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

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HIGHLIGHTS

KESSLERTOPAZ MELTZERCHECK LLP

KESSLER TOPAZ SECURES $130 MILLION RECOVERY FOR INVESTORS IN ALLERGAN GENERIC DRUG PRICE-FIXING LITIGATION

Matthew L. Mustokoff, Esquire and Margaret E. Mazzeo, Esquire

After four years of litigation, on July 9, 2021, the parties in *In re Allergan Generic Drug Pricing Securities Litigation*, No. 2:16-9449 (KSH) (D.N.J.) announced a settlement of all claims for $130 million. This is the first settlement of a federal securities fraud case arising out of the industrywide generic drug price-fixing scandal. The anticompetitive scheme underlying this case first came to light over a half decade ago when Senator Bernie Sanders and other members of Congress launched an investigation into Allergan and at least 15 other drug makers. Since that investigation, multiple criminal cases brought by the U.S. Department of Justice ("DOJ") and civil actions brought by the attorneys general of virtually every state have ensued. The

(continued on page 6)

GLOBALLY, LITIGATION FUNDING ARRANGEMENTS FACING INCREASING SCRUTINY, LICENSING AND OTHER REGULATIONS

Emily N. Christiansen, Esquire

In recent years the number of new litigation funders entering the market has been on the rise. With good reason. With a lack of true "class action" mechanisms and a prohibition on lawyers working on a contingency fee basis in many non-North American jurisdictions, litigation funding is what makes it possible for certain similarly situated claimants, like institutional investors pursuing claims for damages against companies over allegations of fraud and abuse, to pursue recourse. With the number of shareholder actions in non-North American jurisdictions on the rise, it makes sense that there would be an increasing number of litigation funding entities seeking to compete for business. But the increase in market participants

(continued on page 8)

SDNY GREEN LIGHTS SECURITIES FRAUD CLAIMS AGAINST GOLDMAN SACHS FOR ROLE IN 1MDB MONEY LAUNDERING SCANDAL

Matthew L. Mustokoff, Esquire, and Nathaniel C. Simon, Esquire

On June 28, 2021, U.S. District Judge Vernon S. Broderick of the Southern District of New York denied in large part the defendants' motion to dismiss a securities fraud class action against Goldman Sachs alleging that the global investment bank concealed its role in facilitating the 1MDB money laundering scheme, one of the largest financial frauds in recent memory.[1]

The case arises out of Goldman's role as underwriter for 1Malaysia Development Berhad ("1MDB"), Malaysia's sovereign wealth fund, in connection with a series of bond offerings that became the vehicle for an international bribery ring. The investor-plaintiffs, led by Lead Plaintiff Sjunde-AP Fonden ("AP7"), one of Sweden's largest public pension funds, and represented by Kessler Topaz, allege that top Goldman bankers — including then-Chief Executive Officer Lloyd Blankfein — courted the business of a Malaysian national named Jho Low, who served as the key broker for 1MDB, and Malaysia's now-disgraced Prime Minister Najib Razak, who oversaw the fund and was convicted for abuse of power in 2020. Goldman pursued this relationship despite repeated warnings from Goldman's compliance department and other red flags of fraud.

In 2012 and 2013, Goldman served as the underwriter for 1MDB in connection with three state-guaranteed bond offerings. In concert with Goldman, Low and other conspirators including government officials from Malaysia, Saudi Arabia and the United Arab Emirates ran an expansive bribery ring, siphoning $4.5 billion from the bond deals which Goldman peddled as investments for Malaysian state energy projects. In actuality, the deals were shell transactions used to facilitate the historic money laundering scheme. Nearly $700 million of the diverted funds ended up in Najib's private bank account. Other funds were funneled to Low and his associates and were used to buy luxury real estate in New York and Paris, super yachts, and even help finance the 2013 film "The Wolf of Wall Street." Goldman netted $600 million in fees for the three bond offerings — over *100 times* the customary fee for comparable deals.

In 2014, the Malaysian and international press began reporting on the suspicious 1MDB offerings and Goldman's role in bringing them to market. At this point, the fraud started to unravel, prompting Goldman to issue a series of statements falsely denying the bank's knowledge of Low's involvement. Press reports of Goldman's role in the fraud and government investigations in Malaysia, Europe, and the United States continued to mount, however, and the bank's culpability and resulting legal exposure became clearer, causing its stock price to tumble in a series of six disclosures in November and December 2018. Lowe remains a fugitive at large.

AP7, represented by Kessler Topaz, filed the complaint in this case on October 29, 2019. The complaint alleges that Goldman and three individual defendants, Lloyd Blankfein (former CEO), Gary Cohn (former President/Chief Operating Officer), and Harvey Schwartz (former CFO), made a series of material misstatements spanning a Class Period of nearly five years (February 28, 2014, to December 20, 2018).[2] The alleged misrepresentations fall into several categories: (1) statements denying or misrepresenting Goldman's knowledge of various red flags surrounding the 1MDB bond deals, (2) statements regarding Goldman's risk management and internal controls, (3) statements about Goldman's general principles (including compliance practices, reputation, and commitment to integrity), (4) statements about Goldman's financial performance, and (5) certifications of sound internal controls made pursuant to the Sarbanes-Oxley Act in Goldman's SEC filings. The complaint alleged that the defendants made these false statements with *scienter*, or intent to defraud,

(continued on page 10)

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[1] *Sjunde AP-Fonden v. The Goldman Sachs Group. Inc.*, --- F. Supp. 3d ----, 2021 WL 2659797 (S.D.N.Y. June 28, 2021).

[2] Dkt. No. 63.

THE NINTH CIRCUIT SUGGESTS THAT THE PSLRA DOES NOT IMPOSE A HEIGHTENED STANDARD WHEN APPOINTING GROUPS OF UNRELATED INVESTORS AS LEAD PLAINTIFFS

Ryan T. Degnan, Esquire and Karissa J. Sauder, Esquire

In a recent decision, *In re Mersho*, 6 F.4th 891 (9th Cir. 2021), the Ninth Circuit clarified statutory requirements regarding burden-shifting during the appointment of lead plaintiffs in securities class actions. Specifically, the Ninth Circuit, in connection with a class action lawsuit against Nikola Corporation, explained that a district court cannot disqualify a group of unrelated investors based merely on "misgivings," rather than actual evidence of inadequacy, after finding that the group is the presumptively most adequate plaintiff. The Ninth Circuit's ruling suggests that the PSLRA may not impose stricter standards for appointment on unrelated groups than on other types of movants, and that competing movants bear the burden of establishing an unrelated group's inadequacy. Given that *Mersho* has not yet been extensively applied by district courts, the impact of the ruling on the lead plaintiff selection process has not been fully developed.

The PSLRA Provides the Process for Appointing Lead Plaintiffs in Securities Actions

The Private Securities Litigation Reform Act of 1995 (the "PSLRA") sets forth a clear three-step process for appointing a lead plaintiff to manage a class action alleging violations of the federal securities laws. In step one, the plaintiff who filed the initial lawsuit publishes notice alerting investors of the pending action, and purported class members file motions seeking appointment as lead plaintiff.[1] In step two, the court determines which "person or group of persons" is the presumptively "most adequate plaintiff" — that is, the "most capable of adequately representing the interests of class members" — by identifying the movant or group of movants with the largest alleged losses that *also* has made a prima facie showing of

(continued on page 16)

[1] *See* 15 U.S.C. § 78u-4(a)(3)(A)(i).

KESSLER TOPAZ SECURES THE DELAWARE COURT OF CHANCERY'S APPROVAL OF A $17.5 MILLION SETTLEMENT AT THE COURT'S FIRST IN-PERSON HEARING SINCE CLOSING ITS PHYSICAL DOORS DUE TO COVID-19

Stacey A. Greenspan, Esquire

On June 15, 2021, the Delaware Court of Chancery held its first in-person hearing since closing its physical doors due to the COVID-19 pandemic. Vice Chancellor Fioravanti presided over the hearing, which concerned the settlement of litigation challenging the August 23, 2017 acquisition of Nutraceutical International Corporation ("Nutraceutical" or the "Company") by private equity firm HGGC, LLC ("HGGC") for $41.80 per share (the "Merger").[1] Kessler Topaz argued in support of the settlement's approval.

The courtroom was limited that day to twenty lawyers, who court personnel ushered to their seats. Seats were marked three feet apart to conform to the Court's social distancing rules. All attendees were required to wear a face covering when not addressing the Court. A tabletop podium was installed at counsel's tables, as opposed to having attorneys share one freestanding podium to address the Court, as is typically done. The Vice Chancellor took the bench behind Plexiglas. The courtroom was, despite these new formalities, chatty and warm. The Court expressed delight at seeing counsel — and particularly Kessler Topaz, who the Vice Chancellor practiced with for many years — and was emotive about holding the hearing in person. The Vice Chancellor then approved a $17.5 million settlement for Nutraceutical's former stockholders (the "Class") representing a 5.8% increase to the Merger price.

(continued on page 18)

1 *See Weiss v. Burke, et al.*, C.A. No. 2020-0364-PAF (Del. Ch.).

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INVESTING IN CHINESE COMPANIES, IN VOGUE BUT FRAUGHT WITH DANGER, PART 2: DISCOVERY AND JUDGMENT ENFORCEMENT

Kevin E.T. Cunningham Jr., Esquire

In the first half of this two-part article[1], we discussed the growing influence that China-based companies have on a global scale, and how these companies' increasing interactions with United States securities exchanges present attractive opportunities for investors seeking to diversify their portfolios. These opportunities, however, are not without significant risk. For example, while the prospect of getting in early on the next big industry may be enticing, in actuality, only 1% of new companies in China actually survive.[2] While some reasons for failure are legitimate business failures from competition (e.g., before the peak in 2011, there were over 5,000 Groupon copy-cats vying for supremacy in China[3]), or simply not having a viable business model that appealed to Chinese consumers, where a potential claim of fraud exists, investors face significant hurdles in bringing such claims against those companies in United States courts. As discussed in the previous article, the first major hurdle that must be overcome is Hague-complaint service of process.[4] Once proper service has been established, plaintiffs aren't out of the woods yet: A web of international agreements, U.S. jurisprudence, and Chinese domestic laws also dictate the process for engaging in discovery and judgement enforcement. This article will address methods by which a plaintiff may best situate themselves to better navigate the discovery and post-judgement aspects of their cases.

I. Discovery and Judgment Enforcement

Obtaining discovery materials from China-based entities is often a laborious task. For example, though both China and the United States are parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Evidence Convention")[5], an international agreement that ostensibly sets forth the methods by which discovery can be obtained, China has several "blocking statutes" designed specifically to prevent Chinese defendants from participating in foreign litigation, some of which carry the potential for criminal penalties for Chinese entities that do not comply.

Further, even in the event that a plaintiff gets a judgment in its favor, the matter of enforcing that judgment will be difficult against Chinese companies that have no real assets in the United States. This is made even more difficult given that often the executives with the deepest pockets reside outside of the jurisdiction of U.S. courts, rendering them judgment proof. Thankfully, there are several remedies an aggrieved plaintiff can request of a U.S. Court, albeit with varying degrees of success.

II. Obtaining Discovery from China-Based Litigants

Both China and the United States are signatory parties to the Evidence Convention, Article 1 of which sets forth that a "Letter of Request" for particular documents must be sent to the Central Authority of the country from which documents are sought. In China's case, the Central Authority is the Ministry of Justice. Thereafter, the Central Authority issues a decision as to whether to process the request.[6] Further, similar to Section 13 of the Service Convention, under Article 12 of the Evidence Convention, a country can deny to process the discovery request if it prejudices the sovereignty or security of that country.[7]

(continued on page 19)

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1 Kevin Cunningham, *Investing In Chinese Companies, In Vogue, But Fraught With Danger, Part 1: Service Of Process,* The Bulletin - Summer 2021, 2021, www.ktmc.com/newsletters/the-bulletin-summer-2021#12464.

2 Fiona Huang, *Chinese Tech Startups: Gold Rush or Minefield?,* - Entrepreneur Handbook, 27 July 2021, www. entrepreneurhandbook.co.uk/chinese-startups/.

3 *Id.*

4 Cunningham, *Supra.*

5 The criminal law equivalent is the Agreement on Mutual Legal Assistance in Criminal Matters between China and the United States.

6 *Convention Adopted at the Eleventh Session of the Hague Conf. on Priv. Int'l L. Oct. 26, 1968;* T.I.A.S. No. 7444 (Oct. 7, 1972) Articles 1-4.

7 *Id.* at Article 12.

CANOO, LORDSTOWN, AND NIKOLA — PORTENTS OF FUTURE SPAC-RELATED LITIGATION

Jennifer L. Joost, Esquire

Lately, it appears that anyone who is anyone has a special purchase acquisition company or "SPAC"— from well-known investors like Bill Ackman (Pershing Square Tontine Holdings, Ltd), to politicians like Paul Ryan (Executive Network Partnering Corp.), entertainment figures like Jay-Z (The Parent Company), and sports figures like Shaquille O'Neal (Forest Road Acquisition Corp.) and Serena Williams (Jaws Spitfire Acquisition Corporation). As Ackman noted in a February 10, 2021 New York Times *DealBook* article, "Every friend is launching a SPAC. . . . It's like everyone who had an internet company in 2000. It's like, 'Oh yeah, I got one, too.'"[1]

Otherwise known as "blank check companies," SPACs have existed since the 1990s but only recently have become a popular way to take a company public. So, what is a SPAC? A SPAC is a financial vehicle that allows a non-public target company to go public without engaging in the traditional (and highly regulated) initial public offering ("IPO") process. A SPAC is launched by a sponsor who pays a nominal amount for an equity stake in the SPAC. The sponsor then takes the SPAC public through the traditional IPO process. Because the SPAC is a shell company with no business operations, the IPO process is quicker and less expensive for the SPAC than the same process would be for a typical company. After its IPO, the newly-public SPAC searches for a non-public target company with which to merge. After the merger is complete,

(continued on page 24)

[1] *See Firefighters' Pension Sys. of Kansas City, Missouri Tr. v. Presidio, Inc.*, C.A. No. 2019-0839-JTL, 2021 WL 298141 (Del. Ch. Jan. 29, 2021).

KESSLER TOPAZ SECURES MOTION TO DISMISS VICTORY PREMISED ON NOVEL LEGAL THEORY ADDRESSING WHAT CONSTITUTES AN "UNAFFILIATED" MAJORITY-OF-THE-MINORITY STOCKHOLDER VOTE UNDER DELAWARE LAW

J. Daniel Albert, Esquire and Grant Goodhart, Esquire

Kessler Topaz recently defeated efforts to dismiss litigation regarding the 2019 squeeze-out of Empire Resorts, Inc.'s ("Empire") public minority investors (the "Merger") by Empire's controlling stockholder, Kien Huat Realty III Limited ("Kien Huat"). In a matter of first impression, the Delaware Court of Chancery adopted Kessler Topaz's argument that the controller's inclusion of a large, public Empire stockholder with business ties to Empire in the majority-of-the-minority vote to approve the Merger failed to satisfy the "unaffiliated" requirement necessary for the Court to give deference to the vote under the seminal decision *Kahn v. M&F Worldwide Corporation* ("*MFW*").[1]

In *MFW*, the Court held that when certain procedural protections were employed by a controlling stockholder in connection with acquiring the minority interest in a company, the exacting "entire fairness" standard of review that normally applied would be replaced by the deferential "business judgment" standard of review, making it much easier for a controlling stockholder to secure dismissal of litigation challenging the transaction. Specifically, *MFW* held that the business judgment standard would apply where a controlling stockholder conditioned its offer to acquire the minority interest upon both: (1) the approval of an independent, adequately-empowered special committee of the board of directors and (2) a non-waivable condition that the transaction be approved by an uncoerced, informed vote of a majority of minority stockholders unaffiliated with the controlling stockholder. Prior to *MFW*, under the entire fairness standard, the controller would have the burden to prove that the transaction was "entirely fair" (both in process and from a financial point of view) to the minority stockholders,

(continued on page 26)

[1] 88 A.3d 635 (Del. 2014).

KESSLER TOPAZ SECURES $130 MILLION RECOVERY FOR INVESTORS IN ALLERGAN GENERIC DRUG PRICE-FIXING LITIGATION

(continued from page 1)

drug makers' conspiracy is believed to be the largest domestic pharmaceutical cartel in U.S. history.

Kessler Topaz first filed an amended complaint in this securities class action in May 2017 in the U.S. District Court for the District of New Jersey on behalf of Lead Plaintiff Sjunde-AP Fonden, one of Sweden's largest pension funds. The 111-page complaint alleged that Allergan's generic drug division, Actavis, played a central role in the scheme to rig bids, allocate customers, and fix prices in the generic drug market. This anticompetitive behavior began as early as 2009 and continued through 2014. The complaint further alleged that Allergan and its senior officers publicly denied the existence of anticompetitive conduct in the generic drug markets, concealed their participation in the cartel, and misrepresented the nature and sustainability of increased drug prices in a series of SEC filings, quarterly earnings calls, and investor conferences during the three-year class period. These misrepresentations and non-disclosures, the Lead Plaintiffs alleged, served to inflate Allergan's stock price until the allegations of collusion were revealed, causing the stock price to plummet.

Genesis of the Industrywide Price-Fixing Investigation

By way of background, the market for generic drugs is designed to *lower* the price of drugs gradually over time. Typically, the first generic drug of its kind to enter the market is priced 15% to 25% lower than the brand name drug. This discount often surpasses 50% to 80% (or more) when multiple manufacturers market generic versions of a given branded drug. As an intended consequence, generic drugs usually result in significant cost savings to consumers.

Between 2011 and 2014, however, prices for commonly prescribed generic drugs skyrocketed with no apparent economic explanation — in some cases by as much as 2,000%. As a general matter, in a normally-functioning, competitive market, if one manufacturer raises the price of a given drug, its competitors will simply seek to increase their own market share by selling the drug at a lower price. In other words, absent a larger driving force — such as a product shortage or an increase in demand — there is no economic rationale for generic drug makers to collectively raise prices rather than undercut one another to gain market share. By conspiring to allocate market share (rather than fight for it), these companies shored up their ability to maintain control over pricing and deprive consumers of the benefits of a competitive market.

Investigations into these historic price increases for common generic drugs date back to 2014, when the National Community Pharmacists Association, which represents tens of thousands of U.S. pharmacies, requested that Congress hold hearings on the significant spike in pricing. Senator Bernie Sanders and Representative Elijah E. Cummings issued information requests regarding various price hikes to 13 drug companies, including Allergan. In the ensuing months, several government probes sprang up, including investigations by the DOJ and a coalition of state attorneys general led by the Connecticut Attorney General.

Heritage Pharmaceuticals, Inc. ("Heritage") was the first of several drug companies to publicly admit to conspiring to suppress and eliminate competition by allocating customers, rigging bids, and fixing and maintaining prices for certain generic drugs. In December 2016, the DOJ unsealed criminal informations charging Heritage's former Chief Executive Officer, Jeffrey Glazer, and its President, Jason Malek, for illegally conspiring to fix prices and rig customer bids for several generic drugs.[1] Within one month's time, Glazer and Malek pled guilty to the charges and agreed to cooperate with the DOJ's ongoing investigation.

Less than five months after Lead Plaintiffs filed their complaint in the securities action, in October 2017, the attorneys general led, by the Connecticut AG, filed a 189-page proposed

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[1] Dep't of Justice, Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging and Customer Allocation Conspiracies (Dec. 14, 2016), https://www.justice.gov/opa/pr/former-top-generic-pharmaceutical-executives-charged-price-fixing-bid-rigging-and-customer.

amended complaint.[2] This pleading, which incorporated the fruits of a sprawling government investigation, contained copious evidence of inter-firm communications among the various co-conspirators — including phone calls between Actavis and Heritage — occurring just prior or contemporaneous to dramatic price increases for scores of generic drugs. This extensive web of phone calls, text messages, and other inter-competitor communications provided compelling circumstantial evidence of a vast conspiracy to fix prices, as many courts have held that when concerted pricing behavior is "tightly linked" to "exchanges of information," there is strong evidence of a conspiracy.[3]

District Court Sustains Amended Complaint Alleging Securities Fraud

Shortly after the unveiling of the amended Connecticut AG Complaint, Lead Plaintiffs filed a second amended complaint incorporating detailed evidence from the AG investigation as it related to Allergan.[4] This evidence included phone calls between Allergan and Heritage sales representatives during which the companies conspired to raise prices for two commonly prescribed drugs (verapamil and glyburide-metformin).

On August 6, 2019, following a four-hour oral argument held months earlier, U.S. District Judge Katharine Hayden issued a 31-page opinion and order denying Allergan's motion to dismiss the second amended complaint.[5] The Court found that the complaint sufficiently alleged "both direct and indirect evidence of an [anticompetitive] agreement," including through: (i) "communications between executives of different companies regarding price increases, at least two of whom pleaded guilty to violating antitrust laws" (i.e., the Heritage executives discussed above); (ii) "various opportunities to collude, including a host of communications and various trade association meetings"; (iii) "relevant market conditions and attributes"; and (iv) "the timing of parallel price increases."[6] The Court further held that while the "complaint affirmatively alleges that 'there was no reasonable explanation for the price hikes' — no supply shortages were reported, nor were there significant increases in demand for the drugs. . . . Allergan's officers repeatedly represented that the price increases were attributable to benign market explanations, such as supply and demand issues."[7] Such categorical statements, the Court explained, made in the face of directly contradictory information, provided strong evidence of the Defendants' knowledge of the alleged fraud.

With respect to the issue of scienter (or intent to defraud), the Court held that the Lead Plaintiffs adequately pled scienter as to Allergan and the Individual Defendant-officers. Relying heavily on the criminal and civil probes into Allergan's conduct, the Court stated, "ongoing investigations into anticompetitive pricing in the market . . . are a significant piece of the [scienter] puzzle."[8] Judge Hayden remarked that "Allergan's minimization of the import of these related civil and criminal investigations ignores the scope of the investigations and the particularized facts and evidence already derived from them."[9] The Court also ruled that "a 'core operations' inference may be made under the circumstances" — an inference which "allows knowledge of fraud to be imputed to individual defendants where the alleged fraud relates to the core business of the company."[10] The Court noted that "Allergan's generic drug sales comprised a substantial portion of its revenues and operations during the class period, accounting for 32% of 2014's total revenues and jumping to 42% in 2015," suggesting that it is "implausible that the Individual Defendants, who were the Company's senior-most executives, were unaware of the historically colossal price increases and the price-fixing agreements with Co-Conspirators."[11]

Finally, with respect to the issue of loss causation, the Court sustained the Lead Plaintiffs' allegations that two disclosures — news of Allergan's receipt

(continued on page 9)

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[2] Plaintiff States' [Proposed] Consolidated Amended Complaint, *In re: State Attorneys General Cases*, No. 17-cv-3768-CMR (E.D. Pa. Oct. 31, 2017), ECF No. 3-1.

[3] *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004); *see also In re Domestic Drywall Antitrust Litig.*, 163 F. Supp. 3d 175, 197 (E.D. Pa. 2016) (explaining that "opportunities to conspire may be probative of a conspiracy when meetings of Defendants are closely followed in time by . . . suspicious documents or changes in pricing practices").

[4] Consolidated Second Amended Class Action Complaint, *In re Allergan Generic Drug Pricing Sec. Litig.*, No. 16-cv-9449 (CLW) (D.N.J. Nov. 28, 2017), ECF No. 82.

[5] *In re Allergan Generic Drug Pricing Sec. Litig.*, 2019 WL 3562134 (D.N.J. Aug. 6, 2019).

[6] *Id.* at *6.

[7] *Id.* at *12.

[8] *Id.*

[9] *Id.*

[10] *Id.* (citing *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 599 (D.N.J. 2001) (reasoning that "[w]hile asserting that defendants approved or helped prepare public disclosure is insufficient to establish knowledge of all aspects of the company's business . . . knowledge may be imputed to individual defendants when the disclosures involve the company's core business")).

[11] *Id.* at *12.

GLOBALLY, LITIGATION FUNDING ARRANGEMENTS FACING INCREASING SCRUTINY, LICENSING AND OTHER REGULATIONS

(continued from page 1)

has also been leading to a recent increase in scrutiny by legislatures and regulators.

In August 2020, following a rise in litigation funder-backed class actions in Australia, new regulations implemented by the Australian Federal Government took effect.[1] The purpose of the regulations was to increase the transparency of litigation funders' operations. Under the new regulatory regime, litigation funders who fund class actions are now classified and regulated as a "managed investment scheme". In addition to this classification, litigation funders who enter into agreements on or after August 22, 2020 are subject to regulatory requirements including a requirement for the managed investment scheme to be registered and operated by a "responsible entity," which is an Australian public company that holds an Australian Financial Services License ("AFSL") that authorizes the responsible entity to operate the scheme. The AFSL licensing regime requires the responsible entity to, *inter alia*: do all things necessary to ensure that services are provided efficiently, honestly, and fairly; to ensure that they comply with all financial services laws; and to have adequate risk management systems in place. The Australian Securities and Investments Commission ("ASIC") issued an instrument that exempts litigation funders from some regulatory requirements that apply to other types of financial services providers.[2] Many of the exemptions are only available to litigation funders for a period of 5 years and will expire on August 22, 2025. These exemptions were made in recognition of the fact that litigation funders are different and that it would be difficult for them to comply with certain obligations.

It is unclear how the AFSL licensing regime will impact the litigation funding of securities class actions in Australia and whether it will indeed increase transparency and otherwise benefit investors who are pursuing securities-related claims or whether it will only seek to limit competition. As of June 2021 only four litigation funders and two other companies had obtained the AFSL while there were twenty five litigation funders that were previously identified as being active in the Australia government-commissioned December 28 inquiry into class actions and litigation funding.[3] However, it should also be noted that some litigation funders may also be able to use the licenses of other existing organizations instead of obtaining their own. Furthermore, other changes in Australian class action law have made it easier for some Australian law firms to provide litigation funding on their own instead of involving third-party litigation funders and that activity does not require an AFSL license.

Outside of Australia there have also been developments. In June 2021, the European Parliament's Legal Affairs Committee published the D*raft report with recommendations to the European Commission on Responsible private funding of litigation*[4] ("Draft Report"). In the Draft Report, the European Parliament proposes the European Commission issue a Directive with proposed rules for regulating the activities of litigation funders within the EU. The proposed Directive would implement an authorization system overseen by Member State supervisory authorities and would require litigation funders to conduct business from an office that is registered within an EU Member State. Additionally, rules governing the content of the funding agreements and various disclosure obligations are proposed.

Some of the European Parliament's proposals have merit. For example: the European Parliament is concerned with the activities of less scrupulous funders that mean a funder obtains a rate of return that far exceeds the rate of compensation available for claimants. The European Parliament's proposed Directive

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1 https://asic.gov.au/regulatory-resources/managed-investment-schemes/litigation-funding-schemes/

2 https://asic.gov.au/regulatory-resources/managed-investment-schemes/litigation-funding-schemes/

3 https://www.law.com/international-edition/2021/06/09/only-a-handful-of-litigation-funders-obtain-licenses-under-new-australia-law/?slreturn=20210817154953

4 https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf

would therefore guarantee that, absent exceptional circumstances, a litigation funder could not receive more than 40% (including costs, fees and other expenses) of the total recovery such that the claimants would receive less than 60% or less of the share award.[5] Additionally, the proposed authorization system would ensure adequacy of capital and other resources.[6] However, other proposed rules may cause chaos and confusion. For example, Article 5(1) of the proposed Directive provides that a funding agreement must be concluded subject to the laws of the Member State of the intended proceedings or, if different, the laws of the Member State of the claimant or intended beneficiaries. This particular proposal seems to have no consideration for joint proceedings in which there are many claimants who are domiciled both outside of and within (including in different Member States) the EU. This particular choice of law provision could create logistical challenges for litigation funders who are funding collective actions.

At this stage, it remains to be seen what regulations will ultimately be implemented and what the impact will be on shareholder litigation in Europe. The Draft Report is currently being discussed and debated by the European Parliament's Economic Affairs Committee. It will be debated by the full European Parliament in November. If the European Parliament adopts the Draft Report, the EU Commission will be charged with drafting new legislative proposals. ■

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[5] *See e.g.* proposed Directive Article 13 (4), https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf, p. 20.

[6] *See e.g.* proposed Directive Article 6, https://www.europarl.europa.eu/doceo/document/JURI-PR-680934_EN.pdf, p. 15.

KESSLER TOPAZ SECURES $130 MILLION RECOVERY FOR INVESTORS IN ALLERGAN GENERIC DRUG PRICE-FIXING LITIGATION

(continued from page 7)

of a DOJ subpoena in August 2015 and a November 2016 news article reporting that the DOJ investigation had intensified and was likely to result in criminal charges — caused significant declines in Allergan's stock price.[12] Citing numerous cases, Judge Hayden held that a "DOJ investigation can be the basis for a corrective disclosure."[13] The Court also rejected the Defendants' argument that the second disclosure concerning the escalation of the DOJ probe could not have proximately caused any losses because any antitrust liability on the part of Allergan had been transferred to Teva Pharmaceuticals ("Teva") — another generic drug manufacturer and an alleged co-conspirator with Allergan — when Allergan sold its Actavis generics business to Teva three months earlier. As the Court recognized, "the sale of Actavis to Teva does not immunize Allergan shareholders from the losses suffered by the [November 2016] disclosure of the DOJ investigation . . . [because] 'it is more than plausible that the market was reacting to management's concealment of and engagement in wrongdoing, negative information which would have impacted Allergan's stock, not Teva's stock.'"[14]

The Parties Complete Discovery and Reach a Historic Settlement

Over the twenty months following the Court's order denying the motion to dismiss the complaint, the parties engaged in wide-ranging fact discovery. The Lead Plaintiffs took twenty depositions of former Allergan officers and employees in the Actavis unit, as well as several employees of third party companies alleged to have conspired with Allergan to divide up customer accounts and jack up drug prices during the class period. Following the completion of fact discovery in March 2021, and with the Lead Plaintiffs' motion for class certification pending, the parties engaged in a four-week mediation and subsequently announced an all-cash settlement of $130 million on July 9, 2021. On July 30, 2021, the Court issued an order preliminarily approving the parties' settlement and set a final settlement approval hearing for November 17, 2021. If approved, this will be the largest-ever settlement of a securities fraud class action arising out of an underlying antitrust price-fixing conspiracy. ■

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[12] *Id.* at *13-14.

[13] *Id.*

[14] *Id.* at *14.

SDNY GREEN LIGHTS SECURITIES FRAUD CLAIMS AGAINST GOLDMAN SACHS FOR ROLE IN 1MDB MONEY LAUNDERING SCANDAL

(continued from page 2)

pointing to, among other things, Blankfein's and other top bankers' repeated personal meetings with Low and Najib, multiple warnings from Goldman's compliance department about doing business with Low whose background and credentials could not be readily confirmed, and the prosecution by the U.S. Department of Justice ("DOJ") of two senior Goldman bankers involved in the 1MDB bond deals — Timothy Leissner who has pled guilty and awaits sentencing, and Roger Ng, whose trial in the Eastern District of New York is scheduled to begin in the spring of 2022.

On January 9, 2020, the Defendants moved to dismiss the complaint.[3] In October 2020, while the motion remained pending, the DOJ filed a criminal charging document (called an "Information") and a deferred prosecution agreement ("DPA") against Goldman in U.S. District Court for the Eastern District of New York.[4] In filing the DPA, the DOJ announced that Goldman's Malaysia subsidiary had pled guilty to violating the Foreign Corrupt Practices Act ("FCPA") which criminalizes the payment of bribes to foreign officials, and that Goldman had agreed to pay $2.9 billion pursuant to the DPA. This amount includes the largest ever penalty under the FCPA. AP7 subsequently submitted the DPA to the Court, asking Judge Broderick to take judicial notice of DPA, and the factual admissions within it, in deciding the defendants' motion to dismiss the Complaint.[5]

On June 28, 2021, Judge Broderick issued his opinion on the motion to dismiss.[6] As discussed below, the Court found that AP7 adequately alleged the falsity of most of the defendants' statements about 1MDB and Jho Low's involvement in the 1MDB bond offerings, as well as those statements regarding Goldman's general principles (including its commitment to compliance with the law). However, the Court dismissed the statements about Goldman's risk management and controls (finding that such controls did in fact exist but had simply been ignored), the bank's financial results (which, the Court found, had not been falsified), and the Sarbanes-Oxley certifications. The Court sustained the complaint as to Defendants Goldman, Blankfein, and Cohn, finding that AP7 had adequately alleged scienter as to those three defendants, but dismissed the claims against Defendant Schwartz, finding that there were insufficient allegations that Schwartz harbored any intent to defraud.

The Falsity and Materiality of Goldman's Public Statements

As noted above, the complaint alleges that Goldman and the individual defendants made a series of misrepresentations which fall into several categories.

Statements Denying Involvement in 1MDB Corruption. First, the Court addressed "a variety of statements concerning the connection between Goldman, Low, and 1MDB."[7] Of these statements, the Court sustained twelve and dismissed five others.

The Court held as actionable Goldman's statement that it had "found no evidence showing any involvement by Jho Low in the 1MDB bond transactions."[8] The Court reasoned that the complaint was "replete" with allegations establishing the falsity of this statement, including: (1) Blankfein's meetings with Low where the two discussed Goldman's business relations with 1MDB; (2) Goldman Asia's widespread knowledge about Low's involvement with 1MDB; and, (3) Leissner's disclosure at a meeting with Goldman's Capital and Suitability Committees that "Low had played a key role for 1MDB."[9]

The Court also sustained Goldman's October 29, 2014 statement that "[o]ther than legal and accounting firms providing professional services, no fees or commissions were paid by 1MDB or Goldman Sachs to external third parties in connection with" 1MDB's bond transactions to date.[10] In finding this statement actionable,

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[3] Dkt. No. 83.

[4] Dkt. No. 100, Exs. A, B.

[5] Dkt. No. 100 at 4.

[6] *Sjunde AP-Fonden*, 2021 WL 2659797.

[7] *Id.* at *9-11.

[8] *Id.* at *9.

[9] *Id.*

[10] *Id.*

the Court reasoned that "Plaintiff plausibly pleads that this statement is false because it is uncontested that Low, Najib, 1MDB officials, and other third parties received bribes and kickbacks from 1MDB's bond proceeds."[11] The Court firmly rejected Defendants' argument that Goldman's statement was limited to Goldman's own fees and commissions received in the bond offering transactions.

The Court further sustained four statements that Goldman made defending the fees it received under the terms of the agreements between it and 1MDB for work performed on the bond transactions. For example, in October 2014, Goldman stated that the fees and commissions in the 1MDB offer documents were "standard terms used to describe part of Goldman Sachs' compensation for the risks assumed in underwriting the bonds in question."[12] Goldman offered similar statements in July 2015, June 2018, and July 2018. The Court accepted AP7's argument that these statements were false and misleading because (1) Goldman received fees that were exponentially higher than industry standard, and (2) Goldman took on abnormally low risk in underwriting the bonds, because the International Petroleum Investment Company (or "IPIC") served as a guarantor for the transactions, Goldman secured purchasers for the bonds before finalizing the deals, and Goldman did not need to compete with other firms to underwrite the deals. The Court rejected "as untenable and unsupported by law" the defendants' argument that these statements could not be misleading because they were "public knowledge."[13]

Judge Broderick also sustained Goldman's repeated statements that it "had no visibility into whether some of the funds we helped raise for 1MDB may have been subsequently diverted to other purposes."[14] The Court found the complaint alleged facts supporting that Goldman knew that 1MDB was illegitimately diverting funds through kickbacks, bribes, and the disappearance of millions of dollars. The Court keyed in on allegations such as that (1) Goldman represented that it had "fully implemented" recommendations to conduct pre- and post-transaction monitoring; and, (2) Goldman had access to 1MDB's financial records during the relevant period "which reflected the disappearance without explanation of hundreds of millions of dollars" from the proceeds of one of the bond transactions.[15]

The Court also considered whether statements made by Blankfein in a November 1, 2018 interview with reporter Andrew Ross Sorkin were actionable. During this interview, Sorkin asked Blankfein about the 1MDB "scam" and the two Goldman bankers who had been charged with money laundering. Blankfein offered two statements to Sorkin. First, Blankfein responded that Goldman's involvement in the 1MDB fraud was the work of a rogue banker: "one of our people lied to us and evaded our systems and our controls" while also stating that "when we see bad behavior we act, we jump on it and act on it."[16] Second, after Sorkin pressed Blankfein by asking, "[t]here were reports though that . . . senior management, there were red flags on this beforehand. Fair?", Blankfein stated, "I am not aware of them."[17]

The Court dismissed Blankfein's first statement, reasoning that the statement was a vague generalization and therefore was immaterial to investors as a matter of law. But the Court found the second statement actionable, concluding that the complaint "contains sufficient allegations that Blankfein 'likely knew or chose to ignore' warnings about Low and/or 1MDB."[18] The Court relied on many of the plaintiff's allegations relating to Blankfein's meetings with Low, and the diligence Goldman conducted regarding Low and 1MDB.

Finally, the Court dismissed Goldman's statements that it "helped raise money for a sovereign wealth fund that was designed to invest in Malaysia."[19] While AP7 asserted this statement was false because the purpose of 1MDB was clearly to enrich those within 1MDB's inner-circle, the Court found the complaint lacked allegations showing that 1MDB was "designed" to be an illegitimate organization.

Statement Denying Involvement in Coastal Energy Deal. In the second category of statements, the Court addressed a Goldman statement concerning its advising of Low on a proposed takeover of Coastal Energy, a Houston-based oil and gas firm.[20] In the alleged false and misleading statement, Goldman first denied — falsely — that Low or any of his shell companies were a Goldman client in connection with the deal, which the Court concluded was misleading because the complaint alleged that Goldman had extensively advised Low in the transaction. Goldman also falsely denied having any awareness of Low's company selling its stake in Coastal Energy to a foreign oil conglomerate, which the Court concluded was false because of allegations that "Goldman's Dubai office knew about the transfer."[21]

Statements About Business Principles and Risk Management. Next, the Court addressed statements about Goldman's business principles and risk

(continued on page 12)

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[11] *Id.*

[12] *Id.* at *10.

[13] *Id.*

[14] *Id.* at *9.

[15] *Id.*

[16] *Id.* at *11

[17] *Id.*

[18] *Id.* (quoting *In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333, 361 (S.D.N.Y. 2005)).

[19] *Id.* at *9.

[20] *Id.* at *11-12.

[21] *Id.* at *12.

[22] *Id.* at *7-8.

SDNY GREEN LIGHTS SECURITIES FRAUD CLAIMS AGAINST GOLDMAN SACHS FOR ROLE IN 1MDB MONEY LAUNDERING SCANDAL

(continued from page 11)

management.[22] These statements concerned the defendants' touting of Goldman's purportedly strong principles and robust risk controls at the same time they were complicit in the 1MDB fraud.

The Court found five statements about Goldman's business principles actionably false and misleading — including Goldman's statement appearing in four sequential Annual Reports from 2014 to 2017 that it "is dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us."[23] The Court reasoned that at the time Goldman issued these statements, the complaint sufficiently alleged "that Goldman did not comply with laws and ethical principles as they relate to the 1MDB transactions."[24]

However, the Court concluded that Goldman's risk management statements were not actionable. The Court found these statements — such as Goldman touting its "comprehensive control framework designed to prove a well-controlled environment to minimize operational risks" — were vague generalizations and inconsistent with other theories in the complaint alleging that Goldman's risk management functions worked in identifying red flags, but that those red flags were ignored by Blankfein, Cohn, and other senior executives.[25]

Statements About Financial Results. AP7 alleged that Goldman issued a false and misleading statement in its financial results by stating that "[r]evenues in debt underwriting were significantly higher compared with 2012, principally due to leveraged finance activity" without disclosing that revenue increases were attributable to the 1MDB transactions.[26] The Court rejected this theory on the grounds that the complaint could not show that Goldman's increased revenues were based on something other than "leveraged finance activity," nor could plaintiff allege that "the 1MDB revenues themselves were heavily responsible" for Goldman's increased revenues.[27]

Sarbanes-Oxley Certifications Regarding Internal Controls. Finally, the Court addressed the theory that Defendants Blankfein and Schwartz misled the public when certifying the truth and accuracy of Goldman's Form 10-K and 10-Q SEC filings as required by Congress under the Sarbanes-Oxley Act.[28] The complaint alleged that the certifications were false and misleading because Blankfein and Schwartz failed to disclose in the certifications that Goldman's system of internal controls was routinely disregarded. The Court reasoned that because the statements "did not require Defendants to certify that they followed all of the firm's controls and procedures," the statements were not actionably false or misleading.[29]

Scienter (Intent to Defraud)

The Court found that AP7 adequately alleged *scienter*, or intent to defraud, with respect to Defendants Cohn, Blankfein, and Goldman, but did not allege scienter for Defendant Schwartz.[30] At the outset of the Court's scienter analysis, Judge Broderick recited the "four circumstances that may give rise to a strong inference of the requisite scienter" under the law of the Second Circuit: where the defendants "(1) benefitted in a concrete and personal way from the purported fraud"; (2) "engaged in deliberately illegal behavior"; (3) "knew facts or had access to information suggesting that their public statements were not accurate"; or (4) "failed to check information they had a duty to monitor."[31]

First, with respect to Cohn, the court noted plaintiff's allegations that "during the Class Period, Cohn chaired the Client and Business Standards Committee, which 'reviewed and approved each of the 1MDB bond offerings' at issue" and plaintiff's allegation that the three 1MDB bond deals "contained a number of red flags that 'are glaringly suggestive of fraud,' such that Cohn 'ignored [these] obvious signs of fraud'

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23 *Id.* at *7.

24 *Id.* at *8.

25 *Id.* at *7.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at *12-15.

31 *Id.* at *12.

32 *Id.* at *13.

when advocating for and approving [the] deals."[32] Judge Broderick keyed in on *six red flags*:

1) Goldman received "nearly 200 times the typical fee" for its participation in the 1MDB bond deals, which one former Goldman partner stated "should have been a bright warning to its highest executives."
2) Goldman was awarded all three deals "on a no-bid basis and without needing to compete with any other firms."
3) The bond transactions were "designed as private placements, rather than open market offerings, which was 'highly unusual' and was much more costly to 1MDB."
4) Low played a "prominent role" in the bond deals despite the fact that Goldman's compliance and legal departments had "rejected and flagged Low on three separate occasions as someone with whom Goldman should have 'no business,' all before Goldman's participation in any of the three 1MDB bond deals."
5) The underwriting process was "highly secretive and the purpose of huge swaths of the funds 1MDB received in the deals were left undefined."
6) The bond deals were "both extremely large and rushed," — Goldman underwrote *$6.5 billion* in bonds, and earned *$600 million* as a result of its role, in the span of just ten months.[33]

The Court underscored that "the first three red flags — the astronomical fees, the no-bid structure, and the private placements — are even more blatant when considered together" as "these highly irregular aspects of the 1MDB transactions all point in the same direction: that Goldman was getting an unbelievably good deal."[34] The Court also placed great weight on the allegation that Cohn, who was aware of several of these red flags, "sidelined" President of Goldman Asia David Ryan from participating in deals and ultimately demoted Ryan after he voiced concerns about the 1MDB deals — telling Cohn that the no-bid contract and high fees are "possibly too good to be true," a conclusion that was "informed in part by his visit to the 1MDB offices, after which he made clear his opinion that 1MDB had taken on too much debt and did not have the personnel or experience to manage its investments."[35] Cohn also had allegedly boasted about the fees Goldman was receiving to journalists.[36]

In sustaining the claim against Cohn, the Court rejected the defendants' characterization of Cohn's demotion of Ryan as a mere disagreement or difference of opinion. As Judge Broderick explained:

> Defendants rightly note that "differences of opinion, even stark differences . . . do not reveal scienter," [h]owever Cohn's treatment of Ryan is not noteworthy because they had a disagreement, but rather because it demonstrates that Cohn was on notice and "specifically aware" of several of the red flags that Ryan raised that, based on Plaintiff's allegations, constituted "obvious signs of fraud" that Cohn should not have ignored.[37]

Ultimately, the Court held, "Cohn's apparent conscious disregard of the red flags, as pled in Plaintiff's Second Amended Complaint, constitutes the *conscious turning away from the true facts* required for recklessness."[38]

Second, with respect to Blankfein, the Court found that the complaint "plausibly alleges that [Blankfein] approved these deals that, by their plain terms, raised *significant red flags of potential corruption or criminality*."[39] In its analysis, the Court highlighted plaintiff's allegations that "Blankfein met three times with Low, including a one-on-one meeting in late 2012 and two meetings with Leissner, Najib, and Low in 2009 and 2013."[40] While the Court noted these meetings were not by themselves "a smoking gun" of Blankfein's knowledge, the Court reasoned the complaint alleged much more: "Blankfein, Low, Najib, and the others discussed at these meetings how Goldman could support and consult on 1MDB deals and how Goldman could do more business with 1MDB."[41]

Judge Broderick also found significance in the timing of when these meetings took place. As the Court acknowledged, plaintiff alleged that Blankfein's 2012 one-on-one meeting with Low and his 2013 meeting with Low, Leissner, and Najib occurred after "Goldman's Compliance and Legal Departments had flagged and rejected Low over various ethics concerns."[42] The Court reasoned that this timing was "probative to the extent [it] show[s] that Blankfein knew or should have known" about the red flags surrounding Low.[43]

Finally, because the plaintiff adequately alleged scienter for Blankfein and Cohn, the Court found that scienter had been sufficiently pled as to Goldman. The Court did note, however, that even without Blankfein and Cohn's individual culpability, an inference of

(continued on page 14)

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[33] *Id.* at *13-14.

[34] *Id.* at *13.

[35] *Id.* at *14.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

SDNY GREEN LIGHTS SECURITIES FRAUD CLAIMS AGAINST GOLDMAN SACHS FOR ROLE IN 1MDB MONEY LAUNDERING SCANDAL

(continued from page 13)

corporate scienter could be drawn with respect to at least one of the alleged false statements — that Goldman "found no evidence showing any involvement by Jho Low in the 1MDB bond transactions."[44] The Court found that "a pronouncement so dramatic" would have been "vetted with and approved by corporate officials sufficiently knowledgeable about the company to know that the announcement was false."[45] Under such facts, the Court explained, Goldman's scienter could be inferred without establishing the scienter of an individual defendant. The Court's application of the corporate scienter doctrine is consistent with the expansive case law in the Second Circuit which permits trial courts to infer the corporation's scienter in instances of egregious fraud.[46]

Loss Causation

The Court next turned to the element of loss causation which requires a securities fraud plaintiff to establish a causal connection between the defendant's misrepresentations and the subsequent loss suffered when the truth surrounding the fraud is disclosed and the company's stock price declines. Judge Broderick held that two of the "corrective disclosures" pled by AP7 satisfied loss causation.

First, the Court addressed the November 9, 2018 disclosure reported in several news outlets that Blankfein had met with Low and Najib in New York in September 2013, a meeting which, as the *Wall Street Journal* noted, came "after [Goldman's] compliance department had raised multiple concerns about [Low's] background and said that the bank shouldn't do business with him."[47] Goldman's stock dropped by 3.9 percent in a single trading day following this disclosure. As the Court noted, the defendants "acknowledge[d] the 2013 meeting between Blankfein and Low had never before been revealed to the public."[48] But the defendants nonetheless argued that the report was not a corrective disclosure because (1) Goldman never denied such a meeting occurred, and (2) the disclosure did not contradict Goldman's prior statement that it had "found no evidence showing any involvement by Jho Low in the 1MDB transactions."[49] The Court rejected both of these arguments. The Court pointed to specific allegations that "Defendants, including Blankfein, downplayed not only their own relationship with Low, but Low's connection to 1MDB" and reasoned that the disclosure "placed Blankfein's meeting with Low in context by noting his previous comments suggesting he and senior officials were unaware of issues related to 1MDB."[50] Based on these allegations, the Court concluded that the November 9, 2018 disclosure was "more than sufficient as a partial disclosure to satisfy loss causation at the pleading stage."[51]

Second, the Court addressed the December 17, 2018 disclosure reported in the *New York Times* that the Malaysian government announced that it would pursue criminal charges against Goldman over the 1MDB scandal and that it would seek more than $2.7 billion in criminal fines in connection with the charges. Goldman's stock dropped by 2.75 percent in one trading day after this disclosure. The defendants argued that this disclosure was not corrective of the fraud because, in SEC filings predating December 17, 2018, the company had already acknowledged existing governmental and regulatory investigations related to 1MDB. Judge Broderick rejected this argument. The Court held that "as a matter of law" it could not conclude that "a couple of Goldman's statements that it faces investigations and potential liability from unnamed governments, combined with news reports that allude obliquely to Goldman's alleged bad acts and problems in Malaysia, sufficiently telegraphed Malaysia's eventual criminal prosecution against Goldman with its $2.7 billion in criminal fines."[52]

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[44] *Id.* at *15.

[45] *Id.*

[46] *See, e.g., Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital, Inc. (Teamsters)*, 531 F.3d 190 (2d Cir. 2008).

[47] *Sjunde AP-Fonden*, 2021 WL 2659797, at *16.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at *17.

The Deferred Prosecution Agreement

Finally, the Court considered AP7's request to take judicial notice of (1) the fact that Goldman had entered into a DPA with the Department of Justice, and (2) all of the admitted facts in the DPA, on the ground that those facts are now undisputed.[53] As to the first issue, the Court concluded it was well-established that it could take judicial notice "of the fact that the DPA was filed."[54] However, as to the second issue of whether the Court could take judicial notice of the facts set forth in the DPA, the Court "found no clear guidance from the Second Circuit."[55] Because of this uncertainty in the law, and having already found that "Plaintiff's Second Amended Complaint adequately states a claim as to Goldman, Blankfein, and Cohn," the Court "decline[d] to consider the factual admissions contained in the DPA."[56]

Conclusion

Judge Broderick's decision in *Sjunde AP-Fonden v. The Goldman Sachs Group* is an important precedent in the securities fraud arena, particularly in cases involving financial institutions. Significantly, the Court upheld as actionable several of Goldman's corporate statements regarding its general principles in which the bank purported to comply with the law, rejecting the Defendants' arguments that such statements were too generic to give rise to liability and underscoring the context of unlawful behavior in which the statements were made. The Court also sustained the scienter allegations directed at Blankfein and Cohn, two of the most powerful executives on Wall Street over the last decade, rebuffing Goldman's defense that its involvement with 1MDB was limited to a handful of rogue bankers operating half a globe away in Goldman's East Asia outpost and beyond the oversight of the bank's executive suite. ■

[53] *Id.* at *19.

[54] *Id.* at *20.

[55] *Id.*

[56] *Id.*

THE NINTH CIRCUIT SUGGESTS THAT THE PSLRA DOES NOT IMPOSE A HEIGHTENED STANDARD WHEN APPOINTING GROUPS OF UNRELATED INVESTORS AS LEAD PLAINTIFFS

(continued from page 3)

adequacy and typicality under Federal Rule of Civil Procedure 23.[2] In step three, competing movants attempt to rebut this presumption by providing proof that the presumptively most adequate plaintiff: (1) "will not fairly and adequately protect the interests of the class"; or (2) "is subject to unique defenses that render such plaintiff incapable of adequately representing the class."[3]

While the PSLRA expressly allows groups to seek and obtain appointment as lead plaintiff, some courts have expressed skepticism about whether unrelated groups — that is, groups of movants that did not have preexisting relationships before they moved for appointment — are capable of adequately representing the class. Typically, these courts are concerned that the formation of an unrelated group may indicate that lawyers, rather than class members, are driving the litigation, and require unrelated groups to show some evidence that they are cohesive and engaged in the action. While groups of movants are frequently able to overcome these concerns and are appointed lead plaintiff in securities class actions when they provide evidence of their ability to actively manage litigation, many courts continue to deny motions for appointment by unrelated groups that have not established their cohesiveness.[4]

The *Nikola* District Court Declines to Appoint an Unrelated Group

In *Borteanu v. Nikola Corporation*, 507 F. Supp. 3d 1128 (D. Ariz. 2020) — the decision appealed to the Ninth Circuit in *Mersho* — the Honorable Steven P. Logan declined to appoint as lead plaintiff an unrelated group of investors, citing concerns about the group's cohesiveness and ability to direct the litigation.

There were six movants for appointment as lead plaintiff in the *Nikola* action — two small groups of investors and four individuals. One of the groups ("Nikola Investor Group II") asserted more than $6 million in total losses — an amount far greater than the losses alleged by any other movant.[5] Accordingly, Judge Logan held that Nikola Investor Group II had the largest financial interest in the relief sought by the class.[6] Additionally, Judge Logan held that Nikola Investor Group II had established its typicality, as the group members "bought Nikola stock at allegedly artificially inflated prices during the class period and lost money when the value of the stock dropped after the fraud allegations against Nikola came out," and its adequacy, as the group "has no conflicts with other members of the class, its losses are such that it has a significant interest in the outcome of the case, and its counsel . . . is highly qualified and will assist in vigorous prosecution."[7] Therefore, at the second step of the PSLRA's lead plaintiff appointment process, Judge Logan found that Nikola Investor Group II was the presumptively most adequate plaintiff.[8]

However, at step three, several competing movants sought to rebut this presumption by arguing that Nikola Investor Group II was an improper unrelated group, as its filings suggested that the group members were not involved and that counsel was "running the litigation," and that the group had not demonstrated its cohesiveness, in light of the fact that the members were "geographically diverse and unconnected."[9]

Judge Logan agreed. First, he noted that "[c]ourts are often hesitant to appoint groups as lead plaintiffs" because an "aggregate lead plaintiff can defeat the purpose of appointing a lead plaintiff altogether."[10] According to Judge Logan, "[a]nother concern with a group as the lead plaintiff is that the litigation is actually being driven by counsel, rather than the individuals."[11] As a result, Judge Logan focused primarily on questions regarding group cohesion, finding that the group's members "are all from different states and appear to have joined solely for purposes of litigation."[12] Notably, Nikola Investor Group II presented a Joint Declaration stating that the group members "met telephonically to discuss the benefits and detriments of proceeding as a group, and litigation strategy going forward," and "promis[ing] to be the decisionmakers, direct

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[2] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

[3] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

[4] *See, e.g.*, *In re Cloudera, Inc. Sec. Litig.*, 2019 WL 6842021, at *6-*8 (N.D. Cal. Dec. 16, 2019) (citing cases, and denying a group's motion for appointment because it had failed at step two to establish its adequacy)

[5] *Borteanu v. Nikola Corporation*, 507 F. Supp. 3d 1128, 1136 (D. Ariz. 2020).

[6] *Id.*

[7] *Id.* at 1137.

[8] *See id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

the activities of their counsel, and meet telephonically to discuss strategy."[13] Nonetheless, given the fact that "it is not clear how the members of Nikola Investor Group II found each other," and that "courts generally prefer group members to have a pre-litigation relationship," Judge Logan retained his "misgivings about the cohesion of Nikola Investor Group II and its ability to control the litigation without undue influence of counsel," and denied the group's motion for appointment as lead plaintiff.[14]

Turning to the remaining movants, Judge Logan also rejected the movant with the second-highest losses due to concerns that his trading made him subject to unique defenses, and the movant with the third-highest losses — the other group — due to "the same issues as Nikola Group II's aggregation."[15] Accordingly, Judge Logan appointed as lead plaintiff the individual movant with the fourth-highest losses.

The Ninth Circuit Clarifies that District Courts Cannot Disqualify Groups Based on "Misgivings"

Nikola Investor Group II appealed Judge Logan's ruling and argued that Judge Logan "made a clear error at step three" of the PSLRA's process by determining that the presumption of most adequate plaintiff had been rebutted by the court's "misgivings" about the group's cohesion, rather than by "proof" of inadequacy.[16]

The Ninth Circuit agreed. First, the court looked to its own prior decision in *In re Cavanaugh*, 306 F.3d 726 (9th Cir. 2002), where the Ninth Circuit held that a district court improperly "fail[ed] to give effect to the presumption" when it selected a lead plaintiff by comparing movants' fee arrangements rather than by "focusing on whether the presumptive lead plaintiff was adequate."[17] The Ninth Circuit concluded that Judge Logan similarly "did not give effect to the presumption" here, "effectively [leaving] the burden on Group II to ***prove adequacy*** at step three even though the burden should have shifted to the competing movants to ***show inadequacy***."[18] Specifically, Judge Logan "place[d] the burden on [Nikola Investor Group II] to prove adequacy" by "penalizing [the group] for not explaining how they found each other," rather than requiring competing movants to prove that Nikola Investor Group II was inadequate.[19]

Additionally, the Ninth Circuit stated that Judge Logan improperly "based [his] decision on "misgivings" about the group's cohesion "even though the only evidence [he] acknowledged — the [group's] joint declaration — contradicts such conclusions."[20] As the Ninth Circuit explained, "[m]isgivings are not evidence that cast 'genuine and serious doubt on [the] plaintiff's willingness or ability to perform the functions of lead plaintiff.'"[21]

The Ninth Circuit further noted that Judge Logan did not necessarily err in concluding that Nikola Investor Group II lacked cohesion, as "[d]istrict courts have 'latitude' in what information they can consider to assess adequacy."[22] However, Judge Logan erred by applying a heightened standard of proof to the group's motion given that he concluded at step two of the PSLRA's process that Nikola Investor Group II was adequate but changed his mind at step three based "only on the absence of proof by Group II regarding a pre-litigation relationship and [the court's] misgivings," rather than on any affirmative evidence proving inadequacy.[23] Indeed, as the Ninth Circuit stated, "[f]or the presumption to have meaning at step three, competing movants must point to *evidence* of inadequacy."[24]

Accordingly, the Ninth Circuit vacated Judge Logan's ruling, remanding the case to the district court with instructions to redetermine the lead plaintiff. The district court's decision on remand is still pending.

Future Impact

The Ninth Circuit's decision in *Mersho* establishes that a district court's "misgivings" about a group's ability to adequately represent the class are insufficient to deny the group's motion. Rather, groups are subject to the same standards of proof as individual investors: they must make a prima facie showing of their adequacy and typicality to be the presumptively most adequate plaintiff, and if the presumption attaches, competing movants must produce *evidence* of the group's inadequacy to rebut the presumption. This ruling paves the way for unrelated groups of investors to continue to pursue appointment as lead plaintiff in the Ninth Circuit *if* they are able to otherwise meet the adequacy and typicality requirements.

Indeed, in the wake of *Mersho*, at least one district court in the Ninth Circuit has appointed an unrelated group as lead plaintiff.[25] That court, in the Northern District of California, noted that the *Mersho* court "affirmed that district courts have latitude as to what information [they] will consider in determining typicality and adequacy."[26] Consistent with *Mersho*, the district court concluded that the movant group had made prima facie showings of adequacy and typicality and therefore was entitled to the presumption of most adequate plaintiff — and that competing movants had failed to rebut the presumption with evidence of the group's purported lack of cohesion.[27] The full impact of the Ninth Circuit's ruling in *Mersho* will likely emerge as district courts apply the decision to future lead plaintiff motions. ■

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13 *Id.* at 1137-38.

14 *Id.* at 1138.

15 *Id.* at 1139.

16 *In re Mersho*, 6 F.4th 891, 900 (9th Cir. 2021).

17 *Id.* (quoting *Cavanaugh*, 306 F.3d at 731.

18 *Id.* at 901 (emphasis added).

19 *Id.*

20 *See id.*

21 *Id.* (quoting *Cavanaugh*, 306 F.3d at 733).

22 *Id.*

23 *Id.*

24 *Id.* (emphasis added)

25 *See Xu v. Fibrogen, Inc.*, 2021 WL 3861454, at *8 (N.D. Cal. Aug. 30, 2021).

26 *Id.*

27 *Id.*

KESSLER TOPAZ SECURES THE DELAWARE COURT OF CHANCERY'S APPROVAL OF A $17.5 MILLION SETTLEMENT AT THE COURT'S FIRST IN-PERSON HEARING SINCE CLOSING ITS PHYSICAL DOORS DUE TO COVID-19

(continued from page 3)

The Merger involved a tangled web of conflicts. Nutraceutical's longstanding Chairman and Chief Executive Officer, Frank Gay ("Gay"), and HGGC's co-founder and Executive Director are brothers. Gay co-founded the Company in 1993 with Bain Capital, Inc. ("Bain Capital"), when his brother was a Bain Capital executive. Then they took Nutraceutical public and populated the Company's board of directors (the "Board") and senior management team with former Bain Capital executives, members of their church, academic colleagues and family friends. Many of them then left Nutraceutical to co-found and/or work at HGGC.

By 2016, Gay had run the Company for twenty-three years, and was ready to retire. On August 31, Nutraceutical's outside directors asked HGGC Partner Leslie Brown ("Brown"), Nutraceutical's former Chief Financial Officer, to discuss Nutraceutical's future. In January 2017, the outside directors asked Brown to name his price to run the Company. Brown named his price: HGGC would acquire Nutraceutical.

On January 23, 2017, Brown delivered HGGC's initial bid to acquire the Company for $39.47 per share. The Board formed a special committee to consider and negotiate HGGC's proposal (the "Special Committee"). Each of the Special Committee members, however, had decades-long relationships with HGGC's founders and executives. They had also already reached out to Brown to run the Company, and were predisposed to favor HGGC as the Company's acquirer. Moreover, the Special Committee allowed Gay to participate in its process.

Ultimately, the Special Committee negotiated HGGC up from its initial offer, and on May 21, 2017, approved the Merger, along with the Board. A 60-day go-shop ended on July 20, without any potential bidder making an alternative proposal. Then, on August 21, Nutraceutical's stockholders approved the Merger, which closed on August 23. Gay retired, and Brown rejoined Nutraceutical as its CEO.

Kessler Topaz initiated the action challenging the Merger almost three years later, on the eve of the statute of limitations period, following the public disclosure of facts discovered as part of a related appraisal action. The newly discovered facts brought to light certain conflicts of interest between the Board and HGGC, and cast doubt on the sufficiency of the disclosures provided to stockholders when soliciting their approval of the Merger. These newly disclosed facts, coupled with Kessler Topaz's independent investigation, allowed Kessler Topaz to file a complaint that was so strong on the merits that defendants answered the complaint instead of moving to dismiss. Kessler Topaz's complaint alleged, *inter alia*, that (1) the Board breached their fiduciary duties by steering the Company's sale to HGGC, forming a conflicted Special Committee that allowed Gay to participate, agreeing to unfair Merger consideration, and issuing materially misleading incomplete disclosures to stockholders; and (2) HGGC aided and abetted the Board's conduct.

Thereafter, Kessler Topaz pressed the litigation, and ultimately secured a $17.5 million monetary settlement for the Class, comprised of approximately 7.2 million shares. On its face, the settlement is a remarkable recovery; as the Court described, it is a "significant common fund." The settlement consideration is $2.42 per share (before fees), which represents a 5.8% increase to the Merger price, and an improvement over the Special Committee's negotiations with HGGC, which resulted in a $2.33 per share bump from HGGC's initial $39.47 bid. Combined with the fact that the Class faced a real risk of recovering no damages at trial — including because, as the Court noted, "the ultimate [M]erger consideration represented a significant [49%] premium over Nutraceutical's [unaffected] stock price" — and certainly would have recovered nothing had Kessler Topaz not filed the action before the statute of limitations ran, the settlement is particularly noteworthy. The fact that the Court approved the settlement at the first live hearing after closing its doors due to COVID-19 puts the action in the history books. ■

INVESTING IN CHINESE COMPANIES, IN VOGUE BUT FRAUGHT WITH DANGER, PART 2: DISCOVERY AND JUDGMENT ENFORCEMENT

(continued from page 4)

Several countries also employ "blocking statutes" to prevent parties within their borders from complying with international discovery requests.[8] A blocking statute is a law designed to prohibit the transfer of information for the purposes of litigation from one country to another.[9] China has employed several blocking statutes in attempts to stymie participation in foreign litigation and the thread that connects these various laws is a pervasive lack of clarity, allowing for flexible application and interpretation.[10]

The Law of the People's Republic of China on Guarding State Secrets is a good example of a blocking statute with nebulous terms. It generally prevents the export of electronic data[11] and while the law does define seven categories of "secret matters" for which protection is mandated, it also includes a catch-all category that sets forth "other secret matters of the state which shall be kept confidential as determined by state departments for the maintenance of secrets.[12]" Another pertinent example are the Accounting Archives Management Measures, which prohibits the transmission of vaguely defined "accounting archives" outside of China.[13] The somewhat unclear nature of Hong Kong's relationship to China might entice investors to consider having data sent to Hong Kong first, and then exported out. It's not an unreasonable thought, given that while in some in circumstances, Hong Kong is considered to be part of China, it also has its own rules governing aspects of international litigation separate from China's.[14] Unfortunately, exporting data to Hong Kong isn't an option, because for the purposes of the transference of potential state secrets, Hong Kong is considered to be a foreign country.[15]

In good news for Plaintiffs, since the Supreme Court's landmark ruling in *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*[16], U.S. Courts have increasingly chosen to ignore foreign blocking statutes.[17] *Aerospatiale* was noteworthy because the Supreme Court stated in no uncertain terms that even though the Evidence Convention applied to plaintiff's request for discovery from a foreign litigant, it did not give an exclusive mandatory procedure for obtaining discovery.[18] The court also opined that first resort to the Evidence Convention was not required, and that the Evidence Convention did not deprive the district court over jurisdiction it otherwise possessed to order production of documents.[19]

The court noted that when deciding whether to force a defendant to participate in the discovery process pursuant to the court's jurisdiction, the notion of "international comity of nations" should govern that analysis. Distilled to its simplest form, comity of nations is the cordial consideration of another country's laws or customs when addressing cases involving that country. The *Aerospatiale* court set forth five comity factors:

(1) the importance to the investigation or litigation of the documents or other information requested;

(2) the degree of specificity of the request;

(3) whether the information originated in the United States;

(4) the availability of alternative means of securing the information; and

(5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance with the request would undermine the important interests of the state where the information is located.

Courts in the Second Circuit also consider: (6) the hardship of compliance on the party or witness from whom discovery is sought; and (7) the good faith of the party resisting discovery.

Though no single point in the comity analysis is dispositive, it is apparent that there are several grounds a U.S. Court could use to set aside the Evidence Convention or another country's blocking statute. In fact, in from 2008 to 2018, the rate at which U.S. courts ordered foreign defendants to violate their own country's blocking statutes increased 2,500%.[20] One of the most commonly used grounds for ordering production of documents in violation of blocking statutes is the lack of history a country has in enforcing the statutes it's claiming to apply.

For example, in the matter *Wultz v. Bank of China Ltd.*[21], plaintiffs sought to compel production of private financial documents in the possession and control of the Bank of China (the "Bank"), which was a named defendant in the case and had assets in New York City. Citing

(continued on page 20)

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8 Vivian Grosswald Curran*, U.S. Discovery in A Transnational and Digital Age and the Increasing Need for Comparative Analysis*, 51 Akron L. Rev. 857, 857 (2017).

9 M.J. Hoda, *The Aé*rospatiale *Dilemma: Why U.S. Courts Ignore Blocking Statutes and What Foreign States Can Do About It*, 106 Cal. L. Rev. 231 (2018).

10 Mark Cohen, *China's New Blocking Statute Comes into Effect*, China IPR, 11 June 2021, chinaipr.com/2021/06/11/chinas-new-blocking-statute-comes-into-effect/.

11 Law of the People's Republic of China on Guarding State Secrets, Revised on April 29, 2010, Effective on Oct. 1, 2010, Article 2.

12 *Id.* at Article 9(7).

13 Accounting Archives Management Measures, Article 18.

14 *China (Hong Kong) - Other Authority (Art. 18) & Practical Information*, HCCH, 14 July 2021, www.hcch.net/en/states/authorities/details3/?aid=393.

15 Jerry Ling, *Traps for the Unwary in Disputes Involving China,* Jones Day - Insights, Aug. 2012, www.jonesday.com/en/insights/2012/08/traps-for-the-unwary-in-disputes-involving-china#_edn8.

16 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987).

17 Hoda, *Supra* at p. 248.

18 *Aerospatiale,* 482 U.S. 522 at *541.

19 *Id.* at *539.

20 *Id.*

21 910 F. Supp. 2d 548 (S.D.N.Y. 2012).

INVESTING IN CHINESE COMPANIES, IN VOGUE BUT FRAUGHT WITH DANGER, PART 2: DISCOVERY AND JUDGMENT ENFORCEMENT

(continued from page 19)

China's state secrecy laws, the Bank of China requested guidance from its regulator in China, the People's Bank of China, which responded that so long as the requests completed with the strictures of the Evidence Convention, reasonable assistance would be provided.[22] With the parties' consent, the court issued a formal Letter of Request to the Chinese Central Authority pursuant to the Evidence Convention.[23] Over thirteen months elapsed with no response to the letter, and Plaintiff moved to compel the Bank to comply with the discovery requests.[24] Defendants urged the court to withhold entering an order until the Chinese Central Authority rendered a final decision on the applicability of blocking statutes.[25]

The U.S. court did not wait for the Central Authority's decision, and applied the holding in *Aerospatiale*, finding that it was not required to proceed by the Evidence Convention, and that the five "comity factors" expressed in *Aerospatiale* would drive its consideration of the competing requests.[26] Of note to the court was the fact that in other cases wherein the Bank attempted to cite Chinese state secrecy laws as a reason not to comply with discovery requests, there had ultimately been no repercussions to the Bank for producing the documents.[27] Ultimately, the court granted plaintiff's motion and compelled the Bank to comply with plaintiffs' discovery requests, with some modifications to their scope.[28]

Another example can be found in the matter *Gucci Am., Inc. v. Li*.[29] In *Gucci*, the clothier filed suit against several companies, claiming that those companies regularly sold counterfeit versions of Gucci products.[30] At the discovery stage, Gucci sought discovery from the Bank of China, this time a non-party to the litigation, claiming that the Bank had done business with the defendant companies and was in "possession, custody, or control" of important evidentiary materials.[31] Even though the Bank resisted the discovery request on the ground of the Chinese State Secrecy blocking statute, the magistrate judge in the case ordered that the Bank comply with the discovery request anyway.[32] The magistrate judge applied the Aeropostiale factors to its analysis, and specifically noted that "the Bank [had] cited no specific instance in which a Chinese financial institution was punished for complying with a foreign court order for the production of documents.[33, 34]"

As one can imagine, the extraterritorial application of the United States' Rules of Civil Procedure against foreign non-parties could create friction, potentially jeopardizing the prospect of further cooperation later in the litigation. One manner of potentially avoiding the necessity of the U.S. court's involvement in this matter is to enter into an agreement with the parties from which discovery is sought is engaging the services of a China-based preliminary discovery review team. Discovery review services examine sought after materials while still in China, and only export documents that are unlikely to trigger a state-secrecy based challenged, so that no documents ultimately being reviewed by the law firm stateside run afoul of China's state secrecy laws.

III. Enforcement of Judgments against China-Based Litigants

When deciding whether to enforce a foreign judgment, generally speaking, a Chinese court will first consider whether there are international agreements governing the reciprocal enforcement of judgment between the countries.[35] If there are

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22 *Id.* at *551.

23 *Id.*

24 *Id.* at *550.

25 *Id.*

26 *Id.* at *553-556.

27 *Id.* at *553.

28 *Id.* at *561.

29 No. 10 Civ. 4974 (RJS), 2011 WL 6156936 (S.D.N.Y. Aug. 23, 2011), *vacated on other grounds*, 768 F.3d 122 (2d Cir. 2014).

30 *Id.* at *1.

31 *Id.* at *3.

32 *Id.* at *5- 12.

33 *Id.* at *11.

34 See also, *Tiffany (NJ) LLC v. Forbse*, No. 11 CIV. 4976 NRB, 2012 WL 1918866 (S.D.N.Y. May 23, 2012), *vacated in part on other grounds*, 589 F. App'x 550 (2d Cir. 2104).

35 Guanglei Zhang, *et al.*, *Enforcement of Judgments 2021,* Chambers and Partners, 10 Aug. 2021, practiceguides.chambers.com/practice-guides/comparison/683/7146/11684-11686-11694-11701.

none, the Chinese court may decide to enforce the judgment based on the principle of reciprocity, and conduct a strict inquiry on whether the requesting country has any reciprocal precedent for enforcing Chinese judgments.[36] This process takes, on average, about two years.[37]

Though certain international agreements exist that dictate the circumstances where foreign judgments will be recognized in the signatory states,[38] the United States and China are not mutual signatories to any of them. Further, the United States does not have a history of enforcing the judgements of Chinese courts. Therefore, enforcing judgments against Chinese litigants is a prospect fraught with difficulty and may even have greater potential political implications given the retaliatory nature of China's newest blocking statute targeting "unjustified" foreign laws.[39] Even if the prospect of Chinese Courts recognizing judgments of an American court are low, there are actions domestic litigants can request from U.S. courts to coerce defendants to submit to the directives of the court.

i. Prejudgment Attachment of Property

Described as a "harsh and extraordinary" remedy, prejudgment attachment of property is a method by which a federal court can enjoin a defendant from transferring property out of the jurisdictional reach of the court.[40] Federal Rule of Civil Procedure 64 requires that the federal court apply the laws of the state in which it sits in analyzing whether the property should be attached.[41] Generally speaking, most states require the applicant to establish a likelihood they will prevail on the merits of the case, they will be unable to enforce any judgement rendered against defendant if the attachment is not granted, the balance of the equities favor attachment, and public interests favors the attachment.[42] Prejudgment attachment of property has been utilized against Chinese companies, however, the limiting factor of this method of ensuring collectability of a default judgment is that the assets must already be in the United States, and in the case of California, must be located within the state of California. For obvious reasons, this will be ineffective against companies with most or all of their assets outside of the U.S.

ii. Civil Contempt — Monetary Sanctions

A federal court can issue civil contempt sanctions for a violation of its orders under 18 U.S.C.A. § 401. For example, in the matter *Chabad v. Russian Fed'n* 915 F. Supp. 2d 148 (2013). The Washington D.C. District Court held both that it possessed the authority to issue civil contempt sanctions, and that those sanctions were appropriate against the Russian Federation, the Russian Ministry of Culture and Mass Communication, the Russian State Library, and the Russian State Military Archive based on their failure to comply with the district court's order issued in 2010. However, these entities were all arms of the Russian state, and so the *Chabad* court could rely on Foreign Sovereign Immunities Act ("FSIA")[43], which allowed courts to disregard certain aspects of sovereign immunity to obtain judgments.

It is less clear whether courts would be willing to apply the same reasoning to non-state violators. However, given the degree to which the CCP is intertwined with companies in China[44], it is arguable that the FSIA would apply to many Chinese litigants. Despite the potential applicability however, the follow-up to the *Chabad* case illustrates why such efforts may ultimately be futile. In *Agudas Chasidei Chabad of United States v. Russian Fed'n*,[45] after two years, the plaintiffs still had not been able to collect on their judgement, and sought an award of accrued sanctions in the amount of $43,700,000. The court granted the request, however, with no enforcement mechanism to ensure that recalcitrant parties obey court orders to pay, it is unlikely that ordering further monetary damages will have an impact.

iii. Civil Contempt — Arrest Warrant

The issuance of an arrest warrant is perhaps the most extreme measure a court can employ to rein in individual civil defendants. This is a remedy historically employed against paupers and the legality of this remedy has

(continued on page 22)

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[36] *Id.*

[37] *Id.*

[38] For example, the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

[39] Angela Huyue Zhang, *The Dangerous Legal War Posing a New Threat to China-U.S. Relations*, Nikkei Asia (Feb. 1, 2021), https://asia.nikkei.com/Opinion/The-dangerous-legal-war-posing-a-new-threat-to-China-US-relations.

[40] *See, Nat'l Audubon Soc'y, Inc. v. Sonopia Corp.*, 09 cv 975, 2009 WL 636952 *2 (S.D.N.Y. 2009).

[41] Fed. R. Civ. P. 64.

[42] *Prejudgment Attachments and Freezing Orders*, Global Litigation Guide Country Insight, 19 July 2019, www.dlapiperintelligence.com/litigation/insight/index.html?t=08-prejudgment-attachments-and-freezing-orders&c=US.

[43] The FSIA is the primary method of bringing a lawsuit against a foreign sovereign, its agents, or its instrumentalities. Under the act, foreign states have immunity from litigation, however, there are several exceptions, including voluntary waiver of that immunity, or commercial actions conducted by the foreign state in or directly impacting the United States.

[44] Any company with three or more members of the CCOP is required by law to establish a "Party Cell," the purpose of which is to act as the eyes, ears, and mouthpiece of the CCP. As of 2018, 73% of private companies had Party Cells. https://www.csis.org/analysis/new-challenge-communist-corporate-governance.

[45] 128 F. Supp. 3d 242, 243-44 (D.D.C. 2015).

INVESTING IN CHINESE COMPANIES, IN VOGUE BUT FRAUGHT WITH DANGER, PART 2: DISCOVERY AND JUDGMENT ENFORCEMENT

(continued from page 21)

been hotly contested, as evidenced by the ACLU's scathing article on the practice, calling it an unlawful return to the debtor's prisons of old.[46] In the context of a foreign individual defendant, however, the ACLU's concerns are lessened. Though it is true that a defendant *could* face arrest should they find themselves within the jurisdiction of the issuing court, it mostly serves as a way of hampering the defendants ability to conduct business in America, and create such an inconvenience that paying the judgement is preferable to living under the constant threat of arrest.

There is precedent for courts granting such requests. For example, in *AngioDynamics, Inc. v. Biolitec AG*[47] the United States Court of Appeals for the First Circuit affirmed the imposition of a fine of $1 million dollars a month (though modified to ensure that there was an upper limit to liability) and an arrest warrant for the arrest of the foreign defendant company's president. The Court rejected defendants' argument that the sanctions were so severe that they were akin to sanctions for criminal contempt, exceeding the authority of the district court.[48] Noting that the district court stressed that the purpose of the sanctions was meant to be coercive, and not punitive, the Court of Appeals determined that so long as plaintiffs could establish by clear and convincing evidence that the alleged contemnor violated the order having been noticed and given the opportunity to comply, it is within the power of the district court to issue an arrest warrant.[49] Furthermore, because a defendant can easily remove themselves from under the sanction by complying with the court's order, civil contempt sanctions may be imposed with merely notice and opportunity to be heard.[50] While it seems extreme, this may the most effective manner to coerce otherwise judgment-proof individual defendants to comply with court orders.

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[46] American Civil Liberties Union, *A Pound of Flesh The Criminalization of Private Debt*. 2018, www.aclu.org/report/pound-flesh-criminalization-private-debt.

[47] 780 F.3d 420 (1st Cir. 2015).

[48] *Id*. at *427.

[49] *Id*. at *426

[50] *United States v. Winter*, 70 F.3d 655, 661 (1st Cir.1995).

IV. Current State of Affairs

The state of the recognition of American judgments in China is in flux. On one hand, China has recently ratified another blocking statute that purports to block the impact of foreign sanctions on Chinese persons, prohibit those people from following foreign sanctions, and authorize the Chinese government to launch retaliation against those subjecting Chinese nationals to sanctions.[51] It is unclear if this law could be applied to those involved in requesting judicial sanctions incurred over the course of litigation or whether the term "sanctions" includes procedural orders such like default judgements issued by US courts. As discussed above, this law also is strategically ambiguous, and in conjunction with its newness (June 10, 2021), its potential application is unclear.[52] On the other hand, there are encouraging signs of willingness from China to enforce American judgments. China has recently honored two judgments from US Courts for the first time — a state court judgment and a federal court judgment.[53] It does not appear that the deciding authorities in China distinguish between state and federal court rulings.[54] However, undermining this progress are the tensions created each time U.S. courts ignore the Evidence Convention or Chinese blocking statutes, and compel China-based defendants to comply with U.S. discovery orders, potentially in violation of Chinese law.[55]

V. How investors can protect themselves

Given the potential difficulties involved in litigating against China-based defendants, there are several considerations an investor must acknowledge before deciding to buy in to a Chinese company. For example, the prospect of heavy-handed Governmental action should make the reasonable investor at least somewhat circumspect about the idea of investing too heavily in Chinese companies. A recent domestic example was the Trump administration's final-days executive order summarily delisting several Chinese companies from NASDAQ and barring public trading of companies that are considered "CCP companies."[56] In China, the CCP has a history of exerting a heavy hand in its own markets for political reasons, such as scuttling Ant Group's IPO due to a simmering feud between Ant Group's founder Jack Ma and President Xi Jinping.

If an investor still wants to wade into investing in Chinese companies, given the difficulties in engaging in discovery or enforcing judgments, they should consider investing with companies that have assets in the U.S. Prejudgment attachment requests would be far more likely to be granted and enforced, and judgements are more likely to be collected if the assets are already within reach of the courts. Investors should be especially cautious of companies that entered the U.S. market through reverse mergers and whose executives reside outside of the U.S. A reverse merger is the process by which a private company acquires a publically traded company, and merge into one publically traded company. While completely legal and normally not nefarious, this process can allow shares of shady companies to become available to unwitting investors, despite their executives not having requisite experience in running a publically traded company. Further, small companies often use small auditing firms, which may not be equipped to handle the rigors of auditing a publically traded company. The biggest red flag of all, however, should be companies that are publically traded in the United States but not in China and with executives that reside in China and no real assets to speak of in the United States, effectively pacing the company's assets, or the assets of its executives, completely out of the reach of an aggrieved U.S. investor.[57]

Continued diligence is a must — the shares of many of these companies are highly volatile, which present the potential for high reward at a correspondingly high risk. It would be in the best interests of investors to keep diligent tabs on the company's financial filings, press releases, media reports, and earnings calls. Short sellers can also be valuable sources of information. Though financially motivated, their skepticism is often come by honestly, with many expending exorbitant man-hours and money to uncover potential fraud. Investors that keep in mind the intricacies involved in litigating against China-based companies and their executives as set forth over these last two articles will position themselves to both be at an advantage when determining which foreign companies to invest in, as well as in the eventuality that such investments do not go as planned, and litigation is inevitable. ■

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[51] *China Issues Its 'Blocking Statute',* Garrigues, 11 June 2021, www.garrigues.com/en_GB/new/china-issues-its-blocking-statute.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Guiqiang Liu, *A No-Win Situation: The Increasing China-U.S. Conflicts on Judicial Cooperation in Evidence Taking*, China Justice Observer, 11 Oct. 2019, www.chinajusticeobserver.com/a/a-no-win-situation-the-increasing-china-us-conflicts-on-judicial-cooperation-in-evidence-taking.

[56] *Stock Exchange Delisting 3 China Companies Under Trump Order*, AP News, 1 Jan. 2021, apnews.com/article/donald-trump-business-hong-kong-china-08e71111b26c119048c523c5ba3ebde5#:~:text=Limited%2C%20China%20Mobile%20Limited%2C%20and,controlled%20by%20the%20Chinese%20military.

[57] Jesse Fried, et al., *China and the Rise of Law-Proof Insiders (*February 15, 2021). European Corporate Governance Institute - Law Working Paper 557/2020 https://ssrn.com/abstract=3740223 or http://dx.doi.org/10.2139/ssrn.3740223

CANOO, LORDSTOWN, AND NIKOLA — PORTENTS OF FUTURE SPAC-RELATED LITIGATION

(continued from page 5)

the target company takes over the SPAC's listing, thereby becoming a public company without having to conduct an IPO of its own. If a SPAC does not complete a merger within its self-imposed timeframe, typically 18 to 24 months, the SPAC must liquidate and return its capital to its investors.

The number of SPACs has increased exponentially since 2009, when just one SPAC went public with gross proceeds of $36 million.[2] For instance, in 2014, 12 SPACs went public with gross proceeds of ~$1.7 billion. In 2019, 59 SPACs went public for gross proceeds of more than $13 billion. In 2020, the SPAC boom accelerated, with 248 SPACs completing IPOs with gross proceeds of over $83 billion, a three-fold increase in SPAC IPOs and a five-fold increase in gross proceeds over the prior year. In the first nine months of 2021, 435 SPACs went public with gross proceeds of nearly $126 billion, a 75% increase in SPAC IPOs and a 52% increase in gross proceeds from the prior year. With three months remaining in 2021 and another 309 SPACs filing documents to complete an IPO, there is no question that 2021 will be the biggest year yet for SPAC IPOs.

The large number of SPACs coupled with the timeframe SPACs have to find a merger partner or liquidate has created a massive amount of demand for non-public target companies. As of September 2021, nearly 450 SPACs are actively searching for such a company, as compared to 234 SPACs that either announced or completed a merger in 2020 and 2021. The dwindling supply of viable non-public target companies has already led SPACs to partner with start-ups and other companies that do not yet have viable products, let alone steady revenue streams or profits. SPAC investors rely on the SPAC sponsor to conduct robust due diligence of the non-public target company before proposing the merger and to make sufficiently detailed disclosures about the merger prior to the closure of the deal. However, the SPAC sponsor only makes money on its nominal investment in the SPAC if the SPAC completes a merger within the allotted timeframe, creating an incentive to merge with any available target, even if that target is a house of cards or simply not ready to be a public company.

At the same time, non-public target companies view SPACs as a way to access public markets without having to engage in the lengthy, costly, and highly-regulated IPO process. However, the traditional IPO process includes numerous investor protections that do not apply when a company becomes public by merging with a SPAC. For instance, the target company does not have to make extensive public disclosures about its financial, accounting, and control infrastructure or the risks associated with its business prior to trading publicly on a U.S. stock exchange. The market instead must rely on the SPAC investors to assess the target company and the deal and, in turn, those investors are beholden to the due diligence completed and disclosures made by the SPAC sponsor who is incentivized to complete a merger within the allotted timeframe.

Executives at the target company also can make public statements hyping the business prior to the merger that are not typically allowed in the run-up to an IPO. Known as a "quiet period," during a traditional IPO process, company executives are not allowed to provide information about the company outside of the disclosures in the IPO documents. The purpose of the quiet period is to ensure that all investors have the same access to information at the same time and to prevent company executives from hyping or inflating the stock price. Given the number of outlets through which company executives can make statements, including via social media, the quiet period is an important bulwark that is non-existent if a company chooses to go public via a SPAC merger.

These dynamics already have led to and likely will continue to lead to the creation of public companies that are, at worst, out-right frauds, and, at best, companies ill-equipped to comply with accounting, disclosure, and control regulations. The stories behind three electric vehicle companies that recently went public via a SPAC merger — Canoo Inc., Lordstown Motors Corp., and Nikola Corporation — clearly illustrate this spectrum.

For instance, Canoo, a start-up company set to manufacture electric vans for commercial and

[2] The SPAC statistics in this article can be found at SPACInsider, https://spacinsider.com/stats (last visited Sept. 20, 2021).

residential use, went public in December 2020 following its merger with the SPAC known as Hennessy Capital Acquisition Corp. IV. The transaction valued Canoo at $2.4 billion despite the fact that the company had yet to bring a vehicle to market. During Canoo's first investor call on March 29, 2021, the company's executive chairman disclosed that Canoo's original business plan would be materially altered, its partnership with Hyundai Motors was effectively dead, and its CFO and head of corporate strategy had departed the company.[3] During the same call, the executive chairman admitted that Canoo had been "a little more aggressive" and "presumptuous" in its statements about its prospective business opportunities which did not meet "our standard of representation to the public market." Canoo's executive chairman went on to state "this comes back to having an experienced public company team. You've got to be careful of the statements you make." One month later, Canoo's CEO and its chief legal counsel had resigned.[4] In May 2021, the company announced that the U.S. Securities Exchange Commission ("SEC") was investigating the SPAC merger, its business and operations, and the recent executive departures.[5]

Separately, in June 2020, the SPAC known as DiamondPeak Holdings Corp. was desperate to locate a non-public target company with which to merge. With only nine months left before liquidation, and after the loss of several opportunities to merge with a real estate business, DiamondPeak decided to merge with Lordstown Motors, a fledging electric truck manufacturer that had not yet sold a vehicle. After the transaction closed in October 2020, the newly public Lordstown's stock price traded at a high of nearly $30 per share driven by the influx of retail investors seeking to invest in the hype surrounding electric vehicles. Lordstown executives, as well as former-DiamondPeak investors cashed in, successfully selling millions of dollars-worth of Lordstown shares before regulators began investigating Lordstown's CEO for making material misrepresentations about the number of truck orders the company had. The CEO, as well as Lordstown CFO, resigned in June 2021 after the company told the SEC that Lordstown did not have any "binding" truck orders[6] and following the release of an internal Lordstown report finding that truck order claims were inaccurate.[7] In addition to the SEC, the U.S. Department of Justice ("DOJ") is currently investigating Lordstown.[8]

Further, in July 2021, the DOJ announced that a grand jury had indicated Trevor Milton, the founder and CEO of Nikola, with three counts of fraud for lying about "nearly all aspects of Nikola's business" directly to retail investors through social media, as well as television, print, and podcast interviews.[9] For instance, Milton and Nikola released a promotional video that appear to show a working prototype vehicle when, in reality, the truck only was moving forward in the video because it was traveling on an incline in neutral gear.[10] Milton allegedly made these statements in advance of Nikola's merger with a SPAC known as VectoIQ Acquisition Corp., which closed on June 3, 2020. Milton also purportedly targeted retail investors, who he called "Robinhood investors" after the popular stock app.[11] At one point following the merger, Nikola's common stock traded at $65 per share, giving it a higher valuation than Ford Motor Company.[12] Following the revelations of Milton's alleged fraud, shares of Nikola are trading at around $10 per share. If Nikola had become a public company through its own IPO, as opposed to a SPAC merger, the regulatory "quiet period" would have

(continued on page 27

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3 *Canoo's (GOEV) Management on Q4 2020 Results - Earnings Call Transcript*, Seeking Alpha (Mar. 30, 2021, 12:14 AM) https://seekingalpha.com/article/4416699-canoos-goev-management-on-q4-2020-results-earnings-call-transcript

4 Sean O'Kane, *Canoo Co-Founder and CEO Resigns, New Chairman Takes Over*, The Verge (Apr. 22, 2021, 9:38 AM), https://www.theverge.com/2021/4/22/22397356/canoo-cofounder-ulrich-kranz-resign-new-ceo-tony-aquila.

6 Vikas Bajaj, *Lordstown Motors Reverses Itself Again, Telling S.E.C. It Has No 'Binding' Orders*, N.Y. Times (June 17, 2021, 10:47 PM), https://www.nytimes.com/2021/06/17/business/lordstown-no-binding-orders.html.

7 Micah Maidenberg, *Lordstown Board Committee Finds Some Inaccuracies About Truck Preorders,* MarketWatch (June 14, 2021, 7:44 AM), https://www.marketwatch.com/story/lordstown-board-committee-finds-some-inaccuracies-about-truck-preorders-271623671080

8 Ben Foldy, *Lordstown Motors Discloses Justice Department, SEC Investigations*, MarketWatch (July 16, 2021, 10:28 AM), https://www.marketwatch.com/story/lordstown-motors-discloses-justice-department-sec-investigations-11626445704.

9 Press Release, Dept. of Justice, Former Nikola Corporation CEO Trevor Milton Charged in Securities Fraud Scheme (July 29, 2021), https://www.justice.gov/usao-sdny/pr/former-nikola-corporation-ceo-trevor-milton-charged-securities-fraud-scheme.

10 Matthew Goldstein & Kate Kelly, *A Skeptical Stock Analyst Wins Big by Seeking Out Frauds*, N.Y. Times (Aug. 16, 2021, 9:25 AM), https://www.nytimes.com/2021/08/16/business/short-seller-wall-street-scams-hindenburg.html.

11 Jonathan Stempel & Ben Klayman, *U.S. Charges Nikola Founder Trevor Milton With Lying to Investors*, Reuters (July 29, 2021, 2:30 PM), https://www.reuters.com/business/autos-transportation/us-charges-nikola-founder-trevor-milton-with-lying-investors-2021-07-29/.

12 Matthew Goldstein & Niraj Chokshi, *Nikola Founder Is Charged With Fraud in Rebuke to Wall Street*, N.Y. Times (July 29, 2021, 11:11 AM), https://www.nytimes.com/2021/07/29/business/nikola-trevor-milton-fraud.html.

KESSLER TOPAZ SECURES MOTION TO DISMISS VICTORY PREMISED ON NOVEL LEGAL THEORY ADDRESSING WHAT CONSTITUTES AN "UNAFFILIATED" MAJORITY-OF-THE-MINORITY STOCKHOLDER VOTE UNDER DELAWARE LAW *(continued from page 5)*

but under the business judgment standard, the Court defers to the "business judgment" of corporate decision makers unless the stockholder can demonstrate gross negligence or a violation of the fiduciary duty of loyalty. As the standard of review is the lens through which the Court must evaluate whether a stockholder has satisfied its pleading burden when opposing a motion to dismiss, this radical shift in the law made it much more difficult to challenge a controlling stockholder transaction when these procedural protections were employed.

The purported reasoning underlying *MFW* was that by conditioning any deal at the outset upon the approval of both an independent special committee and the unaffiliated stockholders, the controlling stockholder was sufficiently "disabling" itself of its control position such that genuine arm's-length negotiations can occur with the board's special committee. As the Court explained, "where the controller irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote, the controlled merger then acquires the shareholder-protective characteristics of third-party, arm's-length mergers, which are reviewed under the business judgment standard."[2]

When Kien Huat made its initial overture to Empire's board of directors in July 2019 to take the company private, it appeared to facially comply with the dual-*MFW* requirements of (i) approval by an independent special committee, and (ii) approval by a majority of shares owned by Empire stockholders unaffiliated with Kien Huat. However, with the use of corporate documents Kessler Topaz obtained from Empire through a trial pursuant to Section 220 of the Delaware General Corporation Law, the Court held that plaintiffs had sufficiently pled that procedural protections employed in connection with the Merger failed to satisfy the requirements of *MFW* and allowed the case to proceed.

First, the Court held that the "*ab initio*" requirement under *MWF* was not satisfied.[3] Kien Huat argued that it was bound by a letter agreement it executed with Empire in February 2016 that required any future take-private transaction by Kien Huat to be conditioned on special committee approval and a vote of Empire stockholders unaffiliated with Kien Huat, and thus Kien Huat had satisfied the requirement that the procedural protections be employed from the outset of negotiations. However, the letter agreement was set to expire in February 2020, and the Court found that plaintiffs had sufficiently pled that during the Merger negotiations Kien Huat had twice signaled that it would not extend the *MFW* protections in the 2016 letter agreement beyond its expiration. As the Court explained: "It is true that, by virtue of the letter agreement, the requirement was in place upfront. Unfortunately, however, this timing argument misses the point. As I just explained, it is not enough that the controller self-disables at the beginning. Rather, for the condition to actually mitigate concerns of retribution, the condition must be irrevocable, in the sense that it remains in place for the duration of the negotiations over the offer."

Second, and notably, the Court held that plaintiffs had sufficiently pled that the majority-of-the-unaffiliated vote requirement was not satisfied. Plaintiffs alleged that the unaffiliated stockholder approval requirement was not satisfied because the vote improperly included shares held by bet365 Group Limited ("bet365"). bet365 is a British online gambling company. In November 2018, bet365 and Empire had entered into multiple agreements that contemplated that bet365 would operate and manage Empire's retail sports book, online sports book, and online table game operations once all were legally authorized in New York. Empire and bet365 agreed to split the revenues from these three ventures on a 50-50 basis. In connection with that agreement, bet365 and Empire also entered into a purchase agreement

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2 *MFW*, 88 A.3d at 644.

3 As we have previously written about in the Summer 2019 edition of The Bulletin, the *ab initio* requirement of *MFW* requires that the procedural protections be implemented at the outset of negotiations and be irrevocable during the pendency of negotiations. *See* Grant D. Goodhart, III, Esq., *In Alon Litigation, Delaware Courts Clarify Standard of Review for Controller Squeeze-Outs*, The Bulletin (Summer ed. 2019).

pursuant to which bet365 purchased 1,685,759 shares of Empire common stock. The votes of those shares owned by bet365 were counted in the "unaffiliated" vote in connection with the Merger. Had they not been counted in the unaffiliated vote, the Merger would not have been approved by a majority of shares not owned by Kien Huat.

Plaintiffs alleged that the unaffiliated vote should not have included the votes of shares owned by bet365. As an important strategic business partner of Empire, bet365 had unique financial incentives and stood to make millions of dollars from its agreements to operate Empire's retail sports book, online sports book, and online table game operations. Therefore, Kessler Topaz argued that bet365's unique financial interest in Empire as both a stockholder and a business partner rendered it differently situated than Empire's other minority stockholders regarding the Merger.

No Delaware court had previously ever specifically addressed the contours of what constituted an "unaffiliated" majority-of-the-minority under *MFW*, and no case had ever held that a stockholder not under the direct control of a controlling stockholder was "affiliated" with the controller for purposes of an *MFW* vote. However, Kessler Topaz argued that *MFW*'s discussion that the minority stockholders be "disinterested" called into question the propriety of including a stockholder with significantly divergent interests (*i.e.*, staying in the good graces of its business partner in a lucrative joint venture) as part of the minority vote.

The Court agreed, specifically noting that bet365 may have had different incentives than the other minority stockholders as a result of its business partnership with Empire and it was reasonable to infer that the Merger "provided some benefit to bet365 that was not shared by the other minority stockholders." Accordingly, the Court held that entire fairness, rather than business judgment, applied to the Merger at the pleading stage. The Court's holding is significant because it recognized for the first time that a stockholder with a substantial business relationship with a target company might be incentivized to favor the interests of the company's controlling stockholder, even if not "affiliated" with the controlling stockholder in the more conventional meaning of the word.

After applying the entire fairness standard of review, the Court found that plaintiffs had sufficiently pled that the Merger was the result of an unfair process that was timed and designed to benefit Kien Huat, and that the no-premium Merger price was unfair to the minority stockholders, and denied defendants' motions to dismiss.

The Court's July 23, 2021 opinion denying defendants' motions to dismiss represents a significant and positive development for stockholders in *MFW*'s evolution. Delaware courts have again shown that they will seriously scrutinize whether a controlling stockholder adequately satisfies the procedural protections required by *MFW* to achieve deferential business judgment review, rather than treating the requirements as mere "box-checking" mechanisms. Kessler Topaz's victory here sends a strong signal to controlling stockholders and their counsel to pay more than lip service to the procedural protections of *MFW* and hopefully prevent abuse of the already deferential *MFW* framework by requiring good faith adherence to its requirements. ■

CANOO, LORDSTOWN, AND NIKOLA — PORTENTS OF FUTURE SPAC-RELATED LITIGATION

(continued from page 25)

prevented Milton from making many of the statements underlying his indictment for fraud.

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On the surface, SPACs appear to be good for their sponsors, who receive a percentage of the newly public target company in exchange for a nominal investment, and the newly public target company, which receives a stock ticker and capital to invest in its business more quickly and without the same regulatory scrutiny generated by the traditional IPO process. However, the sheer number of SPACs currently searching for a non-public target company with which to merge suggests that the 2020-2021 SPAC boom has materially depleted — perhaps even decimated — the supply of viable non-public target companies. Moreover, the quick turnaround of the SPAC process coupled with limited regulatory scrutiny of the non-public target company means that these companies can access the public markets without having to invest in financial, accounting, and control infrastructure or comply with rigorous disclosure requirements necessary to prevent fraud.

As such, it seems likely that there are more companies like Canoo, Lordstown Motors, and Nikola that have or will go public via a SPAC merger, leading to investor losses and increased litigation. Even if regulators and market participants are able to successfully deflate the SPAC bubble in the near term, given the number of companies that have become public through this process in the last two years, investors likely will be living with the consequences of the SPAC craze for years to come. ■

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