

APR 22 2008

Central Laborers Pension Fund v. Merix Corp.
No. 06-35894

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RYMER, Circuit Judge, concurring.

I concur because the majority's is a fair read of *Vess v. CIBA-GEIGY Corp. USA*, 317 F.3d 1097, 1104-05 (9th Cir. 2003), and *PAE Gov't Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858-60 (9th Cir. 2007). That said, it is unclear to me how *Vess* – which is not a securities case – melds with *In re Stac Elec. Sec. Litig.*, 89 F.3d 1399 (9th Cir. 1996), and *In re Daou Sys., Inc.*, 411 F.3d 1006 (9th Cir. 2005) – which are. It is also difficult to square the strict liability nature of a Section 12 and 15 Securities Act violation with a *Vess* or *Stac* analysis. And it is tough to read the amended pleading in this case as claiming anything other than a classic securities fraud. For sure the magic words are missing, and the plaintiff is the master of the complaint; still the scheme alleged in the amended pleading walks and talks like fraud, as did the scheme averred in the original pleading. It's hard to say that Merix's reputational harm (which Rule 9(b) is there to protect) is any less obvious in the amended pleading than it was in the original pleading. Perhaps it is time we tried to straighten our law out.