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Shareholders Cannot Sue Corporate Officers for Forward-Looking Projections that Don't Pan Out, Ninth Circuit Affirms

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It is illegal under the Securities Exchange Act to make false or misleading statements to the investing public about material facts. At the same time, corporations and their officers must be able to make statements about the company's future plans, projections, and aspirations without fear of opening themselves up to claims of securities law liability should the company's achievements fall short of its ambitions. The Private Securities Litigation Reform Act, therefore, has carved out a "safe harbor" for certain forward-looking statements, including forward-looking statements accompanied by meaningful cautionary language, and forward-looking statements made by someone who does not know the statement to be false or misleading.

But what about forward-looking statements that suggest current conditions are on track to meeting those goals? The Ninth Circuit U.S. Court of Appeals' January 26, 2021 decision in *Wochos v. Tesla, Inc.* provides helpful guidance. In *Wochos v. Tesla*, a class of investors argued that 15 statements made in 2016 and 2017 by Tesla and two of its chief officers, Chairman and Chief Executive Officer Elon Musk and Chief Financial Officer Deepak Ahuja, regarding the production of the Model 3 were false and misleading in violation of the Securities Exchange Act. The class plaintiffs alleged that statements, including those claiming that production of the Model 3 was "on track," and "coming in as expected, that there "were no issues," and that 50 "production cars" had been made, were not protected by the safe harbor because they necessarily "contain embedded assertions concerning present facts that are actionable."

Class plaintiffs argued the statements were false because two Tesla employees had told Mr. Musk the production deadline was impossible to meet. The automated production line was delayed, and the few Model 3's that had been produced had been made by hand.

The Ninth Circuit ruled in favor of Tesla, affirming dismissal of the case. Statements made about production being "on track" to hit a certain goal are indeed forward-looking and covered by the safe harbor when couched in cautionary language. For such a statement to be actionable, the Ninth Circuit held, the statement must go beyond the articulation of plans or assumptions, and "instead contain[] an express or implied "concrete" assertion concerning a specific "current or past fact." *Id*. at *7. Any predictive statement will necessarily reflect the position that the stated goal is achievable based on the current state of affairs – the "statutory safe harbor would cease to exist if it could be defeated simply by showing that a statement has the sort of features that are inherent in any forward-looking statement." *Id*.

Because Tesla's statements were forward-looking, the safe harbor applied if they were accompanied by "meaningful cautionary statements." *Id*. at 8. While plaintiffs did not directly challenge their adequacy, the Ninth Circuit noted that Tesla's cautionary statements were detailed and specific. *Id*., n. 3. Tesla had enumerated many important risk factors which could lead to results that "differ materially from those projected," such as "risk of delays[,]" including the fact that potential loss of suppliers "could lead to product design changes and delays in product deliveries[,]" and recognized that it had experienced significant delays in the design, manufacture, launch, and production ramp of new vehicles in the past, and therefore may experience similar delays with the Model 3. *Id*. The district court had, however, made the express assumption that, if the stated goal was *impossible*, then no cautionary language could be adequately "meaningful" as required to fall under the safe harbor. The Ninth Circuit did not need to reach the issue of whether this assumption was correct, however, because it agreed with the district court that the class plaintiffs did not adequately allege that the defendants *knew* the production goal was impossible. *Id*. While alleging two Tesla employees stated as much to Mr. Musk, plaintiffs did not allege whether the company or Mr. Musk himself shared that view.

The Ninth Circuit also ruled the class plaintiffs failed to plead that the statements made were actually false or misleading with regard to whether Tesla had started the installation of manufacturing equipment. *Id*. Nor was the use of the phrase "production car" found to be the equivalent of representing that the vehicle was made in a fully automated production assembly line. The Ninth Circuit reasoned that, where "a plaintiff claims that the words used in a statement have some special or nuanced meaning that differs from what the literal words suggest, the plaintiff must plead facts that will support this crucial premise in order to satisfy the PSLRA's requirement that a private securities plaintiff adequately plead the reason or reasons why [a] statement is misleading." *Id*. (internal citation omitted). Class plaintiffs did not plead facts sufficient to define the term "production cars" as exclusively those made on a fully automated assembly line.

Because none of the challenged statements were actionable, the complaint was dismissed with prejudice. Following *Wochos,* corporations and executives may continue to share predictions and projections regarding the company with the public, so long as the speaker does not know the statement to be false.

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