Simpson Thacher

Securities Law Alert

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2021

Simpson Thacher Names Lynn K. Neuner Co-Chair of Global Litigation Department

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Supreme Court Decisions and Developments

Supreme Court: The *Basic* Presumption Can Be Rebutted by Showing There Was No Price Impact Even Though That Evidence Is Also Relevant to Materiality

On June 21, 2021, in *Goldman Sachs Group v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021) (Barrett, J.), the Supreme Court vacated the Second Circuit's class certification affirmance in a securities fraud class action brought under Section 10(b).[1] The Court unanimously held that a court must consider all probative evidence, including the nature of the alleged misrepresentations, in assessing price impact at the class certification stage. An eight-justice majority of the Court further held that it was not clear that the Second Circuit properly considered the generic nature of the alleged misrepresentations at issue and for that reason vacated and remanded back to the Second Circuit. The Court directed the Second Circuit on remand to reassess the district court's price impact determination, taking into account "*all* record evidence relevant to price impact, regardless [of] whether that evidence overlaps with materiality or any other merits issue." A six-justice majority of the Court also held that a defendant seeking to overcome the *Basic* presumption bears the burden of persuasion to prove a lack of price impact, which must be carried by a preponderance of the evidence.

Plaintiff stockholders relied on a stock price inflation-maintenance theory asserting that the alleged misrepresentations caused the bank's stock price to remain inflated until the truth regarding certain conflicts of interest was revealed and the bank's stock price fell. Defendants sought to defeat class certification by rebutting the presumption of reliance established in *Basic v. Levinson*, 485 U.S. 224 (1988) with evidence that their alleged misrepresentations had no stock price impact. The district court determined that defendants failed to carry their burden of proving a lack of price impact and certified the class, and the Second Circuit affirmed.

With respect to assessing price impact at the class certification stage, the Supreme Court observed that the "generic nature of a misrepresentation often will be important evidence of a lack of price impact, particularly

1. Simpson Thacher filed an *amici curiae* brief on behalf of the Securities Industry and Financial Markets Association, the U.S. Chamber of Commerce, the Bank Policy Institute, the American Bankers Association, and the American Property Casualty Insurance Association in support of defendants-appellants.

in cases proceeding under the inflation-maintenance theory." The Court reasoned that when the alleged misrepresentation is generic and the back-end corrective disclosure is specific, the argument that the back-end price drop equals front-end inflation starts to "break down" and it is less likely that the disclosure corrected the alleged misrepresentation, meaning that there is less reason to infer price impact.

Subsequently, the Second Circuit sent the case back to the district court seeking a ruling using "all record evidence relevant to price impact." On December 8, 2021, the district court concluded that defendants failed to rebut the *Basic* presumption by a preponderance of the evidence and therefore granted the motion for class certification. *In re Goldman Sachs Sec. Litig.*, 2021 WL 5826285 (S.D.N.Y. 2021) (Crotty, J.). Specifically, the court concluded that defendants failed to establish a lack of price impact by a preponderance of the evidence. The court determined that the alleged misstatements were not so generic as to diminish their power to maintain pre-existing price inflation, and given the strong evidence of price impact, the court found that the statements did in fact maintain price inflation. As to defendants' argument that such statements are commonplace the court questioned why such statements "would have achieved such ubiquity in the first place were they incapable of influencing (including by maintaining) a company's stock price."

Significant Circuit Court Decisions

Second Circuit: Bank's Failure to Disclose Money Laundering Suspicions Not Actionable As There Was No Obligation to Self-Report

On August 25, 2021, the Second Circuit affirmed the dismissal of a putative securities fraud class action alleging that a bank's financial statements were misleading under Section 10(b) of the Exchange Act because they incorporated revenue from money laundering but failed to simultaneously disclose what the bank knew about possible money laundering at one branch. *Plumber & Steamfitters Local 773 Pension Fund v. Danske Bank*, 11 F.4th 90 (2d Cir. 2021) (Jacobs, J.). The court pointed out that plaintiffs did not allege that the financial numbers were manipulated in any way, only that defendants failed to simultaneously disclose the anti-money laundering issues. The court held that "because [the bank] was under no obligation to self-report its growing suspicions regarding those issues, its disclosure of accurate historical data, standing alone, is not actionable."

The court stated that "companies do not have a duty to disclose uncharged, unadjudicated wrongdoing." The court further explained that "[a]s a corollary of that rule, accurately reported financial statements do not automatically become misleading by virtue of the company's nondisclosure of suspected misconduct that may have contributed to the financial results."

In support of its conclusion that the bank's disclosure of accurate historical data was not actionable because it was under no obligation to self-report, the court reasoned that otherwise every company whose quarterly financial reports included revenue from transactions that violated anti-money laundering regulations could be sued for securities fraud. The court thus affirmed the district court, concluding that plaintiffs' "allegations do not move the claims outside the realm of corporate mismanagement and into the realm of securities fraud."

Ninth Circuit: Projected Timelines Concerning a New Product Are Forward-Looking Statements

On January 26, 2021, the Ninth Circuit affirmed the dismissal with prejudice of a putative securities fraud class action alleging that a car company and two of its officers misled investors about the company's progress in building production capacity for its first mass-market electric vehicle. *Wochos v. Tesla*, 985 F.3d 1180 (9th Cir. 2021) (Collins, J.). The court held that none of the 15 statements at issue were actionable as they were protected as forward-looking statements under the Private Securities Litigation Reform Act ("PSLRA"), or to the limited extent that they were not so protected plaintiffs failed to adequately plead falsity.

Plaintiffs alleged that the company announced production goals for its new vehicle for "the end of 2017 that it knew it would not be able to achieve, and it repeatedly reaffirmed that it was on track to reach those targets, even as the end-of-the-year deadline drew closer and as delays grew increasingly significant." With respect to the PSLRA's safe harbor for forward-looking statements, the court found that the company's "goal to produce 5,000 vehicles per week is unquestionably a forward-looking statement under § 21E, because it is a plan or objective of management for future operations, and this plan or objective relates to the products of [the company]."

The court further found that "[the company's] various statements that it was on track to achieve this goal and that there are no issues that would prevent [the company] from achieving the goal are likewise forward-looking statements." The court reasoned that "[b]ecause any announced objective for future operations necessarily reflects an implicit assertion that the goal is achievable based on current circumstances, an unadorned statement that a company is on track to achieve an announced objective, or a simple statement that a company knows of no issues that would make a goal impossible to achieve, are merely alternative ways of declaring or reaffirming the objective itself." The court pointed out that "[t]he statutory safe harbor would cease to exist if it could be defeated simply by showing that a statement has the sort of features that are inherent in *any* forward-looking statement."

The court stated that "statements of the assumptions underlying or relating to a declared objective are also deemed to be forward-looking statements." The court determined that "[t]his reasoning precludes [p]laintiffs' theory that [the company's] year-end goal rested on scheduling assumptions that [the company] knew it was unlikely to meet." The court concluded that "[a]ny such schedule about how future production would play out on the way toward the announced goal is simply a set of the assumptions about future events on which that goal is based." The court continued, stating that "[l]ike the goal itself, such projected timelines are forward-looking statements."

Ninth Circuit: Applies *Omnicare* Standard to Pleading Falsity of Opinion in Section 14(a) Claims

On April 20, 2021, the Ninth Circuit affirmed the dismissal of a putative securities class action alleging misrepresentations of fact and omissions in a proxy statement used to secure shareholder approval for the sale of the defendant company in violation of Section 14(a), Section 20(a), and Rule 14a-9. *Golub v. Gigamon*, 994 F.3d 1102 (9th Cir. 2021) (Wardlaw, J.). Plaintiff alleged that these misrepresentations of fact and omissions made certain statements of opinion in the proxy statement false or misleading. The court held that it would apply the standards for actionability for falsity under Section 11 explained in *Omnicare v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), to falsity of a statement of opinion under SEC Rule 14a-9 through either a misrepresentation-of-material-fact theory or an omission-of-material-fact theory.

The court explained that Rule 14a-9 prohibits any statement which, under the circumstances, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements not false or misleading. The court further explained that despite Rule 14a-9's use of the word "fact" it also permits "a plaintiff to plead and prove false the 'statements of reasons, opinions, or beliefs' of a company's directors[.]" (quoting *Va. Bankshares v. Sandberg*, 501 U.S. 1083 (1991)).

The court pointed out that the Ninth Circuit has not addressed how *Omnicare* affects claims alleging falsity of an opinion under Rule 14a-9. The court explained that in *Omnicare*, "the Supreme Court examined the standards for alleging falsity of an opinion under [S]ection 11[.]" The Ninth Circuit then referenced its decision in *Wochos v. Tesla*, 985 F.3d 1180 (9th Cir. 2021), which discussed *Omnicare* and summarized the three ways[2] that "a statement of opinion may nonetheless involve a representation of material fact that, if that representation is false or misleading, could be actionable." Citing *Wochos*, the court explained that "[s]uch a statement could potentially give rise to liability under an omission theory if the facts conveyed in that fashion are untrue, as would be apparent based on a more fulsome disclosure."

The court held "that *Omnicare*'s standards for pleading falsity of opinion—via either a misleading representation or omission—apply to claims arising under [S]ection 14(a), as implemented by Rule 14a-9."

The Ninth Circuit summarily dealt with plaintiff's allegations in a separate unpublished memorandum concluding that, with respect to the alleged misrepresentations and omissions in connection with statements of opinion, plaintiff failed to allege falsity or to overcome the PSLRA's safe harbor. *See Golub v. Gigamon*, No. 19-16975, 847 F. App'x 368 (9th Cir. 2021).

2. Specifically: (1) "every statement of opinion explicitly affirms one fact: that the speaker actually holds the stated belief"; (2) "some sentences that begin with opinion words like 'I believe' contain embedded statements of fact"; and (3) "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view."

Ninth Circuit: Affirmative Misrepresentation Allegations "Push" Mixed Securities Fraud Case Outside of *Affiliated Ute*'s Presumption of Reliance

On June 25, 2021, the Ninth Circuit reversed the denial of summary judgment to a defendant auto manufacturer in a putative securities fraud class action alleging that defendant made omissions and affirmative misrepresentations in offering memoranda relating to its secret use of defeat devices in its vehicles to hide unlawfully high emissions. *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2 F.4th 1199 (9th Cir. 2021) (Smith, J.). The Ninth Circuit held that the presumption of reliance established by *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), did not apply because plaintiff's allegations could not be characterized "primarily" as claims of omission. The Ninth Circuit remanded the case to the district court to further consider whether a triable issue of material fact exists.

In *Affiliated Ute*, the Supreme Court established the presumption of reliance in a case where plaintiff stockholders alleged "primarily a failure to disclose." The Court reasoned that if the stockholders were required to affirmatively prove reliance they "would have been forced to prove a speculative negative: that they would have relied on information about the secondary market before selling their stock had the bank disclosed it." Subsequently, in *Binder v. Gillespie*, 184 F.3d 1059 (9th Cir. 1999), the Ninth Circuit held that the "presumption should not be applied to cases that allege both misstatements and omissions unless the case can be characterized as one that primarily alleges omissions."

After acknowledging that plaintiff alleged an overarching omission (defendant did not disclose for years that it was secretly installing defeat devices), the Ninth Circuit pointed out that plaintiff also alleged "more than nine pages of affirmative misrepresentations that were made by [defendant] and relied upon by Plaintiff and its investment advisor." The court observed that plaintiff "does not face the difficult or impossible task of proving a speculative negative." The Ninth Circuit concluded that while this is a mixed case, plaintiff's "allegations cannot be characterized primarily as claims of omission, so the *Affiliated Ute* presumption of reliance does not apply." The court determined that "[t]hese affirmative misrepresentations . . . push this case outside *Affiliated Ute*'s narrow presumption." The Ninth Circuit explained that to hold otherwise would make the presumption available for all securities fraud claims "because all misrepresentations can be cast as omissions, at least to the extent they fail to disclose which facts are not true."

Ninth Circuit: Plaintiff Who Purchased Shares in a Direct Listing Has Standing Under Section 11 and Section 12(a)(2) Regardless of Whether Shares Were Registered or Unregistered

On September 20, 2021, the Ninth Circuit affirmed a ruling that a stockholder who purchased shares of a company that went public through a direct listing had standing under Section 11 and Section 12(a)(2) of the Securities Act even though he could not determine if he had purchased registered or unregistered shares in the direct listing. *Pirani v. Slack Techs.*, 13 F.4th 940 (9th Cir. 2021) (Restani, J.). The court held that plaintiff had standing because his shares "could not be purchased without the issuance of [the company's] registration statement, thus demarking these shares, whether registered or unregistered, as 'such security' under Sections 11 and 12 of the Securities Act."

Noting that this was a case of first impression, the court framed the issue as "what does 'such security' mean under Section 11 in the context of a direct listing, where only one registration statement exists, and where registered and unregistered securities are offered to the public at the same time, based on the existence of that one registration statement[.]" Section 11 of the Securities Act states, "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not mis-leading, any person acquiring such security . . . may, either at law or in equity, in any court of competent jurisdiction, sue—(1) every person who signed the registration statement . . . ." 15 U.S.C. § 77k(a). The court explained that under the NYSE's direct listing rule[3] a company must file a registration statement in order to engage in a direct listing. The court continued that the SEC "interprets this reference to a registration statement in the rule as an effective registration statement filed pursuant to the Securities Act of 1933." The court then noted that with a direct listing—as opposed to an IPO—both registered and unregistered shares are immediately sold to the public at the time of the effectiveness of the registration statement, and the same registration statement makes it possible to sell both types of shares.

The court determined that the company's "unregistered shares sold in a direct listing are 'such securities' within the meaning of Section 11 because their public sale cannot occur without the only operative registration in existence." As there was only one registration statement here, the court stated that all of the stock sold in this direct listing, whether labeled as registered or unregistered, was traceable to that one registration. The court determined that plaintiff pled facts sufficient to establish standing under Section 11 and affirmed the denial of dismissal. Separately, the court stated that "Section 12 liability (resulting from a false prospectus) is consistent with Section 11 liability (resulting from a false registration statement)." Accordingly, the court found that plaintiff also had statutory standing under Section 12(a)(2).

Delaware Supreme Court Decisions

Delaware Supreme Court: Plaintiff Need Not Explain Strategy in Section 220 Document Demand

On December 10, 2020, the Delaware Supreme Court held that when a Section 220 books and records inspection demand states a proper investigatory purpose it need not identify the particular course of action the stockholder will take if the books and records confirm the stockholder's suspicion of wrongdoing. *AmerisourceBergen v. Leb. Cnty. Emps.' Ret. Fund*, 243 A.3d 417 (Del. 2020) (Traynor, J.). The court further held

3. NYSE Listed Company Manual, Section 102.01B, Footnote E.

that, although the actionability of wrongdoing can be a relevant factor to consider when assessing the legitimacy of a stockholder's stated purpose, an investigating stockholder is not required in all cases to establish that the wrongdoing under investigation is actionable.

Reaffirming the credible basis test as the standard for investigative inspections under Section 220, the court held that "[t]o obtain books and records, a stockholder must show, by a preponderance of the evidence, a credible basis from which the Court of Chancery can infer there is possible mismanagement or wrongdoing warranting further investigation." The court determined that when a stockholder can present a credible basis from which a court can infer possible wrongdoing or mismanagement, a stockholder's purpose will be deemed proper under Delaware law. However, the court cautioned that "a corporation may challenge the *bona fides* of a stockholder's stated purpose and present evidence from which the court can infer that the stockholder's stated purpose is not its actual purpose." Further, the court explained that "when assessing the propriety of a stockholder's purpose," the court can imply "what the stockholders' intended use of the books and records will be."

Delaware Supreme Court: Post-Merger Standing Exists if Merger Fairness Is Challenged Due to Failure to Secure a Pending Derivative Claim's Value

On January 22, 2021, the Delaware Supreme Court reversed the Court of Chancery's dismissal, due to lack of standing, of post-merger claims challenging a merger's fairness for the controller's failure to recoup the value of derivative claims. [*Morris v. Spectra Energy*, 246 A.3d 121 (Del. 2021) (Seitz, C.J.)]. The court explained that "[w]ith limited exceptions, a merger extinguishes an equity owner's standing to pursue a derivative claim against the target entity's directors or controller." However, the court held that "the same plaintiff has standing to pursue a post-closing suit if they challenge the validity of the merger itself as unfair because the controller failed to secure the value of a material asset—like derivative claims that pass to the acquirer in the merger."

Referring to the three-part test[4] to evaluate standing on a motion to dismiss in *In re Primedia, Inc. Shareholders Litigation*, 67 A.3d 455 (Del. Ch. 2013), the court stated that there were "two errors in the [lower] court's materiality analysis at the motion to dismiss stage of the proceedings." The court stated that it was reasonably conceivable both that the general partner acted in subjective bad faith and that had plaintiff succeeded in the derivative suit challenging the reverse drop down transaction, the recovery could have been at least $660 million. The court concluded that "[a]pplying a further litigation risk discount at the pleading stage was inconsistent with the court's standard of review on a motion to dismiss for lack of standing."

The second materiality analysis error was that "even if it was proper to discount the $660 million in damages alleged in the complaint to reflect the public unitholders' interest in the derivative recovery, to maintain equivalence, the court should have compared the $112 million *pro rata* interest in the derivative claim recovery to the public unitholders' proportional interest in the merger consideration." The court explained that the merger consideration was $3.3 billion, the public unitholders had a 17% beneficial interest in the merger consideration and that an "apples-to-apples comparison would have compared $112 million to $561 million[ ]" (*i.e.*, 17% of $3.3 billion). The court determined that "[u]nder this calculation, the derivative claim was material at the motion to dismiss stage."

4. First, "the court must decide whether the underlying derivative claims were viable, meaning they would survive a motion to dismiss." Second, "the derivative claim recovery as pled must be *material* in relation to the merger consideration." Third, "the court should also assess whether the complaint alleges that the acquirer would not assert the underlying derivative claim and did not provide value for it." (emphasis added).

Delaware Supreme Court: In Overruling *Gentile v. Rossette* the Court Throws Out the Exception to *Tooley*'s "Simple" Test to Distinguish Between Direct and Derivative Claims

On September 20, 2021, the Delaware Supreme Court in a unanimous decision overruled *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006) reversing a Court of Chancery decision that held that plaintiff stockholders had direct standing to challenge a green energy company's private placement of common stock for allegedly inadequate consideration. *Brookfield Asset Mgmt. v. Rosson*, 261 A.3d 1251 (Del. 2021) (Valihura, J.). Plaintiffs alleged that the private placement harmed the energy company because the shares were issued at an unfairly low price and allegedly diluted plaintiffs' economic and voting power. The court agreed with defendants that there was a clear conflict between *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004), which established the test to distinguish direct claims from derivative claims, and *Gentile,* which served as an exception to *Tooley*. In support of its decision, the court noted the difficulty that courts have had in applying *Gentile* in a logically consistent way.

Under *Tooley*, whether a stockholder's claim is direct or derivative turns solely on: "(1) who suffered the alleged harm (the corporation or the stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Two years later, the *Gentile*[5] court allowed minority stockholder plaintiffs to proceed with direct claims and held that "a dual-natured claim arises where: (1) a stockholder having a majority or effective control causes the corporation to issue 'excessive' shares of its stock in exchange for assets of the controlling stockholder that have a lesser value; and (2) the exchange causes an increase in the percentage of the outstanding shares owned by the controlling shareholder, and a corresponding decrease in the share percentage owned by the public (minority) shareholders." A "dual-natured claim" is one that is both derivative and direct in character.

Agreeing with defendants that *Gentile* imposes confusion on *Tooley*'s straightforward and easy-to-apply analysis, the court held that the "claim is derivative because [plaintiffs] allege an overpayment (or over-issuance) of shares to the controlling stockholder constituting harm to the corporation for which it has a claim to compel the restoration of the value of the overpayment. Clearly, the gravamen of the Complaint is that the Private Placement was unfair and that [the energy company] suffered harm."

The court concluded that "the harm to the stockholders was not *independent* of the harm to the Company, but rather flowed indirectly to them in proportion to, and via their shares in, [the company]." The court stated that this alleged corporate overpayment falls "neatly" into *Tooley*'s derivative category. The court also observed that it saw "no practical need for the *Gentile* carve-out."

Delaware Supreme Court: Adopts Three-Part Demand Futility Test; Agrees That Exculpated Claims Do Not Excuse Demand as They Do Not Expose Directors to a Substantial Likelihood of Liability

On September 23, 2021, the Delaware Supreme Court affirmed a decision dismissing a derivative complaint for failing to make a demand on the board of a social media company under Court of Chancery Rule 23.1. *UFCW Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 2021 WL 4344361 (Del. 2021) (Montgomery-Reeves, J.). Notably, the court adopted the Court of Chancery's three-part test for demand futility blending the tests from *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984),[6] and *Rales v. Blasband*, 634 A.2d 927

5. In *Gentile*, minority stockholder plaintiffs claimed that the corporation overpaid its CEO/controlling stockholder when it forgave a portion of the company's debt to him in exchange for additional equity. The subsequent share issuance increased the CEO's equity position from 61.19% to 93.49%, while the minority stockholders suffered a corresponding decrease. The *Gentile* court determined that plaintiffs had pled two independent harms, specifically: "(1) that the corporation was caused to overpay (in stock) for the debt forgiveness, and (2), the minority stockholders lost a significant portion of the cash value and voting power of the minority interest."

6. "Under *Aronson*, demand is excused as futile if the complaint alleges particularized facts that raise a reasonable doubt that (1) the directors are disinterested and independent, or (2) the challenged transaction was otherwise the product of a valid business judgment."

(Del. 1993).[7] Agreeing with the lower court, the court held that exculpated care claims do not excuse demand under *Aronson*'s second prong because they do not expose directors to a substantial likelihood of liability. The court also determined that plaintiff did not plead with particularity that a majority of the demand board lacked independence.

The court pointed out that the company's charter contained a Section 102(b)(7)[8] clause, therefore, the directors faced no risk of personal liability from plaintiff's allegations. Under these circumstances the issue was whether a derivative plaintiff can rely on exculpated care violations to establish that demand was futile under *Aronson*'s second prong. The court affirmed the Court of Chancery's holding that exculpated care claims do not satisfy *Aronson*'s second prong. The court explained that when *Aronson* was decided rebutting the business judgment rule through allegations of duty of care violations exposed directors to a substantial likelihood of liability and raised doubt as to whether they could impartially consider demand. However, due to the enactment of Section 102(b)(7) and other corporate law developments since *Aronson*, exculpated breach of care claims no longer pose a threat that neutralizes director discretion.

Going forward, under the refined test, "courts should ask the following three questions on a director-by-director basis when evaluating allegations of demand futility: (i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand; (ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and (iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand." "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile."

As to the impact of the refined test, the court stated that "because the three-part test is consistent with and enhances *Aronson*, *Rales*, and their progeny, the Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law."

7. "Under *Rales*, demand is excused as futile if the complaint alleges particularized facts creating a reasonable doubt that, as of the time the complaint is filed, a majority of the demand board could have properly exercised its independent and disinterested business judgment in responding to a demand."

8. Section 102(b)(7) of the Delaware General Corporation Law "authorizes corporations to adopt a charter provision insulating directors from liability for breaching their duty of care."

This edition of the Securities Law Alert was edited by Peter E. Kazanoff / +1-212-455-3525 pkazanoff@stblaw.com and Josh Polster / +1-212-455-2266 joshua.polster@stblaw.com

New York

Martin S. Bell
+1-212-455-2542
martin.bell@stblaw.com

Marc P. Berger
+1-212-455-2197
marc.berger@stblaw.com

Brooke E. Cucinella
+1-212-455-3070
brooke.cucinella@stblaw.com

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

Stephen M. Cutler
+1-212-455-2773
stephen.cutler@stblaw.com

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

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

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

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

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

Linton Mann III
+1-212-455-2654
lmann@stblaw.com

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

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

Michael J. Osnato, Jr.
+1-212-455-3252
michael.osnato@stblaw.com

Joshua Polster
+1-212-455-2266
joshua.polster@stblaw.com

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

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

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

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

David Elbaum
Senior Counsel
+1-212-455-2861
david.elbaum@stblaw.com

Janet A. Gochman
Senior Counsel
+1-212-455-2815
jgochman@stblaw.com

Los Angeles

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

Palo Alto

Stephen P. Blake
+1-650-251-5153
sblake@stblaw.com

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

Simona G. Strauss
Senior Counsel
+1-650-251-5203
sstrauss@stblaw.com

Washington, D.C.

Meaghan A. Kelly
+1-202-636-5542
mkelly@stblaw.com

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

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

Hong Kong

Adam Goldberg
+852-2514-7552
adam.goldberg@stblaw.com

Simpson
Thacher

Simpson Thacher Worldwide

UNITED STATES

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

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

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

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

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

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-472-99-42-26

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

ASIA

Beijing
3901 China World Tower A
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

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