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Ninth Circuit Affirms Dismissal of Securities Class Action on Materiality and Safe Harbor Grounds

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The U.S. Court of Appeals for the Ninth Circuit upheld a district court's dismissal of a securities fraud class action suit, ruling that defendants' alleged incomplete disclosures were not material omissions and that the issuer's earnings projections fell within the statutory safe harbor under the Private Securities Litigation Reform Act (PSLRA). In the process, the court clarified case law within that circuit on the application of the PSLRA safe harbor provisions.

Cutera, Inc. is a retailer of lasers and other light-based aesthetic systems sold to medical professionals for use in cosmetic procedures. A purported class of shareholder plaintiffs sued based on alleged misrepresentations and omissions concerning an expansion of Cutera's sales force in 2005 and 2006 to include junior sales executives and a lower-priced laser. The program did not proceed as hoped and was ultimately abandoned. During the program's rollout, Cutera executives stated in a conference call in January of 2007 that they "wanted to have a more junior sales force focus on a certain segment of the market. We didn't get the productivity we were looking for with that." Despite this statement, Cutera projected a significant increase in revenue and its share price spiked. In later statements in April and May, Cutera downgraded its revenue projections, attributed in part to lower productivity levels from its recent sales expansion and "aberrantly high turnover." The May press release, in particular, noted "the unsuccessful implementation of our junior sales program, unusually high sales employee turnover, and disappointing results from... national accounts." Cutera's share price closed after the May release more than 18% off the previous day's price. The court ruled that despite the fluctuations in share price, there was no material difference between Cutera's statements in January and its later statements in April and May. Plaintiffs failed to show that a reasonable investor would have received a materially different impression of Cutera's state of affairs had the company used the April or May language in January.

The court also dismissed plaintiffs' claims to the extent they relied on misleading revenue projections, finding that Cutera's projections fell within the statutory safe harbor for forward-looking statements accompanied by meaningful cautionary disclosures. In so doing, the court clarified that under Ninth Circuit law, the various prongs or separate safe harbors set forth in the PSLRA are independent and should not be read in the conjunctive. The court's decision is consistent with other circuits in holding that allegations showing a strong inference of actual knowledge cannot overcome safe harbor protection for such forward-looking statements. The court expressly rejected a footnote from one of its prior cases, seized on by plaintiffs and certain trial courts, which suggested that an actual knowledge showing could in fact defeat safe harbor protection for forward-looking statements accompanied by meaningful cautionary disclosures. (*In re Cutera Sec. Litig.*, No. 08-17627, 2010 WL 2595281 (9th. Cir. June 30, 2010))

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