
INSIDER TRADING & DISCLOSURE UPDATE

Jury Affirms SEC's Shadow Insider Trading Theory Against Former Pharma Executive

On April 5, 2024, Matthew Panuwat, a former business development executive at biopharmaceutical company Medivation Inc., was found liable by a California federal jury in a closely watched case. Panuwat had allegedly traded in the stock of another pharmaceutical company on the basis of inside information he obtained from Medivation. Gurbir Grewal, Director of the SEC's Division of Enforcement, issued a statement on the same day that "there was nothing novel about this matter . . . this was insider trading, pure and simple."¹ While the case against Panuwat arguably represents a variation of the misappropriation theory of insider trading, rather than a novel enforcement theory, the outcome yields several important takeaways for company insiders and compliance professionals with regards to the scope of the misappropriation theory and the risks of trading in third-party companies when in possession of material non-public information ("MNPI") from any source that might, potentially, be relevant to the traded company.

Background

As discussed in our December 2023 [issue](#), the SEC filed a complaint against Panuwat in 2021 alleging that Panuwat engaged in insider trading, violating Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, when he traded in options of Incyte Corporation based on MNPI that Panuwat received about Medivation (*i.e.*, not directly about Incyte). In 2016, after a failed takeover attempt of the company, Medivation began exploring other potential buyers.² Panuwat was involved in the discussions and received information regarding the potential sale. The SEC argued that both Panuwat and Medivation's investment bankers viewed Medivation and Incyte as peer companies in the biopharmaceutical industry, and that Panuwat expected that a potential acquisition of Medivation would increase the attractiveness of peer companies like Incyte, who would themselves become potential acquisition targets, thereby causing their share prices to increase.³

On August 18, 2016, Medivation's CEO emailed Panuwat and several other executives and shared information that Pfizer, Inc. expressed overwhelming interest in Medivation and that Pfizer's CEO would call Medivation to discuss the final details of Pfizer's impending acquisition of Medivation. The SEC argued that "within minutes of receiving" the email, Panuwat purchased Incyte call options.⁴ Medivation publicly announced its merger agreement with Pfizer four days after Panuwat's trade, which led to an increase in Incyte's stock price by about 8%. Panuwat eventually made more than \$100,000 in profits from his Incyte options trade. According to the SEC, Panuwat "misappropriated Medivation's confidential information by purchasing . . . stock options in [Incyte], another mid-cap oncology-focused biopharmaceutical company whose value he anticipated would materially increase when the Medivation acquisition announcement became public."⁵

Panuwat filed for summary judgment in September 2023, primarily arguing that Medivation and Incyte were entirely different entities, that he had valid reasons for purchasing Incyte securities apart from any MNPI he received from Medivation, and that Medivation's policies did not prohibit him from investing in Incyte.⁶ Panuwat's motion was denied by the United States District Court for the Northern District of California on November 20, 2023. The court found genuine disputes of fact as to whether Panuwat received MNPI, whether that MNPI was material to Incyte, whether Panuwat breached his duty to Medivation by using such information, and whether Panuwat acted with scienter.⁷ Notably, the court held that the SEC could move forward with a breach of duty claim under three independent theories: two based on Medivation's own insider trading and confidentiality policies and the third based on traditional agency law independent of an official policy or agreement.⁸ Having survived summary judgment, the SEC's case against Panuwat proceeded to trial, which commenced on March 25, 2024.

Panuwat's Trial

The eight-day trial focused on several important issues for insider trading enforcement. The SEC and Panuwat's counsel presented arguments on whether Medivation and Incyte could be considered competitors and whether their stock price movements were correlated. In order to prove both the breach of duty and materiality prongs, the SEC needed to establish a link between Medivation and Incyte. On breach of duty, Medivation's Insider Trading Policy included a provision covering trading in both Medivation's securities and the "securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors" of Medivation.⁹ In his summary judgment motion, Panuwat had argued

that Incyte did not fall into any of these categories, and therefore, he did not breach a duty imposed by the Insider Trading Policy. The court rejected this argument, noting that the list was non-exclusive and a jury could find that the policy encompassed other companies of a type not specifically enumerated. On materiality, the SEC had the burden of showing a connection between Medivation and Incyte such that a reasonable investor would view the MNPI Panuwat received about Medivation as "altering the 'total mix' of information available about Incyte."¹⁰ In denying Panuwat's summary judgment motion, the court ruled that information "does not need to come from the issuer of the security to be material" and that establishing a "market connection" between Medivation and Incyte was critical for materiality.¹¹

During trial, the SEC's deputy chief economist and deputy director of the Division of Economic and Risk Analysis ("DERA"), Chyhe Becker, testified that Incyte's stock price hike was caused by Medivation's acquisition news due to a "spillover effect" that happens when a company's major announcement bumps both its own stock price and that of others in that industry, to the extent they are affected by that news.¹² Becker pointed to several articles that discussed acquisitions that could impact both Medivation and Incyte and concluded that spillover effects were relevant in the biotech industry. On the other hand, Medivation's former vice president of finance testified that Medivation and Incyte were not competitors in 2016 and he would not expect their stock prices to rise in tandem.¹³ The former Medivation executive focused on differing research, sales, and distribution functions between Medivation and Incyte.

In addition to the link between Medivation and Incyte, the parties presented arguments on whether the SEC was able to establish that Panuwat acted with scienter. In denying

Panuwat’s summary judgment motion, the court had ruled that the SEC demonstrated sufficient evidence to support a jury finding that Panuwat traded Incyte options while aware of MNPI or using MNPI, and that the SEC’s strongest evidence for scienter was the proximity of Panuwat’s receipt of the August 18, 2016 email from Medivation’s CEO and the initiation of his Incyte trades.¹⁴ During trial, Panuwat’s counsel argued Panuwat received hundreds of emails in August 2016 and that the SEC “created a myth that [Medivation’s CEO’s] email was somehow materially different, more definitive, the smoking gun[.]”¹⁵ When he took the stand, Panuwat argued that his decision to buy Incyte call options was not made because of any confidential information obtained from Medivation and that it did not occur to him that his trading in the stock of another biotech company during the Medivation acquisition process would violate securities laws.¹⁶ Instead, Panuwat pointed to a July 2016 analyst report recommending the purchase of Incyte call options before the company’s earnings report on August 9. While he did not purchase options at that time, Panuwat argued that he began watching Incyte’s stock price. The SEC, on the other hand, challenged Panuwat on his justification, noting that he did not mention it during his initial questioning by the SEC in May 2020.¹⁷

At the end of the trial, the court provided jury instructions requiring findings that (1) Panuwat owed a duty to Medivation, (2) Panuwat possessed non-public information material to Incyte as a result of his relationship with Medivation, (3) Panuwat purchased Incyte call options on the basis of the alleged MNPI and in breach of his duty to Medivation and (4) Panuwat knew, at the time of his trades, that the information was non-public and material, or acted recklessly.¹⁸ Following a short deliberation, the jury found that the SEC established the elements

of insider trading against Panuwat by a preponderance of the evidence.

Takeaways

While Panuwat may appeal the decision against him, there are some significant immediate takeaways from the jury’s decision:

- The basic elements of misappropriation-theory insider trading are consistent with the *Panuwat* case and the verdict illustrates the fact that, in certain instances, confidential, non-public information may be material to a broader set of third-party issuers in the insider trading context than some might expect.
- The determination of what constitutes a “competitor” or an entity with “market connection” will be a heavily factual inquiry based on a combination of business operations, industry analysis, and market price movements, and the SEC will be acting with the benefit of hindsight, knowing, for example, that the stock price in Company B moved following an announcement by Company A. Although “spillover” market effects are likely to be difficult to predict, a broad prohibition on such trading in polices, accompanied by training on the issues and risks, is important to inform trading employees and to help protect companies or firms from allegations of policy or control-related failures.
- Given that the jury’s *Panuwat* decision was based on a “preponderance of the evidence” standard, it is unclear whether shadow insider trading claims will be extended to a criminal setting with the more rigorous “beyond a reasonable doubt” requirement. However, it is likely that the SEC will continue to actively enforce insider trading laws, with this new tool in its belt.

Notes

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- ¹ SEC Press Release, *Statement on Jury’s Verdict in Trial of Matthew Panuwat* (Apr. 5, 2024), <https://www.sec.gov/news/statement/grewal-statement-040524>.
- ² See Compl. at ¶¶ 21-22, *SEC v. Panuwat*, 21-CV-06322 (N.D. Cal. Aug. 17, 2021), <https://www.sec.gov/files/litigation/complaints/2021/comp-pr2021-155.pdf> [hereinafter “Panuwat Complaint”].
- ³ *Id.* at ¶¶ 4, 21-23.
- ⁴ *Id.* at ¶ 33.
- ⁵ *Id.* at ¶ 4.
- ⁶ See Def.’s Mem. Supp. Summ. J. at 6, *SEC v. Panuwat*, 21-CV-06322 (N.D. Cal. Sept. 27, 2023).
- ⁷ See Order at 1, *SEC v. Panuwat*, 21-CV-06322 (N.D. Cal. Nov. 20, 2023) [hereinafter “Panuwat Order”].
- ⁸ *Id.* at 16-18.
- ⁹ Panuwat Complaint at ¶ 20.
- ¹⁰ Panuwat Order at 7.
- ¹¹ *Id.* at 7-8.
- ¹² Bonnie Eslinger, *Merger News Boosts Rivals, ‘Shadow Trading’ Jury Told*, Law360 (Mar. 27, 2024), <https://www.law360.com/articles/1818319/merger-news-boosts-rivals-shadow-trading-jury-told>.
- ¹³ Bonnie Eslinger, *Alleged ‘Shadow Trader’s’ Co-Worker Tells Jury Stocks Not Tied*, Law360 (Mar. 29, 2024), <https://www.law360.com/articles/1819221/alleged-shadow-trader-s-co-worker-tells-jury-stocks-not-tied>.
- ¹⁴ Panuwat Order at 20-21.
- ¹⁵ Bonnie Eslinger, *Jury Finds Pharma Exec ‘Shadow Traded’ With Inside Info*, Law360 (Apr. 5, 2024), <https://www.law360.com/securities/articles/1822388>.
- ¹⁶ Bonnie Eslinger, *Accused ‘Shadow Trader’ Takes Stand To Slam SEC’s Case*, Law 360 (Apr. 3, 2024), <https://www.law360.com/articles/1820717/accused-shadow-trader-takes-stand-to-slam-sec-s-case>.
- ¹⁷ *Id.*
- ¹⁸ Final (Proposed) Jury Instructions at 17, *SEC v. Panuwat*, 21-CV-06322 (N.D. Cal. Apr. 3, 2024).

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