the POMERANTZ MONITOR

VOLUME 14, ISSUE 5 SEPTEMBER/OCTOBER 2017

SECOND CIRCUIT RECONSIDERS "PERSONAL BENEFIT" REQUIREMENT

By Marc C. Gorrie

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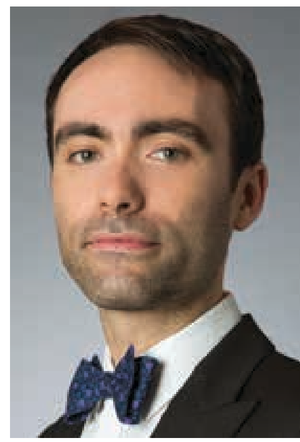
As the *Monitor* has reported, in the past year there have been numerous developments concerning the requirements for criminal liability for insider trading. Most recently, in *U.S. v. Martoma*, the Second Circuit revisited its 2014 decision in *U.S. v. Newman* and decided that there was no requirement, after all, that the recipient of the leaked information (the "tippee") be a close relative or friend of the insider who leaked the information (the "tipper").

The seminal case in this area is the 1983 Supreme Court decision in *Dirks v. Securities and Exchange Commission*. There, the Court held that culpability for insider trading can exist if the tipper received a personal benefit for leaking the information, such as when he "makes a gift of confidential information to a trading relative or friend." The Court did not elaborate on how close the relationship had to be between the tipper and the "trading relative or friend."

When the Second Circuit decided *Newman* in 2014, it effectively put the brakes on much of the government's expansive insider trader enforcement efforts. The *Newman* court overturned the convictions of two "remote" tippees, who had received the information indirectly from the original tippee. The *Newman* court held that the government must prove that the tipper had a "meaningfully close personal relationship" with the tippee, *and* that he expected "at least a potential gain of a pecuniary or similarly valuable nature" to support a finding of criminal liability for insider trading. This heightened standard required a showing that the tipper received some "tangible" benefit other than the satisfaction of rewarding the friend or relative – an interpretation rejected by other circuits. Further, the Second Circuit required that the government must also demonstrate the tippee knew that the tipper breached a fiduciary duty. This can present a major problem if the defendant is a remote tippee, such as colleagues of the original tippee at a brokerage firm, who may have little information of how the information was obtained and under what circumstances.

In *Salman v. United States*, the Supreme Court affirmed the defendant's conviction for insider trading, unanimously holding that a jury may infer a personal benefit when a tipper provides inside information to a relative or friend, and that this is sufficient for a finding of criminal liability for insider trading. The Supreme Court went on to address the Second Circuit's *Newman* decision, finding that any requirement "that the tipper must also receive something of a 'pecuniary or similarly valuable nature' in exchange for a gift to family or friends" is inconsistent with *Dirks*.

On August 23, 2017, the Second Circuit affirmed the insider trading conviction of Mathew Martoma in a 2-1 opinion holding that the Supreme Court's decision in *Salman* effectively overruled *Newman's* requirement of a "meaningfully close personal relationship," but did not disturb *Newman's* other requirement that a tippee knew that the tipper breached a duty and received a benefit.



Attorney Marc C. Gorrie

Martoma was a pharmaceutical and healthcare portfolio manager at S.A.C. Capital Advisors, LLC, ("S.A.C."), a former group of hedge funds founded by Steven A. Cohen. During the course of his employment, he acquired shares of Elan and Wyeth, two companies that were developing an experimental Alzheimer's drug. Martoma executed these trades based on information he obtained from the chair of the safety monitoring committee for the drug's clinical trial, Dr. Sidney Gilman. The two of them met in approximately 43 consultations where, for some, Martoma paid Gilman $1,000 per hour. Dr. Gilman disclosed trial results and other confidential information to Martoma during these consultations.

Martoma and Gilman met twice, just before a conference at which Gilman was to present the clinical trial results of the new drug. After these two meetings but before the conference, S.A.C. began to reduce its positions in Elan and Wyeth. Following Gilman's July 29 presentation disclosing that the drug failed to improve cognitive function in a test of 234 Alzheimer's patients after 18 months of treatment, the share prices of Elan and Wyeth plummeted. The trades that Martoma's hedge fund had made in advance of the presentation resulted in approximately $80 million in gains and $195 million in averted losses.

Martoma was convicted of insider trading and during his appeal, the Supreme Court decided *Salman*, doing away with the personal benefit requirement. Martoma argued that the jury instructions improperly ignored that he did not have a close personal or family relationship with the tipper.

The Second Circuit held that the logic of *Salman* meant that "*Newman's* meaningfully close personal relation-

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ship requirement can no longer be sustained." The Court held that "the straightforward logic of the gift-giving analysis in *Dirks*, strongly reaffirmed in *Salman*, is that a corporate insider personally benefits whenever he discloses inside information as a gift with the expectation that the recipient would trade on the basis of such information or otherwise exploit it for his pecuniary gain" – whether the recipient has a close personal relationship with the tipper or not.

Acknowledging a vigorous dissent that argued that *Salman* did not overrule *Newman's* "meaningfully close personal relationship" requirement where inferring a personal benefit from a gift, the majority concluded that though the government must still prove that the tipper received a personal benefit, a "meaningfully close personal relationship" need not exist between tipper and tippee.

Though the Second Circuit dispensed with *Newman's* "meaningfully close personal relationship" requirement, the other controversial *Newman* requirement, that the tippee knew the tipper provided inside information in exchange for some benefit, apparently remains intact. Additionally, it appears that one fact-sensitive evidentiary foray was replaced with another, with the government now having to prove "the expectation that the recipient would trade" based on inside information. *En banc* review of *Martoma* may also be on the horizon, as the dissent contended the *Martoma* court could not overrule *Newman* without convening *en banc*.

SUPREME COURT MAKES WAVES IN SECURITIES LAW

Attorney Justin Solomon Nematzadeh

KOKESH v. SEC: A DOOR IS CLOSED, BUT WINDOWS ARE OPENED

By Justin Solomon Nematzadeh

In *Kokesh v. Securities and Exchange Commission*, the Supreme Court recently applied the five-year statute of limitations to claims by the SEC for disgorgement of ill-gotten profits from violations of the federal securities laws. Dealing a blow to the SEC's enforcement powers, the Court held that the disgorgement remedy is not primarily remedial but more closely resembles a "punishment" subject to the five-year limitation period. By forcing the SEC to move more quickly in these cases, the *Kokesh* opinion has actually helped plaintiffs in class actions and individual lawsuits. It should motivate the SEC to file actions at an earlier date, and thereby expose securities law violations sooner, better enabling private plaintiffs to file their own actions within the five-year statute of limitations that private plaintiffs face in bringing class actions and individual lawsuits.

In 2009, the SEC commenced an enforcement action against Charles Kokesh, who owned two investment advisory firms, seeking civil monetary penalties, disgorgement, and an injunction. The SEC alleged that between 1995 and 2009, Kokesh misappropriated $34.9 million from four business development companies and concealed this through false and misleading SEC filings and proxy statements. After a five-day trial, the jury found that Kokesh violated securities laws. The district court decided that $29.9 million of the disgorgement request resulting from Kokesh's violations outside the limitations period was proper because disgorgement was not a "penalty" under §2462. The Tenth Circuit affirmed this decision, agreeing that disgorgement is neither a penalty nor forfeiture, so §2462 did not apply. The Court granted certiorari to resolve a circuit split on this issue, and in a unanimous decision authored by Justice Sotomayor, the Court reversed the Tenth Circuit.

Beginning in the 1970s, courts ordered disgorgement in SEC enforcement actions to deprive "'defendants of their profits in order to remove any monetary reward for violating securities laws and to 'protect the investing public by providing an effective deterrent to future violations.'" The Court had already applied the five-year statute of limitations for any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," when the SEC sought statutory monetary penalties. Disgorgement would also fall under this if deemed a "fine, penalty, or forfeiture." A "penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." Whether disgorgement is a penalty hinged on two factors: first, whether the wrong to be redressed is one to the public or to an individual; and second, whether the sanction's purpose is punishment and to deter others from offending in a like manner, as opposed to compensating a victim for her loss.

First, the Court decided that SEC disgorgement is imposed by courts as a consequence of public law violations. The remedy is sought for violations against the United States—rather than an aggrieved investor. This is why a securities-enforcement action may proceed even if victims do not support it nor are parties. Even the SEC conceded that when "the SEC seeks disgorgement, it acts in the public interest, to remedy harm to the public at large, rather than standing in the shoes of particular injured parties."

Second, the Court decided that disgorgement is a punishment. Disgorgement aims to protect the investing public by deterring future violations: "[C]ourts have consistently held that '[t]he primary purpose of disgorgement orders is to deter violations of the securities laws by depriving violators of their ill-gotten gains.'" Sanctions imposed to deter public law infractions are inherently punitive because deterrence is not a legitimate non-punitive governmental objective. Moreover, disgorgement is not compensatory. Disgorged profits are paid to the district court, and it is within the court's discretion how and to whom to distribute the money. District courts have required disgorgement regardless of whether the funds will be paid to investors as restitution: some disgorged funds are paid to victims; other funds are dispersed to the U.S. Treasury.

The Court found unpersuasive the SEC's primary response that disgorgement is not punitive but instead remedial in lessening a violation's effect by restoring the status quo. According to the Court, it is unclear whether disgorgement simply returns a defendant to the place occupied before having broken the law, as it sometimes exceeds profits gained from violations. For example, disgorgement is sometimes ordered without considering a defendant's expenses that reduced the illegal profit. SEC disgorgement is then punitive, not simply restoring the status quo, but leaving the defendant worse off. Although disgorgement can serve compensatory goals, it can also serve retributive or deterrent purposes and be a punishment.

This decision puts limits on the SEC's use of a favored tool—in recent years, the SEC secured nearly $3 billion in disgorgements, more than double what it received in penalties. But the decision should open doors for civil plaintiffs in class actions and individual lawsuits for violations of the federal securities laws. Within the five-year statute of limitations imposed on private civil plaintiffs, the SEC would now have to reveal to investors securities-law violations by companies and individuals who would be defendants in private lawsuits. This will better equip private civil plaintiffs to sue those defendants in a timely fashion. In any case, disgorgement is not a common remedy for private civil plaintiffs in securities lawsuits. Further, defendants who pay relatively less disgorgement in SEC enforcement actions may have more funds to satisfy parallel private civil lawsuits. Through closing the door on an element of the SEC's enforcement powers, the Court has opened several windows for private civil plaintiffs.

SUPREMES TO DECIDE WHETHER STATE COURTS STILL HAVE JURISDICTION OVER SECURITIES ACT CLASS ACTIONS

By H. Adam Prussin

The Exchange Act provides that federal courts have "exclusive" federal jurisdiction over all claims brought under the act, meaning that those claims, including anti-fraud claims, cannot be brought in state courts. In contrast, the Securities Act provides for "concurrent jurisdiction" of claims brought under that act, meaning that such claims, including claims relating to initial public offerings, can be brought in either federal or state courts. At least, that's what we thought until now.

At the end of its last term, in a case called *Cyan*, the Supreme Court granted cert in a case involving SLUSA, the "Securities Law Uniform Standards Act." That law was primarily designed to limit investors' ability to bring class action claims under state law concerning securities transactions (so-called "covered class actions") in state courts, rather than under federal securities laws in federal courts. To accomplish this goal, SLUSA requires that "covered class actions," including state law claims involving misstatements in securities transactions, must be litigated in federal court under federal law. The act was passed in response to complaints that securities plaintiffs were recasting federal securities laws claims as state law claims in order to avoid the enhanced pleading requirements for federal claims imposed by the Private Securities Litigation Reform Act ("PSLRA"). The practical effect is that it is no longer possible to bring "covered class actions" *under state law* in either state or federal court; the claims must be made under the federal securities laws, in federal court, subject to the strictures of the PSLRA – or not at all.

H. Adam Prussin, Editor, Pomerantz Monitor

But defendants have also been trying, with mixed success, to use SLUSA as a weapon to keep *federal* Securities Act claims out of state court as well; some companies and other securities defendants view state courts (so-called "judicial hellholes") as overly sympathetic to securities laws claims.

The hook defendants have been using to advance this argument is a provision in SLUSA that amends section 22 of the Securities Act to provide that federal jurisdiction over Securities Act claims shall be "concurrent with State and Territorial courts, *except as provided in section 77p of this title with respect to covered class actions.*"

Although there have been no federal appeals courts rulings on what this exception means, there have been dozens of conflicting rulings by federal district courts and state courts, most notably in the two states where most securities class action litigation is conducted: California and New York. Courts in New York tend to read the exception to mean that state courts no longer have jurisdiction over covered class actions alleging violations of the Securities Act. Others, such as a California state appellate court in *Luther v. Countrywide Financial*, read the exemption language not as creating a new exemption for all covered class actions, but simply as acknowledging the exceptions to state court jurisdiction that are actually established in section 77p of SLUSA. The *Countrywide* court explained that

> Section 77p does not say that there is an exception to concurrent jurisdiction for all covered class actions. Nor does it create its exception by referring to the definition of covered class actions in section 77p(f)(2). Instead, it refers to section 77p without limitation, and creates an exception to concurrent jurisdiction only as provided in section 77p "with respect to covered class actions.

The *Countrywide* court held that there was nothing in section 77p that eliminated state court jurisdiction over claims brought solely under the Securities Act, and that therefore SLUSA's exception to concurrent jurisdiction did not apply in such cases. Yet, the exemption is codified in the jurisdictional provision of the Securities Act, so it must mean that concurrent jurisdiction does not exist for some claims under the Act. What those claims are is a puzzlement that

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only the Supreme Court can resolve.

It goes without saying that the drafting of this confusing exemption to state court jurisdiction was not among Congress's finest hours. But given that the overriding purpose of SLUSA was to keep misrepresentation claims under state law out of state court, it would be anomalous if this provision were construed as a backhanded way to restrict jurisdiction over federal claims as well.

SUPREME COURT TO DECIDE WHETHER ALL WHISTLEBLOWERS ARE PROTECTED BY THE DODD-FRANK ACT

By Omar Jafri

Attorney Omar Jafri

Next term, the Supreme Court has agreed to resolve a split of authority among the federal courts of appeals on whether an employee who blows the whistle on corporate misconduct internally, but has not yet registered a formal complaint with the SEC, is protected by the anti-retaliation provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank").

Section 21F of the Exchange Act, added by Dodd-Frank, directs the SEC to pay awards to individuals who provide information to the SEC that forms the basis of a successful enforcement action, and prohibits employers from retaliating against such whistleblowers for reporting violations of the securities laws. Section 21F defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission . . ." This definition limits whistleblowers to people who actually provide information to the SEC; but subdivision (iii) of the anti-retaliation provisions protects any employee who makes disclosures to the SEC or makes "disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 ["SOX"], . . . the Securities Exchange Act of 1934 . . . and any other law, rule, or regulation subject to the jurisdiction of the Commission." So, the question is whether the anti-retaliation provisions apply to people who may not fall within the definition of whistleblowers under the Act.

In 2013, the manager of G.E. Energy in Iraq filed a lawsuit against the company pursuant to the anti-retaliation provisions of Dodd-Frank. He alleged that he was fired because he reported to senior corporate officers that the company had engaged in corruption to curry favor with a government official in an effort to negotiate a lucrative business deal. When he was fired he had not (yet) reported the violations to the SEC. The Fifth Circuit affirmed the dismissal of his complaint, holding that the plain and unambiguous meaning of the statutory term "whistleblower" did not include anyone who had not yet reported any corporate misconduct to the SEC. It rejected the argument that the anti-retaliation provision was broader than the statutory definition of a whistleblower because it was plausible that an employee could simultaneously report corporate misconduct to both the company and the SEC, thus qualifying for protection. Based on this far-fetched hypothetical scenario, the Fifth Circuit refused to defer to the SEC's contrary interpretation, and held that the statute's plain and unambiguous language precluded its application to those who had only reported corporate misconduct to management.

Most federal courts, including the Second and Ninth Circuits, have disagreed with the Fifth Circuit's reasoning. These courts have concluded that the anti-retaliatory provisions of the statute protect people who are protected or required under SOX, even if they do not meet the statutory definition of a whistleblower. They have held that the anti-retaliation provisions are, at least, in tension with each other if not independently ambiguous, justifying deferring to the SEC's judgment that internal whistleblowers are protected by Dodd-Frank.

The Fifth Circuit's reasoning would have an especially dramatic effect on auditors and attorneys, who are prohibited by SOX and SEC rules from filing reports with the Commission unless they first report corporate misconduct to senior managers or to a committee of the board of directors of the company. If they can be picked off before they have a chance to report violations to the SEC, companies may be able to stifle them. Auditors and attorneys played a central role in the Enron and other scandals, and the purpose and intent of SOX is to also regulate the behavior of these professionals. The Fifth Circuit utterly failed to address the impact of its decision on the obligations imposed by SOX on auditors and attorneys.

POMERANTZ SECURES REVERSAL IN NINTH CIRCUIT IN *ATOSSA GENETICS* ACTION

By Michael J. Wernke

In a decision issued by the Ninth Circuit on August 18, 2017, Pomerantz scored a major victory for investors in the securities class action against Atossa Genetics, Inc. This is the latest in a series of cases concerning drug companies' failure to disclose accurately the regulatory approval status of their products. In *Atossa*, the company represented that two of its cancer screening tests, which were its main source of revenue, had been approved by the FDA, but, in fact, neither had been approved. When the truth finally came out, Atossa's share price plummeted by more than 46%.

The Ninth Circuit held that the complaint pleaded facts establishing that the company's statements were materially misleading, in violation of Section 10(b) of the Securities Exchange Act, and reversed the district court's dismissal of the claims Pomerantz brought on behalf of investors.

Atossa develops and markets products used to detect pre-cancerous conditions that foreshadow the development of breast cancer. At issue in the case are Atossa's statements concerning FDA clearance of its MASCT System and ForeCYTE Test, which it marketed as being able to detect breast cancer. Our complaint alleges that Atossa's CEO misled investors by repeatedly stating that the MASCT System and ForeCYTE Test had been approved by the FDA for cancer screening. In truth, the ForeCYTE Test had never been approved. While the MASCT System had been FDA-cleared as a collection device for tissue samples, Atossa was marketing it as part of the cancer screening test. Moreover, Atossa had materially altered the MASCT System but never sought the required updated FDA clearance. Defendants also misled investors by concealing an FDA Warning Letter that demanded that the company cease marketing the ForeCYTE Test as FDA-cleared. Investors were injured when, on October 4, 2013, Atossa publicly disclosed that the FDA demanded that it recall the MASCT System and ForeCYTE Test, admitting that the ForeCYTE Test has not been cleared or approved by the FDA for any purpose and that the MASCT System had never been approved for cancer screening.

Reversing the district court's dismissal, the Ninth Circuit held that Pomerantz's complaint adequately alleges that the CEO's statements that the ForeCYTE Test was "FDA-cleared" were materially misleading because they misrepresented the true status of the test. It had never been approved by the FDA, which was material to investors because the test was Atossa's main source of revenue. Defendants asserted that the company had disclosed in prior SEC filings that the ForeCYTE Test was a type of diagnostic test that did not require FDA clearance, but likely would require such clearance in the near future. The court rejected the argument that this constituted adequate disclosure, because the prior statements did not contradict the CEO's assertions of FDA approval but, rather, highlighted why his statements were misleading. "That the FDA did not require clearance at the time of the IPO, does not indicate that the ForeCYTE test was not cleared. … If the FDA was likely to start requiring clearance, then surely a reasonable investor would care whether Atossa's test was FDA-cleared."

The court also found materially misleading Atossa's SEC filing that purported to provide notice of the FDA Warning Letter that the company received. While the notice stated that the company received a Warning Letter and identified the FDA's concerns regarding the modifications to the MASCT System that required a new clearance application, it left out the FDA's concerns about the ForeCYTE Test lacking FDA clearance. The court rejected defendants' argument that the notice was not misleading because it stated that the Warning Letter identified "other matters" and that until they were resolved Atossa may be subject to additional regulatory action. For cautionary language to cure an otherwise misleading statement, it must be a forward-looking statement and must be specific enough such that "reasonable minds could not disagree that the challenged statements were not misleading." The court found that the misleading part of the notice concerned past facts concerning FDA clearance and the FDA's findings, and the cautionary language was insufficient because it was "vague enough to cover any concern the FDA might have related to Atossa."

The Ninth Circuit remanded the case to the district court for further proceedings consistent with the court's decision.

Attorneys Marc I. Gross and Michael J. Wernke were involved in the appeal.

THE EXPANSION OF CONTROLLING STOCKHOLDER LIABILITY

By Darya Kapulina-Filina

Attorney Darya Kapulina-Filina

Many investors are aware that members of the board of directors of public companies owe stockholders fiduciary duties, including the duty to maximize stockholder value in the event of an impending merger. What is less commonly known is that controlling stockholders are also subject to fiduciary duties to the minority public stockholders, and that a controlling stockholder does not have to own the majority of the company's stock to be considered a "controller." In a recent victory by Pomerantz, the Circuit Court in Maryland, applying Delaware law, effectively expanded the definition of controller to a stockholder that owned a mere 15.9% ownership interest, in light of its conduct that the court determined amounted to "actual control" with respect to the merger transaction in question.

In *In re American Capital, Ltd. Shareholder Litigation*, Pomerantz, together with co-lead counsel, filed a class action complaint on behalf of public common stockholders of American Capital Ltd., a global asset manager and private equity firm, challenging a $3.43 billion sale of American Capital to Ares Capital Corporation, a specialty finance company. After substantial discovery, plaintiffs filed a second amended consolidated complaint naming an activist hedge fund, Elliott Management Corporation, and its affiliates, as defendants under the controlling stockholder theory. Meanwhile, plaintiffs negotiated an $11.5 million settlement with the former directors and officers of American Capital. Elliott Management filed a motion to dismiss, which was denied. The court found that Elliott Management was "the catalyst for the merger" and that the facts in the complaint established "actual control by Elliott Management over the American Capital board with respect to the process that led to the sale of American Capital to Ares." In fact, the court determined that Elliott, who had increased its holdings from 10.3% to 15.9%, "acted as a de facto member of the American Capital board."

The court held that the allegations of the complaint were sufficient to establish that Elliot Management exerted actual control over American Capital in connection with its sale to Ares. The Court recounted that, fearing a proxy contest from Elliott, American Capital abandoned its value-maximizing spin-off plan and, in six months, closed a "fire-sale" of the company to Elliott's preferred bidder, Ares, to the exclusion of "at least two other serious bidders" that "offered a better economic deal to the common stockholder." The court also criticized the $3 million so-called "reimbursement" payment the company made to Elliott "for instigating and then advising on the sale"

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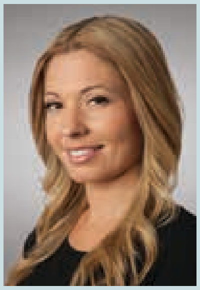
through "unfettered access to the review process of the American Capital Board." The court found that, reaping a 20% return on its investment, Elliott "intentionally acquired a large portion in American Capital stock for a single purpose, and thereafter increased its position in the Company's stock for a single purpose: to force American Capital to sell itself quickly to a suitor of Elliott Management's preference so that Elliott could make a short term gain." The court described the case as "unique, as it presents the confluence of better offers and the putative influence of a potent and feared stockholder."

> "A CONTROLLING STOCKHOLDER DOES NOT HAVE TO OWN THE MAJORITY OF THE COMPANY'S STOCK TO BE CONSIDERED A "CONTROLLER.""

Under Delaware law, a stockholder owning less than 50% of the voting stock is presumed to be a non-controlling holder; and a plaintiff must plausibly allege facts showing domination by that stockholder through actual control over corporate decision-making. For example, in a seminal Delaware decision in 2014 in *In re Zhongpin Shareholder Litigation*, in which Pomerantz was also co-lead counsel, the Delaware Chancery Court determined that Zhongpin's CEO, who held 17.3% of Zhongpin's stock, was a controlling stockholder in connection with his acquisition of the remaining outstanding shares of Zhongpin's common stock in a going-private transaction. The *Zhongpin* court noted that "Zhu exercised significantly more power than would be expected of a CEO and 17% stockholder." In fact, the court found that "Zhu possessed both latent and active control of Zhongpin" because "as a result of his stock ownership, he could exercise significant influence over shareholder approvals for the election of directors, mergers and acquisitions, and amendments to Zhongpin's bylaws" and "[t]he Company relied so heavily on him to manage its business and operations that his departure from Zhongpin would have had a material adverse impact on the Company." The court concluded that "[d]espite the fact that Zhu's ownership interest was much smaller than a typical controller's, Plaintiffs plead indicia of domination, sufficient to raise an inference that Zhu exercised control over Zhongpin."

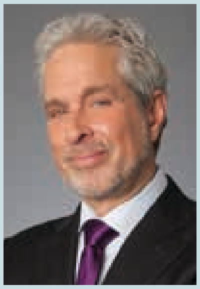
The expanding definition of controlling stockholder means that courts will look at the conduct and formidable power of influential stockholders on the corporate decision-making of the board. If such party exercises actual control of the board through domination, manipulation, and strong-arming, it will be held accountable and liable to minority public stockholders in class action suits.

NOTABLE DATES ON THE POMERANTZ HORIZON

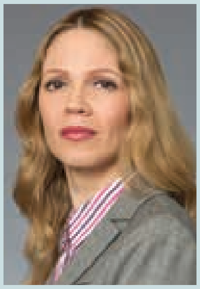


Jennifer Pafiti

Jeremy A. Lieberman



Marc I. Gross



Emma Gilmore

JEREMY LIEBERMAN, JENNIFER PAFITI, and **EMMA GILMORE** will attend the **Council of Institutional Investors Conference** from September 13-15 in San Diego.

JENNIFER PAFITI will speak at the **Texas Local Firefighter Retirement Act's Educational Conference** to be held from October 1-3 in the Woodlands, Texas. She will also attend the **International Foundation of Employee Benefit Plans' Annual Conference** from October 22-25 in Las Vegas, and the **State Association of County Retirement Systems' Fall Conference** from November 14-17.

MARC GROSS will participate in a panel on securities class action developments at the **American Law Institute Securities and Shareholder Litigation Developments Conference** on October 3 in New York City.

POMTRACK© CLASS ACTIONS UPDATE

Pomerantz, through its proprietary PomTrack© system, monitors client portfolios to identify potential claims for securities fraud, and to identify and evaluate clients' potential participation in class action settlements.

NEW CASES:

Recently filed securities class action cases filed by various law firms are listed below. If you believe your fund is affected by any of these cases, contact Pomerantz for a consultation

CASE NAME	TICKER	CLASS PERIOD	LEAD PLAINTIFF DEADLINE
Zebra Technologies Corp.	ZBRA	March 17, 2015 to May 9, 2016	September 24, 2017
Foundation Medicine, Inc.	FMI	February 26, 2014 to November 3, 2015	September 26, 2017
Tableau Software, Inc.	DATA	June 3, 2015 to February 4, 2016	September 26, 2017
Intellipharmaceutics International, Inc.	IPCI	January 14, 2016 to July 26, 2017	September 29, 2017
TechnipFMC plc	FTI	April 27, 2017 to July 24, 2017	October 2, 2017
The Advisory Board Company	ABCO	January 21, 2015 to February 23, 2016	October 2, 2017
Envision Healthcare Corp.	EVHC	March 2, 2015 to July 21, 2017	October 3, 2017
Applied Optoelectronics, Inc.	AAOI	July 13, 2017 to August 3, 2017	October 4, 2017
MAXIMUS, Inc.	MMS	October 30, 2014 to February 3, 2016	October 6, 2017
GlobalSCAPE, Inc.	GSB	January 26, 2017 to August 7, 2017	October 9, 2017
Electronics For Imaging, Inc.	EFII	February 22, 2017 to August 3, 2017	October 10, 2017
Sequans Communications S.A.	SQNS	April 29, 2016 to July 31, 2017	October 10, 2017
TransDigm Group, Inc.	TGD	May 10, 2016 to January 19, 2017	October 10, 2017
Acacia Communications Inc.	ACIA	August 11, 2016 to July 13, 2017	October 13, 2017
Forterra, Inc.	FRTA	October 18, 2016 to August 14, 2017	October 13, 2017
Blue Apron Holdings, Inc.	APRN	June 29, 2017 to August 9, 2017	October 16, 2017
Rayonier Advanced Materials Inc.	RYAM	October 29, 2014 to August 19, 2015	October 16, 2017
Depomed, Inc.	DEPO	February 26, 2015 to August 7, 2017	October 17, 2017
Teva Pharmaceutical Industries Ltd.	TEVA	November 15, 2016 to August 2, 2017	October 22, 2017
TOP Ships Inc.	TOPS	January 17, 2017 to August 22, 2017	October 23, 2017
Zillow Group, Inc.	Z	February 2, 2016 to August 8, 2017	October 23, 2017
Dr. Reddy's Laboratories Limited	N/A	June 17, 2015 to August 10, 2017	October 24, 2017
PetMed Express, Inc.	PETS	May 8, 2017 to August 23, 2017	October 24, 2017
Vitamin Shoppe, Inc.	VSI	March 1, 2017 to August 6, 2017	October 27, 2017
Volkswagen AG	VOW	March 14, 2013 to July 26, 2017	October 30, 2017

SETTLEMENTS:

The following class action settlements were recently announced. If you purchased securities during the listed class period, you may be eligible to participate in the recovery.

CASE NAME	AMOUNT	CLASS PERIOD	CLAIM FILING DEADLINE
Rentrak Corp.	$19,000,000	January 29, 2017	September 29, 2017
ITC Holdings Corp.	$5,000,000	January 29, 2016	September 20, 2017
Albany Molecular Research, Inc.	$2,868,000	August 5, 2014 to November 5, 2014	September 21, 2017
The Dolan Company	$2,100,000	August 1, 2013 to November 12, 2013	September 27, 2017
Detour Gold Corp. (Canada)	$4,456,130	March 12, 2013 to November 7, 2013	September 29, 2017
THQ, Inc. (2012)	$2,600,000	May 3, 2011 to February 2, 2012	October 2, 2017
Lihua International, Inc.	$2,865,000	August 9, 2012 to April 30, 2014	October 4, 2017
Manulife Financial Corp. (Canada)	$52,539,360	January 26, 2004 to February 12, 2009	October 9, 2017
STAAR Surgical Company	$7,000,000	November 1, 2013 to June 30, 2014	October 9, 2017
New Source Energy Partners LP	$2,850,000	May 15, 2015 to October 21, 2015	October 10, 2017
Rocket Fuel Inc.	$3,150,000	September 20, 2013 to August 5, 2014	October 12, 2017
Rayonier Inc.	$73,000,000	October 26, 2010 to November 7, 2014	October 13, 2017
Allied Nevada Gold Corp. (SEC)	$5,875,583	January 14, 2014	October 14, 2017
China Mobile Games and Entertainment Group Ltd.	$1,500,000	April 26, 2013 to January 14, 2015	October 21, 2017
Agria Corp.	$1,300,000	June 8, 2016 to November 4, 2016	October 23, 2017
Textura Corp.	$3,300,000	June 7, 2013 to January 7, 2014	October 23, 2017
Home Loan Servicing Solutions, Ltd.	$6,000,000	February 28, 2012 to January 22, 2015	October 31, 2017
CHC Group, Ltd.	$3,850,000	January 16, 2014 to July 10, 2014	November 2, 2017
Corinthian Colleges, Inc.	$2,250,000	October 30, 2007 to August 19, 2010	November 2, 2017
RCS Capital Corp.	$31,000,000	February 12, 2014 to December 18, 2014	November 2, 2017
J. C. Penney Company, Inc.	$97,500,000	August 20, 2013 to September 26, 2013	November 6, 2017
MobileIron, Inc. (IPO)	$7,500,000	June 12, 2014 to August 5, 2015	November 6, 2017
Resonant, Inc.	$2,750,000	November 6, 2014 to February 26, 2015	November 10, 2017
Aegerion Pharmaceuticals, Inc.	$22,250,000	April 30, 2013 to May 11, 2016	November 17, 2017
Genworth Financial, Inc. (IPO)	$20,000,000	November 3, 2011 to April 17, 2012	November 22, 2017
Fuqi International, Inc.	$1,100,000	May 15, 2009 to March 27, 2011	November 24, 2017
Gerdau S.A.	$15,000,000	April 23, 2012 to May 16, 2016	November 28, 2017
J.P. Morgan Securities LLC (SEC)	$222,415,536	January 1, 2005 to December 31, 2007	November 28, 2017
Corporate Resource Services, Inc.	$1,650,000	April 26, 2012 to March 20, 2015	December 2, 2017
Comverge, Inc.	$5,900,000	May 15, 2012	December 4, 2017
Aimsi Technologies, Inc. (SEC)	$1,245,114	July 1, 2004 to December 14, 2004	December 8, 2017
Ocwen Financial Corp.	$56,000,000	May 2, 2013 to December 19, 2014	December 8, 2017
Clovis Oncology, Inc.	$142,000,000	May 31, 2014 to April 7, 2016	December 11, 2017
Brixmor Property Group Inc.	$28,000,000	February 20, 2014 to February 5, 2016	December 12, 2017
U.S. LIBOR-Based (Antitrust)(OTC Barclays)	$120,000,000	August 1, 2007 to May 31, 2010	December 21, 2017
Euroyen-Based (Antitrust)(Deutsche/JPMorgan)	$148,000,000	January 1, 2006 to June 30, 2011	January 23, 2018

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A BI-MONTHLY PUBLICATION OF POMERANTZ LLP
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