

Securities Litigation

Overview

Allegations of securities fraud, a frequent tactic of the plaintiffs' bar, have long been considered abusive and expensive to defend. Katten's Securities Litigation group has played a prominent role both in challenging these class actions in court and in curbing them through legislative action. Our litigators — including several Securities and Exchange Commission enforcement attorneys — have been instrumental in bringing much-needed change to the way such lawsuits are brought and resolved.

Creating new law

Our attorneys have been defending these types of cases for decades — particularly for life sciences, financial services and other sophisticated companies — and have seen and addressed nearly every conceivable situation. When plaintiffs' lawyers create new types of claims, we develop new legal theories to protect public companies from meritless lawsuits. As examples, we helped stem the wave of “say-on-pay” litigation following Dodd-Frank, we argued for additional requirements for plaintiffs to have standing under Section 16(b) of the Exchange Act, and we helped draft the Private Securities Litigation Reform Act.

Winning at the pleading stage

We are often called on to handle our clients' most complex securities suits, and we defend them creatively and aggressively. We make sure the courts understand the true cause of a drop in stock price so they can be comfortable dismissing such suits, confident that securities fraud has not been committed. Since Congress adopted the heightened pleading standards now in widespread use, we have focused our efforts on winning securities fraud cases at the pleading stage, saving our clients the expense and distraction of discovery and trial.

**"The team brings business acumen - their decisions are based on both legal analysis and real-world business judgment to determine clients' best course of action."
"They provide excellent client service. They are attentive and responsive."**

*- Chambers USA 2022
(New York, Litigation:
Securities) survey
response*

Defending against derivative actions

In reaction to the heightened pleading standards, some plaintiffs have changed tactics, pursuing their claims as stockholder derivative actions alleging breaches of fiduciary duty. Our attorneys have responded to these tactics with successful litigation of corporate governance and derivative actions in Delaware and other jurisdictions.

Addressing regulatory claims

We also represent clients targeted in regulatory investigations, whether in connection with shareholder suits or alone. Our focus is, first, on convincing regulators that enforcement action is not warranted, and then, if necessary, defeating any claims resulting from an investigation. In this manner, we regularly address and defend clients against actions by these regulatory bodies:

- Securities and Exchange Commission
- Commodity Futures Trading Commission
- Financial Industry Regulatory Authority
- State attorneys general
- Other federal and state authorities.

Our Experience

Section 10(b) litigation

- Defended Edwards Lifesciences (whose tissue replacement heart valves are implanted in more than 300,000 patients per year) and certain of its directors and officers in putative Section 10(b) class action in the US District Court for the Central District of California. The lawsuit alleged the company made false and misleading statements concerning the prospects, projected sales and demand for its innovative transcatheter heart valves (THV). Plaintiffs claimed that Edwards' market capitalization fell by more than \$1 billion when it revealed that its THV sales were progressing slower than expected. In an effort to gather information to support their claims, plaintiffs contacted numerous current and former employees of the company as well as a large number of hospital customers of Edwards. We undertook a concentrated effort to ensure that no such contacts were misleading, including by filing an *ex parte* motion for a protective order with the court. After failing to obtain

information to support their theories, plaintiffs dismissed the case without receiving any consideration.

- Defended Angie's List, and certain of its officers and directors, against two putative Section 10(b) securities class action lawsuits and two related state court derivative lawsuits alleging that defendants made misleading statements and omitted material information regarding the company's business model and financial prospects. Following consolidation, we obtained a complete dismissal of the class action lawsuits, which plaintiffs did not appeal. Plaintiff in one of the derivative actions thereafter filed an amended complaint but voluntarily dismissed it upon receiving our motion to dismiss that complaint for failure to state a claim. Plaintiff in the remaining derivative action then voluntarily dismissed it without any motion practice whatsoever, giving defendants a complete victory.
- Defended Amarin Corporation and certain of its officers and directors against a putative Section 10(b) securities class action lawsuit arising out of the company's ultimately unsuccessful application to the FDA to approve its lipid-active drug Vascepa for treatment of individuals with elevated cholesterol levels based solely on the results of a short-term study conducted pursuant to an with the FDA, rather than based on a longer-term outcomes study. After the FDA withdrew the SPA following inconclusive results in outcomes studies for different lipid-active drugs produced by other companies, and Amarin's stock price declined as a result, plaintiffs alleged that the FDA had previously told Amarin that two of those other studies would "provide important information" about lipid-active drugs but that Amarin had improperly failed to disclose the substance of that communication to the market. The court granted the company's motions to dismiss both an initial and an amended complaint, finding that plaintiffs had failed to allege any facts sufficient to establish a duty on Amarin's part to disclose the content of its alleged communication with the FDA; that victory was upheld on appeal.

Section 11 litigation

- Defended five of the largest securities underwriters in the world in connection with shareholder allegations that Skilled Healthcare, a provider of long-term health care and assisted living services, violated Sections 11, 12(a)(2) and 15 of the Securities Act of 1933 and Sections 10(b) and 20 of the Securities Exchange Act of 1934 when a former employee improperly dated certain account records such that the company's allowance for doubtful accounts was substantially understated. (Following an internal investigation, the company uncovered the dating issue and re-stated its financial results.) Plaintiff also brought Securities Act claims against the underwriters for

statements in connection with the company's initial public offering. After we presented the arguments we intended to make on behalf of the underwriters in a motion to dismiss, plaintiff agreed to dismiss its claims against them. Skilled Healthcare subsequently resolved the case, and the settlement included full releases for our clients without any payment by them.

- Defended Maxpoint Interactive, Inc. and its board of directors in a class action alleging claims under Sections 11 and 12 of the Securities Act. After MaxPoint's stock price declined more than 60% following its initial public offering, plaintiffs alleged that the company had failed to properly disclose that its newest customers were smaller and less stable than its previous customers and therefore less likely to spend as much money as the earlier customers and more likely to rescind or cancel purchases. The court granted our motion to dismiss, holding that plaintiffs failed to identify any material information the company had a duty to disclose in connection with its public offering.

Merger and corporate control litigation

- Defended Kensey Nash Corp. and its directors in a lawsuit alleging they breached their fiduciary duties in agreeing to sell the company to Koninklijke DSM N.V. Three different sets of plaintiffs filed suit in the Delaware Court of Chancery and sought expedition of the proceedings including discovery such that they could attempt to enjoin the transaction. We opposed plaintiffs' effort to expedite the proceedings before Vice Chancellor Parsons and, despite the liberal standard applicable to motions to expedite, the court denied plaintiffs' motion for expedition, thereby preventing the plaintiffs from attempting to enjoin the transaction.
- Defended Angie's List, Inc. and its directors against consolidated lawsuits in the US District Court for the District of Indiana alleging that defendants violated Section 14(a) of the Securities Exchange Act by supposedly omitting material information from the proxy statement the company filed in connection with its merger with HomeAdvisor, Inc. Prior to the shareholder vote on the proposed merger, we negotiated a limited disclosure-based settlement of all plaintiffs' allegations without the requirement of any discovery.

Financial industry representation

- Defend one of the largest financial services companies in the world against putative class claims relating to payment for order flow, the duty of best execution and alleged preferencing of HFT firms in a private order-execution venue. The suit alleged that, by paying for order flow, our client induced a

retail broker-dealer to route its orders to our client, which then routed some of the orders to its "dark pool," where they were exposed to alleged predatory trading by HFT firms. The case is significant in that it is one of only a few nationwide in which private plaintiffs have sought to recover from a public or private exchange – instead of, or in addition to, their brokers – based upon alleged improper order-handling and order-execution practices. The court granted our client's motion to dismiss, finding that plaintiffs' claims were precluded by the Securities Litigation Uniform Standards Act.

- Defended Access International Advisors Ltd. and affiliated companies against a complaint in the US District Court for the Southern District of New York alleging that defendants aided and abetted Bernard Madoff's notorious Ponzi scheme by funneling billions of dollars from primarily European investors to Madoff via two hedge funds the defendants managed: Luxalpha SICAV and Groupement Financier Ltd. We obtained dismissal (affirmed by the US Court of Appeals for the Second Circuit Court) on the ground that the complaint failed to adequately show that defendants – as opposed to Madoff himself – were the proximate cause of plaintiff's injuries.

Foreign company representation

- Represented GW Pharmaceuticals PLC (UK) and certain of its officers in a putative Section 10(b) securities class action lawsuit filed in the US District Court for the Southern District of New York after the company publicly disclosed that it had experienced difficulties accounting for the accrued costs of certain clinical trials. Following telephonic meetings and a live presentation to counsel for the putative class in which we presented evidence concerning GW's internal controls, plaintiffs voluntarily dismissed the case without consideration before defendants were required to incur the cost of filing a motion to dismiss.
- Defended Camtek, Ltd. (Israel) and its directors and officers in securities class action covering a class period in which plaintiff alleged Camtek inflated its projected and reported revenues by recognizing revenue for products still under evaluation and by factoring receivables and utilizing letters of credit. Plaintiff also challenged certain of Camtek's transactions with its primary stockholder. The court granted Camtek's initial motion to dismiss on the grounds that it lacked subject matter jurisdiction over a purported securities case brought by a foreign citizen against a foreign company. We made the argument that the court lacked subject matter jurisdiction before the issue came to prominence by the US Supreme Court's grant of *certiorari* and subsequent decision on the issue in *Morrison v. National Australia Bank, Ltd.* Camtek's motion to dismiss the second amended complaint was granted

based on plaintiff's failure to allege falsity, scienter and loss causation. The court gave plaintiff leave to file a third amended complaint, which it did. Camtek filed a motion to dismiss the third amended complaint, which was granted. Our argument in connection with the third motion to dismiss had to address SEC Division of Corporation Finance comment letters that had become public and that plaintiff learned of between the second and third amended complaints. Those comment letters made specific reference to Camtek's inventory disclosures that plaintiff had asserted Camtek was manipulating to hide by recognizing revenue for products still under evaluation. The court granted the third motion to dismiss with prejudice and entered judgment for Camtek, which plaintiff did not appeal.

Other recent matters of note

- Defended nationwide operator of physical therapy clinics against a putative Section 10(b) securities class action alleging that the company's accounting restatement resulted from a knowing mischaracterization of non-controlling interests in its clinics held by the clinics' managing therapists. The US District Court for the Southern District of New York dismissed the allegations with prejudice, finding that plaintiffs had alleged no facts from which fraudulent intent could be inferred.
- Defended pharmaceutical company and certain of its officers and directors in a putative securities class action lawsuit filed in the US District Court for the District of New Jersey. Plaintiff alleged that defendants violated Section 10(b) and Section 11 by making optimistic statements about approval of its lead drug candidate by the European Medicines Agency based on a Phase 2 study without disclosing allegedly critical statements the EMA made during the process. The court granted our motion to dismiss, finding as a matter of law that biopharmaceutical companies have no duty to disclose negative interim feedback by regulators.
- Defended pharmaceutical company and certain of its officers against a putative securities class action lawsuit filed in the US District Court for the District of New Jersey. Plaintiff alleged that defendants misrepresented the likelihood that the FDA would approve the client's leading drug candidate and thereby caused its stock price to be artificially inflated, but dropped the suit voluntarily following discussions with Katten attorneys.
- Represented individual in a California lawsuit alleging breaches of fiduciary duty and related claims against every former officer and director of an Internet company and two cybersecurity companies for allegedly looting the company or otherwise enriching themselves at the expense of the

stockholders. After our client won two demurrers (motions to dismiss) in a row, plaintiff settled on very favorable terms rather than attempt to further amend his complaint to try to state a viable claim against the client.

- Defended international developer and manufacturer of nutritional ingredients and medical foods, and its officers and directors, in securities class action brought under Sections 11, 12(a)(2) and 15 of the Securities Act and Sections 10(b) and 20 of the Securities Exchange Act in the US District Court for the District of New Jersey. Plaintiffs alleged our clients failed to disclose that sales of a product would be greatly affected by changes in the Chinese regulations of infant formula manufacturers. After we succeeded in getting most of the claims dismissed on the pleadings, plaintiff settled the remaining claims for substantially less than defendants' insurance policy limits.
- Defended multiple options market makers in a putative securities class action alleging violations of Section 10(b) of the Securities Exchange Act in a dividend recapture strategy executed on the PHLX options exchange. The US District Court for the Eastern District of Pennsylvania dismissed the case, finding plaintiff had made no showing of illegal conduct.

Key Contacts



Bruce G. Vanyo

Partner and Co-Chair, Securities Litigation Department

New York
+1.212.940.8787
bruce@katten.com



Michael J. Diver

*Partner and Co-Chair, Securities Litigation Department
and Co-Chair, Securities Enforcement Defense*

Chicago
+1.312.902.5671
michael.diver@katten.com

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