

Ninth Circuit scrutinizes and dismisses COVID-related Exchange Act claims

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On March 25, 2024, a Ninth Circuit panel affirmed the dismissal of a putative securities class action alleging that a biopharmaceutical company misled the public in May 2020 about the development of a supposed COVID-19 “cure.” The Ninth Circuit found that the plaintiff failed to allege falsity or scienter with sufficient particularity.

On May 15, 2020, Sorrento Therapeutics, Inc. issued a press release explaining that it had developed an antibody, STI-1499, that “demonstrated 100% inhibition of SARS-CoV-2 virus infection in an in vitro virus infection experiment at a very low antibody concentration.” The same day, two articles were published referring to Sorrento’s announcement, one with the headline, “California biopharmaceutical company claims coronavirus antibody breakthrough.” The articles both explained that the antibody was undergoing further testing, and could potentially be offered as part of a “cocktail” of treatments.

The articles also included statements from two Sorrento executives. The CEO reportedly said: “We want to emphasize there is a cure. There is a solution that works 100 percent If we have the neutralizing antibody in your body, you don’t need the social distancing. You can open up a society without fear.” A vice president reportedly added: “As soon as it is infused, that patient is now immune to the disease For the length of time, the antibody is in that system. So, if we were approved [by the FDA] today, everyone who gets that antibody can go back to work and have no fear of catching COVID-19.” On May 15, 2020, the stock price increased substantially.

Within a week, executives made other statements, and the stock price dropped. For instance, the CEO reportedly said that “if [the antibody] gets through safety studies, if it demonstrates efficacy, it potentially is a cure—if you have the antibody in the blood and it prevents infection.”

On May 26, 2020, Andrew R. Zenoff, an investor in Sorrento, filed a putative securities class action alleging that Sorrento, its CEO, and its vice president misled investors with their May 15 statements about STI-1499 being a possible COVID-19 “cure.” The district court dismissed the action, finding that Zenoff had failed to make plausible showings of falsity or scienter.

Appealing to the Ninth Circuit, Zenoff argued that the defendants had misled investors. Writing for the unanimous panel, Circuit Judge Consuelo M. Callahan [rejected that argument](#). The panel scrutinized the context of the challenged statements and found that while the “enthusiasm for STI-1499 might have been overblown,” there was no promise of an immediate 100% cure. Judge Callahan wrote that the context was clear that the development of STI-1499 was in an early stage and no reasonable person would think that STI-1499 was being represented as an immediate cure for COVID-19 without further testing. The panel also found that the fact that a COVID-19 cure has yet to be discovered does not mean that, at the time defendants expressed enthusiasm about STI-1499, the statements were necessarily unwarranted or false.

With regard to scienter, Zenoff argued a number of points, including that: (1) the individual defendants had management roles and access to STI-1499 data; (2) there was a short period between when the defendants made the challenged statements and purported retractions; and (3) Sorrento was in a poor financial situation when the defendants made the statements in question. The panel dismissed each of these arguments.

First, it found that Zenoff failed to establish that the two executives had access to information that was not also available to the public. Second, the panel found that Sorrento never retracted the challenged statements, and later statements were consistent elaborations of the prior statements, with neither the challenged statements nor the purported retractions ever representing that STI-1499 was a 100% cure for COVID-19. Third, with regard to Sorrento's financial situation, the panel found that Sorrento had already taken steps to address its financial situation prior to the challenged statements, and that Zenoff failed to allege any suspicious insider trading history that could support scienter.

The panel's decision is a reminder of how the Private Securities Litigation Reform Act's heightened pleading requirements for federal securities actions can protect companies at the motion to dismiss stage. The panel recognized that while Zenoff had asserted that the defendants falsely claimed that STI-1499 was a 100% cure for COVID-19 with the intent of inflating Sorrento's stock price, the allegations were not set forth with the requisite particularity.

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