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PRIVATE EQUITY, RESTRUCTURING AND FINANCE DEVELOPMENTS

Trading in Distressed Debt

2009 undoubtedly will be a year of severe economic challenges. Analysts believe that the deepest recession since World War II will continue and worsen in the United States. Unemployment may well exceed 10%. With major financial institutions de-levering their balance sheets, credit was constricted for much of 2008 and likely will remain so for an extended period. Partly as a result, entire industries, from automobile manufacturing to retailing, are facing extreme contraction and even the prospect of collapse.

However, for the survivors of 2008's financial hurricane, 2009 also could be a year of unprecedented opportunity. Bank debt and bonds of good-quality companies are trading at historic lows. Hedge funds that have withstood the wave of investor redemptions, and private equity firms that have raised massive amounts of new capital but see few traditional investment outlets, may explore (or, for the veterans, reenter) the distressed debt market. While the economic and societal benefits of reintroducing liquidity to the debt markets are unquestionable, increased activity in this area no doubt will be met with increased regulatory scrutiny and litigation, particularly in the wake of the myriad financial scandals of the recent past. Some are buying for the enhanced returns available from reasonable credits, while others are buying on a "loan-to-own" basis with a view toward eventually becoming the equity owner of the underlying asset, and some are buying to profit from the potential "reorg" events that others will lead.

The attached note concerning the possession and use of information when buying and selling distressed debt (an abridged version of which was published in *The New York Law Journal*) may thus be of use during the coming year. The rules and customs of the distressed debt market are somewhat different from those that govern other trading markets, and it is important to be careful with information to avoid a problem. This note is meant as a general guide, and particular circumstances will require more detailed analysis. Moreover, prudent investors would be well-advised to have their specific trading policies and procedures reviewed for regulatory compliance and tailored to reflect not only generalized "best practices" but the specific context and framework in which each investor operates.

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The Use of Information in Trading Distressed Debt

Distressed debt is becoming an increasingly common element of our clients' businesses. This presents a number of important issues regarding the use of non-public information in connection with trading decisions. The following outline is designed to provide an overview of some key issues.

I. Insider Trading: When do federal securities anti-fraud rules apply to debt trading?

In order for the prohibition against insider trading under the federal securities laws to apply, the instruments being traded must be "securities." For instance, bonds are generally considered "securities" covered by the anti-fraud provisions of the U.S. securities laws. Interests in bank debt, however, typically have been considered *not* to constitute "securities" for purposes of the securities laws.[1] Because of this, the consensus has been that Rule 10b-5 (restricting insider trading) does not apply to trading in such interests.

However, the assumption that bank debt programs do not qualify as "securities" is not universally held. There are some, including former SEC Chairman Harvey Pitt, who believe that, as more non-banks trade in the bank debt market, bank debt could be considered a security.[2] There has been a lack of recent case law directly discussing these issues, and, in the last 10 years, the documentation and process governing the trading of bank debt has tended to converge with that for bonds that are traditional securities. Therefore, some take the most conservative approach, assuming that the law may change at any time, and treat trading in bank debt as they would treat trading in securities.

Even if bank debt is itself not a "security" and the most conservative approach is not taken, the use of information available as a result of holding bank debt may give rise to insider trading concerns with respect to other securities (such as common stock and bonds). For instance, unlawful insider trading may occur if an investor obtains non-public information as a result of being a bank lender or holder of bond or trade claims, and then trades in debt or equity "securities" (either alone or alongside bank debt). The key issue in such trading is not the purpose of the trade, but, rather, the possession of material non-public information that could result in a Rule 10b-5 violation. Therefore, even if bank debt is not itself considered a "security," it is important to monitor whether non-public information is obtained as a holder of bank debt and to understand how any such information impacts trading activities.

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[1] For a widely-cited case holding that a loan participation agreement among sophisticated financial institutions did not generate covered "securities," see *Banco Espanol de Credito v. Security Pacific National Bank*, 973 F.2d 51, 55–56 (2d Cir. 1992). Note that *Banco Espanol de Credito* did not consider the issue of common law fraud. Moreover, it is possible that subsequent courts analyzing these issues will reach a different conclusion regarding the status of bank debt as a "security." Indeed, in *Banco Espanol de Credito*, Judge Oakes would have held that the debt participations at issue were in fact "securities," *id.* at 56 (Oakes, J., dissenting), and the majority cautioned that "the manner in which participations in [the debt] instrument are used, pooled, or marketed might establish that such participations are securities," *id.*; *see also SEC v. Texas Int'l Co.*, 498 F. Supp. 1231 (N.D. Ill. 1980) (unsecured claims, including bank debt, entitled to receive stock pursuant to a confirmed bankruptcy plan of reorganization of insolvent debtor held to constitute "securities"). An eventual holding that bank debt programs are "securities" could lead to other sources of liability under the federal securities laws, including, for example, for failure to file a registration statement under the Securities Act of 1933, as amended.

[2] Christopher O'Leary, *The Loan Market's Biggest Bugaboo*, IDDmagazine.com, Dec. 5, 2004.

In addition, even if bank debt is not a "security," common law theories of wrongdoing nonetheless remain. Trading with a sophisticated counterparty through the use of a so-called "big boy" letter may help to shield an insider from common law fraud liability. However, "big boy" letters may present problems of their own, as discussed below.

II. Material Non-Public Information: What sort of information do investors have to be most careful with?

Insider trading liability arises from purchasing or selling a security based on material non-public information about a company. Under the U.S. securities laws, information is treated as material if there is a substantial likelihood that, considering all of the surrounding facts and circumstances, a reasonable person would consider that information important to an investment decision. Information need not be market moving in order to be material. Insider information can include, but is not limited to, information regarding negotiations leading to financial restructuring, potential mergers and acquisitions or other significant transactions, the making of arrangements preparatory to an exchange or tender offer, projections or other information about business performance that has not yet been publicly released, and extraordinary borrowings or liquidity problems, to cite just a few examples.

Although the law of insider trading is not static, it generally is understood that the law prohibits: (1) trading by a company's insider (or a temporary insider, such as an investment banker or lawyer) on the basis of material non-public information about the company where such insider would be breaching a duty to disclose or abstain; (2) trading by an "outsider" on the basis of material non-public information in violation of a duty to keep it confidential or when the information was otherwise misappropriated from any source; (3) disclosing such material non-public information to others in breach of a duty (tipping); or (4) trading on the basis of material non-public information that one knows, or should have known, was acquired (directly or indirectly) through a breach of an insider's duty, a breach of a confidence, or some other breach of duty or misappropriation.

Investors may find some comfort in the mosaic theory, which states that "a company has not disclosed material non-public information if it discloses non-material information to an analyst who subsequently puts together a 'mosaic' of non-material information, which, as a whole, is material non-public information."[3] The SEC approved of the mosaic theory in the release that accompanied the adoption of Regulation FD: "[A]n issuer is not prohibited from disclosing a non-material piece of information to an analyst, even if, unbeknownst to the issuer, that piece helps the analyst complete a 'mosaic' of information that, taken together, is material."[4] Relatedly, it should be the case that, if an investor's trading is influenced by its analysis or spin on insider information that is non-material in the first place, a violation will not be found. However, it may be difficult to demonstrate that a piece of information was not material in the case where completing the "mosaic" with that information had a strong influence on the decision to buy or sell.

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[3] Robert P. Sieland, Note, Caveat Emptor! *After All the Regulatory Hoopla, Securities Analysts Remain Conflicted on Wall Street*, 2003 U. Ill. L. Rev. 531, 537.

[4] Selective Disclosure and Insider Trading, Exchange Act Release No. 33-7881, 65 Fed. Reg. 51,716, 51,722 (Aug. 24, 2000).

The rules governing insider trading are complex and subtle. Any employees or consultants of the investor should notify the investor's legal department if they think that there is even a potential *issue* of material non-public information *or* any kind of breach of duty. Both compliance and reputational risk may be at stake.

III. Potential Safeguards: How can investors better protect themselves?

Information Restrictions. One way that an investor can manage information risk is either to restrict the way it moves across the organization or, alternatively, to decide not to receive it in the first place.

Limit Access. To avoid potential consequences of trading debt with non-public information, one strategy is to avoid any access to material non-public information until the investor has accumulated all of the claims or interests it needs to execute its strategy.

"Public Side" and "Private Side." In addition, generally with respect to bank debt where non-public information frequently is made available to syndicate members ("syndicate"-level information), the syndicate is managed so that an investor may opt to receive "public side" or "private side" information, generally choosing between the "public side" ability to trade or the "private side" access to information. Both "public side" and "private side" information generally is provided subject to express confidentiality requirements, and the biggest difference between "public side" and "private side" information is the quality of the information received. Thus, information on the "private side" usually is recognized by the issuer as containing or potentially containing material non-public information. (Note that this does not mean that "public side" information is always free from material non-public information.) To avoid issues with respect to the informational advantage of being on the "private side," an investor may opt not to take any "private side" information, and, therefore, avoid the restrictions on trading that would thereby arise. Alternatively, if an investor chooses "private side" access to information, the investor should trade only with counterparties with the same type of access to information (even if the counterparty elects not to receive the information itself), should be prepared to accept restrictions against trading in securities of the same issuer, and should consider (depending on the sensitivity of the information that the "private side" lender possesses) requiring counterparties to enter into "big boy" letters. In addition, if "private side" investors are part of a "steering committee" of bank lenders who receive more sensitive information than, or who are actively involved in negotiating a restructuring that has not yet been disclosed to, the broader "private side" group, such investors should consider even more stringent limits on trading in the bank debt, such as only trading with other "steering committee" members, or not trading at all, while the information disparity exists.

Some investors who recognize that they will be trading in bonds or other securities may opt not to receive even "public side" information, in order to avoid any conceivable issues that may arise from the receipt of such information. For example, it is at least theoretically possible that an issuer might inadvertently place material non-public information on the "public side" of a dataroom site instead of the "private side," or that an issuer might propose a loan modification or waiver that generally is not known to the investing public, has not been filed with the SEC, and could be material in the particular circumstances, and that the investor might thereby risk becoming "inadvertently" restricted by virtue of signing up for even "public side" information.

In dealing with the public side/private side choice, it is obviously important to limit clearly the authority to accept confidentiality restrictions and sign confidentiality agreements, lest employees and officers informally agree (or be accused of agreeing) to confidentiality arrangements. By limiting authority in this way, an investor will be better prepared to make these choices and will be in a better position to adopt effective compliance measures to control and monitor access to and avoid misuse of material non-public information.

Portfolio Companies. Information access also is important in the context of debt of a portfolio company where an investor may be an affiliate and/or may have representatives on a portfolio company's board or access to special information (for example, under a VCOC management rights letter). To help avoid allegations about the use of information, the investor should consider purchasing debt securities of a portfolio company only during a customary window period, such as for a short period after the announcement of quarterly results, and should avoid purchases during sensitive periods (such as near the quarter end until earnings are announced, or when the portfolio company is seriously pursuing a significant transaction). Window periods are not a panacea, however, and it will still be necessary before each trade to confirm that the investor is not otherwise in possession of material non-public information. Investing in the distressed debt of one's portfolio company potentially raises other non-informational risks, and so should be undertaken only after careful study.

Trading Walls. Another way to avoid the misuse of information is to employ some form of trading wall around the information within an investor's firm. Trading walls (or ethical walls), which are policies and procedures implemented within a financial institution that are designed to isolate trading from other activities, have been approved in a number of bankruptcy cases. However, while trading walls may work for some institutions, for small firms, a trading wall may not provide a robust defense because (1) trading walls are difficult to implement in small firms that are more dependent on individuals to serve a variety of functions, and (2) there could be skepticism about whether the trading wall was respected in such a small firm.

Trading walls are most helpful where it is possible to segregate different parts of an institution. For example, by law, members of an official committee in bankruptcy owe fiduciary duties to those they represent, such that the SEC has argued that "in a bankruptcy context, the members of an official committee are properly viewed as 'temporary insiders' of the debtor . . . [subject] to the same insider trading restrictions as true insiders such as corporate directors."[5] Trading walls are one potential solution to this problem. (A similar concept could be employed with respect to employees who have insider status for a portfolio company or are in a bank syndicate, *provided* that the investor is assured that its relationship or information with the issuer is not so significant as to make the organization itself an insider.) In some bankruptcy

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5 Brief for the SEC as Amicus Curiae in Support of Motion of Fidelity Mgmt. & Research Co., *In re* Federated Dep't Stores Inc., No. 1-90-00130, 1991 WL 11688857, at *5 (Bankr. S.D. Ohio Jan. 18, 1991) (supporting a motion by Fidelity Management & Research Company, a member of the Offical Bondholders' Committee, for an order permitting it to trade in the debtors' securities subject to effective implementation of a trading wall).

cases in recent years, given the size and diversity of trading activities that occur in many institutions, prospective committee members who have wanted to trade have requested that bankruptcy courts preapprove trading walls and other trading guidelines so as to attempt to immunize them from violating their fiduciary duties as committee members when trading in the debtor's claims and interests.[6]

Typically, an order approving a trading wall for committee members will require that the following information blocking procedures, among others, be implemented:

- The committee member must cause all of its personnel engaged in committee-related activities to execute a letter acknowledging that they may receive non-public information and that they are aware of the order and the procedures in effect with respect to the debtor's securities.

- Committee personnel may not share non-public committee information with other employees (except auditors and legal personnel for the purpose of rendering advice and who will not share such non-public committee information with other employees).

- Committee personnel must keep non-public information that is generated from committee activities in files inaccessible to other employees.

- Committee personnel must not receive information regarding trades related to the debtor in advance of such trades.

- Compliance department personnel must review, from time to time as necessary, trades made by non-committee personnel and the trading wall procedures to insure compliance with the order, and keep and maintain records of their review.

Outside of the bankruptcy context, it generally is expected that adequate trading walls will consist of certain minimum elements, including: (1) review of employee and proprietary trading;[7] (2) memorialization and documentation of firm procedures; (3) substantive supervision of interdepartmental communication by the firm's compliance department; and (4) procedures concerning proprietary trading when the firm is in possession of material non-public information. Trading walls also should include policies and procedures designed to limit the

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6 Since the concept of trading walls gained currency in *In re Federated Department Stores, Inc.*, 1991 WL 79143, No. 1-90-00130 (Bankr. S.D. Ohio Mar. 7, 1991), numerous bankruptcy courts have issued orders allowing committee members to trade in the debtor's securities provided that adequate information-blocking procedures are established. Recent cases in which such orders have been entered include *In re Calpine Corp.*, No. 05-60200 (S.D.N.Y. Jan. 25, 2006); *In re Delta Air Lines, Inc.*, No. 05-17923 (S.D.N.Y. Jan. 13, 2006); *In re Fibermark, Inc.*, No. 04-10463 (S.D.N.Y. Oct. 19, 2004); *In re Pacific Gas & Electric Co.*, No. 01-30923-DM (Bankr. N.D. Cal. June 26, 2001); and *In re Integrated Health Services, Inc.*, No. 00-389 (MFW) (Bankr. D. Del. May 4, 2000). Occasionally, a court will refrain from granting this relief. *See, e.g., In re* Spiegel, 292 B.R. 748, 749 (Bankr. S.D.N.Y. 2003); *In re* Leslie Fay, No. 93-B-41724 (Bankr. S.D.N.Y. Aug. 12, 1994).

7 For a recent SEC release analyzing and highlighting the importance of this element of the trading wall scheme, see *In the Matter of Morgan Stanley & Co. Inc. and Morgan Stanley DW Inc.,* Exchange Act Release No. 54047, 88 SEC Docket 932, 2006 WL 1749842 (June 27, 2006).

flow of material non-public information to those employees with a need to know, including by way of actual physical separation of personnel working on opposite sides of the wall and restrictions on access to sensitive records or documents. Employees also should receive regular training on the relevant laws and regulations governing use of material non-public information and the firm's own policies and procedures in this regard.[8] Of course, no single trading wall policy is right for every firm, and firms should tailor policies and procedures to fit their particular businesses and needs.

"Big Boy" Letters. If a prospective trader of bank debt possesses non-public information, it may consider entering into a letter agreement with its counterparty known as a "big boy" letter. In a big boy letter, the counterparty acknowledges that it is a sophisticated market actor; that an insider may possess material non-public information; that it will not sue an insider in connection with the transaction; and that it is relying only on its own research and analysis in entering the transaction. There is sparse case law addressing the efficacy of this type of agreement between private parties. Particularly in view of the general law disfavoring any advance waiver of fraud claims, the effectiveness of big boy letters in shielding insiders from liability cannot be assured. However, many standard form bank debt trading documents contain big boy language.

It also should be noted that, at least in the context of "securities" (but not in the context of standard form bank debt trading documentation), transactions involving big boy letters have been the subject of significant investigation by the SEC in recent years. Depending on the circumstances, use of a big boy letter may magnify the SEC's concerns with respect to particular transactions involving insiders. Particularly in the context of debt that may be "securities," consideration should be given when a big boy letter is employed as to whether the letter itself evidences that the parties consider there to be some potential information abuse in the trade. If a prospective trade is likely to raise questions if scrutinized by the SEC, there may be additional steps that could be taken in advance to enhance the likelihood that the trade will pass muster. This is a case-by-case question that turns on the particular facts with respect to such matters as the nature of the trade, the type of non-public information that is involved, the source of the information and the conditions under which it was obtained, and the relative positions of the trading partners. SEC officials have made clear in public comments that they do not view big boy letters as problematic in all contexts; if handled properly, these letters continue to serve a useful purpose in some transactions.

Common Law Fraud. There is an argument that big boy letters should help shield insider purchasers and sellers from liability to their counterparties for common law fraud. The cause of action for common law fraud generally consists of the following elements: (1) misrepresentation or concealment of a material fact; (2) scienter; (3) justifiable reliance by the

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8 For a study of trading wall practices and minimum elements of an effective policy, see SEC Div. of Market Regulation, *Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information*, Executive Summary (Mar. 1990), *available at* http://www.sec.gov/divisions/marketreg/brokerdealerpolicies.pdf. See also SEC Div. of Market Regulation, *Broker-Dealer Internal Control Procedures for High Yield Securities*, *available at* http://www.sec.gov/divisions/marketreg/15freport1093.pdf and NASD/NYSE, *Joint Memo on Chinese Wall Policies and Procedures* (June 21, 1991), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1182.

other party; and (4) resulting injury.[9] When a sophisticated party acknowledges that it is not relying on the insider-seller for information, a contention of justifiable reliance by that party is made more difficult to sustain.[10] Judicial analysis of "big boy" non-reliance agreements may be context-dependent, however, with courts more likely to approve of those agreements indicating a greater level of specificity and pre-agreement exchange of information.[11] In addition, courts have indicated that big boy letters and other waivers of reliance may not be sufficient to defeat common law fraud liability in all circumstances, including, for example, when the waiver or disclaimer involves "facts . . . peculiarly within the knowledge of the party invoking it."[12] Thus, a signatory to a big boy letter nonetheless may try to seek recovery in fraud by arguing that it could not be expected to discover the relevant material non-public information through its own diligence.[13]

Private Insider Trading Actions. Section 29(a) of the Securities Exchange Act of 1934, as amended, states that "[a]ny condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder . . . shall be void."[14] Courts interpret Section 29(a) as prohibiting parties from contracting around or waiving compliance with substantive obligations of the Exchange Act, including the duties imposed by Rule 10b-5.[15] To the extent that big boy letters are viewed as purporting to waive Rule 10b-5's anti-fraud requirements, they may run afoul of Section 29(a). Indeed, the First and Third Circuit Courts of Appeal have held that "big boy" and non-reliance letters cannot, consistent with Section 29(a), bar private securities action as a matter of law, even if "the existence of [a] non-reliance clause [i]s one of the circumstances to be taken into account in determining whether the plaintiff's reliance was reasonable."[16] However, the Second Circuit Court of Appeals has upheld non-reliance agreements against challenges under Section 29(a).[17]

Even if a big boy letter is void under Section 29(a), however, the letter may still help undermine the factual basis of a private securities fraud action, which requires proof of

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9 *See, e.g.*, Banque Arabe et Internationale D'Investissement v. Md. Nat'l Bank, 57 F.3d 146, 153 (2d Cir. 1994); Zanett Lombardier, Ltd. v. Maslow, 815 N.Y.S.2d 547, 547 (App. Div. 2006). In the case of a claim of fraudulent concealment, plaintiff also must prove that defendant owed a duty to disclose to the plaintiff. *Banque Arabe*, 57 F.3d at 153.

10 *See, e.g.*, Bank of the West v. Valley Nat'l Bank of Ariz., 41 F.3d 471, 477–78 (9th Cir. 1994) (holding participating bank's reliance is unjustified where loan participation agreement contained liability waiver and non-reliance provisions similar to those contained in a big boy letter); Valassis Commc'ns, Inc. v. Weimer, 758 N.Y.S.2d 311, 312 (App. Div. 2003) (holding that under New York law, reliance is unjustified where a sophisticated contract party expressly disclaims reliance on the extra-contractual representations of its counterparty and fails to verify the accuracy of information in its possession).

11 *See, e.g.*, Lazard Frères & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1542–43 (2d Cir. 1997).

12 *Banque Arabe*, 57 F.3d at 155 (quoting Stambovsky v. Ackley, 572 N.Y.S.2d 672, 677 (App. Div. 1991)).

13 Notably, in *Banque Arabe*, the Second Circuit affirmed that contractual adjustments of the duty to disclose will be given effect when the complaining party has independent means of discovering the relevant information, and the duty to disclose will not lie unless the nondisclosing party *knew* that the complaining party "was acting in reliance on mistaken knowledge" with respect to the issue in question. *Id.*

14 15 U.S.C. § 78cc(a) (2000).

15 *E.g.*, AES Corp. v. Dow Chem. Co., 325 F.3d 174, 179–80 (3d Cir. 2003).

16 *Id.* at 183; Rogen v. Ilikon, 361 F.2d 260, 268 (1st Cir. 1966).

17 *See* Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc., 343 F.3d 189, 195–96 (2d Cir. 2003); Harsco Corp. v. Segui, 91 F.3d 337, 342–44 (2d Cir. 1996).

elements that generally are the same as those required for a common-law fraud claim.[18] As in the common law fraud context, given the representations made in the big boy letter, a party may find it difficult to prove that it actually relied on its counterparty's omissions or that any such reliance was justifiable.[19]

Potential Risks Associated with Subsequent Transferees. Even if a big boy letter insulates a seller from a common law or federal securities law fraud claim by a counterparty who signs the big boy letter, future purchasers of the debt instrument—who were not parties to the initial big boy letter—may attempt to make fraud claims against the original seller or against the original counterparty to the big boy letters.[20]

SEC Enforcement Actions. The conventional wisdom is that big boy letters may *not* be a defense to insider trading actions brought by the SEC.[21] Unlike a private litigant, the SEC is not required to prove reliance to sustain a charge of securities fraud.[22] Even if there is no violation based on a theory of deception of a purchaser who signs a big boy letter, trading by an insider may nonetheless be a breach of a duty of confidentiality to the issuers or any other source of the information, and the SEC may charge insider trading on that basis.

In one SEC civil action filed in the Southern District of New York, *SEC* v. *Barclays Bank PLC and Steven J. Landzberg*, the SEC alleged that the defendants violated the insider trading prohibitions when they purchased and sold bonds while aware of material non-public information acquired by serving on six creditors' committees.[23] Although Barclays and some of its bond trading counterparts had executed big boy letters, that did not stop the SEC from investigating the defendants' actions and bringing an enforcement action resulting ultimately in a monetary settlement and injunction against Landzberg's participation on any creditors' committees.[24] This case also illustrates a broader point: that careful attention must be paid to managing legal and reputational risk when using information to trade debt.

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18 *Compare* Paracor Finance, Inc. v. Gen. Elec. Capital Corp., 96 F.3d 1151, 1157 (9th Cir. 1996), *with Banque Arabe*, 57 F.3d at 153.

19 *See*, *e.g.*, *Emergent Capital,* 343 F.3d at 195–96; Paracor Finance, 96 F.3d at 1159; *Harsco*, 91 F.3d at 342–44.

20 *See e.g.*, R2 Invs. LDC v. Salmon Smith Barney, Inc., No. 01 Civ. 3598 (JES), 2005 WL 6194614 (S.D.N.Y. Jan. 13, 2005) (denying summary judgment).

21 Rachel McTague, *"Big Boy" Letter Not a Defense to SEC Insider Trading Charge, Offical Says*, 39 SEC. REG. & LAW REP. 1832, 1832 (2007) (quoting statement by associate director in the SEC's Enforcement Division that big boy letters are no defense to SEC charges of insider trading).

22 *See* SEC v. Tambone, ___ F.3d ___, No. 07-1384, 2008 WL 5076554, at *18 (1st Cir. Dec. 3, 2008); SEC v. Rana Research, 8 F.3d 1358, 1364 (9th Cir. 1993) (collecting authority).

23 SEC v. Barclays Bank PLC, 07-CV-04427, Litigation Release No. 20132, 2007 WL 1559227 (May 30, 2007).

24 *Id.*