

# Cravath Beats Fraud-on-the-Market Presumption in Vivendi Case

By Victor Li

March 4, 2013

It's super rare for securities fraud defendants to successfully rebut the fraud-on-the-market presumption of reliance to beat a case. So even though the immediate stakes weren't too high, it counts as a significant victory for Vivendi S.A. and its lawyers at Cravath, Swaine & Moore that they managed to pull it off last week.

The Cravath team, led by Paul Saunders and Timothy Cameron, won dismissal of a \$3.5 million suit brought by subsidiaries of Gabelli Asset Management Inc. (Gamco), which accused Vivendi of covering up a liquidity crisis brought on by a series of mergers and acquisitions that began in the late 1990s. And according to Saunders, the decision could help litigation-weary Vivendi limit the damage from long-running class action litigation related to the same liquidity crisis.

U.S. District Judge Shira Scheindlin in Manhattan dismissed Gamco's suit on Feb. 28, nine days after a bench trial that focused solely on whether Vivendi could rebut the fraud-on-the-market presumption. That presumption, which was enshrined by the U.S. Supreme Court's 1988 ruling in *Basic v. Levinson*, provides that plaintiffs don't have to prove that they personally relied on alleged misstatements in purchasing a security if they can show that the statements were known by the investing public.

Quoting a dissenting justice in *Basic*, Scheindlin acknowledged that rebutting the fraud-on-the-market presumption is "virtually impossible in all but the most extraordinary case." But she found that Gamco's suit fit the bill.

To make its case, Vivendi produced evidence showing that Gamco purchased stock by relying on its own internal methods. That evidence persuaded Scheindlin, who ruled Thursday that Gamco relied on the private market value of the securities in question—a metric that's independent of liquidity concerns and market price. "There is no indication in the record that Plaintiffs would have viewed Vivendi as a less attractive investment if Vivendi had fully disclosed its liquidity condition at all

relevant times," the judge wrote.

Cravath counsel Paul Saunders told us Monday that the extensive amount of discovery in the case gave him the evidence he needed to rebut the fraud-on-the-market theory. "It's very hard to establish a factual record that rebuts that presumption," said Saunders. "You have to be able to prove that the person who purchased the stock did not rely on the market price of the stock as an accurate measure of its intrinsic value, and that's hard to prove."

The Gamco plaintiffs weren't part of the massive securities class action against Vivendi that produced an estimated \$9.3 billion jury verdict in January 2010. That verdict was drastically reduced as a result of the U.S. Supreme Court's June 2010 decision in *Morrison v. National Australia Bank*, which curtailed the application of U.S. securities laws to foreign transactions. In February 2011, now-retired U.S. District Judge Richard Holwell in New York cited *Morrison* in limiting the class action to holders of Vivendi American Depository Receipts rather than ordinary (foreign) shares.

According to Saunders, the Gamco dismissal could have implications for the ongoing claims process in the larger class action, because now Vivendi has a road map for challenging some individual claims based on lack of reliance. Saunders is co-lead counsel for Vivendi in the class action along with James Quinn of Weil, Gotshal & Manges. The two also represent Vivendi in a related lawsuit brought by Liberty Global Corp. that resulted in a \$1 billion verdict last June. Last month the company lost a bid to escape that verdict when a judge rejected Vivendi's motion for judgment as a matter of law or a new trial.

Gamco counsel Vincent Cappucci of Entwistle and Cappucci didn't immediately respond to a request for comment.

**CRAVATH, SWAINE & MOORE LLP**