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LendingClub Update: Class Plaintiffs Claim Defendants Are "Arguing Facts" on a Motion to Dismiss

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We have been keeping up with the In re LendingClub Securities Litigation class action, No. 3:16-cv-02627-WHA in the Northern District of California ("*LendingClub*"), in regard to Judge William Alsup's unusual decision to require additional briefing from the class plaintiff before agreeing to the class plaintiff's choice of class counsel. Now, as the LendingClub Plaintiffs oppose the Defendants' motions to dismiss, Plaintiffs' counsel is highlighting a recurring trend in motion to dismiss practice: defendants arguing facts at the motion to dismiss stage, particularly in complex cases.

Notably, *LendingClub* involves claims under both Section 11 of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934. As Plaintiffs point out in their opposition to Defendants' motion to dismiss, filed February 10, 2017 (*LendingClub* Docket No. 156 ("Br."), "[t]he primary distinction between a claim under §11 of the Securities Act and a claim under §10(b) of the Exchange Act is that, under §11, the buyer need not prove (as he must to establish certain other securities

offenses) that the defendant acted with any intent to deceive or defraud." (Br. at 7 (internal citations omitted).) Consequently, a plaintiff making a Section 11 claim that does not allege fraud does not have to plead facts "with particularity" as required by Rule 9(b) of the Federal Rules of Civil Procedure.

Typically, then, in a case alleging violations of both Section 11 and Section 10(b), one would expect the defendant to argue that the plaintiff failed to plead the 10(b) claim with particularity, and the plaintiff would emphasize that the Section 11 claim does not require particularized pleading. Although Plaintiffs do make such arguments here (see Br. at 7-8), Plaintiffs also contend that Defendants are holding Plaintiffs's complaint to a higher standard than appropriate at the motion to dismiss stage:

> Defendants confuse the case they wish they were defending for the case they are defending. They also mistakenly believe we are at the summary judgment stage. Time and again defendants fault Lead Plaintiff Water and Power Employees' Retirement, Disability and Death Plan of the City of Los Angeles ("Lead Plaintiff") for "failing" to foreclose potentially innocent explanations for ostensibly culpable conduct; dispute allegations that must be accepted as true; play fact finder by declaring their misleading statements to be immaterial; and paint such a rosy picture of the integrity of LendingClub's management and marketplace, one would never guess that LendingClub's corruption drove its marketplace to the brink of collapse, forced out its CEO and other senior managers (who were soon followed by its CFO), and triggered DOJ and SEC investigations. We are at the pleading stage and defendants' defiance of the clearly established standards for motions to dismiss demonstrates that theirs are not well-taken.

(Br. at 1.) According to Plaintiffs, Defendants dispute Plaintiffs' factual assertions in their motions to dismiss rather than focus on issues of law:

> Throughout their motions, defendants repeatedly treat the Complaint as if it were a motion for summary judgment. Rather than accepting the Complaint's factual allegations as true, as they must, defendants attempt to dispute them. Rather than acknowledging that we are at the pleading stage, defendants fault Lead Plaintiff for failing to "establish" the Complaint's allegations.

(Op. at 5.) Plaintiffs especially have an issue with Defendants' use of the term "establish" to describe the standard Plaintiffs must meet on a complaint:

> [D]efendants next argue that, "even if controls were unchanged, a deficiency in December 2015 would not *establish* that the same controls were inadequate one year earlier, especially given the intervening growth in LendingClub's business, revenues and originations." ... Defendants ignore that we are at the pleading stage. The Court is not deciding a motion for summary judgment. The pleading stage, prior to taking any discovery, is not the time to "establish" (i.e., prove) anything other than the sufficiency of Lead Plaintiff's allegations.

(Op. at 10) (citations omitted). Finally, Plaintiffs argue that it is irrelevant for a motion to dismiss whether Defendants have a defense to Plaintiffs' allegations:

> In any event, whether defendants have a defense (no matter how implausible) to the merits of this claim is not the question now before the Court. … The accuracy of Lead Plaintiff's factual allegations about the material weaknesses in LendingClub's internal controls at the time of the IPO is fully reinforced by LendingClub's admissions. Defendants seem to ignore that we are at the pleading stage of this litigation. Their motions should be denied.

(Op. at 11) (citations omitted).

Due to the complexity of class action cases, especially in commercial and securities contexts where the relevant legal principles are well developed, it is perhaps understandable for an inattentive drafter to slide between arguments on the facts and on the law. Nonetheless, defendants should take care to ensure that they are arguing the proper issues on a motion to dismiss—and plaintiffs should take care to alert the court when defendants do not.