

Ninth Circuit: FOIA Information Can Count as Corrective Disclosure

11.23.20



(Article from *Securities Law Alert*, November 2020)

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On November 3, 2020, the Ninth Circuit revived a securities fraud class action alleging that BofI Holding, Inc. and certain executives falsely denied that BofI was under investigation by the SEC. *Grigsby v. BofI Holding, Inc.*, 2020 WL 6438912 (9th Cir. 2020) (Christen, J.). The Ninth Circuit ruled that the publication of information obtained through a Freedom of Information Act (“FOIA”) request can count as a corrective disclosure for loss causation pleading purposes. The court also reversed “the district court’s loss causation ruling to the extent it deemed information obtained via a FOIA request to be publicly available prior to its disclosure.”

Background

In May 2015, the SEC opened an informal inquiry into BofI and began a formal investigation in February 2016, for which it issued two subpoenas to BofI. Subsequently, “[i]n March 2017, the *New York Post* reported that the Department of Justice, with involvement from the SEC, was investigating BofI for possible money laundering.” The same day, BofI issued a press release denying knowledge of “such purported money laundering investigation.” Then “on October 25, 2017, the *Post* published an article titled Bank of Internet was under 16-month SEC investigation.” Plaintiffs allege that this October 25, 2017 *New York Post* article “revealed that BofI’s earlier denial of any knowledge of an SEC investigation was false.” The October 25, 2017 *Post* article was based on information obtained through a FOIA request.

The district court dismissed plaintiffs’ complaint, concluding that “plaintiffs failed to adequately allege loss causation.” The district court determined that the October 25, 2017 *Post* article “did not reveal new information to the market, and thus could not be a corrective disclosure of any misrepresentation.” Additionally, “the court decided as a matter of law that the information obtained pursuant to the FOIA request was publicly available prior to its disclosure.” Plaintiffs appealed the district court’s decision.

Ninth Circuit Addresses Whether Information Obtained Through a FOIA Request Can Be Corrective

The court started by stating that “[t]he disputed element in this appeal is loss causation.” Refining the issue, the court stated that “[t]his appeal requires us to consider the discrete question whether information obtained through a FOIA request can be corrective of an allegedly false and misleading statement by revealing nonpublic information to the market.”

With respect to defendants’ argument in favor of treating information that might have been discoverable through a FOIA request as

information that was already public, the court pointed out two flaws. “First, information must be requested before it can be received through the FOIA.” The court continued, “[s]econd, information must be produced before it is publicly available, and not all FOIA requests yield disclosure of the sought-after information.” The court cautioned that “[g]iven FOIA’s general framework, the fact that a market actor lodges a FOIA request on a given date does not allow the conclusion that the information became publicly available on that date because FOIA requests do not always result in disclosures—and even when they do, the disclosures are not instantaneous.”

The court explained that “[a]t a minimum, there must be some indication that the relevant information was requested and produced before the information contained in a FOIA response can be considered publicly available for purposes of loss causation.” The court then held that “the district court erred by concluding as a matter of law that an article containing information obtained through the FOIA could not qualify as a corrective disclosure for purposes of establishing loss causation.”

Ninth Circuit Considers Whether Plaintiffs Relying on FOIA information Face a Heightened Pleading Burden

The court then considered “whether information contained in the FOIA response . . . had been publicly disclosed prior to the October 25, 2017 *Post* article.” Citing *Loos v. Immersion Corp.*, 762 F.3d 880 (9th Cir. 2014),^[1] the court set forth the standard stating that “[p]laintiffs’ burden is to plausibly allege that the decline in the defendant’s stock price was proximately caused by a revelation of fraudulent activity, rather than other factors.” The court clarified that “[p]laintiffs’ burden is to describe how the falsity of the defendant’s misstatement was revealed to the market, not to describe all the ways in which it was *not* revealed.” The court held that “plaintiffs relying on corrective disclosures that are in turn based on information obtained through the FOIA do not face a special pleading burden for purposes of alleging § 10(b) loss causation.” The court pointed out that “by effectively requiring plaintiffs to show that no one else had obtained the same information through the FOIA before the October 25, 2017 *Post* article, the court elevated plaintiffs’ pleading burden.” The court stated that it was sufficient for the operative complaint to have “alleged that the *Post* article disclosed BofI had been the subject of a formal SEC investigation, that the article revealed the falsity of BofI’s prior statement, and that the revelation caused BofI’s stock price to drop.”

[1] Please [click here](#) to read our prior discussion of the Ninth Circuit’s decision in *Loos*.

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