

Ninth Circuit: Applies *Omnicare* Standard to Pleading Falsity of Opinion in Section 14(a) Claims

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On April 20, 2021, the Ninth Circuit affirmed the dismissal of a putative securities class action alleging misrepresentations and omissions in a proxy statement used to secure shareholder approval for the sale of the defendant company in violation of Section 14(a), Section 20(a) and Rule 14a-9. [Golub v. Gigamon](#), 2021 WL 1539954 (9th Cir. 2021) (Wardlaw, J.).^[1] The court held that it would apply the standards for actionability for falsity under Section 11 explained in *Omnicare v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), to falsity of a statement of opinion under SEC Rule 14a-9 through either a misrepresentation-of-material-fact theory or an omission-of-material-fact theory.

Background

Plaintiff claimed that the company, its CEO, and its board violated Section 14(a) and SEC Rule 14a-9 when they released a materially false and misleading proxy statement to obtain stockholder support for a proposed sale of the company, allegedly at an undervalued price. Plaintiff alleged that the proxy statement contained misrepresentations of fact and omissions that made certain statements of opinion in the proxy statement false or misleading. Defendants moved to dismiss both plaintiff's initial and amended complaints. The district court granted both motions to dismiss, in part, because plaintiff failed to plead an actionably false misrepresentation or omission. Plaintiff appealed the dismissal.

***Omnicare* Standards for Pleading Falsity of Opinion Via Either a Misleading Representation or Omission Apply to Section 14(a) Claims**

Beginning its discussion of the applicable standard, the court explained that Rule 14a-9 prohibits any statement which, under the circumstances, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements not false or misleading. The court further explained that despite Rule 14a-9's use of the word "fact" it also permits "a plaintiff to plead and prove false the 'statements of reasons, opinions, or beliefs' of a company's directors[.]" Quoting *Va. Bankshares v. Sandberg*, 501 U.S. 1083 (1991). The court then pointed out that the Ninth Circuit has not addressed how *Omnicare* affects claims alleging falsity of an opinion under Rule 14a-9. The court explained that in *Omnicare*, "the Supreme Court examined the standards for alleging falsity of an opinion under [S]ection 11[.]" The Ninth Circuit then referenced its recent decision in *Wochos v. Tesla*, 985 F.3d 1180 (9th Cir. 2021), discussing

Omnicare and summarizing the three ways that “a statement of opinion may nonetheless involve a representation of material fact that, if that representation is false or misleading, could be actionable.” Specifically: (1) “every statement of opinion explicitly affirms one fact: that the speaker actually holds the stated belief”; (2) “some sentences that begin with opinion words like ‘I believe’ contain *embedded* statements of fact”; and (3) “a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker’s basis for holding that view.” Citing *Wochos*, the court explained that “[s]uch a statement could potentially give rise to liability under an omission theory if the facts conveyed in that fashion are untrue, as would be apparent based on a more fulsome disclosure.”

The court observed that “the district court hesitated to extend *Omnicare*’s discussion of how *omissions* can render a statement of opinion false or misleading to the Rule 14a-9 context without our explicit approval.” Providing such approval, the court stated that “we hold that *Omnicare*’s standards for pleading falsity of opinion—via either a misleading representation or omission—apply to claims arising under [S]ection 14(a), as implemented by Rule 14a-9.” The court concluded “that *Omnicare*’s elucidation of what ‘facts’ a statement of opinion may convey and the possibility and manner of proving those ‘facts’ false or misleading through an omission theory applies to the Rule 14a-9 context.”

The Ninth Circuit summarily dealt with plaintiff’s allegations in a separate unpublished memorandum concluding that, with respect to the alleged misrepresentations and omissions in connection with statements of opinion, plaintiff failed to allege falsity or to overcome the PSLRA’s safe harbor. *Golub v. Gigamon*, No. 19-16975, 2021 WL 1554439 (9th Cir. 2021).

[1] The Ninth Circuit’s discussion of the applicable standard appeared in this published opinion, while its application of the standard to the instant facts appeared in an unpublished memorandum. *See Golub v. Gigamon*, No. 19-16975, 2021 WL 1554439 (9th Cir. 2021).

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