

Northern District of California: Misleading Statements and Omissions Alleged Where Due Diligence Fell Short of What an Investor Would Believe Defendants' Assurances Meant

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On October 19, 2021, the Northern District of California denied dismissal of a putative securities fraud class action alleging that a pharmaceutical company and certain current or former executives made misstatements and omissions concerning the company's due diligence efforts prior to acquiring the manufacturer of a herbicide alleged to cause cancer. [Sheet Metal Workers Nat'l Pension Fund v. Bayer, 2021 WL 4864421 \(N.D. Cal. 2021\) \(Seeborg, J.\)](#). The court held that plaintiffs adequately pled that defendants made misleading statements and omissions concerning the acquirer's pre-acquisition due diligence efforts.

Background

Before, during, and after the acquisition, the target faced litigation alleging that the active ingredient in its herbicide causes cancer. After the acquisition, lawsuits against the target concerning the herbicide reached trial, resulting in verdicts against it and tens of millions of dollars in damages in the first two trials. Subsequently, more lawsuits were filed and consolidated in the Northern District of California. In response to the acquirer's 2020 offer to pay up to \$10.9 billion in a global settlement for current and future claims, the presiding judge indicated that he was unlikely to approve the settlement as to future claims. The instant complaint was filed soon after, asserting that defendants deceived investors about lapses in the acquirer's due diligence before pursuing the merger.

Section 10(b) Claim Adequately Pled Where Plaintiff Alleged Assurances as to Due Diligence Were Misleading

The acquirer's CEO stated before the acquisition closed that the acquirer had "confirmed in due diligence" the deal's "significant potential for sales and cost synergies" of \$1.5 billion. The CEO also stated before the closing that "the [target's] people went out of their way to provide us with transparency, data and visibility to the most critical questions we had." Plaintiffs alleged that these statements were misleading because the acquirer had not reviewed any of the target's internal documents and accepted at face value the target's characterization of its litigation risks.

The court determined that defendants’ statements concerning its due diligence could have “given a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists, namely that [the acquirer] had assessed [the target’s] litigation risks, and had reviewed non-public information to inform that review.” The court noted that while merely failing to conduct due diligence is a claim of mismanagement that alone is not an actionable securities fraud claim, that plaintiffs did “more than just aver that Defendants did not fully conduct due diligence; instead, they aver that Defendants assured investors about their diligence, even though their diligence was less than what an investor would believe their statement meant.” The court then stated that “[d]eception concerning mismanagement is actionable under [Section] 10(b) . . . and misleading statements concerning due diligence may be actionable in securities fraud litigation[.]”

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