Simpson Thacher

Securities Law Alert

Year in Review:

- *Dart Cherokee*: Supreme Court Holds That Defendants Must Only Plausibly Allege the Amount in Controversy for Removal Under 28 U.S.C. § 1446(a)
- *Halliburton*: Supreme Court Adopts a Middle Ground in the Challenge to *Basic*'s Fraud-on-the-Market Presumption
- *Troice*: Supreme Court Addresses SLUSA's "in Connection With" Requirement
- *Fifth Third*: Supreme Court Clarifies Pleading Standards for ERISA Breach of Duty of Prudence Claims Against ESOP Fiduciaries
- Circuit Court Decisions Applying the Supreme Court's Ruling in *Morrison*
- Circuit Court Decisions Concerning Insider Trading Prosecutions and Government Enforcement Actions
- Circuit Court Decisions Addressing Section 10(b)'s Loss Causation Requirement
- Circuit Court Decisions Discussing the Duty to Disclose Under Section 10(b)
- Circuit Court Decisions Concerning FINRA
- Delaware Decisions on Forum Selection and Fee-Shifting Bylaws
- Delaware and New York Decisions Addressing the Standard of Review for Controlling Stockholder Transactions
- Delaware Decisions Addressing Financial Advisor Liability in the *Rural Metro* Case

December 2014

"A top-tier practice for defending financial institutions and corporate multinationals in complex securities class actions."

–Chambers USA 2014

Dart Cherokee: Supreme Court Holds That Defendants Must Only Plausibly Allege the Amount in Controversy for Removal Under 28 U.S.C. § 1446(a)

28 U.S.C. § 1446(a) provides in relevant part that a defendant "desiring to remove any civil action from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal … containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings and orders served." When a defendant seeks removal based on diversity of citizenship, the defendant must assert that the amount-in-controversy satisfies 28 U.S.C. § 1332.

In a decision dated December 15, 2014, the Supreme Court considered the requirements for "assert[ing] the amount in controversy adequately in the removal notice." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 2014 WL 7010692 (2014) (Ginsburg, J.). The "single question" before the Court was this: "does it suffice to allege the requisite amount plausibly, or must the defendant incorporate into the notice of

removal evidence supporting the allegation?" Justice Ginsburg, writing for the majority, held that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." The Court found that its conclusion was compelled "by the removal statute itself," which "tracks the general pleading requirement stated in Rule 8(a) of the Federal Rules of Civil Procedure." The Court explained that "[a] statement 'short and plain' need not contain evidentiary submissions."

The Court reasoned that "[w]hen a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith." "Similarly, when a defendant seeks federal-court adjudication," the Court found that "the defendant's amount-in-controversy allegation should be accepted when not contested by the plaintiff or questioned by the court."

However, "[i]f the plaintiff contests [or the court questions] the defendant's allegation," then "[e]vidence establishing the amount is required by § 1446(c)(2)(B)."[1] "In such a case, both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied."

Halliburton: The Supreme Court Adopts a Middle Ground in the Challenge to *Basic*'s Fraud-on-the-Market Presumption

In *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) (Blackmun, J.), a plurality of the Supreme Court endorsed a "fraud-on-the-market" theory, which permits securities fraud plaintiffs to invoke a rebuttable presumption of reliance on public, material misrepresentations regarding securities traded in an efficient market. However, the *Basic* Court ruled that "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."

1 28 U.S.C. § 1446(c)(2)(B) provides in relevant part that "removal of the action is proper on the basis of an amount in controversy … if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a)."

In *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (Roberts, C.J.), the Supreme Court held that investors may continue to invoke a rebuttable presumption that they relied on an alleged misrepresentation when they purchased securities in an efficient market. The Court was divided 6-to-3 on whether to jettison the *Basic* presumption altogether and require that plaintiffs prove actual reliance. Chief Justice Roberts, writing for the majority, concluded that the *Basic* presumption should be preserved. The majority opinion explained that "[b]efore overturning a long-settled precedent," the Court "require[s] 'special justification,' not just an argument that the precedent was wrongly decided." In a concurring opinion joined by Justices Scalia and Alito, Justice Thomas wrote that *Basic* should be overruled entirely.

Significantly, the Supreme Court held that defendants must have an opportunity to rebut the *Basic* presumption of reliance at the class certification stage with evidence that the alleged misstatement did not distort the market price of the stock. The Court observed that in many misrepresentation-based cases the parties already introduce competing price impact evidence at the class certification stage to address the question of whether the market is efficient—a prerequisite for invoking the *Basic* presumption. The Court recognized that it would be a "bizarre result[ ]" not to allow such evidence for the purpose of rebutting the *Basic* presumption altogether.

Notably, the Court declined to put the burden on plaintiffs to prove price impact at the class certification stage on the grounds that it would "effectively jettison half of [the *Basic* presumption]."

Troice: Supreme Court Addresses SLUSA's "in Connection With" Requirement

The Securities Litigation Uniform Standards Act of 1998 ("SLUSA") precludes certain state law-based class actions alleging "a misrepresentation or omission of a material

fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A). For SLUSA purposes, a "covered security" is a security that is listed, or authorized for listing, on a national exchange or issued by a federally registered investment company. 15 U.S.C. § 78bb(f)(5)(E); 15 U.S.C. § 77r(b).

On February 26, 2014, the Supreme Court considered "the scope" of SLUSA's "in connection with" requirement. *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014) (Breyer, J.). In a majority opinion authored by Justice Breyer, the Court held that "[a] fraudulent misrepresentation or omission is not made 'in connection with' ... a 'purchase or sale of a covered security' unless it is material to a decision by [or on behalf of] one or more individuals (other than the fraudster) to buy or to sell a 'covered security.'" The Court emphasized that SLUSA "focuses upon transactions in covered securities, not upon transactions in uncovered securities." Moreover, the Court explained that SLUSA's "in connection with" requirement "suggests a connection that matters." "[F]or present purposes, a connection matters where the misrepresentation makes a significant difference to someone's decision to purchase or to sell a covered security, not to purchase or to sell an uncovered security."

In a dissenting opinion, Justice Kennedy, joined by Justice Alito, took issue with what he described as "[t]he Court's narrow reading of the statute." Instead of the test adopted by the majority, the dissent posited that "[t]he key question" for SLUSA preclusion purposes should be "whether the misrepresentation coincides with the purchase or sale of a covered security or the purchase or sale of the securities is what enables the fraud."

Fifth Third: Supreme Court Clarifies the Pleading Standards for ERISA Breach of Duty of Prudence Claims Against ESOP Fiduciaries

On June 25, 2014, the Supreme Court clarified the requirements for pleading an Employee Retirement Income Security Act ("ERISA") breach of the duty of prudence claim involving Employee Stock Ownership Plans ("ESOPs"), employee benefit plans that invest primarily in employer stock. *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014) (Breyer, J.). The Court concluded, in a unanimous opinion, that ESOP fiduciaries are not entitled to a special presumption of prudence. The Court found that ERISA Section 1104, which discusses the duty of prudence, "makes no reference to a special 'presumption' in favor of ESOP fiduciaries." Rather, the only modification permitted under ERISA for ESOP fiduciaries is an exemption from ERISA's diversification requirement (*i.e.*, ESOPs can make undiversified investments in employer stock). "[A]side from that distinction," the Court found that "ESOP fiduciaries are subject to the duty of prudence just as other ERISA fiduciaries are."

The Court then clarified the requirements for pleading an ERISA breach of the duty of prudence claim. First, the 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." Second, "[t]o state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."

Circuit Court Decisions Applying the Supreme Court's Ruling in *Morrison*

Second Circuit Relies on *Morrison* to Hold That the Dodd-Frank Act's Whistleblower Antiretaliation Provision Does Not Apply Extraterritorially

On August 14, 2014, the Second Circuit considered whether the whistleblower antiretaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act "protects a foreign worker employed abroad by a foreign corporation where all events related to the disclosures occurred

abroad." *Liu Meng-Lin v. Siemens AG*, 763 F.3d 175 (2d Cir. 2014) (Lynch, J.). Applying the presumption against extraterritoriality established in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), the Second Circuit held that the Dodd-Frank Act whistleblower antiretaliation provision "does not apply extraterritorially." The Second Circuit found "absolutely nothing in the text … or in the legislative history" of the Dodd-Frank Act whistleblower antiretaliation provision suggesting that Congress intended the provision "to regulate the relationships between foreign employers and their foreign employees working outside the United States."

Notably, the Second Circuit determined that *Morrison* "decisively refutes [the] contention that the United States securities laws[,]"including the Dodd-Frank Act whistleblower antiretaliation provision, "apply extraterritorially to the actions abroad of any company that has issued United States-listed securities." The court found that "the listing of securities alone is the sort of 'fleeting' connection that 'cannot overcome the presumption against extraterritoriality'" *Id.* (quoting *Morrison*, 561 U.S. 247).

Second Circuit Interprets *Morrison* to Hold That Section 10(b) Does Not Necessarily Reach All Domestic Transactions in Securities Not Listed on a Domestic Exchange

On August 15, 2014, the Second Circuit interpreted the Supreme Court's decision in *Morrison* to hold that "in the case of securities not listed on domestic exchanges, a domestic transaction is necessary but not necessarily sufficient to make § 10(b) applicable." *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014) (per curiam).

The Second Circuit explained that "under *Morrison*, a domestic transaction in a security (or a transaction in a domestically listed security) … [is] a necessary element of a domestic § 10(b) claim." However, the Second Circuit found that the Supreme Court "never said that an application of § 10(b) *will* be deemed domestic *whenever*" a domestic securities transaction or a transaction in a domestically listed security "is present." The Second Circuit observed that "a rule making the statute applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application." Such a rule "would require courts to apply the statute to wholly foreign activity … solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware" of that transaction.

Significantly, the Second Circuit did "not purport to proffer a test that [would] reliably determine when a particular invocation of § 10(b) [should] be deemed appropriately domestic or impermissibly extraterritorial." Rather, the Second Circuit emphasized that "courts must carefully make their way with careful attention to the facts of each case and to combinations of facts that have proved determinative in prior cases, so as eventually to develop a reasonable and consistent governing body of law on this elusive question."

Second Circuit Applies *Morrison* to Limit the Extraterritorial Reach of Private Rights of Action Under the Commodity Exchange Act

On September 4, 2014, the Second Circuit applied the Supreme Court's decision in *Morrison* to hold that § 22 of the Commodity Exchange Act ("CEA"), which provides a private right of action for CEA violations, "is limited to claims alleging a commodities transaction within the United States." *Loginovskaya v. Batratchenko*, 764 F.3d 266 (2d Cir. 2014) (Jacobs, J.). Notably, the Second Circuit rejected plaintiff's contention that *Morrison* only "governs substantive (conduct-regulating) provisions rather than procedural provisions such as § 22." The court explained that "*Morrison* … draws no such distinction, and holds that the presumption applies generally to 'statutes.'"

The Second Circuit determined that "[g] iven the absence of any 'affirmative intention' by Congress to give the CEA extraterritorial effect," it "must 'presume [the CEA] is primarily concerned with domestic conditions'" *Id.* (quoting *Morrison*, 561 U.S. 247). Moreover, because "courts have [traditionally] looked to the securities laws when called upon to interpret similar provisions of the CEA," the Second Circuit

found that the test it had articulated in *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60 (2d Cir. 2012) for pleading a "domestic transaction" under *Morrison* also applies when determining whether a "domestic transaction" took place for purposes of CEA § 22. (The *Absolute Activist* court held that, in order "to sufficiently allege the existence of a 'domestic transaction in other securities'" for *Morrison* purposes, "plaintiffs must allege facts indicating that irrevocable liability was incurred or that title was transferred within the United States.")

Significantly, the Second Circuit found it unnecessary "to decide how the presumption against extraterritorial effect defines the reach of § 40," one of the CEA's antifraud provisions. The court found that plaintiff had to "satisfy the threshold requirement of CEA § 22" before the court could "reach[ ] the merits of her § 40 fraud claim."

Circuit Court Decisions Concerning Government Enforcement Actions and Insider Trading Prosecutions

Second Circuit Holds That the "Proper Standard" for a District Court's Review of a Proposed Consent Decree Is Whether the Decree Is "Fair and Reasonable" and Does Not "Disserve" the Public Interest

On June 4, 2014, the Second Circuit vacated Judge Rakoff's November 2011 order refusing to approve a proposed consent judgment in the SEC's enforcement action against Citigroup Global Markets because the terms of the settlement provided that Citigroup neither admitted nor denied the allegations. *U.S. Securities and Exchange Commission v. Citigroup Global Markets, Inc.*, 752 F.3d 285 (2d Cir. 2014) (Pooler, J.). Among other grounds, the Second Circuit held that it was an "abuse of discretion to require, as the district court did here, that the [SEC] establish the 'truth' of the allegations … as a condition for approving the consent decree[ ]."

As an initial matter, the Second Circuit stated that "there is no basis in the law for [a] district court to require an admission of liability as a condition for approving" a consent decree. The Second Circuit held that "the proper standard" for a district court's review of a proposed consent judgment involving an enforcement agency is "whether the proposed consent decree is fair and reasonable." If the consent decree imposes injunctive relief, then district courts must also consider "the additional requirement that the 'public interest would not be disserved.'" The Second Circuit explained that "the district court is required to enter the order" unless there is "a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements."

The Second Circuit stated that in "evaluating a proposed [SEC] consent decree for fairness and reasonableness," a district court "should, at a minimum, assess" the following factors: (1) "the basic legality of the decree"; (2) "whether the terms of the decree, including its enforcement mechanism, are clear"; (3) "whether the consent decree reflects a resolution of the actual claims in the complaint"; and (4) "whether the consent decree is tainted by improper collusion or corruption of some kind." The Second Circuit recognized that "depending on the decree a district court may need to make additional inquiry to ensure that the consent decree is fair and reasonable." However, the Second Circuit cautioned that "the primary focus" of any additional inquiry "should be on ensuring the consent decree is procedurally proper, using objective measures … [and] taking care not to infringe on the [SEC]'s discretionary authority to settle on a particular set of terms."

With respect to considerations of the public interest, the Second Circuit explained that a consent decree "may disserve the public interest" if, for example, "it bar[s] private litigants from pursuing their own claims independent of the relief obtained under the consent decree." However, a district court may not "find the public interest disserved based on its disagreement with the [SEC]'s decisions on discretionary matters of policy, such as deciding to settle without requiring an admission of liability." The Second Circuit emphasized that "[t]he job of determining whether [a] proposed [SEC] consent decree best serves the public interest … rests squarely with the [SEC], and its decision merits significant deference."

On remand, the Southern District of New York issued an order stating that the proposed consent judgment in the SEC's enforcement action against Citigroup Global Markets would be approved. *SEC v. Citigroup Global Markets Inc.*, 2014 WL 3827497 (S.D.N.Y. Aug. 5, 2014) (Rakoff, J.). The court found that the proposed consent judgment was not "procedurally improper" nor did it "fail[ ] to comport with the very modest standard imposed by the" Second Circuit "in any material respect." However, the court did express concern that "as a result of the [Second Circuit's] decision, the settlements reached by governmental regulatory bodies and enforced by the judiciary's contempt powers will in practice be subject to no meaningful oversight whatsoever."

Second Circuit Holds That Tippee Liability for Insider Trading Attaches Only If the Tippee Knew That the Tipper Disclosed Confidential Information in Exchange for a Personal Benefit

Tippee liability for insider trading "reach[es] situations where the insider or misappropriator in possession of material nonpublic information (the 'tipper') does not himself trade but discloses the information to an outsider (a 'tippee') who then trades on the basis of the information before it is publicly disclosed." *United States v. Newman*, 2014 WL 6911278 (2d Cir. Dec. 10, 2014) (Parker, J.).

On December 10, 2014, the Second Circuit held that "in order to sustain a conviction [against a tippee] for insider trading, the Government must prove beyond a reasonable doubt that the tippee knew that an insider disclosed confidential information *and* that he did so in exchange for a personal benefit." *Id.* Applying this standard, the Second Circuit reversed the insider trading convictions of Todd Newman, a portfolio manager at Diamondback Capital Management, LLC, and Anthony Chiasson, a portfolio manager at Level Global Investors, L.P., based on the district court's failure "to instruct the jury that the Government had to prove beyond a reasonable doubt that Newman and Chiasson knew that the tippers received a personal benefit for their disclosure."

The Second Circuit rejected "the Government's contention that knowledge of a breach of the duty of confidentiality without knowledge of the personal benefit is sufficient to impose criminal liability." The Second Circuit found that "the Supreme Court was quite clear" on the elements for tippee liability in *Dirks v. S.E.C.*, 463 U.S. 646 (1983):

> *First,* the tippee's liability derives *only* from the tipper's breach of a fiduciary duty, *not* from trading on material, non-public information. *Second,* the corporate insider has committed no breach of fiduciary duty unless he receives a personal benefit in exchange for the disclosure. *Third*, even in the presence of a tipper's breach, a tippee is liable only if he knows or should have known of the breach.

Newman, 2014 WL 6911278. The Second Circuit determined that under *Dirks*, "the exchange of confidential information for personal benefit is not separate from an insider's fiduciary breach; it *is* the fiduciary breach that triggers liability for securities fraud under Rule 10b-5." The Second Circuit therefore held that "the Government cannot meet its burden of showing that the tippee knew of a breach" unless it can "establish[] that the tippee [knew] of the personal benefit received by the insider in exchange for the disclosure." The Second Circuit noted that its "conclusion … comports with well-settled principles of substantive criminal law … requir[ing] that the defendant know the facts that make his conduct illegal." The court reasoned that "[s]uch a requirement is particularly appropriate in insider trading cases where … 'it is easy to imagine a … trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful.'"

The Second Circuit underscored that there is "nothing in the law [that] requires a symmetry of information in the nation's securities markets." Rather, "in both [*Chiarella v. United States*, 445 U.S. 222 (1980)] and *Dirks*, the Supreme Court affirmatively established that insider trading liability is based on breaches of fiduciary duty, not on informational asymmetries." The Second Circuit observed that "[t]his is a critical limitation on insider trading liability that protects a corporation's interests in confidentiality while promoting efficiency in the nation's securities markets."

The Second Circuit also clarified that "the personal benefit received in exchange for confidential information must be of some

consequence" to form the basis of a claim for tippee liability. The court found that the Government may not "prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." "To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee," the Second Circuit held that "such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature."

Notably, the Second Circuit criticized "the doctrinal novelty of [the Government's] recent insider trading prosecutions, which are increasingly targeted at remote tippees many levels removed from corporate insiders." The court observed that its "prior cases generally involved tippees who directly participated in the tipper's breach (and therefore had knowledge of the tipper's disclosure for personal benefit) or tippees who were explicitly apprised of the tipper's gain by an intermediary tippee." The Second Circuit "note[d] that the Government has not cited, nor [has the court] found, a single case in which tippees as remote as Newman and Chiasson have been held criminally liable for insider trading."

Circuit Court Decisions Addressing Section 10(b)'s Loss Causation Requirement

Fifth Circuit Holds That Partial Disclosures, Taken Together, May Constitute a Corrective Disclosure for Loss Causation Purposes

On October 2, 2014, the Fifth Circuit reversed dismissal of a securities fraud action based on its finding that plaintiffs' alleged partial disclosures of Medicare fraud "collectively constitute[d] and culminate[d] in a corrective disclosure that adequately [pled] loss causation." *Pub. Emps. Ret. Sys. of Mississippi v. Amedisys, Inc.*, 769 F.3d 313 (5th Cir. 2014) (Gilstrap, J.). The court explained that its "holding can best be understood by simply observing that the whole is greater than the sum of its parts."

The Fifth Circuit underscored that there is "no requirement that a corrective disclosure take a particular form or be of a particular quality." The court explained that "[a] corrective disclosure can come from any source, and can take any form from which the market can absorb [the information] and react ... so long as it 'reveal[s] to the market the falsity' of the prior misstatements." The Fifth Circuit further stated that a corrective disclosure need not "be a single disclosure" but "rather, the truth can be gradually perceived in the marketplace through a series of partial disclosures."

Fifth Circuit Holds That the PSLRA's Heightened Pleading Standards Do Not Apply to Loss Causation Allegations

On July 15, 2014, the Fifth Circuit reversed dismissal of a securities fraud action based, *inter alia*, on its finding that the district court had erred by requiring plaintiffs to allege loss causation with particularity. *Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676 (5th Cir. 2014) (Davis, J.). The Fifth Circuit determined that loss causation allegations are not subject to the heightened pleading requirements of the Private Securities Litigation Reform Act ("PSLRA").

The Fifth Circuit explained that "the plain text of 15 U.S.C. § 78u-4(b)(4) does not indicate that it imposes any heightened standard, or make any mention of a 'particularity' requirement with respect to loss causation."[2] Moreover, the Fifth Circuit noted that in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), "the Supreme Court explicitly declined to address whether any heightened pleading requirement applies to [loss causation]."

The Fifth Circuit stated that under its precedent, courts are "not authorized or required to determine whether the plaintiffs['] plausible inference of loss causation is equally or more plausible than other competing inferences, as [courts] must in assessing allegations of scienter under the PSLRA." While plaintiffs must "eventually" prove loss causation "by a preponderance of the evidence," the Fifth Circuit explained that

2 15 U.S.C. § 78u-4(b)(4) provides as follows: "In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages."

"the PSLRA does not obligate a plaintiff to deny affirmatively that other factors affected the stock price in order to defeat a motion to dismiss."

Ninth Circuit Finds the Announcement of an Internal Investigation, Standing Alone, Insufficient to Establish Loss Causation

On August 7, 2014, the Ninth Circuit held that "the announcement of an investigation, standing alone, is insufficient to establish loss causation." *Loos v. Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014) (Rice, J.). The Ninth Circuit reasoned that "[t]he announcement of an investigation does not 'reveal' fraudulent practices to the market." The court explained that "at the moment the investigation is announced, the market cannot possibly know what the investigation will ultimately reveal." Although "the disclosure of an investigation is … an ominous event," the Ninth Circuit underscored that the announcement of an investigation "simply puts investors on notice of a *potential* future disclosure of fraudulent conduct." The court found that "any decline in a corporation's share price following the announcement of an investigation can only be attributed to market speculation about whether fraud has occurred." The Ninth Circuit held that "[t]his type of speculation cannot form the basis of a viable loss causation theory."

In an amended opinion issued on September 11, 2014, the Ninth Circuit clarified that it did not "mean to suggest that the announcement of an investigation can *never* form the basis of a viable loss causation theory." The court stated that "[t]o the extent an announcement contains an express disclosure of actual wrongdoing, the announcement alone might suffice."

Circuit Court Decisions Discussing the Duty to Disclose Under Section 10(b)

Second Circuit Court Finds Corporations Need Not Phrase Disclosures in Pejorative Terms

On September 8, 2014, the Second Circuit affirmed the district court's grant of summary judgment to defendants in a securities fraud class action alleging material misrepresentations concerning Xerox Corporation's worldwide restructuring initiative in 1998 and 1999. *Dalberth v. Xerox Corp.*, 766 F.3d 172 (2d Cir. 2014) (Pooler, J.). The Second Circuit found meritless plaintiffs' contention that the district court had "incorrectly" deemed "immaterial" "the distinctions between Xerox's carefully phrased public disclosures" concerning restructuring-related challenges with "the more colorful language in the corporation's internal documents. "While [p]laintiffs may have desired more detailed or nuanced language" in Xerox's disclosures, the Second Circuit explained that it has "never required a corporation to frame its public information with specific adjectives." The court underscored that "'[d]isclosure is not a rite of confession'" and "'[c]orporations are not required to phrase disclosures in pejorative terms.'" All that "'is required is the disclosure of material objective factual matters.'"

Ninth Circuit Holds That Item 303 of Regulation S-K Does Not Create a Duty to Disclose Under Section 10(b) and Rule 10b-5

Item 303 of Regulation S-K sets forth the disclosure requirements for the Management's Discussion and Analysis (MD&A) section of a public company's SEC filings. In relevant part, Item 303 states that a public company must "[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." 17 C.F.R. § 229.303(a)(3)(ii).

On October 2, 2014, the Ninth Circuit held that "Item 303 [of Regulation S-K] does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5." *In re NVIDIA*

Corp. Sec. Litig., 768 F.3d 1046 (9th Cir. 2014) (O'Connell, J.). Concurring with the Third Circuit's reasoning in *Oran v. Stafford*, 226 F.3d 275 (3d Cir. 2000), the Ninth Circuit found that "[m]anagement's duty to disclose under Item 303 is much broader than what is required under the standard pronounced in" *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). The *Basic* test for the materiality of forward-looking information balances "the indicated probability that the event will occur" against "the anticipated magnitude of the event in light of the totality of the company activity." *Id.* (quoting *Basic*, 485 U.S. 224). In contrast, Item 303 requires disclosure of "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." *Id.* (quoting 17 C.F.R. § 229.303(a)(3)(ii)). The Ninth Circuit found it significant that the SEC has explicitly stated that *Basic*'s "probability/magnitude test for materiality … is inapposite to Item 303 disclosure," which "specifies its own standard for disclosure—*i.e.*, reasonably likely to have a material effect." *Id.* (quoting Exchange Act Release No. 34-26831, 54 Fed. Reg. 22427 (May 24, 1989)).

The Ninth Circuit concluded that plaintiffs may not rely on Item 303 when alleging a duty to disclose. Rather, the court held that "[s]uch a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* and" *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011).

Circuit Court Decisions Concerning FINRA

Second Circuit Holds Forum Selection Clauses May Supersede FINRA's Arbitration Rules

On August 21, 2014, the Second Circuit held that the arbitration rules of the Financial Industry Regulatory Authority ("FINRA") were "superseded by forum selection clauses requiring 'all actions and proceedings' related to the transactions between the parties to be brought in court." *Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.,* 764 F.3d 210 (2d Cir. 2014) (Walker, Jr., J.).

In so holding, the Second Circuit widened a circuit split on the issue of whether forum selection clauses may supersede FINRA's arbitration rules. The Second Circuit acknowledged that the Ninth Circuit has held that a forum selection clause in a broker-dealer agreement "supersedes Rule 12200," whereas the Fourth Circuit has ruled that "a nearly identical forum selection clause" to the one at issue in the *Golden Empire* case "does not supersede Rule 12200." *Id.* (citing *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733 (9th Cir. 2014); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319 (4th Cir. 2013)). The Second Circuit expressly disagreed with the Fourth Circuit and held that "a forum selection clause requiring 'all actions and proceedings' to be brought in federal court supersedes an earlier agreement to arbitrate." *Golden Empire*, 764 F.3d 210.

The Second Circuit has since issued a stay of its decision to allow the parties to petition the Supreme Court for certiorari on the question of whether forum selection clauses may supersede FINRA's arbitration rules.

Second Circuit Defines Who Constitutes a "Customer" for Purposes of the FINRA Code

On August 1, 2014, the Second Circuit defined the term "customer" for purposes of the right to arbitration under Rule 12200 of the FINRA Code. *Citigroup Global Markets Inc. v. Abbar*, 761 F.3d 268 (2d Cir. 2014) (Jacobs, J.). The court ruled that a "customer" is "one who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member."

The Second Circuit explained that "[b]y agreeing to accept 'a fee for its services' or by selling securities to an entity, a FINRA member understands that it may be compelled to arbitrate if a dispute arises with that entity." The court further stated that "[a]n account holder has a reasonable expectation to be treated as a customer, whether or not goods or services are purchased directly from the FINRA member." The court clarified that "even if the FINRA member executes all securities transactions through an affiliate or provides services without fee, the account-holder can compel arbitration under Rule 12200."

The Second Circuit observed that "[i]n most cases, this definition of 'customer' can be readily applied to undisputed facts." The court noted that "[t]he only relevant inquiry in assessing the existence of a customer relationship is whether an account was opened or a purchase made; parties and courts need not wonder whether myriad facts will 'coalesce into a functional concept of the customer relationship'" for purposes of entitlement to arbitration under Rule 12200 of the FINRA Code.

Delaware Decisions on Forum Selection and Fee-Shifting Bylaws

Delaware Supreme Court Holds Board-Adopted Litigation Fee-Shifting Bylaws May Be Permissible Under Delaware Law

On May 8, 2014, the Delaware Supreme Court responded to certified questions from the District of Delaware "concerning the validity of a [board adopted] fee-shifting provision in a Delaware non-stock corporation's bylaws" pursuant to which unsuccessful plaintiffs in intra-corporate litigation would be held responsible for all attorneys' fees and costs incurred by the corporation. *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014) (Berger, J.). The Delaware Supreme Court held that a board-adopted fee-shifting bylaw is "facially valid" under Delaware law. The Delaware Supreme Court determined that "[n]either the [Delaware General Corporation Law ('DGCL')] nor any other Delaware statute forbids the enactment of fee-shifting bylaws." Moreover, the court found that a fee-shifting bylaw "appear[s] to satisfy the DGCL's requirement that bylaws must 'relat[e] to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees'" (quoting 8 Del. C. § 109(b)). The court also noted that a "corporate charter could permit fee-shifting provisions, either explicitly or implicitly by silence."

Having determined that board-adopted fee-shifting bylaws are "facially valid," the Delaware Supreme Court then clarified that the enforceability of any particular fee-shifting bylaw "depends on the manner in which it was adopted and the circumstances under which it was invoked." The court stated that "[b]ylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose." Notably, the Delaware Supreme Court found that an "intent to deter litigation … is not invariably an improper purpose" and "would not necessarily render the bylaw unenforceable in equity."

Delaware Chancery Court Upholds Forum Selection Bylaw Providing That Intra-Corporate Disputes May Be Heard Only in North Carolina Courts

On September 8, 2014, the Delaware Chancery Court addressed "an issue of first impression: whether the board of a Delaware corporation may adopt a bylaw that designates an exclusive forum other than Delaware for intra-corporate disputes." *City of Providence v. First Citizens BancShares, Inc.*, 2014 WL 4409816 (Del. Ch. 2014) (Bouchard, C.). In the case before it, the board of First Citizens BancShares, Inc. ("FC North"), a Delaware corporation headquartered in North Carolina, had adopted a forum selection bylaw providing that intra-corporate disputes may be brought only in the federal and state courts of North Carolina. The Chancery Court found the bylaw "facially valid as a matter of law."

The Chancery Court determined that "the same analysis of Delaware law outlined in" *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) "validates" the forum selection bylaw adopted by FC North's board. In *Chevron*, the Chancery Court rejected shareholder challenges to forum selection bylaws adopted by the boards of Chevron Corporation and FedEx Corporation requiring that litigation relating to each company's "internal affairs" be conducted in Delaware courts. The *Chevron* court found that the bylaws were both "statutorily valid under Delaware law" and "contractually valid and enforceable." *Chevron*, 73 A.3d 934.

The *City of Providence* court determined that "the fact that the [FC North] Board selected the federal and state courts of North Carolina—the second most obviously reasonable forum given that FC North is

headquartered and has most of its operations there—rather than those of Delaware as the exclusive forums for intra-corporate disputes [did] not … call into question the facial validity of" FC North's forum selection bylaw. Moreover, the Chancery Court found that "important interests of judicial comity" supported the validity of FC North's forum selection bylaw. The court explained that, "[i]f Delaware corporations are to expect, after *Chevron*, that foreign courts will enforce valid bylaws that designate Delaware as the exclusive forum for intra-corporate disputes, then, as a matter of comity, so too should this [c]ourt enforce a Delaware corporation's bylaw that does not designate Delaware as the exclusive forum."

Delaware and New York Decisions Addressing the Standard of Review for Controlling Stockholder Transactions

Delaware Supreme Court Holds Business Judgment Standard of Review Applies to Controlling Stockholder Transactions under Certain Circumstances

Last year, the Delaware Chancery Court addressed "[t]he question of what standard of review should apply to a going private merger conditioned upfront by the controlling stockholder on approval by *both* a properly empowered, independent committee and an informed, uncoerced majority-of-the-minority vote." *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. May 29, 2013) (Strine, C.). The court ruled that the business judgment rule standard of review, rather than the entire fairness standard, applies in such circumstances. On March 14, 2014, the Delaware Supreme Court affirmed the Delaware Chancery Court's decision. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (Holland, J.).

The Delaware Supreme Court offered several reasons for its decision. First, the court explained that "where the controller irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and the shareholder vote, the controlled merger then acquires the shareholder-protective characteristics of third-party, arm's-length mergers, which are reviewed under the business judgment standard." Second, the court agreed with the Chancery Court's determination that "the dual procedural protection merger structure optimally protects the minority stockholders in controller buyouts." Third, the court concurred with the Chancery Court's finding that "the adoption of this rule will … provide a strong incentive for controlling stockholders to accord minority investors" with "the benefits of independent, empowered negotiating agents to bargain for the best price" as well as "the critical ability to determine for themselves whether to accept any deal that their negotiating agents recommend to them." Finally, the Delaware Supreme Court observed that "the underlying purposes of the dual protection merger structure utilized here and the entire fairness standard of review both converge and are fulfilled at the same critical point: price."

New York Appellate Division, First Department, Applies Business Judgment Review to a Going-Private Transaction by a Controlling Stockholder

On November 20, 2014, the New York Appellate Division, First Department, found that "the motion court was not required to apply the 'entire fairness' standard" in a shareholder action challenging a transaction in which Kenneth Cole, the majority shareholder of Kenneth Cole Productions, took Kenneth Cole Productions private. *In re Kenneth Cole Prods., Inc., S'holder Litig.*, 122 A.D. 3d 500 (N.Y. App. Div. 2014). The First Department found that "pre-discovery dismissal based on the business judgment rule was appropriate" because there were "no allegations sufficient to demonstrate that the members of the board or the special committee [established to evaluate Mr. Cole's proposal] did not act in good faith or were otherwise interested."

In reaching its decision, the First Department found it significant that "the merger … required the approval of the majority of the minority (*i.e.*, non-Cole) shareholders" and that Kenneth Cole "did not participate when the Company's board of directors voted on the merger." The First Department rejected plaintiffs' contention that "members of the

special committee … were controlled by Mr. Cole." The court explained that "at least under Delaware law, which all parties urge[d] [the court] to consider, 'it is not enough to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election."

Delaware Decisions Addressing Financial Advisor Liability in the *Rural Metro* Case

Delaware Chancery Court Holds Financial Advisor Liable for Aiding and Abetting Fiduciary Duty Breaches

In a post-trial decision dated March 7, 2014, the Delaware Chancery Court held financial advisor RBC Capital Markets, LLC "liable for aiding and abetting breaches of fiduciary duty by the Board" of Rural/Metro Corporation ("Rural") in connection with Rural's 2011 acquisition by Warburg Pincus LLC (the "Merger"). *In re Rural Metro Corp. S'holdr. Litig.*, 88 A.3d 54 (Del. Ch. Mar. 7, 2014) (Laster, V.C.) (*Rural I*).

Plaintiffs contended that Rural's directors, including the company's President and CEO (the "individual defendants"), had "breached their fiduciary duties in two ways: first, by making decisions that fell outside the range of reasonableness during the process leading up to the Merger and when approving the Merger (the 'Sale Process Claim'), and second, by failing to disclose material information in the definitive proxy statement … that [Rural] issued in connection with the Merger (the 'Disclosure Claim')." *In re Rural/Metro Corp. S'holdrs. Litig.*, 2014 WL 5280894 (Del. Ch. Oct. 10, 2014) (Laster, V.C.) (*Rural II*). Plaintiffs also asserted aiding and abetting claims against RBC, Rural's lead financial advisor, as well as Moelis & Company LLC, Rural's secondary financial advisor. Shortly before trial, Rural's directors and its secondary financial advisor settled plaintiffs' claims. The case proceeded to trial against RBC only.

In its decision following trial, the *Rural I* court rejected RBC's claim that "the exculpatory provision in Rural's certificate of incorporation should apply equally to a party charged with aiding and abetting a breach of fiduciary duty." *Rural I*, 88 A.3d 54. The court found that "[t]he literal language of Section 102(b)(7) only covers directors; it does not extend to aiders and abettors."[3] Deeming Section 102(b)(7)'s structure "rational," the court expressed its view that "the prospect of aiding and abetting liability for investment banks who induce boards of directors to breach their duty of care creates a powerful financial reason for the banks to provide meaningful fairness opinions and to advise boards in a manner that helps ensure that the directors carry out their fiduciary duties when exploring strategic alternatives."

With respect to the Sale Process Claim, the *Rural I* court found that the individual defendants had breached their fiduciary duties, and that RBC had aided and abetted those breaches, in two respects. First, the court held that "the initiation of a sale process in December 2010 fell outside the range of reasonableness."The court found that RBC and Christopher Shackelton, one of Rural's directors, had "unilaterally put Rural into play" without board authorization. The court further determined that RBC had timed the Rural sale process to run in parallel with the sale of Emergency Medical Services Corporation ("EMS"), Rural's only national competitor in the ambulance business. Significantly, the court found that RBC "did not disclose that proceeding in parallel with the EMS process served RBC's interest in gaining a role on the financing trees of bidders for EMS."

Second, the *Rural I* court determined that the Board had "failed to provide active and direct oversight of RBC" during Rural's final negotiations with Warburg. At the time the Board approved the merger, "the Board was unaware of RBC's last minute efforts to solicit a buy-side financing role from Warburg, had not received any valuation information until three hours before the meeting to approve the deal, and did not know about RBC's manipulation of its valuation metrics."

3 Section 102(b)(7) of the Delaware General Corporation Law provides that a Delaware corporation may include in its certificate of incorporation "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director," subject to certain exceptions. A Section 102(b)(7) provision may not limit a director's personal liability for "any breach of the director's duty of loyalty to the corporation or its stockholders;" "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;" or "any transaction from which the director derived an improper personal benefit."

The court concluded that "[u]nder [these] circumstances, the Board's decision to approve Warburg's bid lacked a reasonable informational basis and fell outside the range of reasonableness." Moreover, the court found that "RBC [had] *created* the unreasonable process and informational gaps that led to the Board's breach of duty."

The court determined that "RBC's actions [had] led to (i) an ill-timed sale of Rural that did not capture value attributable to its acquisition strategy; (ii) a mismanaged sale process that generated only one final bid by a bidder that knew it had the upper hand in bidding and price negotiations; and (iii) uninformed board approval based on manipulated valuation analyses." Had it not been "for RBC's actions," the court concluded that "a fully-informed Board would have had numerous opportunities to achieve a superior result."

As to the Disclosure Claim, the court found that the plaintiffs had "proved at trial that the Proxy Statement contained materially misleading disclosures in the form of false [financial] information that RBC [had] presented to the Board." The court underscored that RBC had provided the Board with "false" information "in connection with its precedent transaction analyses," and this "false information was repeated in the Proxy Statement." The *Rural I* court found that as a result of these disclosure violations, Rural's "[s]tockholders were denied the information necessary to make an informed decision whether to seek appraisal."

After finding RBC liable on its aiding and abetting claims, the court concluded that it was "not yet in a position to determine an appropriate remedy."

Delaware Chancery Court Holds That (1) the Delaware Uniform Contribution Among Tortfeasors Act (DUCATA) Does Not Bar Contribution for All Intentional Torts, and (2) A Credit Under DUCATA Is Not Available for a Director's Settlement If the Director Would Have Been Exculpated Under a Section 102(b)(7) Provision

On October 10, 2014, the Chancery Court issued an opinion determining RBC's liability for damages and addressing RBC's entitlement to a settlement credit under the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA"). *In re Rural/Metro Corp. S'holdrs Litig.*, 2014 WL 5280894 (Del. 2014) (Laster, V.C.) (*Rural II*).

The *Rural II* court addressed two significant questions under DUCATA.[4] First, the court held that DUCATA "does not establish a bright-line rule barring contribution for all intentional torts." The court found that "[t]he literal meaning of the words of DUCATA permits contribution among all tortfeasors." The *Rural II* court also found persuasive the District of Delaware's decision in *McLean v. Alexander (McLean II)*, 449 F. Supp. 1251 (D. Del. 1978), *rev'd on other grounds*, 599 F.2d 1190 (3d Cir. 1979). There, the District of Delaware held that an accounting firm found liable for securities fraud and common law fraud in connection with the sale of a closely held company could bring a claim for contribution against defendants who had previously settled their claims with plaintiffs. Finding "no limitation expressed within the terms of" DUCATA, the court concluded that "all wrongdoers may properly share in the apportionment of damages via claims for contribution." *McLean II*, 449 F. Supp. 1251.

Second, the *Rural II* court held that in order to claim a settlement credit under DUCATA with respect to a director's liability, a non-settling defendant must establish that the director was not exculpated under a Section 102(b)(7) provision. The court observed that the issue of "[h]ow Section 102(b)(7)

4 DUCATA provides in relevant part as follows: "A release by the injured person of 1 joint tortfeasor ... does not discharge the other tortfeasor unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid. " 10 Del. C. § 6304(a).

affects a right of contribution presents a question of first impression." However, the court emphasized that "Delaware decisions interpreting DUCATA have long held that if a statute or common law doctrine would prevent a party from being held liable for money damages for the underlying harm based on the claim being asserted, then the party is not a joint tortfeasor against whom an action for contribution will be available." Citing the Delaware Supreme Court's decision in *Lutz v. Boltz*, 100 A.2d 647 (Del. Super. Ct. 1953), the *Rural II* court held that "if the director defendants would have been entitled to exculpation, then RBC could not obtain contribution from them and" therefore could not "claim the settlement credit."

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

New York

Bruce D. Angiolillo
+1-212-455-3735
bangiolillo@stblaw.com

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

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

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

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

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

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

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

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

Linda H. Martin
+1-212-455-7722
lmartin@stblaw.com

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

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

Barry R. Ostrager
+1-212-455-2655
bostrager@stblaw.com

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

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

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

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

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

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

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

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

Los Angeles

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

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

Palo Alto

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

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

Washington, D.C.

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

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

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

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

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

Simpson
Thacher

UNITED STATES

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

Houston
2 Houston Center
909 Fannin Street
Houston, TX 77010
+1-713-821-5650

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

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

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

EUROPE

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

ASIA

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

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

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

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

SOUTH AMERICA

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