

## Southern District of New York: Dismisses Securities Fraud Complaint That Mischaracterized Defendants' Opinions and Emphasizes That Companies Have No Duty to Disclose All Facts Cutting Against Statements of Opinion

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On February 27, 2020, the Southern District of New York dismissed a securities fraud action alleging that a mining company misleadingly expressed continued confidence in its plan for developing and operating a mine (the “mine plan”), while failing to disclose that the quantity of unusable “waste rock” excavated at the mine was higher than expected. *In re Pretium Resources Sec. Litig.*, 2020 WL 953609 (S.D.N.Y. 2020) (Preska, J.). The court found that contrary to “[p]laintiffs’ mischaracterizations, [the company’s] statements were not affirmations of categorical confidence in all aspects of the mine plan or of specific confidence in the plan’s waste rock projections.”

The court held that the statements at issue were opinions. The court explained that in order to allege that a statement of opinion was misleading by omission under the test set forth in *Omnicare v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175 (2015), “the plaintiff must identify particular (and material) facts going to the basis for the speaker’s opinion whose omission makes the opinion statement . . . misleading to a reasonable person reading the statement fairly and in context.”<sup>[1]</sup> The court underscored that “a reasonable investor does not expect that every fact known to a speaker supports its opinion.” The court noted that “[a]n opinion therefore is not necessarily misleading when a speaker knows, but fails to disclose, some fact cutting the other way.”

The court determined that “[d]efendants’ disclosures about the mine plan could not have been fairly construed by reasonable investors as expressing confidence in the plan’s waste rock projections or the plan as a whole.” The court held that “[d]efendants’ failure to disclose the waste rock excavation numbers therefore did not render the statements misleading.” The court further found that even if the company’s “statements could be interpreted as broad expressions of confidence in the mine plan’s viability, [d]efendants’ failure to disclose the waste rock figures would still not be actionable.” The court explained that “[s]ecurities fraud plaintiffs must do more than show that the speaker knew or had access to countervailing information; they must show that the speaker’s opinion did not fairly align with all the information that was then available.” The court held that plaintiffs did “not satisfy that standard.” To the extent that “increased tunneling and waste rock excavation weighed against a cheerful view of the mine plan’s overall viability,” the court found plaintiffs had “not plausibly alleged that [this] pushed the scale’s needle so far as to render continued faith in the plan unreasonable.”

The court also found plaintiffs failed to allege scienter because the waste rock data was publicly available in the company’s reports to Canadian regulators. The court held that the public accessibility of this data “kick[ed] the legs out from any inference of scienter.”

[1] Please [click here](#) to read our discussion of the Supreme Court’s decision in *Omnicare*.

Authors and  
Contacts

Lynn Neuner

Partner

[lneuner@stblaw.com](mailto:lneuner@stblaw.com)

+1-212-455-2696

George Wang

Partner

[gwang@stblaw.com](mailto:gwang@stblaw.com)

+1-212-455-2228

Cheryl Scarboro

Of Counsel

[cscarboro@stblaw.com](mailto:cscarboro@stblaw.com)

+1-202-636-5529

