

## Eastern District of Pennsylvania: CEO's Background and Industry Experience Supported an Inference of Scienter at the Pleading Stage

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On February 16, 2021, the Eastern District of Pennsylvania largely denied a motion to dismiss a securities fraud class action against a drug company and certain of its executives alleging that they made false or misleading statements about the company's COVID-19 vaccine development and its ability to manufacture it. [McDermid v. Inovio Pharms., 2021 WL 601159 \(E.D. Pa. 2021\) \(Pappert, J.\)](#). The court held that scienter was pled with the requisite particularity concerning the CEO's various statements that the company had constructed, not merely designed, a vaccine within hours based on the CEO's background and experience in the pharmaceutical industry and his consistent use of the term "construct."

### Defendants' Motion to Dismiss Arguments

Defendants sought to dismiss plaintiffs' claims based on the CEO's "vaccine construction statements because they failed to state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." Plaintiffs alleged that there was a significant difference between "constructing" and "designing" a vaccine "because a vaccine construct is an actual vaccine, not a mere design of one." Defendants argued that plaintiffs failed to allege that the CEO "intended to deceive when he said construct instead of design, and even if they had, such a claim would be implausible because the terms are synonymous."

### The Court Weighs the CEO's Specialized Background and Experience

The court held that plaintiffs "have pled scienter with the requisite particularity." The court noted that plaintiffs "detail [the CEO's] background and experience in the pharmaceutical industry, which strongly suggest he would understand the difference between constructing and designing a vaccine (taking as true [p]laintiffs' allegation that these terms have distinct meanings in this context)." The CEO's "extensive" experience included having worked in vaccine development at a different well-known pharmaceutical company, publishing more than 100 scientific papers, holding numerous patents, and sitting on editorial boards and scientific review panels. The court pointed out that plaintiffs also allege that "not only did [the CEO] claim [the company] 'constructed' its vaccine in three hours several times during a televised interview, he took the claim a step further when speaking with then-President Trump on television, claiming [the company] had 'fully constructed' its

vaccine in three hours.” The court stated that “[c]onsistent usage of ‘construct’ and the heightened claim that the company had ‘fully constructed’ the vaccine support a strong inference of scienter.” The court reasoned that “[e]ven if [d]efendants’ claim that [the CEO] consistently used ‘construct’ because he thought it was synonymous with ‘design’ raises a plausible inference that he did not act with scienter, that inference is no more plausible than the inference raised by [p]laintiffs’ allegations.”

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