

# NCPERS Signs Amicus Brief in Support of Investors' Appeal of *Overstock* Dismissal

By: Laura H. Posner and Richard Lorant



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Shareholders of online-retailer-turned-blockchain-technology-company Overstock.com Inc. have asked a federal appeals court to revive their securities fraud class action against Overstock and its founder, Patrick Byrne, after the district court ruled that Byrne's plan to manipulate Overstock's stock to harm short sellers was legal.

The complaint filed by Cohen Milstein on behalf of lead plaintiff Mangrove Partners Master Fund Ltd. reads more like a John Grisham novel than a typical stock fraud case. Plaintiffs allege that Byrne decided to resign as Overstock CEO in August 2019 after learning that his romantic relationship with a Russian spy was about to become public. But before leaving, he devised a scheme to goose the Overstock's sagging share price by creating a sham illiquid "Digital Dividend" that would force the stock's legion of short sellers to buy company stock at any price.

A month later, the recently resigned CEO was in Indonesia, safe from extradition, where he spent three days on a boat dumping his remaining 4.7 million Overstock shares for a cool \$90 million – money he quickly invested in precious metals and cryptocurrencies to avoid the clutches of the "Deep State." On September 18, 2019, the same day Byrne sold his last million shares, Overstock ended

the "short squeeze." Over the next 10 days, the stock tanked 62%, leaving investors holding the bag.

Plaintiffs quote statements from Byrne on his blog showing that he deliberately designed the unregistered Digital Dividend to create the short squeeze that artificially increased Overstock's stock price so that he could knowingly sold his stock at inflated prices.

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But U.S. District Judge Dale A. Kimball said the defendants – Utah-based Overstock, Byrne, the company’s former CFO, and its current retail president – didn’t violate federal securities laws because, among other reasons, plaintiffs had not shown that the market was “deceived” by the Digital Dividend because news reports had published details of the short squeeze after it started.

In their appeal to the United States Court of Appeals for the Tenth Circuit, shareholders make numerous arguments as to why the district court’s decision should be reversed – among them Judge Kimball’s finding that because lead plaintiff Mangrove Partners was a short seller, it was not entitled to benefit from the fraud-on-the-market presumption that underpins all securities fraud class actions.

That aspect of the *Overstock* decision prompted enough concern from NCPERS and several public employee retirement systems in the Tenth Circuit (which includes Utah, Colorado, Oklahoma, New Mexico, Kansas, and Wyoming) to sign a friend-of-the-court, or amicus, brief in support of the appellant shareholders.

Established in two Supreme Court decisions, *Affiliated Ute* (1972) and *Basic v. Levinson* (1988), the fraud-on-the-market presumption holds that because stock prices factor in all material public information, investors need not show individually that they relied on a particular fraudulent statement or omission when they bought or sold that stock. That reliance is presumed, unless rebutted by defendants. Without the *Basic* presumption, shareholders wouldn’t be able to form a class to pool their claims, and all but the largest investors would have damages too small to merit litigating.

If the district court’s standard prevails in the Tenth Circuit, the amicus brief argues, it would impact public pension funds’ ability to serve as lead plaintiffs, or even participate as passive class members, in securities class actions where they had shorted defendant company stock. Such a holding flies in the face of both logic and longstanding precedent, the amicus brief maintains.

Other friend-of-the-court briefs were submitted by consumer advocates and law professors. ♦



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