Simpson Thacher

Securities Law Alert

In This Edition:

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– *The Legal 500*

Supreme Court: Hears Oral Argument on Whether the *Basic* Presumption Can Be Rebutted by Showing There Was No Price Impact Even Though That Evidence Is Also Relevant to Materiality

On March 29, 2021, the Supreme Court heard oral arguments in [Goldman Sachs Group v. Arkansas Teacher Retirement System, No. 20-222](). At issue is whether: (1) the *Basic* presumption of classwide stockholder reliance in Section 10(b) claims can be defeated by showing that the alleged misstatements had no impact on the price of the security, even though such evidence is also relevant to the substantive element of materiality; and (2) whether a defendant seeking to rebut the *Basic* presumption has only a burden of production, or a burden of persuasion as well.

Background

In *Basic v. Levinson*, 485 U.S. 224 (1988), the Court created the "rebuttable presumption" of classwide reliance for plaintiffs asserting Section 10(b) claims on behalf of a putative class of stockholders. The *Basic* presumption can be rebutted with "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price." *Halliburton v. Erica P. John Fund*, 573 U.S. 258 (2014) (*Halliburton II*) held that courts must consider evidence at the class certification stage offered to show that an alleged misrepresentation had no impact on the price of the relevant security, even if that same evidence would also be "highly relevant at the merits stage." In so-holding, the Court explained that a defendant is entitled to rebut the *Basic* presumption through any evidence showing that "the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock." In *Amgen v.*

Connecticut Retirement Plans & Trust Funds, 568 U.S. 455 (2013), the Court held that plaintiffs need not establish the substantive element of materiality to certify a class. The *Amgen* Court explained that while a plaintiff "must prove materiality to prevail on the merits," "such proof is not a prerequisite to class certification. Rule 23(b)(3) requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class."

The case of *Goldman Sachs Group v. Arkansas Teacher Retirement System* centers on certain disclosures made by the defendant bank between 2006 and 2010 about its business practices, including that: "We have extensive procedures and controls that are designed to identify and address conflicts of interest" and "Our clients' interests always come first." Stockholders brought a securities fraud lawsuit alleging that these statements were false because the bank made them while knowing that it had undisclosed conflicts of interest. The crux of the plaintiff stockholders' claim is that the bank's representations about being conflict free artificially maintained an inflated stock price and that the later revelations of conflicts, such as those presented in an SEC complaint, were "corrective disclosures" that caused the market to devalue their shares. Defendants (the bank and certain of its executives) have characterized the statements at issue as aspirational and generic and argue that they were not material and had no impact on the stock price.

The Second Circuit held that a defendant in a securities class action may not rebut the *Basic* presumption by pointing to the generic nature of the alleged misstatements, because that evidence is also relevant to the substantive element of materiality. *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp.*, 955 F.3d 254 (2d Cir. 2020). The court characterized defendants' proposed test as one that would require courts to ask whether the alleged misstatements were "immaterial as a matter of law" and were merely "a means for smuggling materiality into Rule 23." Defendants petitioned the Supreme Court for a writ of certiorari to review the Second Circuit's decision. The Court granted defendants' petition on December 11, 2020.

Justices Grapple With Whether a Court Can Consider Evidence That Is Relevant to Both Price Impact and Materiality

During oral argument, petitioners' counsel argued that the Second Circuit made two errors. First, the court had "refused to consider the generality of the statements as evidence tending to disprove price impact," which respondents agreed were relevant to the underlying inquiry. Second, petitioners' counsel stated that the court had "erred by holding that the *Basic* presumption shifted the ultimate burden of persuasion to a defendant on the issue of price impact." Petitioners warned that if class certification is permitted on these facts, "any stock drop will inevitably result in a reverse-engineered securities class action" based on generic corporate statements.

Citing *Amgen*'s holding that a plaintiff is not required to prove materiality at the class certification stage to invoke the *Basic* presumption, Justice Thomas questioned whether *Amgen* precludes a defendant from disproving materiality at the class certification stage. Petitioners' counsel responded that a defendant can "point to evidence that would also be relevant to materiality at the class certification stage in order to negate price impact[]," arguing that "the mere fact that a court at the motion to dismiss stage says that a case shouldn't be dismissed on materiality grounds doesn't mean that that element has been definitively resolved." Petitioners' counsel advocated the Court to adopt a "sliding scale" approach whereby "the more generic a statement is, the less likely it is to have price impact." In advancing this argument, petitioners' counsel asserted that "the nature of the statements is evidence that simply weighs in the preponderance-of-the-evidence inquiry[]" and that the parties can, but are not required to, submit expert testimony on the issue of how generic the statements are and whether they could have a price impact.

Counsel for the United States as *amicus curiae* supporting neither party, stressed that the parties largely agreed that a defendant may rebut the *Basic* presumption by pointing to the generic nature of the alleged misstatements to show a lack of price impact and expressed approval for the sliding scale approach. When asked by Justice Barrett if there could be implications for materiality if the nature of a statement can be considered on the question of price impact, counsel for the United States responded that "the Court had made clear in, I think, *Amgen* and *Halliburton II*, that just because a particular issue might bear on the merits, that's no reason not to allow the defendant or the plaintiff to bring that issue in at class certification." On the question of the defendant's burden of proof, counsel for the United States stated that "every court of appeals to consider the question, including the Seventh Circuit in *Allstate*,[1] has held that defendants bear the burden [of production and persuasion]. And that's what we think this Court should hold as well."

Respondents' counsel agreed that "the generic nature of the statement as they use the term is relevant evidence to price impact." However, respondents' counsel argued price impact "ought to be addressed in the first instance and principally by expert testimony, but judges can evaluate that testimony on the basis of common sense." Pressed by Justices Alito and Gorsuch on how a judge should analyze the burden shifting issue, respondents' counsel acknowledged that where a defendant comes forward with credible evidence that there is no price impact from an alleged misstatement, and plaintiff does not offer its own direct evidence, a court can find a lack of classwide reliance.

The Court will issue a decision in *Goldman Sachs Group v. Arkansas Teacher Retirement System* later this Term.

1. *In re Allstate Corp. Sec. Litig.*, 966 F.3d 595 (7th Cir. 2020).

Ninth Circuit: Strong Inference of Scienter Not Supported Where Plaintiff Failed to Plead a Plausible Motive

On April 8, 2021, the Ninth Circuit affirmed the dismissal of a putative securities fraud class action against an investment bank, in which plaintiffs alleged that the bank sought to fraudulently inflate a company's stock price by publishing a report setting a target price of $7 per share without disclosing that its investment banking department would act as the placement agent for a dilutive offering pricing the stock at $6 per share announced later that same day. [*Prodanova v. H.C. Wainwright*, 2021 WL 1307882 (9th Cir. 2021) (Lee, J.)]. The court held that because the complaint did not offer a plausible motive for the bank's actions, or provide compelling and particularized allegations about scienter, it did not support a strong inference that the bank intentionally made false or misleading statements or acted with deliberate recklessness.

Plaintiff Failed to Plead a Plausible Theory of Defendants' Motive

Plaintiff maintained that the bank deliberately published the report without disclosing the impending offering to drive up the company's stock price. Plaintiff claimed that the bank's "motive was to increase its own compensation from the Offering, as it was set to receive 5% of the Offering's gross proceeds." Noting that plaintiff "appears to assert two formulations of this motive," the court held that "neither theory is plausible" and neither "create[s] a strong inference of scienter."

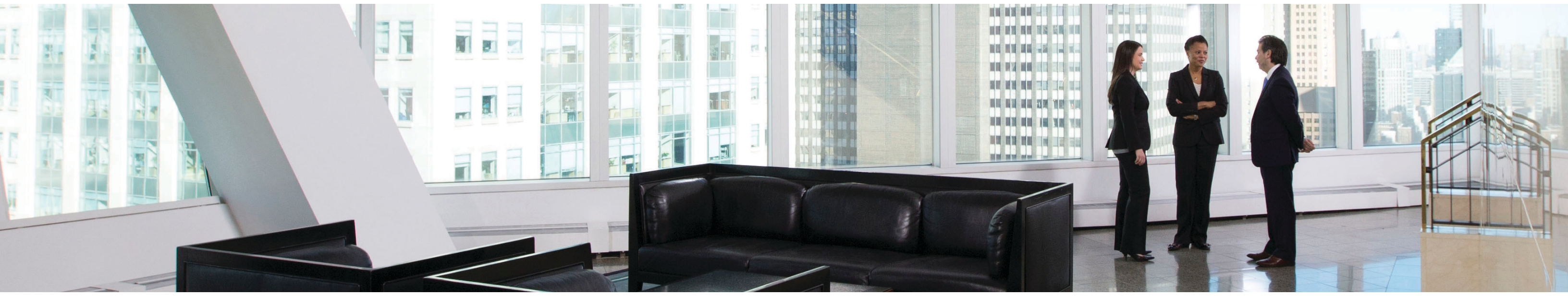
The court observed that plaintiff's first theory alleged that the bank had an incentive to boost the company's stock price because its overall compensation from the offering would somehow increase if the stock price were higher. Plaintiff's second theory similarly asserted that the bank "had an interest in generating buying activity at an artificially inflated price to ensure a profitable offering[]," which would lead to greater compensation for the bank. As there was no predetermined minimum number of shares to be sold in the offering, under plaintiff's theory, the bank had an incentive to generate interest in the company's stock so that as many shares as possible would be sold and publishing the report could generate such interest. The court determined that "[n]either theory is persuasive or plausible, as both are divorced from common experience." The court explained that "we expect that a financial motive for securities fraud will be clear; for example, someone inside a company stands to gain a substantial profit by engaging in deceptive behavior, such as selling shares before the company discloses negative information." However, the court stated that in this case, "neither theory provides a clear financial incentive."

An Apparent Error, Even if Embarrassing or Inexplicable, Does Not Establish Fraudulent Intent Especially in the Absence of a Plausible Motive

The court explained that the "first theory [of fraudulent intent] does not make sense for a couple of reasons." First, the bank was set to receive 5% of the offering's gross proceeds and plaintiff did "not explain how the share price would affect the Offering's gross proceeds, which in turn determine [the bank's] compensation." The court pointed out that the bank "would have received the same compensation for a $61 million Offering, no matter if the share price was $6 or $7." Second, the court observed that the bank "would stand to lose more from its allegedly fraudulent actions than it would gain." The court explained that the bank's "apparent snafu—issuing a $7 target price in a Report just before a dilutive offering of $6 per share—likely strained its longstanding relationship with [the company]." The court reasoned that the "risk of losing a longtime client and publicly sullying its own reputation in the industry far outweighs the benefit of a slightly higher return on one transaction." The court concluded that "a company's apparent error—even an embarrassing or inexplicable one—does not establish fraudulent intent, especially if the plaintiff cannot offer a plausible motive for the company's conduct. [Plaintiff] thus does not plausibly allege scienter on this theory." The court stated that plaintiff's "second theory [of fraudulent intent] is even more speculative." The court found that plaintiff "alleges no facts to show that the Offering would not have sold out but for the Report's publication and the later increase in [the company's] share price and trading volume."

Northern District of California: Materially False Statements Were Not Plausibly Pled Because the Aspirational Assertions Concerning Corporate Diversity Were Non-Actionable

On March 19, 2021, the Northern District of California granted defendants' motion to dismiss with leave to amend a stockholder derivative lawsuit against the board of a prominent social media company, certain executives, and the company itself as a nominal defendant that challenged the company's alleged lack of diversity, discriminatory advertising practices and failure to curb hate speech as false and misleading statements because they contradicted the company's proxy statements about its commitment to diversity, in violation of Section 14(a) of the Exchange Act. *Ocegueda v. Zuckerberg*, 2021 WL 1056611 (N.D. Cal. 2021) (Beeler, J.). The court held that the allegations "do not plausibly plead a materially false statement under [Section] 14(a) primarily because the aspirational assertions in the proxy statements are non-actionable."



Plaintiff's Allegations Concerning Diversity and Inclusion

Plaintiff alleged that defendants' practices contradicted "the representations in [the company's] 2019 and 2020 proxy statements that it is committed to diversity and inclusion, including 'building a workforce that is as diverse as the communities it serves' and including individuals from diverse backgrounds at the board level." Plaintiff further alleged that the company had only one Black board member and no Black senior executives. With respect to the allegedly discriminatory advertising practices, plaintiff cited, among other things, congressional testimony by the company's CEO on its advertising practices, which purportedly "allowed advertisers to discriminate by race in housing ads." Plaintiff also alleged that the company did not stop hate speech, including allegedly incendiary May 2020 posts from then-President Trump on the company's social media platform.

Plaintiff Did Not Plausibly Plead an Actionable False Statement

The court explained that to state a claim under Section 14(a), "plaintiff must allege that the proxy statements contained either (1) a false or misleading declaration of material fact, or (2) an omission of material fact that makes any portion of the statement misleading." The court held that "plaintiff did not plausibly plead an actionable false statement." Citing several cases, the court stated that "courts hold similar statements are non-actionable puffery or aspirational (and hence immaterial)." For example, the court cited *Lopez v. CTPartners Executive Search*, 173 F. Supp. 3d 12 (S.D.N.Y. 2016), which held that a company's statements about commitment to a "diverse workforce" and "an inclusive and positive working environment" were "immaterial puffery."

The court further stated that the allegations did not support an actionable claim of widespread unlawful practices. The court found that plaintiff's allegations about the board's composition and selection process were inaccurate. The court noted that two of the nine directors were Black, a third Black director stepped down in March 2020 and, since its 2018 adoption of its diversity policy, a majority of new nominees were Black or female. The court also credited facts contradicting plaintiff's allegations concerning diversity in the company's senior executive ranks and noted that the company remediated the alleged discriminatory advertising practices by March 2019. The court additionally determined that "plaintiff did not plead plausible facts about discriminatory practices in advertising, hiring, and pay that render the [proxy] statements misleading." Finally, the court stated that "plaintiff identifies no basis for inferring that the statements (and the omission of the directors' alleged lack of commitment to diversity, the lack of an independent chair, and the effect on executive compensation) formed an essential link to a loss-generating corporate action."

Rising Tide of Lawsuits Challenging Lack of Corporate Diversity

Since last year, stockholders have filed a number of lawsuits concerning board diversity against well-known companies. To date, these suits have not fared well. On April 8, 2021, the Central District of California dismissed without prejudice a lawsuit with similar allegations because plaintiff failed to make a demand on the board or adequately plead demand futility. *Falat v. Sacks*, No. 20-1782 (C.D. Cal. 2021) (Selna, J.).[2] And, on April 27, 2021, the Northern District of California dismissed a similar stockholder derivative lawsuit against an apparel company without prejudice to the plaintiff filing claims in Delaware Chancery Court pursuant to the forum selection clause in the company's bylaws. *Lee v. Fisher*, No. 20-06163 (N.D. Cal. 2021) (Kim, J.). The decision in *Ocegueda v.*

2. In this stockholder derivative action plaintiff alleged violation of Section 14(a) against a beverage company as a nominal defendant and certain of its executives and directors, claiming that the individual defendants caused the company to make false and misleading statements regarding its commitment to diversity in its Code of Business Conduct and Ethics, on its website, and in its proxy statements.

Zuckerberg indicates that courts may not give allegations concerning diversity and inclusion special consideration, instead applying precedent where corporate statements were determined to be aspirational assertions or puffery.

Northern District of California: Omission-Based Theory of Fraud Adequately Pled Where Defendants Attributed Revenue Growth to Product Quality and Failed to Disclose Allegedly Coercive Sales Practices

On March 22, 2021, the Northern District of California denied in part a motion to dismiss securities fraud claims against a software company and certain of its officers alleging that the company used coercive sales practices to sell its cloud-based products. *City of Sunrise Firefighters' Pension Fund v. Oracle*, 2021 WL 1091891 (N.D. Cal. 2021) (Freeman, J.). The court held that plaintiff "adequately pled a narrow omission-based theory of [securities] fraud[,]" centering on defendants' statements about the drivers of the company's cloud revenue growth and the reasons for the subsequent deceleration of that growth, where defendants allegedly failed to disclose that "engineered deals" were a material driver of the growth or that the dwindling efficacy of its sales practices had a material impact on this deceleration.

Omission-Based Claim Adequately Pled as to Cloud Revenue Growth

Plaintiff contended that defendants' "statements about cloud revenue and growth were false and misleading because they failed to disclose that [the company] was engaged in improper sales tactics to boost sales of flawed products." More specifically, plaintiff alleged that defendants "misleadingly attributed [the company's] cloud revenue growth to the quality and competitiveness of its cloud offering, while failing to disclose that engineered deals were a material driver of those results." The court determined that plaintiff "has provided additional allegations from the [confidential witnesses] along with new allegations from industry members that establish the materiality of revenue generated through [the] [s]ales [p]ractices." For example, one confidential witness who was a former executive "reported that 90-95% of Company-wide cloud sales during fiscal years 2016 and 2017, at a minimum, were engineered deals." The court held that "[a]t this stage, allegations relating to the reasons for which customers adopted [the company's] cloud products over the competition are adequate to state an omission-based claim under Section 10" of the Securities Exchange Act.

Omission-Based Claim Adequately Pled as to Cloud Revenue Growth Deceleration

Plaintiff also alleged that defendants misled investors about the reasons for the company's cloud revenue growth deceleration, for example by stating that the deceleration was due to customers waiting for the company's next generation cloud product. Plaintiff alleged that customers refused to renew short-term subscriptions that the company had sold using coercive sales tactics, that customers were resisting these tactics with the assistance of consultants, and that there was a smaller pool of targets as the company had already used its sales tactics on many of its customers. The court held that "[a]t this stage, the allegations relating to cloud growth deceleration are adequate to state an omission-based claim under Section 10."

The court emphasized that the company "does not have a stand-alone duty to disclose its sales practices. However, as with [d]efendants' statements about drivers of cloud growth, once [d]efendants made statements about the reasons underpinning cloud growth deceleration, investors would have been interested to know that the dwindling efficacy of [the company's] sales practices had a material impact on this decline." The court stated that the company's "affirmative representations about cloud growth deceleration and drivers of cloud growth 'affirmatively create[d] an impression of a state of affairs that differs in a material way from the one that actually exist[ed].'" Quoting *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997 (9th Cir. 2002). The court further explained that "[t]his is particularly true during a Class Period where the nascent cloud market exploded and [the company's] competitors enjoyed robust growth."

Southern District of New York: Item 303 Does Not Require Real-Time Disclosures of Trading Volume and Commission Revenue Fluctuations

On March 17, 2021, the Southern District of New York dismissed with prejudice a putative securities fraud class action alleging that an online brokerage firm failed to disclose in its registration statement declines in commissions and trading volume for the first quarter of 2019, which had not concluded at the time of the IPO. *Willard v. UP Fintech Holding*, 2021 WL 1026571 (S.D.N.Y. 2021) (Furman, J.).[3] The court held that the brokerage firm was not required to disclose intra-quarter trading commission and trading volume information. The court also held that the allegedly omitted information was not material in light of the historical disclosures and risk warnings disclosed in the registration statement.

Background

Plaintiffs alleged that at the time of the brokerage firm's IPO, which was shortly before the end of the first quarter of 2019, it "had already learned that its trading volume and commissions for the first quarter of 2019 were sharply declining[.]" Plaintiffs contended that Item 303 of SEC Regulation S-K "required [d]efendants to disclose the Q1 2019 declines in trading volume and commissions and that, by failing to do so in the Registration Statement, they violated Sections 11 and 15 of the Securities Act[.]"

3. Simpson Thacher represents the underwriters of UP Fintech's initial public offering in this matter.

The Obligations Imposed by Item 303

The court explained that "Item 303 does not call for disclosure of any trend or uncertainty." Instead, under *Litwin v. Blackstone*, 634 F.3d 706 (2d Cir. 2011), Item 303 "imposes a disclosure duty where a trend, demand, commitment, event or uncertainty is both [1] presently known to management *and* [2] reasonably likely to have material effects on the registrant's financial condition or results of operations." The court noted that Item 303 requires a company "to explain in the prospectus if there has been an important change in the company's business or environment that significantly or materially decreases the predictive value of the reported results so as to prevent the latest reported results from misleading potential investors."

Item 303 Does Not Require Real-Time Disclosures of Trading Volume and Commission Revenue Fluctuations

The court held that plaintiffs "fail to plausibly allege that the alleged declines in trading volume and commissions even constituted a 'trend,' such that disclosure was required by Item 303." The court pointed out that plaintiffs "conspicuously fail to allege the existence of any causal event or moment in time that the declines allegedly began. And their own allegations, drawn from the Registration Statement itself, make plain that there were significant fluctuations in both metrics on a *quarter-to-quarter* basis."

The court further pointed out that "trading volume and commission revenue were not even directly correlated with one another—nor with overall revenue growth—so disclosure of intra-quarter trading volume data could itself be incomplete and misleading." The court stated that "the gravamen of [p]laintiffs' claim is that [d]efendants were required to report fluctuations in trading volume and commission revenue in real time." Citing several Southern District of New York decisions, the court stated that "Item 303, however, does not require such real-time disclosures."

Alleged Omissions Not Material Where Registration Statement Included Historical Disclosures and Risk Warnings

The court also explained that "the Registration Statement disclosed that [the brokerage firm] had seen dramatic swings in trading volume and commission revenue on a quarter-to-quarter basis[.]" The court further pointed out that "these data were accompanied by fulsome warnings that figures like trading activity and commission revenue were highly volatile and subject to factors beyond [the brokerage firm's] control; that this volatility had been largely masked to date by [the brokerage firm's] strong growth and there was no guarantee that that would continue; and that investors could not draw meaningful information through period-to-period comparisons." The court concluded that "'[i]n light of this total mix, a reasonable investor would not have considered the omitted interim financial information'—assuming arguendo that it was available and even known to [d]efendants—'material' and, thus, 'the omissions are not actionable under Section 11.'" Quoting *In re Barclays Bank PLC Sec. Litig.*, 2017 WL 4082305 (S.D.N.Y. 2017), aff'd, 756 F. App'x 41 (2d Cir. 2018) (summary order).

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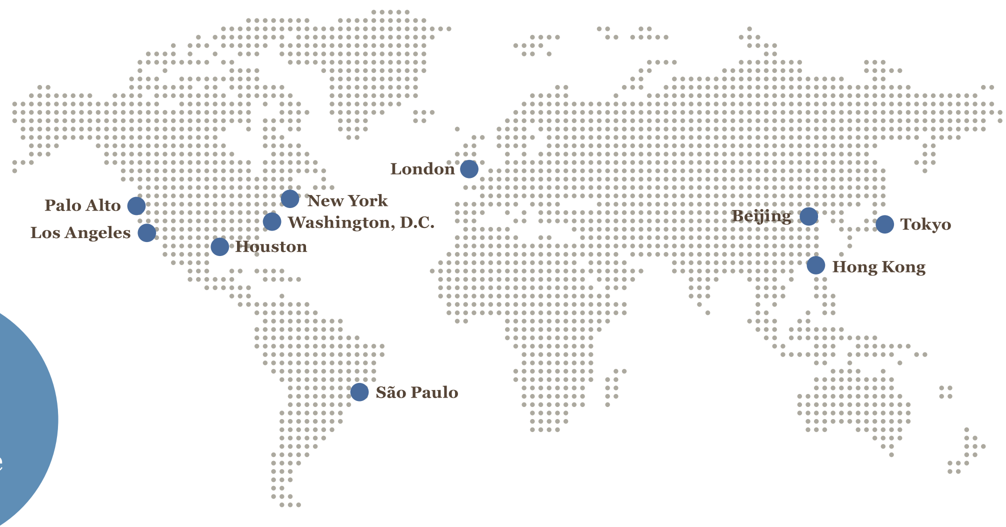

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