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Trial Court Significantly Reduces High Profile Vivendi Jury Award in Light of Supreme Court's *Morrison* Decision

The force of the U.S. Supreme Court's decision in *Morrison v. National Australia Bank* was made dramatically apparent earlier this week when the U.S. District Court for the Southern District of New York in *In Re Vivendi Universal, S.A. Securities Litigation* dismissed fraud claims brought by U.S. and foreign purchasers of Vivendi ordinary shares that traded overseas. The Court's decision is the latest chapter in a litigation that has stretched on for more than nine years, and the ruling substantially reduces the damages Plaintiffs can recover on the jury verdict they received early last year, estimated then to be worth more than nine billion dollars. Joining a number of other recent district court decisions applying *Morrison*, the Court significantly narrowed the size of the potential class of shareholders, allowing only claims for purchases of ADRs that were listed on a U.S. exchange to proceed, and thereby reduced Plaintiffs' potential damages by more than 80%. The impact of the ruling in severely limiting Plaintiffs' recovery, in what would have otherwise amounted to an unprecedented jury award, demonstrates how powerful the *Morrison* decision has become in excluding plaintiffs' claims involving any foreign securities transactions.

I. Background

In Re Vivendi was originally brought in 2002 by both U.S. and foreign purchasers of Vivendi's ordinary shares and American Depositary Receipts representing those shares ("ADRs"). The ordinary shares in question traded primarily on the Paris Bourse, and did not trade on any U.S. exchange. The ADRs were listed and traded on the New York Stock Exchange ("NYSE"). Plaintiffs alleged damages arising from material misrepresentations and omissions in violation of §§ 10(b) and 20(a) of the Exchange Act.

After years of discovery, the case proceeded to a three-month jury trial on October 5, 2009. On January 29, 2010, after three weeks of deliberations, the jury found Vivendi liable for 57 alleged false and misleading statements. Plaintiffs' counsel announced that the verdict would entitle investors to recover some \$9.3 billion, including prejudgment interest. The parties filed various post-trial motions in connection with the verdict.

Meanwhile, on June 24, 2010, the U.S. Supreme Court issued its opinion in *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010), holding that Section 10(b) of the Exchange Act does not apply extraterritorially. The Supreme Court established a new

“transactional” rule that Section 10(b) only reaches “transactions in securities on domestic exchanges, and domestic transactions in other securities.” In light of the *Morrison* decision, the *Vivendi* Court asked the parties to submit supplemental briefs addressing the impact of *Morrison* on the pending post-trial motions.

II. The Court’s February 22nd Decision

In applying the Supreme Court’s *Morrison* decision, the *Vivendi* Court held that *Morrison* barred claims brought by purchasers of Vivendi ordinary shares because those shares were not traded on a U.S. exchange and the transactions for those shares, whether by foreign or American purchasers, necessarily took place outside the United States on foreign exchanges.

Plaintiffs had argued that their claims should proceed because Vivendi’s ordinary shares were “listed” on the NYSE in connection with its ADR program. As a requirement of offering ADRs in the United States, Vivendi’s ordinary shares underlying its ADR offerings were registered with the SEC and also listed on the NYSE – albeit not for trading purposes. Vivendi was also required to register its ordinary shares pursuant to Section 12(b) of the Exchange Act. Plaintiffs argued that this limited registration caused the entire class of Vivendi’s ordinary shares (including those that did not underlie any ADRs) to be registered or listed, and that this alone satisfied the *Morrison* test.

Defendants countered that even if some Vivendi ordinary shares were listed on the NYSE in connection with Vivendi’s ADR program, the shares were not listed for trading purposes and served only as backup to the ADRs that were traded domestically. Actual transactions in Vivendi ordinary shares took place only on foreign exchanges where the shares were truly listed for trading.

Joining several other district courts that have recently applied *Morrison* to similar facts, the Court rejected all of Plaintiffs’ arguments. Rejecting Plaintiffs’ “listing” argument, the Court highlighted among other things that registering ordinary shares with the SEC is not the same as listing the shares on a U.S. exchange for trading purposes. In doing so, the Court noted that “[a]ll the courts who have directly or indirectly addressed this issue have dismissed the argument as a technical one that is contrary to the ‘spirit’ of *Morrison*.” The Court also dismissed claims brought by American purchasers of Vivendi’s ordinary shares on a foreign exchange. The Court ruled that the determinative factor in applying *Morrison* is the location of the transaction and not the location of the purchaser.

In joining with other recent *Morrison* decisions, the *Vivendi* decision further solidifies the clear trend among district courts in strictly and broadly applying *Morrison* and in rejecting plaintiffs’ efforts to find exceptions for certain foreign securities transactions.

For further information about the Vivendi decision or any of the issues discussed above, please do not hesitate to contact any of your regular contacts at the firm or any of our partners and counsel listed under Litigation and Arbitration in the “Practices” section of our website (www.clearygottlieb.com).

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