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Kessler Topaz Takes Dole's Controlling Stockholder and Deutsche Bank to Trial

Michael C. Wagner, Esquire

Representing one of the firm's institutional clients and serving as co-lead Class Counsel, Kessler Topaz lawyers, in February and March 2015, conducted a nine-day trial before a Vice Chancellor of the Delaware Court of Chancery, on behalf of Dole Food Company's former public stockholders.

David Murdock, Dole's long-time controlling stockholder, bought out the public stockholders for $13.50 per share in a 2013 take-private deal. Kessler Topaz brought suit in the summer of 2013 on behalf of the City of Providence, Rhode Island, for itself and on behalf of other public stockholders of Dole. In the case, we contend, generally, that the buyout was the result of a process that was unfair to the public stockholders and resulted in an unfair price, evidencing Murdock's breaches of his fiduciary duty of loyalty owed to Dole's public stockholders. We also contend that Deutsche Bank — which has historically served as a lender and financial advisor to both Dole and Murdock — aided and abetted Murdock's breaches of fiduciary duties by, among other things, helping to design Murdock's

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Brazilian Oil Giant Petrobras Engulfed in Massive Corruption Scandal, Investors Bring Suit

Matthew Mustokoff, Esquire & Richard A. Russo, Esquire

On January 27, 2015, Petróleo Brasileiro S.A.- Petrobras ("Petrobras"), an enormous state-controlled oil and gas conglomerate that is the largest publicly-traded company in the Southern Hemisphere, shocked the global financial markets when it announced that it would be recording a multi-billion dollar asset write-down due to a decade-long bribery and corruption scheme at the company. The disclosure of Petrobras's fraud, which was engineered by its senior-most executives and pervaded all aspects of the company's sprawling operations, has rocked the Brazilian economy and caused the value of Petrobras securities to plummet. In the wake of this revelation, Kessler Topaz has filed several individual shareholder actions on behalf of institutional investors who suffered substantial losses in Petrobras stock and bonds.

The Kickback Scheme

The securities fraud actions filed by Kessler Topaz are based largely on evidence uncovered by Brazilian authorities during their 15-month investigation into the Petrobras kickback scheme. Brazilian prosecutors stumbled upon the scheme almost

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A "Valeant" Scheme Causes Investor Losses

Andrew N. Dodemaide, Esquire

Kessler Topaz is serving as Co-Lead Counsel in a securities class action against William A. Ackman ("Ackman"), his hedge fund Pershing Square Capital Management, L.P. ("Pershing Square"), and the pharmaceutical company Valeant Pharmaceuticals International, Inc. ("Valeant") regarding insider trading conducted in connection with a secret takeover bid for the pharmaceutical company Allergan, Inc. ("Allergan"). The case, *In re Allergan, Inc. Proxy Violation Sec. Litig.*, No. 8:14-cv-02004-DOC-AN (C.D. Cal.), alleges that the defendants violated Section 14(e) of the Securities Exchange Act of 1934 and Rule 14e-3 promulgated thereunder, and is pending in the United States District Court for the Central District of California. Rulings in this important action may implicate disclosure obligations to a target corporation's stockholders in future takeovers.

The investor class action follows a separate action brought against Valeant and Pershing Square by Allergan, which chiefly sought to prevent the takeover from occurring. See *Allergan, Inc. v. Valeant Pharmaceuticals Int'l, Inc.*, No. SACV 14-1214 DOC(ANx) (C.D. Cal.). On November 4, 2014, Judge David O. Carter ordered Valeant and Pershing Square to halt any attempts to further their takeover bid until certain corrective measures could be made. See *Allergan, Inc. v. Valeant Pharms. Int'l, Inc.*, 2014 U.S. Dist. LEXIS 156227 (C.D. Cal. Nov. 4, 2014). The allegations described herein are set forth in that order and the complaints filed by Allergan and Allergan shareholders in their respective actions.

Valeant is a Canadian pharmaceutical company that has been labeled a "serial acquirer" by certain analysts due to its business model in recent years of buying companies with established medical products and then cutting costs to drive growth. Since 2010, Valeant has spent billions of dollars purchasing multiple drug and health care companies, including Bausch & Lomb (for $8.7 billion), Medicis (for $2.6 billion), and Natur Produkt (for $180 million). By the beginning of 2014, Valeant had set its sights on Allergan — a California-based pharmaceutical company that makes the injectable

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KTMC Partners with PILCOP to Represent Students with Disabilities in Special Education Law Project

Meredith L. Lambert, Esquire

Recently, several KTMC attorneys, including Andy Zivitz, Kimberly Justice, Matthew Goldstein, and Meredith Lambert, partnered with the Public Interest Law Center of Philadelphia ("PILCOP") as part of PILCOP's special education law initiative, the Philadelphia Project. By way of background, PILCOP is a public interest law firm that helps individuals and organizations in the Philadelphia area challenge laws, policies, and practices that perpetuate discrimination, inequality, and poverty. The objective of PILCOP's Philadelphia Project is to secure a free appropriate public education ("FAPE") for children with disabilities in the School District of Philadelphia (the "School District"). To this end, PILCOP frequently brings due process complaints in the administrative hearing setting against the School District for failing to fully comply with its legal duties under the Individuals with Disabilities Education Act ("IDEA") and other laws requiring it to effectively and inclusively educate students with special needs.

In its first pro bono case under the Philadelphia Project, KTMC served as co-counsel to PILCOP on behalf of the family of a five-year-old child with severe autism, seeking relief through the administrative hearing process against the School District for denying the child FAPE in violation of IDEA. Specifically, the complaint in this case alleged that when the family attempted to transition the child from Early Intervention ("EI") services to kindergarten in the School District at the beginning of the 2014-15 school year, the School District failed to offer the child a classroom environment with adequate autistic support services that could meet the child's particular behavioral needs and guarantee the child's safety.

When KTMC became involved in the matter in January 2015, the child unfortunately still remained out of school. Accordingly, PILCOP and KTMC sought immediate temporary relief from the administrative hearing officer

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Class Certification and the Use of Event Studies after *Comcast*

Matthew L. Mustokoff, Esquire & Stacey M. Kaplan, Esquire

Two years ago, the U.S. Supreme Court decided *Comcast Corp. v. Behrend*, which denied class certification to a proffered plaintiff class in an antitrust case because the plaintiffs had failed to establish that "questions of law or fact common to class members predominate over any questions affecting only individual members."[1] *Comcast* held that, while damages "[c]alculations need not be exact, [] at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case . . ."[2] Courts across the country have struggled to interpret *Comcast*, resulting in a wide array of conflicting readings.

In the securities fraud class action arena, however, the decision's impact has been limited. This is largely because, to the extent *Comcast* requires that a plaintiff's theory of damages be tethered to its theory of liability, this test is easily satisfied in securities fraud cases, where "[t]he reliance element 'ensures that there is a proper connection between a defendant's misrepresentation and a plaintiff's injury.'"[3] In other words, because, as the Supreme Court has explained, "the price of stock traded in an efficient market reflects all public, material information — including material misstatements," purchasers of that stock are all damaged in the same manner, i.e., by the artificial inflation in the stock price caused by those misstatements and the precipitous price declines that occur when the fraud is revealed and the inflation comes out of the stock price.[4]

Guided by these principles, to calculate damages in securities cases economists and financial analysts use "event studies," which calculate artificial inflation based upon the abnormal stock drops accompanying the disclosure of the fraud. Event studies therefore enable a measure of damages that is directly linked to a plaintiff's theory of liability: the measure of the stock price decline when the artificial inflation caused by the fraud exits the stock price — like the air coming out of a balloon. And because the daily (even minute-to-minute) prices for securities traded in efficient markets are readily available, the measure of inflation in a particular security's price can be determined with reference to these historical prices and can be mechanically applied to every stock purchaser in the class to determine individual damages.

Thus, in securities fraud class actions, "the fraud-on-the-market doctrine" — which provides a rebuttable presumption of classwide reliance for all purchasers of a security traded in an efficient market — "makes it rather easy for a lead

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1 133 S. Ct. 1426 (2013).

2 *Id.*

3 *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (U.S. 2014) ("*Halliburton II*") (quoting *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S. Ct. 1184, 1192 (2013)).

4 *Halliburton II*, 134 S. Ct. at 2405.

Former SEC Enforcement Attorney Joins Whistleblower Litigation Group

KTMC's expanding Whistleblower Litigation Group announces that Rebecca M. Katz has joined the Firm as Of Counsel. Ms. Katz has been at the forefront of representing SEC whistleblowers since the inception of the SEC whistleblower program in 2010. That program allows individuals to report violations of U.S. securities laws directly to the SEC and obtain a percentage of the recovery obtained by the SEC through a successful enforcement action. Ms. Katz brings more than twenty years experience fighting for the rights of those victimized by corporate fraud, both as a longtime SEC enforcement attorney and in private practice.

The Whistleblower Litigation Group represents clients who bring information of corporate wrongdoing to the attention of government authorities and are eligible to receive a share of the government's recovery. The Group is chaired by Lee Rudy and David Bocian, two former federal prosecutors and partners of the Firm. Mr. Bocian was also the Chief Compliance Officer at a major health system before joining the Firm. Ms. Katz served for nine years in the SEC's Division of Enforcement. Since the passage of the Dodd-Frank SEC whistleblower program, she has developed extensive experience representing whistleblowers before the SEC. We welcome her addition to this growing practice group.

Delaware Legislature Weighs Fee Shifting Legislation – *Legislation Bans Fee Shifting While Authorizing Other Litigation-Restricting Bylaws*

Lee D. Rudy, Esquire

After a sustained and unanimous outcry from institutional investors, the Delaware legislature now considers proposed legislation banning fee shifting in stockholder litigation.

The Delaware Supreme Court's May 2014 *ATP* decision[1] upheld the facial validity of a corporate bylaw that shifts fees to a non-prevailing stockholder plaintiff. This decision led dozens of public companies to adopt fee-shifting bylaws. As we reported here in our Winter 2015 newsletter,[2] however, fee shifting bylaws deter meritorious litigation by making stockholder litigation economically irrational for stockholders.

Specifically, such bylaws impose potentially crippling financial risk on stockholder plaintiffs who will receive only a small proportion of the financial reward of a victory. They also typically define "prevailing" in stockholder litigation extremely narrowly, requiring the plaintiff to achieve a full victory on the merits, or else be liable for all of the defendants' fees. In *ATP*, defendants' attorneys' fees were more than *$17 million*.

Corporate practitioners, both for plaintiffs and defendants, quickly understood that *ATP* could spell the end of meritorious stockholder litigation under state law. (Most commentators assumed that federal law would preempt such bylaws.) So within a month of *ATP*, in June 2014, the Delaware Corporate Law Section proposed legislation banning fee shifting at Delaware public corporations. This

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[1] *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

[2] Lee Rudy, "Investors Opposing Fee-Shifting Bylaws," KTMC Bulletin (Winter 2015), available at www.ktmc.com/pdf/KTMC_2015_WINTER_NEWSLETTER.pdf.

The Sixth Annual Evolving Fiduciary Obligations of Pension Plans

Emily N. Christiansen, Esquire

On February 10, 2015, delegates, representing various-sized public pension funds from the United States and Canada, as well as other legal and financial service providers, converged in Tempe, Arizona for the sixth annual Evolving Fiduciary Obligations of Pension Plans conference. The theme of the conference was "Making Strides in Engagement through Strategic Due-Diligence" and was hosted by Kessler Topaz Meltzer & Check, LLP and Institutional Investor. Delegates engaged in a full day of dialogue and debate about fiduciary obligations through a series of panels, case studies, presentations, workshops, and an enthralling keynote address by former SEC chairperson Mary Schapiro.

The day began with a panel discussion about governance practices and polices moderated by Karen Mazza, General Counsel for the New York City Retirement Systems, and featured as panelists Paul Matson, Director of Arizona State Retirement System, Amanda York Ellis Jenkins, Administrator of Compliance and Corporate Governance for the Michigan Department of the Treasury, Katherine Hesse, Counsel for the Norfolk County Retirement Board, and Elaine Reagan, Deputy CEO of Compliance and Legal Operations for the San Diego City Employees' Retirement System. The panelists discussed the practices and policies that fiduciaries utilize in plan governance including conducting plan due diligence, the involvement of board members, and communications with plan members.

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Merck Vioxx Securities Litigation: Trial Approaches As the Court Finds Defendants' Opinion Statements Interpreting Scientific Data Actionable Under *Omnicare*

Michelle M. Newcomer, Esquire

Investors are one step closer to having their long-awaited day in court in the more-than decade-old securities fraud class action over the undisclosed cardiovascular risks associated with Merck's former anti-arthritis drug Vioxx. On May 13, 2015, Judge Chesler addressed the last major procedural hurdle before trial by denying, in large part, the motions for summary judgment filed by Merck and two of its top executives. The court's decision follows nearly twelve years of litigation and extensive motion practice, including appeals to the Third Circuit and the United States Supreme Court. Kessler Topaz represents twelve European institutional investors in a consolidated direct action in which nearly identical summary judgment motions remain pending.

In denying summary judgment in the class action, Judge Chesler found that the plaintiffs had amassed sufficient evidence to allow a jury to decide whether the defendants acted knowingly or recklessly (i.e., with scienter) in publicly espousing: (i) Merck's support of the so-called "naproxen hypothesis," which posited that the increased number of heart attacks associated with Vioxx

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The Tenth Annual Rights and Responsibilities of Institutional Investors Conference

Emily N. Christiansen, Esquire

For the past ten years, Kessler Topaz Meltzer & Check, LLP has been proud to partner with Institutional Investor to co-host the Rights and Responsibilities of Institutional Investors conference ("RRII"). This past March 19, 2015, delegates representing investment and legal and compliance officers of pension funds, insurance funds, and mutual fund companies of various sizes from around Europe and North America gathered to discuss shareholder activism and engagement through a series of panels, case studies, presentations, and workshops relating to the theme of "Fortifying Engagement through Collaborate Action." Arnold Schwarzenegger, the bodybuilder, movie star, and former governor of California, concluded the day with a keynote address emphasizing the danger of climate change and outlining the role that investors can play in pressuring corporations to address the issue.

Afshin Molavi, Senior Advisor on Global Geo-Political Risk for Oxford Analytica and the NP Fellow at the Foreign Policy Institute at Johns Hopkins University School of Advanced International Studies began the day with a case study presentation entitled "Fast and Furious: The New Geo-Political Risk Environment Along the Old (New) Silk Road." Mr. Molavi's dynamic and engaging presentation highlighted how events, fast-moving technology, changes in the composition of countries (stemming from the Arab Spring), and non-state actors like ISIS change the risk assessment for investors.

Following Mr. Molavi's presentation, Raj Thamotheram, Chief Executive Officer at Preventable Surprises, and Howard Covington, Former CEO at New Star Asset Management, presented another case study on "Responsible Engagement and Climate Change." Mr. Thamotheram and Mr. Covington emphasized the dangers posed by climate change and suggested that despite the known concerns, investor engagement has not been as strong as it should have been. The two suggested that to counter the climate change problem investors should become forceful stewards and vote for constructive, non-prescriptive and value enhancing actions rather than merely divesting of shares in companies that are not reducing emissions. They also discussed how investors could take action to mitigate corporate lobbying.

The first panel discussion of the day was "Is It Possible to Be a Better Investor AND Active Owner?" and featured Alex van der Velden, Partner and Chief Investment Officer

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Class Certification and the Use of Event Studies after *Comcast* *(continued from page 3)*

plaintiff to establish that common questions predominate over individual ones."[5] To that end, district courts hearing securities class actions have almost uniformly held that the standard event study methodology satisfies *Comcast.*[6] By contrast, the few securities cases where certification has been denied on *Comcast* grounds have all involved unconventional damages methodologies.[7] Indeed, in the two years since *Comcast* was decided, no court has ultimately declined to certify a securities class invoking a standard event study methodology to measure traditional out-of-pocket (or "but for") damages. This article explores the post-*Comcast* landscape for securities class actions.

I. *Comcast*

Comcast was an antitrust case involving a proposed class of over "2 million current and former Comcast subscribers" spanning 16 counties.[8] The *Comcast* plaintiffs alleged that the defendants had engaged in antitrust violations that resulted in four disparate types of "antitrust injury" (or "antitrust impact") to subscribers in those 16 counties.[9] Of the four theories of liability, the district court accepted only one as capable of classwide resolution. The plaintiffs' proposed damages methodology, however, "assumed the validity of all four theories of antitrust impact initially advanced" and "calculated damages resulting from 'the alleged anticompetitive conduct as a whole'" rather than "attribut[ing] damages to any one particular theory of anticompetitive impact."[10]

The district court certified the class, reasoning that striking the three theories of antitrust injury did "not impeach [plaintiff's expert's] damages model" and the Third Circuit affirmed.[11] The Supreme Court, in a 5-4 decision, reversed. Writing for the five-Justice majority, Justice Scalia explained that because the plaintiff's damages methodology measured damages resulting from all four types of antitrust impact, rather than being tethered to the one type of impact remaining in the case, it "identifie[d] damages that are not the result of the wrong."[12] Further, because the different franchise areas were each damaged in differing combinations and degrees by the four types of impact, the "permutations involving four theories of liability and 2 million subscribers located in 16 counties are nearly endless," and calculating damages would "require labyrinthine individual calculations."[13] As a result, the Court concluded that "[w]ithout presenting another methodology, respondents cannot show [Federal] Rule [of Civil Procedure] 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."[14]

The *Comcast* majority, however, made clear that its decision did not create a new predominance requirement but, rather, "turn[ed] on the straightforward application of class-certification principles."[15] This led Justices Ginsburg and Breyer to clarify, in their dissenting opinion, that *Comcast* "breaks no new ground on the standard for certifying a class action" and "[i]n the mine run of cases, it remains the 'black letter rule' that a class may obtain certification under Rule 23(b)(3) when liability questions common to the class predominate over damages questions unique to class members."[16]

By and large, the circuit courts — perhaps recognizing the unique factual posture of *Comcast* and, specifically, the fact that the court had dismissed three of the plaintiffs' four theories of liability — have been reluctant to bring about a full-scale change in class certification jurisprudence since the decision was handed down. For example, the Sixth Circuit has made clear that *Comcast* does not disturb the "well nigh universal" rule that "individual damages calculations do not preclude class certification under Rule 23(b)(3)."[17] The Ninth Circuit has also reiterated that "'the presence of individualized damages cannot, by itself, defeat class certification under

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5 *In re Groupon, Inc. Sec. Litig.*, 2014 U.S. Dist. LEXIS 137382, at *7-9 (N.D. Ill. 2014).

6 *See, e.g., In re Diamond Foods, Inc. Sec. Litig.*, 295 F.R.D. 240, 251-52 (N.D. Cal. 2013) (*Comcast* satisfied because "[t]he event study method is an accepted method for the evaluation of materiality damages to a class of stockholders in a defendant corporation."); *see also IBEW Local 98 Pension Fund v. Best Buy Co.*, 2014 U.S. Dist. LEXIS 108409, at *22 (D. Minn. 2014) ("[p]laintiffs' expert . . . performed an event study using methodology for the quantification of damages to show that damages are capable of calculation on a class-wide basis."); *Wallace v. Intralinks*, 302 F.R.D. 310, 318 (S.D.N.Y. 2014) ("[p]laintiff's proposed determination of damages by event study appears to be a workable methodology of determining damages on a class-wide basis that conforms to its theory of liability, thus meeting the requirements of [*Comcast*].")

7 *See, e.g., In re BP p.l.c. Sec. Litig.*, 2014 U.S. Dist. LEXIS 69900, at *82-89 (S.D. Tex. 2014) ("*BP II*") (certifying out-of-pocket subclass but refusing to certify subclass of plaintiffs who "eschew[ed]" the traditional "but for" method); *Sicav v. Jun Wang*, 2015 U.S. Dist. LEXIS 6815, at *5-8 (S.D.N.Y. 2015) (denying certification where plaintiffs proposed an "unusual theory of classwide injury").

8 133 S. Ct. at 1429-30.

9 *Comcast*,133 S. Ct. at 1434-35.

10 *Id.* at 1434.

11 *Id.* at 1439.

12 *Id.* at 1434.

13 *Id.* at 1434-35.

14 *Id.* at 1433.

15 *Id.*

16 *Id.* at 1436-37.

17 *In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 861 (6th Cir. 2013).

Rule 23(b)(3).'"[18] And earlier this year, the Second Circuit held that *Comcast* does not require that a plaintiff present a classwide damages model that accounts for every class member's individual injury to establish predominance.[19] Rather, "[a]ll that is required at class certification is that the plaintiffs must be able to show that their damages stemmed from the defendant's actions that created the legal liability."[20]

II. Application of *Comcast* to Securities Class Actions

To the extent these recent appellate decisions have construed *Comcast* to require a nexus between class members' damages and the conduct giving rise to defendants' liability, such a requirement is readily met in a traditional securities class action invoking the fraud-on-the-market presumption of reliance.[21]

As the Supreme Court explained recently in *Halliburton II*, the fraud-on-the-market presumption which undergirds the modern securities class action system is based on the premise that "the price of stock traded in an efficient market reflects all public, material information — including material misstatements."[22] In the words of Judge Easterbrook of the Seventh Circuit, "[w]hen someone makes a false (or true) statement that adds to the supply of available information, that news passes to each investor through the price of the stock. And since all stock trades at the same price at any one time, every investor effectively possesses the same supply of information. *The price both transmits the information and causes the loss*."[23] Thus, in the typical securities case, there is one theory of liability (public misrepresentations) that causes one uniform injury (artificial inflation) to one variable (stock price).[24] And when the relevant truth concealed by the misrepresentations is disclosed, the stock price falls, removing the inflation.

For many years, courts have recognized event studies as "the most prevalent, accepted method to establish loss causation and damages" in securities class actions.[25] An event study is "a statistical regression analysis that examines the effect of an event [, such as the disclosure of a corporate fraud,] on a dependent variable, such as a corporation's stock price."[26] More specifically, the regression analysis identifies dates on which there is an abnormal stock price decline for the subject company when compared to the overall market. Then, more qualitative analysis, including review of market analyst reports and other sources, is performed to determine the actual cause of the decline — i.e., whether the decline was caused by disclosure of the fraud or other, non-fraud-related, company-specific factors.

Of course, plaintiffs need not prove loss causation at the class certification stage — that inquiry is saved for summary judgment or trial.[27] Nor does *Comcast* "articulate any requirement that a damage calculation be performed" for class treatment.[28] But to meet the predominance test of Federal Rule of Civil Procedure 23(b), securities fraud plaintiffs have invoked, and the courts have accepted, the event study methodology as the principal means of estimating damages and a tried method for showing that investors in the same efficiently-traded security are harmed by price inflation in a common (i.e., classwide) manner. These courts have reasoned that, because damages are derived directly from the stock price decline caused by the revelation of the fraud, there is a clear link between the liability theory and the damages methodology, and the event study enables the expert to estimate the price inflation associated with the corrective events.

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18 *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014) (quoting *Leyva v. Medline Industries Inc.*, 716 F.3d 510, 514 (9th Cir. 2013) ("'[T]he amount of damages is invariably an individual question and does not defeat class action treatment.")).

19 *Roach v. T.L. Cannon Corp.*, 2015 U.S. App. LEXIS 2054, at *14 (2d Cir. 2015) ("*Comcast* . . . did *not* hold that a class cannot be certified under Rule 23(b)(3) simply because damages cannot be measured on a classwide basis. *Comcast*'s holding was narrower[:] . . . a model for determining classwide damages relied upon to certify a class under Rule 23(b)(3) must actually measure damages that result from the class's asserted theory of injury; but the Court did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance. . . .").

20 *Sykes v. Mel S. Harris & Assocs., LLC*, 2015 U.S. App. LEXIS 2057, at *40 (2d Cir. 2015).

21 *Leyva*, 716 F.3d at 514.

22 134 S. Ct. at 2405.

23 *Schleicher v. Wendt*, 618 F.3d 679, 682 (7th Cir. 2010) (Easterbrook, J.) (emphasis added).

24 *See, e.g., McIntire v. China MediaExpress Holdings, Inc.*, 2014 U.S. Dist. LEXIS 113446, at *42 (S.D.N.Y. 2014) (certifying class over *Comcast* argument, explaining that, "Plaintiffs' theory of liability is that [defendant's] misrepresentations caused losses of the same kind: the artificial inflation of [the] share price").

25 *WM High Yield Fund v. O'Hanlon*, 2013 U.S. Dist. LEXIS 90323, at *43 n.20 (E.D. Pa. 2013).

26 *FindWhat*, 658 F.3d at 1313.

27 *See Erica P. John Fund, Inc. v. Halliburton Co.* 131 S. Ct. 2179, 2183 (2011) ("*Halliburton I*") ("The question presented in this case is whether securities fraud plaintiffs must also prove loss causation in order to obtain class certification. We hold that they need not.").

28 *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2013 U.S. Dist. LEXIS 137945, at *137-38 (N.D. Cal. 2013).

A "Valeant" Scheme Causes Investor Losses *(continued from page 2)*

wrinkle-treatment Botox and other drugs. However, Valeant knew that any attempt to acquire Allergan would likely be difficult, as Valeant's initial merger overtures to Allergan in 2012 had been flatly rejected. Moreover, because of its growing debt burden, Valeant enlisted the help of Ackman and his $13 billion hedge fund, Pershing Square, in order to jointly carry out the takeover of Allergan.

As set forth in Judge Carter's November 4, 2014 order, Pershing Square agreed to provide the necessary funding and support to Valeant in its effort to acquire Allergan. In order to generate the return Ackman desired from the acquisition, Valeant and Ackman agreed to obtain a 10% stake of Allergan that Valeant would use to launch a hostile takeover of Allergan. As indicated by documents that only later became public, Valeant and Ackman knew that acquiring a significant interest in Allergan was necessary because, as they correctly expected, Allergan's board would take defensive measures against the takeover bid once they became aware of it. Indeed, the 10% stake was important because, as stated in Judge Carter's November 4, 2014 order, it would "go a long way" toward securing the 25% shareholder vote needed to call a special meeting during which Pershing Square could vote its shares to replace Allergan's board, thereby increasing Valeant's probability of closing the deal.

To execute their plan, on February 11, 2014, Ackman and Pershing Square, with Valeant's approval, formed a shell entity they termed "PS Fund 1" to secretly accumulate their stake in Allergan. While the federal securities laws require investors holding 5% or more of a company's stock to disclose their holdings, investors are provided a 10-day window to disclose that they have crossed the 5% threshold. Valeant and Pershing Square were well aware of these restrictions, and took a series of careful steps to avoid detection of their plans in light of these requirements.

For example, rather than buying Allergan stock directly, PS Fund 1 bought zero-strike price "call options" in less visible over-the-counter transactions — options that gave PS Fund 1 essentially the same ownership rights as if it had purchased the shares directly. By April 8, 2014, PS Fund 1 had acquired a 4.99% stake in the Company through these transactions — *i.e.*, an amount just shy of the SEC's 5% reporting requirement threshold. In the 10-day window that immediately followed — from April 11 through April 21, 2014 — PS Fund 1's buying spree accelerated with PS Fund 1 acquiring almost 14 million Allergan shares. By April 21, 2014, PS Fund 1 held 9.7% of Allergan's outstanding stock. These machinations enabled Ackman, Pershing Square, and Valeant to accumulate a massive stake in the Company prior to making any disclosures to the marketplace.

Then, after trading closed on April 21, 2014, the very last day of the 10-day window, Valeant and Pershing Square disclosed their Allergan holdings and revealed that Valeant would seek to acquire Allergan. On the following day, Valeant and Pershing Square further disclosed that they would offer $48.30 in cash per Allergan share and an exchange of 0.83 Valeant shares per Allergan share. The price of Allergan shares immediately shot up in response to the offer by $21.65 per share (or approximately 15%).

While Ackman, Pershing Square, and Valeant initially tried to characterize the takeover as a "merger" on April 21, 2014, the plan, from the beginning, was to launch a tender offer. Indeed, Valeant's aggressive and hostile tactics from the outset showed that Valeant's proposed merger was a tender offer in everything but name. For example, when Allergan did not immediately agree to negotiate a merger, Valeant sought, with Ackman's help, to persuade stockholders that a deal was "inevitable," hosting media and investor events claiming that "time [was] of the essence" and that Allergan promptly needed to respond to the offer. When Allergan's board rejected Valeant's offer, Valeant immediately raised the offer by $10 per share on May 28, 2014 and, without waiting for another denial, again bumped the price even higher and raised the cash portion of the offer dramatically to $72 per share on May 30, 2014.

On June 2, 2014, Defendants revealed their true intentions. Specifically, Pershing Square filed a proxy statement with the SEC in contemplation of calling a special meeting of stockholders in order to: (i) remove and replace six unspecified directors from the Allergan Board; (ii) propose an amendment to Allergan's bylaw provisions regarding special stockholder meetings; and (iii) request that the Board promptly engage in merger discussions with Valeant. In a presentation to investors that day, Valeant abandoned the pretense of "negotiations" with the Allergan board, revealing that it was "preparing to launch an exchange offer."

Finally, on June 18, 2014, Valeant filed documents with the SEC formally announcing what Valeant and Ackman had planned all along — an initiation of a tender offer to acquire Allergan. Indeed, in a press conference held the day before, Valeant's Chief Executive Officer, J. Michael Pearson, admitted that Valeant always knew it would have to launch a tender offer to acquire Allergan, stating that "[o]n April 22nd, we announced our offer for Allergan. ***We suspected at the time it would ultimately have to go directly to Allergan shareholders. We were correct***."

Throughout the Class Period (February 25, 2014 through April 21, 2014), Allergan shareholders were intentionally kept unaware of both the forthcoming tender offer by Valeant and PS Fund 1's agreement to acquire Allergan shares on Valeant's behalf. Thus, Allergan shareholders who sold shares during the Class Period — while Pershing Square was secretly amassing massive quantities of Allergan shares on the basis of material, non-public information about Valeant's planned tender offer for Allergan — did so at artificially deflated and unfair prices based on unequal access to inside information.

Allergan subsequently filed suit against Valeant and Pershing Square accusing the companies of insider trading, among other securities violations. That lawsuit sought: (1) a preliminary injunction preventing PS Fund 1 from exercising any of the privileges of ownership attaching to its stake in Allergan; and (2) a preliminary injunction preventing PS Fund 1, Valeant, and Pershing Square from voting any false proxies solicited by them in violation of Section 14(a) or Rule 14a-9 until corrective disclosures were made. On November 4, 2014, Judge Carter granted in part Allergan's motion for a preliminary injunction against Valeant and Pershing Square, and found, *inter alia*, that "***serious questions were raised***" as to whether Valeant and Pershing Square had violated the federal securities laws. *See Allergan, Inc. v. Valeant Pharms. Int'l, Inc.*, 2014 U.S. Dist. LEXIS 156227, at *27, 43 (C.D. Cal. Nov. 4, 2014). Judge Carter also noted that investors who sold Allergan shares while Valeant and Pershing Square were conducting their insider trading scheme may have "a private right of action under Rule 14e-3" and "suffered" harm as a result of Valeant and Pershing Square's scheme. *See id.* at 51-52. Allergan's action was voluntarily dismissed after Allergan was acquired by Actavis plc on March 17, 2015.

Investors' securities class action against Ackman, Pershing Square, and Valeant remains ongoing, and Kessler Topaz was appointed as Co-Lead Counsel in the securities class action by Judge Carter on May 5, 2015. The outcome of the investor class action could have broad implications for the duties owed to shareholders in future takeover bids, as any adverse rulings against Valeant and Pershing Square could push other companies contemplating a similar strategy toward full compliance with the spirit and letter of federal disclosure obligations.

KTMC Partners with PILCOP to Represent Students with Disabilities in Special Education Law Project *(continued from page 2)*

under IDEA's "stay-put" provision, which required the School District to keep the child in his or her current educational program during the pendency of the litigation. Because the child here had not previously been enrolled in the School District, this meant that the School District was obligated to render "comparable services" to those that the child had received under the last agreed-upon Individualized Education Plan ("IEP") from the EI program.

At an evidentiary hearing on February 12, 2015 before the administrative hearing officer, the parties litigated over the issue of whether such "comparable services" obligated the School District to provide the child with a one-to-one assistant. The School District contended that it was not required to do so because the child's previous IEP did not expressly call for a one-to-one aide. PILCOP and KTMC argued that, under applicable legal authority, the determination of what constituted "comparable services" was not limited to the four corners of the prior IEP; rather, it involved the consideration of a variety of factors relating to the services that the child had been receiving previously in the EI program. As such, PILCOP and KTMC introduced compelling documentary evidence and testimony from the child's EI teacher indicating that the EI program had effectively provided the child constant one-to-one supervision in order to address certain behavioral and safety concerns.

On March 2, 2015, the administrative hearing officer granted the child's requested stay-put relief, mandating that the School District install a one-to-one assistant in the child's kindergarten classroom until it had developed a new IEP for the child. Following this favorable decision, the child began attending kindergarten at the School District and was responding positively to the new classroom environment. The parties reached a settlement in the case shortly thereafter. Under that settlement, the School District agreed to the provision of compensatory educational services for the amount of time that the child had been out of school due to the School District's denial of FAPE, as well as the reimbursement of reasonable attorneys' fees. As part of KTMC's voluntary support for PILCOP, KTMC will donate its portion of attorneys' fees to PILCOP.

In sum, KTMC is pleased with the outcome of this case and looks forward to taking on new pro bono matters with PILCOP in the near future.

Brazilian Oil Giant Petrobras Engulfed in Massive Corruption Scandal, Investors Bring Suit

(continued from page 1)

by accident during the course of an investigation into Alberto Youssef, a convicted black market money launderer known as the "central banker" of Brazil's black market. The investigation — dubbed Operation "Car Wash" because Youssef's money laundering activities were conducted through a network of car washes and gas stations — revealed that Youssef had given a $110,000 Range Rover Evoque to Paulo Roberto Costa. Costa was widely known as the "public face" of Petrobras between 2004 and 2012, serving as its Chief Supply Officer and as a member of its vaunted "Executive Directorate," which consisted of Petrobras's most senior executives. When police raided Costa's home in March 2014, they found him and his family members hiding bags of money in suitcases along with incriminating documents showing the details of an elaborate bribery arrangement involving Costa and other Petrobras officials. Police seized documents, millions of dollars in cash and 25 luxury cars from Costa's home. Though he initially denied any involvement in corruption, Costa and another Petrobras executive swept up in Operation Car Wash — Pedro Barusco — turned state's evidence and began revealing the complex intricacies of a scheme that, according to Barusco's testimony, had been "endemic" and "institutionalized" within the company for a decade.

During his 42 hours of sworn testimony to Brazilian prosecutors, Costa explained that numerous construction contractors, which Petrobras relied upon to build its multi-billion dollar oil refineries, had formed an unlawful cartel and conspired, with Petrobras's knowledge and assistance, to rig bids for company projects. Due to this "cartelization" of contractors, Costa testified that Petrobras knowingly executed contracts that were inflated by as much as 20 percent. In particular, the "Cartel" members met in advance of bidding on Petrobras contracts to determine which companies would bid on a particular contract, and which particular Cartel member would prevail. The agreed-upon list of bidders, along with the predetermined winner, was then provided to Petrobras executives like Costa who had the authority to approve bids. The Cartel's anti-competitive bid-rigging caused the company to incur billions of dollars in excess contract payments.

Petrobras and its executives were not only aware of the Cartel's bid-rigging scheme, they profited handsomely from it. In exchange for executing these inflated construction contracts, Petrobras executives — including Costa, Barusco, Renato Duque (the former Chief Services Officer and Executive Directorate member) and Nestor Cerveró (the former Chief International Officer and Executive Directorate member), among others — received a 3 percent "bribe fee" from the Cartel, which they split among themselves and various Brazilian politicians. Several contractors have testified that the payment of a 3 percent bribe was a "rule of the game" when dealing with Petrobras, meaning that Petrobras would not do business with contractors who refused to pay bribes. Evidence obtained by Brazilian prosecutors has confirmed that Petrobras executives received millions of dollars in bribes through the scheme — Barusco testified that he alone pocketed *$100 million* in bribes during his tenure at Petrobras, and stated that certain government officials likely earned twice that amount.

The Cover-Up

While Barusco and Costa have testified that the bribery scheme was widely known within Petrobras, the company went to great lengths to conceal it from the public. For instance, rather than disclosing these inflated contract costs and bribes as expenses in its publicly-filed financial statements (as was required by U.S. and international accounting standards), Petrobras capitalized the overpayments and bribes as assets. This improper accounting treatment concealed the fraudulent payments from the market and made the company appear more attractive to investors, as it decreased Petrobras's reported expenses and increased its reported assets and net income.

In a further attempt to cover up its misconduct, Petrobras and its executives, including Chief Executive Officer Maria de Gracas Foster, silenced numerous employees who tried to blow the whistle on the scheme. For example, Venina Velosa da Fonseca, a Petrobras executive who reported to Costa and worked closely with Foster, has revealed that, beginning in 2008, she repeatedly tried to alert Foster and Sergio Gabrielli de Azevedo (Foster's predecessor as CEO) to the scheme, but Foster and Gabrielli rebuffed Velosa's efforts. Instead, Velosa was removed from her job and exiled to the company's Singapore office. In addition, Velosa and her daughters were repeatedly threatened; at one point Velosa even had a gun pointed to her head. Similarly, after Fernando de Castro Sa — an attorney working within the Supply Division — uncovered evidence indicating significant pricing irregularities at the company, he too was the victim of retaliation. Ultimately, Sa was fired and informed that Petrobras had erased all electronic documents identifying his concerns.

The Fallout

Despite repeatedly denying the existence of any fraud, bribery, overpricing or irregularities in its construction contracts, Petrobras finally acknowledged the corruption scheme on

October 27, 2014 — after Costa's arrest. A month later, the Company shocked investors when it disclosed that, due to its fraudulent accounting for the bribes and overpayments, the scheme would likely have a material impact on its financial condition. On April 22, 2015 Petrobras disclosed a $19.4 billion asset write-down, which consisted of over $2.5 billion in bribes alone, and nearly $17 billion in additional write-downs to Petrobras's refineries.

Additionally, in April, Costa and Youssef were sentenced to 7½-year and 9-year prison terms, respectively, for their roles in the fraud at Petrobras, though both of their sentences were later reduced given their cooperation with Brazilian authorities. Cerveró received a five-year prison sentence in May, and Barusco recently agreed to return the $100 million in bribes he received during his tenure at Petrobras. Scores of additional Petrobras employees, contractors, and politicians remain under investigation, while the fallout from the scheme has caused at least three of Petrobras's contractors to file for bankruptcy. Litigation stemming from the scandal in both Brazil and the US, particularly lawsuits by investors, is expected to proliferate.

Kessler Topaz Takes Dole's Controlling Stockholder and Deutsche Bank to Trial

(continued from page 1)

buyout while representing Dole in a strategic review that resulted in a sale of Dole assets and a substantial reduction in Dole's debt.

Accordingly our case against Deutsche Bank involves the conflicts of interest that Deutsche Bank faced in advising both Dole with respect to financing and strategic transactions and Murdock on his buyout of Dole's public stockholders. With respect to Murdock, we sought to prove that he paid an unfairly low price for the public stockholders' Dole shares and that the process through which he engineered and effected his buyout did not adequately protect the public stockholders' interests.

The trial was the culmination of nearly two years of hard-fought, multi-faceted litigation. After the Court determined in 2013 that the buyout transaction could close without impacting the stockholders' right to seek damages in a trial, Kessler Topaz and its co-counsel sought and reviewed hundreds of thousands of pages of defendants' documents and took the sworn depositions of more than 20 individuals. Additionally, our case was litigated, and ultimately tried, alongside statutory appraisal actions, in which several former Dole stockholders refused to accept the $13.50 per share buyout price and opted, instead, to seek a court-determined "fair value" for their Dole shares. Plaintiffs opposed and defeated defendants' efforts to have the case thrown out before trial, while achieving unopposed class certification for Dole's former stockholders.

Because of how Delaware law operates, it was the defendants' burden at trial to prove that the transaction was procedurally and financially — i.e., "entirely" — fair to the former Dole stockholders. Yet, the plaintiffs still had the burden to prove the aiding and abetting claims against Deutsche Bank as well as show the class' entitlement to a specific damages award.

The Court heard live trial testimony from 12 witnesses, including Mr. Murdock, Dole executives, former Dole directors and advisors, financial experts, and four representatives of Deutsche Bank. More than 2,000 documents were put into evidence as well. Excepting only our financial expert, whom we called to testify on the issue of damages, all of the other witnesses were called by the defendants. Because of the burdens of proof and the Court's reluctance to require a single witness to be called to the stand multiple times during a trial, unlike many trials where one side presents its case and then another party takes its turn, each party in this case was looking to prove its case at all times through the trial.

Kessler Topaz lawyers cross-examined four of the 11 defense witnesses and provided substantial assistance during co-counsel's cross examinations. Reflecting their deep preparation for trial, the Kessler Topaz trial team was repeatedly able to find documents in the midst of testimony that tended to prove the factual points that the plaintiffs were looking to make for the Court.

Following trial, Kessler Topaz and its co-counsel have presented the Court with in-depth post-trial briefs, summarizing the law and the facts as proved at trial, and the defendants have done the same. In the end, plaintiffs contend that Murdock massively underpaid for the former public stockholders' Dole shares, while the defendants contend that Murdock actually overpaid the former public stockholders. The Court will hear final arguments on July 2, 2015, and issue its decision and verdict, likely by October 2015. Regardless of the outcome, this case shows the firm's willingness and ability to litigate cases through trial if necessary to achieve benefits for public company stockholders.

Class Certification and the Use of Event Studies after *Comcast* (continued from page 7)

A. *Groupon*

The claims in *In re Groupon, Inc. Securities Litigation* arose from Groupon's 2011 initial public offering.[29] Plaintiffs moved to certify classes of investors alleging securities fraud claims. Defendants opposed, arguing that individualized damages issues predominated under *Comcast*. In granting plaintiffs' motion, Judge Norgle of the Northern District of Illinois explained that "[i]n a securities fraud class action, the fraud-on-the-market doctrine makes it rather easy for a lead plaintiff to establish that common questions predominate over individual ones."[30] Thus, "[e]vidence from a plaintiff's expert verifying that the company's stock's price 'changed rapidly . . . in response to new information' will suffice to certify the class because 'certification is largely independent of the merits' of the case." *Id.* (citing *Wendt*, 618 F.3d 679). As a result, the court found *Comcast* "inapposite in a securities fraud class action such as this" and did not accept the defendants' damages arguments as a basis to deny class treatment.[31]

Groupon is in accord with Supreme Court precedent holding that, in a securities action, the critical element for purposes of the predominance inquiry is reliance — not damages. In particular, as the Supreme Court explained four years ago in *Halliburton I*, "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance."[32] Then in *Halliburton II*, its first post-*Comcast* securities decision, the Supreme Court reaffirmed that "[i]n securities class action cases, the crucial requirement for class certification will usually be the predominance requirement of Rule 23(b)(3)."[33] As the Court explained, "[t]he *Basic* [fraud-on-the-market] presumption does not relieve plaintiffs of the burden of proving — before class certification — that this requirement is met. *Basic* [*v. Levinson*][34] instead establishes that a plaintiff satisfies that burden by proving the prerequisites for invoking the [fraud-on-the-market] presumption . . . ."[35] Even Justice Thomas's concurring opinion (in which Justice Scalia, who penned *Comcast*, joined) suggested that "Plaintiffs who invoke the presumption of reliance are deemed to have shown predominance as a matter of law. . . ."[36]

B. *Diamond Foods*

In *In re Diamond Foods Securities Litigation*, plaintiffs moved for certification of a class of investors alleging violations of Section 10(b).[37] To meet their *Comcast* burden, plaintiffs asserted that "[d]amages in this matter will be calculated using an event study analysis similar to the event study analysis presented" to establish market efficiency, which "shows that damages are calculable to the class using standard event study methodology."[38] Defendants opposed, arguing that a "conclusory statement" that "damages 'will be calculated using an event study analysis'" was "a far cry from the evidentiary showing that *Comcast* requires."[39]

In certifying the class, Judge Alsup of the Northern District of California found that the plaintiff's event study satisfied *Comcast*, explaining that "[t]he event study method is an accepted method for the evaluation of materiality damages to a class of stockholders in a defendant corporation."[40] The court also relied on the Ninth Circuit's previous determination, in a Section 10(b) case, that "the amount of price inflation during the [class] period can be charted and the process of computing individual damages will be virtually a mechanical task."[41] At the end of the day, it found that "[w]hether plaintiff will ultimately prevail in proving damages is not necessary to determine at this stage."[42] The court thus concluded that "plaintiff has sufficiently shown that damages are capable of measurement on a classwide basis such that individual damage calculations do not threaten to overwhelm questions common to the class."[43]

C. *Best Buy*

IBEW Local 98 Pension Fund v. Best Buy Company also involved claims brought under Section 10(b).[44] Defendants challenged plaintiffs' motion for class certification, arguing that plaintiffs had failed to satisfy *Comcast* because "a plaintiff in a securities case has an affirmative duty to proffer a damages model that tracks his liability theory, and cannot

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29 2014 U.S. Dist. LEXIS 137382 (N.D. Ill. Sept. 23, 2014).

30 *Id.* at *7-9.

31 *Id.*

32 *Halliburton I*, 131 S. Ct. at 2184.

33 *Halliburton II*, 134 S. Ct. at 2412.

34 485 U.S. 224, 108 S. Ct. 978 (1988).

35 *Halliburton II*, 134 S. Ct. at 2412.

36 *Id.* at 2423-24.

37 295 F.R.D. 240 (N.D. Cal. 2013).

38 *See* Declaration of Dr. Jay Hartzell in Support of Motion for Class Certification, ¶¶23-24, *Diamond Foods* 295 F.R.D. 240 (Case No. 11-cv-05386-WHA), Dkt. No. 202-1.

39 Defendant Diamond Foods, Inc.'s Sur-Reply in Opposition to Class Certification at 3, *Diamond Foods* 295 F.R.D. 240 (Case No. 11-cv-05386-WHA), Dkt. No. 225.

40 *Id.* at 251-52 (citing *In re Credit Indus., Inc. Sec. Litig.*, 252 F. Supp. 2d 1005, 1014 (C.D. Cal. 2003); *In re Apollo Grp. Inc. Sec. Litig.*, 509 F. Supp. 2d 837, 844 (D. Ariz. 2007); *In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1181 (N.D. Cal. 1993)).

41 *Id.* at 251-52 (citing *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

42 *Id.* at 252.

43 *Id.*

44 2014 U.S. Dist. LEXIS 108409, at *3 (D. Minn. 2014).

simply say he will conduct an 'event study.'"[45] Defendants further averred that certain of the alleged misstatements had been dismissed at the pleading stage, and the proposed event study methodology was flawed because it made "no effort to isolate the impact on the share price (and the resultant alleged damages) flowing from the . . . actionable statements in this case."[46] Finally, defendants argued that certain class members, who bought early on the first day of the class period (and, thus, prior to any misstatements) had suffered no damages.[47]

Judge Frank of the District of Minnesota found *Comcast* satisfied, explaining that "[p]laintiffs' expert . . . performed an event study using methodology for the quantification of damages to show that damages are capable of calculation on a class-wide basis."[48] Like *Diamond Foods*, the court rejected defendants' other attacks on the model, reasoning that "[w]hether Plaintiffs will ultimately prevail in proving damages is not an issue presently before the Court."[49] Nor was the court concerned with the potential gap in damages on the first day of the class period, finding that it would not "make the calculation of damages difficult or improper."[50] In so concluding, the court adopted the reasoning of Judge Easterbrook in *Wendt*[51] that questions relating to the "[t]iming of each person's transactions" "can be resolved mechanically. A computer can sort them out using a database of time and quantity information."[52] The *Best Buy* court thus held "that Plaintiffs have sufficiently demonstrated that damages are capable of measurement on a class-wide basis such that individual issues of damages calculations will not overwhelm the predominant questions common to the class."[53]

D. *Intralinks*

In *Wallace v. Intralinks*, plaintiff moved to certify a class of investors bringing claims pursuant to the Exchange Act and a subclass of investors bringing claims pursuant to the Securities Act.[54] To satisfy *Comcast*, plaintiff proposed an event study methodology similar to the event study that it had provided to establish market efficiency.[55] Citing heavily to *Diamond Foods*, plaintiff argued that the event study, which measured inflation based upon corrective disclosure stock drops, was sufficiently tethered to its liability theory because "each [corrective] disclosure . . . directly relates to Lead Plaintiff's claims. . . ."[56] Defendants countered that the relevant truth had been disclosed prior to the class period-ending corrective disclosure, and that plaintiffs had failed to demonstrate predominance for class members who had purchased Intralinks stock after the truth was revealed.

Judge Griesa of the Southern District of New York disagreed, finding that "[d]efendants' arguments [] belong more properly to the discussion of damages, not class certification."[57] The court noted that "[p]resumably, if plaintiff prevails, class members who purchased or sold at different times during the class period will be entitled to significantly different recoveries" but "[i]ndividualized calculations of damages do not generally defeat the predominance requirement."[58] Moreover, the court reasoned that damages do "not demand excessive individual inquiry" because "[p] laintiff's proposed determination of damages by event study appears to be a workable methodology of determining damages on a class-wide basis that conforms to its theory of liability, thus meeting the requirements of [*Comcast*]."[59]

III. Conclusion

When *Comcast* was issued, courts and practitioners alike grappled with its impact. In the securities class action domain, however, the district courts have not viewed *Comcast* as a major obstacle to class certification. Rather, because all investors in a fraud-on-the-market case are injured in a common manner — by the artificial inflation in a company's stock price caused by a defendant's false statements — the courts have by and large held that common questions of damages predominate over individualized ones. In particular, these courts have found that the traditional event study methodology, which seeks to estimate inflation based upon the abnormal stock price declines following disclosure of the fraud, is sufficiently tethered to a securities fraud plaintiff's liability theory to satisfy *Comcast*. Moreover, given the recent opinions by the federal appeals courts in non-securities cases interpreting *Comcast*'s holding narrowly, this trend appears likely to continue.

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45 *See* Defendants' Memorandum in Opposition to Lead Plaintiff's Motion for Class Certification and Appointment of Lead Plaintiff Marion Haynes as Class Representative at 13-14, *Best Buy*, 2014 U.S. Dist. LEXIS 108409 (Case No. 11–429 (DWF/FLN)), Dkt. No. 156.

46 *Id.* at 18-19.

47 *Id.* at 28-29.

48 *Best Buy*, 2014 U.S. Dist. LEXIS 108409, at *22.

49 *Id.* at *24.

50 *Id.* at *23.

51 618 F.3d at 681.

52 *Best Buy*, 2014 U.S. Dist. LEXIS 108409, at *23 (quoting *Wendt*, 618 F.3d at 681).

53 *Best Buy*, 2014 U.S. Dist. LEXIS 108409, at *24.

54 302 F.R.D. at 318.

55 Memorandum of Law in Support of Lead Plaintiff's Motion for Class Certification at 21-22, *Intralinks*, 302 F.R.D. 310 (Civil Action No. 11-CV-8861), Dkt. No. 71.

56 *Id.* at 22.

57 *Id.*

58 *Id.*

59 *Id.*

The Sixth Annual Evolving Fiduciary Obligations of Pension Plans *(continued from page 4)*

Following the discussion of plan governance, another panel session highlighted the due diligence and monitoring considerations that plans should take into account when investing in non-US markets. Moderator Jennifer Schreck, Senior Attorney for Colorado PERA and panelists G. Blair Cowper-Smith, Executive Vice President of Corporate Affairs and Chief Legal Officer of the Ontario Municipal Employees Retirement System, R. Paul Edmonds, Chief Legal and Governance Officer for the Ontario Pension Board, and Cynthia Collins, Attorney at Robinson Bradshaw & Hinson explored the numerous factors that fiduciaries must consider when investment committees look to invest abroad. The panelists highlighted the fact that different foreign markets often present different considerations.

The conference continued with a case study on Selecting and Monitoring Plan Consultants and Service Providers presented by Hank Kim, Executive Director and Counsel for the National Conference on Public Employee Retirement ("NCPERS"). Mr. Kim unveiled and outlined the NCPERS Draft Code of Conduct for service providers that fiduciaries can utilize as a tool to adequately select and monitor service providers. Following Mr. Kim's presentation, Mr. Kim was joined by panelists James Love, General Counsel of the City of Birmingham Retirement and Relief System, Mary Schaaf, Controller for the Erie County Employees' Retirement System, and moderator Erin Perales, General Counsel for the Houston Municipal Employees Pension System for a discussion on monitoring and reviewing investment managers and their compliance with fund investment policies and guidelines.

The conference next offered the delegates the opportunity to choose between two different workshops: one addressing the issue of the SEC's efforts to increase monitoring of private equity firms and the resulting obligations on plan fiduciaries ("Workshop A"), and the other addressing how funds can best manage technological and enterprise risks and adequately protect plan member data and personal information ("Workshop B"). Workshop A was led by Georgette Schaefer, a partner at Morgan Lewis & Bockius and Yuliya Oryol, an attorney at Nossaman. Workshop B was facilitated by Victoria Hale, General Counsel for the Denver Employees Retirement Plan and Thomas Gray, General Counsel for the Teachers' Retirement System of Illinois. Both workshops allowed delegates to actively participate and engage in a constructive dialogue with their colleagues.

After lunch, Scott Shapiro, Senior Advisor to the Mayor of the City of Lexington regaled the delegates with a case study on the city of Lexington's comprehensive pension reform which cut the city's unfunded liability by forty percent and that is now being heralded as a model for the rest of the country.

Lee Rudy, a partner at Kessler Topaz Meltzer & Check, LLP, Jay Chadhuri, General Counsel & Senior Policy Advisor for the North Carolina Department of State Treasury, and Michael Hanrahan, Director at Pricket Jones & Elliot next presented the recent decision by the Delaware Supreme Court in the *ATP Tour Inc. v. Deutscher Tennis Bund* case and the implications that decision has on shareholder rights. The panelists discussed how in the aftermath of the *ATP* decision, more than 50 US public companies adopted bylaws that shift the legal fees to stockholder plaintiffs who bring litigation and do not prevail. The panelists also informed delegates about the legislative debate in Delaware and the efforts by institutional investors to combat the affront to shareholder rights.

The next panel discussion featured moderator Margaret M. Fahrenbach, Legal Advisor to the County Employees' and Officers' Annuity and Benefit Fund of Cook County and panelists Brian Bartow, General Counsel at CalSTRS, Michael Herrera, Senior Staff Counsel at the Los Angeles County Employees Retirement Association, Chris Supple, Deputy Executive Director & General Counsel at Massachusetts Pension Reserves Investment Management Board, and Jeffrey Padwa, Deputy Treasurer for the State of Rhode Island. The panelists discussed the biggest developments in securities litigation over the past year and how those decisions were impacting their funds investment decisions and operations.

Many of the day's themes and discussions were brought together in the next panel discussion, "Combatting Increased Shareholder Constraints." Moderator Julie Deisler, Investment Compliance and Governance Officer for the School Employees Retirement System of Ohio and panelists Amy Borrus, Deputy Director for the Council of Institutional Investors, Carol Nolan Drake, Chief External Affairs Officer for the Ohio Public Employees Retirement System, and Ryan Stippich, attorney at Reinhart Boerner Van Deuren discussed the landscape facing shareholders including the Delaware legislature's consideration of corporate fee shifting bylaws, the US Chamber of Commerce's proposal to limit shareholder proposals, shareholder access to annual meetings and board of directors, and shareholders' ability to file litigation after the Supreme Court decisions in *Halliburton* and *IndyMac*.

Following the final panel discussion, Paul Matson, Director for the Arizona State Retirement System presented a case study on the Arizona State Retirement System's successful performance over the past few years. Mr. Matson outlined strategies other funds could implement in order to replicate some of Arizona's success and create more sustainable pension funds.

The conference concluded with a keynote presentation by Mary Schapiro, a former chairperson of the SEC. Kessler Topaz Meltzer & Check, LLP partner Darren Check interviewed Ms. Schapiro about her time at the SEC, which began just after Bernie Madoff was arrested and continued through some of the most critical moments of the financial crisis. In response to questions, Ms. Schapiro offered insightful remarks about how the 2010 Dodd-Frank act was not perfect but offered a lot more benefits than problems and how in her view, the biggest omission in the Dodd-Frank act was not providing for more stable funding for the SEC that is more insulated from the political process (the SEC's funding is provided by the industry but its budget is still controlled by Congress). Ms. Schapiro also offered insights on the need for Boards to not reflexively react negatively to investors' attempts at engagement because not all activists are the same. Ms. Schapiro's remarks were astute and well-received by the audience.

The delegate response to the sixth annual EFOPP conference was positive and we are already in the process of planning next year's event. We're changing the name of the conference to the Evolving Fiduciary Obligations of Institutional Investors (EFOII) but will still feature the same quality discussions and programming. We look forward to hosting you for EFOII in Washington, DC on February 16, 2016.

Delaware Legislature Weighs Fee Shifting Legislation – *Legislation Bans Fee Shifting While Authorizing Other Litigation-Restricting Bylaws*

(continued from page 4)

legislation met with stiff opposition from the Chamber of Commerce, which encouraged the legislature to delay consideration of the bill until 2015.

The Delaware legislature delayed consideration of the initial legislation until the January 2015 session. Over next nine months, corporate lobbyists, led by the U.S. Chamber of Commerce, met with legislators and published numerous editorials supporting fee shifting. KTMC helped lead an effort to coordinate institutional investor opposition to fee shifting. More than 50 institutional investors, controlling more than $2.5 trillion in assets, wrote letters to the Delaware legislature asking it to ban fee shifting.

In early 2015, after significant deliberation, the Corporate Law Section came out with its new proposed legislation banning fee shifting. The legislation was passed by the Delaware Senate on May 12, 2015, by a vote of 16-5, with all 12 Democrats voting in favor, and 5 out of 9 Republicans voting against. The legislation now moves to the Delaware House of Representatives, which is currently considering it.

While banning fee shifting, the proposed legislation also specifically authorizes Delaware corporations to adopt "forum selection" bylaws, which require stockholder litigation to be brought in one forum, specifically Delaware Chancery Court. KTMC had unsuccessfully challenged forum selection bylaws by bringing suit in Chancery Court in 2013,[3] where we argued that boards of directors should not be allowed to pass bylaws restricting litigation against the board members.

The new proposed legislation also explicitly leaves for another day the validity of other kinds of bylaws that limit stockholder litigation. For example, one company has adopted a "surety" bylaw, allowing the company to require stockholders to post a bond for the company's litigation expenses while the litigation proceeded. Four companies passed bylaws decreeing that only stockholders owning or controlling more than 3% of the company's stock are allowed to sue. Other companies have passed bylaws that prevent plaintiffs' counsel from being paid for creating a "common fund" or "common benefit" shared by all stockholders.

So while fee shifting bylaws appear to be dead, corporate boards have been empowered to pass other bylaws restricting stockholder litigation, each of which will be evaluated on a case-by-case basis. Each of these bylaws presents unique challenges and disincentives for stockholders to exercise their rights. Institutional investors will need to be vigilant in protecting the rights of stockholders against each of these new threats.

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[3] *Boilermakers Local 154 Retirement Fund, et. al. v. Chevron Corp., et. al.*, 73 A.3d 934 (Del. Ch. 2013).

Merck Vioxx Securities Litigation: Trial Approaches As the Court Finds Defendants' Opinion Statements Interpreting Scientific Data Actionable Under *Omnicare* *(continued from page 5)*

as compared to naproxen (commonly branded as Aleve) in the pivotal VIGOR clinical trial of the drug reflected the supposedly "cardio-protective" properties of naproxen, rather than any increased cardiovascular risk for Vioxx; (ii) the purported lack of evidence indicating that Vioxx posed heightened cardiovascular risks; and (iii) the purported cardiovascular safety of Vioxx, as demonstrated by available data. For example, the court found that the plaintiffs identified evidence that defendants were aware of the lack of scientific support for the naproxen hypothesis, disregarded contrary information, and manipulated data to defend the cardiovascular safety of Vioxx.

In deciding the defendants' motions, Judge Chesler also interpreted the Supreme Court's recent decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, in which the Court outlined the circumstances under which an otherwise immaterial statement of opinion may become an actionable misrepresentation under the federal securities laws. Specifically, *Omnicare* held that opinions may be actionable where a defendant: (i) subjectively disbelieves the opinion expressed; (ii) lacks a reasonable basis for the purported belief; or (iii) expresses an opinion that implicitly or explicitly conveys facts that are contradicted by existing evidence. Following a discussion of the Supreme Court's *Omnicare* decision, Judge Chesler found that the plaintiffs had presented ample evidence to create a genuine issue of fact for the jury as to the defendants' state of mind in expressing their belief in the naproxen hypothesis. Moreover, the court held that even if defendants sincerely believed, as they contended, that the "likeliest" explanation for the cardiovascular results observed in the VIGOR trial was that naproxen was cardio-protective (and not that Vioxx posed an increased cardiovascular risk), a reasonable investor could understand such an opinion to convey certain facts about the basis for defendants' belief. These facts, however, "did not align" with the facts contemporaneously known or recklessly disregarded by defendants, including: (i) internal Merck discussions that revealed a different assessment of the VIGOR data than that expressed publicly; (ii) contrary advice from consultants as to the proper interpretation of the VIGOR data; (iii) data discrediting the notion that naproxen had cardio-protective properties (and, therefore, undermining the naproxen hypothesis); and (iv) the FDA's warning to Merck about its public espousal of the naproxen hypothesis.

In determining that defendants' opinion statements may serve as the basis for plaintiffs' securities fraud claims, the court also implicitly resolved a question arguably left open under *Omnicare* — whether proof of a defendant's subjective belief in the opinion expressed precludes a finding of scienter even if the opinion lacks a reasonable basis or conveys facts that are contradicted by existing evidence. As Judge Chesler observed, *Omnicare* concerned alleged violations of Section 11 of the Securities Act of 1933, which do not require proof of intent to defraud (scienter), whereas the plaintiffs' claims under Section 10(b) of the Securities Exchange Act of 1934 at issue in *Merck do* require such proof. Thus, the defendants argued that although proof undermining their belief in an expressed opinion may render such an opinion misleading under Section 11, it does not relieve a plaintiffs' burden of proving scienter and, in fact, precludes such a finding for Section 10(b) claims. The court rejected this argument as irrelevant to the summary judgment motion at hand given the "mixed" evidence in the record bearing on defendants' scienter, which created a factual dispute to be resolved by a jury. Moreover, in holding that there was evidence in the record that would allow a reasonable jury to find that defendants knowingly or recklessly deceived investors when stating their belief in the naproxen hypothesis, the court effectively adopted the view that scienter may be established for an opinion statement where the factual premises underlying the opinion are contradicted by facts known to or recklessly disregarded by the defendants, notwithstanding a defendant's claimed belief in the opinion expressed.

While largely denying the defendants' motion, the court did grant summary judgment with respect to certain statements made prior to the release of the VIGOR clinical trial results based on the lack of evidence that defendants knowingly or recklessly misrepresented the cardiovascular risks associated with Vioxx at that time, viewing the VIGOR trial as the event that first revealed such risks to the defendants.

Nevertheless, the court refused the defendants' request that it grant summary judgment based on the purported lack of evidence supporting plaintiffs' proposed damages model. The plaintiffs' expert quantified the artificial inflation in Merck's stock price attributable to the alleged misstatements by tying the drop in Merck's stock price when the truth about Vioxx's cardiovascular risks became known publicly, to the impact that such a disclosure would have had on Vioxx sales had it been made earlier. Under the plaintiff's model, the artificially inflated price reflected the market's view that Vioxx was 100% commercially viable and the uninflated price reflected a complete loss of sales. The defendants argued this model was unsupported by the record because it required the jury to conclude, e.g., that

Vioxx should never have been marketed which, defendants contended, the jury could not reasonably find based on the factual record. Indeed, the court itself found that the evidence did not demonstrate that defendants knew of Vioxx's true cardiovascular risks until the VIGOR study concluded — which was almost a year after Merck commercially launched the drug. While acknowledging that a finding that Viox should never have come to market no longer fit the facts of the case given the court's dismissal of the pre-VIGOR statements, the court found that the plaintiffs' expert's model also provided for "other scenarios" in which Vioxx would have remained on the market, but with lower sales (e.g., had there been a black-box warning on the product label). This "flexible" approach, the court found, precluded it from granting summary judgment on this issue. A trial date has not yet been set.

The Tenth Annual Rights and Responsibilities of Institutional Investors Conference

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at Ownership Capital as moderator. Panelists included Christopher Ailman, Chief Investment Officer at CalSTRS, Marcel Andringa, Chief Investment Officer for PME, Colin Mayer, Peter Moores Professor of Management Studies at Said Business School at the University of Oxford, and Marc Walker, the Global Chief Investment Officer for Unilever Pension Funds. The panelists discussed the differences between short-term speculator activists and long-term activists and the need to get more people to think long-term. They also made the case for investors investing in a smaller concentration of companies because there would be a decreased risk when investors knew more about the companies they were investing in and were able to adequately engage regarding ESG.

Rounding out the morning's presentations were two workshops that delegates were able to choose between: one on whether investors have a fiduciary duty to withhold investments from corporations who create elaborate structures in order to avoid taxes ("Workshop A") and the other on integrating SRI and ESG into the engagement process ("Workshop B"). Workshop A was led by Anatoli van der Krans, Senior Advisor on Responsible Investment and Governance from MN and Francis Weyzig, Policy Advisor on Tax Justice and Economic Inequality for Oxfam Novib. Workshop B was moderated by Frank Curtiss, Head of Corporate Governance at RPMI Railpen Investments and featured as discussion leaders Claudia Kruse, Managing Director of Governance and Sustainability at APG, Martin Steindl, Senior Corporate Governance Officer at FMO, and Rasmus Juhl Pedersen, Head of Responsible Investment for PBU. Both workshops included lively and constructive participation from delegates in the audience.

After lunch, Jan Erik Saugestad, Chief Investment Officer for Storebrand Asset Management, presented a case study on the growing market for green bonds and the need for good governance. Mr. Saugestad discussed Storebrand's approach (Storebrand has been one of the leading green bond investors in Europe) and the importance of good governance practices including independently verifying projects and then later looking at the impact of green bond investments.

Lee Rudy, a partner at Kessler Topaz Meltzer & Check, LLP, presented a case study on the recent decision by the Delaware Supreme Court in the *ATP Tour Inc. v. Deutscher Tennis Bund* case and the implications that decision has on shareholder rights. Mr. Rudy outlined the current debate in the Delaware legislature and alerted delegates to the risks that fee-shifting and other corporate bylaws present to shareholder rights.

Following Mr. Rudy's presentation, Darren Check, a partner at Kessler Topaz Meltzer & Check, LLP moderated a panel with panelists Jan Matej, General Counsel at AP1, Jack Ehnes, Chief Executive Officer at CalSTRS, Anatoli van der Krans, Senior Advisor for Responsible Investment & Governance at MN, and Anders Månsson, Partner at Setterwalls. The panel topic was "Combatting Increased Shareholder Constraints" and featured a lively discussion about the Delaware legislative proposal on fee-shifting bylaws, forced arbitration, proposals to change proxy access, and access to annual meetings and boards of directors.

Moderator Bridget Uku, Investment Manager at Local Government Pension Fund (UK) and panelists Jillian Reid, Prinicpal of Responsible Investment — EMEA for Mercer, R. Paul Edmonds, Chief Legal and Governance Officer for the Ontario Pension Board, Christina Holms, Lawyer at PKA, Catherine Howarth, Chief Executive Officer for ShareAction, and Jan Erik Saugestad, Chief Investment Officer for Storebrand Asset Management presented on the topic "From Engagement to Divestment: What Role

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Calendar of Upcoming Events

National Association of Public Pension Attorneys 2015 Legal Education Conference

June 23 – 26 , 2015

Hilton Austin Hotel — Austin, TX

Florida Public Pension Trustees Association 31st Annual Conference

June 28 – July 1 , 2015

Boca Raton Resort & Club — Boca Raton, FL

Pennsylvania State Association of County Controllers Annual Conference

July 19 – 23 , 2015

Crowne Plaza Reading Hotel — Reading, PA

County Commissioners Association of Pennsylvania Annual Conference and Trade Show

August 2 – 5 , 2015

Omni William Penn Hotel — Pittsburgh, PA

Georgia Association of Public Pension Trustees (GAPPT) Annual Conference

September 22 – 24 , 2015

Hyatt Regency Savannah — Savannah, GA

Florida Public Pensions Trustees Association (FPPTA) Fall Trustees School

October 4 – 7 , 2015

Naples Grande — Naples, FL

International Foundation of Employee Benefit Plans 61st U.S. Annual Conference

November 8 – 11 , 2015

Hawaii Convention Center — Honolulu, HI

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Should Outside Consituents Play?" The panel presentation discussed the pressure that investors sometimes face, from both members/constituents and outside groups like the media, to divest of shares related to fossil fuels or tobacco. The panel highlighted how funds could incorporate their members' views into investment decisions and take actions like opening up proxy access for fund members in order to participate in board elections and annual general meetings.

Sasja Beslik, Head of Responsible Investment and Governance for Nordea Investment Funds, offered the final presentation before the keynote address. Mr. Beslik's presentation was a call to action and group discussion concerning how investors can reorient their thinking and strategic messaging.

To conclude the day, Arnold Schwarzenegger gave a keynote address followed by an interview with Kessler Topaz Meltzer & Check, LLP partner Darren Check. Mr. Schwarzenegger opened his address by sharing with the delegates his recipe for success: twenty two inch biceps, the ability to wrestle predators, and the ability to travel back in time to save humanity. While Mr. Schwarzenegger's address started out light-hearted and humorous, it took on a more serious note when he began to discuss how climate change is the issue of our time and how in order to get people and governments to take action, the problem needs to be presented holistically with emphasis on how climate change affects not only the climate but also health, the economy, and security. Mr. Schwarzenegger highlighted the actions that investors can take to combat climate change such as green investments and investing in renewable energy.

Overall the conference was a resounding success and in the words of Arnold Schwarzenegger in *The Terminator*, "[RRII will] be back!" We look forward to having you join us next year for the eleventh annual RRII in Amsterdam on March 10, 2016.

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