

# PUBLICATION

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## Insights from First Securities Fraud Class Action Suit Against a Drug Manufacturer Developing a COVID-19 Vaccine

Authors: Matthew Scott Chester

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The claims made in *McDermid, et al. v. Inovio Pharmaceuticals, Inc., et al.*, No. 2:20-cv-01402-GJP (E.D. Pa., filed March 12, 2020), a securities fraud class action, illustrate why publicly traded companies, and particularly drug manufacturers, must exercise great care when publicizing their activities, as their statements may be used against them by investors seeking damages who contend they were misled into buying stock. McDermid, who invested in Inovio Pharmaceuticals, Inc. (Inovio), now seeks to represent a class of investors who bought or acquired Inovio common stock (NASDAQ: INO) between February 14, 2020, and March 9, 2020, at purportedly artificially inflated prices that resulted from public statements made on behalf of Inovio. He names Inovio and its CEO as defendants, claiming they are liable for having made false and misleading statements in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. While McDermid is making his claims through private litigation, claims of this nature often spawn investigations by the United States Securities and Exchange Commission and can lead to parallel administrative, civil, and even criminal proceedings, along with significant fines, penalties, and restitution orders.<sup>1</sup>

### *Huge Stakes Also Mean Huge Risks, Including Putative Class Actions*

This appears to be the first putative securities fraud class action suit against a drug manufacturer involved in developing a vaccine to treat COVID-19, the disease caused by this novel coronavirus.<sup>2</sup> As this virus spreads, the World Health Organization recently designated the virus a pandemic and, in turn, the federal government issued a national emergency to address the myriad problems the public is and will be facing. In light of the threats to lives and the world's economies, a pioneer drug manufacturer that develops an effective vaccine or treatment for this virus understandably stands to reap huge benefits. Federal funds and other monies have been provided to help this effort.

This type of litigation often is filed when a company's stock value jumps after reports of progress are made, and then falls when setbacks or problems become known. On March 13, 2020, MarketWatch reported a big downward movement in Inovio's stock price after gaining more than 180 percent in the year to date on the hope that it had produced a potential vaccine candidate to treat the coronavirus.<sup>3</sup> The large amount of money at stake, along with the insatiable news interest and world-wide need for a break-through product to treat or prevent this virus from killing people and harming the global economy, perhaps made it inevitable that such a lawsuit would be filed. At least five law firms had been issuing press releases seeking shareholders in order to sue Inovio about its claims of a potential vaccine.<sup>4</sup>

### *McDermid's Core Allegations*

McDermid alleges in the complaint that Inovio and its CEO (J. Joseph Kim) capitalized on widespread COVID-19 fears when Kim falsely claimed that Inovio had developed a vaccine for COVID-19 during a February 14, 2020 appearance on Fox Business News, by saying that Inovio had developed a COVID-19 vaccine "***in a matter of about three hours once we had the DNA sequence from the virus***" and "our goal is to start phase one human testing in the U.S. early this summer." According to the complaint, this statement caused

Inovio's stock price to jump over 10 percent in the ensuing trading days. McDermid goes on to allege that, two weeks after that stock jump, after a publicized meeting with President Trump about the COVID-19 outbreak, Kim claimed that Inovio had developed a COVID-19 vaccine, stating "**we were able to fully construct our vaccine within three hours** .... Our plan is to start [U.S. based COVID-19 trials] in April of this year." After that statement, Inovio's stock price **more than quadrupled** from \$4.28 per share on February 28, 2020, and continued to increase in the following weeks, reaching an intra-day high of \$19.36 on March 9, 2020. McDermid further alleges that Inovio had *not* developed a COVID-19 vaccine – which Citron Research exposed on March 9, 2020, before trading commenced, when it called for an SEC investigation into the company's "ludicrous and dangerous claim that they designed a [COVID-19] vaccine in 3 hours." The complaint then details how Inovio's stock price plummeted in a two-day drop that wiped out approximately \$643 million in the company's market capitalization, for a 71 percent decline from its Class Period high. McDermid goes on to allege that, in a message to shareholders that same day, Inovio tried to blunt the Citron revelations by admitting it had not developed a COVID-19 vaccine but had merely "**designed a vaccine construct**" that it believed to be a "viable approach to address the COVID-19 outbreak."

### Independent Advice Costs Far Less than Litigation and Bad Publicity

We suggest that publicly traded companies carefully prepare their executives to avoid potentially going "off script" when addressing questions from analysts or reporters about progress or issues relating to their products or services under development – particularly as to issues likely to generate media exposure and potentially move their stock price. When federal funds are involved, these risks are even greater, as regulators can be expected to closely examine allegations of alleged wrongdoing by recipients of such funds. It is important to solicit input and advice from experienced and knowledgeable counsel about these issues and additional ways to limit litigation risks, and mitigate them if mistakes have occurred. This recent class action against Inovio Pharmaceuticals serves as a clear reminder about the established plaintiffs' bar that is ready to seek damages from such missteps, which can result in serious financial and reputational risks to publicly-traded companies.

If you have any questions regarding this case or the impact of the coronavirus (COVID-19) on your organization, please contact any member of Baker Donelson's [Government Enforcement and Investigations Group](#). Also, please visit the [Coronavirus \(COVID-19\): What You Need to Know](#) information page on our website.

<sup>1</sup> Michael E. Clark, "Securities Law Issues and Disclosure Considerations," Cha. 12.1, PHARMACEUTICAL AND MEDICAL DEVICE LAW: REGULATION OF RESEARCH, DEVELOPMENT, AND MARKETING (ABA/Bloomberg BNA 2d Ed. 2015) (Michael E. Clark, Ed.)

<sup>2</sup> MarketWatch reports there are nine drug manufacturers working on coronavirus treatments or vaccines. See Jaimy Lee, "These nine companies are working on coronavirus treatments or vaccines – here's where things stand," MarketWatch (March 14, 2020); available at <https://www.marketwatch.com/story/these-nine-companies-are-working-on-coronavirus-treatments-or-vaccines-heres-where-things-stand-2020-03-06>. As the article explains, "[t]he list includes Gilead Sciences Inc. and Moderna Inc. along with smaller biotechs" and "[a] mix of legacy drugmakers and small startups have stepped forward with plans to develop vaccines or treatments that target the infection caused by the novel coronavirus." *Id.*

<sup>3</sup> Ciara Linnane, "Inovio Pharmaceuticals downgraded by RBC after gaining more than 180% on coronavirus vaccine hopes," MarketWatch (March 13, 2020), available at <https://www.marketwatch.com/story/inovio-pharmaceuticals-downgraded-by-rbc-after-gaining-more-than-180-on-coronavirus-vaccine-hopes-2020-03-13>.

<sup>4</sup> See Dave Royse, "Inovio Stock Roiled As Citron Research, Law Firms Push Back On Coronavirus Vaccine Announcement," Bengainga (March 13, 2020); available at

<https://www.benzinga.com/general/biotech/20/03/15543738/inovio-stock-roiled-as-citron-research-law-firms-push-back-on-coronavirus-vaccine-announcement>.