Simpson Thacher

Securities Law Alert

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Second Circuit: Under *Omnicare*, Issuers Need Not Disclose Every Piece of Information That Runs Counter to Their Statements of Opinion, Provided Those Opinions "Fairly Align" with the Information in Their Possession at the Time

On March 4, 2016, the Second Circuit applied the Supreme Court's decision in *Omnicare v. Laborers' District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015)[1] in affirming dismissal of a securities fraud action alleging that Sanofi had issued misleading opinions regarding the prospects for its multiple sclerosis drug, Lemtrada. *Tongue v. Sanofi*, 2016 WL 851797 (2d Cir. 2016) (Parker, J.) (*Sanofi II*). The Second Circuit held that "*Omnicare* does not impose liability merely because an issuer failed to disclose information that ran counter to an opinion expressed in the registration statement," provided that the opinion "fairly align[ed] with the information in the issuer's possession at the time."

Background

In 2011, Sanofi acquired Genzyme Corporation, which was in the process of developing Lemtrada. The merger agreement provided that each Genzyme shareholder would receive not only a cash payment per share, but also a contingent value right ("CVR") per share that "entitled the holder to cash payouts upon the achievement of certain 'milestones' connected to the success of Lemtrada."

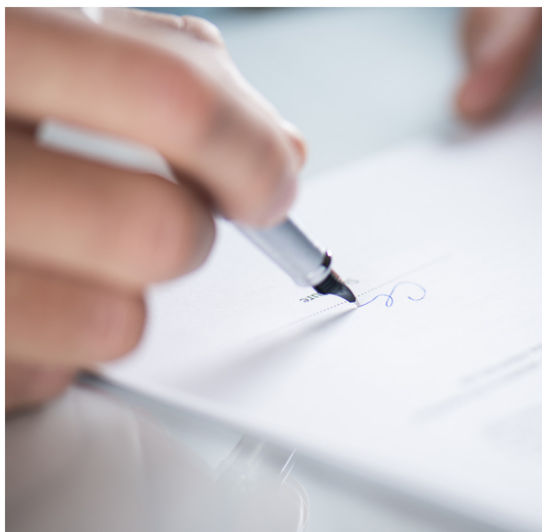
The offering materials for the merger included numerous statements expressing Sanofi's expectation that the FDA would approve Lemtrada before March 31, 2014, the cutoff date for achievement of the first CVR milestone (the "Approval Milestone"). After the merger, "Sanofi continued to speak optimistically about Lemtrada."

Sanofi did not disclose the fact that "the FDA [had] expressed concern about the use of

1. Please click here to read our prior discussion of the *Omnicare* decision.

single-blind studies for Lemtrada."[2] However, the FDA had indicated that a single-blind study for Lemtrada "may be adequate" for approval purposes if the study's "effect [was] large."

On November 8, 2013, the FDA released briefing materials for a pending FDA hearing in which two reviewing physicians raised concerns regarding Sanofi's use of single-blind studies. These briefing materials "also detailed the FDA's communications with Genzyme and Sanofi regarding the use of single-blind clinical trials." Upon release of these briefing materials, the value of the CVRs fell by more than 62%. Several weeks later, Sanofi announced that the FDA had formally rejected its application for Lemtrada's approval. The value of the CVR's "dropped further on the news."



In December 2013, purchasers of the CVRs brought two putative class actions against Sanofi, Genzyme Corporation, and several Sanofi executives (collectively, "defendants"). One putative class alleged claims under Section 10(b) and Rule 10b-5, as well as Section 20(a) claims, under the Exchange Act against the individual defendants. The other putative class asserted claims under Sections 11 and 12(a)(2) of the Securities Act, in addition to claims under Sections 10(b), 18, and 20(a) and state blue sky law claims. Both sets of plaintiffs alleged that "by failing to disclose the feedback from the FDA regarding the use of single-blind studies, [d]efendants [had] misled investors as to the likelihood of meeting the Approval Milestone, . . . thereby artificially inflating the value of the CVRs." Defendants moved to dismiss both complaints.

2. In a double-blind clinical study, neither the patient nor the researcher knows which drug was administered. In a single-blind study, on the other hand, either the patient or the researcher (but not both) knows which drug is being used.

In May 2014, the FDA accepted Sanofi's resubmission for FDA approval of Lemtrada. The FDA approved Lemtrada for the treatment of multiple sclerosis in November 2014 without any further clinical data.

Southern District of New York Finds Defendants' Statements of Opinion Not Misleading Under the Standard Set Forth in *Fait v. Regions Financial Corporation*

On January 28, 2015, the Southern District of New York held that both sets of plaintiffs had failed to allege that defendants' statements of opinion regarding Lemtrada's prospects were false or misleading under the standard set forth in the Second Circuit's decision in *Fait v. Regions Financial Corporation*, 655 F.3d 105 (2d Cir. 2011).[3] *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510 (S.D.N.Y. 2015) (Engelmayer, J.) (*Sanofi I*). In *Fait*, the Second Circuit held that "when a plaintiff asserts a claim under [S]ection 11 or 12 based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed." The Southern District of New York applied the *Fait* standard both to plaintiffs' Section 10(b) claims and plaintiffs' claims brought under Sections 11 and 12 of the Securities Act. The court found that there were no well-pleaded allegations indicating that defendants "did not genuinely believe what they were saying at the time they said it," and further determined that plaintiffs had failed to allege that defendants' opinions were objectively false. *Sanofi I*, 87 F. Supp. 3d 510.

After the district court dismissed plaintiffs' complaints, the Supreme Court issued its decision in *Omnicare* clarifying the pleading requirements for Section 11 claims based on statements of opinion. Plaintiffs appealed the district court's ruling and urged the Second Circuit to reconsider the court's decision based on *Omnicare*.

3. Please click here to read our prior discussion of the Second Circuit's decision in *Fait*.

Second Circuit Explains That *Omnicare* "Altered the Standard" Set Forth in *Fait* for Liability Based on Statements of Opinion

At the outset of its analysis, the Second Circuit stated that *Omnicare* "altered the standard" established in *Fait* for liability based on statements of opinion.[4] *Sanofi II*, 2016 WL 851797. The Second Circuit explained that "*Omnicare* affirmed that liability . . . may lie if either 'the speaker did not hold the belief she professed' or 'the supporting fact[s] she supplied were untrue.'" *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). However, the Second Circuit noted that the *Omnicare* Court "went on to hold that opinions, though sincerely held and otherwise true as a matter of fact, may nonetheless be actionable if the speaker omits information whose omission makes the statement misleading to a reasonable investor." The Second Circuit explained that this omitted information must "conflict with what a reasonable investor would take from the statement itself." *Id.* (quoting *Omnicare*, 135 S. Ct. 1318).

The Second Circuit observed that the *Omnicare* Court "cautioned against an overly expansive reading of this standard." The Supreme Court stated that reasonable investors expect that an issuer's statement of opinion "fairly aligns with the information in the issuer's possession at the time." *Omnicare*, 135 S. Ct. 1318. But the Supreme Court also explained that "[r]easonable investors understand that opinions sometimes rest on a weighing of competing facts" and they do not "expect that *every* fact known to an issuer supports its opinion statement." Significantly, the Supreme Court made it clear that a statement of opinion "is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way."

The *Omnicare* Court further stated that an investor is expected to "read[ ] each statement . . . in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information." The investor also "takes into account the customs and practices of the relevant industry." The Court explained that "an omission that renders misleading a statement of opinion when viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame."

4. While the *Omnicare* decision specifically addressed Section 11 claims, the Second Circuit did not limit its discussion or application of *Omnicare* to plaintiffs' Section 11 claims.

Second Circuit Holds Defendants' Opinions Regarding the Expected Timing of FDA Approval Did Not Conflict With What Plaintiffs Would Have Understood From Those Statements

The Second Circuit concluded that "even under the Supreme Court's revised approach to allegations of materially misleading opinions," plaintiffs had failed to state a claim as to defendants' opinions regarding Lemtrada's prospects. *Sanofi II*, 2016 WL 851797.

The Second Circuit first considered whether defendants' opinions "conflict[ed] with what a reasonable investor would [have] take[n] from" the statements themselves (quoting *Omnicare*, 135 S. Ct. 1318). The court found that there was no "serious conflict between the FDA's interim, albeit repeated, concerns about [the clinical testing] methodology and [d]efendants' optimism about FDA approval." The court noted that the FDA had stated that its concerns "could be overcome if the results showed an 'extremely large effect,'" which in fact was shown.

Notably, the Second Circuit observed that plaintiffs were "sophisticated investors" who were "well accustomed to the 'customs and practices of the relevant industry.'" The court explained that "[r]easonable investors understand that dialogue with the FDA is an integral part of the drug approval process, and no sophisticated investor familiar with standard FDA practice would expect that every view of the data taken by [d]efendants was shared by the FDA." The court determined that this ongoing dialogue "did not prevent [d]efendants from expressing optimism, even exceptional optimism, about the likelihood of drug approval." The Second Circuit observed that while a layperson might "have misinterpreted [d]efendants' statements as evincing assurance of success," plaintiffs here could "claim no such ignorance," particularly given that "the FDA has long made public its preference for double-blind trials." The court reasoned that "[e]specially where a complex financial instrument whose value is tied to FDA approval is involved, investors may be expected to keep themselves

apprised of the FDA's public positions on testing methodology."

Second Circuit Holds Defendants' Failure to Disclose the FDA's Concerns Did Not Render Defendants' Opinions Misleading Under *Omnicare*

The Second Circuit further held that defendants' failure to disclose the FDA's concerns about Lemtrada's clinical testing methodology did not render their opinions misleading. The court emphasized that under *Omnicare*, a statement of opinion "is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way" (quoting *Omnicare*, 135 S. Ct. 1318). Rather, *Omnicare* simply requires that defendants' statements "fairly align[ed] with the information in [their] possession at a time" (quoting *Omnicare*, 135 S. Ct. 1318).

Here, plaintiffs might "have been interested in knowing about the FDA feedback," and may even "have acted otherwise had the feedback been disclosed." But the Second Circuit emphasized that "*Omnicare* does not impose liability merely because an issuer failed to disclose information that ran counter to an opinion expressed in the registration statement." The court determined that defendants had no obligation to "disclose[ ] the FDA feedback merely because it tended to cut against their projections."

Plaintiffs argued that the "test" for opinion liability in this case should be "whether [d]efendants [had] failed to disclose a risk above and beyond the normal risks associated with drug approval." The Second Circuit determined that "[n]o plain reading of *Omnicare* supports this interpretation." The court explained that plaintiffs' proposed test "eschew[ed] the more taxing question of whether an issuer's statement [was] misleading, and instead . . . impose[d] a bright-line disclosure rule, regardless of the nature of the statements actually made by the issuer."

Second Circuit Determines That Defendants' Opinions Regarding the Lemtrada Study Results Were Not Misleading Under *Omnicare*

Plaintiffs also challenged as misleading defendants' opinions touting the effectiveness of Lemtrada. The Second Circuit analogized defendants' statements to the example offered in *Omnicare* of an issuer expressing its belief that its conduct is lawful. The Second Circuit explained that "[s]uch a statement does not imply that the issuer's conduct is, in fact, lawful, but only that the issuer has conducted a meaningful inquiry and has a reasonable basis upon which to make such an assertion." Here, the court determined that defendants' statements concerning Lemtrada's effectiveness could not be deemed "misleading merely because the FDA disagreed with the conclusion—so long as [d]efendants [had] conducted a 'meaningful' inquiry and in fact held that view."

The Second Circuit remarked that plaintiffs' claims regarding these statements were "little more than a dispute about the proper interpretation of data," which the court had previously "rejected as a basis for liability" in *Kleinman v. Elan Corp.*, 706 F.3d 145 (2d Cir. 2013). The court explained that "[d]efendants' statements were not misleading simply because the FDA disagreed with [d]efendants' interpretation of the data."

The Second Circuit concluded that under the standard set forth in *Omnicare*, "no reasonable investor would have been misled by [d]efendants' optimistic statements regarding the approval and launch of Lemtrada."

Second Circuit: Lehman ERISA Suit Dismissed Under Pleading Standards of *Fifth Third*

On March 18, 2016, the Second Circuit affirmed the dismissal of an action brought under the Employee Retirement Income Security Act of 1974 ("ERISA") by former participants in an employee stock ownership plan ("ESOP") that invested exclusively in shares of Lehman Brothers Holdings (the "Plan"). *Rinehart v. Lehman Bros. Holdings*, 2016 WL 1077009 (2d Cir. Mar. 18, 2016) (per curiam) (*Rinehart II*).[5] The Second Circuit held that the pleading standard set forth in *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014)[6] applies to ERISA claims based upon public information suggesting "excessive risk" as well as to claims based on "market value." The Second Circuit further held that a plaintiff alleging ERISA claims based on a fiduciary's failure to investigate inside information must allege (1) facts showing *how* that investigation would have uncovered relevant nonpublic information, and (2) an alternative action that the fiduciary could have taken that "a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it" (quoting *Fifth Third*, 134 S. Ct. 2459).

Background

After Lehman Brothers filed for bankruptcy in September 2008, plaintiffs brought suit against the Plan's fiduciaries (the "Plan Committee Defendants") alleging that they had "breached their duty of prudence under [ERISA] . . . by continuing to permit investment in Lehman stock in the face of circumstances arguably foreshadowing its demise." Plaintiffs also asserted ERISA claims against Lehman's former directors, including the company's former chairman and CEO, Richard S. Fuld, for allegedly "failing to keep the Plan Committee Defendants apprised of material, nonpublic information that could have affected their evaluation of the prudence of investing in Lehman stock."

The Southern District of New York dismissed plaintiffs' first and second amended complaints in their entirety. *In re Lehman Bros. Sec. & ERISA Litig.*, 683 F. Supp. 2d 294 (S.D.N.Y. 2010); *In re Lehman Bros. In re Lehman Bros. Sec. & ERISA Litig.*, 2011 WL 4632885 (S.D.N.Y. Oct. 5, 2011). 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), adopted by the Second Circuit. On July 15, 2013, the Second Circuit applied the *Moench* presumption of prudence and affirmed the dismissal of plaintiffs' second amended complaint. *Rinehart v. Akers*, 722 F.3d 137 (2d Cir. 2013) (*Rinehart I*).

Almost a year later, on June 25, 2014, the Supreme Court unanimously held that "the law does not create a special presumption" of prudence for ESOP fiduciaries. *Fifth Third*, 134 S. Ct. 2459. The Supreme Court subsequently vacated the Second Circuit's decision in *Rinehart I* and remanded the action for further consideration in light of *Fifth Third*. The Second Circuit in turn remanded the action to the district court, which permitted plaintiffs to amend their complaint to narrow their claims and shorten the class period.

On July 10, 2015, the Southern District of New York dismissed plaintiffs' amended complaint. *In re Lehman Bros. Sec. & ERISA Litig.*, 113 F. Supp. 3d 745 (S.D.N.Y. 2015) (*Lehman*) (Kaplan, J.).[7] As the Second Circuit explained, the district court "recogniz[ed] that *Fifth Third* abrogated the *Moench* presumption of prudence formerly governing ESOP-based ERISA claims in this Circuit, [but] nonetheless concluded that [p]laintiffs failed to allege sufficiently that the Plan Committee Defendants violated their ERISA fiduciary duties." The district court also held that plaintiffs [had] failed to state ERISA claims against Richard Fuld, the only remaining director-defendant in the action. Plaintiffs appealed.

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

6. Please click here to read our prior discussion of the court's decision in *Fifth Third*.

7. Please click here to read our prior discussion of the court's decision in *Lehman*.

Second Circuit Holds Plaintiffs Failed to Allege ERISA Claims Against the Plan Committee Defendants Based on Publicly Available Information

The Second Circuit explained that in *Fifth Third*, the Supreme Court "made clear that 'where a stock is publicly traded, 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'" (quoting *Fifth Third*, 134 S. Ct. 2459).

Applying the standard set forth in *Fifth Third*, the Second Circuit held that plaintiffs had failed to allege that the Plan Committee Defendants had breached their duty of prudence by continuing to invest in Lehman stock despite the existence of "publicly available information [allegedly indicating] that investment in Lehman had become increasingly risky throughout 2008." The Second Circuit concurred with the district court's determination that plaintiffs' amended allegations did "no more than add marginally to the cacophony of mixed signals described in" plaintiffs' earlier complaint and did not "nudge the allegations . . . across the plausibility threshold" (quoting *Lehman*, 113 F. Supp. 3d 745).

Fifth Third Applies to Claims Alleging "Excessive Risk"

The Second Circuit rejected plaintiffs' contention that *Fifth Third* only applies to claims based on publicly available information concerning "market value" and not claims concerning "excessive risk." The Second Circuit agreed with the district court's finding that plaintiffs' purported distinction was "illusory" (quoting *Lehman*, 113 F. Supp. 3d 745). The Second Circuit explained that "[a]lthough the language of *Fifth Third* refers primarily to 'over- or undervaluing' stock, the *Fifth Third* Court applied this rule to the plaintiffs' risk-based claims in that case." The Second Circuit further reasoned that applying *Fifth Third*'s holding "to *all* allegations of imprudence based upon public information—regardless of whether the allegations are framed in terms of market value or excessive risk—is consistent with the efficient market hypothesis that risk is accounted for in the market price of a security."

Plaintiffs Failed to Allege "Special Circumstances" Within the Meaning of *Fifth Third*

The Second Circuit regarded as meritless plaintiffs' contention that the SEC's July 2008 orders prohibiting short-sales of certain financial firms' securities, including Lehman stock, "describe[d] market conditions constituting 'special circumstances.'" The court explained that the SEC's orders spoke "only conditionally about potential market effects resulting from so-called naked short sales" and did not "purport to describe then-existing market conditions." The Second Circuit also agreed with the district court's observation that the "the 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 about Lehman."

The Second Circuit also rejected plaintiffs' argument that the SEC orders "created special circumstances by excluding naked short sales of [Lehman] securities." Although plaintiffs "parrot[ed] language from *Fifth Third*," the court held plaintiffs' "conclusory assertions" did not give rise to a plausible inference of "special circumstances."

Second Circuit Holds Plaintiffs Did Not Adequately Allege a Breach of Fiduciary Duty Claim Based on the Plan Committee Defendants' Failure to Investigate Nonpublic Information

Turning from claims based upon public information to claims based upon inside information, the Second Circuit held that plaintiffs had not adequately alleged an ERISA breach of fiduciary duty claim against the Plan Committee Defendants for failing to "investigate nonpublic information regarding the risks" of investing in Lehman stock.

The Second Circuit determined that even after *Fifth Third*, plaintiffs alleging "a breach of the duty of prudence for failure to investigate . . . 'must allege facts that, if proved, would show that an adequate investigation would have revealed to a reasonable fiduciary that the investment at issue was imprudent'" (quoting *In re Citigroup ERISA Litig.*, 662 F.3d 128 (2d Cir. 2011)). The Second Circuit agreed with the district court that plaintiffs did not explain "*how* [their] hypothetical

investigation would have uncovered the alleged inside information" (quoting *Lehman*, 113 F. Supp. 3d 745).

The Second Circuit further reasoned that even if the Plan Committee Defendants had uncovered adverse nonpublic information, plaintiffs had not alleged that "a prudent fiduciary" could not have concluded that taking an alternative action based on that information, such as "divesting Lehman stock, or simply holding it without purchasing more," would have done more harm than good, as plaintiffs were required to show pursuant to the standard set forth in *Fifth Third* and reiterated by the Supreme Court in *Amgen v. Harris*, 136 S. Ct 758 (2016) (per curiam).[8]

Applying this standard, the Second Circuit found that a prudent fiduciary could indeed have concluded that plaintiffs' proposed alternative actions would have done more harm than good. The court therefore held that plaintiffs had failed to allege ERISA claims based on the Plan Committee Defendants' alleged failure to investigate nonpublic information.

Second Circuit Holds Lehman's Former CEO Had No Duty to Inform the Plan Committee Defendants of Nonpublic Information

Finally, the Second Circuit held the district court had correctly dismissed plaintiffs' duty to monitor and duty to inform claims as to Lehman's former chairman and CEO, Richard Fuld, in his capacity as an appointing fiduciary of the Plan. The Second Circuit concurred with the district court's determination that "ERISA does not impose a duty on appointing fiduciaries to keep their appointees apprised of nonpublic information" (quoting *Lehman I*, 113 F. Supp. 3d 745). The Second Circuit also noted that "plaintiffs [could not] maintain a claim for breach of the duty to monitor . . . absent an underlying breach of the duties imposed under ERISA."

The Second Circuit therefore affirmed the district court's dismissal of plaintiffs' claims in their entirety.

8. Please click here to read our prior discussion of the *Amgen* decision.

Second Circuit: (1) Three-Year Statute of Repose Applies to Claims Alleging Materially Misleading Proxy Statements Under Section 14(a), and (2) the Repose Period Begins to Run on the Date of the Most Recent Alleged Violation

On March 17, 2016, the Second Circuit held that the five-year statute of repose established by the Sarbanes-Oxley Act of 2002 ("SOX") for certain fraud claims does not apply to claims brought under Section 14(a) of the Exchange Act, which prohibits material misleading proxy statements. *DeKalb Cty. Pension Fund v. Transocean*, 2016 WL 1055363 (2d Cir. 2016) (Cabranes, J.) (*Transocean*). The court determined that Section 14(a) claims still remain subject to the three-year statute of repose that applied before the passage of SOX. The Second Circuit further held that the statute of repose for Section 14(a) claims "begin[s] to run on the date of the defendant's last culpable act or omission."

Background

Section 14(a) of the Exchange Act prohibits material misrepresentations and omissions in proxy statements sent to shareholders of registered securities. There is no express private right of action under Section 14(a), nor is there a statute of repose that expressly governs Section 14(a) claims.

In *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990), the Second Circuit held that a three-year statute of repose applies to Section 14(a) claims. The *Ceres* court reasoned that "the implied private rights of action in Section 14 were 'analogous' to the express private rights of action in Sections 9(f) and 18(a)" of the Exchange Act [9] because all three provisions were "'designed to ensure that security holders receive full disclosure.'" *Transocean*, 2016 WL 1055363 (quoting *Ceres*, 918 F.2d 349). Given the "common goals" of the three provisions, the court "borrowed the three-year statutes of repose applicable to Sections 9(f) and 18(a) . . . and applied them to Section 14."

In 2002, SOX established a new five-year statute of repose, codified at 28 U.S.C. § 1658(b), for certain securities fraud claims, specifically to "private right[s] of action that involve[ ] a claim of fraud, deceit, manipulation, or contrivance."

Second Circuit Holds § 1658(b)'s Five-Year Statute of Repose Does Not Apply to Section 14(a) Claims Because Those Claims Do Not Necessarily Involve Fraud

The case before the Second Circuit concerned claims under Section 14(a), Rule 14a-9, and Section 20(a) alleging that an October 2, 2007 proxy statement issued in connection with a proposed merger between Transocean and GlobalSantaFe Corporation contained material misrepresentations and omissions. The eventual lead plaintiff did not appear in the case until December 2010, more than three years after the proxy statement was issued. On March 14, 2014, the Southern District of New York dismissed plaintiffs' Section 14(a) claim as untimely; plaintiffs appealed. Plaintiffs contended that § 1658(b)'s five-year statute of repose—rather than the three-year statute of repose adopted in *Ceres*—applies to claims brought under Section 14(a).

On appeal, the Second Circuit began its analysis by considering whether § 1658(b)'s five-year statute of repose applies to claims under Section 9(f) and Section 18(a) of the Exchange Act. The court concluded that Section 9(f) falls within the scope of § 1658(b) because it "contain[s] requirements of both manipulative motive and willfulness." The court determined that § 1658(b) also applies to Section 18(a) because "[a] plaintiff asserting a Section 18(a) claim is, in essence, asserting a fraud claim."

In light of these findings, the Second Circuit observed that "the landscape has fundamentally changed since [it] decided *Ceres*." The court explained that if it "were to take the same analytical approach that [it] took in *Ceres* . . . i.e., borrow the statutes of repose applicable to Sections 9(f) and 18(a)—the statute of repose applicable to Section 14(a) would be five years." The Second Circuit noted that "this would be an absurd result" and "undeniably contrary to clearly expressed congressional intent." The court explained that "Congress has specified that § 1658(b) applies only to 'private right[s] of action that involve[] a claim of fraud, deceit, manipulation, or contrivance,' which Section 14(a) does not."

The Second Circuit stated that it "assume[s] that Congress is aware of existing law when it passes legislation." The court presumed that Congress knew that: (1) courts had long permitted plaintiffs to bring private actions under Section 14(a), and (2) *Ceres* and numerous other decisions had borrowed the three-year statutes of repose applicable to Sections 9(f) and 18(a) and applied them to Section 14(a). The Second Circuit reasoned that "Congress must have known that, by extending only the statute of repose applicable to 'private right[s] of action that involve[] a claim of fraud, deceit, manipulation, or contrivance,' the statutes of repose applicable to Section 14(a) would remain intact."

The Second Circuit "therefore [held] that the same three-year statutes of repose that [it] applied to Section 14 in *Ceres* . . . still apply to Section 14(a) today."

9. Section 9(f) provides a private right of action for certain types of securities price manipulation. Section 18(a) provides a private right of action to purchasers who relied on materially misleading statements or omissions in documents filed with the SEC under the Exchange Act.

Second Circuit Holds the Statute of Repose for Section 14(a) Claims Begins to Run on the Date of the Last Alleged Violation

The Second Circuit next considered when the statute of repose for Section 14(a) claims begins to run, and held that it "begin[s] to run on the date of the violation."

As an initial matter, the court deemed it immaterial that the text of the statute of repose that applied to Section 18(a) claims prior to the enactment of § 1658(b) indicated that the clock did not begin to run until "*after such cause of action accrued*."[10] The court explained that in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), the Supreme Court "recognized that the [Exchange Act's] statutes of *repose*, including those in Sections 9(f) and 18(a), all 'relate to . . . three years *after violation,'* regardless of any differences in statutory language*"* (quoting *Lampf*, 501 U.S. 350).

10. The text of the statute of repose that previously applied to Section 9(f) claims, however, provided that the clock begins to run "*after such violation.*"

The Second Circuit further held that the "discovery rule" does not toll the three-year statute of repose for Section 14(a) claims until the date the alleged fraud was discovered or "could have been discovered in the exercise of reasonable diligence." The court deemed the "discovery rule" inapplicable both because "Section 14(a) claims do not demand fraud" and "also because the discovery rule does not extend to statutes of repose." The court explained that applying the "discovery rule" to statutes of repose would "defeat their distinct purpose, which is to effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time." The Second Circuit underscored that "an injury need not [even] have *occurred*, much less have been discovered, for a statute of repose to begin to run."

The court concluded "that, like all statutes of repose, the statutes of repose applicable to Section 14(a) begin to run on 'the date of the [defendant's] last culpable act or omission."

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

Susannah S. Geltman
+1-212-455-2762
sgeltman@stblaw.com

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

Nicholas S. Goldin
+1-212-455-3685
ngoldin@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

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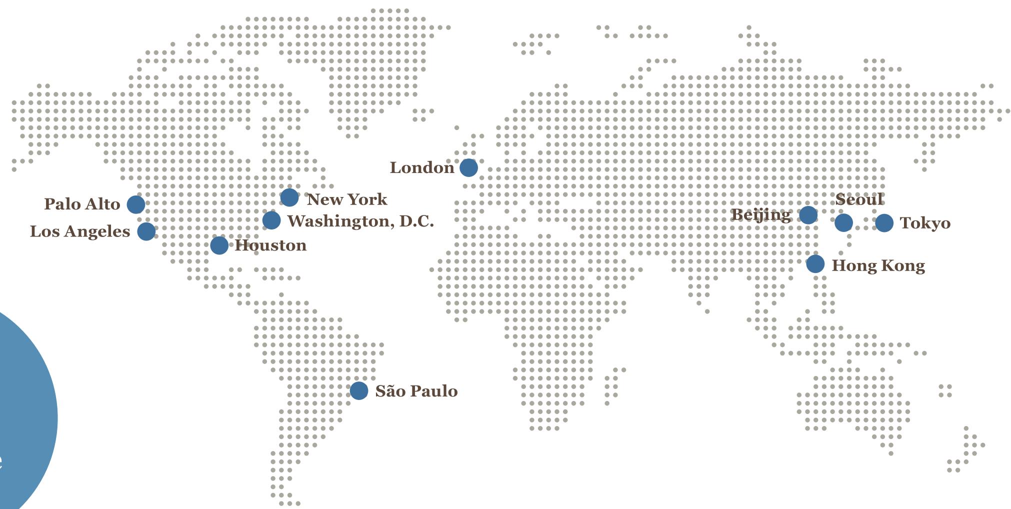

UNITED STATES

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.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

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

ASIA

Beijing
3901 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
25th Floor, 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