Simpson Thacher

Securities Law Alert

In This Edition:

- Supreme Court: Providing a Gift of Inside Information to a Trading Relative or Friend Is Sufficient to Establish the Personal Benefit Requirement for Tipping-Based Insider Trading Liability
- First Circuit: (1) Plaintiffs Asserting a Section 11 Claim Based on Aftermarket Purchases Must Specifically Plead Traceability; (2) Defendants Must Disclose Relevant "Troubling Developments" When Making Optimistic Statements
- Delaware Supreme Court: Plaintiffs Raised a Reasonable Doubt as to the Disinterestedness of a Director Who Co-Owned a Plane with the Controlling Stockholder and Two Directors Who Had Business Relationships with the Controlling Stockholder

Year in Review:

- Supreme Court and Circuit Court Decisions Addressing the ERISA Pleading Standards of *Fifth Third Bancorp v. Dudenhoeffer*
- Supreme Court: Federal Courts Have Exclusive Jurisdiction Over Suits "Brought to Enforce" the Securities Exchange Act
- Circuit Court Decisions Addressing the Requirements for Pleading Scienter
- Circuit Court Decisions Addressing Disclosure Requirements Under Section 10(b)
- Circuit Court Decisions Addressing the Safe Harbor for Forward-Looking Statements
- Circuit Court Decisions Addressing the Requirements for Pleading Loss Causation Under Section 10(b)
- Circuit Court Decisions Addressing Limitations Periods
- Circuit Court Decisions Addressing Constitutional Challenges to SEC Administrative Enforcement Proceedings
- Other Noteworthy Circuit Court Decisions
- Significant New York Court of Appeals Decisions

December 2016

Simpson Thacher's "[s]ophisticated group of securities litigators expertly handl[es] the representation of major financial institutions and private equity clients."

– Chambers USA 2016

Supreme Court: Providing a Gift of Inside Information to a Trading Relative or Friend Is Sufficient to Establish the Personal Benefit Requirement for Tipping-Based Insider Trading Liability

On December 6, 2016, the Supreme Court unanimously held that the personal benefit necessary to establish a breach of duty and insider trading liability under *Dirks v. S.E.C.*, 463 U.S. 646 (1983)[1] is satisfied where a tipper gives inside information to a trading relative or friend. *Salman v. United States*, 2016 WL 7078448 (Alito, J.). The Court's narrow decision resolved a recent split between the Second and Ninth Circuits on the scope of the personal benefit requirement.[2]

The *Salman* Court considered a case in which "the tipper provided inside information to a close relative, his brother." The tipper's brother then passed the information along to a friend, who then traded on that information. The Court found the following oft-cited passage in *Dirks* directly resolved the case before it:

> [T]here may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient. The 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. The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient.

Dirks, 463 U.S. 646.

1. In *Dirks*, the Supreme Court held an insider can only face liability under Section 10(b) and Rule 10b-5 for disclosing material inside information to a third party—or tipping—if the insider "receive[d] a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings."

2. In *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014) (Parker, J.), the Second Circuit held the Government must prove "an exchange that is objective, consequential, and represents at least a potential gain [to the tipper] of a pecuniary or similarly valuable nature." Several months later, the Ninth Circuit held the Government may establish the existence of a personal benefit by presenting "evidence of a friendship or familial relationship between tipper and tippee." *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015) (Rakoff, J.).

The *Salman* Court reiterated the factual finding that the tipper had intended to provide his brother with inside information for his brother's benefit, and found that this was precisely the type of "gift giving" *Dirks* found sufficient to satisfy the "personal benefit" requirement. *Salman*, 2016 WL 7078448. Following the logic in *Dirks*, the Court noted that the tipper's conduct—sharing information with his brother so the latter could reap financial gains—was analogous to the tipper himself trading on the inside information and providing his brother with the proceeds as a gift.

The Court clarified that "[t]o the extent the Second Circuit [in *Newman*] held that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends . . . this requirement is inconsistent with *Dirks*."

Notably, the *Salman* Court expressly acknowledged that "[i]t remains that case that 'determining whether an insider personally benefits from a particular disclosure, a question of fact, will not always be easy for courts.'" *Id.* (quoting *Dirks*, 463 U.S. 646).

First Circuit: (1) Plaintiffs Asserting a Section 11 Claim Based on Aftermarket Purchases Must Specifically Plead Traceability; (2) Defendants Must Disclose Relevant "Troubling Developments" When Making Optimistic Statements

On November 28, 2016, the First Circuit held that plaintiffs who assert Section 11 claims based on aftermarket purchases must specifically plead facts demonstrating that those shares are traceable to the offering corresponding to the allegedly misleading registration statement at issue. *In re ARIAD Pharm., Inc. Sec. Litig.*, 2016 WL 6933788 (1st Cir. 2016) (Howard, C.J.). The court held that "general allegations [of traceability] alone are not sufficient to avoid dismissal."

The First Circuit also revived a securities fraud claim alleging that defendants had expressed optimism concerning FDA approval

with a favorable label without mentioning the FDA's request for a label with a black box warning. The court found defendants' failure to disclose relevant "troubling developments created an impermissible risk of misleading investors."

To Plead a Section 11 Claim, Aftermarket Purchasers Must Allege Particularized Facts Showing the Shares Are Traceable to the Offering at Issue

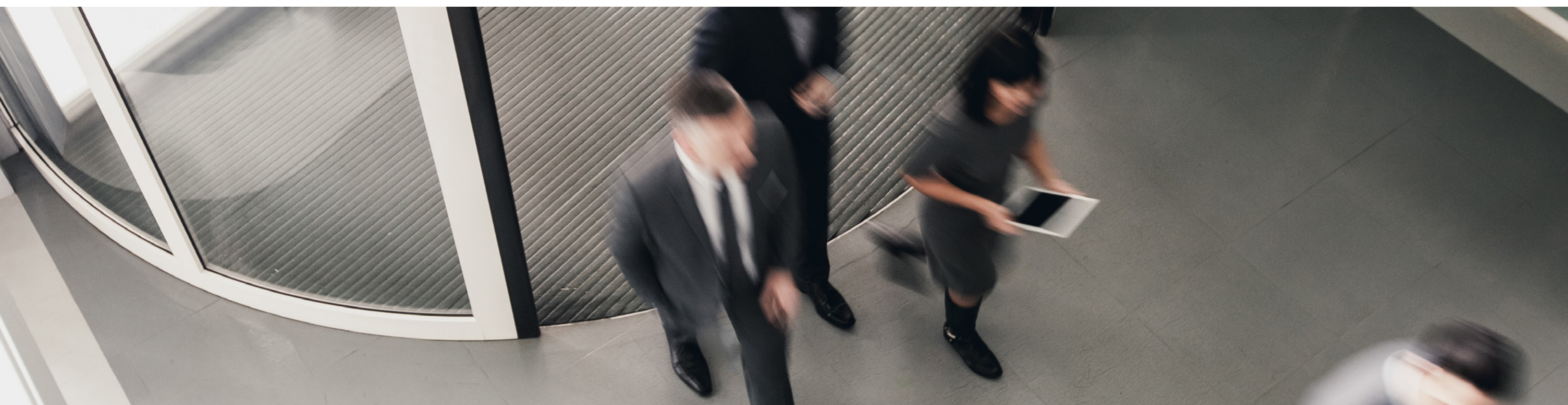
The First Circuit explained that a Section 11 claim "may be maintained only by those who purchase securities that are the direct subject of the prospectus and registration statement." The court noted that "in order to state a claim, the plaintiffs need not have purchased shares in the offering." Aftermarket purchasers also have standing to bring Section 11 claims "provided they can trace their shares back to the relevant offering."

While satisfying the traceability requirement is straightforward in cases where "all of a company's shares have been issued in a single offering under the same registration statement," the First Circuit observed that the inquiry "becomes more complicated where . . . the company has issued shares under multiple registration statements." In those cases, a plaintiff must establish that "her shares were issued under the allegedly false or misleading registration statement, rather than some other registration statement."

The First Circuit rejected the argument that "mere 'general allegations' that [plaintiffs'] shares are traceable to the offering in question are sufficient to avoid dismissal." The court explained that in order to survive dismissal under the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), plaintiffs cannot simply allege a "formulaic recitation" of the elements of a claim (quoting *Twombly*, 550 U.S. 544). Rather, plaintiffs must provide "enough facts to state a claim to relief that is plausible on its face." *Id.* The First Circuit held that "almost by definition, a general allegation that a plaintiff's shares are traceable to the offering in question is nothing more than a 'formulaic recitation' of that element."

Plaintiffs Sufficiently Pled Scienter Where Defendants Allegedly Expressed Optimism Concerning the Likelihood of FDA Approval on Favorable Terms Without Disclosing the FDA's Request for a Black Box Warning

The First Circuit reversed dismissal of a securities fraud claim brought in connection with defendants' expressions of optimism concerning the likelihood that the FDA would approve the company's new leukemia drug with a favorable label. Several weeks earlier, the FDA had allegedly rejected the company's proposed label and instructed the company to submit a revised label for the leukemia drug that included a black box warning, yet defendants allegedly made no mention of the FDA's concerns. The First Circuit found plaintiffs' allegations were "sufficient to support a strong inference of scienter." The court reasoned that although "management may have held out hope of achieving" FDA approval with a favorable label, "the expression of that hope without disclosure of recent troubling developments created an impermissible risk of misleading investors."



Delaware Supreme Court: Plaintiffs Raised a Reasonable Doubt as to the Disinterestedness of a Director Who Co-Owned a Plane with the Controlling Stockholder and Two Directors Who Had Business Relationships with the Controlling Stockholder

On December 5, 2016, the Delaware Supreme Court revived a derivative action brought in connection with claims concerning stock sales by the company's former CEO and controlling stockholder (the "controller") and other company insiders. *Sandys v. Pincus*, 2016 WL 7094027 (Del. 2016) (Strine, C.J.). In addition to the three board members who were interested in the transactions at issue, the Delaware Supreme Court found the complaint raised a reasonable doubt as to the independence of three other directors based on allegations that one director co-owned a plane with the controller and two directors had "interlocking [business] relationships" with him.

Allegation of a Director's Co-Ownership of an Airplane with the Controlling Stockholder Is Sufficient to Support an Inference That the Director Cannot Act Impartially

The Delaware Supreme Court found the co-ownership of an airplane "create[d] a pleading stage inference that [the director] cannot act independently of [the controller]." The court reasoned that "[c]o-ownership of a private plane involves a partnership in a personal asset that is not only very expensive, but also requires close cooperation in use." The court found the arrangement "suggestive of the type of very close personal relationship that, like family ties, one would expect to heavily influence a human's ability to exercise impartial judgment."

The Delaware Supreme Court recognized that plaintiff offered only cursory allegations regarding the implications of the airplane co-ownership. Nevertheless, the court found that even under the "elevated" pleading standard that applies "in the demand excusal context," a plaintiff does not have to "plead a detailed calendar of social interaction to prove that directors have a very substantial relationship rendering them unable to act independently of each other." The court explained that "[a] plaintiff is only required to plead facts supporting an inference . . . that a director cannot act impartially." Here, the Delaware Supreme Court found the facts alleged "support[ed] an inference that [the director] would not be able to act impartially when deciding whether to move forward with a suit implicating a very close friend with whom she and her husband co-own a private plane."

Allegations of a Director's Business Relationships with the Controlling Stockholder Raise an Inference That the Director Cannot Act Impartially

The Delaware Supreme Court then considered allegations that two directors had "a mutually beneficial network of ongoing business relations" with both the controller and an outside director who sold company stock in the transactions at issue. The court found that "it is reasonable to expect" that "a mutually beneficial ongoing business relationship . . . might have a material effect on the parties' ability to act adversely toward each other." The court observed that "[c]ausing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship."

The Delaware Supreme Court also found it significant that the board had allegedly already determined that both directors did not qualify as independent directors pursuant to the NASDAQ Listing Rules. The court stated that "[t]he NASDAQ rules' focus on whether directors can act independently of the company or its managers has important relevance to whether they are independent for purposes of Delaware law." The Delaware Supreme Court determined that "if a director cannot be presumed capable of acting independently because the director derives material benefits from her relationship with the company," then the director "necessarily cannot be presumed capable of acting independently of the company's controlling stockholder."

Year in Review

Supreme Court and Circuit Court Decisions Addressing the ERISA Pleading Standards of *Fifth Third Bancorp v. Dudenhoeffer*

Supreme Court: Courts Must Apply the ERISA Pleading Standards of *Fifth Third*

In *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014), the Supreme Court outlined the standards for pleading an ERISA breach of the duty of prudence claim against the fiduciary of an employee stock ownership plan ("ESOP").

In *Amgen v. Harris*, 136 S. Ct. 758 (2016) (per curiam), the Supreme Court explained that in evaluating a duty of prudence claim based on inside information under the *Fifth Third* standard, courts must "consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases—which the market might take as a sign that insider fiduciaries viewed that employer's stock as a bad investment—or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund" (quoting *Fifth Third*, 134 S. Ct. 2459).

Applying this standard, the Supreme Court held the Ninth Circuit had "failed to properly evaluate" an ERISA complaint brought by participants in Amgen-sponsored plans. The Ninth Circuit had found it "quite plausible" that removing the Amgen Common Stock Fund as an investment option under the Amgen Plans would not have resulted in "undue harm to plan participants" (quoting *Harris v. Amgen*, 788 F.3d 916 (9th Cir.2014)). The Supreme Court conducted its own review of the complaint and determined the complaint "lacked sufficient facts and allegations" to satisfy *Fifth Third*'s standards.

In a Dissenting Opinion, Justice Valihura Expresses Her View That Plaintiff Failed to Rebut the Presumption of Independence That Applies in the Demand Futility Context

Justice Valihura dissented from Chief Justice Strine's opinion based on her view that the allegations were insufficient to rebut the presumption of independence that applies in the demand futility context.

With respect to the two directors who had business relationships with the controlling stockholder, Justice Valihura observed that "plaintiff failed to plead any facts about the size, profits or materiality" to the two directors of the alleged "investments or interests" that raised a potential conflict of interest. She also noted "the lack of any explanation as to why [the two directors] were identified as 'not independent' for NASDAQ purposes."

With respect to the director who co-owned an airplane with the controlling stockholder, Justice Valihura stated that plaintiff alleged only a "business relationship" between the director and the controller based on their co-ownership. She emphasized that "[n]othing more is alleged, let alone facts suggesting [any] kind of familial loyalty and intimate friendship." While Justice Valihura acknowledged that "it may be reasonable to infer some kind of collaborative relationship given the nature of the asset," she stated that she did "not believe the bare allegation in the [c]omplaint [rose] to the level of creating a reasonable doubt as to [the director's] ability to carry out her fiduciary duties."

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

In *Fifth Third*, the Supreme Court held 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." 134 S. Ct. 2459.

On March 18, 2016, the Second Circuit relied on *Fifth Third* to affirm dismissal of an ERISA action brought by former participants in an ESOP that invested exclusively in shares of Lehman Brothers Holdings. *Rinehart v. Lehman Bros. Holdings*, 817 F.3d 56 (2d Cir. 2016) (per curiam).[3] The Second Circuit held *Fifth Third*'s pleading standard applies to ERISA claims based upon public information suggesting "excessive risk" as well as to claims based on "market value." The court further ruled that the SEC's July 2008 orders prohibiting short-sales of certain financial firms' securities, including Lehman stock, did not constitute "special circumstances" within the meaning of *Fifth Third*.

In addition, the Second Circuit 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).

Fifth Circuit: *Fifth Third* Mandates a "More Harm Than Good" Standard for ERISA Breach of Duty of Prudence Claims Based on Inside Information, Not a "More Good Than Harm" Standard

On September 26, 2016, the Fifth Circuit stated that "[u]nder the Supreme Court's formulation" in *Fifth Third*, a plaintiff asserting an ERISA breach of the duty of prudence claim based on inside information "bears the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary *could not conclude* that it would be more likely to harm the fund than to help it." *Whitley v. BP*, 838 F.3d 523 (5th Cir. 2016) (Clement, J.). In the case before it, the Fifth Circuit determined the district court had instead erroneously considered whether "no prudent fiduciary would have concluded that" the alternative actions "would do more good than harm."

Supreme Court: Federal Courts Have Exclusive Jurisdiction Over Suits "Brought to Enforce" the Securities Exchange Act

Section 27 of the Securities Exchange Act confers federal district courts with exclusive jurisdiction over all suits "brought to enforce any liability or duty created by [the Exchange Act] or the rules and regulations thereunder." On May 16, 2016, the Supreme Court held "the jurisdictional test established by [Section 27] is the same as the one used to decide if a cases 'arises under' a federal law" pursuant to 28 U.S.C. § 1331, the general federal question statute.[4] *Merrill Lynch, Pierce, Fenner & Smith v. Manning*, 136 S. Ct. 1562 (2016) (Kagan, J.).

Section 1331's "arising under" test provides for federal jurisdiction when (1) "federal law creates the cause of action asserted[,]" or (2) a state-law claim "necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state power." Applying the second prong of this "arising under" test to Section 27, the Supreme Court stated that federal courts would have exclusive jurisdiction over "a state law cause of action . . . 'brought to enforce' a duty created by the Exchange Act because the claim's very success depends on giving effect to a federal requirement." The Court further stated that a state-law action "could also fall within § 27's compass" if it "necessarily depends on a showing that the defendant breached the Exchange Act." However, the Court found Section 27 "stops short of embracing any complaint that

3. Simpson Thacher represents the former members of the Lehman Brothers Employee Benefit Plans Committee in this action.

4. Section 1331 provides federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

happens to mention a duty established by the Exchange Act."

Circuit Court Decisions Addressing the Requirements for Pleading Scienter

First Circuit: Publication of Erroneous Interim Clinical Study Results, Standing Alone, Does Not Give Rise to an Inference of Scienter

On October 3, 2016, the First Circuit affirmed dismissal of a securities fraud action alleging that a pharmaceutical company and several of its executives "turned a blind eye" to "study results that seemed too good to be true" in order to reap "a windfall on the sale of their stock." *Local No. 8 IBEW Ret. Plan & Tr. v. Vertex Pharm.*, 838 F.3d 76 (1st Cir. 2016) (Kayatta, J.). The court found the inference that the company knowingly or recklessly published the inaccurate study results was not "strong enough to equal the alternative inference that [the company] was negligent in viewing very good results as being even better than they in fact were."

With respect to plaintiffs' argument that [the company] itself described the study results as "unexpected," the First Circuit explained that "many studies of new pharmaceutical products result in surprises, both good and bad." The court also found there was no "legal requirement . . . that obligated the company to double-check the interim results before announcing them."

Finally, the First Circuit rejected plaintiffs' theory that defendants were financially motivated to overlook "the erroneous interpretation of the interim results because of the stock price spike precipitated by the error." The court explained that "[a]nnouncing good results on such a study would have been clearly better for [the company] than announcing great results only to reduce them to good results by shortly thereafter confessing error, thereby harming the company's credibility and its reputation for competence."

Fifth Circuit: Courts Cannot Infer Scienter Based on an Executive's Position in the Company Absent "Special Circumstances"

On January 13, 2016, the Fifth Circuit held that it could not infer scienter based on a corporate officer's position at the company absent "special circumstances." *Local 731 I.B. of T. Excavators and Pavers Pension Tr. Fund v. Diodes*, 810 F.3d 951 (5th Cir. 2016) (Jones, J.). The Fifth Circuit explained that "[t]he 'special circumstances' cases exhibit some combination of four considerations that might tip the scales in favor of an inference of scienter." First, the court noted that "the smaller the company the more likely it is that corporate executives would be familiar with the intricacies of day to day operations." A second factor is whether the transaction in question was "critical to the company's continued vitality." A third factor is whether "the misrepresented or omitted information at issue would have been readily apparent to the speaker." Finally, a fourth factor is whether the "defendant's statements were internally inconsistent with one another." The Fifth Circuit found none of these considerations were present in the case before it, and concluded that it could not infer scienter based solely on the executives' positions within the company.

Sixth Circuit: A Corporate Executive's State of Mind May Only Be Imputed to the Corporation for Scienter Purposes If the Executive Made a Public Misstatement

On May 24, 2016, the Sixth Circuit held a senior corporate executive's state of mind could not be imputed to the corporation where the executive did not himself make any public statements. *Doshi v. Gen. Cable Corp.*, 823 F.3d 1032 (6th Cir. 2016) (Cook, J.). The Sixth Circuit reasoned that under its prior decision in *In re Omnicare Sec. Litig.*, 769 F.3d 455 (6th Cir. 2014), "a corporate executive's or employee's state of mind" may only be imputed "to a corporate defendant when such a person *makes a public misstatement*." In the case before the court, plaintiffs alleged only that the executive "submitted [his division's] financial data to [the company], not that he drafted, reviewed, or approved [the company]'s erroneous public financial statements."

Tenth Circuit: Failure to Disclose Project Delays and Cost Overruns Reflected "Benign Optimism" Rather Than Scienter

On July 6, 2016, the Tenth Circuit held plaintiffs failed to raise a strong inference of scienter in connection with a company's alleged misrepresentations of cost overruns and production delays. *Anderson v. Spirit Aerosystems Holdings*, 827 F.3d 1229 (10th Cir. 2016) (Bacharach, J.). The Tenth Circuit found it was "more probable that the [company] executives were overly optimistic and failed to give adequate weight to financial red flags."

The Tenth Circuit rejected plaintiffs' efforts to allege scienter based on a "recovery plan" to put one of the projects back on schedule. The court acknowledged the company's "eventual announcement of a forward loss suggest[ed] that [the company] had placed too much confidence in the recovery plan." But the court explained that "the same [could] always be said when a company delays announcement of a forward loss based on remedial efforts to increase profitability or production."

The Tenth Circuit also held plaintiffs failed to allege scienter based on the CEO's after-the-fact explanation of why the loss had occurred. The court found the CEO's statements only "suggest[ed] an honest mistake in predicting [the company's] future production and costs, not an inference of scienter."

Circuit Court Decisions Addressing Disclosure Requirements Under Section 10(b)

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 held the Supreme Court's decision in *Omnicare v. Laborers' Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015), "does not impose liability merely because an issuer failed to disclose information that ran counter to an opinion expressed in the registration statement," provided the opinion "fairly align[ed] with the information in the issuer's possession at the time." *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016) (Parker, J.).

The Second Circuit stated that under *Omnicare*, omissions may render opinions actionable if the omitted information "conflict[s] with what a reasonable investor would take from the statement itself." *Id.* (quoting *Omnicare*, 135 S. Ct. 1318). However, the Second Circuit observed that the *Omnicare* Court "cautioned against an overly expansive reading of this standard." The Supreme Court 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." *Omnicare*, 135 S. Ct. 1318. 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."

In the case before it, the Second Circuit found defendants' opinions regarding the expected timing of FDA approval were not rendered misleading by defendants' failure to disclose the FDA's concerns about the company's clinical testing methodology. The Second Circuit held defendants had no obligation to "disclose[ ] the FDA feedback merely because it tended to cut against their projections." *Sanofi*, 816 F.3d 199.

Second Circuit: (1) Item 303 of Regulation S-K Requires the Registrant's Actual Knowledge of a Trend or Uncertainty; and (2) "Probability" Standard Only Applies to FAS 5's Disclosure Requirement If There Was No Manifestation of a Potential Claim

On March 29, 2016, the Second Circuit held that Item 303 of Regulation S-K, which mandates the disclosure of certain "known trends or uncertainties" in a public company's Form 10-Ks and other SEC filings, "requires the registrant's *actual knowledge* of the relevant trend or uncertainty" "rather than a lesser standard of recklessness or negligence" (emphasis added).[5] *Ind. Pub. Ret. Sys. v. SAIC*, 818 F.3d 85 (2d Cir. 2016) (Lohier, J.). Considering the question squarely for the first time, the Second Circuit determined that "Item 303 requires the registrant to disclose only those trends, events, or uncertainties that it actually knows of when it files the relevant report with the SEC." The court found this interpretation supported by both the "plain language of Item 303" as well as the "SEC's interpretation of Item 303." Significantly, the Second Circuit stated that "[i]t is not enough" for purposes of Item 303's disclosure requirements that the registrant "*should have known* of the existing trend, event, or uncertainty" (emphasis added).

The Second Circuit also considered the standard for claims alleging a failure to disclose a loss contingency for unasserted claims as required under Financial Accounting Standard 5 ("FAS 5") of the Generally Accepted Accounting Principles ("GAAP").[6] The court held that a "probability" standard applies to FAS 5-based claims only if there has been "no manifestation by a potential claimant of an awareness of a possible claim or assessment." In cases where a potential claimant has manifested awareness of a possible claim, the court held that FAS 5's disclosure requirements apply if a loss in connection with that claim is a "reasonable possibility."

5. Item 303 of Regulation S-K requires a registrant to "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."

6. Under FAS 5, an issuer must "disclose a loss contingency when a loss is a 'reasonable possibility,' meaning that it is 'more than remote but less than likely.'" *Id.* (quoting FAS Board, Statement of FAS 5).

Ninth Circuit: Pharmaceutical Company's Decision to Discuss Certain Studies Supporting a Drug's Safety Necessitated Disclosure of Another Study Linking the Drug to Cancer

On October 26, 2016, the Ninth Circuit held that once a pharmaceutical company chose to represent that animal studies supported the safety of its new weight loss drug, the company was then required to disclose the existence of an animal study linking the drug to cancer. *Schueneman v. Arena Pharm.,* 840 F.3d 698 (9th Cir. 2016) (Bybee, J.).

The court explained that under the Supreme Court's decision in *Matrixx Initiatives v. Siracusano*, 563 U.S. 27 (2011), "companies can control what they have to disclose under [the securities laws] by controlling what they say to the market" (quoting *Matrixx*, 563 U.S. 27). Once a company opts to "tout" positive information to the market, however, the company is then "bound to do so in a manner that wouldn't mislead investors" (quoting *Berson v. Applied Signal Tech.*, 527 F.3d 982 (9th Cir. 2008)). Specifically, the company must "disclos[e] adverse information that cuts against the positive information."

In the case before it, the Ninth Circuit rejected defendants' claim that the allegations reflected merely "a good-faith scientific disagreement between the FDA and [the company] about the meaning of" the study linking the drug to cancer. The court reasoned that the company "could have remained silent about the dispute or it could have addressed its discussions with the FDA head-on[,]" but it could not "express confidence by claiming that all of the data was running in [the company's] favor."

Circuit Court Decisions Addressing the Safe Harbor for Forward-Looking Statements

Third Circuit: Speaker's State of Mind Is Irrelevant for Purposes of the PSLRA's Safe Harbor Provided the Forward-Looking Statement Is Accompanied by Meaningful Cautionary Statements

On August 22, 2016, the Third Circuit held that if a forward-looking statement is accompanied by meaningful cautionary statements, then "the state of mind of the individual making the statement is irrelevant" for purposes of the safe-harbor provisions of the Private Securities Litigation Reform Act ("PSLRA"). *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481 (3d Cir. 2016) (Jordan, J.).

The Third Circuit found the PSLRA "provides two distinct entrances to the safe harbor" pursuant to which "any forward-looking statement is protected if it is either accompanied by substantive and tailored cautionary statements or if the plaintiff fails to show actual knowledge of falsehood." The court held that "where a future-looking statement is accompanied by sufficient cautions, then . . . the statement is not actionable regardless of the plaintiff's showing of scienter."

Eighth Circuit: Cautionary Statements Must Provide a "Realistic Description of the Risks Applicable to the Particular Circumstances"

On February 10, 2016, the Eighth Circuit held that the warnings accompanying certain alleged misstatements were not "*meaningfully* cautionary" for purposes of the PSLRA's safe harbor because defendants provided only "a boilerplate litany of generally applicable risk factors" rather than "a realistic description of the risks applicable to the particular circumstances." *Rand-Heart of New York v. Dolan*, 812 F.3d 1172 (8th Cir. 2016) (Benton, J.).

Circuit Court Decisions Addressing the Requirements for Pleading Loss Causation Under Section 10(b)

Eighth Circuit: Not All Bad Corporate News Is "Corrective" for Loss Causation Purposes

On February 10, 2016, the Eighth Circuit underscored that "[i]n the financial markets, not every bit of bad news that has a negative effect on the price of a security necessarily has a corrective effect for purposes of loss causation." *Dolan*, 812 F.3d 1172. The court explained that "[a] drop in stock price is not necessarily caused by an earlier misrepresentation." Rather, a lower stock price "may reflect . . . changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price" (quoting *Dura Pharm. v. Brodo*, 544 U.S. 336 (2005)).

In the case before it, the Eighth Circuit found that plaintiffs had not pled loss causation as to a certain segment of the class period because plaintiffs did not adequately allege that the purported "fraud—and not other events—caused the [stock] price to fall."

Ninth Circuit: Announcement of a Government Investigation Can Serve as a Corrective Disclosure for Loss Causation Purposes If the Inaccuracy of the Misstatement at Issue Is Subsequently Confirmed

On February 1st, 2016, the Ninth Circuit held that "the announcement of an SEC investigation related to an alleged misrepresentation, coupled with a subsequent revelation of the inaccuracy of that misrepresentation, can serve as a corrective disclosure for the purpose of loss causation." *Lloyd v. CVB Fin. Corp.,* 811 F.3d 1200 (9th Cir. 2016) (Hurwitz, J.). The court reasoned that "any other rule would allow a defendant to escape liability by first announcing a government investigation and then waiting until the market reacted before revealing that prior representations under investigation were false."

Circuit Court Decisions Addressing Limitations Periods

Second and Sixth Circuits: *American Pipe* Tolling Does Not Apply to the Five-Year Statute of Repose for Claims Brought Under Section 10(b) and Rule 10b-5

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court held "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action."

On July 14, 2016, the Second Circuit determined "*American Pipe* tolling does not apply to" 28 U.S.C. § 1658(b)(2), which establishes a five-year statute of repose for securities fraud claims brought under Section 10(b) and Rule 10b-5. *SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos.*, 829 F.3d 173 (2d Cir. 2016) (Lohier, J.).

The Second Circuit explained that in *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS,* 721 F.3d 95 (2d Cir. 2013) (*IndyMac*), it held *American Pipe* tolling inapplicable to the three-year statute of repose set forth in Section 13 of the Securities Act of 1933, which governs claims brought under Sections 11 and 12(a) of that Act. For the same reasons set forth in *IndyMac*, the Second Circuit held "*American Pipe* tolling does not apply to § 1658(b)(2)'s five-year statute of repose." The court explained that "as a statute of repose, § 1658(b)(2) is not subject to equitable tolling." Moreover, the court found § 1658(b)(2) "creates a substantive right in defendants to be free from liability after five years—a right that *American Pipe* tolling cannot modify without running afoul of the Rules Enabling Act."

On May 19, 2016, the Sixth Circuit also relied on the Second Circuit's decision in *IndyMac* to hold *American Pipe* tolling inapplicable to both the five-year statute of repose for claims brought under Section 10(b) and the three-year statute of repose for claims brought under Sections 11 and 12 of the Securities Act of 1933. *Stein v. Regions Morgan Keegan Select High Income Fund*, 821 F.3d 780 (6th Cir. 2016) (Clay, J.). The Sixth Circuit expressly disagreed with the Tenth Circuit, which applied *American Pipe* tolling to the statute of repose for Section 11 claims in *Joseph v. Wiles*, 223 F.3d 1155 (10th Cir. 2000).

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 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*, 817 F.3d 393 (2d Cir. 2016) (Cabranes, J.). The court reasoned that SOX's five-year statute of repose "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 court determined that Section 14(a) claims still remain subject to the three-year statute of repose that applied before the passage of SOX.[7]

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." The court found the "discovery rule" does not toll the three-year statute of repose for Section 14(a)

7. 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. However, in *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990), the Second Circuit "borrowed the three-year statutes of repose applicable to Sections 9(f) and 18(a) . . . and applied them to Section 14."

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."

Tenth and Eleventh Circuits: Circuit Split Deepens on Whether Section 2462's Five-Year Limitations Period Applies to SEC Claims for Disgorgement

Pursuant to 28 U.S.C. § 2462, the Government may not bring any "action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture" more than five years after the claim accrues.

On May 26, 2016, the Eleventh Circuit held Section 2462's limitations period applies to SEC claims for disgorgement and declaratory relief, but not to claims for injunctive relief. *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016) (Pryor, J.). The court determined that, for Section 2462 purposes, disgorgement is a type of "forfeiture" and declaratory relief "operate[s] as a penalty." However, the court found injunctions are "equitable, forward-looking remedies" outside the reach of Section 2462.

On August 23, 2016, the Tenth Circuit held Section 2462's limitations period does not apply to SEC claims for disgorgement or injunctive relief. *SEC v. Kokesh*, 834 F.3d 1158 (10th Cir. 2016) (Hartz, J.). The Tenth Circuit's decision deepened a circuit split on the question of whether disgorgement is a type of "forfeiture" within the meaning of Section 2462.[8]

8. Several years earlier, the D.C. Circuit held that disgorgement is not a "penalty" subject to Section 2462's limitations period. *Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010).

Circuit Court Decisions Addressing Constitutional Challenges to SEC Administrative Enforcement Proceedings

D.C. Circuit: Rejects a Constitutional Challenge to the SEC's In-House Courts and Holds SEC Administrative Law Judges Are Not "Officers of the United States" Subject to the Appointments Clause

On August 9, 2016, in the first circuit court opinion to consider a constitutional challenge to the SEC's in-house courts, the D.C. Circuit affirmed the constitutionality of the SEC's appointment of administrative law judges ("ALJs"). *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) (Rogers, J.). The D.C. Circuit held the SEC's ALJs are not "Officers of the United States" subject to the Appointments Clause of the United States Constitution[9] because "no initial decision of [the SEC's] ALJs is independently final" under the SEC's regulatory framework.

The D.C. Circuit noted that in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000), it held that ALJs of the Federal Deposit Insurance Corporation ("FDIC") were not Officers for purposes of the Appointments Clause "because their authority was limited by FDIC regulations to recommending decisions that the FDIC Board of Directors might issue." *Raymond Lucia*, 832 F.3d 277. The D.C. Circuit found the SEC ALJ's decisions to be "no more final than the recommended decisions issued by the FDIC ALJs" in *Landry* because the SEC has a discretionary right to review the action of any ALJ as it sees fit, either on its own initiative or upon a petition for review filed by a party or aggrieved person. *Id.* (citing 15 U.S.C. § 78d-1(a)-(b)). The court emphasized that the SEC "retain[s] full decision-making powers" over cases heard by the ALJs.

9. The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States." U.S. Const. art. II, § 2, cl. 2. The D.C. Circuit explained that "[o]nly those deemed to be employees or other 'lesser functionaries' need not be selected in compliance with the strict requirements of Article II." *Raymond Lucia*, 832 F.3d 277.

Second and Eleventh Circuits: Constitutional Challenges to Pending SEC Administrative Enforcement Proceedings are Premature

On June 1, 2016, the Second Circuit rejected as premature claims brought by respondents in a pending SEC enforcement proceeding alleging that the SEC's appointment of the ALJ in the matter violated the Appointments Clause. *Tilton v. SEC*, 824 F.3d 276 (2d Cir. 2016) (Sack, J.). Consistent with the provisions of the SEC's administrative review scheme, the Second Circuit determined "the appellants must await a final [SEC] order before raising their Appointments Clause claim in federal court." In so holding, the Second Circuit agreed with similar decisions issued last year by the D.C. Circuit and the Seventh Circuit. *See Jarkesy v. SEC*, 803 F.3d 9 (D.C. Cir. 2015); *Bebo v. SEC*, 799 F.3d 765 (7th Cir. 2015).

On June 17, 2016, the Eleventh Circuit relied in part on the Second Circuit's decision in *Tilton* to reverse a district court ruling exercising jurisdiction over constitutional challenges to pending SEC administrative enforcement proceedings. *Hill v. SEC*, 825 F.3d 1236 (11th Cir. 2016) (Pryor, J.).

Other Noteworthy Circuit Court Decisions

Second Circuit: Breach of Contract Can Only Serve as the Basis for a Fraud Claim If There Is Proof of Fraudulent Intent at the Time of Contract Execution

On May 23, 2016, the Second Circuit considered the question of when a breach of contract can "also support a claim for fraud[.]" *United States v. Countrywide Home Loans*, 822 F.3d 650 (2016) (Wesley, J.). The Second Circuit held that "where allegedly fraudulent misrepresentations are promises made in a contract, a party claiming fraud must prove fraudulent intent at the time of contract execution; evidence of a subsequent, willful breach cannot sustain the claim."

Second Circuit: Criminal Convictions Under Section 206 of the Investment Advisers Act Do Not Require Proof of Intent to Harm

Section 206 of the Investment Advisers Act prohibits investment advisers from engaging in certain types of transactions, including "any device, scheme, or artifice to defraud any client or prospective client." The Act provides for criminal penalties against anyone who "willfully violates" its provisions.

On May 4, 2016, the Second Circuit held a criminal conviction premised on a violation of Section 206 does not require proof of intent to harm. *United States v. Tagliaferri*, 820 F.3d 568 (2d Cir. 2016) (per curiam). Rather, the Second Circuit held "the willfulness mental state" for criminal convictions under Section 206 only requires the Government to prove "the defendant acted with knowledge that his conduct was unlawful." The Second Circuit emphasized that "[S]ection 206 prohibits not only common-law fraud by investment advisers but also any practice which operates as a fraud or deceit."

Seventh Circuit: Applies the Delaware Chancery Court's *Trulia* Decision and Rejects a Disclosure-Only Settlement

Earlier this year, the Delaware Chancery Court indicated that disclosure-only settlements would likely be met with continued disfavor "unless the supplemental disclosures address a plainly material misrepresentation or omission." *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

On August 10, 2016, the Seventh Circuit explicitly "endorse[d], and appl[ied]" the Delaware Chancery Court's decision in *Trulia* to reverse district court approval of a disclosure-only settlement based on the Seventh Circuit's finding that the supplemental disclosures provided "nonexistent" benefits to the class. *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016) (Posner, J.). The Seventh Circuit stated that supplemental disclosures must not only "address the misrepresentation or omissions" but also "must correct them" for a disclosure-only settlement to merit court approval.

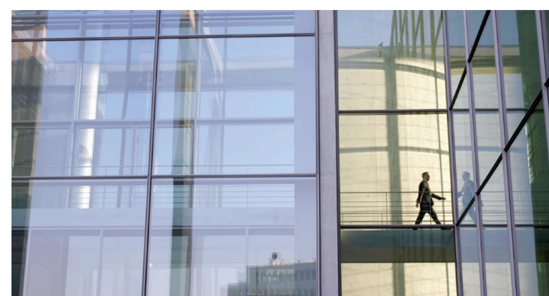
Eighth Circuit: Court Reverses Class Certification in *Best Buy* Action, Holding Defendants Successfully Rebutted the *Basic* Presumption with "Overwhelming Evidence" That the Alleged Misstatements Had No Price Impact

In *Halliburton v. Erica P. John Fund,* 134 S. Ct. 2398 (2014), the Supreme Court held that "defendants must be afforded an opportunity before class certification to defeat the [fraud-on-the-market] presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock."

On April 12, 2016, in the first circuit court opinion to apply *Halliburton* in considering defendants' price impact evidence, the Eighth Circuit reversed a district court decision granting class certification in a securities fraud action against Best Buy.[10] *IBEW Local 98 Pension Fund v. Best Buy Co.*, 818 F.3d 775 (8th Cir. 2016) (Loken, J.). The Eighth Circuit held that defendants had successfully rebutted the fraud-on-the-market presumption by presenting "overwhelming evidence" that the alleged misstatements had no impact on Best Buy's share price. The Eighth Circuit further held that the district court had "misapplied the price impact analysis mandated by" *Halliburton* and "abused its discretion" in certifying the class.

Ninth Circuit: (1) Rule 13a- 14 Provides the SEC with a Cause of Action Against Executives Who Certify False or Misleading Statements, and (2) SOX 304's Disgorgement Provisions Require Only Issuer Misconduct, Not Personal Misconduct by the CEO or CFO

Pursuant to Rule 13a-14 of the Securities Exchange Act, an issuer's CEO and CFO must certify the accuracy of the issuer's financial reports filed with the SEC. On August 31, 2016, the Ninth Circuit held Rule 13a-14 "provides the SEC with a cause of action not only against CEOs and CFOs who do not file the required certifications, but also against CEOs and CFOs who certify false or misleading statements." *SEC v. Jensen*, 835 F.3d 1100 (9th Cir. 2016) (Clifton, J.).



The Ninth Circuit also considered the reach of Section 304 of the Sarbanes-Oxley Act ("SOX 304"), which permits the SEC to seek disgorgement of certain CEO and CFO compensation and stock sale profits when the issuer is required to prepare an accounting restatement "as a result of misconduct." The Ninth Circuit held SOX 304's disgorgement remedy "applies regardless of whether a restatement was caused by the personal misconduct of an issuer's CEO and CFO or by other issuer misconduct." *Jensen*, 835 F.3d 1100.

Significant New York Court of Appeals Decisions

New York Court of Appeals: Adopting Delaware's *MFW* Standard, Court Holds Business Judgment Rule Applies to Going-Private Mergers Conditioned on Independent Committee Approval and the Informed Voluntary Vote of a Majority of Minority Stockholders

In *Kahn v M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (*MFW*), the Delaware Supreme Court held "business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned *ab initio* upon both the approval of an independent, adequately-empowered [s]pecial [c]ommittee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders."

On May 5, 2016, the New York Court of Appeals adopted the *MFW* standard for going-private mergers. *In re Kenneth Cole*

10. Simpson Thacher represents Best Buy and several of its executives in this action.

Prod. S'holder Litig., 27 N.Y. 3d 268 (N.Y. 2016) (Stein, J.). The Court of Appeals found "the *MFW* standard properly considers the rights of minority shareholders . . . and balances them against the interests of directors and controlling shareholders in avoiding frivolous litigation and protecting independently-made business decisions from unwarranted judicial interference."

New York Court of Appeals: New York's Common Interest Doctrine Only Protects Attorney-Client Communications Disclosed to a Third Party in Connection with a Common Legal Interest in Pending or Anticipated Litigation

Pursuant to the common interest doctrine, "an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication and the communication is made in furtherance of that common legal interest." *Ambac Assurance Corp. v. Countrywide Home Loans*, 27 N.Y.3d 616 (N.Y. 2016) (Pigott, J.).

On June 9, 2016, the New York Court of Appeals held that New York's common interest doctrine only applies if the attorney-client communications were shared with a third party "in furtherance of a common legal interest *in pending or reasonably anticipated litigation*" (emphasis added). Significantly, the court found New York's common interest doctrine inapplicable to attorney-client communications shared by entities with "a common legal interest in a commercial transaction or other common problem" where those entities "do not reasonably anticipate litigation."

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

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

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

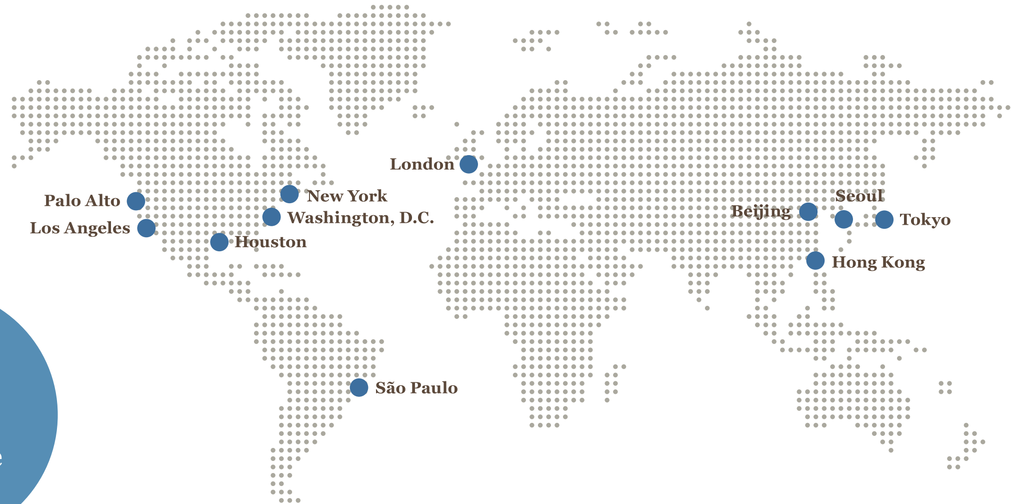
Jeffrey H. Knox
+1-202-636-5532
jeffrey.knox@stblaw.com

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



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