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Ninth Circuit panel rejects claim that Twitter misled investors

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The Ninth Circuit last week issued a decision confirming that companies working through product-specific issues do not need to provide investors with "real-time updates" about every aspect of the work. A panel of three judges wrote, "While society may have become accustomed to being instantly in the loop about the latest news … , our securities laws do not impose a similar requirement."

On March 23, 2022, in *Weston Family Partnership v. Twitter, Inc., et al.*, a panel of the United States Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of a complaint against Twitter and certain of its executives alleging securities fraud under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5.

In a passage that is sure to be cited by defendants in the future in cases alleging selective disclosure of information, the panel ruled that "[s]ecurities laws … do not require real-time business updates or complete disclosure of all material information whenever a company speaks on a particular topic. To the contrary, a company can speak selectively about its business so long as its statements do not paint a misleading picture." (Op. at 5.)

The case arose from public statements that Twitter made about a product it offers to advertisers. Twitter has historically gathered user data and then shared that data with advertisers so that they may tailor ads to different users. In 2017, Twitter began allowing users to opt out of this data sharing.

Twitter has a Mobile App Promotion (MAP) product that allows advertisers to prompt users to download the advertisers' apps. To make the ads more effective, Twitter shares certain information about users, such as the device's operating system and previously downloaded apps, so advertisers can prompt users to download similar apps that can run on their devices. In the lead-up to the start of the proposed class period, Twitter identified MAP to investors as a driver of revenue growth.

On May 13, 2019, Twitter announced that it had discovered a software bug that allowed the sharing of user's cell phone location data with advertisers even if the user had opted out of sharing such information. At the same time, however, Twitter stated that it had fixed the problem. Three months later, on August 6, 2019, Twitter announced that it had again accidentally shared user data with advertisers.

It was later revealed that, when Twitter stated in May that it had "fixed the issues," it had not corrected the software bug that had led to improper sharing—rather, it had stopped sharing all users' data (not just for users who had opted out) with the MAP program entirely. The absence of data sharing pursuant to the MAP program led to a drop in revenue.

On October 23, 2019, Twitter announced "software bugs hampering MAP" and also announced a $25 million revenue shortfall. Twitter's share price then dropped over 20%.

The plaintiffs pointed to various public statements that Twitter made between July and September about MAP that did not disclose the extent of the bugs or the potential impact that failing to share MAP data with advertisers might have on advertising revenue. (*Id.* at 7-9.) For instance, the plaintiffs claimed that statements that Twitter was working on MAP's "stability, performance, and flexibility" were misleading because they made no mention of existing software bugs. Furthermore, the plaintiffs argued that a risk factor in the company's 10-Q indicating that the company's products and services "may contain undetected software errors, which could harm [its] business and operating results" was misleading

because Twitter allegedly *knew* of ongoing software errors but failed to disclose them.

Plaintiffs alleged that the failure to immediately disclose in July 2019 the impact of the software bugs on MAP was materially misleading because the company had left investors with the misimpression that MAP work was "on-track." The panel rejected this argument, finding that the company's actual statements about MAP were "much more qualified and less definitive" than the plaintiffs had claimed. Ultimately, the panel concluded that the company's statements suggested "a vaguely optimistic assessment that MAP, like almost all product developments, has had its ups and downs, even as the company continues to make progress." (*Id.* at 15-16.) The panel held that

> companies do not have an obligation to offer an instantaneous update of every internal development, especially when it involves the oft-tortuous path of product development. (*Id.* at 15.)

The panel also found that the plaintiffs did not allege either plausibly or with particularity that the software bugs that Twitter allegedly failed to disclose in July had materialized and affected the company's revenue by that time. (*Id.* at 17-20.) The panel noted that mere temporal proximity between an allegedly misleading statement and subsequently disclosed facts does not give rise to a plausible inference that the facts were known at the time of the statement.

The panel further found that Twitter's July 2019 statements in its 10-Q regarding the progress of MAP fell within the safe harbor provided by the Private Securities Litigation Reform Act of 1995 because they were forward-looking statements accompanied by meaningful cautionary language. (*Id.* at 20-21.)

On the heels of the Ninth Circuit's January 26, 2021 decision affirming dismissal of a putative class action securities complaint against Tesla, this decision appears to reflect continuing scrutiny by Ninth Circuit panels of claims of alleged securities fraud leveled against technology companies, which frequently see rapid changes in product cycles and business growth drivers.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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