

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of June, two thousand fifteen.

PRESENT: DENNIS JACOBS,
GUIDO CALABRESI,
GERARD E. LYNCH,
Circuit Judges.

- - - - -X
STEPHEN LUCAS,
Plaintiff-Appellant,

CHARLES SILSBY, individually and on
behalf of all others similarly
situated,
Plaintiff,

-v.-

14-1906-cv

CARL C. ICAHN, ROBERT C. FLEXON, CLINT
FREELAND, KEVIN T. HOWELL, THOMAS W.
ELWARD, E. HUNTER HARRISON, MICHAEL J.
EMBLER, VINCENT J. INTRIERI, SAMUEL
MERKSAMER,
Defendants-Appellees,

1 **DYNEGY, INC.,**
2 **Defendant.***

3 - - - - -X

4
5 **FOR APPELLANT:** NICHOLAS I. PORRITT, Levi &
6 Korsinsky LLP, New York, New
7 York.

8
9 **FOR APPELLEES:** DOUGLAS P. BAUMSTEIN (Glenn M.
10 Kurtz and Kimberly A. Haviv, on
11 the brief), White & Case LLP,
12 New York, New York.

13
14 Appeal from a judgment of the United States District
15 Court for the Southern District of New York (Koeltl, J.).

16
17 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
18 **AND DECREED** that the judgment of the district court be
19 **AFFIRMED.**

20
21 Stephen Lucas appeals from the judgment of the United
22 States District Court for the Southern District of New York
23 (Koeltl, J.), dismissing his complaint for failure to state
24 a claim. He appeals only the dismissal of his section 10(b)
25 and Rule 10b-5 claim as to defendants Robert C. Flexon,
26 Clint Freeland, and Samuel Merksamer (the "10b-5
27 Defendants"), who served as officers or directors of Dynegy,
28 Inc. ("Dynegy"), Dynegy Holdings, Inc. ("Dynegy Holdings"),
29 or both. We assume the parties' familiarity with the
30 underlying facts, the procedural history, and the issues
31 presented for review.

32
33 We review de novo the dismissal of a complaint for
34 failure to state a claim. Capital Mgmt. Select Fund Ltd. v.
35 Bennett, 680 F.3d 214, 219 (2d Cir. 2012). "To state a
36 claim under § 10(b) and the corresponding Rule 10b-5, a
37 plaintiff must plead that the defendant, in connection with
38 the purchase or sale of securities, made a materially false
39 statement or omitted a material fact, with scienter, and
40 that the plaintiff's reliance on the defendant's action
41 caused injury to the plaintiff." Ganino v. Citizens
42 Utilities Co., 228 F.3d 154, 161 (2d Cir. 2000).

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

1 As relevant here, Lucas alleges that, at the direction
2 of the 10b-5 Defendants, Dynegy made misrepresentations to
3 investors in a September 2, 2011 press release and a
4 November 14, 2011 filing with the Securities and Exchange
5 Commission.
6

7 In those disclosures, Dynegy stated that, as part of a
8 restructuring effort, it was acquiring from Dynegy Holdings¹
9 certain assets with a "fair value" of approximately \$1.25
10 billion and, in exchange, would provide "this value" in the
11 form of an "Undertaking" to make payments on debt owed by
12 Dynegy Holdings. Lucas does not dispute that the mechanics
13 of the Undertaking were accurately described: Dynegy was
14 required to make principal and interest payments through
15 2026 totaling approximately \$1.25 billion. He argues that
16 the disclosures were nevertheless misleading because they
17 implied that the Undertaking itself had a fair market value
18 of \$1.25 billion, whereas (Lucas alleges) the Undertaking
19 was worth substantially less when appropriately discounted
20 for present value and risk.
21

22 Like the district court, we think it is a close
23 question whether the disclosures were misleading at all. It
24 was not asserted that the Undertaking was worth \$1.25
25 billion; the \$1.25 billion figure was used to describe the
26 assets to be acquired by Dynegy (in exchange for the
27 Undertaking). Furthermore, it is implausible that any
28 reasonable investor would think that a payment stream over a
29 period of fifteen years has a present value equal to the
30 face value of total payments.
31

32 In any event, we need not decide whether the
33 disclosures were misleading because, even if they were,
34 Lucas has not adequately pleaded that the 10b-5 Defendants
35 acted with scienter. A claim under section 10(b) and Rule
36 10b-5 is adequately pleaded only if there are sufficient
37 allegations of "an intent to deceive, manipulate or
38 defraud." Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir.
39 2001) (citation and internal quotation marks omitted).
40 "[T]o be adequate, scienter allegations must give rise to a
41 strong inference of fraudulent intent . . . either with
42 motive and opportunity allegations or with allegations
43 constituting strong circumstantial evidence of conscious

¹ The transaction also involved other corporate entities related to Dynegy and Dynegy Holdings.

1 misbehavior or recklessness." Id. at 138-39 (citations and
2 internal quotation marks omitted); see also Novak v. Kasaks,
3 216 F.3d 300, 306 (2d Cir. 2000).
4

5 There are no such allegations here. To the contrary,
6 Dynegy fully and accurately disclosed the mechanics of the
7 Undertaking, including all the information an investor would
8 need to perform a valuation. Lucas argues that it would
9 have been very difficult for the average investor to
10 actually perform such a valuation, even with the information
11 provided. That is beside the point: such disclosure is
12 flatly inconsistent with an intent to mislead investors as
13 to the value of the Undertaking, especially in the absence
14 of an affirmative statement as to that value.
15

16 For the foregoing reasons, and finding no merit in
17 Lucas's other arguments, we hereby **AFFIRM** the judgment of
18 the district court.
19

20 FOR THE COURT:
21 CATHERINE O' HAGAN WOLFE, CLERK
22