KESSLER TOPAZ

Bulletin

Summer 2013

A Quarterly Newsletter for Institutional Investors by Kessler Topaz Meltzer & Check, LLP

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The Supreme Court's Latest Defense of Arbitration Clauses: *Oxford Health* and *AMEX*

Benjamin de Groot, Esquire and Ryan Degnan, Esquire

Since the adoption of the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"), companies have increasingly relied on arbitration clauses to limit plaintiffs' access to the courts and their ability to effectively seek relief on a class basis. As discussed in greater detail below, the Supreme Court of the United States recently issued two opinions that illustrate and reinforce the Court's reluctance to invalidate or modify contractual arbitration provisions — even when the provisions are set forth in a non-negotiated form contract. While based on a narrow set of facts, the Court's decision upholding an arbitrator's decision permitting class arbitration in *Oxford Health Plans v. Sutter*, 569 U.S. __ (2013) ("*Oxford Health*") highlights the emphasis placed on an arbitration provision's terms and the great deference afforded to an arbitrator's contractual interpretation. Similarly, in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. __ (2013) ("*AMEX*"), the Court's approval of an arbitration clause precluding class treatment where the cost of individually arbitrating under a federal statute was prohibitively expensive further emphasizes that arbitration clauses are generally to be enforced as written.

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Silver v. IMAX: Ontario Court's Treatment of Parallel Class Action Proceedings

Emily Christiansen, Esquire

In the wake of the United States Supreme Court's June 2010 decision in *Morrison v. National Bank of Australia* (holding that only investors who purchase securities on a U.S. market can pursue an action under U.S. securities law in a U.S. court) and the confluence of other countries' addition or development of a class action regime, the potential for parallel proceedings is increasing. Parallel proceedings arise when actions, between the same parties and stemming from essentially the same fact pattern, are pursued in two or more competing countries. In a typical two-party action, parallel proceedings are unusual but if competing actions occurred, one action would likely be stayed. In class actions, however, the potential exists for multiple proceedings to be filed in multiple jurisdictions and it is less apparent whether one court should stay a proceeding in favor of the other when the class members in both actions might not be identical but might simply overlap. In most countries there are no established guidelines or

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Recent Developments in Securities Fraud Damages: The *Liberty Media* Verdict

Matthew Mustokoff, Esquire and Margaret Onasch, Esquire

Trials in securities fraud cases are exceptionally rare. All but the fewest of cases are dismissed or settled long before reaching a jury. As a result, the guidance from the courts as to what is required to prove damages at trial is limited. However, one court has recently provided some needed direction. District Judge Shira A. Scheindlin's post-trial decision in *Liberty Media Corp. v. Vivendi Universal, S.A.*, No. 03-civ-2175 (S.D.N.Y. Feb. 12, 2013) ("*Liberty Media*") demonstrates how a securities fraud plaintiff proved loss causation and damages and successfully staved off a post-verdict assault on its expert.

In re Vivendi Universal, S.A. Securities Litigation was a securities class action brought against Vivendi Universal, S.A. ("Vivendi") and two of the company's executives for violations of Section 10(b) of the Exchange Act. The class plaintiffs alleged that Vivendi and the individual defendants made fifty-seven material misrepresentations and omissions regarding Vivendi's liquidity position between 2000 and 2002 that artificially inflated the price of the company's American Depositary Receipts. In a subsequent individual (non-class) action, *Liberty Media Corp. v. Vivendi Universal, S.A.*, Liberty Media ("Liberty") brought suit against Vivendi, alleging similar securities fraud claims with respect to a subset (twenty-five) of the fifty-seven misrepresentations and omissions alleged by the class. The *Liberty Media* action

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KTMC Achieves Significant Pleading Stage Victories in Two Recent Director Oversight Cases Involving Chinese Companies

Justin O. Reliford, Esquire

Over the past three years, a number of publicly traded companies headquartered in China have been exposed as frauds perpetrated on U.S. investors. The fraudulent schemes work as follows. A company with operations exclusively in China accesses U.S. capital markets by merging with a dormant shell corporation that is already listed on a U.S. exchange. The company's management, which owns a majority of the company's stock, then packs the board of directors with outside directors from the U.S. to provide an air of legitimacy to the corporation. The company then goes on a capital raising campaign, filling its corporate coffers through public offerings of stock based on patently false financial statements. With outside fiduciaries literally on the other side of the world, the controlling management team issues more false financial reports to maintain investor satisfaction. Meanwhile, the controlling insiders begin pilfering the company's resources through related-party transactions or flat out thefts of corporate assets.

When the fraud is exposed, everyone runs for cover. The company goes dark, gets de-listed from its exchange, and fails to file any additional financial reports for U.S. investors. The company insiders disappear behind a complex web of Chinese laws that essentially prevent any effective enforcement actions by U.S. regulators. And the outside directors appointed to create the illusion of effective director oversight defect from the company, attempting to escape any personal liability. After all, the outside directors were not in China, were not directly involved in the frauds, and necessarily relied upon management's false assertions when fulfilling their own fiduciary responsibilities.

At what point, however, should these outside directors be held accountable for the harm that their actions — or more appropriately put, inaction — may have caused?

For better or worse, Delaware law creates a high hurdle for any shareholder claiming that an outside director failed to properly oversee company management. Director oversight claims, colloquially referred to as "Caremark claims," are perhaps the most difficult claims to prosecute in Delaware. Indeed, ever since the 1996 Court of Chancery opinion that gave rise to the oft-used moniker for such claims, a share-

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The Resurgence of the "Unified Standard" and the Import of the *In re MFW Shareholders Litigation* Decision on Controlling Stockholder Transactions

J. Daniel Albert, Esquire

For thirty years, it has been black letter law in Delaware that when a controlling stockholder stands on both sides of a related party transaction, the controlling stockholder has the burden of proving that the transaction was fair to the company's minority stockholders in both its financial terms and the process employed in arriving at the transaction. This heightened standard of review employed by the Delaware courts for controlling stockholder transactions is known as the entire fairness standard. The entire fairness standard, however, permits a controlling stockholder to shift the burden of proof of the fairness of the transaction back upon the minority stockholders by employing the procedural protections of either subjecting the negotiation of the transaction to a special committee of independent directors ("special committee review") or submitting the transaction for approval by a majority vote of the minority stockholders of the company unaffiliated with the controlling stockholder ("majority of the minority vote").

In recent years, certain judges sitting in the Delaware Court of Chancery have suggested that entire fairness review of related-party transactions is not necessarily required. These decisions have suggested that if a controller subjects a related-party transaction to both special committee review and a majority of the minority vote, then the standard of review should not only shift the burden of proof, it should instead subject the entire transaction to more lenient "business judgment" review. Courts that had proposed this "unified standard," however, still required discovery to ensure, among other things, that the special committee was properly functioning and that the majority of the minority vote was fully informed.

However, on May 29, 2013, the Delaware Chancellor issued an opinion in *In re MFW Shareholders Litigation*, C.A. No. 6566-CS ("*MFW*"), suggesting that if certain conditions are met in a controlling stockholder transaction, then litigation challenging that transaction may be dismissed at the pleading stage prior to discovery.[1] In light of this surprising commentary from the Chancery Court's Chancellor, this article provides a historical analysis of the entire fairness standard under Delaware law and the Delaware Chancery Court's recent decisions espousing the unified standard, thereby placing *MFW* in context. This article also explains the potential impact that *MFW's* suggestion — that such transactions could be dismissed at the pleading stage — could have, should it be upheld, on the rights of minority stockholders.

In 1983, the Delaware Supreme Court issued the seminal decision *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), wherein the court espoused: "where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." *Id.* at 710. However, as noted above, the Delaware Supreme Court thereafter determined that where a controller includes a well-functioning procedural device of either a special committee or a majority of the minority vote, then the burden of proving entire fairness of the transaction may shift to the minority stockholder challenging the transaction. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994) ("*Lynch*"). Nevertheless, the court in *Lynch* unequivocally stated that "the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness." *Id.* at 1117. The Delaware Supreme Court has repeated *Lynch*'s holding multiple times in the last twenty years. Last year, in upholding Kessler Topaz's landmark trial victory in *Southern Peru*,[2] the Delaware Supreme Court again held that "[r]egardless of where the burden lies, when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard." *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1240 (Del. 2011) ("*Americas Mining*") (quoting *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 [Del. 1997] ["*Tremont*"]).

Despite these apparent clear pronunciations by the Delaware Supreme Court, in recent years, the Delaware Chancery Court has proposed that business judgment may well be the appropriate standard of review when a controlling stockholder transaction is conditioned on both a special committee and a majority of the minority vote. This deviation appears to have been first suggested in 2005, when then-Vice Chancellor Strine issued his opinion in *In re Cox Communications, Inc. Shareholders Litigation*, 879 A.2d 604

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[1] These statements were dicta, since in *MFW*, the parties had engaged in discovery.

[2] *See Kessler Topaz Bulletin* Fall 2012 at 3, "Kessler Topaz Historic $2 Billion Post-trial Verdict Against Grupo Mexico Upheld on Appeal."

Silver v. IMAX: Ontario Court's Treatment of Parallel Class Action Proceedings

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precedent for the treatment of parallel proceedings and potential class members are often left with the daunting task of trying to decide between competing proceedings. A March 19, 2013 Ontario Superior Court of Justice decision in *Silver v. IMAX*[1] sheds some light on how Ontario, Canada may deal with parallel proceedings and demonstrates that class proceedings in Canada can be bound by the settlement of parallel class proceedings in another country.

Parallel actions in both Ontario and the United States arose against IMAX Corporation in 2006 based on allegations of misrepresentations in financial reporting and recognition of revenue for theater systems. IMAX shares were traded on both the Toronto Stock Exchange (TSX) and the NASDAQ but nearly 85% of the total shares were purchased on the NASDAQ. Initially, the lead plaintiff in the U.S. action sought to certify a global class, but the Supreme Court's *Morrison v. National Bank of Australia* decision precluded it from doing so. Instead, the lead plaintiff in the U.S. action represented only those who purchased their shares on the NASDAQ. Class members were not initially required to opt-out of one action in order to participate in the other.

In 2009 the Ontario Superior Court certified a global class of shareholders, including both those who purchased shares on the NASDAQ and on the TSX. The decision was groundbreaking because it was the first instance in which a court in Canada certified a large "global" class. It is still relatively unsettled in Canada whether a court can certify a national class (class action laws vary from province to province in Canada) and in earlier decisions by the Ontario Superior Court the court expressed a reluctance to assert jurisdiction over foreigners. For example in *McCann v. CP Ships,* Justice Rady concluded:

> It is difficult to understand the basis on which an Ontario court could or should take jurisdiction over the [foreign] class members as proposed. Where is the real and substantial connection between, for example, the Ontario Court and a French citizen residing in France who purchased securities over the [TSX]? It strikes me as judicial hubris to conclude that an Ontario court would have jurisdiction in those circumstances.

Given the earlier sentiment of the court, it is surprising that the court would assert jurisdiction not only over a foreign class member, but a foreign class member who purchased the security on a foreign exchange.

In addition to certifying a large global class, Justice van Rensburg, the judge responsible for the class certification, did not find the parallel action in the United States to be a bar to the Ontario action. Justice van Rensburg paid particular attention to the fact that at the time of the application for certification, there was only a pending application for certification in the U.S. Proceedings and there was no guarantee that certification would be granted. That mere possibility was not enough to prevent the certification of global class.[2]

The consensus in the legal world was that the IMAX class certification decision had ushered in a new era and that Canada was soon to become the new destination for large global class actions. However, the March 19, 2013 decision by Justice van Rensburg confirms that the Ontario court was taking a sort of "wait and see" approach and only declined to limit the class when it was unclear whether there would be a recovery for proposed class members under the U.S. action.

The parties in the U.S. action reached a settlement agreement to resolve only the U.S. class action on November 2, 2011. After reaching a settlement agreement, the defendants apprised the Ontario class counsel of the preliminary agreement and offered them a chance to discuss resolution of the Canadian action under comparable terms. The Ontario class counsel refused the offer.

The proposed U.S. settlement agreement was presented to Judge Buchwald of the U.S. District Court for the Southern District of New York. Judge Buchwald approved the settlement terms of the U.S. action but subject to the Ontario court ordering an amendment of the Ontario class definition to exclude those covered by the U.S. class action (eg. those who purchased securities on the NASDAQ and did not opt-out of the U.S. action). IMAX accordingly brought a motion to change the class definition in the Ontario action. The Ontario class counsel opposed the action arguing that

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[1] Full text of the decision is available online: http://www.canlii.org/en/on/onsc/doc/2013/2013onsc1667/2013onsc1667.html

[2] The U.S. District Court was also nonplussed by the information that a parallel proceeding was underway in Canada. The court noted that the proceedings in Ontario were not a bar to a class certification in the United States because there were unique features to the U.S. litigation such as an additional defendant, a lengthier class period, the class definition only included NASDAQ purchasers, and the Ontario decision was being heard on appeal. Judge Buchwald, the judge in the U.S. action, concluded: "At bottom, a class action in a foreign jurisdiction, applying that jurisdiction's securities laws, to which a named defendant in the United States action is not a party, in which the first complaint in the foreign jurisdiction was filed after the first complaint in this case, is not a 'superior' way of adjudicating plaintiffs' claims against that party for alleged violations of U.S. securities laws. . . ."

the settlement was unsatisfactory and that plaintiffs would likely have a higher recovery under Canadian law because Canadian securities laws are more favorable.

Justice van Rensburg reviewed the motion and first determined that the court had the power to amend a class definition after a certification definition had been issued. Next applied factors, articulated in an earlier Ontario court decision of *Currie v. McDonald's Restaurants of Canada Ltd.* (a case involving the enforcement of a U.S. judgment approving a class action settlement that purported to bind Ontario residents), for when a settlement in a foreign court proceeding will be given preclusive effective over parallel proceedings in Ontario. Under *Currie,* there is a three part test.

The first part of the *Currie* test is to determine whether the U.S. court had jurisdiction stemming from a "real and substantial connection" to the claims of the overlapping members. Justice van Rensburg found this part of the test easily satisfied since the U.S. court "clearly has a connection to the claims of persons who acquired their shares of IMAX on the NASDAQ" and "IMAX is subject to the *Securities Exchange Act of 1934*."

The next part of the *Currie* test is to determine whether the overlapping class members were accorded procedural fairness and adequate notice. As explained in *Currie*, "the courts of this country must have regard to fundamental principles of justice and not to the letter of the rules which, either in our system, or in the relevant system, are designed to give effect to those rules." In applying this factor, Justice van Rensburg noted that Judge Buchwald had confirmed the adequacy of the notice in her decision approving the settlement and that the notice made specific reference to the parallel Ontario action and set out the options available to the overlapping class members. What was relevant, according to Justice van Rensburg, was "not whether or how an actual choice is made by a class member, but whether class members have the opportunity to make an informed choice."

The third *Currie* factor is the adequacy of representation in the foreign proceeding, meaning both the adequacy of the representation of class members by the lead plaintiff and the adequacy of the class counsel. Justice van Rensburg held that the Ontario court was not bound by the determination of the U.S. court that there was adequate representation and that instead it would need to conduct its own analysis to ensure that a "reverse auction," where the "defendant in parallel class actions 'picks the most ineffectual class lawyers to negotiate a settlement with, in the hope that the [applicable] court will approve a weak settlement that will preclude other claims against the defendant'." Here, Justice van Rensburg was satisfied that the representation was adequate because the settlement "occurred after six years of litigation, and extensive document discovery" and that there "were several rounds of negotiations, in which the Ontario plaintiffs' counsel participated at various stages, including in two mediations with experienced mediators." Ontario class counsel argued that the representation was inadequate because U.S. class counsel failed to account for the potentially enhanced recovery that would have occurred under Ontario law. Justice van Rensburg, however, rejected that argument as she was neither satisfied that Ontario law would have actually applied under a proper choice of law analysis nor that the U.S. class counsel had an obligation to justify the merits of a settlement accounting for Ontario law.

Satisfied that the *Currie* factors were all met by the U.S. settlement, Justice van Rensburg turned her attention to whether the amendment of the certification order was a "preferable procedure." The "preferable procedure" inquiry requires the court to determine whether the class action is preferable and whether the proceedings are serving the objectives of judicial economy, access to justice, and behavior modification. Justice van Rensburg was satisfied that the recognition of the U.S. settlement and the amendment of the Ontario class definition would serve the objectives of judicial economy and behavior modification so the remaining inquiry was:

> [W]hether the amendment of the class would further "access to justice," for the overlapping class members and for the members of the class who would remain if the NASDAQ purchasers are "carved out," and whether the order sought would respect the integrity of our class actions regime.

According to Justice van Rensburg, the evidence available did not prove that the U.S. settlement was irresponsible and that the Ontario outcome would be better. Justice van Rensburg concluded:

> [T]here are challenges to litigating the plaintiffs' claims in both jurisdictions, and there is no compelling reason to conclude that the Ontario legal regime, if applicable, would be more favourable to the determination of the claims of NASDAQ members of the class.

Furthermore, only seven opt-out letters were received in the U.S. action, only five of which were members of the overlapping class. None of the opt-out letters contained a stated preference for the Ontario action. There was also only one objector to the U.S. settlement and although he argued that the sum was not fair and reasonable when considering the advantages of the Ontario legal regime, he was alone in his objection and Judge Buchwald's decision that the U.S. settle-

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The Supreme Court's Latest Defense of Arbitration Clauses: *Oxford Health* and *AMEX*

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Oxford Health

In *Oxford Health*, a pediatrician filed suit against a health insurance company alleging that the defendant had failed to make payments as required by contract and various state laws. The relevant contract included an arbitration clause providing that "No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the rules of the American Arbitration Association with one arbitrator." Based on this language, the defendant moved to compel arbitration of the case.

After the district court granted the defendant's motion to compel arbitration, the parties agreed that the arbitrator should determine whether the arbitration clause allowed for class proceedings and the arbitrator found that class arbitration was permitted. Ultimately, the defendant petitioned the Supreme Court to vacate the arbitrator's determination allowing class arbitration on the grounds that it was incorrect and "exceeded [his] powers" under Section 10(a)(4) of the FAA.[1]

In unanimously rejecting the defendant's request, the Supreme Court first explained that Section 10(a)(4) of the FAA places a "heavy burden" on the challenging party and mandates that a federal court vacate the arbitrator's decision "[o]nly if 'the arbitrator act[s] outside the scope of his contractually delegated authority.'" *Oxford Health*, 569 U.S. __ (slip op. at 4-5). Given that the parties in *Oxford Health* previously agreed to allow the arbitrator to determine whether the arbitration clause permitted class arbitration,[2] the Supreme Court held that so long as the arbitrator "even arguably constru[es] or appl[ies] the contract" the arbitrator's decision "must stand, regardless of a court's view of its (de) merits." *Id*. In concluding that the arbitrator did in fact interpret the contract at issue, "[t]he arbitrator's construction holds, however good, bad, or ugly." *Id*. (slip op. at 8).

While *Oxford Health* largely turns on a narrow set of facts, the opinion nonetheless reaffirms both the availability of class arbitration when authorized by an arbitration clause and the highly deferential standard of review applied to an arbitrator's contractual interpretations. Ultimately, the unresolved issue of whether the availability of class arbitration is a question for an arbitrator to decide when the parties *do not* consent to the arbitrator's determination will have significant ramifications in shaping litigation strategy and the drafting of contracts in the future.

AMEX

In *AMEX*, the Court was presented with, and reversed, a lower court's determination that courts could invalidate an arbitration provision prohibiting class arbitration when the cost of individually arbitrating a federal statutory claim greatly exceeded the potential individual recovery. The case came to the Supreme Court on appeal from the Second Circuit's ruling in *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) ("*Am. Express*"). In the case below, the Second Circuit applied a recognized exception to the enforcement of arbitration agreements that allows courts to invalidate agreements that prevent the "effective vindication" of a federal statutory right. *Id*. at 214 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 632 [1985]). In applying this "effective vindication" exception, the Second Circuit relied on the Supreme Court's earlier decision in *Green Tree Financial Corp.-Ala. v. Randolph*, 531 U.S. 79, 92 (2000) ("*Green Tree*"), which noted that in some circumstances a party could "seek[] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive." *Id*. at 216. The Second Circuit concluded that the arbitration agreement containing the class action waiver was unenforceable because the expert testimony necessary to litigate the plaintiff's antitrust claims would be prohibitively expensive and would greatly exceed potential individual recovery, and thus, would prevent plaintiffs from effectively vindicating their federal statutory rights. *Id*. at 217.

In reversing the Second Circuit, the Supreme Court emphasized that "courts must 'rigorously enforce' arbitration agreements according to their terms" and adopted a narrow interpretation of the "effective vindication" exception. *AMEX*, 570 U.S. __ (slip op. at 3-7). As distinguished by the Court, the *Green Tree* discussion of the effective vindication exception focused on "arbitration costs" not the costs of suc-

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[1] Section 10(a)(4) of the FAA states that "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

[2] Consistent with the Supreme Court's prior ruling in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp*., 559 U.S. 662, 684 (2010), the Court reiterated that "[c]lass arbitration is a matter of consent: An arbitrator may employ class procedures only if the parties have authorized them." *Oxford Health*, 569 U.S. __ (slip op. at 1).

cessfully proving a federal statutory claim as an individual — either in arbitration or in court. *Id.* (slip op. at 6-7). According to the Supreme Court, the exception "would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights [a]nd it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id.* (slip op. at 6). However, "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the right to pursue that remedy." *Id.* (slip op. at 7) (emphasis in original).

In response to the majority's distinction between "arbitration costs" and the costs of "proving" a claim, Justice Kagan's strongly-worded dissent highlighted the impact of the troubling impact: when a "monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse . . . Too darn bad." *AMEX*, 570 U.S. __ (diss. op. at 1). The majority, however, noted that the Supreme Court "specifically rejected the argument that class arbitration was necessary to prosecute claims 'that might otherwise slip through the legal system'" in its prior arbitration decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. __ (slip op. at 17) (2011). *AMEX*, 570 U.S. __ (slip op. at 9).

In short, the *AMEX* opinion reinforces the principle that the FAA renders arbitration a matter of contract and further limits the circumstances under which courts may invalidate class arbitration waivers. Moreover, while the full impact of *AMEX* plays out in lower courts, it appears all but guaranteed that many companies will bolster contracts with arbitration provisions precluding class arbitration and continue to incorporate additional provisions in an attempt to limit the mechanisms available to individual plaintiffs in arbitration — after all, a majority of the Supreme Court believes "that the FAA's command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims." *Id.* (slip op. at 9, fn. 5).

Silver v. IMAX: Ontario Court's Treatment of Parallel Class Action Proceedings

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ment was "fair, reasonable, and adequate" took the objector's position into account. According to Justice van Rensburg, this was not sufficient evidence for her to conclude that the settlement was not providing "access to justice" for the NASDAQ purchasers.

There was also no evidence that the U.S. settlement would "leave the TSX purchasers stranded without the option of resolving their claims on a similar basis." Justice van Rensburg noted:

> It is not the function of this court to seek to jealously guard its own jurisdiction over a class proceeding that has been certified here. Such an approach is inconsistent with the principles of comity. It is also not the function of the court to favour or protect the interests of class counsel within its jurisdiction, knowing that they have invested time and resources into the litigation, and that their compensation will depend on the size of the judgment or settlement they are able to achieve.

After concluding her analysis, Justice van Rensburg ordered the amendment of the class certification order to remove all NASDAQ purchasers during the relevant period that failed to submit an opt-out notice in the U.S. proceedings.

The Ontario court's decision in *Silver v. IMAX* is significant for a number of reasons. It illustrates that a class that is certified as a "global" class will not necessarily result in a "global" resolution of all claims when there are competing parallel proceedings. And it highlights the importance of shareholders being aware of competing proceedings and rules in other jurisdictions even when already involved in an action in the U.S. (or another competing jurisdiction).

The Resurgence of the "Unified Standard" and the Import of the *In re MFW Shareholders Litigation* Decision on Controlling Stockholder Transactions *(continued from page 3)*

(Del. Ch. 2005) ("*Cox*"), arguing that the entire fairness standard oftentimes provided too much settlement leverage for minority stockholders and their counsel. The court then stated: "I observe that Delaware law would improve the protections it offers to minority stockholders and the integrity of the representative litigation process by reforming and extending *Lynch* in modest but important ways. The reform would be to invoke the business judgment rule standard of review when a going private merger with a controlling stockholder was effected using a process that mirrored ***both*** elements of an arms-length merger: 1) approval by disinterested directors; and 2) approval by disinterested stockholders." *Id.* at 606 (emphasis in original).

Five years later, in *In re CNX Gas Corp. Shareholders Litigation.*, 4 A.3d 397 (Del. Ch. 2010) ("*CNX*"), the Delaware Chancery Court renewed this suggestion, dubbing it the "unified standard." The *CNX* court stated: "I apply the unified standard for reviewing controlling stockholder freeze-outs described in [*Cox*]. Under that standard, the business judgment rule applies when a freeze-out is conditioned on ***both*** the affirmative recommendation of a special committee ***and*** the approval of a majority of the unaffiliated stockholders." *Id.* at 400 (emphasis in original). The Vice Chancellor who issued *CNX* reiterated his view a year later in *Reis v. Hazlett Strip-Casting Corp.*, 28 A.3d 442 (Del. Ch. 2011) ("*Reis*"). However, in both *CNX* and *Reis*, the Vice Chancellor found after reviewing the factual record developed through discovery that the procedural protections put in place by the controlling stockholders in each of those transactions were not properly functioning, and analyzed the transactions under the entire fairness standard. *CNX*, 4 A.3d at 400; *Reis*, 28 A.3d at 460-461. This highlights the importance of having a developed factual record to determine the appropriate standard of review in analyzing controlling stockholder transactions.

Following the issuance of these unified standard opinions, the Delaware Supreme Court issued the *Americas Mining* decision, which, as noted above, reiterated that entire fairness is the only appropriate standard of review when analyzing a controlling stockholder transaction — implicitly rejecting the unified standard. As one commentator noted, referencing *CNX*, "the Vice Chancellor recognized that until the Delaware Supreme Court weighs in, his application of the unified standard is not binding on subsequent cases . . . The Delaware Supreme Court's decision in [*Americas Mining*] indicates that the Kahn v. Lynch analysis applicable to controlling stockholder-led transactions is alive and well." Robert S. Reder, *Delaware Supreme Court Affirms Significant Damages Award Against Grupo Mexico*, CORPORATE LAW DAILY, Oct. 5, 2012. Thus, the issue appeared settled that entire fairness review governed all controlling stockholder transactions and the unified standard would go down as nothing more than a historical legal footnote.

Then a little over a month ago, Delaware Chancellor Strine, who authored the *Cox* opinion, rendered his decision in *MFW* resurrecting the unified standard and expanding its proposed application. The Chancellor granted defendants' motion for summary judgment, with the benefit of a full factual record after discovery had been completed, on the basis that under the unified standard the transaction should be subject to business judgment review. However, in dicta the Chancellor set forth a detailed set of instructions, which he believed if a controller followed in proposing a transaction would sanitize the process sufficiently to permit a court to dismiss litigation challenging a controlling stockholder transaction at the pleading stage prior to discovery. Specifically, the Chancellor stated: "The business judgment rule is only invoked if: (i) the controller conditions the procession of the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no definitively; (iv) the special committee meets its duty of care; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority. A plaintiff that can plead facts supporting a rational inference that any of those conditions did not exist could state a claim and go on to receive discovery." *MFW*, C.A. No. 6566-CS, 2013 Del. Ch. LEXIS 135, at *112-113 (Del. Ch. May 29, 2013).

The *MFW* decision appears to turn Delaware controlling stockholder jurisprudence on its head by suggesting not only that the more lenient business judgment standard may apply, but also that the appropriate standard of review may be determined prior to discovery. While we strongly believe that the *MFW* decision is inconsistent with deeply-rooted Delaware law, should it be adopted, minority stockholders of public corporations could see their ability to protect their rights from a domineering controlling stockholder severely restricted. Under this dicta from *MFW*, a controlling stockholder could merely satisfy a checklist of procedural protections to trigger business judgment review. Meanwhile, behind the scenes the controlling shareholder could be manipulating those very processes. Without the benefit of discovery, minority stockholders would likely have no real ability to challenge such a transaction and survive a motion to dismiss.

This heightened pleading burden appears contrary to the very decisions that the Chancellor attempts to distinguish in the *MFW* opinion (*Lynch, Tremont* and *Americas Mining*) where those courts found that the procedural protections employed by the controlling stockholder had been manipulated or that the special committee had either not acted independently or abdicated its duties thereby failing to satisfy its duty of care. *See, e.g., MFW*, 2013 Del. Ch. LEXIS 135, at *70-*75 (noting testimony and other discovery cited by the courts in *Lynch* and *Tremont* that questioned the special committees' effectiveness); *see also Americas Mining*, 51 A.3d at 1242 ("the use of procedural devices . . . such as special committees and minority stockholder approval conditions" may provide "***a modest procedural benefit*** . . . if the transaction proponents proved, in a factually intensive way, that the procedural devices had, in fact, operated with integrity") (emphasis in original). The risk that a controlling shareholder can facially employ these procedural devices, but still manipulate the situation in its favor, is too great a risk to allow any standard of review other than entire fairness to govern. *See Tremont*, 694. A.2d at 428-429.

On June 26, 2013, the *MFW* decision was noticed for appeal to the Delaware Supreme Court. Kessler Topaz intends to follow closely the appeal of the *MFW* decision and will report back the Delaware Supreme Court's decision and how it will affect minority stockholder litigation in the future.

Recent Developments in Securities Fraud Damages: The *Liberty Media* Verdict

(continued from page 2)

was consolidated with the class action from mid-2003 to March 2, 2009. The class action was then tried before a jury beginning in October 2009. Following a three month trial, the jury returned a verdict for the class plaintiffs, finding that Vivendi had violated Section 10(b) as to all fifty-seven alleged misstatements or omissions.

On April 11, 2012, Judge Scheindlin issued an opinion in the related *Liberty Media* action, holding that, based on the jury verdict in the class action trial, Vivendi was collaterally estopped from contesting the falsity, materiality, and scienter elements of Liberty's Section 10(b) claims stemming from the twenty-five statements for which the jury found Vivendi liable. The *Liberty Media* action was tried before a jury beginning the following month. On June 25, 2012, the jury returned a verdict in Liberty's favor, finding Vivendi liable for violations of Section 10(b) and awarding Liberty €765 million for each cause of action. Following trial, the defendants moved for judgment as a matter of law. Among other things, Vivendi argued that the opinion of Liberty's expert on loss causation and damages, Dr. Blaine Nye, was unreliable in its failure to disaggregate the inflationary impact on Vivendi's stock price caused by the fraud from the total stock price decline and, therefore, the jury's damages award was not supported by the record. The court rejected these post-trial challenges, reasoning that the question of Dr. Nye's methodology was properly reserved for — and decided by — the jury.

Loss Causation on Trial

At trial, Liberty's expert identified nine days on which, in his opinion, materializations of Vivendi's concealed liquidity risk resulted in statistically significant declines in Vivendi's stock price, after removing market-wide and industry-wide effects. With respect to these nine days, Dr. Nye explained that he had studied the days "for other things that happened on that day that you might need to take out that weren't related to the concealed liquidity risk" but found no material non-fraud-related, company-specific negative news. As Dr. Nye testified, "[i]n those days, . . . everything had to do with the fraud." Dr. Nye concluded that Liberty suffered around €842 million in damages due to the share price declines on these days.

In their post-trial motions, the defendants asserted that Dr. Nye's disaggregation analysis was insufficient to support the jury's verdict. Judge Scheindlin rejected this assertion, emphasizing that the issue was one of credibility reserved for the jury:

> Vivendi offers no significant arguments beyond what the jury heard and reasonably rejected at trial. Vivendi criticizes Dr. Nye for claiming to have excluded non-fraud-related company-specific events from his damages calculation, but then failing to "disaggregate a single such event on any one of his nine disclosure days." According to Dr. Nye's testimony, however, there

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> simply were no confounding events during the nine days on which he identified materialization events. The credibility of Dr. Nye's testimony was a matter for the jury, and *neither legal precedent nor common sense compels the conclusion that every set of materialization event windows, no matter how small in number, must contain at least one confounding event* (emphasis added).

Thus, Judge Scheindlin concluded that "a reasonable juror could have found that none of the ostensible confounding events put forth by Vivendi were both non-fraud-related and affected Vivendi's share price. . . . The weighing of the experts' conflicting testimony was a matter for the jury and will not be disturbed by this Court." In that regard, the court postulated that the jury's reduction of Dr. Nye's damages calculation of €842 million to an award of €765 million could have been based on the jury's conclusion that some of the confounding events presented by the defendants' expert should have been factored into the calculation. Therefore, the court found that the jury's verdict could be upheld, among other reasons, as having incorporated some of the confounding events Dr. Nye rejected, and thus discounting Dr. Nye's total damages figure. The import of the court's reasoning is that even if Dr. Nye's disregard of particular confounding events was improper, the verdict would nonetheless withstand a motion for judgment as a matter of law or a new trial on the premise that the jury's award, being that it represents a fraction of Dr. Nye's total figure, can be appropriately rationalized as an exercise in disaggregation of non-fraud-related factors affecting the stock price.

Artificial Inflation and Individual Misrepresentations

Vivendi also challenged Dr. Nye's computation of inflation in Vivendi's stock price, asserting that a reasonable jury could not have relied on Dr. Nye's calculation because (1) he arrived at the same total inflation amount in both the *Liberty Media* and class action trials (€22.52 per share), despite the different number of misstatements and omissions alleged in the two actions (twenty-five versus fifty-seven), and (2) he did not separately calculate the inflation associated with each of the twenty-five misstatements and omissions.

Judge Scheindlin expressed skepticism towards the defendants' challenge to Dr. Nye's inflation analysis which, she pointed out, did not depend on a distinct, quantifiable assessment of inflation as to *each* alleged misrepresentation or omission. As the court explained, because "Dr. Nye's damages analysis did not depend on the assumption that every misrepresentation by Vivendi could be independently monetized and subtracted from Liberty's damages," his opinion was not prone to defendants' argument:

> The calculation of damages was not derived from an analysis of the specific effects of individual misrepresentations and omissions. Dr. Nye calculated the damages Liberty suffered as a result of this inflation by analyzing the declines in Vivendi's stock price on the nine days during which the market responded to the materialization of the hidden liquidity risk. Vivendi has offered no legal basis for concluding that this was an unacceptable approach . . . . Using a different method, it might in theory have been possible to offer a more precise causal analysis, one that would have arrived at different damages calculations for the fifty-seven misrepresentations at the Class Action trial and the twenty-five at the Liberty trial. But the law does not require the use of such a fine-grained quantitative method, if one in fact exists that would produce reliable rather than spuriously precise results. The jury in this case was explicitly charged that "[d]amages need not be proven with mathematical certainty, but there must be enough evidence for you to make a reasonable estimate of damage."

The court found that Dr. Nye's theory satisfied the evidentiary standard, irrespective of whether the total inflation amount he calculated was the same in both actions. The court also found that Dr. Nye's methodology satisfied the Second Circuit's standards for proof of loss causation and damages because "plaintiffs are not required to allege the precise loss attributed to defendants' fraud." Judge Scheindlin further noted that Vivendi was free to attempt to persuade the jury that Dr. Nye's analysis — which did not depend on an independent assessment of each misstatement or omission but rather a measure of the inflation caused by the cumulative issuance and reissuance of false statements over a twelve-month period — should be rejected in favor of a more granular analysis. However, the court acknowledged the logic of Dr. Nye's opinion that the inflation remained constant throughout the relevant period, given the multiple, repeated false affirmations of no liquidity risk by the defendants: "[A] reasonable juror could have concluded that where losses result from a party's failure to correct a false impression it created that a risk does not exist, the losses may be the same whether the party failed to correct the false impression on twenty-five

occasions over one year or fifty-seven occasions over a year and a half. Either way, plaintiffs may suffer the same losses as a result of the materialization of the risk."

The Jury's Damages Award

Vivendi also challenged the jury's basis for calculating a damages award of €765 million. This award represented roughly €77 million less than Dr. Nye's proffered damages calculation of €842 million. The defendants' expert, on the other hand, had provided a damages range of between €0 and €175 million. Vivendi asserted that the damages award was invalid because it bore "no relation" to either expert's analysis and did not correspond to any of the price drops that Dr. Nye attributed to corrective disclosures. However, the court pointed out that Vivendi failed to explain what kind of "relation" the jury's damage award must have to the experts' proffered number. As Judge Scheindlin explained, "[i]f a jury may depart from expert damages calculations . . . and need not do so in a way that exactly, numerically corresponds to the rejection of specific elements of those calculations, it is difficult to understand the basis for Vivendi's criticism. . . ." The court also noted that Vivendi's argument was "probably waived," as Vivendi failed to request numerical constraints on the jury's damages award or that the jury itemize its award based on specific share price declines.

The court approached the verdict as the likely product of the jury's evaluation of the relative credibility of the two experts. Judge Scheindlin reasoned that the verdict suggested that the jury found Dr. Nye "largely but not entirely credible" and, therefore, if the jury discounted his damage calculation by ten percent to reflect this slightly diminished credibility, "the jury acted appropriately and within the bounds of its instructions." As the court explained, if the jury "found Dr. Nye's calculations roughly ninety percent credible . . . [, such] [c]redibility determinations are the province of the jury, and it is appropriate for damages awards to reflect credibility determinations regarding the damages calculations of experts." Judge Scheindlin further noted that "Vivendi has not cited, and I am not aware of, any precedent for the proposition that juries departing from expert calculations must themselves reason like experts and perform technical calculations, rather than arriving at rough estimates based on reasonable but imprecise credibility determinations."

As another possible explanation for the amount of damages awarded by the verdict, Judge Scheindlin posited that "the jury [could have] subtracted €2.06 per share from Dr. Nye's €22.52 per share inflation calculation by partially or wholly incorporating one or more of [the defendants' expert's] confounding events." In fact, as the court observed, Liberty's counsel "invited such discounting" by suggesting during closing argument that the jury could adopt its own lower inflation number for a given day if it was not sufficiently persuaded by the expert testimony regarding the inflationary impact on that day. Judge Scheindlin found this sort of analysis to be permissible under the applicable Second Circuit case law holding that "losses resulting from securities fraud need not be proved with mathematical precision," so long as it has a reasonable basis. Therefore, Judge Scheindlin declined to parse out which materialization events the jury questioned or which confounding events it considered, stating, "[t]here were any number of reasonable paths for arriving at a damages award of €756 million based on rough credibility determinations regarding the experts' calculations." Because the "jury faithfully obeyed its instructions, arriving at a reasonable estimate of Liberty's damages that fell between the plausible calculations of the experts," the court declined to disturb the jury's damage award.

Conclusion

Judge Scheindlin's decision in *Liberty Media* provides important guidance regarding what is required of plaintiffs to prove securities fraud damages at trial. First, the *Liberty Media* decision demonstrates the latitude afforded to juries in evaluating the credibility of dueling experts and awarding damages when the impact on the stock price caused by the fraud cannot be calculated with mathematical precision. This is often the case in securities actions, given the typical complexities posed by multiple false statements and disclosure events over protracted periods of time. Second, the decision counsels that so long as there is a reasonable basis in the record to support a damages award, juries are not themselves required to perform the kind of sophisticated, technical calculations carried out by experts. Third, the decision confirms that there is no requirement that a plaintiff's expert assign damages on a misstatement-by-misstatement basis. That is, an expert need not provide a quantifiable assessment of the specific damages attributable to each alleged misrepresentation or omission because, as courts in several circuits now recognize, misrepresentations and omissions that are effectively repeated over many months or years may cause inflation simply by maintaining existing market expectations, even if the level of inflation in the stock price does not increase on the day the misrepresentation or omission is made.

KTMC Achieves Significant Pleading Stage Victories in Two Recent Director Oversight Cases Involving Chinese Companies *(continued from page 2)*

holder-plaintiff has needed to allege a complete lack of effective internal reporting systems to survive a pre-discovery motion to dismiss such claims. Stated otherwise, Delaware law will not impose liability on an outside director who was uninvolved in managerial misconduct, unless the director blinded herself to the wrongdoing. Thus, directors defending Caremark claims routinely secure early dismissals of shareholder derivative actions by pointing to the mere existence of some internal controls over financial accounting and reporting — *e.g.*, an audit committee of the board, an internal audit program, use of outside auditors to vet the company's financial reports, *etc*.

Not so, however, for the outside directors of *Fuqi International, Inc.* ("*Fuqi*") and *China Agritech, Inc.* ("*Agritech*"). Rather, in two separate derivative actions filed by KTMC on behalf of U.S. shareholders of these China-based corporations, the Delaware Court of Chancery denied motions to dismiss premised, in large part, on the mere existence of some internal controls.[1] The cause of these rare pleading stage victories is two-fold. First, the market artifices at issue in the two actions are so egregious that the outside directors, as noted by the court in *Fuqi*, would need to either be involved in the wrongdoing or derelict in their oversight duties. Second, KTMC, with the assistance of its co-counsel Prickett, Jones & Elliot P.A., executed pre-filing litigation strategies that maximized the chances of the oversight claims surviving preliminary dispositive motions.

Fuqi is a China-based jewelry manufacturer that accessed U.S. capital markets in 2006 through a reverse merger with a pre-existing, but dormant, publicly traded shell corporation. After providing glowing financial reports in every quarter that followed the Company's reverse merger, in March 2010, *Fuqi* shocked investors by announcing an inability to file its fourth quarter 2009 financial report because of "certain errors related to the accounting of the Company's inventory and cost of sales." *Fuqi* also told investors that they should no longer rely upon the financial filings it made for the first three quarters of 2009.

At the time of these disclosures, *Fuqi's* board of directors had a majority of outside directors, who appeared too removed from the accounting improprieties to claim that they engaged in any knowing or willful misconduct. Accordingly, acting on behalf of minority shareholder George Rich, Jr., on July 19, 2010, KTMC demanded that *Fuqi's* board investigate and take all appropriate actions against any potentially culpable officers and directors, including Yu Kwai Chong, *Fuqi's* founder, controlling shareholder, Chief Executive Officer and Chairman. The board, which included Mr. Chong, formed a Special Investigation Committee (or "SIC") comprised entirely of outside directors to investigate Mr. Rich's allegations.

Notwithstanding the formation of the SIC, months passed without any apparent progress on *Fuqi's* internal investigation or the completion and restatement of its 2009 public filings. The company's significant delays ultimately led the SEC to launch its own investigation into the company in September 2010. That investigation is still ongoing.

Then, on March 28, 2011, *Fuqi* announced that the audit committee of its board instituted a second internal investigation into cash transfers totaling approximately $130 million from *Fuqi's* bank accounts to three potentially fictitious companies in China. Mr. Chong personally authorized each such transfer. The NASDAQ stock exchange de-listed *Fuqi* the following day.

A cavalcade of dissociations and resignations followed, including the resignation of *Fuqi's* independent auditor and three of *Fuqi's* outside directors, two of which served on the SIC. Meanwhile, in June 2011, the sole remaining SIC member took over Mr. Chong's role as Chief Executive Officer, joining the management team that had thwarted the board's investigation efforts by refusing to pay the advisors hired to conduct the investigations.

Accordingly, on June 13, 2012, Mr. Rich commenced his derivative action for the benefit of *Fuqi* against its current and former directors, including Mr. Chong and the outside directors that comprised the defunct SIC. Based, in part, on the facts that unfolded after Mr. Rich made his demand, Mr. Rich specifically alleged: "*Fuqi* had virtually no meaningful internal accounting and financial reporting controls, and in complete abdication of their fiduciary duties, the Individual Defendants willfully ignored the Company's obvious and pervasive lack of controls and made no good faith effort to correct or prevent the disaster that would ensue as a result."

Fuqi, along with the defendant directors, moved to dismiss Mr. Rich's complaint, attempting to cast his claims as typical Caremark claims unworthy of the court's attention. Vice Chancellor Glasscock rejected these arguments, finding instead that *Fuqi's* own disclosures regarding material deficiencies in its internal controls led him "to believe that *Fuqi* had no meaningful controls in place." Going further, the Vice Chancellor explained: "The board of directors may have had

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[1] The actions are captioned: (1) *Rich v. Chong, et al.*, C.A. No. 7616-VCG; and (2) *In re China Agritech, Inc. Shareholder Derivative Litig.*, C.A. No. 7163-VCL.

regular meetings, and an Audit Committee may have existed, but there does not seem to have been any regulation of the company's operations. . . . [E]ven if I were to find that *Fuqi* had some system of internal controls in place, I may infer that the board's failure to monitor that system was a breach of fiduciary duty."

Agritech, like *Fuqi*, is also a China-based company that accessed U.S. capital markets through a reverse merger with a dormant, but publicly listed shell corporation in February 2005. After several years of positive financial reports from the Chinese fertilizer company, an analyst report by an admitted short-seller of *Agritech's* stock made a host of allegations of potentially fraudulent conduct by *Agritech* and its management team. Among other things, the analyst report exposed a lack of production activities and appropriate licenses for several of *Agritech's* processing facilities. The analyst report likewise identified significant discrepancies between *Agritech's* filings with the SEC and Chinese regulatory authorities, indicating that *Agritech* was hardly as successful as its management led U.S. investors to believe. *Agritech* management fervently denied these claims.

In light of the seriousness of these allegations, however, *Agritech* shareholder Albert Rish retained KTMC to conduct an inspection of *Agritech's* books and records to help determine if any of the allegations had merit. In addition, Mr. Rish's inspection demand sought documents concerning a related-party transaction through which *Agritech* acquired its controlling co-founders' minority interest in *Agritech's* otherwise 90% owned subsidiary, Pacific Dragon Fertilizers Co. Ltd ("Pacific Dragon"). *Agritech*, however, refused to turn over any documents, prompting KTMC to file an action on Mr. Rish's behalf to enforce his right to access the company's records. *Agritech* management eventually capitulated, turning over a paltry 227 pages of documents to Mr. Rish.

As Mr. Rish would eventually allege in his Verified Shareholder Derivative Complaint, those records failed to bare management's public rebuttals of the short-seller's allegations and further indicated that *Agritech* had significantly overpaid for its co-founders' minority interest in Pacific Dragon. Citing the lack of reliable supporting documentation produced by the company, Vice Chancellor Laster observed: "The problem for a legitimate entity would be the potential burden of having too many responsive documents, not the difficulty of digging up a few."

Specifically with regard to the board's oversight of the company's financial reporting process, Vice Chancellor Laster noted that *Agritech* failed to produce a single set of Audit Committee meeting minutes for 2009 or 2010. Relying largely on the lack of documents produced by *Agritech* to demonstrate effective director oversight, Vice Chancellor Laster held that Mr. Rish's allegations "support a reasonable inference that the members of the [] Board face a substantial risk of liability for oversight violations."

Taken together, the Chancery Court's opinions in *Fuqi* and *Agritech* offer two significant lessons for directors and shareholders alike. First, the opinions make clear that corporate fiduciaries cannot sit back and collect directors' fees while turning a blind eye towards management's conduct. Rather, they must make efforts to stay informed about their company's operations; and when put on notice of potential misconduct, they must take affirmative steps to protect the company's and its shareholders' interests.

Second, the fact that director oversight claims are difficult to maintain over pleading stage objections does not mean that shareholders should avoid raising such claims when appropriate. With a well-executed pre-filing litigation strategy, such as those KTMC employed in *Fuqi* and *Agritech*, a shareholder can develop a factual record sufficient to survive a motion to dismiss director oversight claims. In *Fuqi*, that factual record developed, in large part, from the outside directors' inaction in response to Mr. Rish's pre-suit litigation demand. In *Agritech*, the company's own records (or lack thereof) helped demonstrate the inaction necessary to support a claim that the outside directors breached their fiduciary duties. In both instances, the records KTMC developed through its pre-litigation efforts allowed the court to find that the outside directors may not have done enough to fulfill their obligations to their respective companies.

Pennsylvania Association of Public Employee Retirement Systems Fall Workshop

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Georgia Association of Public Pension Trustees 4th Annual Conference

September 24 – 26, 2013

Marriott Evergreen — Stone Mountain, GA

The Program Committee is already busy at work developing customized professional development sessions for its attendees. The sessions presented by GAPPT are designed to expose individuals to the fundamentals, strategies, and applications needed by Trustees and Administrators of Public Pension Plans. It is our hope that individuals will get information that will enable them to make informed decisions on relevant topics such as international investing, defined contribution programs, manager selection and retention and asset allocation required for their positions.

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Florida Public Pension Trustees Association Fall Trustees School

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PGA National Resort — Palm Beach Gardens, FL

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Southeast Institutional Investor Forum

October 29, 2013

Marriott Buckhead — Atlanta, GA

The Southeast Institutional Investor Forum is an educational conference designed to address the needs of the Southeast States' Public Pension and Institutional Investor Community. The program's agenda will cover investments, fiduciary responsibilities, legal and legislative issues, healthcare benefits, actuarial assumptions, asset/liability management and best practices in plan management. The forum is specially designed to bring together 100 plus attendees representing North Carolina, South Carolina, Georgia, Alabama, Tennessee, Kentucky, Louisiana, Arkansas, Missouri, Mississippi and Florida.

California State Association of County Retirement Systems Fall Conference 2013

November 12 – 15, 2013

Renaissance Esmeralda Resort — Indian Wells, CA

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