GIBSON, DUNN & CRUTCHER LLP
WAYNE W. SMITH
JOSEPH P. BUSCH, III
JARED M. TOFFER
KRISTOPHER P. DIULIO
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800
Facsimile: (949) 451-4220
kdiulio@gibsondunn.com

SNELL & WILMER L.L.P.
JOEL P. HOXIE (#005448)
JOSEPH G. ADAMS (#018210)
One Arizona Center
Phoenix, AZ 85004-2202
Telephone: (602) 382-6353
Facsimile: (602) 382-6070
jadams@swlaw.com

OSBORN MALEDON, P.A.
DAVID B. ROSENBAUM (#009819)
MAUREEN BEYERS (#017134)
2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012-2793
Telephone: (602) 640-9000
Facsimile: (602) 640-9050
mbeyers@omlaw.com

Attorneys for Defendants
APOLLO GROUP, INC.; TODD S. NELSON and KENDA B. GONZALES

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

In re Apollo Group Inc. Securities Litigation This Document Relates To: All Actions	Master File No. CV-04-2147-PHX-JAT **CLASS ACTION** **DEFENDANTS' MOTION FOR NEW TRIAL PURSUANT TO RULE 59** **ORAL ARGUMENT REQUESTED**

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The jury in this case returned a verdict that is a miscarriage of justice. The core problem with the verdict is that the jury ignored the true corrective disclosures (which did not result in damage), seized upon the September 20 analyst reports, which were not a true corrective disclosure, and awarded $5.50 per share damages based on the reports alone, without attempting to account for the fact that the reports consisted almost entirely of things that were unrelated to the Program Review Report (the "PRR").

Plaintiff was able to lead the jury to a verdict unsupported by law or fact because of improper and missing jury instructions and because of evidence that was improperly admitted or excluded. The jury's improper path included an instruction that Defendants' conduct needed only to be a substantial part in causing a decline in Apollo's stock price. This was compounded by improperly allowing Plaintiff's expert, Dr. Feinstein, to speculate about what an analyst really meant so as to claim that her report, downgrading her guidance on Apollo stock and which mentions not one word of the alleged missing disclosure, was actually a "corrective disclosure" causing a loss. Dr. Feinstein simply ignored that the downgrade itself could cause a decline in price, ignored that the analyst attributed the downgrade to multiple factors, and then speculated that the total decline in price the day after the analyst's report was issued constituted recoverable damages. Plaintiff was able to sell this factually and legally wrong theory by arguing that it was sufficient if the jury believed the report just played a part in the decline in stock price, a theory thoroughly rejected by the Supreme Court in *Dura*.

Plaintiff was also aided in taking the jury down the wrong path by other of the jury instructions and evidentiary rulings:

(a) After Dr. Feinstein was allowed to speculate about Kelly Flynn's unspoken basis for her downgrade of Apollo, Kelly Flynn was not allowed to rebut that speculation. This clearly led the jury to accept Dr. Feinstein's testimony that her reports constituted a "corrective disclosure" contrary to the face of the reports, and contrary to the excluded testimony of the reports' authors.

(b) Without an instruction that no general duty existed to disclose the PRR, the jury

was allowed to conclude that Defendants needed to disclose the PRR whenever they spoke to the market. Plaintiff exploited the missing instruction to the fullest, even invoking the "Golden Rule" by telling the jurors during closing arguments to put themselves in the shoes of the class members and ask themselves if they would have wanted to know about its contents.

(c) Plaintiff exploited the failure to give an instruction that Defendants could rely on the advice of their professional advisors. This harm was compounded when Defendants' advisors were prevented from explaining the "rationale" for the advice that they gave. Plaintiff took full advantage of the missing evidence and missing instruction, attacking the advisors' credibility during witness examination and closing and telling the jury they would not be receiving an instruction on this key issue.

(d) Although the Court ruled that Dr. Feinstein could not opine about materiality, he was allowed to testify about "risk" as a proxy for materiality and allowed to opine about its importance to investors. This not only provided improper opinion testimony, but in the absence of a duty instruction, allowed the jury to conclude Defendants should have disclosed the contents of the PRR every time they spoke to the market.

(e) The failure to give instructions on the time it takes to absorb information and the effect of market overreaction also allowed Plaintiff to lead the jury to an unjust verdict. Plaintiff was able to contend that the market could not understand Flynn's reports for two days, and then ignore that the statistically significant price decline only lasted one day.

(f) These errors were all compounded by the Plaintiff's repeated references to irrelevant, yet inflammatory, matters so that the jury would filter all of the evidence through a dislike for and distrust of Defendants.

These matters, individually and in combination, denied Defendants the right to a fair trial and a just verdict. The resulting prejudice to Defendants is evident.

In their motion for judgment as a matter of law, Defendants demonstrate that the evidence warrants entry of judgment for the Defendants. However, if the Court disagrees,

then the grounds presented in that motion most certainly call for a new trial.[1] Additionally, a new trial is required by the improper jury instructions and evidentiary rulings discussed in this memorandum.

I. ARGUMENT

Federal courts may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." FRCP 59(a)(1)(A). "Historically recognized grounds include, but are not limited to, claims 'that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.'" *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (citations omitted). A party's right to a fair trial may be prejudiced, and a new trial therefore required, by (1) the erroneous admission or exclusion of evidence, *Dorn v. Burlington N. Santa Fe R.R. Co.*, 397 F.3d 1183, 1189 (9th Cir. 2005), or (2) the giving of erroneous jury instructions or the failure to give adequate jury instructions, *Murphy v. Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990).

A. A New Trial Is Required Due to Erroneous and Inadequate Jury Instructions.

It is settled that "erroneous jury instructions, as well as the failure to give adequate instructions, are . . . bases for a new trial." *Murphy*, 914 F.2d at 187. "Jury instructions must be formulated so that they fairly and adequately cover the issues presented, correctly state the law, and are not misleading." *Chuman v. Wright*, 76 F.3d 292, 294 (9th Cir. 1996); *Fikes v. Cleghorn*, 47 F.3d 1011, 1013 (9th Cir. 1995). The instruction "must allow the jury to determine the issues presented intelligently." *Fikes*, 47 F.3d at 1013.

1. The "Causation" and "Securities-Damages" Jury Instructions Incorrectly Stated the Law, Were Inconsistent and Unfairly Prejudiced Defendants.

a. Background.

On January 2, 2008, Defendants argued that the Court's proposed instructions

[1] Defendants are filing, concurrently with this Motion, a Motion for Remittitur and a Motion for Judgment as a Matter of Law Pursuant to Rule 50(b). Defendants hereby incorporate those motions by reference.

"Causation" and "Securities-Damages" were erroneous and handed the Court red-lined versions with proposed changes to address the Supreme Court's decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005).[2] Tr. 3364:12-3368:24, 3371:10-3373:4, 3381:7-3383:25. Specifically, Defendants explained during argument that the alleged fraud need not be the "sole cause of the decline in stock price, but . . . the alleged misrepresentation or the truth being revealed must be the sole cause of the amount of the decline claimed as damages." Tr. 3368:4-14. Defendants summed up their argument, stating:

> The way that this instruction reads now, if the misrepresentation actually only caused 50 percent of the stock price drop and other factors caused the other 50 percent, this instruction tells the jury that 100 percent was due to the misrepresentation. That's not appropriate under *Dura*.

Tr. 3372:10-15. Defendants' changes were rejected, although Defendants were permitted to file a short brief on the issue. Tr. 3372:16-20; 3372:22-3373:3; Docket No. 476.

On January 8, 2008, the Court provided the parties with a revised version of the instructions. Tr. 3712:14-18. Defendants again argued that the instructions required modification under *Dura*, explaining that the jury needed to be instructed on two key points: "First, to establish loss causation the plaintiff must prove that a specific misrepresentation or omission caused a specific loss, and two, that to prove actual damage the plaintiff must isolate and remove any non-fraud factors responsible for a decline in share value." Tr. 3785:14-18. Defendants' proposed changes were rejected. *See* Tr. 3805:3-6; Docket No. 496.

b. *Dura* Requires the Plaintiff to Prove that a Specific Corrective Disclosure Caused a Specific Drop in Stock Price.

Dura established the requirements for pleading and *proving* loss causation in securities fraud cases. *Dura*, 544 U.S. at 338. The Supreme Court recognized that many different factors can play a role in causing a stock price to decline:

> If the purchaser sells later after the truth makes its way into the marketplace, an

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[2] Defendants subsequently lodged the red-lined version of the instructions on January 7, 2008. Docket No. 475-2. Defendants had previously filed, on December 19, 2007, amended instructions on loss causation and damages that incorporated the same key concepts requested by Defendants. Docket No. 450 at 5-7.

> initially inflated purchase price **might** mean a later loss. But that is far from inevitably so. When the purchaser subsequently resells such shares, even at a lower price, **that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events**, which taken separately or together account for **some or all** of that lower price . . . . Other things being equal, the longer the time between purchase and sale, the more likely that this is so, *i.e.*, the more likely that other factors caused the loss. Given the tangle of factors affecting price, **the most logic alone permits us to say is that the higher purchase price will sometimes play a role in bringing about a future loss.**

Dura, 544 U.S. at 342-343 (emphasis added). The Supreme Court concluded that it is not sufficient for a misrepresentation or omission to "touch upon" a loss because to "'touch upon' a loss is not to **cause** a loss, and it is the latter that the law requires." *Id*. at 343.

Later cases confirm that *Dura* requires a plaintiff to prove that a **specific** misrepresentation or omission caused a **specific** loss. As explained by one court just two weeks ago, "the law requires the disaggregation of confounding factors, [and] disaggregating only **some** of them cannot suffice to establish that the alleged misrepresentations actually caused Plaintiffs' loss." *In re Omnicom*, 2008 U.S. Dist. LEXIS 6033, at *23 (S.D.N.Y. Jan. 29, 2008). *Accord In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1266-67 (D. Okla. 2007) (Under *Dura*, "where a securities fraud plaintiff proceeds on a 'leakage' theory of corrective disclosure, he must still establish that the lower price reflects the fraud-related inflation and not 'changed economic circumstances, changed investor expectations, new-industry-specific facts, conditions or other events, which taken separately or together account for some or all of that lower price.'") (citations omitted); *In re Daou Sys., Inc., Secs. Litig.*, 411 F.3d 1006, 1027 (9th Cir. 2005)[3] (Plaintiff's "economic loss was **the decline** in their stock value that

[3] *Daou* cites *Robbins v. Koger Props., Inc.*, 116 F.3d 1441 (11th Cir. 1997), for the proposition that "'[a]s long as the misrepresentation is one substantial cause of the investment's decline in value, other contributing forces will not bar recovery under the loss causation requirement' but will play a role 'in determining recoverable damages.'" 411 F.3d at 1025 (emphasis added.) *Robbins* equates the "substantial cause" test with the requirement that "plaintiff must show that 'the misrepresentation touches upon the reasons for the investment's decline in value.'" *Robbins*, 116 F.3d at 1447. The "touches upon" standard was **explicitly rejected** by the Supreme Court in *Dura*. Importantly, however, *Robbins* also states that, "[I]n determining recoverable damages, these contributing forces **must be isolated and removed**." *Id*. at 1447 n.5. Thus, *Robbins'* "substantial cause" language does not excuse a plaintiff from showing that a specific misrepresentation or omission caused a

[Footnote continued on next page]

was the **direct result** of Daou's misrepresentations.") (emphasis added); *In re Gilead Scis. Secs. Litig.*, 2006 U.S. Dist. LEXIS 32893, at *28-29 (N.D. Cal., May 12, 2006) (loss causation allegations fail where "the Court is left to speculate as to what portion, if any, of that decrease would be attributed to the alleged misconduct and what should be attributed to other market factors.") (citations omitted).

c. The Errors in the "Causation" and "Securities-Damages" Instructions Prejudiced Defendants and Require a New Trial.

The "Causation" and "Securities-Damages" instructions were incorrect, contradictory and confusing and led the jury to improperly award $5.55 in damages.

First, the "Causation" instruction permitted the jury to award damages by determining that an alleged misrepresentation or omission played a "substantial part in causing" the Plaintiff's "loss." Docket No. 496 at 20. The "substantial part" standard is equivalent to the "touches upon" standard that *Dura* specifically rejected and does not excuse a plaintiff from proving the specific damages linked to a specific misrepresentation. *See supra* fn. 3.

This problem was exacerbated because the "Causation" instruction did not clearly define the difference between "loss" or "economic injury" and "damages" – "damages" being that part of the "loss" or "economic injury" that the alleged misrepresentation or omission actually caused. *Compare* Docket No. 496 at 20 ("substantial part in causing the loss") *with id*. at 23 ("Actual damages are calculated as the decline in the plaintiff's stock value that was caused by the defendant's misrepresentation or omission.") (emphasis added). The jury was thus allowed to conclude, erroneously, that "loss" or "economic injury" was the total stock price decline, including both fraud and non-fraud factors, not just the specific decline attributable solely to the alleged fraud. This allowed the jury to accept Dr. Feinstein's $5.55 damage figure even though Plaintiff failed to prove how much of that alleged decline – or how much of Flynn's downgrade – resulted from new information about the PRR.[4]

[Footnote continued from previous page]
specific drop in share value.

[4] Defendants also requested, in the event the Court did not adopt Defendants' changes to the

[Footnote continued on next page]

These flaws in the jury instructions were particularly prejudicial to Defendants here. Plaintiff failed to isolate the non-fraud factors in the Flynn Reports from the alleged "fraud" factors. *See* Tr. 2166:2-2169:4 (Dr. Feinstein's testimony that he "considered all" of the reasons for the downgrade but did not attribute any particular loss to any specific piece of corrective information); 3506:20-3507:7 (Professor Lehn's testimony that, "[Flynn] gives a multitude of reasons for her downgrade in her report, and to ascribe 100 percent of the downgrade to information related to the program review I think is not – has no scientific foundation."). Thus, the jury was left to conclude incorrectly that the Flynn Reports on September 20, 2004 were corrective disclosures and responsible for the entire stock price decline, even though Dr. Feinstein testified that only two of the six factors responsible for the downgrade were "new" and even though Dr. Feinstein did not disaggregate the decline in stock price caused by the downgrade itself or by each piece of news. Tr. 2166:2-2169:4; 3506:20-3507:7.

Second, Plaintiff's counsel exploited the flaw in the instructions during his closing argument by stating "plaintiffs must prove by a preponderance of the evidence the alleged misrepresentation or omission played a substantial part in causing the loss the plaintiffs suffered. **A substantial part. It doesn't say a hundred percent of it. It says a substantial part.**" Tr. 4062:12-17 (emphasis added). This heightened the prejudice to Defendants.[5]

2. The Failure to Give "Duty to Disclose" and "Required Disclosures in SEC Filings" Instructions Prejudiced Defendants.

a. Background.

On December 19, 2007, Defendants filed with the Court amended instructions on

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"Causation" and "Securities-Damages" instructions, that the instruction "Removing Effects Unrelated to Defendants' Statements" be given to address the requirement under *Dura* that Plaintiff must separate out fraud and non-fraud factors responsible for a decline in share value. Tr. 3404:6-10; Docket No. 372 at 178. This instruction also was not given.

[5] The error with this instruction was compounded by the evidentiary rulings that permitted Dr. Feinstein to improperly connect Flynn's September 20th reports to the PRR and treat them as a corrective disclosure. *See infra* Section I.B.

"Duty to Disclose" and "Required Disclosures in SEC Filings." Docket No. 450 at 3-5. Defendants submitted the amended instructions because Plaintiff was no longer arguing that Defendants had a general duty to disclose the contents of the PRR.[6] *See, e.g.*, Tr. 259:7-9; 270:5-6. At oral argument on January 2, 2008, Defendants explained that these instructions were necessary because: (1) it was clear that Plaintiff was no longer arguing a general duty to disclose; and (2) evidence had been elicited that could confuse the jury into thinking Plaintiff was alleging that Defendants had a general duty to disclose.[7] Tr. 3401:16-3402:10; 3406:18-3407:17. The Court, acknowledging Defendants' concern about jury confusion, asked Plaintiff's counsel, "Why shouldn't some type of instruction, however brief, be given to deal with the concern the defendants have that somehow this case might still morph into an absolute duty to disclose the report or an ongoing investigation?" Tr. 3404:16-19.

On January 8, 2008, Defendants argued again for inclusion of the instructions titled "Duty to Disclose" and "Required Disclosures in SEC Filings." Tr. 3792:4-20. Defendants also argued that, in addition to giving the requested instructions, the Court should withdraw the Form 10-Qs from the jury's consideration. Tr. 3700:14-21, 3703:18-3704:8. In response, Plaintiff's counsel argued that Defendants had an affirmative duty to disclose the contents of the PRR in the April 2004 Form 10-Q because it discussed a separate OIG audit of Apollo's subsidiary IPD that dealt with incentive compensation. Tr. 3701:7-3703:12. On January 7, 2008, Defendants filed an additional trial brief on this issue, citing numerous cases supporting Defendants' position that the filing of a Form 10-Q that does not mention the

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[6] Defendants also requested that, should the Court not be inclined to give the new amended instructions, that the Court give Defendants' instruction "No Duty to Disclose Ongoing Investigations." Tr. 3403:1-4; Docket No. 372 at 98. The Court did not give this instruction.

[7] Plaintiff's expert testified that there was price inflation starting on February 5, 2004, the date the PRR was received, but before the first alleged misleading statement on February 27, 2004. Tr. 1998:4-19. In addition, Plaintiff's counsel "harped" on defense witnesses regarding the reasons why the program review was not disclosed in the 2003 Form 10-K. Tr. 2780:16-2782:20 ("They should have disclosed it in the 10-K where they had a specific item where they had classically in the past been disclosing this kind of thing. . . . [B]ut that is one of the reasons why we harped on the 10-K, not making the program review disclosure."). This testimony and argument created an unacceptable risk of juror confusion regarding the existence of a general duty to disclose.

program review does not create an affirmative duty to disclose the PRR. Docket No. 478 (and authorities cited therein). In response, on January 8, 2008, Plaintiff's counsel argued, as a new theory, that the April 2004 Form 10-Q was false and misleading because, like the February 27, 2004 press release, it stated that the government had declined to intervene in the *qui tam* lawsuit. Tr. 3810:22-3812:3. The Court, after hearing argument, did not agree to give the requested instructions, but did agree to exclude the April 2004 Form 10-Q from the jury's consideration on the verdict form. Tr. 3802:6-3803:13; 3805:15-3814:2.

The next morning, the Court stated it was inclined to reverse the prior day's ruling on the April 2004 Form 10-Q. Tr. 3822:5-19. In response, Defendants argued that Plaintiff was offering a new theory as to why the April 2004 Form 10-Q was misleading – a theory that deviated from the sole basis alleged in the Complaint (i.e. that the April 2004 Form 10-Q referenced the OIG IPD audit). Tr. 3823:8-3827:3. Defendants then explained that the disclosures in the April 2004 Form 10-Q were different from the February 27, 2004 press release, because on February 28, 2004 the market was aware, through the *Dallas Morning News*, that the Department of Education was conducting a program review of UOP's compensation practices. Tr. 3825:2-20. Finally, Defendants foreshadowed the prejudice that would result if the Court retained the April 2004 Form 10-Q in the forms of verdict:

> In closing, they're not going to argue that the Q repeated this mistake that was in the February 27th press release. **They're going to argue the OIG audit. They're going to argue the issue that that Your Honor has already determined from your prior ruling didn't trigger a general duty to disclose.** The OIG audit of the IPD clients didn't trigger that duty because there is no reference in there to the program review. Now, I'm not going to repeat that, but that's the danger that we face. If you allow the Q to go to the jury in the verdict form, it gives them an angle to make that argument, and an argument that's wrong legally, wrong factually.

Tr. 3826:9-19 (emphasis added). Defendants then made clear that the danger would be particularly acute if the Court did not give the requested instruction on "Required Disclosures in SEC Filings." Tr. 3826:20-3827:3. After hearing argument, the Court reversed its ruling on the April 2004 Form 10-Q but did not give the requested jury instructions "Duty to Disclose," and "Required Disclosures in SEC Filings." Tr. 3835:13-25; Docket Nos. 483, 496.

b. Resulting Prejudice.

The failure to give the instructions "Duty to Disclose" and "Required Disclosures in SEC Filings" unfairly prejudiced Defendants, particularly because Plaintiff invoked the "Golden Rule" by asking the jurors to place themselves in the shoes of the class members.

First, the instructions requested by Defendants were proper because there was no general duty to disclose the contents of the PRR. *See Basic v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b-5. 'No comment' statements are generally the functional equivalent of silence.") (citations omitted); *Gallagher v. Abbott Labs.*, 269 F.3d 806, 808 (7th Cir. 2001) ("firms are entitled to keep silent (about good news as well as bad news) unless positive law creates a duty to disclose"); *Anderson v. Abbott Labs.*, 140 F. Supp. 2d 894, 903 (N.D. Ill. 2001) ("Even material omissions are not, in and of themselves, sufficient to state a claim for securities fraud.").

Second, the Court's concern acknowledged on January 2, 2008 – that the case might "morph into an absolute duty to disclose the report" – became a reality. Plaintiff's counsel questioned Ms. Gonzales at length about prior disclosures of program reviews in SEC filings and about the absence of a disclosure in the SEC filings from August 2003 to September 2004. *See generally* Tr. 1701-1723, 1739-1744. During closing, Plaintiff's counsel repeatedly suggested to the jury that this was a general duty to disclose case. Tr. 3842:25-3843:3 ("a reasonable investor would have wanted to know about this report"); 3863:14-21 ("But the point of making sure the marketplace has integrity is that the material information, be it positive or negative, is in the marketplace . . . ."); 3916:15-21 ("[S]omebody might cynically say, well, then what you should do is just don't tell the truth, you know, just don't ever disclose anything and nobody will ever suffering [sic] any losses. That's not true. In addition to that, that would be inconsistent with the law. That would be the wrong way to go. That does not promote market integrity."). Counsel's argument created an unacceptable risk that the jury would think Defendants had a general duty to disclose the PRR.

Third, with respect to the April 2004 Form 10-Q, Plaintiff's counsel did exactly what Defendants predicted he would do – argued that the failure to reference the PRR was false

and misleading because Apollo referenced the OIG IPD audit. Tr. 3879:12-22 ("And what's worse about the April 13th, 2004 10-Q is that it talks about an investigation that has been ongoing and a report issued by the Office of Inspector General, OIG, as it relates to a subsidiary, a very small subsidiary, IPD. . . ."). As Defendants explained in oral argument and in trial briefs submitted on the issue, the April 2004 Form 10-Q did not create an affirmative duty to disclose the contents of the PRR because it did not reference the program review.

Finally, Plaintiff's counsel exploited the missing instructions, by invoking the "Golden Rule" and asking the jurors, on multiple occasions, to place themselves in the shoes of the class members.[8] Tr. 4044:13-17 ("I think your answer, all of your answers, is going to be, yeah, I'd want to know about this before I figure out how much money I'm going to pay this company . . . ."); 4049:16-19 ("you would agree [the PRR] is something you would have wanted to see if you were an investor, you would have wanted to know about it."). These improper arguments highlight why the instructions were required and why a new trial is needed.

3. Failure to Give the "Advice of Professional Advisors" Instruction.

Defendants requested that the Court give Defendants' instruction "Advice of Professional Advisors." Tr. 3403:5-9, 3791:17-3792:3; Docket No. 372 at 145. This would have correctly informed the jury that the Defendants could rely in good faith on the advice of legal counsel, public accountants or other persons as to whom Defendants reasonably believed were acting within their professional or expert competence. *See* ARIZ. REV. STAT. §§10-830, 10-842. The instruction was critical to Defendants' defense, because Mr. Nelson

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[8] It is improper for counsel to make argument that encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. *See United States v. Moreno*, 947 F.2d 7, 8 (1st Cir. 1991) (citations omitted); *Ivy v. Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978) ("We need only note that counsel **clearly argued the Golden Rule**, that the jurors should put themselves in the shoes of the plaintiff . . . . **Such an argument is universally recognized as improper** . . . ."). The use of a "Golden Rule" argument "so taints a verdict as to be grounds for a new trial." *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496 (5th Cir. 1982). [Emphasis added.]

and Ms. Gonzales **did rely in good faith** on multiple advisors, including disclosure counsel (Jon Cohen), KPMG (for a statistical analysis discrediting the PRR) and counsel experienced with the Department of Education (Stan Freeman and Timothy Hatch).

The failure to give this instruction prejudiced Defendants. The Court previously ruled that the jury could consider Defendants' good faith reliance on counsel:

> The Ninth Circuit has held that a statement of opinion or belief is false or misleading "if (1) the statement is not actually believed [by the speaker], (2) [it is believed by the speaker, but] there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending to seriously undermine the statement's accuracy." Kaplan, 49 F.3d at 1375. Although **undisputed evidence of Defendants' good faith and reliance on the advice of counsel would eliminate the first two prongs of this disjunctive test**, the third prong would still remain.

In re Apollo Group Secs. Litig., 509 F. Supp. 2d at 837 (D. Ariz. 2007) (emphasis added). But without an instruction, the jury was unable to assess properly the legal advice provided.

Plaintiff's counsel exploited this vacuum by telling the jury during closing argument that "you're **not** going to hear instructions that say because you're talking to your lawyers that gives you a way out." Tr. 4041:15-16 (emphasis added). Counsel's statement was highly prejudicial because it **was** appropriate for Defendants to rely on their counsel and the jury **should** have considered Defendants' subjective state of mind when determining scienter. *See, e.g.*, ARIZ. REV. STAT. §§10-842; *Howard v. SEC*, 376 F.3d 1136, 1148-1149 nn. 20, 21 (D.D.C 2004) ("The exercise of independent, careful and informed legal judgment on difficult issues is critical to the flow of material information to the securities markets; . . . Some states protect directors from liability when they reasonably rely on counsel or other experts.").

Prejudice from the absence of an "Advice of Professional Advisors" instruction was exacerbated when Plaintiff's counsel attacked the advisors' credibility, as highly-paid advocates, yet the advisors were kept from explaining the reasons for their advice. *See infra* I.C. The jury was thus prevented from fully and fairly weighing Defendants' reliance on the professional advice they received, depriving Defendants of a fair trial.

4. Failure to Give the Statement of Opinion or Belief Instruction.

On January 7, 2008, Defendants filed a Request for Proposed Jury Instruction

Regarding Statement of Opinion or Belief. Docket No. 479. During oral argument on January 8, 2008, Defense counsel explained that, as the Court previously recognized, certain of the alleged false and misleading statements were statements of opinion or belief. Tr. 3790:18-3791:16; *In re Apollo Group Secs. Litig.*, 509 F. Supp. 2d at 842 n.4, 844 ("the alleged misrepresentations include . . . optimistic statements concerning the program review"). The jury should have been instructed to consider and apply the separate standard for statements of opinion or belief set forth in *Kaplan v. Rose*, 49 F.3d 1363, 1375 (9th Cir. 1994). This instruction became all the more essential in light of the failure to give Defendants' requested instruction "Advice of Professional Advisors." Without these instructions, the jury was free to find "knowing" conduct even though Defendants reasonably believed their optimistic statements were true based on advice from their counsel.

5. The Instruction "Time to Absorb Information in An Efficient Market" Was Inadequate and Prejudicial to Defendants.

On January 2 and 8, 2008, Defendants argued that the Court's proposed instruction on market efficiency was confusing and misleading. Tr. 3379:1-3380:16. Specifically, Defendants objected to the last sentence of the Court's proposed instruction, which read, "How rapidly new information is reflected in the stock price depends on the facts of each case" and argued that the second sentence in the instruction should read, "In an efficient market, new information is rapidly absorbed and reflected in the stock price, ordinarily within hours if not minutes." Tr. 3380:3-10. As Defendants pointed out, the language in the Court's proposed instruction could lead the jury to conclude that it took seven days for new information to be absorbed into the market (i.e. from September 14, 2004 to September 21, 2004), which is inconsistent with the efficient market hypothesis and the fraud-on-the-market theory of reliance. Tr. 3403:17-20; 3379:9-17; 3787:17-22; *see also* 15 U.S.C. § 78u-4(e)(1)("information correcting the misstatement or omission").

This instruction resulted in an improper verdict for Plaintiff. The jury was not instructed, consistent with economic theory and the law, that an efficient market responds to

new information immediately, within one day if not hours or minutes.[9] *See, e.g.*, *Unger v. Amedisys, Inc.*, 401 F.3d 316, 324 (5th Cir. 2005) ("In an efficient market, where information is nearly perfect, material misstatements alter a stock's price almost immediately."); *In re Polymedica Corp. Sec. Litig.*, 453 F. Supp. 2d 260, 278 (D. Mass. 2006) ("The Court, however, holds that the First Circuit's definition and relevant explanation of efficiency in Polymedica . . . requires that the reaction to news be fully completed on the same trading day as its release – and perhaps even within hours or minutes."); *Cammer v. Bloom*, 711 F. Supp. 1264, 1287 (D.N.J. 1989) (Plaintiff should allege "empirical facts showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price.").

Defendants were unfairly prejudiced by this instruction for several reasons. First, it allowed the jury to find that it took 6 to 7 days for the market to absorb the news of September 14 and 15. Any such finding violates the efficient market hypothesis and the legal authorities that require an efficient market to react "immediately" or "rapidly." Second, this instruction improperly allowed the jury to find that it took the market two days to absorb Flynn's Reports of September 20, 2004. Such a finding is not supported by law, also violates the efficient market hypothesis and, as discussed in Defendants' Motion for Judgment as a Matter of Law, is not supported by substantial evidence.[10] *See* Defendants' JMOL at 11-13.

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[9] *America West* supports Defendants' position. Although *America West* refused to adopt a "bright-line" rule, it did so only where the plaintiff proves market distortions, which Plaintiff did not prove here. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. America West Holding Corp.* 320 F.3d 920, 934 (9th Cir. 2003). While Plaintiff argued that Defendants walked the stock price down, there was no evidence of disclosures by Defendants (which could have caused distortions) following September 15, 2004 and through September 21, 2004. Second, in *America West*, the Ninth Circuit itself looked at the **immediate** market reaction to the final corrective disclosure on September 3, 1998, noting that "[t]he stock immediately fell over six points, from the previous day's $20-5/16 per share, to $14 per share on September 3, 1998" to support its finding that materiality was sufficiently plead. *America West*, 320 F.3d at 930, 935. Thus, the Court's instruction, which put **no limit** on how rapidly information is reflected in price, was at odds with *America West* and inconsistent with the efficient market hypothesis, without which there can be no class action.

[10] If a plaintiff wants to have a class action based on the fraud-on-the-market theory of reliance and the efficient market hypothesis, it must accept all the consequences of what that means, not just those that maximize recovery.

Third, the failure to give the requested duty–to-disclose instructions, coupled with the failure to include the additional language in the efficient market instruction, caused extra prejudice by their combined effect. Apollo was followed by 15 to 20 sell-side analysts and by Apollo's approximately 400 institutional investors. Tr. 2026:5-18. In August 2004, those institutions held approximately 80% of Apollo's stock. Tr. Ex. 24017. Clearly, price reaction to information about Apollo was driven by market professionals. Yet, this lay jury, without guiding instructions, was left to speculate about what these market professionals would have expected to be disclosed, how they would react to news, **and how long it would take them to react to an analyst's downgrade**.[11] Had the jury had been instructed that Apollo had no general duty to disclose the PRR and that an efficient market reacts immediately within minutes or hours to news, the jury could not reasonably have reached the verdict that it did.

6. Failure to Give the Requested "Materiality - Market Overreaction" Instruction Was Error.

On January 8, 2008, Defendants requested the instruction "Materiality – Market Overreaction." Tr. 3403:21-3404:5; Docket No. 372 at 169. This instruction was appropriate because Plaintiff's expert, Dr. Feinstein, agreed that stock price movement can be the result of a market overreaction to news, as discussed in the authoritative article by Tabak & Dunbar, *Materiality and Magnitude: Event Studies in the Courtroom in Litigation Services Handbook* (3rd ed. 2001). Tr. 2155:24-2156:14 (acknowledging that stock price movement can be the result of market overreaction); Tr. Ex. 23092 ("the potential for stock market overreaction is now generally accepted as a factor in stock market behavior."). As the evidence at trial demonstrated, viewing the movement of Apollo's stock price on September 21 in light of its positive movement on September 22 results in a statistically insignificant change. Tr. 3534:5-7; Tr. Ex. 24279-C. The jury should have been permitted to determine whether the

[11] It is noteworthy that after there was extensive coverage of the contents of the PRR, not a single analyst criticized the company for not disclosing it earlier and Flynn was the **only** analyst to issue a downgrade.

movement of Apollo's stock price on September 21, 2004 suggested short-term overreaction, indicating that the Flynn Reports were not corrective disclosures and did not cause a statistically significant decline in stock price.

B. The Introduction of Speculation About what Flynn Meant in her Reports, and the Barring of Flynn's Testimony on the Same Subject, Requires a New Trial.

1. Allowing Plaintiff's Expert to Speculate About What Kelly Flynn Meant, But Did Not Say in Her Reports, Unfairly Prejudiced Defendants.

The Court instructed the jury that to establish damages Plaintiff needed to prove that Kelly Flynn's analyst reports of September 20, 2004, were corrective disclosures (i.e., that they disseminated information revealing the falsity of prior statements and that were "connected to the alleged fraud."). *See In re Omnicom Group Inc. Secs. Litig.*, 2008 U.S. Dist. LEXIS 6033, *18-19; *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 175 n.4 (2d Cir. 2005); *see also* 15 U.S.C § 78u-4(e)(1); Tr. 4084:3-9. Thus, the jury could award damages only if her reports contained information about the PRR that corrected Apollo's non-disclosure of the contents of the PRR (assuming non-disclosure was misleading and material). 15 U.S.C. § 78u-4(e)(1) (PSLRA bounceback period commences on the day that "information correcting the misstatement or omission" enters the market).

The threshold, and insurmountable, obstacle that Plaintiff faced was that Flynn's Reports do not contain a single word about what was actually in the PRR. Plaintiff tried to fill this void with rank speculation by its expert, Dr. Feinstein, who was allowed to testify over objection about what was "implied" and what was meant, but unspoken, by Flynn:

> Q. When she says "now concerned" do you have any idea how that impacts the stock price one way or another?
>
> A. Yes. I mean, she's now concerned that the report -- I mean, just what it says. She's now concerned that regulatory events could hurt industry growth.
>
> Q. It's implied?
>
> A. Yes.
>
> Q. Even though she doesn't even use the words "Program Review Report."
>
> A. Correct.
>
> Q. . . . Where in this document does she disclose or discuss the contents of the Program Review Report?

A. She's – this – in this report she's not excerpting from the Program Review Report. She's interpreting it and interpreting the valuation change based on it. She's not reporting it.

Tr. 1961:13-23, 2167:14-18, 2168:15-18, 2170:18-24. Further:

Q. Can you tell the jury whether or not in that sentence the contents of the Program Review Report are specifically referenced?

A. The specific contents, what the contents were, is not referenced there, but the fact that she's revealing that the motivation for her --

MR. BUSCH: Objection.

A. -- termination --

MR. BUSCH: Everything after what the contents were is not referenced, is nonresponsive.

THE COURT: Overruled.

BY MR. BARRACK:

Q. Please finish your answer.

A. The topic of contents is clearly what she's writing about. ***The specifics of the contents, she's apparently assuming the reader already has some understanding about.***

Tr. 2201:17-2202:25 (emphasis added). Plaintiff should not have used Dr. Feinstein to speculate about what another witness, Flynn, meant or "implied" by her downgrade. Importantly, the market was not aware of Dr. Feinstein's theory of what Flynn really meant to say or imply (as opposed to what she actually said) and could not have reacted to that theory about Flynn's unspoken intent.[12] Dr. Feinstein provided an improper fictional basis for the jury to erroneously determine that Flynn's Reports were corrective disclosures.

2. It was Prejudicial Error to Bar Flynn's Testimony About the Basis for Her Downgrade.

The prejudice from Dr. Feinstein's speculation about Flynn's unspoken intent was compounded when Flynn was not allowed to testify about the basis for her downgrade. Had Defendants been allowed to introduce her testimony, it would have included the following:

Q: And is it fair to say that the contents of the program review report were a

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[12] Defendants asked the Court to strike Dr. Feinstein's improper speculation regarding Flynn's downgrade, but the Court denied that request. Tr. 2694:20-2696:16.

factor in your decision to downgrade?

A: No.

Docket No. 461-2, (Flynn Dep.) at 90:25-91:9 (objections omitted).[13] This testimony would have permitted the jury to conclude that Flynn's downgrade was **not** a corrective disclosure. The jury was left instead to find, based on Dr. Feinstein's speculation about the basis for the downgrade, that the Flynn Reports were corrective disclosures. Indeed, the text of the reports expressly state that the downgrade was based on a reduction of the P/E multiple because of numerous factors. Nevertheless Dr. Feinstein was allowed to speculate that it was really the contents of the PRR that constituted the basis for the downgrade, and Ms. Flynn was not allowed to correct that falsehood. The exclusion of her testimony was highly prejudicial.[14]

3. It was Also Error to Exclude Flynn's Testimony Because it Directly Impeached Dr. Feinstein.

Dr. Feinstein testified that he had read Flynn's deposition. Tr. 2112:22-24. Flynn's testimony was therefore critical impeachment evidence that showed that Dr. Feinstein knew that she did not base her downgrade on the contents of the PRR, but nevertheless misled the jury into thinking she did.[15] Defendants should not have been restricted to impeaching Dr. Feinstein while he was still testifying. *See Dorn*, 397 F.3d at 1189, 1193-94 ("district court abused its discretion by excluding testimony from seemingly unbiased witnesses whose ordinary experiences would tend to rebut, if not impeach, [expert's] conclusion."); *see also* 4-607 WEINSTEIN'S FED. EVID. § 607.06 (Matthew Bender ed., 2d ed. 2007) (proper

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[13] Flynn later testified that she could not tell from looking at the analyst report if the PRR was a factor in her downgrade. Docket No. 461-2 at 93:9-94:23. Regardless, in light of Dr. Feinstein's testimony, the jury was entitled to hear this testimony and draw their own conclusions as to whether the contents of the PRR were a factor in the downgrade.

[14] The prejudice associated with excluding Flynn's testimony was compounded by the erroneous instructions, discussed in Section I.A.

[15] The prejudice from excluding Flynn's testimony was exacerbated when Defendants' expert, Professor Lehn, was not allowed to set the record straight. Tr. 3431:22-3432:6 ("[Y]our expert . . . should not be permitted to get into evidence indirectly that which I have forbidden directly, and that is [Flynn's] own testimony as to what she meant."). Thus, while Professor Lehn was permitted to disagree with Dr. Feinstein, he was not permitted to clear up Dr. Feinstein's false assertions about Flynn's intent. Tr. 3511:24-3512:18.

impeachment includes eliciting "another witness's testimony [that] may contradict that of the witness to be impeached."); FRE 607.

C. The Improper Exclusion of Testimony from Defendants' Advisors Was Prejudicial Error.

Defendants sought to introduce testimony from Timothy Hatch and Jon Cohen (the "advisors") regarding the "rationale" behind the advice they rendered to Defendants. This testimony was necessary to rebut Plaintiff's argument that the advisors lacked credibility because they were highly-paid advocates, and was precluded even though Plaintiff's counsel opened the door. Tr. 2917:12-21; 3054:10-15.

Plaintiff's attack on the credibility of the advisor witnesses was pervasive:

- "Isn't it true that from the moment that you decided to undertake the representation of your client in the program review matter that **you did so as an advocate on behalf of your client in order to find a way out**, so to speak?" [Plaintiff's counsel to Mr. Hatch, Tr. 3157:20-23 (emphasis added)]
- "Isn't it a fact that your client was in -- basically, in a corner at that time and **your whole purpose in getting retained was to help them find a way out**?" [Plaintiff's counsel to Mr. Hatch, Tr. 3157:25-3158:2 (emphasis added)]
- **"Now they're in crisis mode. Mr. Hatch is quarterbacking it.** He is getting direction from his client. The client gives the direction and then the attorneys come in and they try and fulfill the client's wishes. That doesn't sound very unusual, does it? And I'm not faulting them for that. **They are zealous advocates**. But the fact of the matter is what the client wanted, **that's what he was paying these attorneys to deliver. He wanted a way out. He wanted a way out.** And the way out that he wanted was not the way of the truth." [Plaintiff's Closing Argument, Tr. 3858:1-10 (emphasis added)]

Because Plaintiff was allowed to repeatedly attack the advisors' credibility, it was essential that Defendants be permitted to rehabilitate the credibility of the advisors by establishing the soundness of the advice given. As Defendants explained at trial:

> [I]f we don't get to put on the evidence to rebut their assertions about this attack team, that, no, in fact, these people were acting professionally, within their expert competence and that there was a reasonable good faith basis to rely on them, then I think our hands are tied, and it goes to the key issue in the case, which is *scienter*.

Tr. 2917:6-11. The Court rejected this argument (Tr. 2917:10-21), and restricted Defendants' ability to question Mr. Hatch and Mr. Cohen about the "rationale" behind the advice they

gave. Tr. 3054:10-15; 3113:18-20, 3113:23-3114:8.

Because the advisors were repeatedly attacked as untrustworthy advocates, Defendants were entitled to put on rehabilitative testimony regarding the "rationale" behind their advice to bolster their credibility. *See* FRE 608(a)(2) (bolstering evidence is admissible "after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."); *Renda v. King*, 347 F.3d 550, 554 (3d Cir. 2003) ("In addition to direct attacks on a witness's general character for truthfulness, indirect attacks also open the door for evidence of a witness's good character . . . ."). Defendants were unfairly handcuffed in their ability to counter Plaintiff's argument that the advice received was unsound and that the advisors were hired to simply tell Defendants what they wanted to hear.[16]

D. It was Prejudicial Error to Allow Dr. Feinstein To Testify to the "Risks" of the Program Review Report as a Proxy for "Materiality."

Over Defendants' objections, Dr. Feinstein improperly offered expert testimony on the materiality of the PRR, and circumvented the Court's prior rulings, by referring to "risks" instead of "materiality." This was improper because the materiality determination is based on a "reasonable investor" standard and the jury is in the best position to resolve the issue, without an expert imposing his opinion on the subject.

1. Materiality Is An Issue Reserved For The Jury.

"Materiality is an objective concept that is viewed from the perspective of the **'reasonable investor.'"** *In re Apollo Group, Inc. Secs. Litig.*, 509 F. Supp. 2d 837 at 843 (citations omitted) (emphasis added). Where a disputed issue is determined by a "reasonable" person standard, as is the case here, the jury is best situated to make such a determination on its own, without an expert interjecting his opinion on the issue. *See United States v. Hanna*, 293 F.3d 1080, 1086 (9th Cir. 2002) (district court abused its discretion in allowing expert

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[16] The prejudice to Defendants was compounded by the failure to give Defendants' proposed jury instruction "Advice of Professional Advisors." *See infra* I.A.3.; Tr. 3403:5-9; 3791:17-3792:3; Docket No. 372 at 145. As discussed in more detail above, the requested instruction would have informed the jury, consistent with Arizona state law, that Defendants could rely in good faith on the advice of their advisors. *See infra* I.A.3.

testimony regarding whether a "reasonable person" would foresee that a statement would be interpreted as a threat); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th Cir. 1990) (expert testimony inappropriate on reasonable person standard).

Several courts in securities actions have expressed this concern with respect to expert testimony on materiality. *See In re Stratosphere Corp. Sec. Litig.*, 66 F. Supp. 2d 1182, 1188 (D. Nev. 1999) ("[a] district court should be especially cautious when experts comment upon the materiality or fraudulence of disputed misstatements in securities fraud actions" because "it . . . does not take any special competence, for example, to read pertinent public documents (e.g., prospectuses, press releases, and recorded statements) to determine whether **certain risks** were conveyed to the public.") (emphasis added); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1116 (9th Cir. 1989) (court not required to defer to expert's opinion that nondisclosures were material because no "special competence" required to make materiality determination); *Hill v. Equitable Bank*, No. 82-220 CMW, 1987 WL 8953, at *1 (D. Del. Mar. 3, 1987) (expert testimony on materiality excluded).

On November 5, 2007, the Court granted Defendants' Motion In Limine ("MIL") No. 13 to preclude Dr. Feinstein's testimony regarding "materiality." Final Pretrial Conf. Tr. 70:25-71:2. Plaintiff's counsel then sought clarification of the Court's ruling, asking:

> With regard to Dr. Feinstein, it's my understanding that Your Honor is granting is not that Dr. Feinstein cannot testify from his expertise as to risks and how those risks are or are not disclosed to the market . . . but rather is Your Honor saying you don't want him testifying on an ultimate issue as to whether or not that risk would be important to a reasonable investor?" The Court responded "Correct."

Id. at 72:7-15. Thus, when Plaintiff's counsel sought to elicit testimony at trial from Dr. Feinstein regarding the PRR's importance to investors, Defense counsel promptly objected. Tr. 1874:18-1877:6; 1907:5-1912:11 (Defense counsel: "But now we're getting his impressions about what he thinks is important and what he considers to be risks in the Program Review Report . . . And now he's being asked to provide a subjective view on the Program Review Report and its – to express his views, his subjective views, on the risks associated with the Program Review Report as it was."); 1968:20-1970:2. During argument

on the objection, Plaintiff's counsel stated, "When Mr. Basser asked you whether he could talk about these risks you said yes, so long as he doesn't opine as to **what an investor would find important** or not important. I do not intend to so elicit any evidence like that." Tr. 1912:5-9. Based on that representation, the objections were overruled. Tr. 1912:10-12.

Dr. Feinstein then proceeded to explain to the jury why certain "risks" were "important" – "Q: So, for example, with regard to the fine in the early part of the class period, could you **explain to the jury how that particular future risk was important**, whether or not they knew the precise amount? *** A: . . . I mean, [analysts] would have had to wait at that point to see how it played out, whether the company would have been successful or not in negotiating a lower fine, but while that potentially large and catastrophic fine was over the head of the company, while that danger was being posed, the stock price would be impacted." Tr. 1972:18-1973:17. Dr. Feinstein was also asked to opine on why it is "important that these risks" be disclosed – "[I]f information is concealed, then the integrity of the market is disrupted and the stock price won't be fair or correct." Tr. 1974:4-15.

Dr. Feinstein was therefore plainly permitted to testify as to why he thought the PRR was important to an investor, simply altering his terminology and referring to "risks" that the market wanted to know (i.e., information material to the market). Through a mere sleight of tongue, Dr. Feinstein was able to give the kind of opinion testimony that should have been excluded and that the Court previously ruled was inadmissible. Dr. Feinstein's improper testimony was extensive and damaging, and Defendants were unfairly prejudiced as a result. *See Hanna*, 293 F.3d at 1086-87; *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1004-09 (9th Cir. 2001) (danger of prejudice arises when witness comes before jury "cloaked with the mantle of an expert").

2. Dr. Feinstein's Speculation Was Improper and Unfairly Prejudicial.

Dr. Feinstein's speculation about what would have happened had the market known of the material "risks" of the PRR was also improper. To be reliable, an expert's analysis must be based on "more than subjective belief and unsupported speculation." *Claar v. Burlington*, 29 F.3d 499, 502 (9th Cir. 1994); *Jinro Am.*, 266 F.3d at 1005. In securities litigation, expert

testimony of a hypothetical nature must be "evaluated especially carefully," as "[i]t would be an odd rule to allow greater leeway to an expert's speculative and hypothetical analysis about what would have happened to a company's stock price if certain information had been disclosed than to an expert's analysis about what in fact happened to a company's stock price when certain representations were actually made." *In re Northern Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 461 (S.D.N.Y. 2000).

But, indeed, this is exactly what happened here. Dr. Feinstein offered unsupported speculation about what would have happened to Apollo's stock price if certain alleged risks had been disclosed at an earlier date. *See, e.g.*, Tr. 1907:1-4; 1912:17-24; 1913:3-7; 1915:4-1916:16; 1917:13-1918:25. Additionally, although Dr. Feinstein provided speculative testimony about "risks," the Court kept Professor Lehn from presenting his opposing testimony – that the market's failure to move in reaction to news of the PRR proved that the information was immaterial. Tr. 3432:7-3435:5. This left Defendants unable to rebut Dr. Feinstein's improper materiality testimony.

E. Plaintiff's Repeated Reference To Inflammatory and Irrelevant Evidence Prejudiced Defendants.

Throughout the trial, Plaintiff attempted to introduce irrelevant and prejudicial testimony and documents from enrollment counselors and other witnesses in an attempt to bolster the veracity of the PRR, even though Defendants were not challenging the accuracy of how the anecdotes were reported in the PRR.[17] Plaintiff's repeated detours into irrelevant

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[17] Defendants requested, outside the presence of the jury, that a limiting instruction be given that the PRR could not be considered for the truth of the matters asserted therein. *See* Tr. 205:22-208:21; Docket No. 288 (MIL No. 1). A limiting instruction was not given, however, prior to Plaintiff seeking to admit the document into evidence. Tr. 208:8-21. When Plaintiff sought to admit the PRR into evidence, Defendants were forced to argue in front of the jury that the PRR should be admitted only with a limiting instruction that it cannot be considered for the truth of the matters asserted therein. Tr. 346:1-348:15. The Court overruled Defendants' objection and admitted the PRR into evidence with a limiting instruction that, "the law that governs the issues in this case will be the law the Court instructs you on." Tr. 348:9-15. The limiting instruction was insufficient. First, the jury was allowed to consider the factual issues in the PRR for the truth of the matters asserted although the PRR contained hearsay and double-hearsay, and did not meet the requirements for the hearsay exception under FRE 803(8)(C). *See* Docket No. 288 (MIL No. 1 and authorities cited therein). Second, through argument in front of the jury, the jury would have concluded that it **should**

[Footnote continued on next page]

topics, which deflected attention away from and confused the relevant issues, prejudiced Defendants' right to a fair trial. Among the topics on which Plaintiff introduced prejudicial and irrelevant testimony and documents were the "Red Room" (Tr. 1615:8-1616:1, 1616:25-1617:12, 1618:19-1620:11, 2313:6-2326:25, 2341:21-2344:10, 2356:22-2357:4), UOP's vacation policy for enrollment counselors (Tr. 657:12-658:22, 660:24-661:12, 720:14-22, 765:5-10, 767:3-768:23), and overtime issues (Tr. 497:19-498:6, 720:24-722:8, 735:9-736:6). Plaintiff's introduction of such testimony and documents resulted in substantial prejudice to Defendants and prevented a fair trial.

First, as the Court recognized in excluding Plaintiff's rebuttal case, the relevance of such evidence was outweighed by its potential prejudice. *See* Tr. 3660:19-3661:24 ("I'm afraid we may well have allowed ourselves to try some cases within cases, but be that as it may, I'm not going to perpetuate that any further."); 3648:1-3650:20 ("you all have managed to try some tangential issues along the way."); 3676:9-3677:8 (referring to Julie Albertson's testimony, "Likewise, I find this to have dubious relevance, but whatever relevance it may have as to this witness is outweighed by the prejudice that would result under a 403 weighing."). While the Court recognized that this evidence was improper, the damage to Defendants was already done. The irrelevant evidence introduced by Plaintiff early in the trial unfairly tainted the jury and prevented the jury from fairly considering whether Defendants acted with an innocent state of mind when making their disclosure decisions.

Second, even though the Court granted one motion *in limine* and sustained objections to exclude some irrelevant side issues, Plaintiff repeatedly examined witnesses and introduced documents on topics unrelated to the disclosure of the PRR, forcing Defendants to repeatedly object in front of the jury.[18] With one witness alone, Mary Hendow, Defendants

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[Footnote continued from previous page]
consider the factual anecdotes to be true. This prejudiced Defendants because the irrelevant anecdotes were written in a highly pejorative manner.

[18] Defendants anticipated Plaintiff's use of this irrelevant and prejudicial evidence in the motions *in limine* they filed with the Court. *See* Docket No. 288 (MIL No. 1 at 12-13) ("Finally, admission of the Wittman Report would result in confusion of the issues, undue

[Footnote continued on next page]

had 73 objections sustained. *See generally* Tr. 441-555. Similarly, Defendants were compelled to object to the testimony of other witnesses, such as Mathew Kuhnau and Maria Arce. *See generally* Tr. 801-858, 1549-1629. The inordinate number of objections made it appear as if Defendants had something to hide and unfairly tainted Defendants in the eyes of the jury.

II. CONCLUSION

Defendants suffered unfair prejudice as a result of erroneous evidentiary rulings and erroneous and inadequate jury instructions. If Defendants' Motion for Judgment as a Matter of Law is denied, Defendants request that the Court order a new trial to ensure that Defendants' right to a fair and just trial is protected.

Dated: February 13, 2008

Respectfully submitted,

By: /s/ Kristopher P. Diulio
Kristopher P. Diulio, appearing *pro hac vice*

OSBORN MALEDON, P.A.
2929 North Central Avenue, Suite 2100
Phoenix, AZ 85012-2793
Telephone: (602) 640-9000

GIBSON, DUNN & CRUTCHER LLP
3161 Michelson Drive
Irvine, CA 92612-4412
Telephone: (949) 451-3800

SNELL & WILMER L.L.P.
One Arizona Center
Phoenix, AZ 85004-2202
Telephone: (602) 382-6353

Attorneys for Defendants

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delay and waste of time as Defendants would be required to rebut Wittman's conclusions, which are not material to the matters at issue here."); Docket No. 289 (MIL No. 2 at 4-5) ("An unwarranted trial-within-a-trial would result on the question of how ECs *believed* they were compensated - an issue far removed from the real disclosure questions on which this case centers. The Court can and should head off this sideshow."); Docket No. 301 (MIL No. 14 at 5) ("Even though evidence of management practices is irrelevant to Wittman Report's allegation that UOP violated the incentive compensation regulations, and although the evidence sheds no light on the central securities law issues of this litigation, Plaintiff wants to present the evidence to a jury because some of the topics, such as the Room for Improvement, potentially could be extremely prejudicial to Defendants.").

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2008, the attached document was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send notification of such filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Ramzi Abadou	ramzia@lerachlaw.com
Joseph G. Adams	jadams@swlaw.com
Francis Joseph Balint, Jr.	fbalint@bffb.com
William J. Ban	wban@barrack.com
Jeffrey A. Barrack	jbarrack@barrack.com
Stephen R. Basser	sbasser@barrack.com
Maureen Beyers	mbeyers@omlaw.com
James R. Condo	jcondo@swlaw.com
Joel Philip Hoxie	jhoxie@swlaw.com
William J. Maledon	wmaledon@omlaw.com
Robert D. Mitchell	robertmitchell@mitchelllaw.com
Mark R. Rosen	mrosen@barrack.com
David B. Rosenbaum	drosenbaum@omlaw.com
Stephen G. Schulman	sschulman@milbergweiss.com
Rosemary J. Shockman	RShock@aol.com
Geoffrey M. Trachtenberg	gmt@lclegal.com
Marc M. Umeda	mumeda@ruflaw.com
Samuel M. Ward	sward@barrack.com

I further certify that copies of the foregoing were sent on February 13, 2008, via U.S. Mail to the following parties:

Leonard Barrack
Barrack Rodos & Bacine
2 Commerce Square
2001 Market St., Suite 3300
Philadelphia, PA 19103

Patrick Joseph Coughlin
Coughlin Stoia Geller Rudman & Robbins LLP
100 Pine Street
Suite 2600
San Francisco, CA 94111

/s/ Dena F. Kennedy

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