Securities Regulation Daily Wrap Up, PROXIES—U.S.: Cert petition claims Basic presumption requires trade in efficient market, (Sept. 25, 2025)

Securities Regulation Daily Wrap Up

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By Anne Sherry, J.D.

A video-game company claims the Second Circuit was wrong to extend the presumption of reliance to investors who tendered shares in a freeze-out merger.

Shanda Games is asking the Supreme Court to rule on whether *Basic*'s fraud-on-the-market presumption is available to all plaintiffs who buy or sell securities or only those who do so at the market price in an efficient market. According to the company, the presumption requires a transaction anchored to the market price—otherwise, a plaintiff cannot be presumed to have relied on the misstatement incorporated in the market price (Brief for Petitioner, *Shanda Games Limited v. Monk*, No. 25-351 (U.S. Sept. 22, 2025)).

In February, a Second Circuit panel narrowly held that the fraud-on-the-market presumption of reliance is available to minority shareholders who sell shares in a freeze-out merger. The two-judge majority reasoned that those shareholders look to the market price to decide whether to tender their shares or to dissent and seek appraisal.

Shanda maintains that this holding is so irreconcilable with Supreme Court precedent that not only should the Court take the case, but it might consider summary reversal.

The petition cites cases from the Court stating that the fraud-on-the-market presumption does not apply unless there has been a transaction at a price set by an efficient market. These statements "are core to the economic logic underpinning *Basic*," Shanda writes. The reliance presumption depends on the concept that in an efficient market, misrepresentations are immediately reflected in a stock's trading price. "If a plaintiff does not transact at the market price, then she does not transact at a price reflecting any material misrepresentations," Shanda argues (internal quotations omitted).

In Shanda's view, it is decisive that the plaintiff in this case did not sell his stock at the market price; his shares were cashed out automatically via Shanda's freeze-out merger at a price set not by market forces, but by private negotiation.

Shanda argues that the Second Circuit's decision is wrong because it allows the case to move forward based on a hypothetical of what the plaintiff might have done—conflicting, as the dissenting judge observed, with the principle that a private right of action under Section 10(b) requires an overt act. And the decision will become the de facto nationwide rule if the Supreme Court doesn't grant certiorari, because securities actions can nearly always be brought in a district court within the Second Circuit.

The petition also argues that the challenged decision encroaches on state corporate law, raising federalism concerns. If the decision stands, shareholders can bypass the state-law appraisal process and bring a federal class action that "freeride[s] off of another shareholder's appraisal result."

The case is No. 25-351.

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Companies: Shanda Games Ltd.

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