How Rising Secondary Private Markets Affect Tech Disputes

By **Farooq Javed** (March 3, 2025)

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In December, SpaceX became the most valuable private company in the world. The company and investors offered to buy $1.25 billion of common stock from employees at $185 per share, valuing the space technology company at $350 billion.

The transaction marked a significant increase in value for SpaceX, up from $210 billion just a few months earlier.[1] It was also the latest in a series of massive private market secondary sales in 2024: OpenAI employees sold $1.5 billion of stock at a $157 billion valuation;[2] Revolut employees and early investors sold $1 billion of stock at a $45 billion valuation;[3] and Stripe employees sold over $1 billion of stock at a $65 billion valuation.[4]

The 2024 boom in private secondary sales — that is, the sale of previously issued stock in private companies — accelerated a decade-long trend that is reshaping private markets.

This article details the rise of secondaries, shares some examples of how secondary transactions have featured in technology disputes, and presents some of the complexities associated with the analysis of secondaries.

The Rise of Secondaries

Private markets, of course, are not a new phenomenon. Venture capital and private equity firms, such as Sequoia Capital Operations LLC and Blackstone, have been providing private equity capital for decades. These investments have, historically, largely been in the form of primary capital, aka primaries — that is, the cash contributed by investors is added to the company's balance sheet for operating expenses, and the company issues stock to investors in return.

In contrast, secondary sales, aka secondaries, are an exchange of already-issued stock.

In the public markets, secondaries are the norm. For example, when a retail investor buys shares in Apple Inc. on an exchange, Apple is not receiving the funds and issuing stock. Rather, the investor is buying already-issued Apple stock from another investor.

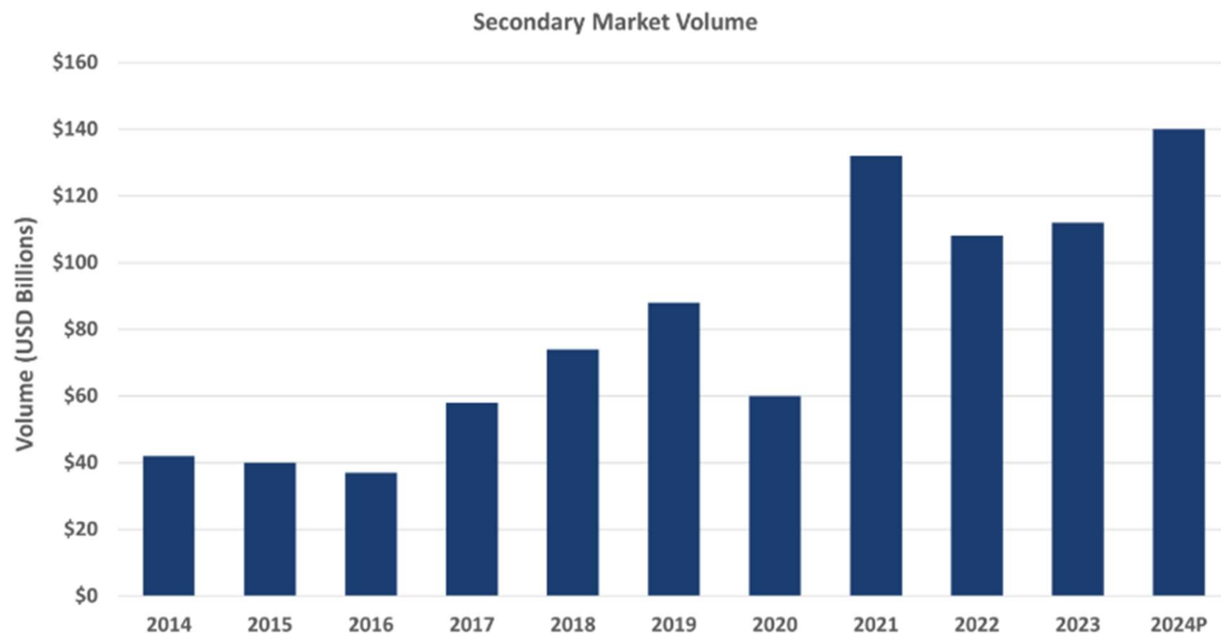
The combination, however, of secondary transactions in private markets at the scale and frequency seen recently is a new and significant phenomenon.

Just 10 years ago, it was common knowledge in Silicon Valley that the only way an employee at a successful private technology company got "liquid," i.e., converted valuable but restricted common stock into cash, was through an "exit" — either a sale of the company or an initial public offering. This changed in 2015 with a landmark event: Uber's $1 billion private secondary at a $51 billion valuation.

Uber's private secondary was significant for a number of reasons. The valuation was the highest ever for a private technology company at the time, and it was the first secondary sale of such a magnitude. Previously, private secondaries were relatively rare, niche events, but Uber's secondary brought them into the mainstream.

Further, it signaled to founders, investors and employees that employee liquidity could be separated from an exit, which has since led to technology companies staying private longer, allowing them to accomplish strategic objectives and milestones that may not have been achievable as public companies.

Since then, private markets have grown significantly, as shown in Figure 1 below:



Source: J.P. Morgan[5] and Commonfund[6]

As a result of this growth, there have been a number of changes in the private market landscape beyond companies staying private longer.

For starters, secondary sales have become much more common, both as stand-alone events and alongside primary financing events. As a result, venture capital and private equity funds have started focusing on secondaries.

For example, Lightspeed Venture Partners, a leading venture capital firm traditionally known for providing primary capital to private technology companies, is increasing its focus on secondary transactions. Lightspeed has, according to The Financial Times, "invested 20 per cent of its $2.4bn growth fund in secondary deals."[7]

Additionally, specialized platforms to facilitate the sale of secondaries have also emerged: Forge Global, EquityZen and CartaX are just a few examples.

And finally, institutional investors, such as pension funds and sovereign wealth funds, are participating in secondaries. For example, The Financial Times reported in July 2024 that GIC, the sovereign wealth fund of Singapore that ranks among the largest such funds in the world, "had become 'one of the largest players' in the market for private equity secondaries."[8]

The scale of this change, together with the high stakes between multiple parties involved, sets the stage for high-stakes litigation. Notably, even if a secondary transaction itself is not the focus of a dispute, secondary transactions are increasingly an aspect of disputes, playing a role in damages and/or as evidence.

Parties include not only founders and employees seeking liquidity, but also general and limited partners of venture capital and private equity funds that manage trillions of dollars of potential equity value to be exchanged on secondary markets. Potential litigation could range from valuation and contract disputes to information asymmetry between parties to funding commitments related to general and limited partner stakes, among many other potential disputes.

Secondaries in Technology Disputes and Their Implications

Traditionally, the analysis of damages in matters related to private technology companies has looked to either primary financing events, such as a company's most recent financing round, or public company comparables to determine the value of a company.

Secondaries offer another perspective, rich with price signals and information. Like a primary financing, a secondary transaction is an arms-length transaction between a willing buyer and a willing seller, and, therefore, it may be able to establish a value for a particular class of stock that can then be used to determine the value of the company.

However, secondaries present a few complicating factors. One, it isn't always clear that a secondary took place. SpaceX's "mega secondary" was major news, but other technology companies that may be valued at a relatively modest $1 billion may have facilitated secondary sales alongside primary financings. In such cases, while the primary financing may make headlines, the secondary financing will often not be mentioned at all.

Pitchbook and Crunchbase aim to capture the details of both the primary and secondary components of such transactions, but these details, too, can often be missed unless counsel and the damages expert know to look for them.

With the increasing scale of secondary markets and the commensurate increase in related disputes, such as those detailed above, a few implications emerge. One is that it will be important to identify early in discovery whether secondary market transactions play a role in the matter. The importance of information about secondary market transactions may extend broadly, serving not only as important information for damages but also, potentially, as important facts for legal claims.

Since private companies restrict the trading of their stock and generally require stock sales to be approved, if they can be executed at all, companies keep detailed records of secondary share sales. These records can be particularly valuable when combined with other records and communications, such as the emails and chat messages of investors, founders, employees, brokers and related parties.

Further, applying information from secondary market transactions to the valuation of equity requires an understanding of the complexities associated with private company equity as well as specialized financial tools to value that equity.

In order to understand why these factors are important, it is worth explaining a common error that occurs in the financial press when it comes to private company valuations. The

financial press will often report the post-money valuation of a company that raises equity capital.

As a simplified example, suppose TechCo closed a Series C at $10 per share of Series C preferred stock, and after the transaction, TechCo had a combined 100 million shares of common stock, stock options and preferred stock outstanding, i.e., 100 million fully diluted shares outstanding. The financial press would report a post-money valuation of $1 billion, aka $10 per share multiplied by 100 million fully diluted shares outstanding.

However, this is inaccurate — all of the classes of TechCo stock do not have equal value. For example, the Series C preferred stock that was valued at $10 per share is senior to common stock. This means that, in certain circumstances, holders of the Series C preferred stock may receive funds from a distribution before holders of common stock.

In more extreme downside scenarios, the holders of Series C preferred stock may see their entire investment returned while holders of common stock receive no payments. Clearly, Series C preferred stock is more valuable than common stock.

While such post-money valuation is acceptable as a shorthand and convention in the financial press, damages in litigation and arbitration must be much more precise and account for these differences in value. The first step in doing so is to begin with the capital structure. Venture-backed private technology companies typically have complex capital structures as a result of the multiple stages of equity financing they typically raise.

A late-stage company will likely have one class of common stock and multiple classes of preferred stock, and each class of preferred stock will have distinct rights. Some of these rights may include: the preferential payment holders of preferred stock are entitled to receive, typically, the price paid for the preferred stock; a dividend that may accrue to that preferred payment annually; a right to convert the preferred stock to common stock, which may or may not require foregoing the preferred payment; a right to receive preferred payments in preference to other preferred stockholders; or a right to be paid a multiple of the price paid for preferred stock as the preferred payment.

The range of options possible leads to capital structures that range from only slightly complex to very complex. A slightly complex case may be one in which the company has multiple classes of preferred stock that are pari passu, or equal to each other in payment seniority. Even so, each class of preferred stock will have different original issue prices, the amount originally invested per share by preferred investors, which corresponds to the preferred payment to holders of preferred stock.

In contrast, a more complex case may be one in which the company's later classes of preferred stock have seniority to earlier classes of preferred stock and receive preferred payments that are a multiple of the amount invested. Analyzing these differences carefully is a key first step in valuing the classes of stock.

Then, determining the value of each class of stock requires a technique called the option pricing method, or OPM. The method is complex, and its details are beyond the scope of this article. However, as a short introduction, the OPM identifies key breakpoints in the company's value at which stock classes behave differently. It then uses the Black-Scholes option pricing model to determine the appropriate value for the stock that received distributions at each breakpoint.

In short, the OPM incorporates information about the different rights associated with each

class of stock along with a model that simulates payments to those classes in different scenarios of liquidity to determine the appropriate relative price of each class of stock.

The OPM is combined with other valuation techniques, which may include comparables company analysis or recent financing events to allocate value to specific classes of stock. In some cases, such as the comparables company analysis, the valuation technique yields an estimate of the company's value, which is then allocated to the various classes of stock using the OPM.

In other cases, such as a financing event that involves one class of stock or a subset of classes, the OPM will be used to determine the implied value of the other classes of stock and, accordingly, the implied value of the company's total equity.

In short, secondary transactions provide valuation information, but in order to draw appropriate conclusions from those transactions, which typically involve one class or a subset of classes of the company's stock, it is necessary to first have an accurate and detailed understanding of the company's capital structure and then to incorporate the OPM alongside other appropriate valuation techniques.

Conclusion

The rise of secondaries is a natural by-product of growing and evolving private markets and, as such, we can expect their growth will continue. The sharp rise in secondaries in 2024 signals a likely increase in the use of secondaries in damages, as well as secondaries themselves being the focus of litigation.

With secondaries playing a particular role in private technology companies that are choosing to stay private longer, understanding related information requests, key capital structure dynamics and relevant specialized financial techniques are among the factors that practitioners will need to be aware of.

The range and importance of these factors will surely increase as the secondary markets continue to grow and expand in scope, encompassing not only employee liquidity but liquidity between and among general partners and limited partners of venture capital and private equity funds.

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