

## Southern District of New York: No Duty to Disclose Risk of a “#MeToo Reckoning” Where Plaintiff Failed to Allege Risk Was Concrete and Substantial

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On February 3, 2021, the Southern District of New York dismissed a securities fraud class action against a restaurant company and two of its former executives, which alleged that they made misrepresentations and omissions regarding the company’s culture where the defendant executives and other non-party executives allegedly sexually harassed the company’s employees and “cultivated a toxic workplace culture.” *Okla. Law Enft Ret. Sys. v. Papa John’s Int’l*, 2021 WL 371401 (S.D.N.Y. 2021) (Wood, J.). The court held that plaintiff failed to plausibly allege that the “positive assurances about the [c]ompany’s culture exceeded the protected bounds of generic puffery” or to plausibly allege that “the risk that [the company] would face a #MeToo reckoning was so concrete and substantial that there arose an affirmative duty to disclose it.”

### Background

One of the two executive defendants in this case was the company’s founder who held various high-level positions in the company over his tenure, including CEO. The founder’s name and likeness were central to the company’s brand, and he frequently appeared in its advertisements. Beginning in 2017, defendants “faced a range of negative publicity.” For example, in 2018 *Forbes* published an article in which numerous unnamed, former employees described “disturbing instances of workplace sexual harassment and misconduct” by senior executives.

### Risks Had Not Already Materialized Where Allegations Were “General and Conclusory”

The court held that the risk disclosures in the company’s SEC filings were not misleading. Plaintiff alleged that when the company filed its 2016 and 2017 annual reports on form 10-K, its “risk disclosures were misleading (*i.e.*, the risks identified had already materialized) because the #MeToo movement was well underway and because [d]efendants had knowledge of their own misconduct and the hostile and unlawful work environment at [the company] at the time.” The court held that, “even drawing all inferences in favor of [p]laintiff, its allegations still fail to show that the risks described above had already materialized at the time the [c]ompany filed its 2016 and 2017 10-K statements.” The court explained that plaintiff “fail[ed]—again—to specify *when* the [c]ompany failed to comply with labor laws (and what these labor laws were), *when* the [c]ompany’s executives engaged in misconduct, and *when* their harassing behavior became widely known (including to those

individuals who had the power to fire them).” The court described plaintiff’s claims about the influence of the #MeToo movement and plaintiff’s claims that the defendant executives “were aware of and were fueling an unlawful workplace culture” as “general and conclusory.”

**No Duty to Disclose Uncharged, Unadjudicated Wrongdoing**

Plaintiff also alleged that the founder engaged in “illegal and unethical sexual behavior, resulting in at least two confidential settlements.” Citing *City of Pontiac Policemen’s & Firemen’s Ret. Sys. v. UBS*, 752 F.3d 173 (2d Cir. 2014), which stated that “companies do not have a duty to disclose uncharged, unadjudicated wrongdoing,” the court determined that “[t]his allegation suffers from the same flaw as [p]laintiff’s other general and conclusory allegations: it does not amount to anything more than uncharged, unadjudicated wrongdoing.” Additionally, quoting from a recent case where a prominent media company executive also faced #MeToo allegations, the court stated that “[e]ven if the risk that [the company’s] executives would be disgraced or fired increased with the expanding influence of the #MeToo movement, ‘an increase in a risk does not mean the risk has already come to pass, such that a disclosure that simply identifies the risk would be misleading.’” Quoting *Constr. Laborers Pension Tr. v. CBS*, 433 F. Supp. 3d 515 (S.D.N.Y. 2020).

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