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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

8th Circ. Revives Investor's Suit Over Merger Disclosures

By **Rachel Graf**

Law360 (March 1, 2019, 6:37 PM EST) -- The Eighth Circuit said Friday a proposed class of investors has convincingly argued a biotechnology company may have excluded important information from premerger documents, reviving a type of lawsuit that has migrated to federal courts in recent years.

A three-judge panel said Transgenomic Inc.'s failure to include projections about net income and loss in its proxy statement filed with the U.S. Securities and Exchange Commission ahead of its merger with Precipio Inc. may have made the filing misleading, as shareholder Jesse Campbell alleges. Projections about net income and loss aren't immaterial, the judges said in their opinion.

"This court has considered net income to be among the three most valuable figures in determining the fairness of an acquisition under the Clayton Act," the panel said.

Lawsuits like Campbell's that allege insufficient M&A disclosures have become increasingly common in federal courts after the Delaware Chancery Court's 2016 Trulia ruling took issue with what are referred to as disclosure-only settlements in shareholders' M&A challenges.

These settlements typically require defendants to make additional disclosures about the deal that critics argue are insignificant. Critics claim the practice allows plaintiffs' attorneys to collect significant fees without much benefit to the investors.

In Campbell's lawsuit, he claimed Transgenomic omitted material information from its proxy statement in violation of the Exchange Act.

But U.S. District Judge John Gerrard dismissed the lawsuit in May because the information Transgenomic omitted didn't make any of the figures it included in its proxy statement inaccurate.

"To successfully state a claim for relief, there must be allegations that, if true, would call into question the accuracy of the information disclosed," Judge Gerrard said at the time.

The Eighth Circuit called this the "wrong inquiry." The net income and loss figures are in fact significant because they would have "significantly altered the total mix of information made available," the panel said.

Campbell's counsel Miles Schreiner of Monteverde & Associates PC cheered the opinion.

"We are pleased with the ruling and the fact that the court highlighted and rejected the erroneous standard many district courts have recently applied," Schreiner told Law360 in

an email.

Counsel for the defendants didn't respond Friday to a request for comment.

U.S. Circuit Court Judges Duane Benton, C. Arlen Beam and Ralph Erickson sat on the panel for the Eighth Circuit.

Jesse Campbell is represented by Juan Monteverde and Miles Schreiner of Monteverde & Associates PC.

The defendants are represented by Tucker DeVoe of Goodwin Procter LLP.

The case is Campbell v. Transgenomic et al. in the U.S. Court of Appeals for the Eighth Circuit.

--Editing by Amy Rowe.