

March 19, 2020

Hon. J. Anthony Kline, Presiding Justice
Hon. James A. Richman, Associate Justice
Hon. Marla J. Miller, Associate Justice
Court of Appeal, State of California
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102

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Re: A155613
City of Warren Police and Fire Retirement System et al. v. Natera Inc. et al.
Amicus Curiae Letter Requesting Publication of Opinion

Honorable Justices:

Amicus curiae the Chamber of Commerce of the United States of America (the Chamber) requests publication of the opinion filed by the Court in this case on February 28, 2020. (See Rules of Court, rule 8.1120, subd. (a).)

The Chamber is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation’s business community.¹

This is such a case. This Court’s opinion provides important guidance regarding omissions claims in securities actions — a rapidly expanding area of litigation in California state courts, as well as other courts. If published, it would be the first of its kind in California state courts. Opinions “should be certified for publication” when they meet certain enumerated criteria. (Rules of Court, rule 8.1105, subd. (c).) This Court’s opinion squarely meets at least three:

- (i) It “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions”;
- (ii) It “explains . . . an existing rule of law”; and

¹The parties to this appeal and their counsel have not authored this letter in whole or in part, nor have they made a monetary contribution for the preparation of this letter. Other than the Chamber, its members, and its counsel, no person or entity has made a monetary contribution for the preparation or submission of this letter.

(iii) It “[i]nvolves a legal issue of continuing public interest.”

(Rules of Court, rule 8.1105, subds. (c)(2), (c)(3), (c)(6).)

I. The opinion applies an existing rule of law to a significantly different set of facts (rule 8.1105(c)(2)).

The Court’s opinion should be published because it provides useful guidance to courts and litigants for how to determine what kinds of statements and omissions may make a registration statement misleading under Section 11 of the Securities Act of 1933. The opinion appears to be the first by a California Court of Appeal to analyze whether a company’s statements in its registration statements are false or misleading under Section 11 and its implementing regulations. Indeed, no published California Court of Appeal decision has yet addressed Section 11’s scope.

The Court’s decision correctly holds that the failure to disclose interim quarterly financial results does not necessarily render a registration statement misleading. The Court noted that the registration statement’s reference to “historical growth . . . does not imply that the growth has been constant or will continue,” that the statement cautions that “[h]istorical results are not necessarily indicative of the results to be expected in future periods,” and that the statement “included information about costs and losses, as well as revenues.” (Opn., at pp. 9-12.) In this manner, this Court’s opinion provides valuable guidance for determining when statements are misleading given an issuer’s omission of interim quarterly financial information.

II. The opinion explains an existing rule of law (rule 8.1105(c)(3)).

This Court’s opinion also warrants publication because it illustrates the proper mode of analysis for determining whether omissions are actionable. In particular, this Court’s opinion accurately explains how in determining whether a registration statement omitted information that was “necessary to make the statements therein not misleading” (15 U.S.C. § 77k(a)), a court must consider “the *context* of the whole document.” (Opn., at p. 9, italics added, quotation marks omitted.) Only after first describing all of the relevant statements and information contained in the registration document did this Court address plaintiffs’ theory that “defendants falsely framed risk factors as ‘hypothetical’ or as ‘possibilities’ when the risks had already materialized.” (Opn., at p. 13.) As the Court rightly explained, in the context of the full registration statement, it was readily apparent that defendants had properly “describe[d] these risks specifically and in depth.” (Opn., at p. 13.)

This Court’s opinion also illustrates the interaction between Section 11 and Item 303, which requires disclosure of “‘known trends or uncertainties’ that the issuer of a registration statement ‘reasonably expects will have a material . . . unfavorable impact on . . . revenues or incomes from continuing operations.’” (Opn., at p. 16, quoting 17 C.F.R. § 229.303(a)(3)(ii).) This Court helpfully explained that although Section 11 generally imposes strict liability for materially misleading statements, “actual knowledge of omitted information” is “an essential element of a Section 11 claim that is based on a violation of Item 303.” (Opn., at p. 17.) Because plaintiffs “fail[ed] to allege specific facts establishing that any of the defendants had

actual knowledge of the [interim quarterly] financial results” (among other failings), this Court correctly concluded that plaintiffs did not assert a viable Section 11 claim. (Opn., at pp. 18-19)

This Court’s detailed and thorough analysis of these Section 11 issues will be helpful to courts and litigants addressing similar issues in the future. That is especially true because no published California decision has yet addressed the scope of Section 11 liability. Publication would thus provide a roadmap for California courts, obviating the need to rely on a patchwork of often conflicting (and nonbinding) federal-court decisions.

III. The opinion involves a legal issue of continuing public interest (rule 8.1105(c)(6)).

Courts nationwide are dealing with an explosion of securities class actions. In 2019 alone, “[p]laintiffs filed 428 new securities class actions across federal and state courts, the highest number on record and nearly double the 1997-2018 average.” (Stanford Clearinghouse, *Securities Class Action Filings: 2019 Year In Review* 5 (2020).) Those suits are increasingly being filed in state courts, especially in California. (*Id.*, at p. 4.)

Recent cases also “threaten much higher litigation and settlement costs than cases filed in prior years—nearly three times larger than the average for 1997 to 2017.” (U.S. Chamber Institute for Legal Reform, *Containing the Contagion: Proposals to Reform the Broken Securities Class Action System* 2 (Feb. 2019).) And the costs of such litigation are spread to all U.S. public companies, which must pay more for insurance and to access capital, all while competing with overseas counterparts not subject to the same constant litigation threat. (See C. Metzger & B. Mukherjee, *Challenging Times: The Hardening D&O Insurance Market*, Harvard Law School Forum on Corporate Governance (Jan. 29, 2020).²)

If published, this Court’s careful analysis would thus provide useful guidance to courts in the growing number of similar lawsuits. It would also help resolve costly class actions early on at the pleadings stage, alleviating the burden placed on courts and lowering litigation costs across the board. And it would educate potential plaintiffs and defendants alike of their rights and obligations before entering court.

For these reasons, the Chamber respectfully requests publication of this Court’s opinion in *City of Warren Police and Fire Retirement System et al. v. Natera Inc. et al.*

Respectfully,

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² <https://corpgov.law.harvard.edu/2020/01/29/challenging-times-the-hardening-do-insurance-market/>.

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PROOF OF SERVICE

City of Warren Police and Fire Retirement System et al. v. Natera Inc. et al., A155613 (Div. 2)
San Mateo County Super. Ct. No. CIV537409

I am a citizen of the United States, over 18 years of age, and not a party to this matter. My business address is: Morrison & Foerster LLP, 2000 Pennsylvania Avenue, NW, Washington, D.C. 20006.

On March 19, 2020, I caused true copies of the within letter to be served on counsel for the parties interested in this proceeding as follows:

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ELECTRONIC SERVICE THROUGH TRUEFILING: This letter is being submitted for filing through the Court of Appeal's TrueFiling service, with designation that an electronic copy be served through a link provided by email from TrueFiling to the attorneys who are registered with TrueFiling for this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 19, 2020, at Washington, D.C..

sf-4211352

/s/ 
Holly Chaisson

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