

First Circuit: Affirms Dismissal of a Securities Fraud Action Challenging Optimistic Statements, “Replete with Caveats,” Concerning FDA Developments

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On August 22, 2017, the First Circuit affirmed dismissal of a securities fraud action against a biopharmaceutical company challenging its communication of a “mix of optimism and caution” to investors following meetings with the FDA. [Corban v. Sarepta Therapeutics, 2017 WL 3599065 \(1st Cir. 2017\) \(Kayatta, J.\)](#). The court found it significant that the company’s statements were so “replete with caveats” that the company’s “stock dropped nineteen percent” following certain of its disclosures.

Plaintiffs claimed the company “disclosed too little of what FDA officials said . . . and painted too rosy a picture of their reaction to [the company’s] data.” Although the court acknowledged that the company’s “caveats could have been more fulsome,” the court determined the company’s cautionary statements “cut against the inference of scienter.” The court found that “[a]t worst, there was positive spin that put more emphasis in tone and presentation on the real signs of forward movement . . . than it did on causes for wondering if the journey would prove successful.”

The First Circuit further found that “[t]he only plausible motive for fraud identified by the plaintiffs [was] revenue generation, which [fell] short of pleading a cogent inference of scienter that [could] carry the day.” The court noted the absence of any allegations “suggesting that [the company’s] capital was insufficient for continued operations, much less that [the company] would shutter its doors unless it padded earnings by deceiving investors.” The court concluded that this was “simply a case in which the complaint focuse[d] too much on nuance rather than false facts or material omissions to support the necessary strong inference of scienter.”

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