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Skadden

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Extraterritoriality

Northern District of California Denies Cryptocurrency Foundation's Motion to Dismiss, Holding Foundation Is Subject to SEC Jurisdiction

In re Tezos Sec. Litig., No. 17-cv-06779 (N.D. Cal. Aug. 7, 2018)
Click here to view the opinion.

Judge Richard Seeborg denied defendant Tezos' motion to dismiss, holding that the company's cryptocurrency — also called Tezos — is a security subject to the jurisdiction of the SEC.

The plaintiff investors argued that cryptocurrency distributed in connection with the defendant's initial coin offering (ICO) was subject to SEC rules and regulations for the sale of unregistered securities because the critical aspects of the sale occurred in the United States. The defendant argued that the ICO occurred outside the United States because it was administered by the Swiss-based Tezos Foundation, the transactions took place in the U.K. where the software was based and the terms of the sale governing the ICO contained a forum selection clause that designated Switzerland as the exclusive forum for disputes.

The court held that the Tezos ICO fell within the SEC's jurisdiction. The court reasoned that, in determining whether the sale of "an unregistered security, purchased on the internet, and 'recorded on the blockchain'" is a domestic transaction subject to the application of U.S. law and thus the SEC's jurisdiction, the "critical aspects of the sale" must occur in the United States. Here, the court found that because the transaction was hosted on an Arizona-based server, run by a California resident, and ICO investors had likely learned about it from "marketing that almost exclusively targeted [U.S.] residents," the critical aspects of the sale occurred in the United States, and thus the sale was subject to the jurisdiction of the SEC.

Fiduciary Duties

Aiding and Abetting Breaches of Fiduciary Duty

Court of Chancery Dismisses Aiding-and-Abetting Claims Post-Trial

In re PLX Tech. Inc. Stockholders Litig., Consol. C.A. No. 9880-VCL (Del. Ch. Oct. 16, 2018)
Click here to view the opinion.

Post-trial, the court entered judgment in favor of a defendant alleged to have aided and abetted breaches of fiduciary duty, holding that although the plaintiffs prevailed on their claims, they failed to prove damages.

The action arose from Avago Technologies' acquisition of PLX Technology following an activist campaign. Prior to the acquisition, Potomac Capital, a 9.4 percent stockholder, replaced three of PLX's directors with its co-managing member, Eric Singer, and two other nominees. Soon thereafter, PLX's financial advisor notified Singer that Avago wanted to acquire PLX at $6.53 per share. Singer did not share that information with the rest of the board. A few months later, a representative of Avago met with Singer and proposed to acquire PLX for $6.25 per share. Nine days later, PLX agreed in principle to a deal at $6.50 per share.

Stockholders filed suit against the members of PLX's board of directors for breaches of fiduciary duty, and against Potomac, Avago and PLX's financial advisor for aiding and abetting breaches of fiduciary duty. Prior to trial, all of the defendants other than Potomac were either dismissed from the case or settled the claims against them.

The Court of Chancery held that the plaintiff prevailed on each element of its aiding-and-abetting claim against Potomac but failed to prove damages. The court noted that enhanced scrutiny would apply to a sale of the company for cash unless, under the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), the merger was approved by a fully informed, uncoerced stockholder tender. After finding that the PLX board committed several disclosure violations, the court concluded the standard of review would be enhanced scrutiny under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173 (Del. 1986). The court noted that although the "narrow, pre-signing canvass with a post-signing market check" suggested that the process fell within a range of reasonableness, it concluded that the sale process was plagued by "divergent interests," and that Potomac "succeeded in influencing the directors to favor a sale when they otherwise would have decided to remain independent." However, with respect to damages, the court determined that the sale price exceeded PLX's fair value on a standalone basis, even though the process was "flawed from a fiduciary standpoint."

Controlling Stockholder Litigation

Delaware Supreme Court Affirms Court of Chancery's Dismissal Under *MFW*

Flood v. Synutra Int'l, Inc., No. 101, 2018 (Del. Oct. 9, 2018)
Click here to view the opinion.

The Delaware Supreme Court affirmed the Court of Chancery's dismissal of breach of fiduciary duty claims and related aiding-and-abetting claims under *Kahn v. M&F Worldwide Corp.* (*MFW*), 88 A.3d 635 (Del. 2014), clarifying the circumstances under which the business judgment rule may apply to controlling stockholder transactions.

The action arose from a squeeze-out merger whereby Synutra International was acquired by its controlling stockholder group. The control group's initial nonbinding proposal did not condition a potential transaction on *MFW*'s dual protections of both approval by a special committee of independent directors and a majority of the company's disinterested stockholders. The control group did, however, send a follow-up letter two weeks after its initial proposal expressly conditioning the transaction on such approval. The plaintiff, a stockholder of Synutra, filed a lawsuit challenging the merger, arguing that it did not comply with the standard set forth in the *MFW* decision, which lessens the standard of review for evaluating mergers involving a controlling stockholder from entire fairness to business judgment review when the merger is conditioned "*ab initio*" on the dual protections.

In the case below, the Court of Chancery held that, despite the two-week delay in conditioning the deal on *MFW*'s dual protections, the control group ultimately complied with *MFW*. Accordingly, the Court dismissed the complaint.

The Delaware Supreme Court agreed with the Court of Chancery and clarified *MFW*'s *ab initio* requirement. The court stated that a controller satisfies the requirement when it "condition[s] the buyout on both [procedural protections] at the beginning stages of the process of considering a going private proposal and before any negotiations commence between the Special Committee and the controller over the economic terms of the offer." The court also expressly overruled *dicta* in *MFW* observing that the plaintiff's "allegations about the sufficiency of the price call[ed] into question the adequacy of the Special Committee's negotiations." The court explained that "a plaintiff can plead a duty of care violation only by showing that the Special Committee acted with gross negligence, not by questioning the sufficiency of the price," and that a "price question is not one for a court applying the business judgment rule standard" but rather for the stockholders to vote on themselves.

Mergers and Acquisitions Litigation

Court of Chancery Authorizes Termination of Merger Agreement Due to Material Adverse Effect

Akorn, Inc. v. Fresenius Kabi AG, C.A. No. 2018-0300-JTL (Del. Ch. Oct. 1, 2018)
Click here to view the opinion.

In a 246-page post-trial decision, Vice Chancellor J. Travis Laster denied a seller's request for an order directing a buyer to specifically perform its contractual obligations to close a merger, finding that the buyer validly terminated the merger agreement because, among other things, it validly relied on the fact that the buyer had suffered a material adverse effect (MAE), as defined in the merger agreement.

The litigation arose from Fresenius Kabi AG's contemplated acquisition of Akorn, Inc. pursuant to an April 2017 merger agreement. In the second quarter of 2017, Akorn's business performance "fell off a cliff" and continued to deteriorate. Later in 2017, Fresenius conducted an investigation that revealed Akorn had "serious and pervasive data integrity problems," including submitting falsified product data to the Food and Drug Administration (FDA). Fresenius provided Akorn with a notice of termination of the merger agreement on the grounds that Akorn (i) breached regulatory representations and warranties that could reasonably be expected to have an MAE (the Bring-Down Condition); (ii) materially breached a covenant that it complied with or performed in all material respects its obligations (the Covenant Compliance Condition), including to operate in the ordinary course of business (the Ordinary Course Covenant); and (iii) had suffered an MAE. In response, Akorn sued for specific performance, asserting that Fresenius breached the Covenant Compliance Condition by failing to use its reasonable best efforts to consummate the merger (the Reasonable Best Efforts Covenant) and take all actions necessary to obtain antitrust approval (the Hell-or-High-Water Covenant).

First, the court found that Akorn breached the Bring-Down Condition, which required Akorn's representations, including representations regarding regulatory compliance, to have been true at signing and closing. At the time of signing, Akorn had "widespread regulatory violations and pervasive compliance problems" and these problems "got worse, rather than better," during the relevant time period. The court estimated that Akorn's data integrity issues constituted a regulatory MAE because the issues would result in a valuation hit of about $900 million, or a 21 percent decline in Akorn's implied value under the merger agreement.

Second, the court found that Akorn breached its duty to use "commercially reasonable efforts" — which the court treated as synonymous with "reasonable best efforts" — to carry on its business "in all material respects" in the ordinary course of business. The court found that Akorn's conduct — in canceling regularly scheduled audits in favor of verification audits that would not reveal additional deficiencies, failing to devote any resources to data integrity projects, submitting regulatory filings to the FDA based on fabricated data and failing to investigate regulatory issues upon receiving whistleblower letters — constituted a material departure from reasonable best efforts to conduct the business in the ordinary course.

Third, the court found that Akorn suffered a MAE that "substantially threaten[ed its] overall earnings potential [] in a durationally-signficant manner." From Q2 2017 through Q1 2018, Akorn's year-over-year declines each quarter ranged from 25 percent to 34 percent for revenue, 84 percent to 292 percent for operating income and 96 percent to 300 percent for earnings per share. In contrast, over the five-year span of 2012 to 2016, Akorn grew consistently, year over year, when measured by the same metrics. Akorn's "dramatic downturn in performance is durationally significant" because it "persisted for a full year" and showed "no signs of abating."

By contrast, the court found that Fresenius did not breach the Reasonable Best Efforts Covenant because it "analyzed and remained committed to fulfilling its obligations under the Merger Agreement" even while it evaluated its rights, including termination rights. Fresenius did breach the Hell-or-High-Water Covenant because for one week, it embarked on a path that would have pushed obtaining regulatory approval beyond the time frame established in the merger agreement. The court, however, found that Fresenius' breach was not material because, within one week of deviating, Fresenius reverted back to the path that would have kept obtaining regulatory approval within the merger agreement time frame.

The court therefore concluded that Fresenius had validly terminated the merger agreement. Akorn has since taken an appeal.

Misrepresentations

SDNY Rules That Companies Must Go to Trial Over Claims Brought by Group of Investment Funds

Silvercreek Mgmt., Inc. v. Citigroup, Inc., No. 02-CV-8881-JPO (S.D.N.Y. Sep. 28, 2018)
Click here to view the opinion.

Judge J. Paul Oetken granted, in part, several financial institutions' motions for summary judgment on claims under Section 11 of the Securities Act. The claims originated from plaintiffs' October 2001 investment of approximately $100 million in two types of Enron securities, which became worthless after Enron's bankruptcy. As to the Section 11 claim, the financial institutions argued that the plaintiffs had failed to establish that they were underwriters for purposes of Section 11 liability. The court granted summary judgment as to one company because the offering at issue was a Rule 144A private placement, not a public offering, and the court held that Section 11 did not apply. Although the plaintiffs argued that the private offering was sufficiently related to a subsequent public offering of the same securities, the court held that Section 11 liability arises only where the public and private transactions are so intertwined that they appear as one to the investing public, and that the plaintiffs had failed to demonstrate the company's involvement in any public offering or even that a public offering had occurred.

As to the other company, however, the court found a materially disputed fact with respect to that company's participation in a public offering of the securities and therefore whether the company could be held to be an underwriter. The court noted that the public registration statement indicated that the company was a reseller of the notes and may be deemed to be an underwriter within the meaning of the Securities Act. The company also purportedly participated in preparing the registration statement and conducting due diligence. The court rejected the company's argument that it had only a minor role and purchased only a small amount of the securities at issue, holding that Section 11 permits liability for "*every* underwriter."

Inside the Courts
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Proxy Solicitations

District of Nebraska Dismisses Shareholder Suit Regarding Allegedly Misleading Proxy Statement

In re Nat'l Research Corp. S'holder Litig., No. 4:17-cv-441 (D. Neb. Oct. 9, 2018)
Click here to view the opinion.

Judge John M. Gerrard dismissed claims brought by a corporation's minority shareholders under Section 14(a) of the Securities Exchange Act, SEC Rule 14(a)-9 and Nebraska law against a corporation, its chairman and controlling shareholder, and the other members of its board of directors. The plaintiffs alleged that the board violated federal law by including false or misleading information in a proxy statement soliciting minority shareholder approval for a plan to repurchase and retire the corporation's Class B stock. Specifically, the plaintiffs alleged two theories. First, the proxy statement was misleading because it did not disclose management's cash flow projections. Second, the proxy statement was misleading because reimbursements to the controlling shareholder characterized as legal, advisory and financial modeling fees were in fact the controlling shareholder's personal expenses related to a prior failed iteration of the share repurchase plan.

Applying the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA), the court dismissed the federal claim. As to the allegation regarding omission of cash flow projections in the proxy statement, the court noted that there was no strong inference of scienter because the plaintiffs failed to ascribe a motive, purpose or "plan in mind" for the omission. The court further observed that omission of the cash flow projections did not render any statement in the proxy statement untrue or misleading.

As to the allegation regarding the mischaracterization of the controlling shareholder's personal expenses related to the prior failed repurchase plan, the court noted that the amounts reimbursed to the controlling shareholder were in fact for legal, advisory and financial modeling fees. Any disagreement stemmed from the plaintiffs' view that the prior failed repurchase plan was for the personal benefit of the controlling shareholder. Even though the proxy statement did not disclose that the same lawyer advised both the controlling shareholder and the board of directors, the plaintiffs alleged this only to be a "potential conflict of interest" and not an actual conflict of interest that could render misleading the statement regarding reimbursement for legal fees.

SEC Enforcement Actions

Ninth Circuit Holds That General Partnership Interests Are Investment Contracts and Qualify as Securities Under Federal Law

SEC v. Schooler, No. 16-55167 (9th Cir. Sept. 26, 2018)
Click here to view the opinion.

The Ninth Circuit affirmed the district court's grant of summary judgment to the Securities and Exchange Commission (SEC), finding that unregistered, purported "partnership interests" sold by the defendant qualified as "investment contracts" and therefore constituted securities under federal law.

The defendant formed a general partnership to identify tracts of land to purchase, with the hope that the land would become developed and increase in value. The defendant sold interests in the partnership to investors. The SEC sued, claiming the partnership interests were unregistered securities and that the defendant had defrauded his investors.

In granting summary judgment to the SEC, the Ninth Circuit held that although the defendant marketed these real estate investments as partnership interests, they qualified as investment contracts under federal law because they were "investment[s] in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others." Specifically, the Ninth Circuit found that the general partnership interests were "stripped of the hallmarks of a general partnership and marketed as passive investments." For example, unlike a typical real estate investment, general partners had no control over what land to purchase or how much to pay for it. Rather, the defendant "exercised near total control over the investments between receipt of investor payments and execution of the partnership agreements," and the partnership agreements were not effective upon delivery of investor funds, but rather, at an arbitrary date after "nearly all meaningful decisions were made that would determine the success or failure of the investment."

Inside the Courts
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DC Circuit Vacates Decision, Remands Case Adjudicated by Unconstitutionally Appointed Administrative Law Judge

Harding Advisory LLC v. SEC, No. 17-1070, SEC-3-15574 (D.C. Cir. Sept. 19, 2018)
Click here to view the opinion.

A three-judge panel of the D.C. Circuit set aside an SEC decision and order, and remanded the case for a new hearing. The case involved claims against investment adviser Wing Chau and his company, Harding Advisory LLC (Harding). The administrative law judge (ALJ) assigned to adjudicate the case found that Chau and Harding violated Section 17(a) of the Securities Act and Section 206 of the Investment Advisers Act by committing fraud in connection with the management of certain collateralized debt obligations, and imposed penalties. On review, the commission upheld the ALJ's decision and imposed additional fines and disgorgement. Chau appealed to the D.C. Circuit. The Court of Appeals ordered a stay pending the U.S. Supreme Court's decision in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044 (2018), which challenged the appointment of the ALJ who adjudicated the case as constitutionally invalid.

On June 21, 2018, in its decision in *Lucia*, the Supreme Court held that ALJs are "Officers of the United States" and thus subject to the Appointments Clause of the U.S. Constitution. The Court further held that if a party makes a timely constitutional challenge to the appointment of the ALJ who adjudicates his or her case, the party is entitled to relief. In the case of an adjudication tainted by an Appointments Clause violation, the appropriate relief is a new hearing before a properly appointed official.

Following the decision in *Lucia*, the SEC moved to remand Chau's case to the commission for a new hearing. Chau opposed, arguing that under *Lucia*, the commission's order could not be affirmed or modified but rather must be set aside. Chau reasoned that the Supreme Court's mention in *Lucia* of "remand" as a remedy for an Appointments Clause violation was merely *dicta* that carried no weight.

The D.C. Circuit issued an order setting aside the commission's decision and remanding Chau's case to the SEC for a new hearing before a different ALJ or before the commission, in accordance with *Lucia*. The circuit court rejected Chau's argument that the case could not be remanded. Quoting language from its decision in *Sierra Club v. EPA*, 322 F.3d 718 (D.C. Cir. 2003), the court emphasized that "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative."

On November 30, 2017, while this case was pending, the SEC announced that it ratified the appointments of its ALJs in order to settle the question of whether the hiring process for those judges violates the Appointments Clause.

Securities Fraud Pleading Standards

Fifth Circuit Affirms Dismissal of Section 10(b) Claim, Holding That Challenged Statements Did Not Constitute Material Misrepresentations and Plaintiffs Did Not Plead Loss Causation

Emps.' Ret. Sys. of the State of Haw. v. Whole Foods Mkt., Inc., No. 17-50840 (5th Cir. Oct. 3, 2018)
Click here to view the opinion.

On October 3, 2018, a three-judge panel dismissed a putative class action lawsuit against Whole Foods Market, Inc. and several of its officers. The suit alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act.

On June 24, 2015, the New York City Department of Consumer Affairs (DCA) released a report detailing violations of national weights-and-measures standards by Whole Foods. On June 29, 2015, Whole Foods CEOs John Mackey and Walter Robb posted a video to the retailer's website, stating that the company had "made some mistakes" with regard to its pricing. When the company released its third-quarter financial data on July 29, 2015, it failed to meet its sales targets for the quarter, as the company experienced a slowdown in sales growth in the weeks between the DCA's report on June 24, 2015, and the end of the quarter on July 5, 2015.

The plaintiffs, who purchased Whole Foods stock between July 31, 2013, and July 29, 2015, alleged that three categories of statements made by Whole Foods during that period were false in light of the weights-and-measures violations: (i) assertions of competitive pricing; (ii) statements suggesting high standards for transparency, quality and corporate responsibility; and (iii) exaggerated financial results that fraudulently reported revenues earned as a result of the weights-and-measures violations. The plaintiffs alleged that these statements deceived stockholders into purchasing stock at artificially inflated prices.

The district court dismissed the case for failure to state a claim, holding that the complaint did not sufficiently identify a material false or misleading statement or adequately plead loss causation, and thus failed to meet the elements of a Section 10(b) cause of action.

The Fifth Circuit affirmed. It held that the plaintiffs failed to allege the competitive pricing statements were misleading because they had not compared the prices at the time in question with prior prices, nor had they alleged that the prices were unattractive to consumers. The court explained that even though the prices actually charged were higher than advertised, this did not yield the inevitable conclusion that the charged prices were uncompetitive. The court further held that statements regarding transparency, quality and corporate responsibility were "the sort of puffery that a reasonable investor would not rely on," rather than material misrepresentations.

With respect to the plaintiffs' allegation of exaggerated financials, the court held that the plaintiffs failed to plead the alleged fraud with particularity, as they did not plead, for each statement alleged to have been misleading, how much of its revenue Whole Foods allegedly overstated. The court further held that the plaintiffs failed to adequately plead loss causation with respect to the allegedly exaggerated financials. The plaintiffs alleged that their loss occurred when Whole Foods' stock price dropped about 10 percent on July 30, 2015, over a month after the weights-and-measures scandal was revealed. The court held that because the plaintiffs did not allege that any new information was revealed in the time period between the DCA findings and the price drop, they failed to identify a decline in stock price that shortly followed a corrective disclosure.

Falsity

Western District of Washington Dismisses Securities Fraud Class Action Arising From Consumer Investigation for Failure to Assert Particularized Facts

In re Zillow Grp. Inc. Sec. Litig., No. C17-1387-JCC (W.D. Wash. Oct. 2, 2018)
Click here to view the opinion.

Judge John C. Coughenour dismissed a putative class action against Zillow Group that arose from a Consumer Financial Protection Bureau (CFPB) investigation into Zillow's co-marketing deal for agents and lenders, finding that the plaintiffs failed to allege falsity with particularity.

Zillow, an online real estate marketing site, offered real estate agents and mortgage lenders a co-marketing program that allowed lenders to contribute to a real estate agent's advertising costs in exchange for appearing on the agent's online listing and receiving some of the leads the agent received from visitors to the site. In April 2015, the CFPB began investigating Zillow's co-marketing program, and in February 2017, it notified Zillow that it was considering legal action for violations of the Real Estate Settlement Procedures Act (RESPA). In August 2017, investors sued, alleging that Zillow previously made misrepresentations regarding the investigation and that they purchased Zillow shares at an artificially inflated price.

The plaintiffs alleged that Zillow made false or misleading statements during an investor call that led investors to believe the co-marketing program was in compliance with RESPA, when Zillow knew it was not. The plaintiffs also claimed that Zillow should have disclosed the CFPB's investigation, and that its failure to do so also misled investors.

The court granted Zillow's motion to dismiss. The court determined that investors failed to allege particularized facts demonstrating that Zillow knew the co-marketing program violated RESPA. The court further found that Zillow was not required to disclose the CFPB investigation because its affirmative statements did not give off the impression that Zillow was not under regulatory scrutiny. Therefore, Zillow had no duty to disclose it.

Scienter

Sixth Circuit Reverses Dismissal of Shareholder Suit Alleging Pharmaceutical Company Fraudulently Misled Investors

Dougherty v. Esperion Therapeutics, Inc., No. 17-1701 (6th Cir. Sept. 27, 2018)
Click here to view the opinion.

The Sixth Circuit reversed a decision dismissing a putative class action brought against a pharmaceutical company by a group of its shareholders. The plaintiffs, who purchased stock in the company during the class period, alleged that the company misled investors by stating in a press release that the FDA would not require it to perform a costly test before approving a drug for market. When the company walked back its statements upon receipt of further information from the FDA, the company's stock price fell 48 percent. The plaintiffs brought suit as a result.

The plaintiffs alleged the company misled investors with false statements, violating Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder. The district court held that the plaintiffs failed to adequately plead a strong inference of scienter because the company's statements were not reckless and, further, that the statements fell within the safe harbor provision of the PSLRA as forward-looking statements.

The Sixth Circuit disagreed. In analyzing the company's statements under the factors set forth in *Helwig v. Vencor, Inc.*, 251 F.3d 540 (6th Cir. 2001), the court determined that the company's two alternative explanations for the discrepancy in its statements were no more plausible than the plaintiffs' position that the statements were knowingly or recklessly false. Furthermore, the court found that the statements were not forward-looking, but rather, were mixed statements of present fact and future prediction and, as such, fell outside the PSLRA's safe harbor. Accordingly, the Sixth Circuit reversed the district court's dismissal and remanded.

SDNY Dismisses Putative Class Claims Brought by Investors in Multinational Gold Mining Company

In re Barrick Gold Corp. Sec. Litig., 17-cv-3507-NRB (S.D.N.Y. Sep. 20, 2018)
Click here to view the opinion.

Judge Naomi Reice Buchwald dismissed putative class claims against a multinational gold mining company brought under Section 10(b) of the Securities Exchange Act. The plaintiffs alleged that, following several incidents in 2016 and early 2017 where one of the company's major mines located in Argentina had chemical spills resulting in certain regulatory measures being imposed by local authorities, the company made false and misleading statements that mischaracterized the impact that those incidents would have on the mine's operations. The plaintiffs alleged that the company had misrepresented that it had taken certain remedial steps and that the mine's output and operating costs for 2017 would not be materially perturbed by the incidents. The plaintiffs alleged that the truth was revealed when the company later announced quarterly operating results showing forecasted reduced output and increased costs for the mine as a result of local regulatory restrictions.

The court determined that the company's statement about remediation was not adequately alleged to be false because they did not plead that the defendants had not undertaken the remedial steps described in their public statements (for example, implementing aerial surveillance of the mine). The court further determined that the plaintiffs failed to adequately plead a strong inference of scienter. Although some of the company's executives had access to information that might have rendered their statements knowingly misleading, the "individually insufficient allegations do not combine to create an inference of scienter sufficient to satisfy the PSLRA." The court also determined that the company's statements were not actionable because they were protected by the PSLRA's safe harbor for forward-looking statements. The statements concerned the mine's expected future economic performance for 2017 and were accompanied by meaningful cautionary language.

SLUSA Preclusion

Ninth Circuit Holds Breach of Fiduciary Duty Claims Precluded by SLUSA

Northstar Fin. Advisors v. Schwab Invs., No. 16-15303 (9th Cir. Sept. 14, 2018)
Click here to view the opinion.

The Ninth Circuit dismissed a putative class action asserting a breach of fiduciary duty claim, finding that it was a covered class action precluded by the Securities Litigation Uniform Standards Act (SLUSA).

The plaintiffs alleged that the defendant breached its fiduciary duty to shareholders by mismanaging an index fund. Specifically, the plaintiffs alleged that the fund's 1997 proxy statement representing that the fund would be managed conservatively was a contract that defendant breached by concentrating more than 25 percent of the fund's assets in mortgage-backed securities and collateralized mortgage obligations from 2007 to 2009.

SLUSA bars class actions based on state law claims alleging a misrepresentation or omission in connection with the purchase or sale of covered securities. Here, the Ninth Circuit affirmed dismissal of the plaintiffs' claims, holding that they were barred by SLUSA because the plaintiffs' purported contract claim based on a breach of promises made in the proxy statement was actually a disguised securities fraud claim. The panel reasoned that the plaintiffs expressly pleaded an omission — that investors were not told about the deviation from the conservative investment policy stated in the proxy agreement. Therefore, the plaintiffs "did not simply plead a garden-variety breach of contract claim," but rather, a misrepresentation or omission barred by SLUSA.

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