



BULLETIN

2006
Winter

A Quarterly Newsletter for Institutional Investors by Schiffrin & Barroway, LLP



SHAREHOLDER ACTIVISM ON THE RISE GLOBALLY

By: Darren J. Check, Esquire

Recent years have seen a sharp increase in the number of investors speaking out and taking action when they are displeased with the management of the companies they invest in. This type of activism has not changed drastically over time. Proxy fights, shareholder proposals, governance actions, increased presence at annual meetings, and shareholder litigation are all avenues through which shareholders flex their muscle. What has changed is the type of investors that have begun stepping up to the plate. It is no longer only corporate raiders like Carl Icahn and hedge funds taking action. A growing number of more “traditional” long-term holders like money managers, mutual fund managers, and pension funds are taking up this important challenge¹. What investors are concerned about varies from companies holding excess stores of cash while providing minimal returns to investors, excessive pay and/or severance packages for executives, poor performance in the areas of mergers or acquisitions, and outright fraud being committed by management. Oftentimes investors are seeking changes in

corporate governance, changes in management and directors, changes in corporate strategy, monetary compensation in cases of fraud, and at times, a combination of these remedies.

Furthermore, it is not just domestic investors that have embraced investor activism. Institutional investors from around the globe in Europe, Australia, Canada, and beyond have also raised their voices at annual meetings and through corporate governance actions, shareholder litigation and the like. Indeed, pension funds, mutual fund managers, and other similar institutions have taken leading roles in class action litigation and corporate governance actions and have developed policies to ensure that they control their proxy votes and vote them in accordance with certain parameters.

Just this past November a chorus of investors ranging from the likes of CalPERS, CalSTRS, the New Jersey State Investment Council, Relational Investors, and Franklin Mutual Advisors were vocal in their opposition to a three way deal Sovereign Bancorp was seeking to enter into without shareholder approval. These investors sought to be heard by the bank itself, as well as the New York Stock

¹ See *Big Shareholders Are Shouting Ever Louder* at <http://online.wsj.com/article/SB113271438282804918-search.html>

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THE RIGHTS & RESPONSIBILITIES OF INSTITUTIONAL INVESTORS

European and U.S. Approaches to Active Ownership

16 March 2006 ~ Renaissance Amsterdam Hotel, Amsterdam

This exclusive meeting will provide a forum for leaders in the investment community to explore the role that active ownership and shareholder rights can play in better serving their funds and their beneficiaries.

Discussion topics will include:

- The Fiduciary Implications of Activism and Engagement
- Corporate Governance Reform: Regulation vs. Litigation - Determining What Needs to Be Changed and What Works Where
- Fiduciary Responsibility in Action
- Around the World in 45 Minutes: An Informed Look at the Ways in Which Institutional Investors are Dealing with Corporate Scandals
- Future Directions for Active Engagement - Convergence or Divergence?
- Unfinished Business: Opportunities and Challenges for Regulators

Approximately 100 senior executives and legal and compliance professionals from European public pension plans, insurance funds, and mutual fund companies will gather to share experiences and learn more about European and U.S. approaches to active ownership.

Registration is complimentary for qualified executives and legal and compliance professionals

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and Business*
Vanderbilt University Law School

S&B WINS MAJOR VICTORY FOR EUROPEAN INVESTORS IN DREAMWORKS ANIMATION SKG, INC. CASE

*By: Sean M. Handler, Esquire
Robin Winchester, Esquire*

Schiffirin & Barroway, LLP (“S&B”) recently filed a motion seeking to have its client, an Italian mutual fund manager appointed as lead plaintiff, in a securities class action suit brought against DreamWorks Animation SKG, Inc. (“DreamWorks”) and certain of its officers and directors in federal court in Los Angeles, California. Three competing lead plaintiff motions were filed on behalf of groups of plaintiffs with substantially smaller losses than S&B’s client. However, two of the three proposed lead plaintiff groups, joined together to form a single proposed group for the purpose of opposing the Italian mutual fund manager’s motion. Specifically, the newly formed proposed lead plaintiff group argued that the mutual fund manager lacked the proper authority to bring suit on behalf of its own funds and that a European investor is an inadequate lead plaintiff because of its distant geographical location and unfamiliarity with United States securities laws.

On September 26, 2005, the Honorable Mariana R. Pfaelzer heard oral argument on the two lead plaintiff motions and S&B partner, Stuart L. Berman, successfully argued the motion on behalf of the firm’s Italian client. Judge Pfaelzer tenta-

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S&B ACHIEVES SUBSTANTIAL RECOVERY FOR CLASS MEMBERS IN CVS PHARMACY, INC. SECURITIES LITIGATION

By: Benjamin J. Sweet, Esquire

After more than three years of contentious litigation and a series of protracted mediation sessions, Schiffirin & Barroway, LLP (“S&B”), serving as co-lead counsel, secured a \$110 million recovery for class members in the CVS Securities Litigation. Settlement was reached just days prior to the commencement of trial, and shortly after the district court had denied the defendants’ motions for summary judgment. This substantial recovery, which represents the third-largest settlement in a securities class action case in the First Circuit received final approval from District Judge Joseph Tauro.

The suit, originally filed in 2001, alleged that CVS, the largest chain pharmacy by number of stores, issued a series of materially false and misleading statements that concealed: (i) the effect of a nationwide pharmacist shortage on the Company’s ongoing operations; (ii) the fact that it needed to close a substantial number of underperforming stores; and (iii) that it had only been able to achieve forecasted financial results by engaging in earnings manipulation in

violation of Generally Accepted Accounting Principles (“GAAP”). Specifically, the suit alleged that CVS violated accounting practices by delaying discounts on merchandise in an effort to prop up its earnings. In addition, the suit charged that in 2001 the Company and its Chief Executive Officer, Thomas M. Ryan, improperly delayed announcement of its intention to close approximately 200 underperforming stores, and that an industry-wide pharmacist shortage would have a materially negative impact on the Company’s performance.

Led by partners Katharine M. Ryan and Michael K. Yarnoff, the S&B team, which included associates Benjamin J. Sweet and Karen E. Reilly, worked to investigate the Company’s class period conduct, draft an amended complaint and defeat defendants’ motion to dismiss. Thereafter, S&B’s rigorous efforts throughout the discovery process allowed for full development of the Class claims, and ultimately, denial of defendants’ motion for summary judgment, setting the stage for this sizable recovery.

BRISTOL-MYERS SQUIBB ERISA LITIGATION ENDS IN VICTORY FOR PLAN PARTICIPANTS

By: Gerald D. Wells, III

Schiffirin & Barroway's nationally recognized ERISA Litigation Department has been a leader in prosecuting claims on behalf of employees whose 401(k) retirement savings were lost as a result of being imprudently invested in employer securities. These actions, brought under the Employee Retirement Income Security Act of 1974 ("ERISA") against persons charged with administering the 401(k) plans ("fiduciaries"), have grabbed headlines in the wake of the numerous corporate scandals that sent Wall Street reeling. Too often, 401(k) plans maintain heavy investments in company stock and these holdings can be decimated when details of widespread corporate malfeasance come to light. Indicative of S&B's success in this growing field of the law, S&B recently negotiated a landmark settlement of ERISA claims brought on behalf of participants in defined contribution plans sponsored by Bristol-Myers Squibb Co. ("Bristol-Myers Squibb").

Serving as Lead Counsel, S&B brought suit against Bristol-Myers Squibb Co. and certain fiduciaries of three defined contribution plans sponsored by the Company. The suit alleges Bristol-Myers and the individual fiduciary defen-

dants allowed the Company's 401(k) plans and their participants to imprudently invest significant assets in company stock, despite the fact that defendants knew or should have known that Bristol-Myers stock was an imprudent investment. Specifically, plaintiffs alleged that Bristol-Myers' stock was an imprudent investment due to, among other issues, the Company's accounting improprieties, problems the Company was experiencing with certain of its pharmaceutical products, and Bristol-Myers' inability to fill its product pipeline.

After lengthy litigation and several rounds of mediation, the matter ultimately settled for a cash component of \$41.22 million, payable to the plans and their affected participants, as well as significant structural relief. The structural relief, valued at up to \$52 million, affords participants much greater leeway in diversifying their retirement savings portfolios. The settlement was recently approved by the Court.

S&B is particularly proud of this case, given that it is one of the largest ERISA settlements and was widely approved by Class members — ultimately not a single objection to the settlement was pursued.

S&B WINS MAJOR VICTORY FOR EUROPEAN INVESTORS IN DREAMWORKS ANIMATION SKG, INC. CASE

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tively appointed the Italian mutual fund manager as lead plaintiff and approved their selection of S&B as lead counsel, however, the Court requested further information regarding the mutual fund manager's authority under Italian law to represent its own funds. Therefore, S&B secured an expert legal opinion from its Italian counsel, whom it had been working closely with throughout the earlier stages of the lead plaintiff briefing, and filed the requested supplemental information with the Court. Shortly thereafter, on November 8, 2005, Judge Pfaelzer formally appointed the firm's Italian client as lead plaintiff and approved its selection of S&B as lead counsel.

The lead plaintiff result here is an important one not only for mutual fund managers in general, but it also is a positive development for foreign-based institutional investors seeking to take a more active role in shareholder litigation brought in the United States. First, the Court's rul-

ing acknowledges that a mutual fund manager is a proper lead plaintiff to represent its own funds in a securities class action finding that it is the only entity capable of bringing these claims on behalf of the funds that it manages. Second, while courts have appointed non-U.S. investors as lead plaintiff in securities class actions before, the Court's appointment of an Italian investor reinforces the fact that with today's technology there are simply no obstacles to an investor who resides anywhere in the world to serve as a lead plaintiff in the United States. Lastly, the Court's ruling serves to confirm the purpose and spirit of the Private Securities Litigation Act of 1995, which was to encourage investors with a large financial interest in the outcome of a securities class action to take a more active role in the case by seeking appointment as lead plaintiff. We are very proud of this result and of our continued representation of foreign-based institutional investors.

BANKRUPTCY AT DELPHI CORP. BRINGING TWISTS TO CLASS ACTION CASE

By: Jodi L. Murland, Esquire

Sean M. Handler, Esquire

Schiffirin & Barroway, LLP (“S&B”), in conjunction with three other law firms (“Lead Counsel”), are leading the way in the securities class action lawsuit brought in connection with the financial collapse of Delphi Corp. (“Delphi”), the nation’s largest auto supplier. S&B represents Raiffeisen Capital Management, an Austrian Mutual Fund Manager, which is serving as a lead plaintiff alongside other U.S. and European institutional investors.

Delphi’s illegal activities first came to light in July 2004, when the Securities and Exchange Commission (“SEC”) announced that it had launched an investigation into Delphi’s accounting practices. By March 2005, Delphi announced that it had uncovered irregularities in its financial statements dating back to its inception. As a result, Delphi was forced to issue restated financial results for the years 2000 through 2003. In response to this news, Delphi’s stock, which had traded as high as \$21.69 during the Class Period, fell to below \$6 as the market learned the extent of Delphi’s financial fraud.

Lead Plaintiffs filed their 290 page amended complaint (“Complaint”) detailing the massive fraud on September 30, 2005. The Complaint asserted a class period of March 7, 2000 through March 3, 2005. In the Complaint, Lead Plaintiffs alleged Exchange Act claims, as well as Securities Act claims. Defendants named in the Complaint included Delphi, officers and directors of Delphi, Deloitte & Touche, LLP, its auditor, and other third-parties who were involved in the accounting fraud at Delphi.

Following the filing of the Complaint, on October 8, 2005, Delphi announced that it was filing for bankruptcy protection, which halted indefinitely any litigation against the Company, but not against any of the remaining defendants. In conjunction with Delphi’s bankruptcy, the Company proposed an extremely generous compensation plan for a number of its officers, many of whom are believed to have actively participated in the fraud alleged in the Complaint. Delphi argued that the plan was justified in order to retain vital employees to aid the company as it attempted to emerge from bankruptcy. In response to the proposed compensation plan, Lead Counsel took a unique step by objecting to the plan on the basis that it inexplicably seeks to reward executives who knowingly participated in Delphi’s massive accounting fraud, or who inexcusably tolerated that fraud as it impelled the Company’s slide toward bankruptcy. In addition, Lead Counsel has also sought permission from the bankruptcy court to lift the automatic stay to allow the Lead Plaintiffs to obtain access to documents provided to government agencies by Delphi. These objectives and motions are presently pending before the bankruptcy court.

Notwithstanding the bankruptcy proceedings, the remaining defendants must still file responses to the Complaint that are due to be filed by January 11, 2006. As a matter of course, defendants typically respond by means of a motion to dismiss, which challenges the legal adequacy of the Complaint. Lead Plaintiffs are fully prepared to oppose these motions and to vigorously litigate the case on behalf of the proposed class of investors.

For up to the minute status report on the Delphi litigation, including the bankruptcy, please visit our website at www.sbclasslaw.com and click on featured cases, or log onto www.delphilitigation.com.

S&B ACHIEVES SIGNIFICANT CORPORATE GOVERNANCE VICTORIES IN TWO CASES

By: Eric L. Zagar, Esquire

In the second half of 2005, Schiffrin & Barroway (“S&B”) achieved substantial monetary and corporate governance relief in two shareholder derivative actions. Below are descriptions of the cases and the corporate governance measures which were accomplished. Corporate Governance remains at the forefront of concerns for investors and for S&B.

CMS Energy Corporation

In *Klotz v. Parfet, et al.*, Case No. 03-06483-CK (Jackson County, MI), S&B pursued claims against the board of directors and executive officers of CMS Energy Corporation for breaches of fiduciary duties in connection with “round trip” energy trading and insider sales of CMS stock. A wide ranging fraud is also being alleged in the context of a securities fraud action against the Company for misrepresentation in connection with this same activity. While the Securities Action was still being litigated, in September 2005, the Court approved a settlement in which S&B recovered a cash payment of \$12 million from the Company’s directors’ and officers’ liability insurance, and instituted a comprehensive overhaul of the Company’s corporate governance program. Among other things, CMS:

- added five new independent directors, reconstituted the committees of the board of directors, and separated the roles of Chairman and CEO;
- created the position of Chief Compliance Officer to oversee and administer the Company’s ethics and corporate compliance program;
- enhanced the responsibilities and procedures of the Audit Committee;
- adopted an enhanced insider trading policy and stock ownership guidelines for officers and directors; and

- reformed the Company’s executive compensation practices by eliminating the use of stock options and instituting new performance criteria for cash bonuses.

Fairchild Corporation

In *In re Fairchild Corp. Shareholder Derivative Litigation*, Consol. C.A. No. 871-N (Del. Ch.), S&B pursued claims against the board of directors and executive officers of Fairchild Corporation for breaches of fiduciary duties in connection with executive compensation and perquisites and related-party transactions, including the Company’s advancement of legal fees in litigation involving its Chairman/CEO Jeffrey Steiner. In November 2005, the Court approved a settlement in which S&B recovered a cash payment of \$3.76 million from Mr. Steiner and the Company’s directors’ and officers’ liability insurance and instituted a broad array of corporate governance enhancements. Among other things, Fairchild:

- added two new independent directors and adopted policies increasing the responsibilities of the independent members of the board;
- created a new Oversight Committee to oversee and pre-approve related-party transactions; and
- reformed the Company’s executive compensation practices by requiring that regular and bonus compensation be directly related to the Company’s performance and prohibiting senior executives from receiving non-compete and consulting payments.

S&B is proud to have achieved these corporate governance victories, which will benefit CMS and Fairchild and their respective shareholders well into the future.

SHAREHOLDER ACTIVISM ON THE RISE GLOBALLY *(Continued from page 1)*

Exchange and the SEC. While the deal was eventually approved by the NYSE, albeit with some adjustments to the terms, it is another example of shareholders making their voices heard to management and regulatory bodies.

Recently, an international group of investors consisting of pension funds and pension managers from Australia, Europe and the United States sued News Corp. in Delaware State Court after its Chief Executive Officer, Rupert Murdoch, renewed News Corp's poison pill provision for an additional two years without first going to the shareholders for a vote.² The shareholder lawsuit claims that Mr. Murdoch induced investors to support the company's change of domicile from Australia to the United States with a promise to put the decision of the poison pill renewal to a shareholder vote. This action, while somewhat unprecedented, is indicative of the actions institutional investors in the United States and abroad are taking to protect their investments. At News Corp.'s annual meeting, shareholders of News Corp. withheld approximately 15% of their vote to re-elect four directors that are Murdoch allies as a protest to the renewal of the poison pill.³ Considering the fact that the Murdoch family controls over 30% of News Corp.'s stock, this 15% withholding was considered significant and the plaintiffs have indicated that they will move forward with their suit.

Institutional investors from around the world have also increased their involvement in shareholder class action litigation. In fact, PricewaterhouseCoopers reported in 2004 that institutional investors served as lead plaintiff in 47% of the cases that were filed.⁴ Like other forms of activism, this increased involvement in shareholder litigation is not restricted to domestic investors. The last two years have seen pension funds, mutual fund managers, and insurance companies from the U.K., Netherlands, Italy, Austria, Germany, Sweden, and other European countries step forward to take an active role either as a lead plaintiff in a securities class action or by bringing their own direct actions against companies that have committed fraud.

Indeed, there has been a sea change in the attitude of European investors when it comes to

investor activism and litigation. Many have come to the broad conclusion that institutional investors have a responsibility to utilize their influence as large shareholders in the proper situation. Others have also realized that when it comes to shareholder litigation and class actions, if they are going to be investors in the U.S. market they must deal with the reality that these cases are going on and must examine them. In fact, Daniel Summerfield of the U.K.'s University Superannuation Scheme stated this past summer that his fund would be a lead plaintiff if they believed the case would bring corporate governance reforms and benefit long-term shareholders. Dr. Summerfield was quoted as saying that "[W]e have decided to consider on a case by case basis the possibility of doing this" and that "... if that's the way it's done in the States and you operate within that system, it makes sense to participate."⁵ In another interesting recent development Hermes Pension Management, based in the U.K. and one of Europe's largest fund managers, named Mark Anson of CalPERS as its new CEO. Hermes, which has been an activist shareholder on several fronts in the past, has now brought on the former CIO of one of America's leading activist investors. It will be interesting to see if Anson brings Hermes further to the forefront of activism.

Schiffirin & Barroway, which represents institutional investors from the United States, Europe, Canada, and around the world, continues with its commitment to educating investors everywhere of their rights and responsibilities and providing valuable representation and portfolio monitoring services at no cost. In addition, we will continue to follow these trends in the pages of S&B Bulletin.

² See *Institutional Shareholders Sue News Corp., Rupert Murdoch and Board, Charge Them with Reneging on Promise of "No Long-Term Poison Pills"* at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/10-07-2005/0004163791&EDATE=>

³ See *News Corp. stockholders withhold up to 15% of vote* at http://www.chicagotribune.com/entertainment/tv/chi-0510220191oct22,1,7683746.story?coll=chi-ent_tv-hed October 22, 2005.

⁴ See *PricewaterhouseCoopers LLP Securities Litigation Study*

⁵ See *Pension Funds Seek Their Share of \$8bn U.S. Claims* TimesOnline at <http://www.timesonline.co.uk/newspaper/0,,173-1710869,00.html>



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