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UPDATE: Vivendi Employs Creative Arguments on Damages and the Fraud-on-the-Market Theory to Prevent Class Recovery

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We posted on June 11 about some novel arguments used by **Vivendi Universal, S.A.** ("Vivendi") as part of its defense against **Southeastern Asset Management, Inc.** ("Southeastern"), a class member in *In re Vivendi Universal, S.A. Securities Litigation*, 02 Civ. 5571 (SAS) (S.D.N.Y.). **Southeastern's briefing** has revealed its response to some of Vivendi's arguments.

As described in our earlier post, Vivendi argues that Southeastern should not be able to recover on a fraud-on-the-market theory because Southeastern "knew" during the class period that the market had inaccurately priced Vivendi securities in regard to the same pricing factor (liquidity risk) about which Southeastern now claims the market was defrauded. **Southeastern's reply brief**, filed on June 12, sheds light on its side of the debate. (Southeastern's initial briefing on this motion appears unavailable on the public docket.) Southeastern argues that Vivendi's defense to the "fraud on the market" theory is a "false equivalence" as it applies to value investors such as Southeastern. While a value investor does believe that the market has mispriced a security, the value investor invests because of its belief that the market is free of fraud and will thus eventually price the security accurately. This is a sharp contrast, Southeastern argues, from distrusting the market due to fraud, even though both situations involve mispriced securities.

Southeastern points to the recent Supreme Court case ***Halliburton Co. v. Erica P. John Fund, Inc.,*** 134 S. Ct. 2398, 2405 (2014) ("Halliburton II"), where Justice Roberts described a value investor as believing not "that the market price accurately reflects public information at the time he transacts" but "that the market price will incorporate public information within a reasonable period." *Halliburton II* at 2405. In terms of the fraud-on-the-market theory, "[t]he value investor also presumably tries to estimate how undervalued or overvalued a particular stock is, and such estimates can be skewed by a market price tainted by fraud." *Id.* Consequently, Southeastern argues, the fraud-on-the-market theory applies directly to this case, and Vivendi's defense, as described above, should not be given weight by the court.

Southeastern also responds to Vivendi's point that Southeastern continued to purchase Vivendi shares even after the class period, remaining a major Vivendi investor to this day. Southeastern cites ***Acticon AG v. China N. E. Petroleum Holdings Ltd.***, 692 F 3d 34, 41 (2d Cir. 2012) for the premise that "an investor's decision to buy or hold post-class-period is properly treated as a second investment decision unrelated to its initial decision to purchase the stock," making Southeastern's investments in Vivendi outside the class period irrelevant. In addition, Southeastern argues that "fraud-related inflation" remained in the Vivendi securities "until the end of the Class Period … and that investors are entitled to recover damages based on [that] inflation." Thus, even if Southeastern was a value investor in (and profited from) Vivendi securities, Southeastern argues that it is still entitled to damages.

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