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Skadden

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US Supreme Court

Supreme Court Rules That Pending Class Actions Do Not Toll Limitations Period for Subsequent Class Actions

China Agritech v. Resh, No. 17-432 (U.S. Jun. 11, 2018)
Click here to view the opinion.

The U.S. Supreme Court held that a pending class action does not toll the statute of limitations for absent class members who bring a subsequent class action. The Supreme Court thereby declined to extend its holdings in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), in which the Court concluded that a timely filed class action tolls the statute of limitations for absent class members who file subsequent individual claims.

China Agritech involved the third of three successive and substantially similar putative class actions alleging that the petitioner, a manufacturer of organic fertilizer, engaged in securities fraud in violation of the Securities Exchange Act. The district court had denied class certification in the prior two actions for failure to satisfy certain requirements of Federal Rule of Civil Procedure 23. The respondents — absent class members of the first two putative classes — then filed a third class action outside of the two-year statute of limitations applicable to Exchange Act claims. After the district court dismissed the respondents' action as time-barred, the Ninth Circuit reversed. It held that the equitable tolling doctrine recognized by the Supreme Court in *American Pipe* and *Crown, Cork* applied to both individual claims and class actions.

The Supreme Court reversed, holding that "*American Pipe* does not permit the maintenance of a follow-on class action past expiration of the statute of limitations." The Court reasoned that the efficiencies that support tolling of individual claims do not also support tolling of class actions, as efficiency favors early assertion of competing class claims. The Court further noted that diligence is generally a prerequisite to equitable tolling and suggested that a class member who waits until the expiration of the limitations period to file a class action has not acted diligently.

Supreme Court Holds That Securities Act Class Actions May Be Adjudicated in State Court

Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund, No. 15-1439 (U.S. Mar. 20, 2018)
Click here to view the opinion.

In a unanimous decision, the U.S. Supreme Court held that state and federal courts have concurrent jurisdiction over class action claims brought under the Securities Act and that such claims are not removable to federal court under the Securities Litigation Uniform Standards Act (SLUSA). The act precludes certain securities class actions based on alleged violations of state law ("covered class actions"). The Supreme Court held that SLUSA does not deprive state courts of jurisdiction to adjudicate securities class actions that allege claims only under federal law and not also state law.

The plaintiffs-investors had filed a putative class action in California state court against a telecommunications company, alleging claims solely under the Securities Act in connection with purported misrepresentations made in the defendant's initial public offering (IPO) documents. The company moved to dismiss, arguing that SLUSA stripped state courts of power to adjudicate federal law claims in covered class actions. The California state court disagreed and denied the company's motion to dismiss.

The Supreme Court affirmed, holding that the plain language of SLUSA does not limit state court jurisdiction over class actions brought under the Securities Act. The Court explained that SLUSA bars certain securities class actions based on state law, but it "says nothing, and so does nothing, to deprive state courts of jurisdiction over class actions based on *federal* law." The Court reasoned that a contrary interpretation would improperly prevent state courts from adjudicating any Securities Act claims, even if they did not involve a "covered security," *i.e.*, a security traded on a national stock exchange. As the Court has previously held, SLUSA "expresses no concern with transactions in uncovered securities" and "maintains state legal authority to address them." Accordingly, the Court determined that SLUSA does not deprive state courts of jurisdiction to adjudicate in this area of state concern.

The Court further held that SLUSA does not alter the Securities Act's general prohibition against removing state court actions brought under that statute to federal court and also does not authorize removal of federal law class actions.

Actionable Statements

Second Circuit Affirms Dismissal of Complaint Against Online Marketplace Company

Altayyar v. Etsy, Inc., No. 17-1180-cv (2d Cir. Apr. 24, 2018)
Click here to view the opinion.

The Second Circuit affirmed the dismissal of claims that an online marketplace company violated Section 10(b) of the Securities Exchange Act and Sections 15, 11 and 12(a)(2) of the Securities Act by making material misstatements and omissions about the quality of its products. The company is an online forum for purchasing handmade items, vintage goods and craft supplies. The plaintiffs alleged that the company made misleading statements about the quality of its products and its policy on verifying the products because it poorly monitored whether the items sold on its marketplace met its terms and guidelines or if those items infringed on trademarks or copyrights. The court held that the plaintiffs failed to plead that the company made any factual misstatements. It determined that the majority of the alleged statements concerning the company's values and policies, which contained phrases such as "we believe," "we strive" or "we are committed," were not statements of fact but rather, nonactionable vague aspirational statements or statements of opinions.

Class Actions

Ninth Circuit Affirms Dismissal of Securities Fraud Suit, Holding Plaintiff Failed to Adequately Plead Scienter

Webb v. SolarCity Corp., No. 16-16440 (9th Cir. Mar. 8, 2018)
Click here to view the opinion.

The Ninth Circuit affirmed the dismissal of a putative securities fraud class action, holding that the plaintiff failed to plead facts giving rise to a strong inference of scienter.

The plaintiff alleged that the defendant corporation misrepresented certain financial information leading up to its 2012 IPO. In 2014, the company revealed that "tens of millions in overhead expenses" had been "incorrectly classified." The plaintiff claimed that this incorrect classification was intentional "in order to make the sales division and company as a whole appear more profitable than it actually was, and thereby maximize their gains from the company's IPO."

The Ninth Circuit disagreed. While the panel credited confidential witness statements that the individual defendants knew the company "was generally unprofitable" and that they were "hands-on managers who generally understood the company's accounting obligations, and that they had reason to suspect that the company's internal accounting controls were imperfect," the court held that those allegations "[a]t best ... paint a picture of a mismanaged organization in need of closer financial oversight that made a minute error at a critical stage in its development." In addition, neither individual defendant sold stock during the alleged class period, which also "detract[s] from a scienter finding." The court also rejected the plaintiff's invocation of the core operations doctrine, concluding that the accounting error was not "so dramatic that it would be *absurd* to think that Defendants-Appellees did not know that something was wrong."

Fiduciary Duties – Derivative Litigation

Delaware Supreme Court Reverses Court of Chancery's Dismissal Under *Corwin*

Appel v. Berkman, No. 316, 2017 (Del. Feb. 20, 2018)
Click here to view the opinion.

The Delaware Supreme Court reversed and remanded a Court of Chancery dismissal under the *Corwin* doctrine, holding that stockholders were not fully informed in approving the challenged transaction because the proxy statement contained "materially misleading" disclosures.

The action arose from a stockholder challenge to Diamond Resorts International's two-step merger with Apollo Global Management. In 2016, Diamond Resorts engaged in a "public sales process" that resulted in indications of interest from several parties, and ultimately two bids. The Diamond Resorts board voted in favor of Apollo's bid; however, the company's founder and former CEO abstained from that vote and in two board meetings stated "he was disappointed with the price and the Company's management for not having run the business in a manner that would command a higher price, and that in his view, it was not the right time to sell the Company." The proxy did not identify why he abstained from approving the merger.

In the case below, the Court of Chancery dismissed the action under *Corwin*, finding that the merger had been approved by a fully informed, uncoerced stockholder vote. The "sole issue" on appeal was whether the stockholder's approval of the transaction was in fact "fully informed" given that the proxy did not identify the Diamond Resorts founder's reasons for abstaining.

The Delaware Supreme Court found that the failure to disclose this information was sufficient to plead a claim that the proxy materially was misleading, explaining that the founder was a "'key board member' if ever there were one," his objections to the sale were clearly and concisely documented in board minutes, and such "views regarding the wisdom of selling the company were ones that reasonable stockholders would have found material in deciding whether to vote for the merger or seek appraisal." The Supreme Court therefore reversed the Court of Chancery's dismissal because, as a pleading matter, the failure to disclose this information stated a claim that the proxy was materially misleading and the stockholder vote uninformed.

Court of Chancery Rejects *Corwin* Defense on Motion to Dismiss

In re Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS (Del. Ch. Mar. 28, 2018)
Click here to view the opinion.

Vice Chancellor Joseph R. Slights III declined to dismiss a post-closing damages action arising from Tesla's 2016 acquisition of SolarCity, concluding that the complaint pleaded facts making it reasonably conceivable that Elon Musk, who held 22.1 percent of Tesla's voting power, was a controlling stockholder with respect to the transaction.

The stockholder plaintiffs alleged that the Tesla board of directors and Tesla's founder, chairman and CEO, Elon Musk, breached their fiduciary duties in connection with the acquisition. At the time of the transaction, in addition to his stake in Tesla, Musk owned 21.9 percent of SolarCity and was also its chairman. The plaintiffs alleged that SolarCity faced a liquidity crisis at the time of the transaction and that Musk persistently pressed Tesla to pursue an acquisition of SolarCity, in what the plaintiffs characterized as a "bailout" of SolarCity for the benefit of Musk and other allegedly conflicted Tesla board members. The complaint also alleged that the Tesla board never considered forming a special committee and that a majority-conflicted board, including Musk, was heavily involved in the purchase process.

The defendants moved to dismiss the action under *Corwin*, which requires dismissal of post-closing challenges to mergers approved by a fully informed, uncoerced stockholder vote absent a conflicted controller. The plaintiffs countered by arguing that a conflicted controller was present.

While emphasizing that whether an individual is a controller is "intensely factual" and "difficult" to resolve on the pleadings, the Court of Chancery ultimately found that the combination of facts pleaded made it reasonably conceivable that Musk was a controller. In its decision, the court found "the combination of well-pled facts relating to Musk's voting influence, his domination of the Board during the process leading up to the Acquisition against the backdrop of his extraordinary influence within the Company generally, the Board level conflicts that diminished the Board's resistance to Musk's influence, and the Company's and Musk's own acknowledgements of his outsized influence, all told, satisfy Plaintiffs' burden to plead that Musk's status as a Tesla controlling stockholder is reasonably conceivable." Because the plaintiffs sufficiently pleaded the presence of a conflicted controller, *Corwin* could not apply, and the complaint otherwise stated a claim subject to entire fairness review.

Court of Chancery Concludes Minority Blockholder Is Not a Controlling Stockholder and Dismisses Claims Under *Corwin*

In re Rouse Props., Inc. Fiduciary Litig., No. 12194-VCS (Del. Ch. Mar. 9, 2018)
Click here to view the opinion.

Vice Chancellor Joseph R. Slights III dismissed breach of fiduciary duty claims and aiding and abetting claims challenging a 33.5 percent stockholder's acquisition of Rouse Properties Inc. under *Corwin*, finding that the complaint failed to adequately allege the existence of a controlling stockholder or a disclosure violation.

In June 2016, more than 80 percent of Rouse's shares voted in favor of a transaction pursuant to which Rouse would be acquired by its 33.5 percent stockholder, Brookfield Asset Management, Inc., for $18.25 per share in cash. The transaction was approved by a special committee of Rouse directors, and the merger was subject to a "majority of the minority" vote condition, which was obtained by the special committee through negotiations with Brookfield.

The defendants moved to dismiss under *Corwin*, arguing that the transaction had been approved by a fully informed, uncoerced stockholder vote and that Brookfield was not a conflicted controller. The plaintiffs, in turn, argued that *Corwin* did not apply because Brookfield was Rouse's controlling stockholder and the stockholder vote was not fully informed.

Vice Chancellor Slights rejected both of the plaintiffs' arguments. First, while acknowledging that "*Corwin* cannot protect a board's determination to recommend a transaction when it is reasonably conceivable that a conflicted controller may have influenced the board and stockholder decisions to approve the transaction," the Court of Chancery found that the plaintiffs had not adequately pleaded Brookfield was a controlling stockholder. Although a 33.5 percent "majority blockholder," the plaintiffs failed to plead that Brookfield actually dominated and controlled the special committee with respect to the merger or actually dominated and controlled the company more generally.

Moreover, the court did not believe that the formation of a special committee or the committee's insistence on a "majority of the minority" condition was evidence of Brookfield's "control," contending that it was simply the product of hard bargaining on behalf of the unaffiliated stockholders, and "to hold otherwise might discourage fiduciaries from employing these important measures for fear they might unwittingly signal that they perceive a minority blockholder with whom they are dealing to be a controller." Because Brookfield was not a controlling stockholder of Rouse, the court concluded that it owed no fiduciary duties to Rouse's stockholders and dismissed the claim for breach of fiduciary duty against Brookfield.

The court then rejected the plaintiffs' contention that the disclosures issued in connection with the merger were deficient such that the stockholder vote was not fully informed, analyzing a number of disclosure claims involving the fairness opinion given by Rouse's financial advisor, as well as alleged potential conflicts of Rouse's financial and legal advisors.

The court also dismissed an aiding and abetting claim against Brookfield because the plaintiffs failed to plead that Brookfield acted with scienter — that is, in a culpable state of knowledge that its conduct advocated or assisted any breach of fiduciary duty.

Loss Causation

Eighth Circuit Affirms Dismissal of Federal Securities Fraud Claim Relating to Stock Redemption Agreement Between Shareholder and Closely Held Corporation

Ryan v. Ryan, No. 16-3149 (8th Cir. May 7, 2018)
Click here to view the opinion.

Judge James B. Loken penned the opinion of a unanimous court that affirmed, in relevant part, the dismissal of claims against a closely held corporation and one of its shareholders, under Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, and various Nebraska state laws. The plaintiff, a former shareholder of the defendant corporation, alleged that the corporation and the defendant shareholder engaged in a series of wrongful acts to cause the plaintiff to sell her shares. Among those alleged wrongful acts was that the corporation misrepresented to the plaintiff that the defendant shareholder would sell her own shares. Judge Laurie Smith Camp of the District of Nebraska dismissed the federal securities fraud claim for failure to plead loss causation, and the Eighth Circuit affirmed.

In affirming the district court's dismissal, the Eighth Circuit noted that the plaintiff and the corporation had entered into a stock redemption agreement that stated, in part, that the corporation "shall have the right to repurchase the stock, in whole or in part, owned by Stockholder at any time." Because the corporation had the "absolute right to repurchase," the alleged misrepresentations subsequent to the execution of the redemption agreement could not have caused the plaintiff's losses. Thus, the Eighth Circuit agreed with the district court that the plaintiff did not plausibly plead loss causation.

Materiality

Northern District of Illinois Denies Dismissal of Federal Securities Fraud Claim Against Insurance Company

Carpenters Pension Trust Fund for N. Cal. v. Allstate Corp., No. 16 C 10510 (N.D. Ill. Feb. 27, 2018)
Click here to view the opinion.

The Northern District of Illinois denied a motion to dismiss claims under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The plaintiffs, a class of investors that purchased Allstate common stock, brought their action against Allstate, its CEO and two of its presidents for material false statements and omissions regarding the cause of an alleged spike in the frequency of auto insurance claims. The plaintiffs alleged that, in an effort to attract more auto insurance customers, the defendants reduced their underwriting standards. According to the plaintiffs, this plan resulted in an increase in insurance claims, which the defendants falsely attributed to external factors instead of their own underwriting changes. The plaintiffs alleged that Allstate's stock price fell when it finally disclosed the negative impact of its underwriting standards.

Judge Robert W. Gettleman disagreed with the defendants that their alleged misstatements were opinions, not facts, and noted statements such as "our frequency trends have been good." The court held that even if the defendants indicated uncertainty as to the cause of the increased claim frequency with terms such as "we believe" and "we think," those statements could still have been misleading. They would not have been understood by reasonable investors as uncertain when coupled with the defendants' assurances that they had considered all possible reasons for the increase and concluded it was due to external factors, the court stated.

Furthermore, Judge Gettleman concluded that the plaintiffs had sufficiently pleaded scienter for the claim that Allstate's two consecutive presidents had engaged in insider trading when they sold off portions of their own shares before disclosing that reduced underwriting standards were impacting claim frequency. The court found the plaintiffs had also sufficiently pleaded loss causation when stock prices dropped more than 10 percent the day after the defendants disclosed the impact of their reduced underwriting standards.

Southern District of New York Dismisses Claims That Mobile Technology Company Made Allegedly Misleading Statements About Its Value

Finocchiaro v. NQ Mobile, Inc., No. 15 Cir. 6385 (NRB) (S.D.N.Y. Feb. 27, 2018)
Click here to view the opinion.

Judge Naomi Reice Buchwald dismissed claims that a mobile technology company violated Section 10(b) of the Securities Exchange Act by making alleged misstatements about its value and omissions about its acquisitions. The plaintiffs alleged that the company misled investors to believe that the company was "worth billions" and that the company made material omissions by waiting 5 1/2 months to disclose that it had acquired "small, private Chinese companies of little or no value."

The court held that statements about the company's worth were immaterial puffery because they were made during negotiations to be acquired when the acquisition proposal was too low. The court also reasoned that the plaintiffs failed to allege that investors reasonably relied on the alleged misrepresentations; the company's financial history was publicly available and the company did not have any fiduciary, long-standing or personal relationship with the plaintiffs.

The court further determined that the plaintiffs failed to plead that the company had a duty to disclose the acquisitions of the Chinese companies sooner because there were no allegations of insider trades on confidential information, that a statute or regulation required disclosure or that a statement was otherwise inaccurate, incomplete or misleading because of the alleged omission.

Misrepresentations

Northern District of Illinois Dismisses Federal Securities Claim for Fraudulent Inducement

Petri v. GeaCom, Inc., No. 17-cv-02579 (N.D. Ill. Apr. 6, 2018)
Click here to view the opinion.

Judge Andrea R. Wood granted in part and denied in part defendant GeaCom, Inc.'s motion to dismiss shareholders' complaint alleging that they invested more than $3.5 million in the company based on false representations. Specifically, the plaintiffs alleged that the defendants, both publicly and privately, made several false statements regarding the company's success, sales and customer contracts.

The plaintiffs brought five state claims and one federal claim under Section 10(b) of the Securities Exchange Act. While the court allowed some of the state claims to proceed, it dismissed the federal claim, for false and misleading statements, in full. It did so because the plaintiffs failed to specify the reason why the statements were misleading or the facts known to the defendants at the time that rendered the statements misleading. Merely alleging that the statements were false, as the plaintiffs did, is not sufficient to meet the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA).

The only allegation that the court found came close to the PSLRA's heightened requirement was the allegation that "none of [GeaCom's] so-called pending sales were ever realized." But the court noted that the defendants' public statements such as "GeaCom 'attracted major strategic relationships,' 'expects to produce' or 'hopes to sell' a certain number of units, anticipated an increase in monthly production, 'started taking orders for shipment,' and future projections of number of units to be sold the following year are not statements regarding pending sales." Similarly, the court noted that the defendants' private statements that a potential customer is "pounding at the door" or has "indicated orders are coming" or "will finalize the order" are not statements about pending sales. Thus, the court found that the plaintiffs failed to plead any false or misleading statement

with sufficient specificity, and, in any case, the statements were mere puffery or forward-looking statements protected under the PSLRA's safe harbor provision.

Pleading Standards

Ninth Circuit Holds That Claims Under Section 14(e) of Securities Exchange Act Need Only Show Negligence

Varjabedian v. Emulex Corp., No. 16-55088 (9th Cir. Apr. 20, 2018)
Click here to view the opinion.

The Ninth Circuit held that plaintiffs bringing claims under Section 14(e) of the Securities Exchange Act need only show negligence, not scienter. Five other circuit courts have previously held that Section 14(e) requires a showing of scienter. The Ninth Circuit panel based its decision on the provision of Section 14(e) that makes it unlawful "to make any untrue statement of a material fact or omit to state any material fact ... *or* engage in any fraudulent, deceptive, or manipulative acts or practices." The word "or," the court reasoned, illustrates that Congress intended to proscribe two different sets of offenses: The former clause prohibits negligent offenses while the latter applies to intentional acts.

In creating the circuit split, the Ninth Circuit declined to analogize Section 14(e) claims to claims brought under Section 10(b) of the Securities Exchange Act, as other circuit courts have done. The panel instead looked to Section 17 of the Securities Act, which contains language similar to Section 14(e), prohibiting "any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made ... not misleading." The U.S. Supreme Court, the panel observed, has interpreted that language in Section 17 to require a showing of only negligence.

Southern District of California Dismisses Complaint With Prejudice, Holding That Allegations in Separately Filed Complaint Are Not Corrective Disclosures

In re BofI Holding Inc. Sec. Litig., No. 3:15-cv-02324-GPC-KSC (S.D. Cal. Mar. 21, 2018)
Click here to view the opinion.

Judge Gonzalo P. Curiel dismissed with prejudice a complaint brought under Section 10(b) of the Securities Exchange Act alleging that the defendant bank made false or misleading statements regarding the adequacy and effectiveness of its internal controls and risk management, holding that the plaintiff failed to adequately plead loss causation.

First, the court held that short-seller articles regarding the defendant corporation could not qualify as corrective disclosures "because they relied on publicly available information, and offered no analysis not generally available to the rest of the market." While the plaintiff alleged that "the market did not appreciate the implications of the publicly available information relied upon" in the short-seller articles, "those conclusory allegations" did not "suggest any plausible reason why market participants would not have understood the implications of the information in front of them."

Second, the court held that allegations in a complaint in another action could not, on their own, serve as a corrective disclosure. Rather, "allegations in a complaint are analogous to an announcement of internal or regulatory investigations into misconduct, which have been held insufficient, on their own, to serve as corrective disclosures." Such revelations "raise[] merely a 'risk' or 'potential' of fraud" but are not themselves "a disclosure of fraud."

An appeal of this decision is pending before the Ninth Circuit.

Northern District of California Holds That *Affiliated Ute* Presumption Does Not Apply When the Only Omission Alleged Is of the Truth That an Affirmative Misstatement Misrepresents

In re Volkswagen "Clean Diesel" Mktg., Sales Practices & Prods. Liab. Litig., MDL No. 2672 CRB (JSC) (N.D. Cal. Mar. 2, 2018)
Click here to view the opinion.

Judge Charles R. Breyer granted the defendants' motion to dismiss claims brought under Section 10(b) of the Securities Exchange Act, holding that the plaintiff failed to adequately plead that it relied on the defendants' emission-related statements when it decided to purchase the securities at issue.

The district court previously held that plaintiffs could rely on a presumption of reliance under *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972), because the allegations were for fraudulent omissions rather than misstatements. The defendants asked the court to reconsider that holding in light of the Second Circuit's decision in *Waggoner v. Barclays PLC*, 875 F.3d 79 (2d Cir. 2017), where that court held that the *Affiliated Ute* presumption does not apply when the only omission alleged is of the truth that an affirmative misstatement misrepresents.

The district court found *Waggoner* persuasive and held that the plaintiff could not rely on the *Affiliated Ute* presumption to plead reliance. The theory behind the *Affiliated Ute* presumption is

that direct proof of reliance in omission cases requires "proof of a speculative negative" — that "I would not have bought had I known." *Blackie v. Barrack*, 524 F.2d 891, 908 (9th Cir. 1975). The court further explained that "whether the *Affiliated Ute* presumption of reliance is applicable is a decision that should be based on whether the presumption's purpose — of avoiding the need to prove a speculative negative — is implicated." Because the plaintiff's claims here were predicated on the defendants' affirmative misstatements rather than omissions, the *Affiliate Ute* presumption of reliance did not apply.

Proxy Solicitations

Northern District of Indiana Grants Motion to Dismiss Proxy Solicitation Claims Against Technology Company

Trahan v. Interactive Intelligence Grp., Inc., No. 1:16-cv-03161-SEB-MPB (S.D. Ind. Mar. 28, 2018)
Click here to view the opinion.

Judge Sarah Evans Barker granted a motion to dismiss claims alleging technology company Interactive Intelligence Group issued a false and misleading proxy solicitation in connection with its shareholders' approval of a proposed merger, in violation of Sections 14(a) and 20(a) of the Securities Exchange Act. At the heart of the plaintiff's claims was his estimation that the proxy solicitation failed to provide shareholders with information about Interactive's future success commensurate with the directors' "public puffing" about the predicted growth of a new product. The plaintiff alleged that the proxy solicitation statement was false and misleading in four respects: (1) it omitted longer-range projections from its financial forecasts; (2) it omitted separate financial projections for its three business lines; (3) Interactive's financial advisor used an inappropriate method to calculate the terminal value; and (4) Interactive's directors expressed insufficient optimism about the possible future success of the business, inducing shareholders to approve the merger rather than sell as a going concern.

The district court ruled that the plaintiff showed neither materiality nor objective and subjective falsity as to any of the alleged omissions or misrepresentations. The court reasoned the emerging technology about which directors allegedly puffed was too new to necessitate any longer than the 1 1/2-year year forecasts used. Moreover, shareholders held an interest in Interactive's entire enterprise, not in any one of its business lines, and Interactive was not proposing separate treatment. Further, Interactive's financial advisor sufficiently described its analysis to permit curious shareholders to do their own calculations. And finally, as a running theme, the court noted that the plaintiff could not show that the directors knew the business would be more valuable as a going concern than its merger value based exclusively on the hopes for success that Interactive publicly professed.

The court also ruled that the directors' statements in the proxy solicitation were entitled to protection under the PSLRA's safe harbor provision. The court noted that all statements at issue were forward-looking and accompanied by cautions, and the plaintiff failed to plead facts showing that Interactive made the statements with actual knowledge of their falsity. Finally, the court characterized the plaintiff's loss causation allegation as "no more than a speculative possibility that he was economically injured by any misrepresentation in connection with the Merger." As such, he could not plead the element of loss causation, and the district court dismissed his claims with prejudice.

Scienter

Second Circuit Affirms Dismissal of Securities Fraud Claims Against Bank

Sfiraiala v. Deutsche Bank Aktiengesellschaft, No. 17-2560 (2d Cir. Apr. 13, 2018)
Click here to view the opinion.

The Second Circuit affirmed the dismissal of claims that a bank and its officers violated Section 10(b) of the Securities Exchange Act by allegedly misrepresenting the effectiveness of its internal controls concerning anti-money laundering compliance.

The court determined that the plaintiffs failed to adequately plead a strong inference of scienter. The court first held that allegations that the bank's Russia office had a culture of "greed and corruption" were insufficient because they failed to show that the individual defendants personally benefited from making the alleged misrepresentations about the internal control. The court also held that the plaintiffs failed to sufficiently allege conscious misbehavior or recklessness. The plaintiffs' allegations that a consent order between the bank and its state regulator — in which the bank admitted that it had serious compliance deficiencies and demonstrated that one of its local offices allowed a money laundering transaction to take place — did not show that the individual defendants knew of any wrongdoing at the time they allegedly made any misrepresentations. The consent order confirmed that any alleged suspicious illegal laundering activities were never escalated out of the local office and thus, the bank did not learn of them until after the issue was escalated and the bank had commenced an internal investigation.

The court also found that certain public regulatory reports criticizing the bank's regulatory reporting controls did not support an inference of scienter because the reports did not concern the bank's money laundering controls, which was the subject matter of the alleged misrepresentations. Finally, the court held that an agreement between the bank and state and federal regulators to improve the bank's anti-money laundering controls showed no indication that the bank had failed to comply with its obligations pursuant to the agreement.

Securities Exchange Act

Fourth Circuit Holds Plaintiff Adequately Alleged Exposure Element of Loss Causation Pursuant to 'Amalgam' of Corrective Disclosure and Materialization of Risk Theories

Singer v. Reali, No. 15-2579 (4th Cir. Feb. 22, 2018)
Click here to view the opinion.

A split panel for the Fourth Circuit held that a plaintiff sufficiently pleaded loss causation to support a claim under Section 10(b) of the Securities Exchange Act where the exposure element of the loss causation analysis was based on "an amalgam" of the corrective disclosure theory and the materialization of the risk theory.

TranS1, Inc., a medical device company that sells a system designed for minimally invasive surgery (the System), derives its revenues from sales of the System and related surgical instruments, as well as from a share of the reimbursements made by health insurers and government-funded health care programs to surgeons.

The plaintiff brought a putative class action against TranS1 and its officers, under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, alleging that the defendants perpetrated a fraudulent scheme to instruct and encourage surgeons to secure unwarranted reimbursements from health insurers and government-funded health care programs by continuing to use an incorrect Category I code (which was more likely to result in reimbursement) after January 1, 2009, when the American Medical Association required procedures using the System to be coded as Category III. The complaint alleged that TranS1 made misrepresentations and omissions in its Securities and Exchange Commission (SEC) filings and press releases by failing to disclose that a substantial portion of its revenues were generated by the purportedly fraudulent reimbursement scheme or that the company was engaged in the scheme.

The Eastern District of North Carolina dismissed the plaintiff's second amended complaint. On appeal, a significant issue was whether the complaint adequately pleaded the two elements of loss causation: (1) the "exposure" of the defendant's misrepresentation or omission (*i.e.*, the revelation of new facts suggesting the defendant perpetrated a fraud on the market), and (2) that such exposure resulted in the decline of the defendant's stock price. The defendants argued that the plaintiffs failed to plead the exposure element under either the materialization of a concealed risk theory or the corrective disclosure theory.

A majority of the Fourth Circuit concluded that the complaint sufficiently alleged exposure by an amalgam of the two theories. The majority noted that the ultimate inquiry under both theories is the same: whether a misstatement or omission concealed something that, when disclosed, negatively affected the value of the security. The complaint relied on a Form 8-K filed by TranS1 after market close on October 17, 2011 (reporting it had received a subpoena from the Department of Health and Human Services under the authority of the federal health care fraud and false claims statutes) and an analyst report published the next day (revealing that the subpoena sought reimbursement communications with surgeons and that half of TranS1's revenues came from surgeons who still used the Category I reimbursement code). The two documents, the majority concluded, collectively revealed enough information for investors to recognize that TranS1 had perpetrated a fraud on the market.

The majority also concluded that the complaint's allegation that the Form 8-K and analyst report caused Trans1's stock price to plummet more than 40 percent on the day the analyst report was published was "wholly adequate" to demonstrate that the exposure of TranS1's fraud was at least one substantial cause of the decline in value.

Judge G. Steven Agee dissented, highlighting decisions from the Ninth and Eleventh circuits to support his opinion that the analyst report and Form 8-K's disclosure of the investigation were insufficient to demonstrate loss causation since, without more, they would not reveal fraud. Judge Agee also opined that the report's disclosure about the source of TranS1's revenues "just as plausibly" suggested nonfraudulent activity.

The Fourth Circuit has not had prior occasion to apply the materialization of the concealed risk theory; the majority's incorporation of that theory in the amalgam analysis could signal a future express adoption of the theory. Moreover, the court's holding leaves open the question of how much more beyond disclosure of an investigation will be required to establish loss causation.

Inside the Courts
An Update From Skadden Securities Litigators

Eastern District of Virginia Grants Motion to Dismiss Section 10(b) Claim, Holding Plaintiffs' Complaint Fails to Plead Any Specific Allegations of Fraud

Langley v. Booz Allen Hamilton Holding Corp., No. 1:17-cv-696 (LMB/TCB) (E.D. Va. Feb. 8, 2018)
Click here to view the opinion.

On June 15, 2017, Booz Allen Hamilton Holding Corporation (BAH) disclosed that its subsidiary, Booz Allen Hamilton Inc., was informed that the Department of Justice was conducting a civil and criminal investigation regarding certain elements of the subsidiary's cost accounting and indirect cost charging practices with the U.S. government. On June 16, 2017, the plaintiffs alleged that BAH's stock price fell approximately 19 percent.

On June 19, 2017, a putative class action complaint was filed against BAH and certain of its officers alleging that the defendants made materially false and misleading statements regarding BAH and its subsidiary in violation of Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder.

On October 20, 2017, lead plaintiffs Uniformed Sanitationmen's Association Local 831 Compensation Accrual Fund and Teamsters Locals Nos. 175 & 505 Pension Trust Fund (collectively, the plaintiffs) filed an amended complaint alleging that the defendants falsely and/or misleadingly represented that BAH "was 'on the path to sustainable quality growth,'" that "BAH 'must comply with laws and regulations relating to the formation, administration, and performance of U.S. government contracts,'" that BAH was complying with ethical requirements and that "BAH was expecting a 'slight uptick in billable expenses.'" The plaintiffs alleged that "these statements were materially false or misleading because they failed to disclose that BAH was defrauding the government." The defendants (who were represented by Skadden) filed a motion to dismiss the plaintiffs' amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and the PSLRA.

On February 8, 2018, the court granted the defendants' motion. The court held that, even assuming the truth of the plaintiffs' allegations and drawing all reasonable inferences in the plaintiffs' favor, the complaint fell short of alleging facts sufficient to state a claim under Section 10(b). The court reasoned that the "gravamen of plaintiffs' Complaint is that defendants' various statements were fraudulent or misleading because defendants made the statements while, at the same time, failing to disclose that BAH was committing fraud on the government; however, plaintiffs do not include any specific allegations relating to the commission of fraud."

The court observed that the plaintiffs did not allege any details about the commission of the alleged fraud, including "who was committing the fraud, what the nature or extent of the fraud was, or for how long the fraud had been taking place." Rather, the amended complaint merely alleged "a variety of relatively weak circumstantial evidence — such as various corporate officers' stock trades during the class period and pre-class period examples of fraudulent behavior at BAH, all of which were promptly disclosed to the public." The court remarked that drawing an inference of fraud from such allegations would require it "to pile inference upon inference, all the while disregarding the heightened requirements of the PSLRA," which the court refused to do. The decision illustrates the exacting level of scrutiny that courts will apply and the factual specificity courts will require with respect to complaints alleging securities fraud in the Fourth Circuit.

Securities Fraud Pleading Standards

Securities Fraud Claims Against Chinese Social Network Dismissed With Prejudice

Goldsmith v. Weibo Corp., No. 17-4728 (SRC) (D.N.J. Jun. 6, 2018)
Click here to view the opinion.

Judge Stanley R. Chesler dismissed a complaint made under Sections 10(b) and 20(a) of the Securities Exchange Act alleging that Weibo made false and misleading statements in public filings with the SEC regarding its compliance with Chinese law and regulations concerning a licensing requirement for companies engaged in internet transmissions.

Chinese law and regulations require a company to obtain a government-issued license before it may engage in the internet transmission of audio-visual programs. However, Weibo is not eligible for a license because the license is only available to state-owned companies. According to the complaint, Weibo stated in SEC filings that Weibo "was not required to have a license" and "gave investors the false impression that Weibo was in full compliance with Chinese laws and regulations by operating through third-party websites."

The district court held that the plaintiff failed to identify which statements in Weibo's public disclosures bolstered the impression that Weibo was in compliance with China's laws, given that Weibo disclosed its noncompliance. Weibo's 2014 prospectus and Form 20-F annual reports contain a section titled "Risks Relating to Doing Business in China," which states that uncertainties in China's licensing scheme may adversely affect Weibo, as the company lacks a license because it is not eligible for one.

Further, the disclosures state that Weibo intends to apply for a license in the event that licenses become available to companies not owned by the state.

First Circuit Holds That Pharmaceutical Company Did Not Mislead Investors When It Underestimated Time for Filing New Drug Application

Kader v. Sarepta Therapeutics, Inc., No. 17-1139 (1st Cir. Apr. 4, 2018)
Click here to view the opinion.

The First Circuit affirmed the dismissal of claims brought under Section 10(b) of the Securities Exchange Act alleging that a pharmaceutical company misled investors about the time it would take to file a new drug application with the Food and Drug Administration (FDA) for its Duchenne muscular dystrophy drug. The plaintiffs alleged that the company fraudulently misrepresented the FDA's communications to them concerning the drug's data and the expected timeline of approval after it disclosed that the company's new drug application (NDA) would be half a year behind schedule.

The court determined that the plaintiffs failed to adequately allege any material misrepresentations or omissions by the company. The court reasoned that the FDA's public statement in October 2014 addressing questions it received from patients did not suggest that the FDA had previously communicated concerns to the company that would have rendered its previous statements — that it expected to file an NDA at the end of 2014 — false or misleading. The court also reasoned that an interim request in July 2014 from the FDA for additional data did not show that the company knew it could not reasonably expect to file an NDA by the end of 2014. The company had previously disclosed to investors a similar request for data from the FDA in April 2014, and the court could not assume that this new request had a materially different impact on the timing for approval. The court further held that the plaintiffs had not adequately pleaded scienter: "When defendants do not divulge the details of interim 'regulatory back-and-forth' with the FDA, that alone cannot support an inference of scienter ... when the defendants **do** provide warnings in broader terms." The fact that the company stood to gain an advantage over its competitor by filing its application first did not give rise to an inference of scienter.

Materiality

Second Circuit Vacates Jury Conviction of RMBS Broker-Dealer

United States v. Litvak, No. 17-1464-cr (2d Cir. May 3, 2018)
Click here to view the opinion.

The Second Circuit vacated the jury conviction of a residential mortgage-backed securities (RMBS) broker-dealer on the charge that he violated Section 10(b) of the Securities Exchange Act by making material misrepresentations in connection with a particular RMBS transaction. At trial, the government alleged that the broker-dealer lied to a trader about the price at which a certain bond could be obtained from a seller, causing the trader to pay $73,000 more for the bond than he otherwise would have. The trial court permitted the trader to testify that he had believed that the broker-dealer was acting as his agent during the course of that transaction. The government submitted to the jury that although the trader's belief was mistaken because broker-dealers are principals and not agents, the trader's belief nonetheless was evidence that the broker-dealer's misstatements were material.

The Second Circuit vacated the conviction. The court first determined that "there was sufficient evidence for a rational jury to find [the broker-dealer's] misstatements material beyond a reasonable doubt," regardless of the trader's belief. The court, however, reasoned that the trial court's admission of the trader's mistaken testimony was erroneous. It reasoned that the materiality standard is objective and "centers on the views of a hypothetical, reasonable investor in the market at issue," that reasonable investors in the RMBS market tend to be more sophisticated than investors in more mainstream markets and that "[m]ateriality cannot be proven by the mistaken beliefs of the worst informed trader in a market." The court concluded that the admission of "evidence of the idiosyncratic and erroneous belief" of the RMBS trader was not harmless because it could have "substantially influence[d] the jury."

Omissions

Southern District of New York Dismisses Claims Against Pharmacy Benefit Management Organization

In re Express Scripts Holding Co. Sec. Litig., No. 16-cv-03338-ER (S.D.N.Y. May 21, 2018)
Click here to view the opinion.

Judge Edgardo Ramos dismissed claims that a pharmaceutical benefit management company violated Section 10(b) of the Securities Exchange Act by making alleged misstatements about

the strength of its contractual relationship with its largest client and how it treated that contract for accounting purposes. The court had previously dismissed the plaintiffs' first complaint, finding that statements about the company's negotiations with its client regarding the contract, which were disclosed, were not actionable. The court also had determined that there were no plausible allegations that the company did not believe its statements regarding the useful life of the contract for accounting purposes at the time they were made. The court reasoned that the company's public disclosures sufficiently warned investors that its contract might not be renewed. In their amended complaint, the plaintiffs alleged that the company misled investors to believe that the parties were actively engaged in good faith discussions to renew the contract and that the company accounted for the contract as if it were "highly probable" that it would be renewed for another five-year period.

The court held that the plaintiffs' amended complaint failed to allege new facts showing that the company misled investors about the strength of its relationship with its client and the nature of the contract renewal negotiations. The court again reasoned that high-level statements disclosing the company's ongoing negotiations with its client were not actionable. The court further determined that the plaintiffs' amended allegations about the accounting treatment of the contract were not actionable; the plaintiffs failed to adequately allege that generally accepted accounting principles required the company to revise its accounting treatment of the contract earlier than it did. Finally, the court determined that the plaintiffs failed to adequately allege scienter. The plaintiffs failed to allege any facts showing that the company knew that its public statements about the contract renewal were incorrect or that it had specific knowledge of or access to facts that contradicted those disclosed in public statements.

SDNY Dismisses Putative Class Claims Against Fast-Food Retailer

Ong v. Chipotle Mexican Grill, Inc., No. 16 Civ. 141 (KPF) (S.D.N.Y. Mar. 22, 2018)
Click here to view the opinion.

Judge Katherine Polk Failla dismissed a second amended complaint brought by a putative class of investors alleging that a fast-food retail company violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder by failing to disclose certain conduct related to the company's food handling processes that led to several E. coli outbreaks at restaurants across the United States and a related investigation by the Centers for Disease Control and Prevention (CDC).

The plaintiffs alleged that the company failed to accurately disclose (1) the company's transition from using central commissary kitchens to prepare and process food to in-store processing and the attendant increased risk of food-borne illness outbreaks; (2) the extent of certain E. coli outbreaks that occurred at the company's restaurants; (3) the status of the CDC's investigations into the outbreaks; and (4) the impact of the outbreaks on the company's risk profile, profitability and financial outlook. The plaintiffs further alleged the company made misleading statements about its ability to trace its ingredients purchased through various supply chains.

The court determined that the plaintiffs failed to adequately allege any material misrepresentation or omission because the company made adequate disclosures about the risks associated with the company's food processing, the status of CDC investigations and the company's risks and financial outlook. Although additional E. coli outbreaks were alleged to have been concealed, the company was not required to update that "lengthy disclosure" to account for each of the E. coli outbreaks. The court also determined that statements about the status of the CDC investigations were not misleading because in context, the company was "only speaking of the 43 restaurants they were reopening rather than the entirety of the CDC's investigation." Similarly, the alleged omission regarding the traceability of the company's food ingredients was not material because "no reasonable investor would have considered significant [the company's] ability to trace ingredients through its supply chain in deciding whether to invest in [the company]."

The court also held that the plaintiffs failed to adequately plead a strong inference of scienter because they failed to show that the defendants had access to material information (*i.e.*, instances of customer sickness) that was allegedly concealed. The court also reasoned that stock sales that occurred months before the alleged corrective disclosures did not create a strong inference of scienter because the transactions were not unusual. The court reasoned that the more plausible and nonculpable inference is that "the negative publicity associated with the food-borne illness outbreaks and the consequent diminution in value of [company] stock" caused the executives to sell less stock after the disclosure.

District of Colorado Dismisses Securities Fraud Claims Against Poultry Company Premised on Purported Price-Fixing Conspiracy

Hogan v. Pilgrim's Pride Corp., No. 16-cv-02611-RBJ (D. Colo. Mar. 14, 2018)
Click here to view the opinion.

Judge R. Brooke Jackson dismissed putative class claims against a poultry company alleging that the company violated Section 10(b) of the Securities Exchange Act by failing to disclose that it was engaging in a price-fixing conspiracy that only came to light when the company was sued for antitrust violations. The plaintiff alleged that the company colluded with other poultry companies to depress production of broiler chickens so as to artificially stabilize their prices and artificially inflate the value of the company's securities. The plaintiff further alleged that the company effected the reduction by, among other means, destroying eggs, reducing breeder flocks, destroying chicks and shutting down facilities. The plaintiff alleged that evidence of this conspiracy was that the Georgia Department of Agriculture's Georgia Dock pricing index — an industry index of broiler prices compiled by telephone calls to top broiler producers — was higher than other industry indexes that performed verification of prices reported by broiler producers.

The court first determined that because the complaint was premised on an alleged underlying antitrust conspiracy, the plaintiff was required to plead with particularity the facts "that establish the existence of the antitrust conspiracy." Although the court determined that the plaintiff met the PSLRA's heightened pleading standard with respect to the alleged falsity of the company's statements, the plaintiff failed to meet the standard with respect to the underlying conspiracy. The court found that the plaintiff failed to adequately allege a Sherman Antitrust Act claim because the allegations "lack[ed] facts about the means and amounts by which the alleged conspirators cut production or when those particular cuts occurred," making it "difficult to determine whether the conspirators were acting in parallel." The court also determined that even if the plaintiff had adequately pleaded parallel conduct, the plaintiff failed to plead that there was any agreement among the alleged co-conspirators, noting that "membership in industry associations, attendance at industry conferences" were insufficient indicia of an agreement. The court concluded that the complaint essentially "plead[ed] fraud by innuendo" and dismissed it without prejudice.

SLUSA Preclusion

Eighth Circuit Rules That State Law Claims by Retail Investors Against Brokerage Firm Are Precluded by SLUSA

Zola v. TD Ameritrade, Inc., No. 16-3013 (8th Cir. May 10, 2018)
Click here to view the opinion.

In an opinion by Judge Roger L. Wollman, the Eighth Circuit held that the class action complaints of retail investors alleging various state law claims were precluded by SLUSA. The plaintiffs in three related class complaints alleged that the brokerage firm defendant breached its "duty of best execution" when it routed orders to buy and sell securities to trading venues that paid the most "kickbacks." Judge Joseph F. Bataillon of the District of Nebraska had dismissed all complaints, ruling that the claims were precluded by SLUSA. Relying on its recent decision in *Lewis v. Scottrade, Inc.*, 879 F.3d 850 (8th Cir. 2018), the Eighth Circuit affirmed, holding that the complaints were a "covered class action" under SLUSA that alleged "a misrepresentation or omission" of a material fact that was "in connection with the purchase or sale of a covered security."

The plaintiffs first argued that they were not pleading that the defendants made a misrepresentation or omission but rather, that they breached their uniform client agreement by failing to consider required factors for directing orders. The Eighth Circuit disagreed. Although it noted that the complaint carefully avoided words that expressly alleged fraud such as misrepresentation, omission or deception, the focus of the plaintiffs' claims was the defendant's alleged failure to disclose the fact that it was selling its order flow to the highest bidder. In coming to this conclusion, the Eighth Circuit noted "a disconnect between the alleged breach ([the defendant]'s failure to consider the factors set forth in the client agreement) and the damaged sought (disgorgement of profits) based on [the defendant]'s misconduct (engaging in a secret scheme to increase profits at the expense of its clients."

The plaintiffs then argued that under *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014), the purchase or sale of a security must be "induced by the fraud" in order to meet SLUSA's "in connection with" requirement. Because the defendant's alleged misconduct did not affect the plaintiffs' decision to buy or sell a security, the plaintiffs reasoned that their claims were not precluded by SLUSA. The Eighth Circuit, however, rejected the plaintiffs' contention, noting that the correct standard for the "in connection with" requirement was that the alleged fraud "coincide" with a securities transaction. *Merrill Lynch, Pierce, Fenner & Smith v. Dabit*, 547 U.S. 71 (2006). Because there

was no dispute that the plaintiffs purchased and sold covered securities and that the defendant allegedly received kickbacks when it routed those purchases and sales, the "in connection with" requirement was met. Thus, the Eighth Circuit held that the plaintiffs' claims were precluded by SLUSA and affirmed the district court's dismissal.

Statutory Appraisal

Court of Chancery Relies on Discounted Cash Flow Analysis to Determine Fair Value Below Deal Price in Statutory Appraisal

In re Appraisal of AOL Inc., No. 11204-VCG
(Del. Ch. Feb. 23, 2018)
Click here to view the opinion.

In the statutory appraisal of AOL Inc., Vice Chancellor Sam Glasscock III relied on a discounted cash flow (DCF) analysis to determine that the fair value of AOL's stock was below the deal price of $50 per share.

On the facts of the case, the Court of Chancery stated that it was a "close question" as to whether the AOL transaction was "*Dell* compliant" — in other words, whether the transaction "represent[ed] an unhindered, informed, and competitive market valuation," in accordance with the Delaware Supreme Court's recent ruling in *Dell*. However, while finding that many of the indicia of a competitive market process were present, the Court of Chancery concluded that certain statements made by AOL's CEO, the lead negotiator of the deal, signaled to the market that there was no other deal to be made and that no topping offers would therefore be successful. The court held that the "unusually preclusive" public statements of the CEO, when combined with other attributes of the transaction, rendered the deal price unreliable as the sole indicator of fair value. Moreover, because the court could not rely on deal price as the sole determinant of fair value, it was unable to find a principled way to assign the deal price any weight in its fair value analysis. Therefore, the court assigned full weight to its own DCF valuation and "relegate[d] transaction price to a role as a check on that DCF valuation." The result of the vice chancellor's DCF analysis was $48.70 per share, which represented $1.30 less than the deal price.

Court of Chancery Relies on 30-Day Average Unaffected Trading Price in Statutory Appraisal

Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448-VCL (Del. Ch. Feb. 15, 2018)
Click here to view the opinion.

In this statutory appraisal action involving Aruba Networks, Inc., Vice Chancellor J. Travis Laster determined that the most reliable indicator of fair value was the 30-day average unaffected trading price of Aruba's stock on the Nasdaq composite.

In the decision, the Court of Chancery accorded full weight to the unaffected trading price and gave no weight to the merger price. Vice Chancellor Laster held that under the Delaware Supreme Court's recent decisions involving the appraisals of Dell and DFC Global, "when the subject company's shares are 'widely traded on a public market based upon a rich information base,' then the fair value of a proportionate interest in the company as a going concern would 'likely be best reflected by the prices at which [the] shares were trading as of the merger.'" Put differently, "when the market for a company's shares has the requisite attributes [associated with market efficiency], the stock price is 'likely a possible proxy for fair value.'" Thus, the court reasoned that "[u]nder *Dell* and *DFC*, the critical question is whether the market for the subject company's shares has attributes associated with market efficiency." Because Aruba's stock price exhibited the same requisite attributes of market efficiency as those found sufficient in *Dell* and *DFC*, the court held that "Aruba's market price provides reliable evidence of the going concern value of the firm."

Analyzing the reliability of deal price, the court interpreted *Dell* and *DFC* to hold that a sales process is not "sufficiently bad to warrant discounting the deal price" so long as "the deal in question was an arm's-length transaction," and that a court should not inquire "into whether a different transaction process might have achieved a superior result." However, in this case, the court ultimately found that the deal price was unreliable because, among other uncertainties, relying on the deal price would require excluding both synergies and the value of a reduction in agency costs, both subjective factors. Therefore, the court accorded full weight to the unaffected market price of $17.13, which it found "provides the more straightforward and reliable method for estimating the value of the entity as a going concern."

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