

3rd Quarter 2016



## Robbins Geller Obtains Record \$1.575 Billion Recovery from HSBC Finance Corp. in Securities Fraud Class Action

***The \$1.575 billion recovery is the largest securities class action recovery ever following a trial.***

On June 24, 2016, after 14 years of litigation, the Honorable Jorge L. Alonso preliminarily approved the settlement in the *Household International* securities class action. The settlement, subject to court approval, was reached just hours before a second jury trial was scheduled to begin. **The \$1.575 billion recovery is a record; it is the largest ever following a securities fraud class action trial, the largest fraud settlement in the Seventh Circuit and the seventh largest settlement ever in a post-PSLRA securities fraud case.**

The case was filed on August 19, 2002. On May 7, 2009, a jury returned a verdict in favor of the plaintiff class following a six-week trial before the Honorable Ronald A. Guzman in the United States District Court for the Northern District of Illinois. The jury found that Household International, Inc. (now HSBC Finance Corporation) and the individual defendants, William Aldinger, David Schoenholz and Gary Gilmer, collectively made 17 false and misleading statements concerning the Illinois lender's financial results and operations in violation of §10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. During the relevant period, William Aldinger was the company's Chief Executive Officer, David Schoenholz was its Chief Financial Officer and Gary Gilmer headed Household's Consumer Lending Group, where the majority of the predatory lending practices asserted by plaintiffs took place. Plaintiffs' counsel, Robbins Geller, fought the defendants' repeated attempts to derail the litigation after

the verdict, which included several post-trial motions to invalidate the verdict, objections to tens of thousands of claims by injured class members, and an appeal to the Seventh Circuit Court of Appeals.

On May 21, 2015, the Seventh Circuit upheld the jury's verdict that defendants made false or misleading statements of material fact about the company's predatory lending practices, the quality of its loan portfolio and the company's financial results between March 23, 2001 and October 11, 2002. However, the case was remanded for a retrial limited to whether the individual defendants "made" certain false statements, whether those statements caused plaintiffs' losses, and the amount of damages. The retrial was scheduled to begin on June 6, 2016.

The *Household International* case was litigated by Robbins Geller on behalf of court-appointed lead plaintiffs the **International Union of Operating Engineers, Local 132 Pension Plan, PACE Industry Union-Management Pension Fund and Glickenhau & Company**. Robbins Geller's team of attorneys, forensic accountants and support staff was led by partners **Michael J. Dowd, Spencer A. Burkholz, Daniel S. Drosman, Luke O. Brooks and Maureen E. Mueller**.

Since the enactment of the PSLRA, trials in securities fraud cases have been rare. According to published reports, the case was just the seventh securities fraud case tried to a verdict since the passage of the PSLRA. Robbins Geller is well equipped to handle such trials.



Darren J. Robbins

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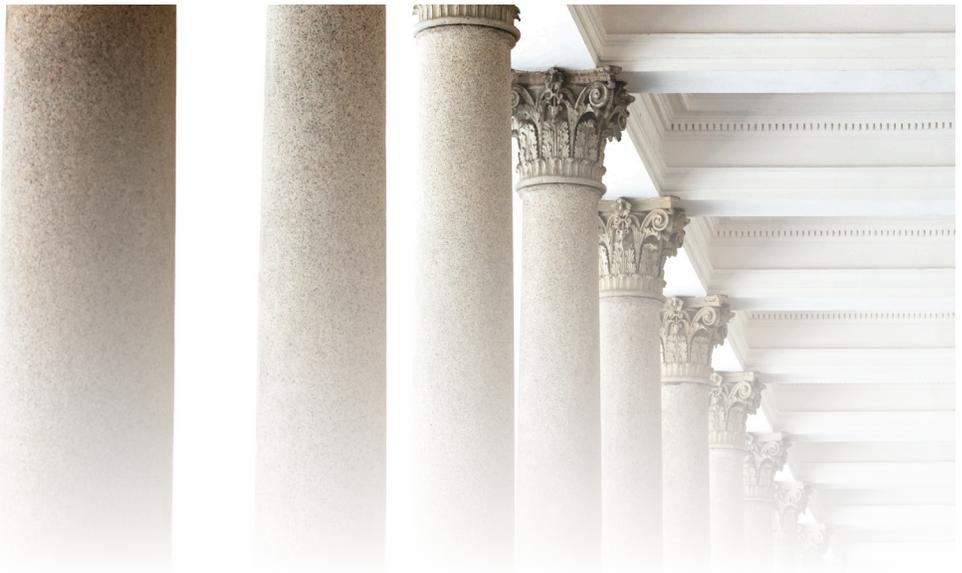
## A Note to Institutional Investors from Darren J. Robbins

We are pleased to report that we were able to recover several billion dollars for investors and other victims of corporate fraud during the second quarter of 2016. These recoveries achieved by our litigation teams are the product of years of hard work and a willingness to take complex cases to trial against large, well-funded defense firms.

On June 6, 2016, after more than a decade of hotly contested litigation, we reached a \$1.575 billion proposed settlement in a securities fraud class action against Household Financial, a mortgage financing subsidiary of HSBC. The case was filed in 2002 and successfully tried to jury verdict in 2009. The proposed settlement was reached on the morning of the commencement of a second jury trial and represents the largest securities class action recovery ever following trial. On July 26, 2016, a massive \$15 billion settlement on behalf of owners and lessees of Volkswagen "clean diesel" automobiles was preliminarily approved by a federal court in San Francisco. My partner, Paul Geller, serves on the Plaintiffs' Steering Committee in that case after having been appointed out of a field of over 150 lawyers in the highly publicized "Dieselgate" lawsuit against Volkswagen.

The Firm was once again recognized this quarter by *Bloomberg*, *The AmLaw Daily*, *Chambers USA* and *The Legal 500* for its outstanding lawyers and continued success. Most notably, ISS once again ranked Robbins Geller first in its annual SCAS Top 50 Report, in both total amount recovered for investors and number of shareholder class action recoveries, with the Firm recovering 50% more for investors in 2015 than any other law firm.

We look forward to continuing to work together to protect you and those who rely upon you from the adverse impact of fraudulent misconduct. Once again, we thank you for placing your trust and confidence in us. ■



## ISS Again Ranks Robbins Geller First in SCAS Top 50 Report

Robbins Geller was ranked first in Institutional Shareholder Services' (ISS) SCAS Top 50 Report for the second year in a row. ISS reports that in 2015, the Firm recovered more than \$1.5 billion for investors, or 50% more than any other law firm. Some of the Firm's notable 2015 recoveries include *Pfizer* (\$400 million), *J.P. Morgan* (\$388 million), *Sprint* (\$131 million) and *Duke Energy* (\$142.5 million).

The SCAS Top 50 Report identifies the top plaintiffs' securities law firms ranked by the dollar value of 2015 class action settlements in which the law firm served as lead or co-lead counsel. Additionally, the Report also cites the top five law firms based on the number of 2015 settlements. Robbins Geller again ranked first

in both total amount recovered for investors and number of shareholder class action recoveries.

Robbins Geller also dominated ISS's recently released SCAS Top 100 Settlements Report, which identified the Firm as having recovered more than \$15 billion for shareholders in the Top 100 settlements alone.

Year after year, ISS has recognized the Firm at the top of its rankings with respect to the number and aggregate amount of recoveries achieved on behalf of shareholders. The ISS studies are consistent with other objective research covering securities class actions that regularly rank Robbins Geller as the leading firm in terms of total annual securities class action recoveries and total number of settlements. ■



## An Update on the SEC's Disclosure Effectiveness Initiative: Concept Release on Business and Financial Disclosure

Investors rely on periodic disclosures provided by companies to make investment and voting decisions. The SEC has regulatory authority over these disclosures, and they are currently reviewing their guidance with their “Disclosure Effectiveness Initiative.”<sup>1</sup> In April 2016, the SEC issued a Concept Release under this program specifically addressing the business and financial disclosure provided in periodic reports. The release addresses copious issues ranging from the broad (e.g., considering whether a principles-based or rules-based approach is best) to the specific (e.g., evaluating certain line items for usefulness). Upon its release, SEC Chair Mary Jo White was quoted as saying that “[t]imely, relevant and material information is critical to investors and companies.”<sup>2</sup>

According to the SEC, “Some investors and interest groups also have expressed a desire for greater disclosure of a variety of public policy and sustainability matters . . . .”<sup>3</sup> Specifically, the SEC is seeking input on whether or not investors take sustainability and public policy matters into account when making investment and voting decisions. If in fact they are taken into consideration, the SEC wants to know which public policy and sustainability issues would be best addressed via required disclosure. In addition, they want to understand the potential burdens

placed on the companies that prepare the disclosures.

While most large U.S. companies have recently formalized their reporting of this information, such disclosures are voluntary and do not follow a standardized format. Summarizing the messages of several comment letters submitted on this topic, the SEC stated that “[s]ome commenters criticized the primarily voluntary nature of current corporate sustainability reporting and stated their belief that information made available to investors is inconsistent and incomplete.”<sup>4</sup>

Most of the comment letters sent to the SEC on this topic were in support of requiring some level of mandatory disclosure on these issues. However, some opposed the idea, stating that sustainability issues “are not typically material to an understanding of the company’s financial performance.”<sup>5</sup>

To be sure, the term *sustainability* is broad and can refer to a variety of different topics. The SEC acknowledges this issue and lists the following as some of the key topics to be considered:

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<sup>1</sup> More information about the SEC’s Disclosure Effectiveness Initiative can be found here: <https://www.sec.gov/spotlight/disclosure-effectiveness.shtml>; see also article entitled *An Update on the SEC’s Disclosure Effectiveness Project* in the Q2 2015 issue of *On the Record* with Robbins Geller.

<sup>2</sup> SEC Press Release, *SEC Solicits Public Comment on Business and Financial Disclosure Requirements in Regulation S-K* (Apr. 15, 2016), <http://www.sec.gov/news/pressrelease/2016-70.html>.

<sup>3</sup> SEC Concept Release, *Business and Financial Disclosure Required by Regulation S-K*, at 204, <https://www.sec.gov/rules/concept/2016/33-10064.pdf>.

<sup>4</sup> *Id.* at 206.

<sup>5</sup> *Id.* at 207.

# Governance Roundup

## Did Boards See Brexit Coming?

Alice Korngold wrote in *The Huffington Post*:<sup>1</sup>

The vast majority of the UK's FTSE 250 companies had not discussed contingency planning for a possible Brexit with the chairman of the board or the chairman of the audit committee. The failure of boards and management to engage on a matter of such significance should be alarming to shareholders on at least three levels: risk management; board process and agendas; and board composition. Furthermore, if management had not been surfacing Brexit on the board agenda, and board members did not ask questions, then how do investors know that boards and management are engaging on other matters that will affect the company's value—issues such as developing markets, climate change, ecosystems loss, and human rights, for example?

Korngold notes that boards should have explicitly considered and planned for the consequences of Brexit, including loss of access to qualified employees from the other EU countries and the impact on trade. Interestingly, she finds that banks are better prepared than some other companies because of their stress tests.

## The Mystery of Rhonda Pitcher

Outstanding investigative reporting from *TheStreet's* Anders Keitz revealed that Lululemon's longest serving board member seems to have fabricated portions of her resume.<sup>2</sup> The founder has been blaming his board for the company's troubles. Rhonda Pitcher, on the board since 2005, heads the nominating and governance committee. Keitz was unable to verify the claims made about Pitcher's professional and academic qualifications. "[T]he longest-serving director on the board of a \$10 billion public company has a personal history that cannot be traced, no identifiable photo, a business that cannot be found, and a degree from an unaccredited entity with a residential street address." Most troubling, the company spokesperson had no comment.

## IEX Finally Approved

After brutal, highly politicized delays, IEX exchange has finally been approved by the SEC. But the problem of high-frequency trading may not be solved. *Quartz* notes:<sup>3</sup>

The Securities and Exchange Commission (SEC) today voted to allow Investor's Exchange (IEX) to operate as a public stock exchange. It will be the first public exchange to employ techniques specifically designed to thwart manipulative strategies used by high-frequency traders.

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Institutional investors, such as pension funds, might send their trades to the new exchange in an effort to circumvent high-frequency traders. That may not last long, however, as those other exchanges have reportedly flirted with speed-bump proposals of their own. The tricky problem for them will be to neutralize IEX's advantage without forfeiting the lucrative business they've built selling speed-related services to traders, such as renting locations to traders in the exchange data centers so their trade instructions arrive faster. Alternatively, they might just sue the SEC to try to get IEX's approval thrown out.

## Nabors Directors Stay on Board After Being Voted Off Four Times

Shareholders withheld a majority of votes from director John Yearwood at Nabors' last four annual meetings. And yet he still continues to serve. *Bloomberg* explains why:<sup>4</sup>

The responsibility to accept his resignation would normally lie with Nabors' governance and nominating committee. Who heads up that committee? Yearwood does. Who are the committee's other members? Mike Linn and Howard Wolf, the other two who were voted out.

To avoid having the three decide on their own resignations, Nabors' board created a specially appointed governance and nominating committee with other directors, and that panel

suggested they stay on. The board then voted unanimously to reject the resignations and overrule the tally, according to the filing. It's the fourth-year in a row that the board has used such a tactic to thwart the will of owners.

## Why Passive Investing Increases Corporate Activism

In a new paper,<sup>5</sup> the authors of the award-winning "Passive Investors, Not Passive Owners" show how

passive investing also leads to more aggressive shareholder activism than there would be otherwise, as passive fund firms add their clout to campaigns waged by activist investors. Their paper is titled, "Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism."

"We're asking whether two recent trends in U.S. stock ownership – the rise of activism and the growth of passive investors – are related," [co-writer Todd A.] Gormley says. "Might the rise in passive ownership actually, somehow, be facilitating activism?"<sup>6</sup>

In the paper, Gormley and his co-authors, Donald B. Keim and Ian R. Appel, find that the rise in activism and its successes has coincided with the growing influence of passive institutional investors. Passively managed mutual funds now account for more than a third of all mutual fund assets, and the institutions that offer these funds, like Vanguard, State Street and Blackrock, are now often the largest shareholders of U.S. companies. In this paper, we ask whether the growing importance of passive institutional investors has influenced activists.

We find, over the 2008-2014 period, that activists are more likely to pursue expensive activism campaigns when the target company's stock has higher ownership by passively managed mutual funds.

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<sup>1</sup> [http://www.huffingtonpost.com/alice-korngold/where-was-the-board-durin\\_b\\_10707362.html](http://www.huffingtonpost.com/alice-korngold/where-was-the-board-durin_b_10707362.html)

<sup>2</sup> <https://www.thestreet.com/story/13612250/1/is-lululemon-board-member-rhoda-pitcher-for-real.html>

<sup>3</sup> <http://qz.com/709271/iex-sec-approval-stock-exchange/>

<sup>4</sup> <http://www.bloomberg.com/news/articles/2016-06-15/nabors-directors-stay-on-board-after-being-voted-off-four-times>

<sup>5</sup> [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2693145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693145)

<sup>6</sup> <http://knowledge.wharton.upenn.edu/article/passive-investing-increases-corporate-activism/>



# Landmark Settlement Secured with Volkswagen After Emissions Cheating Scandal

July 26, 2016 marked a major success for Robbins Geller's **Paul J. Geller**, a member of the team that, along with government agencies, obtained preliminary approval of settlements that created a funding pool of up to \$10.033 billion for affected consumers (plus \$4.7 billion for environmental impact) in the *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. Robbins Geller launched the national investigation after allegations arose that the German automaker installed illegal computer software known as a "defeat device" on many of its diesel-engine vehicles to trick regulators into believing the cars were complying with emissions standards, when in truth they were emitting between 10 and 40 times the allowable limit for harmful pollutants. The defeat device, which can tell when a car is hooked up to an emissions measuring device, would activate the vehicle's emissions controls during testing and then deactivate them in real-world driving.

After months of intense litigation, the parties reached a proposed settlement that, subject to court approval, will be the largest consumer auto industry class action settlement in U.S. history. "This was one of the most egregious examples of corporate fraud in recent history. [The] settlement is not only a victory for American consumers but hopefully it will serve as a deterrent to those who seek to intentionally deceive the public," said Senator Bill Nelson (D-FL). Under the agreement, Volkswagen will create a funding pool of up to \$10.033 billion for the consumer plaintiffs that will provide owners and lessees of Volkswagen and Audi 2.0-liter diesel vehicles

compensation through cash payments, buybacks and lease terminations, government-approved emissions modifications, and the repair or removal of their polluting vehicles from the road.

"One of the highlights of my career has been being part of a team responsible for ensuring that Volkswagen is held accountable for its betrayal of its customers' trust and for the damage to our environment," said Geller, a founding partner of Robbins Geller and

a payment equal to the September 2015 National Automobile Dealers Association Clean Trade-In value of the car (before the emissions conduct became public), adjusted for their options and mileage. Certain owners will also be eligible for forgiveness of their car loan obligations, and certain lessees will be able to terminate their lease with zero penalty. Volkswagen may begin buying back eligible cars as early as the fall of 2016, just over one year after the diesel emissions issues were first revealed.

“The settlement is “extraordinary. . . . [N]othing's ever been done like this in the car business before. . . . The great news for the customer is [the settlement] really takes care of them. . . . I have over a thousand of our guests and customers that have diesels, and we never thought they'd be compensated to this level for cars they already love.”

Matthew Welch, General Manager of Auburn Volkswagen, *NPR*, June 29, 2016

member of the Plaintiffs' Steering Committee ("PSC") that negotiated the settlement on behalf of the class. "The scope of the relief and the speed at which it was achieved are both unprecedented." As *The Recorder* reported, Geller was appointed to the PSC "Dream Team" after more than 150 lawyers applied in a lead counsel contest that was "one of the largest in class action history."

Consumers will have different options regarding their affected vehicles, including the choice of a buyback or lease termination on approximately 475,000 2.0-liter diesel vehicles. Eligible owner class members who choose the Buyback Program will receive

If owners or lessees prefer to keep their vehicle, they can also wait to see whether an emissions modification is approved by the U.S. Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB"). If approved modifications become available, Volkswagen will modify the non-compliant 2.0-liter car free of charge to ensure the vehicle no longer generates excess nitrogen oxide emissions. Extended warranties and "lemon law" protections will also be included with the modifications. If a modification is not approved for a certain car, the Buyback Program will still be available, or a class member can withdraw from the settlement. *Continued on p. 12*



# Climate Change Check

There has been recent progress on governance-based climate change initiatives:

## **CalPERS raises bar on corporate directors' role in tackling climate change<sup>1</sup>**

The country's largest pension fund, the California Public Employees' Retirement System, has updated its Global Governance Principles to state that board members of companies that CalPERS owns should have "expertise and experience in climate change risk management strategies." They also call on companies to assign oversight responsibility on climate change to "a board member, board committee or full board."

## **Over 150 major companies pledge extensive emissions reductions<sup>2</sup>**

For example:

- Coca-Cola Enterprises, Inc.: Coca-Cola Enterprises commits to reduce absolute greenhouse gas ("GHG") emissions from their core business operations by 50% and commits to reduce GHG emissions from their drinks by 33%, both by 2020 using a 2007 base-year.

- Pfizer commits to reduce GHG emissions from operations 20% by 2020 from a 2012 base-year. This goal will keep the company on track to reach a 60%-80% reduction by 2050 from a 2000 base-year. Also, Pfizer commits that "100% of key suppliers will manage their environmental impacts, including GHG emissions, through effective sustainability programs and that 90% of key suppliers will institute GHG reduction targets by the end of 2020."

## **Vote Your Pension has launched a worldwide campaign to tackle climate change in two big oil companies<sup>3</sup>**

The shareholder action platform is asking its users to support its movement to make ExxonMobil and Chevron change their business models to suit the global 2°C climate change target.

*The Economist* reports:<sup>4</sup>

As four of the five largest private oil companies prepare to meet shareholders next week, it is the green

brigade in ties and suits that most worries them. At AGMs on May 25th CalPERS, the California state pension fund, with \$294 billion of assets under management, plans to pressure ExxonMobil and Chevron, America's two biggest oil companies. It wants the energy firms to outline risks to their business plans thanks to more-stringent-than-expected climate-change policies agreed [to] in Paris in December. At ExxonMobil they will be joined by Norway's Norges Bank Investment Management, the world's largest sovereign-wealth fund, the New York City Pension Fund, global asset managers such as HSBC and BMO, which have about \$650 billion of funds, and an ecumenical array of endowment-rich church groups.

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*Some believe that more restrained capital allocation would boost returns, as well as helping the planet. (Emphasis added.)* ■

<sup>1</sup> <http://www.ceres.org/press/blog-posts/calpers-raises-bar-on-corporate-directors2019-role-in-tackling-climate-change>

<sup>2</sup> <http://sciencebasedtargets.org/companies-taking-action/>

<sup>3</sup> <http://blueandgreentomorrow.com/2016/05/10/action-platform-campaign-climate-change-crackdown/>

<sup>4</sup> <http://www.economist.com/news/business/21699141-climate-conscious-shareholders-are-putting-big-oil-spot-greens-pinstriped-suits>

# Litigation Update

## Robbins Geller Defeats 3D Systems' Motion to Dismiss Securities Case

On July 25, 2016, Judge Mary Geiger Lewis, United States District Court Judge for the District of South Carolina, issued an order denying defendants' motion to dismiss claims for securities fraud against 3D Systems Corporation ("3D Systems"), a manufacturer and seller of 3D printing products and services, and its former CEO Abraham N. Reichental and former CFOs Damon J. Gregoire and Ted Hull. This case arises out of allegations that defendants misrepresented the true financial and operational state of the company during a rapid, ill-fated expansion strategy they had undertaken.

3D Systems was the dominant player in the 3D printing industry for years, facing relatively little competition. As 3D printing technology proliferated by the start of the class period, that changed. As alleged in the case, to counter the threat of increased competition and perpetuate the company's image as a fast-growing, cutting-edge industry leader, defendants embarked on an aggressive strategy to boost revenue growth by making scores of acquisitions and introducing a spate of new products within a short period of time. However, defendants struggled to integrate and manage the company's sudden growth, which resulted in critical operating inefficiencies, significant manufacturing problems, poor inventory control, diminished productivity, and inflated operating costs. The case further alleges that defendants concealed these problems to preserve the company's carefully cultivated image, misleadingly trumpeting heavy demand for its "breakthrough," "cutting edge," and "phenomenally" well-received direct metal and consumer 3D printers, boasting of "at least 30%" organic revenue growth, and projecting the company would "double its revenue over the next couple of years." Defendants Reichental and Gregoire also sold their own shares of company stock for total proceeds of over \$17 million.

As alleged, despite their efforts to keep the company's true financial condition under wraps, defendants' scheme unraveled through a series of revelations regarding the company's mounting problems, including inventory write-offs, compressed gross profit margin, manufacturing problems, and a revenue shortfall, which culminated in a

disclosure that, in stark contrast to their earlier boasts of explosive growth, the company actually experienced a growth rate of **zero**. As a result, by the end of the class period, 3D Systems' stock price had plummeted more than 76% from its class period high. Defendants Reichental, Gregoire and Hull all stepped down from the company.

In denying the motion to dismiss, the court rejected defendants' argument that the complaint failed to adequately plead that "3D Systems misrepresented the state of their product quality and customer reception to investors." The court also declined to accept defendants' mismanagement argument, stressing that "this case is about more than mismanagement" of things like inventory control and product quality, given that defendants allegedly "misrepresented the state of those affairs to investors." Moreover, the court determined that "[i]n combination with their positions at 3D Systems, [the Individual Defendants'] revelations of personal and intimate involvement with many of the allegedly misrepresented issues allows the Court to reasonably infer each Individual Defendants' knowledge regarding the true state of affairs at 3D Systems."

In commenting on the decision, Robbins Geller partner Jack Reise said, "We are gratified by the well-reasoned decision and look forward to moving to the next phase of the case, during which we will continue to aggressively prosecute the investors' claims."

Together with co-lead counsel, Robbins Geller attorneys litigating the case are **Jack Reise, Robert J. Robbins, Elizabeth A. Shonson, Andrew T. Rees** and **Holly Kimmel**.

*KBC Asset Management NV v. 3D Systems Corporation, et al.*, No. 0:15-cv-02393-MGL, Memorandum Opinion and Order Denying Defendants' Motion to Dismiss the Amended Consolidated Complaint (D.S.C. July 25, 2016).

## NHL Players Force League to Face Claims It Failed to Warn of Risk of Brain Disease from Concussions

The National Hockey League ("NHL") lost its second attempt to dismiss the widely covered putative class action against it by

over a hundred retirees. The plaintiffs claim the league failed to warn them of the risk of contracting a permanent brain disease from repetitive head trauma, failed to adequately care for them after receiving such injuries, and also promoted and glorified the unreasonable and unnecessary violence that leads to head trauma.

"Thousands of retired NHL players continue to suffer from the effects of head injuries suffered on the ice," stated Robbins Geller partner **Stuart A. Davidson**, who serves as the players' co-lead counsel. "The time is now for the NHL to take a leadership role in the international game of hockey and strive to ensure that retired players and their families receive the assistance they need and that the parents of youth hockey players receive truthful information about head trauma."

On May 16, 2016, in a detailed 47-page opinion, United States District Judge Susan Richard Nelson in St. Paul, Minnesota denied the NHL's motion to dismiss the lawsuit on the ground that federal labor law preempted the players' claims. The NHL had argued that the collective bargaining agreements ("CBAs") that some of the players played under during their NHL careers were central to the players' claims, mandating that the players exhaust the grievance process through the Players' Association rather than sue in court. The court found that the pleadings of the parties alone could not determine whether any of the CBAs were relevant to the players' claims. Although the court left open whether discovery in the case had demonstrated that the CBAs were relevant to the players' claims, the court nonetheless concluded that the players, as retirees no longer in or represented by the Players' Association, would likely not be barred from suing in court based on the CBAs.

Commenting on the ruling, Davidson stated, "District Judge Nelson's order denying the NHL's motion to dismiss on preemption grounds is a historic decision in American sports and labor law."

Robbins Geller attorneys **Stuart A. Davidson, Mark J. Dearman, Kathleen B. Douglas, Janine D. Arno** and **Alexander D. Kruzyk** are co-lead counsel for the retired NHL players.

*In re National Hockey League Players' Concussion Injury Litigation*, MDL No. 14-2551 (SRN/JSM), 2016 U.S. Dist. LEXIS 65953 (D. Minn. May 16, 2016).

## After Appellate Success, Class Certified in Barclays \$2.5 Billion Securities Offering Suit

On June 9, 2016, the Honorable Paul A. Crotty of the Southern District of New York certified a class of investors in a \$2.5 billion preference share offering conducted in April 2008 by Barclays Bank Plc. Led by lead plaintiff Dennis Askelson, the case alleges that Barclays, its directors and management, and a group of underwriters who participated in the offering misled investors about Barclays' exposure to risky credit market assets and risk management practices in offering documents Barclays filed with the SEC in connection with the April 2008 offering. Offered to investors at \$25 per share, the value of the securities declined precipitously thereafter, ultimately plunging to \$6.84 per share by the time the action was filed.

Following extensive fact and expert discovery, on December 8, 2015, plaintiffs moved to certify a class "of all persons or entities who purchased or otherwise acquired American Depositary Shares, Series 5 ('Series 5 ADSs'), representing non-cumulative callable dollar preference shares of Barclays Bank Plc ('Barclays' or the 'Company'),

Series 5, pursuant or traceable to the public offering that commenced on or about April 8, 2008." Askelson contemporaneously moved for appointment as representative of the class and to appoint Robbins Geller as co-class counsel.

Defendants opposed class certification, contending that the lead plaintiff lacked standing under Article III of the United States Constitution to assert his claims under the Securities Act of 1933 and was not an "adequate" class representative as required by Rule 23 of the Federal Rules of Civil Procedure. In addition, defendants urged the court to end the class period on August 7, 2008, contending that "any misrepresentations or omissions were cured by Barclays' release of its 2008 Interim results on August 7, 2008."

On June 9, 2016, following full briefing and oral argument, Judge Crotty published his 15-page order certifying the proposed class, appointing Askelson as class representative, and designating Robbins Geller as co-class counsel. Accepting plaintiffs' arguments, the court concluded that Askelson did have standing under Article III to pursue the asserted claims, finding Askelson's claim to damages under Section 11 of the Securities Act of 1933 "satisfies injury in fact" as required by prevailing law and "establishes his Article III standing." In addition, the court rejected all

"three theories of inadequacy" defendants posited against the lead plaintiff. In reaching the conclusion that "Askelson is an adequate class representative," Judge Crotty specifically recognized that Askelson "reviewed the filings, has sufficient familiarity with the facts and legal theories underlying the case, has been in regular contact with his lawyers over the last four years, and understands his role in making decisions on behalf of the class." Finally, the court refused to limit the class period to August 7, 2008, explaining that "neither this Court nor the Second Circuit has ever found that the 2008 Interim results released on August 7, 2008 cured any or all alleged misrepresentations or omissions," adding that "the time when the alleged misrepresentations were sufficiently revealed is a question of fact that is not appropriate for resolution on a motion for class certification."

Lead plaintiff's victory in certifying a class of investors presents the latest development in this longstanding, hard-fought litigation. Originally filed in early 2009, the district court dismissed plaintiff's claims in 2011. Following an unsuccessful attempt to seek reconsideration of the dismissal, plaintiffs sought appellate review in the Second Circuit Court of Appeals. In 2013, following a tremendous effort by the Robbins Geller Appellate Team, the Second Continued on p. 12

## Settlement Update

### Record-Breaking Recovery for Intercept Pharmaceuticals Investors

On May 23, 2016, the Honorable Naomi Reice Buchwald of the United States District Court for the Southern District of New York granted preliminary approval of a \$55 million settlement in the *Intercept Pharmaceuticals* securities litigation. The settlement, on behalf of investors who purchased Intercept common stock during the January 9 – January 10, 2014 class period, is believed to be the largest per-day recovery in the history of securities litigation.

Originally filed by Robbins Geller in February 2014, the case alleged claims under the Securities Exchange Act of 1934 based on defendants' improper disclosure of the results of a Phase IIb drug trial that was being conducted by the National Institute of Diabetes and Digestive and

Kidney Diseases ("NIDDK"). Following an extensive investigation that included a FOIA request to the NIDDK, the complaint filed by Robbins Geller (on behalf of lead plaintiff George Burton and representative plaintiff Scot Atwood) focused on how defendants repeatedly touted good news to investors regarding the results of the Phase IIb drug trial of the company's key drug, obeticholic acid ("OCA"), while intentionally failing to disclose significant safety concerns that had also been discovered during the trial.

The Phase IIb trial, referred to as the "FLINT Trial," tested the safety and efficacy of OCA for the treatment of Nonalcoholic Steatohepatitis (or NASH), an increasingly common liver disease. According to written communications between the NIDDK and defendants, which were obtained by Robbins Geller from the NIDDK, defendants learned on January 6, 2014 that the FLINT Trial for OCA as a treatment for NASH was being halted because it had already met its efficacy end points. However, defendants were also

told that a second reason for halting the trial was a finding of significant lipid abnormalities associated with OCA.

On January 9, 2014, defendants reported the positive efficacy news, but deliberately withheld from investors the negative news concerning lipid abnormalities. As a consequence of defendants' misleading statements, the price of Intercept common stock skyrocketed from \$72 per share on January 9, 2014, to a high of \$497 per share on January 10, 2014. After the markets closed on January 10, 2014, however, the NIDDK took the unusual step of issuing a press release stating that patients taking OCA in the FLINT Trial had experienced "significant lipid abnormalities." *The Wall Street Journal* and other media outlets seized on the NIDDK's statement that evening and, in response to the news concerning the previously concealed safety issue, the company's stock price slumped by nearly \$200 per share between January 13 and January 14, 2014. This massive decline in the company's stock price caused Continued on p. 12

# HOUSEHOLD

The Largest Securities Class Action Recovery Following a Trial

\$1.575 Billion Recovery

35 lawyers and professionals moved to Chicago for the trials (21 for the 2009 trial and 14 for the 2016 trial)

7<sup>th</sup> largest securities class action  
Circuit's largest recovery  
securities class action to go to trial since PSLRA

14 years of litigation

103,000 hours devoted to the case  
2 Trials scheduled

7.24.16 preliminary approval granted

## Household continued from page 1

The Firm boasts over 20 former federal and state prosecutors among its partners and associates, as well as a number of other experienced trial lawyers, making Robbins Geller unique among firms that specialize in plaintiffs' class action litigation

for its ability to bring such cases to trial, withstand appeal, and ultimately obtain a successful resolution. The case highlights the Firm's willingness to shoulder the burden of sustained litigation. Robbins Geller was ready to try the case to verdict a second time,

moving more than a dozen attorneys, other professionals and support staff to Chicago for the retrial, as the Firm had done for the initial trial in 2009.

*Jaffe v. Household Int'l, Inc.*, No. 02-C-05893 (N.D. Ill.). ■

## SEC continued from page 3

- Climate change
- Resource scarcity
- Corporate social responsibility
- Good corporate citizenship

With regard to the topic of climate change specifically, the SEC would like to know if "existing disclosure requirements [are] adequate to elicit the information that would permit investors to evaluate material climate change risk."<sup>6</sup>

The term *public policy* can also encompass many different issues. Recently, public policies such as the use of conflict minerals

and mine safety have been addressed by new mandatory disclosures required under the Dodd-Frank Act. Currently, the SEC is facing pressure to require mandatory disclosure of political spending by companies.

Another notable topic addressed in the Concept Release is whether disclosure requirements should be *principles based* (which "require disclosure when information is material to investors" and allow "management to exercise judgment") or *prescriptive based* (which "employ objective, quantitative thresholds to identify when disclosure is required" and are often referred to as "rules-

based").<sup>7</sup> A third approach proposed by the SEC is referred to as an *objectives-oriented approach*, under which new disclosure rules would be developed by the SEC "clearly articulating the accounting objective of the standard and providing sufficient detail and structure so that the standard can be applied on a consistent basis."<sup>8</sup>

In requesting comments on all of these issues, the SEC is seeking suggestions on how to create flexible but meaningful disclosure requirements that benefit investors without causing undue burden. ■

<sup>6</sup> *Id.* at 215.

<sup>7</sup> *Id.* at 34-35.

<sup>8</sup> *Id.* at 43.

# 2016 Public Funds Forum

SEPTEMBER 6-8, 2016 | MONTAGE DEER VALLEY | PARK CITY, UTAH

The eighth annual Public Funds Forum is an invitation-only educational conference designed to train public fund representatives on practices to best fulfill fiduciary duties, protect portfolio assets and create long-term value.

For more information and to register, please visit [www.PublicFundsForum.com](http://www.PublicFundsForum.com).



## Governance Roundup continued from page 4

### Does a CEO Have a Duty to Lobby?\*

University of Chicago professor Luigi Zingales writes that on a cost-benefit basis, lobbying may be necessary for corporations, but steps are necessary to make sure the expenditures benefit investors, not executives:

If the goal of a CEO should be to maximize long-term shareholder value and lobbying does produce this outcome (see for example,<sup>7</sup> [there's] evidence that lobbying firms have higher returns), why shouldn't CEOs do so? Yet, in his famous piece where he advocates that firms should have a single-focused goal of maximizing shareholder value, Milton Friedman was very careful in stating the assumption that "the basic rules of the game" were off limits to firms. Thus, implicitly even Milton Friedman recognized that – when lobbying is present and effective – his prescription does not necessarily hold.

\*\*\*

Even if the Constitution allowed for laws to restrict corporate lobbying (and, in the United States after *Citizens United*, it is not), it would be a

practically impossible task to achieve. Thus, one potential remedy is to introduce a progressive tax on lobbying expenditures. The proceeds of this tax could then be used to strengthen the advocacy of public interest groups, which are poorly coordinated and poorly financed, to level the playing field. This money could then be allocated to various groups using a voucher system, along the lines of Larry Lessig's proposal for campaign financing reform.

The second remedy is a combination of naming and shaming. Most people feel it is socially legitimate for a company to lobby to redress an injustice, like a higher tax rate that penalizes one company vis-à-vis the rest. At the same time, I suspect many people would feel uncomfortable with a company lobbying to protect an unjustified tax loophole that benefits it greatly (certainly I do). Thus, exposing excessive lobbying can play a role in mitigating it.

### Take on Wall Street's Agenda for Reform<sup>9</sup>

More than 20 progressive organizations representing millions of voters are putting their

weight behind a five-point agenda for the next stage of Wall Street reform, including ending the carried interest loophole and ending "too big to fail."

### Hall of Shame

When *The Economist* reported that "investors in BP rejected a pay rise for Bob Dudley, the oil firm's boss, furious that he had got a 20% bump in his compensation last year (pension included) for overseeing the company's biggest-ever operating loss," it referred to the protest as "bolshie" and a "belch[] of discontent."<sup>10</sup>

The National Center for Public Policy Research presented a shareholder resolution urging McDonald's to "alter its strategy of catering to leftist activists on wage and other economic issues" and stepped up its opposition to shareholder proposals it insists are political, ignoring the evidence of a quantitative economic basis and offering no basis for opposition except for name-calling.<sup>11</sup>

"Put bluntly, CEO tenures have nothing to do with corporate governance."<sup>12</sup> Put bluntly, yes they do. It is the job of the board to select, incentivize, and replace the CEO. When that happens more (or less) often than it should, it is a governance failure. ■

<sup>7</sup> <https://promarket.org/does-a-ceo-have-a-duty-to-lobby/>

<sup>8</sup> [http://www.krannert.purdue.edu/faculty/hgulen/political\\_contribution\\_paper\\_092708.pdf](http://www.krannert.purdue.edu/faculty/hgulen/political_contribution_paper_092708.pdf)

<sup>9</sup> <https://ourfuture.org/20160524/the-new-agenda-for-taking-on-wall-street>

<sup>10</sup> <http://www.economist.com/news/business/21697240-shareholders-are-partly-responsible-latest-executive-pay-brouhaha-pay-dirt>

<sup>11</sup> [http://www.nationalcenter.org/PR-McDonalds\\_052616.html](http://www.nationalcenter.org/PR-McDonalds_052616.html)

<sup>12</sup> <http://corgovinstitute.com/misconception-ceo-tenures/>

# Book Reviews

Two excellent new books address the hidden fees and conflicts of interest in financial services, pensions, and mutual funds.

▪ Stephen Davis, Jon Lukomnik and David Pitt-Watson are the authors of *What They Do With Your Money: How the Financial System Fails Us and How to Fix It*. In an interview with ValueEdge Advisors LLC Vice Chair Nell Minow, they described as many as 16 layers that take up to 100 fees between the beneficial holders of stock and the value they receive.

Understandably, we have allowed experts to manage our nest eggs – but the number of agents between us and our investments has grown exponentially and each takes a fee or extracts a cost. Yes, there are money management fees which most of us see, but also marketing fees (12B-1 fees), ...transfer agent fees, sub-transfer agent fees, [custodial fees,] sub-custodial fees, audit fees, mutual fund board fees, valuation agent fees, proxy advisory fees, trading costs, broker fees, administration fees... the list goes on and on. It sometimes takes as many as 16 different agents – each extracting fees or adding costs – to shepherd our money from an account to an investment. And while some of those fees are disclosed, many are not, so that the average investor really doesn't appreciate how much the financial industry siphons. Stealth costs can climb enough to knock 50% off the total that a typical worker would have on retirement without those fees and costs.

On the effectiveness of post-Enron era and post-financial meltdown era reforms:

The interesting thing about that package of reforms is that they are systemic; designed to allow the market to work by adding information, expertise and clear accountability. They are not the type of “do this, don't do that” regulations to which the industry objects and, which, we contend, have unintended consequences and don't work that well in the first place.



Consider this: There are now about 100,000 more compliance officers in finance than there were before the financial crisis. They monitor a virtual Hammurabi's code of very specific compliance-type regulation. But few think that the financial sector works better because of this. But if we made the process transparent, made accountability explicit, made fiduciary obligation extend throughout the chain of intermediaries, we could lighten up on the amount of spot regulation.

They strongly support a meaningful fiduciary standard for investment managers and hope that changes in technology will not be co-opted by the industry, but will reduce costs and increase accountability.

▪ Law professor William Birdthistle's new book is *Empire of the Fund*, a thoroughly researched and clearly explained assessment of the mutual fund industry as

the richest and riskiest experiment in our financial history. Over the next twenty years, nearly eighty million baby boomers will retire at a pace of ten thousand per day. The hypothesis of our experiment is that millions of ordinary, untrained, busy citizens can successfully manage trillions of dollars in a financial system dominated by wealthy, skilled, and powerful financial institutions, many of which have a record of treating individual investors shabbily.

Birdthistle documents the ways that the mutual fund industry is organized for the benefit of its own ownerships and executives, and not for the customers. The clearest proof: investments *in* the mutual fund company vastly outperformed the investments *by* the mutual fund companies. ■

We are  
the voice of  
injured  
investors.

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Robbins Geller Rudman & Dowd LLP is widely recognized as one of the leading law firms advising and representing clients in complex litigation, including securities fraud, corporate takeovers, shareholder derivative claims, consumer fraud, antitrust claims, insurance fraud and intellectual property, as well as whistleblower protection and qui tam suits. With 200 lawyers in 10 offices, Robbins Geller has obtained many of the largest securities class action recoveries in history and was ranked first in both total amount recovered for investors and number of shareholder class action recoveries in ISS's SCAS Top 50 Report for the last two years. Robbins Geller attorneys have shaped the law in the areas of securities litigation and shareholder rights and have recovered tens of billions of dollars on behalf of the Firm's clients. Robbins Geller not only secures recoveries for defrauded investors, it also strives to implement corporate governance reforms, helping to improve the financial markets for investors worldwide. Please visit [rgrdlaw.com](http://rgrdlaw.com) for more information.

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## VW continued from page 5

Program will still be available, or a class member can withdraw from the settlement. Volkswagen will be prohibited from re-selling any vehicle that does not receive an approved emissions modification in the United States or abroad.

In addition to the buyback value or approved modification of the car, the settlement will provide members with cash compensation (though the money will only be available to 2.0-liter vehicle owners and lessees who participated in the class action settlement). The settlement agreement includes a formula for how this cash is determined, and the amount will be the same whether one chooses the Buyback Program or the modifications. For example, most consumers who purchased a 2.0-liter vehicle before September 18, 2015 will be eligible for a payment ranging between \$5,100 to approximately \$10,000 per car. Benefits to class members cannot be reduced by attorneys' fees, as fees and costs must be paid in addition by Volkswagen as approved by the court. Once the settlement is finalized, the claims process will open to eligible class members without delays on appeal.

The "\$14.7 billion settlement with Volkswagen ... is one of the largest consumer class action payouts in American history and a significant hit for the company," wrote the Editorial Board of *The New York Times*. "It

should also act as a deterrent to future bad behavior by companies that deliberately violate rules aimed at protecting consumers and the environment.... The settlement appears to provide fair compensation to consumers, many of whom bought their diesel cars because they believed Volkswagen's 'clean diesel' marketing campaign."

Under companion settlements with the EPA and CARB (both are incorporated into the class action settlement agreement), Volkswagen will also pay \$2.7 billion into a mitigation trust to fund environmental remediation and commit another \$2.0 billion to promote Zero Emissions Vehicle technology. If the company fails to remove from commerce or modify at least 85% of covered 2.0-liter vehicles by June 30, 2019, it will be required to pay additional money into a mitigation trust.

Matthew Welch, general manager of Auburn Volkswagen, summed up the landmark settlement to *NPR* on June 28, 2016, noting that it is nothing short of "extraordinary.... [N]othing's ever been done like this in the car business before.... The great news for the customer is [the settlement] really takes care of them.... I have over a thousand of our guests and customers that have diesels, and we never thought they'd be compensated to this level for cars they already love." ■

## Barclays continued from page 8

Circuit reversed in part the lower court's dismissal, reviving plaintiff's claims arising from the April 2008 offering and remanding the action to the district court for further proceedings.

Robbins Geller attorneys litigating the case

are **Andrew J. Brown, Lucas F. Olts, Eric I. Niehaus, Christopher D. Stewart** and **Kevin S. Sciarani**.

*In re Barclays Bank Plc Securities Litigation*, No. 1:09-cv-01989-PAC, Opinion & Order (S.D.N.Y. June 9, 2016). ■

## Intercept continued from page 8

significant damages to institutional and individual investors.

On behalf of Intercept investors, Robbins Geller litigated the case through discovery, settling only after the Firm obtained and analyzed over 1.5 million pages of documents and deposed key witnesses at the NIDDK and Intercept. The \$55 million settlement – \$27.5 million for each day in the class period – is unprecedented and represents a decisive victory for investors. Robbins Geller partner **Trig Smith** commented, "This is an excellent

result, particularly given the skepticism we encountered bringing a case with such a short class period, and the outcome demonstrates our Firm's resolve to vindicate the rights of investors."

Robbins Geller attorneys litigating the case are **Samuel H. Rudman, Tor Gronborg, Trig Smith, David A. Rosenfeld, Kevin A. Lavelle, Kevin S. Sciarani** and **Carissa J. Dolan**.

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