

ROPES & GRAY'S NEW YORK LITIGATION & ENFORCEMENT PRACTICE has expanded significantly during the past few years and now comprises over 70 litigators. The growth of the group is reflected in the breadth and scope of the high-stakes matters handled this past year by litigators in New York, some of which are highlighted in this newsletter.

HIGH-PROFILE MATTERS

- We were retained by a subcommittee of the board of directors of the **United States Olympic Committee** to conduct an independent investigation into the abuse of hundreds of elite and Olympic gymnasts and other children by Larry Nassar. The 233-page independent report, which drew upon over 100 witness interviews and review of over 1.3 million documents, was released on December 10, 2018. The scope of the investigation extended not only to “who knew what when” and what was and was not done in response, but also to any systemic deficiencies, failures of oversight, cultural conditions or other factors contributing to Nassar’s serial sexual abuse of young athletes over an extended period of time. The independent investigation also looked across elite athletics and Olympic sports to identify any relevant facts and circumstances or patterns across the National Governing Bodies for Olympic sports to more broadly inform our assessment of contributing factors and conditions. The investigators had complete control over the investigation, the questions asked, the documents reviewed and the findings made.
- We secured a victory in the Delaware Supreme Court on behalf of industrialist **William I. Koch and certain of his affiliated investment vehicles**, who together compose the majority stakeholders of Oxbow Carbon LLC, seeking to prevent a forced sale of Oxbow Carbon by its minority members. The case was initially tried in the Delaware Court of Chancery, which found that Mr. Koch had ad-

vanced the only logical interpretation of the LLC Agreement—which operated to prevent a forced sale under current market conditions—but that an implied covenant existed to reverse that result. In an en banc decision issued on January 19, 2019, the Delaware Supreme Court found that the plain language of the LLC Agreement controlled and reversed the Chancery Court’s implied covenant holding, vindicating Mr. Koch’s position as argued by Ropes & Gray in the Supreme Court. *In re Oxbow Carbon LLC Unitholder Litigation*

- We represent a **major pharmaceutical manufacturer** in nationwide litigation concerning the manufacture, distribution and sale of opioids. The plaintiffs, mostly counties and municipalities, have filed more than a thousand suits in federal and state courts alleging various statutory and common law claims regarding the defendants’ alleged false marketing of opioids and failures to adequately monitor suspicious opioid orders. In connection with that representation, we obtained a preliminary injunction from the Southern District of New York on behalf of the client. The injunction, directed against New York State officials, enjoined the enforcement of New York’s Opioid Stewardship Act (OSA). The OSA would have forced manufacturers and distributors of opioid medications to pay a \$100 million annual penalty while forbidding manufacturers and distributors from passing any portion of that annual cost to purchasers. For our client and other generic manufacturers of opioid medications, the OSA’s unprecedented combination of steep financial penalties (based on a volumetric calculation that overly burdens the sale of generic opioids) and the “pass on” prohibition would have required our client to sell every FDA-approved generic opioid medication in New York at a loss, potentially forcing the company to exit the New York opioid market entirely. Crediting Ropes & Gray’s arguments, Judge Failla invalidated the OSA as unconstitutional under the Dormant Commerce Clause because it impermissibly discriminates against interstate commerce.

SIGNIFICANT MATTERS FOR FINANCIAL INSTITUTIONS

- We secured the dismissal with prejudice of a federal securities class action brought against some of the country's leading investment banks, including **Deutsche Bank and Merrill Lynch**. Our clients underwrote the \$450 million secondary public offering of Acacia Communications, Inc. Following a significant decline in Acacia's stock price, a series of stockholders filed putative class-action lawsuits claiming that Acacia and the underwriters violated the Securities Act and the Exchange Act for alleged failures to disclose purportedly material information. The court rejected the plaintiffs' claims that the offering materials violated the federal securities laws, and denied their motion for leave to amend as futile, dismissing the action with prejudice. *Tharp v. Acacia Communications, Inc.*
- We represent a **leading private equity firm** and related parties in lawsuits in New York federal and state court alleging fraudulent conveyance, alter ego and other claims in connection with the recapitalization of a European portfolio company. The plaintiffs, which include liquidators, an indenture trustee and bondholders, assert claims in excess of \$2 billion. Two prior federal court cases have resulted in decisions by the Second Circuit Court of Appeals favorable to our clients, and we have achieved multiple dismissals of various actions.
- We continue to be on the cutting edge of large dollar securitization litigations on behalf of global asset managers, both on the plaintiffs' side and the defense side. Representative clients in 2018 include **PIMCO and TIAA**, with matters in the commercial mortgage, residential mortgage, whole company securitization and consumer loan space. For example, we are currently serving as defense counsel in a case alleging violations of a state RICO statute that attacks the right of investment managers to report misconduct to government regulators in an effort to protect their clients' investments.
- We represent the underwriter defendants, including **Morgan Stanley, Citigroup, RBC and UBS**, in class-action securities litigation related to alleged misstatements made by AmTrust Financial Services. Our clients underwrote two offerings of AmTrust stock, which plaintiffs allege give rise to claims under Sections 11 and 12(a)(2) of the Securities Act. The plaintiffs have separately pled Exchange Act claims against AmTrust and certain of its current and former officers and directors. The underwriters' motion to dismiss is currently pending before Judge Kaplan of the Southern District of New York. *In re AmTrust Financial Services Inc. Securities Litigation*
- We obtained a complete dismissal of a class-action lawsuit filed against **Goldman Sachs** in Kansas state court that challenged the acquisition of CEC Entertainment, Inc.—the parent of Chuck E. Cheese's—by an affiliate of Apollo Global Management. The plaintiffs alleged that the CEC board of directors breached its fiduciary duties in connection with that transaction by approving it at an inadequate price through an inadequate process, and that Goldman Sachs aided and abetted those breaches. Ultimately, both the court and the court-appointed special master (retired Vice Chancellor of the Delaware Court of Chancery John W. Noble) concluded that the plaintiffs' claims should be dismissed. *In re CEC Entertainment, Inc. Stockholder Litigation*
- We secured a complete victory for private equity client **Centre Lane Partners** in a suit filed in the Southern District of New York alleging that our client's funds (ZM Funds) and the funds' principals engaged in "short-swing" securities trading in violation of Section 16(b) of the Exchange Act. Judge Forrest of the Southern District largely adopted Ropes & Gray's arguments and cited authority, granted summary judgment for ZM, and terminated the case. *Gibbons v. Morgan, et al.*
- We obtained a complete, with-prejudice dismissal of a class-action lawsuit filed against investment bank **Houlihan Lokey** in the Delaware Court of Chancery. The suit challenged the acquisition of Synutra International, Inc. by its controlling stockholder, arguing that Synutra board members breached their fiduciary duties in connection with the transaction, and that Houlihan Lokey aided and abetted those breaches. *In re Synutra International Inc. Stockholder Litigation*
- We are representing a group of investment banks, including **J.P. Morgan and China Renaissance Securities**, in a federal securities class action filed in connection with the IPO of Jianpu Technology Inc., a China-based corporation that provides a platform for consumer lend-

ing. That action is pending in the Southern District of New York. *Panther Partners Inc. v. Jianpu Technology Inc., et al.*

- We are currently representing **Holiday Acquisition Holdings LLC**, one of the nation's largest owners and operators of senior living facilities, and a portfolio company of funds affiliated with **Fortress Investment Group LLC** in a stockholder derivative litigation filed in the Delaware Court of Chancery. In June 2015, New Senior Investment Group, Inc., a publicly traded REIT that was externally managed by Fortress, agreed to acquire a portfolio of 28 facilities from Holiday for over \$630 million and subsequently entered into management agreements under which Holiday continued to manage those properties. The stockholder plaintiff claims that the New Senior directors breached their fiduciary duties in connection with the transaction, and that Fortress and Holiday aided and abetted those alleged breaches. The matter is scheduled for trial on July 29, 2019. *Cumming v. Edens, et al.*
- We represent a former **Deutsche Bank AG commodities trader** who has been charged with "spoofing" in the precious metals markets on the Chicago Mercantile Exchange. We are currently defending the client in federal district court in Chicago against pending criminal and civil charges by the DOJ and the U.S. Commodity Futures Trading Commission.
- We represented an **individual** in connection with the DOJ special counsel investigation. Specifically, we advised the client with respect to the special counsel's money laundering, bank fraud and tax evasion case against Paul Manafort, President Trump's former campaign chairman.
- We defended **First Guaranty Mortgage Corporation**, a portfolio company of a large investment manager client, in a \$100 million bet-the-company breach of contract litigation filed in Minnesota federal district court. After over two years of litigation, involving 14 experts for each side, the litigation concluded prior to trial in a private settlement. *Residential Funding Co. LLC v. First Guaranty Mortgage Corp.*
- We represented **German American Capital Corporation** (a subsidiary of Deutsche Bank) in a litigation filed in

New York Supreme Court arising out of a luxury condominium project in Tribeca. GACC made mortgage and mezzanine loans to the developer of the project, who then defaulted. After GACC foreclosed, the borrower filed suit, alleging breach of contract and conversion. After oral argument, the court granted GACC's motion to dismiss. Following plaintiff's appeal and oral argument, the decision was affirmed by the Appellate Division, First Department, of New York Supreme Court in May 2018. *87 Mezz Member LLC v. German American Capital Corporation*

SIGNIFICANT MATTERS FOR PHARMACEUTICAL COMPANIES AND OTHER LIFE SCIENCES COMPANIES

- We secured complete dismissal of a securities class-action lawsuit brought against clinical-stage biopharmaceutical company **Stemline Therapeutics, Inc.** and its officers and directors under section 10(b) of the Exchange Act. The litigation arose from Stemline's alleged failure to disclose adverse events in a clinical drug trial that occurred prior to a \$50 million public securities offering. In March 2018, the Southern District of New York dismissed the case in its entirety. *In re Stemline Therapeutics, Inc. Securities Litigation*
- We represent biopharmaceutical company **TG Therapeutics, Inc.** in a securities class-action filed in October 2018 in the Southern District of New York against the company and one of its officers under Section 10(b) of the Exchange Act. Plaintiffs allege that TG Therapeutics made false and/or misleading statements and/or failed to disclose various facts regarding a clinical trial. *Reinmann v. TG Therapeutics, Inc.*
- We represented a **global medical device maker** in an arbitration arising out of a long-term commercial agreement with a supplier. In 2017, the supplier claimed that our client materially breached that agreement, purported to terminate the agreement and demanded \$415 million in damages. At the outset of the dispute, we secured a preliminary injunction barring the supplier from terminating the parties' agreement during the pendency of the arbitration. We then represented the client in a four-day arbitration hearing in which we examined an array of fact and expert witnesses. On the eve of the arbitrator's award, the parties reached a private settlement on terms favorable to our client.

- We won a complete victory on behalf of **Shire US Holdings Inc.** in the Delaware Court of Chancery in a breach of contract litigation with Fortis Advisors LLC, the agent for the former stockholders of SARcode Bioscience Inc. The former SARcode stockholders alleged that, based on the results of a clinical trial and subsequent regulatory approval of the drug Lifitegrast, they were entitled to milestone payments of \$425 million. The court dismissed the case in its entirety, crediting the arguments advanced by Ropes & Gray. Fortis voluntarily dismissed its appeal. *Fortis Advisors LLC v. Shire US Holdings Inc.*
- In March 2018, we secured a complete dismissal for a **life sciences company** and its two primary founders in an action filed in New York Supreme Court by the third founder, relating to his ownership stake in the company. Plaintiff sought relief under theories of breach of contract, unjust enrichment and promissory estoppel. The court rejected those arguments and dismissed the plaintiff's claims in their entirety.
- We represented the special committee of the **board of directors of a New York-based biopharmaceutical company** in connection with a stockholder demand concerning compensation awarded to one of the company's senior officers. We conducted an investigation for the special committee and ultimately convinced the stockholder's counsel to abandon its claims.
- We successfully represented a **global medical device company** in connection with a criminal antitrust investigation led by the DOJ into alleged price-fixing and other anticompetitive conduct. After an almost two-year-long investigation, the DOJ informed Ropes & Gray that it was declining to prosecute and closed the grand jury investigation—a significant victory for our client.
- We represented a **New York-based real estate management company** and two individuals in connection with a DOJ-led False Claims Act action that was recently settled, without any liability for our clients, after an almost two-year investigation. The DOJ's investigation involved allegations that certain skilled nursing facilities and consulting companies with which they contracted billed Medicare for skilled therapy services that were either not delivered or that were medically unnecessary.

OTHER NOTABLE MATTERS

- We represented the **founder and CEO of a specialty lending business** in multiple arbitrations and related litigation. The disputes arose out of the CEO/founder's trigger of his right to force a sale of the business to a third party. In May 2018, Judge Zachary Carter of the Southern District of New York affirmed the first arbitration award in our client's favor (denying claim by JV partner that it had a right to buy the founder's shares at a fixed price), including a fee award of over \$2 million. That same month, a different arbitration panel ruled in our client's favor regarding key issues in the sales process and also awarded our client attorneys' fees.
- We represent **two firms** in overlapping investigations regarding alleged public corruption and bid rigging involving the administration of Andrew Cuomo, the governor of New York. Following the March 2018 conviction of Governor Cuomo's former top aide, Joseph Percoco, and the July 2018 conviction of Alain Kaloyeros, a primary engineer of Governor Cuomo's significant economic development initiative, this continues to be a high-profile case in the greater New York area.
- We secured a victory on behalf of an **elite New York City private school** in connection with an Article 78 proceeding in New York Supreme Court related to the school's multimillion-dollar campus redevelopment project. Following extensive briefing, discovery and oral arguments, the Supreme Court upheld the approval of the school's campus redevelopment project and dismissed the case. Petitioners did not appeal.
- We represent a **major New York-based real estate developer** in a litigation filed in the Commercial Division of New York Supreme Court by its JV partner. The litigation seeks to vacate an arbitration award we obtained for our client relating to a luxury condominium development and hotel in Manhattan. The dispute relates to a 33-story hotel and residential condominium building located in Midtown Manhattan. After a three-day hearing, the arbitrator ruled in our client's favor, awarding our client over \$1.25 million in attorneys' fees.



Ropes & Gray has **10 litigation & enforcement practice group partners** in its New York office, and approximately 60 associates and counsel.

GLOBAL REACH

Ropes & Gray serves clients through a global network of offices in the world's major centers of business, finance, technology and government. Across 17 time zones, approximately 1,400 attorneys based in the United States, Europe and Asia collaborate seamlessly to provide clients with the high-quality representation and uncompromising, round-the-clock service that have made Ropes & Gray one of the world's premier law firms.

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