

Securities Law Alert

KEY DEVELOPMENT IN SHAREHOLDER LITIGATION

First Circuit: Reverses Dismissal, Concluding Optimistic Opinion Could Have Been Materially Misleading

September 30, 2026

On June 5, 2026, the First Circuit reversed dismissal in part in a securities fraud class action, which arose following an abandoned merger between a manufacturer and an online retailer, alleging that the manufacturer, its CEO, and its CFO violated Section 10(b) of the Exchange Act by making misleading statements and omissions about the retailer's cooperation with the EU's antitrust regulator, the European Commission (EC). [*Premca Extra Income Fund, LP v. Angle*](#), 178 F.4th 712 (1st Cir. 2026) (Aframe, J.). The First Circuit held that the complaint plausibly alleged that an opinion appearing in the manufacturer's modified proxy statement that it "expected that all applicable regulatory approvals would be obtained," qualified as a misleading statement "because it omitted important contrary information about European approval in circumstances that adequately suggest scienter."

Background and Procedural History

In 2022, the retailer agreed to acquire the manufacturer at \$61 per share. Later in 2022, the manufacturer filed a proxy statement predicting that "all applicable regulatory approvals would be obtained." In May 2023, the manufacturer's CEO and CFO learned that the retailer had refused to comply with an EC request for information about its search engine due to EC concerns that the retailer would boost its own products at the expense of competitors. In July 2023, the EC announced that it was pursuing a Phase II investigation based on concerns that the transaction would allow the retailer to exclude the manufacturer's rivals from its online marketplace and/or degrade their access. In August 2023, the manufacturer filed a modified merger proxy statement stating that it and the retailer "expected that all applicable regulatory approvals would be obtained" but—as would become relevant later—did not include a description of the EC's anticompetitive concerns related to the Phase II investigation or state that the retailer had refused to provide search engine information related to the EC's competitive concerns. In January 2024, the parties abandoned the merger and the manufacturer subsequently entered Chapter 11 bankruptcy.

Stockholders of the manufacturer subsequently sued alleging that defendants "made numerous misleading statements and omitted material information regarding [the retailer's] cooperation with regulators and the status of the regulatory approval process." The district court dismissed concluding that there was insufficient factual support for the fraud allegations and inadequate allegations of scienter.

The Modified Proxy Statement Omitted Crucial Information

The First Circuit concluded that the manufacturer's modified proxy statement contained the only statement that presents a plausible claim under Section 10(b) and qualifies as a misleading statement. The First Circuit pointed out that months after the manufacturer refrained from predicting the outcome of the regulatory approvals, it reversed course and predicted success. The court noted that it did so in the context of new information indicating strong regulatory headwinds, including that the EC had "just taken the rare step of elevating the investigation to Phase II" and that the manufacturer privately knew the retailer was refusing to provide the EC with information about how its search engine worked. The First Circuit concluded that "[v]iewed against that backdrop, the modified proxy statement's optimism could be found to have been materially misleading to investors for saying one thing and holding back another." The court further stated that the manufacturer's "rosy prediction of regulatory success . . . could reasonably be understood as reassurance to investors as it came on the heels of the EC's Phase II announcement." The court noted that if the proxy statement had included the retailer's refusal to provide information it could have undermined the manufacturer's message of reassurance and significantly altered the total mix of information available to investors.

No Strong Inference of Scienter Arising From Regulatory Cooperation Statements

Plaintiff also asserted that prior to the filing of the modified proxy statement, the manufacturer made misleading statements asserting that the parties to the merger were cooperating with antitrust regulators but that the retailer had at certain points not yet met regulatory requests. The First Circuit concluded that even assuming that these statements were materially false or misrepresentative, that they did not give rise to a strong inference of scienter. The First Circuit concluded that there were insufficient allegations that the manufacturer was intentionally or recklessly deceptive and that a "reasonable disagreement" over the meaning of "cooperate" does not give rise to a strong inference of scienter.

The court explained that any argument that the individual defendants possessed the requisite scienter presumes that they understood cooperation to mean an inflexible obligation to provide regulators with all requested information on demand. However, the court pointed out that the merger agreement required the parties to use "reasonable best efforts" to obtain regulatory approval and to supply additional information to regulators as promptly as "reasonably practicable." The court stated that "[i]n this context, 'reasonable' leaves space for give-and-take between antitrust regulators and merging parties." The court further noted that the complaint did not allege that the manufacturer knew that the retailer had stopped negotiating with regulators or was stonewalling when it said the parties were cooperating.

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