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New York State Court Refuses to Vacate Stay of Securities Act Case Despite Differences with Parallel Federal Lawsuit

Last week, Justice Ostrager's decision in *In re NIO Inc. Securities Litigation* was a welcome development for companies facing parallel claims in federal and state courts under the Securities Act of 1933 (the "Securities Act"). Justice Ostrager of the New York State Supreme Court refused to vacate his stay of a class action under the Securities Act in favor of a parallel first-filed federal court suit, despite plaintiffs' argument that the proposed amended state court complaint included allegations and defendants that were not included in the federal action. Justice Ostrager's decision rejects plaintiffs' strategy to manufacture daylight between federal and state Securities Act lawsuits arising out of the same initial public offering ("IPO") and registration statement, and reaffirms that "[i]t would manifestly be a waste of judicial resources to have duplicative claims pending in two different courts."¹

***Cyan* and the Rise of Duplicative Securities Act Litigation in State and Federal Court**

The Securities Act provides for concurrent jurisdiction in state and federal courts. In 2018, the United States Supreme Court held in *Cyan, Inc. v. Beaver County Employees Retirement Fund*,² that such claims are not removable from state to federal court. After *Cyan*, the securities plaintiffs' bar dramatically increased the number of Securities Act class actions filed in state courts, which are generally perceived as more favorable forums for plaintiffs than federal courts due to more lenient pleading standards and, according to some courts, the lack of certain statutory protections for defendants. Additionally, Securities Act defendants have increasingly faced parallel, simultaneous lawsuits in both state and federal courts that cannot be consolidated or even coordinated. In the first half of 2020, 45 percent of all Securities Act filings in state court had a parallel action in federal court.³

The potential for inconsistent state court rulings on issues under the federal securities laws and the increased cost of multi-jurisdictional litigation have led to increased burdens on public companies. In an effort to reduce these burdens, many defendants facing simultaneous Securities Act lawsuits have sought to stay second-filed state court proceedings in favor of parallel federal actions.

¹ *In re NIO, Inc. Sec. Litig.*, No. 0653422/2019 at 2 (N.Y. Sup. Ct. Aug. 21, 2020) (NYSCEF Doc. No. 102).

² 138 S. Ct. 1061 (2018).

³ Stanford Law Sch. Secs. Class Action Clearinghouse & Cornerstone Research, *Securities Class Action Filings 2020 Midyear Assessment 3* (2020).

The New York State Supreme Court Issues and Subsequently Refuses to Vacate a Stay in *In re NIO Inc. Securities Litigation*

In March and June 2019, parallel Securities Act claims were filed in federal and state court in New York, respectively, in cases captioned *In re NIO Inc. Securities Litigation*.⁴ Plaintiffs in these actions allege that defendants made false and misleading statements in the registration statement accompanying the IPO for NIO, Inc., a Shanghai-based electric car company. In December 2019, Justice Ostrager, who is presiding over the state court action, granted defendants' motion to stay that case in favor of the federal action on the grounds that the federal action was filed first and had the potential to resolve the Securities Act claims pending in both courts.⁵

On May 18, 2020, the lead plaintiff appointed in the federal action under the Private Securities Litigation Reform Act filed an amended complaint principally alleging that NIO and certain of its executives falsely represented that the company was building a new manufacturing facility in China.⁶ On May 29, 2020, plaintiffs in the state action moved to vacate the stay and filed a proposed consolidated amended complaint that (i) alleged *different* misstatements in NIO's registration statement and (ii) included certain defendants not named in the operative federal complaint. Plaintiffs argued that "because the [federal] Complaint is incapable of resolving any of the Securities Act claims against all defendants in this action, the prior basis for temporarily staying this action no longer exists."⁷

Justice Ostrager denied plaintiffs' motion and left the stay intact. He found that the court-appointed lead plaintiff and lead counsel in the federal action had discretion to form a legal strategy for the putative class, including the determination of which alleged misstatements in the NIO registration statement to challenge, and held that plaintiffs had failed to show that the putative class would be prejudiced by that strategy.⁸ The court explained: "[i]f, as it presently appears, and [the federal judge] has ruled, the plaintiffs in the consolidated Federal Action adequately represent the class, this Court cannot vacate the stay issued here."⁹ The court further found that *Cyan* did not overrule "the body of New York law [holding] that a stay or dismissal of a subsequently filed action is appropriate even though the second action asserts different legal

⁴ *In re NIO, Inc. Sec. Litig.*, No. 19-cv-1424-NGG-VMS (E.D.N.Y.); *In re NIO, Inc. Sec. Litig.*, No. 0653422/2019 (N.Y. Sup. Ct.).

⁵ *In re NIO, Inc. Sec. Litig.*, No. 0653422/2019 (N.Y. Sup. Ct. Dec. 13, 2019) (NYSCEF Doc. No. 86).

⁶ *In re NIO, Inc. Sec. Litig.*, No. 1:19-cv-01424-NGG-VMS (E.D.N.Y. May 18, 2020) (NYSCEF Doc. No. 48).

⁷ *In re NIO, Inc. Sec. Litig.*, No. 0653422/2019 (N.Y. Sup. Ct. Dec. 13, 2019) (NYSCEF Doc. No. 92).

⁸ *In re NIO, Inc. Sec. Litig.*, No. 0653422/2019 (N.Y. Sup. Ct. Aug. 21, 2020) (NYSCEF Doc. No. 102).

⁹ *Id.* at 2.

theories when both cases arise out of the same transaction and seek to recover for the same alleged harm based on the same underlying events.”¹⁰

Impact of the Decision in *In re NIO Inc. Securities Litigation*

State court plaintiffs have increasingly sought to evade stays in second-filed state cases by arguing that an operative federal complaint does not encompass every theory of liability or cause of action, or does not seek relief against every defendant, contemplated in the state court proceeding. Justice Ostrager’s decision rejects this tactic and should aid companies defending duplicative lawsuits under the Securities Act in both state and federal courts.

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¹⁰ *Id.* at 1–2 (citing *Syncora Guar. Inc. v. J.P. Morgan Sec. LLC*, 110 A.D.3d 87, 96-97 (1st Dep’t 2013)).

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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