

District of Maryland: Omission of the Industry Classification of Companies Used in a Comparable Public Companies Analysis Did Not Render a Proxy Statement Misleading

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On December 4, 2019, the District of Maryland dismissed with prejudice a securities fraud action alleging that a proxy statement (“Proxy”) issued in connection with the sale of an industrial real estate investment trust (“REIT”) was materially misleading in violation of Section 14(a) of the Securities Exchange Act of 1934 and SEC Rule 14a-9. [Hurtado v. Gramercy Property Trust, 2019 WL 6618663 \(D. Md. 2019\) \(Hollander, J.\)](#).^[1] Plaintiff alleged that the Proxy’s summary of a comparable public companies analysis (“CPC Analysis”) that underpinned a fairness opinion was misleading because it did not disclose that only two of the five comparator companies were industrial REITs. The court found this “omission was not material” in view of “the full mix of statements in the Proxy as well as the Proxy’s tailored warnings, combined with publicly available information.”

The court explained that “[t]he materiality of an omission must be examined in context and in light of the total mix of information made available to investors,” including “the entirety of the relevant SEC filing” and “information in the public domain.” Here, the Proxy “set forth twenty-nine material factors that the [b]oard considered before recommending the acquisition.” The court found “the Proxy made clear that the [f]airness [o]pinion was but one of many variables the [b]oard evaluated in arriving at its decision.” Moreover, the court found the Proxy “contained an exhaustive summary” of the seven financial analyses that were discussed in the fairness opinion, and noted that “the per share valuation range produced by the CPC Analysis fit comfortably within the estimates produced by the other” analyses. “Given these comprehensive disclosures,” the court determined that “the Proxy provided shareholders more than enough information to decide how to vote.”

With respect to the CPC Analysis, the court found the Proxy “disclosed the five companies that [the financial advisor] selected as comparators,” and explained that these companies were selected “because they shared similar business characteristics” with the company. The Proxy “expressly disavowed any representation that the comparator companies used in the CPC Analysis were a perfect match to [the company].” The Proxy also disclosed that the financial advisor “made judgments and assumptions” when “evaluating companies.” The court found these warnings “negate the materiality of the alleged omission.”

The court emphasized that the classification of the comparator companies “was not uniquely in the possession of defendants.” Rather, “the way in which the market indices classify these companies is information easily accessible in the public domain.” The court observed that “an interested shareholder had the option of researching the comparators and determining for herself whether the comparators were good ones.” The court held that “the omission of this information did not affect the information available to [the company’s] shareholders.”

“Even assuming, for the sake of argument, that the omitted information was material,” the court found that “it did not render any statements contained in the Proxy false or misleading.” The court reasoned that the Proxy did not represent that the comparator companies were selected “based on how market indices classified them.” Moreover, the Proxy “fully disclosed” that the CPC Analysis “was suffused with subjective judgments and may undervalue or overvalue [the company’s] stock price.”

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