Simpson Thacher

Securities Law Alert

In This Edition:

- Second Circuit: (1) Courts May Rely on Confidential Witness Allegations Pled with "Sufficient Particularity;" (2) 10b5-1 Plan Stock Trades May Support an Inference of Scienter If Plan Participation Commenced After the Alleged Fraud Began
- Eighth Circuit: Key Inquiry for Determining Whether a Statement Was Forward-Looking for Purposes of the PSLRA's Safe-Harbor Provision Is Whether the Statement's Veracity Was Discernible at the Time the Statement Was Made
- Ninth Circuit: "Personal Benefit" Requirement for Tippee Liability Is Met Where an Insider Discloses Confidential Information to a Trading Relative or Friend, Even If There Was No Potential or Actual Financial Benefit
- Southern District of New York: (1) *Dudenhoeffer* Forecloses ERISA Breach of Fiduciary Duty Claims Based on Public Information Absent "Special Circumstances;" (2) ERISA Appointing Fiduciaries Have No Duty to Disclose Inside Information to Appointees
- Southern District of New York: Second Circuit's Decision in *Newman* Did Not Change the "Personal Benefit" Requirement for Tipper Liability for Insider Trading
- Delaware Chancery Court: (1) Continuous Holder Requirement for Appraisal Actions Is Not Met If There Is an Administrative Transfer at the DTC Level; (2) Court Suggests a Different Approach to Determining Who Is a Stockholder for Appraisal Purposes
- Delaware Chancery Court: (1) Discounted Cash Flow Method of Share Appraisal in a Section 262 Action Is Inappropriate If Management Projections Are Unreliable; (2) Merger Price Can Be Evidence of Share Value If the Sales Process Was Fair

July 2015

Simpson Thacher's "market-leading securities litigation practice" is "known for handling highly-publicized disputes in defense of major financial institutions and international corporations."

– Chambers USA 2015

Second Circuit: (1) Courts May Rely on Confidential Witness Allegations Pled with "Sufficient Particularity;" (2) 10b5-1 Plan Stock Trades May Support an Inference of Scienter If Plan Participation Commenced After the Alleged Fraud Began

On July 24, 2015, the Second Circuit revived a securities fraud action alleging that Green Mountain Coffee Roasters, Inc. and certain of its executives had made material misstatements concerning "Green Mountain's inventory, business performance, and growth prospects." *Emps.' Ret. Sys. of Gov't. of V.I. v. Blanford*, 2015 WL 4491319 (2d Cir. 2015) (Chin, J.). The court determined that plaintiffs had adequately alleged misstatements based on confidential witness allegations, which the court found to be pled with "sufficient particularity to support the possibility that the witnesses possessed the information alleged." The court further found that stock trades made pursuant to 10b5-1 trading plans supported an inference of scienter because Green Mountain's executives allegedly began participating in those plans during the class

period, after the allegedly fraudulent scheme had begun.

Background

Between February 2, 2011 and November 9, 2011, defendants allegedly represented that Green Mountain "was straining to meet consumer demand for its Keurig and K-Cup products and that the company was ramping up production without accumulating excess inventory." Plaintiffs contended that to the contrary, "Green Mountain was accumulating a significant overstock of expiring and unsold product." Plaintiffs presented "observations from numerous confidential witnesses ('CWs')—Green Mountain employees from different tiers of the company—detailing the company's increasing inventory buildup." According to the CWs, defendants went to great lengths to conceal Green Mountain's growing inventory from investors, using measures such as "phony shipment[s]" and "non-mainstream accounting practices to track [the company's] inventory." Plaintiffs further alleged that the company's "senior executives capitalized on their own pronouncements of Green Mountain's financial strength by selling their shares of company stock at peak stock prices" pursuant to their 10b5-1 trading plans.

On October 17, 2011, an investor, David Einhorn, released a report stating that "Green Mountain was engaged in a 'variety of shenanigans that appear[ed] designed to mislead auditors and to inflate financial results.'" A few weeks later, on November 9, 2011, Green Mountain announced that it had missed its "sales and revenue expectations for the first time in eight quarters." Green Mountain also "admitted that … its total inventory and obsolete inventory levels had skyrocketed 61% and 47%, respectively, from the prior quarter."

Plaintiffs subsequently brought the instant securities fraud action. On December 20, 2013, the District of Vermont dismissed the complaint on the grounds that plaintiffs had failed to allege either material misstatements or scienter. Plaintiffs appealed.

Second Circuit Finds Plaintiffs Adequately Alleged Misstatements Concerning the Company's Inventory Levels

The Second Circuit explained that in order "[t]o satisfy the pleading standard for a misleading statement or omission under Rule 9(b), a complaint must … specify the statements that the plaintiff contends were fraudulent" and "explain why the statements were fraudulent." The court further stated that "[a] complaint may rely on information from confidential witnesses if 'they are described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged'" (quoting *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000)).

Here, the Second Circuit found that plaintiffs had alleged "specific misleading statements by [d]efendants about the status of Green Mountain's inventory during the [c]lass [p]eriod." The court further determined that the complaint "explain[ed] why these statements were fraudulent by detailing numerous CWs' observations that Green Mountain's inventory was decidedly not at 'appropriate levels.'" For example, "[m]any witnesses described the buildup of inventory 'up to the rafters' and their need to throw away 'pallet after pallet after pallet' as the coffee products expired." In addition to statements from lower-level employees, the complaint also "detail[ed] statements from CWs in management positions with a broader knowledge of the company's inventory and accounting practices." According to the complaint, "[t]hese managers reported to Green Mountain executives who discouraged questions about the inventory practices and ignored their repeated complaints." The Second Circuit noted that the complaint "specifie[d] each witness's position, length of employment, and job responsibilities." The court found that plaintiffs' allegations had "sufficient particularity to support the probability that the witnesses possessed the information alleged."

Because the court found that "the [c]omplaint state[d] with particularity the statements it allege[d] [were] misleading and the reasons why these statements [were] fraudulent," the Second Circuit held that "the [c]omplaint

adequately allege[d] false statements of material fact."

Second Circuit Finds Company Executives' Stock Sales Supported an Inference of Scienter Even Though the Sales Were Made Pursuant to 10b5-1 Trading Plans Because Defendants Began Participating in the Trading Plans After the Fraudulent Scheme Allegedly Began

The Second Circuit stated that "the scienter requirement is met where the complaint alleges facts showing either: 1) a 'motive and opportunity to commit the fraud'; or 2) 'strong circumstantial evidence of conscious misbehavior or recklessness'" (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir. 2007)). The court explained that "motive for scienter can 'be shown by pointing to the concrete benefits that could be realized from one or more of the allegedly misleading statements or nondisclosures; opportunity could be shown by alleging the means used and the likely prospect of achieving concrete benefits by the means alleged'" (quoting *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98 (2d Cir. 2009)).

Applying this standard, the Second Circuit found that plaintiffs had pled "strong circumstantial evidence of Green Mountain's intent to deceive or defraud [p]laintiffs by detailing both (1) [d]efendants' efforts to deceive auditors and investors and conceal the true facts about Green Mountain's excess inventory, and (2) [d]efendants' significant personal gain from these efforts" through stock sales made soon after the "allegedly misleading statements to investors."

Notably, the Second Circuit rejected Green Mountain's contention that defendants' stock sales did "not support an inference of scienter because they were made pursuant to … pre-determined 10b5-1 trading plans." The court underscored the fact that defendants began participating in these plans "long after … Green Mountain's fraudulent growth scheme [allegedly] began." The court held that "[w]hen executives enter into a trading plan during the [c]lass [p]eriod and the [c]omplaint sufficiently alleges that the purpose of the plan was to take advantage of an inflated stock price, the plan provides no defense to scienter allegations."

Here, the court pointed out that defendants had allegedly "made positive public statements about Green Mountain's growth that drove up its stock price immediately before" scheduled sales of stock in their 10b5-1 trading plans. Although the sales "were made pursuant to their 10b5-1 trading plans," the court found it significant that defendants "knew the dates of their scheduled sales [were] imminent when they made allegedly misleading statements to investors."

The Second Circuit found that the complaint sufficiently alleged both "[d]efendants' intent to craft a false growth story" and "the extraordinary opportunities for personal gain this 'growth' created for Green Mountain's executives." The court determined that the allegations as a whole gave rise to a strong inference of scienter.

The Second Circuit vacated the district court's dismissal order and remanded for further proceedings consistent with its opinion.

Eighth Circuit: Key Inquiry for Determining Whether a Statement Was Forward-Looking for Purposes of the PSLRA's Safe-Harbor Provision Is Whether the Statement's Veracity Was Discernible at the Time the Statement Was Made

On July 2, 2015, the Eighth Circuit affirmed dismissal of a securities-fraud action against K-V Pharmaceutical Company based on alleged misstatements concerning, in part, the likelihood that the Food & Drug Administration (FDA) would enforce a period of exclusive sales rights once K-V launched Makena, a prescription drug for the prevention of preterm labor. *Julianello v. K-V Pharm. Co.*, 2015 WL 4032102 (8th Cir. 2015) (Shepherd, J.). The court found that the challenged statements fell within the safe-harbor provision for forward-looking statements under the Private Securities Litigation Reform Act of 1995 ("PSLRA")

because they were "tied to a future event: the launch of Makena," and therefore the veracity of K-V's statements could not be determined until this future event took place.

Background

Under the Orphan Drug Act, "manufacturers of drugs designed to treat diseases or disorders that affect fewer than 200,000 people may obtain seven years of exclusive sales rights," subject to FDA approval. On February 3, 2011, the FDA granted K-V exclusive sales rights to Makena.

Two weeks later, during an investor conference call on February 14, 2011, K-V expressed its expectation that the FDA would enforce a period of exclusivity for Makena. K-V stated that it "believe[d] that the regulations and laws are very clear" and "that FDA regulations … generally prohibit the distribution of compounded products that are the same or essentially the same as FDA-approved products." K-V further stated that it "believe[d] that compounded pharmacies are aware of these laws and regulations," and that it anticipated that compounding pharmacies would "adhere to them." At the beginning of the call, K-V warned that certain statements made during the call might be "forward-looking statements" subject to "various risks and uncertainties," including "the possibility that any period of exclusivity may not be realized."

In March 2011, K-V released Makena at a high price point. Later that month, the FDA announced that "it did not intend to take enforcement action against compounding pharmacies that compounded the equivalent of Makena." Plaintiffs subsequently brought suit, alleging, *inter alia*, "that K-V [had] made both false statements and omissions about the risk of the FDA not enforcing exclusive sales rights" to Makena. The district court dismissed plaintiffs' complaint in its entirety. Plaintiffs appealed, contending in part that the district court had "erred … in holding [that] K-V's statements regarding the FDA's likelihood of enforcing exclusivity were protected by the PSLRA's safe-harbor provision."

Eighth Circuit Finds K-V's Statements Concerning Whether the FDA Would Enforce Exclusivity Were Forward-Looking Because the Statements Were Tied to a Future Event: the Launch of Makena

On appeal, the Eighth Circuit explained that, "[u]nder the PSLRA, protected forward-looking statements include, among others: (1) projections of revenues or other financial items, (2) statements of plans and objectives for future operations, and (3) statements of the assumptions underlying the previous two categories." The court underscored that, "[i]n determining whether a statement is truly forward-looking, the determinative factor is not the tense of the statement; instead, the key is whether its 'truth or falsity is discernible only after it is made.'"

Applying these standards, the Eighth Circuit found that K-V's statements on the likelihood that the FDA would enforce a period of exclusivity for Makena "were forward-looking" under the PSLRA. First, the court found that K-V's statements fell "within the category of statements regarding plans and objectives for further operations because they detailed K-V's future launch of Makena and the anticipated results." Second, the court explained that "the veracity of the statements could only be determined after they were made" because they were "tied to a future event: the launch of Makena." The court reasoned that, "[u]ntil this future event occurred, it could not be determined whether the FDA would vary from its usual practice of enforcing exclusivity." Notably, the court observed that "there was no evidence at the time K-V made the statement that the FDA would not enforce exclusivity."

The Eighth Circuit further found that "the use of the present tense in the challenged statements [did] not undermine [its] determination that they were forward-looking." The court held that "[t]he critical inquiry in determining whether a statement is forward-looking is whether its veracity can be determined at the time the statement is made, not the tense of the statement."

Finally, the court found that "K-V's forward-looking statements were accompanied by meaningful cautionary language" that "explicitly identified the risks associated with the FDA's presumed enforcement of

exclusivity." The court therefore held that "K-V's statements [fell] within the PSLRA's safe-harbor provision … and [were] not actionable as a basis for a securities fraud action."

Ninth Circuit: "Personal Benefit" Requirement for Tippee Liability Is Met Where an Insider Discloses Confidential Information to a Trading Relative or Friend, Even If There Was No Potential or Actual Financial Benefit

On July 6, 2015, the Ninth Circuit held that "[p]roof that [an] insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary duty element of insider trading" for tippee liability. *United States v. Salman*, 2015 WL 4068903 (9th Cir. 2015) (Rakoff, J.).[1] The Ninth Circuit declined to follow the Second Circuit's decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) [2] "[t]o the extent *Newman* can be read to go so far" as to require that the insider stood to obtain "'at least a potential gain of a pecuniary or similarly valuable nature'" for disclosing confidential information to a trading relative or friend (quoting *Newman*, 773 F.3d 438).

Background

Defendant Bassam Yacoub Salman was convicted of insider trading based on his receipt of information from Michael Kara, who had received the information from his brother, Maher Kara, a Citigroup investment banker. The government presented evidence that Salman "knew full well" that (1) Maher Kara was the source of the information Salman received from Michael Kara, and (2) the two brothers "enjoyed a close and mutually beneficial relationship."

1. The Honorable Jed S. Rakoff of the Southern District of New York was sitting by designation on the Ninth Circuit Court of Appeals.

2. Please click here to read our prior discussion of the *Newman* decision.

Salman subsequently appealed his conviction, arguing, *inter alia*, that the Ninth Circuit should adopt the standard set forth by the Second Circuit in *Newman*. Salman contended that, "under *Newman*, the evidence was insufficient to find either that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that Salman knew of such benefit."

Ninth Circuit Declines to Follow the Second Circuit's Decision in *Newman* to the Extent *Newman* Requires That an Insider Receive an Actual or Potential Financial Benefit for Disclosing Confidential Information to a Trading Relative or Friend

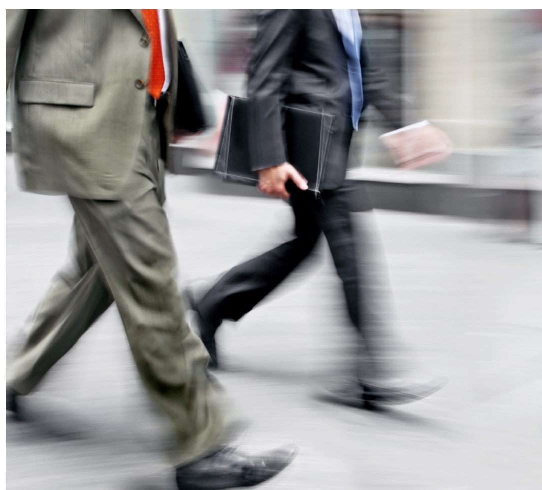
On appeal, the Ninth Circuit stated that "[t]he 'personal benefit' requirement for tippee liability derives from the Supreme Court's opinion in *Dirks v. S.E.C.*, 463 U.S. 646 (1983)." Under *Dirks*, the Ninth Circuit explained, "'the test is whether the insider personally will benefit, directly or indirectly, from his disclosure'" and whether "'the tippee knows or should know' … of the [insider's] personal benefit" gained by disclosing the information (quoting *Dirks*, 463 U.S. 646). The *Dirks* Court stated that this "personal benefit" could include "a pecuniary gain or a reputational benefit that will translate into future earnings." However, as the Ninth Circuit explained, the *Dirks* Court made clear that "'[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend'" (quoting *Dirks*, 463 U.S. 646).

The Ninth Circuit found that "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." In light of "the Kara brothers' close relationship," the court determined that "Salman could readily have inferred Maher's intent to benefit Michael." The Ninth Circuit concluded that, "under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that Salman knew as much."

The Ninth Circuit expressly declined to follow the Second Circuit's decision in *Newman* "[t]o the extent *Newman* can be read to go so far" as "to hold that evidence of a friendship or familial relationship between tipper and tippee, standing alone, is insufficient to demonstrate that the tipper received a benefit." The court rejected Salman's contention that the government should have been required to present evidence that Maher received "'at least a potential gain of a pecuniary or similarly valuable nature'" for disclosing the information to Michael (quoting *Newman*, 773 F.3d 438). The court reasoned that, if it accepted Salman's theory, "then a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return."

The Ninth Circuit also questioned whether *Newman* in fact requires evidence of such a tangible personal benefit in cases involving disclosures to family members of friends. The court noted that "*Newman* itself recognized that the 'personal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, … the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend'" (quoting *Newman*, 773 F.3d 438).

The Ninth Circuit affirmed Salman's conviction, finding the evidence "more than sufficient for a rational jury to find both that the inside information was disclosed in breach of a fiduciary duty, and that Salman knew of that breach at the time he traded on it."



Southern District of New York: (1) *Dudenhoeffer* Forecloses ERISA Breach of Fiduciary Duty Claims Based on Public Information Absent "Special Circumstances;" (2) ERISA Appointing Fiduciaries Have No Duty to Disclose Inside Information to Appointees

On July 10, 2015, following a remand from the Supreme Court in light of its decision in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014),[3] the Southern District of New York dismissed for a third time an action brought by participants in the Lehman Brothers Savings Plan (the "Plan") under the Employee Retirement Income Security Act ("ERISA"). *In re Lehman Bros. Sec. & ERISA Litig.*, 2015 WL 4139978 (S.D.N.Y. July 10, 2015) (Kaplan, J.) (*Lehman III*).[4] The court found that plaintiffs' complaint failed to state a claim based on non-public information, where, *inter alia*, plaintiffs failed to plead how a hypothetical investigation would have uncovered alleged inside information. Finally, the court held that appointing fiduciaries have no obligation under ERISA to keep their appointees apprised of material nonpublic information.

Background

After Lehman Brothers filed for bankruptcy in September 2008, Plan participants brought suit against Lehman's former directors (the "Director Defendants") and former members of the company's Employee Benefit Plans Committee (the "Plan Committee Defendants"). Plaintiffs contended that defendants had violated ERISA "by [allegedly] imprudently continuing to keep Plan assets invested in Lehman stock despite Lehman's deteriorating condition." Plaintiffs claimed that, during the class period, defendants knew or should have known that the Plan's investment in Lehman stock was imprudent. Defendants moved to dismiss.

3. Please click here to read our prior discussion of the *Dudenhoeffer* decision.

4. Simpson Thacher represents the former members of the Lehman Brothers Employee Benefit Plans Committee (the "Plan Committee Defendants") in this action.

On February 2, 2010, the Southern District of New York dismissed plaintiffs' ERISA claims in their entirety. *In re Lehman Bros. Sec. & ERISA Litig.*, 683 F. Supp. 2d 294 (S.D.N.Y. 2010) (Kaplan, J.) (*Lehman I*). Plaintiffs filed an amended complaint, and defendants again moved to dismiss. On October 5, 2011, the Southern District of New York once again dismissed plaintiffs' ERISA claims. *In re Lehman Bros. Sec. & ERISA Litig.*, 2011 WL 4632885 (S.D.N.Y. Oct. 5, 2011) (Kaplan, J.) (*Lehman II*).[5] Among other grounds, the court found that plaintiffs had failed to allege facts sufficient to overcome the presumption of prudence set forth in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995). On July 15, 2013, the Second Circuit applied the presumption of prudence and affirmed dismissal of plaintiffs' complaint. *Rinehart v. Akers*, 722 F.3d 137 (2d Cir. 2013) (Wesley, J.).[6]

A year later, on June 25, 2014, the Supreme Court unanimously held that "the law does not create a special presumption" of prudence for fiduciaries of Employee Stock Ownership Plans (ESOPs). *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014). The Supreme Court subsequently vacated the Second Circuit's decision in *Rinehart* and remanded the action for further consideration in light of *Dudenhoeffer*. The Second Circuit, in turn, granted plaintiffs' motion to vacate the district court's judgment and remanded the action to the Southern District of New York for further proceedings. Defendants thereafter moved for the third time to dismiss plaintiffs' complaint. In response, plaintiffs opposed defendants' motions and moved to further amend their complaint to, *inter alia,* "narrow their claims against the Plan Committee Defendants" and Richard S. Fuld, Lehman's former chairman and CEO (and the only remaining Director Defendant in this action). On May 20, 2015, the court granted plaintiffs' motion to amend and file their third consolidated amended complaint "without prejudice to [d]efendants' arguments in favor of dismissal."

5. Please click here to read our prior discussion of the *Lehman II* decision.

6. Please click here to read our prior discussion of the Second Circuit's decision.

Lehman III **Court Finds** ***Dudenhoeffer*** **Requires Dismissal of Plaintiffs' Public Information-Based Breach of Fiduciary Duty Claims Against the Plan Committee Defendants**

On July 10, 2015, the Southern District of New York found that plaintiffs' third amended complaint "fail[ed] plausibly to allege that public information about Lehman was so clearly negative in mid-to-late 2008 that the Plan Committee Defendants [had] acted imprudently." While this amended complaint included "scattered changes," such as "new descriptions of allegedly ominous news articles" and "volatility in Lehman's stock price," the court found that "[t]hese new bits of information [did] no more than add marginally to the cacaphony of 'mixed signals' described in" plaintiffs' earlier complaint. The court concluded that "[t]hey [did] not nudge the allegations of the [third consolidated amended complaint] across the plausibility threshold."

Significantly, the court found that "*Dudenhoeffer* appears to have '*raised* the bar for plaintiffs seeking to bring a claim based on a breach of the duty of prudence'" in connection with publicly available information (quoting *In re UBS ERISA Litig.*, 2014 WL 4812387 (S.D.N.Y. Sept. 29, 2014)). In *Dudenhoeffer*, the Court stated that "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances." The *Lehman III* court determined that "*Dudenhoeffer* seemingly has foreclosed any such claim against the Plan Committee Defendants."

Finding their distinction to be "illusory," the court rejected plaintiffs' contention "that *Dudenhoeffer*'s limitation on claims based on public information applies only to assertions 'that the market was over- or undervaluing the stock'" (quoting *Dudenhoeffer*, 134 S. Ct. 2459) and not to allegations "that a stock has become excessively risky." Thus, in the absence of "factual allegations justifying a conclusion that 'reliance on the market price [was] imprudent,'" the *Lehman III* court found that *Dudenhoeffer* "foreclose[s] breach of [the duty of] prudence claims based on public information irrespective of whether

such claims are characterized as based on alleged overvaluation or alleged riskiness of a stock."

The court found equally meritless plaintiffs' attempt to rely on *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), to argue that the Plan Committee Defendants should have conducted a "substantive review … of the prudence of continued investment in Lehman stock" following the collapse of Bear Stearns. [7] The court recognized that the *Tibble* decision reiterated that "ERISA fiduciaries bear a 'continuous duty' to monitor the prudence of investments." However, while "changed circumstances can trigger a fiduciary's obligation to review the prudence of an investment," the court explained that "plaintiffs must allege that circumstances actually have changed sufficiently and that the failure to make such a review injured the plan." The court found that plaintiffs had failed to do so here. Notably, the court rejected plaintiffs' apparent "view … that once Bear Stearns collapsed, the ERISA fiduciaries of every major financial institution's ESOP bore a fiduciary duty to re-evaluate the prudence of continued investment in a sponsor's securities." Moreover, the court pointed out that plaintiffs did not allege that any such review "would have averted the injury that ultimately occurred when Lehman later collapsed." The court stated that "[n]either *Dudenhoeffer* nor *Tibble* permits ERISA claims to withstand challenge based on such threadbare allegations."

Finally, the court determined that plaintiffs had failed to allege any "special circumstances" required for alleging a breach of fiduciary duty claim based on publicly-available information under *Dudenhoeffer*. The court specifically rejected plaintiffs' contention that SEC orders issued in July 2008 placing short-selling restrictions on the securities of certain financial-services companies, including Lehman, amounted to such "special circumstances." The court underscored that "the SEC never announced that the market for Lehman stock had ceased to function efficiently." Rather, the SEC stated that "rumor-mongering '*may* artificially and unnecessarily' depress security prices and that it was acting to 'eliminate any possibility that naked short selling' *could* contribute to such disruption." The *Lehman III* court explained that "[a]ction taken to prevent a negative effect is not the same thing as declaring that such an effect already had become manifest." Moreover, the court noted that, if anything, the SEC orders indicated that the SEC believed that Lehman stock was actually worth more, not less, and was "less risky than its artificially depressed market price had made it appear." The court determined that "[t]he only plausible inference supported by the [complaint] is that the market processed any risks identified in the SEC's orders as it would have processed any other public information." The *Lehman III* court explained that "*Dudenhoeffer* bars claims based on such public information precisely because the market is competent to react to it."

Court Finds Plaintiffs Failed to Allege a Breach of Fiduciary Duty Claim Based on the Plan Committee Defendants' Failure to Investigate Whether Lehman Was a Sound Investment

The court next turned to plaintiffs' claim that "the Plan Committee Defendants were obligated to undertake an investigation into Lehman's soundness as an investment and that, had they done so, they *would have uncovered*" "negative inside information about Lehman." The *Lehman III* court acknowledged that, after *Dudenhoeffer*, "*some* claims of breach of fiduciary duty based on nonpublic information may be cognizable." The court stated that *Dudenhoeffer* "altered the landscape by making clear that claims based on nonpublic information—at least where defendants are corporate insiders—no longer may be rejected out of hand solely because of concerns born of the insider trading laws."

However, the *Lehman III* court found a "significant difference" between the facts at issue in *Dudenhoeffer* and the allegations here. In *Dudenhoeffer*, plaintiffs alleged that defendants had "'behaved imprudently by failing to act on the basis of nonpublic information that was available to them because they were Fifth Third insiders'" (quoting *Dudenhoeffer*, 134 S. Ct. 2459). Here, on the other hand, plaintiffs alleged that "the Plan Committee Defendants [had] breached their fiduciary duty by failing to pursue insider information held by *others*."

7. Please click here to read our prior discussion of the *Tibble* decision.

The *Lehman III* court declined to reach the question of "whether [such] a duty to investigate nonpublic information [held by others] even exists," because it found that plaintiffs' allegations were "otherwise insufficient." The court noted that plaintiffs did not adequately allege "*how* [this] hypothetical investigation would have uncovered the alleged inside information" or "that any such investigation would have resulted in averting the harm that ultimately befell the Plan when Lehman suddenly collapsed."

Court Dismisses Duty to Inform Claim Against Fuld, Finding That ERISA Does Not Impose a Duty on Appointing Fiduciaries to Keep Appointees Informed of Material Nonpublic Information

The court then considered plaintiffs' contention that Richard Fuld, Lehman's former chairman and CEO, "had inside information about the precariousness of Lehman's position and failed to disclose it to the Plan Committee Defendants so that they could evaluate the prudence of continuing to invest in Lehman on a fully-informed basis." The *Lehman III* court found this "duty to inform" claim against Fuld "impermissible as a matter of law" because "ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information."

First, the court explained that "Fuld was an ERISA fiduciary only to the extent that he appointed others to manage the Lehman Plan." The court rejected plaintiffs' attempt to "transform Fuld's limited obligations under ERISA into all-encompassing ones" that would have applied "[w]henever Fuld received information in any business capacity." The court further found that appointing fiduciaries do not have "an ongoing obligation to share inside information" under ERISA.

Second, the court pointed out that the Second Circuit has "consistently … rejected efforts to impose additional disclosure obligations upon ERISA fiduciaries." The *Lehman III* court found that, if appointing fiduciaries were obligated to disclose nonpublic information to their appointees, "the result would be ceaseless conflict between duties of officers, directors and other company employees, which run to the company and its shareholders, and the duties of ERISA plan fiduciaries, which run to plan beneficiaries."

Finally, the court determined that the guidance set forth in the Second Circuit's prior decisions in *In re Citigroup ERISA Litigation*, 662 F.3d 128 (2d Cir. 2011), and *Rinehart*, 722 F.3d 137, "remains persuasive even after *Dudenhoeffer*." The court explained that the Second Circuit in *Citigroup* had held that "ERISA fiduciaries have no obligation to disclose nonpublic information to plan beneficiaries," based, *inter alia*, on its finding that "ERISA [does] not require fiduciaries to act as investment advisors." The court also noted that the Second Circuit in *Rinehart* had found that it "'would be unlikely'" to impose on appointing fiduciaries a duty to disclose inside information (quoting *Rinehart*, 722 F.3d 137).

The *Lehman III* court acknowledged that the Court in "*Dudenhoeffer* contemplated that the duty of prudence might be breached based on nonpublic information, so long as plaintiffs allege[d] 'an alternative action that the defendant could have taken that would have been consistent with the securities laws'" (quoting *Dudenhoeffer*, 134 S. Ct. 2459). However, the *Lehman IIII* court determined that the language in *Dudenhoeffer* was "not dispositive of whether an appointing fiduciary has a duty to disclose inside information."

The court therefore dismissed plaintiffs' duty to inform claim against Fuld, and separately dismissed plaintiffs' duty to monitor claim against Fuld because plaintiffs failed to allege a predicate breach of fiduciary duty by the Plan Committee Defendants.

Southern District of New York: Second Circuit's Decision in *Newman* Did Not Change the "Personal Benefit" Requirement for Tipper Liability for Insider Trading

On July 2, 2015, the Southern District of New York denied a motion by Rajat Gupta, a former director of Goldman Sachs, to vacate his insider-trading conviction for sharing material nonpublic information concerning Goldman Sachs with Galleon Group head Raj Rajaratnam, who traded on the basis of that information. *United States v. Gupta*, 2015 WL 4036158 (S.D.N.Y. 2015) (Rakoff, J.). Following the Second Circuit's decision in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), Gupta had moved, pursuant to 28 U.S.C. § 2255, to vacate the judgment against him on the grounds that the trial court's jury instruction regarding the "personal benefit" requirement for tipper liability was erroneous. The Southern District of New York found that *Newman* "did not open the door to an argument that 'prior … case law [had] consistently rejected,'" nor did *Newman* change the "personal benefit" requirement for tipper liability.

Court Holds *Newman* Did Not Overrule Any Binding Precedent on Tipper Liability

The court explained that, "where, as here, 'a criminal defendant has procedurally forfeited his claim by failing to raise it on direct review, the claim may be raised in a § 2255 motion only if the defendant can demonstrate either: (1) cause for failing to raise the issue, and prejudice resulting therefrom; or (2) actual innocence.'" A petitioner "may demonstrate cause for a failure to raise an issue during trial or to preserve it on appeal where doing so would have been futile in light of 'prior … case law that consistently rejected [the] particular … claim.'"

With respect to Gupta's contention that the trial court's jury instruction regarding the "personal benefit" requirement was erroneous, the court found that this argument would not have been "futile for the simple reason that *Newman* … did not purport to overrule any binding precedent." The court explained that *Newman* only "arguably narrowed the range of evidence that would support an inference of 'benefit.'"

Court Holds *Newman* Did Not Alter the "Personal Benefit" Requirement for Tipper Liability

Gupta claimed that, if the trial court had instructed the jury on the *Newman* "personal benefit" standard, the government's evidence would have been insufficient to convict him. According to Gupta, "*Newman* requires that a tipper (here Gupta) receive from his tippee (Rajaratnam) a 'quid pro quo' in the form of 'a potential gain of a pecuniary or similarly valuable nature.'" The court found that "Gupta's argument misread[ ] *Newman*."

The court explained that "*Newman* was concerned with the liability of a remote tippee," not tipper liability. The court stated that *Newman* "in no way purport[ed] to change [the] fundamental concept" that "a tipper is liable for securities fraud if he takes sensitive market information provided to him in a fiduciary capacity and exploits it for some personal benefit." The court found that "the plain language of … *Newman*" makes it clear that "a tipper's intention to benefit the tippee is sufficient to satisfy the benefit requirement so far as the tipper is concerned." For purposes of establishing tipper liability,

the court found that "no *quid pro quo* is required."

Nevertheless, the court determined that "the proof at trial easily satisfied even Gupta's view of *Newman*." The court explained that Gupta and Rajaratnam "were close business associates with a considerable history of exchanging financial favors." Gupta benefited in some way, either indirectly through a return favor or directly through his stake in Galleon, with every tip he conveyed to Rajaratnam. The court therefore denied Gupta's motion to vacate the judgment against him on *Newman* grounds.

Delaware Chancery Court: (1) Continuous Holder Requirement for Appraisal Actions Is Not Met If There Is an Administrative Transfer at the DTC Level; (2) Court Suggests a Different Approach to Determining Who Is a Stockholder for Appraisal Purposes

Section 262 of the Delaware General Corporation Law permits dissenting shareholders in certain merger transactions to petition the court to obtain the "fair value" of their shares. 8 *Del. C.* § 262. A prerequisite for appraisal rights is that a shareholder must "continuously hold [ ] such shares through the effective date of the merger" (the "Continuous Holder Requirement").

On July 13, 2015, the Delaware Chancery Court considered whether the Continuous Holder Requirement "bar[s] a beneficial owner" of stock held in fungible bulk by the federal Depository Trust Company ("DTC") "from pursuing appraisal if there has been an administrative transfer at the depository level." *In re Appraisal of Dell Inc.*, 2015 WL 4313206 (Del. Ch. 2015) (Laster, V.C.). The court held that "[u]nder current [Delaware] law, the answer is yes." However, the court stated that if it were "writing on a blank state," it would "look[ ] through" the DTC ownership structure and "recognize[ ] the custodial banks and brokers as record holders." The court explained that if Delaware law took this approach, then beneficial owners of stock held by the DTC "would retain their appraisal rights" regardless of any administrative transfers at the depository level as long as "ownership by the relevant DTC participants" remained the same.

The Creation of the DTC System

In the late 1960s and early 1970s, "[i]ncreased trading volume in the securities markets overwhelmed the back offices of brokerage firms and the capabilities of transfer agents," which could not "cope with the burdens of documenting stock trades using paper certificates." The SEC eventually responded by "adopt[ing] a national policy of share immobilization."

Pursuant to this policy, the SEC created the DTC to hold shares in fungible bulk on behalf of banks and brokers. Instead of issuing shares in the names of the participant entities, the DTC issues all shares in the name of Cede & Co., the DTC's nominee. Through an "electronic book entry system," the DTC "track[s] the number of shares of stock that each participant holds." However, because "legal title [typically] remains with Cede," "[n]o new certificates are required" when shares of stock are transferred from one owner to the next. The addition of the "DTC to the bottom of the ownership chain" "eliminated the need for the overwhelming majority of legal transfers."

Today, more than 800 custodial banks and brokers are members of the DTC. While the DTC system "solved the paperwork crisis, it complicated other aspects of the legal system," including appraisal for dissenting shareholders in the merger context. The DTC eventually "modified its procedures" to "help issuers oversee the surrender of shares." In the event that "a beneficial owner causes Cede to demand appraisal, [the] DTC removes the shares covered by the demand from the fungible bulk" and "cause[s] the issuer's transfer agent to issue a paper stock certificate [in Cede's name] for the number of shares held by the beneficial owner." By titling the stock certificate in Cede's name, the DTC ensures that "the same record holder continues to hold the shares for purposes of [Section 262's] Continuous Holder Requirement."

Case Background

In February 2013, Dell agreed to a going-private merger transaction. Five institutions that owned Dell stock through custodial banks participating in the DTC system (the "Funds") exercised appraisal rights for certain of their shares. The DTC then "followed its procedures and issued paper stock certificates in Cede's name for the Funds' shares." However, the Funds' custodial banks followed a policy of "only hold[ing] stock certificates that are issued in the names of their own nominees." The custodial banks therefore "instructed Dell's transfer agent to record a transfer of the shares to [each bank's] nominee and issue a certificate in [each bank's] nominee's name." While "[t]he Funds remained the beneficial owners" and "[t]he custodians remained the custodians," "there were [now] new nominees on the stock ledger."

Dell moved for summary judgment on the Funds' appraisal claim, "arguing that these back-office steps resulted in new record holders and broke the chain of title for purposes of the Continuous Holder Requirement."

Following Delaware Precedent, Chancery Court Finds the Continuous Holder Requirement Is Not Met If There Is a Change of Legal Ownership, Even If Beneficial Ownership Remains the Same

The Chancery Court began its analysis with the appraisal statute. Pursuant to Section 262, "'[a]ny stockholder of a corporation'" may petition for appraisal in connection with certain merger transactions provided the Continuous Holder Requirement is met (quoting 8 *Del. C.* § 262). The court observed that the statute defines "stockholder" as "'a holder of record of stock in a stock corporation,'" but "does not define what it means to be a 'holder of record.'"

The Chancery Court then turned to Delaware precedent. The court found that under prior Delaware decisions, "'only the person appearing on the corporate records as the owner of stock in the corporation may qualify for an appraisal'" (quoting *In re Engel v. Magnavox Co.*, 1976 WL 1705 (Del. Ch. April 22, 1976)). Delaware courts have held that "'[i]t is the 'record holder—not the beneficial owner—[that] is subject to the statutory requirements for showing entitlement to appraisal and demonstrating perfection of appraisal rights under Sections 262(a) and (d)'" (quoting *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 66825 (Del. Ch. Jan. 5, 2015)). Delaware courts have further held that "[t]he re-titling of a certified share after the demand but before the effective date violates the Continuous Holder Requirement by causing record ownership to change" (citing *Nelson v. Frank E. Best Inc.*, 768 A.2d 473 (Del. Ch. 2000)).[8]

In the case before it, the Chancery Court found that "on Dell's records," "legal ownership of [the] Funds' shares [had] changed from Cede" to the custodial banks' nominees between the date of the demand and the effective date of the merger. Applying Delaware precedent, the court accordingly determined that "the Funds lost their appraisal rights" "[w]hen the shares were re-titled."

Chancery Court Suggests Delaware Courts Should Consider DTC Participants to Be "Stockholders of Record" for Purposes of Section 262 Appraisal Rights

The Chancery Court suggested that "[a] different approach" to determining who qualifies as a stockholder of record for Section 262 appraisal purposes is both "possible" and "preferable." The court stated that if it were "writing on a blank slate," it "would hold that the 'records' of the corporation for purposes of determining who is a 'stockholder of record' include the DTC participant list."

The court explained that this approach would bring Delaware law in line with federal law, which "looks through Cede [and the DTC] and recognizes the custodial banks and brokers as record holders." Moreover, the court reasoned that such an approach would "better reflect[ ] current reality." The court explained that, "[v]iewed pragmatically, the federal policy of share immobilization compelled publicly traded Delaware corporations to outsource one part of the stock ledger—the DTC participant list—to DTC." The court found that "Delaware law … should treat the

8. In *Nelson*, the Chancery Court noted that because Cede had transferred record ownership of shares to the appraisal petitioner, Cede's appraisal demand was "invalid, because Cede would not 'continuously' be the holder of record between the … date of Cede's demand and the effective date of the [m]erger, as required by 8 Del. C. § 262(a)." 768 A.2d 473.

outsourced DTC participant list as a record of the corporation, albeit one maintained by [the] DTC."

If the Delaware Supreme Court were to adopt this approach, then "the Funds would [have] retain[ed] their appraisal rights" in this case "because ownership by the relevant DTC participants never changed." However, the Chancery Court found that it was not "free to interpret the 'holder of record' language in this manner" given "existing precedent." The court noted that it had "previously advocated treating DTC participants as holders of record for purposes of analyzing whether the shares they held could be voted without a DTC omnibus proxy" (citing *Kurz v. Holbrook*, 989 A.2d 140 (Del. Ch. 2010), *aff'd in part, rev'd on other grounds sub nom. Crown EMAK Partners LLC v. Kurz*, 992 A.2d 377 (Del. 2010)). On appeal in *Kurz*, the Delaware Supreme Court did not reach the question of "whether DTC participants should be treated as record holders," but did express its view that "'a legislative cure is preferable'" to resolve the question of who is a record holder for appraisal rights purposes (quoting *EMAK P'rs*, 992 A.2d 377). The Chancery Court here "respectfully disagree[d] with [the Delaware Supreme Court's] expressed preference for a legislative cure," finding "the question of what constitutes the records of the corporation for purposes of determining who is a 'holder of record'" to be "a quintessential issue of statutory interpretation appropriate for the judiciary to address."

Delaware Chancery Court: (1) Discounted Cash Flow Method of Share Appraisal in a Section 262 Action Is Inappropriate If Management Projections Are Unreliable; (2) Merger Price Can Be Evidence of Share Value If the Sales Process Was Fair

On June 30, 2015, in an appraisal action brought pursuant to Section 262 of the Delaware General Corporation Law following Cypress Semiconductor Corporation's hostile cash acquisition of Ramtron International Corporation, the Delaware Chancery Court issued a post-trial decision rejecting the discounted cash flow ("DCF") methodology for appraising the value of Ramtron's shares because it found the underlying management projections "unreliable." *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 BL 208944 (Del. Ch. 2015) (Parsons, V.C.). The court instead determined that the merger price was "a reliable indication of Ramtron's fair value" because the sales process was "thorough, effective, and free from any spectre of self-interest or disloyalty."

Court Finds Ramtron's Management Projections "Unreliable" Because They Were (1) Prepared by a New Management Team (2) Using a New Methodology (3) in Anticipation of a Potential Acquisition

The Chancery Court stated at the outset that "[t]ypically, Delaware courts tend to favor a DCF model over other available methodologies in an appraisal proceeding." However, the court explained that the DCF "metric has much less utility in cases where … the data inputs used in the model are not reliable." The court noted that "[t]he foundational inputs of a DCF [analysis] are the company's cash flows," which are in turn based on management projections.

The court stated that, as a rule, "management projections … made in the ordinary course of business … are generally deemed reliable." However, "projections prepared outside of the ordinary course do not enjoy the same deference." The court observed that "management projections can be, and have been, rejected entirely when they lack sufficient indicia of reliability, such as when they were prepared: (1) outside of the ordinary course of business; (2) by a management team that never before had created long-term projections; (3) by a management team with a motive to alter the projections, such as to protect their jobs; and (4) when the possibility of litigation, including an appraisal action, was likely and probably affected the neutrality of the projections." Here, the court found that "the Ramtron management projections suffer[ed] from all of these problems."

The court explained that the management projections were created by a "new management team" that utilized several

new methodologies for creating long-term projections. The court also pointed out that the projections were questionable in light of "management's lack of success in accurately projecting future revenue in the past" and the fact that the projections "def[ied] historical trends." In addition, the court determined that the projections relied on "revenue figures that were distorted" due to certain "improper [ ]" revenue recognition practices, and also "incorporate[d] unrealistic assumptions" regarding Ramtron's transition to a second foundry. The court found that "the final nail in the coffin for [Ramtron's] [m]anagement [p]rojections [was] that Ramtron did not rely on them in the ordinary course of its business." Instead, Ramtron created the projections "in anticipation of potential litigation, or, at least, a hostile takeover bid."

Because the court found that the management projections were "unreliable," the court determined that "it would be inappropriate to determine [Ramtron's] fair value based on a DCF analysis."

Court Determines the Merger Price Is the Best Evidence of Ramtron's Fair Value, Even Though There Was No Multi-Bidder Auction for Ramtron and Cypress's Acquisition of Ramtron Was Hostile

In the case before it, the court determined that "the [m]erger price offer[ed] the best indication of fair value." The court recognized that "[a] merger price does not necessarily represent the fair value of a company" for purposes of a Section 262 appraisal. However, the court noted that "in the situation of a proper transactional process likely to have resulted in an accurate valuation of an acquired corporation," the Chancery Court has previously "looked to the merger price as evidence of fair value and, on occasion, given that metric one-hundred percent weight."

The court noted that unlike in prior cases adopting the merger price as the best evidence of fair value, "only one company, Cypress, [had] made a bid" for Ramtron. However, the court stated that it was "not aware of any case holding that a multi-bidder auction of a company is a prerequisite to finding that the merger price is a reliable indicator of fair value." The court further observed that the Ramtron case was unique insofar as it involved "a hostile deal." Nevertheless, the court found that the "lengthy" and "publicized" Ramtron sales process was adequately "thorough" and gave the court "confidence that, if Ramtron could have commanded a higher value, it would have." The court found meritless petitioner's contention that "the lack of other bidders" for Ramtron "indicate[d] a flawed process." Rather, the court determined that "[a]ny impediments to a higher bid resulted from Ramtron's operative reality, not shortcomings of the [m]erger process." The court therefore "conclude[d] that the [m]erger price [was] a reliable indication of Ramtron's fair value."

The Securities Law Alert is edited by Paul C. Gluckow (pgluckow@stblaw.com/ +1-212-455-2653), Peter E. Kazanoff (pkazanoff@stblaw.com/+1-212-455-3525) and Jonathan K. Youngwood (jyoungwood@stblaw.com/ +1-212-455-3539).

New York

Mark G. Cunha
+1-212-455-3475
mcunha@stblaw.com

Paul C. Curnin
+1-212-455-2519
pcurnin@stblaw.com

Michael J. Garvey
+1-212-455-7358
mgarvey@stblaw.com

Paul C. Gluckow
+1-212-455-2653
pgluckow@stblaw.com

Nicholas Goldin
+1-212-455-3685
ngoldin@stblaw.com

David W. Ichel
+1-212-455-2563
dichel@stblaw.com

Peter E. Kazanoff
+1-212-455-3525
pkazanoff@stblaw.com

Joshua A. Levine
+1-212-455-7694
jlevine@stblaw.com

Joseph M. McLaughlin
+1-212-455-3242
jmclaughlin@stblaw.com

Lynn K. Neuner
+1-212-455-2696
lneuner@stblaw.com

Thomas C. Rice
+1-212-455-3040
trice@stblaw.com

Mark J. Stein
+1-212-455-2310
mstein@stblaw.com

Alan C. Turner
+1-212-455-2472
aturner@stblaw.com

Mary Kay Vyskocil
+1-212-455-3093
mvyskocil@stblaw.com

Craig S. Waldman
+1-212-455-2881
cwaldman@stblaw.com

George S. Wang
+1-212-455-2228
gwang@stblaw.com

David J. Woll
+1-212-455-3136
dwoll@stblaw.com

Jonathan K. Youngwood
+1-212-455-3539
jyoungwood@stblaw.com

Los Angeles

Michael D. Kibler
+1-310-407-7515
mkibler@stblaw.com

Chet A. Kronenberg
+1-310-407-7557
ckronenberg@stblaw.com

Palo Alto

Alexis S. Coll-Very
+1-650-251-5201
acoll-very@stblaw.com

James G. Kreissman
+1-650-251-5080
jkreissman@stblaw.com

Washington, D.C.

Peter H. Bresnan
+1-202-636-5569
pbresnan@stblaw.com

Jeffrey H. Knox
+1-202-636-5532
jeffrey.knox@stblaw.com

Cheryl J. Scarboro
+1-202-636-5529
cscarboro@stblaw.com

Peter C. Thomas
+1-202-636-5535
pthomas@stblaw.com

The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters, nor does the distribution of this publication to any person constitute the establishment of an attorney-client relationship. Simpson Thacher & Bartlett LLP assumes no liability in connection with the use of this publication. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as our recent memoranda, can be obtained from our website, www.simpsonthacher.com.

Simpson Thacher Worldwide

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Houston
600 Travis Street, Suite 5400
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.
1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA

Beijing
3919 China World Tower
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Seoul
West Tower, Mirae Asset Center 1
26 Eulji-ro 5-gil, Jung-gu
Seoul 100-210
Korea
+82-2-6030-3800

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000