

## SEC Enforcement Case Summary Shadow Theory Insider Trading Litigation in the Trial of Matthew Panuwat

On April 5, 2024, a civil jury found a former biopharmaceutical executive, Matthew Panuwat, liable for insider trading under a novel legal theory with potentially far-reaching implications for the government's enforcement of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, as well as potential criminal insider trading prosecutions. In August 2021, the Securities and Exchange Commission (**SEC**) filed charges against Panuwat, a former Senior Director of Business Development at Medivation Inc. (Ticker: MDVN) for insider trading under the so-called "shadow trading" theory. Shortly after learning that Medivation would be purchased by Pfizer, Panuwat purchased call options on Incyte Corporation stock, one of a handful of similar publicly traded biopharmaceutical companies focused on late-stage oncology treatments. When Pfizer's acquisition of Medivation was publicly announced a few days later, Incyte's stock increased 7.7% and Mr. Panuwat made approximately \$110,000 from his call options.

Panuwat subsequently filed a motion to dismiss the SEC's complaint in January 2022. However, in November 2023, a federal district court denied summary judgment. The case proceeded to an eight-day jury trial that began on March 25, 2024. After two hours of deliberation, on April 5, the jury returned their verdict, finding Panuwat liable for insider trading. SEC litigation staff successfully argued that trading in the securities of one company based upon material nonpublic information about a separate company (in whose securities the defendant does not trade) can nevertheless violate the federal securities laws. The April verdict notably established that the "shadow theory" of insider trading may now be considered a viable theory.

Unlike the classical theory, in which insider trading is committed based on the information about an issuer and trades in the same issuer, shadow theory makes it possible for a recipient of information about one issuer to trade in the securities of a close competitor and commit insider trading, if the competitor is a "close comparable" to the subject of the information.

Around the same time as the April 2024 jury verdict, the SEC settled enforcement on a similar theory which it brought in 2021, showing that this may prove to be a viable theory for the SEC to bring civil and civil insider trading cases in the right circumstances. The court in the Panuwat case accepted the SEC's theory that the duty element of insider trading is not dependent on a policy that prohibits trading in a competitor, but rather, on the theory of agency. On May 30, 2024, the U.S. District Court for the Northern District of California entered final judgment against a Silicon Valley technology company, Artista Networks, Inc., in which the SEC settled with the founder on allegations of insider trading using the shadow theory. On May 29, 2024, the SEC filed a motion for final judgment seeking to impose civil penalties against Panuwat, which would result in another successful shadow theory enforcement settlement.

Panuwat filed a motion for a new trial and has asked the court to rule on the sufficiency of the evidence presented by the SEC connecting his trades and the timing of his apparent receipt of inside information about his employer's competitor, Incyte, and further to the Incyte share price after the merger announcement. Panuwat asserts that the evidence was insufficient as a matter of law to establish the intent required to commit insider trading. A hearing on the matter of Panuwat's penalty as well as the motion challenging the sufficiency of the SEC's' evidence is scheduled for August 7, 2024.

See April 2024 Litigation Release - <https://www.sec.gov/litigation/litreleases/lr-25970>

See April 2021 Press Release - <https://www.sec.gov/news/press-release/2021-155>

See SEC Statement - <https://www.sec.gov/news/statement/grewal-statement-040524>