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JURISDICTION AND PROCEDURE

Pleading Damages in Section 14(a) Mergers and Acquisitions Litigation

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Section 14(a) of the Securities Exchange Act of 1934 (the ''Exchange Act'') prohibits material misrepresentations and omissions in proxy statements sent to stockholders of registered securities.[1] Many Section 14(a) cases involving mergers and acquisitions transactions are resolved before closing, through dismissal, supplemental disclosures and/or settlement. When a Section 14(a) case is not resolved before closing, the complaint must satisfy rigorous threshold pleading standards to proceed. To survive a motion to dismiss under the Federal Rules of Civil Procedure, the Section 14(a) plaintiff must plead ''enough facts to state a claim that is plausible on its face,'' a standard that ''requires more than labels and conclusions.''[2] In addition, the heightened pleading requirements of the Private Securities Litigation Reform Act (''PSLRA'') require that any Section 14(a) complaint ''specify each allegedly misleading statement, explain the reason (or reasons) that the statement is misleading, and, if an allegation is made upon information and belief, all facts with particularity upon which that belief is formed.''[3] Finally, although pleadings alleging negligence are sufficient to

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[1] *See* 15 U.S.C. § 78n. Cases brought under § 14(a) typically allege a violation of Securities and Exchange Commission (''SEC'') Rule 14a-9, which provides in relevant part: ''No solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which . . . is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading.''

[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). *See also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (''Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice'').

[3] *Bond Opportunity Fund v. Unilab Corp.*, 87 Fed. Appx. 772, 773 (2d Cir. 2004) (citing 15 U.S.C. § 78u-4(b)(1)); *See also Beck ex rel. Equity Office Props. Trust v. Dobrowski*, No. 06 C 6411, 2007 BL 151392, at *14 (N.D. Ill. Nov. 14, 2007) (dismissing plaintiff's section 14(a) claims under the PSLRA where plaintiff ''simply list[ed] information that [d]efendants allegedly omitted from the proxies''); *Hysong v. Encore Energy Partners LP*, C.A. No. 11-781, 2011 BL 291388, at *21 (D. Del. Nov. 10, 2011) (determining dismissal of Section 14(a) claims is warranted where plaintiff fails ''to identify even one specific misleading statement'' because the ''desire to know informa-

state a claim under Section 14(a),[4] a complaint that goes further and alleges fraud must also comply with the heightened pleading standards of Federal Rule of Civil Procedure 9(b).[5]

Section 14(a) is not a post-closing opportunity for plaintiffs to litigate or re-litigate vague and unsupported allegations that the transaction consideration was inadequate.[6] In evaluating the damages standards set forth in Section 14(a) pleading cases, it is important to consider the specific nature of the alleged misrepresentations or omissions and their relation to the harm alleged in the complaint. Specific material misrepresentations that go to the heart of the transaction and caused economic loss must be alleged. [7] This article briefly discusses the three damages theories that courts have considered in pleading Section 14(a) cases: ''out-of-pocket,'' ''benefit-of-the-bargain,'' and ''lost opportunity'' or ''disgorgement.'' When appropriate, multiple alternative damage theories may be asserted in the same case.

'Out-of-Pocket' Damages

In an appropriate case, Section 14(a) plaintiffs may seek to recover as ''out-of-pocket'' damages any incidental costs reasonably incurred as a direct result of a defendant's fraudulent conduct. For example, in *Maldonado v. Flynn*, 477 F. Supp. 1007 (S.D.N.Y. 1979), plaintiff challenged the sufficiency of proxies distributed in an election of directors. Plaintiff sought as damages (1) the expenses of preparing and mailing the allegedly defective proxy statements; (2) the expense of a new proxy solicitation, if the court should order one; (3) the directors' fees and expenses paid to the defendant directors; and (4) compensation paid to the defendant director-officers. The Court held that of these items ''only the expense of a new solicitation, strictly speaking, may be said to represent out-of-pocket losses attributable to the false proxy statements.''[8] The cost of the allegedly misleading proxy and the compensation to directors were costs that the corporation would have had to bear even absent the alleged fraud. Only the costs of curative disclosure were directly related to the alleged fraud.

More broadly, ''out-of-pocket'' damages in securities cases are defined as ''the difference between the price paid for [a] security and its true value absent the fraud on the date of the transaction.''[9] This damages theory is based on tort theory and ''seeks to compensate a plaintiff for his loss by returning him to the position he occupied before the fraud.''[10]

A recent Section 14(a) pleading case illustrates an application of this damages theory: *Lane v. Page*, 727 F. Supp. 2d 1214 (D.N.M. 2010). The procedural history of the *Lane* case is protracted and consists of multiple court opinions over nearly six years.[11] The case involved a Section 14(a) claim arising from the merger of Westland Development Co., Inc. (''Westland'') into SunCal Companies Group (''SunCal'') at a cash price of $315 per share.[12] Westland owned 56,000 acres of land near Albuquerque, N.M.[13] Westland's stock was not publicly traded and, for most of its existence, transfer of the stock was severely restricted.[14] In 2001 and 2005, Westland's board of directors engaged an independent company to value the company's shares; these apprais-

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tion that may be material. . . .cannot push [plaintiff's] factual allegations over the speculative-level threshold.'').

[4] *See, e.g., Wilson v. Great Am. Indus., Inc.*, 855 F.2d 987, 995 (2d Cir. 1988) (''liability can be imposed [under Section 14(a)] for negligently drafting proxy statement.'').

[5] Fed. R. Civ. Proc. 9(b); *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (a properly pled claim of fraud must ''set forth the time, place and contents of the false representation, the identity of the party making the false statements and the consequences thereof''). In addition, several U.S. Courts of Appeals have held that negligence is ''a state of mind'' and that to state a claim the PSLRA, 15 U.S.C. § 78u-4(b)(2)(A), requires that a complaint shall ''state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'' *See Little Gem Life Sciences, LLC v. Orphan Med., Inc.*, 537 F.3d 913, 916-17 (8th Cir. 2008); *Knollenberg v. Harmonic, Inc.*, 152 Fed. Appx. 674, 682 (9th Cir. 2005); *but see Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009) (particularized pleading of negligence not required by PSLRA because ''negligence is not a state of mind; it is a failure to . . . to come up to the specified standard of care'').

[6] *Cf. Beck*, 559 F.3d at 682 (a plaintiff ''is not to be allowed to extort a settlement by reason of the defendant's having to incur heavy litigation expenses if the suit proceeds beyond the pleading stage even if it is a groundless suit'').

[7] 15 U.S.C. § 78u-4(b)(4) (''In any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.''); *Kelley v. Rambus, Inc.*, No. C 07-01238 JF, 2008 BL 86942, at *4 (N.D. Cal. Apr. 17, 2008) (The complaint ''does not allege sufficient facts to show that any specific representation caused any specific loss for which plaintiffs seek to recover. . . .their claims are subject to dismissal for this reason alone''); *Little Gem Life Sciences LLC v. Orphan Med., Inc.*, Civ. No. 06-1377 ADM/AJB, 2007 BL 225601, at *13 (D. Minn. Feb. 16, 2007) (Section 14(a) complaint must be dismissed where it failed to specify '''what the relevant economic loss might be or what the causal connection might be' between the loss and the omission'') (citing *Dura Pharm., Inc. v. Broudo*, 125 S. Ct. 1627, 1634 (2005)); *Hartman v. Pathmark Stores, Inc.*, No. Civ.A. 05-403-JJF, 2006 BL 33033, at **4-5 (D. Del. Mar. 8, 2006) (Section 14(a) complaint dismissed where causation alleged only in conclusory language). *See also DCML LLC v. Danka Bus. Sys. PLC*, No. 08 Civ. 5829(SAS), 2008 BL 277090, at **5-6 (S.D.N.Y. Nov. 26, 2008) (''To state a claim under Section 14(a), a plaintiff must plead loss causation, that is, the plaintiff must demonstrate that the economic harm that it suffered occurred as a result of the alleged misrepresentations'') (internal quotations omitted); *Grace v. Rosenstock*, 228 F.3d 40, 46-47 (2d Cir. 2000) (''both loss causation and transaction causation must be proven . . . under Section 14(a)'').

[8] *Id.* at 1010.

[9] *Goldkrantz v. Griffin*, No. 97 Civ. 9075 (DLC), 1999 BL 840, at *16 (S.D.N.Y. Apr. 5, 1999).

[10] *Panos v. Island Gem Enters., Ltd., N.V.*, 880 F. Supp. 169, 176 (S.D.N.Y. 1995).

[11] *Lane v. Page*, 581 F. Supp. 2d 1094 (D.N.M. 2008) (motion to dismiss); *Lane v. Page*, 649 F. Supp. 2d 1256 (D.N.M. 2009) (motion to dismiss second amended complaint); *Lane v. Page*, 727 F. Supp. 2d 1214 (D.N.M. 2010) (motion for leave to file third amended complaint); *Lane v. Page*, No. Civ. 06-1071 JB/ACT, 2011 BL 334261 (D.N.M. Jan. 10, 2011) (motion for leave to join additional defendants); *Lane v. Page*, 272 F.R.D. 558 (D.N.M. 2011) (class certification); *Lane v. Page*, 272 F.R.D. 581 (D.N.M. 2011) (motion to strike affirmative defenses); *Lane v. Page*, No. Civ. 06-1071 JB/ACT, 2011 BL 52136 (D.N.M. Feb. 17, 2011) (discovery disputes); and *Lane v. Page*, 273 F.R.D. 665 (D.N.M. 2011) (discovery disputes).

[12] *Lane*, 727 F. Supp. 2d at 1218, 1221.

[13] *Lane*, 581 F. Supp. 2d at 1099-1100.

[14] *Id.* at 1100.

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als resulted in valuations of $87 and $180 per share.[15] The first valuation was allegedly reduced from $249 to $87 per share because Westland's President and Chief Executive Officer (''CEO'') ''ordered the company performing the valuation to manipulate the valuation downward.''[16]

In 2005, a bidding war led to a series of offers and ultimately resulted in the SunCal's merger agreement at $315 per share.[17] Westland's CEO voted against the SunCal merger at the board of directors' meeting that approved the merger and four of nine directors voted their shares against the merger proposal at the shareholder's meeting to approve the sale.[18] In November 2006, a plaintiff shareholder brought a class action complaint against Westland and its merger partner SunCal alleging that the proxy statement relied upon to obtain approval for the merger contained material misrepresentations and omissions. Plaintiff alleged various misrepresentations and omissions including the CEO's manipulation of the 2001 valuation, her vote against the merger transaction and the four directors voting against the transaction, none of which were disclosed in the proxy statement and the failure to disclose certain oil and gas lease proposals.[19] Plaintiff filed a motion for a temporary restraining order and preliminary injunction, which was denied.[20]

Thereafter, the merger transaction closed and defendants sought a ruling on their motion to dismiss the complaint. In a 2008 opinion, the Court considered defendants' motion to dismiss and held that the PSLRA provisions that require particularized pleading of misrepresentations and omissions apply in Section 14(a) cases.[21] The Court then considered the sufficiency of each of plaintiff's allegations of misrepresentations and omissions and held that the following statements were misleading omissions: (i) the disclosure of the 2001 valuation without also disclosing the CEO's manipulation of it; (ii) the disclosure that all of the directors intended to vote for the merger when four of the nine did not so vote; (iii) the failure to disclose the CEO's vote against the merger; and (iv) the failure to disclose certain lucrative oil and gas lease offers.[22] The Court also held that plaintiff's various other allegations failed to state a claim either because the matters were disclosed or because they were not material.[23]

Plaintiff thereafter filed a second amended complaint seeking to replead several dismissed claims and adding new facts, new claims and additional defendants.[24] In a 2009 opinion ruling on defendants' second motion to dismiss, the Court dismissed most of plaintiff's repled claims and sustained several new claims in addition to the misleading omissions sustained in the first motion to dismiss.[25] The Court also considered defendant's argument that the second amended complaint failed adequately to allege damages and loss causation. After surveying the relevant precedent cases, the Court found ''a general consensus that plaintiffs [in Section 14(a) cases] must plead their injuries and the relationship of the injury to the proxy solicitation and transaction with at least some particularity.''[26] The Court dismissed the second amended complaint finding that plaintiff had failed to ''adequately plead 'the economic loss and proximate cause he had in mind'. . . . An adequate pleading of economic loss would indicate what the loss contemplated is and the basic causal connection for the loss.''[27]

Thereafter, plaintiff sought leave to file a third amended complaint in which he alleged damages based upon the difference between the alleged true value of the Westland shares and the $315 per share merger consideration. Defendants opposed the amendment arguing that it was ''pure speculation'' whether any hypothetical transaction price better than $315 per share was available from SunCal or any other suitor.[28] In a 2010 opinion, the court held that the third amended complaint sufficiently alleged damages:

> [Plaintiff] has successfully alleged that, based on a false proxy statement, he and the class members were induced to take an insufficient sum of money for their Westland shares. *Lane* does not have to prove that he had some other mechanism to immediately change those shares into cash in order to properly allege damages.[29]

The Court also held that plaintiff's allegations of loss causation were sufficient: ''He sets forth . . . a causal chain from the misrepresentations to the transaction, to the alleged damages. It is not immediately apparent what more a defendant could desire at the pleading stage.''[30]

'Benefit-of-the-Bargain' Damages

When the defendant has allegedly misrepresented the value of the *consideration* being delivered in the proposed transaction, the plaintiff will likely seek to recover under a second damages theory known as the ''benefit-of-the-bargain.'' The Supreme Court implicitly endorsed this theory in *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375 (1970): ''Where the defect in the proxy solicitation relates to the specific terms of the merger, the district court might appropriately order an accounting to ensure that the shareholders receive the value that was represented as coming to them.''[31] ''Benefit-of-the-bargain'' damages are the difference between the value the plaintiff received and the amount which was represented as coming to him in a transaction such as a merger.[32] This theory puts the plaintiff in the position he would have been in had the misrepresentations on which he relied been true. Courts typically apply the ''benefit-of-the-bargain'' theory in situations ''where misrepresentation is made in the tender offer and proxy

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[15] *Id.*
[16] *Lane*, 272 F.R.D. at 565; *Lane*, 649 F. Supp. 2d at 1286; *Lane*, 581 F. Supp. 2d at 1125-26.
[17] *Lane*, 581 F. Supp. 2d at 1100-01.
[18] *Id.* at 1121-23.
[19] *Id.* at 1102-03, 1122-23.
[20] *Id.* at 1104.
[21] *Id.* at 1114-15.
[22] *Id.* at 1120-23; 1125-27; 1129-30.
[23] *Id.* at 1120-21, 1123-32.
[24] *Lane*, 649 F. Supp. 2d at 1273.
[25] *Id.* at 1280-97.
[26] *Id.* at 1277.
[27] *Id.* at 1279 (citing *Dura Pharm.*, 125 S. Ct. at 1629).
[28] *Lane*, 727 F. Supp. 2d at 1236.
[29] *Id.* at 1237.
[30] *Id.* at 1231.
[31] *Id.* at 388.
[32] *In re Real Estate Assocs. Ltd. P'ship Litig.*, 223 F. Supp. 2d 1142, 1153 (C.D. Cal. 2002) (holding that plaintiffs had sufficiently alleged ''that the misrepresentations at issue concerned the consideration for their securities'' and thus could ''proceed under the benefit-of-the-bargain theory'').

solicitation materials as to the consideration to be forthcoming'' upon the consummation of a change in control transaction.[33]

For example, in *Osofsky v. Zipf*, 645 F.2d 107 (2d Cir. 1981), the stockholders of Babcock & Wilcox Company were asked to approve a stock-for-stock sale to an acquirer who had won a furious bidding contest with another potential buyer. The stock consideration in the proposed transaction was represented to be equivalent to the price previously offered to the stockholders in a tender offer. Upon closing of the stock-for-stock exchange, however, the fair market value of the stock consideration was substantially less than the cash consideration that had been offered in the tender offer and plaintiffs filed a Section 14(a) action to recover the difference in value. In reversing the district court's granting of summary judgment for defendants, the Second Circuit found that there was an alleged material difference between the value of the consideration that stockholders were led to believe they would receive in the merger and the consideration they actually did receive.[34] The court held that the ''benefit-of-the-bargain'' theory of damages is available to plaintiffs in situations where a ''misrepresentation is made . . . as to the consideration to be forthcoming upon an intended merger.''[35] Because the misrepresentation deprived plaintiffs of the actual consideration that had been promised to them in the merger, the court found this to be a reasonably ascertainable, non-speculative loss.[36]

The *Osofsky* court, however, limited its application of the ''benefit-of-the-bargain'' theory to cases ''where the misleading aspect of the solicitation [relates] to the terms of the merger.''[37] Where ''the alleged misrepresentation concerns something other than the consideration for the merger, benefit-of-the-bargain damages are unavailable.''[38] For example, *Goldkrantz v. Griffin*, No. 97 Civ. 9075 (DLC), 1999 BL 840 (S.D.N.Y. Apr. 5, 1999), arose from the sale of Griffin Gaming & Entertainment (''GGE'') to Sun International Hotels in a stock-for-stock exchange.[39] Following closing of the transaction, the value of the stock consideration exchanged in the merger declined precipitously. Plaintiff, a GGE stockholder, filed an action against the buyer seeking damages relating to an approximately $11 million cash payment made by Sun to principal GGE stockholder, Merv Griffin, under a licensing agreement executed following the merger closing. Although the $11 million licensing payment was anticipated and disclosed in the proxy soliciting votes in favor of the proposed transaction, the proxy did not disclose that Sun had no intention of using Mr. Griffin's services under the licensing agreement post-closing. Plaintiff sought damages on a theory that ''if [Merv] Griffin had not been paid the 'license fee,' he would have been able to negotiate a better price for GGE shareholders.''[40]

In granting defendants' motion for summary judgment, the Court rejected plaintiff's damage theory and held that because the license fee was not part of the merger consideration ''benefit-of-the-bargain damages are unavailable.''[41] The Court also found that plaintiff's damages theory was too speculative because it relied on an impossible chain of events:

> First, Sun would have abandoned the licensing arrangement if it were forced to disclose in the proxy statement its intent not to use the license. Second, Griffin would have demanded more compensation for all the shareholders in lieu of the licensing fee. Third, Sun would have agreed to Griffin's demand. This chain of events is too speculative to support recovery of damages.[42]

This affirms the principle that the benefit-of-the-bargain theory only encompasses ''actual damages'' arising from actual transactions where the consideration falls short of what is specifically promised, not hypothetical transactions that might have taken place had disclosures been more complete. This limitation is consistent with Section 28 of the Exchange Act, which provides that only ''actual damages'' may be awarded under the Act.[43] This ''actual damages'' requirement prevents any proxy plaintiff from recovery at both the state and federal levels for the same loss[44] and precludes punitive damages.[45] ''In short, damages [under Section 14(a)] should be recoverable only to the extent that they can be shown.''[46]

'Lost Opportunity' or 'Disgorgement' Damages

A third damages theory applies to plaintiffs who were sellers in a mergers and acquisitions transaction where the buyer or some other party to the transaction allegedly misrepresents the nature or value of the business being sold or otherwise receives consideration that was not disclosed to the plaintiff sellers. This measure is described in three landmark Section 14(a) cases and has come to be known as the ''lost opportunity'' or ''disgorgement'' theory of damages.[47]

Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281 (2d Cir. 1973), is one of the earliest cases to apply the ''lost-opportunity'' theory of recovery in the Section 14(a) context. In *Gerstle*, the shareholders voted to approve the sale of an outside advertising company to a controlling shareholder. The proxy statement soliciting votes in support of the transaction failed to disclose that the company had been actively and successfully marketing its billboard plants with the expectation of closing lucrative sales shortly following closing of the transaction.[48] Management was successfully soliciting offers for the plants far in excess of their book value as reported to shareholders in the proxy materials,[49] but minority shareholders were not aware of the imminent asset sales at the time of the merger vote.[50] The Second Circuit held that plaintiff shareholders almost certainly

[33] *Osofsky v. Zipf*, 645 F.2d 107, 114 (2d Cir. 1981).
[34] *Id* at 114-15.
[35] *Id.* at 114.
[36] *Id.* at 113.
[37] *Id.*
[38] *Goldkrantz*, 1999 BL 840, at *18.
[39] *Id.* at *3.
[40] *Id.* at **17-18.
[41] *Id.* at *18.
[42] *Id.*
[43] 15 U.S.C. § 78 bb(a).
[44] *See Osofsky*, 645 F.2d at 111.
[45] *See Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1313 (2d Cir. 1977); *Gould v. American-Hawaiian S.S. Co.*, 535 F.2d 761, 781 (3d Cir. 1976).
[46] *Mills*, 396 U.S. at 389.
[47] *See, e.g., Gould*, 535 F.2d at 781-82.
[48] *Id.* at 1284.
[49] *Id.* at 1284-85.
[50] *Id.* at 1288-89.

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would have demanded a better deal from the buyer had they known of the sale plans. The Court affirmed a damages award based on each plaintiff stockholder's share of ''the profits on the [post-closing] plant sales and the value of the unsold assets, together with prejudgment interest at a substantial rate,''[51] an amount considered to be an accurate reflection of how the transaction would likely have been structured with proper proxy disclosures. The Court declined to award damages based on any further appreciation of the unsold assets *after* the transaction date, however, suggesting that courts will limit ''lost-opportunity'' damages to the amount that plaintiffs would have received in a fair, arm's-length transaction, absent the Section 14(a) violations.

Gould v. American-Hawaiian S.S. Co., 535 F.2d 761 (2d Cir. 1976), is the second landmark precedent applying the ''lost opportunity or disgorgement'' theory of recovery. In *Gould*, stockholders approved the sale of a cargo shipping company in a stock-for-stock exchange in a transaction whereby certain stockholders would instead receive $50 per share in cash. At closing, the stock consideration received in the transaction was valued substantially less than $50 cash and the stockholders who received the stock consideration filed an action against the acquirer and the stockholders who received the cash consideration alleging proxy fraud. The Third Circuit agreed with the District Court's observation that ''while it was possible that full disclosure and correction of the defective proxy materials would not have affected the terms of the merger it was equally possible that such disclosure might have resulted in the favored [stockholders] sharing with plaintiffs the premium . . . which the former received.''[52] The District Court and Court of Appeals both concluded that it was conceivable that as a result of the defective proxy statements, plaintiffs had been ''lulled to inaction'' and did not attempt to negotiate better terms to the merger, resulting in a lost opportunity to obtain the true value of their shares in the transaction.[53] Consequently, each stockholder plaintiff was awarded, as damages, their ''*pro rata* share in the [cash] premium of $8.25 received by [the defendant stockholders].''[54] The Court expressed concern about the potential speculation inherent in ''lost opportunity'' theories of damages.[55] The Court, however, found that the ''*pro rata* share of the premium received by the favored defendants in the merger,'' was grounded in ascertainable values and not unduly speculative.[56]

In re Daimlerchrysler AG Sec. Litig., 294 F. Supp. 2d 616 (D. Del. 2003), is the third landmark precedent applying a hybrid of the ''lost opportunity'' theory of damages. *Daimlerchrysler* arose from the merger of the American auto maker, Chrysler, with Daimler-Benz. The court held that Daimler-Benz had misled stockholders in stating that the transaction was to be structured as a ''merger of equals'' when, in fact, it amounted to an outright takeover of Chrysler by Daimler-Benz.[57] The court agreed with plaintiffs that if they had known that the transaction at issue was an outright acquisition rather than a merger of equals, they would have negotiated a control premium and thereby received additional consideration in the transaction. The Court proceeded to award plaintiffs the premium that would have been due on a change in control.[58] The Court was careful to point out that its holding was based on ''the transaction that actually occurred,'' not one based on a ''hypothetical transaction which would require speculation as to what the parties would have done had the circumstances been different.''[59] Though not classifying plaintiff's claim as falling under the ''lost opportunity'' theory, the court recognized that plaintiffs' claim significantly resembled such a claim, and noted that, if the claims were characterized as such, ''the fact of the loss [alleged] is not wholly speculative.[60]

A more recent pleading case, *Brown v. Brewer,* No. CV 06-3731-GHK (SHx), 2010 BL 319223 (C.D. Cal. June 17, 2010), illustrates the critical limitation that ''lost opportunity'' damages, may not be speculative: ''[L]ost opportunities damages are not available where the fact of the loss, *i.e.*, whether there was any lost opportunity at all, is wholly speculative.''[61] *Brown* involved the acquisition by News Corporation (''News Corp.'') of Intermix Media, Inc. (''Intermix''), which (among other assets) owned the social networking website MySpace. Plaintiffs sought, in part, ''lost opportunity'' damages based on a theory that another bidder, Viacom, was poised to make a competing offer for the company at a 10-20% premium to the $12 News Corp. offer, but was allegedly thwarted by Intermix's stockholder approval of the $12 News Corp. offer based upon an allegedly misleading proxy statement.[62]

The Court granted defendants' summary judgment motion and refused to allow this lost opportunity theory to be presented at trial:

> Viacom never in fact put in a bid for Intermix. . . . [I]t is undisputed that Viacom's board simply refused to engage in a public bidding war with its competitor News Corp. . . .
>
> While it may be theoretically possible that Viacom would have entered a subsequent bid had the Intermix shareholders not been allegedly deceived by the defective Proxy and had they rejected the merger with News Corp., we conclude that under the totality of the evidence, Plaintiff's showing is no more than speculative . . . . This is precisely the type of speculation and indeterminacy that is insufficient to create a triable issue on the existence of any lost opportunity.[63]

This decision is consistent with the ''actual damages'' requirement of Section 28 of the Exchange Act as well as the various exhortations of the Section 14(a) precedent cases that emphasize that damages must be reasonably ascertainable and not wholly speculative.

Conclusion

The pleading requirements of *Twombly* and the PSLRA ensure that Section 14(a) complaints that continue post-closing must allege particularized material

[51] *Id.* at 1306.
[52] *Id.* at 782.
[53] *Id.*
[54] *Id.* at 783.
[55] *Id.*
[56] *Id.* at 784.
[57] *Id.* at 621-22.
[58] *Id.* at 627.
[59] *Id.*
[60] *Id.* at 631.
[61] *Brown*, 2010 BL 319223, at *38 (internal quotations and citations omitted).
[62] *Id.*
[63] *Id.*

misrepresentations and omissions and specific allegations of injury and causation. In sanctioning permissible damages theories, the courts have fashioned remedies as fairness under the particular facts and circumstances of the case has required.[64] When plaintiffs reasonably suffer losses as a result of Section 14(a) violations in the mergers and acquisitions context, they can seek to recover those losses under three theories of damages. First, plaintiff may seek to recover ''out-of-pocket'' damages. Second, when the defendant misrepresents the value of the consideration being exchanged in a merger transaction, the plaintiff may seek to recover the full value of the promised consideration under the ''benefit-of-the-bargain'' theory. Third, when the defendant or another party to the transaction allegedly received an undisclosed material benefit in the transaction or otherwise misrepresented the nature of the transaction or the financial condition of the company in question, the plaintiff may seek to recover under a ''lost opportunity'' or ''disgorgement'' theory. While these three methods often overlap, the ultimate limitation of each theory is that only plaintiffs who suffer reasonably ascertainable and non-speculative losses as a result of Section 14(a) violations may be compensated with money damages.

[64] *See Panos*, 880 F. Supp. at 175-76.

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