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CORPORATE GOVERNANCE BULLETIN

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FEATURE 1

RECORD $600-MILLION RECOVERY OBTAINED IN *CARDINAL HEALTH* CASE

A $600-million settlement for shareholders in the securities fraud class action against Ohio's biggest drug distributor, Cardinal Health, Inc., was approved in October.

The settlement is the largest ever obtained in the Sixth Circuit and represents a significant recovery for the class achieved by lead plaintiffs **Amalgamated Bank, as Trustee for the LongView Collective Investment Fund, LongView 600 Small Cap Collective Fund, LongView VEBA 500 and LongView Quantitative Fund; California Ironworkers Field Trust Funds; New Mexico State Investment Council;** and **PACE Industry Union-Management Pension Fund**.

"Judge [Algenon] Marbley's approval of this settlement is a tremendous victory for the shareholders that were victimized by Cardinal Health's fraudulent activity," said plaintiffs' attorney **Henry Rosen**.

Cardinal is a drug middleman with a huge market share of the multi-billion dollar pharmaceutical distribution business, buying from "Big Pharma" manufacturers and reselling and distributing drugs to nationwide pharmacies like CVS and Walgreens. As far as investors knew, Cardinal's business was booming – until the company's 2004 announcement that it was under investigation by the SEC for revenue misclassification.

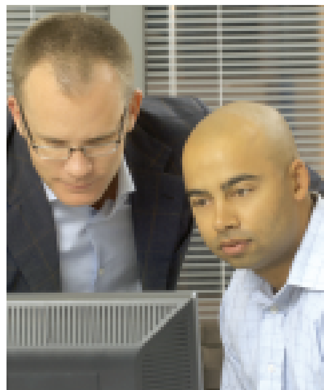
This announcement and subsequent restatement of earnings triggered a sudden decline in Cardinal's stock price during mid-2004, resulting in approximately $3 billion in losses for investors. The victims filed a class-action lawsuit on behalf of all purchasers of Cardinal common stock during the October 24, 2000 through July 26, 2004 class period.

As uncovered by plaintiffs' counsel in the course of investigating the fraud and conducting pre-trial discovery, insiders knew that Cardinal's long run of double-digit growth was coming to an end in 2000. To create the misleading impression of continued growth at historic high rates and meet market expectations, defendants embarked on a scheme to reclassify zero-margin bulk transactions as profitable operating revenue.

During the class period, the misclassification of revenue had the intended effect of inflating Cardinal's stock price to levels as high as $74 per share. Beginning in May 2004, however, the company was forced into making a series of embarrassing disclosures: first, that the SEC had launched a formal investigation; second, that the investigation focused on Cardinal's misclassification of revenue; and third, that Richard Miller, Cardinal's CFO, had been forced to resign. In the wake of the scandal, Cardinal's stock price lost 40% of its value, settling at $44 per share.

Class members' claims had to be filed by December 13. The claims administrator is currently reviewing and processing the claims, and will distribute the settlement proceeds to claimants once this process is complete.

In re Cardinal Health, Inc. Sec. Litig., No. C2-04-575, Final Settlement Hearing (S.D. Ohio Oct. 19, 2007).



Recovering assets. Reforming business.
Restoring confidence.

And now, resolving securities claims filing.

Recovering assets. Reforming business.
Restoring confidence.

Lead for Tots

By Al Meyerhoff

FEATURE 2

Contaminated by lead, millions of toys have been recalled by the federal Consumer Products Safety Commission (CPSC), from Barbie® to SpongeBob SquarePants™ to Thomas & Friends.™ More are likely on the way to a Toys "R" Us or Wal-Mart near you.

These events are not aberrations. They are the consequences of a failing and outdated regulatory regime – inadequate to safeguard even domestic production, and now overwhelmed by the global economy. Food and consumer products manufactured in US fields (yes, food is now "manufactured") and factories are at least subject to US quality control and (infrequent) inspections. Not so for the fields and factories of China, India and elsewhere; inspections at the border are little more than a fantasy.

Al Meyerhoff

If government doesn't protect us from poisoned food and dangerous products, then why have government at all?

Our regulatory "safety net" is broken. It was sewn together and then patched over several decades by the likes of Upton Sinclair, Ralph Nader and Congressman Henry Waxman – tacked together with overlapping laws and conflicting standards – the Food and Drug Act, Consumer Product Safety Act, Poison Prevention Act, Refrigeration Safety Act and many others. Whether it's food for humans, toys for Billy or kibble for Fido, this net has too many holes: (1) a lack of scientific toxicity data on "what's it do" for pesticides, mercury, lead, *E. coli* and dozens of other toxins and pathogens; (2) an enormous lack of residue chemistry data for "what's there," especially for imported goods; (3) when contamination is found, the cow is always already out of the barn, the hamburger already on the barbeque; (4) a lack of regulatory power to adequately punish offenders, initiate effective recalls or stop distribution; and (5) absence of centralized decision making, no single health- based standards, far too much "process," and a dearth of money. If government doesn't protect us from poisoned food and dangerous products, then why have government at all?

While China is catching most of the heat, the global economy has simply made matters worse. When children's toys present a possible health hazard, agencies like the CPSC placate, rather than protect, announcing one "recall" after another, each more a sham than the last. (How many parents know precisely when they bought a toy with what lot numbers?) Agencies routinely leave products on the shelves – and in people's homes – for weeks after a problem is found. Last summer, some one million pounds of shrimp, catfish and eel from China went straight through an FDA "import alert" to America's supermarkets. Recently, the USDA waited 18 days before recalling ground beef found to contain deadly *E. coli* O157:H7. Eventually, 21.7 million pounds of beef were recalled – the second largest in US history. That's enough for 80 million "Quarterpounders" – which, if laid end to end, would reach . . . well, a very long way.

What's been the Congressional response? Tepid. After "*l'affaire spinache*," Senator Dick Durbin (D-IL) and Representative Rosa DeLauro (D-CT) introduced legislation consolidating all food safety issues into one agency with a "food czar." The bill remains in committee. "Lead for Tots" has sparked cries of outrage. CPSC Chief Nancy Nord appears on television more often than Hillary Clinton. Congressional committees drag bureaucrats in for "oversight." But – if you'll pardon the expression – "Where's the Beef?"

What's a concerned consumer to do? Boycott toys? Stop eating tuna? Give up beef? Pass the spinach? No. None of that would work. The source of exposure to toxic contamination – air, water, food or consumer products – is irrelevant. *E. coli* is not only in spinach, it's in drinking water. Lead (its elimination from gasoline a success story) is ubiquitous, in the air, food, home and workplace.

And there is no stopping globalization and millions of products pouring in from countries with even greater problems. Consumer groups are calling for more inspections at the border and changes in trade agreements because – should our hog-tied Congress ever actually legislate – new laws are open to challenge as "non-tariff trade barriers." All of these reforms are necessary. But so is self-defense. After Union Carbide's Bhopal disaster, Clean Air Act amendments created the Toxic Release Inventory (TRI), establishing a "right to know." Major polluters were required to test their emissions and disclose amounts to those exposed. From the glare of this sunlight, dramatic reductions occurred.

This same approach should now be used for consumer products. Companies like Toys "R" Us, Mattel and Wal-Mart have made profits in the billions, and have profited again this past holiday season (although perhaps a tad less). They should be required to test their products extensively for dangerous chemicals – and disclose the results to their customers. So should other manufacturers of consumer products. The power of information – and the market – will do the rest. Congress knows how to write such a law. They have done it with TRI. Time to do it again, by amending a now nearly useless 30-year-old Toxic Substances Control Act.

Or we can stay the course, relying on neutered bureaucrats and corporate inaction. We do so at our own peril, however, and should keep in mind the recently expressed views of Mattel Chairman Robert Eckert: "The company discloses problems on its own timetable because it believes both the law and the [CPSC] enforcement practices are unreasonable," the Mattel head said. Mattel should evaluate hazards internally before alerting any outsiders, "regardless of what the law says." Oh really . . . .

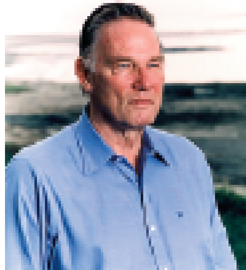
An environmental lawyer, Al Meyerhoff is the former director of the Natural Resources Defense Council's Public Health Program.

Robert A.G. Monks
Standing Up to the *Corpocracy*

FEATURE 3

Standing tall is a way of life for Robert A.G. Monks. Physically imposing at six-foot-six inches, Monks holds equal stature as a powerful force for shareholder activism, fighting in the arena of corporate governance. Monks' decades-spanning career took him from boardrooms to government and back. A noted author, Mr. Monks' latest opus is titled *Corpocracy: How CEOs and the Business Roundtable Hijacked the World's Greatest Wealth Machine – and How to Get It Back*. This book, published in December by John Wiley & Sons Inc., is Monks' seventh – and adds to Monks' formidable library of work.

Monks has literally "written the book" on corporate governance – in fact, his textbook *Corporate Governance*, co-written with Nell Minow, is used in MBA programs across the country. Monks has earned a reputation as a thought-provoking writer, having authored *The Emperor's Nightingale and Watching the Watchers: Corporate Governance for the 21st Century*. Presciently, both of these books pre-date the exposure of the Enron, WorldCom and AOL Time Warner corporate frauds.


Robert A.G. Monks

A scion of New England, Monks is the subject of a notable biography *A Traitor to His Class*. Given his pedigree, one would assume that Monks would have enjoyed a profitable career on Wall Street, perhaps defending the corporate class. Instead, Monks' life path directed him toward shareholder activism, including the founding of Institutional Shareholder Services. A life-long Republican, Monks campaigned in Maine for a seat in the United States Senate three times, in 1972, 1976, and again in 1996. Serving under President Reagan, Monks directed the Pension and Welfare Benefits Administration (now called the Employee Benefits Security Administration), working with Senator Jacob Javits. A staunch defender of the Employee Retirement Income Security Act (ERISA), Monks writes about the law with passion: "There is clarity and beauty in the statutory language that the pensioners' estate must be managed 'for their exclusive benefit' and that fiduciaries must consider 'solely' the interest of beneficiaries." Many consider Monks a "Father of ERISA."

Monks has long marched in the vanguard of the shareholder activism movement, never letting corporate America forget that shareholders are the true owners of a corporation and are responsible for acting in that capacity. Monks' aggressive advocacy for shareholder rights and responsibility, particularly concerning large institutional investors, may not have won him popularity on Wall Street (or Pennsylvania Avenue), but quietly and surely gained him recognition in boardrooms and classrooms. In 2001, The Robert Monks Professorship of Corporate Governance was endowed in his honor at Cambridge University.

As an investor and as manager of the LENS Fund (along with Richard Bennett, who currently oversees The Corporate Library; *see Corporate Governance Bulletin*, First Quarter 2006), Monks has urged shareholder owners to reform corporate boards using the proxy process and other means. Practicing what he preaches, Monks has served on a dozen boards and demonstrated that a well-governed corporation delivers greater long-term value. A rugged man at home on the rocky coast of Maine, Monks has been criticized as a gadfly by the Business Roundtable of the Wall Street elite. Institutional investors and students of the art of corporate governance take a different view.

In tribute, Nelson W. Aldrich, Jr., author of *Old Money*, writes, "Bob Monks is a truly rare creature, not only a businessman turned political activist, which is rare enough, but an activist in and on behalf of business, which makes him virtually unique."

NEWSBRIEFS

Coughlin Stoia Makes Plaintiffs' Hot List - Again

The National Law Journal (NLJ) has named Coughlin Stoia to its exclusive plaintiffs' hot list for the fourth consecutive year.

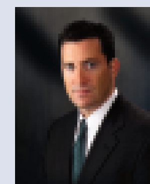
NLJ cited the Firm's "recoveries of $1 billion during the past year from a wide variety of complex litigation," and praised its leadership "at the front lines, pursuing actions involving stock options backdating and corporate takeover litigation."

Fighting the Big Dogs

Plaintiffs' lawyers are used to standing up for innocent victims and fighting back against powerful adversaries.

The attorneys at Coughlin Stoia are no exception, successfully recovering billions of dollars for investors defrauded by corrupt corporations, and winning battles to improve corporate governance at dozens of the world's largest companies. But this fight was different.

Paul Geller, a name partner at Coughlin Stoia and head of its Boca Raton office, "saved a pregnant woman and her small schnauzer, Midnight Duke, from two attacking pit bulls," reported *The Wall Street Journal*.


Paul J. Geller

As detailed in *The Palm Beach Post*, Geller, a jujitsu expert and Ultimate Fighting enthusiast, sprung into action when he saw the woman being mauled. "Geller, the Florida point man for the law firm that goes after the Enrons of the world, ran and kicked the biggest of the two pit bulls – something that victim Stacey Lewis told cops was 'a miracle.'"

After using his martial arts training to beat back the pit bulls, Geller transported Ms. Lewis and her small dog to the hospital, and thanks to him, both have made a full recovery.

"Mr. Geller is a true hero," Lewis' grateful husband told *The Palm Beach Post*. "There could have been a loss of life."

LITIGATION update

Motion for Lead Plaintiff Next "Biggest Loser"

A UK pension fund was recently chosen to lead the *GlaxoSmithKline PLC* securities class action over a number of funds with larger losses. In a significant development, **Avon Pension Fund, Administered by Bath & North East Somerset Council** was appointed as lead plaintiff, despite the fact that other institutional investors – namely a group of German funds with claimed losses substantially larger than Avon's – were also actively vying for the leadership position.

According to the Private Securities Litigation Reform Act of 1995, the court is to presume that the investor with the largest financial interest (or largest loss) is the "most adequate" to perform the important role of lead plaintiff. However, this presumption is not absolute, and courts also consider other factors in determining which plaintiff can best represent the interests of the absent class members. Included in these factors is a determination of whether the proposed lead plaintiff is subject to attacks or defenses not applicable to other members of the class.

In appointing Avon as lead plaintiff, Judge Louis L. Stanton relied on an earlier decision in the *Vivendi* case. In *Vivendi*, the court engaged in a lengthy analysis of German procedural law to determine whether a judgment from a foreign court would be recognized in Germany. The court noted that German courts might require actual, individual notice before recognizing a US judgment, and that the status of "collective actions remain[ed] unknown in Germany." The court determined that plaintiffs failed to show with any degree of certainty that German courts would enforce a US judgment, and as a result, the court excluded German purchasers from the class. Based on the *Vivendi* decision, Judge Stanton stated that "prudence cautions that the arguments [against German investors] are substantial, and in light of that risk it would be improvident to appoint the German Institutional Investor Group as lead plaintiff."

Given the *Vivendi* court's analysis, Judge Stanton then turned to Avon, and after determining that the Fund met the general prerequisites for serving as lead plaintiff, found that Avon was not subject to the same defense that disqualified the German funds: "English courts, when ultimately presented with the issue, are more likely than not to find that US courts are competent to adjudicate with finality the claims of absent class members and, therefore, would recognize a judgment or settlement in this action." Accordingly, the court appointed Avon as lead plaintiff and Coughlin Stoia as lead counsel.

"In appointing the Avon Pension Fund as lead plaintiff, the court issued a thoughtful opinion resolving certain issues that are at the cutting edge of the extraterritorial application of the federal securities laws," said plaintiff's attorney **Ramzi Abadou**.

The complaint, filed against global drug manufacturer GlaxoSmithKline (GSK), charges the company with making numerous positive statements regarding its aggressively marketed diabetes drug Avandia, while at the same time failing to disclose that the medication increases the risk of heart attacks in users.

Prior to revealing this damaging information to the market, the individual defendants unloaded $17 million of their own GSK shares. The truth was finally revealed on May 21, 2007, when the *New England Journal of Medicine* released an analysis linking Avandia to the increased risk of heart attacks. On this news, GSK's stock promptly collapsed as investors realized the serious risk associated with the drug, and the consequent overvaluation of GSK's stock.

Borochoff v. GlaxoSmithKline PLC, No. 07-Civ-5574, 2007 U.S. Dist. LEXIS 74621 (S.D.N.Y. Oct. 5, 2007); relying on *In re Vivendi Universal, S.A.*, 242 F.R.D. 76 (S.D.N.Y. 2001).

Motion for Leave to Amend Vioxx Heartache

A shareholder suit arising out of the Vioxx debacle at Merck & Co., Inc. recently secured the go-ahead when an appellate court allowed the plaintiffs to replead their case. Merck, the giant drug company, is alleged to have aggressively marketed the pain reliever Vioxx to millions of unsuspecting consumers – all the while knowing that the popular drug contained hidden side effects that caused heart attacks, strokes, and even death. Indeed, Congressional testimony found that Vioxx may be responsible for over 88,000 heart attacks or strokes in the US alone, and up to 55,000 deaths.

Plaintiffs representing the company in a suit against its officers and directors asked the United States Court of Appeals for the Third Circuit to review a district court decision denying Merck shareholders leave (or permission) to amend the derivative complaint. The shareholders sought to update their complaint with additional facts showing "demand futility" – *i.e.* that a pre-suit demand upon Merck's board to initiate and prosecute the lawsuit would have been futile. Importantly, the new facts had been gleaned from materials that the Merck defendants had produced *after* the lawsuit's initial filing. Relying on the general rule in derivative actions that prohibits "discovery" materials from being used to supplement demand-futility allegations, the lower court refused to allow plaintiffs to amend the complaint and dismissed the case with prejudice.

Following extensive briefing and argument, a unanimous Third Circuit panel reversed the lower court's decision and ruled in the shareholders' favor. In its published opinion, the panel concluded that the case's unusual posture presented an exception to the general rule against using discovery to plead demand futility.

Argued by plaintiffs' attorney **Joseph Daley**, the appeal's nuances clearly piqued the panel's interest. Of particular note were the judges' favorable comments during argument, including the senior judge's remark that the briefs had been "exquisite" and read "like literature."

In re Merck & Co., Inc. Sec., Deriv. & ERISA Litig., 493 F.3d 393 (3d Cir. 2007).

Motion to Dismiss No Closing Bell for NYSE

New York Stock Exchange, Inc. enjoys absolute immunity when it breaks its own rules – so long as it doesn't talk about it, according to a recent appellate court ruling in an investor-led lawsuit. Plaintiffs alleged that the NYSE failed to enforce the Exchange's rules prohibiting improper trading by its specialists. The suit also charged the Exchange with misleading investors about practices.

Although finding that the Exchange had immunity for its alleged failure to operate an honest market, the Second Circuit vacated the district court's ruling that investors who purchased securities on the NYSE could not sue the Exchange for making false statements about the integrity of the market it operated.

In so doing, the Second Circuit limited the precedential effect of its prior decision in the *Nortel Networks* case, which was misinterpreted as holding that *only issuers* of securities may be liable for making false statements. In its opinion, the court acknowledged that *Nortel* does not in fact stand for the scheme-liability limitation that "would place beyond the reach of Rule 10(b)-5 false statements made by underwriters, brokers, bankers, and non-issuer sellers."

"In short," the appeals court concluded, "the district court incorrectly read *Nortel* [] to mean that an action under Rule 10(b)-5 for false statements . . . lies only against the issuer of the security, or that only statements about a security issuer are actionable."

The court remanded the plaintiffs' action to the district court for further proceedings against the NYSE on the claims based on the Exchange's allegedly false statements.

In re NYSE Specialists Sec. Litig. (California Public Employees' Ret. Sys. v. New York Stock Exchange, Inc.), No. 06-1038, Opinion (2d Cir. Sept. 18, 2007); *Ontario Public Service Employees Union Pension Trust Fund v. Nortel Networks Corp.*, 369 F.3d 27 (2d Cir. 2004).

Motion to Dismiss Tie Goes to the Plaintiff

A securities class action victory in the District of Arizona is rare. However, the court recently denied motions to dismiss the complaint filed by the **Communications Workers of America Plan for Employees' Pensions and Death Benefits** against CSK Auto Corp. and its former officers and directors.

The complaint alleges that certain of CSK's executives (namely the former CEO and CFO) issued false statements about the company's income, earnings, and internal controls, causing the company's stock to trade at artificially inflated prices. The auto parts maker has since restated its financial statements issued during the class period and admitted to material errors in its accounting for inventory and vendor allowances. The complaint also alleges that CSK insiders sold off nearly 500,000 shares of CSK stock for insider trading proceeds of over $8 million.

Judge David G. Campbell heard oral argument on the motion to dismiss and issued an opinion that interpreted and applied the recent United States Supreme Court *Tellabs* decision. The court's analysis centered around the issue of pleading a *strong inference* of intent to commit securities fraud under the Private Securities Litigation Reform Act of 1995. Judge Campbell's opinion emphasized the four guiding principles recognized in *Tellabs* for deciding a motion to dismiss: (1) all factual allegations in the complaint must be taken as true; (2) all allegations in the complaint must be considered collectively in deciding whether the complaint pleads a strong inference of intent; (3) the court must take into account plausible opposing inferences; and (4) the inference of intent must be cogent and at least as likely as any plausible opposing inference. The Arizona court also acknowledged that "[t]he Supreme Court has now made clear [] that a tie goes to the Plaintiff."

In applying the *Tellabs* standards and denying the defendants' motion to dismiss, Judge Campbell held "that Plaintiff has alleged facts giving rise to a cogent inference of *scienter* that is as plausible as an inference of nonculpability."

Added plaintiffs' attorney **Bill Doyle**, "Public shareholders benefit when the courts properly apply the *Tellabs* standard to meritorious securities fraud claims, as the Court did in the *CSK* litigation."

Commc'ns Workers of Am. Plan for Employees' Pensions and Death Benefits v. CSK Auto Corp., No. CV06-1503, 2007 U.S. Dist. LEXIS 72424 (D. Ariz. Sept. 27, 2007); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007).

Motion to Dismiss Detroit Represents

The securities lawsuit alleging a scheme to willfully deceive The Cooper Companies, Inc.'s investors was recently given the go-ahead to proceed. The suit, filed by **Wayne County Employees' Retirement System**, **UNITE HERE National Retirement Fund** and **United Food and Commercial Workers Union Local 880 – Retail Food Employers Joint Pension Fund** alleges that Cooper insiders engaged in a scheme to win shareholder approval of a merger with rival Ocular Sciences, Inc.

Cooper is a medical products company that develops contact lenses. The company merged with Ocular in 2005. However, material facts regarding the true value of the newly created eyecare conglomerate, once disclosed, resulted in the collapse of Cooper's share price. The complaint alleges that the deception that led to the merger wiped out hundreds of millions of dollars of shareholder equity as share prices collapsed from $83.90 to $44.75. In the meantime, top Cooper and Ocular executives who orchestrated the shareholder approval of the disastrous merger pocketed over $100 million in insider-trading proceeds.

The complaint alleges that Cooper's executives sold shareholders a "bill of goods" regarding the

For more information on these and other cases, check out our website at csgrr.com

SETTLEMENT update

Direct General
Big Brother & The Holding Company

The shareholders of Direct General Corp. received welcome news when a federal judge approved the settlement of their class action suit. Led by the **Structural Ironworkers Local Union #1 Annuity, Pension and Welfare Funds**, shareholders recovered $14.96 million, including $2.96 million recovered from the well-lined pockets of the individual defendants.

Direct General is a financial services holding company known mainly for offering subprime automobile insurance in Florida and the Southeast. Run and largely owned by William Adair and family, Direct General was a classic "pump-and-dump" scheme. During the August 11, 2003 through January 26, 2005 class period, corporate insiders issued a series of false statements to investors regarding the company's new business and strong loss reserves.

As an insurer, Direct General's cash reserves were supposed to account for potential liabilities – claims made under insurance policies – and be adjusted every quarter. In August 2003, Direct General was faced with both rising claims and new legislation in Florida, potentially doubling the company's claims exposure. While other insurers increased their loss reserves, defendants assured investors that the company's reserves were adequate and that they had properly accounted for the new legislation. Defendants continued the deception for five quarters while engaging in massive insider stock sell-offs. Finally, on January 27, 2005, defendants disclosed the inadequacy of Direct General's loss reserves, and the company's stock price plummeted.

Plaintiffs' attorneys worked with investigators, forensic accountants and industry experts to win significant victories at both the motion to dismiss and class certification stage of the litigation. After digging into Direct General's financial records and internal correspondence, plaintiffs' attorneys identified both errors in the company's calculation of loss reserves and the individual defendants' motivation to mislead shareholders.

With evidence well in hand, defendants were forced to come to the bargaining table. Borrowing from a common adage, plaintiffs' attorney **Ramzi Abadou** remarked that "these books did not cook themselves – the defendants were the chefs."

Despite serious issues concerning the proper measurement of damages and the specter of dueling insurance and actuarial experts at trial, Structural Ironworkers secured a settlement that is not only highly beneficial to the class, but also ensured that the corporate wrongdoers felt the pain of turning over $2.96 million of their own money. Settlement funds will be distributed once the claims-filing process is complete.

In re Direct General Corp. Sec. Litig., No. 3:05-0077, Order (M.D. Tenn. July 20, 2007).

Litigation Update continued from page 5

proposed merger with Ocular, misstating and concealing material facts to obtain shareholder approval by means of deception, and the court found that defendants' misleading statements had resulted in the effect of deceiving the market.

Judge Cormac J. Carney's ruling permits the class action against Cooper and the named defendants to move forward and for discovery to begin immediately.

In re Cooper Companies, Inc. Sec. Litig., No. SACV-060169, Order (C.D. Cal. Oct. 23, 2007).

Motion to Dismiss
This Suit Isn't Going Back on the Rack

A shareholder lawsuit alleging inventory shenanigans recently overcame defendants' challenges. The motion to dismiss filed by Jos. A. Bank Clothiers, Inc., an upscale men's haberdasher, and its senior officers, Robert N. Wildrick, David E. Ullman and R. Neal Black, was recently denied by a federal court judge.

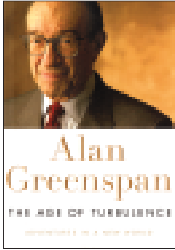
In its complaint, lead plaintiff **Massachusetts Laborers' Annuity Fund** alleges that defendants actively concealed from investors the inventory and profit-margin crisis facing Jos. A. Bank during 2005. Gross misjudgments about the response to the clothier's fall/winter 2005 merchandise line and poor execution of the company's aggressive store expansion initiative led to a pile-up of inventory. To liquidate this unprecedented glut, defendants drastically discounted prices and held continuous company-wide sales. While defendants were able to boost sales in the short term, this "success" came at a significant long-term cost – sales of the company's higher-margin spring 2006 and core merchandise suffered greatly, lowering profit margins and damaging the company's overall financial performance.

Despite knowing the full truth about the company's problems, defendants repeatedly assured the market that all was well. These positive statements about Jos. A. Bank's financial condition continued throughout the class period until defendants revealed that expected earnings and gross profit margins had nose-dived. The market reacted negatively to these disclosures. Indeed, in addition to a 29% drop in stock price, market analysts began openly questioning the candor of defendants and the credibility concerning defendants' previously sunny forecast. In the meantime, Jos. A. Bank's President and CEO quietly unloaded over 74% of his holdings during the same period and netted almost $36 million in illegal proceeds.

Defendants moved to dismiss the complaint, arguing that it failed to allege a material misrepresentation, holding fraudulent mindset (or *scienter*),

Continued on page 7

Recommended Reading



The Age of Turbulence: Adventures in a New World

Alan Greenspan
The Penguin Press

Give me control of a nation's money and I care not who makes the laws.
– Mayer Amschel Rothschild (Bauer)

Alan Greenspan presided over one of the most exciting and indeed turbulent eras of US financial history. Greenspan's roughly two-decade service as Chairman of the privately held banking system known as the US Federal Reserve spanned from the "Black Monday" crash of 1987 to the second term of President George W. Bush. Greenspan's tenure at the "Fed" was marked by rapid technological changes as well as key innovations in economics and finance. Arguably one of the most powerful men on the planet, financial markets often hung onto his every word.

Conscious of the effect of his words on the world economy, Greenspan's pronouncements were composed in meticulously chosen "FedSpeak." Now retired, Greenspan's voice is liberated. The first half of his autobiography covers Greenspan's early life, evoking a 10-year-old in short pants fascinated by statistics hidden within the 1936 New York Yankees' batting averages. As a teen, Greenspan trained as a professional clarinetist – occasionally a sideman to Stan Getz. While fellow jazzmen were in the "green room" smoking pot, Greenspan was doing their tax returns. Politically a blank slate, he was molded by the Ayn Rand circle of libertarians, and he reflects with nostalgia on the late night philosophic discussions at Rand's New York salon.

Courteous to a fault to friend and foe alike, Greenspan chronicles a career association with the world's powerful elite, beginning when he was plucked from monetarist obscurity to serve as one of President Richard M. Nixon's Advisors on Economic Policy, sworn in as Chairman of that board in 1974 (with Ms. Rand at his side) – and tells of his later romances with two famous dowagers of prime-time news: Barbara Walters and Andrea Mitchell. Greenspan served under President Gerald Ford, whom he admired greatly, and was catapulted into the public eye when nominated to be Chairman of the Fed under President Ronald Reagan – taking the reins from Paul Volcker just 69 days after the disastrous 1987 stock market plunge. At the helm of the Fed during the go-go '90s and the dot-com investment boom (and bust), Greenspan is at his analytical best while detailing how the "old economy" morphed into the "New Economy" – citing as an example how General Motors' pension fund invests in dot-com stocks like Google.

Recognizing this change and crafting monetary policy to best suit the transition indeed made Greenspan the "Maestro" (in the words of Bob Woodward) who could engineer "soft landings" and reduce the pains of recession. Greenspan's underlying core beliefs are consistent: the "invisible hand" coupled with open markets ensures optimal allocation of resources, government intervention should be limited to enforcing property rights, and the role of the Fed is one of cautious moderation – to "take away the punch bowl just when the party gets going."

Greenspan found President Bill Clinton to be well-informed and engaged in economic decision making, while he depicts President George W. Bush as a man who neither understands nor cares about the economic constraints he faces in fulfilling his agenda – he sees in Bush's insistence on tax cuts for the wealthiest an uncaring and economically destructive streak.

Not surprisingly, Greenspan's memoir glosses over the fact that he presided over the largest stock market contraction ever – $7 trillion of shareholder value was wiped out under his tenure in the early 2000s (some call it theft) – and perhaps more importantly for the modern age of corporate governance, under his watch, a record 10% of market value was quietly transferred from investors to the hands of private CEOs and directors under the guise of "stock option grants" and similar sleight-of-hand.

Greenspan stepped down in 2006. After nearly 20 years of being restrained to carefully crafted "Fedspeak," Greenspan can finally speak in his own voice.

Continued from page 6

and loss causation. In a well-reasoned opinion, Judge William M. Nickerson rejected all of these arguments and determined that, based on the exhaustive testimony from 18 confidential witnesses, plaintiffs "alleged material misrepresentations and omissions in satisfaction of . . . §10(b) as well as [a] compelling inference of *scienter*." On the issue of loss causation, Judge Nickerson concluded that plaintiffs' "broad allegations" of a significant stock drop following defendants' disclosure of true facts about Jos. A. Bank's financial condition and gross profit margins were "sufficient to satisfy the loss causation pleading requirements for a §10(b) claim at this stage of the litigation."

"This is a significant victory for Jos. A. Bank's shareholders in a very difficult jurisdiction," said **Jack Reise**, a Coughlin Stoia partner prosecuting the case. Added partner **Douglas Wilens**, "Now that we have defeated the motion to dismiss, we fully expect that discovery will further reveal the truth about the defendants' scheme to defraud Jos. A. Bank's shareholders."

Lefkoe v. Jos. A. Bank Clothiers, Inc., No. 06-cv-1892, Memorandum Opinion (D. Md. Sept. 10, 2007).

Calendar of Upcoming Events

January 28-29, 2008

Information Management Network
Ohio Forum on Public Retirement

The Columbus
Columbus, Ohio

The Ohio Forum on Public Retirement is designed to meet the needs of the five consolidated defined benefit public retirement systems of Ohio, the Ohio deferred compensation plan and the Cincinnati municipal retirement system. Topics include fiduciary responsibility, legal and legislative issues, healthcare benefits, actuarial assumptions, asset/liability management and best practices in plan management.

For more information, visit: www.imn.org

February 7-8, 2008

The University of Texas at Austin/School of Law
Conference on Securities Regulation and Business Law Problems

The Belo Mansion
Dallas, Texas

Featured Speaker: **Darren Robbins**, Coughlin Stoia Geller Rudman & Robbins LLP

This conference is focused on Securities Regulation and Business Law Problems, as well as a number of sessions that are directed specifically at issues surrounding directors and corporate governance.

For more information, visit: www.utcle.org

February 10-12, 2008

Financial Research Associates
Made in America 2008 – The 5th Annual Taft-Hartley Benefits Summit

Disney's Grand Floridian Resort & Spa
Lake Buena Vista, Orlando, Florida

This annual conference will cover topics on pension/investment and health and welfare funds. Industry speakers will address legislative regulatory and judicial issues affecting multiemployer benefit plans. Additional roundtables include Liability-Driven Investing, Commodities, DC/DB Plans, Absolute Returns and Securities Litigation.

For more information, visit: www.frallc.com

February 28-29, 2008

Information Management Network
11th Annual World Cup of Investment Management

Le Méridien Montparnasse
Paris, France

Featured Speaker: **Patrick Daniels**, Coughlin Stoia Geller Rudman & Robbins LLP

This conference includes roundtables and keynote presentations from senior investment officers from the region's pension schemes, representatives from the firms that manage pension scheme investments, and other industry service providers. Topics to be covered include macro investment trends and specific investment strategies.

For more information, visit: www.imn.org

March 5-6, 2008

C5
11th Annual D&O Liability Insurance

Russell Hotel
London, England

Featured Speaker: **Michelle Ciccarelli**, Coughlin Stoia Geller Rudman & Robbins LLP

This forum evaluates Directors & Officers policy structures, analyzes the issues with respect to the provision of global policies, and assesses the risk to European D&O insurers of class actions, from both plaintiff and defense perspectives.

For more information, visit: www.c5-online.com

March 17-19, 2008

Campaign for America's Future
Take Back America 2008

Omni Shoreham Hotel
Washington, D.C.

Featured Speaker: **Michelle Ciccarelli**, Coughlin Stoia Geller Rudman & Robbins LLP

This is the leading conference of progressives in the United States, featuring experts in covering a variety of fields, including the economy, social security, energy independence and healthcare.

For more information, visit: www.ourfuture.org

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