
SEC Charges Former Executive with Insider Trading on a Misappropriation Theory—with a Twist

On August 17, 2021, the Securities and Exchange Commission (“SEC”) filed a complaint (the “Complaint”)¹ in the U.S. District Court for the Northern District of California against Matthew Panuwat, formerly a business development executive at Medivation, Inc. (“Medivation”), which is a mid-cap oncology-focused biopharmaceutical company. The Complaint alleges that on August 18, 2016, during the course of his employment at Medivation, Mr. Panuwat received an email from Medivation’s Chief Executive Officer stating that the company was about to be acquired by pharmaceutical giant Pfizer, Inc. (“Pfizer”). Within minutes of receiving this information, Mr. Panuwat allegedly used his work computer to purchase out-of-the-money, short-term stock options in Incyte Corporation (“Incyte”), another mid-cap oncology-focused biopharmaceutical company. He allegedly did not seek pre-clearance or authorization of his Incyte trades from anyone at Medivation, and did not inform anyone at Medivation about his Incyte trades.

On August 22, 2016, Medivation publicly announced that it would be acquired by Pfizer in an all-cash tender offer, at a significant premium to the company’s stock price. Over the course of the trading day, the price of Medivation shares rose by approximately 20%. On the same day, the price of Incyte shares rose by approximately 8%, and the value of Mr. Panuwat’s stock options roughly doubled, giving him profits of \$107,066.

The SEC claims that Mr. Panuwat violated Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The Complaint seeks an order (1) enjoining Mr. Panuwat from future violations of Section 10(b) and Rule 10b-5, (2) requiring him to pay a civil monetary penalty, and (3) barring him from serving as an officer or director of a public company.

In bringing this action, the SEC appears to be relying on a misappropriation theory, which the United States Supreme Court upheld in 1997 as a valid basis on which to impose insider trading liability in *United States v. O’Hagan*, 521 US 642 (1997). Under this theory, a person may be liable for insider trading if he or she uses material, nonpublic information for securities trading purposes in violation of a fiduciary duty owed to the information source.

The twist in this case, however, is that the information Mr. Panuwat allegedly received was not directly about the company whose securities he traded, and the information did not arise from any dealings between his employer and Incyte. The SEC likely will face challenges in showing that Medivation’s policies created a fiduciary duty that Mr. Panuwat breached, and that the information was material to Incyte. The Complaint alleges that Mr. Panuwat had agreed to maintain the confidentiality of Medivation’s information and that Medivation’s insider trading policy

¹ *Securities and Exchange Commission v. Matthew Panuwat*, Civil Action No. 4:21-cv-06322 (N.D. Cal. Filed August 17, 2021), which can be found [here](#).

expressly prohibited Mr. Panuwat from using confidential information about Medivation to trade in the securities of any publicly-traded company. The Complaint also alleges that Mr. Panuwat knew that investment bankers had identified Incyte as a Medivation peer company and that the acquisition of Medivation likely would lead to an increase in Incyte's stock price. Whether the misappropriation theory extends to this set of facts remains to be determined.

It is notable that the trading activity described in the Complaint came to the attention of the SEC's Enforcement Division in the first place, given the fact that the company whose securities were traded was not part of the acquisition. The case may signal a more expansive enforcement approach by the SEC. It also serves as a reminder to companies to include language in their insider trading policies prohibiting transactions in the securities of other companies.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Bradley Bondi (partner) at 212.701.3710 or bbondi@cahill.com; Kimberly Petillo-Décossard (partner) at 212.701.3265 or kpetillo-decossard@cahill.com; or Sarah Klein-Cloud (attorney) at 212.701.3231 or sklein-cloud@cahill.com; or email publications@cahill.com.

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