SECURITIES LITIGATION PRACTICE GROUP SUCCESSES 2006 –2008

Gibson Dunn Secures Dismissal of Fraud Claims Against the Financial Industry Regulatory Authority

On May 8, 2008, the U.S. District Court for the Western District of Arkansas dismissed with prejudice all claims against our client the **Financial Industry Regulatory Authority (FINRA)** in a fraud case arising from an undercover investigation of plaintiff based on allegations of illegal kickbacks in violation of the federal securities law. The plaintiff claimed that FINRA—in assisting federal law-enforcement authorities—violated an Arkansas statute by issuing fraudulent securities registrations, publishing false advertising materials, and altering records in an official records system. In dismissing the case, the Court concluded that no private right of action exists against FINRA for actions relating to the performance of its self-regulatory duties under the Exchange Act and that plaintiff's complaint was an apparent attempt to circumvent this clearly established rule. Also, the doctrine of absolute immunity protects FINRA from liability.

Gibson Dunn Prevails in Merger Litigation on Behalf of Currenex, Inc.

On April 7, 2008, the California Superior Court dismissed all claims against our client, **Currenex, Inc.**, and members of its senior management, in a shareholder action challenging stock options granted to Currenex executives in connection with the acquisition of Currenex by State Street Bank & Trust in March 2007. Currenex, based in New York, is one of the leading companies in the worldwide foreign exchange market, offering institutional clients reliable, low-cost access to the global foreign exchange trading market. State Street acquired Currenex for $564 million. Shortly after the merger, a group of shareholders (including the founders of the company) sued Currenex and four of its officers for various violations of state law, including breach of fiduciary duty, fraud, abuse of control, and breach of contract. In the April 7 ruling, the court found that under controlling Delaware law, all the claims were derivative, not direct, and that plaintiffs had lost standing to sue when the merger extinguished their ownership rights in Currenex. Additional claims against certain venture capital defendants not represented by Gibson Dunn were allowed to proceed.

Gibson Dunn Obtains Denial of Class Certification on Behalf of Belo Corp. and Certain Officers and Directors

On April 2, 2008, Chief Judge Sidney Fitzwater on the Northern District of Texas denied Plaintiffs' motion for class certification in a purported securities class action against Gibson Dunn client **Belo Corp**. and certain of its officers and directors arising from acknowledged circulation overstatements at Belo's flagship newspaper *The Dallas Morning News*.

Chief Judge Fitzwater accepted Gibson Dunn's argument that the "corrective disclosure" at issue included negative news unrelated to the circulation overstatement and that

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Plaintiffs had failed to prove that it was more probable than not that the overstatement-related news, and not the other unrelated negative news, caused a significant amount of the stock price decline that followed the disclosure. See *Oscar Private Equity Inv. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007).

Gibson Dunn Secures Dismissal of Securities Class Action Against Hewlett-Packard Directors

On March 28, 2008, the United States District Court for the Northern District of California issued an order dismissing all claims against our clients, the **Board of Directors of Hewlett-Packard**, in a hotly contested securities class action brought against the Board following the Company's termination of its former Chief Executive Officer, Carly Fiorina. In early 2006, several major HP pension fund investors brought suit against the Board for violations of the federal securities laws, and breach of fiduciary duty under state law, contending that the payments made to Ms. Fiorina when she was terminated as CEO were not authorized under HP's Severance Policy, that the payments constituted an act of "corporate waste," and that the Company's proxy statement disclosures regarding its severance policies were false and misleading. Gibson Dunn filed an extensive motion to dismiss the complaint, and in March 2007 we obtained a decision dismissing all claims with leave to amend. Plaintiffs' counsel then filed an amended complaint, adding new allegations relating to the Board's alleged misconduct in connection with HP's investigation of leaks of confidential information and its alleged use of unlawful "pre-texting," problems that led to the departure of HP's Chairwoman, Patricia Dunn, in late 2006. In April 2007, Gibson Dunn renewed its motion to dismiss all claims, and on March 28, 2008, Judge Ronald Whyte granted our motion and entered final judgment in favor of our clients.

Gibson Dunn Obtains Second Dismissal of Options Backdating Case Against Openwave Systems, Inc.

On February 12, 2008, Gibson, Dunn & Crutcher obtained a second dismissal on demand futility grounds of a federal shareholder derivative complaint in a stock option backdating matter pending in the United States District Court for the Northern District of California, entitled *In re Openwave Systems, Inc. Shareholder Derivative Litigation.* Gibson Dunn represents **Openwave Systems.** Plaintiffs in the case brought federal securities law claims under Sections 10(b) and 14(a) of the Securities Exchange Act of 1934 and state law claims for breach of fiduciary duty, unjust enrichment, and insider selling, among other claims, based on alleged "backdating" of certain stock option grants between 2000 and 2006. Although plaintiffs alleged that a pre-suit litigation demand on Openwave's current Board of Directors (as required by applicable Delaware law) would have been "futile", the Court earlier agreed with Openwave's argument that plaintiffs failed to plead facts, that if true, would demonstrate that any of Openwave's directors could not impartially consider such a demand in determining whether the litigation was in the best interests of Openwave. Among other things, the Court held that plaintiffs' complaint failed to demonstrate any "pattern" of stock option grants during the relevant time-period that suggested that backdating had actually occurred. On May 18, 2007, the Court dismissed the complaint, but gave plaintiffs leave to amend. After plaintiffs filed an

amended complaint, Openwave again moved to dismiss the complaint on demand futility grounds. The Court ruled that the amended complaint again failed to sufficiently support the plaintiff's backdating claims because, in part, plaintiffs' showing that six out of a total of 39 report dates occurred during the lowest, second lowest, fifth lowest and seventh lowest closing dates of the various months or quarters is as consistent with a random selection of stock option grant dates, as with a pattern of backdating. Plaintiff's' inclusion of a more detailed 20-day trading analysis also failed to support a showing of the presence of backdating and demand futility. The Court dismissed the complaint, but gave the plaintiffs 17 days to file an amended complaint supporting an inference of backdating.

U.S. Supreme Court's Decision in Stoneridge Limits the Scope of Private Rights of Action Under the Federal Securities Laws

On January 15, 2008, the Supreme Court issued an important decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* clarifying the contours of private actions under the key anti-fraud provisions of the securities laws. The Court reaffirmed its decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* that liability under Section 10(b) of the Securities Exchange Act of 1934 does "not extend to aiders and abettors," and held that, to be actionable, "[t]he conduct of a secondary actor must" *itself* "satisfy each of the elements or preconditions for liability" under Section 10(b) or the SEC's Rule 10b-5. Gibson Dunn filed an *amicus* brief on behalf of thirteen former SEC Commissioners and a number of distinguished law professors urging the result that the Court adopted.

The petitioner had alleged, on behalf of a class of investors in defendant Charter Communications Inc., that respondents--certain equipment vendors of Charter--had "agreed to arrangements that allowed [Charter] to mislead its auditor and issue a misleading financial statement" even though respondents had no role in preparing or disseminating the statements. The Supreme Court affirmed the Eighth Circuit's judgment upholding the dismissal of the petitioner's claim, because the petitioner had not adequately alleged reliance on the respondent's deceptive acts, which is an "essential element of" a Section 10-b private cause of action. The Court also underscored the adverse practical consequences of petitioner's contended-for "expansion" of Section 10(b)'s private cause of action including the increased risk that "innocent companies" would have to pay extortionate settlements to avoid the downside of even weak 10-b claims; the deterrent effect on overseas firms with no other exposure to our securities laws; and the resulting shift of securities offerings away from domestic capital markets.

Gibson Dunn Secures Dismissal of More Consolidated Stock Option Backdating Derivative Litigation Involving Computer Sciences Corporation

On January 9, 2008, Judge Carl West of the Los Angeles Superior Court's Complex Case Panel sustained a demurrer filed and argued by Gibson Dunn in the consolidated state derivative litigation involving allegations of stock option backdating at **Computer Sciences Corporation.** This victory comes after Gibson Dunn previously secured the dismissal with prejudice of related consolidated federal derivative suits alleging

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backdating at CSC brought in the Central District of California. In the state matters, which have been pending since June 2006, Gibson Dunn represented the company, its board of directors, and various senior executives. In the demurrer ruling, Judge West held that plaintiffs had failed to allege sufficient facts showing that a pre-filing demand on the board of directors, as required under California, Delaware, and Nevada law, would have been futile, thus excusing demand. In doing so, Judge West specifically held that mere allegations of service on the Compensation Committee of the Board during periods in which backdated options were allegedly granted were not sufficient to show director interestedness as required under the Delaware *Rales* test for pleading demand futility. The ruling gives plaintiffs 30 days to amend their complaint.

Gibson Dunn Obtains Dismissal of "Holder" Action Against Marsh & McLennan Cos. and its Former Chief Executive Officer

On December 7, 2007, Gibson Dunn obtained dismissal of a state securities "holder" action brought by a group of former shareholders against client **Marsh & McLennan Cos.** and its former CEO, Jeff Greenberg (who was represented by separate counsel). Plaintiff Frank A. Lee Jr., along with family members and various trusts and entities, had owned approximately two million Marsh shares, which were valued in early 2004 at approximately $93 million, and which allegedly comprised some 85-90% of the family's net worth. Lee claimed that he had refrained from selling the family's stock based upon Greenberg's misrepresentations, at a private meeting with Lee, about the merits of then-Attorney General Eliot Spitzer's probe into Marsh's business practices. Although Greenberg allegedly told Lee that the Spitzer probe had no merit, the probe later culminated in a criminal suit, $850 million in fines, and exposure to numerous civil class actions. Judge Ira B. Warshawsky of the New York Supreme Court dismissed the plaintiffs' "holder" claims, concluding that they were derivative in nature because they alleged harm to the corporate entity, and because the injury alleged was shared by all shareholders, rather than by the plaintiffs alone. The court concluded that dismissal was appropriate because plaintiffs had failed to make pre-suit demand. Judge Warshawsky also found persuasive defendants' argument that the action was barred by federal law and public policy because plaintiffs' claims were premised on Greenberg's refusal to selectively disclose material nonpublic information.

Gibson Dunn Defeats Motion for Preliminary Injunction Seeking to Stop Acquisition by Computer Sciences Corporation

Gibson Dunn client **Computer Sciences Corporation** ("CSC") announced on October 31, 2007 that it had entered into an agreement to acquire through a merger all of the stock in First Consulting Group, Inc., a provider of consulting and other services for healthcare, pharmaceutical and life sciences organizations. Gibson Dunn represented CSC in connection with the merger transaction. Following the announcement, two First Consulting Group shareholders filed separate suits in Los Angeles County Superior Court alleging breaches of fiduciary duty by the board of First Consulting Group in agreeing to an allegedly inadequate price and making allegedly inadequate disclosures in First Consulting Group's proxy to shareholders. One of the suits names CSC and its subsidiary as defendants alleging that they aided and abetted the alleged breaches of fiduciary duty. The actions were consolidated and plaintiffs announced that they intended to file a motion for preliminary injunction to stop the First Consulting Group

shareholder meeting from being held and to prevent the merger transaction from going forward. In light of the fact that First Consulting Group's shareholder meeting to approve the merger was scheduled for January 10, 2008, the parties agreed to expedited discovery over a two week period in December including depositions in London, Raleigh, Chicago, Dallas and New York as well as an expedited briefing schedule over the last week of December and first few days of January. The issues raised in the motion for preliminary injunction included allegations of an unfair bidding process and the failure of First Consulting Group's investment banker to include a discounted cash flow analysis as part of its fairness opinion. On January 7, 2008, the court (Judge Carolyn Kuhl) held a hearing on the motion, and on January 8, Judge Kuhl issued her order denying the motion for preliminary injunction in its entirety.

Gibson Dunn Secures Victory in Securities Class Action for PricewaterhouseCoopers

On November 13, 2007, Gibson Dunn won a solid victory for **PricewaterhouseCoopers LLP** ("PwC") in a securities class action in the Northern District of Texas, relating to PwC's audits of Flowserve Corporation. Judge Jane Boyle denied Plaintiffs' motion for class certification and granted PwC's motion for summary judgment with respect to the Section 11 claims asserted against PwC. In her opinion, Judge Boyle agreed that PwC had met its heavy burden of establishing its "negative causation" defense under Section 11(e) and rejected Plaintiffs' assertion that a disclosure which reveals "the true financial condition of the company" is sufficient to establish loss causation even if the allegedly fraudulent conduct was not itself disclosed.

Gibson Dunn Secures Settlement for Veeco Instruments Inc. in Securities Class Action Following Favorable Ruling on Motion in Limine

On November 7, 2007, Judge Colleen McMahon of the Southern District of New York in a lengthy opinion approved a very favorable class action settlement in a securities law class action against our clients **Veeco Instruments Inc.** and various of its officers and directors. The settlement was reached in early July, just a few days before we were about to start trial and after extensive fact and expert discovery and more than two years of hard-fought litigation. The settlement occurred after the court issued an extremely favorable and important ruling on a motion in liminie concerning loss causation and damages. The Court, in a ruling which it referred to several times in its settlement approval opinion as an important factor justifying the settlement, held that class members who either sold their shares after a corrective disclosure at a price higher than their purchase price, or who retained their stock past the point at which the stock price recovered to their purchase price, could prove no economic loss and thus were not entitled to damages. This ruling resolved an important question left open by the Supreme Court's decision on loss causation pleading in *Dura Pharmaceuticals Inc. v. Broudo*, decided in 2005. Accepting our arguments that "loss" under the securities laws meant actual loss measured by reference to the purchase price, Judge McMahon rejected the contention that, in a fraud-on-the-market case, plaintiffs could necessarily recover damages on the theory that they bought stock at an inflated value measured by

the drop in the stock price occurring as a result of a curative disclosure. This important ruling, handed down after discovery was complete, diminished the number of shares eligible for damages by over 40% and thus radically reduced the aggregate damages available to the class. Plaintiffs agreed to a settlement on terms favorable to our clients shortly after the ruling was handed down.

Gibson Dunn Obtains Dismissal of Key Claims Against Levi Strauss & Co. in Securities Class Action

On September 11, 2007, Judge Ronald Whyte of the United States District Court for the Northern District of California dismissed the key claims in a securities class action against **Levi Strauss & Co.** for failure to plead falsity and *scienter* with the requisite particularity. Levi Strauss & Co. is a privately held company with $2 billion in publicly held debt, and is thus an SEC registrant. In 2003, two former employees of the Company's Tax Department made allegations, in Congressional testimony and in their own Sarbanes Oxley whistleblower litigation, that the Tax Department was committing a fraud on the IRS, and that as a result, the financial statements of Levi Strauss & Co. were materially misstated. Plaintiff bondholders asserted claims under Section 10 (b) claiming that bondholders were misled about Levi Strauss & Co.'s financial condition. Plaintiffs also asserted claims under Section 11 based on two registered offerings of bonds.

Despite the detailed fraud allegations of the two former Tax Department employees, the Court found that plaintiffs had pled neither falsity nor *scienter* with the particularity required by the Private Securities Litigation Reform Act. The Court also applied a heightened pleading standard to the tax-fraud related allegations contained in the Section 11 claims. Gibson, Dunn introduced evidence from documents referenced by plaintiffs that the Company's new auditor audited the 2003 financial statements with full knowledge of the allegations of tax fraud and issued an unqualified opinion on financial statements that included the disputed tax treatments. Gibson, Dunn then argued that this evidence negated any inference of fraud. The Court agreed and dismissed the fraud claims with leave to amend.

A Section 11 claim based on essentially clerical errors in the financial statements contained in one of the two offering documents, which financial statements were later restated and which errors were unrelated to the alleged tax fraud, remains in the case.

Gibson Dunn Wins Dismissal of Shareholder Derivative Suit Against CSK Auto Corporation, Inc.

In a detailed and carefully reasoned opinion, Judge David G. Campbell of the United States District Court for the District of Arizona on August 24, 2007 granted Gibson, Dunn's motion to dismiss a shareholder derivative suit against directors of **CSK Auto Corporation, Inc.** for failure to adequately plead demand futility. CSK, a Delaware corporation, is the largest specialty retailer of auto parts and accessories in the Western United States and one of the largest such retailers in the United States. It owns and

operates 1,327 Checker Auto Parts, Schuck's Auto Supply, Kragen Auto Parts and Murray's Discount Auto Stores. In March 2006, CSK announced that it had discovered accounting errors and irregularities during its review of internal controls as required under Section 404 of the Sarbanes-Oxley Act. Following an internal investigation conducted by its audit committee with the assistance of outside counsel and a major accounting firm, CSK restated its financial results for fiscal years 2001 through 2005, resulting in a significant net reduction in income over those periods. Plaintiffs filed their derivative suit alleging various breaches of duty and violation of the Sarbanes-Oxley Act. Gibson Dunn filed its motion to dismiss on behalf of nominal defendant CSK, arguing that plaintiffs had failed to satisfy the requirements of Delaware law in pleading demand futility. In particular, we argued that plaintiff had failed to plead particularized facts demonstrating that a majority of CSK's directors faced a sufficiently substantial threat of personal liability to render them "interested" under Delaware's *Rales* test. The court agreed with our arguments, including that the audit committee's actions in its internal investigation were "precisely what a responsible audit committee would be expected to do upon discovering accounting irregularities."

Gibson Dunn Successfully Moves to Dismiss Stock Option Backdating Case Against THQ Inc.

Gibson Dunn successfully moved to dismiss a stock option backdating case filed against our client **THQ Inc.** and various of its officers and directors by the Lerach firm and its client Hawaii Laborers Pension Fund. We successfully argued that the plaintiff had not established standing to assert claims relating to grants made years ago and had not pled sufficient facts to establish demand futility. On August 20, 2007, Judge Wright of the Central District of California agreed and gave the plaintiffs thirty days to file an amended complaint.

Gibson Dunn Obtains Complete Dismissal with Prejudice of Federal Stock Options Backdating Litigation Involving Computer Sciences Corporation

On July 24, 2007, U.S. District Judge Mariana Pfaelzer dismissed (for a second time) the federal shareholder derivative complaint alleging options backdating in *In re Computer Sciences Corporation Shareholder Derivative Litigation*, CV 06-5288-MRP. Gibson Dunn represents **Computer Sciences Corporation** ("CSC"), former CEO Van Honeycutt, current CEO Michael Laphen, the CSC Board of Directors, and various other officer and director defendants named in this action. Plaintiff shareholders, who had failed to make a pre-suit demand on the CSC board regarding their claims, alleged a pattern of options manipulation at CSC between 1996-2004 that included purported "backdating," "springloading," and "repricing." Plaintiffs claimed that CSC and its officers and directors had "colluded" to improperly manipulate thousands of stock option grants to senior executives and others in violation of company stock plans, and had disseminated false financial and proxy statements concealing the alleged misconduct. Plaintiffs claimed that the CSC board was sufficiently compromised by self-interest that a demand should be deemed excused as "futile," in accordance with Fed.R.Civ.P. 23.1. On March 26, 2007, Gibson Dunn had obtained dismissal of plaintiffs' last derivative

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complaint for failure to adequately plead demand futility, and the Court had given plaintiffs leave to amend. In its July 24 decision, the Court held that plaintiffs had again failed to plead demand futility with particularity, and "despite having had the opportunity to amend their complaint . . . have still not shown that demand should be excused in this case." The Court therefore ordered the dismissal of the amended complaint with prejudice.

Gibson Dunn Wins Summary Judgment in Securities Class Action Against the Williams Companies, Inc.

Gibson, Dunn won a significant victory July 6, 2007 for the **Williams Companies, Inc.** in a massive securities class action in the Northern District of Oklahoma relating to its former telecommunications subsidiary Williams Communications Group. Judge Stephen Friot granted *Daubert* motions excluding plaintiffs' expert witnesses on damages and accounting matters, and, largely on the basis of the exclusion of these experts, granted summary judgment motions disposing of the case. In his 169 page opinion Judge Friot found that plaintiffs' damages expert's opinions were inconsistent with the Supreme Court's requirements for loss causation as set forth in *Dura Pharms. v. Broudo*, and excluded them on that basis (quoting from the expert's cross-examination by Orange County partner Joe Busch). A large team of Gibson Dunn lawyers and paralegals worked on the extensive summary judgment and Daubert briefing, as well as the discovery efforts, leading to this victory.

Gibson Dunn Defeats Plaintiffs' Attempt to Obtain a TRO in Computer Sciences Corp. Stock Option Backdating Litigation

On June 28, 2007, Gibson Dunn prevailed before L.A. Superior Court Judge Carl West in defeating an application for a temporary restraining order filed by shareholder plaintiffs (represented by the Schiffrin & Barroway firm) in the derivative lawsuit alleging stock option backdating, "springloading," and "bullet-dodging" in claims against **Computer Sciences Corporation** ("CSC") Gibson Dunn had previously obtained a stay of these proceedings pending the outcome of a parallel federal derivative lawsuit involving CSC now pending in the Central District of California. Despite the stay, Plaintiffs sought permission for imposition of a TRO (to be followed by an injunction) restraining CSC from providing certain retirement benefits to outgoing CEO Van Honeycutt, including the vesting of stock options and a large lump sum cash payment, under his retirement agreement. Plaintiffs alleged that immediate vesting of Mr. Honeycutt's options would allow him to exercise a large number of allegedly backdated options, which would "flood" the market, increase Honeycutt's voting control over the company, and dissipate company assets. Gibson Dunn opposed the application based on Plaintiffs' failure to show immediacy of any threatened harm, the lack of irreparable injury, Plaintiffs' dilatory conduct in waiting to seek a TRO, and the fact that Plaintiffs had not shown they are likely to succeed on the merits (including a showing that they have standing to proceed with their suit or that any actionable misconduct occurred at the company). Judge West agreed in denying the TRO application, and noted that Plaintiffs had not yet shown standing and had made none of the required showings for a TRO. The Court further

indicated that it also would be unwilling to grant a subsequent preliminary injunction based on Plaintiffs' inadequate showing.

Supreme Court Establishes Rigorous Pleading Standard for Investor Suits

On June 21, 2007, the Supreme Court issued an 8-1 decision in *Tellabs v. Makor Issues & Rights*, No. 06-484, explaining the plaintiff's burden under § 21D(b)(2) of the PSLRA (15 U.S.C. § 78u-4(b)(2)) to plead facts giving rise to a strong inference of *scienter* (*i.e.*, fraudulent intent). The Supreme Court held that, after considering all the allegations collectively, the reviewing court must conclude that the inference of *scienter* is "cogent" and at least as compelling as any opposing inference of non-fraudulent intent.

The defendants had sought reversal of a Seventh Circuit decision holding that the PSLRA only requires a plaintiff to allege facts from which an inference of fraudulent intent *could* be drawn and does not require consideration of competing inferences of non-fraudulent intent. The Court reversed, holding that the PSLRA requires more. It requires a "powerful or cogent" inference. Because the strength of an inference cannot be decided in a vacuum, the Court reasoned, the inquiry is inherently comparative. Thus, a court must consider nonculpable explanations for the defendant's conduct in addition to inferences favoring the plaintiff. In sum, although a *scienter* inference need not be irrefutable, it "must be cogent and compelling--thus strong in light of other explanations."

The Court agreed that omissions and ambiguities count against inferring *scienter*, but cautioned that "the court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically." The reviewing court must ask: "When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of *scienter* at least as strong as any opposing inference?"

The Court further instructed lower courts to perform the following analysis when faced with a Rule 12(b)(6) motion to dismiss a §10(b) action. *First*, courts must accept all factual allegations in the complaint as true. *Second*, courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss. *Third*, in determining whether the pleaded facts give rise to a strong inference of *scienter*, the court must take into account plausible opposing inferences. The case was remanded to the Seventh Circuit for further determinations in light of this new standard.

The Supreme Court also held that the Seventh Amendment does not bar consideration of competing inferences of non-fraudulent conduct, because it does not inhibit Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims.

Gibson Dunn participated in the case, filing an *amicus* brief on behalf of the American Institute of Certified Public Accountants and the leading accounting firms, which urged the Court to conclude, as it did, that the PSLRA requires a plaintiff to plead facts giving rise to a *scienter* inference that is cogent and compelling in light of competing inferences of non-fraudulent conduct.

Gibson Dunn Secures Victory for Deloitte in Securities Class Action

Since 2003, Gibson Dunn has represented **Deloitte & Touche Accountants** of the Netherlands ("Deloitte Netherlands") in connection with civil litigation and regulatory proceedings resulting from revelations of improprieties at Royal Ahold, a Dutch company and the world's third largest supermarket group. As described by the Securities and Exchange Commission, the Ahold case was a "deplorable example of a massive, multifaceted fraud at a major corporation." Ultimately, the SEC charged Ahold and former top executives with fraudulently overstating sales by billions of dollars, and Ahold was charged with fraudulently fabricating hundreds of millions of dollars of earnings. Deloitte Netherlands also was confronted with a series of class action complaints in the United States seeking billions of dollars in damages and investigations by the SEC and the DOJ as well as authorities in the Netherlands. According to Plaintiffs, Ahold, with the help of Deloitte Netherlands and other named defendants, defrauded investors by materially misstating its financials due to overstated promotional allowances and improperly consolidated joint ventures. Subsequently, Gibson Dunn moved to dismiss this class action, and in a December 21, 2004 opinion, the United States District Court for the District of Maryland dismissed all claims against Deloitte Netherlands, concluding that plaintiffs failed to allege sufficient facts demonstrating that Deloitte Netherlands acted with scienter or that it engaged in deceptive or manipulative conduct. However, the claims against Ahold and other remaining defendants proceeded through discovery and were eventually settled in November 2005 for $1.1 billion. Subsequently, Plaintiffs filed a motion to amend the consolidated amended complaint against Deloitte Netherlands, claiming that additional facts learned during their discovery against Ahold and the other named defendants provided new information sufficient to cure the complaint's deficiencies and state a viable claim against Deloitte Netherlands. Gibson Dunn opposed Plaintiffs' motion arguing, among other things, that the proposed amended complaint would be futile because notwithstanding the voluminous discovery conducted by Plaintiffs, the proposed complaint failed to offer any additional facts to support scienter against Deloitte Netherlands. The Maryland court agreed with Gibson Dunn's arguments, and on June 18, 2007, denied Plaintiffs' motion for leave to amend.

Gibson Dunn Prevails for Tenet in Texas Securities Fraud Case

On May 31, 2007, the Dallas Court of Appeals affirmed the summary judgment granted by the trial court to **Tenet Healthcare Corporation** and 5 of its former officers, including its former CEO, COO and general counsel, in a securities fraud case brought by Tenet's former Vice President for Human Resources, Lourdes Cordero. Cordero had taken early retirement from Tenet, but was permitted to hold her stock options for an additional year pursuant to an agreement to continue to consult for Tenet on a part-time basis. During that year, the Tenet stock price plummeted and Cordero's options lost millions of dollars of value. She later brought suit claiming that she was fraudulently induced to enter into her resignation agreement (which contained a broad release) and to continue to hold her stock options by management's failure to tell her the stock was overvalued. The trial court granted summary judgment based on our contention that Cordero ratified the

resignation agreement, and thus waived her right to rescind the release, by continuing to accept the benefits of her resignation agreement after she learned of the alleged fraud. The court of appeals concurred.

Gibson Dunn Lawyers Help Defeat an Injunction Sought to Halt Zell Bid for Tribune Company

A team of lawyers from Gibson Dunn and Sidley & Austin successfully resisted a shareholders suit brought to halt the closing of the purchase of the **Tribune Company** by Sam Zell. After a long sale process conducted by a Special Committee of the Tribune Company Board of Directors, a deal was reached by which investor Sam Zell would purchase the company through a front end tender offer for 54% of the shares followed by a back end merger into an ESOP-funded entity. Gibson Dunn's client, the Chandler family trusts, fully supported the Zell transaction. A shareholder represented by the Lerach Coughlin firm sought to enjoin the tender offer on the basis that it was the product of a flawed auction process and on the grounds it was improperly coercive. On May 22, 2007, Judge Victoria Chaney heard argument for over six hours, after which she denied in all respects the plaintiffs motion for preliminary injunction, thereby clearing the way for the tender offer to close on May 24. Upon closing, the Chandler Trusts received in excess of $800 million in cash.

Gibson Dunn Scores Dismissal of Shareholder Suit in Market Timing Litigation

On May 21, 2007, Gibson Dunn secured a significant victory for **Janus Capital Management LLC** ("JCM"), the investment adviser to the Janus family of mutual funds, and **Janus Capital Group, Inc.** ("JCG"), its parent corporation, in multi-district litigation pending in the United States District for the District of Maryland. Plaintiffs, shareholders in JCG, sought to hold JCG and JCM liable under Rule 10b-5 for a decline in JCG's stock price allegedly caused by the public disclosure of "market timing" in certain mutual funds advised by JCM. The district court dismissed the action with prejudice, holding that plaintiffs had failed to sufficiently plead the allegedly false statements in the mutual fund prospectuses were directly attributable to JCG, as required by the PSLRA, and that the absence of any direct connection between the alleged misrepresentations and the harm suffered by the putative class members precluded relief against JCM.

Gibson Dunn Obtains Dismissal of Litigation Challenging Major Proposed NASD/NYSE Transaction

On May 3, 2007, United States District Judge Shirley Wohl Kram of the Southern District of New York dismissed a putative class action seeking to prevent Gibson Dunn's client, the **National Association of Securities Dealers, Inc. (NASD)**, from completing a transaction with the **New York Stock Exchange (NYSE)** that would make the newly

combined entity the single private-sector regulator of U.S. securities firms -- a transaction with far-reaching implications for the securities markets.

As part of the proposed transaction, NASD and the NYSE will consolidate their regulation of broker-dealer firms. The new entity will take on the regulatory duties previously performed by both organizations, a change that will eliminate overlapping regulation and other inefficiencies. The transaction also involves a transfer of assets valued in the hundreds of millions of dollars. As a self-regulatory organization overseen by the Securities and Exchange Commission, NASD is required to amend its by-laws in connection with the proposed consolidation and to obtain SEC approval of the amendments. NASD members have already approved the by-law amendments by a substantial majority, and SEC review is now pending.

Plaintiff Standard Investment Chartered, Inc., an NASD member firm, sued NASD, its CEO, and two other NASD officials, as well as NYSE, seeking to enjoin the by-law amendments and the proposed consolidation. Standard alleged primarily that the proxy statement relating to the transaction was misleading. Gibson Dunn, which has represented NASD and the three individual defendants throughout the litigation, moved to dismiss the complaint for lack of jurisdiction on the ground that Standard had failed to exhaust its administrative remedies before the SEC. Standard maintained that it should be allowed to proceed in district court, to take discovery, and to seek an injunction blocking the proposed amendments before the SEC had taken any action.

Judge Kram agreed with Gibson Dunn's arguments and dismissed the complaint in its entirety, holding that Standard had improperly sought to circumvent the statutory scheme for review of NASD by-laws and rules. First, proposed changes are submitted to the SEC, and, if approved, they may be reviewed by the courts of appeals. No review in district court is permitted, even if plaintiffs artfully plead their complaints under state law. Under Judge Kram's opinion, all challenges to amendments to NASD's by-laws must proceed before the SEC, whose decisions are reviewed deferentially by appellate courts -- and without private-party discovery.

Federal Judge Dismisses Securities Class Action Complaint Against CSK Auto Corporation, Inc.

On March 28, 2007, Gibson, Dunn & Crutcher obtained a dismissal of the consolidated complaint in a federal securities class action against **CSK Auto Corporation, Inc.** and certain of its officers and directors. Plaintiffs alleged a claim under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, promulgated thereunder, as well as a control person claim under Exchange Act Section 20(a) arising out of CSK's announcements that it had discovered material accounting errors and irregularities impacting several prior years of financial statements along with material deficiencies in its internal controls. CSK also announced that its CFO and COO would no longer be employed by the company and that its CEO would retire. Gibson Dunn moved to dismiss the complaint on the grounds that plaintiffs had failed to plead facts giving rise to a strong inference of scienter as required by the Private Securities Litigation Reform Act. The court agreed with our arguments that a strong inference of scienter could not be

inferred from the individual defendants' access to information and positions in the company; that plaintiffs had failed to provide detailed information from identified sources corroborating their general allegations; that the departures of the CEO, CFO and COO did not give rise to an inference of fraud; and that the insider stock sales alleged in the complaint did not give rise to a strong inference of scienter. In particular, we were able to show that the stock sales were not suspicious because they almost always took place just before the insider's stock options were about to expire and most occurred well before the end of the putative class period. The court granted plaintiffs leave to amend their complaint.

Gibson Dunn Obtains Dismissal for Hewlett-Packard Directors

Gibson Dunn secured a victory for the directors of **Hewlett-Packard Company** in a derivative and securities class action relating to the benefits paid to former Chairman and Chief Executive Officer Carly Fiorina. On March 1, 2007, Judge Ronald M. Whyte of the United States District Court for the Northern District of California granted in their entirety the motions to dismiss filed by the director defendants, and by nominal defendant HP and Ms. Fiorina.

The plaintiffs' complaint contended that the benefits awarded to Ms. Fiorina upon her departure from HP in 2005 (including $14 million in severance payments and $7.4 million in performance-based cash awards) violated HP's Severance Policy because they exceeded the "cap" based on her annual base salary and target bonus. As a result, plaintiffs argued that several of HP's proxy statements describing the Severance Policy and Ms. Fiorina's benefits were false and misleading, and that HP and its Board committed fraud, waste, ultra vires acts, breach of contract, and breached the fiduciary duty of disclosure.

Judge Whyte issued a 20-page decision detailing why none of plaintiffs' claims had merit, and had to be dismissed. First, the court dismissed with prejudice plaintiffs' federal claim for allegedly false and misleading proxy statements, in violation of section 14(a) of the Securities Exchange Act of 1934. The court held that plaintiffs knew all the necessary facts more than a year before filing their complaint, and this claim was therefore barred by the one-year statute of limitations. Second, the court found that each of the state law claims (including purportedly "direct" claims for breach of contract, promissory fraud, and breach of the fiduciary duty of disclosure) could only be maintained on behalf of HP. Third, the court found that plaintiffs failed to make a pre-suit demand on HP or its Board, or to adequately allege that demand was excused under Delaware law. The Court therefore dismissed all of plaintiffs' state law claims. Finally, because all of the federal and state law claims were dismissed, plaintiffs' claim against Ms. Fiorina seeking to impose a constructive trust was also dismissed. With the exception of the federal claim, the court's order gives plaintiffs 20 days to amend the complaint and state a viable cause of action.

Gibson Dunn Secures Victory for Bjurman Barry in Second Circuit

Gibson Dunn secured an important victory in the Second Circuit for **Bjurman, Barry & Associates** ("BB&A"), and one of the mutual funds that BB&A advises in a securities case brought by a professional shareholder plaintiff. Gibson Dunn handled both the appellate and district court proceedings for BB&A, as well as related Delaware state court litigation.

In both the district and appellate courts, plaintiff alleged that BB&A breached its fiduciary duties under section 36(b) of the Investment Company Act by causing the Fund to incur excessive fees for promoting, marketing, and distribution services provided to the Fund by third party broker-dealers. After discovery definitively established that these fees were paid directly by the Fund to various broker-dealers, and that the investment advisor, BB&A, had not received any of the fees, Gibson Dunn moved for summary judgment. The District Court, the Honorable Denise L. Cote presiding, granted Gibson Dunn's motion on the basis that the investment advisor was not, as required under the statute, the "recipient" of the fees at issue. Judge Cote specifically rejected plaintiff's two-pronged argument that BB&A nonetheless should be liable as an "indirect recipient" of the fees: (1) either as a "pass-through" recipient where it was alleged that BB&A was a conduit through which the fees flowed from the Fund to the broker-dealers, or (2) as the indirect beneficiary of the fees where the payment of such fees by the Fund was alleged to have extinguished BB&A's obligation to pay the broker-dealers for those fees.

On appeal, Gibson Dunn urged the Second Circuit to adopt the lower court's reasoning that Section 36(b) must be interpreted narrowly, and that in order for liability to attach, a defendant must have been an actual recipient of the fees at issue, not merely an indirect beneficiary. The plaintiff argued in opposition that both public policy and the Securities and Exchange Commission's interpretive releases suggested a broader reading of section 36(b) liability to include indirect recipients. On January 31, 2007, a panel of Second Circuit judges comprised of the Honorable Robert A. Katzmann, the Honorable Peter W. Hall, and the Honorable David G. Trager (sitting by designation), unanimously affirmed the lower court's decision and held that the mere fact that BB&A may have been liable for the fees had the Fund not paid for them, did not make them "recipients" of such fees, under the meaning of Section 36(b).

Following the Second Circuit's decision, plaintiff agreed to withdraw, with prejudice, its companion case in the Delaware Chancery Court which alleged breach of fiduciary duties against the fund and its trustees.

Gibson Dunn Successfully Defends Parlux Fragrance Against Insurgents' Effort to Replace Entire Board

Gibson Dunn represented **Parlux Fragrance** in early 2007 in a successful defense of a consent solicitation by an activist shareholder to replace the entire board. On January 22, 2007, Gibson Dunn filed suit in the United States District Court for the Southern District of New York against Quality King Distributors, Inc., Model Reorg, Inc., Glenn Nussdorf ("Nussdorf"), Michael Katz, Joshua Angel, Anthony D' Agostino, Neil Katz and Robert Mitzman on behalf of Parlux Fragrances. The suit alleged that Nussdorf and

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entities and individuals that he controlled had improperly sought to replace the then-current Parlux Board of Directors (the "Board") with an entirely new slate of directors, including Nussdorf, through a consent solicitation process. Specifically, Parlux alleged that Nussdorf and the entities that he controlled were direct competitors of Parlux, and thus, that the consent solicitation violated antitrust and securities laws. Parlux sought a temporary restraining order and preliminary injunction prohibiting the defendants and their agents from serving on the Board and from soliciting consents, among other relief. After achieving, in effect, a stay on the consent solicitation following our emergency application for relief on both antitrust and securities grounds, and following extensive and expedited discovery, the lawsuit was settled. As part of the settlement, Parlux's suit against the defendants was withdrawn and the defendants' consent solicitation was terminated.

Gibson Dunn Wins Dismissal of Derivative Suit Against Janus Capital Group

Gibson Dunn scored a victory for **Janus Capital Group** in January 2007 by securing a dismissal with prejudice of a shareholder derivative action against the Janus Board of Directors in the mutual fund “market timing” litigation pending in the District of Maryland. The complaint alleged that the Board of Directors should be held personally liable for failing to detect and prevent market timing and late trading in the Janus mutual funds. Gibson Dunn moved to dismiss the complaint for failure to make pre-suit demand on the Board. The district court dismissed the complaint, holding that demand was not excused because the complaint’s generalized allegations did not establish that a majority of the Board faced a substantial likelihood of personal liability.

Gibson Dunn Obtains Dismissal of Securities Class Action In Wine Industry Takeover Battle

On December 30, 2006 Judge Martin J. Jenkins of the United States District Court for the Northern District of California granted the motion of our clients **Jeffrey B. O'Neill and O'Neill Acquisition Co., LLC,** as well as **Golden State Vintners Inc.** ("GSV") and certain of its senior officers, to dismiss a securities class action filed by the Lerach firm arising out of a takeover battle between our clients and a competing bidder, The Wine Group ("TWG"), in which our client ultimately was the unsuccessful bidder. The class action was brought on behalf of a class of sellers of GSV stock, who alleged that they sold their shares before the release of news that the company was going to be bought out for a higher price than the current trading price. The complaint alleged that defendants knew, but failed to disclose, that (1) The Wine Group was interested in making an offer to buy the company, (2) our client O'Neill also wanted to buy the company, and (3) a likely bidding war would dramatically increase the stock price. Plaintiffs also alleged insider trading by O'Neill and members of his buy-out group. At the time, O'Neill was President, CEO, and a director of GSV.

This is the second complaint Judge Jenkins has dismissed in this class action. As with the original complaint, Judge Jenkins dismissed the first amended complaint in its entirety, finding that plaintiffs had failed to adequately allege either the falsity of the

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challenged statements or defendants' scienter with respect to those statements under the heightened pleading standards of the Private Securities Litigation Reform Act. Judge Jenkins also found that new factual allegations based on the accounts of seven confidential witnesses were insufficient to meet the PSLRA's pleading standards, and that the named plaintiff lacked standing to bring claims based on later disclosures included in the amended complaint because the named plaintiff had sold his stock by the time those disclosures were made. Judge Jenkins also found that plaintiffs had failed to plead sufficient facts to support a claim of insider trading under either a "classical" or "misappropriation" theory. The Court granted plaintiffs leave to amend, noting that it may be possible to name other class members that have standing to assert claims with respect to the later disclosures. Judge Jenkins did not opine on the merits of the claims based on the later disclosures.

Federal Judge in Dallas Increases Fee Award to NASD and Addresses Attorney Conduct

On December 20, 2006, Chief Judge Joe Fish of the United States District Court for the Northern District of Texas denied plaintiffs' motion for reconsideration of an earlier order in which the court had (i) dismissed plaintiffs' complaint, (ii) denied plaintiffs' motion for sanctions against Dallas partner Thom McGraw, associate John Guild, and a NASD lawyer, and (iii) awarded NASD nearly $25,000 in fees incurred opposing the sanctions motion. The court granted **NASD** additional fees of more than $11,000 incurred in defending the motion to reconsider. The court also signaled in no uncertain terms its displeasure with plaintiffs' conduct and made clear that there are limits to the court's patience with respect to vexatious conduct and the wasting of judicial resources.

In their motion, plaintiffs' sought fees for having to address what plaintiffs' characterized as NASD's improper arguments. In response, Judge Fish wrote: "The court is stunned by the plaintiffs' audacity in requesting attorney's fees to sanction the defendant for its effective advocacy on this motion for reconsideration. The plaintiffs' request is baseless and vexatious. More tellingly though, this request is an indication of the fact that the prior award of attorney's fees was insufficient to forestall these plaintiffs from continuing to ask for sanctions where their request has no foundation in the law." Even more pointedly: "The court suggests to the plaintiffs that, rather than volunteering unsolicited advice on effective advocacy in the federal courts, they should restrain themselves from wasting limited judicial resources. Furthermore, the court recommends that they more thoroughly familiarize themselves with the Federal and Local Rules of Civil Procedure before returning to the federal courts on this or any other matter. The lessons of procedure learned during this litigation have come at a heavy price to these plaintiffs; it is the sincere desire of this court that they should embrace those lessons, despite the negative ramifications of their behavior to this point, and that they aspire to a higher plane of advocacy in the future."

Gibson Dunn Wins Dismissal of Securities Class Action Against Marsh & McLennan Companies Inc.

On October 17, 2006, Gibson Dunn won a motion to dismiss all claims asserted against **Marsh & McLennan Companies, Inc.** in a putative securities class action brought in the United States District Court for the Southern District of New York on behalf of purchasers and acquirers of common stock of Axis Capital Holdings Limited. Following the decision, the plaintiffs decided not to amend their complaint and did not appeal the dismissal.

Shareholder's Takeover Attempt of Drug Company Thwarted

Gibson Dunn came to the rescue of **Delcath Systems, Inc.**, a publicly-traded drug development company, under siege from an activist shareholder, hedge fund Laddcap Value Partners LP, which was trying to seize control of the company. Laddcap was Delcath's largest shareholder, holding more than 11 percent of the company's outstanding stock. In late July 2006, Laddcap launched a consent solicitation to replace Delcath's entire board with its own slate and then announced to the market that it had obtained sufficient written consents to accomplish that end.

Gibson Dunn developed a two-pronged litigation strategy, suing Laddcap and seeking a temporary restraining order in federal court in the Southern District of New York for violations of the Securities Exchange Act of 1934, and suing Delcath's former Director of Operations for fiduciary breaches in Connecticut state court after he defected to join the Laddcap slate. In August 2006, U.S. District Judge Loretta A. Preska issued a temporary restraining order blocking Laddcap's takeover efforts and further ordered expedited discovery of Laddcap's computer files. Gibson Dunn obtained similar emergency relief in the Connecticut action against Delcath's former Director of Operations. Over two months of intensive emergency litigation involving more than a dozen court hearings in two jurisdictions and a federal appellate argument, Gibson Dunn's team prevailed at every turn and, finally, on the eve of trial in October 2006, Laddcap abandoned its quest for control of Delcath and agreed to a lopsided settlement.

Gibson Dunn Obtains Dismissal of Securities Class Action Against Underwriters of Star Gas Partners

On August 21, 2006, Gibson Dunn secured a dismissal with prejudice for **A.G. Edwards & Sons, Inc., RBC Capital Markets Corporation** and **UBS Investment Bank** in a securities class action pending in the United States District Court for the District of Connecticut. The action was commenced by purchasers of securities of Star Gas Partners L.P. against various defendants, including the above-noted underwriters in connection with two Star Gas securities offerings. Star Gas is the nation's largest retail distributor of home heating oil. On October 18, 2004, the company's stock price dropped 80% after Star Gas announced a substantial decline in earnings due, in part, to high customer attrition and the inability to pass along to customers the full effect of record heating oil prices. The plaintiffs alleged that the underwriter defendants violated

sections 11 and 12(a)(2) based upon purportedly misleading statements and/or omissions contained in the prospectuses issued in connection with two Star Gas securities offerings. In dismissing the case with prejudice as against all defendants, Judge Janet Bond Arterton found that plaintiffs' allegations were "insufficient as a matter of law to state a securities law violation because they do not allege any statement that was actually false or misleading when made."

Gibson Dunn Obtains Dismissal of Securities Class Action Against Thoratec Corporation

On May 10, 2006 Judge Ronald M. Whyte of the United States District Court for the Northern District of California granted the motion filed by our client **Thoratec Corporation** and certain of its senior officers to dismiss a securities class action alleging that defendants (1) made false and misleading statements regarding expected sales and future prospects of a key Thoratec product, the HeartMate XVE; and (2) concealed adverse material facts about the HeartMate XVE. Thoratec is a leading medical heart device company. The products involved in the case are new, state-of-the art devices designed to extend the life of terminally ill patients. Judge Whyte dismissed the class action complaint in its entirety, finding that plaintiffs had failed to adequately allege either the falsity of the challenged statements or defendants' scienter with respect to those statements under the heightened pleading standards of the Private Securities Litigation Reform Act. In doing so, Judge Whyte explicitly rejected plaintiffs' argument that the Court should follow the Seventh Circuit's controversial decision in *Asher v. Baxter Int'l, Inc.*, which had held that the PSLRA "safe harbor" could not be invoked at the pleading stage, and that plaintiffs should be permitted to conduct discovery into management's state of mind before the court can decide whether a company had properly provided meaningful cautionary language in conjunction with any forward looking statements. This was plaintiffs' first complaint, and the Court granted plaintiffs leave to amend.

Gibson Dunn Wins Challenge to SEC Mutual Fund Rule in D.C. Circuit on Behalf of U.S. Chamber of Commerce

On April 7, 2006, the United States Court of Appeals for the District of Columbia Circuit granted a petition for review of Gibson Dunn client **Chamber of Commerce of the United States of America**. In granting the petition, the D.C. Circuit vacated two key provisions of the SEC's mutual fund governance rule. The matter arose from the Commission's re-adoption of the two provisions just eight days after the Court had declared them unlawful and remanded them to the Commission in June 2005. (Gibson Dunn represented the Chamber in the earlier successful action as well.) In response to the Commission's actions, Gibson Dunn filed an emergency motion seeking a stay of the readopted rules. The Court granted a rare stay in response to the motion. On the merits, the D.C. Circuit's April 7 decision adopted Gibson Dunn's argument that the SEC had violated the Administrative Procedure Act by relying extensively on evidence outside the administrative record, without providing for public comment.

Gibson Dunn Obtains Dismissal of Securities Class Action for Belo Corp., Officers and Directors

On March 30, 2006, the United States District Court for the Northern District of Texas granted the motion to dismiss filed by **Belo Corp**. and its officers and directors in a securities class action arising from circulation overstatements at Belo's flagship newspaper, *The Dallas Morning News* . In a 59-page opinion, the Court held that plaintiff improperly relied on "group pleading" and failed to allege facts giving rise to a strong inference of scienter on the part of the individual defendants and, by extension, Belo Corp. itself. The suit was filed shortly after Belo Corp. announced, in August 2004, that circulation figures at *The Dallas Morning News* had been overstated, resulting in overcharges to advertisers. According to plaintiff, the circulation overstatements were part of a scheme hatched by Belo Corp. management to inflate advertising revenue and prop up the price of Belo Corp. stock. The Court, however, agreed with defendants' position that plaintiff failed to distinguish among the individual defendants and failed to allege specific acts by Belo officers or directors that satisfy the PSLRA requirement of a "strong" inference of scienter: "Plaintiffs must distinguish among defendants and allege the role of each. Corporate officers are *not* liable for acts solely because they are officers, even where their day-to-day involvement in the corporation is pleaded." The Court gave plaintiff leave to file an amended complaint but suggested that it was unlikely to do so again.

Gibson Dunn Secures Review in California Supreme Court for PricewaterhouseCoopers LLP

On March 22, 2006, the California Supreme Court granted **PricewaterhouseCoopers LLP's** (PwC's) petition for review of a decision reinstating claims against the firm for aiding and abetting fraud based on a failure to disclose (*Frame v. PricewaterhouseCoopers LLP,* 134 Cal. App. 4th 396 (2005).) The Court of Appeals held that PwC could be held liable to non-client investors for "substantially assisting" a fraud, if the firm's duty to *its clients* obligated it to disclose information pertaining to the alleged fraud to the nonclient investors. In its petition for review, PwC argued that the Court of Appeal's decision upset longstanding principles of tort law, whereby mere nondisclosure can give rise to liability only if the defendant owed the plaintiff an independent legal duty to speak, and threatened to undermine the carefully crafted limitations on auditor liability announced in *Bily v. Arthur Young & Co.*, 3 Cal. 4th 370 (1992). The underlying litigation resulted from the collapse of a large Ponzi scheme run by the infamous Michael Fanghella. PwC was retained to audit the financial statements of two limited partnerships defrauded by Fanghella, but was fired before it issued any audit reports. After nearly four years of hard-fought litigation, including one previous trip to the California Supreme Court (see *Grafton Partners v. Superior Court,* 36 Cal. 4th 944 (Cal. 2005)), trial was set to begin in the case on April 17. News of the California Supreme Court's grant of review reached the parties in the midst of their final pre-trial mediation, however, and prompted settlement.

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Gibson Dunn Lawyers Win Dismissal with Prejudice on Behalf of Underwriters in '33 Act Case Sounding in Fraud

On March 1, 2006, Gibson Dunn won the complete dismissal, with prejudice, of a class action brought under Sections 11 and 12(b)(2) of the Securities Act of 1933 against **Goldman Sachs & Co., Merrill Lynch, Pierce, Fenner & Smith Inc., Thomas Weisel Partners LLC, and Needham & Company**, the four underwriters of the initial public offering of Leadis Technology, Inc., a semiconductor company that designs, develops and markets display drivers for LCD and OLED displays. Plaintiffs alleged that Leadis' IPO Prospectus was materially false or misleading, primarily because certain statements pertaining to pricing pressures and demand in the industry and Leadis' continued relationship with its customers were made as forward-looking statements when, as plaintiffs alleged, the warned-of contingencies already had come to pass. Gibson Dunn filed a motion to dismiss the consolidated complaint on the grounds that plaintiffs' claims sounded in fraud, and thus had to be pled with particularity under Federal Rule of Civil Procedure 9(b), which plaintiffs had failed to do. Judge Charles R. Breyer of the U.S. District Court for the Northern District of California agreed, and dismissed the case with prejudice.

Gibson Dunn Wins Case in Ninth Circuit for PwC

On February 23, 2006 the United States Court of Appeals for the Ninth Circuit issued its opinion affirming the District Court's dismissal of a securities class action complaint against **PricewaterhouseCoopers LLP**. The matter arose out of the insolvency of PwC's audit client PHP Healthcare, which followed a spectacular collapse three months after PwC had issued a clean audit opinion on the financial statements. PHP was liquidated and the insiders all settled, which left PwC as the sole defendant in the class action case. On behalf of PwC, we filed a succession of pleading motions which were heard by District Court Judge Mariana Pfaelzer. The Judge dismissed the Third Amended Complaint without leave to amend, finding that the Plaintiffs had not sufficiently alleged that PwC acted with "scienter" in connection with its audit work and the unqualified opinion which PwC had given on the company's financial statements. The Plaintiffs then appealed to the Ninth Circuit.

Oral argument on the appeal was held on February 8, 2006 before a panel consisting of Judges Beezer, Gould and T.G. Nelson. The opinion rendered two weeks later affirmed in all respects the District Court's dismissal, including specifically that Plaintiffs' 115-page complaint did not allege with specificity facts which raised a strong inference that PwC acted with the state of mind necessary to constitute a violation of Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5 promulgated under that section.

Gibson Dunn Lawyers Defeat Derivative Claim Against Las Vegas Sands Directors and Officers

On January 26, 2006, Gibson Dunn won the complete dismissal of a derivative complaint filed against the officers and directors of Gibson Dunn client **Las Vegas Sands Corporation** (owner and operator of the Venetian Hotel) in the Eighth Judicial District Court, Clark County (Las Vegas), Nevada. Plaintiffs alleged that certain officers

of the Company were paid excessive compensation under their employment and other agreements, and that the approval of these compensation agreements by the directors was made in violation of their fiduciary duties. On behalf of the Individual Defendants, Gibson Dunn filed a motion to dismiss the consolidated complaint (containing breach of fiduciary duty and unjust enrichment causes of action) on the grounds that Plaintiffs lacked standing to pursue the claims because the employment agreements and compensation policies were established prior to the Company's Initial Public Offering, and thus before Plaintiffs acquired any interest in the Company. Plaintiffs asserted they had standing under the "continuing wrong" doctrine because the challenged compensation continues to be paid. After reviewing the extensive briefing and hearing argument, Judge Kathy Hardcastle granted the motion in full and ordered the case dismissed in its entirety.

Gibson Dunn Obtains Summary Judgment in ERISA Litigation on Behalf of Cardinal Health, Inc.

On January 10, 2006, Gibson Dunn attorneys in Los Angeles won summary judgment for **Syncor International Corporation** (now operating as a subsidiary of our client Cardinal Health, Inc.) in an ERISA action pending in Federal Court in Los Angeles. Plaintiffs - a certified class of Syncor's ERISA plan participants - sought over $65 million in damages, alleging that Syncor breached its ERISA fiduciary duties of prudence and monitoring by offering Syncor stock under the company's ERISA plan. Plaintiffs claimed that Syncor stock was an imprudent investment for ERISA participants based on allegedly improper payments made by Syncor's international subsidiaries in violation of the Foreign Corrupt Practices Act (FCPA). Plaintiffs argued that a guilty plea for violation of the FCPA by Syncor's Taiwanese subsidiary, coupled with a 50% drop in Syncor's stock price on public disclosure of potentially improper payments, constituted sufficient evidence to support a claim for violation of the duty of prudence or at least raise a triable issue of fact as to the same.

The Gibson Dunn team argued that claims such as Plaintiffs' should be subject to an extremely high burden of proof, i.e., requiring proof of serious financial decline - bankruptcy or imminent financial collapse - coupled with the risk of insider self-dealing. The Gibson Dunn team pointed to the facts that Syncor remained financially viable, that the international division alleged to have made improper payments accounted for only a small percentage of the company's' profits and operating income, that Syncor stock outperformed market benchmarks during the class period, and that when Cardinal Health purchased Syncor on the final day of the Class Period, it paid a price within the range Syncor was trading at prior to the announcement of potentially improper payments. Finally, the Gibson Dunn team argued that Plaintiffs' monitoring claim failed as derivative of their prudence claim: since Syncor's ERISA committee had not breached the duty of prudence by offering company stock in the ERISA plan, Syncor's Board of Directors could not be liable for failing to more closely monitor the committee.

Quoting liberally from Gibson Dunn's motion for summary judgment, the Court agreed with every single one of Gibson Dunn's points, and granted Defendants summary judgment on both claims. The Order addresses favorably to defendants a number of important issues concerning the burgeoning field of ERISA company stock cases.