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

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Court Approves Settlements with Ex-Lehman Brothers Officers, Directors and with the Underwriters of Certain Lehman Offerings

Richard A. Russo, Jr., Esquire

In May of 2012, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York approved over $516 million in settlements related to the cataclysmic 2008 collapse of Lehman Brothers Holdings, Inc. ("Lehman"). The settlements were the culmination of three years of litigation, which included extensive investigation into the claims, the filing of three detailed consolidated complaints, two rounds of motions to dismiss by multiple separate groups of defendants, and protracted settlement negotiations under the supervision of the Hon. Daniel J. Weinstein (Ret.) of JAMS, a highly-experienced mediator.

Kessler Topaz Meltzer & Check, LLP served as the Court-appointed Lead Counsel on behalf of Alameda County Employees' Retirement Association, Government of Guam Retirement Fund, Northern Ireland Local Government Officers' Superannuation

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Kessler Topaz Forces Repeal of Forum Selection Bylaws and Proposals, Continues Additional Forum Selection Litigation

Michael C. Wagner, Esquire and James H. Miller, Esquire

As reported in our Winter 2012 *Bulletin,*[1] in February 2012 Kessler Topaz commenced litigation challenging forum selection bylaws adopted by twelve companies. In April and May 2012, Kessler Topaz filed additional lawsuits against corporate directors of four other companies that had included in their annual proxy statements proposals asking stockholders to adopt forum selection provisions in their certificates of incorporation and bylaws. Most of these sixteen cases produced immediate results for stockholders: Thirteen of these companies promptly repealed their forum selection bylaws or withdrew their stockholder proposals in their entirety. One company failed to obtain the requisite stockholder vote for approval of its forum selection provision after disclosing to stockholders additional information sought by

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[1] For additional information regarding the numerous ways in which forum selection provisions violate stockholder rights and Delaware law, please see the Kessler Topaz Winter 2012 *Bulletin*, available at http://www.ktmc.com/pdf/newsletter_winter_2012.pdf.

Kessler Topaz Obtains $150 Million and $280 Million Settlements in Proprietary Securities Lending Matters

Samantha E. Jones, Esquire and Shannon O. Braden, Esquire

After years of hard-fought litigation, Kessler Topaz recently achieved outstanding settlement results in two class actions involving securities lending, securing remarkable recoveries for members of the respective classes.

The $150 million settlement of the first matter — *Board of Trustees of the AFTRA Retirement Fund v. JPMorgan Bank, N.A.*, No. 09-cv-686, Dkt. No. 190 (S.D.N.Y. June 5, 2012) ("JPMorgan") — was finally approved by the Honorable Shira A. Scheindlin of the United States District Court for the Southern District of New York on June 5, 2012. One month later, the Honorable Judge Kimberly E. West granted preliminary approval of a $280 million settlement in *CompSource Oklahoma, Board of Trustees of the Electrical Workers Local No. 26 pension Fund v. BNY Mellon, N.A.*, No. 08-cv-469 (E.D Okla.) ("BNY Mellon"). The fairness hearing, during which the court will consider whether the settlement should be finally approved, is scheduled for October 25, 2012.

In both actions, Kessler Topaz recovered substantial losses suffered by securities lending clients as a result of defendants' imprudent decisions relating to investment in medium-term notes ("MTNs") issued by Sigma Finance, Inc. ("Sigma").

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Regulation S-K and the New Wave of Securities Act Liability

Matthew L. Mustokoff, Esquire

The federal securities laws have been interpreted by the courts to impose a duty to disclose all material non-public information regarding a particular subject once a company elects to speak on that subject. Thus, when there is an incomplete or inaccurate disclosure, the affirmative duty to speak completely and accurately arises. What is less clear, however, is the scope of the duty to disclose when the company has been completely silent on the subject.

In the past fifteen months, the U.S. Court of Appeals for the Second Circuit has issued two decisions recognizing a 1933 Securities Act claim for failing to disclose "known trends or uncertainties" that are reasonably likely to have an effect on sales, revenues or income, in violation of Item 303 of SEC Regulation S-K. Item 303 casts a wide net with respect to the range of so-called "soft" information that must be disclosed by a company's management. As these recent Second Circuit cases demonstrate, when invoked as the basis for a Securities Act claim, Reg S-K becomes a potent weapon because plaintiffs have the additional advantage of not having to prove scienter, reliance or loss causation — all elements of a Section 10(b) fraud claim under the 1934 Exchange Act but not elements of a Section 11 or 12 claim under the '33 Act.

Item 303 of Regulation S-K mandates the disclosure of "any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way," as well as "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. §§ 229.303(a)(1) and (a)(3)(ii)). At least three federal circuit courts have held that violations of Reg S-K's disclosure provisions are actionable under the Securities Act. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1296 (9th Cir. 1998) ("Allegations which sufficiently state a claim under Item 303 also state a claim under section 11 [of the Securities Act]."); *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 716 (2d Cir. 2011); *J&R Marketing v. GMC*, 549 F.3d 384, 392 (6th Cir. 2008). In addition, at least one circuit court, the Second Circuit, has held that Reg S-K equally gives rise to a Section 10(b) claim under the Exchange Act. *See In re Scholastic Corp. Securities Litigation*, 252 F.3d 63, 70, 74 (2d Cir. 2001) (reversing dismissal of Section 10(b) claim where complaint adequately alleged that defendants failed to disclose a "known trend" under Item 303 on Form 10–Q; "We conclude therefore that the facts alleged are sufficiently detailed to allow the plaintiffs to present proofs that the

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Kessler Topaz Secures $49 Million Settlement for Delphi Financial Group Shareholders

Michael C. Wagner, Esquire and J. Daniel Albert, Esquire

Kessler Topaz, serving as Co-Lead Counsel for the public shareholders of Delphi Financial Group, Inc. ("Delphi" or the "Company"), recently obtained a significant settlement in litigation relating to the acquisition of Delphi by Tokio Marine Holdings, Inc. ("Tokio Marine"), creating a settlement fund of $49 million for Delphi's public stockholders.

Delphi, an insurance company specializing in employee absence insurance coverage for employers, had two classes of common stock: Class A common stock, which was publicly-traded on the New York Stock Exchange; and Class B common stock, which was solely owned by the Company's founder, Chairman of the Board and CEO, Robert Rosenkranz ("Rosenkranz"). By virtue of Rosenkranz's ownership of Delphi's Class B stock, Rosenkranz controlled 49.9% of the Company's total voting control.

On December 21, 2011, Delphi and Tokio Marine jointly announced that they had reached an agreement under which Tokio Marine would acquire Delphi for $44.875 per Class A share and $53.875 per Class B share, including a special one-time dividend of $1.00 per share upon closing of the acquisition (the "Merger"). While the $44.875 promised to the Class A shareholders represented a 72.5% premium to the Company's December 20, 2011 closing stock price, Rosenkranz had negotiated for himself a $55 million premium on his Class B stock, resulting in merger consideration flowing only to him that was not shared with the Company's Class A shareholders.

Yet Delphi's Certificate of Incorporation (the "Certificate") prohibited the payment of disparate consideration

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Saying a Lot Without Saying Anything at All: The SEC Offers Options But No Clear Path on *Morrison*

Naumon A. Amjed, Esquire and Ryan T. Degnan, Esquire

In the wake of the Supreme Court's ruling in *Morrison v. National Australia Bank Ltd.*, 130 S.Ct. 2869 (2010) ("*Morrison*"), which held that the Securities Exchange Act of 1934 (the "Exchange Act") applied only to transactions on domestic exchanges and domestic transactions in other securities, Congress instructed the Securities and Exchange Commission (the "SEC") to solicit public comment and study whether *Morrison*'s impact on private rights of action should be reversed. The results of the SEC's findings were recently published as the *Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934*. This article discusses the SEC's conclusions regarding *Morrison*'s limitation on the private right of action under Section 10(b) of the Exchange Act.[1] We also briefly discuss the findings the SEC provided Congress as to potential alternatives to the current state of the law.

I. Morrison v. National Australia Bank

In *Morrison*, the Supreme Court rejected the prior standard for assessing the extraterritorial reach of the federal securities laws (the conduct and effects tests)[2] in favor of a transactional test. Under the transactional test, the Court limited the reach of Section 10(b) to fraud involving "transactions in securities listed on domestic exchanges, and domestic transactions in other securities." *Morrison*, 130 S.Ct. at 2874. While concurring with *Morrison*'s conclusion that Section 10(b) did not extend to the transaction before the court, Justice Stevens

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[1] Section 10(b) of the Exchange Act provides that: It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange … [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[2] Prior to *Morrison*, decades of case law held that Section 10(b) conferred a private right of action if defendants' misconduct emanated from the United States or the effects of non-domestic conduct affected persons in the United States.

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Kessler Topaz. Only two companies have decided to stand behind their forum selection provisions, and Kessler Topaz is actively litigating those cases.

Litigation Against Companies That Adopted Forum Selection Bylaw Provisions

Beginning on February 6, 2012, Kessler Topaz commenced litigation against twelve companies and their boards of directors who, through the unilateral adoption of forum selection bylaw provisions, sought to force their stockholders to bring essentially all corporate litigation in the Delaware Court of Chancery.[2] Kessler Topaz alleged that those companies' corporate directors breached their fiduciary duties to stockholders.

The first thing that ten of those companies did in response to Kessler Topaz's complaints was to promptly repeal their forum selection bylaws.[3] With total victory achieved, the lawsuits against those ten companies were dismissed as moot.

Only two companies — Chevron and FedEx — have decided to defend their forum bylaws. The Chevron board of directors tried to ameliorate the harm caused by its bylaw by amending — but not withdrawing — that company's forum selection bylaw. Yet, Kessler Topaz does not believe that the amendment comports with the proper exercise of the directors' fiduciary duties. FedEx has neither amended nor withdrawn its forum selection bylaw. Accordingly, Kessler Topaz continues to litigate its actions against both Chevron and FedEx in an effort to invalidate both companies' forum selection bylaw provisions.[4]

Litigation Against Companies That Sought Stockholder Approval of Forum Selection Provisions

In litigation commenced in April and May 2012 litigation against boards of directors of four companies that sought shareholder approval at their annual shareholder meetings for forum selection provisions,[5] Kessler Topaz achieved prevailed across the board. Kessler Topaz alleged that the proxy statements containing the director-sponsored proposals were materially false and misleading because they failed to disclose, among other things, the actual effect that the proposed forum selection provisions would have on stockholder rights and the directors' actual motivations for asking stockholders to approve the forum selection provisions. These false and misleading proxy statements prevented stockholders from making a fully informed decision whether to approve or reject the boards' proposals. Accordingly, Kessler Topaz sought to enjoin the companies' annual meetings until the false and misleading proxy statements were corrected.[6]

Once again, these lawsuits produced immediate results for stockholders. Rather than contest Kessler Topaz's claims or disclose to stockholders the truth about forum selection provisions, three companies immediately withdrew their proposals after litigation was commenced against them. The fourth company, Cameron, amended its proxy statement in response to our complaint to disclose additional information concerning the proposed forum selection provision. Having disclosed additional information about the proposed forum selection provision, Cameron's stockholders rejected the proposed forum selection provision.

The Future of Forum Selection Provisions

The issue of forum selection provisions in bylaws and certificates of incorporation has evolved into one of the hottest issues in Delaware corporate law. As well as litigating the cases concerning FedEx and Chevron, Kessler Topaz is continuing to monitor developments with regard to forum selection provisions in connection with its ongoing effort to protect stockholder rights.

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[2] These companies are: Air Products and Chemicals, Inc.; AutoNation, Inc.; Chevron Corporation ("Chevron"), Curtiss-Wright Corporation; Danaher Corporation; FedEx Corporation ("FedEx"), Franklin Resources, Inc.; Jack in the Box, Inc.; Navistar International Corporation; Priceline.com Incorporated; SPX Corporation; and Superior Energy Services, Inc.

[3] The companies that repealed their forum selection bylaws are: Air Products and Chemicals, Inc.; AutoNation, Inc.; Curtiss-Wright Corporation; Danaher Corporation; Franklin Resources, Inc.; Jack in the Box, Inc.; Navistar International Corporation; Priceline.com Incorporated; SPX Corporation; and Superior Energy Services, Inc. Chevron Corporation amended its forum selection bylaw.

[4] *Boilermakers Local 154 Retirement Fund and Key West Police & Fire Pension Fund v. Chevron Corporation*, C.A. No. 7220-CS (Del. Ch.); *ICLUB Investment Partnership v. FedEx Corporation*, C.A. No. 7238-CS (Del. Ch.).

[5] These companies are: Calix, Inc; Cameron International Corporation ("Cameron"); Fairchild Semiconductor International, Inc.; and Hittite Microwave Corporation.

[6] Although Kessler Topaz believed that the proposed forum selection provisions would likely be unlawful for many of the reasons stated above, the validity of the provisions was not challenged in the litigation because the provisions had not yet been adopted.

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Committee, City of Edinburgh Council as Administering Authority of the Lothian Pension Fund, and Operating Engineers Local 3 Trust Fund (collectively, "Lead Plaintiffs").

The Allegations

Among other allegations, Lead Plaintiffs alleged that Lehman employed undisclosed repurchase and resale ("repo") transactions, known as "Repo 105" and "Repo 108" transactions (together, "Repo 105"), to temporarily remove tens of billions of dollars from its balance sheet at the end of financial reporting periods, usually for a period of seven to ten days.

As alleged in the Complaint, the Repo 105 transactions lacked any economic substance. While Lehman affirmatively represented that it engaged in ordinary repo transactions and recorded these repos as short-term financings, *i.e.*, borrowings, Lehman failed to disclose that it (i) simultaneously engaged in Repo 105 transactions involving tens of billions of dollars in assets; (ii) was recording the Repo 105 transactions as if the underlying assets had been permanently sold and removed from the books; and (iii) had an obligation to repurchase these assets just days after the end of each quarter. This undisclosed practice had the effect of artificially and temporarily reducing Lehman's net leverage ratio each quarter during the Class Period — an important metric to securities analysts, credit agencies and investors — rendering Lehman's statements concerning its net leverage and financial condition materially false and misleading when made and in violation of GAAP.

At bottom, Lehman's Repo 105 transactions lacked economic substance, and Lehman's reported de-leveraging failed to reflect its true financial condition. The quarterly cycle of temporarily "removing" as much as $50 billion of assets off its balance sheet for only days at quarter-end created the false impression that Lehman had reduced its balance sheet exposure and net leverage, and fostered the appearance of increased liquidity, thereby making Lehman's financial health appear significantly more sound than it actually was.

In 2009, the federal bankruptcy court appointed Anton Valukas, a prominent Chicago lawyer and former United States attorney, to investigate the factors leading to Lehman's bankruptcy. According to a 2,200-page report that Mr. Valukas published, "[Lehman's] balance sheet manipulation was intentional, for deceptive appearances, had a material impact on Lehman's net leverage ratio, and, because Lehman did not disclose the accounting treatment of these transactions, rendered Lehman's Forms 10-K and 10-Q deceptive and misleading." Mr. Valukas reported that Matthew Lee, a former Lehman Senior Vice President, Finance Division, in charge of Global Balance Sheet and Legal Entity Accounting through at least June 2008, described how Lehman would "sell" assets through Repo 105 transactions approximately four or five days before the close of a quarter and then repurchase them approximately four or five days after the beginning of the next quarter in order to "reverse engineer" its net leverage ratio for its publicly-filed financial statements.

Lead Plaintiffs brought claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 against certain of Lehman's officers and directors — including its former CEO Richard Fuld, along with Lehman's outside auditor, Ernst & Young ("E&Y"), and various Wall Street banks that underwrote approximately $3.3 billion in Lehman debt and preferred share offerings in 2007-08 (the "Underwriter Defendants"). Because Lehman had filed for bankruptcy, all litigation against it was automatically stayed under the Bankruptcy Act.

On July 27, 2011, Judge Kaplan denied, in large part, Defendants' motions to dismiss Lead Plaintiffs' claims. In allowing the bulk of Lead Plaintiffs' claims to proceed, Judge Kaplan held, among other things, that Lehman's "repetitive, temporary, and undisclosed reduction of net leverage at the end of each quarter is sufficient to make out a claim that the Offering Materials and oral statements about net leverage violated the overriding GAAP requirement to present the financial condition of the company accurately." Judge Kaplan further opined that "the misleading picture that Lehman portrayed played a material part in keeping its stock higher during the class period than it otherwise would have been and, in consequence that some part of the losses the plaintiffs suffered was attributable to the alleged fraud."

The $426.2 Million Underwriter Settlement

On May 4, 2012, Judge Kaplan granted final approval of a $426.2 million settlement with the Underwriter Defendants (the "Underwriter Settlement"). The Underwriter Settlement was the product of mediation and over six months of negotiation. Participants in the settlement include over 40 offering underwriters. Standing alone, the Underwriter Settlement represents one of the largest recoveries in any case arising out of the 2008 financial crisis, and amounts to 13% of the approximately $3.3 billion in Lehman securities that the Underwriter Defendants underwrote.

Not only does the 13% recovery significantly exceed the median recovery in similar securities class actions against underwriters, but the Underwriter Defendants had asserted throughout the litigation, and were expected to continue to

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expressed concern that the transactional test "withdraw[s] the statute's application from cases in which there is *both* substantial wrongful conduct that occurred in the United States *and* a substantial injurious effect on United States markets and citizens." *Id*. at 2895 (emphasis original). Justice Stevens explained that, under the new transactional test, "an American investor who buys shares in a company listed only on an overseas exchange" would be barred from recovery even when "[t]hat company has a major American subsidiary with executives based in New York City; and it was in New York City that the executives masterminded and implemented a massive deception which artificially inflated the stock price — and which will, upon its disclosure, cause the price to plummet." *Id*. As such, Justice Stevens concluded that the transactional test "pays short shrift to the United States' interest in remedying frauds that transpire on American soil or harm American citizens." *Id*.

In response to *Morrison*, Congress added Section 929P(b) to the Dodd-Frank Act, which reinstated the conduct and effects tests for civil actions brought by the SEC and criminal actions brought by the Department of Justice (the "DOJ"). More specifically, the Dodd-Frank Act allows the SEC and DOJ to bring enforcement actions for securities fraud if the matter involves: "(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States." While the Dodd-Frank Act did not reinstate a similar private right of action, Section 929Y of the Dodd-Frank Act required the SEC to solicit public comment and conduct a study in order to determine whether *Morrison*'s ruling should be amended for private litigants. Specifically, Section 929Y asks the SEC to study if:

(1) The scope of such a private right of action, including whether it should extend to all private actors or whether it should be more limited to extend just to institutional investors or otherwise;

(2) What implications such a private right of action would have on international comity;

(3) The economic costs and benefits of extending a private right of action for transnational securities frauds; and

(4) Whether a narrower extraterritorial standard should be adopted.

II. The SEC Study on the Cross-Border Scope of the Private Right of Action Under Section 10(b) of the Securities Exchange Act of 1934

In response to Section 929Y's mandate, the SEC released its 106 page report on April 11, 2012.[3] The report offers a description of the law before and after *Morrison*, responses to the Commission's request for public comment, as well as the SEC's recommendations. The SEC received seventy-two comment letters from institutional investors, law firms and accounting firms, of which forty-four supported reenactment of some form of the conduct and effects tests, while twenty-three supported keeping the *Morrison* transactional test. The SEC weighed public opinion against factors such as economic consequences and international comity, and formulated a number of possible options for Congress including various reinstatements of the conduct and effects tests, potential modifications of the *Morrison* transactional test, as well as the option of doing nothing at all.

a. Reinstating a Variation of the Conduct and Effects Tests

As an initial matter, the SEC maintained the position it presented in its amicus brief in *Morrison* — which is to preserve some form of the conduct and effects tests. In the report, the SEC stated that one option would be to narrow the conduct test's scope to require the plaintiff to demonstrate that her injury resulted directly from conduct within the United States. This "direct conduct" test would limit the cross-border private right of action by forcing the plaintiff to link the grievance with clear domestic conduct. According to the SEC, this requirement would ensure that private cases under Section 10(b) carry domestic significance and are not a waste of judicial resources. Moreover, the "direct conduct" requirement "could serve as a filter to exclude claims that have a closer connection to another jurisdiction" and would allow the appropriate nation to step in and adjudicate based on their sovereign securities policies. However, even with a "direct conduct" requirement, the high cost of litigation remains and imposes burdens on U.S. courts and foreign corporations. Additionally, the "direct conduct" adjustment fails to resolve the issue of a foreign nation demanding that Section 10(b) private right of action cases not involve securities on its exchanges.

A second proposed variation of the conduct and effects tests would extend Section 10(b)'s private right of action to

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[3] The full report is available at http://www.sec.gov/news/studies/2012/929y-study-cross-border-private-rights.pdf.

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assert through summary judgment and trial, that myriad factors other than the alleged untrue statements and omissions caused the decline in the value of the bonds and preferred shares subject to the settlement. In other words, the Underwriter Defendants were expected to argue that damages were zero or substantially less than $3.3 billion, in which case the $426.2 million represents a recovery substantially greater than 13% of class members' damages.

During the April 12, 2012 final approval hearing, Judge Kaplan applauded Lead Plaintiffs and Lead Counsel for obtaining "a nice result in the underwriter case."

The $90 Million D&O Settlement

On May 24, 2012, Judge Kaplan approved an additional $90 million settlement with certain of Lehman's former officers and directors (the "D&O Settlement"), amounting to the vast majority of the remaining D&O insurance proceeds. In approving the settlement, Judge Kaplan noted that "if the Court did not approve the D&O Settlement, the $90 million in Lehman insurance money currently on offer quickly would be depleted or consumed entirely [in defense costs and through competing claims]. This would leave only the former directors and officers' own resources in the event the class were successful at trial."

To ensure that a recovery of $90 million from the D&O insurance proceeds was the best option to maximize the benefit to the class, Lead Plaintiffs conditioned the D&O Settlement on the outcome of an independent assessment of the officer defendants' combined liquid net worth. The parties retained a highly-respected neutral and former United States District Judge for the Southern District of New York, the Honorable John S. Martin (Ret.), to conduct this financial analysis. After obtaining a plethora of financial documentation from the officer defendants, Judge Martin determined that their combined liquid net worth fell substantially below $100 million. In light of Judge Martin's finding and after considering the inherent risks associated with bringing a case to trial, Lead Plaintiffs accepted a certain recovery of $90 million on behalf of the D&O Settlement class.

Before approving the D&O Settlement, Judge Kaplan asked the parties to provide him with additional information regarding the combined net worth of the officer defendants. In response, Lead Plaintiffs filed a declaration with the Court detailing the results of their own investigation into the net worth of Lehman's officers. On May 3, 2012, Judge Kaplan issued an order lauding Lead Counsel as "able and distinguished," and expressing gratitude for their efforts in providing him with this additional information. Prior to signing off on the D&O Settlement, however, Judge Kaplan requested the opportunity to conduct his own independent review of the documents submitted to Judge Martin in order to determine "whether and to what extent these defendants could withstand a judgment in excess of the insurance money."

After conducting his own analysis of the officer defendants' liquid and non-liquid assets, Judge Kaplan approved the $90 million D&O Settlement on May 24, 2012. In finding that the D&O Settlement was fair, reasonable and adequate, Judge Kaplan again applauded Lead Counsel's efforts on behalf of the class, noting that Lead Plaintiffs were represented "by experienced and highly competent counsel," and recognizing that "the settlement was reached only after extensive arms-length negotiations."

The combined $516.2 million settlement is one of the most significant recoveries to arise out of the recent financial crisis, and represents a substantial victory for Lehman shareholders and investors who saw their investments in the company evaporate in 2008. Lead Plaintiffs continue to pursue their claims against E&Y in the Southern District of New York. The case is captioned *In re Lehman Brothers Equity/Debt Securities Litigation*, 08-CV-5523 (LAK).

Institutional Investor FORUMS

KESSLER TOPAZ MELTZER CHECK LLP

4TH ANNUAL

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Kessler Topaz Obtains $150 Million and $280 Million Settlements in Proprietary Securities Lending Matters *(continued from page 2)*

Board of Trustees of the AFTRA Retirement Fund, et al. v. JPMorgan Bank, N.A.

Beginning in January 2009, Kessler Topaz separately filed suits against JPMorgan Bank, N.A. ("JPMorgan") on behalf of the Board of Trustees of the AFTRA Retirement Fund ("AFTRA"), an ERISA-governed employee benefit plan, and the Board of Trustees of the Imperial County (California) Employees' Retirement System ("ICERS"), a non-ERISA governmental plan. Both plans participated in JPMorgan's securities lending program and suffered significant losses as a result of JPMorgan's multiple breaches of fiduciary duties.[1]

The complaints collectively alleged that each of the named plaintiffs and members of the proposed class entered into materially similar securities lending agreement with JPMorgan, their custodial bank. Pursuant to such agreements, JPMorgan loaned the plans' securities to third-party borrowers in return for cash collateral which was then reinvested. Securities lending clients received a *pro rata* share of all revenue earned by the investment of cash collateral, less expenses and fees owed to JPMorgan for administering the program and less the "rebate" (cash collateral plus a negotiated rate of interest) paid to the borrowers of the securities. In its fiduciary role as discretionary investment manager, JPMorgan was expected to invest the cash collateral in safe, secure and liquid investments during the term of the securities loan.

In dereliction of its fiduciary duties, in June 2007, JPMorgan imprudently invested half a billion dollars in Sigma MTNs. Sigma was a structured investment vehicle ("SIV"), organized for the sole purpose of issuing debt securities (in the form of commercial paper, medium-term notes and capital notes) and then investing those funds in longer-term and higher-yielding assets. The Sigma MTNs were secured only by a "floating lien" on Sigma's assets, which was subject to subordination by the lien interests of Sigma's other creditors, including repo counterparties.

Shortly after JPMorgan purchased the Sigma MTNs, analysts following SIVs warned that the lack of liquidity in the credit market and sharp declines in the market value of assets backing many SIVs threatened their ongoing viability. Additionally, JPMorgan insiders both publicly and privately warned of the collapse of the entire SIV sector, including Sigma. Despite these warnings, however, JPMorgan continued to hold the deteriorating Sigma MTNs.

Ultimately, the analysts' predictions proved true when, in late September 2008, Sigma's creditors seized over $25 billion of its approximately $27 billion of assets, leaving roughly $1.9 billion as security for approximately $6.2 billion of outstanding MTNs and other secured debt. The Sigma MTNs that JPMorgan continued to hold on behalf of its securities lending clients were rendered essentially worthless. By October 6, 2008, Sigma had entered receivership.

The litigation was hard-fought. Over the course of discovery, Kessler Topaz exchanged numerous discovery requests; produced more than 111,173 pages of documents on behalf of plaintiffs; reviewed over 685,000 pages of documents produced by JPMorgan; served numerous third-party subpoenas and reviewed documents produced in response thereto; took a total of 23 fact witness depositions; defended five fact witness depositions; retained six experts; served a total of nine expert reports; reviewed an additional 11 expert reports issued by Defendant's experts; took seven expert depositions; and defended an additional six expert depositions. Kessler Topaz also filed a Motion for Class Certification, which the Court granted in its entirety on August 4, 2010, appointing Kessler Topaz as Lead Class Counsel. The parties also engaged in extensive motion practice throughout the course of the litigation, and diligently prepared for trial — which was scheduled to commence on February 6, 2012.

On January 25, 2012, following multiple conversations with a mediator, the parties reached an agreement in principle to settle all claims in the action. On March 28, 2012, the parties fully executed the Stipulation of Settlement providing that JPMorgan will pay $150,000,000 to the class to be allocated pursuant to a court-approved plan of allocation; in exchange, plaintiffs and the class agreed to dismiss their complaints and all related claims.

As stated previously, the court granted preliminary approval of the settlement on March 30, 2012. Kessler Topaz mailed notice of the settlement to all class members, and not one class member objected to the proposed settlement, proposed plan of allocation, or plaintiffs' counsel's request for an award of attorneys' fees, reimbursement of expenses and case contribution awards to named plaintiffs. Further, no class member opted-out of the settlement.

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[1] The Investment Committee of the Manhattan and Bronx Surface Transit Operating Authority ("MaBSTOA") Pension Plan later filed its own suit against JPMorgan, which was subsequently consolidated with the AFTRA and Imperial County matters.

Regulation S-K and the New Wave of Securities Act Liability *(continued from page 2)*

defendants knew, despite the fact that their business was cyclical, of a material downward secular trend"). Although the Third Circuit, in an opinion authored by now Justice Samuel Alito, declined to recognize that the affirmative disclosure obligations of Reg S-K give rise to a private cause of action, this case involved a Section 10(b) claim under the Exchange Act, not a Securities Act claim. *See Oran v. Stafford*, 226 F.3d 275, 287-88 (3d Cir. 2000) ("[A] violation of SK-303's reporting requirements does not automatically give rise to a material omission under Rule 10b-5.").

Blackstone

Last year, the Second Circuit generated a renewed focus on Securities Act claims based on Regulation S-K, Item 303's disclosure requirements when it revived such a claim in *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706 (2d Cir. 2011). *Blackstone*, which marked the first major appellate victory for plaintiffs in a securities class action arising from the subprime mortgage crisis, related to Blackstone's IPO and the uncertainties surrounding the impact of the crisis on Blackstone's mortgage and real estate-related investments.

The plaintiffs appealed a decision of the district court dismissing claims against Blackstone Group, L.P. ("Blackstone") for its alleged violations of Sections 11 and 12(a)(2) of the Securities Act. The plaintiffs alleged that Item 303 required Blackstone to disclose that worsening market conditions were reasonably likely to impact its revenues in light of the composition of its investments, including (i) an 88% stake in FGIC Corp., a monoline financial guarantor that wrote insurance on collateralized debt obligations (CDOs) based on the values of subprime mortgage pools, (ii) a $3.1 billion investment in Freescale Semiconductor which lost an exclusive agreement to manufacture wireless 3G chipsets for its largest customer, Motorola, shortly before the Blackstone IPO, and (iii) certain real estate investments which constituted 22.6% of Blackstone's assets under management. U.S. District Judge Harold Baer, Jr. held that the omission of the potential revenue decline was not actionable because it was not material, and thus its disclosure was not required by Reg S-K.

The Second Circuit disagreed and reversed, holding that because plaintiffs alleged that the known trend existed at the time of the IPO and the trend "was reasonably likely to have a material impact on Blackstone's financial condition," they had adequately pled a violation of Item 303 and, in turn, a violation of Section 11 of the '33 Act. As the *Blackstone* court stated, a plaintiff satisfies the materiality requirement of Regulation S-K, by merely alleging that a defendant "reasonably expects the impact [of the undisclosed trend] to be material."

With respect to Blackstone's FGIC and Freescale investments, the court clarified that:

> the focus of plaintiffs' claims is the required disclosures under Item 303 — plaintiffs are not seeking the disclosure of the mere fact of Blackstone's investment in FGIC, of the downward trend in the real estate market, or of Freescale's loss of its exclusive contract with Motorola. Rather, plaintiffs claim that Blackstone was required to disclose the manner in which those then-known trends, events, or uncertainties might reasonably be expected to materially impact Blackstone's future revenues. *Id.* at 718.

The Second Circuit found that because Blackstone's omission of these adverse trends "mask[ed] a change in earnings"— one of the factors for materiality enunciated by the SEC in Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150 (1999) ("SAB No. 99") — Item 303 was triggered because "[s] uch a possibility is precisely what the required disclosures under Item 303 aim to avoid." *Id.* at 720 (quoting SAB No. 99). (Blackstone ultimately had to write down $122 million of its $331 investment in FGIC.) The court concluded that these disclosure violations by the company "masked a reasonably likely change in earnings, as well as a trend, event or uncertainty that was likely to cause such a change." *Id.* With respect to Blackstone's real estate investments, the Second Circuit found that they were equally material and thus triggered a disclosure obligation under Item 303:

> A reasonable Blackstone investor may well have wanted to know of any potentially adverse trends concerning a segment that constituted nearly a quarter of Blackstone's total assets under management. Second, the alleged misstatements and omissions regarding real estate were qualitatively material because they masked a potential change in earnings or other trends. *Id.* at 721.

In emphasizing that such trends and uncertainties are "information [Blackstone] had a duty to report," the Second Circuit explained that the district court had erred in dismissing plaintiffs' claim on the ground that the complaint did not identify specific real estate investments at risk. *Id.* Rather, the court stated that the pleading burden under Federal Rule of Civil Procedure 8 was "minimal," and that plaintiffs had satisfied this burden by pleading that Blackstone "failed to disclose the manner in which [its] unidentified, particular investments might be materially affected by the then-existing downward trend in housing prices, the increasing default rates for subprime mortgage loans, and the pending problems for complex mortgage securities." *Id.* at 718, 721.

Panther Partners

A year later, the Second Circuit relied on *Blackstone* to revive a '33 Act claim based on the "known uncertainties" prong of Item 303 in *Panther Partners v. Ikanos Communications, Inc.* --- F.3d ----, 2012 WL 1889622 (2d Cir. May 25, 2012). The *Panther Partners* case arose out of the rising rate of defects in Ikanos' semiconductor chips which, plaintiffs alleged, management and the board of directors were aware of in the days leading up to the company's $120 million secondary offering in 2006.

U.S. District Judge Paul A. Crotty of the Southern District of New York dismissed the action, finding that the allegations did not support an inference that the company was aware of or should have been aware of the extent of the chip defects prior to the offering. In particular, the district court found that the pleading "failed to allege 'additional facts that Ikanos knew the defect rate was above average before filing the registration statement.'" *Id.* at *4 (internal citation omitted).

On appeal, the Second Circuit reversed and remanded. As a threshold matter, the court reiterated the minimal pleading standard for plaintiffs' Securities Act claims, stating that "[n]either scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims which — unless they are premised on allegations of fraud — need not satisfy the heightened particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure." *Id.* at *5. The court then addressed the proper inquiry for a claim premised on a violation of Item 303.

Essentially, the court concluded that the relevant inquiry under Item 303 as applied to this case was not the defendants' knowledge of the statistical degree of the defect rate, but rather their awareness of the uncertainties surrounding the defect problem's impact on revenues. As stated by the court:

> We believe that, viewed in the context of Item 303's disclosure obligations, the defect rate, in a vacuum, is not what is at issue. Rather, it is the manner in which uncertainty surrounding that defect rate, generated by an increasing flow of highly negative information from key customers, might reasonably be expected to have a material impact on future revenues. *Id.*

The Second Circuit concluded that the complaint "plausibly alleges that the defect issue, and its potential impact on Ikanos's business, constituted a known trend or uncertainty that Ikanos reasonably expected would have a material unfavorable impact on revenues or income from continuing operations." *Id.* at *6. The court found that two allegations in particular were adequate to sustain the claim: (i) Ikanos had received an increasing number of calls from its two largest customers, Sumitomo Electric and NEC, which accounted for 72% of Ikanos' revenues in the year prior to the offering, informing the company that its chips were resulting in network failures, and (ii) Ikanos' board of directors had been aware of the increasing number of complaints about the defective chips. *See id.* As the Second Circuit explained, the complaint "articulates the plausible inference to be drawn from these facts: that Ikanos 'knew that . . . the chips that it had sold to . . . its largest customers and the largest source of its revenues[ ] were defective, . . . and that it [may] therefore have to accept returns of all of the chips that it had sold to these two important customers.'" *Id.* (internal citation omitted).

The Second Circuit found that "[i]n focusing on whether plaintiff alleged that Ikanos knew the defect rate was 'above average' before the offering," the district court construed the complaint "too narrowly." *Id.* at *7. Citing the U.S. Supreme Court's 2011 decision in *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011) which rejected a "bright-line" statistical test for materiality, the Second Circuit emphasized that "Item 303's disclosure obligations, like materiality under the federal securities laws' anti-fraud provisions, do not turn on restrictive mechanical or quantitative inquiries." *Id.* The court reasoned that regardless of whether the defect rate was "above average" across the board, "the defect rate was, in essence, 100% for all chips sold to clients representing 72% of revenues," and that such "circumstances were not simply 'potentially problematic' for the Company; *they were very bad*." *Id.* (emphasis added; internal citation omitted). Accordingly, the court found "little difficulty concluding that Panther has adequately alleged that the disclosures concerning a problem of this magnitude were inadequate and failed to comply with Item 303." *Id.*

Conclusion

The Second Circuit's decisions in *Blackstone* and *Panther Partners* signal a notable expansion of liability to private claimants under Item 303 of SEC Regulation S-K, a development which one would expect to influence the disclosure decisions made by SEC registrants, particularly those numerous companies doing business in the Southern District of New York. These recent decisions illuminate how, when pled under the Securities Act which requires no showing of scienter, reliance or loss causation, a claim premised on Item 303's disclosure requirements can be difficult to challenge at the pleading stage.

Kessler Topaz Obtains $150 Million and $280 Million Settlements in Proprietary Securities Lending Matters *(continued from page 9)*

The court subsequently granted final approval of the settlement on June 5, 2012, finding that "the Settlement is, in all respects, fair, reasonable and adequate, and is in the best interests of Lead Plaintiffs, the Class, and the Class Members."[2] Kessler Topaz is currently facilitating distribution of the net settlement proceeds to members of the class.

CompSource Oklahoma, Board of Trustees of the Electrical Workers Local No. 26 Pension Fund v. BNY Mellon, N.A.

Kessler Topaz also engaged in hard-fought litigation for nearly three and a half years in the BNY Mellon securities lending matter. Indeed, by the time the parties reached the $280 million settlement, fact discovery had closed and only summary judgment and certain expert discovery remained to be completed before trial.

Plaintiff CompSource initiated the action in December 2008 against BNY Mellon, N.A. and the Bank of New York Mellon Corporation (collectively "BNY Mellon"), asserting claims for breach of contract, negligence and breach of fiduciary duty for losses suffered in the securities lending program operated by BNY Mellon.[3] The claims in BNY Mellon were based largely on the same set of facts present in the JPMorgan litigation. Here, Plaintiffs alleged that BNY Mellon, as a fiduciary, had a duty with respect to the management and/or disposition of class members' assets pursuant to materially similar securities lending agreements and that BNY Mellon breached its duties by (i) investing a substantial portion of class members' cash collateral in MTNs issued by Sigma and (ii) holding the MTNs as Sigma plummeted into eventual receivership. Plaintiffs brought the action on behalf of themselves and others similarly situated to recover for BNY Mellon's fiduciary breaches.

As was the case with the JPMorgan matter, the BNY Mellon matter was hard-fought. Plaintiffs' case survived defendants' motions to dismiss and the court ultimately denied BNY Mellon's motion for summary judgment, but both motions raised unique legal issues and required extensive briefing. BNY Mellon also attempted to transfer the action to the District Court for the Western District of Pennsylvania in an effort consolidate the case with three other actions pending in different districts across the country. And although the United States Judicial Panel on Multi-District Litigation denied BNY Mellon's motion to transfer, it did so only after thorough briefing by the parties and an in-person hearing in Chicago.

Moreover, during the course of discovery, counsel for the parties to the BNY Mellon matter produced and reviewed nearly five million pages of documents and took a total of 59 depositions, 12 of which continued over multiple days in seven different states across the country — New York, Texas, California, Maryland, Oklahoma, Pennsylvania, and Missouri — and had begun expert depositions. Finally, on August 26, 2011, after all fact discovery relating to both class certification and merits issues had closed, plaintiffs filed their motion for class certification on behalf of the class. Indeed, and as mentioned above, at the time the parties reached an agreement to settle this matter, class certification had been fully briefed and the parties were awaiting a decision from the court.

On June 3, 2012 the parties reached an agreement in principle to settle the matter for $280 million. On July 5, 2012, the parties executed a Stipulation and Agreement of Settlement, which the Court preliminarily approved on July 6, 2012. The parties await a ruling on Plaintiffs' motion for final approval of the settlement, which is currently scheduled for a hearing on October 25, 2012.

Conclusion

Kessler Topaz secured significant and meaningful recoveries for class members in both the JPMorgan and BNY Mellon securities lending actions after lengthy, hard-fought litigation in both matters. The settlements obtained, and the favorable legal opinions rendered throughout the course of litigation, will likely have a lasting impact on pending securities lending class actions as well as similar breach of fiduciary duty class actions. Imprudence such as that alleged in the JPMorgan and BNY Mellon matters cannot go unchecked and through these two successful actions, Kessler Topaz has assured that its clients and the respective classes were fairly compensated for the damages they sustained.

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[2] *See Bd. of Trustees of the AFTRA Retirement Fund v. JPMorgan Chase Bank, N.A.*, 09-cv-686, Dkt. No. 190, (S.D.N.Y. June 6, 2012).

[3] Kessler Topaz amended the initial complaint two subsequent times, naming Board of Trustees of the Electrical Workers Local No. 26 Pension Trust Fund, Children's Hospital of Philadelphia Foundation and CHOP on behalf of its Defined Benefit Master Trust as plaintiffs in the action.

Saying a Lot Without Saying Anything at All: The SEC Offers Options But No Clear Path on *Morrison* *(continued from page 6)*

all American investors seeking to recover losses in connection with foreign transactions. By limiting the private right of action for foreign transactions to American investors, this option lessens international comity issues because it does not include foreign citizens whose countries may not confer such securities rights on its own people. Nonetheless, the issues of costly litigation and conflict with foreign nations over utilizing Section 10(b) for securities on their exchanges remain.

b. Modifying the Morrison Transactional Test

Notwithstanding the SEC's suggestion that several variations of the conduct and effects tests would be appropriate, the SEC also offered several proposed modifications to the *Morrison* transactional test. These options provide a narrower extraterritorial standard than previously allowed for under the conduct and effects tests but extend the Section 10(b) private right of action to situations excluded under the transactional test.

The first proposed option would provide a private right of action to all investors seeking to recover in connection with foreign securities that are of the same class as domestic securities, irrespective of the location of the transaction. Under this approach, an investor would be able to bring claims related to common stock traded on a foreign exchange if the foreign issuer also registered an equivalent security (such as American Depositary Shares or ADSs) on a U.S. exchange. According to the SEC, this modification would increase the deterrent effect that arises from the prospect of private liability and would allow investors to diversify their portfolios through cross-listed securities without choosing between investing in ADSs or giving up protection under Section 10(b). Additionally, having a bright line standard with regards to domestic registration would allow issuers to clearly assess their potential liability under Section 10(b). The SEC suggests that this is a fair and practical revision, as companies that seek access to domestic securities markets should be held accountable to investors. Although the SEC is in favor of this modification, it recognized that there is the potential for an increase in "foreign-cubed" class actions (involving foreign issuers, foreign plaintiffs, and foreign transactions — as in *Morrison*) which could discourage foreign issuers from registering their securities in the United States. However, as noted by the SEC, over the past forty years the broader conduct and effects tests had no deterrent effect on foreign issuers' registration of securities on domestic exchanges.

The SEC's second proposed revision to the transactional test would allow all investors to pursue Section 10(b) claims if they can establish that they were in the United States when the defendant induced them to purchase or sell securities, regardless of where the fraudulent transaction actually occurred. According to the study, this revision would discourage foreign and domestic parties from specifically seeking to defraud investors while they were resident in the United States. Further, it does not raise international comity issues as the United States has a strong and well-recognized interest in ensuring that fraud is not directed at investors in the United States, and investors would carry the burden of demonstrating that they were actually victims of fraud while they were in the United States.

A third option presented in the study would allow investors to pursue Section 10(b) claims against both domestic securities intermediaries who were involved with the purchase or sale of securities for investors and foreign securities intermediaries who were involved with the purchase or sale of securities for American investors. As reported by the SEC, such a modification would reverse recent trends of courts using the transactional test to excuse such securities intermediaries from liability under Section 10(b). According to the SEC, this option would respect international comity and would work to curtail a blatant abuse of investor rights.

The last recommendation for modifying the transactional test would be to clearly define "domestic transactions in other securities" to include off-exchange transactions where the offer to sell or purchase is made or accepted in the United States, regardless of where the transaction actually occurs. As noted by the SEC's study, *Morrison* failed to explain when an off-exchange transaction would be considered to have taken place in the United States, and thus, has led lower courts to develop different definitions.

III. Response of SEC Commissioner Luis Aguilar

Despite generally favoring the enactment of a modified version of the conduct and effects tests, the SEC report failed to strongly advocate for any one particular option and left open the possibility that Congress take no action in response to *Morrison*'s impact on Section 10(b)'s private right of action. As a result, one of the SEC's five Commissioners, Luis Aguilar, offered harsh criticism of the SEC's unwillingness to provide a concrete recommendation to Congress. In a response entitled, *Defrauded Investors Deserve Their Day in Court*, Commissioner Aguilar recommended that Congress enact a cross-border standard for private litigants

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Kessler Topaz Secures $49 Million Settlement for Delphi Financial Group Shareholders

(continued from page 3)

to the Class A and B shares in connection with a merger. To avoid this contractual prohibition on the payment of greater consideration to Rosenkranz, Delphi, at Rosenkranz's behest, conditioned approval of the Merger on Delphi's Class A shareholders' agreeing to a coercive Certificate amendment that would permit Rosenkranz to receive the disparate consideration for his Class B shares. Accordingly, if Delphi Class A shareholders wanted to receive the substantial premium offered by Tokio Marine for their Class A shares, they had to sacrifice their right to equal consideration set forth in the Company's Certificate and grant Rosenkranz's demand to receive greater consideration for his Class B shares. Otherwise, Rosenkranz would scuttle the Merger with his effective voting control over the Company.

Recognizing the blatant unfairness of the situation, Kessler Topaz brought suit in the Delaware Court of Chancery (the "Court") on behalf of Oklahoma Firefighters' Pension and Retirement System as a representative for the class of Delphi Class A stockholders. Kessler Topaz then engaged in expedited discovery, which unearthed facts showing that Rosenkranz had, from the outset of his discussions with Tokio, insisted that he receive more for his Class B shares at the expense of Delphi's Class A shareholders and had resisted efforts of Delphi's Board to treat the Class A stockholders fairly.

Following discovery, Kessler Topaz sought to prevent the coercive shareholder vote on the Merger that left Delphi's Class A shareholders with no choice but to approve Rosenkranz's $55 million of additional Merger consideration. While the Court denied the injunction, it found that the public stockholders would likely prevail at trial on the claim that Rosenkranz's conduct was improper, stating "to accept Rosenkranz's argument and to allow him to coerce such an amendment here . . . would amount to a wrongful transfer of merger consideration from the Class A stockholders to Rosenkranz." The Court concluded, "that the Plaintiffs are reasonably likely to be able to demonstrate at trial that in negotiating for disparate consideration and only agreeing to support the merger if he received it, Rosenkranz violated his duties to the stockholders."

Kessler Topaz, as Co-Lead Counsel, set the litigation for trial to pursue this claim. During this same time, Kessler Topaz engaged in settlement discussions with the defendants. Ultimately, the parties reached an agreement to settle the litigation, which resulted in the $49 million settlement fund for the benefit of the Company's Class A shareholders. The $49 million settlement represents nearly 90% of the recoverable damages resulting from the excess consideration paid to Rosenkranz for his Class B shares in connection with the Merger — an exceptional result when compared with similar cases. A hearing to approve the proposed settlement is scheduled for July 31, 2012.

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that would be equivalent to the standard set for SEC and DOJ enforcement in Section 929P of the Dodd-Frank Act. Commissioner Aguilar opined that the SEC study "fails to satisfactorily answer the Congressional request, contains no specific recommendations, and does not portray a complete picture of the immense and irreparable harm that has resulted" from *Morrison*. Commissioner Aguilar further noted that he is "particularly astonished that the study states that an option 'would be for Congress to take no action,' and, thus, would continue to deny American investors who have been harmed by fraud the ability to seek redress in court." As such, Commissioner Aguilar believes Congress "should act to rectify this with haste."

IV. Conclusion

While the SEC study provides several recommendations that would expand Section 10(b)'s cross-border jurisdiction, the SEC left open the possibility that Congress could take no action to correct the Supreme Court's ruling in *Morrison*. In light of the SEC's failure to provide clear guidance for Congress, investors suffering losses in connection with foreign transactions remain unprotected by Section 10(b). As a result, investors engaging in non-U.S. transactions must continue to consider alternative means, including filing actions under states' laws and filing lawsuits in foreign jurisdictions, to recover damages attributable to fraud.

Calendar of Upcoming Events

Pennsylvania Association of Public Employee Retirement Systems (PAPERS) – 6th Annual PAPERS Fall Workshop

September 19 – 20, 2012

Holiday Inn Historic District — Philadelphia, Pennsylvania

The annual PAPERS Fall Workshop, a conference held alternately in the Pittsburgh and Philadelphia areas, provides another opportunity beyond the PAPERS Forum for education and networking to those individuals who work in or provide services to Pennsylvania's public pension funds.

Council of Institutional Investors 2012 Fall Conference – "Engaging the Future"

October 3 – 5, 2012

The Westin Seattle — Seattle, Washington

Confirmed speakers include:

- Daniel Fulton, president & CEO, Weyerhaeuser
- Frank Partnoy, George E. Barrett Professor of Law and Finance at the University of San Diego, and author of *WAIT: The Art and Science of Delay*
- Spencer Rascoff, CEO, Zillow.com
- Laura Tyson, S. K. and Angela Chan Chair in Global Management, Haas School of Business, University of California at Berkeley

National Conference on Public Employee Retirement Systems – 2012 Public Safety Employees Pension & Benefits Conference

October 7 – 10, 2012

Omni Royal Orleans Hotel — New Orleans, Louisiana

The PSEP&BC is dedicated to providing quality education that is specifically tailored for the unique needs and demands of public safety pensions. Since 1985, the Conference has educated hundreds of public safety pension trustees, administrators and staff; union officials; and local elected officials by featuring presentations from recognized leaders in both the worlds of finance and politics, providing news on the latest developments, and offering attendees the opportunity to network with fellow trustees.

57th U.S. Annual Employee Benefits Conference

November 11 – 14, 2012

San Diego Convention Center — San Diego, California

The Annual Employee Benefits Conference provides an ideal venue for discussing the latest cost-saving ideas, getting updates on legislative developments, finding creative approaches to new challenges and collaborating with your peers who are dealing with the same issues you face.

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