No. 07-15083

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELLEN RUBKE, AS TRUSTEE OF THE 1986 RUBKE LIVING TRUST and JACK FERGUSON, individually and on behalf of all other similarly situated shareholders of Napa Community Bank,

Plaintiffs-Appellants,

v.

CAPITOL BANCORP LIMITED and JOSEPH D. REID,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of California
Case No. C-05-4800 PJH
The Honorable Phyllis J. Hamilton, United States District Judge

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I. INTRODUCTION

In their brief, Defendants ignore numerous allegations in Plaintiffs' First Amended Complaint ("FAC") and improperly attempt to argue the truth of those allegations, rather than their sufficiency and particularity. Defendants also misapply the standards for pleading scienter under the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 ("the PSLRA") as those standards were explained in a recent Supreme Court decision. As demonstrated herein and in Plaintiffs' opening brief, the district court's order dismissing the FAC must be reversed, and the matter should be remanded to that court for further proceedings.

II. ARGUMENT

A. Defendants Had a Duty To, But Did Not, Disclose Material Information in the Exchange Offer in Violation of Section 11 of the 1933 Act.

In their opening brief, Defendants do not dispute the general proposition that they were under a duty to disclose all material information in their possession related to the Exchange Offer by virtue of the specific statements made by Defendants in the Exchange Offer and generally by virtue of their status as insiders and majority shareholders of NCB. Rather, Defendants contend that the allegations related to the specific matters they failed to disclose here are not actionable for a variety of reasons. None of Defendants' contentions, however, shield them from liability under Section 11 of the 1933 Act, 15 U.S.C. § 77k.

1. Defendants Were Required to Disclose All Material Facts Concerning the JMP Fairness Opinion.

The gravamen of Plaintiffs' Section 11 claim is that Defendants were under a duty to disclose material qualifying information related to the JMP Fairness Opinion – specifically, that the Opinion was not objective due to the longstanding relationship between JMP and Capitol, and was not reliable as shown by JMP's previous "blessings" of the exchange rates offered by Capitol in 26 out of 30 transactions involving entirely dissimilar banks. Capitol's failure to include this material qualifying information in the Exchange Offer (which Defendants did not address directly in their brief) must be seen as a violation of Section 11.

The only logical conclusion that can be drawn from Defendants' attachment of the JMP Fairness Opinion to the Exchange Offer is that Defendants intended to foster the impression among the NCB shareholders that an objective and reliable analysis of NCB's value had been done, and that NCB shareholders were getting a fair price for their shares in the Exchange Offer. Because Capitol chose to proffer the JMP Fairness Opinion as support for the Exchange Offer, Capitol was required to set forth fully the nature and background of its long-standing relationship with JMP so that a reasonable investor could make an informed and independent decision about how much weight to give the JMP Fairness Opinion. *McMahon & Co. v. Wherehouse Entertainment Inc.*, 900 F.2d 576, 579 (2d Cir. 1990).

Without directly addressing the issue of their failure to include information about the longstanding relationship between Capitol and JMP, Defendants argue that they made "meaningful cautionary disclosures" about the JMP Fairness Opinion, and that those disclosures provide a hedge against Section 11 liability for Defendants' extraneous statements about the Exchange Offer in their "Campaign of Deception." Brief of Appellees at 22. For example, Defendants assert that "it had retained JMP 'as its financial advisor and agent' and also disclosed how much it paid for JMP's...fairness opinions." *Id.* at 23. Because they made those bare disclosures, Defendants reason, no liability under Section 11 can attach.

That argument lacks merit for several reasons. First, it should be noted that by so arguing, Defendants have implicitly admitted the materiality of those statements, and thus needed to disclose the omitted information regarding the long-standing relationship with JMP. "When a corporation does make a disclosure – whether it be voluntary or required – there is a duty to make it complete and accurate." *Roeder v. Alpha Industries Inc.*, 814 F.2d 22, 26 (1st Cir. 1987). Any references by Capitol to its relationship with JMP or to the JMP Fairness Opinion as a means for evaluating the fairness of the Exchange Offer thus imposed on Defendants the obligation to make a full and complete disclosure about the longstanding relationship. *McMahon & Co.*, 900 F.2d at 579 ("the disclosure

required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers").

In an attempt to sidestep their failure to disclose, Defendants contend that Plaintiffs were required to allege that the JMP Fairness Opinion was both objectively and subjectively false. Brief of Appellees at 15-22. That contention ignores that irrespective of the actual contents or accuracy of the JMP Fairness Opinion, the Exchange Offer failed to include material qualifying information about the relationship between JMP and Capitol and JMP's record of previous fairness opinions that would have enabled NCB shareholders to weigh the credibility of the Opinion and possibly decide to discount or ignore it altogether. With that information in hand, NCB shareholders reasonably might have been more inclined to seek out and consider evaluations of the value of their shares from other sources. At the very least, it was information that shareholders reasonably would have found significant in their decision-making process. Thus, Capitol was required to disclose it, irrespective of whether the Opinion itself was objectively or subjectively false. *Monroe v. Hughes,* 31 F.3d 772, 775 (9th Cir. 1994).

The second prong of Defendants' argument – that the FAC does not allege that the JMP Fairness Opinion was both objectively and subjectively biased – fails as well. Plaintiffs have alleged that the JMP Fairness Opinion was virtually identical to the opinions JMP had issued in nearly every other Capitol exchange

offer JMP had blessed in the past, irrespective of the significant differences among the banks being evaluated. FAC ¶ 53, AR 775. Moreover, the FAC sets forth that JMP had opined just one year earlier that equivalent shares of NCB Holdings were worth more even though the performance of NCB had significantly improved after the sale was accomplished. FAC ¶ 52, AR 774. Those facts, too, are material in nature and were required to be disclosed in the Exchange Offer, regardless of whether the Opinion could be read as objectively or subjectively biased.

2. Defendants Improperly Attempt to Argue The Truth of the Allegations in the FAC.

In the answering brief, Defendants attempt to argue a variety of factual points in a manner inappropriate to proceedings on a motion to dismiss. First, Defendants take great pains to attempt to distinguish the NCB Holding shares from the NCB shares. Brief of Appellees at 19-21. For example, Defendants assert that "Capitol could logically pay more for a share exchange by which it purchased all outstanding shares than in one where it did not." *Id.* at 20. Defendants also assert that "the Exchange Offer actually resulted in a greater total return on the investors' original investment (158%) than the did the First California Northern share exchange (150%), albeit over a longer holding period." *Id.* at 21. Each of these assertions were intended to rebut Plaintiffs' allegations that the transactions were "equivalent," and thus that the Opinion was not objectively or subjectively false.

Such arguments might be appropriately presented to a trier of fact, but they go far beyond the issue that was before the district court: the legal sufficiency of the facts alleged in the FAC. At the pleading stage, the district court's only mission is to determine whether the facts alleged, *taken as true,* and the inferences raised thereby are sufficiently particular under the PSLRA to state a cause of action. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, ___ U.S. ___, 168 L.Ed.2d 179, slip op. at 11 (2007). Defendants cannot urge the district court or this Court to determine the truth of the allegations in the FAC at this point in the case.

Moreover, Defendants attempt to excuse their failure to reveal the previous JMP fairness opinion by asserting that it was "publicly available" to NCB shareholders as part of the "total mix" of information. *Kapps v. Torch Offshore Inc.*, 379 F.3d 207, 216 (5th Cir. 2004). Whether it was or not is also a factual issue that is beyond the scope of inquiry at the pleading stage. Besides, as Defendants point out, it is not enough merely to assert that the information is "publicly available." Brief of Appellees at 21-22. Rather, the facts must have been in the "*readily available* general public domain." *Id.* (emphasis added). There are sufficient cognizable facts in the record that demonstrate that the information about the previous JMP opinion was not "publicly available." Defendants' contention to the contrary is based upon their apparent reasoning that the NCB shareholders could have reviewed all of Capitol's 650-plus filings with

the SEC, located the *one filing* in which the prior buyout information was contained, applied sophisticated financial analysis to the information, and thereby received full disclosure about the results of such analysis. That reasoning is beyond credibility. Federal securities law cannot impose such demanding standards of due diligence and investigation on ordinary shareholders, let alone the shareholders in this case, who were entitled to believe that Capitol would provide all material information in connection with the Exchange Offer.

Moreover, the critical information the NCB shareholders should have had was not available anywhere in Capitol's SEC filings. None of those filings contain a statement that shares equivalent to NCB shares were being purchased at a price higher than 150% of book value. In fact, nowhere does the previous JMP opinion's estimate of 167% of book value appear in connection with NCB Holdings. That number can only be calculated through a careful and exacting analysis of the filings. Nor is there any acknowledgement that insiders of NCB and Capitol were cashed out at a higher price than what was being offered in the Exchange Offer. Therefore, Defendants cannot argue successfully that such information was disclosed in publicly available filings.

Furthermore, the use of words like "premium" and "fair" in the Exchange Offer imposed on Capitol a duty to disclose all material qualifying information in its possession particularly considering its status as a majority shareholder and

insider. Under the "disclose or abstain" rule, Capitol could have elected not to enter into the transaction. *Chiarella v. United States,* 445 U.S. 222, 230 (1980). However, Capitol elected to proceed, thereby assuming significant disclosure obligations in order to make the transaction fair.

Under these circumstances, Defendants cannot blithely ignore the significance of the use of the terms "premium" and "fair." Brief of Appellees at 23. In particular, Defendants were required to but did not disclose their knowledge that NCB management was projecting that NCB's net income for 2006 would be approximately $1,000,000 which would be a 66% increase over 2005. Contrary to Defendants' assertions, a reasonable shareholder would not be put on notice of the projected growth of NCB's profitability by the inclusion of net income information for one quarter, along with the tepid statement that "Capitol believes that NCB's profitability will increase." Brief of Appellees at 24. Capitol knew that NCB was on track for 66% net income growth in 2005; however, the NCB shareholders without access to Capitol's insider knowledge could not have known about the projected results based on Defendants' bland and incomplete understatement regarding NCB's performance.

3. Plaintiffs Have Alleged Section 11 Damages Sufficiently.

Finally, Plaintiffs have adequately alleged damages under Section 11. As an initial point, the "price paid" for Capitol's shares and the amount of damages

suffered by Plaintiffs is more appropriately determined at trial. Such damages issues are intensely factual issues which is not appropriate for resolution by a motion to dismiss where, as here, damages have been alleged. *Emmi v. First-Manufacturers Nat'l Bank,* 336 F.Supp. 629, 634 (D. Me. 1971). Defendants' argument against Plaintiffs' damage theory is not appropriate at this point.

Second, Defendants' overly simplistic attempt to compare what they believe to be the relative values of Capitol's stock at the time the Exchange Offer became final and at the filing of the complaint misconstrues the nature of Plaintiffs' damages. Although the analysis is more complex due to the unique nature of the Exchange Offer, it must be remembered that this case in no way concerns the intrinsic value of Capitol's shares. None of the deceptive statements alleged in the FAC were aimed at making investors believe Capitol's shares were worth more than they were. If that were the case, then subsequent rises in Capitol's stock could be seen as alleviating the wrong done. However, here the deceptive statements in the Exchange Offer were aimed at downplaying the value of NCB's shares. Defendants' conduct thus induced NCB shareholders to take too few shares of Capitol as payment. Thus, rises in the price of Capitol stock exacerbated the wrong by giving NCB shareholders too few shares to exchange, which deprived them of the ability to take better advantage of any rising stock price.

Defendants' arguments concerning Plaintiff's Section 11 claims are unavailing. For the reasons stated above, the district court should not have dismissed those claims, and this Court should reverse that dismissal and remand the matter to the district court for further proceedings.

B. Plaintiffs Have Pled Their Sections 10(b) and 14(e) Claims With The Requisite Particularity.

1. Plaintiffs Have Alleged Scienter Sufficiently.

Defendants argue that Plaintiffs have not pled the facts supporting scienter in their Section 10(b) and 14(e) claims with sufficient particularity. That argument fails under the Supreme Court's recent pronouncement of the standards for pleading scienter in cases subject to the PSLRA.

In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, ___ U.S. ___, 168 L.Ed.2d 179 (2007), the Supreme Court explained that allegations relating to scienter[1] in a PSLRA claim must be considered as a whole, rather than one by one, and that a complaint is sufficient under the PSLRA if the inferences of fraudulent intent

[1] As Defendants point out, the sufficiency of allegations regarding scienter and falsity are typically considered in the same inquiry since they tend to arise from the same set of facts. Brief of Appellees at 28, citing *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1091 (9th Cir. 2002) and *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001). Accordingly, although the *Tellabs* Court considered only the issue of scienter, its holding may logically be applied to the analysis of allegations of falsity as well. Plaintiffs will thus discuss the "falsity" and "scienter" aspects of the FAC's factual allegations in a unitary fashion, as did Defendants in their brief.

raised by the facts alleged are "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs,* ___ U.S. at ___, 168 L.Ed.2d at ___, slip op. at 2. A complaint must be analyzed with an eye toward determining "whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.,* slip op. at 11. Accordingly, allegations of fraud cannot be read in isolation but must be considered "holistically." *Id.,* slip op. at 14.[2]

Defendants engage in the same type of item-by-item breakdown of the components of their "Campaign of Deception" that the *Tellabs* Court held was improper. However, *Tellabs* requires that the *entire* course of defendants' alleged conduct be considered as a whole and then weighed against any opposing inferences to determine whether the FAC raises a "cogent" and "at least as compelling" inference of fraudulent intent. *Tellabs,* slip op. at 2. It was in that unitary context, therefore, that the district court should have read the FAC's allegations pertaining to the "Campaign of Deception," rather than the piecemeal approach urged by Defendants.

Taken as a whole, the allegations in the FAC as to the "Campaign of Deception" are more than sufficient to meet the *Tellabs* standards for pleading

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[2] The Supreme Court issued its decision in *Tellabs* on June 21, 2007, after Defendants filed their brief. Accordingly, *Tellabs* is being explored here for the first time in this appeal.

falsity and scienter. Defendants argue that the FAC does not plead sufficient facts to connect Defendants to the oral misrepresentations about the Exchange Offer by NCB's president Dennis Pedisich to particular shareholders, and that those allegations are insufficient to show that Defendants acted with the requisite intent to defraud. *See* Brief of Appellees at 29-31, 32-37. That argument lacks merit.

As a prefatory point, Defendants contend that Plaintiffs failed to provide factual support for their belief that the misrepresentations by NCB's president, Dennis Pedisich, were made at Defendants' behest. See FAC ¶ 68, AR 778; see also *In re Daou Systems, Inc.*, 411 F.3d 1006, 1015 (9th Cir. 2005). However, Plaintiffs did explain the factual basis for that belief in detail elsewhere in the FAC. As explained in Plaintiffs' opening brief, the FAC is replete with allegations about particular shareholders' contacts with Pedisich and other officers and directors of Capitol. In those instances, the shareholders were told that they must tender their shares to Capitol, that their shares would be worthless if they did not, that all of NCB's board members had tendered or were going to tender their shares, and so on. FAC ¶¶ 69-70, 77, 80, 83, 87, AR 778-779, 781-783. Plaintiffs also alleged facts explaining *why* those misrepresentations were untrue or misleading, in spite of their attempts in the Exchange Offer to disclaim them. FAC ¶¶ 71-76, 78-79, 81-82, 84-85, 88-89, AR 778-782.

District courts must consider not only the black-and-white allegations of the FAC, but also the inferences that a reasonable person would find "cogent." *Tellabs,* slip op. at 2. Moreover, Plaintiffs are not required to plead a conclusive case. "The inference that the defendant acted with scienter need not be irrefutable, *i.e.*, of the 'smoking gun' genre, or even the 'most plausible of competing inferences[.]'" *Tellabs,* slip op. at 12, citing *Fidel v. Farley,* 392 F. 3d 220, 227 (6th Cir. 2004). Under those generous standards, the inferences arising from the allegations about the "Campaign of Deception" are sufficient to state a claim that Defendants – acting through Pedisich and the other NCB principals – acted with the requisite scienter to support a claim under sections 10(b) and 14(e).

It is difficult to imagine, as Defendants urge, that a reasonable person could not find it cogent – indeed, compelling – that the concerted and pervasive effort at misinformation described in the FAC was carried out at Defendants' command. Logically, there could have been no reason for Pedisich and the other NCB directors to have tried to urge NCB's shareholders to accept the Exchange Offer, other than at the behest of Defendants. Also, the effort to convince NCB's shareholders to accept the Exchange Offer was coordinated and pervasive; the FAC alone reports five instances of shareholders being contacted by NCB principals who urged them to tender their shares, all within the space of ten days. It requires little imagination to see that many more NCB shareholders who had

received similar contacts would reasonably be expected to turn up in discovery. There is thus a cogent and compelling inference from the facts alleged in the FAC that the "Campaign of Deception" had its genesis with Defendants, and that inference must logically outweigh Defendants' fanciful arguments to the contrary.

Plaintiffs have alleged a connection between Defendants and the "Campaign of Deception" sufficiently under the PSLRA. Those facts, and the inferences arising from them, are sufficiently cogent to counter any opposing inferences urged by Defendants. Accordingly, the district court erred in concluding otherwise.

2. Plaintiffs Have Alleged Reliance Sufficiently.

Nor is there any merit to Defendants' argument that plaintiffs have failed to allege reliance by the class members on Defendants' misrepresentations. See Appellees' Brief at 31-32. Plaintiffs alleged clearly in the FAC that Defendants' misrepresentations and omissions of material fact in the "Campaign of Deception" "was intended to, and throughout the class period did, deceive Plaintiffs and the other class members" and "caused Plaintiffs and other members of the class to exchange shares of NCB for shares of Capitol stock at less than fair value and otherwise suffered damages." FAC ¶ 128, AR 788-789. The FAC also alleges that "[a]s a result of" those misrepresentations and omissions, "the price paid to each class member for their shares of NCB was materially understated." FAC ¶ 131, AR 790. Plaintiffs allege further that "[h]ad Plaintiffs and the other members of

the class known the truth concerning the Share Exchange Offer which were not disclosed by Defendants, Plaintiffs and other members of the class would not have tendered their NCB shares" or would not have done so at the price offered by Capitol. FAC ¶ 132, AR 790-791. Finally, and perhaps most significantly, Plaintiffs allege that the class members acquired their Capitol stock in exchange for NCB stock "*in reliance upon* such untrue statements made in the Share Exchange Offer tender offer, and *in reliance upon* the tender offer not knowing of the omissions of material facts therefrom," FAC ¶ 143, AR 792 (emphasis added).

Those allegations are sufficient to plead reliance by the class members upon Defendants' misrepresentations and omissions of fact in deciding to exchange their shares of NCB stock for Capitol stock. The FAC alleges that the NCB shareholders received a materially understated price for their NCB shares "[a]s a result" of Defendants' deception; that the class members "would not have [tendered their shares] at the price offered" had they known all the facts; and that they accepted the Offer "*in reliance upon*" the misrepresentations and omissions of material fact by Defendants. The import of such words and phrases is impossible to miss – clearly, they allege reliance by the class members upon Defendants' misrepresentations and omissions of material facts in the Exchange Offer. Therefore, reliance has been pled sufficiently and the district court should not have dismissed Plaintiffs' claims under Sections 10(b) and 14(e).

CONCLUSION

The allegations in the First Amended Complaint were more than sufficiently particular to state claims under Section 11 of the 1933 Act and Sections 10(b) and 14(e) of the 1934 Act. The district court erred in holding otherwise, both under then-existing precedent and under the Supreme Court's recent pronouncements in *Tellabs*. This Court should therefore reverse the decision of the district court, and should remand this matter to that court for further proceedings on the remaining claims in the First Amended Complaint.

DATED: July 16, 2007.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1

I, James V. Weixel, Jr., certify as follows:

1. This brief is not subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a reply brief of no more than 15 pages.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point Times New Roman.

DATED: July 16, 2007.

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PROOF OF SERVICE

I, James V. Weixel, Jr., declare as follows:

I am an attorney with the Weixel Law Office. I am over the age of eighteen years and am not a party to this action. My business address is 2370 Market Street • No. 133, San Francisco, CA 94114.

On July 16, 2007, I served two copies of the foregoing **"Reply Brief of Appellants"** by placing true and correct copies of same, enclosed in sealed envelopes with first class postage prepaid, addressed as indicated below:

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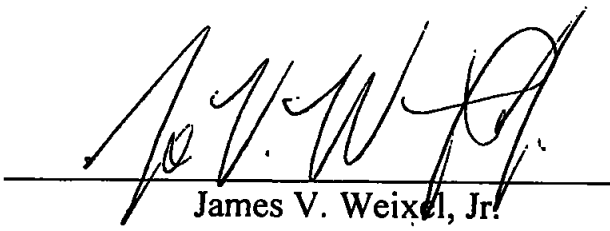
I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, that the foregoing document was printed on recycled paper, and that this certificate of service was executed on the 16th day of July, 2007 at San Francisco, California.



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