Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—N.D. Cal.: Co-lead plaintiff and co-counsel appointed in securities fraud suit against cybersecurity company, (Nov. 20, 2020)

Securities Regulation Daily Wrap Up

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By Lene Powell, J.D.

In a contest for lead plaintiff that hinged on timing of share purchases, the court hedged its bets by appointing co-lead-plaintiffs who together had purchased shares across the entire class period.

Of three competitors for lead plaintiff in a suit alleging that a cybersecurity company concealed deal volatility that endangered financial results, the plaintiffs with the largest and smallest losses ($5.3 million and $200,000, respectively) were appointed as co-lead plaintiffs. That the largest plaintiff purchased many shares after certain corrective disclosures did not destroy its typicality. However, the court found it prudent to appoint both the largest and smallest plaintiffs as co-lead plaintiffs to ensure the entire class was best represented (*Sayce v. Forescout Technologies, Inc.,* November 19, 2020, Illston, S.).

Alleged misstatements by struggling company. In a consolidated class action, plaintiffs alleged that Forescout Technologies, a San Jose, California-based cybersecurity company, made materially false and misleading statements regarding the company's business, operational and compliance policies. Specifically, plaintiffs alleged that Forescout misled about its financial prospects, concealing that it was experiencing volatility relating to the timing and execution of major deals in the pipeline, as well as likely material negative impact of the situation on the company's financial results.

Lead plaintiff typicality. Three groups of plaintiffs vied to be named lead plaintiff. A group of related funds ("Glazer Funds") claimed $5.3 million in losses; a second set of plaintiffs ("Arbitrage Plaintiffs") asserted losses of $3.4 million; and a third set of funds ("Meitav") claimed damages of $200,000.

Meitav and the Arbitrage Plaintiffs argued that the Glazer Funds was not typical of the entire class because it had purchased a large portion of its relevant shares after the release of a short-seller report that identified some of the misrepresentations at issue. Glazer had also purchased all relevant shares after the announcement of the planned (but then-failed) merger of Forescout with another company. Finally, Meitav asserted that Glazer had based its purchases on an investment strategy markedly different from that of most members of the class.

The court did not find any of these arguments compelling. First, at this early stage of litigation, the court found it did not need to determine whether the short-seller report constituted a corrective disclosure. The report did not contain any previously unavailable information that would clearly distinguish Glazer from the other plaintiffs in the class who may have bought shares only prior to its release. Even if it were, precedent established that a plaintiff's post-disclosure purchases do not automatically defeat typicality. Further, this potential defense was not necessarily unique to Glazer.

Next, the court found that it did not defeat Glazer's typicality that Glazer did not purchase any shares for one year prior to a merger announcement. Glazer's alleged "moment of revelation" was May 18, 2020, and nothing showed that Glazer significantly increased its holding of Forescout stock after this date. Accordingly, the court found that the Glazer Funds had purchased shares based on alleged misrepresentations made within the specified class period.

Nevertheless, the court found it "prudent" to appoint both Glazer and Meitav as co-lead plaintiffs to ensure the entire class was best represented. Although the court would not go so far as to find the timing of Glazer's purchases rendered it atypical, the court agreed that the class would be best represented by lead plaintiffs who also purchased securities during the earlier portion of the class period.

Finally, the court rejected that Glazer's investment strategy rendered it atypical. Meitav's assertions that Glazer purchased shares based on event-driven strategies designed to "take advantage of market miscalculations," as opposed to only stock prices, did not constitute proof at this stage that Glazer's claims were not typical of the class. Further, the key concern was the defendants' behavior rather than the plaintiffs', and there was nothing to suggest that the defendants treated Glazer any differently from the other plaintiff groups, said the court.

Co-lead plaintiffs appointed. The court found that Glazer and Meitav together would be a "small" group under the established standard that a group of co-lead plaintiffs should be a "small group of manageable size that is capable of joint decision-making regarding the litigation." Accordingly, there was no barrier to appointing Glazer and Meitav as co-lead plaintiffs.

Co-class counsel appointed. The choice of class counsel was clear. According to the court, the Ninth Circuit has explained that "the district court does not select class counsel at all." Instead, the district court generally approves the lead plaintiff's selection of counsel. The firms selected by Glazer (Abraham, Fruchter & Twersky, LLP) and Meitav (Pomerantz LLP) had years of experience successfully litigating large securities class action suits and indicated a willingness to work together, noting successful past joint litigation. Accordingly, the court approved the two firms as co-lead counsel.

This is case No. 20-cv-00076-SI.

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