SIMPSON THACHER

SECURITIES LAW ALERT

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This month's Alert addresses a Tenth Circuit ruling affirming the dismissal of a securities fraud action against Level 3 Communications, and a Fifth Circuit decision endorsing the percentage method for calculating attorneys' fees in common fund cases. We also discuss the Delaware Supreme Court's reversal of a Chancery Court order of dismissal for failure to apply the "reasonable conceivability" pleading standard.

In addition, we address a decision from the Southern District of Texas narrowing claims in the BP Deepwater Horizon securities fraud action based on the Supreme Court's ruling in *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869 (2010). We also discuss the District of New Jersey's dismissal of a class action against Pfizer in connection with clinical trial announcements for a potential Alzheimer's drug. Finally, we address the Southern District of California's rulings on dismissal motions in two "Say on Pay" actions brought on behalf of PICO Holdings.

The Tenth Circuit Affirms the Dismissal of a Securities Fraud Action against Level 3 Communications

On February 6, 2012, the Tenth Circuit affirmed the dismissal of a securities fraud action against Level 3 Communications, Inc. and several of its officers on the grounds that the complaint failed to raise a strong inference of scienter. *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 2012 WL 364820 (10th Cir. Feb. 6, 2012) (Briscoe, C.J.) (*Level 3*).

Background

Level 3 is a publicly traded telecommunications company. "Between December 2005 and January 2007, the company sought to expand its [fiber optic] network through a series of acquisitions." *Id.* at *2. The defendants allegedly made numerous "false or misleading statements of material fact to the market … regarding Level 3's progress in integrating several entities it had acquired." *Id.* at *2. Many of these alleged misstatements concerned "Level 3's attempts to integrate into its business the first of these acquisitions," WilTel Communications Group, LLC. *Id.*

On October 23, 2007, Level 3 executives "announced reductions to Level 3's financial forecasts for the fourth quarter of fiscal year 2007 and for the fiscal year 2008." *Id.* at *5. Level 3's CEO attributed the revised estimates in part to challenges with the WilTel integration process. The October 23, 2007 announcement allegedly caused a drop in Level 3's stock price, "resulting in a loss of approximately $1.76 billion in market capitalization in two days." *Id.*

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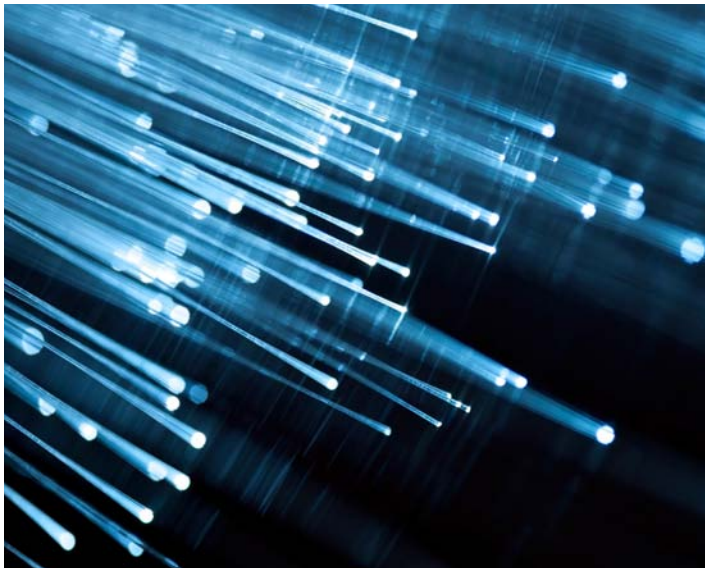
at *6. Shortly thereafter, the plaintiff filed the instant securities fraud action.

On December 10, 2010, the District of Colorado dismissed the plaintiff's complaint on the grounds that the Level 3 executives' "aspirational statements" regarding the integration process "were not material misstatements" under Section 10(b) and Rule 10b-5. *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 2010 WL 5129524, at *10 (D. Colo. Dec. 10, 2010) (Brimmer, J.). "Even assuming the defendants' assurances regarding the progress they were making were material misstatements," the court determined that "the complaint lacks factual allegations supporting a strong inference of scienter, if any inference at all." *Id.*

The Tenth Circuit Finds the Complaint Alleges Several Material Misstatements

Like the district court, the Tenth Circuit held that most of the alleged misstatements at issue were "nothing more than puffery." *Level 3*, 2012 WL 364820, at *8. However, the circuit court found that the complaint did "adequately allege—if only barely—that [the] defendants made three statements of material fact … that a reasonable person would understand as inconsistent with the facts on the ground." *Id.* at *10. First, on October 17, 2006, Level 3's COO stated that "the majority of WilTel integration was complete, 'ahead of plan' and 'under budget.'" *Id.* at *8. On October 24, 2006, the same executive stated that "'[a] majority of the physical network interconnections are completed.'" *Id.* And on December 4, 2006, Level 3's CFO claimed that the company was "'85%, 90% done'" with the WilTel integration efforts. *Id.*



In contrast to these representations, an internal Level 3 report allegedly "document[ed] that by December 2006 … 'Level 3 had spent less than half of the capital … devoted to completing critical transport interconnects and route integration …" for the WilTel acquisition. *Id.* at *9. The Tenth Circuit found that "[i]f Level 3 had spent less than half the money budgeted for this task by December [2006]," it was "reasonable to assume that overall WilTel network integration was not more than half complete at that time." *Id.* at *10. "Thus, a reasonable person would consider the December report inconsistent with [the] defendants' claims to have completed a majority of integration by October 17, 2006; a majority of physical network interconnections by October 24, 2006; or '85%, 90%' of integration by December 4, 2006." *Id.*

The Tenth Circuit Holds the Complaint Does Not Raise a Strong Inference of Scienter

While the Tenth Circuit found that the complaint adequately alleged several material misstatements, the circuit court nevertheless "affirm[ed] the district court's dismissal of the complaint based on [its] conclusion that [the complaint] fails adequately to plead scienter." *Id.* at *7. The circuit court explained that even though "a close reading of some of [the] defendants' progress estimates suggests that they may have been inconsistent with a few internal reports," this "does not lead us to a strong inference that [the] defendants' statements were intentionally fraudulent or extremely reckless." *Id.* at *12.

The Tenth Circuit determined that it could "plausibly infer from low expenditure levels that the high progress estimates [the Level 3 executives] gave were wrong." *Id.* "If our inferences are correct, the conflict between internal reports and public statements would be evidence of scienter." *Id.* "But in the context of scienter, we must consider plausible competing inferences as well, such as the possibility that the pace of Level 3's spending would not necessarily track the rate of actual integration progress." *Id.* (internal citations omitted).

Because "the language [the] defendants used does not track the terminology in the internal reports [the] plaintiff cites," the Tenth Circuit explained that it had to "stack inference upon inference to even conclude that the statements were false—much less that [the] defendants knew or were reckless in not knowing they were false." *Id.* The court also found it significant that "some of the critical terms at issue are open to multiple interpretations." *Id.* "Given the difficulty we have … in determining whether a conflict actually existed between the reports and [the] defendants' statements, the strongest inference we can draw is that [the] defendants were negligent in failing to put together the pieces." *Id.*

The Tenth Circuit Finds the Complaint Does Not Adequately Allege a Motive for the Level 3 Executives to Engage in Fraud

The plaintiff contended that "the circumstantial evidence of scienter" based on the alleged contradiction between the company's internal reports and the Level 3 executives' public statements was "bolstered by the fact that [the] defendants had strong motives to engage in reckless or deliberate fraud." *Id.* at *13. The Tenth Circuit found that "the asserted motives … fail[ed] to contribute to any inference of scienter." *Id.*

First, the plaintiffs contended that the defendants were "motivated to mislead investors regarding the

integration process … to allow Level 3 to 'complete the Broadwing [Corporation] acquisition on more favorable terms, *i.e.*, using less stock than it would have had the truth about the integration status been known to investors.'" *Id.* The Tenth Circuit found this purported motive unconvincing given that the "defendants [allegedly] continued to make false or misleading statements regarding integration progress long after the [Broadwing] acquisition." *Id.*

The court was also not persuaded by allegations that the defendants had "a motive to refinance Level 3's debt," explaining that "general motives for management to further the interests of the corporation fail to raise an inference of scienter." *Id.*

As to claims that the "defendants received cash bonuses for the successful integration of WilTel and other acquired businesses," the Tenth Circuit determined that "bonuses were awarded based on *actual* integration progress, not merely [the] defendants' representations that the integration was successful." *Id.* at *13. With respect to allegations that the defendants "received stock options and restricted stock as compensation based on the performance of Level 3's stock," the court explained that "[t]his type of incentive-based compensation … is common among executives at publicly traded companies and does not ordinarily indicate scienter." *Id.*

Finally, the Tenth Circuit concluded that "allegations concerning [the] defendants' stock sales

do not point to scienter" because: (1) "[t]he defendants engaging in these sales … retained a substantial percentage of their Level 3 holdings" and (2) "the sales were made pursuant to 'automatic transactions' set up prior to the class period to pay withholding taxes that became due." *Id.* at *14

The Fifth Circuit Endorses the Percentage Method for Calculating Attorneys' Fees in Common Fund Cases

On February 7, 2012, the Fifth Circuit "join[ed] the majority of circuits in allowing … district courts the flexibility to choose between the percentage and lodestar methods [for calculating attorneys' fees] in common fund cases …." *Union Asset Mgmt. Holding A.G. v. Dell, Inc.*, 2012 WL 375249, at *6 (5th Cir. Feb. 7, 2012) (Higginbotham, C.J.).

Background

On June 10, 2010, the Western District of Texas approved a class settlement in a securities fraud suit brought against Dell and its officers. The court "awarded class counsel attorneys' fees with interest, using the percentage method to award fees of … 18% of the settlement fund." *Id.* at *2.

Objectors to the settlement appealed, claiming, *inter alia*, "that the court [had] erred in using the percentage method to calculate class counsel's fees." *Id.* The objectors contended that "the only way to calculate attorneys' fees in this Circuit" is "the lodestar method, in which the court computes fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate and, in its discretion, applying an upward or downward multiplier." *Id.* at *6.

The Fifth Circuit had "never explicitly endorsed the percentage method for common fund cases." *Id.* It was "the only circuit [except for the Fourth Circuit] yet to do so." *Id.* Nevertheless, "district courts in [the Fifth] Circuit regularly use[d] the percentage method blended with a *Johnson* reasonableness check" when awarding attorneys' fees in common fund cases. *Id.*[1]

The Fifth Circuit Formally Approves the Percentage Method

In considering the appropriateness of the district court's utilization of the percentage method, the Fifth Circuit explained that "[p]art of the reason behind the near-universal adoption of the percentage method in securities cases is that the [Private Securities Litigation Reform Act ('PSLRA')] contemplates such a calculation." *Id.* The PSLRA "states that '[t]otal attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class.'" *Id.* (quoting 15 U.S.C. § 78u-4(a)(6)).

The Fifth Circuit also found that "[t]he U.S. Supreme Court has indicated, obliquely, that the percentage method is at least appropriate." *Id.* at *6 n.28. In *Blum v. Stevenson*, 465 U.S. 886 (1984), the Supreme Court stated in a footnote that "[u]nlike the calculation of attorney's fees under the 'common fund doctrine,' where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably

1. "The twelve [*Johnson*] factors are (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal service adequately; (4) the preclusion of other employment by the attorney because he accepted this case; (5) the customary fee for similar work in the community; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." *Union Asset Mgmt.*, 2012 WL 375249, at *6 n.25.

expended on the litigation." *Id.* at 900 n.16. The Fifth Circuit noted that "[t]he Supreme Court has never spoken to the appropriateness or desirability of the lodestar method in common fund cases." *Union Asset Mgmt.*, 2012 WL 375249, at *6 n.28.

Turning to a practical comparison of the two methodologies, the Fifth Circuit determined that "[t]he percentage method … brings certain advantages[,]" such as "allow[ing] for easy computation" and "align[ing] the interests of class counsel with those

of the class members." *Id.* at *6. Finally, the Fifth Circuit emphasized that it "has never reversed a district court judge's decision to use the percentage method, and none of our cases preclude its use." *Id.* "Given the Fifth Circuit's stance on choice of method" for calculating attorneys' fees in common fund cases, the circuit court held that "the district court did not abuse its discretion by using the percentage method with a meticulous *Johnson* analysis." *Id.* The Fifth Circuit also explicitly "endorse[d] the district courts' continued use of the percentage method cross-checked with the *Johnson* factors." *Id.*

The Delaware Supreme Court Reverses a Chancery Court Order of Dismissal for Failure to Apply the "Reasonable Conceivability" Pleading Standard

On January 20, 2012, the Delaware Supreme Court reversed a Chancery Court order dismissing with prejudice an action brought by Cambium Ltd. against Trilantic Capital Partners III L.P., a Delaware limited partnership, and its general partner. *Cambium Ltd. v. Trilantic Capital Partners III L.P.*, 2012 WL 172844 (Del. Jan. 20, 2012) (Holland, J.). The Delaware Supreme Court found that the Chancery Court erroneously had applied the federal "plausibility" pleading standard set forth in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), rather than Delaware's "reasonable conceivability" pleading standard.

Background

On June 21, 2011, the Chancery Court heard oral argument on the defendants' motion to dismiss Cambium's complaint. Following oral argument, the court issued a ruling from the bench dismissing the complaint with prejudice. The Chancery Court "used the term 'plausibility' nine times in dismissing Cambium's claims." *Id.* at *1.

On August 18, 2011, the Delaware Supreme Court reaffirmed Delaware's pleading standards. *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, (Del. 2011). "In Delaware, a complaint cannot be dismissed 'unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.'" *Cambium*, 2012 WL 172844, at *1 (quoting *Central Mortgage*, 27 A.3d at 535).

The *Central Mortgage* court noted that "[s]ince the Supreme Court decided *Twombly* in 2007, various members of the Court of Chancery have cited the *Twombly-Iqbal* 'plausibility' standard with approval when adjudicating motions to dismiss." *Central Mortgage*, 27 A.3d at 537. However, the court explained that "[t]he *Twombly-Iqbal* 'plausibility' pleading standard is higher than [Delaware's] governing 'conceivability' standard …." *Id.* Delaware's "'conceivability' standard is more akin to 'possibility,' while the federal 'plausibility' standard falls somewhere beyond mere 'possibility' but short of 'probability.'" *Id.* at 537 n.13.

The *Central Mortgage* court expressly declined "to address whether the *Twombly-Iqbal* holdings affect [Delaware's] governing [pleading] standard …." *Id.* at 537. Instead, the *Central Mortgage* court "emphasize[d] that, until this Court decides otherwise or a change is duly effected through the Civil Rules process, the governing pleading standard in Delaware to survive a motion to dismiss is reasonable 'conceivability.'" *Id.*

The Delaware Supreme Court Relies on *Central Mortgage* to Reverse the Chancery Court's Dismissal of the Cambium Complaint

The Delaware Supreme Court explained that "[t]he Court of Chancery dismissed [Cambium's] amended complaint prior to this Court's ruling in *Central Mortgage*, which reaffirmed that Delaware continues to apply the 'reasonable conceivability' standard." *Cambium*, 2012 WL 172844, at *1. While the Chancery Court "did not expressly state which standard of review it was applying" in reviewing Cambium's complaint, the Delaware Supreme Court found that "the record of the bench ruling reflects that the Vice Chancellor applied the federal standard" because he repeatedly referenced the term "plausibility." *Id.*

The Delaware Supreme Court held that the

Chancery Court had "erred by applying the federal 'plausibility' standard in dismissing the amended complaint." *Id.* at *2. Accordingly, the Delaware Supreme Court reversed the Chancery Court's dismissal, and remanded the case to the Chancery Court for "further proceedings in accordance with [its] order." *Id.*

The Southern District of Texas Relies on *Morrison* to Narrow the Claims in the BP Deepwater Horizon Securities Fraud Action

On February 13, 2012, the Southern District of Texas dismissed Section 10(b) claims brought by purchasers of BP plc ordinary shares on the London Stock Exchange in a securities fraud action alleging that BP had made misrepresentations regarding its safety precautions over the three-and-a-half-year period preceding the Deepwater Horizon Oil spill. *In re BP p.l.c. Sec. Litig.*, 2012 WL 432611 (S.D. Tex. Feb. 13, 2012) (Ellison, J.) (BP). The court held that *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S.Ct. 2869 (2010) precluded claims involving BP securities traded solely on a

foreign exchange.

However, the *BP* court permitted certain claims brought by purchasers of BP American Depositary Shares ("ADS") on the New York Stock Exchange ("NYSE") to proceed. The court found, *inter alia*, that the plaintiffs "have alleged sufficient facts to call into question whether BP and its corporate officers and directors were in fact implementing the process safety reforms as they represented." *Id*. at *36.

Background

"On April 20, 2010, the Macondo well blew out, costing the lives of eleven rig workers, and setting off a chain of events that eventually sank the Deepwater Horizon rig operated by … BP plc." *Id*. at *1. "BP was unable to stop the resulting oil spill for eighty-seven days following the explosion, costing the [c]ompany somewhere between $20 and $40 billion dollars." *Id*. at *3.

"In the months that followed [the Deepwater Horizon oil spill], lawsuits raising a variety of claims, including securities fraud claims, were filed across the country." *Id*. at *1. On August 10, 2010, all cases involving securities, shareholder derivative and/or ERISA claims were transferred to the Southern District of Texas. On December 28, 2010, the Southern District of Texas consolidated the securities class actions pending before the court, and appointed a group of plaintiffs from New York and Ohio (the "NY/OH Plaintiffs") as the lead plaintiffs.[2]

On February 14, 2011, the NY/OH Plaintiffs filed a consolidated class action complaint against BP plc, BP America, Inc., and BP Exploration & Production, Inc. (collectively, "BP"), along with ten individual defendants. The NY/OH Plaintiffs purported to represent a class consisting of:

> (1) all persons and entities who purchased or acquired BP ADSs (the "ADS Purchasers") between January 16, 2007 and May 28, 2010 (the "Class Period"), and (2) all persons and entities who purchased or acquired BP ordinary shares in domestic transactions executed on foreign exchanges (the "Ordinary Share Purchasers") during the Class Period.

Id. at *2. The ADS Purchasers and the Ordinary Share Purchasers brought claims under Sections 10(b) and 20(a) of the Exchange Act. "In addition, the Ordinary Share Purchasers assert[ed] both New York common law and English law claims against BP." *Id*. at *3.

The defendants "filed two separate motions to dismiss" the NY/OH Plaintiffs' complaint, "distinguishing between the claims of" the Ordinary Share Purchasers and "the remaining claims" of the ADS Purchasers. *Id*. at *1. While "[t]he ADS

2. The court also appointed a separate group of plaintiffs (the "Ludlow Plaintiffs") as the lead plaintiffs of a subclass. "[W]hereas the Ludlow Plaintiffs' claims center[ed] on BP's statements about the safety of its drilling operations in the Gulf of Mexico in the thirteen months leading up to the Deepwater Horizon explosion," the NY/OH Plaintiffs "argue[d] more generally that BP made fraudulent statements between 2005 and 2010 about its safety precautions both in the Gulf of Mexico and elsewhere." *In re BP, PLC Sec. Litig.*, 758 F. Supp. 2d 428, 438 (S.D. Tex. 2010).

On February 11, 2011, the Ludlow Plaintiffs filed a consolidated securities fraud class action against BP plc and BP America, Inc., as well as nine individual defendants. On February 13, 2012, the Southern District of Texas dismissed the Ludlow Plaintiffs' complaint with leave to amend. *In re: BP p.l.c. Sec. Litig.*, Civ. A. No. 4:10-md-2185 (S.D. Tex. Feb. 13, 2012) (Ellison, J.).

Purchasers [had] bought BP ADSs on the NYSE," the Ordinary Share Purchasers had "bought ordinary shares on the London Stock Exchange ('LSE')." *Id.* at *65. The defendants "contend[ed] that the difference in the location of the purchase require[d] [the] [c]ourt … to consider preliminarily whether the Ordinary Share Purchasers can bring Exchange Act claims at all in light of the Supreme Court's recent decision in *Morrison*." *Id.*

The *BP* Court Dismisses the Ordinary Share Purchasers' Section 10(b) Claims on *Morrison* Grounds

The *BP* court held that "[t]he Ordinary Share Purchasers' [S]ection 10(b) claims fall squarely into the category of claims that *Morrison* seeks to curtail." *Id.* at *67. Although the shares at issue were "registered on the NYSE," the court explained that "the shares never traded on a U.S. exchange and were listed on the NYSE solely to comply with SEC requirements governing BP's ADS program." *Id.* The *BP* court found that the plaintiffs could not "point to the 'domestic transaction,' … required for [S]ection 10(b) liability following *Morrison*." *Id.*

The plaintiffs "advance[d] two arguments in an attempt to point to a 'domestic transaction.'" *Id.* Their "first argument hinge[d] on the [U.S.] residency of the investors and the locus of the purchase decision." *Id.* The plaintiffs "highlight[ed] that many of the investors in the NY/OH Plaintiff class, including those who [had] purchased BP ordinary shares, [were] U.S. residents" and "several 'pivotal aspects of the purchases'—including the initial purchase decision—were made in the United States." *Id.* The *BP* court quickly rejected this claim, explaining that "a majority of district courts have found the citizenship of the investors involved or mere 'listing' on the NYSE insufficient reasons to extend [S]ection 10(b) liability." *Id.* at *68.

The plaintiffs' "second, more novel argument" turned on "the trading rules governing the LSE." *Id.* According to the plaintiffs, "'ordinary [BP] shares can be purchased [on the LSE] directly from a third-party market maker over an electronic communications network that could result in matching U.S. purchasers and sellers, or internally within a broker-dealer from its own inventory.'" *Id.* The plaintiffs therefore "dispute[d] that the physical locus of the trade is necessarily London, even if ordinary shares only trade on the LSE." *Id.*

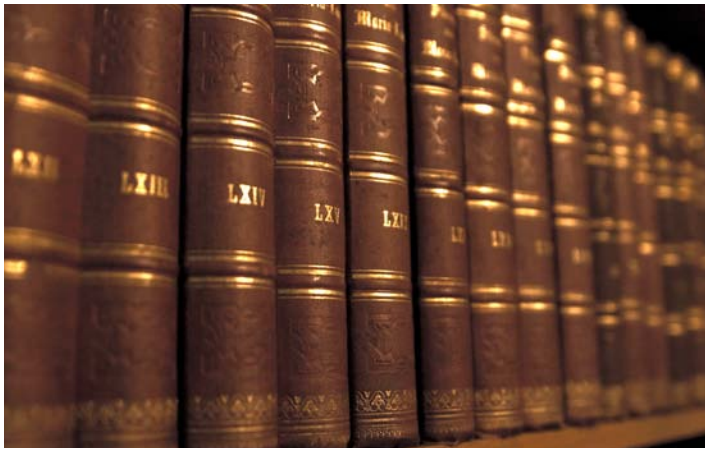
Rejecting this argument as well, the *BP* court explained that "courts have refused to adopt as technical a reading as [the] [p]laintiffs would require for their [S]ection 10(b) claim to survive *Morrison*." *Id.* (citing, *inter alia*, *Plumbers' Union Local No. 12 Pension Fund v. Swiss Reinsurance Co.*, 753 F. Supp. 2d. 166, 177-78 (S.D.N.Y. 2010) (Koeltl, J.) (deeming shares to be purchased on a foreign exchange even where the initial purchase orders were placed by brokers in Chicago and reasoning that, for *Morrison* purposes, a purchase does not *per force* occur where the order has been placed)). The *BP* court found "directly on point" the Southern District of New York's decision in *In re UBS Securities Litigation*, 2011 WL 4059356 (S.D.N.Y. Sept. 13, 2011) (Sullivan, J.). There, the court held that Section 10(b) "claims asserted by U.S. investors who [had] purchased UBS stock on a foreign exchange were barred [under *Morrison*], even though the orders were placed from the United States." *Id.* at *68. (To read our discussion of the *UBS* case in the September edition of the Alert, please click here.)

The *BP* court found that "carving out an exception for the purchase of securities on the LSE because some acts that ultimately result[ed] in the execution of a transaction abroad [took] place in the United States would be to reinstate the conduct test." *Id.* at *69. The court explained that "[r]egardless of their U.S. residency and the LSE trading rules, the Ordinary Share Purchasers bought BP ordinary shares on the LSE, the only exchange where BP ordinary shares trade." *Id.* Accordingly, the *BP* court concluded that it "must dismiss the [S]ection 10(b) claims brought by the BP Ordinary Shareholders …." *Id.*

The *BP* Court Finds That SLUSA Precludes the Ordinary Share Purchasers' New York Common Law Claims

The Securities Litigation Uniform Standards Act ("SLUSA") "precludes a securities action if: (1) the action is a 'covered class action'; (2) the claims are based on state law; (3) the action involves one or more 'covered securities'; and (4) the claims allege a misrepresentation or omission of a material fact 'in connection with the purchase or sale' of a security." *Id.* (quoting 15 U.S.C.A. § 78bb(f)(1)). With respect to the Ordinary Share Purchasers' New York common law fraud claims, the parties disputed "whether the action involves 'covered securities' and whether the alleged misrepresentations and omissions were made 'in connection with' the purchase or sale of securities" under SLUSA. *Id.* The plaintiffs argued that the defendants were "attempting to 'have it both ways' by arguing that BP ordinary shares are not a 'domestic transaction' under *Morrison* while simultaneously arguing that the same shares are 'covered securities' for SLUSA purposes." *Id.*

SLUSA's definition of "covered securities" includes securities "listed, or authorized for listing, on" the NYSE. 15 U.S.C.A. § 77r(b)(1)(A). The plaintiffs "contend[ed] that the definition of 'covered securities' under SLUSA requires shares to be registered or listed *and traded* on a U.S. exchange since mere listing is insufficient for [S]ection 10(b) liability post-*Morrison*." *BP*, 2012 WL 432611, at *69 (emphasis added by the court). In support of this argument, the plaintiffs "urge[d] the [c]ourt to look to the subsection heading of the statute, which refers to the 'Exclusive Federal reg[istration] of nationally traded securities.'" *Id.* at *70 (quoting 15 U.S.C.A. § 77r(b)(1)). The *BP* court found the plaintiffs' "reliance on the heading of the SLUSA subsection … misplaced," particularly since "the definition portion of the statute, which follows, makes no reference to trading." *Id.* Therefore, the court concluded that "the ordinary shares at issue are clearly 'covered securities' for purposes of SLUSA." *Id.*



The *BP* court further held that SLUSA's "in connection with" requirement was satisfied. *Id.* "Because the BP ordinary shares themselves are 'covered securities,'" the court determined that the plaintiffs' "New York common law claims, founded on allegations of misrepresentations and omissions advanced in connection with the ordinary shares, are precluded under SLUSA." *Id.*

The *BP* Court Dismisses the Ordinary Share Purchasers' English Law Claims

The Ordinary Share Purchasers also "raised several claims under English law, including claims for alleged violations of the Financial Services and Markets Act of 2006, common law fraud, and negligent misrepresentation and misstatement." *Id.* at *71. The *BP* court found that it "lacks original jurisdiction over [the] [p]laintiffs' English law claims" under the Class Action Fairness Act ("CAFA") because "CAFA does not apply to claims involving solely 'covered securities'" and "CAFA and SLUSA look to the same definition of 'covered securities ….'" *Id.* The *BP* court also determined that it could not exercise supplemental jurisdiction over the plaintiffs' English law claims "[b]ecause this [c]ourt does not have jurisdiction over the Ordinary Share Purchasers' [S]ection 10(b) claims …." *Id.*

The District of New Jersey Dismisses a Class Action against Pfizer Concerning Clinical Trial Announcements for a Potential Alzheimer's Drug

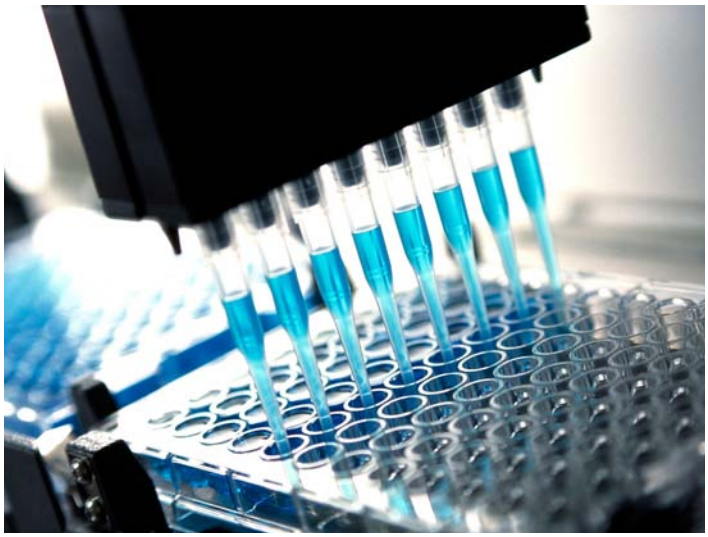
On February 10, 2012, the District of New Jersey dismissed a securities class action brought against Pfizer, Inc., as successor in interest to Wyeth, and several former Wyeth executives in connection with clinical trial announcements for a potential Alzheimer's treatment. *Sec. Police and Fire Prof'ls of Am. Ret. Fund v. Pfizer, Inc.*, 2012 WL 458431 (D.N.J. Feb. 10, 2012) (Wigenton, J.).

Background

In collaboration with Elan, an Ireland-based biotechnology company, Wyeth developed bapineuzumab ("AAB-001"), an experimental treatment for mild to moderate Alzheimer's disease. "The clinical trial program for AAB-001 … followed … three sequential phases." *Id.* at *2. Based on Phase I data and "the unmet needs" of Alzheimer's sufferers, the Food & Drug Administration granted Wyeth "Fast Track" designation for AAB-001. *Id.* In April 2005, before Phase I testing was complete, Wyeth began Phase II testing of AAB-001. *Id.*

In October 2006, at Wyeth's annual meeting for securities analysts, the then-President of Wyeth Research, Robert Ruffolo, "discussed the potential for an accelerated move to Phase III" testing for AAB-001. *Id.* He explained that while Wyeth and Elan did not yet have "'any results'" from the Phase II study, the companies had "'planned [an] interim look at the data at the end of [2006].'" *Id.* He further stated: "depending on the data, we could advance directly into Phase III in the first half of 2007, but the results would have to be spectacular. We don't know what results we're going to get." *Id.*

"On May 21, 2007, Wyeth and Elan issued a joint press release ('May 21 Press Release') announcing their decision to initiate a Phase III clinical program for AAB-001." *Id.* at *3. The May 21 Press Release stated that this "'decision was based on the seriousness of the disease and the totality of what the companies have learned from their immunotherapy programs, including a scheduled Interim look at data from an ongoing Phase II study, which remains blinded.'" *Id.* The May 21 Press Release further stated that "'[n]o conclusion about the Phase II study can be drawn until the study is completed and the final data are analyzed and released in 2008.'" *Id.* In December 2007, Wyeth and Elan commenced Phase III testing for AAB-001.



On June 17, 2008, Wyeth and Elan issued a joint press release ("June 17 Press Release") announcing the preliminary results of the Phase II trial. The press release described the results as "'encouraging,'" but explained that "'[t]here can be no assurance that the clinical program for [AAB-001] will be successful in demonstrating safety and/or efficacy.'" *Id.* at *4. The June 17 Press Release also "disclosed safety concerns, noting that 'serious adverse events were more frequently observed in [AAB-001]-treated patients than in placebo patients.'" *Id.*

On July 29, 2008, Wyeth and Elan released the final Phase II results, which were not as "promising … [as] investors had hoped." *Id.* Allegedly "[i]n response to the July 29, 2008 disclosure, Wyeth's stock price declined 11.9% …." *Id.* Wyeth and Elan have since continued with Phase III testing.

The District of New Jersey Grants the Defendants' Motion to Dismiss the Plaintiffs' Claims under Section 10(b) and Rule 10b-5

The plaintiffs contended that "by announcing the planned commencement of Phase III testing" in the May 21 Press Release, Wyeth "misled investors to believe that the results of the Phase II Alzheimer study were 'spectacular' enough to warrant moving on to Phase III." *Id.* at *6. This "argument essentially follow[ed] the logic that because [the] [d]efendants' October 2006 statement regarding Phase III set forth a condition precedent to the commencement of Phase III testing and since Phase III testing was launched, the presumption should be that the condition precedent was met." *Id.*

The District of New Jersey held that this "logic … cannot hold true here because of the cautionary language in the May 21 Press Release." *Id.* The court found that the May 21 Press Release "explicitly stated" that the decision to progress to Phase III testing "'was based on the seriousness of the disease and the totality of what the companies have learned from their immunotherapy programs ….'" *Id.* Moreover, the May 21 Press Release warned that "'[n]o conclusion about the Phase II study can be drawn until … the final data are analyzed and released in 2008.'" *Id.* Accordingly, the court ruled that the plaintiffs' "allegations regarding [the] [d]efendants' announcement to begin Phase III trials do not adequately allege a misstatement." *Id.*

The plaintiffs further claimed that the May 21 Press Release failed to disclose "various efficacy and safety concerns," among other material omissions. *Id.* However, the District of New Jersey explained that "'[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5.'" *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988)). "'Such a duty to disclose may arise when there is insider trading, a statute requiring disclosure, or an inaccurate, incomplete or misleading prior disclosure.'" *Id.* Because "[n]one of these circumstances are present here," the court held that the "[p]laintiffs' argument regarding … alleged omissions in the May 21 Press Release are ineffective." *Id.*

With respect to the June 17 Press Release, the plaintiffs claimed that "since [the] [d]efendants had the Phase II results in April 2008, [the] [d]efendant[s'] incomplete disclosure of Phase II results in the June 17 Press Release was misleading." *Id.* at *7. Here again, the court held that the plaintiffs arguments "fail because of their failure to establish that [the] [d]efendants had a duty to disclose the information at issue." *Id.*

The Southern District of California Rules on Dismissal Motions in Two "Say on Pay" Actions Brought on Behalf of PICO Holdings

On January 6, 2012, the Southern District of California issued rulings on motions to dismiss two "Say on Pay" shareholder derivative actions brought on behalf of PICO Holdings. In one action, the court granted the defendants' motion to dismiss the plaintiff's claim that the directors had breached their fiduciary duties by failing to respond to the negative "Say on Pay" vote. *Assad v. Hart*, 2012 WL 33220 (S.D. Cal. Jan. 6, 2012) (Hayes, J.). In the other

action, the court dismissed the plaintiff's request for a declaratory judgment that the negative "Say on Pay" vote rebutted the business judgment presumption as to the PICO board's 2010 compensation decisions. *Dennis v. Hart*, 2012 WL 33199 (S.D. Cal. Jan. 6, 2012) (Hayes, J.).

Background

The plaintiffs contended that "PICO maintains a 'pay for performance' policy that 'rewards executive[s] for achieving a superior return ….'" *Assad*, 2012 WL 33220, at *1; see also *Dennis*, 2012 WL 33199, at *1. "In 2010, PICO's stock performance [allegedly] 'lagged the Dow by nearly 14% ….'" *Assad*, 2012 WL 33220, at *1. "PICO's annual revenue declined from $60.35 million in 2008 to $32.17 million in 2010." *Dennis*, 2012 WL 33199, at *1. Nonetheless, "the board increased executive salaries from $2.4 million in 2009 to nearly $14.3 million in 2010." *Assad*, 2012 WL 33220, at *1.

"On May 13, 2011, sixty-one percent of shareholders 'rejected the [b]oard's senior officer compensation recommendation' in a '[S]ay on [P]ay' vote conducted pursuant to the provisions of the Dodd-Frank Wall Street Reform Act." *Id*. at *2. The board did not rescind or amend the 2010 executive compensation in response to the vote, and shareholder derivative actions against the company soon followed. On August 16, 2011, plaintiff Ronald Dennis filed suit in California state court asserting claims for breach of fiduciary duty, gross mismanagement, contribution and indemnification, abuse of control, waste of corporate assets, and unjust enrichment. In addition, Dennis sought a declaratory judgment that "the adverse May 13, 2011 advisory shareholder vote on the PICO Board's 2010 executive compensation rebutted the business judgment [presumption] surrounding the PICO Board's decisions to increase executive compensation in 2010." *Dennis*, 2012 WL 33199, at *2 (internal quotes omitted).

Shortly thereafter, on August 26, 2011, plaintiff George Assad filed suit in California state court asserting claims for: "(1) breach of fiduciary duty in connection with the issuance of false and misleading statements; (2) breach of fiduciary duty in connection with the board's compensation practices; (3) breach of fiduciary duty in connection with the failure to respond to the negative say on pay vote; and (4) unjust enrichment." *Assad*, 2012 WL 33220, at *2.

The defendants removed both actions to the Southern District of California.

The Southern District of California Dismisses a Claim for Breach of Fiduciary Duty Based on the PICO Board's Failure to Respond to the Negative "Say on Pay" Vote

In the *Assad* action, the plaintiff alleged that the defendants had "breached their fiduciary duties 'by failing to amend or alter 2010 executive compensation (or even issue a response) in connection with the negative say on pay vote.'" *Id*. "'[D]espite having their executive compensation program rejected by 61% of voting shareholders,'" the plaintiff asserted, "'the board has done nothing in response, in direct violation of their fiduciary duties.'" *Id*.

The Southern District of California explained that Section 951 of the Dodd-Frank Wall Street Reform Act "expressly states that it 'may *not* be construed … to create or imply any *change* to fiduciary duties' nor does it '*create or imply* any additional fiduciary duties.'" *Id.* at *4 (quoting 15 U.S.C. § 78n-1(c)) (emphasis added by the court). In view of this statutory language, the court found that "[t]he Dodd-Frank Wall Street Reform Act did not create a private right of action or create new fiduciary duties." *Id.* Accordingly, the court "conclude[d] that [the] [p]laintiff has failed to state a claim for breach of fiduciary duty based on the failure to respond to the negative say on pay vote …." *Id.*

As to the remaining state law claims—including the plaintiff's claims for breach of fiduciary duty in connection with the issuance of false and misleading statements, and breach of fiduciary duty in connection with the board's compensation practices—the Southern District of California declined to exercise supplemental jurisdiction and remanded the *Assad* action to the California Superior Court for the County of San Diego.

The Southern District of California Dismisses the Plaintiff's Claim for a Declaratory Judgment That the Negative "Say on Pay" Vote Rebutted the Business Judgment Presumption

In the *Dennis* action, the plaintiff sought a "declaratory judgment that 'the adverse May 13, 2011 advisory shareholder vote on the PICO Board's 2010 executive compensation rebutted the business judgment [presumption] surrounding the PICO Board's decisions to increase executive compensation in 2010.'" *Dennis*, 2012 WL 33199, at *2. The plaintiff contended that "'[a]lthough advisory in nature, the adverse shareholder vote on PICO's 2010 executive compensation is nonetheless evidence that the 2010 pay hikes were irrational and unreasonable under the

circumstances, and were not primarily motivated by a desire to protect PICO's interest.'" *Id.* "'In light of the adverse shareholder vote,'" the plaintiff alleged, "'the presumption of business judgment has been rebutted, and the burden of proof … now rests with the PICO Board.'" *Id.*

For the same reasons discussed in the *Assad* opinion, the Southern District of California "conclude[d] that [the] [p]laintiff … failed to state a claim for declaratory judgment …." *Id.* at *3. The court accordingly granted the defendants' motion to dismiss the plaintiff's request for declaratory judgment. As to the plaintiff's remaining state law claims, the Southern District of California declined to exercise supplemental jurisdiction and remanded the *Dennis* action to the California Superior Court for the County of San Diego.

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