



2016 SECURITIES AND M&A LITIGATION YEAR IN REVIEW

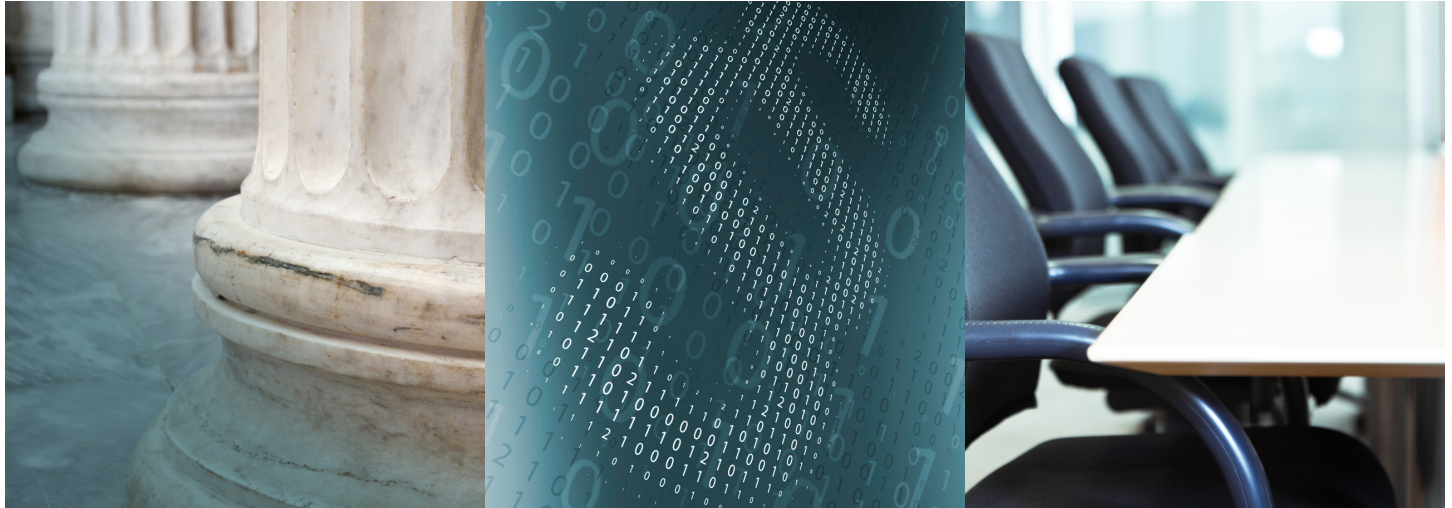
Table of Contents

Introduction	1
Developments in Federal Securities Law	2
<i>Omnicare</i> Analyses	2
<i>General Partner Glenn Tongue v. Sanofi</i>	2
<i>Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.</i>	3
<i>Querub v. Moore Stephens Hong Kong</i>	3
<i>In re Deutsche Bank AG Securities Litigation</i>	3
<i>In re BP p.l.c. Securities Litigation</i>	4
Developments Related to Item 303 of Regulation S-K	5
Class Certification Decisions Post- <i>Halliburton II</i>	5
<i>IBEW Local 98 Pension Fund v. Best Buy Co.</i>	6
<i>In re Goldman Sachs Group, Inc., Securities Litigation</i>	6
<i>In re Intuitive Surgical Securities Litigation</i>	7
<i>American Pipe</i> Tolling	8
Securities Fraud Claims: Scienter and the PSLRA Safe Harbor	8
<i>Arena Pharmaceuticals</i>	8
PSLRA Safe Harbor	9
Standard for Disclosure for Corporations Purchasing Their Own Stock	10
Continued Increase in Cases Filed Under the Securities Act in State Court	11
<i>O'Donnell v. Coupons.com</i>	12
Cyan Petition for <i>Certiorari</i>	12

Table of Contents (cont.)

Developments in Delaware M&A Law.....	13
<i>Trulia</i> Resolves Recent Uncertainty Regarding Disclosure-Only Settlements	13
The Aftermath of <i>Trulia</i>	14
Other State and Federal Courts Appear to Be Following <i>Trulia</i> Reasoning	15
Plaintiffs’ Bar’s Response to <i>Trulia</i>	16
Rise of the “Mooting” Disclosure.....	16
Increase in Disclosure Claims Under Section 14(a) of the Exchange Act	16
Increase in Other Forms of Stockholder Activity	17
Looking Forward	17
About WSGR’s Securities and M&A Litigation Practice	18

Introduction



Wilson Sonsini Goodrich & Rosati is pleased to present its *2016 Securities and M&A Litigation Year in Review*. This report covers some of the major developments in securities and M&A litigation over the past year.

The first part of the report discusses developments under the federal securities laws. There, many of the most significant decisions concerned how lower courts would interpret and apply two recent decisions by the U.S. Supreme Court, the *Omnicare* decision issued in 2015 concerning whether statements of opinion are actionable,¹ and the 2014 decision in the second *Halliburton* case, where the Court reaffirmed the viability of the fraud-on-the-market theory for class certification.² We expect that this will continue in the upcoming year, as courts increasingly deal with cases based on claims concerning qualitative statements and defendants challenging the feasibility of certifying a class of disparate shareholders. One trend that accelerated in 2016 was the attempt by plaintiffs to avoid federal courts altogether by filing

cases under the Securities Act of 1933 (the “Securities Act”) in state courts, particularly in California. As discussed below, there is a petition for *certiorari* pending before the U.S. Supreme Court that has the potential to close this end-run around the federal courts.

In the second part of the report, we cover some of the major cases and developments in Delaware, the epicenter of cases alleging breaches of fiduciary duties. Most notably, the past year saw a significant change in cases challenging the decisions of boards of directors of public companies to enter into mergers. Over the last few years, almost every public company board that agreed to a sale of the company was hit with a shareholder class action alleging that the board breached its fiduciary duties in entering into the transaction and/or in connection with the disclosures provided to shareholders. Most of those cases settled, with the company agreeing to issue additional disclosures to shareholders. After several decisions in 2015 called into question such settlements, at the

start of 2016, the Delaware Court of Chancery issued a major decision in which it made clear that such settlements were disfavored absent shareholders being provided with clearly material supplemental disclosures. In response, the incidence of challenges to mergers decreased, but also expanded in scope, as plaintiffs sought to file such cases in federal court under the federal securities laws.

In looking back on the year that just ended, it is notable that shareholder litigation under both the federal securities laws and Delaware corporate law evolved on similar paths: In response to an increased judicial skepticism of shareholder claims, plaintiffs moved to alternate forums. The upcoming year should provide greater clarity on whether they will be successful in finding or maintaining a warmer welcome.

We hope you will find this report to be informative on some of the key developments of the past year. If you have any questions or comments, please contact a member of WSGR’s securities and M&A litigation practice.

Developments in Federal Securities Law

In 2016, courts addressed a wide variety of issues arising under the federal securities laws, including applying the U.S. Supreme Court's recent decisions in *Omnicare* and *Halliburton II*. Below are summaries of some of the year's most notable cases.

Omnicare Analyses

In its landmark 2015 decision *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the U.S. Supreme Court resolved a circuit split regarding the scope of liability under Section 11 of the Securities Act for false statements of opinion.³ Section 11 provides securities purchasers with a private right of action against issuers (and others) where an already effective registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading."⁴ In *Omnicare*, the Court held that a genuinely held statement of opinion is not an untrue statement of material fact for purposes of Section 11, regardless of whether it is ultimately proven incorrect. In doing so, the Court recognized that opinion-based assessments can be inherently subjective and uncertain, and that Section 11 should not be employed to "Monday morning quarterback an issuer's opinions."⁵

However, the Court also recognized that there are circumstances where an omitted fact could render an otherwise nonactionable opinion statement misleading to a reasonable investor, such

as where the registration statement "omits material facts about the issuer's inquiry into or knowledge" regarding a statement of opinion when those facts "conflict with what a reasonable investor would take from the statement itself."⁶ The lower courts have applied *Omnicare* to claims under the Securities Exchange Act of 1934 (the "Exchange Act") as well as the Securities Act.

General Partner Glenn Tongue v. Sanofi

On March 4, 2016, the Second Circuit had its first opportunity to analyze and apply *Omnicare* when it issued its published opinion in *General Partner Glenn Tongue v. Sanofi*.⁷ There, the plaintiffs alleged that Sanofi, a global pharmaceutical company, violated both federal and state securities laws by omitting key information regarding U.S. Food and Drug Administration (FDA) concerns over its drug trial methodology when expressing optimism regarding the timeline for approval of one of its key drugs, Lemtrada.

The basis for these claims stemmed from Sanofi's 2011 acquisition of Genzyme, where it had agreed to a deal giving Genzyme's former stockholders partial compensation in the form of financial instruments called contingent value rights (CVRs), which provided the holders with cash payouts upon the achievement of certain milestones tied to the success of Lemtrada. One milestone, the "approval milestone," entitled CVR holders to a cash payout if Lemtrada was approved

by March 31, 2014, and Sanofi made statements in both the offering materials of the CVRs and to the market generally following the acquisition in which it expressed satisfaction with the progress of Lemtrada's clinical trials and described the drug's likelihood of approval with "exceptional optimism."⁸ In discussions with the company, however, the FDA had allegedly expressed "major concern[s]" about the use of single-blind studies, indicating a strong preference for double-blinded controlled studies and noting that Sanofi's trial methodology posed a "significant problem which w[ould] cause serious difficulties in interpreting the results of the trial."⁹ When the FDA subsequently released materials in October 2013 detailing its communications with Sanofi regarding these concerns, the value of the CVRs dropped more than 62 percent. Lemtrada was ultimately approved by the FDA in November 2014, but this approval came months after the deadline for the approval milestone had passed.

Plaintiff CVR holders filed class action complaints against Sanofi, its predecessor, and three executives, alleging violations of Section 10(b) of the Exchange Act against all defendants and Section 20(a) against the individual defendants. These complaints were later consolidated, and a separate complaint was also filed by a group of corporations alleging similar claims arising from the same set of facts (though alleging many additional violations). In an opinion authored prior to the Supreme Court's decision in *Omnicare*, the district court granted the defendants'

motion to dismiss as to all claims, applying a standard from *Fait v. Regions Financial Corp.*¹⁰ in addressing the allegedly false and misleading statements of opinion. Under *Fait*, a defendant's statement of opinion would be actionable only where it is both "objectively false and disbelieved by the defendant at the time it was expressed."¹¹ The district court found that the plaintiffs had failed to adequately allege either prong—that the defendants "did not genuinely believe what they were saying at the time they said it," or that the claims were objectively false.¹² Importantly, the district court also rejected the plaintiffs' arguments that Sanofi's disclosures omitted facts regarding the FDA's feedback that were necessary in order to make Sanofi's optimistic statements about FDA approval not misleading.

On appeal, the Second Circuit affirmed both the district court's "reasoning and holding," but took the opportunity to engage in a thorough analysis of *Omnicare* as applied to the facts of the case.¹³ The Second Circuit found that under *Omnicare*, the two requirements articulated in *Fait* were to be applied separately such that only one of the two prongs must be satisfied in order to find a statement to be actionable. Further, the Second Circuit found that under *Omnicare*, opinions that satisfy this standard "may nonetheless be actionable if the speaker omits information whose omission makes the statement misleading to a reasonable investor."¹⁴ Notably, the Second Circuit emphasized both the sophistication of securities investors and the principle, derived from *Omnicare*, that liability does not follow "merely because an issuer failed to disclose information that ran counter to

an opinion expressed in the registration statement."¹⁵ Even in the face of Sanofi's "exceptional optimism," investors were charged with knowledge of the context in which the statements were issued, including as to the "[c]ontinuous dialogue between the FDA and [Sanofi]" surrounding the sufficiency of "various aspects of the clinical trials," the "numerous caveats to the reliability of the projections" made in offering materials, and the "wide variety of information" that formed the basis for the projections.¹⁶ Future cases will tell whether these points of emphasis indicate the Second Circuit's intention to narrowly construe those statements or omissions that may give rise to liability under *Omnicare*.

Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.

In an unpublished decision issued later in the spring of 2016, the Second Circuit also applied *Omnicare* to a claim brought under Section 18 of the Exchange Act. Under Section 18, any person who "make[s] or cause[s] to be made" a false or misleading statement in a document filed pursuant to the Exchange Act is liable to any person who purchased or sold a security in reliance on that statement.¹⁷ In *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, the Second Circuit affirmed a district court's dismissal of a Section 18 claim on the grounds that the plaintiffs failed to adequately allege that opinions by a company's auditors, included in Form 10-Ks from 2007-2010, supported allegations of misrepresentations.¹⁸ In doing so, it recited the standard from *Omnicare* as

part of its Section 18 analysis, saying in a footnote that because the parties had not commented on the textual difference between Section 11 of the Securities Act and Section 18 of the Exchange Act, the court "assume[d], *arguendo*, that the standard announced in *Omnicare* applies to § 18 claims."¹⁹ This further underscores the influence of the *Omnicare* decision within the Second Circuit's securities law jurisprudence.

Querub v. Moore Stephens Hong Kong

In May 2016, the Second Circuit issued another unpublished opinion applying an *Omnicare* analysis to purportedly false audit opinions. In affirming a district court's grant of summary judgment for the defendants, the Second Circuit reasoned that audit reports labeled "opinions" involve "considerable subjective judgment," and held that such reports are statements of opinion subject to the *Omnicare* standard for claims under Section 11 of the Securities Act.²⁰ Finding evidence of neither a subjective belief inconsistent with the opinions at issue, nor the omission of material facts about the basis for those opinions, the court found that the plaintiffs could not sustain their Section 11 claims under *Omnicare*.

In re Deutsche Bank AG Securities Litigation

Consistent with the Second Circuit's strict interpretation of *Omnicare*, in July 2016, the U.S. District Court for the Southern District of New York granted in part a motion to dismiss claims against Deutsche Bank involving a series of shelf offerings

between May 2007 and May 2008 in which allegedly false or misleading offering materials were used to sell billions of dollars in preferred securities purportedly in violation of Sections 11, 12(a)(2), and 15 of the Securities Act. In *In re Deutsche Bank AG Securities Litigation*,²¹ the district court considered a motion to dismiss a third amended complaint made possible following the Supreme Court's order vacating judgment and remanding the case for further consideration in light of *Omnicare*, and the Second Circuit's subsequent remand to the district court. The plaintiffs' new complaint alleged, in essence, that the defendants—including Deutsche Bank, underwriters, and individuals—were aware of facts regarding the status of the subprime market and Deutsche Bank's subprime assets at the time of the offerings, which would have required them to disclose more information about the bank's exposure during the subprime crisis, particularly as the situation worsened. The plaintiffs alleged that the defendants had a duty to disclose additional information in order to render other statements they made not misleading, both because of:

(1) management's knowledge at the time; and (2) regulatory obligations under Items 303 and 503 of Regulation S-K.

While the court denied the defendants' motion to dismiss as to certain offerings due to regulatory obligations, it granted the motion with respect to alleged omissions based on management's knowledge. Citing *Omnicare*, the court required the plaintiffs to allege "particular (and material) facts going to the basis for [Deutsche Bank]'s opinion—facts about the inquiry [Deutsche Bank] did or did not conduct

or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."²² Despite allegations that one of Deutsche Bank's top traders testified before a Senate subcommittee that he had warned "anyone who would listen"²³ regarding the suspect quality of securities underlying CDOs before the crisis and had hedged against the collapse of mortgage-backed securities, saving Deutsche Bank billions of dollars, the court held that the defendants were not required to disclose further information. Because senior bank officials disagreed with his assessment, the court likened the situation to one in which "a single junior attorney expressed doubts about a practice[] when six of his more senior colleagues gave a stamp of approval."²⁴ As to several other claims, the court emphasized the presence of disclaimers in the offering materials, pointing to specific provisions underscoring Deutsche Bank's disclosure of the "tentativeness of its belief" in the true value of write-downs.²⁵

In re BP p.l.c. Securities Litigation

Outside of the Second Circuit, district courts have been the primary interpreters of *Omnicare*. For example, in the Southern District of Texas, a district court engaged in a thorough analysis of *Omnicare* while granting in part and denying in part the defendants' motion for summary judgment as to Section 10(b) claims. In *In re BP p.l.c. Securities Litigation*, the court considered evidence of falsity and scienter regarding public statements concerning the range of oil flow estimates made by

BP representatives in the days immediately following the Deepwater Horizon oil spill.²⁶ After concluding that the statements at issue were statements of opinion, the court applied *Omnicare*'s analysis as to misleading omissions under Section 11—that liability flows if a statement "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, [where] those facts conflict with what a reasonable investor would take from the statement itself"²⁷—to the omissions provision of SEC Rule 10b-5, stating that "courts have overwhelmingly applied [*Omnicare*'s] holdings in the context of alleged omissions under Section 10(b)."^{28, 29} The court found that omitted facts as to internal estimates regarding the flow rates did not "'fairly align[]' with what a reasonable investor would have taken" from the several statements at issue.³⁰ And while context can sometimes make clear the tentativeness of beliefs, the lack of surrounding "'hedges' or 'disclaimers' of any kind" in the offending statements failed to alert investors of the "extraordinarily tentative nature of BP's estimate."³¹

As to scienter, the court found that because "falsity is the *foundation* of scienter, not a wholly unrelated structure[,] . . . to establish scienter . . . post-*Omnicare*, a court looks to whether the record contains evidence upon which a reasonable jury could conclude that the defendant 'omitt[ed] material facts about [his] inquiry into or knowledge concerning a statement of opinion' with the 'intent to deceive, manipulate, or defraud or severe recklessness.'"³² Where the plaintiffs had presented evidence for certain claims that the speaker knew of the wide range of potential flow rates, that the estimates

were highly uncertain and inaccurate, and that flow rate estimates themselves were market-sensitive information, a reasonable jury could conclude that omitting those facts while stating “a specific estimate . . . with some degree of certainty” in prepared remarks was sufficient for a finding of knowledge or recklessness.³³ But the court was careful to note that its holding was “driven by the unique factual contours of the case—specifically, the unusual asymmetry of information between BP and its investors,” and that “[o]missions that might not have been misleading under conventional circumstances . . . were particularly misleading given the market’s relative lack of familiarity with the [D]eepwater oil leaks.”³⁴ While only some of the claims at issue survived summary judgment, this case is an illustration of district courts’ willingness to apply *Omnicare*’s holdings to Section 10(b) claims and of the methodology they employ when doing so.

Developments Related to Item 303 of Regulation S-K

Also of note in 2016 were further developments regarding the circuit split over whether Item 303 of Regulation S-K creates an actionable duty to disclose under the antifraud provisions of the Exchange Act. Item 303 imposes specific disclosure requirements on companies filing reports on SEC Forms 10-K and 10-Q, including requiring that the reporting company “[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales

or revenues or income from continuing operations.”³⁵

In an opinion authored in 2000 by then-Circuit Judge Alito, the Third Circuit explicitly rejected the “claim that SEC Regulation S-K, Item 303(a) impose[s] an affirmative duty of disclosure on [a company] that could give rise to a claim under Rule 10b-5.”³⁶ In its opinion, the Third Circuit recognized a distinction between the materiality standards for Item 303 and SEC Rule 10b-5, noting that the test under Item 303 “varies considerably from the general test for securities fraud materiality set out by the Supreme Court.”³⁷ The *Oran* decision also cited an SEC release stating that the tests were “inapposite,” while noting that the disclosure obligations under Item 303 “extend considerably beyond those required by Rule 10b-5.”³⁸

The Ninth Circuit Court of Appeals has similarly held that “Item 303 does not create a duty to disclose for purposes of Section 10(b) and Rule 10b-5. Such a duty to disclose must be separately shown according to the principles set forth by the Supreme Court in *Basic* and *Matrixx Initiatives*.”³⁹

With its 2016 opinion in *Indiana Public Retirement System v. SAIC, Inc.*, the Second Circuit Court of Appeals confirmed an earlier ruling at odds with the *Oran* and *NVIDIA* decisions, and recognized once again that, in the Second Circuit, Item 303 disclosure obligations can form a basis for liability under Section 10(b).^{40, 41} In *SAIC*, the Second Circuit vacated in part a district court decision denying the plaintiffs’ post-judgment motion to amend

their complaint alleging violations of Rule 10b-5, in part based on the holding that the plaintiffs’ amended complaint made sufficient allegations to “support the strong inference” that the defendant actually knew of offending conduct that it would be required to disclose under Item 303.⁴²

In late October 2016, the defendant SAIC, now operating under the name Leidos, Inc., filed a petition for writ of *certiorari* with the U.S. Supreme Court in order to resolve the “open disagreement” between the Second, Third, and Ninth Circuits regarding whether Item 303 creates a duty to disclose that is actionable under Section 10(b) of the Exchange Act and SEC Rule 10b-5.⁴³ The petition argues that the Second Circuit’s opinions are at odds with views expressed in the Sixth and Eleventh Circuits, and will lead to disparate outcomes between circuits and forum shopping.⁴⁴ Given the substantial potential liability for claims stemming from Item 303 disclosures, the disposition of this petition for *certiorari* warrants careful observation in the year to come.

Class Certification Decisions Post-*Halliburton II*

In *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, the U.S. Supreme Court reaffirmed the applicability of the fraud-on-the-market presumption established in *Basic Inc. v. Levinson* (the “*Basic* presumption”), but held that defendants must be allowed to challenge that presumption at the class certification stage.⁴⁵ Until this past year, district courts had been alone in defining the contours

of what constitutes sufficient evidence for rebuttal. 2016 saw the first appellate court ruling on what evidence a defendant must present to rebut the *Basic* presumption. More appellate decisions are likely in 2017, making this an area to continue to watch.

Since *Basic*, plaintiffs suing for federal securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5 have benefited from the ability to invoke a rebuttable fraud-on-the-market presumption of reliance at the class certification stage. Under Federal Rule of Civil Procedure 23(b)(3), in order to be certified, a proposed class must show that “questions of law or fact common to class members predominate over any questions affecting only individual members.”⁴⁶ But as the Supreme Court noted in *Basic*, this predominance requirement would place an “unrealistic evidentiary burden” on plaintiffs in the context of securities class actions, where each individual investor would have to prove how he or she would have acted in the absence of the misrepresentation.⁴⁷ Therefore, the Court held in *Basic* that Rule 10b-5 plaintiffs may invoke the rebuttable presumption that, in the case of publicly known material misrepresentations related to stocks traded in well-developed efficient markets, where plaintiffs traded the stock between the time when the misrepresentations were made and the truth was revealed, they did so “in reliance on the integrity of [the market] price.”⁴⁸ This is commonly referred to as the “fraud-on-the-market” theory of reliance.

While *Halliburton II* reaffirmed the fraud-on-the-market theory, the Court clarified that after plaintiffs make a *prima facie*

showing of reliance, defendants must also be afforded the opportunity to rebut the presumption with evidence that “severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff.”⁴⁹

IBEW Local 98 Pension Fund v. Best Buy Co.

In April 2016, in the first court of appeals ruling on the issue following the Supreme Court’s opinion in *Halliburton II*, a court held that direct evidence presented by the defendants had successfully severed that link, thereby rebutting the *Basic* presumption. In *IBEW Local 98 Pension Fund v. Best Buy Co.*, the U.S. Court of Appeals for the Eighth Circuit held that a district court abused its discretion in certifying a class and had “misapplied the price impact analysis mandated by *Halliburton II*.”⁵⁰ The district court had certified a class based on two allegedly misleading statements made during a conference call with analysts that took place only hours after a press release announcing quarterly earnings. The parties agreed that the economic substance of statements made during the conference call was “virtually the same” as that of non-fraudulent press release statements and “would have been expected to be interpreted similarly by investors.”⁵¹ Importantly, both parties’ experts agreed that the conference call statements had “no additional price impact” beyond that caused by the earlier press release.⁵²

Halliburton II invited defendants “to defeat the presumption [of reliance] through evidence that an alleged misrepresentation did not actually affect the market price

of the stock.”⁵³ Where both parties’ experts agreed that the allegedly false statements at issue had caused no price impact upon their publication, a majority of the Eighth Circuit panel held that “overwhelming evidence of no ‘front-end’ price impact . . . severed any link between the alleged . . . misrepresentations and the stock price.”⁵⁴ Though they conceded that there was no price impact on the day of the announcement, the plaintiffs argued that a decline in stock price following an alleged corrective disclosure was sufficient to support a price maintenance theory—whereby the alleged fraudulent disclosure maintains a stock price that would otherwise decline—but a majority of the panel disagreed, stating that the theory provided “no evidence that refuted defendants’ overwhelming evidence of no price impact,” especially where “[t]he allegedly ‘inflated price’ was established by [a] non-fraudulent press release.”⁵⁵

While the opinion included a vigorous dissent arguing that the defendant had not “produc[ed] evidence showing that the alleged misrepresentations had not counteracted a price decline that would have otherwise occurred,” on June 1, 2016, the Eighth Circuit nonetheless denied rehearing *en banc*.⁵⁶

In re Goldman Sachs Group, Inc., Securities Litigation

While the Eighth Circuit was the first court of appeals to interpret *Halliburton II*, it will not be the last. Pending appeals to be decided in 2017 and other district court cases throughout the country will further define the implications of *Halliburton II*. The Second Circuit recently granted appellate

review of two decisions from the Southern District of New York touching on the evidentiary standard that defendants must meet to rebut the *Basic* presumption.

In the first case, *In re Goldman Sachs Group, Inc., Securities Litigation*,⁵⁷ the district court found that the defendants could not rebut the presumption through evidence that “suggests a price decline for an alternate reason” than the alleged false statements “but does not provide conclusive evidence that no link exists between the price decline and the misrepresentation.”⁵⁸ The claims in *Goldman Sachs* are based on statements Goldman made about its internal controls to address conflicts of interest—statements the plaintiffs allege were revealed to be false when the SEC and DOJ announced investigations of allegedly conflicted Goldman CDO transactions.⁵⁹ Goldman presented expert evidence that the price drop was caused by market reaction to the fact of the investigations, not by corrective disclosure of the alleged misstatements.⁶⁰ That was not enough to rebut the presumption, the district court ruled, because it “failed to demonstrate a complete lack of price impact,” i.e., that “no part of the decline was caused by the corrective disclosure.”⁶¹ “[W]here [d]efendants cannot demonstrate a complete absence of price impact, and where [p]laintiffs have demonstrated an efficient market,” the district court held, “the *Basic* presumption applies.”⁶²

In their brief seeking reversal of class certification, the appellant defendants have asked the Second Circuit to review what they characterized as the “virtually

insurmountable legal standard” employed by the district court in requiring that defendants must present “conclusive evidence” demonstrating a “complete lack of price impact.”⁶³ They argue that this high standard contravenes both *Halliburton II*’s “any showing that severs the link” standard and Federal Rule of Evidence 301.⁶⁴ They have also asked the court of appeals to review the district court’s refusal to consider what they characterize as “unrebutted empirical evidence demonstrating an absence of any . . . price impact”⁶⁵ owing to the fact that this evidence also bore on materiality.⁶⁶

Similarly, in *Strougo v. Barclays PLC*,⁶⁷ the defendants attempted to show lack of price impact by arguing that the disclosure of a government investigation, not the alleged misstatements themselves, caused the price drop.⁶⁸ The district court responded that “[w]hile defendants’ arguments suggest that the post-disclosure price movement does not support a strong inference or provide compelling evidence of price impact,” that was not enough to rebut the presumption because “they have not met their burden of proving lack of price impact.”⁶⁹ “The fact that other factors contributed to the price decline does not establish by a preponderance of the evidence that the drop in the price . . . was not caused at least in part by the disclosure of fraud”⁷⁰ According to the court in *Strougo*, to show lack of price impact sufficient to rebut the *Basic* presumption, “defendants must prove by a preponderance of the evidence that the price drop on the corrective disclosure date was not due to the alleged fraud,” and the defendants there had not done so.⁷¹

In their Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), the defendant petitioners presented issues that they say “overlap substantially with those in [*Goldman*].”⁷² In particular, they seek immediate review as to the district court’s ruling that, in order to rebut the *Basic* presumption under *Halliburton II*, defendants must prove a lack of price impact “by a preponderance of the evidence”—in other words, “that the alleged misstatements *could not have* impacted the [stock] price.”⁷³ They also argue that the district court erred in failing to consider undisputed evidence of a lack of price movement on the day of the alleged misstatements simply because the plaintiffs had asserted a “tenable theory of price maintenance,” arguing that this “improperly decides the Rule 23 inquiry solely on the basis of [p]laintiffs’ pleadings.”⁷⁴

In re Intuitive Surgical Securities Litigation

Similar issues were presented in *In re Intuitive Surgical Securities Litigation*.⁷⁵ In *Intuitive Surgical*, the court acknowledged that *Halliburton II* allows a defendant to “attempt to rebut the *Basic* presumption at the class certification stage with evidence showing a lack of price impact,” but nevertheless found that the defendants’ evidence of no price impact was insufficient to defeat the presumption of reliance.⁷⁶ In so finding, the court held that “[d]efendants bear both the burden of production and the burden of persuasion on the issue of price impact That is, where [p]laintiffs have satisfied the requirements entitling them to the initial

presumption of reliance, in order to rebut this presumption [d]efendants must convince the court that their evidence is more probative of price impact than the evidence offered by [p]laintiffs.”⁷⁷ After reviewing the competing expert reports submitted by the parties, the court found that the defendants had not “met their burden” to persuade the court that no price impact existed.^{78, 79}

The defendants have sought leave to appeal the district court’s ruling to the Ninth Circuit Court of Appeals pursuant to Federal Rule of Civil Procedure 23(f). The defendants argue that the district court’s holding was “pure legal error,” because it improperly shifted the burden of persuasion from plaintiffs to defendants.^{80, 81} According to the defendants, “[a]ny showing that severs the link between the alleged misrepresentation and the price received (or paid) by the plaintiff [should] be sufficient to rebut the presumption of reliance.”⁸² The burden of persuasion, the defendants contend, should then “shift[] back to plaintiffs who, at all times, retain the burden of persuading the court that the essential element of reliance can be proven on a classwide basis.”^{83, 84}

The outcome of these cases will determine whether the Second, Fifth, and Ninth Circuits join the Eighth Circuit on the issue of evidence required for rebuttal of the *Basic* presumption in the wake of *Halliburton II*, or if a circuit split emerges.

American Pipe Tolling

The Sixth Circuit Court of Appeals issued an opinion with important implications for when certain securities claims may be time-barred. The case, *Stein v. Regions*

Morgan Keegan Select High Income Fund, Inc.,⁸⁵ weighed in on a question that has split other federal courts of appeal: whether statutes of repose, such as the ones governing claims under the federal securities laws, are tolled for individual plaintiffs pending resolution of class certification in related class action suits. This type of tolling—referred to as *American Pipe* tolling after the 1974 Supreme Court case that created the doctrine—stops the running of statutes of limitation from the time a class action is commenced through the denial of class certification. That allows plaintiffs to file individual claims after either opting out of the class or after class certification is denied, even if the statute of limitations on their claim would otherwise have expired.

Claims under the federal securities laws, however, are governed not only by statutes of limitation, but also by statutes of repose. In the case of the Securities Act, claims must be brought within one year of their discovery (the limitations period), and in “no event” can they be brought more than three years after the sale of the security (the repose period).⁸⁶ Similarly, the Exchange Act provides that claims must be brought “not later than the earlier of” two years after “discovery of the facts constituting the violation” (the limitations period) or five years “after such violation” (the repose period).⁸⁷ Like statutes of limitation, statutes of repose create time limits for bringing claims. But unlike statutes of limitation, statutes of repose are not only requirements that plaintiffs diligently pursue known claims, they “effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.”⁸⁸

The key issue in *Stein* was whether the principle set forth in *American Pipe*—that statutes of limitation do not run against individual class members while class actions are pending—should also apply to statutes of repose. The Sixth Circuit, noting a split on the issue in its sister circuits, held that it does not apply because “statutes of repose vest a substantive right in defendants to be free of liability” and “give priority to defendants’ right to be free of liability after a certain absolute period of time (rather than plaintiffs’ ability to bring claims).”⁸⁹ Accordingly, under *Stein*, individual plaintiffs must bring securities claims within the strict three-year or five-year periods prescribed in the statutes of repose, regardless of whether that time may expire while certification of a class of which they are a member is pending.⁹⁰

Securities Fraud Claims: Scienter and the PSLRA Safe Harbor

Arena Pharmaceuticals

The Ninth Circuit delivered an important opinion in October 2016 regarding the “scienter”—or state of mind—requirement in securities fraud cases. *Schueneman v. Arena Pharmaceuticals, Inc.*⁹¹ centered on public statements Arena made about the likelihood that its diet drug would ultimately be approved by the FDA. Between 2006 and 2009, Arena conducted two Phase III human clinical trials on the drug Locaserin, while simultaneously conducting a nonclinical study on lab rats to determine whether there was a risk of humans developing cancer from the drug.⁹² By February 2007, initial results showed that Locaserin was causing various forms of

cancer in the rats.⁹³ Arena reported those results to the FDA in May 2007, indicating that it believed the reason for the cancer was a build-up of a hormone—prolactin—that had been linked to cancer in rats.⁹⁴ The FDA permitted Arena to continue the human clinical trials while Arena conducted follow-up testing on whether the rats experienced increased prolactin levels.⁹⁵ Over the next two years, Arena met with and provided updates to the FDA on the rat study while also continuing the human studies.

In February 2009, Arena submitted to the FDA a final report on the rat study, concluding that follow-up studies “substantiated the connection between prolactin and the increased cancer.”⁹⁶ The following month, Arena’s CEO told investors that Arena was confident Locaserin would be approved based on human trials, preclinical trials, and “all the animal studies that have been completed.”⁹⁷ Over the following months, Arena made statements that “the long term safety and efficacy” of Locaserin had been “demonstrated” in part by “preclinical, animal studies” designed to assess the risk that the drug could cause cancer in humans; that Arena had “favorable results on everything that we’ve compiled so far”; and that it was “not expecting any surprises” associated with FDA review.⁹⁸ Arena submitted its final application for Locaserin in December 2009.⁹⁹ In September 2010, the FDA published the documentation around the application, including documents discussing the rat study and the possible carcinogenic effects it raised. Investors were surprised, and Arena’s stock fell by 40 percent in a day.¹⁰⁰ The FDA initially rejected Arena’s

application based on concerns that the studies did not show enough increases in prolactin levels in the rats to ensure safety in humans.^{101, 102}

A class action suit was filed after the stock drop. The trial court dismissed the case, holding that Arena could not be liable because “the strongest inference from the alleged facts was that Arena experienced an unexpected scientific disagreement with the FDA, and that because there was a reasonable basis to believe that the data supported” Arena’s theory about prolactin levels, any omissions in Arena’s public statements were not made with the requisite level of intent for securities fraud.¹⁰³ On appeal, the Ninth Circuit reversed the trial court’s ruling, and allowed the case to proceed.

The Ninth Circuit described this as a “close case,” but held that “once they raised the animal studies” in their public statements, “[d]efendants were obligated to disclose the rat study’s existence to the market.”¹⁰⁴ As the court made clear, Arena “may not have had a duty to disclose the rat study had they not been representing that animal studies supported Locaserin’s safety and therefore its likelihood of being approved.”¹⁰⁵ But crucially, “Arena did more than just express its confidence in Locaserin’s future.”¹⁰⁶ Rather, it “affirmatively represented that ‘all the animal studies that had been completed’ supported Arena’s case for approval” while knowing that “the animal studies were the sticking point with the FDA.”¹⁰⁷ As the court explained: “Arena was free to express confidence in FDA approval. It might have represented that Arena was working through some requests

from the FDA and was confident the data would vindicate Locaserin. But what it could not do was express confidence by claiming that all of the data was running in Locaserin’s favor. It was not.”¹⁰⁸

Arena Pharmaceuticals carries important implications for companies, both in the pharmaceutical industry and beyond. The court took pains to say that it was not creating an affirmative duty to disclose all adverse information a company is aware of, nor finding scienter whenever a company’s reasonable scientific belief met with disagreement from a regulator. But the opinion should remind companies to be careful about making definitive claims on a topic without disclosing information relevant to that topic that might negatively color investors’ views of the company’s prospects.

PSLRA Safe Harbor

District courts in California and Massachusetts issued opinions in 2016 further clarifying the extent of the Private Securities Litigation Reform Act (PSLRA) safe harbor for “forward-looking statements” from claims alleging securities fraud under Section 10(b) of the Exchange Act.

In *Grobler v. Neovasc Inc.*,¹⁰⁹ a securities fraud plaintiff claimed that defendant Neovasc misled investors about the likely outcome of a lawsuit accusing the company of misappropriating a competitor’s trade secrets for one of its products. While the trade secret lawsuit was pending, the company and its executives opined publicly that the claims against it were “without merit” and “baseless.”¹¹⁰ A jury in the trade secrets

litigation ultimately found against Neovasc on several of the competitor's claims, awarding \$70 million in damages, among other relief.¹¹¹ The company's stock price fell from \$1.84 to \$0.46 per share following the jury verdict. A securities fraud class action soon followed, accusing Neovasc and certain of its executives of misleading investors about the trade secrets litigation and its effect on the prospects for Neovasc's product.¹¹²

On a motion to dismiss the securities fraud complaint, the defendants argued that the challenged statements were protected by the PSLRA's safe harbor for "forward-looking statements," and thus could not be the basis for a securities fraud claim.¹¹³ The court agreed, and made several important holdings about the safe harbor. First, the court held that the statements asserting that the competitor's claims were meritless were forward-looking "because they were predictions about the future outcome of the pending litigation, and could only be invalidated by reference to the ultimate outcome of the case."¹¹⁴ Second, the court reaffirmed that where forward-looking statements are accompanied by meaningful cautionary statements—as were the statements in *Neovasc*—the safe harbor applies even if a plaintiff can plead facts demonstrating that the defendants had actual knowledge that the statements were false or misleading.¹¹⁵ Third, the court rejected the plaintiff's argument that it could base a claim on "embedded assertions of present fact" in the defendants' forward-looking statements—"specifically, that defendants purported to actually believe" that the

competitor's claims were meritless.¹¹⁶ That argument, the court held, could not be used to circumvent the safe harbor because "[v]irtually every statement about a future event could be said to imply a statement of present belief. Yet examining an alleged present belief apart from the forward-looking aspects of the statement requires an inquiry into the state of mind of the defendant—something that the first prong of the safe-harbor provision is written to ignore."¹¹⁷ As such, "[t]reating all such projections as containing an implicit statement of present fact—that the speaker actually holds the opinion expressed—would render meaningless the protections" of the safe harbor.¹¹⁸

An opinion from the Northern District of California also reaffirmed application of the PSLRA safe harbor to statements forecasting financial results and discussing future operations. In that case, *In re Leapfrog Enterprise, Inc. Securities Litigation*,¹¹⁹ the plaintiff challenged a number of statements LeapFrog made regarding the planned rollout of a new product, inventory levels, and its financial outlook. In dismissing the complaint, the court determined that not only were statements forecasting future financial results forward-looking, but so were statements discussing the launch date of the new product, how that launch date would affect the product's performance, and LeapFrog's "plans and ability to work through carryover inventory."¹²⁰ Because these forward-looking statements were accompanied by meaningful cautionary language, the court found that the PSLRA safe harbor applied.¹²¹

Standard for Disclosure for Corporations Purchasing Their Own Stock

In *Fried v. Stiefel Laboratories, Inc.*, the Eleventh Circuit helped to define the scope of fiduciary obligations owed by a private corporation purchasing its own stock, holding that those corporations do not have a duty under Rule 10b-5(b) to disclose "all material information" to potential sellers in the absence of a prior affirmative representation.¹²²

Richard Fried, the former CFO of a privately held pharmaceutical company, brought a lawsuit against his former employer, Steifel Labs (SLI), and its president, Charles Stiefel, stemming from the sale (back to the company) of shares previously issued to him as a part of his pension plan. Following a meeting between Fried and Stiefel in the fall of 2008 in which Stiefel revealed the company's challenging short-term outlook—interpreted by Fried as "kind of a sell signal"—Fried exercised his "put" right, selling 30 shares of stock back to SLI in January 2009 for roughly \$16,500 per share.¹²³ Unbeknownst to Fried, during the intervening period, Stiefel was approached by a larger pharmaceutical company and entered into negotiations that eventually resulted in its sale to GlaxoSmithKline in April at a valuation that netted stockholders over \$69,000 per share.¹²⁴

In the resulting lawsuit, among other claims, Fried alleged fraud under Section 10(b) of the Exchange Act and Rule

10b-5(b), arguing that SLI committed an actionable omission when it failed to inform him that it was in the midst of negotiations regarding the potential sale. At trial, a jury returned a verdict in favor of the defendants after the court refused to include Fried's proposed jury instruction stating that the defendants had a duty under Rule 10b-5(b) to disclose "all material information" when trading.¹²⁵ Fried appealed, arguing that his proposed jury instruction had correctly stated Stiefel Labs' disclosure duties as a corporate insider.

On appeal, the Eleventh Circuit reviewed the district court's refusal to give Fried's proposed jury instruction, holding that while Rule 10b-5(b) prohibits misrepresentations and omissions of material fact, the "plain text of the Rule . . . describes an omission that makes other 'statements made' misleading," thereby proscribing fraud "only in connection with an affirmative representation."¹²⁶ While omissions under Rule 10b-5(a) and (c) are not restricted to affirmative representations and therefore "do not require making statements," Fried's proposed jury instruction did not adequately state the elements of insider-trading claims under those provisions, as it neither explained the corporation's duty to disclose stemming from its role as an insider nor explained how insider trading occurs.¹²⁷ The court therefore affirmed the judgment in favor of the defendants.

In late May 2016, Fried petitioned the U.S. Supreme Court for review, claiming that the Eleventh Circuit's "strict insistence that a claim resting on this relationship-based duty to disclose must proceed under subsection (a) or (c) of Rule 10b-5 and

satisfy the elements of a classical insider-trading claim" conflicted with the Second, Ninth, and Tenth Circuits' "less formalistic approach."¹²⁸ While the Supreme Court has taken up important securities law issues in recent terms, it denied the petition for *certiorari*, effectively leaving clarification of this important issue for a later date.

Continued Increase in Cases Filed Under the Securities Act in State Court

Securities class actions brought under the federal securities laws are largely found in federal courts. In fact, the Exchange Act (under which most securities class actions are filed) has always provided for exclusive federal jurisdiction.

In 2016, however, we saw the acceleration of a trend that had been building for several years—the filing of class actions under the Securities Act in California state courts. While the number of such cases grew this past year, so did the prospect that this end-run around federal jurisdiction over the federal securities laws would be closed.

When the Securities Act was adopted, it included a unique provision: cases could be brought in either federal or state court, but if a case was filed in state court, it could not be removed to federal court. In 1995, after finding many abuses in the filing of securities class actions, Congress toughened the pleading standard for the securities laws and created a number of other procedural protections.

The passage of the PSLRA had an "unintended consequence"—plaintiffs began filing securities class actions in state court.¹²⁹ Congress again responded, passing the Securities Litigation Uniform Standards Act of 1998 (SLUSA). Among the changes in SLUSA was a revision of the anti-removal provision of the Securities Act, to provide that concurrent state-court subject matter jurisdiction over Securities Act claims will continue "except as provided in [Section 16 of the Securities Act] with respect to covered class actions."¹³⁰ Section 16, as amended by SLUSA, defines "covered class action" as any damages action on behalf of more than 50 people. It also precludes covered class actions alleging state-law securities claims and permits precluded actions to be removed to and dismissed in federal court.

In the decade following the adoption of SLUSA, few Securities Act class actions were filed in state courts. That changed after the decision by the California Court of Appeal in *Luther v. Countrywide Financial Corp.*,¹³¹ which held that state courts retained jurisdiction over Securities Act class actions despite SLUSA's revisions, as well as the decisions of many federal district courts in California also finding that state courts retained jurisdiction over such cases and, therefore, defendants could not remove those cases to federal court. Notably, the views of the California state and federal courts are contrary to those in other jurisdictions, particularly federal district courts in New York and New Jersey, which have held that SLUSA took away state court jurisdiction over Securities Act class actions.

In the years that followed, more such class actions were filed in California state courts, slowly at first, with 2011, 2012, 2013, and 2014 seeing the filing of three, four, one, and five cases, respectively, by our calculations. The pace picked up significantly in 2015, with 14 such cases filed. 2016 saw even more, with 18 such cases filed.

The reason why plaintiffs sought California state courts is not hard to fathom. In general, California's pleading standards and their application by the courts are viewed as more permissive than their federal counterparts. In addition, some of the provisions of the PSLRA are specifically geared toward cases in federal court, and plaintiffs could evade those by filing in state courts.

O'Donnell v. Coupons.com

One notable exception to the difficulties defendants have experienced in state court was the dismissal of a class action filed against Coupons.com and its directors in Santa Clara County Superior Court.¹³² In that case, the plaintiffs alleged that the results in an IPO prospectus were inflated because they were driven in substantial part by incremental spending outside of the annual plan commitments by holiday coupon campaigns during December 2013. In response to the defendants' demurrers, the superior court dismissed the complaint with leave to amend, holding that the company was under no obligation to predict that past spending by customers may or may not occur again in the future.¹³³ In so dismissing, the court discussed at length federal case law finding that companies were under

no obligation to predict the future in their offering documents.

Following amendment, the court considered and sustained the renewed demurrer, this time without leave to amend, holding that the "plaintiffs' theory that defendants should have disclosed that the growth resulting from the 'December to Remember' campaign was not to be replicated calls for the type of prediction as to future performance that courts have held is not required."¹³⁴ The plaintiffs opted not to appeal the dismissal.

Although the *Coupons.com* decision was a welcome affirmation that federal law and pleading standards should apply to Securities Act claims, it stands out because it is rare. The majority of Securities Act class actions in state courts have seen similar motions denied, and the cases have then settled even where on the merits the defendants had a strong argument that there was no viable claim under the federal securities law.

Cyan Petition for Certiorari

The year that just ended saw the potential for stopping this end-run around the federal securities laws. In May 2016, a petition for *certiorari* was filed in the U.S. Supreme Court by Cyan Inc. and its officers and directors, who were named as defendants in a securities class action filed in San Francisco Superior Court.¹³⁵

In May 2013, Cyan conducted its initial public offering. Following an announcement of weaker-than-expected results, shareholders sued in San Francisco County Superior Court. The

complaint alleged claims solely under the Securities Act on behalf of purchasers of Cyan stock issued in the IPO. In August 2015, the defendants filed a motion for judgment on the pleadings for lack of subject matter jurisdiction. The superior court denied the motion, explaining that its "hands are tied by" *Countrywide*. Cyan and the individual defendants then challenged that order in a writ petition with the California Court of Appeal. That petition was denied without opinion. The defendants then filed a petition for review with the Supreme Court of California, which also denied the petition without opinion. In May 2016, Cyan and its officers and directors filed a petition for *certiorari* with the U.S. Supreme Court, arguing that SLUSA divested state courts of jurisdiction over class actions filed under the Securities Act.¹³⁶ The petition attracted two amicus briefs in support, one filed by the Securities Industry and Financial Markets Association and the U.S. Chamber of Commerce, and the other filed by a group of prominent law professors. In response to the petition, the plaintiffs waived their right to file a response, but the Court asked that they do so. In October 2016, the Court asked that the Solicitor General (SG) of the United States file a brief setting out the views of the United States. The SG's response is pending.

If the Supreme Court agrees with the petitioners (as well as a number of federal district courts) that SLUSA divested the state courts of jurisdiction over Securities Act class actions, the loophole to evade the federal courts would close. That is a development that many companies and their officers and directors are eager to see in 2017.

Developments in Delaware M&A Law

This past year saw a seismic shift in M&A litigation with the Delaware Court of Chancery's decision in *Trulia*, which effectively eliminated so-called "disclosure-only" settlements—i.e., settlements where stockholders receive only additional disclosures, often consisting of minutiae of limited value, in exchange for an often broad release of claims—that had become the primary mechanism to resolve stockholder challenges to M&A transactions. In *Trulia*'s wake, there has been a notable decrease in stockholder suits challenging M&A transactions filed in Delaware state courts, and we expect to see similar trends in other state courts that adopt *Trulia*'s reasoning. At the same time, we have observed more vigorous litigation of post-closing claims and an increase in claims under Section 14(a) of the Exchange Act and other forms of stockholder litigation, as plaintiffs' lawyers seek other paths to monetary recovery. We expect these trends to continue into 2017 and beyond.

Trulia Resolves Recent Uncertainty Regarding Disclosure-Only Settlements

During the last half of 2015, disclosure-only settlements came under increased scrutiny. This had an immediate chilling effect on strike-suit M&A litigation, as the percentage of M&A transactions that saw stockholder challenges fell to its lowest level in the previous six years.¹³⁷ Indeed, in 2015, the percentage of deals worth \$100

million or more that resulted in stockholder litigation dropped to below 90 percent for the first time since 2009. Likewise, the number of lawsuits that were resolved before closing also decreased, from between 74 and 78 percent from 2009 to 2014 to only 57 percent in 2015.¹³⁸

While Delaware courts had long criticized aspects of disclosure-only settlements, this criticism built to a crescendo in early July 2015 with two important rulings by the Court of Chancery. In the first, on July 8, 2015, Vice Chancellor J. Travis Laster denied approval of a disclosure-only settlement and cast doubt on the continued viability of the practice, questioning whether defendants should get a broad release of claims and plaintiffs' counsel get a large fee where the only consideration given to stockholders was additional disclosure.¹³⁹ In another decision issued later that same day, Vice Chancellor John W. Noble weighed in with similar concerns, questioning whether the practice of disclosure-only settlements coupled with broad releases of claims amounted to court-sponsored "deal insurance."¹⁴⁰

Vice Chancellor Sam Glasscock III joined the fray in September 2015 in *In re Riverbed Technology Inc. Stockholders Litigation*.^{141, 142} There, a Fordham Law School professor—who had previously published pieces questioning the propriety of disclosure-only settlements and had started buying stock in companies for the purpose of objecting to the anticipated settlements—filed an objection, echoing

the concerns raised in *Aeroflex* and *Intermune*, and urged the court to reject the settlement. Although Vice Chancellor Glasscock ultimately approved the settlement over the professor's objection, he raised concerns about the continued practice and indicated that he would be much more circumspect in the future when evaluating such settlements.

In October 2015, Vice Chancellor Laster again rejected a proposed disclosure-only settlement in *In re Aruba Networks Inc. Stockholder Litigation*.^{143, 144} In *Aruba*, he described the practice of disclosure-only settlements coupled with broad releases of claims as a "systemic problem" and was critical of the plaintiffs' counsel's litigation efforts, which seemed to be geared toward achieving a disclosure-based settlement rather than securing meaningful relief for stockholders.

These decisions left M&A practitioners questioning whether disclosure-only settlements remained a viable path to resolving stockholder challenges. This not only led to a decrease in the number of new cases being filed in Delaware in the second half of 2015, but also created a logjam of agreed-upon settlements based on supplemental disclosures waiting for court approval, as practitioners sought alternative paths to resolve those cases (some of which are discussed below).

In January 2016, Chancellor Andre G. Bouchard resolved this uncertainty by issuing his decision in *In re Trulia, Inc. Stockholder Litigation*,¹⁴⁵ which rejected

a proposed disclosure-only settlement of claims related to the merger of Trulia and Zillow. In doing so, Chancellor Bouchard provided guidance to practitioners on how the Court of Chancery would approach disclosure-only settlements and pre-closing M&A litigation more generally. Moreover, he expressed the hope of reducing the number of strike suits and freeing resources for more meritorious cases capable of generating meaningful benefits for stockholders—for example, cases where “the integrity of a sales process has been corrupted by conflicts of interest on the part of corporate fiduciaries or their advisors.”¹⁴⁶

Before embarking on his legal analysis, Chancellor Bouchard discussed the dynamics in M&A litigation that led to the disclosure-only settlement epidemic, noting: “Today, the public announcement of virtually every transaction involving the acquisition of a public corporation provokes a flurry of class action lawsuits alleging that the target’s directors breached their fiduciary duties”¹⁴⁷ He observed that plaintiffs use the threat of derailing the deal as leverage, while defendants seek to settle quickly to minimize expense, to guarantee the deal closes, and to secure broad releases as a form of “deal insurance.”¹⁴⁸ But he noted that the lack of any kind of adversarial process once the parties reach an agreement to settle—which in turn makes it difficult for courts to judge the materiality of the additional disclosures—has led to the proliferation of deal litigation “beyond the realm of reason.”¹⁴⁹ Chancellor Bouchard’s principal holding, which he arrived at after discussing the

background dynamics, was that, going forward, to support a disclosure-only settlement, additional disclosures would have to be “plainly material” and the related release would have to be “narrowly circumscribed.”¹⁵⁰ He also expressed his hope that “sister courts will reach the same conclusion if confronted with the issue.”¹⁵¹

Chancellor Bouchard then examined the four supplemental disclosures that the plaintiffs had obtained—some of which were the familiar type of additional minutiae, such as the disclosure of additional multiples in the bankers’ comparable companies analysis—and concluded that none of the disclosures were “plainly material.”

The Aftermath of *Trulia*

The impact of *Trulia* on M&A litigation has been both quantitative and qualitative. The decline in the number of filings in late 2015 became much more pronounced in 2016. A recent study issued by Cornerstone Research detailed the substantial extent to which “[t]he rate of M&A litigation has declined . . . since the Delaware Court of Chancery’s decision in *Trulia*.”¹⁵² According to that study, 84 percent of M&A deals were sued upon in 2015, but only 64 percent were sued upon in the first half of 2016 (the most recent data available).¹⁵³ The average number of lawsuits filed per deal also decreased, from 4.6 in 2014, to 4.1 in 2015, and to 2.9 in the first half of 2016.¹⁵⁴ The average length of time from deal announcement to the filing of the first lawsuit increased as well, from 14 days in 2014 to 22 days in 2015 and the first half of 2016.¹⁵⁵ The percentage of filings in Delaware also declined: 61 percent of

deal litigation was filed in Delaware in the first three quarters of 2015, but only 26 percent of deal litigation was filed there in the last quarter of 2015 and the first half of 2016.¹⁵⁶ For Delaware corporations, the number of cases filed in Delaware declined from 74 percent in 2015 to 36 percent in the first half of 2016.¹⁵⁷ Litigation outcomes also changed—although between 74 and 78 percent of cases were resolved before closing from 2009 to 2014, only 56 percent were resolved pre-closing in the first half of 2016.¹⁵⁸

The reduced number of cases brought in the Delaware Court of Chancery, coupled with a recent shift in the standard of review applicable to M&A transactions, has also had a qualitative impact on the cases that are being litigated. Indeed, the Court of Chancery’s increased focus on settlements in M&A litigation occurred at the same time that the court’s jurisprudence shifted to give greater legal effect to the fully informed vote of stockholders approving M&A transactions. Under the rubric outlined in the Delaware Supreme Court’s decision in *Corwin v. KKR Financial Holdings LLC*¹⁵⁹ in the fall of 2015, the fully informed and uncoerced vote of a majority of disinterested stockholders approving a transaction shifts the standard of review to the more deferential business judgment rule. In May 2016, the Delaware Supreme Court extended the reasoning in *Corwin* in *Singh v. Attenborough*,¹⁶⁰ holding that a fully informed stockholder vote not only invokes the business judgment rule, but that the presumption is irrebuttable and “dismissal is typically the result” absent a showing of waste.¹⁶¹

In several decisions in 2016, each member of the Court of Chancery has applied the *Corwin-Singh* reasoning to dismiss post-closing challenges to M&A transactions absent material disclosure claims.¹⁶² Notably, in *In re Volcano Corp. Stockholder Litigation*,¹⁶³ Vice Chancellor Tamika Montgomery-Reeves held that the acceptance of a “first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation’s outstanding shares in a two-step merger . . . has the same cleansing effect . . . as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority.” More recently, in *In re OM Group, Inc. Stockholders Litigation*,¹⁶⁴ Vice Chancellor Joseph R. Slight III dismissed the plaintiffs’ complaint, declining to apply *Revlon* and noting that he had to “first account for the fact that another ‘qualified decision maker,’ the disinterested OM stockholders, overwhelmingly approved the transaction.”¹⁶⁵ Indeed, in the last half of 2016, defendants relied on *Corwin-Singh* at the motion to dismiss stage with considerable success to get rid of cases lacking material disclosure claims or significant allegations of breaches of the duty of loyalty.

Thus, as a result of *Trulia*, we have seen a smaller number of M&A cases than before. But the combination of *Trulia* and the application of *Corwin-Singh* has had a significant impact on the types of cases that are being litigated. If the cases we have seen so far are any indication, we expect the cases that are filed in Delaware in the future to be more vigorously litigated, and to involve post-closing challenges based on allegations of interested board majorities and material non-disclosures.

Other State and Federal Courts Appear to Be Following *Trulia* Reasoning

Critically, a number of state and federal courts have followed the approach that the Delaware courts outlined in *Trulia*. The most notable endorsement of *Trulia*’s rejection of disclosure-only settlements came from Judge Richard Posner on the Seventh Circuit in *In re Walgreen Co. Stockholder Litigation*.¹⁶⁶ *Walgreen* involved a stockholder challenge to the company’s 2014 acquisition of Alliance Boots GmbH. Before the deal closed, the company agreed to make certain supplemental disclosures in exchange for a broad release of claims, and the plaintiffs sought attorneys’ fees of \$350,000. The district court approved the settlement. On appeal to the Seventh Circuit Court of Appeals, after considering the supplemental disclosures, Judge Posner found that it was “inconceivable” that they “either reduced support for the merger by frightening the shareholders or increased that support by giving the shareholders a sense that now they knew everything.”¹⁶⁷ Describing the benefit to the class from the disclosures in this case as “non-existent,” he characterized the practice of pursuing class claims that serve only to produce attorneys’ fees as “no better than a racket.”¹⁶⁸ Judge Posner then adopted the “plainly material” standard from *Trulia*, found that it was not satisfied in this case, and reversed the district court’s approval of the settlement.¹⁶⁹

Likewise, Judge Peter Kirwan, who oversaw the complex litigation docket

for the California Superior Court in Santa Clara County during the last several years, followed the reasoning in *Trulia* and *Walgreen* in two recent decisions. In *Drullias v. 1st Century Bancshares, Inc.*,¹⁷⁰ the court addressed a proposed disclosure-only settlement arising out of Midland Financial Company’s acquisition of 1st Century. The defendants agreed to make certain supplemental disclosures related to potential conflicts of certain board members and the company’s financial advisor, and related to “don’t ask, don’t waive” provisions in confidentiality agreements with potential buyers, in exchange for a broad release. The plaintiffs sought \$400,000 in attorneys’ fees. Noting first that most of the supplemental disclosures had in fact been contained in the original proxy, Judge Kirwan then commented that he found it “troubling” that, despite the fact that Delaware law applied, the plaintiff had not acknowledged the Court of Chancery’s decision in *Trulia*. Judge Kirwan summarized and then endorsed the holding in *Trulia*, stating that “deal practitioners should not be encouraged to file strike suits in California in order to avoid *Trulia*, a possibility which *Trulia* itself recognized.”¹⁷¹ Considering both that the supplemental disclosures had in substance been contained in the original proxy and the very broad scope of the releases, Judge Kirwan determined that the settlement was not fair and declined to approve it. In another recent decision, *Anderson v. Alexza Pharmaceuticals, Inc.*,¹⁷² Judge Kirwan ordered a continuance of the settlement hearing after the plaintiff failed to acknowledge *Trulia* in its submissions and also gave the court insufficient information to determine the materiality of the disclosures at issue.

Lastly, North Carolina's business court has also acknowledged *Trulia* in the context of approving disclosure-only settlements, though it has declined to adopt it at this time.¹⁷³

Plaintiffs' Bar's Response to *Trulia*

As 2016 progressed, we also gained clarity on how the plaintiffs' bar would react to the post-*Trulia* environment. Specifically, in 2016 we saw: (1) the rise of the "mooting disclosure"; (2) the filing of more federal securities lawsuits, especially under Section 14(a) of the Exchange Act; and (3) the increase of alternate forms of stockholder litigation, including stockholder inspection demands under Section 220 of the Delaware General Corporation Law and invalidity challenges to charter and bylaw provisions.

Rise of the "Mooting" Disclosure

Plaintiffs' lawyers, faced with the less-than-promising prospects of seeking court approval of previously agreed-upon disclosure-only settlements or of filing new actions based on arguably non-material disclosure claims, have found a new avenue to seek a fee—the "mootness" fee dismissal. In these cases, the stockholder plaintiff files a complaint and immediately moves to expedite on targeted disclosure claims in the hope of causing the company to "moot" those disclosure claims. If the company makes supplemental disclosures before the scheduled stockholder vote, the plaintiff voluntarily dismisses the complaint, and then tries to collect a mootness fee

from the company. Chancellor Bouchard described this approach as preferable to the court-approved class action settlement of disclosure claims in *Trulia* because it does not involve a court-sanctioned release of claims and preserves the adversarial process. That is, because securing a broad release of claims is not on the table—unlike in the context of a disclosure-only settlement—defendants have a greater incentive to oppose fees they view as excessive. The scenario contemplated in *Trulia* has already played out on various occasions in the Court of Chancery.

In two cases decided in hearings on consecutive days in July 2016, Chancellor Bouchard awarded fees far below what the plaintiffs' attorneys sought after examining the relevant disclosures and considering opposition from the defendants. First, he slashed the plaintiffs' requested fee award of \$350,000 down to \$100,000 in *In re Receptos, Inc. Stockholder Litigation*.¹⁷⁴ The parties had actually agreed to a disclosure-only settlement in 2015, only for the plaintiffs to try to salvage it as a mootness-fee case after *Trulia*. Although Chancellor Bouchard found that some of the disclosures—particularly management's estimates for the likelihood of regulatory approval of Receptos' lead drug—had limited "therapeutic" value, he found that no disclosure rose to the level of materiality articulated in *Trulia*. He observed that "plaintiffs should not expect to receive a fee in the neighborhood of \$300,000 for supplemental disclosures in a post-*Trulia* world unless some of the supplemental information is material under the standards of Delaware law."¹⁷⁵

The next day, in *In re Keurig Green Mountain Inc. Stockholders Litigation*,¹⁷⁶ Chancellor Bouchard completely denied the plaintiffs' attorneys' application for \$300,000 in fees for securing various mooted disclosures related to alleged promises to keep management on after the deal and information about a possible strategic buyer's prior commercial relations with Keurig. He denied the fee application because the disclosures merely confirmed what was already in the proxy or were not relevant to the stockholders, providing "no compensable benefit to Keurig stockholders."¹⁷⁷ Thus, whether the mooted disclosure route remains a viable path for plaintiffs in cases where the materiality of the disclosures is marginal remains an open question.

Increase in Disclosure Claims Under Section 14(a) of the Exchange Act

In the aftermath of the *Trulia* decision in Delaware and its adoption in other jurisdictions, plaintiffs' lawyers have also increasingly recast state-law disclosure claims as federal securities claims under Section 14(a) of the Exchange Act.¹⁷⁸

Indeed, the number of federal securities lawsuits filed in the first half of 2016 increased 17 percent over the second half of 2015, mostly due to a substantial increase in M&A-related filings.¹⁷⁹ In the first half of 2016, M&A-related filings increased 167 percent over the second half of 2015, and were the highest they have been since 2010.¹⁸⁰ Of those, 58 percent of M&A-related filings were in the Third Circuit (which includes the District of Delaware) and the Ninth Circuit (which

includes California).¹⁸¹ Cornerstone Research has posited that this increase can be attributed to the effect of *Trulia*, as it “may have resulted in some venue shifting for merger objection lawsuits, many of which in recent years have been filed in Delaware.”¹⁸² There will likely be a continued increase in the number of federal securities lawsuits filed, as plaintiffs increase their efforts to find friendly forums in which to bring disclosure claims, as well as alternate or novel theories by which to articulate those claims.

But these numbers may be obscuring the reality on the ground. So far, shareholder plaintiffs have not found the federal courts to be all that welcoming. For one thing, federal securities class actions brought under Section 14(a) remain subject to the heightened pleading and procedural requirements of the PSLRA.¹⁸³ Moreover, federal courts are generally less willing to grant injunctive relief than the Court of Chancery. Rarely—if ever—do federal courts enjoin merger transactions based on alleged disclosure violations. For example, in *Rosati v. Marketo, Inc.*,^{184, 185} a federal district court denied the plaintiff’s motion to enjoin a stockholder vote to approve a pending merger because the proxy supposedly omitted material facts about management’s discussions with the acquirer. The court found that the plaintiff failed to demonstrate the likelihood of irreparable harm, because in the absence of an injunction, the plaintiff could still seek “to rescind the transaction or [to seek money] damages.”¹⁸⁶ If cases like these are any indication, plaintiffs may find that Section 14(a) claims do not provide

a viable alternative in the post-*Trulia* environment.

Increase in Other Forms of Stockholder Activity

Meanwhile, the increased scrutiny on pre-closing M&A litigation has also resulted in an increase in other forms of stockholder litigation and litigation-related demands. For example, WSGR has observed an uptick in Section 220 demands seeking books and records in connection with M&A transactions under Section 220 of the Delaware General Corporation Law. Delaware courts have long encouraged practitioners to use the “tools at hand” rather than bring pre-closing litigation based solely on publicly available information. With the greater scrutiny on pre-closing litigation, plaintiffs’ firms appear to be using Section 220 at a greater rate to investigate potential breaches of fiduciary duty in connection with M&A deals in order to bring post-closing lawsuits. One indicator of the growth in the use of Section 220 is the increase in Section 220 complaints filed in Delaware (although, even then, the vast majority of Section 220 demands do not result in the filing of a complaint). During 2016, 68 Section 220 complaints were filed, up roughly 20 percent from 56 in 2015 as well as the yearly average of 54.5 from 2010 to 2015.¹⁸⁷ We expect stockholders to bring increasingly more Section 220 demands going forward.

We also expect to see an increase in various kinds of quasi-extortionist stockholder demands and related litigation, such as the recent spate of stockholder

demands challenging the validity of charter or bylaw provisions following the Court of Chancery’s ruling in *In re VAALCO Energy, Inc. Stockholder Litigation*.¹⁸⁸ In *VAALCO*, the court invalidated a charter provision that limited stockholders to removing directors for cause only, as contrary to Section 141(k) of the Delaware General Corporation Law. Following the decision, enterprising plaintiffs’ firms sent out stockholder demands to dozens of companies with similar provisions in their charters demanding that those companies take corrective action. When those companies agreed to amend the offending provisions, the plaintiffs’ firms sought a quick fee for having caused the companies to take corrective action.

Looking Forward

As would be true after any event as disruptive to the M&A litigation environment as *Trulia*, the new “normal” will come into focus only with the passage of time. So far, however, the trend appears to be a decrease in the overall number of stockholder challenges to M&A transactions under state law, with those remaining cases being more vigorously litigated post-closing. At the same time, plaintiffs’ firms have sought out alternative avenues to secure a recovery—or a fee.

About WSGR's Securities and M&A Litigation Practice

Wilson Sonsini Goodrich & Rosati's securities and M&A litigation practice is characterized by a unique and sophisticated understanding of our clients' businesses. This understanding allows us to execute creative, aggressive strategies in litigation. We have built a reputation as one of the top securities defense firms in the country, and have defended cases in 32 states and in all of the federal courts. Between 1999 and 2015, WSGR defended companies in 213 federal securities class actions—more than any other law firm in the country, according to *Securities Law360*.

We have also represented companies, their directors, and officers in other

closely related types of litigation, including shareholder derivative lawsuits alleging breaches of fiduciary duties, and formal and informal investigations before the Securities and Exchange Commission and other regulatory agencies. We have defended virtually every conceivable type of securities class action, including cases involving alleged financial fraud, new drugs and medical devices, defective products, and financial forecasts. Beyond our core technology and life sciences clients, we have represented companies in a broad array of industries, including aerospace and avionics, consumer products, construction, energy, entertainment, financial services, gaming, restaurants, and social media.

Between 1996 and 2016, we completely prevailed for our clients in 121 cases. During the same period, we successfully convinced plaintiffs' lawyers to abandon 27 cases, won 94 motions to dismiss all claims with prejudice, and obtained complete summary judgment victories in 12 cases. Our winning percentage is significantly higher than the national average, based upon data published by NERA Economic Consulting. Our demonstrated and sustained ability to win cases across the country and in a wide variety of industries places us in a unique position among leading defense firms. In addition, our track record of success provides leverage that enables our clients to obtain favorable settlements.

Endnotes

¹ *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015).

² *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 134 S. Ct. 2398 (2014).

³ 135 S. Ct. 1318 (2015).

⁴ 15 U.S.C. § 77k(a).

⁵ *Omnicare*, 135 S. Ct. at 1327.

⁶ *Id.* at 1329.

⁷ 816 F.3d 199 (2d Cir. 2016).

⁸ *Sanofi*, 816 F.3d at 211.

⁹ *Id.* at 204.

¹⁰ 655 F.3d 105 (2d Cir. 2011).

¹¹ *Sanofi*, 816 F.3d at 209 (emphasis added) (citation omitted).

¹² *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 531 (S.D.N.Y. 2015).

¹³ *Sanofi*, 816 F.3d at 202.

¹⁴ *Id.* at 210 (citing *Omnicare*, 135 S. Ct. at 1332).

¹⁵ *Id.* at 213.

¹⁶ *Id.* at 211 (first alteration in original) (citations omitted).

¹⁷ 15 U.S.C. § 78r(a).

¹⁸ 645 F. App'x 72 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 186 (2016).

¹⁹ *Id.* at 76 n.3.

²⁰ *Querub v. Moore Stephens Hong Kong*, 649 F. App'x 55, 58 (2d Cir. 2016).

²¹ No. 09 CV 1714 (DAB), 2016 WL 4083429 (S.D.N.Y. July 25, 2016).

²² *Id.* at *17 (quoting *Omnicare*, 135 S. Ct. at 1332).

²³ *Id.* at *23.

²⁴ *Id.* at *25 (citation omitted).

²⁵ *Id.* at *31 (citing *Omnicare*, 135 S. Ct. at 1332).

²⁶ No. 4:10-MD-2185, 2016 WL 3090779 (S.D. Tex. May 31, 2016).

²⁷ *Omnicare*, 135 S. Ct. at 1329.

²⁸ *BP*, 2016 WL 3090779, at *10.

Endnotes (continued...)

- ²⁹ As the court in *BP* noted, district courts around the country have applied *Omnicare* to the analysis of Section 10(b) claims. For example, within the Ninth Circuit, the district court for the Eastern District of Washington in *In re Iso Ray, Inc. Securities Litigation* cited *Omnicare* in holding that a press release statement regarding “outstanding patient outcomes” resulting from the use of a drug to treat non-small cell lung cancer was actionable where omitted facts “conflict[ed] with what a reasonable investor would take” from the statement. 189 F. Supp. 3d 1057, 1071 (E.D. Wash. 2016). WSGR represented the defendants in this matter.
- ³⁰ *Id.* at *12 (alteration in original) (citation omitted).
- ³¹ *Id.* (citations omitted).
- ³² *Id.* at *10 (alterations in original) (citations omitted).
- ³³ *Id.* at *13.
- ³⁴ *Id.*
- ³⁵ 17 C.F.R. § 229.303(a)(3)(ii).
- ³⁶ *Oran v. Stafford*, 226 F.3d 275, 286 n.6 (3d Cir. 2000).
- ³⁷ *Id.* at 288.
- ³⁸ *Id.* (citations omitted).
- ³⁹ *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014), cert. denied, 135 S. Ct. 2349 (2015).
- ⁴⁰ 818 F.3d 85 (2d Cir. 2016).
- ⁴¹ The earlier decision by the Second Circuit was *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94 (2d Cir. 2015), in which the court held that “Item 303 imposes an ‘affirmative duty to disclose that can serve as the basis for a securities fraud claim under Section 10(b).’” *SAIC*, 818 F.3d at 94 n.7 (quoting *Stratte-McClure*, 776 F.3d at 101).
- ⁴² *Id.* at 95-96.
- ⁴³ Pet. for Writ of Cert., *Leidos, Inc. f/k/a SAIC, Inc. v. Ind. Pub. Ret. Sys.*, No. 16-581, 2016 WL 6472615 (U.S. Oct. 31, 2016).
- ⁴⁴ *Id.* at *17.
- ⁴⁵ 134 S. Ct. 2398 (2014).
- ⁴⁶ Fed. R. Civ. P. 23(b)(3).
- ⁴⁷ *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988).
- ⁴⁸ *Id.* at 247.
- ⁴⁹ *Halliburton II*, 134 S. Ct. at 2415 (quoting *Basic*, 485 U.S. at 248).
- ⁵⁰ 818 F.3d 775, 777 (8th Cir. 2016).
- ⁵¹ *Id.* at 782.
- ⁵² *Id.*
- ⁵³ 134 S. Ct. at 2417.
- ⁵⁴ *Best Buy*, 818 F.3d at 782-83.
- ⁵⁵ *Id.* at 783.
- ⁵⁶ *Id.* at 784.
- ⁵⁷ No. 10 Civ. 3461 (PAC), 2015 WL 5613150 (S.D.N.Y. Sept. 24, 2015), appeal docketed, No. 16-250 (2d Cir. Jan. 26, 2016).
- ⁵⁸ *Id.* at *7.
- ⁵⁹ *Id.* at *1.
- ⁶⁰ *Id.* at *4-6.
- ⁶¹ *Id.* at *6-7.
- ⁶² *Id.* at *7.
- ⁶³ Br. of Appellant at 2, *In re Goldman Sachs Grp., Inc.*, No. 16-250 (2d Cir. Apr. 27, 2016).
- ⁶⁴ *Id.* at 24 (citing *Halliburton II*, 134 S. Ct. at 2415).
- ⁶⁵ *Id.* at 15.
- ⁶⁶ *Id.* at 25.
- ⁶⁷ 312 F.R.D. 307 (S.D.N.Y. 2016), appeal docketed, No. 16-450 (2d Cir. June 15, 2016).
- ⁶⁸ *Id.* at 326.
- ⁶⁹ *Id.* at 327.
- ⁷⁰ *Id.*
- ⁷¹ *Id.* at 326.
- ⁷² Pet. for Permission to Appeal at 3, *Strougo v. Barclays PLC*, No. 16-450 (2d Cir. Feb. 16, 2016).
- ⁷³ *Id.* at 10-11.
- ⁷⁴ *Id.* at 12.
- ⁷⁵ No. 5:13-cv-01920-EJD, 2016 WL 7425926 (N.D. Cal. Dec. 22, 2016), appeal docketed, No. 17-80001 (9th Cir. Jan. 6, 2017).
- ⁷⁶ *Id.* at *13.
- ⁷⁷ *Id.*
- ⁷⁸ *Id.* at *14.
- ⁷⁹ *Intuitive Surgical* followed a similar holding in *Hatamian v. Advanced Micro Devices, Inc.*, No. 14-cv-00226 YGR, 2016 WL 1042502, at *7 (N.D. Cal. Mar. 16, 2016), which held that “the burden is on [d]efendants” to convince the court of no price impact. The court in *Hatamian* also held that the court must not only consider price impact at the time of a misrepresentation, it must also consider price decrease at the time of a corrective disclosure. *Id.* (“[A] misstatement could serve to maintain the stock price at an artificially inflated level Plaintiffs can travel on the fraud-on-the-market theory by showing that the negative truthful information that caused the share price to drop was related to the prior false positive statements.” (citations omitted)).
- ⁸⁰ See Pet. for Permission to Appeal at 15, *Abrams v. Intuitive Surgical, Inc.*, No. 17-80001 (9th Cir. Jan. 5, 2017) (“Petition”) (“Rule 301, which is cited in *Basic* itself, provides that ‘the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption,’ but [the] ‘burden of persuasion . . . remains on the party who had it originally.’” (alteration in original)).
- ⁸¹ WSGR represents a group of law professors and former SEC officials who have filed an amicus brief in support of the petition.
- ⁸² *Basic*, 485 U.S. at 248 (emphasis added).
- ⁸³ Petition at 15.
- ⁸⁴ There is also an appeal pending in the Fifth Circuit Court of Appeals to consider burden shifting in light of *Halliburton II* (*Erica P. John Fund, Inc., v. Halliburton Co.*, No. 15-90038, 2015 WL 10714013 (5th Cir. Nov. 4, 2015)); however, the appeal was put on hold pending the district court’s consideration of a proposed settlement agreement that would end the litigation.
- ⁸⁵ 821 F.3d 780 (6th Cir. 2016).
- ⁸⁶ *Id.* at 787 (citation omitted).
- ⁸⁷ *Id.*
- ⁸⁸ *Id.* at 787 (quoting *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2183 (2014)).
- ⁸⁹ *Id.* at 794.
- ⁹⁰ The Eleventh Circuit has since agreed with *Stein*, describing it as a “well-reasoned discussion of why the Rules Enabling Act would prohibit tolling,” and holding that “*American Pipe* tolling does not apply to the statute of repose.” See *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1248-49 (11th Cir. 2016), petition for cert. filed, (U.S. Sept. 26, 2016) (No. 16-389).
- ⁹¹ 840 F.3d 698 (9th Cir. 2016).
- ⁹² *Id.* at 701.
- ⁹³ *Id.*
- ⁹⁴ *Id.*
- ⁹⁵ *Id.* at 702.
- ⁹⁶ *Id.*

Endnotes (continued...)

- ⁹⁷ *Id.*
- ⁹⁸ *Id.*
- ⁹⁹ *Id.* at 702-03.
- ¹⁰⁰ *Id.*
- ¹⁰¹ In 2012, after Arena submitted a new application, the FDA approved Locaserin and it went on the market. *Id.* at 703.
- ¹⁰² *Id.* at 703.
- ¹⁰³ *Id.* at 704.
- ¹⁰⁴ *Id.* at 704.
- ¹⁰⁵ *Id.* at 707.
- ¹⁰⁶ *Id.* at 708.
- ¹⁰⁷ *Id.*
- ¹⁰⁸ *Id.*
- ¹⁰⁹ No. 16-11038-RGS, 2016 WL 6897760 (D. Mass. Nov. 22, 2016).
- ¹¹⁰ *Id.* at *2.
- ¹¹¹ *Id.* at *1.
- ¹¹² *Id.* at *1-2.
- ¹¹³ *Id.* at *2.
- ¹¹⁴ *Id.* at *3.
- ¹¹⁵ *Id.* at *4.
- ¹¹⁶ *Id.*
- ¹¹⁷ *Id.* at *5.
- ¹¹⁸ *Id.*
- ¹¹⁹ No. 15-cv-00347-EMC, 2016 WL 4091395 (N.D. Cal. Aug. 2, 2016).
- ¹²⁰ *Id.* at *17.
- ¹²¹ *Id.*
- ¹²² 814 F.3d 1288, 1292 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 102 (2016).
- ¹²³ *Id.* at 1291.
- ¹²⁴ *Id.*
- ¹²⁵ *Id.* at 1292.
- ¹²⁶ *Id.* at 1294 (citations omitted).
- ¹²⁷ *Id.* at 1295.
- ¹²⁸ Pet. for Writ of Cert. at 3, *Fried v. Stiefel*, No. 15-1458 (U.S. May 31, 2016), 2016 WL 3136684.
- ¹²⁹ *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006).
- ¹³⁰ 15 U.S.C. § 77v(a).
- ¹³¹ 195 Cal. App. 4th 789 (2011).
- ¹³² WSGR represented Coupons.com and its officers and directors in the litigation.
- ¹³³ *O'Donnell v. Coupons.com*, No. 1-15-CV-278399, slip op. (Cal. Super. Ct. Santa Clara Cty. Nov. 12, 2015).
- ¹³⁴ *O'Donnell v. Coupons.com*, No. 1-15-CV-278399, 2016 Cal. Super. LEXIS 1097, at *11 (Cal. Super. Ct. Santa Clara Cty. May 24, 2016) (citing authority).
- ¹³⁵ WSGR represents Cyan and its officers and directors in the litigation. A subsequent petition for *certiorari* raising the same question was filed in another action. *FireEye, Inc. v. Superior Court*, No. 16-744 (docketed Dec. 8, 2016). WSGR represents FireEye and its officers and directors in the litigation.
- ¹³⁶ *Cyan, Inc. v. Beaver County Employees Retirement Fund*, No. 15-1439 (docketed May 27, 2016).
- ¹³⁷ See Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation 1 (2016).
- ¹³⁸ *Id.* at 4.
- ¹³⁹ See *Acevedo v. Aeroflex Holding Corp.*, C.A. No. 7930-VCL (Del. Ch. July 8, 2015) (Transcript).
- ¹⁴⁰ *In re InterMune, Inc. Stockholder Litig.*, C.A. No. 10086-VCN (Del. Ch. July 8, 2015) (Transcript).
- ¹⁴¹ See *In re Riverbed Tech. Inc. Stockholders Litig.*, No. 10484-VCG, 2015 WL 5458041 (Del. Ch. Sept. 17, 2015).
- ¹⁴² WSGR represented Riverbed Technology, Inc. and members of its board of directors in this matter.
- ¹⁴³ C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015) (Transcript).
- ¹⁴⁴ WSGR represented Aruba Networks, Inc. and members of its board of directors in this matter.
- ¹⁴⁵ 129 A.3d 884 (Del. Ch. 2016).
- ¹⁴⁶ *Id.* at 891.
- ¹⁴⁷ *Id.*
- ¹⁴⁸ *Id.* at 892.
- ¹⁴⁹ *Id.* at 894.
- ¹⁵⁰ *Id.* at 898.
- ¹⁵¹ *Id.* at 899.
- ¹⁵² Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2015 and 1H 2016 M&A Litigation 2 (2016).
- ¹⁵³ *Id.*
- ¹⁵⁴ *Id.*
- ¹⁵⁵ *Id.*
- ¹⁵⁶ *Id.* at 3.
- ¹⁵⁷ *Id.*
- ¹⁵⁸ *Id.* at 4.
- ¹⁵⁹ 125 A.3d 304 (Del. 2015).
- ¹⁶⁰ 137 A.3d 151 (Del. 2016).
- ¹⁶¹ *Id.* at 151-52.
- ¹⁶² See, e.g., *Huff Energy Fund, L.P. v. Gershen*, No. CV 11116-VCS, 2016 WL 5462958 (Del. Ch. Sept. 29, 2016); *Larkin v. Shah*, No. CV 10918-VCS, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016); *City of Miami Gen. Emps. & Sanitation Emps. Ret. Trust v. Comstock*, No. CV 9980-CB, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016); *Chester Cty. Ret. Sys. v. Collins*, C.A. No. 12072-VCL, 2016 Del. Ch. LEXIS 197 (Del. Ch. Dec. 6, 2016).
- ¹⁶³ 143 A.3d 727, 747 (Del. Ch. 2016).
- ¹⁶⁴ No. CV 11216-VCS, 2016 WL 5929951 (Del. Ch. Oct. 12, 2016).
- ¹⁶⁵ *Id.* at *10 (citation omitted).
- ¹⁶⁶ 832 F.3d 718 (7th Cir. 2016).
- ¹⁶⁷ *Id.* at 723.
- ¹⁶⁸ *Id.* at 724.
- ¹⁶⁹ *Id.* at 725-26.
- ¹⁷⁰ No. 16-CV-294673, slip op. (Cal. Super. Ct. Santa Clara Cty. Nov. 21, 2016).
- ¹⁷¹ *Id.*
- ¹⁷² No. 16-CV-295357 (Cal. Super. Ct. Santa Clara Cty. Dec. 2, 2016).
- ¹⁷³ See *In re Newbridge Bancorp S'holder Litig.*, No. 15 CVS 10047, 2016 WL 6885882, at *1 (N.C. Super. Ct. Guilford Cty. Nov. 22, 2016) (declining to follow *Trulia* but indicating that the court may elect to do so in the future); *Corwin v. British Am. Tobacco PLC*, No. 14 CVS 8130, 2016 WL 635191, at *4 (N.C. Super. Ct. Guilford Cty. Feb. 17, 2016) (acknowledging the potential significance of *Trulia* but declining to adopt it based on "differences between Delaware law and North Carolina law").
- ¹⁷⁴ C.A. No. 11316-CB (Del. Ch. July 21, 2016) (Transcript).
- ¹⁷⁵ *Id.* at 76.

Endnotes (continued...)

¹⁷⁶ C.A. No. 11815-CB (Del. Ch. July 22, 2016) (Transcript).

¹⁷⁷ *Id.* at 77.

¹⁷⁸ *E.g.*, *Bumgarner v. Williams Companies*, No. 16-CV-26-GKF-FHM, 2016 WL 3162062 (N.D. Okla. June 3, 2016) (seeking to enjoin merger of a Delaware corporation and alleging violations of Section 14(a)); *Guerra v. Linear Tech. Corp.*, No. 4:16-cv-05514-PJH (N.D. Cal. Sept. 28, 2016) (same); *Borrego v. Ruckus Wireless, Inc.*, No. 1:16-cv-00340-SLR (D. Del. May 11, 2016) (same).

¹⁷⁹ Cornerstone Research, Securities Class Action Filings: 2016 Midyear Assessment 4 (2016).

¹⁸⁰ *Id.* at 10.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737.

¹⁸⁴ No. C 16-03907 CW, slip op. (N.D. Cal. July 26, 2016).

¹⁸⁵ WSGR represented Marketo, Inc. and members of its board of directors in this matter.

¹⁸⁶ *Id.* at 2; *see also Erickson v. Hutchinson Tech. Inc.*, 158 F. Supp. 3d 751, 760 (D. Minn. 2016) (denying preliminary injunction of stockholder merger vote for alleged disclosure

violations, finding inability to cast informed vote would not be irreparable harm because stockholders could recover money damages or seek appraisal remedy); *Masters v. Avair Pharm., Inc.*, 996 F. Supp. 2d 872, 885 (C.D. Cal. 2014) (“In the context of motions to enjoin shareholder votes, federal courts . . . have rejected the *per se* rule . . . that ‘denying stockholders their right to cast an informed vote constitutes irreparable harm.’” (citations omitted)).

¹⁸⁷ WSGR research based on a review of the Delaware Court of Chancery’s electronic docket system.

¹⁸⁸ C.A. No. 11775-VCL (Del. Ch. Dec. 21, 2015) (Transcript).



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