

13-616-cv
Vaughn Leroy Meyer v. JinkoSolar Holding Co.

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2013

4 (Argued: September 18, 2013 Decided: July 31, 2014)

5 Docket No. 13-616-cv

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7 VAUGHN LEROY MEYER, RICHARD MATKEVICH, ABDULLAH AL MAHMUD,
8 AZRIEL SHUSTERMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
9 SIMILARLY SITUATED,

10
11 Plaintiffs-Appellants,

12 MARCO PETERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS
13 SIMILARLY SITUATED,

14
15 Plaintiff,

16 v.

17 JINKOSOLAR HOLDINGS CO., LTD., STEVEN MARKSCHEID, CREDIT SUISSE
18 SECURITIES (USA) LLC, OPPENHEIMER & CO., INC., ROTH CAPITAL
19 PARTNERS, LLC, COLLINS STEWART LLC,

20
21 Defendants-Appellees,

22 WILLIAM BLAIR & CO., XIANDE LI, KANGPING CHEN, XIANHUA LI, WING
23 KEONG SLEW, HAITAO JIN, ZIBIN LI, LOGGEN ZHANG,

24
25 Defendants.*
26
27 - - - - -

28 B e f o r e: WINTER, WALKER, and WESLEY, Circuit Judges.
29

* The clerk is instructed to modify the party caption to conform to this opinion.

1 Appeal from an order of the District Court for the
2 Southern District of New York (J. Paul Oetken, Judge)
3 dismissing a complaint alleging violations of the federal
4 securities laws. We vacate the dismissal of the complaint on
5 the ground that the failure to disclose ongoing serious
6 pollution problems rendered misleading statements describing
7 measures taken to comply with Chinese environmental
8 regulations.

9 MICHAEL STEPHEN BIGIN (Uri Seth
10 Ottensoser, Joseph R. Seidman, Jr.,
11 Laurence Jesse Hasson, on the
12 brief), Bernstein Liebhard LLP, New
13 York, NY, for Plaintiffs-
14 Appellants.
15

16 BRIAN H. POLOVOY (Jerome S. Fortinsky,
17 on the brief), Shearman & Sterling
18 LLP, New York, NY, for Defendants-
19 Appellees JinkoSolar Holdings Co.,
20 Ltd. and Steven Markscheid.
21

22 WILLIAM J. SUSHON (Bradley J. Butwin,
23 B. Andrew Bednark, on the brief),
24 O'Melveny & Meyers LLP, New York, NY,
25 for Defendants-Appellees Credit Suisse
26 Securities (USA) LLC, Oppenheimer &
27 Co., Inc., Roth Capital Partners, LLC,
28 and Collins Stewart LLC.
29

30 WINTER, Circuit Judge:

31 Various purchasers of securities issued by JinkoSolar
32 Holdings Co., Ltd. in two public offerings appeal from Judge
33 Oetken's dismissal of their complaint alleging violations of the

1 federal securities laws. We hold that appellees' failure to
2 disclose ongoing, serious pollution problems rendered misleading
3 statements in a prospectus describing prophylactic measures taken
4 to comply with Chinese environmental regulations. We therefore
5 vacate and remand.

6 BACKGROUND

7 In reviewing a dismissal under Rule 12(b)(6), we view the
8 facts alleged in the complaint as true. N.J. Carpenters Health
9 Fund v. Royal Bank of Scot. Grp., PLC, 709 F.3d 109, 119 (2d Cir.
10 2013).

11 Primarily using facilities in China, JinkoSolar manufactures
12 various photovoltaic products ("PV products"), that is, solar
13 cells and solar panel products. JinkoSolar's size and range of
14 products rapidly increased after its July 2009 acquisition of
15 Zhejiang Sun Valley Energy Application Technology Company, Ltd.
16 ("Sun Valley"). Its main production plants are located in the
17 Jiangzi and Zhejiang provinces in China, which are regulated by
18 the Haining Environmental Protection Bureau ("EPB").

19 JinkoSolar made two public offerings of American Depository
20 Shares ("ADS") on the New York Stock Exchange ("NYSE"), one on
21 May 13, 2010, and the other on November 10, 2010. The May
22 offering consisted of 5,835,000 ADS, which were sold at \$11 a
23 share and raised a total of \$64,185,000.

1 The prospectus accompanying the May offering discussed the
2 pollution potential of JinkoSolar's business, the applicability
3 of Chinese environmental regulations and standards, and
4 JinkoSolar's efforts at compliance. It stated:

5 We generate and discharge chemical wastes,
6 waste water, gaseous waste and other
7 industrial waste at various stages of our
8 manufacturing process as well as during the
9 processing of recovered silicon material. **We**
10 **have installed pollution abatement equipment**
11 **at our facilities to process, reduce, treat,**
12 **and where feasible, recycle the waste**
13 **materials before disposal, and we treat the**
14 **waste water, gaseous and liquid waste and**
15 **other industrial waste produced during the**
16 **manufacturing process before discharge. We**
17 **also maintain environmental teams at each of**
18 **our manufacturing facilities to monitor waste**
19 **treatment and ensure that [these] waste**
20 **emissions comply with [People's Republic of**
21 **China] environmental standards. Our**
22 **environmental teams are on duty 24 hours. We**
23 **are required to comply with all PRC national**
24 **and local environmental protection laws and**
25 **regulations** and our operations are subject to
26 periodic inspection by national and local
27 environmental protection authorities. PRC
28 national and local environmental laws and
29 regulations impose fees for the discharge of
30 waste materials above prescribed levels,
31 require the payment of fines for serious
32 violations and provide that the relevant
33 authorities may at their own discretion close
34 or suspend the operation of any facility that
35 fails to comply with orders requiring it to
36 cease or remedy operations causing
37 environmental damage. As of December 31,
38 2009, no such penalties had been imposed on
39 us.¹

¹ The November prospectus contained the same language, except, at the end of the section it stated, "[a]s of the date of this prospectus, no such penalties had been imposed on us."

1 Amend. Compl. ¶ 80 (emphasis in original). The May prospectus
2 also stated:

3 ***Compliance with environmental, safe***
4 ***production and construction regulations can***
5 ***be costly, while non-compliance with such***
6 ***regulations may result in adverse publicity***
7 ***and potentially significant monetary damages,***
8 ***fines and suspension of our business***
9 ***operations.*** We use, store and generate
10 volatile and otherwise dangerous chemicals
11 and wastes during our manufacturing process,
12 ***and are subject to a variety of government***
13 ***regulations related to the use, storage and***
14 ***disposal of such hazardous chemicals and***
15 ***waste. We are required to comply with all PRC***
16 ***national and local environmental regulations***
17 ***. . . .***

18
19 Amend. Compl. ¶ 82 (emphasis in original).²

20 On June 8, 2010, appellees submitted a report to the EPB
21 about JinkoSolar’s recent expansion in solar cell production.
22 The report contained a section entitled “Existing Problems.” It
23 explained that the Zhejiang plant was “not disposing of hazardous
24 solid waste in accordance with relevant disposal methods, and was
25 emitting high levels of fluorides.” Amend. Compl. ¶ 5. It
26 stated:

- 27 1. The tube used for the discharge of
28 chlorine (Discharge Tube A) currently has a
29 height of 15 metres. This does not meet the
30 minimum height requirements.
31 2. According to monitoring data from the
32 Haining City Environmental Protection Bureau,

²The November prospectus contained identical language. This exact passage was repeated in the 2010 year-end report on April 25, 2011.

1 HCl concentration levels in the region
2 surrounding the enterprise have exceeded set
3 limits The area surrounding the
4 project does not have capacity for storing
5 HCl. If this project continues to use HCl
6 cleaning processes then once completed this
7 would worsen the HCl pollution situation in
8 the local area.

9 3. Sludge produced by the enterprise is
10 classed as hazardous solid waste. This has
11 not been disposed of in accordance with
12 relevant State disposal methods.

13 4. Presently, the tower operated by the
14 enterprise to absorb acidic mist has 35%
15 efficiency in removing inorganic fluorides,
16 which means that industrial emission volumes
17 for fluorides are comparatively large.

18
19 Amend. Compl. ¶ 61. In a section entitled "Measures for
20 Restructuring and Reform," the report listed a number of
21 structural changes that would be necessary to ameliorate the
22 problems described in the report.

23 In April 2011, JinkoSolar received a notice from the EPB
24 "informing [JinkoSolar] of high fluoride level in its waste." On
25 May 11, 2011, the EPB detected "higher than acceptable levels of
26 fluoride at JKS, this time in its waste water." Amend. Compl. ¶
27 6. In another document submitted to the EPB, JinkoSolar reported
28 again that the water around the plant did not meet environmental
29 standards because of, inter alia, fluoride levels.

30 The complaint further alleges that on September 15, 2011,
31 "news started to break that local residents living near
32 [JinkoSolar's] solar cell plant in Zhejiang angrily demonstrated
33 outside the facility following a massive die-off of fish over the

1 previous month in the river flowing immediately adjacent to the
2 plant." Amend. Compl. ¶ 9. At one point, the protest turned
3 violent and protesters overturned cars, including police cars,
4 and damaged surrounding buildings. Within the next few days, the
5 People's Republic of China ordered that the plant be closed and
6 that JinkoSolar take remedial action. On September 22, 2011,
7 JinkoSolar issued a press release revealing that JinkoSolar was
8 fined for non-compliance with environmental regulations in May
9 2011 and paid local landowners for damage to their crops and
10 death of livestock and wildlife. The complaint alleges that
11 JinkoSolar's stock lost 40% of its value by the time the dust had
12 settled.

13 On October 11, 2011, appellants commenced this action
14 against JinkoSolar, several of its officers and directors, and
15 several entities that served as underwriters for the ADS
16 offerings. Appellants alleged violations of Sections 11 and
17 12(a)(2) of the Securities Act of 1933 and Section 10(b) of the
18 Securities Exchange Act of 1934. The complaint also alleged
19 controlling person liability against various appellees under
20 Section 15 of the 1933 Act and Section 20(a) of the 1934 Act.

21 Various appellees moved before the district court for
22 dismissal for failure to state a claim for relief under Fed. R.
23 Civ. P. 12(b)(6). The court granted the motion.

1 Central to appellants' claims were the paragraphs in the May
2 prospectus (and repeated later) quoted above. With regard to the
3 statements about JinkoSolar's storage of hazardous and dangerous
4 chemicals, PRC national and local regulations, and the costs of
5 compliance or non-compliance, the court held that those
6 statements were not misleading. However, the court deemed that
7 the paragraph discussing JinkoSolar's pollution abatement
8 equipment and its 24-hour environmental monitoring team "a more
9 complicated matter" and "arguably a close call." Peters v.
10 JinkoSolar Holding Co., No. 11 Civ. 7133 (JPO) (S.D.N.Y. Feb. 27,
11 2013). However, the court concluded that the reasonable investor
12 would not read the statement about "ensur[ing]" compliance to
13 actually guarantee compliance because "elsewhere in the
14 Prospectuses, Jinkosolar underscored to investors that fines due
15 to pollution are a real possibility." Id. at *7. Because the
16 court did not find any material misstatements or omissions, it
17 dismissed the complaint. This appeal followed.

18 DISCUSSION

19 We review the grant of a Section 12(b)(6) motion to dismiss
20 de novo. N.J. Carpenters, 709 F.3d at 119; Lentell v. Merrill
21 Lynch & Co., 396 F.3d 161, 167 (2d Cir. 2005). In doing so, we
22 "accept[] all factual allegations [in the complaint] as true and
23 draw[] all reasonable inferences in favor of the plaintiff."
24 N.J. Carpenters, 709 F.3d at 119 (quoting Litwin v. Blackstone

1 Grp., L.P., 634 F.3d 706, 715 (2d Cir. 2011)). At this stage,
2 dismissal is appropriate only where appellants can prove no set
3 of facts consistent with the complaint that would entitle them to
4 relief. Elec. Commc'ns Corp. v. Toshiba Am. Consumer Prods.,
5 Inc., 129 F.3d 240, 242-43 (2d Cir. 1997).

6 The complaint, alleging violations of Sections 11 and 12 of
7 the 1933 Securities Act and Section 10(b) of the 1934 Securities
8 Exchange Act, raises a host of legal issues with regard to
9 varying standards of liability and defenses, the various
10 plaintiffs' standing, the particularity of the pleadings with
11 regard to requisite states of mind and conduct of each defendant,
12 etc. However, each of the three sections imposes liability for a
13 material misstatement of fact or an omission to state a fact that
14 renders a statement made materially misleading. See Securities
15 Act of 1933 § 11(a), 15 U.S.C. § 77k(a) (2012) ("In case any part
16 of the registration statement . . . contain[s] an untrue
17 statement of a material fact or omit[s] to state a material fact
18 . . . necessary to make the statements therein not misleading,
19 any person acquiring such security . . . may . . . sue");
20 Securities Act of 1933 § 12(a)(2), 15 U.S.C. § 77l(a)(2) (2012)
21 ("Any person who . . . offers or sells a security . . . which
22 includes an untrue statement of a material fact or omits to state
23 a material fact necessary in order to make the statements . . .
24 not misleading . . . shall be liable"); In re Time Warner

1 Inc. Sec. Litig., 9 F.3d 259, 269 (2d Cir. 1993) ("A duty to
2 disclose arises whenever secret information renders prior public
3 statements materially misleading").

4 The district court dismissed the complaint for failure to
5 meet this requirement. We disagree and vacate the dismissal. We
6 intimate no view on any other issue.

7 While the statements regarding JinkoSolar being subject to a
8 variety of pollution regulations and the high cost of both
9 compliance and non-compliance are not misstatements, they are
10 relevant to the materiality of the prospectuses' description of
11 JinkoSolar's potential to cause serious pollution problems and
12 the steps it was taking to avoid those problems. With regard to
13 that description, we believe the complaint sufficiently alleges
14 that the failure to disclose that the prophylactic steps were
15 then failing to prevent serious ongoing pollution problems
16 rendered that description misleading.

17 a) Material Omissions

18 In general there is no duty to disclose a fact in the
19 offering documents "merely because a reasonable investor would
20 very much like to know that fact," In re Time Warner, 9 F.3d at
21 267, but "[d]isclosure is required . . . when necessary 'to make
22 . . . statements made, in light of the circumstances under which
23 they were made, not misleading.'" Matrixx Initiatives, Inc. v.
24 Siracusano, 131 S.Ct. 1309, 1321 (2011) (quoting 17 C.F.R. §
25 240.10b-5(b)).

1 Even when there is no existing independent duty to disclose
2 information, once a company speaks on an issue or topic, there is
3 a duty to tell the whole truth. See Caiola v. Citibank, N.A.,
4 295 F.3d 312, 331 (2d Cir. 2002) (“[T]he lack of an independent
5 duty is not . . . a defense to . . . liability because upon
6 choosing to speak, one must speak truthfully about material
7 issues. Once Citibank chose to discuss its hedging strategy, it
8 had a duty to be both accurate and complete.”).³ As we have
9 stated:

10 The literal truth of an isolated statement is
11 insufficient; the proper inquiry requires an
12 examination of defendants' representations,
13 taken together and in context. Thus, when an
14 offering participant makes a disclosure about
15 a particular topic, whether voluntary or
16 required, the representation must be complete
17 and accurate.

18
19 In re Morgan Stanley Info. Fund Sec. Litig., 592 F.3d 347, 366
20 (2d Cir. 2010) (internal citations and quotation marks omitted).

21 b) Application

22 We address only the disclosures of the May prospectus
23 because our conclusion that they could be found by a trier of
24 fact to be materially misleading applies a fortiori to the later
25 repetition of those disclosures.

³ Because the May prospectus discussed the risks of pollution inherent in JinkoSolar's business and the general practices JinkoSolar had implemented to cabin this risk, it put the issue "in play," Shapiro v. UJB Financial Corp., 964 F.2d 272, 282 (3d Cir. 1992), so we have no need to discuss whether it had a duty to disclose such risks.

1 As quoted above, the prospectus discussed JinkoSolar's
2 pollution abatement equipment and its provision of monitoring
3 environmental teams on duty 24 hours a day. These statements
4 must be read in the context of the further disclosure by the
5 prospectus that JinkoSolar generates, uses, and stores "dangerous
6 chemicals and wastes" and is subject to Chinese regulations
7 regarding such chemicals and wastes. Amend. Compl. ¶ 82. The
8 prospectus also informed investors that compliance with such
9 regulations is costly and that non-compliance may lead to bad
10 publicity, fines, and even a suspension of the business.

11 All of the above may be technically true. However, the
12 description of pollution-preventing equipment and 24-hour
13 monitoring teams gave comfort to investors that reasonably
14 effective steps were being taken to comply with applicable
15 environmental regulations. To be sure, these descriptions did
16 not guarantee 100% compliance 100% of the time. Such compliance
17 may often be unobtainable, and reasonable investors may be deemed
18 to know that. However, investors would be misled by a statement
19 such as that quoted above if in fact the equipment and 24-hour
20 team were then failing to prevent substantial violations of the
21 Chinese regulations.

22 The complaint alleges that in June 2010 JinkoSolar submitted
23 a report to Chinese regulators about "existing problems." This
24 report, quoted in detail supra, describes problems of a nature

1 that is sufficient, if proven, to allow a trier of fact, absent
2 contrary evidence, to draw an inference that the problems
3 "existing" as of June 8, 2010, were both present and substantial
4 at the time of the May 13, 2010, offering.

5 The failure to disclose these problems in the May prospectus
6 could be found by a trier of fact to be an omission that renders
7 misleading the comforting statements in the prospectus about
8 compliance measures. This misleading omission is not cured by
9 the additional statement that non-compliance with the
10 environmental regulations may be very costly. Although this
11 statement warned of a financial risk to the company from
12 environmental violations, the failure to disclose then-ongoing
13 and serious pollution violations would cause a reasonable
14 investor to make an overly optimistic assessment of the risk. A
15 generic warning of a risk will not suffice when undisclosed facts
16 on the ground would substantially affect a reasonable investor's
17 calculations of probability. Rombach v. Chang, 355 F.3d 164, 173
18 (2d Cir. 2004) ("Cautionary words about future risk cannot
19 insulate from liability the failure to disclose that the risk has
20 transpired.") One cannot, for example, disclose in a securities
21 offering a business's peculiar risk of fire, the installation of
22 a comprehensive sprinkler system to reduce fire danger, and omit
23 the fact that the system has been found to be inoperable, without
24 misleading investors.

