

[Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION— W.D.N.C.: North Carolina court washes its hands of Swisher securities fraud litigation, \(Jul. 9, 2015\)](#)

Securities Regulation Daily Wrap Up

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By Amanda Maine, J.D.

A North Carolina district court dismissed securities fraud claims against a sanitation company and its officers, finding that the plaintiffs failed to plead actionable misstatements and scienter. The company had identified possible accounting irregularities that led to a drop in the company's stock price, but the plaintiffs were unable to demonstrate that the defendants made any misrepresentations or omissions about the company's future or that they possessed the intent to defraud. The court also recommended that the case be transferred to a district court in Florida (*In re Swisher Hygiene Inc. Securities and Derivative Litigation*, June 8, 2015, Mullen, G.).

Background. In March 2011, Swisher Hygiene, Inc. acquired Choice Environmental Services, Inc., a Florida-based waste management business. The terms of the merger agreement stated that Choice owners Glen Miller and Neal Rodrigue would receive \$5.7 million in cash and \$48.8 million in Swisher common stock in the form of restricted securities. Swisher's acquisition of Choice was part of a campaign of rapid expansion, averaging about one acquisition a week in 2011.

In March 2012, Swisher announced that its 2011 financial results would be delayed due to possible adjustments to the accounting for business acquisitions and the calculation of the allowance of doubtful accounts receivable. Within a week, Swisher stock lost 25 percent of its value and continued to decline thereafter. Choice was eventually sold to a Canadian company for \$123 million and Miller and Rodrigue were terminated. Miller and Rodrigue (plaintiffs) brought a number of claims against Swisher and certain executives, including violations of the federal securities antifraud and controlling persons provisions. The defendants moved to dismiss.

Misrepresentations. The plaintiffs' complaint laid out several allegedly actionable pre-merger fraudulent statements by the defendants. The court, however, was unconvinced that the statements were materially false or misleading. The plaintiffs cited optimistic statements made by the defendants about Swisher's ability to expand rapidly through acquisitions, but the court noted that the plaintiffs could point to no specific guarantees they received about Swisher's growth strategy. The complaint also failed to state with particularity why the defendants' statements were unrealistically unfavorable. In addition, the court found lacking the plaintiffs' argument that Swisher fraudulently failed to disclose that it had no legal obligation or intention to file its fourth quarter financial information prior to the closing of the merger, noting that they were sophisticated investors who "knew or should have known the law."

The plaintiffs also argued that they had been misled by promises of "freely tradable and liquid shares," but the court pointed out that the merger agreement specifically provided that Miller and Rodrigue's shares would be Rule 144 "restricted securities." The court also noted that the merger agreement contained a lock-up clause that prohibited the plaintiffs from transferring a portion of their shares for a year following the merger. The complaint thus failed to adequately identify any material misrepresentations or omissions by the defendants, the court concluded.

Scienter. The court also determined that the complaint's factual allegations did not create a "strong inference" of scienter as required by the PSLRA. The court agreed the defendants' argument that the more compelling inference was that Swisher's accounting errors occurred during a hectic period during which it acquired over 60 companies. Rather than demonstrating fraudulent intent, the court was convinced that the more compelling

inference was that the pace and number of the acquisitions resulted in honest mistakes, and not actionable fraud. Having failed to plead scienter, the plaintiffs' antifraud claims failed.

Other claims. Because the plaintiffs' underlying fraud claims were not adequately pleaded, the controlling persons claims also fail, the court held. The court also dismissed the plaintiffs' claims of breach of fiduciary duty and negligence. The court determined that the remaining claims, including breach of contract and violations of Florida statutes, would be more appropriately resolved by a Florida court. The court therefore recommended to the Judicial Panel on Multidistrict Litigation that the case be transferred back to the Southern District of Florida.

The case is [No. 14-cv-2387](#).

Attorneys: Alfred J. Bennington, Jr. (Shutts & Bowen LLP) for Glen Miller. Stanley H. Wakshlag (Kenny Nachwalter, P.A.) for Swisher Hygiene, Inc.

Companies: Swisher Hygiene, Inc.

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