
# Ninth Circuit Finds That In Contract Interpretation "Words of a Feather Flock Together"

August 24, 2011 by Keith Paul Bishop

Yesterday, the Ninth Circuit Court of Appeals issued an opinion that will likely be cited most often for its conclusions regarding scienter, loss causation and Rule 10b-5. *WPP Luxembourg Gamma v. Spot Runner,* 9th Cir. Case No. 10-55401 (Aug. 23, 2011). Today, however, I'm going to focus the Court's application of California contract law.

The plaintiff generally alleged that the the executives of a privately held company, Spot Runner, Inc., solicited the purchase of shares by the plaintiff at the same time that those executives were selling personally owned shares and when the company was incurring substantial losses. Under Rule 10b-5(b), a defendant can be liable for an omission of material information if she has a duty to disclose. The plaintiff argued that the defendants had a duty to disclose based on a Right of First Refusal/Co-Sale Agreement. In response, the defendants contended that the notice had been waived pursuant to a provision in the agreement that allowed waivers by "the holders of sixty percent (60%) of the Shares held by the investors voting together". According to the defendants, two other investors who owned the requisite 60% had waived the plaintiff's right to receive notice. The plaintiff, however, contended that the "voting together" language in the agreement required that all investors participate in the vote. In other words, there had to be be an opportunity for a vote by all shareholders.

The Court of Appeals, applying California contract law, the doctrine of *noscitur a sociis,*[1] and the doctrine of the last antecedent, concluded that although the agreement was ambiguous the plaintiff's interpretation was far more natural. The phrase *noscitur a sociis* means it is known by its companions or in Lord MacMillan's more colorful translation "words of a feather flock together". MacMillan, Rt. Hon. Lord, *Law and Language, Presidential Address to the Holdsworth Club*, May 15, 1931. The court found that "voting together" more reasonably modifies the adjacent "investor" rather than the non-adjacent and not clearly associated "the holders of sixty (60%) of the Shares". Corporate practitioners may be surprised by the Court's conclusion because corporate law does not usually require that all shareholders be solicited when action is taken by written consent.

The opinion also discusses, but does not decide, the question of whether a duty to disclose could arise from the fact that the plaintiff's had a contractual right to a board observer. The plaintiff argued that this gave rise to a duty to disclose because the defendants knew that the plaintiff believed the board observer would provide notice of any stock sale.

---

[1] The opinion uses this Latin phrase. For those who think Latin is dead, the Finnish Broadcasting Company has for more than two decades broadcast news in Latin, *Nuntii Latini*. You can listen here to a broadcast.

Please contact **Keith Paul Bishop** at Allen Matkins for more information kbishop@allenmatkins.com