Robbins Geller Rudman & Dowd LLP

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Shareholders Prevail at Trial Over Rural/Metro Buyout

In a case that *The New York Times* wrote "shows just how greedy investment bankers can be," plaintiffs prevailed in a March 7, 2014 post-trial decision where Delaware Vice Chancellor J. Travis Laster found defendant RBC Capital Markets ("RBC") liable for aiding and abetting Rural/Metro Corporation's board of directors' fiduciary duty breaches in the $438 million buyout of Rural/Metro by Warburg Pincus LLC ("Warburg").

Legal action over Rural/Metro's buyout by Warburg in 2011 began in Delaware Chancery court and Arizona when shareholders charged that the company was being sold at an inadequate price. The case was consolidated, and the Delaware plaintiff and counsel named as lead. After that, lead plaintiff entered into an agreement to settle the action in exchange for supplemental disclosure by Rural/Metro and defendants' agreement not to oppose plaintiff's fee application. Shareholders approved the merger, and a fairness hearing was held in January 2012. The Arizona plaintiff (Joanna Jervis) and her counsel (Robbins Geller Rudman & Dowd LLP and Bouchard, Margules & Friedlander, P.A.) objected to the settlement as inadequate and argued that it did not take into account evidence of defendants' conflicts of interest. The judge agreed and rejected the settlement, and in a rare move, named Jervis as the new lead plaintiff and named her attorneys at Robbins Geller and Bouchard, Margules as lead counsel.

Lead counsel filed a new amended complaint, adding RBC and financial advisors Moelis & Company as defendants. As the case neared trial in 2013, Moelis settled for $5 million and the Rural/Metro defendant directors settled for $6.6 million, leaving RBC as the remaining defendant.

Robbins Geller presented evidence at trial demonstrating that RBC aided and abetted a pair of Rural/Metro directors whose desire to have the company sold very quickly was motivated by separate factors that put them at odds with Rural/Metro's (and its shareholders') best interests. RBC wanted the merger to be concurrent with one where Emergency Medical Services ("EMS"), the parent of Rural/Metro's rival, American Medical Response, was up for sale with some of the largest private equity shops showing interest. Even as RBC stood to gain $5.1 million from advising Rural/Metro in a buyout, they stood to gain $14-$20 million more if they could help finance one of

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Justices to Decide Important Securities Fraud Case

On March 5, 2014, the U.S. Supreme Court heard oral arguments in the *Halliburton Co. v. Erica P. John Fund* case. That case is an attempt by Halliburton Company to overturn the "fraud-on-the-market" theory, set forth in a 1988 U.S. Supreme Court decision, *Basic Inc. v. Levinson* ("*Basic*").

In *Basic*, the Court held that shareholder plaintiffs alleging fraud on a class-wide basis need not prove they individually or directly relied on a defendant's alleged misstatements. The Court reasoned that any misrepresentation, along with all material information about the stock, is reflected in the price of each share. Thus, investors are defrauded when they purchase those shares, even if they do not directly rely on the misrepresentation, because the price they paid was based on the misrepresentation. At its core, *Basic* set forth the rule that shareholders in a class action can benefit from that rebuttable presumption of reliance, which has come to be known as the "fraud-on-the-market" theory of reliance.

In the absence of that theory and its rebuttable presumption of reliance, shareholders might have to prove individual proof of direct reliance on the alleged misstatements, adversely affecting the ability to proceed on a class-wide basis. In short, overturning *Basic* could harm investors by negatively impacting the ability to pursue investment losses via securities fraud class actions.

A decision from the U.S. Supreme Court is expected by the end of June. ■

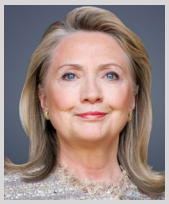
Institutional Investors Will Discuss Corporate Reform at Upcoming Public Funds Forum

GMI Ratings is pleased to announce the sixth annual Public Funds Forum, an invitation-only conference designed to train public fund representatives on practices to best fulfill fiduciary duties, protect portfolio assets and create long-term value. The 2014 Forum will be held from September 2-4, 2014, in San Diego, California. **Robbins Geller Rudman & Dowd LLP**, the premier securities litigation firm, and **Gilardi & Co. LLC**, class action administration experts, will be co-sponsoring the event.

Officials from public pension systems throughout the United States and abroad will meet to participate in panel discussions ranging from investment strategies, to protecting portfolio assets through securities litigation, to corporate reform. Speakers at this year's conference will include, among others, Former Secretary of State Hillary Rodham Clinton; Barney Frank, U.S. Congressman (1981-2012) and Chairman, House Financial Services Committee (2007-2011); Captain Richard Phillips, hero of the high seas and Captain of the Maersk Alabama, which was hijacked by Somali pirates; and Robert A.G. Monks, co-founder of GMI Ratings.

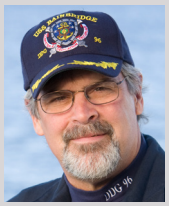
Attendees will participate in educational sessions and informative panel discussions to obtain strategies for navigating the current and future challenges presented by today's economy. The conference will include an exciting variety of activities, which will allow guests ample opportunity to network and build relationships. For the most current information about the sessions agenda and to register, please visit www.GMIconferences.com. ■

Distinguished Speakers Include:



Hillary Rodham Clinton
Former Secretary of State and Former U.S. Senator from New York

Barney Frank
U.S. Congressman (1981-2012); Chairman, House Financial Services Committee (2007-2011)



Captain Richard Phillips
Hero of the high seas and Captain of the Maersk Alabama, hijacked by Somali pirates

Shareholder Activism: New Wine in New Bottles

It seems that every day brings news of another shareholder agitating to change a company's strategic direction. Campaigns at eBay, Apple, ThyssenKrupp, Men's Wearhouse, CommonWealth REIT, Abercrombie & Fitch, and Itaú Unibanco are a few recent examples where activists have pressed their case for change.

"Shareholder activist" is an old term with many meanings. It is sometimes used to evoke images of hedge-fund "barbarians at the gates" who represent only their own short-term interests, ready to damage companies for the sake of a quick profit. At other times it is intended to conjure forth the idea of a lonely governance gadfly riding his hobby-horse, or a pension fund representing some "special interest." It is becoming clear, however, that today's "activists" are a far broader group, looking more and more like owners and less like barbarians or gadflies. Activism has changed – in its goals, in its tactics, and in its reception from the broader body of institutional shareholders.

There are four interlocking trends that help illustrate and make sense of this transformation:

The activist agenda has changed – and broadened. Activists are looking more seriously at issues of corporate governance and paying more attention to longer-term value creation. To be sure, much activism is motivated by the thought of returning some of the record levels of cash on company balance sheets to shareholders, or taking advantage of relatively easy credit to fund share buybacks and dividends. This kind of "balance-sheet activism" is just one of the strategic objectives of activists, however; many activist campaigns focus on more operational issues, such as cost control and product focus, that they believe will generate longer-term value. Still more activism focuses on governance issues – the qualifications and focus of board members, for example, and the processes by which the board and management operate.

Activists do not always get it right, as examples like Pershing Square's stinging losses at J.C. Penney or Herbalife illustrate. And activist interests are not always aligned with long-term shareholders. Notably, activist focus on increasing stock price or returning money to shareholders via share buybacks or special dividends can threaten – in some cases – to divert a company's resources away from longer-term investments. At the same time, research from Harvard's Lucian Bebchuk, among others, into the outcome of shareholder activist situations finds a positive relationship between activist campaigns and longer-term operating performance. At bottom, activists are proposing that companies take risks, just as incumbent boards and management do. They are just proposing a different bet. What activists do add to the mix, however, is that they force both sides to argue these different bets before shareholders.

Activist tactics have evolved. With funds flowing to activist strategies, activists have been able to take on bigger targets. For instance, Apple, one of the largest companies in the world by market capitalization, was the subject of successive campaigns to unlock its enormous cash hoard for shareholders. That activists can take on a $500 billion company – and be heard in the process – speaks volumes about the reach of current activism.

This reach is extended by some new plays in the activist playbook. Letter-writing and jawboning campaigns are still important, and we still see proxy contests such as at CommonWealth REIT, where the full board was removed. But activists have increasingly turned to partial proxy contests with short slates of directors, campaigning not for control of the company, but for a seat or two in the boardroom. This approach has appealed to many investors who might fear unseating management or changing control, but may see little harm or positive benefit in putting an alternative voice in the boardroom. This in turn raises the pressure on companies to settle with activists, providing a seat or two on the board rather than continuing to fight.

Some recent shareholder campaigns have taken this soft-sell approach even further, proposing that advisory votes on key strategic issues be put to shareholders, rather than (or in addition to) the blunter instrument of board nominations. Last year's campaign by CalSTRS and Relational Investors at Timken was notable in this regard, yielding a shareholder vote that set the company on the path of splitting up. Carl Icahn has borrowed from this idea at eBay, where he is nominating directors and proposing an advisory vote to split off eBay's PayPal subsidiary. At Darden Restaurants, Starboard Capital wants a shareholder vote on the divestiture of the restaurant group's troubled Red Lobster chain. At the same time, shareholder focus – from activists across the spectrum – has remained squarely on directors, with notable shakeups at Hewlett-Packard and JPMorgan Chase in 2013.

Companies are less insulated from shareholders. Takeover defenses and other devices that insulate boards have dramatically declined over the past decade. Classified boards are well on the road to extinction within the S&P 500, where most firms also have a form of majority voting. Poison pills have become scarce everywhere. To be sure, these changes do not leave boards naked before their

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Paying for Failure: Lavish Pay Independent of Performance

Investor interest in executive compensation and pay for performance is as strong as ever. Mandatory "say on pay" votes and enhanced disclosure of "golden parachute" compensation have focused attention on how effectively companies link executive pay to company performance.

Never is this clearer than when companies give generous goodbye packages to executives who depart after failing to deliver performance. These packages are the natural consequence of all-too-common compensation practices that promise spectacular rewards for success – and still pay for failure.

An example is the case of FTI Consulting, Inc., a consulting firm with rapid growth over the last decade but slowing growth in the past several years. In 2012, facing both succession concerns and long-term incentives that seemed unlikely to be earned, the company renewed long-time CEO Jack Dunn's employment agreement through 2015. In exchange, Dunn received a $4.5 million cash bonus and a guaranteed $1 million annual payment for five years following his departure, along with a generous $1.5 million base salary and continued short- and long-term incentive awards.

Facing a slowdown in performance over 2012 and 2013, Dunn resigned in December 2013. His termination, as is typical, was considered "without cause" and triggered full vesting of his outstanding equity awards – much of which was sold off within days – together with a $2 million cash lump sum severance and continuation of Dunn's $1.5 million salary through 2015. Between retention awards, regular salary, and severance awards, Dunn will have received nearly $10 million in cash completely unrelated to performance for his service, with an additional $3 million in salary continuation and five annual $1 million payments due under his employment agreement. The "retention agreement" from 2012 became a golden parachute that paid off nearly $18 million in cash, regardless of the company's performance, together with significant value from accelerated equity vesting.

Shareholders saw this coming: at FTI's June 2013 annual meeting, after seeing the details of Dunn's employment agreement, the company's advisory vote on executive compensation was opposed by about 60% of votes cast. In addition, each member of the compensation committee serving longer than one year received nearly 20% of votes cast against their re-election to the board.

The board and compensation committee appear to have taken little away from the strong shareholder rebuke of the executive pay policy. Indeed, current CEO Steven Gunby was welcomed in January 2014 with an employment agreement that included a $3 million stock sign-on award, also lacking performance vesting conditions. One month later, the compensation committee approved retention agreements for three executive officers, guaranteeing the $1 million bonuses merely for continuing their

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News Brief

Robbins Geller Again Receives a Top Ranking Among All Plaintiffs' Securities Firms in 2014 Plaintiffs' Hot List

Robbins Geller continues to demonstrate that the Firm is at the forefront of the securities litigation field. In 2014, the Firm was again selected for *The National Law Journal's* "Plaintiffs' Hot List." *The National Law Journal* annually designates 12 firms that "landed groundbreaking verdicts, negotiated big settlements and, in many cases, paved the way for the resolution of other disputes."

Each year, *The National Law Journal* "takes the pulse of the plaintiffs' bar by examining its most successful practices." In the article, *The National Law Journal* highlighted some of Robbins Geller's most notable victories. The cases named involved some of the most powerful banks and companies in the nation in securities class action, antitrust, and product liability litigation.

The National Law Journal noted: "In the 10 years that Robbins Geller Rudman & Dowd has been in operation, it's scored a string of impressive knockouts in complex securities litigation cases." One of those cases was *Household International*. After 11 years of hard-fought litigation, Robbins Geller achieved a judgment of $2.46 billion against Household International, now HSBC Finance Corp. The *Household* judgment is the largest judgment following a securities fraud class action trial in history.

Robbins Geller was also recognized for its largest settlement of 2013, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*. Judge John Gleeson of the Eastern District of New York granted final approval of the $5.7 billion recovery in December 2013. This case is believed to be the largest antitrust class action recovery of all time, and contains significant changes to rules regarding acceptance of Visa and MasterCard credit cards. ■

Supreme Court Update: *Omnicare* and *IndyMac*

On March 3, 2014, the United States Supreme Court granted certiorari in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund ("Omnicare")*, which was on appeal from the Sixth Circuit. By agreeing to hear this appeal, the Roberts Court again demonstrated its keen interest in securities fraud class actions, having decided over a dozen such cases since Chief Justice Robert's confirmation in 2005.

The issue for the Court to decide in *Omnicare* is whether, in a case proceeding under §11 of the Securities Act of 1933, a plaintiff must simply show that a statement of opinion was untrue or that a statement was subjectively false. The former is the current state of the law in the Sixth Circuit, where proof that the opinion was objectively false is sufficient; the latter is the current state of the law in the Second, Third and Ninth Circuits, where plaintiffs must prove that the speaker's actual opinion differed from the one expressed.

The reason this issue arises is that §11 provides an express remedy for investors who purchase securities pursuant to a registration statement that contained an "untrue statement of material fact" (or omitted a material fact that would render the statement not misleading).

The Sixth Circuit held that the speaker's state of mind when making the statement is irrelevant, rendering §11 a statute of strict liability. This is consistent with prior rulings from the Supreme Court: "Liability against the issuer of a security is virtually absolute, even for innocent misstatements." *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983); "[T]he issuer of the securities is held absolutely liable." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976).

Accordingly, the *Omnicare* case will have a direct impact on how courts evaluate statements of opinion in registration statements.

Just one week later, on March 10, 2014, the Supreme Court granted certiorari in yet another securities fraud class action, *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc. ("IndyMac")*, on appeal from the Second Circuit.

In securities cases, a statute of limitation generally begins to run at the point a plaintiff's cause of action accrues (typically when an investor discovers the loss is due to fraud), and can be tolled for equitable reasons. *See American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). However, a statute of repose under §11 generally begins to run at the time the securities were offered to the public. The issue in *IndyMac* is whether the filing of a securities fraud class action tolls the applicable statute of repose (3 years) for individual class members under §13 of the Securities Act of 1933. The Second Circuit held that it does not and cannot, because of the difference between a statute of repose and a statute of limitation. Specifically, the Second Circuit found that a statute of repose creates a substantive right to be free from the threat of litigation, and thus any tolling is illegal, as it would modify that right.

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Litigation Update

Sprint Investors Dial Up Class Certification Victory: *Can You Hear Us Now?*

On March 27, 2014, plaintiffs scored a significant victory in a case relating to the disastrous merger between Sprint Corp. and Nextel Communications when United States District Judge Eric F. Melgren granted plaintiffs' motion for class certification in full.

Pervasive problems arose almost immediately after Sprint's merger with Nextel. Cultural differences divided legacy Sprint and Nextel personnel, and technological differences eliminated the possibility of integrating the two companies' wireless networks. The combination of these difficulties, among others, led to the deterioration of the company's customer base. To cover up the company's worsening condition, defendants made repeated false and misleading statements about the company's business metrics and financials. Among other things, defendants falsely represented that Sprint had received billions of dollars in benefits from merger synergies, that Sprint had improved its customer mix as a result of tightening credit standards, that the integration of the Sprint and Nextel cellular platforms was progressing as planned, and that the goodwill associated with the Nextel purchase was not impaired. Defendants continued to conceal the widespread problems plaguing Sprint until late 2007, when Sprint forced the company's CEO and Chairman to "resign."

On January 18, 2008, Sprint revealed severe subscriber problems and disclosed that it was evaluating a charge in the fourth quarter related to a goodwill write-down. That day, the company's stock price dropped 24.8%, or $2.87 per share. Then, on February 28, 2008, Sprint disclosed that the company had recorded a goodwill impairment charge of $29.7 billion. As a result of these disclosures, in a little over six months, Sprint's stock price plummeted almost 70%, from its class period high of $23.25 per share to less than $7.15 per share.

In addressing the merits of plaintiffs' motion, the court – focusing largely on defendants' challenges to the fraud-on-the market theory of reliance for the proposed class of bond purchasers – found that plaintiffs had "established by a preponderance of the evidence that the Sprint Bonds traded in an efficient market during the class period." Therefore, the court explained, the "proposed class is entitled to the presumption of reliance afforded by the fraud-on-the-market theory." As part of the ruling, the court appointed the **West Virginia Investment Management Board**, **PACE Industry Union-Management Pension Fund** and **Skandia Life Insurance Company** as class representatives.

"This is a significant victory for lead plaintiffs and the class as we prepare this case for trial," said **Brian O. O'Mara**, a Robbins Geller partner. "We will continue our aggressive efforts to vindicate the rights of aggrieved Sprint investors harmed as a result of defendants' misconduct."

The Robbins Geller attorneys litigating the case are **Tor Gronborg**, **Brian O. O'Mara**, **Robert K. Lu**, **James E. Barz**, **L. Dana Martindale** and **Hillary B. Stakem**.

Bennett v. Sprint Nextel Corp., et al., No. 09-cv-2122-EFM-KMH, Memorandum and Order (D. Kan. Mar. 27, 2014). ■

Attorney Spotlight

Randall J. Baron

Robbins Geller partner **Randall J. Baron** is no stranger to accolades over his advocacy for shareholders. In 2012, he and fellow partner **A. Rick Atwood, Jr.** were named as *California Lawyer* magazine's Attorneys of the Year for their success in the Delaware-based Del Monte shareholder litigation over that company's buyout and financing, which returned an additional $89.4 million to Del Monte's shareholders (see 1Q12 *Corporate Governance Bulletin*). The court in Delaware noted that "it was only through the effective use of discovery that the plaintiffs were able to 'disturb[] the patina of normalcy surrounding the transaction.'" The shareholder recovery in the *Del Monte* action also got Baron named as *American Lawyer* magazine's "Litigator of the Week."

Baron also oversaw the class action that arose over the buyout of Kinder Morgan, Inc., and his efforts led to a $200 million common fund recovery for shareholders of the company who alleged that the buyout had left them underpaid for their shares (see 1Q11 *Corporate Governance Bulletin*).

Baron, a former Deputy District Attorney in Los Angeles, has most recently won praise over the results gained in litigation over the buyout of Rural/Metro Corporation and the role(s) of Royal Bank of Canada's investment bank ("RBC"). In a case where Baron and co-counsel took over control of the action after objecting to a prior lead plaintiff's counsel's proposed settlement, added defendants and took the case to trial, the result was a post-trial ruling (citing the *Del Monte* case) that turned heads in the legal world. Professor J. Robert Brown at TheRacetotheBottom.org observed that the ruling "has the potential to elevate the role of the board in the oversight of the sale process, particularly the supervision of investment banks." *The Wall Street Journal* wrote that the RBC ruling "Crowns a Career of Representing Shareholders," but Baron's not ready to let up just yet. ■

Settlement Update

Investors Obtain $95 Million in *VeriFone* Securities Class Action

In February 2014, United States District Court Judge Edward M. Chen approved a $95 million settlement in *In re VeriFone Holdings, Inc. Securities Litigation*, one of the largest securities class action settlements ever achieved in the Northern District of California.

Led by lead plaintiff **National Elevator Industry Pension Fund** and their counsel at Robbins Geller and O'Donoghue & O'Donoghue LLP, the settlement was the result of over seven years of tenacious litigation, including lead plaintiff's successful efforts to reverse the district court's dismissal of the action with prejudice.

The action was brought on behalf of purchasers of VeriFone stock between August 31, 2006 and April 1, 2008. VeriFone, based in San Jose, California, designs, manufactures, and sells electronic payment devices that enable acceptance and processing of electronic and point-of-sale payments for goods and services. During the class period, VeriFone's shares were dual-listed on both the New York Stock Exchange and the Tel Aviv Stock Exchange (the "TASE").

The complaint alleged that during the class period, VeriFone issued financial statements that were materially false and misleading and not prepared in accordance with GAAP because VeriFone (a) recorded millions of dollars of intercompany in-transit inventory that did not exist; (b) double-booked millions of dollars of manufacturing and distribution overhead costs; (c) failed to eliminate millions of dollars in intercompany profit in inventory; (d) improperly capitalized overhead into inventory; and (e) failed to write off excess and obsolete inventory.

As a result of this conduct, VeriFone was able to report significant increases in gross margins during the class period, which defendants told investors were the most important measure of the company's financial performance – indeed, "the ultimate barometer of the operational Excellence of this business." Defendants boasted that the better-than-expected gross margins were the result of "supply chain efficiencies in Israel that we never experienced before," "procurement synergies," "better commercial execution," and declines in fixed costs that provided VeriFone with a "structural gross margin advantage" and assured them the reported gross margins were accurate, stating that "we have tremendous transparency, financial transparency into the true cost of manufacturing and all the little nuanced items that roll up into that."

On December 3, 2007, VeriFone shocked investors by reporting that its financial results for the first through third quarters of 2007 should no longer be relied upon, principally due to errors in accounting related to the valuation of in-transit inventory and allocation of manufacturing and distribution overhead to inventory, each of which caused VeriFone to understate reported costs of net revenues and overstate gross margins and net income. VeriFone disclosed that its first through third quarter 2007 financial statements would therefore need to be restated, and that the final restatement would result in reductions to previously reported inventories of approximately $13.3 million, $23.9 million and $40.6 million in the first, second and third quarters of 2007, respectively, and corresponding reductions to previously reported net income of approximately $4.7 million, $9.7 million and $55.8 million. This, as well as other subsequent disclosures, caused VeriFone's stock price to plummet, resulting in millions of dollars of losses to investors.

Between October 15, 2008 and September 15, 2010, lead plaintiff filed four separate complaints in the district court, incorporating facts and allegations from an exhaustive investigation, including testimony obtained by the United States Securities and Exchange Commission ("SEC") from certain defendants in connection with the SEC's investigation of similar allegations, which ultimately yielded no fraud charges against VeriFone. Notwithstanding lead plaintiff's dogged efforts, on March 8, 2011, the district court dismissed the case with prejudice, finding that plaintiffs had failed to meet the stringent pleading standards for federal securities fraud claims.

Lead plaintiff appealed the district court's dismissal to the United States Court of Appeals for the Ninth Circuit, contending that the district court's dismissal was erroneous and that plaintiffs had more than adequately stated a claim against defendants. On December 21, 2012, the Ninth Circuit reversed the district court's dismissal, concluding that the "logical inference" was that "VeriFone's priority was meeting projections even at the expense of accuracy." Additionally, the Ninth Circuit found that defendants' attack on "individual allegations in isolation . . . cannot overcome the overwhelming inference drawn from a holistic view" that defendants were "deliberately reckless to the truth or falsity of the financial reports."

Following the remand of the action to the district court, the parties began to participate in discovery. As part of the discovery process, VeriFone produced hundreds of thousands of pages of documents to plaintiffs regarding the claims at issue, as well as additional transcripts of testimony taken by the SEC. The parties participated in mediation efforts during the discovery process, and in June 2013, an agreement was reached to resolve the action for $95 million.

Judge Chen approved the proposed settlement in February 2014, finding it "fair, adequate and reasonable," and noting that lead plaintiff had faced "very substantial risks" and performed "extensive work on the case." Significantly, the court rejected contentions that the Supreme Court's decision in *Morrison v. Nat'l Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), which limited the reach of U.S. securities laws to "[1] transactions in securities listed on domestic exchanges, and [2] domestic transactions in other securities," should bar foreign investors who purchased VeriFone shares on the TASE from recovering. The court found that neither *Morrison* nor any other authority addressed

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"the situation where, as here, a foreign investor purchases *domestic* securities on a foreign exchange which is also listed on a domestic exchange," and held that investors who purchased on the TASE were indeed eligible to participate in the settlement.

"We are proud to have achieved a substantial recovery for investors harmed by defendants' fraud," said **Patrick J. Coughlin**, who led Robbins Geller's litigation team. "While the SEC declined to bring fraud charges against these defendants, or achieve any recovery for shareholders, the fact that we were able to secure one of the largest recoveries ever in the Northern District of California is a testament to our unwavering commitment to shareholder rights, even in the face of regulatory inaction."

Robbins Geller attorneys **Patrick J. Coughlin**, **Christopher P. Seefer** and **Christopher M. Wood** were responsible for obtaining this settlement on behalf of the plaintiffs.

In re VeriFone Holdings, Inc. Securities Litigation, Master File No. C-07-6140 EMC, Order Granting Plaintiff's Motion for Final Approval and for Attorneys' Fees (N.D. Cal. Feb. 18, 2014).

$60 Million Recovered for Hospira Shareholders

Robbins Geller, together with its co-lead counsel, reached a $60 million settlement to resolve claims brought on behalf of shareholders against Hospira, Inc. and several of its executives. Hospira is a global specialty pharmaceutical and medication delivery company. The securities fraud class action arose from a series of false and misleading statements made by Hospira and its executives about the manner in which Hospira was addressing ongoing issues raised by the U.S. Food and Drug Administration ("FDA") and the supposed success of Hospira's ongoing cost-cutting initiatives.

In early 2010, Hospira hyped its Project Fuel campaign, which was designed to optimize its operations and increase shareholder value by improving Hospira's margins, fueling growth, and improving operational and manufacturing efficiency. As alleged in the complaint, defendants omitted and/or misrepresented that Hospira was beset by myriad manufacturing deficiencies and a host of design failures. As a result, it received warning letters from the FDA and faced an abnormal level of regulatory scrutiny that substantially threatened its current and future financial results and business prospects.

The Project Fuel "savings" (from gutting quality and kicking the can down the road on necessary remediation) were proven illusory, which Hospira and its executives acknowledged in the fall of 2011. They also informed shareholders that the cost to remediate Hospira's largest manufacturing plant in North Carolina would be an astonishing $375 million and, worse yet, the remediation would force a production slowdown, causing them to miss financial guidance. Defendants finally admitted that, rather than working in harmony, Project Fuel was "competing with" the required remediation of the quality issues that had led to increased FDA scrutiny in the first place. Shocked by these revelations, Hospira's stock price tumbled by 34%, and shareholders suffered millions of dollars in losses.

On February 13, 2013, the Honorable Amy J. St. Eve largely denied the motion to dismiss filed by the defendants. Having cleared that procedural hurdle, Robbins Geller and its co-lead counsel aggressively pursued discovery to obtain evidence that they intended to use against the defendants at trial. Plaintiffs, including Robbins Geller clients **Heavy & General Laborers' Locals 472 & 172 Pension & Annuity Funds** and the **Roofers Local No. 149 Pension Fund**, also filed a motion for class certification.

The parties agreed to participate in a mediation that culminated in the settlement just months before the completion of fact discovery. On March 31, 2014, Judge St. Eve preliminarily approved the settlement and ordered that notice be sent to the class. Judge St. Eve will consider final approval of the settlement at a hearing scheduled for August 5, 2014.

Robbins Geller attorneys **Jack Reise**, **James E. Barz**, **Stephen R. Astley** and **Jesse S. Johnson** prosecuted the action on behalf of the plaintiffs.

City of Sterling Heights General Employees' Retirement System v. Hospira, Inc. et al., No. 1:11-cv-08332 (N.D. Ill.). ■

the purchasers of Rural/Metro, and perhaps another $14-$35 million by financing an EMS purchaser. Indeed, RBC began putting Rural/Metro "in play" before the Board as a whole ever authorized such action. Judge Laster agreed, writing that not only did this action fall outside the range of reasonableness, but that it was exacerbated by RBC's motivation to have Rural/Metro in play at the same time as EMS. As Judge Laster noted, "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."

This turned out to be an even worse situation for Rural/Metro, because the entities in the running for EMS would find it extremely difficult, if not impossible, to put in bids on Rural/Metro due to confidentiality agreements, leaving less well-heeled potential purchasers with smaller bids to scrabble over Rural/Metro. In fact, the purchaser of EMS wrote that they were interested in bidding on Rural/Metro, and asked that Rural/Metro's final decision be put off until after the EMS deal closed. Ultimately they were refused, the bidding for Rural/Metro proceeded, and only Warburg submitted a "final" bid, at $17.00 per share, eventually increased to $17.25. As Judge Laster wrote, "RBC did not disclose that it was continuing to seek a buy-side role providing financing to Warburg." RBC even "worked to lower the analyses in its fairness presentation so Warburg's bid looked more attractive." Also, "[r]ather than pushing for the best deal possible for Rural, RBC did everything it could to get a deal, secure its advisory fee, and further its chances for additional compensation from Warburg."

When it became evident that Warburg was not planning to use RBC's services in financing the purchase, RBC redoubled its efforts, going so far as giving Warburg information about the mindset, competing views and internal dynamics of Rural/Metro's boardroom. Laster wrote that "[n]o one ever told the Board that its bankers had helped Warburg by giving . . . this information," or that senior bankers at RBC "spent March 26, 2011, making a final push to get a role in Warburg's financing, including by offering to fund a $65 million revolver" of credit to a different Warburg branch. "There was no conceivable upside for Rural from RBC's last-minute lobbying," noted Laster.

While its bankers were trying to ingratiate themselves with Warburg, RBC's M&A team was trying to make Warburg's offer of $17.25 look better by lowering the analyses of Rural/Metro's worth in the fairness opinion. When RBC finally gave Rural/Metro their "board book," there were less than 12 hours left before Warburg's offer expired. Laster found it "conflicted with RBC's earlier advice, contravened the premises underlying the Board's business plan . . . and contained outright falsehoods. . . . The evidence at trial demonstrated persuasively that the fair value of Rural's stock at the time of the sale exceeded the $17.25 per share that Warburg was willing to pay." Further, "[t]he combination of RBC's behind the scenes maneuvering, the absence of any disclosure to the Board regarding RBC's activities, and the belated and skewed valuation deck" was cited by Laster when he observed that "[b]ecause RBC misled the Board," the Board's valuation of Rural/Metro was skewed, and that "plaintiffs proved that 'the adequacy of the decisionmaking process [and the] information on which the directors based their decision' fell outside the range of reasonableness. . . . On the facts of this case, RBC acted with the necessary degree of *scienter* and can be held liable for aiding and abetting." Laster added that "RBC *created* the unreasonable process and informational gaps that led to the Board's breach of duty. . . . [B]ut for RBC's actions, a fully-informed Board would have had numerous opportunities to achieve a superior result."

Judge Laster's 91-page ruling continued to blister RBC, citing "the magnitude of the conflict between RBC's claims and the evidence" that may justify fee-shifting in this action. Laster "placed the least weight on the testimony of the two RBC managing directors who appeared at trial. Their accounts at times strained credulity, and the plaintiffs successfully impeached their testimony on multiple occasions."

"Boards are supposed to be looking out for shareholders," said **Randall J. Baron** of Robbins Geller, one of the lead plaintiff's attorneys on the case. "When that doesn't happen, that's where litigation comes in."

Judge Laster ordered the parties to submit expert reports to determine a range of fair value for Rural/Metro at the time of the merger with Warburg, to brief whether RBC's liability can be reduced by any amount due to other defendants' share of liability, and that plaintiffs could make a formal motion for a bad faith fee award at a later stage in the case.

Praise for lead counsels' success in this action has poured in from many sources. *Reuters* columnist Alison Frankel wrote that the trial and ruling "should scare M&A advisors." In a *Wall Street Journal* interview, retired Delaware Supreme Court Chief Justice Myron T. Steele said of lead counsel, "They are not what [many judges] would characterize as frequent fliers. They take cases to win them, and they push hard." In devoting nearly a week of blog postings to the case and decision, J. Robert Brown, Jr., University of Denver Sturm College of Law Professor and corporate governance and shareholder litigation blogger at TheRacetotheBottom.org wrote, "Is it the best case for shareholders in Delaware of the New Millennium? It may well be."

"Boards are supposed to be looking out for shareholders," said **Randall J. Baron** of Robbins Geller, one of the lead plaintiff's attorneys on the case. "When that doesn't happen, that's where litigation comes in."

In re Rural Metro Corp. Stockholders Litigation, No. 6350-VCL, 2014 Del. Ch. LEXIS 36 (Del. Ch. Mar. 7, 2014). ■

For more information on these and other cases, please visit: www.rgrdlaw.com

Shareholder Activism continued from page 3

perceived enemies; poison pills, for instance, remain a potent defense that most companies keep on the shelf, and few directors actually leave boards even after they have been rejected by a majority of shareholders. But together they do raise the general level of accountability from boards of directors to their shareholders.

An additional and perhaps unexpected wild card is say on pay, which has spread to most developed markets. Pay is typically a secondary focus, if at all, of activist campaigns. But directors pay an enormous amount of attention to pay votes, and the result has been more engagement between directors and their investors, including on issues beyond compensation. This means that directors have the opportunity to hear directly from their shareholders regarding which issues are of concern, and to better understand where activist campaigns might resonate.

Shareholders are listening. Activist campaigns have resonated for many investors. Part of this is driven by long-term trends affecting institutional investors: greater attention to proxy voting, but also greater levels of shareholder engagement with companies and a keener sense of the responsibilities of ownership and stewardship. As a result, many investors no longer see the "Wall Street Walk" – selling shares – as the primary way to assert one's ownership rights.

The rise of passive investing plays a role here as well. Investors have become more willing to hear out dissident arguments, especially when these arguments seem to be the best chance at long-term value creation at a firm. When dissidents can make their case, these large investors are increasingly ready to support their calls for change.

Perhaps the word "activism" no longer accurately describes these investor campaigns. Activism has taken its place alongside – and indeed, overlapping with – other well-known ways by which the owners of companies exercise their oversight over boards of directors and hold them accountable, together with familiar mechanisms like board elections, proxy voting, shareholder proposals, traditional engagement, and litigation. The owners of companies may find they need any or all of these mechanisms to protect and forward their interests. ■

Paying for Failure continued from page 4

employment through March 2015 (and vesting in case of their termination).

FTI Consulting is hardly the only company that has failed to revise its pay policy toward an emphasis on performance following a failed advisory vote. Abercrombie & Fitch and DFC Global Corp. have each received less than 30% support for pay plans in the past two years on the back of poor shareholder returns and compensation independent of performance. Big Lots, Comstock Resources and Gentiva Health Services, Inc. have each failed advisory votes for the past two years, while Nabors Industries Ltd. has failed the advisory vote for three years running. At Yahoo! Inc., shareholders strongly supported pay plans in 2013 after just 50% approval the year prior. However, the short-lived tenure of Chief Operating Officer Henrique de Castro could have a strong influence on the vote in 2014.

Mr. De Castro was a high-profile hire of CEO Marissa Mayer, who plucked him from Google to serve as COO of Yahoo! However, after just 14 months, the company issued a filing announcing that Mr. De Castro would be leaving the company immediately, and in an unusual move, specifically attributed his dismissal to non-performance. As part of his dismissal, he will receive all severance and equity awards detailed in his generous employment agreement. All told, the payout for his failed 14-month tenure could eclipse $100 million in total equity and cash payments. Indeed, it's very unlikely that shareholders will overlook this egregious example of pay for failure when voting on pay policy in the spring of 2014.

Despite these pay for failure examples, there are certainly publicly traded companies that are paying executives in accordance with performance. For example, Franklin Resources, Inc. is a clear-cut leader in terms of executive pay at a large-cap financial institution. For 2012, CEO Gregory Johnson received a base salary below the $1 million starting point of most large financial institutions. He received no discretionary bonus and perquisites of only $40,000. In fact, nearly 80% of his 2012 pay came from the satisfaction of specified performance measures regarding net income and earnings per share. Similarly, long-term awards vest according to specific operating results hurdles. This clear tie to pay for performance is likely why shareholders pass compensation plans at Franklin Resources by a margin of about 98%.

Bob Monks, a widely published expert on corporate governance, is the co-founder of GMI Ratings, an independent research firm specializing in environmental, social, and governance (ESG) data and analysis. For more of his commentary on topical issues in governance and investment, see his website at www.ragm.com. ■

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If, however, a statute of repose that begins to run at the time the investment was made cannot be tolled, plaintiffs face the danger that particularly skilled fraudsters could act with impunity, simply by concealing their fraud past the running of the statute of repose.

Of additional concern in *IndyMac* is the potential impact on investors who may wish to pursue individual litigation by opting out of a securities class action. If investors wish to preserve their rights to opt out of a potential class action, they would have to file their individual complaints much earlier, or risk having their claims barred by the statute of repose.

Accordingly, the *IndyMac* case could have a direct impact on how investors pursue securities fraud claims.

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, __ U.S. __, 134 S. Ct. 1490 (2014).

Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc., __ U.S. __, 134 S. Ct. 1515 (2014). ■

Calendar of Upcoming Events

Robbins Geller Rudman & Dowd LLP

Atlanta
Boca Raton
Chicago
Manhattan
Melville
Nashville
Philadelphia
San Diego
San Francisco
Washington, D.C.

(800) 449-4900
rgrdlaw.com

April 22-23, 2014

Sovereign Wealth Fund Institute (SWF)
Institute Fund Summit 2014 Asia

Peninsula Hotel
Hong Kong

Featured Speaker: **Darren J. Robbins**, Robbins Geller Rudman & Dowd LLP

This summit will bring together sovereign wealth funds, pension funds, superannuation funds, central banks, and other long-term public investors to discuss investing, asset allocation, risk, governance, economics, policy, trade, and other relevant issues.

For more information, visit: www.ifsummitasia.com

April 24, 2014

Practising Law Institute (PLI)
Handling a Securities Case 2014: From Investigation to Trial and Everything in Between

New York, New York

Featured Speaker: **David A. Rosenfeld**, Robbins Geller Rudman & Dowd LLP

This program takes attendees through all the issues that can arise in the most complex securities matters — from the initial government investigation to the filing of the civil cases to either settlement or trial. If you practice in this dynamic field, you know that the need to stay current and develop new strategies and tactics has never been more important. Our faculty of leading practitioners, government officials, and judges will update you on the latest best practices and case law.

For more information, visit: www.pli.edu

April 27-May 1, 2014

National Conference on Public Employee Retirement Systems (NCPERS)
2014 Annual Conference and Exhibition

Sheraton Chicago Hotel & Towers
Chicago, Illinois

Featured Speaker: **Darren J. Robbins**, Robbins Geller Rudman & Dowd LLP

More than 1,000 trustees, administrators, state and local-officials, investment, financial and union officers, pension staff and regulators attend this annual conference. Attendees benefit from comprehensive educational programming, dynamic speakers, and networking opportunities with money managers, investment service providers and public fund colleagues from across the nation.

For more information, visit: www.ncpers.org

April 29, 2014

Institutional Investor Forums
The 6th Annual Middle East Institutional Investor Summit

Emirates Palace
Abu Dhabi, United Arab Emirates

Featured Speaker: **Patrick W. Daniels**, Robbins Geller Rudman & Dowd LLP

This forum brings together international and regional investors with industry leaders, financial intermediaries and high-profile government officials. Sessions will highlight the range of investment opportunities available in the UAE and bring to light the progress being made in Abu Dhabi's ambitious diversification program. Speakers will also discuss the outlook for emerging markets globally and debate the strength of international and local financial markets.

For more information, visit: www.iiconferences.com

May 7-9, 2014

Council of Institutional Investors (CII)
2014 Spring Conference

Washington Marriott Wardman Park
Washington, D.C.

This conference will bring together public, union and corporate pension funds and educate members, policymakers and the public about good corporate governance, shareowner rights and related investment issues.

For more information, visit: www.cii.org

May 12, 2014

Latin Markets
Pension Fund Brazil Forum

JW Marriott
Rio de Janeiro, Brazil

Featured Speaker: **Patrick W. Daniels**, Robbins Geller Rudman & Dowd LLP

The Pension Fund Brazil Forum is a specialized asset allocation summit for Brazilian pension funds. Brazilian pension fund CIOs will direct and discuss the investment of more than USD$350 billion in assets to equities, ETFs, real assets, private equity, and other alternatives. Participate in a customized discussion panel to demonstrate expertise and source prospective clients in a gathering of Brazil's institutional investor leaders.

For more information, visit: www.latinmarkets.org

June 16-18, 2014

International Corporate Governance Network (ICGN)
2014 ICGN Annual Conference

Beurs Van Berlage
Amsterdam, Netherlands

This annual conference will inform institutional investors, business leaders, policymakers and professional advisors on best practice deadlines, leadership development, and emerging issues in corporate governance.

For more information, visit: www.icgn.org

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