2011 WL 11684653 (Cal.Super.) (Partial Expert Testimony)
Superior Court of California.
San Francisco County

OVERSTOCK.COM, INC., a Delaware corporation, et al., Plaintiffs,
v.
MORGAN STANLEY & CO., et al., Defendants.

No. CGC-07-460147.
October 14, 2011.

Videotaped Deposition of Leslie Boni, Ph.D.

Name of Expert: Leslie A. Boni
Area of Expertise: Accounting & Economics >> Finance
Representing: Plaintiff
Jurisdiction: San Francisco County, California

Behmke Reporting And Video Services, Inc., By: Christine L. Jordan, CSR No. 12262, CCRR, 160 Spear Street, Suite 300, San Francisco, California 94105, (415) 597-5600.

Bockius, on behalf of the Goldman Sachs defendants.

MS. RUDZIN: Abby Rudzin, with O'Melveny & Myers for Merrill Lynch, Pierce, Fenner & Smith and Merrill Lynch Professional Clearing Corp.

MR. KOPCZYNSKI: Jeffrey Kopczynski, for O'Melveny & Myers, representing Merrill Lynch, Pierce, Fenner & Smith and Merrill Lynch Professional Clearing Corp.

MR. GRIFFINGER: Theodore Griffinger, for plaintiffs,

MR. POLLAND: Jonathan Pol land, also for plaintiffs.

THE VIDEOGRAPHER: The court reporter today is Christine Jordan, certified shorthand reporter, contracted by Behmke Reporting and Video Services, Inc.

Would the reporter please swear in the witness.

(Oath administered,)

THE WITNESS: Yes.

THE VIDEOGRAPHER: Please begin.

LESLIE BONI, Ph.D., having been first duly sworn, testified as follows:

[Note: Pages 11-115 missing in original document]

A. I looked at whether or not a stock appears on the threshold list. And for a stock to appear on the threshold list, there's a requirement that it had fails-to-deliver of at least one half of 1 percent and 10,000 shares for "X" number of days.

And I'll have to check my paper, remind myself whether eventually the SEC ended up in five or ten days. Because when I was working there, they were -- they were thinking of both. So I'll need to refresh my memory.

But that's a proxy for fail-to-deliver frequency. And I did look at all the NASDAQ-listed stocks for 2005 to 2007 for that reason.

Q. What you did was you just -- you counted up when stocks did or did not appear on that list, correct?

A. I took every stock and I determined how many days it failed in total during the period 2005 to 2007. And I also then looked at how many consecutive days the stock appeared on the Reg SHO threshold list, because that's a very important distinction.

Because, as we know, stocks can come on and off the Reg SHO list. So I feel that consecutive number of days is a very important indicator when I'm analyzing intentional fails-to-deliver.

Q. Why is consecutive days on the Reg SHO threshold list a very important indicator when you're analyzing whether fails-to-deliver are intentional?

Notice how crucial it is to establish actual knowledge in fraud cases against financial institutions. Some courts will even say willful blindness (avoiding learning a suspected truth) is not enough.

A. Because, as I note in my opinion, my opinion of whether fails-to-deliver are intentional or inadvertent depends not only on the amount of fails-to-deliver but also the persistence; in other words, the number of consecutive days of fails-to-deliver.

Q. So are you saying that you determined the number of days that every NASDAQ stock had fails-to-deliver?

A. I report that as well as number of consecutive days that they failed to deliver in Exhibit 2.

Q. Where is that?

A. The third page.

Q. Where is that information in Exhibit 2? Third page?

A. This is what you asked me about earlier when you asked me whether I had downloaded every --

You're shaking your head yes. Do you remember now?

Q. I do. I don't see where it talks about fails-to-deliver of every --of anything.

[Note: Pages 118-122 missing in original document]

opinion.

Q. Why was it important that Overstock --to you that Overstock was one of only two NASDAQ stocks that was on the threshold list for more than 600 consecutive days?

A. It was important to me because what I saw when I looked at the 2005 and 2007 data that we're discussing, it completely reinforces what I concluded in my 2003 and 2004 analysis and reported and discussed in my 2006 publication; that these longlived consecutive days of fails-to-deliver in 2005 to 2007, sufficient to put them on the Reg SHO threshold list, is consistent with intentional fails-to-deliver; that you simply don't see 600 days of consecutive fails-to-deliver if fails-to-deliver are inadvertent.

Q. So you're not testifying that Goldman Sachs was on -- was in a failure-to-deliver position for Overstock's stock for more than 600 consecutive days, are you?

A. To answer that question, I'll go to the last three tables of this same document, Exhibit 2.

And to form these tables and.-- I used the DTCC data where I analyzed the Goldman Sachs and Merrill Lynch subaccounts.

[Note: Pages 124-130 missing in original document]

Any questions like that?

A. I did not.

Q. Well, you're drawing inferences about Goldman Sachs' intent based on this data, correct?

A. Correct.

Q. And you billed, in a very precise estimate, around 141 to 142 hours, which I think equals out to almost $60,000, worth of your time that's been billed to Overstock, correct?

A. I haven't billed all of that yet, but it will come out to about that.

Q. Okay, And how can you draw an inference about intent if you don't know who owns the accounts that are providing -- the data that you're using to develop your inferences?

A. Because the only thing I'm relying on when I draw conclusions about intent are what the failed-to-deliver data showed me.

So my conclusions are --is that Account Nos. 501 and 690 are failing to deliver in such high amounts and for so many days during the period I looked at, that this behavior cannot be inadvertent. I have every reason to conclude that this is intentional, not inadvertent, fails-to-deliver.

And I've been told that 501 and 690 belong

[Note: Pages 132-140 missing in original document]

told that they were Merrill's accounts,

Q. And you -- for purposes of your analysis, you aggregated together the fails-to-deliver in those two accounts, correct?

A. That's what I've reported here, yes.

Q. And, therefore, for purposes of your analysis, you're assuming that accounts 551 and 671 were acting as a single economic unit such that they could have the same intent; is that correct?

&TT;

Q. Well, then why do you combine and aggregate the data only in your opinions and conclusions here that you've provided to us, and you have not provided to us the results of the analysis of accounts 551 and 671 separately?

A. Because I've followed the request of Overstock's counsel to analyze Merrill's accounts and

[Note: Page 142 missing in original document]

And ray best recollection is she said, Go ahead. Analyze them separately and together.

And I did that. And my conclusions are that whether I analyze the DTC accounts separately or together for Merrill Lynch or separately or together for Goldman Sachs, I draw the same conclusions that there's intentional fails-to-deliver for each of these four accounts individually, the data are quite strong; and also consistent conclusion when I aggregate Goldman Sachs' two accounts and when I aggregate Merrill Lynch's two accounts.

I presented the summary tables attached to my opinion. I'm certainly happy to provide, to my best recollection, details, if I can remember them, for the individual accounts; but my sum conclusion was the strong evidence of intentional fails-to-deliver was there in each account individually as well as when the two accounts were aggregated for Merrill Lynch and aggregated for Goldman Sachs.

And as far as my opinion that these are intentional fails-to-deliver, that's what the data tell me.

Q. Well, if your opinion is the same regardless of whether you aggregate the accounts or not, then

[Note: Pages 144-175 missing in original document]

of failures-to-deliver, would it be relevant to you to look at the data showing which customers were long or short at any particular point in time or over the time period that you were studying?

A. No and no.

Q. Why not?

A. Because I'm analysing the clearing account fails-to-deliver. They're responsible for delivery.

Q. Who is responsible?

A. The clearing member.

Q. What's your basis for saying that the clearing member is responsible for delivery?

A. It's my understanding of industry practice based on the time I spent at the Securities and Exchange Commission during that time.

After I had, within the first few weeks, produced the summary statistics for the first date of data on DTC fails, I was asked by Annette Nazareth, who was the director of Market Regulation, and by Larry Harris, the chief economist, if I would please join them during a series of meetings that they held when they asked industry clearing members to come in and talk about the enormous levels of fails-to-deliver that the SEC was seeing in the DTC numbers.

[Note: Pages 177-178 missing in original document]

Q. -- with respect to delivery?

MR. GRIFFINGER: This is well outside the area that you've been promoted as an expert, And I'd advise you that you do not have to give an opinion on that.

BY MR. FLOREN:

Q. I'm not asking for your opinion. I'm asking. if you have any understanding of that subject. And you either do or you don't. I don't know.

A. I do have an opinion on this. And I have not been retained as an expert on this. But because I write about this in my 2006 strategic delivery paper and since I've gone back and I've reviewed and reread that paper in preparation for forming my opinion and also in preparation of being here today and testifying under oath, I can tell you that I do have some, I believe, good knowledge.

And I do indicate in the paper that it is the ultimate responsibility of the clearing member to deliver the shares.

And I was in meetings where the lawyers from Market Regulation that worked for Annette Nazareth -- and I was in some of those meetings -- discussed in forming the drafts and the proposed Reg SHO rules, both the proposing release and then the final

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