

Labaton On 'Quest For Ignorance' In Millennial IPO Suit

By **Ben Conarck**

Law360, New York (May 29, 2015, 5:22 PM ET) -- A New York federal judge blasted Labaton Sucharow LLP for its handling of confidential witnesses while dismissing a shareholder class action over mobile advertiser Millennial Media Inc.'s \$152 million initial public offering, suggesting that attorneys were on a "quest for ignorance" when constructing their complaint.

U.S. District Judge Paul A. Engelmayer, who tossed the suit after an unopposed voluntary dismissal, lashed out against "pervasive" deficiencies in the statements attributed to confidential witnesses in the first amended complaint, which included statements that witnesses denied making, ones that had been made but were presented out of context, and those lacking a factual basis.

"It is difficult to come up with a good reason why counsel would not attempt to confirm with a witness, let alone any of 11 [confidential witnesses], the accuracy of the statements that counsel intended to attribute to them in a complaint," Judge Engelmayer said in his opinion. "Perhaps counsel feared that, confronted with such statements, the witness might repudiate or unhelpfully modify or contextualize the investigator's account of his earlier statements."

Judge Engelmayer propositioned that "perhaps counsel were pleased with the pungent sound-bites" the investigator reported from the fourth confidential witness, in particular, and feared that a follow-up call would risk a repudiation or a backing away from the statements, or otherwise weaken the complaint.

"But those are not good reasons to refrain from checking factual accuracy," Judge Engelmayer said. "And the Federal Rules of Civil Procedure do not countenance a 'see no evil' approach to pleading. A quest for ignorance when preparing a federal-court complaint diminishes counsel and ill behooves the litigation process."

The complaint, consolidated with a similar class action in February, was based on allegations that Millennial Media made misrepresentations about the success of its proprietary technology platform in the run-up to its March 2012 IPO, which later led to steep losses for investors after dismal revenue results and projections sent its stock price tumbling by more than 86 percent.

Four days before the anticipated motion to dismiss by Millennial, on April 13, the plaintiffs sought to strike all references to their fourth confidential witness, referred to as CW-4 in court documents, prompting further court-ordered document production that unraveled the shoddy practices behind Labaton's handling of the witnesses, according to the opinion.

In the first amended complaint, Labaton handled 10 of 11 confidential witnesses, while co-counsel Cera LLP handled one, the opinion said.

In an affidavit submitted by its lead partner on the case, Labaton explained that the law firm's practice "is to identify all witnesses referenced in a complaint as 'confidential witnesses' rather than by name," according to the opinion.

The firm "does not affirmatively notify such an interviewee that he will be identified in a complaint as a CW" unless asked by that person, the affidavit said. Judge Engelmayer said that the court is "not in a position to know whether, as suggested, other firms representing plaintiffs in securities class actions subscribe to these same practices" but that they are problematic in their potential for inaccuracy and their fairness to witnesses.

The issue of not notifying an interviewee that he will be designated as a confidential witness unless he asks, Judge Engelmayer said, is "not one of law."

"It is one of basic decency," Judge Engelmayer said. "When counsel designates an interviewee as a CW, counsel exposes the interviewee to risk of public disclosure of his name, and, potentially, professional or personal tumult."

Lyle Roberts of Cooley LLP, who represents Millennial, told Law360 on Friday that the case was without merit and expressed his gratitude to Judge Engelmayer taking a "serious look at confidential witness issues."

"We think his order provides an appropriate 'roadmap' for the plaintiffs' bar on how to handle confidential witnesses in future cases," Roberts said.

Counsel for plaintiffs did not immediately respond to requests for comment on Friday.

The plaintiffs are represented by Bernstein Litowitz Berger & Grossmann LLP, Labaton Sucharow LLP and Gold Bennett Cera & Sidener LLP.

Millennial Media is represented by Lyle Roberts of Cooley LLP.

The case is In re: Millennial Media Inc. Securities Litigation case number 1:14-cv-07923, in the U.S. District Court for the Southern District of New York.

--Editing by Kat Laskowski.