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The Bulletin is a quarterly newsletter by Kessler Topaz Meltzer & Check to help institutional investors stay

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HIGHLIGHTS

KESSLERTOPAZ MELTZERCHECK LLP

KESSLER TOPAZ ACHIEVES SIGNIFICANT VICTORY IN SECURITIES FRAUD CASE AGAINST MANUFACTURER OF OPIOIDS

Stephanie Grey, Esquire

Kessler Topaz is currently litigating a securities fraud class action against Endo International plc ("Endo" or the "Company") and certain of its officers and directors (collectively "Defendants") arising from the Defendants' false claims about the safety of Endo's reformulated opioid pain reliever, Opana ER. Endo had sought an exclusive "abuse-deterrent" label for its reformulated drug in part to stave off generic competition for its original formulation. In doing so, the Defendants repeatedly touted to Endo's investors the alleged abuse-deterrent properties of the new Opana ER and asserted that ongoing post-marketing data the Company was gathering supported the label application. In truth, while these studies did show a declining rate of abuse of the new formulation by some modes of abuse, including by inhalation, the very same

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FAILED MERGER SHOWS PERILS OF POOR CORPORATE GOVERNANCE

Christopher M. Windover, Esquire

Kessler Topaz is currently prosecuting a shareholder derivative action on behalf of Akorn, Inc. ("Akorn" or the "Company") against its current and former directors and officers relating to pervasive regulatory issues that were uncovered through Akorn's failed merger with Fresenius Kabi AG and its affiliates ("Fresenius"). The lawsuit is an unfortunate reminder of the havoc that poor corporate governance can wreak on a company.

Akorn is a generic pharmaceutical company whose primary regulator is the U.S. Food and Drug Administration ("FDA"). The FDA requires Akorn to strictly follow the agency's current Good Manufacturing Practices ("cGMP"), which are designed to ensure the safety and efficacy of the Company's products. A critical component of the cGMP is its "data integrity" requirements, which mandate

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AUSTRALIA'S EVOLVING SHAREHOLDER LITIGATION LANDSCAPE AND THE *GETSWIFT* AND *BHP BILLITON* CLASS CARRIAGE DECISIONS

Emily N. Christiansen Esquire

Over the past five years, the shareholder litigation landscape in Australia has been in an almost constant state of flux. Where once most shareholder litigation proceeded on a closed class basis (where investors were required to opt-in or join a case by signing a litigation funding agreement before the case was filed), now most shareholder litigation proceeds on an open class basis (where investors are essentially included in the class unless they take action to opt-out by a given date)[1]. As a result, the Australian Federal Courts have increasingly been tasked with determining how to best address multiple competing proceedings.

On November 20, 2018, in the *Perera v. GetSwift Limited* case (*"GetSwift"*), the Full Federal Court of Australia upheld a lower court's decision implementing a process analogous to a carriage motion to decide which of several competing open class actions should proceed. In the original proceedings, Justice Lee, the judge overseeing the *GetSwift* case, ordered each of the three competing

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[1] In Australia, proceedings have always technically been open class or opt-out proceedings. For a long period of time, due to the necessity of third party litigation funding, most classes were defined in such a way that it only included members who had signed a litigation funding agreement with the funder. That, however, began to change in October 2016 when the Full Court of the Federal Court of Australia issued its decision in *Money Max Int Pty Ltd (Trustee) v. QBE Insurance Group Limited ("Money Max")* because in *Money Max* the court granted an application for a "common fund order" which allowed a litigation funder to provide funding for a representative proceeding and obtain a contingent funders' fee from all class members, regardless of whether they had previously executed signed a funding agreement. Essentially, the court's decision in *Money Max* brought the operation of representative proceedings in Australia more in line with the operation of class actions in the U.S. in that if there is a settlement or judgment in favor of the class, the funders' fee is deducted first before the proceeds are distributed on a pro rata basis to all class members.

TOYOTA AND LEXUS OWNERS DEFEAT SUMMARY JUDGMENT IN HVAC ODOR CLASS ACTION

Tyler S. Graden, Esquire and Abigail J. Gertner, Esquire

On any hot day, almost everyone reaches for the A/C button as soon as they get into their car. But what if, in addition to cool air, a smell comes from the vents too: a "musty, wet smell" like "mildew or mold"? Certainly, this is not something any vehicle owner should expect, but this is precisely what Toyota owners have complained about for years.

Toyota has long denied that its air conditioning systems are defective, leaving consumers to decide between sweltering in their vehicles, paying for expensive countermeasures, or subjecting themselves and their passengers to putrid odors. However, in *Stockinger v. Toyota Motor Sales, U.S.A. Inc.* Case No. 17-cv-0035-VAP-KS (C.D. Cal. March 8, 2019), the District Court for the Central District of California recently entered an important decision finding that a group of Toyota owners represented by Kessler Topaz presented sufficient, triable evidence to show that (i) these odors are caused by a design defect, (ii) Toyota knew of the odor's prevalence in its vehicles, and (iii) Toyota failed to disclose information about these odors to consumers.

Stockinger v. Toyota Motor Sales, U.S.A. Inc.

In early 2017, Kessler Topaz and plaintiffs filed a putative class action against Toyota Motor Sales, U.S.A. ("Toyota") on behalf of a nationwide class, and various state subclasses, alleging that Toyota knowingly sold vehicles with defective air conditioning systems that emit "foul and noxious" odors. The proposed class included multiple Toyota and Lexus vehicles manufactured and sold by Toyota since the mid 2000's.

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POST-TRIAL SETTLEMENT REFORMS EXECUTIVE PAY AND CORPORATE GOVERNANCE AT EBIX

Michael C. Wagner, Esquire

On January 23, 2019, Kessler Topaz and its co-counsel filed a settlement agreement with the Delaware Court of Chancery, proposing the resolution of a five-year litigation primarily concerning Ebix, Inc., its corporate governance generally, and a bonus agreement between the Company and its long-standing Chairman and CEO, Robin Raina in particular. Under the settlement, Raina has agreed to modify his existing change-in-control bonus agreement so as to reduce payments under it to him by more than $300 million. The settlement also will implement fundamental corporate governance reforms at Ebix, such as the Company's first-time hiring of a general counsel and the formulation of a formal succession plan for Raina. This article discusses some of the highlights from this long case, and describes the settlement that is currently pending approval before the Court of Chancery.

The Acquisition Bonus Agreement and the Case's Early Years

The case began in the spring of 2013, after Ebix announced it would be taken private by affiliates of Goldman Sachs. As part of that deal, Raina contended he was entitled to a substantial cash payment under an Acquisition Bonus Agreement, purportedly entered into on July 15, 2018 (the "ABA"), and he leveraged that payment into a substantial stake in the post-merger company. We noted that the payment Raina had calculated appeared to exceed the payments that would be called for under the ABA's already generous terms. Our lawsuit challenged the deal generally and the ABA's impact on the deal in particular. Ultimately, Goldman Sachs terminated the merger agreement.

Our case continued, focused on the ABA and the unprecedentedly generous cash payout to Raina that, Ebix had disclosed, the ABA would require in any change-in-control transaction, equal to more than 25% of the value of any buyout of Ebix, above any amount a buyer would have to pay for Ebix's stock. The case focused on the rationality of such an enormous cash payment as well as the deterrent effect it would have on any potential acquirer.

As Ebix continued to make inaccurate disclosures concerning the ABA and commit other conduct, and as we began to discover additional information in the case concerning the ABA's purported adoption, the Company's attempted stock splits, and how disclosures concerning the ABA evolved over time, our case expanded to encompass related issues. Defendants attempted multiple times with many arguments over several years to have our complaint and its amendments dismissed, and took other action to moot certain of Plaintiffs' claims, but our core claims concerning the ABA survived every effort. In September 2017, after Ebix's directors changed counsel, the Court directed depositions to proceed and scheduled a trial for August 2018.

The depositions of Ebix's long-standing directors, who had been on the Board since at least 2006, proceeded in October and November 2017, and revealed several facts that strongly supported our lawsuit and, principally, our claims regarding the ABA. For example, the depositions confirmed that Raina had (1) directed a law firm to craft the ABA's

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CLASS ACTIONS IN THE NETHERLANDS: RADICAL CHANGE IS ON THE HORIZON

Geoffrey C. Jarvis, Esquire

For a number of years the Netherlands has explored potentially significant changes to its existing collective action regime. On January 29, 2019, a new Dutch law (the "Proposed Act") was adopted by the Dutch House of Representatives that — if approved by the Dutch Senate and entered into law (which is expected) — will enact substantial changes in the remedies available in Dutch collective actions. The Proposed Act will — for the first time — allow collective damages actions for Dutch citizens on an "opt-out" basis and for non-Dutch citizens who chose to "opt-in" to a proceeding. While providing a significant new remedy to persons harmed by fraud in connection with their purchases of securities (and other forms of wrong-doing), the reach of the Proposed Act will be substantially narrower than recent Dutch decisions that have allowed actions to proceed before the Dutch courts that have seemingly little connection to the Netherlands.

Collective Redress in the Netherlands — The Current System

In the Netherlands, there are two different procedures that allow for the

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KESSLER TOPAZ SECURES EXPEDITED TRIAL CHALLENGING THE VALIDITY OF MINDBODY MERGER VOTE

J. Daniel Albert, Esquire and Stacey A. Greenspan, Esquire

On February 27, 2019, the Delaware Court of Chancery granted Kessler Topaz's application to schedule an expedited trial to be held on April 29 through May 1, 2019. The trial will determine, pursuant to Section 225 of the Delaware General Corporation Law ("Section 225"), whether the February 14, 2019 stockholder vote on the merger of Mindbody, Inc. into a subsidiary of Vista Equity Partners Management, LLC was valid.

The litigation arose from Mindbody and Vista's December 24, 2018 announcement that Vista would acquire Mindbody for $36.50 per share (the "Merger"). Mindbody told stockholders that approximately 32% of the vote had already been secured in favor of the Merger based on commitments of certain Company insiders and other holders of the Company's super-voting Class B common stock. Our case alleges otherwise — this will be the subject of the trial.

Mindbody operates cloud-based business management software for businesses in the wellness industry, including yoga studios, salons and spas. The Company went public on June 18, 2015. In connection with the public offering, Mindbody's co-founder and CEO Richard Stollmeyer and certain other pre-IPO equity holders were issued Class B common stock that carried 10 votes per share, as opposed to the Class A common stock issued to the public in the IPO that carried 1 vote per share. However, under the Company's Amended and Restated Certificate of Incorporation (the "Certificate"), there were significant restrictions on the transfer of Class B shares to other parties. The 10-vote per share Class B stock would automatically convert into the 1-vote per share Class A stock should any of the transfer restrictions be triggered.

In early 2018, approximately 90% of the Class B shares were held by Stollmeyer and venture capital firm Institutional Venture Partners ("IVP"), who at the time collectively controlled approximately 44% of the Company's voting power. IVP also had a designated member on Mindbody's Board of Directors, Eric Liaw.

In early 2018, Mindbody made certain transformational acquisitions that portended significant growth for the Company in 2019 and beyond. Before the Company's public stockholders could reap any of those rewards, in August 2018, Stollmeyer began discussions with Vista concerning a potential going-private transaction. These discussions continued into October 2018 before Stollmeyer informed the Board that Vista was interested in acquiring the Company. The Board then empaneled a transaction committee of directors, chaired by Liaw, to select a financial advisor for the Company. However, the financial advisor selected, Qatalyst Partners L.P., was the same investment advisory firm that had introduced Stollmeyer and Vista back in August, and had a long and lucrative relationship with Vista.

As talks intensified between Stollmeyer and Vista, Stollmeyer caused the Company to issue reduced guidance in connection with its third-quarter earnings release. On this news, Mindbody's stock plummeted to $26.18 per share on November 7, 2018, when just a month earlier the Company's stock was trading at $41.25 per share.

On December 18, 2018, Vista made its first "formal" offer to acquire the Company for $35.00 per share. In connection with this offer, Vista demanded that Stollmeyer and IVP execute voting and support agreements ("VSAs") that obligated them to vote all of their Mindbody shares in favor of the Merger. Under the terms of Article IV of Mindbody's Certificate, however, the VSAs would cause Stollmeyer's and IVP's Class B shares to automatically convert into Class A shares. If that happened, Stollmeyer's and IVP's collective voting power would drop from approximately 32.1% to roughly 6.33%, making their support of the Merger far less of a guarantee that the Merger would be approved by a vote of Mindbody stockholders.

As a result, Stollmeyer and IVP attempted to shoehorn the VSAs into a narrow exception in the Certificate for the automatic conversion of Class B shares into Class A shares: "the grant of a proxy to officers or directors of the Corporation at the request of the Board . . . in connection with actions to be taken at an annual or special meeting of stockholders . . . ." The parties thus essentially

agreed to call their VSAs "Irrevocable Proxies." These "Irrevocable Proxies," however, contained numerous provisions that are not typically found in an irrevocable proxy to vote shares, but are frequently found in VSAs. Kessler Topaz alleges that the "Irrevocable Proxies" are VSAs in disguise, and that Stollmeyer and IVP's Class B shares therefore converted to one-vote Class A shares.

After just three days of "negotiations," the Board approved the Merger and Stollmeyer and IVP executed the "Irrevocable Proxies." Stollmeyer announced the Merger on December 24, 2018, and characterized the price as a "68% premium" to the Company's stock price. This characterization ignored that the Merger was announced at the end of the worst December for the stock market since the Great Depression. The week preceding the Board's approval of the Merger was the worst week for stocks since the 2008-2009 financial crisis. That week alone, Mindbody's stock price fell 13% from $24.98 to $21.72. Accordingly, Stollmeyer's touting of the 68% premium in the Merger was misleading at best, especially considering the $36.50 deal price was a discount to Mindbody's stock price when Stollmeyer began negotiating with Vista.

Following the Merger's announcement, Kessler Topaz conducted an investigation to determine whether the Board members had breached their fiduciary duties, and whether IVP and Vista aided and abetted those breaches. However, Mindbody and Vista were simultaneously rushing to complete the Merger during the partial government shutdown, which would avoid scrutiny of the deal by the Securities and Exchange Commission. Mindbody took advantage of the government shutdown to issue its definitive Proxy Statement on January 23, 2019 (just 30 days after announcing the Merger), and scheduled a Special Meeting for a vote on the Merger for February 14, 2019. By scheduling the Special Meeting just three weeks after issuing the Proxy, the minimum period of time allowed by law, Defendants made it impracticable for stockholders to try to seek pre-vote expedited relief to attempt to enjoin the Special Meeting and the Merger.

Nevertheless, on January 29, 2019, Kessler Topaz filed, on behalf of two Mindbody stockholders, a verified class action complaint asserting claims for violations of the Certificate, including that the "Irrevocable Proxies" converted Stollmeyer's and IVP's Class B shares into Class A shares. The Complaint also included claims for breaches of fiduciary duty against the Board for failing to maximize stockholder value and aiding and abetting those breaches against IVP and Vista (collectively, the "Defendants").

On February 15, 2019, the Company announced that a majority of Mindbody's stockholders had voted in favor of the Merger. This vote, however, counted Stollmeyer and IVP's shares as having 10 votes per share.

Since pre-vote relief had been practically foreclosed by Defendants rushing to consummate the Merger, Kessler Topaz then took the novel approach of seeking a post-closing determination under Section 225 on the validity of the Merger vote, considering Defendants were maintaining that Stollmeyer's and IVP's Class B shares remained Class B shares, and as such 32% of Mindbody's voting power was already locked up in favor of the Merger. Accordingly, Kessler Topaz filed an application to schedule a trial on the Class B conversion claim under Section 225, which provides for summary trials to determine the validity of a stockholder vote.[1] Our primary argument is that Stollmeyer and IVP's Class B shares converted to Class A shares when they transferred those shares by committing to vote for the Merger. The vote in favor of the Merger was therefore invalid.

Defendants hotly contested the application to schedule a Section 225 trial. Nonetheless, at a hearing on February 27, 2019, the Court granted plaintiffs' application and scheduled a three-day trial commencing April 29, 2019.

Should the Court determine after trial that the Merger vote was invalid because Stollmeyer's and IVP's Class B shares had been converted to Class A shares, but the Company counted their votes as Class B votes anyway, this could open up significant additional claims and remedies for Mindbody stockholders. Such remedies include that Defendants illegally converted Mindbody stockholders' property by cashing out their shares without a valid merger, quasi-appraisal rights, and rescissory damages. The trial's outcome could also have precedential value for future Section 225 claims challenging the validity of merger votes, and the potential conversion of high-vote stock subject to transfer restrictions in dual-class stock companies.

Finally, regardless of the outcome of the trial, Kessler Topaz will continue to prosecute claims against the Defendants for breaches of fiduciary duties. Defendants ran a conflicted sales process that resulted in a low-ball price for Mindbody. The $36.50 deal price was only a premium to Mindbody's stock price on the date the Merger was announced because of Stollmeyer's manipulation of the Company's stock price and the stock market meltdown in the fourth quarter of 2018. Further, the $36.50 deal price wholly failed to account for the Company's significant growth potential in 2019 and beyond.

This case illustrates the innovative approaches Kessler Topaz continues to take in prosecuting fast-moving merger litigation. ■

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[1] *Hewlett v. Hewlett-Packard Co.*, 2002 WL 549137, at *9 (Del. Ch. Apr. 8, 2002); *Superwire.Com, Inc. v. Hampton*, 805 A.2d 904, 910-11 (Del. Ch. 2002); *In re Bigmar, Inc.*, 2002 WL 550469, at *22-25 (Del. Ch. April 5, 2002).

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groups to file their funding and legal cost proposals along with additional evidence in support of their application. Justice Lee then weighed the evidence before him and considered factors such as the experience of the lawyers, the resources available to each firm and each litigation funder, the amount of preparation each group had already undertaken, the strength of the representative plaintiffs, the number of group members that had already joined each group, each groups' proposed economic terms in conjunction with any proposals to control and reduce the costs to group members, and the consequences of a permanent stay in each proceeding. The court declined to give preference to the first to file and to the number of group members that had joined a particular action and instead gave the most weight to novel proposals made by law firms and funders to keep the legal expenses reasonable. Based on an assessment of the foregoing factors, Justice Lee decided to allow one of the three competing actions to proceed and permanently stayed the other two proceedings.

The two groups, whose actions were permanently stayed, appealed Justice Lee's decision but the Full Federal Court dismissed the appeal and held that the court has broad discretion in its case management abilities including the power to stay competing class actions and to conduct carriage motion proceedings. In its decision, the Full Federal Court was careful to avoid implying that a permanent stay of one or more actions is the only or most desirable course of action. Instead the Court noted that stays were one tool but that there were other legitimate case management options available to courts for dealing with competing groups. Other options the court noted include consolidation (where there is an agreement by the parties), a "wait and see" approach, and an order closing the classes in all but one proceeding (in other words leaving one group with the "open class" including absent class members and treating the other competing groups as an opt-out on behalf of a specific defined group of members who had affirmatively joined the case). Ultimately the procedural mechanism to be utilized will depend on the specific facts of the competing cases before the court and the discretion of the Judge assigned to the cases.

In addition to outlining the case management options available to a court, the Full Federal Court highlighted certain risks in conducting a carriage motion. For example, the Court noted that it could cause a race to the bottom for funding fees, that it could create a rush to file without conducting proper due diligence, and that the carriage motion itself could be expensive (and indeed it had cost each of the competing groups between $300,000 to $500,000 AUD each to litigate the carriage motion in the *GetSwift* case). The Court also emphasized that a class carriage motion may be less helpful where there has been a substantial book build process and where large numbers of would-be class members have already entered into agreements with particular law firms and litigation funders. Nevertheless, the Court held that like the power to permanently stay one or more proceedings, the courts in Australia have the inherent powers to conduct carriage motions and to evaluate which group is best suited to represent the interests of the class.

While the *GetSwift* decision was on appeal to the Full Federal Court, three competing "open class" class actions were commenced before the Federal Court of Australia against BHP Billiton Limited ("BHP") on behalf of shareholders who suffered investment losses as a result of the November 5, 2015 collapse of the Fundão tailings[2] dam at the BHP owned Germano mine in Brazil. The three proceedings include: *Impiombato v. BHP Billiton Limited,* which was filed on May 31, 2018 by the Australian law firm Phi Finney McDonald and is being funded by G&E KTMC Funding LLC (a litigation funder that is backed by Grant & Eisenhofer P.A. and Kessler Topaz Meltzer & Check, LLP) ("Impiombato proceeding"); *Klemweb Nominees Pty Ltd (as trustee for the Klemweb Superannuation Fund) v. BHP Billiton Limited*, which was filed on August 31, 2018 by the Australian law firm Maurice Blackburn Lawyers and which Maurice Blackburn lawyers also propose to fund ("Klemweb proceeding"); and *Los Angeles County Employees Retirement Association v. BHP Billiton Limited,* which was filed on September 24, 2018 by the law firm Australian law firm Johnson Winter & Slattery and funded by Harbour Fund IV, L.P. and Robbins Geller Rudman & Dowd, LLP ("LACERA proceeding"). All three cases allege that BHP engaged in misleading or deceptive conduct and breached its continuous disclosure obligations by failing to inform the market of the material risk that the Fundão dam would collapse.

As with the *GetSwift* case, in *BHP* an Australian Federal Court was tasked with determining how to manage multiple proceedings alleging similar facts and legal claims against the same defendant. On October 29, 2018, Justice Moshinsky, the judge assigned to the BHP case, held a case management hearing "for the purpose of considering the consolidation or selection of proceedings or any other proposed option to deal with the potential overlap of proceedings."[3] Although Justice Mosinsky appears to have approached the case management hearing with a mind open to considering options other than staying one or more of the groups, the submissions made and the specific facts in the case weighed in favor of staying two of the groups while allowing one group to proceed. Each of the competing parties of claimants made submissions to the court asking that the other two groups be stayed. BHP also made a submission to the court asking that two of the groups be stayed (although it did not specifically identify which two groups should be stayed).

While Justice Moshinsky was considering the competing BHP proceedings, the Full Federal Court issued its decision in *GetSwift*. Justice Moshinsky reviewed the Full Federal Court decision in *GetSwift* and applied the principles outlined within the decision to the facts before him in the BHP proceedings. In reviewing the facts before him, Justice Moshinsky noted:

> "[t]here is no issue that the Court has the power to permanently stay one or two of the proceedings. Each party accepted this at the hearing before me. Indeed, the primary position of each party was that two of the three proceedings should be permanently stayed. The Full Court's judgment in *GetSwift* has confirmed that the Court has the power, in circumstances such as this, to permanently stay one or two of the proceedings."[4]

Justice Moshinsky then turned his attention to the other case management options available to him but quickly determined that the majority of the options were not appropriate in the BHP case. Consolidation of the proceedings would not be appropriate (there was no agreement among the parties and there were different lawyers and funders in each action). A "wait and see" approach would be inefficient and lead to increased expense given the overlap of the three proceedings. That left the court with only two realistic case management options: a permanent stay of one or more of the proceedings or an order closing the class in one or more of the proceedings and leaving one with an open class and scheduling a joint trial to deal with them all.

Before deciding between those two options, Justice Moshinsky decided to first determine which proceeding should go forward as an open class proceeding and then to consider whether any of the other proceedings should continue to move forward on a closed class basis. Justice Moshinsky first noted that given the Full Court's expressed concerns in *GetSwift* about a race to file without adequate due diligence that he would not accord the order of filing any weight. However, he noted that there was no evidence that the Impiombato proceeding was filed in haste and instead it appeared that substantial research and preparations had preceded the filing of the case. Given the substantial overlap of the allegations in the competing complaints, Justice Moshinsky indicated that he did not consider the nature and extent of allegations to provide a basis for weighing one proceeding over another. Justice Moshinsky also indicated that he considered the lawyers for all three groups to have considerable class action experience and to be capable of managing the proceedings to a high standard. He noted that each group was capable of providing security for costs. Because none of those factors distinguished any of the groups, Justice Moshinsky did not place any weight on them.

Instead, Justice Moshinsky focused on the areas where there were material differences between the groups. The first material difference between the groups centered on the litigation funding arrangements. Justice Moshinsky determined that the Impiombato proceeding offered the most attractive funding terms for group members because, "[i]t offers group members the certainty of a minimum net percentage from any settlement or judgment sum, insulates them from potential costs overruns, and incentivizes the funder to keep costs low."[5] The court determined that the Impiombato proceeding funding arrangement offered class members the greatest certainty about the minimum amount of any settlement or judgment that would be available for distribution to the class. Compared to the LACERA proceeding model, it was considered by the court to result in a lower fee for claimants. Although the Klemweb proceeding model may have resulted in a lower fee to group members (the Klemweb proceeding proposed a contingency fee[6] to the attorneys or that they would represent the group on a "now in, no pay" basis) there was a possibility that the interests of the class members and the law firm were not aligned in a way that would best motivate the lawyers to achieve the best outcome for the class. Overall Justice Moshinsky viewed the Impiombato proceeding fee arrangement better

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[2] "Tailings" is the waste material created by the mining process.

[3] *Impiombato v BHP Limited (No 2)* [2018] FCA 2045 judgement of 18 December 2018, para.3

[4] *Id* at para 122.

[5] *Id* at para 135.

[6] Australian law prohibits attorneys from charging a contingency fee that is calculated as a percentage of any recovery. Australian attorneys may represent clients on a "no win, no pay" basis but the amount clients pay must be based on the hours billed and expenses incurred with a small uplift (a percentage multiplied by the hours billed).

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equipped to motivate the lawyers while not promoting a "race to the bottom" like the *GetSwift* court had expressed concern over.

Another distinguishing factor that Justice Moshinsky considered was the book build that had been conducted by each group. 29,610 group members (including 219 institutional investors) had signed agreements with the attorneys and litigation funders in connection with the Impiombato proceeding, 197 group members (including 68 institutional investors) had signed up in the Klemweb proceeding, and only 1 institutional investor had signed up in the LACERA proceeding. Although Justice Moshinsky did not place much weight on this factor, he noted that it favored the Impiombato proceeding.

Ultimately Justice Moshinsky determined that the Impiombato proceeding was the most appropriate to proceed on an open class basis because it offered a funding arrangement that best served the interest of group members and all other factors that were assessed were either neutral or in favor of the Impiombato proceeding.

Justice Moshinsky then turned his attention back to the issue of whether to stay the Klemweb and LACERA proceedings. He determined first that the Klemweb proceeding should be permanently stayed because the claims of the group members were covered by the Impiombato proceeding and to have both proceedings continue would result in a duplication of legal work, increased costs to the group members, and less efficient proceedings. In making this determination, Justice Moshinsky emphasized that this decision was based on the facts before him and his broad discretionary powers. With respect to the LACERA proceeding, Justice Moshinsky determined that the proceeding should be temporarily stayed until 1 September 2019. The LACERA proceeding proposed a longer class period than the Impiombato proceeding but the attorneys in the Impiombato proceeding had informed the court that they would amend the class period if it was warranted after discovery proceedings had been completed in the case. Accordingly, Justice Moshinsky saw fit to temporarily stay the proceedings and to revisit the issue of whether the stay should be permanent at a later stage in the open class proceedings. Both Klemweb and LACERA have appealed and the appeal to the Full Federal Court is currently pending.

The *GetSwift* and *Impiombato v. BHP Billiton* case decisions both indicate how Australian courts may continue to address multiplicity of proceedings in the future. Both decisions, however, emphasize that courts have broad discretionary powers when it comes to case management and that different facts in different cases can cause the court to take a different approach. There is no clear approach or bright line rule for the courts to apply. ■

TOYOTA AND LEXUS OWNERS DEFEAT SUMMARY JUDGMENT IN HVAC ODOR CLASS ACTIONS

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In July 2018, the Court denied the bulk of Toyota's motion to dismiss and divided discovery into two phases. Phase I was to focus on the four Toyota vehicle model generations that the Plaintiffs purchased: model year 2011-2015 Sienna, 2010-2015 Prius, 2009-2013 Corolla and 2007-2012 Lexus ES 350. After Phase I, the parties were ordered to exchange expert reports on the issue of design defect and Toyota was permitted to file a mid-discovery motion for summary judgment. Depending on the result of the summary judgment motion, Phase II would then focus on the remaining vehicles in the class and other issues not fully addressed in Phase I.

After Phase I discovery concluded, Plaintiffs submitted the report of an automobile design expert. Plaintiffs' expert analyzed exemplar air conditioning units from the Phase I vehicles, as well as documents and deposition testimony, and opined that the air conditioning systems in Plaintiffs' vehicles contained several defective design features including: improper air flow over the evaporator core, unsuitable condensation drainage, use of porous foam material within the evaporator housing, and absence of additional design elements such as charcoal filters to mitigate odors. In response, Toyota moved for summary judgement and moved to strike Plaintiffs' expert.

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data showed a dramatic increase in the rates of intravenous abuse, a fact which Defendants concealed from investors. When Endo finally submitted its study data to the FDA in support of the new label, the FDA quickly convened an advisory committee to assess the risk/benefit profile of the drug and then demanded that Endo withdraw the drug from the market.[1] Endo's stock price consequently collapsed.

In this Action, Kessler Topaz serves as lead counsel for the court-appointed lead plaintiff, SEB Investment Management AB ("Lead Plaintiff" or "SEB") and a putative class of Endo investors. On December 10, 2018, the Honorable Timothy J. Savage of United States District Court for the Eastern District of Pennsylvania denied Defendants' motion to dismiss the claims and issued an opinion sustaining SEB's core theories of liability.[2] The case will now proceed to discovery.

I. Endo and its Blockbuster Opioid Pain Reliever, Opana ER

Endo is a global pharmaceutical company that markets and sells branded opioids. Headquartered in Malvern, Pennsylvania, the Company is located twenty-seven miles from Philadelphia, one of the cities hardest hit by the opioid epidemic. Endo has been named as one of many defendants in hundreds of opioid related lawsuits brought by states and municipalities across the United States which, among other causes of action, seek to hold the manufacturers and distributers of opioids liable for the immense costs of treating opioid addiction in the U.S. SEB's case is the only case that seeks to hold Endo liable to its investors for Endo's false statements concerning the safety of Opana ER.

In July 2006, Endo introduced to the market, Opana ER, the Company's blockbuster opioid drug. Opana ER was an extended release version of oxymorphone hydrochloride, which was supposed to provide longer-lasting, twelve hour pain relief that enabled a patient to take fewer pills each day. At the time, Opana ER was the only extended release version of oxymorphone hydrochloride on the market. The drug's formulation, however, made it susceptible to abuse because Opana ER could be easily crushed and subsequently snorted, chewed, or injected. These means of ingestion bypassed Opana ER's extended-release mechanism and provied the user with an immediate, highly addictive release of the drug's full dosage.

Opana ER quickly became one of Endo's best-selling drugs growing from $5 million in sales in 2006 to earning a stunning $384 million in sales in 2011. Opana ER's success attracted generic drug makers who wanted to capture a portion of the market share for opioid pain relievers. As Opana ER's sales continued to grow, numerous generic drug manufacturers began preparing FDA drug applications for generic versions of Opana ER.

As the generic manufacturers prepared their generic drug applications and the opioid crises continued to grow, Endo was at risk of losing one of its most valuable products. As a result, Endo began developing a new formulation of Opana ER ("Reformulated Opana ER") due to the abuse-potential of the original Opana ER. Endo submitted a New Drug Application ("NDA") to the FDA for Reformulated Opana ER, in July 2010. Endo claimed that Reformulated Opana ER was designed to be abuse-deterrent, making the drug more difficult to crush and therefore, reducing the drug's propensity for abuse. One of Endo's chief competitors, Purdue Pharma, the maker of the now notorious opioid OxyContin, had similarly developed what it called an abuse-deterrent formulation of OxyContin, and Endo sought to copy Purdue's playbook.

Within the NDA, Endo provided data from studies assessing Reformulated Opana ER's abuse-deterrent properties. These studies showed that while the drug was resistant to a pill crusher, the drug could still be tampered by other means, which compromised the extended release property and released a full dose of the drug. In December 2011, the FDA approved the Reformulated Opana ER's NDA. The FDA, however, excluded from the drug's label any language that it was crush-resistant due to the inadequate data submitted by Endo. The FDA approval of the Reformulated Opana ER provided the drug with a period of market exclusivity allowing the drug to be sold free from any competition.

Despite Endo's inability to receive FDA approval regarding its abuse-deterrent labeling, Endo continued to attempt to secure its strong foothold in the opioid market by removing the original Opana ER from the market for purported "safety reasons." If Endo could convince the FDA that the Company withdrew original Opana ER from the market for safety reasons, no generic versions of the original Opana ER could be sold to the public. By effectively removing generics from the market and gaining market exclusivity for the Reformulated Opana ER, Endo would protect its highly profitable revenue stream.

To that end, on August 10, 2012, Endo filed a Citizen Petition with the FDA seeking a formal determination that Endo withdrew the original Opana ER from the market for safety reasons. In support of its Citizen Petition, Endo falsely stated that the data provided, "show[ed] [a] dramatic decrease in abuse rates of

(continued on page 10)

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[1] This case is captioned *SEB Inv. Mgmt. AB v. Endo Int'l PLC, et al.*, Case No. 2:17-cv-3711 (E.D. Pa.) (the "Action").

[2] *See SEB Inv. Mgmt. AB v. Endo Int'l, PLC*, 351 F. Supp. 3d 874 (E.D. Pa. 2018) (the "Opinion").

KESSLER TOPAZ ACHIEVES SIGNIFICANT VICTORY IN SECURITIES FRAUD CASE AGAINST MANUFACTURER OF OPIOIDS

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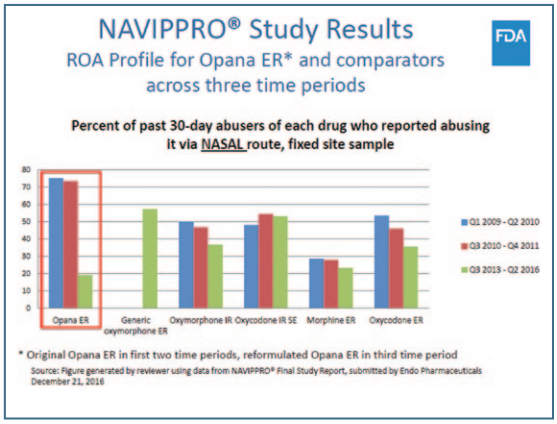
reformulation OPANA® ER designed to be crush-resistant when compared to non-tamper resistant formulation."

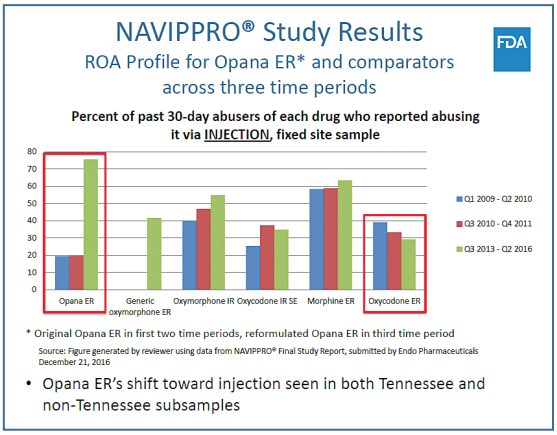
Shortly thereafter, in March 2013, Endo filed a supplemental new drug application ("sNDA") with the FDA, again seeking abuse-deterrent labeling for the Reformulated Opana ER. Within the sNDA, Endo highlighted the alleged safety characteristics of the Reformulated Opana ER, including its crush-resistant properties and lower abuse rates purportedly observed in its post-marketing surveillance data. Endo also released public statements highlighting that data established the Reformulated Opana ER's effectiveness at deterring abuse. In reality, Endo received data from these studies that the Reformulated Opana ER was increasing the rates of abuse via injection.

On April 23, 2013, Endo supplemented its Citizen Petition again, this time falsely claiming that the Reformulated Opana ER was "virtually identical" to reformulated OxyContin, which had by then successfully obtained an abuse-deterrent label. On April 16, 2013, the FDA had approved a sNDA for reformulated OxyContin, approving changes to the product labeling that described certain abuse-deterrent properties of that reformulated product. A few days later, the FDA granted a Citizen Petition submitted by Purdue seeking a determination that reformulated OxyContin replaced original OxyContin for reasons of safety. Endo argued that, based on purported similarities between the two drugs' abuse deterrent properites, its Citizen Petition regarding Opana ER should be granted.

On May 10, 2013, the FDA denied Endo's Citizen Petition concluding that the original Opana ER was not withdrawn for safety reasons, and rejected Endo's sNDA seeking abuse-deterrent labeling. The FDA found that the post-marketing data Endo submitted was "inconclusive" and "suggest[ed] the troubling possibility that a higher (and rising) percentage of [Reformulated Opana ER] abuse is occurring via injection than was the case with [the original Opana ER.]"

Despite the FDA's rejection, Endo continued to issue misleading statements to the market that post-marketing surveillance of the drug revealed a decrease in abuse of the Reformulated Opana ER. As illustrated in the graphs below, the data Endo used and analyzed showed a significant shift in the route of abuse for the Reformulated Opana ER, from intranasal abuse to intravenous abuse. The graphs also show that this shift occurred beginning, at the latest, in the third quarter of 2013, immediately after the FDA rejected Endo's Citizen Petition.





Defendants also pointed to this information as a means to mislead investors concerning Endo's prospects of securing abuse-deterrent labeling for the drug based on the accumulation of additional post-marketing surveillance data. In reality, although the data showed a decrease in abuse rates through some modes of abuse, the post-marketing surveillance data Defendants possessed showed a clear and dramatic increase in rates of intravenous abuse for the Reformulated Opana ER, the very risk that the FDA had noted as being "troubling" in its denial of the sNDA.

On January 29, 2016, Endo again sought abuse-deterrent labeling from the FDA through another sNDA filing. Defendants continued to misrepresent

and omit material facts regarding Endo's prospects of securing such labeling based on its post-marketing surveillance data and other safety data. In reality, Endo's own clinical study and post-marketing surveillance data directly contradicted their statements to the market concerning the Reformulated Opana ER's putative safety and abuse-deterrent qualities.

On August 12, 2016, Endo withdrew its sNDA seeking abuse-deterrent labeling for the Reformulated Opana ER "based on an August 11, 2016 discussion" with the FDA. This withdrawal came just two months after the FDA announced in the fall of 2016 that it would convene an Advisory Committee to review Endo's sNDA.

On March 9, 2017, in advance of the Advisory Committee meeting, the FDA published its briefing documents. This included the FDA's preliminary views that Endo's post-marketing abuse data presented a "compelling" case that "the reformulation caused a shift in non-oral routes from predominately nasal to predominately injection," particularly in light of the number of reports of a serious — often deadly — clotting disorder. At the conclusion of its two-day meeting on March 14, 2017, the Advisory Committee voted 18-8, with one abstention, that the abuse risks associated with the Reformulated Opana ER outweighed the drugs benefits.

II. Lead Plaintiff's Claims

In the operative complaint, Lead Plaintiff alleged that Defendants misrepresented the purported safety and abuse-deterrent properties of Endo's reformulated opioid pain reliever, the Reformulated Opana ER. Specifically, Lead Plaintiff alleged that Defendants misrepresented and omitted facts regarding the safety of the reformulated drug and the results of the post-marketing surveillance data. Lead Plaintiff also alleged that Defendants affirmatively misrepresented and concealed adverse facts that contradicted their claims that the Reformulated Opana ER was a safer product than its predecessor and had succeeded in reducing abuse rates.

Based on these facts, Lead Plaintiff asserted securities fraud claims for violations of: (i) Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder, and (ii) Sections 11 and 15 of the Securities Act of 1933, against Defendants on behalf of all purchasers or acquirers of Endo's common stock during the period from November 30, 2012 to June 8, 2018.

III. The Motion to Dismiss Opinion

On December 10, 2018, Judge Savage issued an opinion and order rejecting the vast majority of arguments Defendants raised in their motion to dismiss the operative complaint. The Court concluded that many of the Lead Plaintiff's alleged misrepresentations remain actionable. For instance, the Court found that Defendants made misrepresentations regarding the reduction of abuse attributable to the Reformulated Opana ER.[3] Additionally, the Court found that Defendants made affirmative statements regarding the Opana ER's safety that were misleading because they failed to disclose the countervailing evidence of the increase in intravenous abuse rates.[4]

Within the motion to dismiss, Defendants set forth two main arguments that the Court ultimately found unpersuasive. First, Defendants argued that the statements regarding the surveillance data, the Citizen Petition, and the abuse-deterrent labeling were nothing more than optimistic opinions that later proved to be wrong. Defendants asserted that because the surveillance data showing abuse trends for the Reformulated Opana ER were created in 2016 and 2017, the Defendants could not have known that their statements about the abuse rates were false when they made them in 2012 and 2013. In short, Defendants argued Lead Plaintiff improperly relied on recent studies to show the representations predating those studies were false.

The Court, however, rejected this argument, finding that the Lead Plaintiff established that when Defendants made the statements they were aware of the negative information. The Court agreed with the Lead Plaintiff that, if proven, Defendants possessed the adverse intravenous abuse data regarding the Reformulated Opana ER when it relied on the post-marketing surveillance data in its Citizen Petition filed in November 2012. Therefore, Defendants statements regarding abuse deterrent features of reformulated Opana ER were false when made in the August 2012 Citizen Petition and March 2013 supplement.

Second, the Court found Defendants' argument unpersuasive that the statement regarding the sufficiency of the surveillance data were subjective interpretations of data. The Court determined that Defendants' statement heralding favorable abuse trends and the crush-resistant formulation were false and misleading because they were only half-truths. Rather, at the time those statements were made, Defendants knew the data actually indicated intravenous abuse had increased significantly. As a result, Defendants were not expressing opinions, but made affirmative false statements about Reformulated Opana ER's efficacy and safety.

IV. Next Steps

With the Court having now denied Defendants' motion to dismiss, discovery has commenced and SEB intends to file a class certification motion by May 22, 2019 to certify a class of all investors who acquired Endo common stock from November 30, 2012 to June 8, 2017. The close of fact discovery is September 20, 2019, and we expect that this case will be scheduled for trial no later than the first

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[3] *Id.* at 899.

[4] *Id.* at 907.

FAILED MERGER SHOWS PERILS OF POOR CORPORATE GOVERNANCE

(continued from page 1)

that the testing data provided by Akorn to the FDA in connection with the Company's abbreviated new drug applications ("ANDAs") is accurate and reliable. The FDA has stated that data integrity "is an important component of [a pharmaceutical company's] responsibility to ensure the safety, efficacy and quality of drugs, and of [the] FDA's ability to protect the public health." Failure to comply with the FDA's data integrity requirements can result in significant sanctions and a breach of trust that can imperil a company's ability to obtain timely regulatory approval for products within its development pipeline.

Akorn's FDA compliance was carried out by its Global Quality Compliance ("GQC") function which was responsible for reviewing FDA regulations and ensuring that Akorn's facilities meet those requirements. At the management level, former Executive Vice President for Quality Assurance Mark Silverberg ("Silverberg") was the head of Akorn's FDA compliance operations. In this capacity, Silverberg reported directly to former Akorn Chief Executive Officer ("CEO") Rajat Rai ("Rai"). Akorn's Board of Directors (the "Board") was also responsible for implementing and managing the Company's compliance function. A hybrid management- and Board-level committee called the Quality Oversight Committee (the "Quality Committee") was tasked with ensuring the adequacy of Akorn's quality and compliance functions, including the GQC. The Quality Committee consisted of three Akorn directors, as well as Silverberg and Rai.

On April 24, 2017, Akorn executed a merger agreement with Fresenius (the "Merger Agreement") whereby Fresenius would acquire all of the Company's outstanding common stock in exchange for a cash payment of $34.00 per share. The Merger Agreement was signed by Rai and adopted by the full Board.

The Merger Agreement contained several representations and warranties from Akorn regarding its compliance with FDA regulations and cGMP. For example, Akorn represented that (1) it had been in "compliance with . . . all applicable Laws . . . relating to or promulgated by the [FDA]"; (2) it had been in "compliance with [cGMP]"; (3) all studies or tests had "been conducted in compliance with standard medical and scientific research procedures and applicable Law"; (4) it had not "made an untrue statement of a material fact or a fraudulent statement to the FDA"; and (5) all "ANDAs submitted by [Akorn] . . . are true, complete and correct[.]" The Merger Agreement enabled Fresenius to terminate the merger if Akorn's representations and warranties in the Merger Agreement were not true and correct at signing or closing such that they would be considered a Material Adverse Effect, or MAE (the "Regulatory MAE"). The Merger Agreement defined MAE to include "any effect, change, event or occurrence that, individually or in the aggregate . . . would prevent or materially delay, interfere with, impair or hinder the consummation of the [merger] or the compliance by the Company with its obligations under [the Merger Agreement] or . . . has a material adverse effect on the business . . . of the Company."

The Merger Agreement also enabled Fresenius to terminate the merger if Akorn failed to "use . . . commercially reasonable efforts to carry on its business in all material respects in the ordinary course of business between" signing and closing (the "Ordinary Course Condition").

Beginning in October 2017, Fresenius received three anonymous letters reporting serious product development and FDA compliance issues at the Company. Fresenius provided the letters to Akorn and commenced an investigation into their allegations.

Fresenius' investigation corroborated the concerns raised by the whistleblowers. Among other things, Fresenius discovered that Silverberg was responsible for the submission of falsified data to the FDA in connection with one of the Company's ANDAs. As a result of these events, Fresenius gave notice to Akorn on April 22, 2018 that Fresenius was terminating the Merger Agreement based on the Company's breaches of the Regulatory MAE and Ordinary Course Condition. In response, Akorn commenced litigation in the Delaware Court of Chancery seeking a declaration that Fresenius' termination of the Merger Agreement was invalid and a decree of specific performance compelling Fresenius to consummate the merger.

Following an expedited trial and post-trial briefing, on October 1, 2018, Vice Chancellor J. Travis Laster issued a 246-page post-trial opinion — believed to be the longest in Court of Chancery history — ruling in favor of Fresenius. The opinion marked the first time the Court of Chancery

had found that an acquiror properly terminated a merger agreement on the basis of an MAE.

In connection with the Regulatory MAE, Vice Chancellor Laster found that Fresenius validly terminated the Merger Agreement because Akorn's representations and warranties regarding regulatory compliance were not true and correct and, further, that these inaccuracies constituted a MAE. Vice Chancellor Laster noted the "overwhelming evidence of widespread regulatory violations and pervasive compliance problems at Akorn" which "existed at signing and got worse, rather than better, during the period between signing and when Fresenius served its termination notice." Vice Chancellor Laster further noted that "[t]he systemic failures at Akorn raise questions about the accuracy and reliability of all its data, regardless of site or product," such that "Akorn cannot meet its burden to prove to the FDA that its data is accurate." Akorn had thus "gone from representing itself as an FDA-compliant company with accurate and reliable submissions from compliant testing practices to a company in persistent, serious violation of FDA requirements with a disastrous culture of noncompliance." Vice Chancellor Laster estimated the financial impact of Akorn's compliance issues at a staggering $900 million, a range which he said "makes intuitive sense to me given the seriousness of Akorn's regulatory problems and the ever-expanding efforts that Akorn has been forced to make to remediate them."

The Quality Committee was complicit in this failure. In his testimony in the merger litigation, Rai admitted that in November 2016, the Quality Committee was aware of significant and repeated FDA compliance issues at the Company. The committee was made aware of these failings through reports from the GQC, as well as the Company's third-party consultant, who would later testify that Akorn's compliance problems were so bad that he would not expect to see them "at a company that made Styrofoam cups," let alone a pharmaceutical company. Notwithstanding these pervasive issues, the Quality Committee failed to take action to correct them; instead, the Quality Committee totally disabled itself from doing so by suspending its meetings in their entirety from June 2017 to March 2018 (i.e., one month before Fresenius terminated the Merger Agreement).

The Board and Rai similarly failed to manage Silverberg, the purported "leader" of the Company's compliance function. Vice Chancellor Laster noted that, one year before executing the Merger Agreement, the Board and Rai had determined that Silverberg "was not up to task of carrying out his duties and needed to retire," but nonetheless elected to keep Silverberg at his post until March 2018. Vice Chancellor Laster corroborated the Board's and Rai's prior determination, observing that "[t]he record demonstrated that Silverberg was not a suitable individual to be responsible for Akorn's quality efforts" and that "[o]n Silverberg's watch, Akorn did very little to address data integrity issues."

Nor did Rai, Akorn's CEO and Chairman of the Quality Committee, express a commitment to FDA compliance. Vice Chancellor Laster observed that "Rai made claims about quality, but having considered his answers and evaluated his demeanor while he was being cross-examined about his commitment to quality, I am forced to conclude that he does not regard it as a priority." Indeed, Rai testified that he had never read the reports issued by the GQC or the Company's third-party consultant.

Furthermore, Vice Chancellor Laster found that Akorn breached the Ordinary Course Condition by failing to use commercially reasonable efforts to operate the Company in the ordinary course of business. Vice Chancellor Laster noted that after signing the Merger Agreement, Akorn ceased conducting regular compliance audits at four of its sites in favor of abbreviated audits that did not probe additional compliance issues. Akorn also cancelled future assessments planned by the Company's third-party compliance consultant. Vice Chancellor Laster further noted that Akorn failed to comply with the Ordinary Course Condition by halting remediation of compliance issues until March 2018 (just one month before Fresenius terminated the Merger Agreement), submitting falsified data to the FDA, and conducting a half-hearted investigation of the whistleblower letters out of fear of exposing the Company's widespread regulatory issues.

Akorn's hopes of reviving the Merger through appeal were dashed when the Delaware Supreme Court affirmed Vice Chancellor Laster's ruling on December 7, 2018. The parties are currently litigating in the Court of Chancery Fresenius' claim for damages resulting from Akorn's contractual breaches.

The fallout at Akorn from the failed merger has been substantial. In addition to litigation costs and potential contractual damages, the Company's standing with the FDA is on thin ice. For example, on January 4, 2019, Akorn received a warning letter from the FDA related to inspections of the Company's primary manufacturing facility in April and May 2018. According to the FDA, warning letters entail findings "that a manufacturer has significantly violated FDA regulations."

The failed Akorn-Fresenius merger is a telltale story of the perils of poor corporate governance. Rather than affirmatively and proactively addressing the Company's compliance issues, of which they were acutely aware, Akorn's directors and officers ignored or concealed these problems in the hopes that they could be passed on to Fresenius. This ill-conceived plan has since backfired, and now the Company and its shareholders are left holding the bag. Through its pending derivative action, Kessler Topaz is seeking to hold these faithless fiduciaries accountable for their misdeeds and remedy the harm they have caused Akorn. Defendants have moved to dismiss the derivative action, and a decision on their motion is expected in the next few months. ■

TOYOTA AND LEXUS OWNERS DEFEAT SUMMARY JUDGMENT IN HVAC ODOR CLASS ACTIONS

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On March 8, 2019, the Court denied both of Toyota's motions. Toyota had argued that, because Plaintiffs' expert only analyzed exemplar parts from Plaintiffs' vehicles, rather than individual inspection of the Plaintiffs' vehicles, his opinion was inadmissible. The Court, however, rejected this argument finding that Plaintiffs' expert's "opinions encompass more than the alleged defects encountered in the named Plaintiffs' individual vehicles." The Court also rejected Toyota's contention that Plaintiffs' expert's opinions were speculative and based on an unreliable methodology, instead finding that he used accepted industry methods, examined and inspected the relevant parts of the vehicles in forming his opinion, and also relied upon his relative specialized experience of over forty years. The Court further dismissed Toyota's insistence that expert opinions must be peer-reviewed as unreasonable due to "the narrow scope of his design defect opinion," citing Ninth Circuit precedent dismissing the need for peer-reviewed opinions.

Nationwide Automotive Defect Cases

The Central District of California's decision in *Stockinger* is not just an important step for Toyota vehicle owners with defective air conditioning systems, but it is also an important decision for automotive defect cases more broadly.

As modern cars and trucks become more sophisticated, manufacturers denying that problems exist, or refusing to repair defective components that become apparent after a few years, has become a familiar refrain. While manufacturers tout their latest innovations in fuel efficiency, safety, and comfort in nationwide campaigns, consumers are finding more problems in their vehicles that manufacturers refuse to address. As a result, customers are left to repair or replace their vehicles, which for many is already a major purchase, at their own expense.

Kessler Topaz is working on several such cases, including against Fiat-Chrysler for the monostable shifter in its vehicles that gained nationwide attention after the death of noted actor Anton Yelchin; against Ford for defective water pumps in its Cyclone engine currently installed in some of its most popular vehicles; and against BMW for sunroofs which spontaneously shatter. Because there is no federal consumer protection statute, plaintiffs are often forced to proceed in these cases on state-law claims.

In *Stockinger,* the Court found that Plaintiffs had raised a triable issue of fact regarding whether Toyota's fraud occurred in California, such that California's Consumer Legal Remedies Act ("CLRA") could apply to a nationwide class. In reaching this decision, the Court distinguished the case most often used by manufacturers to defeat the application of California's notoriously stringent consumer protection laws to nationwide classes of consumers, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594 (9th Cir. 2012). As the Court correctly recognized, the Ninth Circuit in *Mazza* "did not hold that CLRA claims cannot be brought by out-of-state plaintiffs where the harm occurred in California." Accordingly, where manufacturers violate California law in California, they can be held liable where the purchases occurred in other states.

The ruling in *Stockinger* follows a trend among courts holding that state consumer protection laws will apply to prohibit deceptive conduct of defendants who otherwise sell their products out-of-state. For example, in *Danganan v. Guardian Prot. Servs.*, 179 A.3d 9, 17 (Pa. 2018), the Pennsylvania Supreme Court recently held that a non-Pennsylvania resident may bring suit under Pennsylvania's Unfair Trade Practices and Consumer Protection Law ("UTPCPL") against a Pennsylvania-headquartered business based on transactions that occurred out-of-state. Notably, the Pennsylvania Supreme Court in *Danganan* recognized the UTPCPL's "broad underlying foundation of fraud prevention" and held that Pennsylvania-based businesses are subject to the UTPCPL even where there is no specific nexus between their Pennsylvania-based conduct and the transaction or injury at issue in the litigation. The Washington Supreme Court reached a similar conclusion in *Thornell v. Seattle Service Bureau, Inc.*, 184 Wash.2d 793, 803-04 (2015), holding that the Washington Consumer Protection Act ("WCPA") creates a cause of action for an out-of-state plaintiff to pursue a WCPA claim against a Washington corporate defendant for allegedly deceptive acts.

These decisions, along with *Stockinger,* highlight the remedial, and thus expansive, nature of these consumer protection statutes and, importantly, offer a way forward for nationwide consumer classes. ■

POST-TRIAL SETTLEMENT REFORMS EXECUTIVE PAY AND CORPORATE GOVERNANCE AT EBIX

(continued from page 3)

terms to his liking, and then falsely passed on his preferred draft as the work of neutral, expert lawyers acting in the Company's, rather than his, best interests, a representation that the Board blindly accepted, and (2) later caused Ebix to misrepresent the ABA's terms, effectively adding terms that greatly increased the amounts payable under the ABA's actual, written terms.

The depositions further revealed that the Company had improperly conducted a stock split in 2008, jeopardizing the integrity of Ebix's resulting capital structure, and that the Board had conducted no investigation whatsoever before agreeing to go forward with the ABA. One director revealed that the Board's Nominating and Corporate Governance Committee — tasked with, among other things, annually recommending director nominees to stockholders for election to the Board — had not met in the last seven or eight years, reflecting a fundamental breakdown in corporate governance. Finally, the depositions confirmed that the Board botched the ABA's purported approval, failing to adhere to Delaware's formalities for board action.

All of these facts are consistent with the claims we had been making in our complaints and arguments to the Court.

Ebix's Board Attempts to "Save" the ABA

After the depositions, later in November 2017, the Ebix Board apparently had gained a deeper understanding of our claims, and decided to meet without Raina to discuss the lawsuit and the ABA in particular. The Board, without Raina, resolved to take action to cure the defects we had identified in the ABA, including facts we had discovered demonstrating that the Board had never effectively adopted the ABA in the first place. The directors decided to delegate to the Compensation Committee — comprising the same two directors who had led Board efforts in 2009 regarding the ABA — responsibility for working with the directors' new counsel and hiring a compensation consultant to advise on how to "fix" or "save" the ABA. The apparent goal was to make our litigation moot and avoid any consequences for their misconduct as demonstrated in our discovery efforts.

Board Adopts Stock Appreciation Rights Agreement

The Board's "fix" for the ABA was announced in April 2018, and took the form of a Stock Appreciation Rights Agreement between Raina and the Board (the "SAR Agreement" or "SARA"), which revealed that the Board had decided to repackage Raina's reading of the ABA into a new agreement that would give him all of the economic benefits of the ABA — including, specifically, a cash payment on a change-in-control equal of more than $650 million at the then-prevailing market price for Ebix of about $80 per share, with Ebix worth about $2.4 billion at the time.

The total cost to the Company would be even greater because of lost tax deductions resulting from the SARA's (and ABA's) tax-inefficient (but Raina-beneficial) terms. Principal among these is a tax gross-up feature that required Ebix to pay Raina any excise tax he owed to the IRS because the SARA's huge cash bonus exceeded certain IRS-set thresholds for change-in-control payments. In addition to making this tax-gross-up payments to Raina, the Company would lose the ability to deduct those payments as a compensation cost for the Company's tax purposes. This feature, alone, accounted for more than 1/3 of the total payment to Raina and an even greater portion of the SARA's total projected cost. The tax-inefficient nature of gross-up payments is the reason prominent institutional investor proxy advisors ISS and Glass Lewis have long recommended against executive compensation schemes that include gross-ups.

Nevertheless, from the outset of this renewed effort starting in November 2017, the Ebix Board appeared focused on one thing: giving Raina the bonus he claimed he was entitled to under the ABA. The Board embarked on a process apparently designed to show the Court that the Board had actually and thoughtfully considered the SARA and all of its aspects, and that the SARA had been in the end validly approved, countering many of our arguments concerning the Board's duty of care and deficient deliberative process in adopting ABA. However, we believed several fatal flaws to the SARA/ABA still existed, and we amended our complaint in the spring of 2018 to assert claims concerning the SARA.

Defendants Declare Case Over, but Case Proceeds to Trial

The Defendants approached the Court and announced that our case was moot and should be dismissed, and that any claims concerning the SARA would be meritless and, in any event, should proceed on a different schedule contemplating a trial well after August 2018. The Court, following rounds of written briefing and oral argument, agreed that claims regarding the ABA were moot in light of the SARA, but found that Plaintiffs' new claims about the SARA had merit. The Court directed Plaintiffs to take additional discovery and new depositions of the Ebix directors concerning the SARA, noting several times how things might have been different if Ebix had historically employed general counsel, a historically non-existent position at the Company. The Court also directed that trial would proceed on the SARA claims, as scheduled, in August 2018.

The new discovery concerning the SAR Agreement revealed several new facts, including (1) the Board had hired a nationally recognized compensation

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CLASS ACTIONS IN THE NETHERLANDS: RADICAL CHANGE IS ON THE HORIZON

(continued from page 3)

resolution of group claims: (1) the Collective Action proceeding under Article 3-305a of the Dutch Civil Code and (2) the Dutch Act on Collective Settlement of Mass Claims (Wet Collectieve Afwikkeling Massaschade ("WCAM")). Neither is akin to the U.S.-style class action. The Collective Action proceeding may only be used to establish the liability of a defendant (or seek other declaratory relief) and not to pursue claims for damages and the WCAM procedure requires a voluntary settlement between the parties before the proceedings may commence.

Collective Action — A Representative Organization (usually a Dutch Foundation) may pursue collective action to establish the liability of a defendant or to obtain other declaratory relief. Damages are not permitted. In order to obtain damages, each individual investor must bring an action, although any liability established by the Collective Action may be used in the subsequent damages action.

WCAM — The WCAM is an act that is designed solely for the purpose of making settlement agreements binding and enforceable against parties (and absent class members). The settling parties can submit a proposed settlement to the Amsterdam Court of Appeals and have it approved on a classwide basis such that it will be binding upon all putative class members who do not affirmatively opt-out of the settlement. A Representative Organization is the only entity that can commence a WCAM procedure, however, it should be noted that, because a Foundation can be established solely for the purpose of pursuing a legal action, it only can be established after a settlement has been negotiated.

Jurisdiction — Several recent decisions by the Dutch Courts have established the current Dutch collective action regime as potentially having the broadest possible jurisdiction of any collective redress regime in the world.

In a decision in 2012 under the WCAM, which involved two Swiss reinsurance companies — Scor Holding AG and Zurich Financial Services Ltd (collectively "Converium") — the Amsterdam Court of Appeals approved a settlement of securities fraud claims on a classwide basis where the proposed class was comprised of approximately 12,000 persons and companies of which only 200 were Dutch. The majority of the claimants were Swiss residents and companies or UK residents and companies. The Converium companies did not have headquarters or similar operations in the Netherlands and none of the actions that formed the basis for the underlying fraud took place there. This decision opened the door to classwide, opt-out type settlements involving any company, so-long as at least some of the potential class members were Dutch citizens.

In a recent decision involving the Brazilian oil giant Petrobras, a District Court in Rotterdam allowed a Collective Action to proceed with respect to common shares of Petrobras that were purchased on exchanges outside of the Netherlands (primarily in Brazil itself) despite the fact that Petrobras has no significant operations in the Netherlands and none of the allegedly improper actions took place there. The Court went so far as to invalidate an arbitration provision applicable to purchases of securities of Petrobras in Brazil that had been upheld by the Brazilian courts. If this decision stands, and the current collective redress regime in the Netherlands remains unchanged, there is the possibility that representative liability actions could proceed in the Netherlands against companies with only the most tenuous ties to that country.

The New Collective Redress Law

On November 16, 2016, the Minister of Security and Justice submitted a draft bill to the Dutch Parliament introducing collective claims for damages in The Netherlands. The bill was amended on January 24, 2018, and the Proposed Act was adopted on January 29, 2019, by the Dutch House of Representatives. It is expected to be adopted by the Dutch Senate in the next few months and to go into effect sometime in the Fall of 2019. The Proposed Act makes widespread substantive and jurisdictional changes to the Dutch system of collective redress.

The Proposed Act will apply to all collective actions, irrespective of whether the proceedings seek monetary damages or merely seek to establish liability of a party. An action must be brought by a representative organization that is a non-profit entity and meets certain other organizational requirements.

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POST-TRIAL SETTLEMENT REFORMS EXECUTIVE PAY AND CORPORATE GOVERNANCE AT EBIX

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consultant, but ultimately rejected its advice after the consultant's view of the ABA coincided with Plaintiffs' views; (2) after firing its compensation consultant, the Board relied on the advice of its litigation counsel, who led the Board-level discussions and designed the SARA; and (3) driving the entire process was the Board's fear that Raina would quit the Company if the Board did not give him every penny he claimed under the ABA. The directors' primary motivation was not Ebix's best interests or whether the SARA made sense from a competitive or business perspective, but whether Raina would be happy with the SARA and whether the SARA would get rid of the lawsuit.

Indeed the new facts revealed that directors' fear of Raina, and the resulting absence of a CEO succession plan at Ebix, nearly became a disaster for the Company shortly before the SARA was signed, when Raina was seriously injured in an automobile accident.

Plaintiffs also hired experts to provide opinions from multiple perspectives. Investment banker Murray Beach, who has more than 30 years of experience advising corporate boards from all perspectives of merger transactions, testified among other things that the SARA would deter bidders seeking to buy Ebix because the SARA effectively added a 30% premium to the value of Ebix's equity. Our compensation consultant, David Gordon of F.W. Cook & Co., observed that he had not seen anything remotely like the ABA or SARA in his 40 years of advising corporate boards on executive compensation, and that the absence of a CEO succession plan after Raina had held the job for more than 15 years indicated that something had gone wrong with Ebix's corporate governance.

At the August 2018 trial, the Ebix directors unequivocally acknowledged for the first time that Raina made up several terms of the ABA that were now reflected in the SARA, as Plaintiffs had long contended, and Raina repeatedly testified that he might quit if the SARA no longer existed. The trial testimony also confirmed the Board's view of Raina as an exceptionally valuable executive whose efforts as Chairman and CEO have added billions to Ebix's value since Raina assumed the positions of CEO and Chairman in 2002, and their affirmation that he should be compensated for that added value in a merger transaction. The judge also made clear at trial that the Court would not lightly invalidate the SARA and potentially trigger Raina's departure, resulting in a leaderless company worth $2.4 billion. At the end of testimony, the Court strongly encouraged the parties to try to negotiate a resolution to the lawsuit.

Settlement Negotiated to Reduce SARA Value, Implement Governance Reforms

Following months of negotiations between Plaintiffs and Defendants, Plaintiffs focused on eliminating the tax-gross-up feature of the ABA that survived in the SARA, and focus on other reforms at Ebix designed to retain Raina while preparing for his eventual and inevitable departure, and generally provide for a better-managed and governed Company as a whole.

In January 2019, the parties finally reached a settlement agreement that, if approved by the Court, promises substantial benefits to Ebix and, derivatively, to Ebix's stockholders, both in the form of substantial reduction in the SARA's cost and bonus and substantial corporate governance reforms. The Settlement also recognizes the immense value that Raina has created at Ebix, while encouraging him to continue to do so for the next several years. Fully spelled out in a January 23, 2019 Stipulation and Agreement of Settlement (the "Settlement") filed with the Court, the Settlement's terms include:

- Amending the SARA to eliminate the tax-gross-up feature, reducing a post-buyout payout to Raina by more than $300 million at the August 2018 stock prices used at trial, with the additional cost savings o the Company by preserving its tax deduction for the considerable compensation costs;
- Amending the SARA to insert a vesting feature, such that Raina receives only about 1/6 of the Stock Appreciation Rights upon the Settlement's approval, with the remainder vesting in seven annual installments so long as Raina remains with the Company as CEO during that time;
- The Company will, for the first time, hire a general counsel;
- The Company will, with the advice of a nationally recognized executive advisory firm, design and adopt a CEO succession plan;
- The Company will revamp its Compensation Committee, adding a former public-company CEO to its members, and hire a compensation consultant to advise the committee every year; and
- The Company's Nomination and Corporate Governance Committee will meet at least annually.

The lawsuit provided additional benefits before trial, including (a) the deletion of a "dead-hand" proxy put provision in a credit agreement that accelerated debt payments if stockholders voted in new directors to replace the existing Board, and (b) the Court-endorsed ratification of the 2008 botched stock split. The litigation and Settlement, in all, stand to provide substantial corporate governance reforms and historic changes to Ebix's executive compensation scheme.

This case exemplifies Kessler Topaz's dedication to stockholders and the companies they own. The Court has scheduled a hearing for April 5, 2019, to consider whether to approve the Settlement. ■

CLASS ACTIONS IN THE NETHERLANDS: RADICAL CHANGE IS ON THE HORIZON

(continued from page 16)

A collective action will not proceed unless the representative organization first makes a reasonable effort to resolve the dispute. In effect, an organization is required to wait two weeks after seeking to resolve a dispute with a defendant before initiating a proceeding.

Once a proceeding is initiated, the court then determines whether the representative organization meets all requirements and whether the representative organization has made it sufficiently plausible that the action is fit to be dealt with through a collective action.

Any collective action that is allowed to go forward by the court would proceed on an opt-out basis for Dutch claimants and an opt-in basis for foreign claimants.

While allowing for a damages remedy for the first time, the Proposed Act significantly limits the jurisdictional reach of the Dutch Courts. Thus, a collective action will only be able to be brought before the court if it has a sufficiently close link to the Netherlands, which requires that one of three conditions is met:

- the representative organization sufficiently demonstrates that the majority of the individuals on behalf of whom the collective claim is brought reside in the Netherlands;
- the defendant resides in the Netherlands; or
- the event or events on which the claim is based, took place in the Netherlands.

Once a proceeding is initiated, if more than one representative organization brings a claim addressing the same facts and events, the claims will be consolidated. The court will then choose among the potential claimant groups to determine the best qualified lead representative organization. If appropriate, the court may appoint two or more co-lead representative organizations. Within a certain period after the appointment of the lead representative organization, class members who do not want to be represented in the collective action can opt-out. During this period, foreign claimants can join the collective action by opting-in.

The court will, from the outset, seek to have the parties resolve the dispute through a settlement. If a settlement is reached, the collective action will end up in a class settlement certified by the WCAM procedure. Despite the jurisdictional limits noted above, the WCAM will continue to allow the settling parties to jointly request the court to declare that the settlement agreement is internationally binding. The settlement agreement binds all persons covered by its terms, unless such person decided to opt-out within a specific period of time after the binding declaration. A court judgment, however, (where no settlement is reached) will be binding only on actual class members, *i.e.,* all Netherlands residents who do not opt-out and foreign residents who have opted-in.

Conclusion

The new collective redress law is a significant step toward the option of a U.S.-style class action damages system in Europe. It allows for a collective damages remedy on an opt-out basis for Dutch citizens and provides an opt-in remedy for others. The jurisdictional reach of the new system, however, is greatly limited compared to recent decisions of the Dutch courts, requiring a significant nexus to the Netherlands (either most plaintiffs, the defendant or the bad acts must be linked to the Netherlands). It is a significant step toward collective redress in the Netherlands and only time will tell if other European countries follow the trail being blazed by the Dutch. ■

EVENTS

WHAT'S TO COME

APRIL 2019

Litigation & Governance Trends for Asset Management Firms
April 30 – May 1
Waldorf Astoria ■ Chicago, IL

MAY 2019

State Association of County Retirement Systems (SACRS) Spring Conference
May 7 – 10
Resort at Squaw Creek ■ Lake Tahoe, CA

National Conference on Public Employee Retirement Systems (NCPERS) Annual Conference & Exhibition
May 19 – 22
Hilton Austin ■ Austin, TX

Pennsylvania Association of Public Employee Retirement Systems (PAPERS) 14th PAPERS Forum
May 29 – 30
Hilton Hotel ■ Harrisburg, PA

JUNE 2019

County Treasurers' Association of Pennsylvania Annual Convention
June 11 – 14
Marriott Pittsburgh North ■ Butler County, PA

National Association of Public Pension Attorneys (NAPPA) Legal Education Conference
June 25 – 29
Sheraton San Diego ■ San Diego, CA

Florida Public Pensions Trustees Association (FPPTA) 35th Annual Conference
June 30 – July 3
Marriott World Center ■ Orlando, FL

JULY 2019

Missouri Association of Public Employee Retirement Systems (MAPERS) Annual Conference
July 10 – 12
Tan-Tar-A Resort ■ Osago Beach, MO

Pennsylvania State Association of County Controllers (PSACC) — Annual Conference
July 21 – 25
Holiday Inn Breiningsville ■ Lehigh County, PA

AUGUST 2019

County Commissioners Association of Pennsylvania (CCAP) — Annual Conference and Trade Show
August 4 – 7
DoubleTree by Hilton Hotel Reading and Santander Arena Berks County, PA

Texas Association of Public Employee Retirement Systems (TEXPERS) — Summer Educational Forum
August 17 – 20
Omni Hotel ■ Frisco, TX

SEPTEMBER 2019

Georgia Association of Public Pension Trustees (GAPPT) — 10th Annual Conference
September 16 – 19
Legacy Lodge – Lanier Islands ■ Buford, GA

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