

Plaintiffs Ordered to 'Start Over' On Eve of Securities Class Action Trial

By David Bario
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U.S. District Judge Sam Sparks in Austin isn't one to mince words.

There was that time he invited lawyers in a case before him to a "kindergarten party" to get up to speed on the law, or when he mocked some other unfortunate lawyers in rhyming couplets. This week, Sparks got so fed up with a 4-year-old securities class action against drugmaker Pain Therapeutics Inc. that he ordered the plaintiffs lawyers nearly back to square one, scuttling a jury trial that was all set to begin on Tuesday.

"We're going to start over," Sparks said at a July 7 hearing—the same day he had been expecting to start picking a jury. "None of you want this trial. And believe me, I wasn't looking forward to it for four years."

What got Sparks so riled up? According to a transcript of Tuesday's hearing, it appears that the trial was about to proceed on the plaintiffs' class claims despite a failure to notify the class. Both sides blamed the other for that omission, which the judge learned about from a flurry of eleventh-hour briefs that welcomed him home from an Independence Day holiday vacation.

"I had to take my bride to Colorado for July Fourth, because that's where she likes to go," Sparks told the lawyers. "Got up and got scolded badly because we were all going to some nice facilities there in Aspen, and I spent 10 hours preparing for trial."

Sparks continued: "I get in this morning ... and I've got an opposed motion for an order establishing a program and schedule for notice to the class and continuance of trial. The class lawyers, where have y'all been? There's an answer for that. You haven't been anywhere."

So, the judge asked, "what do I do with you?"

First, the judge granted the defendants' motion to allow for class notices and continue the trial, siding with defense counsel at Boies, Schiller & Flexner. (That's after saying he was "shocked" at Boies Schiller's last-minute motion,



complaining that "I had my tux on, I had a pink carnation, I had an orchestra, and you didn't want to come to the dance.") But Sparks didn't just postpone the trial for a few weeks. He vacated nearly all his prior rulings in the case, reopened discovery, told the plaintiffs to look for new experts, and set a new trial date ... for 2017.

And the kicker? Sparks also told the plaintiffs, who claimed that Pain Therapeutics deceived investors about its failed efforts to win FDA approval for its flagship prescription painkiller, Remoxy, that they had a lousy case.

"It's a weak case," the judge said at Tuesday's hearing. "I had real doubts that you could get a jury verdict."

Ouch.

The plaintiffs are represented by class counsel at Pomerantz (the judge did not vacate a prior order certifying the class). Boies Schiller's Joshua Schiller represents the defendants. Schiller told us Wednesday that the judge made the right call, but that the defendants were prepared to try the case whatever Sparks decided. "Whether it's two months or two years, the facts are the facts," he said. "These guys didn't commit securities fraud."