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 INVESTOR CHOICE ADVOCATES NETWORK

7  
 8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

11  
 12 SECURITIES AND EXCHANGE  
 COMMISSION,

13 Plaintiff,

14 vs.

15 MATTHEW PANUWAT,

16 Defendant.

CASE NO. 21-cv-06322-WHO

**BRIEF FOR AMICUS CURIAE  
 INVESTOR CHOICE ADVOCATES  
 NETWORK IN SUPPORT OF  
 DEFENDANT’S MOTION FOR  
 SUMMARY JUDGMENT**

Date: November 8, 2023  
 Time: 2:00 p.m.  
 Hon. William H. Orrick

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1 **I. INTRODUCTION**

2 The Securities and Exchange Commission’s (“SEC” or “Commission”) complaint rests on  
3 a fundamental assumption. The SEC asserts that a company’s insider trading policy can preclude  
4 an employee from trading in *a competitor’s stock*, which policy can then anchor civil regulatory  
5 and possibly criminal sanctions. *Amicus* highlights this assumption because (1) it is legally  
6 unsupported, and (2) the SEC’s position will have enormous impact, not just in this case and  
7 against the individual defendant, but more broadly on many other market participants nationwide.  
8 In his motion for summary judgment, Defendant has addressed the legal shortcomings of the  
9 SEC’s case, and *amicus* will not repeat those points here. Instead, *amicus* will describe the  
10 incredible harm to market integrity and retail investors that would result from adoption of the  
11 SEC’s novel theory in this case.

12 **II. THE SEC’S SHADOW INSIDER TRADING POLICY WILL HARM RETAIL**  
13 **INVESTORS AND MARKET INTEGRITY**

14 The overly expansive (and legally unsupported) theory of insider trading put forth by the  
15 SEC in this case will inadvertently harm the very retail investors and market integrity the SEC’s  
16 own stated mission requires it to protect. This is because when taken to its logical conclusion, the  
17 SEC’s theory of liability in this case would run the risk of creating numerous industry-wide  
18 and/or sector-wide trading blackout periods, repeatedly, whenever employees possess nonpublic  
19 information about their own employers that may, or may not, implicate trends or developments  
20 for their employers’ competitors.

21 A. Trading On the Basis of Nonpublic Information Contributes to Price  
22 Accuracy

23 Fundamental to the SEC’s case (and all federal securities fraud cases) is the notion that the  
24 prices of publicly traded securities fully reflect all available information, known as the efficient  
25 market hypothesis. *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2417 (2014)  
26 (Thomas, J., concurring). Here, the SEC makes the connection between information and stock  
27 prices when it argues, “The Medivation Acquisition News Was Material to Incyte’s  
28 Shareholders. . . . Incyte’s stock price, which had closed at \$76.11 on Friday, August 19, opened

1 on August 22 trading at \$79.80 and closed at \$81.98, about 8% higher than the prior trading day’s  
2 close.” (SEC Opp. at 8). Implicit in the SEC’s position is the notion that Incyte’s stock price on  
3 August 19 did not reflect the news about the Medivation acquisition. Thus, the SEC would  
4 presumably contend, retail investors who sold Incyte’s stock on August 19, before the Medivation  
5 news was fully reflected in Incyte’s stock price, were at an informational disadvantage and sold  
6 too cheaply, failing to capture the value of the Medivation news that would only be reflected in  
7 Incyte’s stock price days later after Medivation publicly disclosed the transaction with Pfizer.  
8 The SEC’s shadow insider trading theory, however, would exacerbate the extent to which retail  
9 investors are disadvantaged by stock prices that do not fully reflect all material information.

10 Trading on the basis of material nonpublic information “will always push stock prices in  
11 the ‘correct’ direction. That is, the effect of insider trading will always be to move a share’s price  
12 towards the level correctly reflecting all the real facts about the company.”<sup>2</sup> Thus, the prohibition  
13 against insider trading involves a trade-off: we sometimes tolerate “inaccurate” share prices that  
14 do not yet reflect all available information, public and nonpublic, in order to prevent insiders from  
15 profiting from their possession and use of information unknown to the market at large. In other  
16 words, we don’t allow some insider trading even though permitting such trading would “push  
17 stock prices in the ‘correct’ direction” to more quickly reflect the nonpublic information.

18 Just as permitting too much trading on nonpublic information under certain conditions  
19 might undermine the integrity of the markets, prohibiting *all or too much* trading on nonpublic  
20 information in other circumstances might undermine the integrity of the markets if the investing  
21 public believes prices do not reflect all relevant information, whether publicly available or not.  
22 *See* H.R. REP. NO. 100–910, at 8 (1988) reprinted in 1988 U.S.C.C.A.N. 6043, 6045 (legislative  
23 history of the Insider Trading and Securities Fraud Enforcement Act of 1988) (noting economists  
24 and academics who argue “the faster the market price reflects the nonpublic information, the  
25 more smoothly the market functions,” and “the investing public has a legitimate expectation that  
26

27 <sup>2</sup> Henry G. Manne, *Insider Trading and Property Rights in New Information*, 4 CATO J. 933,  
28 935-36 (1985) (citing Hsiu-Kwang Wu, *An Economist Looks at Section 16 of the Securities  
Exchange Act of 1934*, Columbia Law Review 68 (February 1968): 260—9).



1 the prices of actively traded securities reflect publicly available information about the issuer of  
 2 such securities. According to this view, the small investor will be—and has been—reluctant to  
 3 invest in the market if he feels it is rigged against him.”).

4 B. The Supreme Court has Previously Rejected Similar Government Efforts to  
 5 Broadly Prohibit Trading on Nonpublic Information

6 The issue raised by this case is how much “correctional” trading by people with nonpublic  
 7 information should be tolerated. At one end of the spectrum, the Supreme Court has rejected a  
 8 prohibition on all instances of trading by anyone with nonpublic information. In rejecting the so-  
 9 called equal access test—imposing trading liability on the mere possession of material nonpublic  
 10 information, the Supreme Court recognized that some trading based on nonpublic information is  
 11 legitimate and permissible. As described by one critic of insider trading regulation:

12 [I]n *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394  
 13 U.S. 976 (1969),] Judge Sterry R. Waterman’s majority opinion interpreted  
 Securities Exchange Act § 10(b) and SEC Rule 10b-5 thereunder as mandating  
 that:

14 [A]nyone in possession of material inside information must either  
 15 disclose it to the investing public, or, if he is disabled from  
 16 disclosing it in order to protect a corporate confidence, or he  
 17 chooses not to do so, must abstain from trading in or recommending  
 the securities concerned while such inside information remains  
 undisclosed.

18 Just over a decade later, however, in *Chiarella v. United States*, Justice Powell’s  
 19 majority opinion expressly rejected that proposition, explaining that ‘a duty to  
 disclose under §10(b) does not arise from the mere possession of nonpublic market  
 information.’

20 Why did the Supreme Court cut the heart out of *TGS*? Justice Powell’s main  
 21 concern was the risk that broad application of the equal access test would  
 criminalize legitimate trading activity.<sup>3</sup>

22 At the other end of the spectrum, in *Chiarella*, the Supreme Court clearly prohibited  
 23 trading on the basis of material, nonpublic information by insiders who owe a duty to the  
 24 company’s shareholders, but even in that “classical insider” context, the Supreme Court  
 25 recognized the value of permitting *some* trading on nonpublic information:

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 28 <sup>3</sup> Stephen M. Bainbridge, *Equal Access to Information: The Fraud at the Heart of Texas Gulf Sulphur*, 71 SMU L. Rev. 643 (2018).

1 In *Chiarella*, Justice Powell noted that a broad insider trading prohibition might  
2 ban ‘a tender offeror’s purchases of target corporation stock before public  
3 announcement of the offer,’ a step Congress clearly had declined to take when it  
4 adopted the Williams Act. In the subsequent *Dirks* opinion, Justice Powell further  
5 explained that such a broad policy basis for regulating insider trading implied a  
6 ban that ‘could have an inhibiting influence on the role of market analysts, which  
7 the SEC itself recognizes is necessary to the preservation of a healthy market.’<sup>4</sup>

8 Indeed, in *Dirks*, the Supreme Court recognized the “inhibiting influence” the SEC’s proposed  
9 universal disclose or abstain rule would have on market participants and quoted the SEC about  
10 the fact that “market efficiency in pricing is significantly enhanced by initiatives to ferret out and  
11 analyze information, and thus the analyst’s work redounds to the benefit of all investors.”<sup>5</sup>

12 Even after the Supreme Court expanded insider trading liability beyond classical insiders  
13 to include those “outsiders” who “misappropriate” information in *U.S. v. O’Hagan*, 521 U.S. 642  
14 (1997), the trading ban was not absolute; the Court rooted its decision in a company’s property  
15 rights, stating, “[a] company’s confidential information . . . qualifies as property to which the  
16 company has a right of exclusive use.” Because the misappropriation insider trading theory turns  
17 on the property rights belonging to the source of the information, trading restrictions, if any, can  
18 be the subject of contractual language between the trader and the source.

19 It is one thing for the SEC to pursue a defendant for trading in his own company’s shares  
20 or even the shares of a counterparty to an unannounced acquisition as contemplated in *O’Hagan*.  
21 But here the SEC seeks to extend the misappropriation theory in a way that would allow publicly  
22 traded companies to restrict by contractual obligation any trading in the stock of “significant  
23 collaborators, customers, partners, suppliers, or competitors” *unless it benefited the company*.  
24 (SEC Complaint at ¶ 20 and SEC Opp. at 26).

25 Allowing a publicly traded company to restrict trading in its competitors’ stock unless it  
26 benefits the company and anchoring civil and possibly criminal liability to such facially self-  
27 serving prohibitions, would lead to perverse results harmful to retail investors and the integrity of

28 <sup>4</sup> Cf. Stephen M. Bainbridge, *A Critique of the Insider Trading Prohibition Act of 2021*, 2021 U.  
Ill. L. Rev. Online 231 (Aug. 8, 2021) (an expansive prohibition of insider trading “could have an  
inhibiting influence on the role” of those whose efforts to find and act upon new information  
contribute substantially to the efficiency of the stock markets).

<sup>5</sup> *Dirks v. SEC*, 463 U.S. 646, 658 n. 17 (1983).

1 the market. Here, the SEC agrees that Incyte’s stock price was artificially low in the days before  
2 the Medivation/Pfizer transaction was announced. (SEC Opp. at 8). In the SEC’s view,  
3 Medivation had the power to both keep its competitor’s stock price artificially low by restricting  
4 Medivation’s employees from “pushing” Incyte’s share price in the right direction by purchasing  
5 shares and, sua sponte, the power to impose potential civil regulatory and/or criminal liability for  
6 its employees who fail to comply, all with the SEC’s support. That cannot be what Congress  
7 intended. Before the public announcement of the Medivation/Pfizer transaction, Incyte’s share  
8 price did not reflect all available information, and the SEC would allow Incyte’s competitor,  
9 Medivation, to keep Incyte’s share price depressed to benefit Medivation. Such a result would be  
10 anathema to the long line of authority permitting trading while in possession of material,  
11 nonpublic information necessary to the preservation of a healthy market. Allowing companies  
12 the ability to contractually restrict trading in a competitor’s stock to keep the prices of that stock  
13 artificially low (and not reflective of relevant, material information), with possible assistance by  
14 the SEC and criminal authorities, would lead precisely to the result Congress sought to avoid:  
15 “the small investor will be . . . reluctant to invest in the market if he feels it is rigged against him.”  
16 *See* H.R. REP. NO. 100–910, at 8 (1988).

17 One commentator articulated as follows the chilling effect such a result would have on  
18 legitimate trading activity based on nonpublic information:

19 Where such information from an insider may arguably be viewed as MNPI about a  
20 particular company, the prudent investment professional will not trade that  
21 company’s stock until the information becomes public. But the investment  
22 professional focuses on the industry as a whole and will still be aware of such  
23 information in formulating general industry viewpoints, in advising clients and  
24 others trading in other companies in the industry, and possibly in making personal  
25 trades in other companies in the industry.

26 Particularly when viewed with hindsight – as insider trading cases always are –  
27 developments concerning one company can potentially look material to a wide  
28 range of other companies. Yet it cannot be that all of these other companies will be  
off limits for investment to those with possible MNPI about the first company. For  
example, information about strong demand for one company’s product can  
obviously indicate demand for its industry peers’ products – thus a reason to invest  
in those peer companies. And information about one company can also indicate  
demand for raw materials and components offered by its key suppliers – a reason  
to invest in the suppliers. And such information can likewise indicate demand for  
retailing, delivery, installation, and other services needed to bring the company’s

1 product to consumers. Information about one company can influence views of  
2 numerous other companies. . . .

3 Uncertainty chills action, and following *Panuwat*, mere possession of MNPI about  
4 any company may inhibit trading in certain other companies, particularly those in  
5 similar businesses, as they theoretically could be indirectly affected by the MNPI.<sup>6</sup>

6 Notably, anchoring liability for insider trading to the terms of a company’s insider trading  
7 policy could also have unforeseen, inconsistent, and possibly even unlawful consequences due to  
8 the fact that not all company insider trading policies extend to trading in competitors’ securities  
9 like the Medivation policy.<sup>7</sup> Imagine, trader #1 at publicly traded biopharmaceutical company A,  
10 which has a broad, expansive insider trading policy, could find himself charged by the SEC and  
11 Department of Justice for trading in competitor’s stock while in possession of material nonpublic  
12 information about his own company A, while his next-door neighbor, trader #2 at  
13 biopharmaceutical company B that has no such prohibition on trading in other companies’  
14 securities, could engage in the exact same conduct free of any regulatory peril. That cannot be  
15 the law. Investors should not run the risk of civil regulatory and possibly criminal liability merely  
16 because they happen to work for an employer that chooses to broadly prohibit their employees  
17 securities trading.

### 18 **III. THE SEC SHOULD ENGAGE IN RULEMAKING OR SEEK CONGRESSIONAL 19 AUTHORITY RATHER THAN PURSUING MAJOR CHANGE THROUGH 20 PIECEMEAL LITIGATION**

21 The lack of clarity around insider trading liability has led to calls<sup>8</sup> for explicit statutory  
22 authority from Congress. And in fact, proposed legislation has been introduced to provide such

23 <sup>6</sup> Stephen J. Crimmins, “*Shadow Trading*” *Becomes Insider Trading*, The Columbia Blue Sky  
24 Blog (Mar. 28, 2022) (*available at* [https://clsbluesky.law.columbia.edu/2022/03/28/shadow-  
25 trading-becomes-insider-trading/#\\_ftnref18](https://clsbluesky.law.columbia.edu/2022/03/28/shadow-trading-becomes-insider-trading/#_ftnref18)).

26 <sup>7</sup> Brian Jacobs, *Jumping At Shadows: The Implications of SEC v. Panuwat*, Forbes, Jan. 26, 2022  
27 (reporting that “researchers found that out of 267 companies with insider trading policies, only  
28 53% prohibit trading other companies’ stock based on non-public information”)

<sup>8</sup> Testimony of Professor John C. Coffee, Columbia Law School, before U.S. House of  
Representatives Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets of  
the Financial Services Committee (Apr. 3, 2019) (*available at* [https://www.congress.gov/116/meeting/house/109256/witnesses/HHRG-116-BA16-Wstate-  
CoffeeJ-20190403.pdf](https://www.congress.gov/116/meeting/house/109256/witnesses/HHRG-116-BA16-Wstate-CoffeeJ-20190403.pdf)).

1 clarity, but Congress has not reached consensus on the form of such statutory guidance.<sup>9</sup> This  
2 Court should not impose “shadow trading” liability in this case in the absence of clear  
3 Congressional delegation of authority to the SEC, which does not exist.

4 In specific instances, Congress has delegated regulatory authority to certain federal  
5 agencies. However, in what has become known as the “major questions doctrine,” the Supreme  
6 Court has held that when an agency seeks to use its delegated authority to regulate an issue of  
7 major national significance, that agency’s authority to do so must be supported by clear, and not  
8 vague or ambiguous, statutory authorization. *See, e.g., MCI Telecomms. Corp. v. AT&T Co.*, 512  
9 U.S. 218 (1994) (rejecting Federal Communication Commission’s waiver of tariff requirement);  
10 *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (rejecting Food and Drug  
11 Administration’s regulation of tobacco industry based on statutory authority over “drugs” and  
12 “devices”); *Gonzales v. Oregon*, 546 U.S. 243 (2006) (rejecting Attorney General’s regulation of  
13 assisted suicide drugs under his statutory authority over controlled substances).

14 Most recently, in *W. Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2620 (2022), the  
15 Supreme Court ruled that Section 111(d) of the Clean Air Act did not give the Environmental  
16 Protection Agency (“EPA”) broad authority to regulate certain greenhouse gas emissions. In his  
17 concurring opinion, Justice Gorsuch observed that “when agencies seek to resolve major  
18 questions, they at least act with clear congressional authorization and do not ‘exploit some gap,  
19 ambiguity, or doubtful expression in Congress’s statutes to assume responsibilities far beyond’  
20 those the people’s representatives actually conferred on them.” *W. Virginia*, 142 S. Ct. at 2620  
21 (2022) (Gorsuch, J., concurring) (citing *NFIB v. Osha*, 142 S. Ct. 661, 669 (2022)) (internal  
22 quotations and citations omitted).

23 The Court ultimately found that no such authorization existed under the Clean Air Act. In  
24 determining that the EPA’s decision constituted a “major question” in *West Virginia*, the Supreme  
25 Court observed that the EPA’s decision would have “vast economic and political significance”  
26

27 <sup>9</sup> Insider Trading Prohibition Act, H.R. 2655, which passed in the House of Representatives on  
28 May 18, 2021, and was referred to the Senate Committee on Banking, Housing, and Urban  
Affairs (*available at* <https://www.congress.gov/bill/117th-congress/house-bill/2655/text>).

1 involving “billions of dollars of impact” (*W. Virginia*, 142 S. Ct. at 2604) “representing a  
2 ‘transformative expansion in [its] regulatory authority’ . . . that Congress had conspicuously and  
3 repeatedly declined to enact itself.” *W. Virginia*, 142 S. Ct. at 2610. In describing the EPA’s  
4 regulatory decision, the Supreme Court could just as easily have been describing the SEC’s  
5 attempt to expand its authority over “shadow trading” despite the vast economic and political  
6 significance such a decision would have and in the absence of Congressional delegation to do so.

7 At a minimum, in the absence of clarity from Congress, the SEC should subject its  
8 “shadow trading” theory to the rigors and public scrutiny of the rulemaking process.<sup>10</sup> When the  
9 SEC attempts to increase or decrease its jurisdiction through rulemaking, the public (including  
10 investors) must have the opportunity to comment, and challenge in court, the extent of applicable  
11 statutory authority in a transparent and predictable manner. *See, e.g., Digital Realty Trust, Inc. v.*  
12 *Somers*, 583 U.S. \_\_\_\_ (2018) (SEC promulgated rule expanding “whistleblower” beyond  
13 statutory limitations in Dodd-Frank Act); *Goldstein v. Securities and Exchange Commission*, 451  
14 F.3d 873 (D.C. Cir. 2006) (SEC promulgated rule expanding “client” beyond statutory authority  
15 in Investment Advisers Act of 1940); *Financial Planning Ass’n v. SEC*, 482 F.3d 481 (D.C. Cir.  
16 2007) (SEC promulgated rule defining “investment adviser” in a manner inconsistent with the  
17 Investment Advisers Act of 1940).

18 By proceeding by way of this litigation rather than seeking Congressional delegation of  
19 authority or by engaging in public rulemaking, the SEC has denied the public and investors the  
20 opportunity to evaluate and weigh in on whether the SEC’s proposed expansion of insider trading  
21 liability in a way that would permit public companies to prohibit trading in their competitors’  
22 stock with restrictive contractual provisions imposed on employees is consistent with both its  
23 stated mission to protect investors and market integrity, as well as its statutory authority.

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27 <sup>10</sup> *See* Randy L. Koonce, Student Note, *Into the Shadows: A Rule for the Prevention of Shadow*  
28 *Trading*, 47 S. Ill. U. L.J. (2022) (available at [https://law.siu.edu/\\_common/documents/law-journal/articles-2022/fall-2022/5---Koonce.pdf](https://law.siu.edu/_common/documents/law-journal/articles-2022/fall-2022/5---Koonce.pdf)).



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**IV. CONCLUSION**

For all the foregoing reasons, the Court should grant Defendant’s Motion for Summary Judgment.

DATED: October 27, 2023

Respectfully submitted,

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