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

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KESSLERTOPAZ MELTZERCHECK LLP

INSIGHTS ON GLOBAL SHAREHOLDER LITIGATION FROM RECENT ISS SCAS REPORT ON TOP 25 NON-NORTH AMERICAN SETTLEMENTS

Emily Christiansen, Esquire

Nearly ten years have passed since the U.S. Supreme Court issued its decision in the *Morrison v. National Australia Bank,* which limited claims for violations of U.S. securities laws to securities that were purchased on U.S. exchanges, and the number of actions organized and pursued outside the U.S. each year have continued to rise. In the aftermath of *Morrison,* cases continue to arise in more and more jurisdictions and to generate more and more attention and participation by investors from around the globe. For example, in 2014 there were only 29 new cases filed outside North America while in 2016 there were 73.[1] And with a

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[1] See Figure 3 on page 13 of the Report available for download here: https://www.issgovernance.com/library/the-top-25-non-north-american-settlements/).

CORPORATE RECORDS TRIALS PUSH DEVELOPMENTS IN DELAWARE LAW

Michael C. Wagner, Esquire

In October and November 2019, Kessler Topaz prosecuted two actions under Section 220 of the Delaware General Corporation Law, which generally provides stockholders with a right to inspect corporate books and records that are "necessary and essential" for stockholder investigations into potential corporate wrongdoing. In these cases, Kessler Topaz helped develop and present arguments allowing for the production of electronic communications and other materials beyond the lawyer-drafted minutes of board meetings that Delaware courts have found, in some cases, to be sufficient productions under Section 220. The Court's recent decisions in these cases involving AmerisourceBergen Corporation and CBS Corporation either directed the production of documents beyond board minutes, including emails, or generally noted that such documents could be ordered for inspection under Section 220 depending on the facts and circumstances of each case.

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MANDATORY ARBITRATION CORPORATE BYLAWS: WILL RECENT DEVELOPMENTS MAKE THESE PROVISIONS MORE PALATABLE TO COMPANIES AND THEIR SHAREHOLDERS?

Jennifer L. Joost, Esquire

On January 23, 2020, Intuit Inc. shareholders overwhelmingly voted against a proposal to amend Intuit's bylaws to require investors to arbitrate securities claims.[1] Initiated by Hal S. Scott, as Trustee for The Doris Behr 2012 Irrevocable Trust and beneficial owner of 900 shares of Intuit common stock, the proposal would have required Intuit's board of directors to take "all practicable steps to adopt a mandatory arbitration bylaw that provides" that any disputes arising under the federal securities laws related to transactions in any Intuit-issued security must be "exclusively and finally settled by arbitration" and any disputes subject to mandatory arbitration "may not be brought as a class and may not be consolidated or joined."[2]

What was once a fringe issue — corporate bylaw and charter provisions requiring shareholders arbitrate federal securities claims — has now taken center stage in a variety of arenas.

Commercial arbitration is a way of settling disputes between parties through the selection of one or several neutral arbitrators who then render a decision. The parties typically agree in advance as to the procedure for arbitration, including whether there will be evidence and testimony, whether claims can be consolidated, combined, or proceed on a class-wide basis, and if the decision rendered by the arbiter(s) is reviewable by state or federal courts. While the ultimate decision of the arbiter(s) may become public, the procedure itself is designed to prevent the public from ever learning the details regarding the underlying issue. There also are fewer procedural safeguards, and the breadth and depth of discovery can be significantly curtailed.

Mandatory arbitration of securities claims is not a new concept. In 1953, the U.S. Supreme Court held that an agreement to arbitrate claims under the Securities Act of 1933 (the "Securities Act") was void because it usurped the right of the aggrieved party to select a judicial forum under the statute.[3] Nearly 35 years later, in 1987, the U.S. Supreme Court greatly restricted this precedent, finding that a similar provision in the Securities Exchange Act of 1934 could be waived in favor of arbitration by a valid agreement.[4] Over the last decade virtually all of the U.S. Supreme Court's decisions interrupting enforceability of arbitration clauses generally under the Federal Arbitration Act of 1927 have been pro-arbitration.[5] Currently, no public company requires its shareholders to arbitrate federal securities law claims.

Since 1988, a handful of companies and activist investors have proposed mandatory arbitration bylaws or charter provisions to restrict shareholder class action litigation in state and federal courts. Each time, these efforts were unsuccessful, in large part because of the U.S. Securities and Exchange Commission ("SEC"). In 1988 and 2012, the SEC effectively blocked the IPO of two companies that wanted to require shareholders to arbitrate their claims by refusing to accelerate the effective date of the IPO registration statements.[6] During the 2011-2012 proxy seasons, the SEC issued "no-action" letters in support of public companies who wanted to avoid asking shareholders to vote on a mandatory arbitration proposal, find that the proposals likely violated federal law.[7]

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[1] Intuit Form 8-K filed January 27, 2020; Alison Frankel, *Intuit Shareholders overwhelmingly reject mandatory arbitration proposal*, On The Case (Jan. 28. 2020, 23:09), https://reut.rs/37CrjIh.

[2] Intuit 2019 Proxy Statement filed with the SEC on Form DEF14A on November 27, 2019, at 77.

[3] *Wilko v. Swan*, 346 U.S. 427 (1953).

[4] *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

[5] *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

[6] Franklin First Financial Corporation (1988); Carlyle Group LP (2012).

[7] *See, e.g.*, Gannett Co., Inc. Rule 14a-8 No-Action Letter, SEC.gov (Feb. 22, 2012), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/2donaldvuchetich022212-14a8.pdf; Pfizer Inc. Rule 14a-8 No-Action Letter, SEC.gov (Feb. 22, 2012), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/donaldvuchetich022212-14a8.pdf.

CONTROLLING STOCKHOLDER MUST ANSWER TO ECHOSTAR CORPORATION'S MINORITY STOCKHOLDERS

Daniel Baker, Esquire and Stacey A. Greenspan, Esquire

On January 13, 2020, Kessler Topaz defeated a motion to dismiss a breach of fiduciary claim against Charles Ergen ("Ergen"), the founder and controlling stockholder of EchoStar Corporation ("EchoStar") and DISH Network Corporation ("DISH"). The action, which Kessler Topaz is litigating on behalf of plaintiff City of Hallandale Beach Police Officers' and Firefighters' Personnel Retirement Trust ("Hallandale") in the District Court of Clark County, Nevada, challenges Ergen's conduct in connection with EchoStar's August 19, 2019 sale of the majority of its satellite services business to DISH (the "Transaction"). Kessler Topaz alleges that Ergen orchestrated the Transaction for an unfair price, paying EchoStar shareholders DISH stock worth approximately $700 million less than the fair value of the assets sold, to benefit DISH at EchoStar shareholders' expense. The action also includes claims that EchoStar's Chief Executive Officer ("CEO") and Chief Financial Officer ("CFO") aided and abetted Ergen's conduct.

In seeking to dismiss the litigation, the defendants argued that even though Ergen participated in the Transaction on both the buy- and sell-sides and did not fully recuse himself from the sale process, under Nevada law the business judgment rule prohibited shareholders from challenging the Transaction. The Nevada District Court, however, denied the defendants' motions in their entirety, and thus reiterated the viability under Nevada law of a common-law breach of fiduciary duty claim against a controlling stockholder.

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WORKING AROUND *MORRISON: STOYAS V. TOSHIBA CORPORATION* EXPANDS REACH OF THE EXCHANGE ACT TO INCLUDE UNSPONSORED ADRS AND ALLOWS NON-U.S. INVESTORS TO PURSUE COMPANION CLAIMS IN FEDERAL COURT

Karissa J. Sauder, Esquire

Ten years ago, in *Morrison v. National Australia Bank Ltd.*,[1] the Supreme Court of the United States clarified that liability under the Securities Exchange Act of 1934 (the "Exchange Act") is limited to cases involving securities "listed on domestic exchanges and domestic transactions in other securities." *Morrison*'s bright-line rule abolished the amorphous "conduct and effects" test previously used to assess the Exchange Act's jurisdictional limits. While *Morrison* provided clarity in some respects, the Court's opinion did not address the treatment afforded to securities traded in the Over-the-Counter Market ("OTC Market") — a market where several non-U.S. corporations are traded directly or via American Depositary Receipts ("ADRs"). Recently, in *Stoyas v. Toshiba Corporation*,[2] Judge Dean D. Pregerson of the United States District Court for the Central District of California provided guidance on the issue: the court allowed claims under the federal securities laws to be brought against Toshiba Corporation — the Japanese conglomerate — in connection with its ADRs even though these securities did not trade on a U.S. stock exchange (they traded exclusively in the OTC Market) and were "unsponsored," meaning that they traded without Toshiba's direction or involvement. In finding that plaintiffs' purchases of Toshiba ADRs satisfied *Morrison*'s "domestic transaction" requirement, the *Toshiba* decision provides a road map for investors seeking to demonstrate the domestic nature of their purchase because "irrevocable liability" (e.g., where the parties became bound to effectuate the transaction) for the transaction occurred within the United States. Moreover, because the court had jurisdiction over the federal securities claims for the unsponsored, OTC-traded ADRs, Judge Pregerson concluded that plaintiffs could also bring

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[1] *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

[2] *Stoyas v. Toshiba Corporation*, No. 15-cv-4194, 2020 WL 466629 (C.D. Cal. Jan. 28, 2020).

KESSLER TOPAZ MELTZER & CHECK, LLP WINS GROUNDBREAKING ICSID ARBITRATION DECISION, ALLOWING THE CLAIMS OF NEARLY ONE THOUSAND GREEK INVESTORS TO MOVE FORWARD AGAINST THE REPUBLIC OF CYPRUS

Emily Christiansen, Esquire and Geoffrey Jarvis, Esquire

On Friday, February 7, 2020 a three member Tribunal of the International Centre for the Settlement of Investment Disputes ("ICSID") issued a 2-1 "Decision on Jurisdiction," upholding the Tribunal's jurisdiction over investment treaty claims brought against the Republic of Cyprus ("Cyprus") by 951 individuals and seven companies who suffered substantial losses following the adoption by Cyprus of certain bank resolution measures in connection with its March 2013 financial crisis.

The claimants were Greek and Luxembourg nationals who were all creditors (either depositors or bond holders) of either the Cyprus Popular Bank (also known as Marfin Popular Bank or Laiki

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A WIN FOR PHARMACEUTICAL PURCHASERS IN IN RE LOESTRIN 24 FE ANTITRUST LITIGATION[1]

Ethan Barlieb, Esquire

In December, a class of Direct Purchasers of brand and generic Loestrin 24 Fe ("Loestrin") settled their antitrust claims against pharmaceutical companies Warner Chilcott[2] and Watson[3] for $120 million. Kessler Topaz, along with three other firms, serve as lead counsel for the Direct Purchasers.

Direct Purchasers alleged that Defendants violated federal antitrust laws by engaging in a wrongful anticompetitive scheme to delay market entry of less expensive, generic versions of Loestrin. The alleged scheme included patent fraud, a wrongful Orange Book listing, sham patent litigation and a large, anticompetitive reverse payment from Warner Chilcott (the brand manufacturer of Loestrin) to Watson (the first FDA-approved generic manufacturer) in order to delay Watson's launch of a less expensive generic product. The alleged conduct also included Warner Chilcott's anticompetitive product hop from Loestrin to Minastrin 24 Fe ("Minastrin") — a product that Direct Purchasers allege provided no additional benefit to patients — in order to further impede generic entry and delay the availability of lower cost generics.

The case was first filed in 2013, and the Court initially dismissed the case on a motion under Fed. R. Civ. P. 12(b)(6). The plaintiffs appealed to the First Circuit, which vacated the Court's decision and remanded the case for further proceedings. The parties thereafter engaged in substantial fact and expert discovery as well as briefing on class certification, which the Court granted for the Direct Purchasers in July of 2019. Trial was set to begin on January 6, 2020.

Shortly before trial, the Court issued a comprehensive and favorable summary judgment opinion, which largely rejected Defendants' arguments and would have allowed all claims to proceed to trial. The Court initially addressed the issue of market power. Under federal antitrust law, a plaintiff must show that defendants had the power

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[1] *In re Loestrin Fe Antitrust Litigation,* Civil Action No. 1:13-md-2472-WES-PAS (D.R.I.).

[2] There are five different Warner Chilcott defendants: Warner Chilcott (US), LLC; Warner Chilcott Sales (US) LLC; Warner Chilcott Company LLC; Warner Chilcott, plc, and Warner Chilcott Limited.

[3] The two Watson defendants are Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc.

INVESTORS WIN KEY VICTORY IN SECURITIES CLASS ACTION INVOLVING SEAWORLD ENTERTAINMENT, INC.

Stacey Kaplan, Esquire

In 2005, the Supreme Court held that a plaintiff in an action brought under Section 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") could not establish that the fraud caused its injury — i.e., the element of "loss causation" — simply through proof that price of the security was artificially inflated by material misrepresentations and omissions at the time of purchase.[1] Instead, a plaintiff must also prove a back-end "causal connection" between the plaintiff's loss and the defendant's misrepresentations — for example, by establishing that the "share price fell significantly after the truth became known."[2]

In the fifteen years since *Dura* was decided, the element of loss causation — and specifically, what suffices to establish the requisite "causal connection" — has been a major area of dispute in Section 10(b) litigation. Most often, the debate centers on whether an alleged "corrective disclosure" is sufficiently "causally connected" to the facts that were allegedly misrepresented or omitted. While courts have consistently held that a corrective disclosure need not be a "mirror image" of a misrepresentation,[3] or constitute an actual admission of fraud,[4] ambiguity about what level of connection *does* suffice has provided fertile ground for creative defense attorneys.

The defense bar's latest strategy is to argue that a "causal connection" requires a temporal match — in other words, that a corrective disclosure must relate to the exact same time period as the misrepresentations. This tactic recently surfaced in *Baker v. SeaWorld Entm't, Inc.*, No. 14-cv-2129-MMA (AGS), a Section 10(b) action pending in front of Judge Michael M. Anello of the Southern District of California. The case involves alleged misstatements by the Defendants[5] about the impact of the 2013 documentary *Blackfish* — which chronicled the negative experience of killer whales in captivity and the dangers to killer whale trainers — on SeaWorld's business between August 29, 2013 and August 12, 2014 (the "Class Period").[6] In particular, the Lead Plaintiffs[7] alleged that throughout the Class Period, Defendants misleadingly assured investors that they were seeing "no impact" from *Blackfish* on SeaWorld's business.[8] Lead Plaintiffs contended that the relevant truth concealed by Defendants' misrepresentations was revealed to the market on August 13, 2014, when Defendants revealed that SeaWorld's earnings in the first half of 2014 had been negatively impacted by *Blackfish* — causing the Company's share price to plummet by 33%.[9]

After years of hard-fought litigation, Defendants moved for summary judgment,[10] arguing among other things that Lead Plaintiffs could not establish loss causation because the August 13, 2014 corrective disclosure did "not relate back to the time period when the alleged misstatements were made."[11] More specifically, Defendants argued that "a disclosure that only addresses the reasons for a decline in attendance in 2Q14 — a quarter about which no alleged misrepresentations were made — cannot

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1 *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 338 (2005) (finding that the Ninth Circuit erred in "holding that a plaintiff can satisfy [the loss causation] requirement . . . simply by alleging in the complaint and subsequently establishing that 'the price' of the security 'on the *date of purchase* was inflated because of the misrepresentation.'") (citation omitted).

2 *Id.* at 347.

3 *See, e.g.*, *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016) ("To be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but it must at least relate back to the misrepresentation and not to some other negative information about the company.") (citation omitted).

4 *See, e.g.*, *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 753 (9th Cir. 2018) ("[d]isclosure of the fraud is not a sine qua non of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss") (citation omitted).

5 "Defendants" are SeaWorld Entertainment, Inc. ("SeaWorld" or the "Company"), former Chief Executive Officer James Atchison, Chief Financial Officer James M. Heaney, Chief Accounting Officer Marc G. Swanson, and The Blackstone Group L.P.

6 *Baker v. SeaWorld Entm't, Inc.*, 2019 WL 6118448, at *1 (S.D. Cal. Nov. 18, 2019).

7 "Lead Plaintiffs" are Arkansas Public Employees Retirement System and Pensionskassen for Børne-Og Ungdomspædagoger.

8 *Id.* at *2-3.

9 *Id.* at *3.

10 At summary judgment, courts determine whether, viewing all of the non-moving party's evidence (including documents and deposition testimony garnered through the discovery process) "in the light most favorable to" the non-moving party, there is "sufficient evidence for a reasonable jury to return a verdict for the non-moving party." *Id.* at *29 (citation omitted).

11 *Id.* at *34.

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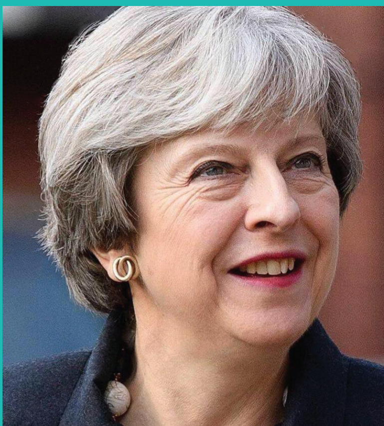

The Rt. Hon. Theresa May, MP

Prime Minister of the United Kingdom (2016–2019)

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APRIL 1, 2020 • CENTRAL LONDON

Institutional Investor's Sovereign Investor Institute and Legal Forum membership in partnership with Kessler Topaz Meltzer & Check LLP (KTMC) will hold the third annual gathering of senior legal executives at sovereign wealth funds and asset management firms. This meeting will provide a private, closed-door environment to discuss and debate issues related to governance, shareholder engagement and related legal and compliance issues.

Preliminary Topics

We are excited to bring you the first look of our 2020 discussion topics. Topics under consideration include:

- The Deglobalizing World: CFIUS, Japan and Beyond
- Governance Best Practice for Sovereign Funds and Asset Managers
- Sustainable Finance: Regulatory and Industry Initiatives
- Implementing ESG Strategies: What Investors Want from their Managers
- Managing Regulatory Change in a Global Organisation
- Litigation Case Study

Institutional Investor

FEDERAL COURT REJECTS SNAP INC.'S ATTEMPTS TO EVADE SECTION 11 LIABILITY FOR MISSTATEMENTS IN CONNECTION WITH ITS IPO

Stacey M. Kaplan, Esquire & Jonathan F. Neumann, Esquire

Section 11 of the Securities Act of 1933 (the "Securities Act") provides a private remedy for investors who purchase shares issued pursuant to a registration statement that contains a material misstatement or omission.[1] Section 11 imposes nearly strict liability; unlike Section 10(b) claims, Section 11 claims generally do not require any proof of a defendants' mental state.[2] To avail themselves of the "relatively minimal burden"[3] imposed by Section 11, however, investors must establish that they "purchased a security issued under that [misleading registration statement], rather than some other[] registration statement" — a requirement known as "tracing."[4]

Historically, "tracing" has only been a potential impediment to Section 11 liability in cases involving secondary public offerings. This is because once shares issued pursuant to multiple registration statements are commingled in the public market, it is more difficult for investors to establish that the shares they purchased were issued in any particular offering. By contrast, in cases involving a company's initial public offering ("IPO"), typically all of the shares in the public market have traditionally been issued pursuant to one IPO registration statement and, thus, "traceability" is readily established. This is particularly true because in most IPOs, management and other shareholders, who typically receive their shares pursuant to a different registration statement than the publicly sold shares, are required to enter into "lock-up agreements." Under such agreements, they are prohibited from selling any of their shares on the public market for a certain period of time, thereby preventing any shares that are not directly traceable to the IPO from entering the market.

A few years ago, however, the defense bar began advocating that companies undertaking an IPO could potentially avoid Section 11 liability by altering (or waiving) their lock-up agreements to allow a small number of non-IPO shares to enter the public market. For example, in a March 2015 article in the Harvard Law School Forum on Corporate Governance and Financial Regulation, Boris Feldman of Wilson Sonsini Goodrich & Rosati wrote that companies pursuing an IPO should consider "a minor change to the customary lock-up agreement" because "[b]y allowing non-registration statement shares to enter the market, underwriters may prevent Section 11 strike-suiters from 'tracing' their shares to the IPO. This could enable '33 Act defendants to knock out the lawsuits against them."[5]

Recently, this tactic was put to the test in a class action suit pending in front of Judge Stephen V. Wilson of the U.S. District Court for the Central District of California — *In re Snap Inc. Securities Litigation*, 2:17-cv-03679-SVW-AGR. The action involves Snap Inc.'s ("Snap") alleged misrepresentations and omissions in the registration statement issued in connection with its March 2, 2017 IPO. The class — which consists of investors who purchased or otherwise acquired Snap common stock between March 2, 2017 and August 10, 2017 — brought claims under Section 11, as well as Section 10(b). On June 7, 2019, Lead Plaintiffs moved to certify the class.[6]

Defendants,[7] who were represented by Mr. Feldman, argued that the Section 11 class must be severely curtailed to only those persons or entities who purchased during the first six days after the IPO (i.e., March 2 through March 7, 2017).[8] This is because — as Mr. Feldman earlier advocated — one of Snap's IPO lock-up agreements was waived by Snap's underwriters, allowing a small "influx of non-IPO shares into the market" on March 8, 2017.[9] As a result, Defendants argued, "[t]hose who

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1 15 U.S.C. § 77k.

2 *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) ("a Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff. Most significantly, he must prove that the defendant acted with scienter, *i.e.,* with intent to deceive, manipulate, or defraud").

3 *Id*.

4 *Hertzberg v. Dignity Partners, Inc.,* 191 F.3d 1076, 1080 (9th Cir. 1999).

5 Boris Feldman, *A Modest Strategy for Combatting Frivolous IPO Lawsuits*, Harvard Law School Forum on Corporate Governance and Financial Regulation (Mar. 13, 2015), https://corpgov.law.harvard.edu/2015/03/13/a-modest-strategy-for-combatting-frivolous-ipo-lawsuits/.

6 ECF No. 275. "Lead Plaintiffs" are Smilka Melgoza, as trustee of the Smilka Melgoza Trust U/A DTD 04/08/2014, Rediet Tilahun, Tony Ray Nelson, Rickey E. Butler, and Alan L. Dukes.

7 "Defendants" are Snap; Snap's co-founder and Chief Executive Officer Evan Spiegel; Snap's co-founder and Chief Technology Officer Robert Murphy; Snap's former Chief Financial Officer Andrew Vollero; and Snap's former Chief Strategy Officer Imran Khan.

8 ECF No. 292 at 12.

9 *Id*.

WORKING AROUND MORRISON: STOYAS V. TOSHIBA CORPORATION EXPANDS REACH OF THE EXCHANGE ACT TO INCLUDE UNSPONSORED ADRS AND ALLOWS NON-U.S. INVESTORS TO PURSUE COMPANION CLAIMS IN FEDERAL COURT

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parallel claims under Japanese securities laws in connection with the purchase of Toshiba common stock on the Tokyo Stock Exchange. While not binding authority on other federal courts, the rationale set forth in *Toshiba* likely provides increased access to the federal court system for certain investors in foreign companies harmed by securities fraud.

Morrison Limits Extraterritorial Scope of the Exchange Act

In *Morrison*, the Supreme Court considered whether federal courts have jurisdiction to hear claims under Section 10(b) of Exchange Act — the primary anti-fraud provision of the federal securities laws — against foreign companies whose common stock is traded outside of the United States. Applying the presumption that congressional legislation is "meant to apply only within the territorial jurisdiction of the United States," and finding no "contrary intent" in the Exchange Act,[3] the *Morrison* Court held that Section 10(b) applies only to "transactions in securities listed on domestic exchanges and domestic transactions in other securities."[4] Stated simply, while any investor purchasing shares of a U.S.-listed security (regardless of the investor's or the corporation's domicile) has the ability to assert claims for securities fraud in U.S. federal courts, shareholders who purchased securities on foreign markets cannot. While the *Morrison* decision was a sea change for securities law — placing the focus of the jurisdictional inquiry on the location of the transaction — the decision left lower courts to determine what exactly qualifies as a "domestic transaction."

Courts Attempt to Define "Domestic Transactions"

Since *Morrison*, federal courts have wrestled with the question of whether Exchange Act claims can be brought in connection with the purchase of a foreign company's ADRs. Rather than creating a direct link between an ADR investor and a

corporation, an ADR acts as a derivative security whose value is linked to an underlying security (usually common shares). To create ADRs, a U.S.-based depositary bank typically purchases common stock on a foreign exchange, then sells investors "receipts" representing shares in the foreign stock — effectively allowing investors to trade in foreign securities in the United States without many of the risks of purchasing foreign stock. ADRs can be "sponsored," where the corporation issuing the underlying stock works with the depositary bank to establish ADRs, or "unsponsored," where the corporation has no formal involvement in the creation or trading of its ADRs.

In 2017, Judge Charles Breyer of the United States District Court for the Northern District of California addressed in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Product Liability Litigation*[5] whether transactions in a foreign company's sponsored ADRs constituted a domestic transaction. In concluding that "[p]laintiffs in fact purchased the ADRs in the United States," Judge Breyer specifically noted that the ADRs were "sponsored" by Volkswagen — meaning that Volkswagen "took affirmative steps to make its securities available to investors here in the United States," including "entering into a Deposit Agreement governed by New York law with a depositary bank, and submitting a Form F-6 Registration Statement to the SEC to make the ADRs available in the United States."[6]

In contrast, the *Toshiba* court was faced with a different question — namely, whether purchases of Toshiba unsponsored ADRs — which correspond with Toshiba's common stock on the Tokyo Stock Exchange — qualify as "domestic transactions" even though the company had no involvement in their creation. In 2016, the district court initially determined that such purchases were not domestic transactions because, although the ADRs "were both sold and purchased in the United States," Toshiba "was not involved in those transactions in any way," and extending liability to Toshiba in these circumstances would be "inconsistent with the spirit and law of *Morrison*."[7]

On appeal, the Ninth Circuit Court of Appeals disagreed.[8] Specifically, the Ninth Circuit found that the district court had failed to apply the appropriate "irrevocable liability" analysis, previously adopted by the Second Circuit and Third Circuit, which states that a securities transaction is domestic if the purchaser "incurred irrevocable liability within the United States to take and pay for a security," "the seller incurred irrevocable liability within the United States to deliver a security," or "title to the shares was transferred within the U.S."[9] Under this analysis, factual allegations "concerning the formation of the contracts, the placement of purchase orders, the passing of title, or the exchange of money" can suffice to allege a domestic transaction.[10] Ultimately, the Ninth Circuit held that while plaintiffs had not sufficiently alleged domestic transactions because they had not alleged specific facts regarding where the parties to the Toshiba ADR transactions had incurred irrevocable liability, plaintiffs could "almost certainly" correct these flaws.[11] Accordingly, the Ninth Circuit reversed and remanded to allow plaintiffs to amend the complaint.

Toshiba Expands the Exchange Act's Reach

Following the Ninth Circuit's reversal, plaintiffs filed an amended complaint seeking to bolster allegations demonstrating that their purchases were domestic transactions and Toshiba again moved to dismiss the claims for lack of jurisdiction. On January 28, 2020, Judge Pregerson denied Toshiba's motion, holding that plaintiffs had sufficiently alleged that their purchases of unsponsored Toshiba ADRs were domestic transactions under the irrevocable liability test.

As an initial matter, the district court considered Toshiba's argument that the lead plaintiff's ADR purchases were not domestic transactions because plaintiff purchased the underlying securities (Toshiba common stock) in foreign transactions before converting the foreign stock into ADRs. Stated differently, plaintiff could not allege a domestic transaction because the subsequent conversion of their ownership interest from title holder of Toshiba common stock to beneficial owner through unsponsored ADRs does not qualify as a purchase.

In rejecting this argument, the court concluded that there were no allegations that plaintiff first purchased shares of Toshiba common stock on the Tokyo Stock Exchange and then exchanged Toshiba common stock for Toshiba ADRs. Instead, the court credited plaintiff's numerous allegations explaining

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[3] *Morrison*, 561 U.S. at 255 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1949)).

[4] *Id.* at 267.

[5] *In re Volkswagen "Clean Diesel" Marketing, Sales Practices & Product Liability Litig.*, 2017 WL 66281 (N.D. Cal. Jan. 4, 2017)).

[6] *Id.* at *6.

[7] *Stoyas v. Toshiba Corp.*, 191 F. Supp. 3d 1080, 1094 (C.D. Cal. 2016).

[8] *Stoyas v. Toshiba Corp.*, 896 F.3d 933 (9th Cir. 2018).

[9] *Id.* at 948 (quoting *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012)).

[10] *Id.* at 948 (quoting *Absolute Activist*, 677 F.3d at 70).

[11] *Id.* at 950.

CORPORATE RECORDS TRIALS PUSH DEVELOPMENTS IN DELAWARE LAW

(continued from page 1)

Section 220 and Scope of Inspection

Section 220 generally allows stockholders to inspect corporate books and records, so long as certain formal requirements are met and the stockholder can demonstrate a proper purpose for requesting inspection.[1] Investigating potential corporate wrongdoing, when there is some evidence of wrongdoing at the corporation, has long been held a proper purpose under Section 220. Other proper purposes include obtaining stockholder lists for purposes of communicating the other stockholders about matters relating to their shares, or seeking information related to the valuation of one's shares. In all events, the Delaware courts have made the clear that Section 220 requires a case-by-case analysis, though there's a clear distinction between the scope of discovery in litigation and an inspection under Section 220: in litigation, all "relevant" documents must generally be produced, while only a narrower set of documents deemed "necessary and essential" and, thus, sufficient to fulfill a proper purpose will be ordered for inspection under Section 220.

Section 220 has been identified as one of the primary "tools at hand" available for stockholders who are seeking to investigate corporate misconduct, and before filing a stockholder derivative action in particular. "Delaware courts have strongly encouraged stockholder-plaintiffs to utilize Section 220 before filing a derivative action, in order to satisfy the heightened demand futility pleading requirements of Court of Chancery Rule 23.1."[2]

Both cases encountered the impact of a recent decision from the Delaware Supreme Court, *KT4 Partners v. Palantir Technologies.* In that case, the Supreme Court ordered the production of emails among directors, but noted that board minutes and materials presented at board meetings, if they existed, would often fulfill the "necessary and essential" scope of materials subject to inspection under Section 220.[3] Since that decision, companies had adopted the argument that if board minutes exist, there is now a blanket rule in all cases that stockholders should receive nothing more than board minutes in Section 220 inspections.

Our two cases were among the first to test this argument in the Court of Chancery. We sought, on our clients' behalf, to investigate board-level wrongdoing at both AmerisourceBergen and CBS, explicitly seeking non-board-meeting documents, like emails and text messages, in addition to those traditional, and usually lawyer-drafted, documents actually presented at, or formally memorializing the proceedings of, board meetings. Among the potential uses identified in our initial inspection demands was for use in stockholder litigation.

Our investigation into AmerisourceBergen, on behalf of the Lebanon County Employees' Retirement Fund, related to multiple public reports and governmental investigations and enforcement actions the company had historically not complied with federal law to implement and monitor controls against illegal opiate diversion. Specifically, we sought to investigate the extent to which the AmerisourceBergen board or senior management was directly involved in the company's compliance efforts, and what those fiduciaries did through the years to ensure the company's compliance with federal law.

For CBS Corporation, on behalf of the Bucks County Employees Retirement Fund, we sought to investigate the decision of newly appointed directors to merge with Viacom, despite that former CBS directors had fiercely opposed the same merger less than a year before, to the point of taking extraordinary steps, including litigation, seeking to dilute the controlling stake in CBS held by Shari Redstone through her family's investment vehicle National Amusements, Inc. In both cases, the companies refused our initial requests for information, requiring us to seek to enforce our clients' rights under Section 220 in the Delaware Court of Chancery.

AmerisourceBergen Books and Records Litigation

Our first case was against AmerisourceBergen,[4] who maintained that we had no proper purpose to investigate potential wrongdoing. We cited a multitude of lawsuits and governmental investigations, and a documented history of failures

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[1] 8 *Del. C.* §220.

[2] *King v. VeriFone Hldgs., Inc.*, 12 A.3d 1140, 1145–46 (Del. 2011).

[3] *KT4 P'rs v. Palantir Techs., Inc.*, 203 A.3d 738 (Del. 2019).

[4] *Lebanon County v. AmerisourceBergen Corp.*, C.A. No. 2019-0527-JTL (Del. Ch.).

to comply with federal law, which requires opiate pharmaceutical distributors such as AmerisourceBergen, to implement and monitor effective internal controls to prevent the diversion of highly addictive opioid medications into illegal channels. While the public record showed these multiple compliance violations, public documents did not reveal to what extent the AmerisourceBergen board might have ignored red flags and failed to take action to prevent additional compliance failures at the company. Recent decisions in Delaware made clear that investigations into such regulatory compliance matters constituted "proper purposes" under Section 220. At trial, we argued that board minutes alone were unlikely to be enough, as they would not likely reflect Board members' candid reactions to reports or proposals from company management, which the Supreme Court stated in a case involving Martha Stewart was precisely the kind of information that stockholders can expect in an inspection under Section 220.[5]

After the October 15, 2019 trial, the Court ruled that Lebanon County had stated a proper investigative purpose in light of the plain indications of repeated compliance failures at AmerisourceBergen, and the Court directed the company to produce board minutes and materials presented at board meetings. The court then permitted Lebanon County to conduct limited discovery to determine if any other documents at the company are "necessary and essential" to fulfill Lebanon County's investigative purposes.[6] The Court's ruling pushed back against the company's argument that only board minutes and other materials considered at board meetings could be subject to inspection, and held that emails and other non-board-meeting documents may well be inspectable under Section 220's mandated case-by-case approach, depending on a particular case's facts.

AmerisourceBergen is seeking an immediate appeal of the ruling, and is continuing to oppose any requirement that it produce any documents to Lebanon County.

CBS Corporation Books and Records Litigation

In our CBS litigation,[7] controlling stockholder Shari Redstone had engaged in a years'-long campaign to force a merger between CBS and Viacom, which she also controlled. Her father, Sumner Redstone, had separated the companies more than 15 years ago, and now that Ms. Redstone was in control of the family media enterprise, she sought to reverse that decision, with which she had vocally disagreed. In 2018, the CBS independent directors thought that a merger with Viacom was so diametrically against the interests of CBS and its public stockholders that it filed a lawsuit seeking to dilute Ms. Redstone's controlling stake and thereby prevent her from forcing a merger with Viacom. However, that lawsuit dissolved after its leader, former CBS CEO Les Moonves, was dismissed by CBS under sexual harassment charges, and the resulting settlement re-made the CBS Board, as Ms. Redstone had done years earlier at Viacom.

Less than a year later, in August 2019, and now with the support of the new CBS directors, CBS and Viacom agreed to the merger that Shari Redstone fought for years to get. After a one-day trial on our 220 demand on November 22, 2019, the Court agreed that this board-level about-face, standing alone, supported our proper investigative purpose, as did other facts we presented. The Court also directed CBS to produce emails and other documents in the weeks before and after a certain meeting of CBS directors, the minutes of which suggested misconduct by Ms. Redstone and potentially others and warranted further investigation under these facts.[8] As in the *AmerisourceBergen* decision, the Court of Chancery rejected the company's argument that the Supreme Court had made emails off-limits in Section 220 inspections where the company had board minutes it could provide.

The Decisions' Impact

The Court of Chancery's recent decisions in *AmerisourceBergen* and *CBS* have diminished the potential negative impact of the Supreme Court's recent decision in *Palantir*, and make clear that emails and other non-board-meeting materials may be subject to inspection under Section 220, depending on the facts and circumstances. The decisions are consistent with Section 220's required case-by-case approach, and contrasts to the blanket, always-applicable rule against emails that corporate counsel has sought to impose since *Palantir*. Should the Delaware Supreme Court accept an immediate appeal of the *AmerisourceBergen* ruling, the law in this regard may develop further.

For now, because board minutes and materials are often drafted by corporate counsel to place the board and its proceedings in the most favorable light for the directors, the courts appear to recognize that such board-meeting materials often provide scant information, and that other materials at companies may be genuinely "necessary and essential" to investigate corporate wrongdoing. The Delaware courts remain among the most important venues for the vindication of stockholder rights. These decisions will prove useful not only to Kessler Topaz and its clients, but for stockholder plaintiffs generally who seek to use Section 220 to investigate corporate misconduct. ■

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[5] *Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1056–57 (Del. 2004).

[6] *Lebanon County v. AmerisourceBergen Corp.*, C.A. No. 2019-0527-JTL (Del. Ch., Jan. 13, 2020)(Memorandum Opinion).

[7] *Bucks County v. CBS Corp.*, C.A. No. 2019-0820-JRS (Del. Ch.).

[8] *Bucks County v. CBS Corp.*, C.A. No. 2019-0820-JRS (Del. Ch., Nov. 25, 2019) (Memorandum Opinion).

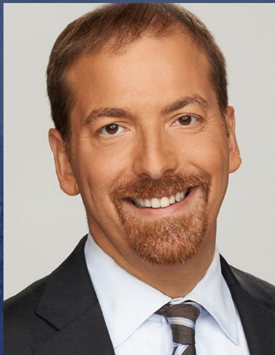
Institutional Investor

KESSLERTOPAZ MELTZERCHECK LLP

APRIL 28 - 29, 2020 • APELLA • NEW YORK

Litigation & Governance Trends for Asset Management Firms

Special Guest



Chuck Todd

NBC News Political Director and Moderator of Meet the Press and MTP Daily

When is taking action appropriate for your firm and your clients?

As old standards and norms change and new trends and priorities emerge, active investors have a lot to worry about at both the macro and the firm levels. From the fiduciary, legal and investment ramifications of climate change to firm-specific concerns of privacy and data as well as the altered role of the legal team within the decision-making structure from increasing privacy concern to climate change and from cryptocurrency to power shifts within the company, times they are a-changing. And one of those changes is the way an increasing number and diversity of asset management firms are approaching their obligations when it comes to protecting and recovering assets, and integral to this process is the question of when and how to get involved when the need arises.

This year's Litigation & Governance Trends program is going to focus more on the how than the why, reflecting the growing acknowledgement of the value and efficacy of appropriate shareholder litigation and next-generation corporate governance efforts. This day and half event is the third event in a three-part annual global series focusing exclusively on the needs of legal and compliance teams at global asset management firms through the lens of active engagement, shareholder actions, and affirmative litigation.

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Registration is COMPLIMENTARY for qualified delegates

INSIGHTS ON GLOBAL SHAREHOLDER LITIGATION FROM RECENT ISS SCAS REPORT ON TOP 25 NON-NORTH AMERICAN SETTLEMENTS

(continued from page 1)

rise in the number of actions offered in a greater number of countries and more interest and participation by investors, we have also seen a rise in the number and amount of recoveries achieved by shareholders. Illustrating some of the most significant settlements outside of the U.S. and Canada (where securities class actions have a longer history), ISS Securities Class Action Services recently published a report entitled "The Top 25 Non-North American Settlements: Largest Securities-Related Settlements Outside of North America of All-Time" (the "Report").

Although there were some securities class or group action settlements prior to 2011, it should come as no surprise that 16 out of the top 25 settlements occurred post-*Morrison*. And of the nine settlements that occurred in or before 2011, two thirds (six out of nine) of the settlements were in Australia. It is perhaps also no surprise that more than half, 17 out of 25, of the top non-North American settlements occurred in Australia. As we previously reported, Australia introduced its class action mechanism in 1992 and since that time approximately 120 total securities class actions have commenced. Additionally, until the fall of 2019 no securities class action had ever gone to judgment in Australia and cases pursued in the country typically resulted in settlement. But despite the number of cases and settlements in Australia, but only one of the Australian settlements made it into the top five on the Report. In fact the largest Australian settlement, which claimed the number five spot, against Storm Financial Limited settled for $240,543,320 and was significantly smaller than the settlement that claimed the number four spot (the Royal Dutch Shell case, which settled for $389,072,515). A few factors may be at play in the smaller size of the Australian settlements. First, the Australian exchange, the ASX, is ranked only 15th in terms of exchange size and has 2,185 listed companies and a market capitalization of $1.3 trillion US, which is rather small compared to the exchanges of many other countries represented on the top 25 settlement list (including the London Stock Exchange, which has more than 3,000 listed companies and a $3.76 trillion market capitalization, the Euronext in Amsterdam, which has approximately 1,300 listed companies and a $3.92 trillion market capitalization, and the Tokyo Stock Exchange, which has nearly 2,300 listed companies and a $5.67 trillion market capitalization). Second, until somewhat recently, most Australian class actions proceeded as closed class or opt-in cases. As more cases in the future in Australia may proceed on either an open class/opt-out basis and more investors choose to participate in actions around the world, including in Australia (regardless of whether it is an open class or closed class action), we may start seeing larger class sizes with larger damages and that may ultimately mean larger settlements.

The Netherlands is the second-ranking country in terms of number of total settlements (four settlements included in the top 25 occurred in the Netherlands) while the United Kingdom came in third, boasting two settlements, and Japan and Israel each had only one settlement included in the Report. However, what the Netherlands and the United Kingdom lacked in number of settlements, they more than made up for in terms of the amount of money recovered. The Netherlands claimed three of the top five spots with the settlement against Ageas SA/NV (formerly known as Fortis S.A./N.V. & Fortis N.V.) for $1.54 billion (#1 on the Report), the settlement against Unilever N.V. for $406,245,345 (#3 on the Report), and the settlement against Royal Dutch Shell for $389,072,515 (#4 on the Report). There was a total of $2.40 billion of securities settlement fund dollars in the Netherlands. The United Kingdom claimed the remaining spot out of the top five with the settlement against the Royal Bank of Scotland Group for $1,018,320,000 (#2 on the Report). The United Kingdom, with only 2 settlements included on the Report, came in third behind Australia (which settlement funds recovered totaling $1.52 billion from its 17 settlements) with a total of $1.13 billion in securities settlement funds achieved in the country.

With large cases currently proceeding in countries like Brazil, Denmark, Germany, and Japan, it will be interesting to see how the composition of the list of Top 25 non-North American settlements changes in the coming years. Only one thing appears to be a given and that is that there will be continued shareholder actions and potential recoveries outside the U.S. ■

Kessler Topaz has been at the forefront of representing institutional investor interests outside the U.S. and is proud to have played an integral part in four out of the top twelve settlements (and four of the top six settlements if you exclude Australian settlements from the list) included in the ISS SCAS "The Top 25 Non-North American Settlements: Largest Securities-Related Settlements Outside of North America of All-Time" report. Kessler Topaz represented numerous institutional investors in the top settlement with Ageas SA/NV (f/k/a/ Fortis) in the Netherlands, the number two settlement with The Royal Bank of Scotland Group in the United Kingdom, in the number four settlement with Royal Dutch Petroleum Company / the Shell Transport and Trading Company PLC in the Netherlands, and in the number 12 settlement with Olympus Corporation in Japan.

MANDATORY ARBITRATION CORPORATE BYLAWS: WILL RECENT DEVELOPMENTS MAKE THESE PROVISIONS MORE PALATABLE TO COMPANIES AND THEIR SHAREHOLDERS?

(continued from page 2)

In 2012, Google's board of directors recommended against a shareholder proposal requiring mandatory arbitration of securities claims because of these "no-action" letters (the proposal was subsequently rejected by the vast majority of shareholders).[8]

Following the 2016 presidential election, the SEC's position on mandatory arbitration provisions shifted. In July 2017, then-SEC commissioner Michael Piwowar "encourage[d]" companies to ask the SEC "for relief to put in mandatory arbitration into their charters" to address "shareholder lawsuits."[9] Thereafter, in 2018 and again in 2019, SEC commissioner Hester Peirce signaled that she would support bylaw or charter amendments requiring arbitration of securities fraud claims.[10] The current Chairman of the SEC, Jay Clayton, has taken no position, repeatedly representing that if another company seeks to go public with a mandatory arbitration provision, the entire Commission would carefully weigh the issue.[11]

The SEC's recent shift to a neutral (or even slightly positive) stance on mandatory arbitration provisions in corporate bylaws and charters has created an opening through which activist investors like Scott hope to step through. In November 2018, Scott submitted a proposal for inclusion in Johnson & Johnson's ("J&J") proxy statement that, if ratified by shareholders, would require J&J to adopt a mandatory arbitration virtually identical to the provision the Intuit shareholders recently rejected. J&J sought assurances from the SEC that the regulator would not take any action against J&J if it chose not to include Scott's mandatory arbitration proposal in its proxy statement.[12] The SEC obliged, relying on an opinion from the New Jersey Attorney General ("NJ AG") that a mandatory arbitration bylaw would not be consistent with state corporate law; the SEC, however, declined to opine on the validity of such a bylaw under federal law.[13]

Notwithstanding the opinions of the SEC and the NJ AG, Scott filed suit on March 21, 2019, asking a New Jersey federal court to declare that J&J violated federal and New Jersey state law by refusing to include his proposal in its proxy materials.[14] J&J, as well as two intervenor institutional investors, promptly moved to dismiss Scott's lawsuit. In the pleadings and briefing filed in the J&J litigation, the parties have paid special attention to another litigation regarding forum selection clauses, then-pending in Delaware Chancery Court: *Sciabacucchi v. Salzberg*, C.A. 2017-0931-JTL. The opinion of Delaware courts is important because more than 60% of Fortune 500 companies are incorporated in Delaware[15] and many sister states, including New Jersey, look to Delaware General Corporation Law ("DGCL") and the Delaware courts' interpretation thereof in deciding similar issues. *Sciabacucchi* looked at whether Delaware corporate law allows for bylaws that restrict the forum available to investors bringing claims under the Securities Act.

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[8] *See* Form DEF14A filed by Google with the SEC on May 9, 2012; Form 8-K filed by Google with the SEC on June 26, 2012.

[9] Sarah N. Lynch, *U.S. SEC's Piwowar urges companies to pursue mandatory arbitration clauses*, Reuters (July 17, 2017, 12:14 PM), https://www.reuters.com/article/us-usa-sec-arbitration-idUSKBN1A221Y.

[10] Alison Frankel, *SEC commissioner Peirce signals shareholder arbitration is not dead yet*, Reuters (Mar. 8, 2019, 1:35 PM), https://www.reuters.com/article/us-otc-arbitration/sec-commissioner-peirce-signals-shareholder-arbitration-is-not-dead-yet-idUSKBN1QP2DY.

[11] Jay Clayton, *Statement on Shareholder Proposals Seeking to Require Mandatory Arbitration Bylaw Provisions*, SEC (Feb. 11, 2019), https://www.sec.gov/news/public-statement/clayton-statement-mandatory-arbitration-bylaw-provisions.

[12] J&J No-Action Letter, SEC.gov (Dec. 11, 2018), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/dorisbehr121118-14a8-incoming.pdf.

[13] J&J No-Action Letter, SEC.gov (Feb. 11, 2019), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2019/dorisbehrjohnson021119-14a8.pdf.

[14] *The Doris Behr 2012 Irrevocable Trust v. Johnson & Johnson*, No. 19-cv-08828 (D.N.J. Mar. 21, 2019).

[15] *Why Businesses Choose Delaware*, Delaware.gov, https://corplaw.delaware.gov/why-businesses-choose-delaware/ (last visited Feb. 5, 2020).

The Securities Act provides that claims based on its provisions can be filed in both state and federal court. Following the Supreme Court confirmation that investors could file Securities Act claims in both state and federal court in 2017,[16] companies have considered a variety of ways to limit the judicial forum in which an investor could seek relief under the provisions of the Act. Prior to going public in 2017, three companies, Roku, Inc.; Blue Apron Holdings, Inc.; and StitchFix, Inc., amended their corporate bylaws to require shareholders to litigate claims under the Securities Act only in federal court. A lawsuit — *Sciabacucchi* — followed and in December 2018, the Delaware Court of Chancery held that corporate bylaws could not be used to regulate the forum in which investors may bring Securities Act claims.[17] This decision is currently on appeal to the Delaware Supreme Court, which heard oral argument on these issues on January 8, 2020.[18]

This year promises to bring some clarity to certain aspects of this debate. If the Delaware Supreme Court allows forum selection bylaws for federal securities claims in the governing documents of Delaware-incorporated public companies, it may embolden activist shareholders like Scott to propose similar bylaws at other companies incorporated in Delaware or a sister state that consistently follows developments in the DGCL (like New Jersey) during the next proxy season. Alternatively, private companies seeking to go public may push the SEC to take a stance on the inclusion of mandatory arbitration provisions in the bylaws or charters of public companies under federal law. If state or federal courts determine that a forum selection clause for claims under the federal securities laws may exist in corporate bylaws or charters, the U.S. Supreme Court's pro-arbitration precedent likely will provide for the use of mandatory arbitration clauses for these claims under the Federal Arbitration Act.

If the Delaware Supreme Court does not allow forum selection clauses for federal securities claims under the DGCL, it seems likely that Scott will not succeed in his lawsuit against J&J in New Jersey federal court, in unspecified potential litigation against Intuit, or in future efforts to force a vote on these proposals at other public companies. Simply put, there will be no viable "contract" in which to put these provisions, making the U.S. Supreme Court's pro-arbitration precedent less relevant to the inquiry. The SEC also will not have to take a stance on whether mandatory arbitration provisions violate the federal securities law; for instance, it can continue to issue "no-action" letters on the basis that such provisions violate state law, as was the case with J&J's inquiry in 2019.

What is not clear is whether there is any real appetite among public companies (or their investors) to require shareholders to arbitrate securities claims. Roku, Blue Apron, and StitchFix only sought to require shareholders litigate Securities Act claims in federal court over concerns that the Act's concurrent jurisdiction provisions may require defending against duplicative lawsuits in both state and federal court. That is not the same as eliminating shareholders' ability to go to court over violations of the federal securities laws. J&J sought the protection of regulators in rejecting Scott's mandatory arbitration proposal; in other words, J&J did not even want to put its shareholders through a vote on a legally suspect proposal. Intuit put Scott's mandatory arbitration proposal to a vote but Intuit's board of directors came out strongly against the proposal and over 213 million shareholders rejected it,[19] likely including some of the largest institutional holders of Intuit common stock based on the vote tally. Indeed, groups like the Council of Institutional Investors Corporate Governance Policies have come out strongly against any attempt to restrict the venue in which investors can seek redress for violations of the securities laws[20] and it would seem that mandatory arbitration provisions are not reconcilable with the resent trend towards utilizing Environment-Social-Governance criteria to develop investment strategies.

Investors should remain vigilant as to the introduction of these proposals, either in the context of a public company's annual meeting or if a private company is seeking to go public with such a provision. For now, Scott's attempts to push companies like J&J and Intuit into restricting shareholders' rights to litigate in a judicial forum seem more quixotic than prescient but much remains uncertain with respect to this important issue. ■

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[16] *See Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, 137 S. Ct. 2325 (2017).

[17] *Sciabacucchi v. Salzberg*, 2018 WL 6719718 (Ch. Dec. 19, 2018).

[18] *Salzberg v. Sciabacucchi*, No. 346, 2019 (Del. Jan. 8, 2020), https://courts.delaware.gov/supreme/oralarguments/.

[19] Intuit Form 8-K filed January 27, 2020.

[20] Jeff Mahoney, *Comment Letter Regarding Mandatory Arbitration Bylaw Proposal at Johnson & Johnson*, Harvard Law School Forum on Corporate Governance (Mar. 1, 2019), https://corpgov.law.harvard.edu/2019/03/01/comment-letter-regarding-mandatory-arbitration-bylaw-proposal-at-johnson-johnson/#8.

Institutional Investor

KESSLERTOPAZ MELTZERCHECK LLP

24 SEPTEMBER 2020 · STOCKHOLM

Litigation & Governance

Trends for Nordic Asset Managers & Owners

The thinking around corporate governance, shareholder engagement, and active litigation has evolved and matured over the past decade. The openness to, and use of, these tools has become more developed as a reflection of the growing acceptance of active engagement and shareholder litigation by money managers.

The Litigation & Governance: Trends for Nordic Asset Managers & Owners meeting will focus exclusively on examining the needs of legal and compliance teams at Nordic money managers. This will be done through the lens of active engagement, shareholder actions, and affirmative litigation.

Anders Fogh Ramussen

A CHANGING POLITICAL LANDSCAPE: RISKS AND OPPORTUNITIES FOR FINANCIAL INSTITUTIONS

Last year brought significant change to the world's exisiting geopolitical structures, and this year is likely to increase their complexity even more, causing financial investors to be additionally meticulous. This new climate requires a solid basis for balancing risk and reward. In this presentation, Anders Fogh Ramussen explores the ever-changing geopolitical environment with a sharp focus on the intersection between multinational business and trade, security and stability, economic growth, innovation, and governance.

For further information

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CONTROLLING STOCKHOLDER MUST ANSWER TO ECHOSTAR CORPORATION'S MINORITY STOCKHOLDERS

(continued from page 3)

A. The Interrelationships between EchoStar and DISH

EchoStar and DISH are both publicly-traded Nevada corporations headquartered in Englewood, Colorado. EchoStar provides satellite operations and services, and DISH provides digital broadcast satellite pay TV services. Ergen is the founder, controlling stockholder and strategic visionary of EchoStar and DISH. As of May 31, 2019, Ergen held approximately 91% of the voting power and 51% of the equity securities of each of EchoStar and DISH.

Before the Transaction closed, DISH was historically the primary customer of EchoStar's satellite services business, and EchoStar was historically the primary servicer of DISH's satellite needs. In the three years preceding the Transaction's close, DISH paid EchoStar more than $1 billion for satellite services.

B. Ergen Sacrifices EchoStar to Help DISH

Over the last decade, Ergen has watched DISH's revenue stream tumble as pay TV subscribers have flocked to cheaper internet offerings. Ergen has attempted to keep DISH afloat by diversifying its business. Between 2008 and 2018, Ergen caused DISH to spend over $21 billion acquiring wireless spectrum in order to enter the wireless communications market. DISH, however, does not have a network on which to use its spectrum, so the spectrum has not generated any cash flow. Accordingly, as of March 31, 2019, DISH had $16 billion of consolidated debt, only $1.5 billion of cash and cash equivalents, and millions of dollars of upcoming debt maturities. DISH was also suffering the steepest subscriber losses in the pay TV industry, and the market was questioning DISH's ability to pay its debts after 2020.

Ergen, however, was considering various business opportunities for DISH that would require substantial additional capital. For example, Ergen wants DISH to build the first next-generation standalone 5G network in the U.S., which Ergen says will fuel the "digital revolution." Analysts estimate that building the network will cost $25 billion. Ergen also wanted DISH to acquire $5 billion of assets that Sprint and T-Mobile were divesting to secure government approval of the pending Sprint/T-Mobile merger.

Ergen was looking for ways to increase DISH's financial flexibility to pursue these options and meet its debt obligations, so he looked to EchoStar. Ergen recognized that if DISH acquired certain assets in EchoStar's satellite services business that DISH had paid EchoStar to use (the "BSS Business"), DISH would bring those costs (multi-million dollars annually) in-house. Thus, the Information Statement that EchoStar filed with the U.S. Securities and Exchange Commission on August 19, 2019, in connection with the Transaction (the "Information Statement") states that DISH's board viewed the Transaction as a "method to, among other things, reduce costs, enhance DISH Network's credit profile, improve free cash flow and EBITDA, and otherwise serve as an alternative to raising capital."[1]

C. Ergen Self-Interestedly Orchestrates the Transaction

The Information Statement indicates that Ergen began planning the Transaction during the third quarter of 2018. From the outset Ergen undermined any semblance of a fair process to protect EchoStar's minority stockholders from his self-dealing. Indeed, Ergen was inclined to sacrifice EchoStar to help DISH, as his DISH investment ($8.7 billion) was worth more than four times his investment in EchoStar ($2.1 billion).

First, Ergen did not form a special committee of EchoStar's independent directors (1) to evaluate and negotiate the Transaction; (2) to consider strategic alternatives for the BSS Business; or (3) with the authority to unilaterally reject the Transaction. Instead, Ergen directed the negotiations on both the buy- and sell-sides by assigning the negotiations to EchoStar's and DISH's respective senior management teams, whom Ergen knew were conflicted due to his control over their compensation and future employment. Accordingly, by the time Ergen convened EchoStar's board to discuss the Transaction on October 30, 2018, EchoStar and DISH had already agreed on the Transaction structure that Ergen wanted: (1) EchoStar would spin-off the BSS Business into a subsidiary of EchoStar, Hughes Satellite Services Corporation ("HSSC"), that would then merge with DISH; and (2) DISH would issue shares of DISH Class A common stock to EchoStar's stockholders. Moreover, during their "negotiations," EchoStar's and DISH's management teams never discussed price; they simply negotiated around the price that Ergen dictated.

Second, Ergen instructed EchoStar's board to approve the Transaction pursuant to EchoStar's Related Party Transaction Policy, which Ergen knew enabled conflicted directors to infect the vote. Two EchoStar directors are members of EchoStar's senior management team, whose employment Ergen controls, and two additional directors have decades-long personal and professional relationships with Ergen, whom they look to as a mentor. Thus, a majority of EchoStar's seven-member board (excluding Ergen) could not consider Ergen's

(continued on page 19)

[1] Information Statement at 40.

A WIN FOR PHARMACEUTICAL PURCHASERS IN IN RE LOESTRIN 24 FE ANTITRUST LITIGATION

(continued from page 4)

to control prices and competition. The parties here disagreed as to the products making up the relevant market — in particular, Defendants argued that the oral contraceptive market contained hundreds of available products over which they had no control. Direct Purchasers, on the other hand, maintained that, as supported by Supreme Court precedent, this is a single-product market consisting of brand and generic Loestrin, as well as any closely-related product including Minastrin. The Court determined that summary judgment was not appropriate on the issue, however, and should be decided by the jury.

In addition to market power, Defendants sought judgment in their favor on all of Direct Purchasers' claims. First, the Court addressed the patent fraud (or *Walker Process* fraud) claim. Under this theory, antitrust liability is imposed on those who enforce a patent that they know to be procured by fraud on the U.S. Patent and Trademark Office. The Court examined the evidence cited by Direct Purchasers and determined that Defendants' failure to disclose an applicable study and the omission of prior art for the relevant Loestrin patent were sufficient to allow the claim to proceed. The Court similarly sustained the claim that Warner Chilcott's listing of the relevant Loestrin patent in the Orange Book, which identifies drug products approved by the FDA and the related patent and exclusivity information, was a sham that violated federal antitrust law.

The Court next turned to the sham litigation claim, which alleged that Warner Chilcott's patent infringement litigation against Watson over the relevant Loestrin patent was a sham intended only to interfere with Watson's ability to launch generic Loestrin. The Court likewise allowed the claim to proceed, citing expert testimony proffered by the plaintiffs that Warner Chilcott's patent suit was baseless. As to Direct Purchasers' product hop claim — that Warner Chilcott's decision to cease manufacturing Loestrin and launch Minastrin (which, according to plaintiffs, was identical to Loestrin with flavor added to the placebo tablets) violated antitrust law — after reviewing the evidence, the Court determined that the jury could find that Warner Chilcott engaged in anticompetitive conduct by promoting Minstrin and obstructing generic substitution.

Defendants also challenged Direct Purchasers' reverse payment claim, *i.e.* that Warner Chilcott made a large and unjustified payment to Watson which caused a delay in the entry of generic versions of Loestrin. The primary theory for the reverse payment claim was that Warner Chilcott, when settling its patent litigation with Watson, agreed not to launch an authorized generic ("AG") version of Loestrin until six months after Watson had entered the market. The parties disputed the actual value of this no-AG agreement and how it compared to the costs of continued patent litigation. But in the end, the Court rejected Defendants' arguments, finding that a jury could conclude that the agreement's anticompetitive effects outweighed any procompetitive justifications.[4]

Finally, the Court turned to the issue of causation, as a plaintiff must demonstrate that the alleged antitrust violations were a material cause of their injury. Finding again for Direct Purchasers, the Court held that there was sufficient evidence supporting each of their causation theories — that absent the reverse payments: (1) Defendants would have settled their patent litigation with an earlier generic entry date; (2) Watson would have launched its generic Loestrin product "at risk" before the court presiding over the patent litigation had resolved the claims; and (3) Watson would have launched its generic Loestrin product after obtaining a final judgment in the patent litigation. The Court also rejected the Defendants' argument that damages should be measured by lost profits as opposed to overcharges.

The settlement is an excellent result obtained after several years of hard-fought litigation, and the Court's well-reasoned summary judgment opinion, allowing Direct Purchasers to proceed to trial on all of their claims, stands as further authority endorsing the merits of these theories of anticompetitive conduct. ■

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[4] The Court concluded similarly as to the other reverse payment theories advanced by the plaintiffs, which included an acceleration clause in the settlement agreement that allowed Watson to launch its generic Loestrin product earlier if a third party introduced a generic version of Loestrin and separate agreements between Warner Chilcott and Watson to market and promote other drugs. The Court thus held that a jury could find that Warner Chilcott's payments to Watson – the no-AG agreement, the acceleration clause and the separate agreements – did not merely compensate Watson for avoided litigation costs and instead were unjustified payments intended to delay competition in violation of antitrust laws.

CONTROLLING STOCKHOLDER MUST ANSWER TO ECHOSTAR CORPORATION'S MINORITY STOCKHOLDERS

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Transaction proposal disinterestedly or independently. Even so, the Related Party Transaction Policy did not require their recusal from the EchoStar board's deliberations or final vote. Moreover, the policy allowed Ergen to attend the board's final vote on the Transaction; thus, EchoStar's directors deliberated and voted under Ergen's eye.

Third, Ergen did not allow EchoStar's board to engage independent financial or legal advisors. Instead, Ergen caused EchoStar to engage Deutsche Bank Securities, Inc. ("Deutsche Bank") as its financial advisor in connection with the Transaction. Deutsche Bank, however, could not render independent advice due to its long and lucrative relationship with Ergen and DISH. Indeed, Deutsche Bank has been described as DISH's "house bank."[2] Ergen also caused EchoStar to engage White & Case LLP as its legal counsel, which, like Deutsche Bank, has a long and lucrative relationship advising the companies that Ergen controls. EchoStar's board therefore relied on and was influenced by conflicted advice throughout the process.

Fourth, Ergen did not condition the Transaction on the affirmative vote of a majority of EchoStar's minority stockholders. Instead, he structured the Transaction so the only affirmative vote necessary to consummate the Transaction was that of HSSC, which Ergen controlled through EchoStar.

Ergen therefore instituted and conducted a process that made the EchoStar board's approval of the Transaction a *fait accompli*, including at the price that Ergen wanted. On May 17, 2019, EchoStar's board approved the Transaction after Deutsche Bank advised the board that the Transaction consideration, 22.9 million shares of DISH Class A common stock worth approximately $797 million, was "fair." A conservative market-based analysis, however, valued the BSS Business at $1.5 billion, and DISH's financial advisor Bank of America valued the BSS Business as high as $1.63 billion, which Ergen knew because he attended DISH's board meetings.

On May 20, 2019, Ergen caused HSSC to deliver its written consent approving the Transaction to DISH. The Transaction closed on August 19, 2019.

D. The Court Denies Defendants' Motions to Dismiss

In light of Ergen's self-interested manipulation of the Transaction process and price, Kessler Topaz filed a complaint on behalf of Hallandale in the Nevada District Court on October 11, 2019. The complaint alleged that Ergen breached his fiduciary duty of loyalty as EchoStar's controlling stockholder by negotiating a self-interested transaction through unfair dealing for an unfair price, and that EchoStar's CEO and CFO, as well as EchoStar, HSSC and DISH, aided and abetted Ergen's conduct.

In November 2019, the defendants moved to dismiss the complaint. In denying the defendants' motions in their entirety, the court largely adopted Kessler Topaz's arguments opposing the motions.

First, the defendants argued that Kessler Topaz was improperly relying on law outside of Nevada to assert claims against Ergen. The court, however, held that Kessler Topaz stated a common law claim for breach of fiduciary duty against Ergen as a controlling stockholder under *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720 (Nev. 2003), a Nevada Supreme Court case the defendants ignored in their motions to dismiss. In *Cohen*, the Nevada Supreme Court held that a plaintiff states a claim against a controlling stockholder by sufficiently alleging that the controller orchestrated a transaction through unfair dealing and/or for an unfair price.[3] In holding that Kessler Topaz stated a *Cohen* claim, the court was particularly concerned with the allegations of unfair dealing, specifically Ergen's failure to form a fully empowered special committee of disinterested directors to negotiate the Transaction.

Second, the defendants argued that Nevada's statutory business judgment rule applied, and thus the court should not second-guess the board's decision to approve the Transaction. Kessler Topaz, however, alleged a *Cohen* claim, not a claim for any statutory violation. In addition, by its plain language, the business judgment rule applies only to "directors and officers"[4] and not controlling stockholders.

Third, the defendants argued that the business judgment rule applied for the additional reason that EchoStar's board approved the Transaction in compliance with Nevada's interested director statute, which provides that a transaction "is not void or voidable" solely because it involves conflicted directors or officers.[5] Kessler Topaz, however, was not seeking to "void"

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[2] *Dish's Ergen mulls bid for T-Mobile*, HeraldNet.com (Oct. 23, 2014, 1:31PM), https://www.heraldnet.com/business/dishs-ergen-mulls-bid-for-t-mobile/.

[3] *Cohen,* 62 P.3d at 727-28. Unfair dealing involves allegations that "directors, officers, or majority shareholders had conflicts of interest," as well as issues concerning the "timing of the merger, merger negotiations, how the merger was structured, and the approval process." *Id*. Unfair price involves allegations that "the price per share was deliberately undervalued," or that the price resulted from "negligent conduct." *Id*. at 728.

[4] NRS 78.138(7).

INVESTORS WIN KEY VICTORY IN SECURITIES CLASS ACTION INVOLVING SEAWORLD ENTERTAINMENT, INC.

(continued from page 5)

be 'corrective' of earlier statements concerning prior quarters."[12] In the months that followed, similar arguments were unveiled in several other securities fraud cases pending in district courts in the Ninth Circuit.[13]

Lead Plaintiffs opposed Defendants' motion, arguing that the temporal standard they advocated found no support in Ninth Circuit jurisprudence, and that to be corrective, a disclosure need only "relate to the same subject matter" as the alleged misstatements.[14] In a major victory for Lead Plaintiffs, on November 6, 2019, Judge Anello issued an order denying Defendants' motion for summary judgment in full (the "Order").[15] In rejecting Defendants' loss causation arguments, the Court undertook a thorough review of the Ninth Circuit's loss causation opinions before determining that there is "no Ninth Circuit authority to support [Defendants'] contention that summary judgment is appropriate as to loss causation if the corrective disclosure does not expressly reference the *time period* when the misrepresentations were made."[16] Rather, the Court explained, "Ninth Circuit analyses focus[] on whether the *subject* of the disclosure relates back to the misrepresentation."[17] Because Defendants' alleged misstatements concerned *Blackfish*, and "market commentary [] attributed the August 13 stock decline . . . to *Blackfish*," the Court concluded that a "reasonable jury could find that the August 13 disclosure" was sufficiently causally connected to Defendants' alleged misstatements.[18] By prevailing in the first of these cases to reach decision, Lead Plaintiffs and Lead Counsel[19] created valuable precedent that will be critical in opposing similar arguments moving forward.

The Court's Order was notable in several additional respects. *First*, Judge Anello rejected Defendants' argument that they did not act with the requisite scienter[20] because, even if they knew that "SeaWorld personnel had concerns about *Blackfish*," they never studied (and thus had no knowledge of) its precise

"financial impact" on the Company.[21] In other words, because Defendants put their heads in the sand, they contended they could not have acted with scienter when they denied any *Blackfish* impact. In rejecting Defendants' argument, the Court emphasized that Defendants had not merely remained silent, but instead had affirmatively and "repeatedly stated that *Blackfish* was having no impact on the Company's business."[22] The Court likened Defendants' conduct to the facts in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011), "where the defendant issued a press release suggesting certain studies had confirmed information when, in fact, no such studies existed."[23] As a result, the Court concluded that "Plaintiffs raise genuine issues of material fact as to whether Defendants made false or misleading statements about *Blackfish*'s impact intentionally or with deliberate recklessness."[24]

Second, the Court rejected Defendants' argument that summary judgment was appropriate as to materiality because "any *Blackfish* impacts [were] minimal or *de minimus*."[25] In so holding, the Court explained that "the concept of 'materiality' is not limited to a percentage of a company's total profits, but rather requires assessment of qualitative and quantitative factors so that even quantitatively small amounts can still present a materially misleading picture of a company's health."[26] As a result, Judge Anello concluded that "Defendants' argument that Blackfish impacts were minimal misses the mark" and "[a] ccordingly, genuine issues of fact preclude summary judgment on the element of materiality."[27]

Lead Plaintiffs and Lead Counsel believe that the Order added significant value for the Class. Indeed, less than three months after the Order was issued — and just weeks before the February 18, 2020 trial date — the parties reached an agreement-in-principle to resolve the Action. ■

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[12] *Id.*

[13] For example, in moving for summary judgment in *In re Snap Inc. Sec. Litig.*, No. 2:17-cv-03679-SVW-AGR, ECF No. 349-1, a securities fraud case pending in front of Judge Stephen V. Wilson of the Central District of California, the defendants argued that the plaintiffs could not establish loss causation because they "fail to explain how . . . earnings results [for 2017], revealed that Snap had misrepresented the impact of Instagram on Snap's DAU growth in [the third and fourth quarters of 2016]. Snap, Spiegel, Murphy, and Vollero Motion for Summary Judgment, *supra* 31-32. Similarly, in their summary judgment motion in *Murphy v. Precision Castparts Corp.*, No. 3:16-cv-00521-SB, ECF No. 234, a Section 10(b) case pending in front of Judge Stacie F. Beckerman in the District of Oregon, the defendants argued that corrective disclosures about the impact of recent negative trends on "*future* earnings" were not sufficiently causally connected to previous misrepresentations "concerning the then-existing state of affairs at PCC." Defendants' Motion for Summary Judgment, *supra* 47 (emphasis added).

[14] Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment, *Baker*, ECF No. 437 at 25-32.

[15] *Baker*, 2019 WL 6118448, at *50.

[16] *Id.* at *34-36.

[17] *Id.* at *36.

[18] *Id.*

[19] "Lead Counsel" is Kessler Topaz Meltzer & Check, LLP and Nix Patterson, LLP.

[20] "Scienter" is "a mental state embracing an intent to deceive, manipulate, or defraud." *Id.* at *45 (quoting *Provenz v. Miller*, 102 F.3d 1478, 1490 (9th Cir. 1996)). In the Ninth Circuit, a plaintiff can "establish scienter by proving either actual knowledge or recklessness." *Id.* (citation omitted).

[21] *Id.* at *47 (citation omitted).

[22] *Id.*

[23] *Id.*

[24] *Id.* at *48 (citing *Gebhart v. S.E.C.*, 595 F.3d 1034, 1044 (9th Cir. 2010) (finding scienter where the defendants "conducted no meaningful independent investigation to confirm the truth of their representations."); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1064-65 (9th Cir. 2000) (finding recklessness shown where the defendant had "grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts")).

[25] *Id.* at *44-45.

[26] *Id.* at *45 (quoting *S.E.C. v. Yuen*, 2006 WL 1390828, at *37 (C.D. Cal. Mar. 16, 2006); citing *Fecht v. Price Co.*, 70 F.3d 1078, 1080-81 (9th Cir. 1995) (rejecting argument that omission was not material "because it is the profitability of the Company as a whole, not any particular aspect of the Company's operations, that is significant.")).

[27] *Id.* (citation omitted).

KESSLER TOPAZ MELTZER & CHECK, LLP WINS GROUNDBREAKING ICSID ARBITRATION DECISION, ALLOWING THE CLAIMS OF NEARLY ONE THOUSAND GREEK INVESTORS TO MOVE FORWARD AGAINST THE REPUBLIC OF CYPRUS

(continued from page 4)

Bank) or the Bank of Cyprus. The claimants suffered substantial losses when their deposits/bonds were "bailed-in" (*i.e.* confiscated) as part of Cyprus' response (known as "Plan B") to the Cypriot financial crisis. Claimants' bonds were rendered worthless and the value of their deposits above €100,000 decreased substantially when the Cyprus government merged Laiki Bank with the Bank of Cyprus.

The claims against Cyprus arise under nearly identical provisions of two bilateral investment treaties ("BITs"): one between Cyprus and Greece (the "Cyprus-Greece BIT") and the other between Cyprus and the Belgo-Luxembourg Economic Union (the "Cyprus-BLEU BIT"). Claimants allege that Cyprus adopted its Plan B response to the economic crisis because it disproportionately impacted foreign (non-Cypriot) investors and that in doing so Cyprus violated its obligations under the Cyprus-Greece BIT and the Cyprus-BLEU BIT, including its obligations not to discriminate, not to expropriate, and to afford foreign investments fair and equitable treatment and full protection and security.

In response to the Claimants' Statement of Claim, Cyprus objected to the jurisdiction of an ICSID Tribunal to hear the dispute. Cyprus' primary objections were: 1) that both the Cyprus-Greece BIT and the Cyprus-BLEU BIT were superseded by European Union law and became inoperative when Cyprus joined the European Union in 2004; 2) that Cyprus had not consented to the arbitration of mass claims (i.e., claims by 958 persons/corporations) in either of the two BITs and the ICSID convention did not authorize such claims; and 3) even if the Tribunal determined that mass claims were permissible, the claims brought by the Claimants were not compatible with ICSID because the claimants claims were not homogenous in that they were brought under two separate BITs and involved claimants with a variety of assets that were at two different banks. Cyprus also made additional objections to jurisdiction with respect to some categories of Claimants claiming, for example, that the Claimants investments did not qualify as investments under the BITs.

Attorneys for both Cyprus and the claimants submitted opposing briefs and presented oral arguments at a hearing before the arbitrators in May 2019. After months of deliberations, the Tribunal issued its decision.

International Law v. European Union Law

With respect to Cyprus' first objection, that the BITs were superseded by EU law, the Tribunal Majority held that "the Tribunal cannot accept that EU law must necessarily override other principles of international law applicable between the parties." While the Court of Justice of the European Union (CJEU") was free to determine that the BITs were superseded with respect to EU law, the Tribunal confirmed that jurisdiction for this case should be on the basis of international law and not EU law and that the Tribunal was therefore not subject to the same interpretations as the CJEU. Furthermore, the Tribunal found that the dispute at hand is ultimately a question of a conflict of treaties and that there was no true conflict between the BITs and EU Treaties. The Tribunal went on to explain that,

> "[T]he Tribunal has difficulty in seeing the BITs and the EU Treaties as being of the same subject-matter. The existence of a procedure allowing the nationals of one state to bring a claim against another state under a BIT does not prevent the EU Treaties from operating. The fact that both have provisions relating to obligations on states in respect of foreign investors does not mean that the functioning of one prevents the functioning of the other. They can both operate side by side."

Indeed, the Tribunal confirmed that the relevant provisions of EU law, were not applicable to this case because the provisions relied upon by Cyprus were concerned with interpretation and application of EU treaties and that was not at issue in this case. The

Tribunal would ultimately be tasked with determining whether Cyprus' actions violated provisions of the BIT and not whether Cyprus' actions violated its obligations under EU law. Additionally, the Tribunal found no evidence that suggested that there was an intention by Cyprus or EU states generally, at the time of the negotiation of EU Treaties, to terminate or replace existing BITs and that, similarly, no subsequent actions by Cyprus or other EU states had resulted in termination of the BITs.

The dissenting arbitrator, Marcelo G. Kohen, focused most of his dissenting opinion on the incompatibility of the BITs with EU law and, contrary to the majority, concluded that "the possibility to set up arbitration as emerging from the two invoked BITs is incompatible with the later conventional engagements adopted by the same parties to these BITs at the time of the accession of Cyprus to the European Union on 1 May 2004."

Mass Arbitration Claims and Homogeneity

The Tribunal Majority next turned its attention to Cyprus' arguments that the Tribunal lacked jurisdiction to hear mass claims and that, even if mass claims were permissible under ICSID or the BITs, the mass claims were insufficiently homogenous. The Tribunal, relying on *Alemanni,* one of three mass ICSID arbitration cases known collectively as the "Argentina Bondholder Cases", determine that whether it had jurisdiction over mass claims would be resolved not only by determining whether there was jurisdiction over the individual claims but also by determining "whether those individual claims can be put together as a single 'mass claim'." Ultimately the Tribunal Majority found that "there is 'substantial unity' or similarity in the claims that are being made and the breaches alleged." The Tribunal Majority also found that "[t]he alleged liability of [Cyprus] in this case does not differ in respect of individual claimants… the claims in this case fall into four categories and the actions giving rise to liability are identical within each category although there are some differences between categories." The Tribunal Majority continued, "[i]t is not a claim about some of the Claimants; it was about the treatment of foreigners and all Claimants fall into that class." Additionally the Tribunal Majority determined that asserting jurisdiction over all claims would best serve the interests of justice and efficiency.

It was the Tribunal Majority's decision on mass claims and homogeneity that is groundbreaking. As the Tribunal Majority noted, although there is some precedent for mass claims, including detailed discussions in the Argentine Bondholder Cases, this case was unique in that the number of claimants included was well in excess of the number of claimants included in two out of three of the Argentine Bondholder Cases. ■

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the Transaction. Moreover, the board's compliance with the interested director statute involves an entirely separate inquiry from whether Ergen breached his fiduciary duties.

Fourth, the defendants argued that Kessler Topaz needed to plead its claims with particularity under Nevada Rule of Civil Procedure 9(b), which applies to common-law fraud claims, as opposed to the liberal pleading standards of Rule 8(a). The court rejected this argument, holding that fiduciary claims are not fraud claims.

EchoStar's CEO and CFO, as well as EchoStar, HSSC, and DISH, argued that they did not knowingly participate in Ergen's fiduciary breaches and therefore could not be held liable for aiding and abetting Ergen's breaches. In denying these defendants' motions, the court was persuaded by Kessler Topaz's argument that EchoStar's CEO and CFO knowingly assisted Ergen's breaches by, *inter alia*, (1) acquiescing to Ergen when valuing the BSS Business and negotiating with DISH, (2) failing to conduct a market check for the BSS Business, and (3) advising EchoStar's board that such a market check was unnecessary. The court was also persuaded that Ergen's knowledge of his own wrongful conduct was imputed to EchoStar, HSSC, and DISH in light of Ergen's control over these entities, making them liable for knowing participation.[6]

The action will now proceed to the discovery phase, with a trial to be scheduled. ■

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[5] NRS 78.140.

[6] *See Bates v. Cottonwood Cove Corp.*, 441 P.2d 622, 624 (Nev. 1968) (holding that a corporate officer's or director's knowledge is imputed to the corporation "when the knowledge was obtained in furtherance of corporate goals and within the scope of his duties" (citation omitted)).

FEDERAL COURT REJECTS SNAP INC.'S ATTEMPTS TO EVADE SECTION 11 LIABILITY FOR MISSTATEMENTS IN CONNECTION WITH ITS IPO

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bought Snap shares on or after March 8, 2017 cannot trace their stock back to the IPO" and thus "will not be able to prove standing under the Securities Act."[10]

On July 26, 2019, Lead Plaintiffs — who were represented by Lead Counsel Kessler Topaz Meltzer & Check, LLP ("Kessler Topaz") — filed their reply, strongly refuting Snap's arguments.[11] In particular, Lead Plaintiffs argued that they had clearly established "traceability" under the applicable "preponderance of the evidence" standard[12] because "99.95% of the shares available during the Class Period — i.e., 199,900,000 of 200,000,000 shares — were issued pursuant to the [IPO's] Registration Statement."[13] Moreover, citing to Mr. Feldman's argument, Lead Plaintiffs argued that "as a matter of policy alone, it would undermine the remedial purpose of the Securities Act and its goal of protecting investors if Defendants could simply evade Section 11 liability for every open-market purchaser by injecting an immaterial number of non-IPO shares into the market shortly after the IPO."[14]

On November 20, 2019, Judge Wilson issued an order granting Lead Plaintiffs' motion for class certification in full (the "Order").[15] In rejecting Snap's traceability arguments, the Court found "that the facts alleged by Lead Plaintiffs regarding the proportion of Snap's shares that are directly traceable to the IPO (99.95%) constitute a very substantial showing that effectively all class members can trace their shares back to the IPO."[16] The Court also credited Lead Plaintiffs' argument about the broader implications of Defendants' strategy, explaining that: "[a]s a policy matter, barring use of statistical tracing in litigation following a major IPO would mean that waiving the lock-up period for even nominal number of pre-IPO investors would effectively inoculate a corporation against nearly all potential Section 11 liability it might face for misstatements or omissions in its registration statement."[17] Ultimately, "[t]he Court decline[d] to narrow the relevant Class Period for the Securities Act claims on this basis."[18]

The Court's Order also rejected several other attempts by Defendants to skirt Section 11 liability. First, the Court rejected Defendants' argument that Lead Plaintiffs' Section 11 claims were time-barred under the Supreme Court's 2018 decision in *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018).

China Agritech held that, where class certification has already been denied, *American Pipe* tolling[19] does not apply to a new class action filed after the expiration of the statute of limitations.[20] Defendants argued that because Lead Plaintiffs joined this existing action and filed a new complaint after the expiration of Section 11's one-year statute of limitations,[21] those claims were time-barred under *China Agritech*. In holding that Lead Plaintiffs' class claims were timely, the Court reasoned that "*China Agritech* is not properly applied here, because Lead Plaintiffs intervened in an existing class action following the withdrawal of the former Lead Plaintiff, rather than filing a motion for class certification in a new (and otherwise time-barred) lawsuit."[22]

Second, Judge Wilson also rejected Defendants' argument that the Class did not suffer any Section 11 damages. Section 11 damages are subject to a statutory formula which caps damages at the difference between the offering price and the "value" of the security "as of the time such suit was brought."[23] Throughout the action, Defendants had maintained that "value" meant "price," meaning that because the action was filed when Snap's stock price was trading above its $17 offering price, Class members had no Section 11 damages. In the Order, the Court rejected this argument, explaining that "[i]t is an elemental proposition of modern securities law that in an efficient market, fraud can inflate the price of a security above its actual value."[24] The Court further found that the plain language of Section 11(e) "strongly suggests that Congress' intent was [] to calculate damages based on the underlying value when the lawsuit was filed, not the price."[25]

Two weeks after the Court's Order, on December 3, 2019, Defendants filed a Petition for Permission to Appeal under Rule 23(f), seeking immediate interlocutory appeal of the Order and, more specifically, its holdings with respect to traceability, *China Agritech*, and Section 11 damages.[26] To litigate the appeal, Snap brought in appellate heavyweight Paul D. Clement of Kirkland & Ellis LLP, who served as the 43rd Solicitor General of the United States from June 2005 until June 2008. Snap also received the backing of the Chamber of Commerce of the United States, which sought permission to file an *amicus* submission in support of Snap's Petition[27]. Lead Plaintiffs vigorously opposed Defendants' Rule 23(f) Petition. On January 17, 2020, while the Petition was pending, the parties reached an agreement-in-principle to resolve the action, on terms that Lead Plaintiffs and Kessler Topaz believe are extremely favorable to the Class.[28] ■

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[10] *Id.* at 12-13.

[11] ECF No. 304.

[12] Under this standard, a plaintiff must simply present "evidence that the claim . . . is more probably true than not," Ninth Circuit Manual of Model Civil Jury Instructions 1.6 (last updated 2019), which "allows both parties to 'share the risk of error in roughly equal fashion.'" *Herman & MacLean*, 459 U.S. at 390 (citation omitted).

[13] ECF No. 304 at 19.

[14] *Id.* at 19-20.

[15] *In re Snap Inc. Sec. Litig.*, 2019 WL 6270291 (C.D. Cal. Nov. 20, 2019).

[16] *Id.* at *11 (citation omitted).

[17] *Id.*

[18] *Id.* In *Sudunagunta v. Nantkwest, Inc.,* 2018 WL 3917865 (C.D. Cal. Aug. 13, 2018), Judge Michael W. Fitzgerald rejected a nearly identical argument raised by defendant Nantkwest, Inc.—another of Mr. Feldman's clients. There, too, a small number of non-IPO shares was allowed to enter the market during the IPO lock-up period, which the defendants argued destroyed traceability. *Id.* at *4-6. The court disagreed, finding that the plaintiffs had met their burden because "[o]ver 99.5% of the lock-up period trading volume related to IPO-registered shares rather than the Non-IPO Shares" which established "far more than a 'speculative basis' for statutory standing." Id. at *5-6.

[19] Under *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 549 (1974), "the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint." *China Agritech*, 138 S. Ct. at 1804.

[20] *China Agritech*, 138 S. Ct. at 1804.

[21] After the first-appointed lead plaintiff, Tom DiBiase, had to withdraw for medical reasons, the Court administratively terminated the pending motion for class certification and reopened the lead plaintiff process. ECF No. 208. The Court subsequently appointed Lead Plaintiffs. ECF No. 262.

[22] *Snap,* 2019 WL 6270291, at *10 (citing *China Agritech*, 138 S. Ct. at 1805). The Court further explained that its denial of class certification had been an "procedural decision" and that "class certification has never been addressed on the merits." *Id.* at *10.

[23] 15 U.S.C. § 77k(e).

[24] *Snap,* 2019 WL 6270291, at *23 (citing *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. 258, 272-74 (2014)).

[25] *Id.* at *7 (citing *Campton v. Ignite Rest. Grp., Inc.*, 2014 WL 61199, at *5 (S.D. Tex. Jan. 7, 2014)). The Court also relied on the fact that "[t]he Second Circuit has directly addressed this question and observed that 'the term 'value' in section 11(e) was intended to mean the security's true value after the alleged misrepresentations are made public.'" *Id.* (quoting *McMahan & Co. v. Wherehouse Entm't, Inc.*, 65 F.3d 1044, 1048-49 (2d Cir. 1995); and citing *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 165 (2d Cir. 2012)).

[26] Brief for Appellant at 1, *Snap Inc. v. Erickson*, No. 19-80157 (9th Cir. Dec. 3, 2019).

[27] Motion by Chamber of Commerce of the United States, 3-1, *Snap Inc. v. Erickson*, No. 19-80157 (9th Cir. Dec. 10, 2019).

[28] ECF No. 363.

WORKING AROUND MORRISON: STOYAS V. TOSHIBA CORPORATION EXPANDS REACH OF THE EXCHANGE ACT TO INCLUDE UNSPONSORED ADRS AND ALLOWS NON-U.S. INVESTORS TO PURSUE COMPANION CLAIMS IN FEDERAL COURT

(continued from page 9)

the domestic nature of its purchases, including that: plaintiff purchased 36,000 shares of Toshiba ADRs on the OTC market; the placement of the buy order, the payment of the purchase price, and transfer of the title to the securities took place within the territorial jurisdiction of the United States; the depositary bank, Citibank, issued the ADRs from the bank's office in New York; plaintiff made payment from a bank based in New York; and Citibank recorded a transfer of title in New York. Accordingly, the court concluded that plaintiffs plausibly alleged that the lead plaintiff incurred irrevocable liability to purchase the ADRs in the United States — making those purchases "domestic transactions" for the purposes of the Exchange Act.

Second, the district court addressed Toshiba's argument that the alleged fraud did not occur "in connection with the purchase or sale" of a security, as required by Section 10(b), because plaintiffs had not sufficiently alleged "that Toshiba had anything at all to do with" the creation or sale of the unsponsored ADRs. In rejecting this argument, Judge Pregerson concluded that plaintiffs "sufficiently alleged Toshiba's plausible participation in the establishment of the ADR program." Specifically, the court noted allegations regarding "the nature of the [Toshiba] ADRs, the OTC Market, the Toshiba ADR program, including the depositary institutions that offer Toshiba ADRs, the Form F-6s, the trading volume, the contractual terms, and Toshiba's plausible consent to the sale of its stock in the United States as ADRs."[12] Additionally, the court noted plaintiffs' allegations that Bank of New York Mellon — one of the Toshiba ADR depositary banks — was one of Toshiba's largest shareholders, with a percentage of Toshiba's common stock that rendered it "unlikely that [that] many shares could have been acquired on the open market without the consent, assistance or participation of Toshiba."

Accordingly, the court concluded that plaintiffs could assert claims under the Exchange Act in connection with purchases of Toshiba ADRs.

Separately, the court addressed issues of comity and *forum non conveniens* regarding plaintiffs' supplemental claim brought under Japan's Financial Instruments and Exchange Act. While the district court had previously declined to exercise jurisdiction over this supplemental claim when it dismissed plaintiffs' Exchange Act claims, the court reversed its position holding that because plaintiffs had now sufficiently alleged Exchange Act claims, comity and *forum non conveniens* no longer compelled dismissal of the Japanese claim.[13]

As such, the district court denied Toshiba's motion to dismiss in its entirety, allowing plaintiffs' securities claims — brought under both U.S. and Japanese securities laws — to proceed.

Potential Impact

While the *Toshiba* decision is not binding law, the district court's holding will likely provide persuasive authority for investors seeking to hold certain foreign defendants liable for securities fraud. First, the decision is instructive for plaintiffs pleading the domestic nature of unsponsored ADR purchases under the irrevocable liability test — laying out a series of facts that may support jurisdiction. Second, the court's willingness to allow parallel claims under Japanese law may provide a partial end-run around *Morrison*'s constraints in situations where investors can establish jurisdiction for foreign purchases (i.e., foreign common stock) by pleading viable claims for domestic purchases (i.e., ADRs). In short, the *Toshiba* decision may open courtroom doors for certain investors in foreign companies that were previously shut out by *Morrison*. ■

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[12] *Stoyas*, 2020 WL 466629, at *5.

[13] *Id.* at *6.

WHAT'S TO COME

MARCH 2020

Council of Institutional Investors (CII) 2020 Spring Conference & 35th Anniversary
March 9 – March 11
Mandarin Oriental Hotel ■ Washington D.C.

Georgia Association of Public Pension Trustees (GAPPT) 11th Annual Conference
March 23 – 26
King and Prince Beach & Golf Resort
St. Simons Island, GA

Florida Public Pension Trustees Association (FPPTA) NYC Wall Street Program
March 24 – 28
Sheraton Times Square ■ New York, NY

APRIL 2020

3rd Annual Institutional Governance and Legal Symposium
April 1
The Landmark London ■ London, UK

Litigation & Governance Trends for Asset Management Firms
April 28 – 29
Apella ■ New York, NY

MAY 2020

Texas Association of Public Employee Retirement Systems (TEXPERS) 31st Annual Conference
May 3 – 6
Moody Gardens Hotel ■ Galveston, TX

National Conference on Public Employee Retirement Systems (NCPERS) Annual Conference & Exhibition
May 10 – 13
Caesar's Palace ■ Las Vegas, NV

State Association of County Retirement Systems (SACRS) Spring Conference
May 12 – 15
Paradise Point Resort & Spa ■ San Diego, CA

Pennsylvania Association of Public Employee Retirement Systems (PAPERS) 16th Spring Forum
May 19 – 20
Hilton Harrisburg ■ Harrisburg, PA

JUNE 2020

Pennsylvania Treasurers' Annual Convention
June 9 – 11
DuBois Comfort Suites ■ DuBois, PA

National Association of Public Pension Attorneys (NAPPA) Legal Education Conference
June 23 – June 26
Marriott Resort Fort Lauderdale Harbor Beach
Fort Lauderdale, FL

Florida Public Pensions Trustees Association (FPPTA) 36th Annual Conference
June 28 – July 1
Renaissance Orlando at SeaWorld ■ Orlando, FL

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