



Cooley Secures Dismissal of Securities Class Action for Fastly

November 30, 2021

Cooley litigators locked in a win on behalf of Fastly, a cloud platform that processes data for thousands of companies around the world, its CEO, and former CFO, in a securities class action filed in the United States District Court for the Northern District of California. The diverse Cooley team, located in Palo Alto, consisted of partner Jessica Valenzuela Santamaria and associates Brett De Jarnette, Janelle Fernandes and Angelica Leo. Jessica Valenzuela Santamaria handled the oral argument on the motion to dismiss.

Background

The case arises from Former President Trump's August 2020 Executive Order purportedly banning any transaction between U.S. companies and social media app, TikTok (owned by Chinese company ByteDance). Specifically, the plaintiff claims that Fastly misled investors in May 2020 by making positive statements about its demand and large customers, while not disclosing that TikTok was a major customer, and was facing heightened regulatory scrutiny by the U.S. government. He contends that Fastly revealed the "truth" in August 2020 (notably before President Trump issued his order), when it disclosed that TikTok was Fastly's largest customer in the second quarter. Plaintiff also alleges that Fastly continued to mislead investors in August by assuming that TikTok traffic would remain status quo in the third quarter and by stating its belief that it could backfill any lost traffic. Ultimately, Fastly missed its third quarter revenue guidance. The plaintiff's complaint relied on numerous third-party articles to purportedly show that the U.S. government considered TikTok to be a national security threat in May 2020. It similarly cited post-class period analyst reports supposedly showing that TikTok had begun shifting traffic away from Fastly before August 2020.

The Dismissal

On November 23, 2021, United States Senior District Judge Phyllis J. Hamilton dismissed the complaint with leave to amend. The key arguments on the motion to dismiss – and the basis for the Court's dismissal order – was that plaintiff failed to adequately allege that any defendant made a false or misleading statement, and that no defendant intended to defraud investors. With respect to the May 2020 statements, the Court held that "Defendants disclosed the very risk plaintiff alleges they concealed: that possible U.S. bans on Chinese companies 'posed a material risk to Fastly's revenues.' Fastly noted even before the class period that nearly 30% of its revenue was at risk because of the U.S. government's expressed concerns regarding Chinese businesses." Similarly, the Court found the August 2020 statements inactionable because Fastly warned investors that customer traffic was unpredictable and could not be guaranteed. Further, the "media plaintiff cites regarding TikTok's diversification of its traffic are thin on specifics and provide no information regarding a specific reduction in TikTok's use of Fastly's services." The Court also found that many of the statements in both time periods were protected by the Private Securities Litigation Reform Act's safe harbor for forward-looking statements, were accurate historical statements, or were non-actionable statements of corporate optimism. The Court also rejected all of plaintiff's scienter arguments, finding no compelling inference that any defendant had an intent to defraud.

Significance

This is an important decision confirming that there is no affirmative duty to disclose information under the federal securities laws. There is only a duty to disclose if a defendant touts its business in a manner that is inconsistent with the purportedly omitted information. The decision also makes clear that a plaintiff cannot plead a securities fraud claim based on an omission theory where the defendant discloses the risk that was purportedly concealed. It is not enough for a plaintiff to claim that additional details about the disclosed risk could have been disclosed without explaining how such details were inconsistent with the disclosed risk. Moreover, the decision reiterates that hindsight speculation based on conclusory third-party articles and analyst reports is insufficient to establish a securities fraud claim. Instead, plaintiffs must plead particularized facts demonstrating that the challenged statements were false or misleading, and that each defendant made such statements with the intent to defraud investors.

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