

[Securities Regulation Daily Wrap Up, FRAUD AND MANIPULATION— S.D.N.Y.: Shareholder suit targets Elon Musk’s allegedly untimely Twitter stake disclosures, \(Apr. 13, 2022\)](#)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

One of the first suits against Elon Musk for allegedly making a late filing of a Schedule 13D/G showing he had amassed a 9.1 percent stake in Twitter asserts that Musk is liable for damages under Rule 10b-5.

Plaintiff Marc Rasella is one of the first persons who claims to have sold Twitter shares at artificially deflated prices during a time in early 2022 when billionaire Elon Musk, with his own separate history with the SEC over his use of Twitter posts, was allegedly acquiring a 9.1 percent stake in Twitter albeit without making timely disclosures of that stake via Schedules 13D or 13G. The filing of the Rasella complaint comes days after a federal court in New Jersey dismissed a similar suit involving Riot Blockchain, Inc. The fact that the Rasella complaint was filed in a different federal court jurisdiction than the case against Riot Blockchain suggests at least the possibility that a court could reach a different result, although national trends may suggest a challenging path ahead (*Rasella v. Musk*, April 12, 2022).

The claim against Musk. The Rasella complaint makes a singular claim that Musk’s failure to timely file a Schedule 13G or 13D regarding his acquisition of Twitter stock violated Exchange Act Section 10(b) and Rule 10b-5. According to the complaint, Musk began to acquire Twitter shares in January 2022 and crossed the 5 percent threshold for disclosure under federal securities laws on March 14, 2022. As a result, the complaint said Musk then had 10 days under applicable laws and regulations to file a Schedule 13G or 13D disclosing his 5 percent plus stake in Twitter.

The complaint went on to allege that Musk did not make the required filing until April 4, 2022, when Musk filed a [Schedule 13G](#). Although the complaint does not mention it, Musk then filed a [Schedule 13D](#) on April 5, 2022. Schedule 13G is a short-form statement that a shareholder may file if they are a passive investor or otherwise satisfy the requirements of Exchange Act Rule 13d-1 for using Schedule 13G. Persons seeking a controlling interest in a company would, instead, file Schedule 13D.

Media reports also had initially indicated that Musk would join Twitter’s board, but Musk filed an [amended Schedule 13D](#) on April 11, 2022 indicating that, although Musk had been invited to join the board via a letter agreement dated April 4, 2022, Musk had decided by April 9, 2022 not to join Twitter’s board. The amended filing also clarified that Musk intends to hold his Twitter shares “for investment purposes,” that Musk may acquire more shares or sell shares, but that Musk otherwise has no plans to engage in a variety of transactions noted in Item 4 to Schedule 13D including, for example, a reorganization, changes in the present board, or material changes in the company’s business or corporate structure. The amended filing also states that Musk may express views about Twitter’s management and business via social media (media reports suggested that Musk has asked Twitter for an edit button; a Twitter [tweet](#) confirmed such work is ongoing).

The complaint asserts that the class period should be March 24, 2022 through April 1, 2022. The complaint’s theory of the case is that Twitter shareholders who sold their Twitter securities before April 4, 2022, the date of Musk’s first relevant SEC filing, were deprived of the 27 percent upswing in Twitter shares that occurred between the market close on April 1, 2022, and the market close on April 4, 2022. Moreover, the complaint posits that Musk’s alleged failure to disclose his Twitter holdings allowed him to acquire Twitter’s shares at a lower cost. As a result, plaintiff Rasella claims to have incurred damages from selling his Twitter shares at “artificially deflated prices.”

The complaint, thus, concludes that Musk violated the Exchange Act's antifraud provisions by making "materially false and misleading statements, by failing to disclose to investors that he had acquired a 5 [percent] ownership stake in Twitter as required by Section 13(d) of the Exchange Act and SEC Rule 13d-1." The complaint seeks certification of the case as a securities class action and an award of compensatory and punitive damages. The complaint also seeks a jury trial.

New Jersey case. Securities law bloggers have been actively speculating about shareholder suits against Musk since his initial Schedule 13G filing came to light. Much of that debate has to do with what, if any, legal theories for holding Musk liable for his allegedly late disclosures might withstand court scrutiny (see, e.g., Ann Lipton, [So Elon Musk didn't file a form on time](#), Business Law Prof Blog, April 7, 2022).

The Rasella complaint's Exchange Act Section 10(b)/Rule 10b-5 theory is one of the prime candidates discussed on securities law blogs, but a recent New Jersey federal district court opinion may cast a shadow on that approach. Even so, it is important to remember that district courts can be reversed by federal appeals courts and that what a particular district court does in a particular case often depends on the presence or absence of relevant authority in the federal circuit within which the district court is located. Moreover, different circuits ultimately may approach the same legal question differently and, thus, it may matter that the Rasella complaint was filed in the U.S. District Court for the Southern District of New York, which is within the U.S. Court of Appeals for the Second Circuit (the New Jersey district court case, if appealed, would go before the Third Circuit).

On April 8, 2022, the U.S. District Court for New Jersey issued a non-precedential, unpublished opinion in [Takata v. Riot Blockchain, Inc.](#), in which it was alleged that an undisclosed control group made false statements in, or failed to timely file, Schedule 13D or 13G. The court dismissed the complaint without prejudice, although the plaintiff may later move for leave to amend the complaint.

In dismissing the complaint, the New Jersey district court's opinion referenced a number of precedents from federal courts around the U.S. and made a number of its own observations based on a review of those precedents. From the court's discussion, it would appear that it is significant what a complaint specifically alleges and that the remedy sought (injunctive relief versus damages) also may be significant in this context. The following are some of the observations made by the New Jersey district court regarding Exchange Act Section 10(b)/Rule 10b-5 suits based on Schedules 13D and 13G:

- The question was "...whether there is an implied private right of action for shareholders to seek damages (1) directly under Section 13(d) of the Securities Exchange Act of 1934 or (2) indirectly under 10(b)."
- "An important threshold question remains before the Court which has not been directly answered by binding precedent: are damages available as a remedy when liability for Section 10(b) arises from a Section 13(d) violation?"
- "Unlike prior cases, plaintiffs have asked the Court for damages, rather than injunctive relief."
- "The trend in Section 13(d) cases indicates a strong reluctance of, if not an absolute bar to, allowing suits for damages, both under 10(b) and 18(a)."
- "As such, the Court finds that [a] Section 13(d) violation may not give rise to a private right of action for damages under Section 10(b). Accordingly, the Court finds that Plaintiff's Section 20(a) claim necessarily fails as well."

The statute sections cited by the New Jersey district court, in addition to Sections 10(b) and 13(d) (fraud and beneficial ownership reporting, respectively), all relate to the Exchange Act, with Section 20 addressing controlling person liability and Section 18 addressing materially false or misleading filings.

The case is [No. 22-cv-03026](#).

Attorneys: Jeffrey Craig Block (Block & Leviton LLP) for Marc Bain Rasella.

Companies: Twitter, Inc.

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