

Drugmaker MannKind Escapes Investors' Suit At 9th Circ.

By **Emilie Ruscoe**

Law360 (April 9, 2021, 8:36 PM EDT) -- The Ninth Circuit has affirmed a lower court's dismissal of a putative securities class action against investment bank H.C. Wainwright & Co. LLC claiming it artificially inflated trading prices for shares of drugmaker MannKind Corp. in advance of a "highly dilutive" offering of the company's shares.

In a published opinion authored by U.S. Circuit Judge Kenneth K. Lee, the three-judge panel on Thursday found that investors hadn't shown there was a plausible basis for the bank's alleged fraud. As a result, the shareholders "face a substantial hurdle" to show that the bank intentionally misled the public, the panel said.

In the latest version of their allegations, the shareholders claim that in October 2017, an H.C. Wainwright investment analyst wrote a report setting a \$7 buy target for MannKind shares after the company announced the U.S. Food and Drug Administration had approved a label change for the company's only FDA-approved drug.

The investors claim that the report pushed up MannKind's share price by 26% to a closing price of \$6.71. But the spike didn't last long. Later that evening, MannKind announced a registered direct offering of more than 10 million shares of common stock at \$6, noting that H.C. Wainwright would serve as the placement agent for the offering.

When markets opened the next morning, prices for MannKind shares trended down, closing at \$5.47 for a decline of 18%.

The proposed class would include those who bought shares between when the analyst's report went live and when the company announced its offering.

Alongside H.C. Wainwright, the suit names the company's CEO Mark Viklund and the report's author Oren Livnat.

U.S. District Judge John A. Kronstadt twice dismissed the action on the basis that the investors hadn't shown the company deliberately misled people, the second time with prejudice.

In their Thursday opinion, the appellate judges said that even though investors advanced two theories about why the bank might have deceived them, "neither theory is persuasive or plausible, as both are divorced from common experience."

Specifically, the investors contended that by driving up trading prices for MannKind's shares, H.C. Wainwright could have made more money. But the appeals court noted that the company would have received the same amount of compensation regardless of the trading price. The appeals court also noted that the bank's "snafu" would likely have strained its relationship with MannKind, from which the company stood to lose more than it gained.

Such conduct, the appellate panel said, "is more like an embarrassing Red Sox error than an elaborate Black Sox fraud," referencing respectively the mistake that cost the Boston Red Sox the 1986 World Series and a Major League Baseball game-fixing scandal from 1919 involving the Chicago White Sox.

The investors also suggested that H.C. Wainwright had attempted to use the report to generate additional interest in the offering. But the panel shot down that assertion, telling the shareholders that it didn't seem realistic to claim that H.C. Wainwright thought it would need such a report for the offering to sell out.

"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, such as selling shares before the company discloses negative information," the panel said. "But here, neither theory provides a clear financial incentive."

On Friday, Jay Auslander, an attorney for the company, told Law360 in an emailed statement that "we are grateful that the Ninth Circuit, applying well-settled law with respect to pleading specificity and scienter, affirmed the dismissal by the district court."

"Supposition and innuendo as to motive and intent should never be enough to sustain a securities claim, and the court forcefully rejected that effort here," he added.

Representatives for investors did not immediately respond to requests for comment Friday.

Judges Ronald M. Gould, Kenneth K. Lee and Lawrence VanDyke sat on the panel for the Ninth Circuit.

The investors are represented by Ira M. Press, Peter S. Linden and Angela M. Farren of Kirby McInerney LLP, Lionel Z. Glancy and Robert V. Prongay of Glancy Prongay & Murray LLP, and James R. Swanson, Jason W. Burge and Kathryn J. Johnson of Fishman Haygood LLP.

H.C. Wainwright and co-defendants are represented by Jay S. Auslander and Adam Itzkowitz of Wilk Auslander LLP, and Paul B. Salvaty and Jordan D. Teti of Hogan Lovells.

The case is Prodanova et al. v. H.C. Wainwright & Co. et al., case number 19-56048, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Adam LoBelia.