

Growing Exceptions, Shrinking PSLRA Safe Harbor

by Lyle Roberts

As numerous courts have recognized, risk disclosures are forward-looking statements covered by the PSLRA's safe harbor (which renders such statements inactionable if they are accompanied by meaningful cautionary language *or* were not made without actual knowledge of their falsity). But if the risk disclosure is alleged to have been false or misleading because the company omitted to state that that the risk had previously materialized, does that suddenly make the safe harbor inapplicable (i.e., convert the forward-looking statement into a statement of present fact)? The Ninth Circuit, in a decision that is certain to create some controversy, has found that it does.

In *Const. Laborers Pension Trust of Greater St. Louis v. Funko, Inc.*, No. 24-4909 (9th Cir. Feb. 4, 2026) the plaintiffs alleged that Funko's "risk disclosures" about its ability to manage its inventory in the future "concealed the facts that Funko had already failed to manage its inventory and that its business, financial condition, and operations were already adversely affected." The district court found that these risk disclosures were protected by the PSLRA's safe harbor because the plaintiffs failed to adequately plead actual knowledge of their falsity. On appeal, however, the Ninth Circuit panel appears to have created a new exception to the safe harbor.

In particular, the panel concluded that because the alleged omission related to Funko's current failure to manage its inventory, the risk disclosure "implicitly serves as a comment on the *present* state of affairs, because it suggests that the circumstance posing the risk has not yet occurred." And, as a result, the risk disclosure "does not fall under the safe harbor for forward-looking statements because its falsity lies not in the failure to predict the future, but in the implicit assertion about the present that the risk identified has not happened yet." In other words, if a plaintiff alleges an "affirmative misrepresentation theory" then the otherwise forward-looking risk disclosure is converted into a statement of present fact and is not subject to the safe harbor.

The panel offered no direct citations in support of its analysis, perhaps because it seems to run counter to longstanding precedent both within the Ninth Circuit and other circuits. As a general matter, a forward-looking statement is never false because it fails to accurately predict the future, which is inherently unknowable. Instead, as the Ninth Circuit (*see, e.g., Apple* (9th Cir. 1989)) and Second Circuit (*see, e.g., Slayton* (2nd Cir. 2010)) have long held, forward-looking statements contain certain "implicit factual assertions," including that the speaker is not aware of any undisclosed facts tending to seriously undermine the accuracy of the statement.

If the speaker knows that this implicit factual assertion is not true, then the forward-looking statement is misleading. Presuming that risk disclosures are actionable at all (at least two circuits have found that they may be inherently immaterial statements), the failure to disclose a prior or current

materialization of the risk would appear to fall into the category of an “undisclosed fact tending to seriously undermine the accuracy of the statement.” And this theory of falsity does not prevent the application of the safe harbor with its “actual knowledge” prong (*see, e.g., Slayton* (2nd Cir. 2010)).

In the *Funko* case, however, the panel has taken the unusual position that the safe harbor does not apply when a plaintiff alleges an “affirmative misrepresentation theory” (i.e., claims that a present fact undermining the statement was omitted and rendered the forward-looking statement misleading) even if there is no dispute that the statement itself is a forward-looking statement. Taken to its logical conclusion, the PSLRA’s safe harbor is largely mooted by this analysis, as virtually every forward-looking statement securities fraud claim is based on the alleged omission of some “undisclosed fact tending to seriously undermine the accuracy of the statement.” It seems hard to believe that is what Congress intended when it passed the statute. Stay tuned.