

TWEETS AND EMOJIS: TEACHING MOMENT FOR 13DS AND 144S

Aug 02, 2023

WHAT HAPPENED?

The U.S. District Court for D.C. recently rejected a motion to dismiss a lawsuit claiming fraud in an alleged “pump and dump scheme” arising out of:

- a tweeted emoji that allegedly triggered the run-up in price of a meme stock;
- a 13D amendment triggered by an issuer stock buyback that did not disclose plans to sell the stake; and
- a Form 144 that disclosed “potential” sales and included the required certification of no material adverse information.

TAKEAWAYS

Although the court’s decision may be appealed, and the allegations may be disproven at trial, the decision provides some useful reminders:

- Market participants and insiders should exercise extreme caution when engaging in social media.
- Courts can view emoji symbols as disclosures. Given potential misinterpretation, or over-interpretation, they should be avoided in public disclosures or market communications.
- Whenever filing a 13D amendment, all items should be evaluated for potential updating obligations.
- Avoid referring to sales as “potential” in Form 144 if the sale has already taken place.
- Affiliates should confirm the absence of MNPI before selling stock, particularly for sales reportable on Form 144.

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Statement of facts. The factual allegations may ultimately be disproven, but were accepted as true for purposes of the motion to dismiss:

- Following the sale of his online pet store, a successful entrepreneur-turned-investor, Ryan Cohen used the \$3 billion in proceeds to establish an investment portfolio, comprised of both “meme” stocks and mainstream stocks. He developed a large following and “cachet” among meme stock investors.
- In March 2022, Cohen purchased a 9.8% stake in Bed Bath & Beyond for \$121 million and began making public recommendations, attracting retail investors to the stock. According to [one commentator, Matt Levine](#), “When his stake and activism were disclosed in March, the stock shot up 34%.”
- The company disregarded Cohen’s recommendations and, facing challenges, began struggling, with its investment rating downgraded. The stock price declined well below Cohen’s purchase price.
- On August 12, 2022, CNBC tweeted a negative story about the company, accompanied by a picture of a woman pushing a shopping cart at a Bed Bath store. In response, Cohen tweeted a reply: “At least her cart is full” with what was described as a “smiley moon emoji.” The court stated:

“Some online communities understand the smiley moon emoji to mean ‘to the moon’ or ‘take it to the moon.’ . . . In other words, according to Plaintiff, Cohen was telling his hundreds of thousands of followers that Bed Bath’s stock was going up and that they should buy or hold.”
- On August 16, 2022, Cohen filed an amendment to his Schedule 13D reporting the change in his percentage ownership, stating that it “was triggered solely due to a change in the number of outstanding Shares of the Issuer.” He did not report any acquisitions or dispositions of shares or any change in investment purpose.
- According to the court, “If he had any concrete plans to sell, he needed to disclose that in the form. But Cohen mentioned no such plans. So some investors read this as Cohen’s continued enthusiasm for Bed Bath.” According to [Matt Levine](#), “The stock rallied, closing at \$23.08 on Aug. 17, the day after his new filing.”
- On August 18, he filed another amendment to his 13D reporting the sale of his entire stake in the company resulting in a profit of \$68 million.” The court noted: “After closing at over \$20 on August 16 and \$23 on August 17, the stock plummeted to under \$9 within the next few days.”

- Later that day, he filed a Form 144 reporting that “This filing represents the potential sale” of common stock and call options in the “Remarks” section of the filing.

The court concluded:

Emoji symbol as actionable and misleading

- Although an emoji may be ambiguous, its meaning can be clarified “by the context in which [it] is used.”
- “Emojis may be actionable if they communicate an idea that would otherwise be actionable.”
- The plaintiff “plausibly alleged that the moon tweet relayed that Cohen was telling his hundreds of thousands of followers that Bed Bath’s stock was going up *and* that they should buy or hold. In the meme stock ‘subculture,’ moon emojis are associated with the phrase ‘to the moon,’ which investors use to indicate ‘that a stock will rise.’ So meme stock investors conceivably understood Cohen’s tweet to mean that Cohen was confident in Bed Bath and that he was encouraging them to act” [citations omitted].
- The tweet is actionable because “plausibly material,” rather than “mere puffery,” as evidenced by investors’ reliance in driving up the stock price. Further, “[i]nvestors may have reasonably seen Cohen as an insider sympathetic to the little guy’s cause,” by interacting with followers on Twitter, his large stake and public interactions with the company.

Failure to disclose plan to sell stock in 13D amendment as misleading

- “Investors filing 13Ds have a duty to disclose any solid plans to sell their stock. See *Azurite Corp. v. Amster & Co.*, 52 F.3d 15, 18 (2d Cir. 1995) ([‘if] a course of action is decided upon or intended, it [must] be disclosed’ in a 13D). Cohen has conceded as much.”
- The plaintiff “plausibly alleged that Cohen had a definite plan to sell. For one, the timing of Cohen’s sales suggests it. Cohen filed his 13D in the morning on August 16, 2022, and that very same day sold roughly \$100 million in Bed Bath shares. It is no stretch to infer that Cohen likely hatched that plan some time before that morning. . . . Despite the reporting requirement, Cohen did not mention his purported plan to sell in his amended 13D. That was misleading. And it was material too: meme stock investors “reacted positively to his filing,” sending the stock price soaring “by over 70%” that same day.” [citations omitted]
- Regardless of whether a private right of action exists under Section 13(d), the plaintiff can bring a Section 10(b) claim based on misleading statements in a 13D.
- “Generic warnings” that he may sell in the original 13D did not relieve him from the obligation to report his “alleged concrete plan to dump \$100 million in stock.”

Reference to “potential sales” in Form 144 as misleading

- The plaintiff “plausibly alleges that Cohen had sold his shares by the time he submitted his Form 144. See Compl. ¶¶ 170–72 (analyzing metadata and ‘historical market data’ to conclude that Cohen sold the share before he submitted the Form 144). Thus, his reference to ‘potential’ sales was misleading. Those sales had likely already happened. So he should have instead said something like ‘sales’ or ‘past sales.’”

Misrepresentation in Form 144 of no MNPI

- The plaintiff plausibly alleges that Cohen misrepresented about knowing no material adverse information about the company, given his access to MNPI under the cooperation agreement and discussions with insiders and the timing of his sales shortly before a series of negative news reports.

MEET THE TEAM

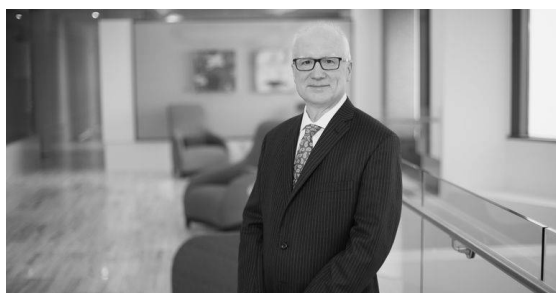


R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)



Robert J. Endicott

St. Louis

rob.endicott@bclplaw.com

[+1 314 259 2447](tel:+13142592447)

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