

# SECURITIES CLASS ACTION REPORTER

Oct. 31, 2011

## Docket+Trak

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- ✦ **Aerostale Inc.:** Plaintiffs allege: Aerostale Inc. and certain of its officers and directors violated federal securities laws by making false and misleading statements to the investing public regarding the company's sales of women's clothing.
  
- ✦ **Global Indus. Ltd.:** Plaintiffs allege: Global Industries Ltd. (GI) and certain of its officers and directors violated federal securities laws by making material misstatements and/or omissions in a proxy statement issued in connection with the company's merger with Technip, under which GI shareholders will receive \$8 for each share of outstanding GI stock.
  
- ✦ **JinkoSolar Holding Co. Ltd.:** Plaintiffs allege: JinkoSolar Holding Co. Ltd. and certain of its officers and directors violated the Securities Exchange Act of 1934 by making false and misleading statements in documentation released in connection with the company's IPO.
  
- ✦ **Renaissance Learning Inc.:** Plaintiffs allege: Renaissance Learning Inc. and certain of its officers and directors violated federal securities laws by material misstatements and/or omissions in a proxy statement issued in connection with the company's proposed merger with London-based Permira Funds.
  
- ✦ **Stereotaxis Inc.:** Plaintiffs allege: Stereotaxis Inc. and certain of its officers and directors violated the Securities Exchange Act of 1934 by fraudulently concealing material facts regarding the company's Niobe cardiology instrument control system.

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## Docket★Trak™

### Federal Securities First Filings

Company (defendants)	Nature of Claim	Plaintiff	Citation	Plaintiff Firm	Contact
Aeropostale Inc.	<p>Plaintiffs allege: Aeropostale Inc. and certain of its officers and directors violated federal securities laws by making false and misleading statements to the investing public regarding the company's sales of women's clothing. The plaintiffs specifically allege that Aeropostale fraudulently concealed and/or misrepresented the following material facts: (1) that the company was experiencing declining demand for its women's fashion division products, which account for 70% of its annual sales; (2) the company was experiencing pressure on its profit margins as a result of increasing inventory and higher discounted sales; and (3) as a result, the company lacked a reasonable basis for positive statements regarding its business and prospects.</p> <p>On Aug. 4, 2011, Aeropostale announced results for the second quarter of FY 2011, reporting a decrease in net sales and net earnings per share. On that news, the trading price of Aeropostale common shares fell 24% on heavy volume. Class period: 2/3/2011–8/3/2011.</p>	Arbuthnot	<b>Arbuthnot v. Aeropostale Inc.</b> , No. 11-CV-7132 (S.D.N.Y. filed 10/11/11)	Robbins Geller Rudman, Melville, N.Y.	Mario Alba Jr., 631-367-7100
Global Indus. Ltd.; Apollon Merger Sub B. Inc.	<p>Plaintiffs allege: Global Industries Ltd. (GI) and certain of its officers and directors violated federal securities laws by making material misstatements and/or omissions in a proxy statement issued in connection with the company's merger with Technip, under which GI shareholders will receive \$8 for each share of outstanding GI stock. The plaintiffs specifically allege that GI failed to disclose: (1) whether its board of directors undertook any actions to protect the transaction against potential conflicts of interest; (2) the sales process relied on by the board in recommending the transactions to shareholders; and (3) the results of the analysis by GI's financial analyst regarding the merger. Class period: 9/12/2011–10/11/2011.</p>	Miller	<b>Miller v. Global Indus. Ltd.</b> , No. 11-CV-3625 (S.D. Tex. filed 10/11/11)	Brothers Sepulveda & Alvarado P.C., Houston	Annette M. Sepulveda, 713-337-0750
JinkoSolar Holding Co. Ltd., Credit Suisse Sec. (USA) L.L.C.; Oppenheimer & Co. Inc.; Roth Capital Ptrs. L.L.C.; Collins Stewart L.L.C.	<p>Plaintiffs allege: JinkoSolar Holding Co. Ltd. and certain of its officers and directors violated the Securities Exchange Act of 1934 by making false and misleading statements in documentation released in connection with the company's IPO. The plaintiffs specifically allege that JinkoSolar fraudulently failed to disclose to investors: (1) that the waste disposal system at the company's Zhejiang, China, facility had failed regulatory checks since April; and (2) that the company had been notified of the problems at its Zhejiang facility by Chinese environmental regulatory authorities and had not corrected the problem.</p> <p>On Sept. 19, 2011, JinkoSolar suspended operations at the aforementioned facility after local residents complained of a massive fish kill in a river adjacent to the plant. On news of that event, the price of JinkoSolar shares fell 42% over the course of the week. Chinese regulatory authorities have since concluded that the pollution event was linked to JinkoSolar's use of improper methods in disposing of solid waste generated during its production of silicon wafers. JinkoSolar has since publicly admitted responsibility for the event. Class period: 5/13/2011–9/21/2011.</p>	Peters	<b>Peters v. JinkoSolar Holding Co. Ltd.</b> , No. 11-CV-7133 (SD.N.Y. filed 10/11/11)	Zamansky & Assocs. L.L.C., New York	Jacob H. Zamansky, 212-742-1414
Renaissance Learning Inc.; Permira Advisors L.L.C.; Raphael Holding Co.; Raphael Acquisition Corp.	<p>Plaintiffs allege: Renaissance Learning Inc. and certain of its officers and directors violated federal securities laws by material misstatements and/or omissions in a proxy statement issued in connection with the company's proposed merger with London-based Permira Funds. The plaintiffs specifically allege that Renaissance failed to disclose: (1) the sales process undertaken by Renaissance prior to the merger; (2) the data underlying the "fairness opinion" provided by Renaissance's financial advisor; (3) details concerning Renaissance's financial advisor's potential conflict of interest; and (4) details on why Renaissance's Board of Directors concluded that Permira had the superior offer when another company had submitted a financially superior offer. Class period: 8/16/2011–10/7/2011.</p>	McDonald	<b>McDonald v. Paul</b> , No. 11-CV-0690 (W.D. Wis. filed 10/7/11)	O'Neil Cannon Hollman, Milwaukee	Patrick G. McBride, 414-276-5000
Stereotaxis Inc.	<p>Plaintiffs allege: Stereotaxis Inc. and certain of its officers and directors violated the Securities Exchange Act of 1934 by fraudulently concealing material facts regarding the company's Niobe cardiology instrument control system. Specifically, the company concealed the following facts from investors: (1) the company's business model was not working because it was unable to leverage its portfolio and scale in a strategically beneficial manner; (2) feedback from users regarding the Niobe system was only "mixed," rather than positive; (3) the Niobe system needs "fundamental improvement" according to users; (4) demand for the Niobe system has been weak, and the number of units sold has been decreasing; (5) the company's reported order backlog did not represent future revenue that the company expected to recognize; and (6) the company had overstated its market competitiveness.</p> <p>On Aug. 8, 2011, Stereotaxis announced disappointing results for the second quarter of FY 2011, suspended its guidance for the fiscal year, and disclosed the resignation of its CFO. On that news, the trading price of Stereotaxis shares fell nearly 60%. Class period: 2/28/2011–8/9/2011.</p>	Pound	<b>Pound v. Stereotaxis Inc.</b> , No. 11-CV-1752 (ED. Mo. filed 10/7/11)	Carey & Danis, Clayton, Mo.	James J. Rosemergy, 314-725-7700

Source: Securities Class Action Reporter research

## News & Filings

### Rentech settles securities suit for \$1.8 million

Rentech Inc. has agreed to pay \$1.8 million to resolve allegations stemming from a December 2009 restatement of financial papers.

Rentech is a maker of nitrogen fertilizer and developer of clean-fuel products. The lawsuit, filed in 2009, alleged that as a result of the restatement, company stock dropped 22% in two weeks. The settlement provides for \$1.8 million to shareholders and an additional \$300,000 in attorney fees.

Rentech denied wrongdoing in agreeing to the settlement, most of which will be funded by the company's insurer.

**Silbergleid v. Rentech Inc.**, No. 09-9495 (C.D. Cal. *final approval granted* Sept. 27, 2011)

**Counsel for plaintiffs:** Peter A. Binkow, Lionel Z. Glancy, Michael Goldberg, Robert V. Prongay, Glancy Binkow & Goldberg L.L.P., 310-201-9150, Los Angeles.

**Counsel for Rentech:** Melanie Marilyn Blunschi, Latham & Watkins L.L.P., 213-485-1234, Los Angeles, Patrick E Gibbs, Latham & Watkins L.L.P., 650-463-4696, Menlo Park, Cal.

### SEC sues former CEO of SemGroup alleging false statements

The Securities and Exchange Commission (SEC) has filed a lawsuit against Thomas Krivisto, the former CEO of SemGroup, alleging he made false statements and conducted improper dealings between companies he controlled.

According to the SEC's complaint, Krivisto controlled both SemGroup and SemGroup Energy Partners (SEP). The complaint alleges Krivisto made claims that SEP had stable and predictable revenues, when in reality, those revenues were tied to SemGroup.

SemGroup was unable to keep its commitments to SEP, creating a loss in stock value for both. The lawsuit seeks disgorgement of more than \$150,000 in addition to civil penalties.

**SEC v. Krivisto**, No. 11-0641 (N.D. Okla. *complaint filed* Oct. 18, 2011)

**Counsel for SEC:** Jeffrey A. Cohen, Robert C. Hannaan, SEC, Ft. Worth, Tex.

## Motions

SMITH BARNEY FUND MANAGEMENT L.L.C.

### Lead plaintiff withdraws following discovery it did not purchase shares in defendants' fund

**In re Smith Barney Transfer Agent Litig.**, No. 05-7583 (S.D.N.Y. Sept. 22, 2011)

The U.S. District Court for the Southern District of New York granted a lead plaintiff's motion to withdraw in a securities fraud class action brought against a fund management company defendant after determining—following more than six years of litigation—that the lead plaintiff never purchased any of the securities at issue.

An investor in securities issued by Smith Barney Fund Management L.L.C. sued the firm and certain of its officers for securities fraud alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. The complaint alleged misstatements concerning the firm's business operations that mirrored charges brought against Smith Barney by the SEC. The SEC action was settled after Smith Barney agreed to pay approximately \$208 million, including \$128 million in disgorgement and \$80 million in penalties.

After six years of litigation—including extensive motion practice, an appeal to the Second U.S. Circuit Court of Appeal, remand and discovery—lead counsel learned that the lead plaintiff, Operating Local 649 Annuity Trust Fund, never actually purchased any shares in the Smith Barney Capital Preservation Fund, which were the securities at issue in the case. The lead plaintiff had in fact purchased shares in the similarly-named Smith Barney Capital Preservation Collective Trust.

**Mistake not attributable to mere scrivener's error.** The district court rejected the plaintiff's contention that the mistake was attributable to a mere scrivener's error. The court pointed out that the case is a large class action against multiple defendants involving voluminous discovery and extensive motion practice. Lead counsel was well aware of the costs associated with such litigation and was required to

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conduct sufficient due diligence before embarking on what the court characterized as a detour and frolic.

The court granted the lead plaintiff's request to withdraw, as Local 649 was never a proper plaintiff to the action. The court denied the lead counsel's motion to add a new lead plaintiff, and held that renewed lead plaintiff motions were appropriate to ensure the appointment of suitable class representatives and lead counsel. It would moreover be imprudent to permit lead counsel to add a lead plaintiff of their choosing. The court further indicated that it would by separate order fix a briefing schedule for appointment of lead plaintiff and lead counsel. (For earlier decisions in this case, see 4 **S.Cl.Act.Rep.** 102, May 31, 2006; and 4 **S.Cl.Act.Rep.** 152, Aug. 15, 2006.)

**Judge:** William H. Pauley III

#### DIEBOLD INC.

### Suit against Diebold and KPMG may proceed

**La. Mun. Police Emps. Ret. Sys. v. KPMG L.L.P.**,  
No. 10-1461 (N.D. Ohio Sept. 30, 2011)

The U.S. District Court for the Northern District of Ohio denied a motion to dismiss a securities fraud class action brought against a maker of secure electronic devices alleging misstatements concerning the firm's earnings and financial performance.

Investors initiated a securities fraud class action against Diebold Inc.—a maker of ATMs, bank security systems and electronic voting machines—as well as against Diebold's auditor KPMG L.L.P. and certain of Diebold's officers alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. The complaint alleged that the defendants fraudulently manipulated Diebold's reported earnings and financial performance, causing economic loss to the proposed class of investors.

The plaintiff alleged that the defendants misled the investor public by causing Diebold to include false and misleading financial statements in public press releases and filings with the SEC. The defendants moved to dismiss the plaintiff's complaint.

The court noted that the complaint alleged that the officer defendants orchestrated financial manipulations that were designed, and did, misstate the firm's financial results, and issued press releases that were false and misleading when made and failed to disclose material facts concerning the firm's financial results. The complaint contained detailed allegations as to these alleged acts, which mirrored charges filed against the firm by the SEC in a civil complaint that resulted in a \$25 million settlement and further pending civil actions against three of the firm's executives.

**Record supports finding of scienter.** The court found that, taken collectively, these allegations gave rise to a cogent and compelling inference that the firm's officer defendants acted with deliberate recklessness by participating in the formulation and dissemination of the firm's inaccurate financial statements. Accordingly, the complaint adequately alleged scienter under the heightened pleading standards of the Private Securities Litigation Reform Act of 1995.

The court separately held that the complaint adequately alleged loss causation by asserting that, although the SEC charges were previously known to the market, it was the later release of a restatement of earnings and the contaminate non-compliance with GAAP that caused the stock to drop and the plaintiff to suffer losses. Accordingly, the defendants' motion to dismiss was denied.

**Judge:** Benita Y. Pearson

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ADVANTA CORP.**Fraud claims against managers of bankrupt credit card firm adequately alleged**

**Steamfitters Local 449 Pension Fund v. Alter**,  
No. 09-4730 (E.D. Pa. Sept. 30, 2011)

The U.S. District Court for the Eastern District of Pennsylvania denied in part a motion to dismiss securities fraud class action claims brought by an institutional investor against the individual officers of a bankrupt credit card issuer.

An institutional investor sued officers and outside directors of Advanta Corp., a bankrupt firm previously engaged in the issuance of credit cards to small businesses, and the president of Advanta subsidiary Advanta Bank Corp. (Bank Corp.) alleging violations of §§ 10(b), 20(a) and 20A of the Securities Exchange Act of 1934.

The complaint alleged that beginning in 2005, Advanta pursued an aggressive marketing approach involving problematic business practices, and that the defendants misrepresented Advanta investors about these practices. The plaintiff asserted that these material misstatements and omissions led to artificially inflated stock prices, and that when the truth about the firm's financial condition became known to the market in the fall of 2007, the stock price fell, to the plaintiff's material detriment. The defendants moved to dismiss.

The district court found that the complaint adequately alleged the falsity and materiality of statements by the officer defendants regarding credit quality, repricing and loan delinquency. The complaint alleged that the firm informed investors that its delinquency and charge-off rates were low, even after it received audit reports confirming that those rates were rising precipitously.

The complaint further alleged that the firm failed to inform the market that it was repricing its credit cards by raising interest rates to 30%, a practice that the officer defendants had reason to know would lead to short-term increases in revenue but to result in the loss of high credit quality customers.

**Specific facts alleged concerning officer defendants' awareness of scheme.** The court also concluded that the complaint alleged specific facts to show that the officer defendants were aware of the repricing scheme, the falling credit quality of its customers and the delinquency issues, and that they allowed these practices to continue in order to meet short-term Wall Street expectations, knowing of the long-term risks.

The complaint further alleged that these defendants made public statements which they knew were contradicted by facts in their possession. The court found that the complaint sufficiently pled scienter by alleging that the officer defendants knew or should have known about the serious

problems with Advanta, and recklessly or consciously made false and misleading statements about the firm's financial status. Accordingly, the officer defendants' motion to dismiss the §§ 10(b) and 20(a) claims was denied.

The court dismissed the §§ 10(b) and 20(a) claims against the outside directors, finding the plaintiffs failed to adequately allege scienter as to those defendants. Finally, the court dismissed the § 20A claims alleging insider trading against all defendants because the defendants did not purchase stock on the same day the plaintiffs purchased stock.

**Judge:** Cynthia M. Rufe

**Counsel for plaintiffs:** Danielle S. Myers, Shannon McKenna Matera, Douglas R. Britton, Robbins Geller Rudman & Dowd L.L.P., 619-231-1058, San Diego; Deborah R. Gross, Law Offices of Bernard M. Gross P.C., 215-561-3600, Philadelphia.

**Counsel for defendants:** Ann Ryan Robertson, Thomas R. Ajamie, Wallace A. Showman, Ajamie L.L.P., 713-860-1600, Houston; David W. Engstrom, Thorp Reed & Armstrong L.L.P., 215-640-8546, Philadelphia; Steven B. Feirson, Dechert Price & Rhoads, 215-994-2489, Philadelphia; Paul T. McGurkin Jr., David L. Comerford, Jeffery A. Dailey, Akin Gump Strauss Hauer & Feld L.L.P., 215-965-1354, Philadelphia.

OCLARO INC.**Pension fund appointed lead plaintiff in securities fraud class action**

**Westley v. Oclaro Inc.**, No. 11-2448 (N.D. Cal. Sept. 12, 2011)

The U.S. District Court for the Northern District of California appointed a lead plaintiff in a securities fraud class action brought by investors against an optical and laser component provider.

Two individual investors in Oclaro Inc. sued the company and certain of its officers alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 arising out of material omissions and misrepresentations made by the defendants concerning the firm's business and financial conditions (see 9 S.Cl.Act.Rep. 107, June 15, 2011). The case came before the court on the motion of Connecticut Laborers' Pension Fund (CLPF) for appointment as lead plaintiff.

The court noted that under the Private Securities Litigation Reform Act of 1995, there was a presumption that the most adequate plaintiff, entitled to appointment as lead plaintiff, was the claimant who had the largest financial interest in the litigation, and who otherwise satisfied the requirements of Rule 23 of the Federal Rules of Civil Procedure.

The court found that, although there was insufficient evidence on the record as to who in the putative class had the largest financial interest, CLPF based on the relevant factors was the most adequate plaintiff. The court noted that CLPF was the only party to make a motion for appointment as lead plaintiff, and that the individual investors who

filed the original complaint made no competing motion and did not oppose CLPF's motion.

The court further noted that CLPF provided evidence that it suffered a loss of \$134,000 as a result of the defendants' alleged fraud, an amount that was the largest loss of which the court was aware. The court further held that CLPF made an adequate preliminary showing that it satisfies the requirements of Rule 23 in that its claims are typical of those of the class.

After separately concluding that CLPF made an adequate showing that it was capable of acting as an adequate class representative, the court granted CLPF's motion for appointment as lead plaintiff.

**Judge:** Edward M. Chen

**Counsel for plaintiffs:** Shawn A. Williams, Robbins Geller Rudman & Dowd L.L.P., 415-288-4545, San Francisco; Mark Punzalan, Finkelstein Thompson L.L.P., 415-398-8700, San Francisco; Darren Jay Robbins, David Conrad Walton, Robbins Geller Rudman & Dowd L.L.P., 619-231-1058, San Diego; Michael I. Fistel Jr., Holzer Holzer & Fistel L.L.C., 770-392-0090, Atlanta; Robert J. Dyer III, Dyer & Berens L.L.P., 303-395-0393, Denver.

**Counsel for defendants:** Gidon M. Caine, Alston & Bird L.L.P., 650-838-2060, Menlo Park, Cal.; Elizabeth Patz Skola, Jessica Perry Corley, Alston & Bird L.L.P., 404-881-7000, Atlanta.

## MIVA

### **Dismissal of securities fraud action against online advertising firm reversed in part**

**FindWhat Investor Group v. FindWhat.com,**  
No. 10-10107 (11th Cir. Sept. 30, 2011)

The Eleventh U.S. Circuit Court of Appeals vacated a portion of a district court's judgment dismissing a securities fraud class action against an Internet advertising service provider after concluding that certain of the claims were adequately alleged.

Investors in MIVA, an Internet commerce company that provides "pay-per-click" advertising services, sued the firm and three of its officers alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. The complaint alleged that the defendants made a series of false or misleading statements to the public which had the effect of artificially inflating the firm's stock price, and that when corrective disclosures were made, the stock price dropped, to the plaintiffs' material detriment.

The complaint alleged that, beginning in 2003, two of MIVA's top revenue generating distribution partners, "Saveli" and "Dmitri," who together represented 36% of MIVA's click revenue, began using "click fraud" to generate revenue. Click fraud is the practice of using spyware or browser hijacking software to click on an Internet advertisement for the sole purpose of forcing the advertiser to pay for the click. Over time, this practice caused advertisers to lower their advertising bids, decreasing company revenue.

The plaintiffs alleged that the defendants misrepresented to the investing public that the short-term earnings growth achieved through click fraud was sustainable when they had reason to know that the practice would result, as it did, in bid deflation and reduced earnings. The district court partially dismissed the plaintiffs' claim as to all statements except two, and the court later granted summary judgment to the defendants on the remaining two statements. The plaintiffs appealed.

**Materiality adequately alleged despite previously inflated stock price.** The Eleventh Circuit concluded that the complaint adequately alleged that statements made by the defendants to investors on Feb. 23, 2005 and Mar. 16, 2005 contained material omissions concerning the existence of click fraud and its role in increasing short-term earnings at the likely cost of long-term earnings. The court stated that it is irrelevant to securities fraud liability that the stock price was, as here, already inflated before a defendant's first actionable misrepresentation.

Moreover, during each day that MIVA's stock price remained purportedly inflated, investors bought thousands of shares of MIVA stock at inflated prices and, thus, "overpaid" for the stock based on the false information that MIVA did not rely on click fraud to generate Internet traffic when in fact it did. Accordingly, the Eleventh Circuit vacated that portion of the district court's judgment relating to the claims arising from the Feb. 23, 2005 and Mar. 16, 2005 statements, and remanded the action for further consistent proceedings.

**Judge:** Stanley Marcus

**Counsel for plaintiffs:** Maya Saxena, Lester R. Hooker, Christopher Steven Jones, Joseph Edward White III, Saxena White P.A., 561-394-3399, Boca Raton, Fla.; Stephen Richard Astley, Paul J. Geller, David J. George, Jack Reice, Robert Jeffrey Robbins, Robbins Geller Rudman & Dowd L.L.P., 561-750-3000, Boca Raton, Fla.; Julie Prag Vianale, Kenneth J. Vianale, Vianale & Vianale L.L.P., 561-392-4750, Boca Raton, Fla.; Chris A. Barker, Barker Rodems & Cook P.A., 813-489-1008, Tampa, Fla.; Marc J. Greenspon, Michael J. Pucillo, Berman DeValerio, 561-835-9400, Palm Beach Gardens, Fla.

**Counsel for defendants:** Todd R. David, Susan Elaine Hurd, Robert R. Long, Alston & Bird L.L.P., 404-881-7000, Atlanta; Joseph Gerard Foster, Porter Wright Morris & Arthur L.L.P., 239-593-2965, Naples, Fla.; Christina S. Woods, Grant Fridkin Pearson Athan & Crown, 239-514-1000, Naples, Fla.

## ENERGYSOLUTIONS INC.

### **Class claims against nuclear industry service provider adequately alleged**

**City of Roseville Emps. Ret. Sys. v. EnergySolutions Inc.,** No. 09-8633 (S.D.N.Y. Sept. 30, 2011)

The U.S. District Court for the Southern District of New York denied in part a motion to dismiss securities fraud class action claims brought against a provider of services to the nuclear industry.

Institutional investors sued EnergySolutions Inc.—a provider of engineering, spent fuel management decontamination and decommissioning (D&D), and similar services to the nuclear industry—and certain of the firm’s officers alleging violations of §§ 11, 12(a)(2) and 15 of the Securities Act of 1933 (see 7 **S.Cl.Act.Rep.** 202, Oct. 31, 2009). The complaint alleged that the defendants made misstatements and material omissions on documents published in connection with a Nov. 14, 2007, IPO of Energy’s stock. The defendants moved to dismiss the complaint.

The district court found that the complaint adequately alleged that registration statements filed with the SEC in connection with the firm’s IPO contained material misstatements regarding “life of plant” (LOP) contracts maintained by the firm with 82 of the country’s 104 operating nuclear plants. The registration statements described the LOP contracts as encompassing the disposal of substantially all mixed low-level radioactive waste (MLLW) generated by the 82 referenced nuclear plants.

**Falsity adequately alleged.** According to specific factual allegations in the complaint, however, the vast majority of MLLW was outside the scope of the LOP contracts. The complaint also sufficiently alleged that Energy omitted mentioning that the terms of the contracts made it highly unlikely that any waste not required to be disposed of by the contracts, including MLLW and D&D waste, would be disposed of until far in the future, due to the economic incentives created by the terms of the contracts.

The complaint also adequately alleged that statements asserting that Energy believed itself to be well-positioned to obtain and perform decommissioning contracts with shut-down reactors, and statements portraying an expectation that a petition submitted by Energy to the Nuclear Regulatory Commission (NRC) would be approved when in fact that expectation was not sincerely held, were false or omitted facts necessary to make the disclosures not materially misleading.

After separately finding that scienter was adequately alleged as to certain of the individual defendants, the district court denied in part the defendants’ motion to dismiss.

**Judge:** John G. Koeltl

**Counsel for plaintiffs:** David Avi Rosenfeld, Evan Jay Kaufman, Samuel Howard Rudman, Mark Samuel Reich, Robbins Geller Rudman & Dowd L.L.P., 631-367-7100, Melville, N.Y.

**Counsel for defendants:** Bruce Domenick Angiolillo, Jonathan K. Youngwood, Paul Jacob Sirkis, Simpson Thacher & Bartlett L.L.P., 212-455-2000, New York; Robert S. Clark, Parr Brown Gee & Loveless, 801-532-7840, Salt Lake City.

#### LONGTOP FINANCIAL TECHNOLOGIES LTD.

### **Lead plaintiff appointed in fraud class action against software and IT firm**

**Faris v. Longtop Fin. Techs. Ltd.**, No. 11-3658 (S.D.N.Y. Oct. 4, 2011)

The U.S. District Court for the Southern District of New York appointed a lead plaintiff in a securities fraud class action brought by shareholders against a software and IT company providing services to financial institutions in China.

Longtop Financial Technologies Ltd., a Cayman Islands corporation with principal offices in Hong Kong and China, provides software and information technology to financial institutions operating in China. Investors in the company sued the firm and certain of its officers for securities fraud alleging that the defendants misrepresented and overstated the financial condition of the company and issued materially false and misleading statements regarding its financial condition.

The plaintiffs alleged that the defendants failed to disclose that they falsified financial records relating to cash reserves, loan balances and sales revenue, and that they interfered with the audit process and understated expenses in order to falsely inflate profit margins. The complaint alleged that when the true facts concerning these issues were disclosed to the investing public, the firm’s stock price dropped substantially, to the plaintiffs’ material detriment. The case came before the court on competing motions for appointment of lead plaintiff.

The court noted that following the withdrawal of other claimants, it was required to choose between Danske-Invest Management A/S and Pension Funds of Local No. One I.A.T.S.E. (collectively, Danske-Local One) and Joseph Kowalczyk and numerous other parties collectively described as the Kowalczyk Group.

The court concluded that as a result of its alleged losses, Danske-Local One had the greatest financial stake in the litigation and as a result was entitled to a rebuttable presumption established under the Private Securities Litigation Reform Act of 1995 of being the most adequate plaintiff.

**Assignment valid under Danish law.** The court rejected the Kowalczyk Group’s contention that Danske-Local One, as an investment manager, lacked Article III standing absent a valid assignment from the investment funds that actually purchased Longtop securities and that the assignment offered by Danske-Local One was invalid under applicable Danish law. The court found that Danish law permitted Danske-Local One to execute such an assignment as part of its core management duties.

The court separately determined that, based on the record, Danske-Local One was comprised of a collection of sophisticated institutional investors collectively responsible for overseeing billions of dollars in investments, and

was qualified to oversee securities fraud litigation of this type. As a result, and after concluding that the Kowalczyk group failed to rebut the presumption that Danske-Local One was the most adequate plaintiff, the court appointed Danske-Local One as lead plaintiff.

**Judge:** Shira A. Scheindlin

**Counsel for plaintiffs:** Curtis V. Trinko, Jennifer E. Traystman, Curtis V. Trinko L.L.P., 212-490-9550, New York; Joseph E. White, Christopher S. Jones, Lester R. Hooker, Saxena White P.A., 561-394-3399, Boca Raton, Fla.; Jeffrey P. Campisi, Donald R. Hall Jr., Frederic S. Fox Sr., Joel B. Strauss, Pamela A. Mayer, Kaplan Fox & Kilsheimer L.L.P., 212-687-1980, New York.

**Counsel for defendants:** Jay W. Eisenhofer, Grant & Eisenhofer P.A., 646-722-8500, New York.

#### COINSTAR INC.

### **Class claims against Redbox owner adequately alleged**

**In re Coinstar Inc. Sec. Litig.**, No. 11-0133 (W.D. Wash. Oct. 6, 2011)

The U.S. District Court for the Western District of Washington denied in part a motion to dismiss securities fraud class action claims brought by an institutional investor against a DVD rental company.

An institutional investor sued Coinstar Inc., a renter of new release DVDs to consumers for \$1 per night, and five Coinstar executives alleging the defendants provided misleading guidance concerning its fourth quarter 2010 and fiscal year 2010 revenues while being aware of factors adversely affecting its Redbox business, which accounted for 80% of the firm's sales.

The complaint alleged that on Jan. 13, 2011, after the firm notified the public of an 11% shortfall in its 4Q10 earnings, the company's stock price dropped more than 27%, to the plaintiffs' material detriment. The defendants moved to dismiss.

**Statements not protected by "safe harbor" provision of PSLRA.** The district court rejected in part the defendants' contention that the challenged statements were protected by the "safe harbor" provisions of the Private Securities Litigation Reform Act of 1995.

Although most of the challenged statements were accompanied by meaningful cautionary language rendering them protected under the safe harbor provision, statements made in a Nov. 17 and 19, 2010 conference call alleging the defendants internally re-forecasted Coinstar's guidance downward for 4Q10 at the same time that it was publicly forecasting higher revenues, and supported by confidential witness testimony, were adequately pled as false or misleading.

The court separately concluded that challenged statements regarding the strength or market demand for DVD

titles made during a 3Q10 earnings call were also adequately pled as false or misleading.

The district court held that the confidential witness' testimony concerning internal re-forecasting of guidance, in combination with the individual defendants' position within Coinstar under the core operations doctrine, was sufficient to raise a plausible inference of scienter. Accordingly, the defendants' motion to dismiss was granted in part and denied in part.

**Judge:** Marsha J. Pechman

#### HQ SUSTAINABLE MARITIME INDUSTRIES INC.

### **Defendants' motion to stay discovery in parallel state action granted**

**Moomjy v. HQ Sustainable Maritime Indus. Inc.**, No. 11-0726 (W.D. Wash. Sept. 12, 2011)

The U.S. District Court for the Western District of Washington granted the motion of defendants in a securities fraud class action to stay discovery in a pending state court derivative action arising from the same operative facts.

Investors in HQ Sustainable Maritime Industries Inc. sued the firm and certain of its officers alleging violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 arising from alleged misstatements made by the defendants concerning the firm's business and its financial condition (see 9 S.Cl.Act.Rep. 85, May 15, 2011). The case came before the court on the firm's motion seeking a stay of discovery in a pending state court derivative action. The motion was opposed by the state court plaintiffs.

The district court noted that that Private Securities Litigation Reform Act of 1995 (PSLRA) imposed a discovery stay in private federal securities litigation while a motion to dismiss was pending. Under the Securities Litigation Uniform Standards Act of 1998, courts were empowered to stay discovery in private state court actions as necessary to aid the federal court's jurisdiction or to protect or effectuate its judgments.

The district court concluded that, given the significant overlap in the subject matter of the state and federal actions, a substantial risk existed that relevant discovery obtained in the state court action would reach the federal plaintiffs during the pendency of the motion to dismiss. Although different counsel represents the state court plaintiffs, those plaintiffs are putative members of the federal securities fraud action and, as such, their receipt of discovery would violate the PSLRA.

The court separately rejected the state court plaintiffs' contention that, because their action was derivative, the state and federal claims did not substantially overlap. The

factual allegations in the complaints were substantially identical, and undisputedly, state court discovery would be useful to the federal court plaintiffs if they were to amend their complaint.

Accordingly, and after concluding that imposition of a stay would not unduly burden the state court plaintiffs, the district court granted the defendants' motion to stay discovery in the state court action.

**Judge:** Robert S. Lasknik

**Counsel for plaintiffs:** Karl Phillip Barth, Steve W. Berman, Hagens Berman Sobol Shapiro L.L.P., 206-623-7292, Seattle.

**Counsel for defendants:** Benjamin J. Stone, Cozen O'Connor, 206-373-7237, Seattle; Andrea Delgadillo Ostrovsky, Jeremy E. Roller, Yarmuth Wilsdon Calfo P.L.L.C., 206-516-3800, Seattle; Peter M. Ryan, Rachel Robbins, Robert W. Hayes, Cozen O'Connor, 215-665-2000, Philadelphia; Marc D. Ashley, Marcelo Blackburn, Thomas J. McCormack, Chadbourne & Parke L.L.P., 212-408-5100, New York.

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## Dismissals

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ASCOT PARTNERS/GABRIEL PARTNERS/ARIEL FUND

### Fraud action arising from hedge funds' investment in Madoff Ponzi scheme dismissed

**In re Merkin & BDO Seidman Sec. Litig.**, Nos. 08-10922, 09-6031, 09-6483 (S.D.N.Y. Sept. 23, 2011)

The U.S. District Court for the Southern District of New York dismissed a securities fraud class action brought by hedge fund investors against the partner and auditors of three funds that invested heavily in the Bernard Madoff Ponzi scheme.

New York Law School and other parties, on behalf of investors in three hedge funds—Ascot Partners L.P., Gabriel Partners L.P. and Ariel Fund Ltd. (collectively, the Funds)—sued the general partner and auditors of the Funds alleging the defendants failed to disclose the Funds' investments in Bernard L. Madoff Investment Securities L.L.C. and failed to perform required due diligence in connection with those investments. The plaintiffs alleged violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. The defendants moved to dismiss.

The district court concluded that the complaint failed to allege that the defendants made a material misstatement or omission as required under the heightened pleadings standards of the Private Securities Litigation Reform Act of 1995. The complaint impermissibly attempted to “cherry pick” language from offering documents, while ignoring explicit cautionary language which warned the plaintiffs that third-party managers would have custody over the Funds' assets and that this custody carried a risk of loss.

The court separately concluded that the complaint failed to adequately allege scienter against any of the individual plaintiffs. The record contained no evidence that an individual defendant had direct knowledge of the Ponzi scheme; and under applicable Second U.S. Circuit Court of Appeal precedent, an investment advisor who recommends investments in a fund that turns out to be a Ponzi scheme will not ordinarily be held liable for securities fraud unless the investor alleges particular facts giving rise to a strong inference of scienter, which was absent in this case.

The court also found that the plaintiffs' state common law claims for fraud, negligent misrepresentation and fraudulent concealment all arose “in connection with” securities transactions and, as a result, were preempted under the Securities Litigation Uniform Standards Act of 1998. Accordingly, the defendants' motion to dismiss was granted in all respects.

**Judge:** Deborah A. Batts

ATHENAHEALTH INC.

### Scienter not adequately alleged in action against online medical business services provider

**Casula v. athenahealth Inc.**, No. 10-10477 (D. Mass. Sept. 30, 2011)

The U.S. District Court for the District of Massachusetts dismissed a securities fraud class action brought against a provider to physicians of Internet-based business services.

An institutional investor sued athenahealth Inc., a provider of Internet-based business services for physician practices, and certain of its officers alleging violation of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934. The complaint alleged that the defendants violated GAAP by adopting physician contract periods, rather than the estimated length of the customer relationship, as the firm's basis for calculating deferral of revenue.

During the week following the firm's Apr. 20, 2010, announcement that its profits had been negatively impacted by higher general and administrative expenses of approximately \$1 million related to an accounting review and restatement, the company's stock price fell from \$35.35 to \$26.96, to the plaintiff's material detriment. The defendants moved to dismiss.

The district court concluded that in changing the recognition of revenue principle in 2010, the defendants acknowledged that their prior practice was not in compliance with SAB 104. The court noted, however, that under applicable precedent, allegations of GAAP violations or accounting irregularities, standing alone, were not sufficient to state a securities fraud claim unless coupled with evidence of corresponding fraudulent intent.

The district court held that there were no other circumstances indicative of fraudulent intent or recklessness sufficient to raise a strong inference of scienter. While the company was recognizing revenue in full in the first year of a customer contract, it was getting a sign-off on its financial statements from its outside auditor, a factor weighing heavily against an inference of intent to receive.

The court further concluded that the circumstances surrounding the firm's decision to acknowledge its accounting error were fully consistent with recognition of an honest mistake of judgment. There was nothing about a change of accounting procedure in itself that suggested a prior intent to defraud and this was especially true where, as here, the change affected a very small portion of the firm's overall revenue. Accordingly, the defendants' motion to dismiss was granted.

**Judge:** George A. O'Toole Jr.

#### LIZ CLAIBORNE INC.

### **Scienter not adequately alleged in action against apparel maker**

**Tyler v. Liz Claiborne Inc.**, No. 09-4147 (S.D.N.Y. Sept. 29, 2011)

The U.S. District Court for the Southern District of New York dismissed a securities fraud class action brought by a shareholder against a clothing designer and seller arising from alleged misstatements concerning the firm's relationship with a major retailer.

An investor in Liz Claiborne Inc. sued the company and certain of its officers for violations of §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 (see 7 **S.Cl.Act.Rep.** 94, May 15, 2009). The complaint alleged that the defendants fraudulently misrepresented facts relating both to the firm's relationship with Macy's Inc. and to the firm's design of a new line of clothing for J.C. Penney Co. Inc.

The complaint alleged that the defendants falsely represented to investors that Claiborne had a "great relationship" with Macy's, and made similar positive statements about the firms' relationship, when in fact the defendants were aware that Macy's executives were "furious" with Claiborne for permitting J.C. Penney, a Macy's competitor, to market competing, lower-priced lines of clothing bearing the "Liz" mark. The defendants moved to dismiss.

The district court concluded that the complaint did not adequately allege scienter under the heightened pleading standards of the Private Securities Litigation Reform Act of 1995. Even assuming that Macy's CEO informed Claiborne's CEO at a Nov. 22, 2006, meeting that he was furious over Claiborne's relationship with J.C. Penney, and

assuming that statement of displeasure contradicted public statements about the longstanding nature of the Macy's-Claiborne relationship, the plaintiff would still have failed to establish a strong inference of scienter.

**Allegations do not support scienter.** The court noted that two months passed between the Nov. 22, 2006, meeting and the first allegedly misleading statement concerning the relationship between the two firms. In the absence of additional supporting allegations, the fact that Macy's CEO was upset in November did not mean that the relationship between the firms was or remained rocky the following February.

The district court separately rejected the plaintiff's contention that scienter was adequately supported through application of the core operations doctrine. Even if this doctrine could apply, it appeared that Macy's business was not sufficiently core to Claiborne for the doctrine to apply. Sales to Macy's represented 16% of Claiborne's business and, under applicable precedent, the operation in question must constitute nearly all of a firm's sales before a finding of scienter may be based on the core operations doctrine. Accordingly, the defendants' motion to dismiss was granted.

**Judge:** Richard J. Holwell

**Counsel for plaintiffs:** Howard G. Smith, Smith & Smith, 215-638-4847, Bensalem, Pa.; Katherine Den Blevker, Lionel Z. Glancy, Glancy Binkow & Goldberg L.L.P., 310-201-9150, Los Angeles.

**Counsel for defendants:** Andrew J. Ehrlich, Leslie G. Fagen, Tobias J. Stern, Paul Weiss Rifkind Wharton & Garrison L.L.P., 212-373-3000, New York.

## **In The Law Journals**

### **Examining materiality in securities fraud actions against pharmaceutical companies**

Benjamin Shook, *The Materiality Standard After Matrixx Initiatives Inc. v. Siracusano*, 12 N.C. J. L. & Tech. 369 (2011)

Of the cases the U.S. Supreme Court reviews each year, a number typically involve resolving conflicts among the circuit courts pertaining to critical issues, for example, a disagreement about the interpretation of a phrase in a piece of legislation. Recently, the Court resolved a circuit split regarding the materiality of certain types of evidence in securities fraud class actions. According to Benjamin Shook, the Court's decision will give more guidance to pharmaceutical companies facing securities fraud class action lawsuits.

The Court recently decided a case involving Matrixx Initiatives Inc., the manufacturer of Zicam, an over-the-counter cold remedy (see 9 **S.Cl.Act.Rep.** 63, Apr. 15, 2011). Shareholders of Matrixx brought a class action lawsuit against Matrixx regarding alleged violations of Rule 10b-5 under the Securities Exchange Act of 1934.

Specifically, the shareholders alleged that Matrixx should have disclosed the link between Zicam and anosmia, the loss of smell. A number of reports surfaced between 1999 and 2004, indicating a link between Zicam and anosmia, leading to a report regarding the link on the television show “Good Morning America” in February 2004. Following the report, the Matrixx stock price dropped greatly. Matrixx disputed the linkage between Zicam and anosmia, but the FDA informed Matrixx in 2009 that there was evidence that Zicam might pose a risk to consumers.

Rule 10b-5 was promulgated by the SEC in under §10(b) of the Securities and Exchange Act. In order to bring a claim under Rule 10b-5, the plaintiff must allege that the defendant corporation made a misstatement or omission of a material fact. In addition the plaintiff must allege that the defendant acted with scienter and that the plaintiff relied on the misstatement or omission. The misstatement or omission also must have been the proximate cause of the plaintiff’s injury.

The Supreme Court has set standards for what the plaintiff must prove in order to satisfy the materiality requirement. For an omission, the omitted facts are material if there would be a substantial likelihood that the plaintiff would not have bought or sold the securities had the omitted information been a part of the total mix of information available to the plaintiff. However, the circuit courts have differed with respect to the application of the materiality standard to cases involving pharmaceutical companies.

For example, the Second, Third and First Circuit Courts of Appeal have chosen to use a standard that requires a “statistically significant” standard of materiality with regard to claims under Rule 10b-5. Under the statistically significant standard, a pharmaceutical company must report an adverse event if there is statistically significant data to support a causal connection between an adverse event and the use of the drug.

The circuit courts have differed with regard to how the statistical significance standard has been applied. The district court hearing the *Matrixx* case applied the statistical significance standard and concluded that the plaintiffs failed to allege a valid securities fraud claim, but the case was reversed on appeal by the Ninth Circuit Court of Appeal. The Ninth Circuit held that materiality should be based on a totality of the circumstances and remanded the case.

The U.S. Supreme Court upheld the Ninth Circuit’s decision to reverse the lower court’s decision. The Court held that the test for materiality is a fact-specific inquiry, and while statistical analysis can be one way to determine materiality, courts should be open to other methods to prove materiality in securities fraud actions involving pharmaceutical companies. As a result, pharmaceutical companies must be aware that courts evaluating securities fraud claims may consider the total mix of factors that can affect a decision, not just the statistical significance of the omission of facts.

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