ON THE RECORD with Robbins Geller Rudman & Dowd LLP

2nd Quarter 2015

The Supreme Court Rules on Securities Issuers' Liability for Misleading Statements of Opinion

On March 24, the Supreme Court ruled in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, that investors asserting a claim under Section 11 of the Securities Act of 1933 with respect to a misleading statement of opinion do not, as Omnicare had contended, have to prove that the statement was subjectively disbelieved when made.

The decision resolves a conflict among the circuits. Decades ago in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 208 (1976), and in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983), the U.S. Supreme Court opined that Section 11 subjects the issuer of a security to strict liability for a false or misleading registration statement, imposing liability without proof of knowledge of falsity on the issuer's part. More recently, some federal appellate courts adopted a different rule for misleading statements cast as expressions of "opinion." Most prominently, the Second Circuit held in *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011), that an investor must show not only that a statement of opinion included in a registration statement was misleading when made, but also that it was subjectively "disbelieved" by the issuer. In *Omnicare*, on the other hand, the Sixth Circuit held that Section 11 imposes liability for misleading statements without regard to the issuer's state of mind.

Omnicare, which provides pharmaceutical services for elderly residents of long-term care facilities, had issued securities pursuant to a registration statement expressing the belief that Omnicare operated within the law. According to the investors' complaint, Omnicare actually operated by paying and receiving illegal kickbacks, illegally promoting products such as Johnson & Johnson's Risperdal for dangerous off-label uses, and submitting false claims to Medicaid and Medicare. To settle governmental claims against it, Omnicare eventually paid roughly $150 million (plus interest) and agreed to enter a five-year corporate integrity rehabilitation program.

Although Omnicare's statements were cast as opinions expressing a belief that the company operated within the law, the Sixth Circuit rejected the contention that such statements cannot give rise to liability unless the issuer actually disbelieved them. It thus expressly rejected the Second Circuit's holding in *Fait*, which required investors to demonstrate that the issuer disbelieved the statements of opinion it made. It was enough, for the Sixth Circuit, that the statements of opinion ultimately turned out to be wrong.

The Supreme Court's decision in *Omnicare* resolves the resulting conflict between the circuit courts by holding that a statement of opinion may be actionable ***either*** because it was not believed, ***or*** because it lacked a reasonable basis in fact. The Court noted that in certain contexts, such as securities offerings, a statement of opinion may reasonably be understood as an "'implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he does know facts which justify it.'" The Court added that "an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion." It vacated the Sixth Circuit's decision and remanded with directions for the lower courts to consider whether Omnicare's statements were misleading under this reasonable-basis standard.

"This is a great day for investors," declared Robbins Geller partner **Eric Alan Isaacson**, who briefed and argued both the Second Circuit appeal in *Fait* and the Sixth Circuit appeal in *Omnicare*. Isaacson, who also appeared as counsel of record before the Supreme Court in *Omnicare*, added that "the Supreme Court's decision is consistent with the statutory text and with precedent recognizing that some statements of opinion are misleading because they lack a reasonable basis."

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A Note to Institutional Investors from Michael J. Dowd

Michael J. Dowd

With well over $300 million in settlements just from the cases in this quarter's newsletter, the Firm's attorneys continue to excel, whether relying on written briefs or speaking in front of a judge or jury. Our appellate team's efforts were rewarded at the Supreme Court when the Court resolved a circuit split without adopting Omnicare's contention that defendants' statements were only actionable if subjectively disbelieved. The nine-year-old case will return to the district court for additional litigation. We are also pleased to report the preliminary approval of the settlement made on the brink of trial in the *St. Jude Medical* action, as well as two more large settlements in the *Sprint* and *Duke Energy* class actions.

Our newsletter notes three new cases at the district court level where our litigation teams defeated motions to dismiss, two in securities cases on behalf of shareholders, and one in an antitrust action against defendants including Goldman Sachs and JPMorgan in an alleged conspiracy to inflate commodity prices paid by aluminum purchasers.

Cases may have class periods that range from days to years, and the cases may hinge on millions of pages of documents or on a single omission; yet the Firm has the intellectual and logistical resources to take on cases of any size and see them through to wherever the course of litigation might take them. We continue to offer not only exceptional litigation services for our clients but also remain leaders in the advocacy for corporate governance improvements and shareholder rights. ■

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Features

St. Jude Medical Settles as Trial Looms

On March 9, 2015, United States District Judge Susan Richard Nelson of the District of Minnesota granted preliminary approval to a $50 million settlement in the securities class action lawsuit *In re St. Jude Medical, Inc. Securities Litigation*. The agreement to settle the case subject to court approval came on the eve of trial after investor class members, represented by lead plaintiff and class representative **Building Trades United Pension Trust Fund** ("Building Trades"), obtained significant pretrial rulings in their favor and defeated attempts by defendants to obtain summary judgment and decertify the class.

Robbins Geller and named plaintiff **City of Taylor Police and Fire Retirement System** filed the case on March 18, 2010 on behalf of purchasers of St. Jude Medical, Inc. ("STJ") securities between April 22, 2009 and October 6, 2009, inclusive. The complaint names as defendants STJ, CEO Dan Starks, CFO John Heinmiller, Group President Mike Rousseau, and President of the Cardiac Rhythm Management Division Eric Fain.

The complaint alleged that STJ, a medical device manufacturer based in St. Paul, Minnesota, defrauded investors by utilizing heavily discounted end-of-quarter bulk sales to meet quarterly expectations, which created a false picture of demand by increasing customer inventory of STJ medical devices. Because these reported sales outpaced true demand, customers' shelf stock built up and put STJ's ability to make future sales at risk. The complaint also alleges that defendants issued deliberately inflated guidance to investors that was contradicted by STJ's internal forecasts and concealed the extent to which an ongoing economic recession was affecting or could potentially affect sales and demand for its products. According to the complaint, due to the company's extensive reliance on end-of-quarter bulk sales of products in amounts that exceeded customers' demand, STJ's business was at great risk of declining during an extended recession.

"Through 4-1/2 years of hard-fought litigation, we succeeded in obtaining strong evidence to present at trial to prove the fraud that had been perpetrated on Building Trades and the other members of the class," said Robbins Geller partner **Dennis J. Herman**. "The defendants are represented by skilled counsel who left no stone unturned in their efforts to defeat liability. That we were able to withstand these attacks and were prepared to present this case to a jury is a testament to the efforts of our trial team and our commitment to pursuing a recovery on behalf of injured investors, no matter the obstacles placed in our way." The $50 million recovery, voluntarily reached with the assistance of a respected mediator, reflects the merits of the claims while avoiding the cost and uncertainty of continued litigation.

Building Trades and Robbins Geller aggressively litigated this action up to the eve of the scheduled February 23, 2015 trial. Building Trades overcame defendants' motion to dismiss on December 23, 2011; successfully obtained an order certifying the case as a class action on October 25, 2012; and prevailed in all significant respects on defendants' motion for summary judgment on August 11, 2014. During this time, Robbins Geller attorneys engaged in expansive discovery, spanning approximately three years, developing evidence that would have been presented at trial to demonstrate fraud. Robbins Geller attorneys reviewed more than 230,000 documents obtained from STJ and conducted more than 40 depositions, including of current and former STJ employees and experts defendants retained to testify at trial.

Robbins Geller attorneys **Darren J. Robbins**, **Dennis J. Herman**, **Daniel S. Drosman**, **Luke O. Brooks**, **Matthew S. Melamed**, **Armen Zohrabian**, **Katerina M. Polychronopoulos** and **X. Jay Alvarez** litigated this case on behalf of the class. The final approval hearing is scheduled for June 12, 2015.

In re St. Jude Medical, Inc. Sec. Litig., No. 0:10-cv-00851-SRN-TNL (D. Minn.). ■

An Update on the SEC's Disclosure Effectiveness Project

Shareowners rely on corporate disclosures to make investment and voting decisions. However, these disclosures quite often lack the detail and insight that shareowners desire. As required by the Jumpstart Our Business Startups (JOBS) Act, the SEC is currently undergoing a review of required corporate disclosures with their Disclosure Effectiveness Project.

In December 2013, the SEC issued a report to Congress summarizing its initial review of the corporate disclosures required under Regulation S-K, which governs the reporting requirements for Forms S-1, 10-K, 10-Q, 8-K and proxy statements. In this initial review, the SEC has chosen to focus on the S-1 and 10-K and 10-Q, leaving an overhaul of the proxy statement requirements for a later time (the rules governing the Form 8-K were revised recently in conjunction with the implementation of the Sarbanes-Oxley Act). In addition to providing the historical background of many important areas of disclosure in Forms S-1 and 10-K, the report presents the SEC staff's recommendations for further review of disclosure reform.

One recommendation calls for any revised disclosure rules to eliminate the need for duplicative information. There are several examples under the current reporting regime where similar information is required in two different places in a company's SEC filings (*e.g.*, in the MD&A and in a footnote to the financial statements). Not only is this cumbersome for the companies preparing the documents, but it also can be misleading for the shareowners and other users. The SEC plans to work with the Financial Accounting Standards Board to eliminate requirements for duplicative information to the extent possible.

Another recommendation made by the SEC calls for companies to focus on information that is material for making investment and voting decisions. The current disclosure rules require information that may no longer be important to investors or that is readily available elsewhere (*e.g.*, historical stock price information). When considering this issue, the SEC staff has suggested that "any recommended revisions should emphasize a principles-based approach … while preserving the benefits of a rules based system affording consistency, completeness and comparability of information" across companies.[1]

A third recommendation addresses the issue of changes in technology and the potential for the disclosure requirements to be "flexible enough to adapt to dynamic circumstances."[2] Included in this review, the SEC will explore ways to better use technology to deliver company information, "both through the EDGAR system and other means."[3] They will also "consider ways to present information that would improve the readability and navigability of disclosure documents."[4]

Upon the release of this report, SEC Chair Mary Jo White said that the SEC "will seek input from companies about how we can make our disclosure rules work better for them and will solicit the views of investors about what type of information they want and how it can be best presented."[5] Approximately 30 organizations have submitted Comment Letters to date.[6]

More recently, the SEC has called for companies to be proactive and make changes to their filings before it is required. Several companies have taken this initiative and provided a higher level of disclosure than currently required. In 2014, the Council of Institutional Investors issued reports highlighting companies that have the "Best Disclosure" regarding board evaluations and director qualifications and skills.[7]

While many shareowners agree that improved disclosure will be beneficial, they may also have concerns regarding the implications of changes to disclosure requirements. Institutional investors that have holdings in hundreds, if not thousands, of U.S. companies must manage all of the data provided in the SEC disclosures filed by these companies to make voting and investment decisions. When the disclosure requirements call for more descriptive discussions about corporate practices and performance, it becomes more difficult to capture the data and to analyze it for voting and investment purposes. ■

Annalisa Barrett, Senior Advisor at ValueEdge Advisors, is also a Clinical Professor of Finance at the University of San Diego's School of Business Administration. She teaches graduate courses in Corporate Governance and undergraduate courses in Financial Management, Financial Statement Analysis and Personal Finance. Her research interests focus on corporate governance practices, board composition and director demographics. She is the author of numerous reports and articles that have been published in a variety of practitioner journals. She has also been quoted in several periodicals, and her research has been featured on the front page of *The Wall Street Journal*.

1 U.S. Securities and Exchange Commission, *Report on Review of Disclosure Requirements in Regulation S-K*, December 2013, at 98.
2 *Id.* at 93.
3 *Id.* at 98.
4 *Id.* at 98-9.
5 SEC press release dated December 20, 2013, *available at* https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540530982#.VM8N1KPTnDc.
6 Comment Letters are available for review at https://www.sec.gov/comments/disclosure-effectiveness/disclosureeffectiveness.shtml.
7 These reports are available to the public on the CII's website at http://www.cii.org/special_reports.

Proxy Season Roundup

Proxy season 2015 is starting off with an unprecedented series of capitulations by major corporations on what may turn out to be the most significant shareholder initiative to date: proxy access.

New York City Comptroller Scott M. Stringer's Boardroom Accountability Project includes 75 shareholder proposals calling on portfolio companies to give shareowners the right to nominate directors at U.S. companies using the corporate ballot.

Of the resolutions filed, with some overlap included, 33 were at carbon-intensive coal, oil and gas, and utility companies, 24 at companies with little to no diversity on their boards, and 25 at companies that received significant opposition by shareholders to excessive executive compensation put to an advisory shareholder vote in 2013. Similar proposals have been filed by TIAA-CREF, CalPERS, and individual investor James McRitchie, among others. In general, they call for companies to allow board candidates submitted by holders of at least three percent of the stock for at least three years to be included on the company's proxy.

Even if these proposals received a majority vote from shareholders, the company would not have to adopt them. And of course even if they did adopt them and shareholders nominated one or more candidates, they would not be elected unless they received majority support from shareholders. This follows a successful challenge to the SEC's rule that would have imposed proxy access on companies pursuant to a provision in the Dodd-Frank legislation. When the rule was invalidated by the courts for inadequate cost-benefit analysis, the SEC put any further attempts to implement the provision on hold.

And yet, a number of major companies have agreed to adopt proxy access, including General Electric, Citigroup, Wendy's, and Prudential. Institutional Shareholder Services Inc. Special Counsel Patrick McGurn told *Pensions & Investments* magazine, "Proxy access is really the 800-pound gorilla for this proxy season. It's actually surprising access has had an impact on the broader list of topics this season."

An outlier is Whole Foods, which was so flummoxed by McRitchie's proxy access proposal that the company tried to block it with their own proposal, which they argued was essentially similar, even though it would have imposed a mathematically insurmountable threshold for submitting candidates. Initially the SEC agreed, but when they reversed their ruling, Whole Foods responded by postponing its annual meeting for six months.

This progress on proxy access shows that shareholders realize the most significant proxy issue is who serves on the board, and that the best assurance of genuine independence is communicating to directors that they are elected by shareholders, not appointed by management. It also shows that corporate managers and boards are beginning to understand that accountability to shareholders is the best guarantee of a robust, sustainable business.

The other big issues for the 2015 proxy season include continued focus on excessive executive compensation, disclosure of political spending, and sustainability/environmental issues. The AFL-CIO has submitted proposals to stop "government service golden parachutes," payments from corporations (primarily financial services companies) to employees who leave for government service, and CtW Investment Group is calling for a "no" vote on the "say on pay" executive compensation proposal at Domino's Pizza. Marco Consulting Group has coordinated proposals for 15 institutional investors concerning separating the CEO and board chair positions, pay, proxy access, and majority vote. UAW's proposals include focus on stronger clawback policies and better disclosure on the way clawbacks are used. We are also beginning to see some concerns about cybersecurity risk.

One of the most innovative proposals of the year was submitted to Citigroup by Bartlett Naylor. The proposal would require a significant portion of executive pay to be deferred and if penalties are assessed against the company, applied to pay the fines. Naylor noted in his supporting statement:

On July 14, 2014, the Department of Justice "announced a $7 billion settlement with Citigroup Inc. to resolve . . . claims related to Citigroup's conduct in the . . . issuance of residential mortgage-backed securities (RMBS) prior to Jan. 1, 2009. The resolution includes a $4 billion civil penalty – the largest penalty to date under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA). . . . Citigroup acknowledged it made serious misrepresentations to the public." This monetary penalty was borne by Citi shareholders who were not responsible for this unlawful conduct. Citi employees committed these unlawful acts. They did not contribute to this penalty payment, but instead undoubtedly received bonuses.

In 2014, Citi refined its clawback policies. In addition to recouping incentive compensation for employees who violate the law, the Compensation Committee "may also cancel awards if an employee failed to supervise individuals who engaged in such behavior."

This refinement is welcome. It reflects that the Board agrees that compensation serves as an appropriate tool for deterrence and that restrictions should apply more broadly than simply to those determined to have violated the law. We believe the further refinement in our resolution can help strengthen Citi's policy by making compliance with the law a group concern.

President William Dudley of the New York Federal Reserve outlined the utility of what he called a performance bond. "In the case of a large fine, the senior management . . . would forfeit their performance bond. . . . Each individual's ability to realize their deferred debt compensation would depend not only on their own behavior, but also on the behavior of their colleagues. This would create a strong incentive for individuals to monitor the actions of their colleagues, and to call attention to any issues. . . . Importantly, individuals would not be able to 'opt out' of the firm as a way of escaping the problem. If a person knew that something is amiss and decided to leave the firm, their deferred debt compensation would still be at risk."

The statute of limitations under the FIRREA is 10 years, meaning that annual deferral period should be 10 years. ■

Robbins Geller Defeats Intercept Pharmaceuticals, Inc.'s Motion to Dismiss Securities Fraud Claims

On March 4, 2015, Judge Naomi Reice Buchwald of the United States District Court for the Southern District of New York denied in full a motion to dismiss federal securities fraud claims brought by lead plaintiff George Burton against Intercept Pharmaceuticals, Inc. and the company's Chief Executive Officer, Dr. Mark Pruzanski, and Chief Medical Officer, Dr. David Shapiro (the "defendants"). The complaint alleges that the defendants repeatedly touted good news to investors concerning the results of a Phase IIb drug trial of Intercept's key drug, obeticholic acid ("OCA"), while intentionally failing to disclose significant safety concerns that had also been discovered during the trial.

The pivotal Phase IIb trial was conducted on behalf of Intercept by the National Institute of Diabetes and Digestive and Kidney Diseases ("NIDDK"), a federal government agency that supports medical research. According to records obtained by Robbins Geller from the NIDDK through the Freedom of Information Act, the defendants learned on January 6, 2014 that despite the fact that OCA had demonstrated efficacy, the trial was being halted because significant lipid abnormalities had been found in patients taking the drug. When Intercept disclosed these findings to the public on January 9, 2014, defendants chose to report the positive news about the efficacy of OCA while deliberately withholding the negative news concerning the significant lipid abnormalities. As a result of defendants' conduct, the price of Intercept common stock skyrocketed from $72 per share on January 9, 2014, to $445 per share by the close of trading on January 10, 2014.

However, defendants' scheme quickly unraveled. After the markets closed on January 10, 2014, the NIDDK took the unusual step of releasing a statement publicizing the fact that patients taking OCA in the Phase IIb trial had also experienced "significant lipid abnormalities." *The Wall Street Journal* and other media outlets seized on the NIDDK's release that evening, and, in response to the news concerning the previously concealed safety issues, Intercept's stock price plummeted by approximately $200 per share between January 13 and January 14, 2014, causing significant damages to institutional and individual investors.

In denying their motion to dismiss, the court held that defendants chose "only to report the positive development" concerning the Phase IIb study and engaged "in the sort of selective disclosure that creates a real possibility of misleading investors." Now, having defeated defendants' motion to dismiss, Robbins Geller will continue to prosecute the claims against Intercept and two of its top executives. According to Robbins Geller partner **Tor Gronborg**, "This was an egregious attempt to manipulate a government agency, the NIDDK, and mislead investors. Judge Buchwald's order clears the way for us to move forward and recover the damages caused by defendants' fraudulent conduct."

Robbins Geller attorneys litigating the case are **Samuel H. Rudman**, **Tor Gronborg**, **Trig Smith**, **David A. Rosenfeld**, **Tricia L. McCormick** and **Kevin A. Lavelle**.

In re Intercept Pharmaceuticals, Inc. Securities Litigation, No. 14 Civ. 1123 (NRB) (S.D.N.Y.).

Robbins Geller Foils Goldman Sachs and JPMorgan's Motion to Dismiss Claims in Aluminum Antitrust Action

On March 26, 2015, Judge Katherine B. Forrest, a federal district judge in Manhattan, denied in large part defendants' motion to dismiss plaintiffs' complaint against defendants Goldman Sachs & Co., JPMorgan Securities plc, Metro International Trade Services LLC, and others.

The complaint alleges that defendants violated the antitrust laws by conspiring to inflate their profits through a series of agreements between their metals warehousing businesses and their commodities trading arms, effectively controlling the price for aluminum for their own financial gain. In denying the motion to dismiss, the court said that plaintiffs have "sharpened their story . . . such that they have now stated a plausible claim under §1 of the Sherman Act." As the court noted, "Defendants consist of two groups: financial institutions with commodities trading arms that trade financial instruments (such as warrants) tied to physical metals, and operators of warehouses that store metals. Working together, these entities allegedly engaged in a conspiracy to increase the financial institutions' commodities trading profits and warehouse companies' revenues. This was effected – at least in part – by using the financial firms' ability to obtain, retain, and strategically settle aluminum warrants along with their affiliated warehouses' ability to store or agreeing to accommodate storage requests for aluminum."

The court found that although the conspiracy alleged was complex and unusual, "Plaintiffs here are the most efficient enforcers of claims that defendants' anticompetitive conduct caused injuries to economic actors who paid prices in the primary aluminum market that incorporated the Midwest Premium."

The case was brought in the wake of public outcry about the increasing price of aluminum, which industry participants alleged cost aluminum purchasers billions of dollars every year. After a bipartisan Senate investigation into the industry, Senator Carl Levin, D-Mich. said, "Wall Street's massive involvement in physical commodities puts our economy, our manufacturers and the integrity of our markets at risk."

In August 2013, plaintiffs filed the first of what would turn into a large number of cases alleging anticompetitive conduct affecting the aluminum industry. After several rounds of briefing and amendments that incorporated many of the materials studied by the Senate during its investigation, as well as documents plaintiffs won access to from defendant Goldman Sachs, the court's March 26, 2015 order sets the stage for the discovery process to begin at once. Plaintiffs are purchasers of aluminum who paid inflated prices for aluminum as a result of defendants' conduct.

According to **David W. Mitchell**, a partner from co-lead counsel Robbins Geller, "The court's ruling moves this action to the next phase, during which we will continue to aggressively prosecute the class's claims against the defendants." Along with Mitchell, the Robbins Geller attorneys litigating the case include **Brian O. O'Mara** and **Carmen A. Medici**.

In re Aluminum Warehousing Antitrust Litigation, No. 13-md-2481 (KBF), Opinion & Order (S.D.N.Y. Mar. 26, 2015).

Tile Shop Can't Chip Away at Disclosure Duty

On March 4, 2015, Judge Ann D. Montgomery of the United States District Court for the District of Minnesota (located in the Eighth Circuit) sustained securities fraud and other claims against Tile Shop Holdings Inc. and its President, CEO and founder, Robert Rucker. In doing so, Judge Montgomery navigated a Circuit split and followed Second Circuit authority – developed, in large part, by Robbins Geller – to find that Item 303 of SEC Regulation S-K, which requires the disclosure of known trends that could have a material effect on an issuer's Continued on p. 8

Educational Conference for Public Fund Fiduciaries

ValueEdge Advisors, co-founded by corporate governance leaders Robert A.G. Monks and Richard A. Bennett, formerly with GMI Ratings, will host the seventh annual 2015 Public Funds Forum from September 8-10, 2015 in Laguna Beach, California. The conference is designed to train public fund representatives on practices to best fulfill fiduciary duties, protect portfolio assets and create long-term value. **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 new initiatives, building better boards, protecting assets through securities litigation, effective governance strategies, and opportunities facing funds investing in global markets.

Speakers at this year's conference will include Mohamed El-Erian, CEO and Co-Chief Investment Officer of PIMCO and Chair of President Obama's Global Development Council; Shaquille O'Neal, 15-time NBA All Star, media personality, entrepreneur and philanthropist; and Michael Lewis, journalist and best-selling author of *Flash Boys*, *Moneyball* and *The Blind Side*. Other scholars, regulators and figures in the fields of finance, institutional investing, corporate governance and securities litigation will also speak at the conference.

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 three-day event will be held at the Montage Resort. The conference will include an exciting variety of activities, allowing guests ample opportunity to network and build relationships.

For the most current information about the sessions agenda and to register, please visit www.publicfundsforum.com. ■

Distinguished Speakers Include:

Mohamed El-Erian

Chair of President Obama's Global Development Council; CEO and Co-Chief Investment Officer of PIMCO (2007-2014)

Shaquille O'Neal

15-Time NBA All Star, Media Personality, Entrepreneur and Philanthropist

Michael Lewis

Journalist & Best-Selling Author of *Flash Boys*, *Moneyball* and *The Blind Side*

Settlement Update

$131 Million Settlement Secured for Sprint Securities Holders

On April 10, 2015, the Honorable Eric F. Melgren of the United States District Court for the District of Kansas granted preliminary approval of a $131 million settlement in favor of plaintiffs, resolving claims arising from Sprint Corporation's ill-fated merger with Nextel Communications in 2005 in *Bennett v. Sprint Nextel Corp.* The settlement represents a significant recovery for the plaintiff class, achieved after five years of tireless effort by Robbins Geller.

Bennett v. Sprint Nextel Corp. was first filed on March 10, 2009, on behalf of all persons who purchased or otherwise acquired the common stock and certain categories of debt securities of Sprint Nextel Corporation between October 26, 2006 and February 27, 2008. Investors were represented by lead plaintiffs **PACE Industry Union-Management Pension Fund**, **Skandia Life Insurance Company** and the **West Virginia Investment Management Board**. The complaint names Sprint Nextel Corporation, as well as former CEO, President and Chairman Gary D. Forsee, former CFO Paul N. Saleh, and former Senior Vice President and Controller William G. Arendt as defendants.

The complaint alleges that throughout the class period, defendants issued false and misleading statements to investors concerning the success of Sprint's merger with Nextel Communications. Specifically, plaintiffs claim the defendants falsely affirmed that Sprint was on track to achieve $14.5 billion in synergies from the merger; that the integration of the two companies and their cellular platforms was progressing as planned; that Sprint had tightened its credit standards, thereby decreasing its reliance on subprime subscribers; and that the goodwill associated with the purchase of Nextel was not impaired. These misrepresentations continued to artificially inflate the price of Sprint's publicly traded securities until a series of startling disclosures made by the company and then-CEO Dan Hesse in early 2008 revealed the true depth of Sprint's problems.

On January 18, 2008, in response to the first of the company's disclosures, Sprint's stock price plunged 24.8% – the steepest stock price drop Sprint had experienced in a single trading day in nearly three decades. On February 28, 2008, the company announced that it would be recording a non-cash goodwill impairment charge of $29.7 billion. Further evidence of Sprint's desperate condition continued to emerge over the next several months, causing Sprint's stock price to plummet 70% from a class period high of $23.25. This rapid deterioration, and the tremendous losses they suffered as a result, left investors stunned.

The $131 million settlement achieved by Robbins Geller and co-lead counsel represents a significant victory on behalf of those investors. Robbins Geller partner **Tor Gronborg** commented that "this excellent result, after six years of litigation, demonstrates our Firm's resolve to vindicate the rights of investors." The settlement was reached after extensive and unusually complicated merits discovery, during which co-lead counsel received, reviewed and analyzed more than 8.7 million pages of documents produced by defendants and third parties and deposed more than 40 fact witnesses nationwide.

Attorneys **Tor Gronborg**, **Brian O. O'Mara**, **James E. Barz**, **Lea M. Bays** and **Hillary B. Stakem**, together with forensic accountants **Chris Yurcek** and **James Feldman**, led Robbins Geller's team on behalf of the plaintiffs.

Bennett v. Sprint Nextel Corp., et al., No. 09-cv-2122-EFM-KMH (D. Kan.).

$146.25 Million Recovered for Duke Energy Investors

On March 25, 2015, United States District Court Judge Max O. Cogburn, Jr. granted preliminary approval of a $146.25 million settlement on behalf of plaintiffs in the securities class action *Nieman v. Duke Energy Corp.* The recovery is the largest ever in North Carolina for a case involving securities fraud, and one of the five largest recoveries in the Fourth Circuit.

Originally filed on July 24, 2012, the case concerned false statements by Duke Energy and its senior officers and board members regarding an impending merger with Progress Energy, Inc. **Amalgamated Bank, Trustee to the LongView Funds**, along with **Gerald and Carolyn Friesen** and the **Janice and Craig Bacino Trust**, were appointed lead plaintiffs by Judge Cogburn. Lead plaintiffs' allegations focused on statements made in connection with the merger of Duke and Progress regarding the future leadership of the combined company. Specifically, defendants assured investors that, following the merger, the well-respected CEO of Progress, William D. Johnson, would serve as CEO of the combined company.

Prior to the merger, however, defendants were already planning to immediately oust Johnson from this role and replace him with Duke's then-CEO James Rogers. On July 2, 2012, less than two hours after the merger became effective, defendants carried out their premeditated coup, and the newly constituted board of Duke voted to demand Johnson's resignation and re-install Rogers as CEO. Johnson was paid $44 million to leave quietly. The next day, Duke announced that Johnson had "resigned" and that Rogers had been named as CEO. Duke's stock price fell precipitously and, almost immediately, the North Carolina Utilities Commission ("NCUC") and North Carolina Department of Justice ("NCDOJ") announced investigations related to Duke's forced removal of Johnson as CEO. As the former lead director of Progress, John Mullin III, stated in a letter to the editor published in *The Wall Street Journal*, Johnson's ouster was an "incredible act of bad faith," "the most blatant example of corporate deceit that I have witnessed during a long career on Wall Street," and "one of the greatest corporate hijackings in U.S. business history."

Robbins Geller prosecuted claims under both the Securities Act of 1933 and Securities Exchange Act of 1934 on behalf of Amalgamated Bank and all investors in Duke Energy during the June 11, 2012 to July 9, 2012 class period, including investors who exchanged Progress shares for Duke shares at the time of the July 2, 2012 merger. In a decisive early victory, lead plaintiffs prevailed in a fight over defendants' liability for statements made in the prospectus and offering documents. After considering defendants' initial legal arguments, Judge David S. Cayer found in a July 2013 ruling that lead plaintiffs alleged "ample facts, many supported by documentation and/or testimony, establishing that [d]efendants' statements regarding Johnson's role as CEO were false" and supporting a cogent inference that defendants "concealed from investors their plan to remove Johnson as CEO."

Following the July 2013 ruling, the parties engaged in settlement negotiations that lasted more than 12 months. During that period, Robbins Geller and the lead plaintiffs continued to investigate the allegations, incorporating the work of experts and consultants. Ultimately, the parties agreed to settle the case for $146.25 million in cash. The hearing on final approval of the settlement has been set for August 12, 2015.

With its long history of pursuing corporate governance reforms, Amalgamated Bank, the largest union-owned bank in the United States, played an integral role in obtaining this significant monetary settlement for Duke investors. Commenting on what he described as a "historic settlement," Keith Mestrich, President and CEO of Amalgamated Bank, said, "Our financial markets work best when public companies that rely on our investments act with integrity and transparency, and we won't hesitate to act on behalf of all investors when they don't."

News coverage regarding the settlement highlighted that it was an outstanding result for Duke investors. Prominent securities law professor James Cox was quoted by *ABC News* describing the settlement as "off the charts." As *The Wall Street Journal* pointed out, lawsuits such as this one, "which typically allege that boards sold for too little, failed to disclose key points about the deal, or both, have long been common but rarely yield any additional money for investors."

The Robbins Geller attorneys litigating the case are **Paul J. Geller**, **Tor Gronborg**, **Elizabeth A. Shonson**, **Andrew T. Rees** and **Kathleen B. Douglas**.

Nieman v. Duke Energy Corp., et al., No. 12-cv-00456 (W.D.N.C.). ■

Councillor Kieran Quinn, Executive Leader of Tameside Metropolitan Borough Council, congratulating Patrick W. Daniels for Robbins Geller's selection to advise the Greater Manchester Pension Fund on corporate governance and shareholder actions.

Fund Focus

Robbins Geller provides comprehensive securities fraud monitoring solutions for its clients who invest globally. By providing clients with the ability to identify and assess their losses associated with securities fraud, clients are given the information necessary to maximize their potential recoveries worldwide.

Robbins Geller was recently selected to advise the largest local authority pension fund in the United Kingdom, the £16 billion Greater Manchester Pension Fund, on corporate governance and shareholder actions. "We are pleased to have access to the expert advice of Robbins Geller. They have a long-proven track record of vigorously and effectively protecting shareholder rights and we value their input," said Councillor Kieran Quinn, Executive Leader of Tameside Metropolitan Borough Council, Chair of Greater Manchester Pension Fund and Chair of Local Authority Pension Fund Forum. The fund won 2014 Large Scheme of the Year and also Best Member Communications Awards from *Professional Pensions* magazine.

Participants in Robbins Geller's Portfolio Monitoring Program℠ receive a monthly Portfolio Monitoring Report and monthly Settlement Report. The Portfolio Monitoring Report provides information on U.S. securities class actions. The Settlement Report provides detailed information on U.S. and international settlements that have approaching claim deadlines.

Robbins Geller's Portfolio Monitoring Program℠ is used all over the world by pension fund trustees, fund managers and institutional investors. The Firm currently monitors hundreds of institutional investor funds with more than $2 trillion in total assets. ■

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>
> Cllr Kieran Quinn, Executive Leader of Tameside Metropolitan Borough Council

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Robbins Geller represents plaintiffs in litigation involving securities fraud, corporate takeovers, shareholder derivative claims, intellectual property, consumer and insurance fraud, and antitrust claims, as well as whistleblower protection and qui tam suits. The Firm has 200 lawyers in 10 offices, and has obtained many of the largest recoveries in history, including the largest securities class action judgment, the largest antitrust class action settlement, the largest securities class action recovery, the largest corporate takeover class action recovery, and the largest opt-out (non-class) securities action recovery. Robbins Geller not only secures recoveries for defrauded investors, it also works hard to enforce corporate governance changes, helping to improve the financial markets for investors worldwide. Please visit rgrdlaw.com for more information.

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"We look forward to pressing ahead with these claims," said Robbins Geller partner **Henry Rosen**, who has litigated the case since 2006 on behalf of the court-appointed lead plaintiff **Laborers District Council Construction Industry Pension Fund** and the class and who framed the case that led to the Supreme Court's decision.

Robbins Geller partner **Darren J. Robbins** noted that "more than 80 years ago, Congress passed the Securities Act of 1933 to ensure that corporate issuers tell the whole truth when they sell securities to investors. This opinion goes a long way in emphasizing the importance and scope of the federal securities laws and the important protections they provide to the integrity of our financial markets." ■

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business, imposed a disclosure duty that these defendants violated.

Tile Shop is a manufacturer and retailer of tile. The complaint alleges that during the class period (August 22, 2012 to January 28, 2014), Tile Shop emphasized the success of its business model and the strength of its business and supplier relationships. Capitalizing on these statements, Tile Shop completed two secondary public offerings that generated proceeds of nearly $70 million for several insiders, including Rucker. Unbeknownst to investors, however, Tile Shop had cultivated an extensive business relationship with foreign supplier Beijing Pingxiu ("BP"), which was owned by Rucker's brother-in-law, who was also employed as Tile Shop's purchasing supervisor. As of fiscal year 2011, 8.3% of Tile Shop product sold was purchased from BP. By fiscal year 2013, that figure had skyrocketed to 32.2%.

On November 14, 2013, a securities research report exposed BP's relationship with Tile Shop and Rucker and alleged that Tile Shop had engaged in various accounting improprieties by, among other things, overstating inventory and gross profits and understating the cost of sales. In response, Tile Shop announced that it had engaged outside counsel to conduct an investigation. But the damage was done, and Tile Shop's stock price plummeted by almost 39%. On January 27, 2014, Tile Shop claimed that it found no basis to believe that Rucker knew about his brother-in-law's ownership of BP or that accounting improprieties took place, but disclosed additional facts concerning BP and related matters. In response, the stock price declined by nearly another 7%.

A core issue at the motion to dismiss stage was whether Item 303 – which requires the disclosure of *known trends* – required Tile Shop to disclose its increasing dependency on BP. In considering this issue, Judge Montgomery was confronted with a dearth of authority in the Eighth Circuit and conflicting authorities from the Second and Ninth Circuits, which had most recently addressed whether Item 303 could provide a basis for liability in a securities fraud case. As Judge Montgomery recognized, while the Ninth Circuit questioned whether Item 303 could provide a basis for liability, "the Second Circuit held that Item 303 disclosure can be actionable . . . if certain conditions are met." Notably, the Second Circuit's decision was based, in part, on an earlier Second Circuit decision in a case in which Robbins Geller was co-lead counsel.

Finding the Second Circuit's reasoning "persuasive," Judge Montgomery concluded that "Tile Shop was required to disclose the trend of its increasing reliance on BP" under Item 303, reasoning that "a disruption in this relationship would be reasonably likely to impact Tile Shop's future performance." Judge Montgomery further held that "Tile Shop management knew, or had access to information, about BP's growing importance." Judge Montgomery also held that Tile Shop's positive statements regarding its business were actionable in the absence of disclosure of its relationship with BP and upheld other securities claims against Tile Shop, Rucker, and other defendants.

Commenting on this decision, **Samuel H. Rudman** stated: "We have always recognized the importance to investors of material trends in a company's business and are gratified by the court's well-reasoned decision in this case. We pride ourselves on facilitating the development of law that makes the markets safer for investors."

Robbins Geller attorneys litigating this action are **Samuel H. Rudman** and **Joseph Russello**. The Firm is co-lead counsel in this case, and the Firm's client is co-lead plaintiff **Luc De Wulf**, an individual investor.

Beaver County Employees' Retirement Fund, et al. v. Tile Shop Holdings, Inc., et al., No. 14-cv-00786-ADM-TNL, Memorandum Opinion and Order (D. Minn. Mar. 4, 2015). ■