SUMMER 2019

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

FULLY INFORMED

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FIRST SOLAR: CORRECTIVE DISCLOSURE KEEPS ITS FLARE, AS THE SUPREME COURT DECLINES TO REVIEW THE NINTH CIRCUIT'S BROAD INTERPRETATION

Samuel C. Feldman, Esquire

"Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."
— Justice Louis Brandeis

Justice Brandeis's "publicity" translates to the modern concepts of transparency and disclosure.[1] These constructs underlie the securities laws, which encourage the flow of truthful information to investors. In securities litigation, the truth can set you free — and bludgeon your stock.

When revelations of information remove artificial inflation from a company's stock, the reconciliation causes the share price to decline. That decline harms innocent

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[1] *See* MICHAEL KONCZAL, *Financial Reform After the 2008 Crisis*, PROGRESSIVISM IN AMERICA: PAST, PRESENT, & FUTURE 81, 85 (David B. Woolner & John M. Thompson eds., Oxford University Press ed. 2015).

IN *ALON* LITIGATION, DELAWARE COURTS CLARIFY STANDARD OF REVIEW FOR CONTROLLER SQUEEZE-OUTS

Grant D. Goodhart, III, Esquire

Kessler Topaz recently defeated efforts to dismiss litigation filed on behalf of the Arkansas Teachers Retirement System regarding Delek US Holdings, Inc. ("Delek") and its 2017 squeeze-out of the public investors in Alon USA Energy, Inc. ("Alon"). In denying the motions to dismiss, the Delaware Court of Chancery provided additional clarity regarding lawsuits against majority stockholders following squeeze-out transactions and the timing of procedural devices designed to protect minority stockholders from the conflicts of interests inherent in a controlled company.

In 2014, the Delaware Supreme Court issued a milestone decision in *Kahn v.*

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DELAWARE CHANCERY COURT SAYS STOCKHOLDERS WERE MISINFORMED WHEN APPROVING BUYOUT OF KCG HOLDINGS

Stacey A. Greenspan, Esquire and J. Daniel Albert, Esquire

Since 2017, Kessler Topaz has been pursuing claims on behalf of Chester County Employees' Retirement Fund ("Chester County") and KCG Holdings, Inc. ("KCG" or the "Company") stockholders against the KCG board of directors (the "Board"), Virtu Financial, Inc. ("Virtu") and Jefferies LLC ("Jefferies") in connection with Virtu's acquisition of KCG for $20.00 per share (the "Buyout"), which we allege underpaid KCG's stockholders.

Kessler Topaz first secured expedited relief for KCG stockholders in the summer of 2017, forcing the defendants to seek a supermajority vote of 66 2/3% of KCG stockholders to approve the Buyout because of alleged agreements reached between Virtu and Jefferies that violated Section 203 of the Delaware General Corporation Law ("Section 203"). Section 203 places restrictions on an acquirer reaching certain agreements, arrangements or understandings with a 15% or greater stockholder of a target (in this case Jefferies which held 24.5% of KCG's stock) to prevent a would-be acquirer from circumventing the board to negotiate a deal.

After the transaction closed on July 20, 2017, Kessler Topaz has continued to pursue post-closing damages claims against the defendants. On July 16, 2018, using discovery unearthed in the expedited phase of the litigation, Kessler Topaz filed a Verified Second Amended Class Action Complaint against the Board for breaches of fiduciary duty, and against Virtu and Jefferies for aiding and abetting and civil conspiracy.

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SEC PROPOSES RULE CHANGES TO ELIMINATE AUDITOR REVIEW FOR SMALLER COMPANIES

Christopher M. Windover, Esquire

On May 9, 2019, the Commissioners of the U.S. Securities and Exchange Commission (the "SEC") voted to propose amendments that would exempt public companies with less than $100 million in revenues from obtaining an attestation regarding their internal control over financial reporting ("ICFR") from an independent outside auditor. The proposed amendments are the latest in a series of changes intended to ease the regulatory burden of public companies and encourage access to capital markets.

Background

In 2002, the SEC introduced a reporting regime that categorized issuers subject to the reporting requirements of the Securities Exchange Act of 1934 (the "Exchange Act") as non-accelerated, accelerated, and large accelerated filers. Rule 12b-2 of the Exchange Act defines an "accelerated filer" as an issuer that, among other things, has a public float of $75 to $700 million, and a "large accelerated filer" as an issuer that has a public float of $700 million or more. An issuer that is not an accelerated filer or a large accelerated filer is considered a "non-accelerated filer."

Under this regime, accelerated and large accelerated filers are subject to shorter filing deadlines for quarterly and annual reports and are subject to some disclosure and other requirements that do not apply to non-accelerated filers. A significant requirement that applies to accelerated and large accelerated filers, but not to non-accelerated filers, is the requirement that an issuer's independent auditor must attest to, and report on, management's assessment of the effectiveness of the issuer's ICFR. Section 404(a) of Sarbanes-Oxley Act

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BACK TO NORMAL: THE NINTH CIRCUIT REVIVES SETTLEMENT STANDARD IN MULTI-STATE CLASS ACTIONS

Brandon Herling, Esquire and Ryan T. Degnan, Esquire

In *In re Hyundai & Kia Fuel Economy Litigation*, 926 F.3d 539 (9th Cir. 2019) ("*Hyundai & Kia*"), the Ninth Circuit Court of Appeals, sitting *en banc*, restored long-standing jurisprudence allowing district courts to approve settlements resolving claims brought under the laws of multiple states without analyzing the laws of each implicated state. The Ninth Circuit's decision in *Hyundai & Kia* reversed the earlier decision issued by a divided Ninth Circuit panel that had previously held that district courts needed to undertake a detailed survey of the variance in state laws prior to certifying a settlement class under Federal Rule of Civil Procedure 23 ("Rule 23") — notwithstanding defendants' desire to settle all claims.[1] In doing so, the Ninth Circuit emphasized the "strong judicial policy" favoring settlement in complex class action litigation and gave confidence — to both plaintiffs and defendants — that class actions asserting claims under the laws of multiple states can be resolved through a nationwide settlement in the Ninth Circuit.

The Settlement Agreement and the Ninth Circuit's Panel Opinion

In *In re Hyundai & Kia Fuel Economy Litigation,* No. MDL-13-2424-GW(FFMx) (C.D. Cal.), plaintiffs alleged that automakers Hyundai and Kia made deceptive and

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[1] The Ninth Circuit's earlier decision, *In re Hyundai & Kia Fuel Economy Litigation,* 881 F.3d 679 (9th Cir. 2018) (the "Panel Opinion"), applied only to class actions asserting claims under multiple state laws. Class actions asserting claims under federal law (*e.g.*, federal securities fraud and antitrust claims) on behalf of a nationwide class were unaffected by the decision.

COURT CERTIFIES DIRECT PURCHASER CLASS CLAIMS THAT PHARMACEUTICAL COMPANIES UNLAWFULLY SOUGHT TO *DELAY AND SUPPRESS GENERIC COMPETITION FOR THE ORAL CONTRACEPTIVE LOESTRIN 24 FE*

Donna Siegel Moffa, Esquire and Terence S. Ziegler, Esquire

On July 2, 2019, Chief Judge William E. Smith of the United States District Court for the District of Rhode Island granted the request of forty-seven Direct Purchasers of Loestrin 24 Fe ("Loestrin 24") or generic Loestrin 24 to be certified as a class to prosecute their common antitrust claims against pharmaceutical companies Warner Chilcott[1] and Watson[2]. The Direct Purchasers in *In re Loestrin Fe Antitrust Litigation,* Civil Action No. 1:13-md-2472-WES-PAS (D.R.I.), allege that Warner Chilcott and Watson violated federal antitrust laws by unlawfully delaying the introduction of generic versions of the popular birth control drug, Loestrin 24, causing the Direct Purchasers to pay billions of dollars more than they otherwise would have for the drug. Kessler Topaz, along with three other law firms, has pursued the Direct Purchasers' claims since 2013, and with its co-counsel, was appointed to serve as class counsel by Judge Smith in his July 2, 2019 class certification decision.[3] The action is set to begin trial on January 6, 2020.

The Class Certified and the Claims Asserted

The members of the certified Class are corporate entities that purchased brand Loestrin 24 directly from Warner Chilcott or generic Loestrin 24 from Amneal Pharmaceuticals LLC ("Amneal")[4] between September 1, 2009 and June 5, 2015, or purchased brand Minastrin 24 directly from Warner Chilcott (or its successor entities) between September 1, 2009 and March 14, 2017. They

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[1] There are five different Warner Chilcott defendants: Warner Chilcott (US), LLC; Warner Chilcott Sales (US) LLC; Warner Chilcott Company LLC; Warner Chilcott, plc, and Warner Chilcott Limited. The court referred to the five collectively as "Warner Chilcott."

[2] The Court referred to the two Watson Defendants, Watson Pharmaceuticals, Inc. and Watson Laboratories, Inc., collectively as "Watson."

[3] The Slip Opinion and Order ("Slip Op.") certifying the Class and appointing Co-Lead Counsel for the DPP Class is ECF No. 1050 on the docket for Civil Action No. 1:13-md-2472.

[4] Amneal acquired Watson's Loestrin 24 Abbreviated New Drug Application ("ANDA") from Watson in a divestiture. *See* Slip Op. at 7, n. 7.

2019–2020

Upcoming KTMC Conferences

For 14 years in Europe, 11 years in the US, and 3 years in London, Kessler Topaz Meltzer & Check LLP (KTMC) has partnered with Institutional Investor to co-develop these three events annually to serve and educate legal executives at global asset management firms and institutions.

Litigation & Governance Trends for Nordic Asset Managers & Owners

SEPTEMBER 12, 2019
MARRIOTT HOTEL

The Litigation & Governance Trends for Nordic Asset Managers & Owners meeting will be held in Copenhagen and co-sponsored by Institutional Investor and Kessler Topaz Meltzer & Check LLP. The thinking around corporate governance, shareholder engagement, and active litigation has evolved and matured over the past decade. The openness to, and use of, these tools has become more developed as a reflection of the growing acceptance of active engagement and shareholder litigation by money managers.

15th Annual

The Rights & Responsibilities of Institutional Investors

MARCH 5, 2020
NH GRAND HOTEL KRASNAPOLSKY

The 15th Annual Rights & Responsibilities of Institutional Investors meeting will again be held in Amsterdam and co-sponsored by Institutional Investor and Kessler Topaz Meltzer & Check LLP. The pressing issues for investors and shareholders covered in this agenda will consider the ways that legal, investment, and compliance ocers from European and selectively, global public pension plans, insurance funds and asset management rms, are paving a path forward to meet their responsibilities and to leverage their rights as active investors.

Litigation & Governance Trends for Asset Management Firms

APRIL 28-29, 2020
APELLA

The Litigation & Governance Trends for Asset Management Firms will focus on examining the needs of legal and compliance teams at global asset management firms through the lens of active engagement, shareholder actions, and affirmative litigation accurately reflects the state of thinking and evolution in the market today and provides much-needed information that these executives require to fully fulfill their full range of responsibilities at their firms.

More Information

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investors. Investors can recoup fraud-related losses under Section 10(b) of the Exchange Act of 1934 and Rule 10b-5, which the SEC enacted under Section 10(b)'s authority.[2]

One critical element of a fraud claim is loss causation: a link between the plaintiffs' harm and the defendants' misrepresentations/omissions.[3] To make that connection, plaintiffs usually[4] must identify at least one[5] corrective disclosure, *i.e.*, one of truthful information that cures a prior distortion. Correctives come in many forms, *e.g.*, a company's own disclosures, news articles, analyst reports, asset write-downs, corporate bankruptcies, catastrophic safety failures, unfavorable clinical studies, regulatory bans, and governmental investigations.

But form aside, federal courts have struggled to define corrective disclosure's substance. In other words: If the market's learning of new information coincides with a stock's loss of value, for what types of information are defendants on the hook? The answer matters to all players. If the scope of corrective disclosure narrows, both investors' ability to establish loss causation and corporate accountability diminish. Courts *do* agree that misrepresentations and kindred correctives need not be "mirror images,"[6] that a corrective need not reveal the fraud verbatim.

Yet, courts' accord unravel in the residual details. Some courts have restricted corrective disclosure to only include news that specifically references defendants' misconduct.[7] Put differently, for investors to recover, the exposé of defendants' actual fraud must cause the stock to lose value.

Rejecting such a narrow view, other courts interpret corrective disclosure more broadly. They hold that a revelation of "facts" — ones important to investors, misrepresented by defendants — can satisfy the corrective disclosure requirement.[8] The revelation need not suggest that concealment of the facts was a product of fraud, but fraud must be the reason why, up until the corrective, the market misunderstood the facts. Under those circumstances: the defendants' fraud causes the market's delayed understanding of the facts; the delayed understanding causes the company's share price decline; and the share price decline causes the investors' harm. That chain establishes loss causation. Remove from it the middlemen, and the defendants' fraud connects to the investors' harm. Relatedly, the fraud need not be "the *sole* reason for the [share price] decline . . . . As long as [it] is one substantial cause . . . , other contributing forces will not bar recovery under the loss causation requirement[,] but will play a role in determining recoverable damages."[9] This latter view favors investors by broadening the scope of available loss causation proof.

Accordingly, the Supreme Court's recent refusal to review a case that represents the broad view was a victory for investors. On June 24, 2019, the Supreme Court denied *certiorari* in *First Solar*,[10] a case in which both the District Court for the District of Arizona and the U.S. Court of Appeals for the Ninth

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[2] For private plaintiffs, the six elements of Rule 10b-5 are: (1) a material misrepresentation or omission; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809-10 (2011).

[3] 15 U.S.C. § 78u-4(b)(4) ("In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages."); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (defining loss causation as "a causal connection between the material misrepresentation and the loss").

[4] There are an "infinite variety" of ways to establish loss causation because the inquiry is "context-dependent." *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016) (internal citations and quotations omitted). Viable theories include price maintenance (inflation), materialization of the risk, and leakage.

[5] Plaintiffs may allege a series of partial corrective disclosures. *See, e.g.*, *In re Snap Sec. Litig.*, No. 2:17-cv-03679-SVW-AGR, 2018 U.S. Dist. LEXIS 97704, at *2-3 (C.D. Cal. June 7, 2018). However, each "must disclose [a new piece of concealed] information." *Meyer v. Greene*, 710 F.3d 1189, 1198 (11th Cir. 2013) (internal citations and quotations omitted).

However, the repackaging of old information — facts linked to the fraud, but made public previously — cannot be corrective. Matthew L. Mustokoff & Margaret E. Mazzeo, *Loss Causation on Trial in Rule 10b-5 Litigation a Decade After Dura*, 70 Rutgers U.L. Rev. 175, 198 (2017) (citing *Meyer*, 710 F.3d at 1198). Instead, "a corrective disclosure [] must disclose new information." *Meyer*, 710 F.3d at 1198 (internal citations and quotations omitted).

[6] *See, e.g.*, *Mass. Ret. Sys. v. CVS Caremark Corp.*, 716 F.3d 229, 240 (1st Cir. 2013) ("[A] corrective disclosure need not be a 'mirror-image' disclosure — a direct admission that a previous statement is untrue . . . [but] must relate to the same subject matter as the alleged misrepresentation."); *In re Williams Sec. Litig. - WCG Subclass*, 558 F.3d 1130, 1140 (10th Cir. 2009) ("To be corrective, the disclosure need not precisely mirror the earlier misrepresentation, but it must at least relate back to the misrepresentation and not to some other negative information about the company.").

[7] *See, e.g.*, *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049 (9th Cir. 2008), and its progeny.

[8] *See, e.g.*, *In re Daou Sys., Inc.*, 411 F.3d 1006 (9th Cir. 2005), and its progeny.

[9] *Id.* at 1025 (internal citations and quotations omitted) (emphasis in original).

[10] *Smilovits v. First Solar Inc.*, 119 F. Supp. 3d 978 (D. Ariz. 2015), *aff'd*, 881 F.3d 750 (9th Cir. 2018), *cert. denied*, No. 18-164, 2019 U.S. LEXIS 4292 (June 24, 2019).

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Circuit determined that a corporate disclosure — absent any hint of fraud — was nonetheless sufficient as a corrective. (The Supreme Court's denial serves as guidance for other U.S. Courts of Appeal, which can adopt the Ninth Circuit's rule from *First Solar* without fear of reversal.) Before reaching *First Solar*'s nuances, consider the following example of the broad v. narrow distinction's application.

Broad v. Narrow Corrective Disclosure Example

Following the launch of Instagram's "Stories" feature, Snap, Inc. — the parent company of Snapchat, a social media and messaging app — and its executives (collectively, the "Snap Defendants") realized that Instagram was stealing Snap's daily active users ("DAUs"). The competition with Instagram was significantly reducing Snap's DAUs, its most important metric. The Snap Defendants knew of that trend's certainty via internal reports. Despite them, leading up to Snap's IPO, the Snap Defendants represented to the market that Instagram *may be* competing with Snap for DAUs. Five months later, two disclosures reached the market:

Disclosure 1:

> In terms of DAUs, Instagram has been munching Snap's lunch.

Disclosure 2:

> The Snap Defendants downplayed both the certainty and extent of the threat posed by Instagram, which has been crippling Snap's DAUs.

In response to these disclosures, Snap's stock nosedived.

Per the broad view, both Disclosures are corrective because "proof of loss causation is not confined to a particular kind of market disclosure."[11] Each revealed the adverse impact of Instagram's competition on Snap's DAUs, the facts misrepresented and omitted by the Snap Defendants, which caused the stock drop (and investors' losses).

However, per the narrow view, only Disclosure 2 is corrective because, to prove loss causation, a disclosure must reveal the fraud. While Disclosure 2 explicitly revealed the Snap Defendants' fraud, Disclosure 1 did not.

Removing Disclosure 2 from the hypothetical simulates the distinction's importance. With only Disclosure 1 in play, the operative view determines the outcome. Under the broad view, investors could show loss causation.[12] Under the narrow view, they could not.

First Solar Reinforces the Broad View of Corrective Disclosure

Returning to *First Solar* — a securities fraud class action against "one of the world's largest producers of photovoltaic solar panel modules"[13] — the Ninth Circuit affirmed the district court's broad view of corrective disclosure.

At the trial level, investors sued First Solar, Inc., its executives, and select officers for violations of Sections 10(b) and 20(a) of the Exchange Act in the District of Arizona, which encompasses the Company's headquarters. The plaintiffs claimed that the defendants misrepresented and omitted the scope and cost of two defects: "a manufacturing defect causing field power loss[,] and a design defect causing faster power loss in hot climates."[14] The truth underlying those defects reached the market indirectly and in pieces. That is, the plaintiffs said revelations of the Company's financial turmoil *caused* by the fraud, as opposed to revelations of the fraud *itself*, led to their losses. They alleged several correctives; each bit a chunk from First Solar's stock price, which fell from almost $300 to below $50 per share between April 30, 2008 and February 28, 2012.[15]

While assessing those correctives at the summary judgment stage, the district court encountered two

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[11] *Smilovits v. First Solar Inc.*, 119 F. Supp. 3d 978, 989 (D. Ariz. 2015) (hereinafter, "*First Solar SJ Order*").

[12] For the latest on KTMC's prosecution of *In re. Snap Inc. Sec. Litig.* in the Central District of California (within the Ninth Circuit), see https://www.ktmc.com/news.

[13] *Mineworkers' Pension Scheme v. First Solar Inc.*, 881 F.3d 750, 752 (9th Cir. 2018) (hereinafter, "*First Solar Appeal*").

[14] *Id*.

[15] *First Solar SJ Order*, 119 F. Supp. 3d at 981.

divergent lines of Ninth Circuit cases on loss causation. *Daou*[16] and its progeny stood for the broad view of corrective disclosures, and *Metzler*[17] and its progeny stood for the narrow view.[18] The district court selected the broad view for three reasons: (1) *Daou*, the earliest pertinent case, was still good law; (2) the broad view better served Congress's intent and on-point Supreme Court precedent; and (3) it accurately embodied "traditional notions of proximate cause."[19] Flowing from that analysis, the district court recited this loss causation test:

> A plaintiff can satisfy loss causation by showing that the defendant misrepresented or omitted the *very facts that were a substantial* factor in causing the plaintiff's economic loss. The fraud or misrepresentation need not be the sole reason for the decline in value of the securities, but it must be a substantial cause.[20]

Applying that test, the district court denied in large part the defendants' motion for summary judgment. Specifically, the court denied summary judgment on five of six correctives. For those five correctives — four earnings releases and one guidance reduction — a reasonable jury could link the facts misrepresented and omitted by the defendants to the plaintiffs' losses:

- 2Q10 Earnings Release (7/29/10): First Solar announced the manufacturing defect, "estimate[ing] that [it] would negatively impact [the Company's] revenues by $99 million" and slashing its revenue guidance by $100 million. However, First Solar did not indicate that it had concealed the known issue for over a year. Following the news, First Solar's stock fell by $10.05 per share, or 7.4%. Per internal correspondence, the defendants "recognized that the [manufacturing] defect caused the stock drop." Consistently, the plaintiffs' expert linked the manufacturing defect to First Solar's poor financial performance, which caused its stock to dip. His opinion convinced the court that "the 'very facts' allegedly omitted by Defendants — the existence of the [manufacturing] defect — ultimately led to a drop in stock price that caused Plaintiffs' loss."[21]

- 4Q10 Earnings Release (2/24/11): First Solar missed its revenue guidance, gently lowering the range from $3.7-3.9 billion to $3.7-3.8 billion, and cited the manufacturing defect for additional expenses of $8.5 million. Upon that news, First Solar's stock dropped by $8.96 per share, or 5.4%. Again, the plaintiffs' expert linked the manufacturing defect to First Solar's poor financial performance, which hurt its stock. The court held that "a reasonable jury could find that the very facts Defendants allegedly fraudulently concealed — the scope of the [manufacturing] defect and its resulting financial impact — were substantial factors in causing Plaintiffs' loss."[22]

- 1Q11 Earnings Release (5/3/11): First Solar cited the manufacturing defect for additional expenses of $4.5 million, and reduced its operating income and operating cash flow guidance. The guidance reduction stemmed from the design defect, but the defendants did not say so. In response to the news, First Solar's stock dropped by $8.35 per share, or 6.2%. The plaintiffs' expert opined that both the defendants' misrepresentation of the manufacturing defect and omission of the design defect explained sizable portions of the stock drop. After noting that "Plaintiffs need not show that a misrepresentation was the *sole reason for th*e investment's decline in value in order to establish loss causation," the court held that "[a] reasonable jury could determine that the very facts omitted and misrepresented by Defendants — the effect of the [manufacturing] defect and existence of the [design defect] — were substantial factors in causing the stock to decline and Plaintiffs' loss."[23]

- FY11-12 Guidance Reductions (12/14/11): First Solar missed consensus estimates, and reduced its EPS and revenue guidance for both FY11 and FY12. It also announced a restructuring charge of $0.85 per share (tied to the elimination of 100 jobs). In the wake of that news, First Solar's stock fell by $9.12 per share, or 21.4%. According to the plaintiffs' expert, the concealed design defect caused the guidance revisions, which tanked the stock. The court agreed: "From this evidence, a reasonable jury could conclude that the facts omitted by Defendants relating to the [design] defect revealed the true financial condition of First Solar and were a substantial factor in the stock price decline."[24]

- 4Q11 Earnings Release (2/28/12) and FY11 Form 10-K (2/29/12): First Solar lowered revenue and cash flow

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[16] 411 F.3d at 1025.

[17] 540 F.3d at 1057.

[18] *First Solar Appeal*, 881 F.3d at 752 (quoting the district court, which encountered "one line of cases represents the rule that 'drawing a causal connection between the *facts* misrepresented and the plaintiff's loss will satisfy loss causation[,]'" while "a second group of cases [] adopt[s] a 'more restrictive view,' in which '[s]ecurities fraud plaintiffs can recover only if the market learns of the defendants' fraudulent practices'") (emphasis in original).

[19] *See First Solar SJ Order*, 119 F. Supp. 3d at 991-92.

[20] *Id.* at 992 (internal citations and quotations omitted) (emphasis in original).

[21] *Id.* at 994-95. The news was not all bad. First Solar beat consensus estimates for EPS and revenue, and increased its EPS guidance. *Id.*

[22] *Id.* at 995-96. Again, the news was mixed. First Solar beat consensus estimates for EPS, and increased its EPS guidance. *Id.*

[23] *Id.* at 996 (internal citations and quotations omitted). First Solar beat consensus estimates for EPS and revenue, and maintained its EPS and revenue guidance. *Id.*

[24] *Id.* at 997-98.

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> guidance for FY12. It reported substantial losses, including charges totaling $6.00 per share for non-cash goodwill impairment, restructuring, and excess warranty. In its FY11 Form 10-K, the Company reported a $13.8 million "module inventory write-down." On February 29, First Solar's stock plunged by $4.10 per share, or 11.26%. The next day, it tumbled by another 5.8%. The plaintiffs' expert connected several costs — including ones for warranty, outstanding claims, and the module inventory write-down — to the two defects. Approving, the court held: "From this evidence, a reasonable jury could find that Defendants' alleged concealment of the true scope of the defects . . . caused a negative financial impact to First Solar's sales, a drop in revenue and guidance, and Plaintiffs' losses."[25]

The court granted summary judgment on the remaining alleged corrective, the departure of First Solar's CEO, because its link to the defendants' fraud (misrepresentation and omission of the defects) was too attenuated.[26] Although the plaintiffs could connect the CEO's departure to the stock drop to their losses, their causal chain was incomplete. Still, with no indicia of patent fraud in the alleged correctives, the plaintiffs went fix for six.

Despite the district court's conclusions, it permitted an interlocutory appeal so the Ninth Circuit could resolve the apparent split between loss causation decisions.[27] The district court stayed the action pending the Ninth Circuit's instruction.[28]

On appeal, a panel of the Ninth Circuit addressed the certified loss causation issue *per curiam* (*i.e.*, unsigned by any specific judge(s), unanimously on behalf of the court). "[It] conclude[d] that a general proximate cause test — the test ultimately applied by the district court — is the proper test."[29] To support that conclusion, the Ninth Circuit interpreted the plain language of the loss causation requirement[30] as calling for garden-variety proximate cause:

> The [Exchange] Act defines loss causation as the plaintiff's burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages. This inquiry requires no more than the familiar test for proximate cause. To prove loss causation, plaintiffs need only show a causal connection between the fraud and the loss by tracing the loss back to the very facts about which the defendant lied. Disclosure of the fraud is not a sine qua non [*i.e.*, a necessary condition] of loss causation, which may be shown even where the alleged fraud is not necessarily revealed prior to the economic loss.[31]

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[25] *Id.* at 998-1000.

[26] *Id.* at 997 (rejecting the "[p]laintiffs' argument that a jury could simply infer a connection between [the CEO's] departure and the alleged fraud" as "pure speculation").

[27] The district court certified this question under 28 U.S.C. § 1292(b):

> [W]hat is the correct test for loss causation in the Ninth Circuit? Can a plaintiff prove loss causation by showing that the very facts misrepresented or omitted by the defendant were a substantial factor in causing the plaintiff's economic loss, even if the fraud itself was not revealed to the market (*Nuveen*, 730 F.3d at 1120), or must the market actually learn that the defendant engaged in fraud and react to the fraud itself (*Oracle*, 627 F.3d at 392)?

[28] *First Solar Appeal*, 881 F.3d at 752.

[29] *Id.*

[30] The Private Securities Litigation Reform Act of 1995 codified the loss causation requirement. 15 U.S.C. § 78u-4(b)(4) ("In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages."); *see* S. Rep. No. 98, 104th Cong., 1st Sess. 15 (1995) (requiring proof "that the misstatement or loss alleged in the complaint," not "factors unrelated to the fraud," "caused the loss incurred by the plaintiff").

[31] *First Solar Appeal*, 881 F.3d at 753 (9th Cir. 2018) (internal citations and quotations omitted) (clarifying "the ultimate issue [of] whether the defendant's misstatement, as opposed to some other fact, foreseeably caused the plaintiff's loss").

To extinguish any inconsistency within its territory, the Ninth Circuit instructed lower courts to treat "[t]he cases . . . cite[d] for the proposition of a more restrictive test . . . as fact-specific variants of the basic proximate cause test. . . ."[32]

Turning to ways to satisfy that test, the panel characterized "loss causation [a]s a context-dependent inquiry [because] there are an infinite variety of ways for a tort to cause a loss."[33] It explained that a court's causation assessment should "naturally" mimic a plaintiff's causation theory.[34]

Wrapping up, the Ninth Circuit affirmed the district court's holding. After, it unanimously denied the defendants-appellants' petition for rehearing *en banc* (*i.e.*, before all judges of the court, rather than before a panel).[35] Likewise, the Supreme Court denied the defendants-appellants' petition for a writ of *certiorari*.[36]

Conclusion

Less known than Justice Brandeis's oft-cited quote are the remaining contents of the paragraph it opens:

> The provisions in the Committee's bill concerning the incorporation of stock exchanges and the statement to be made in connection with the listing of securities would doubtless have a beneficent effect. But there should be a further call upon publicity for service. That potent force must, in the impending struggle, be utilized in many ways as a continuous remedial measure.[37]

Justice Brandeis knew that information arms the investor. While his demand for transparency is animating in theory, its true value can only extend to its enforceability in practice. Had the Supreme Court used *First Solar* to revisit corrective disclosure and limit it to direct admissions of fraud, it would have defanged the private enforcement mechanism[38] that is designed to "maintain public confidence in the marketplace" and "deter[] fraud."[39] It did not. Fraud harms investors, regardless of whether defendants admit to deception. As Justice Breyer commented during oral argument on *Dura*, the truth "might come out in many different ways," not only "because [an executive] announces[,] 'I'm a liar.'"[40] Courts give credence to that reality by preserving the breadth of corrective disclosure.

And because they preserved it so far, for now, we may bask in sunlight. ■

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[32] *Id.* at 754.

[33] *First Solar Appeal*, 881 F.3d at 753 (quoting *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1210 (9th Cir. 2016)).

[34] *First Solar Appeal*, 881 F.3d at 754 ("But our approval of one theory should not imply our rejection of others."). The Ninth Circuit also clarified that loss causation does not demand a revelation of the fraud. *Id.* ("A plaintiff may [] prove loss causation by showing that the stock price fell upon the revelation of an earnings miss, even if the market was unaware at the time that fraud had concealed the miss. That a stock price drop comes immediately *after* the revelation of fraud can help to rule out alternative causes. But that sequence is not a condition of loss causation.") (citations omitted) (emphasis in original). "This rule makes sense because it is the underlying facts concealed by fraud that affect the stock price. Fraud simply causes a delay in the revelation of those facts." *Id.*

[35] *Mineworkers' Pension Scheme v. First Solar Inc.*, No. 15-17282, 2018 U.S. App. LEXIS 11918 (9th Cir. May 7, 2018).

[36] *First Solar, Inc. v. Mineworkers' Pension Scheme*, No. 18-164, 2019 U.S. LEXIS 4292 (June 24, 2019).

[37] Louis Brandeis, Other People's Money 62 (National Home Library Foundation ed. 1933)).

[38] In 1971, the Supreme Court confirmed a private right of action exists under Section 10(b). *See Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971); *see also Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946) (first recognizing the private action under Section 10(b)).

[39] *Dura*, 544 U.S. at 345 (internal citations omitted). In service of those objectives, the Supreme Court has found private securities proceedings to be "necessary supplement[s] to [Securities Exchange] Commission action." *J. I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964) (finding an implied private right of action under Section 14(a) of the Exchange Act and noting one of the provision's "chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result").

On the other end of the spectrum, the Supreme Court has expressed concern about over-inclusive corrective disclosure. *Dura*, 544 U.S. at 345 ("[T]he statutes make these [private] actions available, not to provide investors with broad insurance against market losses[.]"). The proper balance is to shield investors from "those economic losses that misrepresentations actually cause." *Id.*

[40] Mustokoff, *supra* n.5, at 197 n.103 (quoting Transcript of Oral Argument at 38-39, *Dura*, 544 U.S. at 336 (No. 03-932)); *see also Alaska Electric Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009) (citing *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1422 (9th Cir. 1994)) ("If a fact-for-fact disclosure were required to establish loss causation, a defendant could defeat liability by refusing to admit the falsity of its prior misstatements.").

IN *ALON* LITIGATION, DELAWARE COURTS CLARIFY STANDARD OF REVIEW FOR CONTROLLER SQUEEZE-OUTS

(continued from page 1)

M&F Worldwide ("*MFW*").[1] In *MFW*, the Court affirmed a Court of Chancery holding that the deferential business judgment standard of review would govern a controlling stockholder's going-private squeeze-out of minority stockholders if the controlling stockholder conditioned the transaction, *ab initio*, upon: (1) the approval of an independent, adequately-empowered special committee of the board of directors and (2) a non-waivable condition that the transaction be approved by an uncoerced, informed vote of a majority of the minority stockholders. Prior to the Court's holding in *MFW*, such controlling stockholder take-private transactions were subject to the heightened scrutiny of entire fairness review, which required the company and controller to prove (subject to potential burden shifting) that the transaction was "entirely fair" to the minority stockholders.

The *MFW* holding and its introduction of its two procedural protections was a blow to stockholders invested in controlled corporations, as inherent conflicts of interest in a controller take-private and informational asymmetries between the controller and public minority shareholders rendered these types of transactions ripe for abuses of power that harmed shareholder interests. The business judgment standard of review is an incredibly deferential standard whereby the courts defer to the "business judgment" of corporate decision makers absent a showing of gross negligence or a duty of loyalty violation. Further, this standard as applied at a pleading stage motion to dismiss — before there is the benefit of discovery — made it extremely difficult for shareholders to challenge such transactions successfully. However, *MFW* made clear that in order to receive the benefit of business judgment review, the controller most pre-condition any deal on the above listed requirements "*ab initio*", meaning up front and at the outset of negotiations.[2] The notion was that by conditioning any deal at the outset upon the approval of an independent special committee and unaffiliated shareholder approval, the controlling stockholder was sufficiently "disabling" itself of its control position such that genuine arm's-length negotiations can occur with the board's special committee. As the Court explained, "where the controller irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote, the controlled merger then acquires the shareholder-protective characteristics of third-party, arm's-length mergers, which are reviewed under the business judgment standard."[3]

However, the *ab initio* requirement had recently come under pressure as a result of a recent Delaware Supreme Court decision, *Flood v. Synutra International, Inc.*,[4] decided in October 2018. In *Synutra*, the Delaware Supreme Court held that the business judgment rule still applied despite the fact that the controlling stockholder's initial overture to the board proposing he take the company private did not contain the preconditions requiring special committee approval and approval by a majority of the minority shareholders. In fact, those "preconditions" were not made until two weeks later, after the special committee has already been formed. Nonetheless, the Supreme Court, in affirming the Chancery Court holding, ruled that *MFW's* "*ab initio*" requirement was satisfied, and actually meant that the procedural protections must be put in place "before the start of substantive economic negotiations."[5] *Synutra* reasoned that so long as the procedural devices are implemented before substantive economic negotiations took place, they were sufficiently "at the beginning" such that they could not be offered by the controller in exchange for price concessions.[6] Thus, *Synutra* blurred what had been a bright-line rule meant to guide corporate behavior.

Further, in *Olenik v. Lodzinski*,[7] the Court of Chancery dismissed a shareholder complaint challenging a controlling stockholder transaction pursuant to *MFW* where the parties had been

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

[2] "*Ab initio*" is Latin for "from the beginning." *Flood v. Synutra International, Inc.*, 195 A.3d 754, 760.

[3] 88 A.3d 635, 644 (Del. 2014).

[4] 195 A. 3d 754 (Del. 2018).

[5] 195 A.3d at 763.

[6] 195 A.3d 754, 762-63.

[7] 2018 WL 3493092, at *1 (Del. Ch. July 20, 2018).

working on the transaction for months before the *MFW* procedural preconditions were put in place. The Court of Chancery reasoned that those lengthy interactions "never rose to the level of bargaining: they were entirely exploratory in nature."[8] The Chancery Court drew a distinction, for purposes of applying *MFW*, between "'discussions' about the possibility of a deal and 'negotiations' of a proposed transaction after the 'discussions' lead to a definitive proposal."[9] Thus, in the Chancery Court's view, preliminary discussions did not rise to the level of negotiations required to trigger *MFW's* protections.

The Delaware Supreme Court disagreed in April 2019.[10] The Delaware Supreme Court held that the months of discussions regarding the merger at issue in *Olenik* — which had occurred before the implementation of the *MFW* procedural devices — did in fact rise to the level of substantive economic negotiations. These discussions included, *inter alia*, data room access, exchange of confidential diligence information, discussing valuation, discussion of a transaction timeline, discussion of potential post-deal employment matters, and discussing transaction structures.[11] Thus, contrary to the Chancery Court's holding which focused on the date of the first official proposal, the Delaware Supreme Court recognized that substantive economic negotiations can occur prior to the delivery of a definitive proposal or offer.

Most recently, in Kessler Topaz's *Alon* litigation, the Court of Chancery expanded on the *Olenik* decision. While Alon and Delek maintained that the *MFW* procedural safeguards had been utilized from the outset of negotiations, once the merger proxy was filed with the SEC, it became clear that their representations were misleading. Delek had become Alon's controlling stockholder in 2015 when it purchased 48% of Alon's common shares in a block sale from Alon's then largest shareholder, Alon Israel. Ordinarily, Delaware law would prohibit Delek from acquiring the rest of Alon for a period of three years once Delek acquired an ownership stake that large. But instead, Alon's board of directors approved the sale and shortened the statutory period from

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[8] *Olenik v. Lodzinski,*, 2018 WL 3493092, at *16 (Del. Ch. July 20, 2018)

[9] *Olenik,* 2018 WL 3493092, at *16.

[10] *Olenik v. Lodzinski*, 208 A.3d 704 (Del. 2019).

[11] *Olenik*, 208 A.3d at 709–11; 716-17.

COURT CERTIFIES DIRECT PURCHASER CLASS CLAIMS THAT PHARMACEUTICAL COMPANIES UNLAWFULLY SOUGHT TO *DELAY AND SUPPRESS GENERIC COMPETITION FOR THE ORAL CONTRACEPTIVE LOESTRIN 24 FE*

(continued from page 3)

claim that Warner Chilcott unlawfully secured its Loestrin 24 patent and engaged in further unlawful conduct, including acts in concert with Watson, to prolong the patent protection and suppress entry of a generic Loestrin 24 in a successful effort to shield its Loestrin 24 sales (and profits) from competition. The unlawful conduct that the Direct Purchasers allege Warner Chilcott engaged in includes, in addition to committing fraud on the Patent and Trademark Office: filing sham patent infringement litigation against potential generic competitors to delay generic competition; making large and unjustified payments to Watson and another generic manufacturer to settle such sham patent litigation in exchange for the generic manufacturers' agreements to stay out of the relevant market; and entering the market with a chewable version of Loestrin 24 (branded Minastrin 24) just before generic Loestrin 24 was set to enter the market in an effort to move branded Loestrin 24 customers to the "new" chewable product and so, prevent automatic substitution of generic Loestrin 24 for those customers with prescriptions for the chewable.

The Class Certification Decision:

Judge Smith's thorough decision certifying the Direct Purchaser class presents a solid analysis that affirms the utility and propriety of the class vehicle for adjudicating "pay for delay" pharmaceutical antitrust claims asserted by direct purchasers. In reaching his decision, Judge Smith addressed at length both Defendants' attacks on Plaintiffs' expert, Dr. Jeffrey J. Leitzinger, Ph.D., and the elements that the Direct Purchasers were required to establish to support class certification under Federal Rule of Civil Procedure 23. Judge Smith concluded that Dr. Leitzinger supported his opinion that the Direct Purchasers "were all impacted by Defendants' alleged anticompetitive conduct" resulting in antitrust damages that could be proven with evidence common to class,[5] with a "robust analysis based on sound methodology."[6] Judge Smith's conclusion in this regard led him not only to reject the defendants' challenges to Dr. Leitzinger's methodology but also to find that the Direct Purchasers, relying on Dr. Leitzinger's opinions, had shown that their claims were appropriate for class adjudication.

Indeed, throughout the decision, Judge Smith reiterated that Plaintiffs' expert presented a sound class-wide analysis of antitrust impact resulting from Defendants' alleged anticompetitive conduct and for the calculation of class wide damages — both of which the judge found appropriate for presentation at trial to a jury charged with resolving the Direct Purchasers' common claims. Notably, on numerous occasions the Court expressly declined to accept Defendants' arguments seeking to capitalize on conditions that were the result of their own challenged conduct. Thus, Judge Smith rejected Defendants' arguments based upon what the market actually did, stating that "the jury is free to accept, based upon Dr. Leitzinger's robust analysis and sound methodology, that the actual world was too tainted by Defendants' unlawful conduct to give credence to how prices in this [actual] market responded to generic entry."[7] He likewise rejected Defendants' assertions that certain Direct Purchasers' failure to purchase generic Loestrin once it was available cast doubt on whether they would have done so in a world absent the challenged conduct (the "but for" world), observing: "Defendants have not earned 'the benefit of the doubt when the very reason we cannot know the answer to that question is because of their alleged wrongdoing.'"[8] The decision thus recognizes and confirms the purpose of the federal antitrust laws and Rule 23 in enabling direct purchasers to adjudicate their common claims against pharmaceutical companies for generic suppression in a single trial.

Defendants vigorously argued that the Direct Purchasers did not satisfy the requirements for class certification set forth in Rule 23. And, Judge Smith considered and addressed their arguments, explaining why he rejected them. For example, as to Rule 23's requirement that the members of a proposed class be "so numerous that joinder

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[5] Slip Op. at 10.

[6] *Id.* at 17.

[7] *Id.* at 17.

[8] *Id.* at 36 (quoting *In re Namenda Direct Purchaser Antitrust Litig.,* 331 F. Supp. 3d 152, 2009 (S.D.N.Y. 2018)).

of all members is impracticable,"[9] Defendants contended that rather than 47 separate entities with standing to pursue the antitrust claims alleged, there were at most sixteen — which Defendants argued was not sufficiently numerous for class certification. One argument Defendants advanced in this regard was that nine of corporate entity Direct Purchasers should not be counted separately from their corporate affiliates. Judge Smith dispensed with this argument summarily, stating it "gets no traction."[10] The judge pointed to Warner Chilcott's own treatment of these Direct Purchasers, noting that each of these separately incorporated entities were "separately listed in Warner Chilcott's transactional sales data, and are distinct from their corporate affiliates."[11] Accordingly, and consistent with other recent cases addressing such arguments in direct purchaser cases including *In re Solodyn (Minocycline Hydrochloride) Antitrust Litig.,* 2017 WL 4621777, at *4 (D. Mass. October 16, 2017) and *Namenda,* 331 F. Supp. 3d at 207, the Court rejected Defendants' attempt to winnow down the number of class members by combining corporate affiliates.[12]

Defendants' other arguments as to numerosity challenged the inclusion of Direct Purchasers that had only purchased generic versions of Loestrin 24 ("Generic-Only Purchases") and Direct Purchasers that had only purchased branded Loestrin 24 ("Brand-Only Purchasers"). The Court disposed of arguments that Generic-Only Purchasers did not have standing for antitrust purposes, explaining that Plaintiffs' expert, Dr. Leitzinger, presented an analysis that:

> plainly demonstrates that the overcharges incurred by Generic-Only Purchasers were the result of Defendants' unlawful conduct aimed at suppressing generic competition; an inference can readily be drawn that Defendants intended both to suppress generic competition and to cause prices to increase market-wide; and Generic-Only Purchasers' injury (overcharges from an anticompetitive scheme) is the type the Sherman Act intends to redress.[13]

The Court advised that it was "unconvinced" by Defendants' contention that the damages calculation as to these injuries would be too speculative because they were not directly caused by Defendants' conduct, observing "Defendants' alleged unlawful conduct is plainly the proximate cause of the Generic-Only Purchaser's alleged antitrust injury."[14] The Court also dismissed Defendants' assertions that Generic-Only purchasers presented issues of "apportionment" or "burdens of duplicative recovery" akin to those that may be implicated by indirect purchaser claims. In so doing, Judge Smith observed that the "Generic-Only Purchasers are the only purchasers in a position to prove injury and recover damages for the overcharges on their purchases of generic Loestrin 24 from [the generic pharmaceutical company] during the class period under federal antitrust law."[15]

As to arguments that Brand-Only Purchasers could not be included in the class because there was no proof that they would have purchased generic Loestrin had it been available, the Court relied upon its analysis rejecting Defendants' attacks on Plaintiffs' expert's opinion demonstrating injury for these class members.[16] Defendants argued that in the actual world none of the six Brand-Only Purchasers purchased generic Loestrin 24 after it became available in January 2014 and, thus, contended that Plaintiffs' expert opinion was "fundamentally flawed."[17] The Court concluded otherwise, finding that Plaintiffs had "set forth sufficient, reliable evidence supporting the conclusion that Generic-Only and Brand-Only Purchasers would have purchased cheaper generic Loestrin in a but-for world with sustained and robust competition."[18]

To certify a class, Rule 23 requires, among other things, that the court find that the class members raise common issues, and where, as here, certification is sought under Rule 23(b)(3), that those common issues predominate over individual issues.[19] As to the first, Judge Smith found the requirement was "easily met for this putative class. Each putative class member alleges that Defendants caused overcharges by engaging in an anticompetitive scheme to delay and suppress generic competition."[20] As to the requirement that common issues predominate, the Court's analysis focused on whether the Direct Purchasers had presented, as they must in case such as this one, "some means of determining that each member of the class was in fact injured."[21] The common injury posited by the Direct Purchasers is that "every Class member would have purchased at least some lower-priced generic Loestrin [24] instead of higher-priced branded Loestrin 24, Minastrin 24 or generic Loestrin 24 that it did buy."[22] The Direct Purchasers presented Dr. Leitzinger's model to demonstrate such injury using common evidence. Defendants' challenged that model, arguing that it did

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9 Fed.R.Civ.P. 23(a)(1).

10 *Id.* at 27

11 *Id.*

12 *Id.*

13 *Id.* at 24.

14 *Id.* at 25.

15 *Id.* at 27.

16 *Id.* at 27, n. 16.

17 *Id.* at 13.

18 *Id.* at 14.

19 Fed.R.Civ.P. 23(a)(2) & (b)(3).

20 Slip Op. at 28-29.

21 *Id.* at 33, *citing In re New Motor Vehicles Canadian Exp. Antitrust Litig.,* 522 F. 3d 6, 28 (1st Cir. 2008) and *In Re Asacol Antitrust Litigation*, 907 F.3d 42, 51 (1st Cir. 2019).

22 Slip Op. at 34, quoting the Direct Purchasers' Motion for Class Certification.

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not properly establish injury-in-fact for Generic-Only and Brand-Only Purchasers because it relied on aggregate trends and averages to eliminate relevant individualized inquiries that they argued had to be conducted. As discussed above, Judge Smith rebuffed Defendants' challenges to the expert's model. As to the Brand-Only Purchasers, Judge Smith stated:

> The Court is fully satisfied that Dr. Leitzinger's report and testimony establish that the Brand-Only Purchasers each likely would have purchased at least a single prescription of generic Loestrin 24 during the class period in a market with robust, sustained generic competition, given their business interests in meeting customer's demand. . . . [I]t will be for the jury to decide whether Dr. Leitzinger's theory wins the day, in whole or in part; but for present purposes-class certification — his theory more than suffices.[23]

As to the common proof of injury for the Generic-Only Purchasers, Judge Smith also accepted Dr. Leitzinger's methodology which incorporated "'variation across Class members in the actual prices they paid and in the prices they would have paid', providing averages that 'correctly summarize the combined effects of all of these Class members in a single class-wide overcharge measure.'"[24] The Court reiterated a point made throughout, "aggregating damages in this way is well accepted."[25] Further, the Court again rejected arguments by Defendants that focused on the fact that the price of generic Loestrin 24 from Amneal did not fall once additional generic manufacturers entered. Once more the Court noted that Defendants failed to "consider the effect of sustained, robust generic competition" that would have occurred in the but-for world posited by the Direct Purchasers' expert. Finally, as to establishing that all class members were injured, Judge Smith held that the possibility that the evidence may ultimately reveal a "handful of identifiable class members [who] may be uninjured is not a barrier to class certification."[26]

With respect to whether the Direct Purchasers had demonstrated that damages could be calculated on a class-wide basis, Judge Smith found that the approach of the Direct Purchasers' expert properly established a formulaic approach that did not involve individualized analyses. He again rejected Defendants' reprise of the arguments they had made in their challenges to the expert's model holding that the model did not ignore uninjured purchasers or improperly assume facts.[27] The Court observed that the output of the model is a "single overcharge measure" determined through a "methodology . . . widely accepted [which] does not purport to calculate individual damages for any one purchaser."[28]

In sum, in his decision certifying the Direct Purchaser class, Judge Smith did not blaze new trails but rather followed paths well-established by accepted principles and precedent to reach a result well supported by the record, the law and the procompetitive purposes of antitrust law. Nonetheless, the pharmaceutical companies have recently sought review of the class certification decision. Their petition for review, and the Direct Purchasers' responding opposition, await consideration by the First Circuit Court of Appeals. ■

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[23] *Id.* at 37.

[24] *Id.* at 38 (quoting Dr. Leitzinger's Rebuttal Report).

[25] *Id.* at 39.

[26] *Id.* at 40.

[27] *Id.* at 43.

[28] Id. at 44 (*citing Solodyn*, 2017 WL 4621777, *9-10 (accepting the same aggregated damages model in certifying a class of direct purchasers).

BACK TO NORMAL: THE NINTH CIRCUIT REVIVES SETTLEMENT STANDARD IN MULTI-STATE CLASS ACTIONS

(continued from page 3)

misleading statements about the fuel economy of various car models and asserted claims for fraud, negligence, and consumer protection under the laws of multiple states. After more than three years of litigation, the parties agreed to a nationwide settlement (valued at as much as $210 million in aggregate reimbursement to the class) and plaintiffs moved for approval of the settlement and certification of a settlement class on December 23, 2013.[2] Judge George H. Wu of the District Court for the Central District of California preliminarily approved the parties' proposed settlement and certified a nationwide settlement class on August 21, 2014. *See In re Hyundai & Kia Fuel Econ. Litig.*, No. 13-ml-2424-GW(FFMx), 2014 WL 12603199 (C.D. Cal. Aug. 21, 2014) (the "Settlement Order"). Judge Wu granted final approval of the settlement on June 11, 2015.[3]

Following final approval of the nationwide settlement, several objectors filed appeals challenging the district court's certification of a settlement class. Specifically, the objectors argued that the district court abused its discretion by failing to conduct a choice-of-law analysis or to rigorously analyze differences in the various states' consumer protection laws.[4] In response, a divided panel of the Ninth Circuit vacated the Settlement Order, finding that the district court abused its discretion and committed legal error by failing to: (1) undertake a choice-of-law analysis to determine whether California law could apply to the claims of all class plaintiffs or whether the court had to apply the laws of each state separately; (2) acknowledge that material differences in the state laws did, in fact, prevent the court from applying only California law; and (3) determine whether the variances in the state laws defeated the predominance requirement of Rule 23(b)(3). Panel Opinion, 881 F.3d at 702-03.

Ultimately, the Ninth Circuit panel determined that "[b]ecause a court's obligations under Rule 23 are heightened in the settlement-class context," a "rigorous analysis" into the satisfaction of Rule 23's prerequisites was required. *Id.* at 705. As a result, the Panel Opinion created an affirmative burden on the settling parties to prove that there were no significant differences between the various states' laws — a demanding standard that potentially required an in-depth analysis of the laws of all fifty states — and, in effect, created a presumption against the nationwide settlement of a class action asserting claims under the laws of multiple states.

In a vigorous dissent, Ninth Circuit Judge Jacqueline Nguyen noted that, by eschewing precedent and elevating the standard for settlement approval, the majority "deal[t] a major blow to multistate class actions" that was "[c]ontrary to our case law and that of our sister circuits." *Id.* at 708. As stated succinctly by Judge Nguyen, the majority had "effectively ensure[d] that 'no one will recover anything.'" *Id.* at 719 (citation omitted).

The Ninth Circuit's *en banc* Reversal in *Hyundai & Kia* Corrects Course

Plaintiffs and defendants appealed the Panel Opinion and the Ninth Circuit agreed to rehear the case *en banc*.[5]

In an opinion authored by Judge Nguyen, the Ninth Circuit rejected the Panel Opinion and affirmed the district court's settlement approval and certification of the settlement class — thereby restoring the long-understood framework governing approval of nationwide settlements in class actions asserting claims under the laws of multiple states. *See generally Hyundai & Kia*, 926 F.3d at 561-66. Specifically, the Ninth Circuit held that, subject to the forum state's laws and the Constitution, "a court adjudicating a multistate [state law] class action is free to apply the substantive law of a single state to the entire class." *Id.* at 561. Moreover, the Ninth Circuit held that the objectors failed to prove that: (1) "the law of the foreign state 'materially differs from the law of California'"; (2) "a 'true conflict exists,' meaning that each state has an interest in the application of its own law to 'the circumstances of the particular case'"; and (3) "the foreign state's interest would be 'more impaired' than California's interest if California law were applied." *Id.* at 562. Accordingly, the district court correctly applied California law.

In analyzing these issues, the Ninth Circuit emphasized that — given the "strong judicial policy" favoring settlements — a district court's decision to approve a class action settlement is entitled to substantial deference and is subject only to "extremely limited

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[2] *See* Motion, *In re Hyundai & Kia Fuel Econ. Litig.*, No. 13-ml-2424-GW(FFMx) (C.D. Cal. Dec. 23, 2013), ECF No. 185.

[3] *See* Civil Minutes, *In re Hyundai & Kia Fuel Econ. Litig.*, No. 13-ml-2424-GW(FFMx) (C.D. Cal. June 11, 2015), ECF No. 494.

[4] *See* Panel Opinion, 881 F.3d at 701-02.

[5] *See In re Hyundai & Kia Fuel Econ. Litig.*, 897 F.3d 1003, 1007 (9th Cir. 2018) (granting rehearing *en banc*).

DELAWARE CHANCERY COURT SAYS STOCKHOLDERS WERE MISINFORMED WHEN APPROVING BUYOUT OF KCG HOLDINGS

(continued from page 2)

Defendants moved to dismiss the litigation, relying primarily on the now-seminal Delaware Supreme Court decision *Corwin v. KKR Financial Holdings LLC*,[1] which held that post-closing damages claims are effectively foreclosed where a transaction is approved by a fully-informed stockholder vote. On June 21, 2019, the Delaware Chancery Court denied defendants' motions in their entirety, finding that defendants failed to disclose significant material information to KCG stockholders in the definitive proxy statement (the "Proxy") soliciting their approval of the Buyout.[2] The decision highlights the importance of "testing" the accuracy and completeness of proxy statements in the post-*Corwin* world.

A. Jefferies and Virtu Plan the Buyout

Virtu was interested in acquiring KCG for strategic reasons, as both companies provided trading and liquidity services to the financial markets. However, instead of approaching KCG management or the Board, Virtu contacted Jefferies in late 2016 to see if KCG's largest stockholder was interested in a Virtu acquisition. Virtu and Jefferies met multiple times between December 2016 and February 2017 without KCG's knowledge. In these meetings, Virtu and Jefferies discussed the structure of a proposed transaction, the price of such a transaction and how to appropriately value KCG, including the potential impact of the sale of KCG's stand-alone trading platform, BondPoint.

Finally, on February 23, 2017, Virtu sent KCG a proposal to acquire the Company for $18.50 to $20 per share. Over the next two months Jefferies repeatedly pressured KCG to engage in merger discussions with Virtu, culminating on April 11, 2017, when Jefferies told Board members and management that Virtu would pay $20 per share, and KCG should take it. The next day, Virtu delivered its $20 per share "best and final" proposal.

On April 20, 2017, the Board approved Virtu's $20 per share proposal. On June 1 2017, KCG issued the Proxy, soliciting KCG stockholders to approve the Buyout. The Proxy made vague disclosures concerning Jefferies' and Virtu's interactions surrounding the Buyout, but as detailed herein, hid significant information from KCG stockholders.

B. Kessler Topaz Secures Expedited Discovery, Uncovering Numerous Process Flaws and Misleading Disclosures

Based on the disclosures in the Proxy, Kessler Topaz filed a complaint alleging that Virtu and Jefferies had reached an agreement, arrangement or understanding concerning the Buyout in violation of Section 203.[3] Kessler Topaz simultaneously sought expedited discovery and an injunction of the stockholder vote on the Buyout. On June 9, 2017, the Court granted Kessler Topaz's motion for expedited proceedings as to the Section 203 claim, and scheduled a July 7 preliminary injunction hearing. Between June 12 and June 26, 2017, Kessler Topaz reviewed over ten thousand pages of documents and deposed four witnesses, including KCG's CEO Daniel Coleman ("Coleman") and Chairman of the Board Charles Haldeman ("Haldeman"), as well as Jefferies' CEO Richard Handler ("Handler"), and Virtu's CEO Douglas Cifu ("Cifu").

Discovery provided significantly more detail concerning Jefferies' and Virtu's contacts than was disclosed in the Proxy. On December 19, 2016, Handler met with Virtu's controlling stockholder Vincent Viola to discuss a potential acquisition. The very next day, Handler met with Cifu, who proposed that $17 to $18 per share was an appropriate price for Virtu to pay to acquire KCG. Handler countered that tangible book value ("TBV") was the proper way to value KCG, and that KCG's TBV would increase to at least

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[1] 125 A.3d 304 (Del. 2015)

[2] *Chester County Emps.' Retirement Fund v. KCG Holdings, Inc.*, 2019 WL 2564093 (Del. Ch. June 21, 2019).

[3] The initial complaint also alleged that (1) the Board breached their fiduciary duties of loyalty and care by failing to take all steps reasonably available to maximize stockholder value in connection with the Merger, including failing to adequately canvas the market for competing bids and allowing Jefferies and Virtu to improperly influence the sale process; and (2) Jefferies and Virtu abetted the Board's breaches of fiduciary duties.

$21 per share upon selling BondPoint. Handler's knowledge of BondPoint was the result of Jefferies' position as KCG's largest stockholder and long-time financial advisor, as KCG had never disclosed BondPoint's financial results or indicated it was for sale.

After a series of additional meetings and discussions concerning KCG's valuation and BondPoint's potential sale, including on February 13, 14 and 16, 2017, Jefferies and Virtu reached an understanding that: (1) Jefferies would support Virtu's acquisition of KCG for $20 per share and pressure KCG's Board and CEO to do the same; and (2) Jefferies would assist Virtu in selling BondPoint post-Buyout. Thus, the Buyout would enable Jefferies to liquidate its long-term KCG investment and develop a lucrative relationship with Virtu post-Buyout, while Virtu would be able to acquire KCG at a discount.

Once Virtu and Jefferies had come to terms on the Buyout, Virtu sent its acquisition proposal to Coleman. Coleman was blind-sided by Virtu's offer and promptly advised KCG's board that KCG management, with Jefferies' assistance as its financial advisor, had been working on a restructuring initiative to reduce costs and return value to stockholders (the "Restructuring Plan"). Coleman projected that the Restructuring Plan could result in 25% more value to stockholders than Virtu's offer. Jefferies, however, pressured KCG to entertain Virtu's offer over the Restructuring Plan, even though Jefferies was advising on it. Throughout the sale process with Virtu, Jefferies continued to hide from KCG the extent of its negotiations with Virtu, and while the Board had suspicions, it failed to adequately investigate Virtu's and Jefferies' communications.

While the Board was initially considering the Virtu offer and the Restructuring Plan side-by-side, by April 2017, Coleman was the only KCG director opposing the Buyout. After Virtu delivered its $20 per share proposal on April 12, 2017, KCG's Board resolved to counter Virtu's offer with $20.21. Coleman, however, voted against the counter-offer because he believed it was "still too low." Nevertheless, Coleman promised the Board that he would support the Buyout if Virtu agreed to a satisfactory bonus and compensation pool for KCG management and employees. Although this created a patent conflict with the Board's duty to maximize value for KCG's stockholders, the Board directed Coleman to finalize the compensation negotiations as well as try to get a better Buyout price. Coleman prioritized the compensation negotiations with Virtu over the Buyout price.

On April 18, 2017, Virtu and Coleman agreed on compensation, failing to seriously discuss an increase in the Buyout price. Coleman subsequently emailed the Board revisions to KCG's projections. The revised projections slashed $18 million (2.6%) of net revenue, $53 million (21.8%) in adjusted EBITDA, and $30 million (42.8%) in adjusted net income for 2017. The revisions made Virtu's $20 per share offer look more attractive than the Restructuring Plan. KCG's Board approved the projections over email, and unanimously approved the Buyout the next day.

C. Defendants Cave on the Section 203 Claim But Kessler Topaz Continues to Litigate Post-Closing

As Kessler Topaz was filing its opening brief in support of its preliminary injunction motion, KCG issued a new proxy statement (the "New Proxy"). The New Proxy required an additional vote of two-thirds of KCG's outstanding shares, excluding Jefferies' shares, in connection with the Buyout. This was the exact relief that Kessler Topaz sought in the Section 203 claim.[4]

On July 19, 2017, KCG's stockholders voted to approve the Buyout. However, the stockholders' approval was tainted by the New Proxy's failure to disclose that: (1) Jefferies and Virtu discussed selling BondPoint post-Merger, which they expected to increase KCG's TBV to $21+ per share; (2) Coleman voted against a $20.21 counteroffer, because he believed it was still too low, but then voted in favor of the Buyout at $20 per share after securing management's compensation pool; and (3) KCG's original projections under the Restructuring Plan forecast more value than the Virtu offer, but were revised at the 11th hour by Coleman and the Board to support the Buyout.

In light of these process and disclosure issues, Kessler Topaz filed an amended complaint on behalf of Chester County, which alleged that (1) KCG's stockholders were not fully informed of all material facts when they voted on the Buyout; (2) Coleman and the board breached their fiduciary duty to maximize stockholder value in all-cash sale of the Company, as required by Delaware law;[5] and (3) Jefferies and Virtu aided and abetted the Board's and Coleman's conduct and participated in a civil conspiracy to enable Jefferies to develop a lucrative advisory relationship

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[4] Section 203 requires that if a 15% stockholder reaches an agreement, arrangement or understanding with an acquirer, then there is a 3-year moratorium on any acquisition, beginning on the date the stockholder acquired its 15% stake, unless the transaction is put to a 66 2/3 stockholder vote, excluding the shares held by the 15% stockholder.

[5] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986).

DELAWARE CHANCERY COURT SAYS STOCKHOLDERS WERE MISINFORMED WHEN APPROVING BUYOUT OF KCG HOLDINGS

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with Virtu post-Merger and to enable Virtu to acquire KCG at an unfair price.

Defendants moved to dismiss the amended complaint, arguing that none of the disclosure claims raised were material, and therefore *Corwin* required dismissal, and that the amended complaint failed to state claims against the defendants upon which relief could be granted. In denying the motions, the Court largely adopted Kessler Topaz's arguments opposing the motions.

First, the Court found that the New Proxy was materially misleading and incomplete in three respects. The Court found that the New Proxy incompletely disclosed that Jefferies and Virtu discussed that KCG's TBV could exceed $20 per share following "certain" divestitures, and that defendants were obligated to fully and fairly disclose that Jefferies and Virtu engaged in detailed discussions concerning selling BondPoint and its impact KCG's TBV.[6] The Court held that because "defendants traveled down the road of partial disclosure . . . they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events."[7]

The Court also found that the New Proxy was incomplete because KCG's stockholders would have considered it important to know that Coleman voted against a $20.21 counter-offer because he believed it was too low, and only changed course after securing his desired compensation. The Court further found that the New Proxy's failure to disclose the original set of projections concerning KCG's Restructuring Plan and the last minute downward revisions to the projections that made the Buyout look superior were material omissions.[8] Because stockholders did not vote with full material information, they did not ratify the Board's conduct, and the business judgment rule did not apply under *Corwin*.[9]

Second, the Court found it reasonably conceivable that the Board breached its fiduciary duties and acted in bad faith by prioritizing the interests of management over KCG's stockholders. The Court reasoned that the Board knew that Coleman faced a conflict between maximizing value for KCG's management and stockholders, but did nothing to prevent it. Instead, the Board permitted Coleman to secure management's compensation pool, and then approved the downwardly revised KCG's projections to support the Buyout price.[10]

Third, the Court found that Jefferies and Virtu knowingly participated in the Board's and Coleman's failure to maximize stockholder value. The Court faulted Jefferies for putting the Board in an informational vacuum by misleading and failing to fully inform the Board about its communications with Virtu.[11] The Court also faulted Virtu for undermining arm's-length negotiations with KCG by accepting confidential information from Jefferies concerning BondPoint, and exploiting Coleman's conflict to obtain his support of the Buyout price.[12]

The Court's decision turned on disclosures, and the New Proxy's failure to accurately and adequately disclose the conduct of the Board, Coleman, Jefferies and Virtu throughout the sale process leading up to the Buyout. This case illustrates the aggressive approach Kessler Topaz takes in prosecuting merger litigation, and the importance of challenging vague and misleading proxy disclosures. Trial in the litigation is scheduled for the fall of 2020. ■

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[6] *KCG*, 2019 WL 2564093, at *11-12.

[7] *Id.*, at *11 (citing *Arnold v. Soc'y for Sav. Bancorp., Inc.*, 650 A.2d 1270, 1280 (Del. 1994))

[8] *Id.*, at *17-18.

[9] *Id.*, at *2.

[10] *Id.* at *17.

[11] *Id.*, at *19.

[12] *Id.*

SEC PROPOSES RULE CHANGES TO ELIMINATE AUDITOR REVIEW FOR SMALLER COMPANIES

(continued from page 2)

of 2002 ("SOX") requires almost all issuers, including smaller reporting companies ("SRCs") that benefit from scaled disclosure requirements and file reports pursuant to Section 13(a) or 15(d) of the Exchange Act, to establish and maintain ICFR and have their management assess the effectiveness of their ICFR. In addition, Section 404(b) of SOX requires those issuers to comply with the ICFR auditor attestation requirement. Section 404(c) of SOX exempts from the ICFR auditor attestation requirement issuers that are non-accelerated filers. Congress introduced the ICFR auditor attestation requirement as part of a package of regulations intended to improve the accuracy and reliability of corporate disclosures in the wake of the Enron Corp. and WorldCom accounting scandals of the early 2000s, as issuers with weak ICFR are often forced to restate their financial results.

The Proposed Amendments

The proposed amendments are the latest in a series of changes designed to roll back the requirements of SOX. On June 28, 2018, the SEC adopted amendments to the definition of SRC to expand the number of companies subject to scaled disclosure requirements. Most significantly, the amendments raised the SRC threshold to include companies with less than $250 million in public float and companies with less than $100 million in annual revenues if they also have either (i) no public float or (ii) a public float that is less than $700 million. The SEC also approved conforming amendments to the accelerated filer definition to provide that notwithstanding the fact that companies with $75 million or more of public float may now qualify as SRCs, such companies remain subject to the requirements applicable to accelerated filers, including the accelerated timing of filing of periodic reports and the ICFR audit attestation requirement.

As a result of the amendments, some issuers were categorized as both SRCs and accelerated filers and thus were required to comply with the ICFR auditor attestation requirement. In a purported effort to balance the benefits and burdens of compliance mandates for these companies, the proposed amendments would exclude from the definitions of accelerated filer and large accelerated filer an issuer that has a public float of less than $700 million and revenues of less than $100 million. The effect of the proposed amendments would be to expand the number of issuers that qualify as non-accelerated filers and are thus eligible to take advantage of certain reporting accommodations offered to such issuers, the most significant of which is the elimination of the ICFR auditor attestation requirement.

SEC Chairman Jay Clayton, who was nominated by President Donald J. Trump in January 2017, has made it a priority to make it more attractive for companies to go public, and the SEC has framed the proposed amendments as a step toward that goal. In a press release, Clayton stated that the proposed amendments were "aimed at a subset of companies where the additional requirement of an ICFR auditor attestation may not be an efficient way of benefitting and protecting investors." Clayton added that "[i]nvestors in these lower-revenue companies will benefit from more tailored control requirements" as "[m]any of these smaller companies — including biotech and health care companies — will be able to redirect the savings into growing their companies by investing in research and human capital."

The proposed amendments state that the "ICFR audit attestation requirement may be disproportionately burdensome for the issuers that are eligible to be an SRC . . . and, as with all compliance requirements, these costs may divert funds otherwise available for reinvestment by these issuers because they have less access than other issuers to internally-generated capital."[1] The SEC has also stated that "[t]he alleviation of these costs could be a positive factor in the decision of additional companies to enter public markets[.]" The SEC estimates that the proposed amendments would result in 282 additional issuers being classified as non-accelerated filers, and no longer subject to the ICFR auditor attestation requirement.

SEC Commissioner Robert J. Jackson, Jr., the lone dissenter in connection with the vote on the proposed amendments, stated that the amendments understated the benefits of the auditor attestations while exaggerating the benefits of its elimination for smaller companies. Jackson stated in a press release that:

> While paying auditors isn't free, neither is fraud. And fraud is more likely when insiders are less careful about controls. That's why, when we roll back protections like these, we can expect the cost of capital to rise; investors will either diligence the risk of fraud themselves or require higher returns to protect

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[1] The SEC estimates that the annual cost-savings to companies in foregoing ICFR auditor attestations would be $210,000, comprising $110,000 in audit fee cost savings and $100,000 in other cost savings.

SEC PROPOSES RULE CHANGES TO ELIMINATE AUDITOR REVIEW FOR SMALLER COMPANIES

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> against that risk. There's a tradeoff; and hard evidence from the market, not ideological intuition, should tell us how to strike that balance.
>
> One reason we're rushing to roll back these protections is the hope that it will lead to more IPOs. We have tried that experiment before with little success — a result that is hardly surprising, since we have still not addressed the far larger tax companies must pay to Wall Street to go public. But today's proposal provides a unique window into why those efforts have failed. The reason is that investors know better than Washington insiders about the value of protections like Section 404(b).
>
> The proposal rolls back 404(b) only for smaller companies on the theory that these are the firms for which the costs of attestation are most burdensome. But it's equally possible that these are the firms — high-growth companies where the risk, and consequences, of fraud are greatest — where the benefits of the auditor's presence are highest.

Academic literature supports Jackson's position. A 2017 study by accounting professors at the University of Washington and Georgetown University estimated that 20% of exempted firms had ineffective ICFR from 2007 to 2014, yet only 11% of them actually disclosed such weaknesses to investors. The study also found that 41% of the exempted firms provided insufficient information to identify the causes of the weaknesses in their ICFR, compared with just 7% for firms that were in compliance.

The 2017 study also found that the costs of foregoing the ICFR auditor attestation far outweighed the benefits of exemption. According to the study, exemption would have saved issuers an aggregate of $388 million in audit fees from 2007 to 2014. However, the study estimated that compliance with the ICFR audit attestation requirement reduced ICFR misreporting by almost 40%. According to the study, the benefits of ensuring compliance were substantial. Indeed, the study estimated that misreporting issuers experienced an aggregate of $719 million of lower future three-year operating performance due to non-remediation of ICFR weaknesses and delayed a $935 million decline in market value due to their failure to disclose ICFR weaknesses.

Meanwhile, a 2016 study by a consortium of accounting professors found that the ICFR auditor attestation is relevant to the investment community. This study, which surveyed 344 buy-side analysts from 181 investment companies about the "red flags" of financial misreporting, found that 60% of the analysts reported that "material internal control weaknesses are definitely a 'red flag' of management intent to misrepresent financial results." The existence of an ICFR weakness was the most common "red flag" for misrepresentation, followed by poor corporate governance.

The Comment Period

The proposed amendments were subject to a sixty day comment period following publication in the Federal Register. As would be expected, the proposed amendments drew effusive praise from businesses. For example, San Diego, California-based pharmaceutical company Organovo, Inc. wrote in a comment that "[w]e strongly believe that this proposed rule will benefit small public companies and their investors by freeing up more capital to hire talent, invest further in research and development, and expand our clinical pipeline to improve our ability to innovate succeed in developing new drugs to treat the nation's most intractable health problems."

Some comments, however, have been critical of the amendments. For example, a comment submitted by a consortium of four professors from Stanford University, the University of Pennsylvania, Indiana University, and the University of North Carolina was critical of the SEC's calculation of the cost-savings of the proposed amendments to exempted issuers:

> The [SEC's] total estimated benefit to companies — $210,000 in cost savings from foregoing internal control audits — is economically small and amounts to less than 0.1% of the average affected company's equity market value. In contrast, we interpret the evidence in

the Proposal as suggesting that the elimination of internal control audits is likely to result in significantly weaker internal controls over the financial reporting system and significantly greater levels of accounting restatements (i.e., poorer financial reporting quality). Thus, the $210,000 cost savings needs to be weighed against the potentially large social costs created by weaker internal controls and elevated levels of accounting restatements.

The professors found that these costs were substantial. According to their analysis, more than 100 companies that could get relief have reported restatements that altered combined net income by $295 million from 2014 through 2018. For 2018 alone, the professors uncovered eleven restatements that misrepresented more than $65 million in net income and destroyed more than $294 million in market value — a figure almost four times as big as the estimated $75 million in total cost savings from the proposed amendments.

The contributors to the 2017 study also submitted a comment stating that they "do not support . . . an increase in the number of issuers exempt from [the ICFR auditor] attestation[.]" Citing to their prior study, the professors noted that doing so "would negatively impact capital markets and fail to achieve the proposed rule's stated goal which is 'to promote capital formation for smaller reporting issuers.'"

The comment period closed on July 29, 2019. Following the closing of the comment period, the SEC can vote to adopt the proposal after studying the comments it receives. ■

IN *ALON* LITIGATION, DELAWARE COURTS CLARIFY STANDARD OF REVIEW FOR CONTROLLER SQUEEZE-OUTS

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three years to one year. During that one year period, Delek was contractually required to not seek to acquire the remaining shares of Alon stock. However, after the merger of Alon into Delek was announced on January 3, 2017, the proxy revealed that almost immediately upon Delek's block purchase of Alon stock, discussions ensued regarding a potential combination of the two companies.

In fact, the proxy demonstrated that Alon's board of directors immediately formed a special committee to evaluate an eventual combination of Alon and Delek. For months, the chairman of that special committee routinely met with the chairman of Delek to discuss proposed pricing terms and potential structures the transaction could take. Never during these discussions was it set forth that any transaction would require special committee approval and approval of a majority of shareholders unaffiliated with Delek. During this time, the special committee made numerous proposals and repeatedly bid against itself. Like in *Olenik*, it was not until the special committee and Delek submitted their first official proposal letters were the *MFW* requirements put in place, despite the fact that the transaction structure was largely agreed to already. Ultimately, the merger was agreed to at an exchange ratio of 0.504 shares of Delek stock for each share of Alon stock.

Believing the final terms of the merger were the result of an unfair process and undervalued Alon's common stock, Kessler Topaz and Arkansas Teacher Retirement System initiated litigation alongside Delaware co-counsel. Defendants moved to dismiss the action based in large part on the argument that the *MFW* procedural protections were utilized and plaintiffs had not plead a claim that could survive the business judgment standard of review.

The Court of Chancery ruled on defendants' motion to dismiss on June 28, 2019, and held that *MFW's ab initio* requirement was not satisfied because Delek had engaged in substantive economic negotiations prior to accepting the *MFW* conditions in October 2016, six months after negotiations had started. Those negotiations included discussions of deal structure and price terms. Accordingly, the Court indicated that the defendants were not entitled to business judgment review at the pleadings stage, and it was reasonably conceivable that the merger would be subject to the entire fairness standard of review. Also, because substantive merger negotiations began in the one-year period where Delek was contractually required to not seek to acquire the remaining shares of Alon stock, the Court of Chancery sustained plaintiffs' statutory claims that the merger was invalid under Delaware law. This case is now set to move forward into discovery where Kessler Topaz will seek to prove that the merger was unfair for all of Alon's former minority shareholders.

Ultimately, the recent decisions by the Delaware Supreme Court and Court of Chancery have put an end to the erosion of *MFW's ab initio* requirement. This will help prevent controlling stockholders from abusing the already overly deferential *MFW* framework by requiring good faith adherence to the requirement that if they wish to buy out the minority shareholders' interest, they will have to let it be known before substantive negotiations begin that any deal will require independent special committee approval and majority of the minority approval. ■

BACK TO NORMAL: THE NINTH CIRCUIT REVIVES SETTLEMENT STANDARD IN MULTI-STATE CLASS ACTIONS

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review." *Id.* at 556. The Ninth Circuit also acknowledged that while a district court's Rule 23(b) analysis must be "rigorous," "[t]he criteria for class certification are applied differently in litigation classes and settlement classes." *Id.* Specifically, a district court certifying a settlement class "need not inquire whether the case . . . would present intractable management problems" if tried and should, instead, give heightened attention to the definition of the class and subclasses. *Id.* at 556-57 (citation omitted). Indeed, as explained by the Supreme Court of the United States, when "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial." *Id.* at 557 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

Moreover, the Ninth Circuit clarified that Rule 23's predominance analysis is not "a matter of nose-counting," but a pragmatic analysis wherein "more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis over individualized questions which are of considerably less significance" to resolving the claims. *Id.*

Importantly, the Ninth Circuit reiterated that the predominance requirement can be met where "just one common question predominates." *Id.* As such, the Ninth Circuit explained that the predominance analysis must be "considered in light of the reason for which certification is sought" — explicitly rejecting several objectors' contentions that "the test is 'precisely the same for a settlement class as it is for a litigation class.'" *Id.* at 558 (alteration omitted).

Finding that the district court applied the appropriate predominance standard to its evaluation of the proposed class, the Ninth Circuit determined that the class was properly certified for settlement.[6]

The Court's Ruling Restores Confidence and Finality

The Ninth Circuit's ruling in *Hyundai & Kia* corrected course, allowing district courts to once again evaluate and approve multi-state settlement classes with a focus on pragmatism and efficiency — providing substantial certainty for both plaintiffs and defendants. As such, parties seeking to resolve class actions asserting claims under the laws of multiple states can again trust that settlement efforts will not be delayed or jeopardized by an unnecessary focus on potential variances between the states' laws. ■

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[6] Incidentally, even if the district court had conducted a predominance analysis based on the differences in the laws of the various states, certification would likely still be proper in this case. As explained in *Hyundai & Kia*, the Ninth Circuit had previously held in a similar case against automakers that "common questions as to the defendant's knowledge and the existence of the problem . . . predominated notwithstanding variations in state laws." *Id.* at 563. Such reasoning "applie[d] with even greater force here, where the class claims turn on the automakers' common course of conduct . . . and no objector established that the law of any other states applied." *Id.* at 563-64.

WHAT'S TO COME

AUGUST 2019

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

August 4 – 7
DoubleTree by Hilton ■ Reading, PA
and Santander Arena
Berks County, PA

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

August 17 – 20
Omni Frisco ■ Frisco, TX

SEPTEMBER 2019

Litigation & Governance Trends for Nordic Asset Management & Owners

September 12
Marriott Hotel ■ Copenhagen, Denmark

Georgia Association of Public Pension Trustees (GAPPT) 10th Annual Conference

September 16 – 19
Lanier Islands Legacy Lodge ■ Buford, GA

Council of Institutional Investors (CII) 2019 Fall Conference

September 16 – 18
Hilton Minneapolis ■ Minneapolis, MN

Michigan Association of Public Employee Retirement Systems (MAPERS) 2019 Fall Conference

September 21 – 24
Radisson Hotel ■ Kalamazoo, MI

OCTOBER 2019

Illinois Public Pension Fund Association (IPPFA) 2019 MidAmerica Pension Conference

October 1 – 4
Grand Geneva Resort ■ Lake Geneva, WI

Florida Public Pensions Trustees Association (FPPTA) Fall Trustee School

October 6 – 9
Sawgrass Marriott ■ Ponte Vedra, FL

International Foundation of Employee Benefit Programs (IFEBP) 65th Annual Employee Benefits Conference

October 20 – 23
San Diego Convention Center ■ San Diego, CA

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

October 27 – 30
JW Marriott ■ New Orleans, LA

NOVEMBER 2019

State Association of County Retirement Systems (SACRS) Fall Conference

November 12 – 15
Hyatt Regency Monterey Hotel & Spa, Monterey, CA

County Commissioners Association of Pennsylvania (CCAP) Fall Conference

November 23 – 26
Hershey Hotel ■ Hershey, PA

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