismiss the original complaint was granted in part and denied in part (claims arising from three alleged misrepresentations were upheld), Magistrate Judge Douglas E. Arpert of the U.S. District Court for the District of New Jersey nonetheless applied the PSLRA's discovery stay pending resolution of a motion to dismiss the amended complaint alleging that a company misled investors as to defects in its over-the-counter pain medication. The court determined the PSLRA discovery stay applied to all claims, even those that survived the earlier motion to dismiss. Proceeding with discovery on only some claims, in a case where all claims arise from the same alleged conduct, would cause confusion. The additional delay would not cause the plaintiffs "undue prejudice" because delay is inherent in any stay.

Pleading Standards

City of Sterling Heights Gen. Emps.' Ret. Sys. v. Hospira, Inc., No. 11 C 8332 (N.D. Ill. Feb. 13, 2013)

Click here to view the opinion.

Illinois Federal Court Refuses to Dismiss Class Action Alleging Misrepresentations Regarding Condition of Facilities and Remediation Efforts Prompted by FDA Warnings

Judge Amy St. Eve of the U.S. District Court for the Northern District of Illinois granted in part and denied in part a motion to dismiss a class action claiming that Hospira violated Section 10(b) of the Securities Exchange Act by allegedly engaging in a fraudulent scheme to artificially inflate its stock price by promising to address issues raised by FDA inspections of company facilities, while in reality the company was allegedly gutting quality control efforts as part of a plan to increase shareholder value by reducing operating expenses.

As a threshold matter, the court declined to take judicial notice of exhibits Hospira submitted in support of its motion to dismiss. The court reasoned that the company submitted the proxy statements and FDA reports not only to demonstrate that the reports contained particular statements, but also to establish the truth of or substantiate interpretations of those statements. Thus, considering the exhibits at issue would have required the court to take judicial notice of the truth of the sales data contained in the proxy statements and the extrinsic fact of the total number of FDA warning letters in a year, neither of which was a proper subject for judicial notice.

The court also determined that the plaintiffs had sufficiently described the confidential witnesses to support the probability that the former undisclosed Hospira employees possessed the information alleged in the complaint. Addressing this issue, the court noted that the plaintiffs had provided the witnesses' job titles, durations of employment at Hospira and responsibilities. The court further noted that the plaintiffs relied upon the information from the confidential witnesses to corroborate and particularize the allegations contained in the complaint, rather than to allege an independent basis for the misleading nature of the statements.

(continued on next page)

The court then considered each alleged omission or misrepresentation, finding that the plaintiffs failed to allege with sufficient particularity that statements about having a "very good relationship with the FDA," "tak[ing] all of these matters seriously" and "working closely with the FDA" were false or misleading, because the statements were ambiguous and were not contradicted by other allegations. Similarly, the court found that statements about projects "serving to transform the company" or "raising the bar internally" constituted mere puffery that was devoid of substantive factual material.

However, the court found that the pleadings were sufficient for other alleged misrepresentations and omissions, including omissions regarding the cost-cutting project's impact on quality control at a manufacturing facility and statements regarding the operating condition and maintenance of that facility. Moreover, as these statements specifically referred to the present condition of Hospira's facilities and equipment, they were not so lacking in specificity or devoid of substantive information as to qualify as puffery or otherwise vague, aspirational statements.

The court also found that the plaintiffs sufficiently alleged scienter under the PSLRA regarding Hospira's statements about the condition of its plants, the extent of the regulatory issues and the efforts to address issues raised in FDA warning letters. The court noted that participation by executives in various meetings on Hospira's remediation efforts supported the inference that the individuals were aware of quality-control issues at Hospira facilities. The court emphasized that these were not routine meetings, but rather specifically directed to addressing Hospira's remediation and quality control issues at its various facilities. Based on these and other allegations, the court concluded that the plaintiffs had raised an inference of scienter at least as compelling as any opposing inference.

PROXY SOLICITATIONS

Kallick v. SandRidge Energy, Inc., C.A. No. 8182-CS (Del. Ch. Mar. 8, 2013)

Click here to view the opinion.

Delaware Court of Chancery Enjoins Incumbent Board From Impeding Consent Solicitation to Seat New Board

Chancellor Leo E. Strine Jr. of the Delaware Court of Chancery enjoined the incumbent board of SandRidge Energy, from, among other things, soliciting against or otherwise impeding a consent solicitation until the board approved the rival slate for purposes of a "Proxy Put" provision in SandRidge's credit agreements.

Large stockholder TPG-Axon launched a consent solicitation to seat a new board committed to changing the company's management and exploring strategic alternatives for the company. The incumbent board resisted the consent solicitation, contending that TPG's slate was less qualified than the incumbents to run the company due to its lack of expertise and warned that the election of TPG's proposed slate would trigger SandRidge's lenders' right to put back $4.3 billion worth of notes (the Proxy Put). Applying intermediate scrutiny under *Unocal*, and relying on *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*, 983 A.2d 304 (Del. Ch. 2009), the court determined that the board's duty of loyalty required it to approve the opposing slate, unless it posed a material threat of harm to the company. Finding no material threat of harm, the court enjoined the board from (i) soliciting any further consent revocations; (ii) relying upon or otherwise giving effect to any consent revocations received to date and (iii) impeding TPG's consent solicitation process in any way.

Greenlight Capital, L.P. v. Apple, Inc.,
No. 13 Civ. 900 (RJS)
(S.D.N.Y. Feb. 22, 2013)

Click here to view the opinion.

S.D.N.Y. Enjoins Issuer From Giving Effect to a Shareholder Vote on a Proposal That an Investor Claimed Required 'Unbundling'

Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York preliminarily enjoined an issuer from giving effect to a shareholder vote on a proposal that an investor claimed violated SEC Rule 14a-4(a)(3), requiring "unbundling" of separate issues into separate questions. The investor demonstrated a likelihood of success in showing that matters in contention — the change to directors' terms of office, new limitations on the company's ability to issue preferred stock, establishment of par value for common stock and changes to the articles of incorporation — were, in fact, separate matters. The court rejected arguments that other companies grouped similar issues into a single proposal, the SEC did not object to the company's proposal and all issues were purportedly "pro-shareholder" for most shareholders. In addition, requiring the investor to vote one way on a package of issues — only one of which the investor opposed (the limitations on issuance of preferred stock) — would cause irreparable harm, and granting the injunction was in the public interest.

RELIANCE

GAMCO Investors, Inc., v. Vivendi, S.A.,
No. 03 Civ. 5911 (SAS)
(S.D.N.Y. Feb. 28, 2013)

Click here to view the opinion.

S.D.N.Y. Concludes That Defendants Successfully Rebutted Fraud-on-the-Market Presumption of Reliance

Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York concluded, following a bench trial, that the defendants successfully rebutted the fraud-on-the-market presumption of reliance by showing that the plaintiff, as asset manager, used an investing strategy that did not rely on the integrity of the market price. The asset manager used a proprietary model to estimate the value of potential investments, and made investing decisions by comparing its own per-share valuation to the market price. The court noted that the asset manager's valuation was not dependent on market price, the company's alleged corrective disclosures made the company's stock even more attractive, and the asset manager, in fact, doubled or tripled its holdings of company stock after the alleged corrective disclosures. The defendant was not required to show that the asset manager would have purchased the stock at the same price had it known of the fraud, but rather, that price was not the primary reason for the asset manager's investment decisions.

Liberty Media Corp. v. Vivendi Universal, S.A.,
No. 03 Civ. 2175 (SAS)
(S.D.N.Y. Feb. 12, 2013)

Click here to view the opinion.

S.D.N.Y. Denies Motion for Judgment as a Matter of Law on Claims That a Target Company Allegedly Misrepresented Its Risk of a Liquidity Crisis Prior to a Merger

Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York denied a motion for judgment as a matter of law on claims that a target company violated Section 10(b) of the Securities Exchange Act by allegedly misrepresenting its risk of a liquidity crisis prior to a merger. A jury found that the target did violate Section 10(b), and the defendants moved to have the verdict set aside, challenging the jury's findings in regard to reliance, loss causation and damages. The plaintiff presented sufficient evidence of actual reliance on the alleged misstatements through an officer's testimony that he relied on the misrepresentations within the premerger analysis, even though the officer did not have actual authority to close the deal. Moreover, actual reliance was not defeated by the company's decision to close the deal despite learning of certain allegedly concealed risks because the jury found that the company was never actually free to walk away from the merger under the terms of the agreement. In addition, the jury properly found loss causation because the plaintiff's damages model was reliable and the alleged corrective disclosures did, in fact, reveal new information to the market that related to previously unknown liquidity risks. The jury also properly calculated damages because it based the calculation on expert testimony and did not deviate materially from similar cases, even though the jury did not accept either party's exact damages estimate.

SCIENTER

In re Pfizer Inc. Sec. Litig., No. 04 Civ. 9866 (LTS)(HBP) (S.D.N.Y. Mar. 28, 2013)

Click here to view the opinion.

S.D.N.Y. Grants in Part and Denies in Part Manufacturer's Motion for Summary Judgment on Claims It Misrepresented Drugs' Cardiovascular Risks

Judge Laura T. Swain of the U.S. District Court for the Southern District of New York granted in part and denied in part a drug manufacturer's motion for summary judgment on claims that the company violated Section 10(b) of the Securities Exchange Act by allegedly misrepresenting the cardiovascular risks of two drugs. Summary judgment was inappropriate as to the element of scienter because triable issues remained regarding whether the allegations constituted a "good-faith disagreement about the proper interpretation of scientific data" or fraudulent concealment of material facts. Triable issues also existed as to the falsity and materiality of the alleged statements, even though defendants argued that the statements were either true or merely opinions, and that it was not aware of the risks allegedly concealed. Further, material issues of fact remained as to whether other alleged disclosures did, in fact, cause the company's stock price to fall. But, partial summary judgment for the defendants on the issue of causation was appropriate as to disclosures that could not have been corrective because they did not reveal credible or new information regarding the allegedly concealed drug risks to the market.

SEC ENFORCEMENT ACTIONS

Sec. & Exch. Comm'n v. NIR Grp., LLC, No. CV 11-4723 (JFB) (GRB) (E.D.N.Y. Mar. 24, 2013))

Click here to view the opinion.

E.D.N.Y. Quashes a Subpoena Seeking Discovery Into SEC's Compliance With Dodd-Frank's 180-Day Period for Filing an Action After Issuing a Wells Notice

In an SEC enforcement action, Magistrate Judge Gary R. Brown of the U.S. District Court for the Eastern District of New York quashed a subpoena seeking discovery into the SEC's compliance with the Dodd-Frank Act's 180-day period for filing an action after issuing a Wells notice. Even though the defendants sought to use the 180-day period as a statute of limitations-like defense, the court determined that the 180-day period was only an internal governmental deadline and did not create a private right to be free of agency action after the period had passed. In addition, much of the discovery sought would be subject to attorney work-product protection, and the defendants failed to satisfy the higher standard of showing that the deposition was necessary.

Sec. & Exch. Comm'n v. Sharef, No. 11 Civ. 9073 (SAS) (S.D.N.Y. Feb. 19, 2013)

Click here to view the opinion.

S.D.N.Y. Dismisses Claims That Executive Violated Sarbanese-Oxley and the FCPA By Allegedly Bribing Argentinian Officials to Secure a Major Government Contract

In an SEC enforcement action, Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York dismissed claims that an executive violated the Sarbanes-Oxley Act and the Foreign Corrupt Practices Act by allegedly bribing Argentinian officials (and concealing the bribes ex post facto) in an effort to secure a major government contract. Although the executive allegedly encouraged a subordinate to engage in bribery, he did not directly authorize the bribes, did not participate in the cover-up and did not have any involvement in falsifying documents filed with the SEC, thus, the executive's conduct was not sufficiently connected to the filing of allegedly false financial statements in the United States to support jurisdiction. In addition, jurisdiction was unreasonable because of the executive's age, poor proficiency in English and location in a foreign country, and the availability of alternative forms of recovery against the company itself.

SECURITIES ACT CLAIMS

In re OmniVision Techs., Inc. Sec. Litig., No. C-11-5235 RMW (N.D. Cal. Mar. 29, 2013)

Click here to view the opinion.

Northern District of California Denies Motion to Dismiss Securities Class Action Based on Alleged Misrepresentations Related to the iPhone 4

The U.S. District Court for the Northern District of California denied OmniVision Technologies, Inc. and individual named defendants' (OmniVision) motion to dismiss a securities class action relating to alleged material misrepresentations in connection with OmniVision's contract to supply complementary metal-oxide semiconductor (CMOS) sensors to Apple for use in its iPhone 4S. The plaintiff's complaint alleged violations of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5 and pointed to several statements allegedly made by OmniVision executives and named defendants that were purportedly intended to mislead the market into believing that OmniVision would be the exclusive supplier of CMOS sensors for the iPhone 4S release, which falsely kept OmniVision share prices from falling.

Ultimately, OmniVision's sensors were not used in the iPhone 4S and instead Apple used chips manufactured by Sony. Thus a question of central importance in the district court's analysis of the plaintiff's claims was *when* OmniVision became aware that Apple would not be using its products. With respect to a majority of statements alleged in the complaint, the district court found that the plaintiff failed to show either that OmniVision knew it would not be receiving the Apple contract or that the statements themselves were misrepresentations. However, the district court found that the plaintiff sufficiently showed that OmniVision knew the following two statements were misrepresentations at the time they were made: (i) a September 1, 2011, statement by individual defendant Chan stating that OmniVision had gone head-to-head with Sony only once and that OmniVision had won the resulting design opportunity, which was for a 2012 product, and (ii) a September 20, 2011, statement by Chan that, in terms of market share, OmniVision's original equipment manufacturer (OEM) business relationships remain unchanged. The first statement was inaccurate because, at the time, OmniVision knew that Sony was its competitor for the iPhone 4S, which was a 2011 product and therefore it had gone head-to-head with Sony more than once. The second statement was inaccurate because regardless of whether OmniVision had lost its contract with Apple at the time, it knew, at the very least, that Apple was considering Sony and thus at least one of OmniVision's OEM relationships had changed, according to the court.

In re Facebook, Inc., IPO Sec. & Derivative Litig., MDL No. 12-2389 (S.D.N.Y. Feb. 13, 2013)

Click here to view the opinion.

S.D.N.Y. Denies Plaintiff's Motion to Remand Class Action Alleging NASDAQ Negligently Executed and Confirmed Trades in Facebook Stock on Day of Its IPO

Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York denied a plaintiff's motion to remand a purported class action alleging that NASDAQ negligently executed and confirmed trades in Facebook stock on the day of the company's IPO, causing the plaintiff to purchase Facebook shares at a higher than anticipated price. Although the plaintiff's claim was, on its face, based on state law, the court found a substantial federal interest in determining whether NASDAQ — a federally regulated entity — complied with the rules and regulations promulgated by the SEC under the Securities Exchange Act. The claim necessarily involved consideration of the trade processing rules implemented by NASDAQ pursuant to the public rule-making process established by the Securities Exchange Act, even though the plaintiff's claim purportedly focused only on conduct alleged to have taken place on the day of the IPO.

SECURITIES FRAUD PLEADING STANDARDS

Shemian v. Research In Motion Ltd., No. 11 Civ. 4068 (RJS) (S.D.N.Y. Mar. 29, 2013)

Click here to view the opinion.

S.D.N.Y. Dismisses Claims That Research In Motion Allegedly Failed to Disclose Purportedly Anticipated Complications in Its Smartphones and Tablets

Judge Richard J. Sullivan of the U.S. District Court for the Southern District of New York dismissed claims that Research In Motion violated Section 10(b) of the Securities Exchange Act by allegedly failing to disclose allegedly anticipated complications in the company's smartphones and tablets. The complaint did not adequately plead scienter because allegations that the executives hoped to inflate the company's stock price in order to acquire new technology for the company's new tablet were not plausible and the plaintiffs' evidence (including testimony from confidential witnesses and evidence of the defendants' positions, and the importance of the products, within the company) failed to link the alleged misrepresentations to any defendants' actual knowledge of falsity. Further, the defendants did not misrepresent facts material to investors because the alleged statements about the company's product line were either very general in nature or were forward-looking statements coupled with adequate warnings, and no evidence showed that defendants knew of information to the contrary at the time of the statement.

Mallen v. Alphatec Holdings, Inc., No. 10-cv-1673-BEN (MDD) (S.D. Cal. Mar. 28, 2013)

Click here to view the opinion.

Southern District of California Dismisses Putative Securities Class Action With Prejudice Because Plaintiff Failed to Prove Statements Were Not Literally True

Judge Roger T. Benitez of the U.S. District Court for the Southern District of California dismissed with prejudice a putative securities class action arising out of the acquisition of Scient'x, S.A. by the defendant, Alphatec Holdings, Inc. The plaintiff asserted claims under Section 10(b) of the Securities Exchange Act, SEC Rule 10b-5, and Sections 11 and 12(a)(2) of the Securities Act.

The plaintiff, on behalf of a class of shareholders, alleged that Alphatec misled investors about the benefits of the acquisition while failing to disclose the problems with Scient'x's inventory. Among other things, the plaintiff claimed that Alphatec materially misrepresented the company's position when it stated that anticipated revenues would grow driven in part "by the inclusion of Scient'x revenues" and the "launch of up to 15 innovative products into the U.S. and/or E.U. markets." With respect to the Section 10(b) and Rule 10b-5 claims, the plaintiff argued that failure to disclose certain problems with Scient'x's inventory made Alphatec's statements misleading. However, because the plaintiff did not challenge the literal truth of the statements — and the district court found that all of the statements were plausibly true at the time they were made — the district court rejected the plaintiff's argument and held that the plaintiff failed to "allege sufficient facts to show that the statements at issue were misleading." Furthermore, the district court found that the plaintiff failed to adequately plead scienter. Specifically, the district court noted that the fact that Alphatec shipped Scient'x's inventory to California and attempted to look for certain missing paperwork that, if found, would have rendered the inventory usable suggests that Alphatec actually believed that the inventory problems could be rectified. With respect to the Section 11 and 12(a)(2) claims, the district court found that the plaintiff failed to "plausibly allege that the inventory issues known [by Alphatec, at the time] constituted a known trend reasonably likely to have a material unfavorable impact on Alphatec's revenues." Therefore, the district court held that "without knowing more about Alphatec's specific expectations for Scient'x then-existing inventory, it is hard to infer anything about the potential impact of these issues on Alphatec's revenues, much less defendants' awareness of that potential impact."

NECA-IBEW Health & Welfare Fund v. Pitney Bowes Inc., No. 3:09-CV-01740 (VLB) (D. Conn. Mar. 23, 2013)

Click here to view the opinion.

District of Connecticut Dismisses Claims That Company Allegedly Misrepresented Negative Developments in Its Performance

Judge Vanessa L. Bryant of the U.S. District Court for the District of Connecticut dismissed claims that a mail processing equipment company violated Sections 10(b) of the Securities Exchange Act by allegedly misrepresenting negative developments in the company's performance. Several of the allegedly misleading statements were intended to project future revenue (based on "linguistic cues" such as "anticipates" and "expects"), and were accompanied by meaningful cautionary language (including warnings about the alleged negative developments in the company's business), and were, therefore, non-actionable forward-looking statements for purposes of the PSLRA safe harbor. In addition, the complaint did not adequately identify which of its voluminous quotations were alleged to be false, and did not allege that the alleged misrepresentations actually related to declining sales. Further, a strong inference of scienter was not raised because the plaintiffs failed to show motive and opportunity or knowledge of the falsity of the alleged misrepresentations.

STANDING

Crown Cork & Seal Co., Inc. Master Ret. Trust v. Credit Suisse First Boston Corp., No. 12-cv-05803-JLG (S.D.N.Y. Feb. 8, 2013)

Click here to view the opinion.

S.D.N.Y. Upholds Claims That Founder and CEO Allegedly Conducted a Ponzi Scheme Leading to the Company's Collapse

Judge James L. Graham of the U.S. District Court for the Southern District of New York upheld claims that the founder and CEO of a company violated Section 10(b) of the Securities Exchange Act by allegedly conducting a Ponzi scheme leading to the company's collapse. Even though the defendant had previously filed a motion to dismiss in the same case, the court considered the defendant's challenge to constitutional standing because standing objections are not waived and may be brought at any time during the suit. The court, however, determined that the plaintiffs had standing because the complaint sufficiently alleged that the plaintiffs purchased securities in the company, the defendant's alleged orchestration of a massive fraud caused the company's collapse and the plaintiffs lost their investments when the company collapsed.

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