

9th Circuit won't revive fraud class action claiming investment bank fluffed client's share price

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(Reuters) - Judge Kenneth Lee of the 9th U.S. Circuit Court of Appeals is a hard sell for shareholders alleging fraud in securities class actions.

On Thursday, Lee wrote the 9th Circuit's opinion in [Panthera Investment Fund v. H.C. Wainwright \(2021 WL 1307882\)](#), affirming the dismissal of a class action alleging that Wainwright, a specialty investment bank, fraudulently issued a report that fluffed the target share price of a client, MannKind Corporation, without disclosing that MannKind was about to announce a dilutive stock offering at a lower price – with Wainwright acting as the placing agent.

The 9th Circuit ruled that shareholders failed to allege Wainwright's fraudulent intent. Lead counsel at Kirby McInerney had proposed two theories for why Wainwright was motivated to issue a report proposing a high target price for MannKind without disclosing the imminent offering at a lower price: that the bank's compensation from the stock offering would be higher if shares were trading at a higher price; and that the bank wanted to drum up interest in the offering because there was no pre-set minimum number of shares to be sold and Wainwright would benefit from increasing trading volume.

Neither theory held up, according to the 9th Circuit. "Generally, we expect that a financial motive for securities fraud will be clear; for example, someone inside a company stands to gain a substantial profit by engaging in deceptive behavior," wrote Lee for a panel that also included Judges Ronald Gould and Lawrence VanDyke. "But here, neither theory provides a clear financial incentive."

The bank was slated to receive the same compensation from the offering regardless of the company's share price, the panel said, and plaintiffs provided no plausible allegation that the offering would not have sold out if Wainwright hadn't issued the report suggesting an even higher target price for MannKind. Besides, the 9th Circuit said, Wainwright had more to lose — from sullyng its reputation and angering MannKind — than to gain from issuing the report.

Lee outlined the 9th Circuit's take on the case in memorable language: "The only plausible explanation for (Wainwright's) action is that someone there pulled a Bill Buckner and somehow let a glaring conflict pass by," he wrote. "Its conduct is more like an embarrassing Red Sox error than an elaborate Black Sox fraud. Simply put, a company's apparent error — even an embarrassing or inexplicable one — does not establish fraudulent intent, especially if the plaintiff cannot offer a plausible motive for the company's conduct."

This is not the first time that the 9th Circuit judge has emphasized his view that shareholder fraud class actions ought to clear a very high bar to proceed. Last year, in [In re Boff Securities Litigation \(2020 WL 5951150\)](#), Lee wrote a dissent arguing that allegations of misconduct from corporate whistleblowers should not be considered corrective disclosures without additional external confirmation of fraud.

"The plausibility standard provides little comfort to companies that may face securities fraud lawsuits based on unsubstantiated insider allegations," Lee wrote in the Boff case. Quoting a D&O insurer on the "menace" of shareholder class actions, Lee suggested that investors who survive dismissal motions can "bludgeon" companies into nuisance settlements.

"Even meritless securities fraud lawsuits impose an exorbitant cost on companies," Lee wrote in the Boff case.

I emailed Ira Press of Kirby McInerney about Thursday's decision but didn't hear back. Jay Auslander of Wilk Auslander, who argued at the 9th Circuit for the defendants, said via email that his team was "delighted but not surprised" by the 9th Circuit ruling.

"There never was any 'there' there and the court aptly found that none of the allegations supported the class claims, as we've maintained all along," Auslander said.

The case is Panthera Investment Fund v. H.C. Wainwright, No. 19-56048 at the 9th U.S. Circuit Court of Appeals.

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References

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