

SEC Enforcement Case Summary Insider Trading Including Use of Rule 10b5-1 Trading Plan

On December 30, 2024, the SEC announced insider trading charges against Cameron Durrant and Dale B. Chappell, the CEO and Chief Scientific Officer, respectively, of New Jersey-based biopharmaceutical company Humanigen, Inc. Trades were made through three private fund vehicles under Chappell's control. On December 23, 2024, in a parallel action, the Department of Justice's Fraud Section and the U.S. Attorney's Office for the District of New Jersey announced unsealed criminal charges against Chappell.

According to the SEC's complaint, between June and August 2021, Chappell and Durrant sold Humanigen stock while in possession of material nonpublic information (MNPI) that the U.S. Food and Drug Administration was unlikely to approve Emergency Use Authorization (EUA) for Humanigen's newly developed COVID-19 drug, lenzilumab. The SEC alleged that Chappell and three investment vehicles under his control sold more than 3.8 million shares of Humanigen for more than \$68 million, and Durrant sold more than 80,000 shares for more than \$1.68 million. When Humanigen announced that the FDA had denied EUA for lenzilumab on September 9, 2021, Humanigen's stock price dropped by nearly 50 percent. The SEC alleges that, as a result of their insider trading, Chappell avoided losses of more than \$38 million while Durrant avoided losses of more than \$1 million.

The case involved the use by Chappell of a Rule 10b5-1 trading plan, the first of which was established in March 2021, five days before a pre-EUA meeting with the FDA. The plan had a 90-day effective date and was approved by Humanigen's Chief Financial Officer ("CFO") and Compliance Coordinator. The Plan called for the sale of Humanigen shares at an initial limit price of \$25, followed by a limit price of \$35. Humanigen stock at this time was trading around \$16.07. Because Humanigen's stock price never rose above the initial \$25 limit price, no trades were ever initiated under the March 2021 Trading Plan. Less than 2 hours following Durrant's receipt of correspondence from the FDA on May 13 warning that an EUA submission would likely be denied at this time, and a subsequent telephone conversation with Durrant, Chappell emailed his broker to set up new Rule 10b5-1 trading plans for the private fund entities. In this email, Chappell explained that "price targets [were] a little too high on the last 10b-5," referring to the March 2021 Trading Plans, and that he wanted to reduce the targets "to ensure we get some shares sold." Chappell prepared new Rule 10b5-1 trading plans (the "May 2021 Trading Plans") and emailed them to his broker but informed his broker that he was waiting for final confirmation of an open trading window before signing. Ultimately, Chappell did not execute the May 2021 Trading Plans, however, because there was no open trading window at the time.

When Chappell learned that a trading window would open on June 2, 2021, he directed his broker to sell 475,000 shares of Humanigen stock during that window, mirroring the trading volumes contemplated in the unexecuted May 2021 Trading Plans. From June 2 to June 7, 2021, Chappell sold 475,000 shares of Humanigen stock at prices hovering around \$19 per share for a total of more than \$8 million. The SEC noted that Chappell made these trades with no 10b5-1 trading plans in place, and while possessing MNPI regarding FDA's strong indications that Humanigen's May 28, 2021 EUA application would be denied.

Chappell subsequently established additional Rule 10b5-1 trading plans on two different dates in June 2021, this first of which was never utilized because Humanigen's stock price never rose above the \$25 limit price. On June 15, 2021, Chappell entered into another series of Rule 10b5-1 trading plans for the private fund entities (the "June 15, 2021 Trading Plans"). The June 15, 2021 Trading Plans had an effective date of June 16, 2021, termination date of August 30, 2021, and called for sale of shares at a limit price

of \$17. Humanigen stock closed at \$20.52 on the last trading day before the June 15, 2021 Trading Plans were put in place. The private fund entities subsequently sold 3,360,000 shares of Humanigen common stock under the June 15, 2021 Trading Plans at prices ranging from \$17.04 to \$19.50 per share for nearly \$60 million. Throughout that period, the SEC alleged that Chappell and the private fund entities were in possession of MNPI about the FDA's communications with Humanigen concerning its EUA application.

Humanigen's Insider Trading Policy, to which Chappell certified he was subject, specifically addressed Rule 10b5-1 trading plans. The Policy provided that "a 10b5-1 plan must be entered into before [the executive is] aware of material nonpublic information." The Policy emphasized this rule by specifying a second time that Rule 10b5-1 plans "may only be adopted before the person adopting the plan is aware of material nonpublic information." When establishing all of the Rule 10b5-1 trading plans, Chappell represented in writing to his broker that he was entering into them in good faith and not while in possession of any MNPI concerning Humanigen. However, the SEC noted that these representations were false and Chappell knew, or was reckless in not knowing, that information concerning communication from regulatory authorities, like the FDA, was MNPI pursuant to the terms of Humanigen's Insider Trading Policy.

While the facts in this case represent an egregious misuse of MNPI, the case highlights the limitations in relying on a Rule 10b5-1 trading plan to shield violative insider trading. Private funds and investment advisers that utilize such plans must ensure they are appropriately reviewed and approved by legal and compliance professionals to ensure they are established when the relevant parties are not in possession of MNPI.

See Summary - <https://www.sec.gov/enforcement-litigation/litigation-releases/lr-26206>