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In the
United States Court of Appeals
For the Second Circuit

AUGUST TERM, 2016

ARGUED: AUGUST 25, 2016

DECIDED: JUNE 21, 2017

No. 16-65-cv

ROBBY SHAWN STADNICK, individually and on behalf of all others
similarly situated,
Plaintiff-Appellant,

BRENNEN HYATT,
Plaintiff,

v.

THOMAS LIMA, individually and on behalf of all others similarly
situated,
Consolidated Plaintiff,

v.

VIVINT SOLAR, INC., THE BLACKSTONE GROUP L.P., GREGORY S.
BUTTERFIELD, DANA C. RUSSELL, DAVID F. D’ALESSANDRO, ALEX J.
DUNN, BRUCE McEVOY, TODD R. PEDERSEN, JOSEPH F. TRUSTEY, PETER
F. WALLACE, JOSEPH S. TIBBETTS, GOLDMAN, SACHS & CO., MERRILL
LYNCH, PIERCE, FENNER & SMITH INCORPORATED, CREDIT SUISSE
SECURITIES (USA) LLC, CITIGROUP GLOBAL MARKETS INC., DEUTSCHE

1 BANK SECURITIES INC., MORGAN STANLEY & CO. LLC, BARCLAYS
2 CAPITAL INC., BLACKSTONE ADVISORY PARTNERS L.P.,
3 *Defendants-Appellees.*

4 _____
5
6 Appeal from the United States District Court
7 for the Southern District of New York.
8 No. 14 Cv. 9283 – Katherine B. Forrest, *District Judge.*

9 _____
10
11 Before: WALKER, CABRANES, and LOHIER, *Circuit Judges.*

12 _____
13
14 Plaintiff-Appellant Robby Shawn Stadnick appeals from a
15 judgment of the United States District Court for the Southern
16 District of New York (Forrest, J.) dismissing his securities class
17 action complaint pursuant to Federal Rule of Civil Procedure
18 12(b)(6). Stadnick’s claims arise out of the October 1, 2014 Initial
19 Public Offering (“IPO”) for shares of Vivint Solar, Inc., a residential
20 solar energy unit installer. Stadnick principally argues on appeal
21 that Vivint was obligated to disclose financial information for the
22 quarter ending one day before the IPO because Vivint’s performance
23 during that quarter constituted an “extreme departure” under *Shaw*
24 *v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996). He also argues
25 that Vivint misled prospective shareholders regarding the
26 company’s opportunities for expansion in Hawaii by failing to
27 disclose the potential impact of the state’s evolving regulatory
28 regime. We conclude that the “extreme departure” test of *Shaw* is not

1 the law of this Circuit and that Vivint's omissions were not material
2 under the test set forth in *DeMaria v. Andersen*, 318 F.3d 170 (2d Cir.
3 2003), to which we adhere. We further conclude that Vivint did not
4 mislead shareholders regarding the company's prospects in Hawaii.
5 We therefore AFFIRM the judgment of the district court.

6 _____
7 NICHOLAS IAN PORRITT (Adam M. Apton *on the*
8 *brief*), Levi & Korsinsky LLP, Washington, DC, *for*
9 *Plaintiff-Appellant*.

10
11 JAY B. KASNER (Scott D. Musoff *on the brief*),
12 Skadden, Arps, Slate, Meagher & Flom LLP, New
13 York, NY, *for Defendants-Appellees* Vivint Solar,
14 Inc., The Blackstone Group L.P., Gregory S.
15 Butterfield, Dana C. Russell, David F.
16 D'Alessandro, Alex J. Dunn, Bruce McEvoy, Todd
17 R. Pedersen, Joseph F. Trustey, Peter F. Wallace &
18 Joseph S. Tibbetts.

19
20 Paul Vizcarrondo, Jr., Carrie M. Reilly & Steven
21 Winter *on the brief*, Wachtell, Lipton, Rosen &
22 Katz, New York, NY, *for Defendants-Appellees*
23 Goldman, Sachs & Co., Merrill Lynch, Pierce,
24 Fenner & Smith Incorporated, Credit Suisse
25 Securities (USA) LLC, Citigroup Global Markets
26 Inc., Deutsche Bank Securities Inc., Morgan
27 Stanley & Co. LLC, Barclays Capital Inc. &
28 Blackstone Advisory Partners L.P.
29 _____

1 JOHN M. WALKER, JR., *Circuit Judge*:

2 Plaintiff-Appellant Robby Shawn Stadnick appeals from a
3 judgment of the United States District Court for the Southern
4 District of New York (Forrest, J.) dismissing his securities class
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6 12(b)(6). Stadnick's claims arise out of the October 1, 2014 Initial
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12 *v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996). He also argues
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15 disclose the potential impact of the state's evolving regulatory
16 regime. We conclude that the "extreme departure" test of *Shaw* is not
17 the law of this Circuit and that Vivint's omissions were not material
18 under the test set forth in *DeMaria v. Andersen*, 318 F.3d 170 (2d Cir.
19 2003), to which we adhere. We further conclude that Vivint did not
20 mislead shareholders regarding the company's prospects in Hawaii.
21 We therefore AFFIRM the judgment of the district court.

22

23

BACKGROUND

For purposes of this appeal we must accept the facts as they are alleged in the complaint and draw all reasonable inferences in Stadnick's favor. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Stadnick argues, in essence, that the registration statement Vivint issued in conjunction with its IPO misled prospective shareholders.

Defendant-Appellee Vivint Solar is a residential solar energy unit installer that leases solar energy systems to homeowners.¹ During the relevant period, Vivint was the second largest installer of solar energy systems in the U.S. residential market, with approximately an 8% market share in 2013 and a 9% share in the first quarter of 2014. Vivint operated in a number of states, but as of June 30, 2014 more than 50% of its installations were in California and 15% in Hawaii. Twenty-one of its thirty-seven offices were located in those two states.

Vivint's business model is predicated upon its continued ownership of the solar energy equipment it installs, which allows Vivint to qualify for various tax credits and other government incentives. Customers pay no up-front costs and instead enter into

¹ The individual defendants are: Gregory S. Butterfield, at the time of Vivint's IPO the CEO, President, and a director of Vivint; Dana C. Russell, Vivint's CFO at the time of the IPO; and the remaining Vivint directors at the time of the IPO. The complaint also names the following underwriter defendants: Goldman, Sachs & Co.; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Credit Suisse Securities (USA) LLC; Citigroup Global Markets Inc.; Deutsche Bank Securities Inc.; Morgan Stanley & Co. LLC; Barclays Capital Inc.; and Blackstone Advisory Partners L.P.

1 twenty-year leases by which they purchase solar energy in monthly
2 payments at approximately 15% to 30% less than they would pay for
3 utility-generated electricity. These monthly payments are Vivint's
4 primary revenue stream. Because Vivint incurs significant up-front
5 costs, it has operated at a loss from its inception.

6 To fund its operations, Vivint secures financing from outside
7 investors. Pursuant to contractual arrangements, these outside
8 investors periodically make cash contributions into investment
9 funds jointly owned by the investors and Vivint. Each investment
10 fund then finances Vivint's purchase and installation of a particular
11 tranche of solar energy systems. Once a system is installed, its title is
12 transferred to the fund that contributed the capital, which allows the
13 fund to benefit from the relevant tax credits. The fund also receives
14 most of the customer's monthly payments until either the fund
15 achieves a targeted rate of return or the recapture period associated
16 with certain tax credits expires. At that time, Vivint begins to receive
17 a majority of the revenues.

18 Given the investment funds' role, Vivint allocates its income
19 between (i) its public shareholders and (ii) the outside investors, the
20 latter of whom Vivint refers to variously as non-controlling interests
21 or redeemable non-controlling interests ("NCIs"). Vivint thus
22 calculates the income available to public shareholders by first

1 determining the company's overall income and then subtracting the
2 portion allocated to NCIs.

3 Vivint utilizes an equity accounting method known as
4 Hypothetical Liquidation at Book Value ("HLBV"). Under HLBV,
5 the value of an individual's portion of a business is determined by
6 hypothetically liquidating the business at book value, *i.e.*, the value
7 at which its assets are carried on a balance sheet. If the calculation is
8 performed at the end of two successive quarters, the difference in
9 the amount an individual would receive from the first quarter to the
10 second represents his or her net gain or loss over the course of the
11 second quarter.

12 Due to Vivint's business model and the HLBV method, the
13 allocation of income (a net loss in each quarter during the relevant
14 period) between shareholders and NCIs may vary substantially
15 from one quarter to the next depending upon (1) contributions by
16 investors and (2) transfers of title to the funds that provided the
17 requisite capital. For example, if a fund provided capital to Vivint
18 but did not receive title to the systems until after the quarter ended,
19 HLBV would show a loss being allocated to NCIs. If title were
20 transferred before the quarter ended, however, the loss would be
21 allocated to shareholders. Because the income allocated to NCIs was
22 a net loss during every quarter, subtracting NCI income from
23 Vivint's overall income had the effect of recognizing increased

1 income to shareholders. NCI losses were occasionally larger than the
2 amount lost by the company as a whole, resulting in the recognition
3 of a net positive amount of income to shareholders.

4 In 2014, Vivint sought capital on the public equity markets.
5 On October 1, 2014, Vivint issued the IPO at issue on appeal, in
6 which it sold 20,600,000 shares of common stock at \$16 per share,
7 raising \$300.8 million in net proceeds. In the accompanying
8 registration statement, Vivint disclosed financial results for the six
9 quarters immediately preceding the third quarter of 2014. These
10 results revealed ever increasing overall net losses and fluctuating
11 NCI losses, income available to shareholders, and earnings-per-
12 share. Vivint also warned of the impact its business model and
13 accounting practices could have on the allocation of income between
14 NCIs and shareholders. The registration statement identified certain
15 “key operating metrics” for assessing the company’s performance:
16 (1) system installations, (2) megawatts and cumulative megawatts
17 installed, (3) estimated nominal contract payments remaining, and
18 (4) estimated retained value. Vivint also identified Hawaii as a target
19 for expansion while warning that changes in regulatory limitations,
20 particularly in concentrated markets such as Hawaii, could hinder
21 the company’s growth.

22 On November 10, 2014, Vivint issued a press release that
23 disclosed its financial results for the quarter ending September 30,

1 2014, the day before the October 1 IPO. The net loss attributable to
2 NCIs decreased from negative \$45 million in the second quarter to
3 negative \$16.4 million in the third—a decrease of \$28.6 million. This
4 change contributed substantially to a decrease in net income for
5 shareholders, from positive \$5.5 million in the second quarter to
6 *negative* \$35.3 million—a decline of \$40.8 million. Earnings-per-share
7 fell from \$0.07 per share to negative \$0.45, resulting in Vivint
8 missing analyst projections by 143%.

9 The press release reported, however, that Vivint’s third
10 quarter 2014 results surpassed analyst expectations as measured by
11 the “key operating metrics” referred to above: (1) 6,935 new
12 installations, up 137% year-over-year; (2) 49 megawatts installed, up
13 196% year-over-year; (3) remaining contract payments from
14 customers increased by \$195 million, up 175% year-over-year; and
15 (4) estimated retained value increased by \$89 million, up 172% year-
16 over-year. The company’s overall market share also increased from
17 approximately 9% in the first quarter to 16% in the third quarter.

18 On November 12, forty-three days after the IPO, Vivint
19 released its Form 10-Q for the third quarter of 2014. The company
20 specified that the “the decrease in net loss attributable to [NCIs] was
21 primarily due to the timing of our sale and subsequent installation
22 of solar energy systems into certain investment funds.” J.A. 96. The
23 10-Q also revealed that Vivint’s solar installations in Hawaii had

1 decreased from 15% of Vivint's total installations as of June 30, 2014
2 to 12% as of September 30, 2014.

3 From November 10 to November 11, 2014, the price of Vivint's
4 stock declined from \$14.74 to \$11.42 per share, a decrease of
5 approximately 22.5%. On November 13, 2014, the day following the
6 release of the 10-Q, Vivint's stock declined to \$11.70 per share from
7 \$12.33 per share on November 12, a decrease of approximately 5%.

8 On February 13, 2015, Stadnick filed the first amended
9 complaint alleging violations of Sections 11, 12(a)(2) and 15 of the
10 Securities Act of 1933, 15 U.S.C. §§ 77k(a), 77l(a), and 77o(a), which
11 was later superseded by a second consolidated amended complaint
12 substantially repeating the allegations. On December 10, 2015, the
13 district court granted the defendants' motion to dismiss the
14 complaint for failure to state a claim. Stadnick timely filed this
15 appeal challenging the dismissal of his claims under Sections 11 and
16 15.

17 DISCUSSION

18 We review *de novo* a district court's dismissal for failure to
19 state a claim under Rule 12(b)(6), "accepting all factual allegations as
20 true, but 'giving no effect to legal conclusions couched as factual
21 allegations.'" *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d

1 Cir. 2010) (quoting *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507
2 F.3d 117, 121 (2d Cir. 2007)).²

3 On appeal, Stadnick argues that the district court erred in
4 determining that the second amended complaint failed to state a
5 claim under Section 11 when it alleged that Vivint failed to disclose,
6 first, the financial information from the third quarter of 2014 and,
7 second, the material adverse effect on its business of the evolving
8 regulatory regime in Hawaii. Stadnick further argues that, because
9 his Section 11 claims were improperly dismissed, so too were his
10 claims under Section 15. We address each of these arguments in
11 turn.

12 Section 11 of the Securities Act of 1933 imposes liability on an
13 issuer of a registration statement in three circumstances: if (1) the
14 statement “contained an untrue statement of a material fact,” (2) the
15 statement “omitted to state a material fact required to be stated
16 therein,” or (3) the omitted information was “necessary to make the
17 statements therein not misleading.” 15 U.S.C. § 77k(a); *see also Litwin*
18 *v. Blackstone Grp., L.P.*, 634 F.3d 706, 715-16 (2d Cir. 2011) (specifying
19 the bases for liability under Section 11).

20

² The parties also dispute whether Stadnick’s allegations are premised on fraud and therefore must satisfy the heightened particularity requirements of Federal Rule of Civil Procedure 9(b). *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010). We decline to address this issue because Stadnick’s claims fail even under the more lenient pleading standard of Federal Rule of Civil Procedure 8(a).

1 **I. The Third Quarter 2014 Interim Information**

2 Stadnick alleges that Vivint violated Section 11 in failing to
3 disclose the 2014 third quarter financial information in its
4 registration statement, which was issued the day after the third
5 quarter ended. Stadnick concedes, as he must, that Vivint did not
6 violate SEC Regulation S-X, which requires only that a registration
7 statement include financial statements that are more than 135 days
8 old. 17 C.F.R. § 210.3-12(a), (g). But he argues that omitting the
9 financial information as alleged here rendered the information that
10 Vivint did disclose misleading. His argument, in substance, is that
11 Vivint's third quarter performance, measured by income available to
12 shareholders and earnings-per-share, should have been disclosed
13 because it was an "extreme departure" from previous performance,
14 under the test articulated by the First Circuit in *Shaw v. Digital*
15 *Equipment Corp.*, 82 F.3d at 1210.

16 In the Second Circuit, the long-standing test for assessing the
17 materiality of an omission of interim financial information has been
18 that set forth in *DeMaria v. Andersen*, where we held that a duty to
19 disclose such information arises if a reasonable investor would view
20 the omission as "significantly alter[ing] the 'total mix' of information
21 made available." 318 F.3d at 180 (quoting *TSC Indus., Inc. v.*
22 *Northway, Inc.*, 426 U.S. 438, 449 (1976)). We have carefully
23 considered *Shaw's* "extreme departure" test and decline to adopt it.

1 The defendant in *Shaw*, Digital Equipment, prepared its
2 registration statement on SEC Form S-3, which required disclosure
3 of “any and all material changes.” 82 F.3d at 1205 (emphasis
4 omitted). The successful offering of preferred shares in *Shaw*
5 commenced eleven days, and closed four days, before the end of the
6 third quarter. *Id.* at 1200. Two weeks after the third quarter’s close,
7 the company announced an operating loss of \$183 million for the
8 quarter, far greater than analysts had expected. *Id.* The price of the
9 common and preferred stock dropped approximately 20% below the
10 IPO offering price. *Id.*

11 The *Shaw* plaintiffs alleged that, as of the date of the IPO, the
12 defendants knew that the company’s third quarter performance
13 would be substantially worse than that of previous quarters and yet
14 failed to disclose it. *Id.* at 1206. Accepting the factual allegations as
15 true, the First Circuit concluded that Digital Equipment possessed,
16 at the time of the IPO, interim information that created a
17 “substantial likelihood” that Digital’s performance during the
18 quarter in question would represent an “extreme departure” from
19 its previous performance. *Id.* at 1211. The operating loss was
20 therefore material to the offering and disclosure was required. *Id.*

21 **A. *DeMaria v. Andersen***

22 As noted above, in assessing whether an omission of interim
23 financial information violated Section 11, the test in this Circuit has

1 been that set forth in *DeMaria*. There, plaintiffs claimed that the
2 registration statement was materially false and misleading because
3 the defendant corporation, ILife, failed to include financial
4 information for the first quarter of 1999. *DeMaria*, 318 F.3d at 173. On
5 May 24, eleven days after the IPO, ILife announced its first quarter
6 results, indicating that it had suffered a \$6 million loss while
7 generating revenue of \$2.2 million. *Id.* Three days later, the price of
8 the company's stock had declined to \$8.19, and the stock was
9 trading at approximately \$0.67 by August. *Id.* Plaintiffs alleged a
10 violation of the third prong of Section 11: the omitted information
11 was necessary to make the publicly available information not
12 misleading. *Id.* at 178.

13 In assessing whether the omission violated Section 11, we
14 applied the traditional materiality test long employed by courts,
15 including the Supreme Court, in the omission context: "whether
16 there is 'a substantial likelihood that the disclosure of the omitted
17 [information] would have been viewed by the reasonable investor as
18 having significantly altered the "total mix" of information made
19 available.'" *Id.* at 180 (alteration in original) (quoting *TSC*, 426 U.S. at
20 449); see also *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38, 44
21 (2011). We concluded that the omission did not violate Section 11
22 because, *inter alia*, the company had disclosed its losses for every
23 quarter through the end of 1998 and had warned that it expected to

1 continue sustaining substantial losses. *Id.* at 181-82. The omission,
2 therefore, would not have caused the registration statement to
3 mislead a reasonable investor.

4 **B. *DeMaria* Remains the Operative Test in This**
5 **Circuit**

6 The district court, in dismissing Stadnick's claim, applied the
7 "extreme departure" test of *Shaw*. We use this occasion to re-affirm
8 that the "extreme departure" test is not the operative test in this
9 Circuit. The operative test remains that set forth in *DeMaria*.

10 Stadnick accurately notes that we have relied upon *Shaw* in
11 the past. Although we have relied upon some aspects of *Shaw*, the
12 cases Stadnick cites lend no support to the proposition that we
13 adopted the "extreme departure" test. *See Stratte-McClure v. Morgan*
14 *Stanley*, 776 F.3d 94, 102 & n.5 (2d Cir. 2015) (citing *Shaw* in finding
15 that statutes and regulations can give rise to disclosure obligations);
16 *Iowa Pub. Emps.' Ret. Sys. v. MF Glob., Ltd.*, 620 F.3d 137, 141 (2d Cir.
17 2010) (citing *Shaw* for the proposition that courts must consider
18 statements and omissions in context); *In re Morgan Stanley*, 592 F.3d
19 at 360 n.8 (citing *Shaw* to demonstrate differences between Sections
20 11 and 12 of the Securities Act of 1933); *Rombach v. Chang*, 355 F.3d

1 164, 170 n.5 (2d Cir. 2004) (citing *Shaw* for the notion that the Rule
2 9(b) pleading standard applies to allegations sounding in fraud).³

3 There is good reason not to adopt the “extreme departure”
4 test when assessing the materiality of a registration statement’s
5 omissions. First, *DeMaria* rests upon the classic materiality standard
6 in the omission context, with which we and most other courts are
7 familiar. Second, upon close examination, *Shaw*’s “extreme
8 departure” test leaves too many open questions, such as: the degree
9 of change necessary for an “extreme departure”; which metrics
10 courts should look to in assessing whether such a departure has
11 occurred; and the precise role of the familiar “objectively reasonable
12 investor” in assessing whether a departure is extreme. And third, in
13 some situations the “extreme departure” test can be analytically
14 counterproductive.

15 This very case illustrates the unsoundness of the “extreme
16 departure” test. Stadnick argues that changes in two metrics—
17 income available to shareholders and earnings-per-share—over just
18 three quarters represent an “extreme departure.” To be sure, these
19 traditional metrics, standing alone, lend support to Stadnick’s claim.
20 But the two metrics identified by Stadnick are not fair indicators of

³ The same holds true as to Stadnick’s claim that other circuits utilize *Shaw*’s “extreme departure” test. In every case he cites, the court similarly relied upon *Shaw* for other aspects of that opinion. See *Pension Fund Grp. v. Tempur-Pedic Int’l, Inc.*, 614 F. App’x 237, 242 (6th Cir. 2015); *Schmidt v. Skolas*, 770 F.3d 241, 249 (3d Cir. 2014); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005).

1 Vivint's performance. Their fluctuation is attributable to the normal
2 operation of the company's business model, in which the allocation
3 of income, as determined by HLBV, is subject to the vagaries of the
4 timing of transactions between Vivint and the NCI funds. The
5 "extreme departure" test makes little sense in this context and
6 confuses the analysis, while the *DeMaria* test, which examines
7 omissions in the context of the total mix of available investor
8 information, does not.

9 **C. *DeMaria* Did Not Require Vivint to Disclose its**
10 **Third Quarter Interim Information**

11 Stadnick has failed to satisfy the test articulated in *DeMaria*
12 because a reasonable investor would not have viewed Vivint's
13 omission as "significantly alter[ing] the 'total mix' of information
14 made available." *DeMaria*, 318 F.3d at 180 (quoting *TSC*, 426 U.S. at
15 449). Stadnick's view is too myopic, both temporally and with
16 regard to the number of relevant metrics. The materiality of an
17 omission must be assessed in light of the total mix of information in
18 the public domain. For Vivint's registration statement, therefore, we
19 assess the materiality of the omissions by taking into account: (1) the
20 performance of all five metrics disclosed by Vivint (2) from the first
21 quarter of 2013 through the second of 2014 and (3) the disclosures
22 regarding Vivint's unique business plan and the HLBV accounting

1 method. When viewed in this context, it is plain that the omissions
2 relating to income and earnings-per-share for the third quarter of
3 2014 did not render the publicly available information misleading.⁴

4 Stadnick focuses solely on income available to shareholders
5 and earnings-per-share. A more accurate indicator of the company's
6 performance, however, is Vivint's *total* revenue and *total* income
7 (available to both shareholders and NCIs), neither of which are
8 affected by the HLBV method. Prior to the third quarter of 2014,
9 during every quarter but one, the company's total revenue increased
10 from the previous quarter, and in every single quarter its net losses
11 became larger, which comported with the successful
12 implementation of its business model. Both of these trends
13 continued through the third quarter of 2014.

14 It is clear, moreover, that the omission was not material even
15 according to the variables identified by Stadnick if we examine them
16 over the entire period for which Vivint disclosed information.
17 Stadnick accurately notes that income available to shareholders and
18 earnings-per-share decreased sharply from the second through the
19 third quarter of 2014. But this was consistent with a pattern of
20 fluctuation that began with the first quarter of 2013. Not only was
21 the fluctuation substantial but, prior to the third quarter of 2014,

⁴ We reproduce in the Appendix a chart from the defendants' brief detailing the pertinent metrics, displayed, except for per-share data, in thousands of dollars, that Vivint disclosed in its registration statement and in subsequent filings.

1 neither variable fluctuated in the same direction for two successive
2 quarters; in other words there was never a trend of the shareholders'
3 income increasing or decreasing. A reasonable investor, therefore,
4 would not have harbored any solid expectations based on prior
5 performance as to Vivint's third quarter 2014 performance as
6 measured by the two metrics identified by Stadnick.

7 Also, and critically, Vivint's registration statement contained
8 ample warnings and disclosures that explained shareholder revenue
9 and earning fluctuations, namely that: (1) the peculiarities of its
10 business model and the HLBV method render the metrics identified
11 by Stadnick less probative of Vivint's performance; (2) as a result,
12 the income available for shareholders would likely fluctuate from
13 quarter to quarter; and (3) Vivint anticipated its substantial
14 operating losses to continue.

15 Finally, we are persuaded that a reasonable investor would
16 not consider the omission of the third-quarter results to be material
17 in light of Vivint's self-described "key operating metrics." Each of
18 them increased substantially from the second quarter of 2014 to the
19 third and had more than doubled since the second quarter of 2013.

20 II. Evolving Regulatory Regime in Hawaii

21 Stadnick tacks onto his complaint an allegation that Vivint
22 violated Section 11 by failing to adequately warn prospective

1 shareholders of the evolving regulatory regime in Hawaii, in
2 violation of an affirmative duty of disclosure imposed by Item 303 of
3 Regulation S-K.

4 In relevant part, Item 303 of Regulation S-K requires the
5 disclosure of “any known trends . . . the registrant reasonably
6 expects will have a material . . . impact on net sales or revenues or
7 income.” 17 C.F.R. § 229.303(a)(3)(ii). Disclosure is required where
8 the trend is both (1) known to management and (2) “reasonably
9 likely to have material effects on the registrant’s financial condition
10 or results of operations.” *Litwin*, 634 F.3d at 716 (citation omitted).

11 Stadnick’s argument is unavailing because (1) he has failed to
12 allege that Vivint’s operations in Hawaii were negatively affected by
13 the regulatory changes and (2) Vivint’s registration statement
14 included ample warning that its business could be affected by
15 evolving regulatory regimes, and named Hawaii in particular.

16 Stadnick focuses on the fact that, from the second to the fourth
17 quarters of 2014, installations in Hawaii comprised a smaller portion
18 of Vivint’s total installations. Stadnick does not allege, however, that
19 this decline was material to Vivint’s revenue or operations. He has
20 not alleged, for instance, that the actual number of installations in
21 Hawaii decreased or even increased at a slower pace. Given the
22 rapid increase in Vivint’s total installations during this period, as
23 reported in both the prospectus and the press release regarding the

1 third quarter 2014 results, it would not be unreasonable to infer that
2 the number of installations simply increased at a greater rate in
3 geographic regions other than Hawaii. There is thus no basis to
4 disturb the district court's conclusion that the percentage drop in
5 Hawaii was not a material fact that needed to be disclosed.

6 Stadnick's claim also fails because Vivint's registration
7 statement included repeated warnings that its business was
8 generally vulnerable to changing regulations, and particularly so in
9 Hawaii. We thus find no basis for holding that Vivint failed to fulfill
10 its affirmative disclosure obligation under Item 303 of Regulation S-
11 K regarding the evolving regulatory regime in Hawaii.

12 **III. Stadnick's Section 15 Claims**

13 Because we affirm the district court's dismissal of Stadnick's
14 Section 11 claims, we also affirm the dismissal of his claims under
15 Section 15. *See In re Morgan Stanley*, 592 F.3d at 358.

16 **CONCLUSION**

17 For the reasons stated above, we AFFIRM the judgment of the
18 district court.

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APPENDIX

3

Vivint Quarterly Results

4

Displayed in Thousands of Dollars, Except Per Share Data

| | 1Q13 | 2Q13 | 3Q13 | 4Q13 | 1Q14 | 2Q14 | 3Q14 | 4Q14 | 1Q15 |
|---|----------|----------|----------|----------|----------|----------|----------|----------|----------|
| Total Revenue | 592 | 1,333 | 2,274 | 1,971 | 3,507 | 6,558 | 8,333 | 6,860 | 9,545 |
| Net Loss | (10,780) | (11,961) | (14,993) | (18,736) | (36,543) | (39,611) | (51,693) | (38,072) | (59,975) |
| NCI Loss | (2,121) | (186) | (37,848) | (21,953) | (43,584) | (45,104) | (16,415) | (31,933) | (72,124) |
| Net Income Available to Shareholders | (8,659) | (11,775) | 22,855 | 3,217 | 7,041 | 5,493 | (35,278) | (6,139) | 12,149 |
| Earnings Per Share | (0.12) | (0.16) | 0.30 | 0.04 | 0.09 | 0.07 | (0.45) | (0.06) | 0.11 |

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