

Skadden Securities Team Strikes Again

April 4, 2018

Securities litigators at **Skadden, Arps, Slate, Meagher & Flom** have been on a roll, racking up five wins in the past week (and eight in the last month) for clients including **Intercept Pharmaceuticals, Biogen Inc., the executives of Republic Airways and the president and CEO of Sempra Energy.**

The latest victory, on behalf of **Brazilian aerospace conglomerate Embraer S.A.** in the Southern District of New York, is especially notable. The decision by **U.S. District Judge Richard Berman in Manhattan** breaks new ground in clarifying the standard for what a company must disclose (or not) when there's an ongoing investigation.

The plaintiffs, led by the **Employees' Retirement System of the City of Providence, Rhode Island,** alleged that "Embraer has engaged in and covered up a brazen and sprawling bribery scheme" involving officials in the Dominican Republic, Mozambique, Saudi Arabia and India.

In November of 2011, the company disclosed that it was under investigation by the **Department of Justice and the Securities and Exchange Commission** "relating to possible violations of the U.S. Foreign Corrupt Practices Act." It also acknowledged that "[it] may be required to pay substantial fines and/or incur other sanctions."

Sure enough, in the fall of 2016 Embraer announced it would pay a \$107.3 million criminal fine and disgorge \$84 million in profits.

Predictably, shareholders sued. But the suit, which was filed by **Pomerantz LLP,** had a quirk—what the Skadden lawyers termed a "temporal disconnect." That is, Embraer disclosed it was under investigation before the class period began.

The plaintiffs argued that Embraer was "duty bound to alert investors to the certainty of the fraud... While the revenues reported may have been the revenues collected, defendants' failure to identify that a portion were derived from an illicit scheme is misleading."

Berman didn't buy it. The judge noted that "companies do not have a duty to disclose uncharged, unadjudicated wrongdoing."

The plaintiffs pointed to Embraer's code of ethics, which proclaims it "must work against corruption in all its forms."

But Berman found that was not enough to support the lawsuit. "Because Embraer's code of ethics is inherently aspirational, it cannot be that every time a violation of that code occurs, Embraer will be liable under federal laws," he wrote.

The Skadden team included New York-based partners **Jay Kasner, Scott Musoff and Christopher Malloy,** associates **Nicholas Ickovic and Amanda Raymond Kalantirsky** and Sao Paulo-based partner **Julie Bédard.**

Daniel Perry and Scott Edelman of Milbank, Tweed, Hadley & McCloy were co-counsel for Embraer's former CEO, **Frederico Pinheiro Fleury Curado,** and CFO **José Antonio de Almeida Filippo.**

Because we at Lit Daily believe in sharing the love, here's a quick shout-out to Skadden lawyers who won the other securities cases this week.

For Intercept Pharmaceuticals: **Ed Micheletti, Scott Musoff and Graham Robinson**

For the executives of Republic Airways: **Jay Kasner and Scott Musoff**

For Biogen Inc.: **James Carroll and Michael Hines**

For the president and CEO of Sempra Energy: **Jack DiCanio and Allen Lanstra**