

Sixth Circuit Affirms Dismissal of Securities Class Action for Failure to Properly Plead Scienter

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On March 28, the US Court of Appeals for the Sixth Circuit affirmed a lower court's dismissal of a shareholder class action against **BioMimetic Therapeutics Inc.**, finding that plaintiffs had failed to sufficiently allege that the orthopedics company had lied about the progress of Food and Drug Administration (FDA) approval of Augment, a bone injury treatment.

Shareholders alleged that throughout the class period, the company was aware of numerous deficiencies in Augment's clinical trials, but nevertheless spoke optimistically to investors about the device's prospects for FDA approval. Plaintiffs also argued that defendants modified the patient population used to analyze its clinical trial results in a way that allowed the company to report more favorable results than if the original population was used.

The District Court granted BioMimetic's motion to dismiss, finding that under the pleading requirements of the **Private Securities Litigation Reform Act (PSLRA)**, plaintiffs failed to adequately support their claims that BioMimetic had conducted inferior clinical trials and had deceived investors about their progress and results. A plaintiff only clears the high hurdle imposed by the PSLRA if a reasonable person would deem the inference of scienter at least as strong as any opposing inference. The Sixth Circuit affirmed, agreeing that the company could have legitimately believed that the statistical results it achieved in clinical trials would be sufficient to obtain approval by the FDA. It noted that several factors indicated that BioMimetic rightfully expressed optimism about the device's prospects and found that the complaint failed to set forth facts that would prove otherwise.

Kuyat et al. v. BioMimetic Therapeutics Inc. et al., No. [13-5602](#) (6th Cir. 2014).

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