SUMMER 2018

The Bulletin **is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay**

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HIGHLIGHTS

KESSLERTOPAZ MELTZERCHECK LLP

KESSLER TOPAZ OBTAINS UNPRECEDENTED SETTLEMENT AFTER WINNING PRELIMINARY INJUNCTION ENJOINING CHANGE-OF-CONTROL TRANSACTION BETWEEN XEROX CORPORATION AND FUJIFILM HOLDINGS CORPORATION

M. Rullo, Esquire and J. Reliford, Esquire

On April 27, 2018, Kessler Topaz, acting on behalf of Iron Workers District Council of Philadelphia & Vicinity Benefit and Pension Plan, obtained a landmark ruling enjoining a proposed change-of-control transaction between Xerox Corp. ("Xerox") and FUJIFILM Holdings Corp. ("Fuji"). The transaction, announced less than two months after activist investor Carl Icahn launched a proxy contest for seats on Xerox's board, would have provided Fuji with majority control of Xerox "without spending a penny," while also securing continuing lucrative directorships for the Xerox board members whom Icahn specifically targeted to replace.

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KESSLER TOPAZ PLAYED INSTRUMENTAL ROLE IN THE LARGEST EUROPEAN SETTLEMENT TO-DATE; HELPED SECURE $1.5 BILLION INVESTOR RECOVERY

Emily Christiansen, Esquire

The Amsterdam Court of Appeals recently approved a €1.3 billion ($1.5 billion) multi-party global settlement between investors and Ageas N.L. (the successor entity to Fortis Bank which at the time was a Dutch-Belgian entity). The settlement is the largest investor recovery in Europe to-date and provides another example of the value to investors in pursuing redress for allegations of corporate fraud and abuse outside the U.S. Although this particular settlement was ultimately approved on a global

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THE SUPREME COURT RE-TOOLS *AMERICAN PIPE'S* TOLLING DOCTRINE

Ryan T. Degnan, Esquire and Erin Keil[1]

Since the Supreme Court of the United States' landmark decision in *American Pipe & Construction Co*. v. *Utah*, 414 U.S. 538 (1974) ("*American Pipe*"), absent class members have been allowed to rely on the filing of a class action complaint to toll — or suspend — the statute of limitations period for their individual claims until a ruling on class certification was issued. Accordingly, in situations where courts ultimately deny class certification, absent class members are permitted to intervene in the initial action or file separate individual lawsuits that would otherwise be untimely. More recently, the Ninth Circuit in *Resh v. China Agritech, Inc.*, 857 F.3d 994 (9th Cir. 2017) ("*Resh*"), expanded *American Pipe*'s tolling doctrine to allow absent class members to file (otherwise untimely) follow-on class action

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[1] Ms. Keil, a summer associate of the Firm, is a third-year law student at the University of Arkansas School of Law.

KESSLER TOPAZ SECURES CHANCERY COURT DECISION PERMITTING TESLA CASE TO PROCEED

Eric L. Zagar, Esquire and Michael J. Rullo, Esquire

On March 28, 2018, Kessler Topaz Meltzer & Check, LLP, along with co-lead counsel, obtained a ruling denying a motion to dismiss filed by the defendants in *In re Tesla Motors, Inc. Stockholder Litigation*. Vice Chancellor Joseph R. Slights III held that it was reasonably conceivable that Elon Musk, who owned 22.1% of Tesla's common stock, was the Company's controlling stockholder. As a result, Tesla's 2016 acquisition of SolarCity Corporation, a company Musk founded with his cousins, was subject to review under the rigorous "entire fairness" standard despite Tesla stockholders' approval of the transaction. Kessler Topaz initiated litigation on behalf of Tesla stockholders shortly after the transaction's announcement, alleging that Tesla's Board of Directors (the "Board"), including Musk, breached their fiduciary duties in approving the $2.6 billion acquisition of SolarCity.

The Background

Founded in 2006 by Musk and two of his cousins, SolarCity is in the business of leasing solar panel equipment to residential and commercial customers. Its business model required significant upfront costs for equipment and installation. As a result, in the three years preceding Tesla's offer in June 2016, SolarCity's debt increased thirteen-fold to $3.56 billion. SolarCity faced a liquidity crisis and risked default unless it promptly obtained access to additional capital. The debt and equity markets, however, were effectively closed to SolarCity.

Faced with few viable alternatives for preventing the collapse of SolarCity, Musk turned to Tesla. In early 2016, Musk first proposed to Tesla's Board the idea of Tesla acquiring SolarCity, but on two separate occasions the Board delayed, noting concerns that it could impact the management team's time and resources in the near term. Undeterred, Musk raised the prospect of a possible acquisition of SolarCity at a third Board meeting in May 2016, at which time the Board authorized the evaluation of a potential acquisition. The Board did not focus on any other potential target in the solar energy space, and Musk neglected to note the significant liquidity crisis SolarCity faced. Moreover, despite "obvious conflicts," including Musk's

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DOJ'S ANTITRUST DIVISION SETS ITS SIGHTS ON "NO-POACH" AGREEMENTS

Zachary Arbitman, Esquire

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . "[1] Given this, agreements among employers to refrain from "poaching" one another's employees have long been recognized as running afoul of United States antitrust laws.[2] For, a horizontal agreement not to hire competitors' employees functions, in essence, as an unlawful market allocation agreement.[3]

But, given the apparent uptick in these types of agreements, the Antitrust Division of the United States Department of Justice and the Federal Trade Commission issued guidance in 2016 to reemphasize their illegality (the "Guidance").[4]

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[1] 15 U.S.C. § 1.

[2] *Eichorn v. AT&T Corp.*, 248 F.3d 131, 142 (3d Cir. 2001) (employees challenging no-hire agreement had antitrust standing to sue); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 545 (10th Cir. 1995) (employee had antitrust standing to challenge agreement between employers not to hire each other's employees); Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶352a (3rd and 4th Editions, 2018 Cum. Supp. 2010-2017) ("Employees may challenge antitrust violations that are premised on restraining the employment market . . . Standing for employees thus parallels that for 'suppliers' generally[.]"); *Doe v. Arizona Hosp. and Healthcare Ass'n*, Case No. CV 07-1292, 2009 WL 1423378 at *3 (D. Ariz. March 19, 2009) ("Price-fixing agreements among buyers, like those among sellers, are prohibited by the Sherman Act, even where the damages caused by the agreement is to sellers and not consumers."); *cf. Mandeville Island Farms v. American Chrystal Sugar Co.*, 334 U.S. 219 (1948) (sugar beet suppliers had antitrust claim for price-fixing against sugar beet refiners).

[3] *See United States v. eBay, Inc.*, 968 F.Supp. 2d 1030, 1039 (N.D. Cal. 2013) ("The court thus finds that the United States' allegations concerning agreement between eBay and Intuit [not to hire each other's employees] suffice to state a horizontal market allocation agreement.").

[4] Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation* (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.

NINTH CIRCUIT RELAXES STANDARD OF LIABILITY FOR TENDER OFFER MISREPRESENTATION CLAIMS

Ryan T. Degnan, Esquire and Erin Keil[1]

Courts throughout the country have historically held that Section 14(e) of the Securities Exchange Act of 1934 (the "Exchange Act") — which prohibits false and misleading statements made in connection with a tender offer — requires plaintiffs to prove that the defendants acted with "scienter" or a fraudulent intent when issuing such false or misleading statements. In April 2018, this landscape was fundamentally altered when the United States Court of Appeals for the Ninth Circuit in *Varjabedian v. Emulex Corp.*, 888 F. Supp. 3d 399 (9th Cir. 2018) ("*Emulex*"), rejected the reasoning of five other federal circuit courts and became the first circuit court to conclude that Section 14(e) requires proof of only negligence, not scienter. Given the lower burden of proof required by the Ninth Circuit, the *Emulex* decision has the potential to both increase the use of Section 14(e) by plaintiffs in policing tender offers in the Ninth Circuit and encourage defendants to seek transfer of such lawsuits to other less favorable venues.

The Emulex Tender Offer

Tender offers are public solicitations to acquire a particular quantity of stock from a publicly traded company's existing stockholders. More specifically, a tender offer allows an acquirer to

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[1] Ms. Keil, a summer associate of the Firm, is a third-year law student at the University of Arkansas School of Law.

2019 Event Calendar

For 13 years in Europe, 10 years in the US, and 2 years in London, Kessler Topaz Meltzer & Check LLP (KTMC) has partnered with Institutional Investor Forums and Memberships to co-develop these three events annually to serve and educate legal executives at global asset management firms and institutions.

14th Annual
The Rights & Responsibilities of Institutional Investors

March 7-8, 2019
NH Grand Hotel Krasnapolsky

The 14th Annual Rights & Responsibilities of Institutional Investors meeting will again be held in Amsterdam and co-sponsored by Institutional Investor and Kessler Topaz Meltzer & Check LLP. The pressing issues for investors and shareholders covered in this agenda will consider the ways that legal, investment, and compliance ocers from European and selectively, global public pension plans, insurance funds and asset management rms, are paving a path forward to meet their responsibilities and to leverage their rights as active investors.

www.iiforums.com/rrii

2nd Annual
Institutional Governance and Legal Symposium

April 3, 2019
The Landmark London

The 2nd Annual Institutional Governance and Legal Symposium will offer a thorough overview of the legal landscape affecting institutional shareholders with an audience of general counsels and heads of legal from asset management firms and sovereign wealth funds. Emphasizing real-world examples of how shareholders are engaging with the companies they invest in, the Symposium will review the most crucial legal decisions, regulatory actions, and developments in M&A, private markets strategies, asset recovery, etc., and offer insights on the approaches successful funds have implemented to meet their legal, compliance, and fiduciary objectives.

www.iiforums.com/igls

10th Annual
Evolving Fiduciary Obligations of Institutional Investors

April 30 - May 1, 2019
Waldorf-Astoria

In this tenth year now, in conjunction with co-host Kessler Topaz Meltzer & Check LLP, and with the essential input of an Advisory Board of your peers, we will offer a thorough overview of the landscape within which legal teams at asset management firms are operating to fulfill their obligations as fiduciaries and active shareholders. And in turn, how they may better leverage strategies and achieve objectives within this environment to meet both their individual as well as the community's shared objectives.

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Institutional Investor FORUMS

KESSLER TOPAZ MELTZER CHECK LLP

KESSLER TOPAZ OBTAINS UNPRECEDENTED SETTLEMENT AFTER WINNING PRELIMINARY INJUNCTION ENJOINING CHANGE-OF-CONTROL TRANSACTION BETWEEN XEROX CORPORATION AND FUJIFILM HOLDINGS CORPORATION

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Expedited discovery revealed overwhelming evidence that the Xerox's "massively conflicted" former CEO, Jeff Jacobson, and other Xerox directors negotiated and approved the financially unfair transaction principally for the purpose of winning the proxy fight with Icahn. The proposed settlement of the action, which Kessler Topaz and its co-counsel will present to the Court for final approval over the summer of 2018, directly addresses the governance failures that gave rise to the bad deal by, among other things: (1) ousting Jacobson from his role as CEO; (2) replacing each of the "old guard" directors who stood to gain the most from approving the deal; and (3) requiring the new Xerox board to engage in a fair sales process aimed to maximize shareholder value.

The Facts

Xerox and Fuji have a longstanding relationship centered on a joint venture — Fuji Xerox — that distributes Xerox products in Asia and the Pacific Rim. Pursuant to the proposed transaction, Fuji would exchange its 75% interest in the Fuji Xerox joint venture for a 50.1% stake in Xerox, and Xerox would pay a special dividend to its existing shareholders funded solely through new debt carried by the post-transaction company.

When strategic discussions began in early 2017, however, the Xerox board was focused on negotiating an all-cash premium transaction. Those discussions stalled in April 2017, when Fuji announced a massive accounting scandal at Fuji Xerox.

Jacobson, however, could not afford to wait for Fuji to resolve the accounting issues at Fuji Xerox before negotiating a change-of control transaction that would serve his own needs. Indeed, in mid-May 2017, Icahn invited Jacobson to dinner at Icahn's New York apartment. Icahn showed up 30 minutes late, then spent the next two-and-a-half hours telling Jacobson that he needed to find a way to sell the Company or Icahn would push to have him terminated.

Jacobson felt disrespected by the 82-year-old activist investor, who dressed Jacobson down in front of two other Xerox executives also in attendance. Rather than look for a way to sell the Company at Icahn's demand, Jacobson turned to finding ways to push Icahn out of his Xerox position.

Jacobson turned back to Fuji and, in consultation with Xerox's financial advisor, developed a transaction structure that would allow Fuji to make a cashless acquisition of a controlling interest in Xerox. By selling control to Fuji, with whom Jacobson had repeated interactions over his long tenure at Xerox, Jacobson could minimize Icahn's influence over Xerox, if not completely force Icahn out of the stock. Jacobson did not advise the full Board of this concept until after presenting it to Fuji and subsequently failed to inform *any* director that Fuji expressed continuing interest in an all-cash, whole company acquisition — even if that required more time or partnering with a private-equity firm.

Simultaneously, following its meeting in mid-July 2017, the full board came to the "unanimous view" that Jacobson was not the right leader for Xerox. It began looking for his replacement and, in early-November 2017, identified his successor — John Visentin, a candidate certain Xerox directors described as "head and shoulders better" than Jacobson. On November 10, 2017, pursuant to a "unanimous" board directive, Robert J. Keegan, Xerox's Chairman, informed Jacobson of his impending dismissal and ordered him to cease discussions with Fuji.

Jacobson promptly communicated his "situation" to Fuji and thereafter prevailed upon Keegan to allow him to proceed with his negotiations with Fuji. Keegan, without consulting his fellow directors, including the two independent directors Icahn installed on the Board, gave Jacobson the green light. While Jacobson denies soliciting Fuji's assistance to save his job, text messages produced in discovery confirm that Fuji, for its part, was keenly focused on discussing Jacobson's "current situation" and how Fuji could assist him in his personal war against Icahn.

By November 21, Jacobson had assurances that Fuji's CEO, Shigetaka Komori, would condition any deal on Jacobson continued employment. An internal memorandum summarized Fuji's interest in and reasoning for co-opting Jacobson's loyalty: "[I]f Mr. [Jacobson] was dismissed, then the next CEO would be someone associated with Mr. [Icahn], resulting in [Fuji] *losing control* of the [Xerox] board of directors through association with Mr. [Jacobson]." Ten days later Fuji sent Jacobson a term sheet for what ultimately became the change-of-control transaction at issue in the litigation.

It was only then that the full board learned that Jacobson continued his negotiations with Fuji. But the board was not in position to undermine what Jacobson had done.

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KESSLER TOPAZ OBTAINS UNPRECEDENTED SETTLEMENT AFTER WINNING PRELIMINARY INJUNCTION ENJOINING CHANGE-OF-CONTROL TRANSACTION BETWEEN XEROX CORPORATION AND FUJIFILM HOLDINGS CORPORATION *(continued from page 5)*

By December 8, 2017, Icahn officially announced his proxy contest to install four new directors on the Board. At this point, the cashless, no-premium proposal by Fuji took on new light as a defensive transaction that would help the incumbent directors win the proxy war with Icahn. Indeed, materials provided to the Xerox board by its financial advisors specifically noted that approving a transaction with Fuji would help the board defeat Icahn at the Xerox's next annual meeting.

On January 30, 2018, the board approved the transaction. The board was in such a rush to finalize a deal in time to thwart Icahn, that it agreed to the transaction terms without receiving audited financial statements for Fuji Xerox, even though the directors knew that Fuji had still not fully addressed the accounting issues originally disclosed in April 2017.

Indeed, Fuji did not provide audited financial statements for Fuji Xerox until two days before the preliminary injunction hearing, almost three months after the board approved the deal. Even worse, the audited financial statements did not match the unaudited financial statements Xerox used during negotiations. In fact, the new audited financials were so different from the unaudited statements that Xerox needed to take a $28 million "charge" in its May 2018 quarterly report, given its 25% interest in the joint venture.

The Result

On April 26 and 27, 2018, Kessler Topaz, alongside counsel for Darwin Deason — Xerox's third largest shareholder, who filed individual claims challenging the Fuji Deal — conducted an evidentiary hearing before Justice Barry R. Ostrager of the New York State Supreme Court. The litigation team elicited key testimony during the hearing that ultimately led to the injunction ruling and eventual termination of the proposed transaction. This includes, among other things, admissions by Keegan that Xerox and Fuji were actively renegotiating the transaction and that the belatedly provided audited financial statements would potentially give Xerox leverage to negotiate a better transaction.

Within hours of the hearing, Justice Ostrager issued his decision. He noted his inability to credit the self-serving and unbelievable explanations proffered by Jacobson and other directors at the hearing in light of the documentary record, and he preliminarily enjoined Fuji and Xerox from taking steps to consummate the transaction on its current terms.

Kessler Topaz, along with co-lead counsel for the class and counsel for Deason, subsequently used the leverage provided by the preliminary injunction ruling to obtain an unprecedented settlement for Xerox shareholders. The settlement reforms Xerox's corporate governance by replacing the six most culpable directors with four new independent directors, installing John Visentin as CEO, and requiring the new Board to engage in a comprehensive strategic review to find a value maximizing transaction.

The Takeaways

The Xerox case teaches many lessons. Perhaps, the most important of those lessons is: "Bad corporate governance leads to bad deals for shareholders." Indeed, this case brought to light the exact manner in which poor and disloyal corporate leadership can have direct and detrimental impacts on shareholder value. Indeed, Jacobson and his fellow directors were ready to sell shareholders short to win a proxy fight and keep their jobs. Their disloyalty has resulted in their resignations.

This is the cleansing nature of sunlight in action. The litigation stopped a bad deal from moving forward and paved the way for new independent fiduciaries to pursue a value maximizing transaction for Xerox shareholders. On behalf of all of Xerox's constituents, we wish them the best of luck. ■

KESSLER TOPAZ PLAYED INSTRUMENTAL ROLE IN THE LARGEST EUROPEAN SETTLEMENT TO-DATE; HELPED SECURE $1.5 BILLION INVESTOR RECOVERY CORPORATION

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basis that will also allow "absent" investors to file a claim, the plaintiffs represented by Kessler Topaz and other investors who actively pursued litigation will receive a twenty five percent premium and will receive their portion of the recovery at least a year earlier than those who took no steps and remained passive.

Kessler Topaz, along with co-counsel, represented the group Stichting Investor Claims against Fortis ("SICAF"). SICAF was a group of over 180 institutional investors who collectively held more than 80 million shares of Fortis Bank. Litigation against Fortis arose out of the subprime mortgage crisis. Investors lost up to ninety percent of the value of their investments in Fortis shares after Fortis attempted to acquire the Dutch bank ABN Amro Holding N.V. in 2007 and failed. The first complaint filed by the SICAF group was filed in 2011 and alleged that Fortis misrepresented the value of its collateralized debt obligations, its exposure to subprime-related mortgage-backed securities, and the extent to which the decision to acquire ABN Amro jeopardized its solvency. After the ABN Amro acquisition failed, Fortis encountered financial difficulties and ultimately was forced to breakup in the fall of 2008.

The €1.3 billion settlement resolves all shareholder claims that relate to the 2007-2008 failed acquisition of ABN Amro and the subsequent failure of Fortis Bank. The settlement was the result of extensive multiparty negotiations between Ageas, SICAF, and three other groups of investors who actively pursued claims in either the Netherlands or Belgium. ■

THE SUPREME COURT RE-TOOLS *AMERICAN PIPE'S* TOLLING DOCTRINE

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complaints in the event that the original (timely) class action complaint was not certified as a class action.

In *China Agritech, Inc. v. Resh*, 584 U.S. __ (2018) ("*China Agritech*"), the Supreme Court rejected the Ninth Circuit's expansion of the *American Pipe* tolling doctrine to follow-on class action claims. In doing so, the Supreme Court clarified that permitting absent class members to file follow-on class action claims after the denial of class certification did not advance *American Pipe*'s stated goal of promoting efficient litigation and would only serve to deny defendants the protection afforded to them by the applicable statutes of limitations. While *China Agritech* is clearly a victory for defendants, the Supreme Court's ruling is unlikely to materially impact the rights of diligent class members who proactively seek to serve as class representatives or appropriately pursue claims as individual litigants.

Tolling of Statutes of Limitations under *American Pipe* and *Resh*

Ordinarily, statutes of limitations require plaintiffs to file lawsuits seeking to remedy their injuries within a prescribed time period in order to ensure that they act with reasonable diligence and to provide defendants with some certainty as to when their exposure to liability ends. In *American Pipe*, the Supreme Court held that the timely filing of a class action complaint would toll the statute of limitations for all members of the proposed class during the pendency of the class action and until the court issues a ruling on class certification. Thus, as further explained by the Supreme Court in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), if the class action is ultimately not certified, the members of the proposed class are permitted to file their own individual complaints even though the statute of limitations period might have otherwise expired. The Supreme Court has reasoned that any contrary rule would "deprive Rule 23 class actions of the efficiency and economy of litigation" that the rules governing class actions sought to promote because, without tolling, absent class members would be encouraged to intervene or file unnecessary duplicate actions within the statute of limitations period in an attempt to preserve the timeliness of their individual claims. *American Pipe*, 414 U.S. at 553-54.

In *Resh*, the Ninth Circuit held that the *American Pipe* tolling doctrine not only permitted absent class members to file individual claims in the event that class certification was denied, but it also permitted absent class members to file (otherwise untimely) additional or follow-on class action claims if the initial class action complaint was not certified. In doing so, the Ninth Circuit explained "that permitting future class action named plaintiffs, who were unnamed class members in previously uncertified classes, to avail themselves of *American Pipe* tolling would advance the policy objectives that led the Supreme Court to permit tolling in the first place" and "creates no unfair surprise to defendants because the pendency of a prior class suit has already alerted them" to the potential claims and that a potential class of plaintiffs was seeking relief. *Resh*, 857 F.3d at 1004. Stated simply, if plaintiffs' individual claims were not time-barred, then their class action claims were similarly not time-barred.

The Supreme Court Narrows the Outer Limits of Tolling

In *China Agritech*, the Supreme Court rejected the Ninth Circuit's reasoning in *Resh* and held that the application of the *American Pipe* tolling doctrine to follow-on class action claims was inconsistent with the purposes of *American Pipe* and the rules governing class action litigation.

As reiterated by the Supreme Court in *China Agritech*, tolling of absent class members' individual claims promotes efficient litigation because "[i]f certification is granted, the claims will proceed as a class and there would be no need for the assertion of any claim individually" and "[i]f certification is denied, only then would it be necessary to pursue claims individually." According to the Supreme Court, that same rationale does not apply to follow-on class action claims given that "efficiency favors early assertion of competing class representative claims" — not follow-on class actions after the denial of class certification — and because the early filing of competing class actions allows "the district court [to] select the best plaintiff with knowledge of the full array of potential class representatives and class counsel." Indeed, the Supreme Court explained that while its decision limiting tolling to individual claims could lead to the filing of multiple competing class actions early in litigation, "a multiplicity of class-action filings is not necessarily 'needless'" given that "multiple filings may aid a district court in determining, early on, whether class treatment is warranted, and if so, which of the contenders would be the best representative." To this end, the Supreme Court specifically highlighted that the Private Securities Litigation Reform Act of 1995 ("PSLRA") — which governs class actions asserting claims under the federal securities laws — already contains mechanisms designed to encourage all potential lead plaintiffs to come forward at the outset of litigation such that the district court can appoint the most adequate lead plaintiff early in the litigation.

Moreover, the Supreme Court noted that applying the *American Pipe* tolling doctrine to follow-on class actions was untenable because it "would allow the statute of limitations to be extended time and time again; as each class is denied certification, a new named plaintiff could file a class complaint that resuscitates the litigation." As stated by the Court, "[t]he time to file individual actions once a class action ends is finite, extended only by the time the class suit was pending; the time for filing successive class suits, if tolling were allowed, could be limitless" and "[e]ndless tolling of a statute of limitations is not a result envisioned by *American Pipe*."

Justice Sotomayor's Concurring Opinion

In reaching its conclusion that the *American Pipe* tolling doctrine did not permit absent class members to file follow-on class action complaints, the majority opinion did not draw any distinction between the various types of class actions that are commonly brought by plaintiffs. While Justice Sonia Sotomayor agreed with the practical result finding the follow-on class action untimely in *China Agritech*, she wrote a concurring opinion explaining that not all types of class actions should be subject to such broad restrictions. Specifically, Sotomayor explained that the statutes of limitations should not be tolled for follow-on class actions where the claims are governed by the PSLRA (like that in *China Agritech*) because the PSLRA imposes specific procedures requiring "all prospective class representatives [to] come forward in the first-filed class action and make their arguments to the court for lead-plaintiff status." Thus, a plaintiff filing a follow-on class action in the PSLRA context "can hardly qualify as diligent in asserting [class] claims and pursing relief" if it did not seek to represent the class in the initial class action litigation. In contrast, Sotomayor noted that other class action cases (*e.g.*, antitrust, consumer fraud, and product defect cases) — which are simply governed by Federal Rule of Civil Procedure 23 — should not be held to such rigorous standards because there is no uniform process for alerting potential class members of the existence of these class actions and facilitating a competitive class representative selection process.

Given the distinction between PSLRA securities class actions and all other class actions, Sotomayor explained that the majority should have more narrowly construed its opinion to make tolling available for future class action claims where class certification is denied for a reason that bears on the suitability of the class representative (*i.e.*, not because the class action mechanism is inappropriate given the facts of the claims generally). Accordingly, Sotomayor advocated in her concurrence that "district courts can help mitigate the potential unfairness of denying *American Pipe* tolling to class claims not subject to the PSLRA" by, "[w]here appropriate, . . . liberally permit[ting] amendment of the pleadings or intervention of new plaintiffs and counsel."

Class Actions after China Agritech

The Supreme Court's ruling in *China Agritech* provides certainty for defendants and absent class members alike. Defendants now know that the full and final denial of class certification after the expiration of the statute of limitations period will prevent the filing of follow-on class actions from absent class members standing at the ready. Likewise, absent class members now know that their only potential avenue for relief in these situations is through the pursuit of individual claims. In addition to providing this clarity, the ruling in *China Agritech* may also serve to improve the quality of class representatives leading non-PSLRA class actions. As explained by the Supreme Court, the refusal to toll the statute of limitations for follow-on class actions may encourage multiple potential class representative to come forward shortly after the filing of the first class action complaint — thereby allowing "the district court [to] select the best plaintiff with knowledge of the full array of potential class representatives and class counsel." Such a result, would benefit all class members by minimizing the likelihood that class certification will be subsequently denied due to deficiencies unique to the class representatives. ■

NINTH CIRCUIT RELAXES STANDARD OF LIABILITY FOR TENDER OFFER MISREPRESENTATION CLAIMS

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invite a company's existing shareholders to "tender" or sell a minimum quantity of shares to the acquirer at a fixed price, which is often at a premium to the company's current stock price, on a fixed date. Tender offers are frequently used by acquiring companies as a means to purchase a number of shares sufficient to obtain majority control of the targeted company. While tender offers are frequently used as a means to conduct hostile takeovers, tender offers may also be completed with the support and approval of the targeted company. Given this dynamic, companies targeted in a tender offer frequently issue recommendation statements either encouraging or discouraging their shareholders from tendering shares to an acquirer.

The *Emulex* case centers on the 2015 acquisition of Emulex Corp. ("Emulex") by Avago Technologies Wireless Manufacturing, Inc. ("Avago") pursuant to a tender offer. Specifically, Emulex and Avago announced in February 2015 that they had entered into a merger agreement in which Avago agreed to pay Emulex's shareholders $8.00 for each share of outstanding Emulex stock (representing a premium of 26.4% on Emulex's stock price the day before the announcement). Pursuant to the merger agreement, Avago initiated a tender offer for Emulex's outstanding stock and Emulex issued a recommendation statement encouraging its shareholders to tender their shares to Avago (the "Recommendation Statement"). In connection with the Recommendation Statement, Emulex provided a summary of the financial analysis and fairness opinion for the proposed merger that was conducted by Emulex's investment bank advisor. However, the Recommendation Statement omitted a "Premium Analysis" conducted by Emulex's investment bank advisor that demonstrated that while the 26.4% premium associated with the tender offer was within the normal range of premiums offered in other transactions, the premium was below average when compared to seventeen similar transactions. In May 2015, the Emulex tender offer was successfully completed — and Emulex was merged into an Avago subsidiary — after Emulex's shareholders tendered more than 60% of the company's outstanding shares to Avago.

After the merger was completed, certain objecting shareholders filed suit against, *inter alia*, Emulex, Avago, and Emulex's board of directors, claiming that defendants violated Section 14(e) by failing to include the Premium Analysis in the Recommendation Statement. *See Varjabedian v. Emulex Corp.*, No. 8:15-CV-554, ECF No. 1 (C.D. Cal. Apr. 8, 2015). Relying on precedent from the Second, Third, Fifth, Sixth, and Eleventh Circuits, Judge Cormac J. Carney from the United States District Court for the Central District of California dismissed the Section 14(e) claim against the defendants and concluded that the plaintiff had failed to establish that the defendants acted with scienter in omitting the Premium Analysis from the Recommendation Statement. *See Varjabedian v. Emulex Corp.*, 152 F. Supp. 3d 1226, 1232-34 (C.D. Cal. 2016) ("the wealth of persuasive case law . . . require[s] a plaintiff bringing a cause of action under § 14(e) to allege scienter").

The Ninth Circuit Parts with Five Other Federal Circuit Courts

On appeal, the Ninth Circuit reversed and remanded the Section 14(e) claim, holding that Section 14(e) requires plaintiffs to prove only that defendants acted negligently, not with scienter, in making material misstatements or omissions in connection with a tender offer. In doing so, the Ninth Circuit expressly rejected the reasoning set forth by the other circuit courts, and relied extensively on both the plain language of Section 14(e) and two U.S. Supreme Court decisions concerning other sections of the Exchange Act in concluding that Section 14(e) calls for a negligence standard.

As an initial matter, the Ninth Circuit emphasized the disjunctive construction of the statute which states that: "[i]t shall be unlawful for any person to make any untrue statement of a material fact or to omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, ***or*** to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer

. . . " *See* 15 U.S.C. § 78n(e) (emphasis added). Specifically, the Ninth Circuit explained that the word "or" in between the two clauses established that there are two different offenses that the statute proscribes. While the second clause prohibits "fraudulent, deceptive, or manipulative acts or practices" — thereby suggesting that scienter is necessary — no similar requirement for proving scienter is suggested by the plain language of the first clause. *See Emulex*, 888 F. Supp. 3d at 404.

Additionally, the Ninth Circuit determined that the rationale used by the other circuits to justify a scienter standard — which compared Section 14(e) to Section 10(b) of the Exchange Act (the general anti-fraud provision of the Exchange Act which requires proof of scienter) — would not apply to Section 14(e). As explained by the Ninth Circuit, the origins of a scienter requirement in Section 14(e) came in 1973 in *Chris-Craft Indus. Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir. 1973). There, the Second Circuit held that because Section 14(e) and Rule 10b-5, the implementing rule for Section 10(b), shared identical phrasing and claims under Section 10(b) required a showing of scienter, then Section 14(e) must require a showing of scienter as well. The Third, Fifth, Sixth, and Eleventh Circuits followed suit.

In contrast to these other circuit courts, the Ninth Circuit concluded that any interpretation of Section 14(e) requiring proof of scienter was not consistent with Supreme Court case law. First, the Ninth Circuit explained that the Supreme Court's "conclusion [in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)] that scienter is an element of Rule 10b-5 had nothing to do with the text of Rule 10b-5" and instead was predicated on the language of Section 10(b), which empowered the U.S. Securities and Exchange Commission to pass rules "regulat[ing] *only* 'manipulative or deceptive device[s]' " in the securities markets. *Emulex*, 888 F. Supp. 3d at 406. Indeed, the Supreme Court in *Ernst & Ernst* expressly noted that the language of Rule 10b-5 ("It shall be unlawful . . . [t]o make any untrue statement of a material fact or omit to state any material fact") could be read as imposing either a scienter ***or*** a negligence standard. 425 U.S. at 193. Therefore, according to the Ninth Circuit, the identical phrasing of Rule 10b-5 and the first clause of Section 14(e) did not necessarily require a showing of scienter.

Second, the Ninth Circuit highlighted the fact the Supreme Court provided guidance for interpreting Section 14(e) in *Aaron v. SEC*, 446 U.S. 680 (1980). Specifically, the Supreme Court in *Aaron* analyzed Section 17(a)(2) of the Exchange Act — which governs disclosures made in connection with initial public offerings and contains nearly identical language to that found in the first clause of Section 14(e) — and concluded that Section 17(a)(2) does ***not*** require a showing of scienter. Given the existence of nearly identical language in Sections 14(e) and 17(a)(2), the Ninth Circuit found that the two sections should be interpreted consistently and not impose a scienter requirement. *Emulex*, 888 F. Supp. 3d at 406.

Ultimately, the Ninth Circuit found that *Ernst & Ernst* and *Aaron* cast doubt on the logic that had been followed by the five other circuits and provided the Ninth Circuit with support for the interpretation that Section 14(e) requires a showing of negligence, not scienter, in connection with alleged false and misleading tender offer statements.

Potential Impact

The Ninth Circuit's decision in *Emulex* is significant given that, for the first time since Section 14(e) was passed fifty years ago, a federal appeals court has endorsed a lower negligence standard for material misstatements and omissions made in connection with tender offers. Critically, the Ninth Circuit's reduced pleading standard requirements may increase the filing of tender offer litigation in the Ninth Circuit (as well as other circuits that have yet to opine on the pleading standard) and may also prompt defendants to seek avenues to transfer Section 14(e) litigation out of the Ninth Circuit, if possible. Moreover, the emergence of a circuit split between the Ninth Circuit and the Second, Third, Fifth, Sixth, and Eleventh Circuits creates an opportunity for Supreme Court review. ■

KESSLER TOPAZ SECURES CHANCERY COURT DECISION PERMITTING TESLA CASE TO PROCEED

(continued from page 2)

and other Tesla directors' membership on the SolarCity board and ownership of significant amounts of SolarCity stock, the Tesla Board never formed a special committee to evaluate the transaction.

The Board subsequently met in June 2016 and Musk "reminded" the directors that they had previously considered but ultimately deferred their review of a potential acquisition of SolarCity. This meeting was the first at which the Board met with its financial advisor Evercore and, while Musk and Antonio Jose Gracias (also a SolarCity director) recused themselves from the vote, Musk remained at the meeting and led most of the discussions.

At the June 2016 meeting, the five remaining directors approved the offer to acquire SolarCity. Importantly, however, the majority of these directors had close business and/or personal connections to Musk. These directors included Kimbal Musk (Elon's brother); Brad Buss (who served as CFO of SolarCity from August 2014 until February 2016 and received $32 million in compensation); and Stephen T. Jurveston (a longtime investor in Musk's business ventures who received numerous gifts from Musk over the years, such as the first Tesla Model S and the second Tesla Model X ever made).

On July 31, 2016, despite the aforementioned issues, the Board executed the merger agreements and announced the transaction the following day.

The first of seven lawsuits challenging Tesla's proposed acquisition of SolarCity was filed on September 1, 2016. Kessler Topaz filed an initial complaint on September 12, 2016 and an amended complaint on September 30, 2016, both of which incorporated information obtained through Section 220 demand requests. On October 10, 2016, the Court designated Kessler Topaz co-lead counsel and the September 30, 2016 amended complaint as the operative pleading in the consolidated action. Kessler Topaz, along with co-lead counsel, filed a second amended complaint on March 3, 2017, which the defendants moved to dismiss on March 17, 2017. The Court subsequently held oral argument on December 13, 2017 and, on March 28, 2018, Vice Chancellor Slights issued his opinion denying the defendants' motion to dismiss.

The Takeaways

Vice Chancellor Slights' decision is significant for numerous reasons, most notably because he rejected the defendants' contention that Musk's 22.1% ownership stake in Tesla, which falls well below the 50%+ needed for absolute voting control, was insufficient to provide him with control of Tesla. Instead, the ruling clarified that a controlling-stockholder inquiry focuses on the actual power exercised by the alleged controller and whether, in light of all pertinent factors, that stockholder dominates the corporation's decision making. Fundamental to the Court's decision was the manner in which Kessler Topaz, along with co-lead counsel, structured the plaintiffs' complaint to emphasize Musk's persona, the irrevocably flawed process, and the pervasive conflicts of interest on the Board.

First, Vice Chancellor Slights noted that Musk possessed a unique ability to use his visionary persona to conduct highly effective public outreach. As a result, when it comes to stockholder voting, Musk has the means to narrow the difference between his minority ownership stake and majority stockholder support.

Second, Vice Chancellor Slights highlighted failures of process by Musk and the Board. Musk "brought the proposal to the Board not once, not twice, but three times" — failing to mention SolarCity's ongoing liquidity crisis on each occasion. Additionally, and despite the Board's knowledge of Musk's relationship with SolarCity, the Board failed to even consider forming a special committee to independently evaluate the merits of the acquisition. Instead, the Board permitted Musk to lead the discussions throughout the process, even after recusing himself. Finally, the Board failed to discuss acquisitions of any other company in the solar energy space, despite one of Tesla's investment banks publicly stating that SolarCity was the "worst positioned" company in the sector.

Third, Vice Chancellor Slights emphasized the "obvious conflicts" of the directors who participated in the acquisition discussions and approval. These conflicts included the previously noted substantial personal and business relationships between Musk and a majority of the directors, which created "a reasonable inference" that these directors were "beholden" to Musk.

This ruling was a significant win for Tesla's stockholders and demonstrates the need for corporate fiduciaries to institute proper corporate governance policies and procedures whenever a company engages in a transaction with a large and influential stockholder. Moving forward, the parties will conduct discovery, with a trial expected to occur in the latter half of 2019. ■

DOJ'S ANTITRUST DIVISION SETS ITS SIGHTS ON "NO-POACH" AGREEMENTS

(continued from page 3)

The Guidance provides important insights for HR professionals geared toward preventing discussions or agreements among companies seeking to hire from similar talent pools.[5] Specifically, DOJ advised HR professionals and others involved in hiring and compensation decisions that "[a]n agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; term of employment; or even job opportunities."[6] Indeed, the Guidance stated, "[a]n individual likely is breaking the antitrust laws if he or she . . . agrees with individual(s) at another company to refuse to solicit or hire that other company's employees (so-called 'no poaching' agreements)."[7]

Regulators made clear their intention to crack down on no-poach agreements by way of a recent investigation and subsequent enforcement action initiated by DOJ.[8] Beginning in or around 2016, DOJ launched an investigation into the employment practices of Knorr-Bremse AG ("Knorr") and Westinghouse Air Brake Technologies Corporation ("Wabtec") — leading suppliers of equipment used in freight and rail passenger applications. As a result of its

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5 U.S. Dep't of Justice, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS (Oct. 2016), *available at* https://www.justice.gov/atr/file/903511/download.

6 *Id.* at 1.

7 *Id.* at 3.

8 Press Release, U.S. Dep't of Justice, *Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees* (Apr. 3, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

DOJ'S ANTITRUST DIVISION SETS ITS SIGHTS ON "NO-POACH" AGREEMENTS

(continued from page 13)

investigation, DOJ concluded that Knorr and Wabtec entered into no-poach agreements constituting unreasonable restraints of trade and *per se* violations of antitrust laws.[9] The no-poach agreements were deemed "facially anticompetitive because they eliminated a significant form of competition to attract skilled labor in the U.S. rail industry."[10] Such agreements "denied employees access to better job opportunities, restricted their mobility, and deprived them of competitively significant information that they could have used to negotiate for better terms of employment."[11]

On April 3, 2018, the DOJ filed its complaint alleging that Knorr and Wabtec's no-poach conspiracy was unlawful under Section 1 of the Sherman Act. The DOJ also filed a stipulated proposed final judgment in which Knorr and Wabtec agreed that the DOJ's complaint "state[d] a claim upon which relief may be granted against the Defendants under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1."[12] In the stipulated proposed final judgment, Knorr and Wabtec were, among other things, "enjoined from attempting to enter into, entering into, maintaining, or enforcing any No-Poach Agreement or No-Poach Provision."[13]

The DOJ did not, however, seek monetary penalties or compensation in the stipulated proposed final judgment filed against Knorr and Wabtec. For this reason, on June 6, 2018, KTMC filed a class-action lawsuit against Knorr, Wabtec, and certain of their subsidiaries to recover the difference between the compensation that Plaintiff and Class members were paid and what she and Class members would have been paid absent Knorr and Wabtec's *per se* unlawful conduct.[14] Plaintiff filed her Complaint in the United States District Court for the District of Maryland, but her action is now subject to a motion to transfer and coordinate or consolidate it, along with other related actions, currently pending before the United States Judicial Panel on Multidistrict Litigation.[15]

Other additional, high-profile "no-poach" enforcement actions are likely to follow. Indeed, as recently as April 17, 2018, at the American Bar Association's Spring Meeting, DOJ Deputy Assistant Attorney General Barry Nigro noted that "[g]oing forward, we intend to . . . investigate those [no-poach agreements] and, if appropriate, pursue them criminally . . . This is an area that is active [at DOJ] . . . I've personally been surprised at how many of these agreements I've stumbled across . . . many more than I expected . . . including companies whose names you all know . . . There is more activity in this area than you realize." ■

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9 *United States v. Knorr-Bremse AG*, No. 18-cv-00747, ECF No. 3 at 2, 8-12 (D.D.C. Apr. 3, 2018) (Competitive Impact Statement).

10 *Knorr-Bremse AG*, No. 18-cv-00747, ECF No. 1 at ¶ 31 (Complaint).

11 *Id.*

12 *Knorr-Bremse AG*, No. 18-cv-00747, ECF No. 2-1 at 2 (D.D.C. Apr. 3, 2018) (Proposed Final Judgement).

13 *Id.* at 3.

14 *McNeal v. Knorr-Bremse AG, et al.*, No. 18-cv-01667 (D. Md.).

15 *In re Railway Industry Employee No-Poach Antitrust Litigation*, MDL No. 2850 (J.P.M.L.).

EVENTS

WHAT'S TO COME

AUGUST 2018

County Commissioners Association of Pennsylvania (CCAP) — Annual Conference and Trade Show

August 5 – 8

Wyndham Gettysburg ■ Gettysburg, PA

Texas Association of Public Employee Retirement Systems (TEXPERS) — Summer Educational Forum

August 12 – 14

Grand Hyatt ■ San Antonio, TX

SEPTEMBER 2018

Georgia Association of Public Pension Trustees (GAPPT) — 9th Annual Conference

September 17 – 20

Savannah Hyatt Regency ■ Savannah, GA

Florida Public Pensions Trustees Association (FPPTA) — Fall Trustee School

September 30 – October 3

Hyatt Regency Coconut Point Resort
Bonita Springs, FL

OCTOBER 2018

International Foundation of Employee Benefit Programs (IFEBP) — 64th Annual Employee Benefits Conference

October 14 – 17

Ernest N. Morial Convention Center
New Orleans, LA

Council of Institutional Investors (CII) — 2018 Fall Conference

October 24 – 26

The Westin Copley Place ■ Boston, MA

National Conference on Public Employee Retirement Systems (NCPERS) — Public Safety Employees' Pension & Benefits Conference

October 28 – 31

Paris Las Vegas Hotel ■ Las Vegas, NV

NOVEMBER 2018

State Association of County Retirement Systems (SACRS) — Fall Conference

November 13 – 16

Renaissance Esmeralda Resort
Indian Wells, CA

County Commissioners Association of Pennsylvania (CCAP) — Fall Conference

November 18 – 20

Hershey Hotel ■ Hershey, PA

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