Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION—2d Cir.: Some claims revived against Teladoc Health, (Sept. 25, 2024)

Securities Regulation Daily Wrap Up

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By Kristin J. Angelino, J.D.

Plaintiffs adequately pleaded certain alleged misstatements by the telehealth company regarding the status of the integration progress with its merger partner. Other alleged misstatements constituted inactionable puffery or lacked the requisite specificity.

A Second Circuit panel issued a summary order affirming in part and denying in part the dismissal of securities fraud and control person liability claims in a putative class action brought against Teledoc Health, Inc., and five of its officers, for alleged misleading statements regarding the status of Teladoc's integration progress with competitor Livongo Health, Inc. following a merger between the two companies. The Second Circuit also held that the plaintiff failed to demonstrate how an amended complaint could correct the defects identified by the district court and, therefore, leave to amend was denied (*Leadersel Innotech ESG v. Teladoc Health, Inc.*, No. 23-1112 (2d Cir. Sept. 25, 2024)).

Lead plaintiff Leadersel Innotech ESG (Leadersel) appealed the district court judgment dismissing the claims it brought against Teladoc Health, Inc., and five of its officers, for violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and control person liability under Exchange Act Section 20(a) arising out of Teladoc's merger with Livongo, one of its key competitors, in October 2020. Plaintiff's Second Amended Complaint (the SAC) detailed numerous statements made by Teladoc officers in earnings calls and public filings that allegedly falsely assured investors that the integration with Livongo following the merger was either progressing well or was complete in certain key areas, including the companies' technology and sales teams. The district court held that Leadersel failed to plead any actionable Section 10(b) claims and accordingly also dismissed its Section 20(a) claims. It also denied plaintiff's request for leave to amend.

Puffery and optimism. The Second Circuit agreed with the district court's finding that four alleged misstatements about the integration made by Teladoc's officers in earnings calls or to reporters were not actionable. The Second Circuit found that the officers' "vague positive statements" about the integration progress - including phrases like "going really great," "continues to progress," and "on track," were too general to cause a reasonable investor to rely upon them and therefore were inactionable expressions of puffery and optimism.

Lack of specificity. The Second Circuit also agreed with the district court's dismissal of claims that were based on Teladoc's cautionary statements regarding integration risks in its 2020 Form 10-K. Plaintiff Leadersel argued that these cautionary statements were misleading because they characterized risks related to certain Livongo integration challenges as purely hypothetical, when, in fact, those risks had already materialized. The Second Circuit disagreed with the plaintiff, holding that the SAC failed to plead any specific facts leading up to the filing of the 2020 Form 10-K that could plausibly support the claim that such risks had already materialized. In addition, the court noted, the 2020 10-K contained statements such as "the overall integration of Livongo post-merger will continue to be a time-consuming and expensive process," which indicated that certain integration difficulties were already present at the time of filing. Accordingly, the court affirmed the dismissal of these fraud claims since they were not pleaded with the necessary specificity.

Statements by confidential witnesses. The Second Circuit disagreed with the district's courts dismissal of claims relating to alleged misstatements regarding the status of the integration itself. Such alleged misstatements took place during two earning calls with CEO Jason Gorevic in February and April 2021; a statement by Chief Marketing & Engagement Officer Stephany Vestraete in November 2021; and risk warnings in Teladoc's 2021 Form 10-K.

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For each alleged misstatement by a Teladoc officer, the Second Circuit found that the plaintiff provided statements from confidential witnesses sufficient to adequately plead that these representations were false or misleading. For example, in both earnings calls Gorevic stated that the commercial organization had been "fully integrated," and he used specific business units as examples. Since the SAC included statements from multiple confidential witnesses who worked for Livongo during the relevant time frame and who provided details regarding the lack of integration in sales teams at the time Gorevic's statements were made, the Second Circuit found that the plaintiff stated a plausible claim that Gorevic's declarations of "full integration" were misleading.

Similarly, the Second Circuit found that the district court's dismissal of claims related to Teladoc's warnings of hypothetical integration risks with Livongo in its 2021 Form 10-K was unwarranted. The Second Circuit reasoned that the SAC contained allegations that were sufficiently specific to plausibly support a finding that, by the time of the filing of the 2021 Form 10-K in February 2022, the risks regarding the Livongo integration were not merely potential difficulties but had already materialized and resulted in significant disruption to Teladoc's business.

The case is No. 23-1112.

Judge: *Per curiam*.

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Companies: Teladoc Health, Inc.; Leadersel Innotech ESG

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