Westlaw Journal
WHITE-COLLAR CRIME
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 33, ISSUE 3 / NOVEMBER 2018

WHAT'S INSIDE

WIRE FRAUD

Arizona man pleads guilty to defrauding PAC donors

By Phyllis L. Skupien, Esq.

An Arizona man has admitted in federal court that he created scam political action committees and used false and misleading representations about the PACs to defraud donors.

United States v. Tierney, No. 18-cr-804, plea entered (S.D.N.Y. Nov. 2, 2018)

William Tierney, 46, pleaded guilty to one count of conspiring to commit wire fraud in the U.S. District Court for the Southern District of New York. Tierney entered his plea before U.S. District Judge Jesse M. Furman.

"This is the first-ever federal prosecution of fraudulent scam PACs, but it won't be the last," U.S. Attorney Geoffrey S. Berman said in a statement.

Tierney established and operated six PACs, according to the Justice Department. The phony PACs targeted victims across the country, including in the Southern District of New York, seeking money for political campaigns that advanced "autism awareness," "law enforcement appreciation" and the anti-abortion movement, court documents said.

REUTERS/Mike Segar

"This is the first-ever federal prosecution of fraudulent scam PACs, but it won't be the last," U.S. Attorney Geoffrey S. Berman said.

The DOJ said Tierney defrauded tens of thousands of donors "who believed their hard-earned money would support the causes described in solicitation calls and mailings."

In fact, less than 1 percent of the money was given to candidates for office, with much of the

CONTINUED ON PAGE 15

EXPERT ANALYSIS

New Jersey's former top prosecutors: Bail reform isn't easy, but it works

Christopher Porrino and Elie Honig of Lowenstein Sandler LLP examine the need for bail reform and how recent New Jersey legislation provides a model that other states should follow.

SEE PAGE 3

42089839

Westlaw Journal White-Collar Crime

Published since April 1987

Director: Nadia Abadir

Editors:
Phyllis Lipka Skupien, Esq.
Phyllis.Skupien@thomsonreuters.com

Kevin M. McVeigh, Esq.

Desk Editors:
Jennifer McCreary, Elena Neuzil, Abbie Sarfo, Maggie Tacheny

Graphic Designers:
Nancy A. Dubin, Ramona Hunter

Westlaw Journal White-Collar Crime
(ISSN 2155-5923) is published monthly by Thomson Reuters.

Thomson Reuters
2 W. Baltimore Avenue, Suite 315
Media, PA 19063
www.westlaw.com
Customer service: 800-328-4880

For more information, or to subscribe, please call 800-328-9352 or visit legalsolutions.thomsonreuters.com.

TABLE OF CONTENTS

New Jersey's former top prosecutors: Bail reform isn't easy, but it works

By Christopher Porrino, Esq., and Elie Honig, Esq.
Lowenstein Sandler LLP

Too many people across the United States spend too long in jail before they've ever been convicted of a crime, simply because they are too poor to post cash bail. At the same time, some dangerous offenders are able to buy their way out of jail by posting cash bail, regardless of the risk they pose to the community.

For far too long, the criminal justice system in New Jersey — and many other states — suffered from these dual fundamental failures. Recently, however, New Jersey instituted sweeping reforms to its bail system. The lesson we offer from the front lines of the New Jersey bail reform effort is this: It is not easy, but it works.

Despite heated opposition from the bail bonds industry, New Jersey has successfully enacted and implemented a reformed system that is more just because it does not discriminate against arrestees based on wealth.

At the same time, the new system better protects the public by enabling judges to consider an arrestee's potential dangerousness and to detain without bail the highest-risk defendants. The objective data, and our own experiences working in the criminal justice system, support this conclusion.

The bail reform effort in New Jersey happened only because diverse stakeholders put aside narrow self-interests and focused on the greater public good. In 2013, the Drug Policy Alliance shined a spotlight on the urgent need for bail reform when it issued a groundbreaking study finding that over 73 percent of New Jersey's incarcerated population were awaiting trial. Stunningly, the study also found that 12 percent of the state's incarcerated population were pretrial detainees who could not afford to post bail of $2,500 or less. That report underscored the urgent need to fix our broken cash bail system.

The bail reform effort in New Jersey happened only because diverse stakeholders put aside narrow self-interests and focused on the greater public good.

Shortly after the report was issued, the chief justice of the New Jersey Supreme Court, Stuart Rabner, convened a Joint Committee on Criminal Justice to study bail reform and make recommendations. The committee was comprised of judges, prosecutors, public defenders, private criminal defense practitioners, the American Civil Liberties Union, and representatives of the governor's office and the state legislature.

Working together over several months, committee members put aside their conventional talking points, formed novel partnerships, and arrived at broad consensus on two very important issues.

First, they agreed that our cash bail system discriminated based on wealth because some offenders could afford to pay their way out of jail while indigent offenders could not, even if they posed little or no risk.

Even the prosecutors on the committee agreed that too many low-risk, poor arrestees were behind bars simply because they could not pay for their freedom pending trial.

On the flip side, a broad consensus emerged on the committee — joined even by the state's top public defender — that at least some of the highest-risk offenders should be detained pending trial without any bail.

Incredibly, before bail reform, New Jersey law prohibited prosecutors from arguing, and judges from considering, the danger posed by an arrestee in setting bail conditions. The committee members agreed that risk must be not only a relevant factor but a primary focus in an effective bail system.

The committee ultimately submitted a report that became the framework for bail reform legislation. The proposed legislation abolished cash bail in all but a very narrow set of circumstances. It generally required courts either to release offenders on nonmonetary conditions or to detain high-risk offenders without bail.

The bill also required implementation of a data-driven risk assessment tool to provide an objective measure of the risk posed by each individual arrestee.

Christopher Porrino (L) is a partner at **Lowenstein Sandler LLP** in New York and is the chair of its litigation department. He is a former attorney general of New Jersey, former director of the attorney general's office's law division and former chief counsel to Gov. Chris Christie. As chief counsel, he oversaw the New Jersey bail reform legislative effort. **Elie Honig** (R) is special counsel at the firm. He is also a former director of the New Jersey Division of Criminal Justice and a former assistant U.S. attorney for the Southern District of New York.

The bill further called for an amendment to the New Jersey Constitution, because the constitution as written entitled all defendants to cash bail.

The proposed constitutional amendment permitted judges to detain without bail some arrestees deemed high-risk by the court if necessary to ensure the arrestee's future appearance in court or to protect the public.

At first, the legislation and accompanying constitutional amendment appeared to be headed toward quick and decisive enactment. The measures enjoyed broad bipartisan support from then-Gov. Chris Christie, a Republican, and from the Democratic-controlled state Senate and Assembly.

Liberal-leaning interest groups like the ACLU supported the reform measures, as did many criminal law practitioners, including the attorney general's office and the public defender. A broad alliance coalesced in favor of bail reform, transcending traditional fault lines of politics and ideology.

for a maximum of 48 hours before their first court appearance (though the average stay in county jail before first appearance is closer to 24 hours).

The arrestee is fingerprinted through the automated Livescan system. The risk assessment tool then automatically evaluates various factors, including the nature and seriousness of the new charges, the arrestee's criminal history, and the arrestee's history of appearance or non-appearance in court.

The risk assessment tool automatically scores each arrestee on risk of new criminal activity and risk of non-appearance in court (each on a 1 to 6 scale, with 6 being highest) and risk of new violent criminal activity (a yes/no determination).

Importantly, these risk assessment scores are not binding on the judge or the parties. Rather, they provide an objective and standardized measure of the risk posed by each individual alleged offender.

> Prior to enactment of bail reform, New Jersey law prohibited prosecutors from arguing, and judges from considering, the danger posed by an arrestee in setting bail conditions.

Passage of the new law seemed all but assured — until the bail bonds industry intervened. Sensing an existential threat, the multibillion-dollar industry took the clever tack of enlisting the Southern Christian Leadership Conference — the legendary civil rights organization co-founded by Dr. Martin Luther King Jr. — to advocate on its behalf.

The SCLC dispatched representatives to New Jersey to argue that bail reform would discriminate against minorities. That argument so plainly lacked merit — the vast majority of the pretrial incarcerated population who stood to benefit from abolition of cash bail were minorities — that the bail bonds industry's strategic lobbying effort failed.

The bill passed with overwhelming majorities of the Assembly and the Senate. Christie signed the bill into law, and voters overwhelmingly approved a ballot referendum to amend the state constitution by a 62 percent to 38 percent margin.

New Jersey's new system went into effect Jan. 1, 2017. Under the new law, arrestees charged by warrant are held in county jail

It remains up to the prosecutor and defense attorney to make appropriate arguments, and for the judge to apply discretion in deciding whether to detain the arrestee without bail or to release the arrestee on appropriate nonmonetary conditions (such as home confinement, electronic monitoring, curfew and stay-away orders).

Since implementation of the new system, approximately 18 percent of arrestees charged by warrant have been detained without bail, while the remaining 82 percent either have been released on their own recognizance or on nonmonetary conditions. Fewer than 0.1 percent of all arrestees have been released on cash bail.

The new legislation also contains speedy-trial rules requiring prosecutors to indict any detained defendant within 90 days after arrest and then to try the case within 180 days after indictment. Violation of the deadlines results in release of the defendant from prison, but not dismissal of charges.

Under the old system, arrestees spent an average of 314 days in jail awaiting trial, and delays sometimes lasted as long as two years or more. Under the new system, all defendants held without bail are assured of a trial within 270 days after arrest.

To be sure, bail reform in New Jersey required hard work, innovation and creativity by prosecutors, defense lawyers and the courts alike. All the relevant players in the criminal justice system had to learn to prioritize potential jail cases; to understand and make proper use of the new risk assessment tool; to conduct detention hearings promptly and fairly; to meet earlier discovery requirements necessary for detention hearings; and to comply with speedy trial deadlines.

While prosecutors, defense attorneys and judges faced challenges during the first months under the new bail reform, the new procedures now are well ingrained in the everyday course of work. What once felt cataclysmic now seems routine.

Now that the new system has been in place for nearly two years, the objective data proves decisively that bail reform in New Jersey has been a sweeping success.

In 2017 — the first year when judges could consider danger in denying cash bail to arrestees — over 8,000 of the state's highest-risk arrestees were detained pending trial, with no opportunity to buy their freedom by posting a bail bond.

During that time, New Jersey's violent crime index fell by 5.7 percent, including a 14.3 percent drop in murders and significant decreases in robbery, assault and burglary rates. Preliminary data indicates that violent crime rates have fallen again in 2018.

At the same time — with indigent, low-risk arrestees eligible for release without having to post cash bail — New Jersey's pretrial county jail population fell by a staggering 20.3 percent in 2017 alone. As of Aug. 31, 2018, that reduction stands at 26.3 percent compared to the jail population on Jan. 1, 2017.

Even using a conservative estimate that incarceration of pretrial inmates costs $100 per person, per day, that reduction equates to over $68 million per year in taxpayer savings. Further, low-risk defendants who stay out of jail avoid socially costly collateral consequences such as loss of a job or driving privileges.

Also, statistics show those low-risk defendants who spend less time in jail are less likely to commit future crimes.

Notwithstanding the undeniable success of the new system, the bail bonds industry has challenged reform efforts at every turn.

In addition to launching sensationalistic internet campaigns depicting the Grim Reaper and predicting that New Jersey would devolve into lawless chaos, the bail bonds industry took their fight to the courts. To date, the courts have rejected every lawsuit filed by the bail bonds industry.

Most recently, in July the 3rd U.S. Circuit Court of Appeals, in *Holland v. Rosen*, 895 F.3d 272 (3d Cir. 2018), firmly denied the bail bonds industry's challenge to the constitutionality of the new system, finding that "New Jersey's interests in ensuring defendants appear in court, do not endanger the safety of any person or the community, or obstruct their criminal process, are no doubt legitimate."

Now that the battle largely has been fought in New Jersey, the question becomes: Which states will follow? In August California passed sweeping legislation that closely mirrors New Jersey's system. The California legislation eliminates cash bail and requires adoption of a data-driven risk assessment tool.

Upon passage of the legislation, the chief justice of California's courts stated that "[o]ur old system of money bail was outdated, unsafe and unfair." The New York Times noted that "[t]he California law is part of a wave of criminal justice reforms taking place across the country."[1]

Other states should follow California in enacting bail reform legislation built on the New Jersey model. New York should step up next.

In his 2018 State of the State address, Gov. Andrew Cuomo declared that "[t]he blunt ugly reality is that too often, if you can make bail you are set free and if you are too poor to make bail you are punished. We must reform our bail system so a person is only held if a judge finds either a significant flight risk or a real threat to public safety."

Many other states seem poised to follow suit. In fact, at least 20 have formed task forces to study bail reform, and many others are considering the issue. To all of those states, we say this: If you want to see what meaningful and successful bail reform looks like, not only in theory but also in practice, then look no further than New Jersey.

In 1964 Attorney General Robert Kennedy testified before Congress that the "problem, simply stated, is: The rich man and the poor man do not receive equal justice in our courts. And in no area is this more evident than in the matter of bail. ... Bail has become a vehicle for systematic injustice."[2]

We as a country have known this truth for over five decades. Now, New Jersey has shown that bail reform truly does work. The road map is available for everyone else to follow. We call on all other states to join us in creating the fairer and more just bail system that Kennedy envisioned so many years ago. WJ

NOTES

[1] Thomas Fuller, *California Is the First State to Scrap Cash Bail,* N.Y. Times (Aug. 28, 2018), https://nyti.ms/2T6WN2v.

[2] *Hearing Before the Subcomms. on Constitutional Rights and Improvements in Judicial Machinery of the S. Jud. Comm.* (Aug. 4, 1964) (testimony by U.S. Attorney General Robert F. Kennedy on bail legislation), https://bit.ly/2FiAXpl.

Computer fraud coverage and email hacks

By John K. DiMugno, Esq.
Insurance Research Group

In recent years, crime insurers have received claims for theft losses that were unheard of before the advent of our high-tech, global economy, where business transactions occur online without any personal contact between the parties.

We've all heard stories of direct computer hacks to steal data or money from a business electronically without contacting staff. These hacks result in a direct loss caused by the use of a computer, and so are covered under the computer fraud provisions of the business's crime insurance policy.

But improvements in business firewalls and anti-hacking software have caused scammers to change tactics. Rather than gain direct electronic access to a business's bank accounts, they hack into its email servers to manipulate employees into doing what the hackers can no longer do directly.

Known variously as spoofing, business email compromise, social engineering or, my favorite, "fake president" fraud, this new tactic entails commandeering a high-level executive's email account. The scammer then uses the executive's email address and online identity to instruct an employee to transfer funds into a bank account controlled by the scammer.

Although the loss resulting from these spoofing attacks is identical to the loss resulting from a direct hack, insurers have consistently denied coverage for spoofing claims on the ground they do not involve a direct loss caused by a computer.

Insurers have argued with some success that the presence of authorized employee actions in the causal chain of events vitiates the causal connection between the use of the computer and the loss of funds.

A CHANGE OF DIRECTION?

Both *American Tooling Center Inc. v. Travelers Casualty and Surety Co. of America*, 895 F.3d 455 (6th Cir. 2018), and *Medidata Solutions Inc. v. Federal Insurance Co.*, 729 F. App'x 117 (2d Cir. 2018), reject the insurers' argument.

They hold that a crime policy's computer fraud coverage is not limited to direct hacking, but also applies when email spoofing causes the policyholder's employee to transfer funds to a scammer impersonating an executive or vendor.

> The 6th U.S. Circuit Court of Appeals' decision in *American Tooling* is particularly significant because it overrules a federal district court decision that insurers frequently relied on to deny coverage.

American Tooling

The 6th U.S. Circuit Court of Appeals' decision in *American Tooling* is particularly significant because it overrules a federal district court decision that insurers frequently relied on to deny coverage. In *American Tooling,* the insured's treasurer sent a vendor's employee an email requesting all outstanding invoices.

An unidentified third-party hacker intercepted this email and, impersonating the vendor's employee, instructed the treasurer to wire the insured's payments to an account the hacker controlled. The treasurer did so, transferring over $800,000 via several transactions.

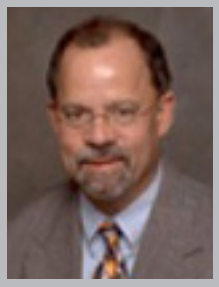
Only when the real vendor demanded payment did the insured realize it was the victim of a scam. The insured paid the vendor 50 percent of the outstanding debt, and the vendor agreed payment of the remaining 50 percent would be contingent on an insurance claim under its crime policy.

The insured sought coverage under the computer fraud provisions of its crime policy with Travelers. Travelers denied coverage, asserting that the insured did not suffer a "direct loss," the case did not involve "computer fraud," and the loss was not "directly caused by computer fraud."

The U.S District Court for the Eastern District of Michigan granted summary judgment to Travelers, but the 6th Circuit reversed and granted summary judgment in favor of the insured.

Applying Michigan law, the 6th Circuit first rejected the District Court's holding that the insured did not suffer a direct loss. The District Court had reasoned that the loss did not occur when the insured wired funds to the scammer. It said the loss occurred later, when the insured agreed to pay the vendor at least half of the money owed.

Disagreeing with the District Court, the 6th Circuit pointed to Michigan appellate decisions construing the word "direct" to mean proximate or immediate, as distinct from remote or incidental. The appeals court reasoned that the insured suffered a direct loss when it transferred funds to the hacker.



John K. DiMugno of **Insurance Research Group** in Cameron, California, has testified as an expert witness on a wide variety of insurance coverage and bad-faith issues for both policyholders and insurance companies. He is the author of numerous articles and is a co-author of three insurance law treatises published by Thomson Reuters. For a complete list of his publications and presentations, visit dimugnolaw.com.

The 6th Circuit flatly rejected the insurer's argument that the scammer's conduct did not constitute "computer fraud," which the policy defined as the use of a computer to fraudulently cause a transfer of money to a person or place outside the company.

Travelers had argued that the definition requires a computer to "fraudulently cause the transfer," and that it was not sufficient to simply use a computer to fraudulently induce an authorized employee's transfer of funds.

The court expressly refused to limit coverage to "hacking and similar behaviors in which a nefarious party somehow gains access to and/or controls the insured's computer." If the insurer had wanted to limit coverage in this manner, the court observed, it should have done so by using unambiguous policy language.

Is so ruling, the court distinguished an unpublished decision from the 9th U.S. Circuit Court of Appeals, *Pestmaster Services Inc. v. Travelers Casualty & Surety Co. of America*, 656 F. App'x 332 (9th Cir. 2016). In *Pestmaster*, the insured had outsourced its payroll services and granted its vendor electronic access to its bank account. The vendor was authorized to transfer funds out of Pestmaster's bank account into its own account to pay Pestmaster's payroll taxes.

The fraud occurred when the vendor kept the money instead of paying the taxes. Thus, everything occurring using the computer was legitimate, and the fraudulent conduct occurred without the use of a computer. By contrast, in *American Tooling*, the scammer used a computer to send American Tooling spoofed emails that caused the company to transfer the money.

Medidata Solutions

A week before the 6th Circuit issued its opinion in the *American Tooling* case, the 2nd U.S. Circuit Court of Appeals reached a similar result in *Medidata*.

In *Medidata*, employees of the policyholder company transferred more than $5 million because of fraudulent email instructions that appeared to come from Medidata's president. The scammers went to great lengths to impersonate the president, including putting his email address and picture in the "From" field.

"The attack represented a fraudulent entry of data into the computer system, as the spoofing code was introduced into the email system," the court said. "The attack ... made a change to a data element, as the email system's appearance was altered by the spoofing code to misleadingly indicate the sender."

> The 2nd Circuit in *Medidata* interpreted "direct loss" to mean "a proximate cause" and concluded that the fraudulent email impersonating the company's president proximately caused the loss.

In affirming the lower court's finding of coverage, the 2nd Circuit, applying New York law, rejected the insurer's contention that the policy's direct-loss requirement limited coverage to direct-hacking-type intrusions and did not include losses that occur when the policyholder's own employees initiate the transfer.

The court interpreted "direct loss" to mean "a proximate cause" and concluded that the fraudulent email impersonating the company's president proximately caused the loss. Although authorized Medidata employees themselves transferred the funds, that did not, in the court's view, interrupt the chain of causation between the initial fraud and the ultimate loss.

The court rejected the insurer's argument that the spoofing attack did not fall within the grant of coverage for losses stemming from any "'entry of data into' or 'change to data elements or program logic of' a computer system."

"While Medidata concedes that no hacking occurred," the court said, "the fraudsters nonetheless crafted a computer-based attack that manipulated Medidata's email system."

CONCLUSION

Perhaps the 2nd Circuit discussed the technical aspects of the intrusion into the policyholder's email system so extensively because the policy required "fraudulent entry of data into" or "change to data elements or program logic of" a computer system. In contrast to Medidata's policy, some policies require only some "use" of a computer to fraudulently transfer money.

At least one court, the 5th U.S. Circuit Court of Appeals in *Apache Corp. v. Great American Insurance Co.*, 662 F. App'x 252 (5th Cir. 2016) (per curiam), has held that the mere sending of an email by a criminal is not the type of "usage" that could trigger coverage.

"To interpret the computer fraud provision as reaching any fraudulent scheme in which an email communication was part of the process would ... convert the computer fraud provision to one for general fraud," the *Apache* court said.

The 2nd Circuit's decision in *Medidata* provides a blueprint for policyholders to overcome this defense by presenting evidence on the technical details of the criminal's scheme. WJ

Lunch anyone? Developing your business and building your brand

By Shanon Lazarus, Esq.,
Kelley Kronenberg

In most law firms, having an established book of business, or demonstrating the ability to grow a book of business, is a significant factor in determining who joins the partnership ranks. Business development is not a core focus at most law schools, though, and it is not always apparent to new lawyers that a big part of what lawyers do is, in fact, sales.

And for many lawyers, the skills required to be an excellent legal practitioner are very different from those needed to market themselves and their practice. To build a business, new attorneys must take a measured approach to using and creating networks, identifying the right business opportunities and ultimately asking for the work.

What some might not realize is that the new attorney position offers unlimited possibilities for growth and success. So then, how do new lawyers capitalize on this opportunity and learn to target specific clients and industries, distinguish their services from the competition and overcome possible obstacles and objections of prospective clients?

Savvy firms are equipping their lawyers, millennials and veteran partners with the skills necessary to turn their network of contacts into clients. More and more law firms are recognizing the value of involving their lawyers in marketing and are turning to professional coaching to arm their attorneys with the skills needed to be successful in business development.

COACHING AND TRAINING

Many lawyers are uncomfortable with the notion of business development. They express their distaste for "selling," yet acknowledge it is a necessary component of career success. To overcome the pre-disposed aversion to sales, business development training breaks the concept down into small, manageable action items.

Coaching provides a systematic approach that aligns business development with each attorney's specific personality traits, skill sets and personal and professional values. Lawyers should take advantage of training and guidance their firm's marketing team offers, or seek coaching from a marketing professional.

> Make connections, not contacts.

By focusing on targeted, concrete, smaller action steps, which usually follow a linear and logical process that resonates with most attorneys, any lawyer can succeed in business development with the proper training.

For attorney business development coaching to be successful, the training must provide guidance and assistance in both the "process" of business development — the tactical strategies and methods — and the "soft skills" side of business development, which includes communication, relationship building and likability.

Further, business development coaching success requires accountability, consistent encouragement, practice and feedback.

BECOMING LIKEABLE

The top business development principle — and often the hardest for attorneys to understand and adopt — is that likability is the most crucial key to business development success.

Numerous strategies and methods to approach sales can help attorneys produce results. One requirement remains constant: The lawyer must be likable to gain business, regardless of the lawyer's level of experience or strength of reputation.

It seems hard to believe, but being likable is not a character trait one is born with. It is a skill a lawyer can learn.

Just like any other skill, it can be taught, improved upon and mastered. It is said over and again, ad nauseam, but it is true: People do business with those they know, like and trust. Likability is the foundation of trust, and potential clients need to trust you before they will give you their business.

The failure to do what it takes to be likable — to talk about oneself in a personal, humble, engaging or compelling way — is the downfall of all attorney business development. No likability usually means no follow-up meeting and, indeed, no new clients.

Likable people know how to endear themselves to others from the start. They understand the importance of presenting themselves as genuine and willing to connect.

Since likability can be learned and honed, lawyers should aim to be a friendly and highly likable person who makes others feel comfortable, and whom everyone wants to get to know better.

Be cognizant of how you present yourself to others, and do your best to be approachable. Let your personality shine through, and practice open communication — in both verbal and nonverbal ways.

Shanon Lazarus is an attorney and the marketing and business development manager at **Kelley Kronenberg** in Fort Lauderdale, Florida. She works directly with marketing leadership to develop and implement the firm's overall marketing, communications and business development initiatives. She also assists the firm's attorneys in the identification and pursuit of business development prospects and supports them in developing and executing personal, strategic marketing and business development plans. She may be reached at 954-370-9970 or slazarus@kklaw.com.

RELATIONSHIP MANAGEMENT

Increasing your likability is a relatively easy and practical way to build new relationships. Business development is, and always has been, dependent on building relationships.

Lawyers working on honing their likeability should start by making a list of critical relationships they wish to cultivate. For business development success, they should be systematic about developing and maintaining relationships and learn to make connections rather than contacts.

Building strong business connections does not have to be an arduous endeavor. Lawyers need only make it a priority. Managing relationships like the vital assets they are will go a long way. Become interested in your connections: Invest time, energy and effort into getting to know and understand your prospects and their businesses.

Systematically document relationship and contact details: how and where you met, conversation specifics, personal preferences, communication styles, personality attributes and the like. Make it your business to understand what is special and unique about your prospects and their business.

As a business developer, the more you know about people and what they are doing in their businesses, the better they will respond and relate. The better you know your connection, the better the relationship, and the more likely your connection will become your client.

GETTING OUT FROM BEHIND YOUR DESK

Business development and networking are not interchangeable terms. Business development is ultimately relationship building to generate revenue from new business. Networking involves building a web of contacts who are useful and valuable.

If you are new to business development, it will be challenging to build a book of business if the only people you know are those you are meeting through work. You must get out of your office and meet people. This means going to events where attorneys are likely to be present, but it also means going to events or meetings where you are likely to stand out because you are an attorney.

Leaving the computer screen behind and attending, speaking at and meaningfully involving yourself in actual in-person events is critical if you want to build your network. Getting involved in an organization in a way that demonstrates competency and authority will help to develop leadership skills and a positive reputation within the community.

To benefit and derive business from networking within an organization, it is imperative to become ingrained in the group. Join a committee, routinely attend meetings, take a leadership position, engage with key members, maximize speaking opportunities and fully invest.

Often, this means a significant commitment of personal and professional time, energy and financial resources, such as membership dues and sponsorship fees.

Though it can be costly in terms of both time and money, consistent involvement in an association is a surefire way to build your reputation more quickly and boost business development efforts.

> Asking for advice is a great way to get a connection started.

The bottom line is that regular and active participation is the key to successfully developing relationships and business opportunities.

EFFECTIVE NETWORKING REQUIRES PREPARATION

Networking is much more than showing up, having some drinks and snacks, and handing out business cards. Networking's emphasis should be on how you can help another person — not how that person can help you. It is about connecting with people, sharing who you are and how you can assist and maybe gaining some information that you can potentially use in the future.

As lawyers, we prepare for meetings with clients, judges, opposing counsel and colleagues. In contrast, as business developers, we often walk into a networking event or meeting without a game plan or strategy.

It is important to practice good networking to succeed and overcome the perception that these events and prospect meetings are awkward. A little preparation can go a long way.

So how can you maximize the return on your time at a networking event or prospect meeting? To start, it is essential to develop and understand the goal of the event or meet-up. Before you head out to a meeting or happy hour, clearly set your intentions. Think about why you are attending, whom you want to meet and what you would like to achieve.

Without clear objectives, you will be unable to measure the success of your networking. Further, it helps to know the names of the fellow event attendees you would like to meet. You need to do some homework.

Research the people you want to get to know so you can find common ground and find a basis for initial conversations. Knowing even a few details about your contacts' personal or business life will help spark a connection. Arming yourself with information maximizes the chances your conversations will be productive and memorable.

Now you have done the research on your potential contacts and strategized for the networking event. Great. But what do you say when you get there? When it comes to developing business relationships, it is critical to overlook the word "business" and focus on the word "relationships."

You want each meeting to be friendly and personal, and to lay the foundation for a mutually beneficial relationship. The best business relationships usually form as the result of genuine curiosity.

Asking for advice about a topic a person is familiar with is a great way to get a connection started and to form a bond. Actively showing interest in other people is powerful. People attend events because they are social opportunities to meet new business connections, share information and learn. Actively listening to your contacts and asking them to tell you more is the quickest way to start a business relationship.

Most importantly, when attending a networking event or meeting, focus on making one quality connection. Successful networking does not mean blanketing the room with your business card. Aim to have a single authentic conversation with someone that you like, and share ideas.

Instead of forcing yourself to talk to 10 people, allow yourself to be drawn to one person who is engaging and informative. When you have a single goal while networking — to make

one quality connection — you have a metric for measuring success.

Making a connection at networking events is just the jumping-off point for starting a new professional relationship. Everyone knows the secret to effective networking is following up. This is the key to developing your relationship into one that brings in business. It stabilizes the connection.

Business development and networking follow-up must be systematic, routine and timely. It shows you are invested in developing the relationship, interested in adding value and determined to grow your connection.

When done strategically, tactfully and effectively, networking can take your business development efforts to the next level and boost your personal brand.

AUDITING YOUR PERSONAL BRAND

Developing your brand while building your book of business is not only beneficial to career longevity; it is essential for presenting yourself as a highly competent, successful leader who is the best choice to provide legal representation.

Your personal brand comes to life in how you consistently act, promote yourself and present yourself to others. In a nutshell, your brand is how other people perceive you.

Presenting yourself effectively, in person and online, is the first step in building the mutually beneficial network of contacts needed to develop business. The way you look and act — and what information is available about you online — is a massive part of your personal brand. How you dress and act speaks volumes about you as a professional.

By actively cultivating your brand, you can help others form positive impressions of you. Thoughtfully building your brand will allow you to establish yourself as a leader in your field and connect with a broader base of potential clients. Creating a targeted and consistent brand can help you make a strong and lasting impression.

Start with your appearance. Your clothing, hair, makeup, accessories, voice, tone and posture are the initial outward-facing signals you give to those around you.

Your appearance should be purposeful and determined. The goal is to look sharp and polished. Wear sophisticated clothes that fit you well. This does not necessarily mean breaking the bank. A less expensive but clean, well-fitting outfit can make just as good an impression as a designer piece.

Practice good grooming habits. If you look and feel good, you will be more confident in your dealings with your prospects. Put some thought into what you wear and your presence, because others are forming their opinion of you based on it.

> Act like you have the business before you have the business.

Try asking people how they would describe you if they were to recommend you to someone. Notice if they mention any elements of your presence and physical appearance. Getting feedback from others will help you identify any issues and give insight into how your brand is perceived.

In addition, review your social media profiles and see what story you are telling there. Be conscious of the digital presence you project, from the language you use to your images and graphics.

Take care to build an online presence that reinforces your in-person appearance. Someone looking you up online should see a strong positive presence that reflects your brand and expertise.

GIVE FIRST, ASK LATER

So, will becoming likable, auditing your image and practicing effective networking bring in business immediately? Probably not. As a new business developer, don't worry — for now — about getting the work.

For people to do business with you and choose you as their attorney, you need to be a measured and strategic giver. This means phone calls, handwritten holiday cards and gifts on peoples' birthdays. It also means frequent "check-ins" and introducing them to a person in your circle who can help them in some way.

It means forwarding valuable industry-specific news, business leads or articles of interest. And it means going out of your way to provide connections with information of value and offer knowledge, access or assistance that they could not easily find otherwise.

Give without the expectation of receiving something in return. Build a smart and authentic value-add by focusing on the other person's gain rather than on your own.

Strategic giving is crucial. It is the mindset of acting like you have the business before you have the business. This may mean putting off asking for actual business for months, but it is bound to get a better response once your connection is primed to trust your instincts and acumen.

By offering this "free" value and advice, you demonstrate your knowledge and willingness to make the needs of your prospect a top priority.

Once you have tested the relationship waters, slowly shift the connection from a prospect relationship to client partnership by showing interest in your contact and adding value. With a little push and some nurturing, a new business developer can make it happen. Take incremental action.

During subsequent meetings, slowly venture into more targeted questions about their work, what kind of stresses they deal with, or what kind of issues they face. With enough sincere probing, you will find an opening to get their buy-in. They may even begin asking for your casual advice.

Mention that you can help with those kinds of issues, or that you would be happy to introduce them to a colleague who can assist. Never underestimate the value of being a "connector" for your contacts and prospects. Introducing people in your circle to each other engenders goodwill.

You can then use this goodwill as currency. Acknowledge your role and contribution to their success, express your gratitude for being able to assist, and then ask if you could talk about access to some additional work or business. People want to help and pay back those who have helped them.

SHAPE YOUR EFFORTS TO REFLECT YOUR LIFESTYLE

As busy professionals, attorneys often have difficulty focusing consistently on things that are important but not urgent. This is especially true for new marketers, who usually get stuck in a vicious cycle of always trying to juggle billable hours and marketing. However, business development is a fluid art, not a hard science.

Create business development strategies that are uniquely suited to your interests and personality type. Choose marketing opportunities that fit with your lifestyle and values and reflect who you are. Incorporate business development into your personal activities. If you enjoy meeting new people, try more traditional networking events and parties.

If you prefer a more intimate setting, try taking people out for coffee or lunch. Carefully evaluate how you spend your time and effort, and then focus on the activities that will play to your strengths and lead to the highest returns.

No one is ever going to hand you the clients you need to build a business. Instead, business development is a career-long process that has its twists and turns as well as ups and downs over time. It is a long game played over several years. With a little planning, focus and persistence, anyone can succeed in business development. It is high-value work, and it should be prioritized accordingly.

The act of prioritizing business development does not bring in business. But it increases the likelihood that the time spent on business development will be productive The personal efforts you make to develop likability, define your personal brand and grow your network throughout your career will be vital to long-term success. WJ

Former Adidas exec convicted for paying college recruits

By Phyllis L. Skupien, Esq.

A jury has convicted three men, including a former Adidas executive, for secretly paying college basketball recruits to play for company-sponsored programs at state universities in Louisville, Kansas and North Carolina.

United States v. Gatto, No. 17-cr-686, jury verdict returned, 2018 WL 5353908 (S.D.N.Y. Oct. 25, 2018).

James Gatto, of Wilsonville, Oregon; Merl Code, of Greer, South Carolina; and Christian Dawkins, of Atlanta, were each convicted of one count of conspiracy to commit wire fraud and one count of wire fraud. Gatto was also convicted of a second count of wire fraud.

"Today's convictions expose an underground culture of illicit payments, deception and corruption in the world of college basketball," U.S. Attorney Robert S. Khuzami said in an Oct. 24 announcement.

The Justice Department said Gatto, the former director of global basketball sports marketing at Adidas, conducted a pay-to-play scheme to persuade student basketball players to sign with certain schools in exchange for helping them secure lucrative endorsement deals if they became professional players.

Code, a former Adidas consultant, and Dawkins, a sports agent, were also convicted of paying players and concealing those payments, which were prohibited under NCAA rules, from the universities.

Munish Sood, a financial adviser, and Thomas "T.J." Gassnola, another former company consultant, previously pleaded guilty for their respective roles, the Justice Department said.

The scheme created a risk for the universities because the NCAA could have imposed fines and other restrictions, including disqualification from NCAA programs and competitions.

In 2015, Gatto and Gassnola gave about $40,000 from Adidas to the family of Dennis Smith Jr. to ensure he committed to play for North Carolina State University, the Justice Department said.

In May 2017, the defendants funneled about $100,000 from Adidas to the father of Brian Bowen to secure his commitment to play basketball at the University of Louisville. To hide the payments, prosecutors said, the defendants sent the money through an amateur team affiliated with Code and a corporation controlled by Dawkins.

According to the Justice Department, Adidas used phony invoices approved by Gatto to pay Bowen. His father received the initial payment in cash in a New Jersey parking lot, prosecutors said.

Between 2016 and 2017, Gatto and Gassnola also funneled about $90,000 from Adidas to the family of Billy Preston for his commitment to play for the University of Kansas. To conceal the payments, Gatto approved invoices submitted by an amateur team affiliated with Gassnola, the Justice Department added.

In the summer of 2017, Gatto and Gassnola gave at least $20,000 to the guardian of Silvio DeSousa to ensure that he committed to play at the University of Kansas.

"The defendants not only deceived universities into issuing scholarships under false pretenses, they deprived the universities of their economic rights and tarnished an ideal which makes college sports a beloved tradition by so many fans all over the world," Khuzami said.

Presiding Judge Lewis Kaplan will sentence the defendants March 5. WJ

Related Filings:
Verdict form: 2018 WL 5353908
Superseding indictment: 2018 WL 4567253

See Document Section B (P. 22) for the verdict form.

REUTERS/Brendan McDermid

REUTERS/Lucas Jackson

Former Adidas executive James Gatto (L) and sports agent Christian Dawkins (R) are two of the defendants convicted for their roles in the college basketball pay-to-play scheme.

Feds: Woman accused of $600,000 credit card fraud plot

A Georgia woman has been accused of conspiring to defraud a bank out of more than $600,000 by using fraudulent credit cards she acquired using stolen identities.

United States v. Adekanmi, No. 18-mj-8207, defendant arrested (D.N.J. Oct. 25, 2018).

Funmilola Adekanmi, who was arrested Oct. 25, has been charged with one count each of bank fraud conspiracy and aggravated identity theft, U.S. Attorney Craig Carpenito of the District of New Jersey said in a statement.

FRAUDULENT ACCOUNTS

The defendant worked with co-conspirator Akintunde Adeyemi and others between July 2016 and May 2017 to obtain credit cards using stolen personal identifying information from victims, some of whom were in New Jersey.

Adeyemi created the fake credit card accounts at the victim banks using the stolen personal information, according to the criminal complaint.

Once the accounts were created, Adeyemi contacted the bank and changed the addresses so the credit cards would be mailed to locations in New Jersey and Georgia, where he and other conspiracy members had access, Carpenito said.

Adeyemi also made fake identification cards with his co-conspirators' photos, and used the names and addresses of the identity theft victims when merchants asked for identification in conjunction with a credit card purchase, prosecutors said.

The conspirators used the cards to buy merchandise and gift cards, according to the charges. They sold some of the gift cards and other purchased items to third parties and kept the rest, causing the bank more than $600,000 in losses, Carpenito said.

Adekanmi, who appeared on store surveillance footage while using some of the credit cards, received a portion of the scheme's profits, according to the criminal complaint.

If convicted, she faces up to 30 years in prison and a maximum fine of $1 million on the bank fraud conspiracy charge. The charge of aggravated identity theft carries a mandatory two-year prison sentence that runs consecutive to any other prison term, prosecutors said.

Adeyemi is currently a fugitive, according to Carpenito. WJ

Los Angeles lawyer who set up pot farms can't rescind guilty plea

By Michael Scott Leonard

A Los Angeles lawyer sentenced in 2017 to four years in prison for his role in setting up two industrial pot farms cannot use a 2016 court ruling to try to rescind his guilty plea, the 9th U.S. Circuit Court of Appeals has decided.

United States v. Hoffman, No. 17-10472, 2018 WL 5045690 (9th Cir. Oct. 17, 2018).

Nathan Hoffman tried unsuccessfully to withdraw from the deal after a Sacramento federal judge refused to hold an evidentiary hearing under *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), which prohibits federal marijuana prosecutions of those complying with state law.

Upholding Hoffman's conviction and sentence Oct. 17, the unanimous appellate panel said the time for Hoffman to assert a *McIntosh* defense was before he pleaded guilty.

"This court decided *McIntosh* in 2016, well prior to Hoffman's plea agreement, and he offers no credible argument that his plea implicitly allowed him to appeal the denial of a *McIntosh* defense raised only after the guilty plea," the panel wrote.

Even if Hoffman had not waived his right to appeal, the appeals court said, he would not be eligible for a *McIntosh* defense because he admitted as part of his plea deal that he was involved in the pot business for profit.

The *McIntosh* court held that only marijuana merchants complying with state law are exempt from federal prosecution, and California law, Cal. Health & Safety Code § 11362.765, forbids for-profit pot sales, the panel noted.

"By his own admission, Hoffman was not in compliance with California law, and a *McIntosh* hearing was unwarranted," the panel wrote.

U.S. Circuit Judges Michael D. Hawkins and Andrew D. Hurwitz and U.S. District Judge Lee H. Rosenthal of the Southern District of Texas, sitting by designation, signed the unpublished memorandum opinion, which does not have precedential value.

The decision affirmed a series of rulings by U.S. District Judge John A. Mendez of the Eastern District of California.

In addition to serving four years in prison, Hoffman will surrender his law license, according to a Justice Department statement issued Oct. 24, 2017, at the time of his sentencing.

All other participants in the scheme have also been convicted and sentenced, including Hung C. Nguyen, owner of the Canna Clinic of Garden Grove and the South Bay Canna Clinic in Torrance, the DOJ statement said.

Law enforcement seized a combined 5,500 marijuana plants from the grow operations Hoffman set up, according to the statement. WJ

Related Filings:
Opinion: 2018 WL 5045690

ENDANGERED SPECIES ACT

PETA's suit against Maryland zoo proceeds despite wiretapping violation

By Meera Gajjar

Despite showing that People for the Ethical Treatment of Animals Inc. engaged in illegal wiretapping in an undercover investigation, a Maryland zoo has failed to convince a federal judge to toss the organization's suit over several endangered animals' welfare.

People for the Ethical Treatment of Animals Inc. v. Tri-State Zoological Park of Western Maryland Inc. et al., No. 17-cv-2148, 2018 WL 5761689 (D. Md. Nov. 1, 2018).

U.S. District Judge Paula Xinis of the District of Maryland in a Nov. 1 opinion refused the Tri-State Zoological Park of Western Maryland Inc.'s call to dismiss the suit as punishment for PETA's obtaining evidence in violation of the Maryland Wiretap Act, Md. Code Ann., Cts. & Jud. Proc. § 10-402.

She also denied the zoo's June 11 motion for judgment on the pleadings, which sought dismissal of the suit for lack of standing and failure to state a claim.

PETA alleges Tri-State is violating the Endangered Species Act, 16 U.S.C.A. § 1531, by failing to provide adequate social interactions, shelter and nutrition for two ring-tailed lemurs, five tigers and an African lion.

The zoo's June motion reasserted arguments the court had previously rejected and no grounds exist for revisiting them, Judge Xinis said. *PETA Inc. v. Tri-State Zoological Park of W. Md. Inc.*, No. 17-cv-2148, 2018 WL 434229 (D. Md. Jan. 16, 2018).

Her analysis focused on new arguments to prevent the zoo from having a "second bite at the dismissal apple," according to the opinion.

IMPAIRED MISSION IS SUFFICIENT INJURY

Tri-State challenged whether PETA has suffered "a sufficiently concrete and particularized injury" to meet standing requirements, Judge Xinis said.

According to the complaint, the zoo's alleged "take" of endangered species and normalization of animal mistreatment are injuring PETA by frustrating its mission to reduce animal abuse.

PETA's diversion of its limited resources from animal rescues and public education campaigns to investigations and actions regarding Tri-State has also impaired its mission, the organization said.

Judge Xinis said PETA's purported injuries satisfied standing requirements.

SUBSPECIES-BASED PROTECTIONS

Tri-State argued in its motion for judgment on the pleadings that the ESA claims related to its tigers and lion fail because those animals do not belong to the subspecies protected by the statute.

PETA cannot claim that Tri-State is violating federal law, the zoo argued, because ESA regulations in place prior to 2016 removed protections for "generic" tigers, those not identifiable as belonging to a particular subspecies.

But Judge Xinis said the regulations were related to a registration requirement for generic tigers used in breeding efforts, and did not to apply to the take in this case, which was solely for exhibition purposes.

She likewise dismissed Tri-State's argument that its lion is not covered by the ESA because the animal does not belong to either of the subspecies listed under the statute.

Tri-State's assertion that a lion's current geographic location alone determines its subspecies, and thus its eligibility for ESA protections, ignored regulations protecting all lions — including captive ones — from take, she said.

UNDERCOVER INVESTIGATION

On July 12, Tri-State moved to dismiss the suit as a sanction for PETA agents trespassing on zoo property by fraudulently posing as volunteers and then illegally obtaining evidence by covertly taking photos and videos of the facility, according to the opinion.

Due to a lack of controlling Maryland law as to whether fraudulently obtained consent is a viable defense to trespass, Judge Xinis said she could not justify sanctioning PETA for using faux volunteers to conduct its investigation.

But she ruled that PETA violated Maryland's wiretap law by recording videos that include audio without the consent of all parties being recorded.

She said dismissal was not necessary because exclusion of the videos as evidence cures any prejudice against the defendants.

Future similar violations will be viewed as "knowing, willful and contemptuous" and sanctioned accordingly, Judge Xinis warned PETA. WJ

Attorneys:
Plaintiff: Conor B. O'Croinin, Zuckerman Spaeder LLP, Baltimore, MD

Defendants: Nevin L. Young, Burlington & Young, Annapolis, MD

Related Filings:
Opinion: 2018 WL 5761689
Motion for judgment on the pleadings: 2018 WL 3359749
Order denying motion to dismiss: 2018 WL 434229

See Document Section C (P. 31) for the opinion.

German shipper to pay $3.2 million for oil pollution crimes

By Carin Ford

A German shipping company will pay a $3.2 million fine for falsifying its log books to hide illegal discharges while making regular port calls in Portland, Maine, according to a U.S. Justice Department statement.

DOJ Press Release, German Shipping Operator Sentenced to Pay $3.2 Million for Obstruction of Justice and Falsifying Official Logs to Hide Deliberate Oil Pollution, DOJ-1450, 2018 WL 5730248 (Nov. 2, 2018).

The company, MST Mineralien Schiffahrt Spedition und Transport GmbH, also was ordered to serve four years of probation requiring its vessels to implement an environmental compliance plan that includes independently audited inspections, according to the statement.

The company pleaded guilty to one count of violating the Act to Prevent Pollution from Ships, 33 U.S.C.A. § 1901, and one count of obstruction of justice for falsifying its records to hide intentionally discharging oily bilge waste from its vessel, the M/V Marguerita, the DOJ said.

MST faced similar charges in 2016 in the District of Minnesota for concealing discharges of oil-contaminated waste from the M/V Cornelia into the Great Lakes, and was on probation in that state at the time of the Maine violations, according to the statement.

The case is *United States v. MST Mineralien Schiffahrt Spedition und Transport GmbH*, No. 17-cr-117, *indictment filed* (D. Me. Aug. 22, 2017). WJ

Related Filings:
DOJ statement: 2018 WL 5730248

PAC donors

CONTINUED FROM PAGE 1

funds being paid to Tierney, who used the alias of Bill Johnson, the Justice Department said.

Criminal charges filed Nov. 2 said the scam PACs received more than $1 million, of which Tierney received at least $410,000. The remaining funds were used to continue the fraudulent fundraising scheme through his use of telemarketers, the government said.

According to the criminal complaint, the scam entities were:

- The Grassroots Awareness PAC, which Tierney called "Autism Awareness."
- The Americans for Law Enforcement PAC, or the "Law Enforcement Coalition."
- The National Campaign PAC, or the "Pro-Life Committee."
- The Voter Education PAC, or the "Republican Victory Campaign."
- The Action Coalition PAC, or the "Pro-Life Action Coalition."
- The Protect Our Future PAC, or the "Pro-Life Committee."

The Justice Department said these PACs solicited donations based on false and misleading representations made in written fundraising materials, telephone calls and public filings with the Federal Election Commission.

For example, the National Campaign PAC stated that donations would help it work with anti-abortion allies in churches and with activists across the country, when in actuality it did not do any work with those individuals, the complaint said.

In addition to the PACs, Tierney created shell entities with names that suggested they were related to marketing and other communications, but were in fact used to conceal fraudulent money transfers, the Justice Department said.

The shell companies did not have any active operations or employees, and were only used to funnel the donated funds to the defendant, it added.

The defendant also created the fake identity of Emma Smith, a supposed "volunteer" for one of the PACs, but the Justice Department said that neither Emma Smith nor the position ever existed.

As part of his plea, Tierney agreed to pay restitution of at least $1.4 million, the DOJ said.

The charge of conspiracy to commit wire fraud carries a maximum sentence of five years in prison. Tierney is scheduled to be sentenced Feb. 7, 2019. WJ

Related Filings:
Tierney information: 2018 WL 5800474

See Document Section A (P. 19) for the information.

Drugmaker AbbVie hid 5-year kickback scheme, investor suit says

By Katie Pasek

AbbVie Inc. deceived investors by hiding a kickback program to boost sales of the drugmaker's blockbuster arthritis treatment Humira, a shareholder says in a Chicago federal court lawsuit.

Holwill v. AbbVie Inc. et al., No. 18-cv-6790, complaint filed, 2018 WL 4905500 (N.D. Ill. Oct. 9, 2018).

The class-action complaint says North Chicago, Illinois-based AbbVie's shares lost about 5 percent of their value, or $4.35 each, on news that the California insurance commissioner had sued the company, alleging it violated the state's anti-kickback laws.

Humira is an anti-inflammatory injectable medication used to treat rheumatoid arthritis, Crohn's disease, ulcerative colitis, psoriasis and other ailments, according to the complaint.

Shareholder Mayuko Holwill is seeking compensation for investors who allegedly lost money on AbbVie shares bought during a nearly five-year period ending Sept. 18, the day California filed its lawsuit.

Holwill's complaint, filed Oct. 9 in the U.S. District Court for the Northern District of Illinois, also names AbbVie Chairman and CEO Richard A. Gonzalez, and Chief Financial Officer and Executive Vice President William J. Chase as defendants.

MISLEADING REGULATORY FILINGS

According to Holwill's suit, AbbVie touted "the strength and durability" of its products in its third-quarter fiscal results, filed with the Securities and Exchange Commission on Oct. 25, 2013, the start of the class period. The company's stock was trading that day at about $50 a share.

In its annual fiscal reports for 2014 to 2017, AbbVie repeatedly enumerated its objective to increase Humira sales, in part by seeking regulatory approval to treat additional ailments and expanding its market share and presence in new markets.

REUTERS/Brednan McDermid

At the same time, the regulatory filings acknowledged AbbVie was subject to anti-kickback laws, the complaint says.

CALIFORNIA ALLEGATIONS

According to a Sept. 18 Reuters article, California alleged AbbVie's kickback scheme gave cash, meals, trips, patient referrals, and other goods and services to health care providers for prescribing Humira. *State v. AbbVie Inc.*, No. RG18893169, *complaint filed* (Cal. Super. Ct., Alameda Cty. Sept. 18, 2018).

A whistleblower, who was a registered nurse employed as an AbbVie "nurse ambassador," alerted the state to the alleged scheme, Reuters reported.

A Bloomberg article published the same day said complaints about known side effects of Humira may have been unreported as part of the ambassador program.

California claims the five-year scheme began in 2013, according to Holwill's suit.

AbbVie shares fell to about $91 over the next two days after trading as high as $123 in late January.

Holwill says the defendants violated the anti-fraud provisions of the Securities Exchange Act of 1934, 15 U.S.C.A. §§ 78j(b) and 78t(a), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, by deceiving investors and artificially inflating AbbVie's share price. WJ

Attorneys:
Plaintiff: Jeremy A. Lieberman, Pomerantz LLP, New York, NY; Patrick V. Dahlstrom, Pomerantz LLP, Chicago, IL

Related Filings:
Complaint: 2018 WL 4905500

See Document Section D (P. 37) for the complaint.

Pittsburgh residents charged in multimillion-dollar Medicaid fraud scheme

Four employees of a group of home health care-related agencies in Pittsburgh have been charged for their alleged roles in a Medicaid fraud scheme that may have cost the state and federal governments millions of dollars.

United States v. Moriarty, No. 18-cr-282, information filed, 2018 WL 5603122 (W.D. Pa. Oct. 18, 2018).

United States v. Covington, No. 18-cr-283, information filed (W.D. Pa. Oct. 18, 2018).

United States v. Brown, No. 18-cr-284, information filed (W.D. Pa. Oct. 18, 2018).

United States v. Horton, No. 18-cr-285, information filed (W.D. Pa. Oct. 18, 2018).

Autumn Brown, 31; Tiffhany Covington, 41; Brenda Lowry Horton, 48; and Travis Moriarty, 37, all of Pittsburgh, have been separately charged with one count each of conspiracy to commit health care fraud, according to criminal informations filed Oct. 18 in the U.S. District Court for the Western District of Pennsylvania.

Each defendant was an employee of one or more related businesses: Moriarty Consultants Inc., Activity Daily Living Services Inc., Coordination Care Inc. and Everyday People Staffing Inc., according to the charges. Federal prosecutors said the companies commingled their money.

The government said in a statement that the Pennsylvania Medicaid Program approved MCI, ADL and CCI to offer Medicaid recipients certain services, such as personal assistance services, nonmedical transportation and service coordination. EPS served as back-office and staffing support, the statement said.

Each business was owned by the same two related people, identified only as "AM" and "DD" in the charges.

Prosecutors noted that personal assistance services can include things like in-home meal preparation, bathing and other services that allow beneficiaries to remain in their homes rather than being institutionalized.

Beneficiaries can receive up to 168 hours of personal assistance care per week, at a reimbursement rate of $16 to $19 per hour, according to the charges.

Prosecutors claim that between January 2011 and April 2017, the defendants and others fabricated time sheets to indicate they had provided beneficiaries with in-home care that never actually occurred.

The businesses' owners also allegedly directed the defendants to stop using their own names on time sheets and substitute the names of "ghost employees."

Some, like Brown, were in on this scheme and received kickbacks for allowing their names to be used, while other "ghost employees" were not aware of the practice or that their names had been used, according to the charges.

Prosecutors said the time sheets sometimes reflected periods where employees were either working at other jobs or were not living in the area. In other instances, the claims submitted to Medicaid allegedly involved beneficiaries who were hospitalized, incarcerated or dead at the time the personal assistance services were supposedly rendered.

The charges said employees were also directed to fabricate certain documents for state audits, including time sheets, service coordination notes, employee background checks and affidavits from beneficiaries.

Between January 2011 and April 2017, MCI, ADL and CCI collectively took in about $87 million in Medicaid payments, with personal assistance payments accounting for more than 90 percent of that sum, according to the statement.

The charges estimate that each defendant caused losses to the Medicaid program of up to $1.5 million.

Each defendant faces up to 10 years in prison, a fine of $250,000 or both under federal sentencing guidelines, prosecutors said. WJ

Related Filings:
Moriarty information: 2018 WL 5603122

CASE AND DOCUMENT INDEX

TIERNEY

2018 WL 5800474 (S.D.N.Y.) (Trial Pleading)
United States District Court, S.D. New York.

UNITED STATES OF AMERICA,
v.
William TIERNEY, a/k/a "Bill Johnson", Defendant.

No. 1:18CR00804.
November 2, 2018.

Information

Geoffrey S. Berman, United States Attorney.

COUNT ONE
(Wire Fraud Conspiracy)

The United States Attorney charges:

Overview of the Fraudulent Scheme

1. Beginning at least in or about January 2018, WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, conspired to defraud tens of thousands of donors to approximately six political action committees ("PACs") that he founded, controlled, and operated (the "Scam PACs").

2. The Scam PACs targeted victims across the country, including in the Southern District of New York, raising funds on the basis of false and misleading representations regarding causes including "autism awareness," "law enforcement appreciation," and the pro-life movement. In truth and in fact, virtually all of the money raised was paid to WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, and his associates, or else used to perpetuate the fraud through additional telemarketing and fundraising expenditures. In particular, during the charged period, the Scam PACs raised more than $1,000,000, at least $410,649.18 of which was received by Tierney personally. Less than one percent (1%) of all donor money to the PACs was spent on political contributions during the relevant period, and virtually all of the remaining funds were used to further the fraudulent fundraising scheme through telemarketing and other means.

3. WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, used various means and methods to carry out the fraudulent scheme involving the Scam PACs, including but not limited to the following:

a. Between 2014 and 2018, TIERNEY established, and directed the fundraising efforts for, the following Scam PACs: Grassroots Awareness PAC, a/k/a "Autism Awareness"; Americans for Law Enforcement PAC, a/k/a "Law Enforcement Coalition"; National Campaign PAC, a/k/a the "Pro-Life Committee"; Voter Education PAC, a/k/a the "Republican Victory Campaign"; Action Coalition PAC, a/k/a the "Pro-Life Action Coalition"; and Protect Our Future PAC, a/k/a the "Pro-Life Committee." In December 2017, TIERNEY also established Health Awareness PAC, a/k/a "Breast Cancer Awareness," which did not raise funds prior to TIERNEY's arrest in 2018.

b. The Scam PACs solicited donations based on false and misleading representations and material omissions about their purported efforts, activities, and spending. These representations were made in written fundraising solicitations, telephone call solicitations, public PAC filings with the Federal Election Commission ("FEC"), and websites associated with the Scam PACs and related entities. For example:

i. Grassroots Awareness PAC, a/k/a "Autism Awareness," claimed to be a "grassroots organization" that was "launching a new effort from coast to coast to educate the public about autism [...]." In fact, Grassroots Awareness PAC engaged in no local organizing, had no members or volunteers, and was not engaging in any "new effort" separate from its fundraising activities.

ii. National Campaign PAC, a/k/a "Pro-Life Committee," stated that it was "out there every day, persuading people and changing minds" and that it intended to "reach persuadable Americans in key areas across the country." It also stated that donations would help it to "[w]ork with allies in churches and pro-life activists across the country." In fact, National Campaign PAC specifically instructed telemarketers to ask call recipients if they were pro-life, pro-choice, or in-between, and to hang up immediately if the answer was anything but pro-life. Additionally, National Campaign PAC did no work whatsoever with churches or activists.

c. TIERNEY created and utilized a web of shell pass-through entities that concealed and disguised the fraud. Donated funds were transferred to these shell entities, which were given names that suggested the entities engaged in marketing, consulting, and communications efforts; for example, "Political Issue Advocacy, LLC," "Alliance Marketing, LLC," and "Community Outreach, LLC." In public FEC disclosure documents filed by the Scam PACs, those payments to the shell entities therefore appeared to be expenditures related to marketing, consulting, and communications efforts. In truth and in fact, the shell entities had no active operations or employees. Rather, TIERNEY used them as pass-through entities to transfer donations to himself and to additional accounts he controlled.

d. In connection with the creation and use of shell entities, among other things, TIERNEY established a website for Political Issue Advocacy, LLC. The website claimed that Political Issue Advocacy provided services to trade associations, candidate campaigns, and nonprofit organizations. Each of those assertions was false.

e. The scheme utilized multiple fraudulent identities. For example, TIERNEY used the fake identity "Bill Johnson" when meeting and corresponding with numerous officials at call centers he engaged to raise money for certain of the Scam PACs, as well as in communications with an individual TIERNEY hired to act as Treasurer for two of the Scam PACs. Another fake identity, "Emma Smith," was used in fundraising solicitations that described "Smith" as the "Volunteer Chairman" for one of the Scam PACs. "Smith" was listed as the signatory of letter stating, among other things, that "I'm a pro-life woman myself, as are our Pro-Life Committee's founder and many of our colleagues." In truth and in fact, neither Emma Smith nor the position of "Volunteer Chairman" actually existed, and the founder of National Campaign PAC, a/k/a the "Pro-Life Committee," was TIERNEY.

f. TIERNEY oversaw the hiring of individuals, recruited through an online classified advertisements website, who would be listed in public FEC filings as the Treasurer of certain of the Scam PACs -- but who in fact had no substantive role in the operations, fundraising, or spending of the PACs for which they were listed as Treasurer. Those individuals were paid approximately $300 per month by TIERNEY to review and confirm calculations for FEC filings prepared by TIERNEY and his associates. By using these different individuals as Treasurers, TIERNEY avoided publicly associating his own name with the Scam PACs, and also avoided linkages between the Scam PACs in public filings. Additionally, TIERNEY instructed one of his associates to use a fake last name when interviewing individuals to be listed as Treasurer for certain of the Scam PACs.

g. TIERNEY instructed two telemarketing vendors that received millions of dollars from certain of the Scam PACs to create shell subsidiary LLCs -- which he referred to as "Stealth LLCs" -- with names that avoided any discernable connection with their parent telemarketing vendors. TIERNEY further directed the telemarketing vendors to bill each relevant Scam PAC from a corresponding Stealth LLC. Each Scam PAC then stated in public FEC filings that donor funds were used, among other things, to pay different Stealth LLCs. This prevented the FEC, donors, and other members of the public from being able to learn from FEC disclosure forms that multiple Scam PACs were in fact paying the same telemarketing vendors.

h. TIERNEY undertook efforts to avoid press coverage of the Scam PACs, despite the PACs' public claims of national advocacy and awareness campaigns. TIERNEY also monitored media articles about fraudulent PACs, including in connection with evaluating whether to increase their de minimis political donations to avoid the suspicion of journalists.

i. Certain of the Scam PACs falsely purported to provide opportunities for individuals to contact the relevant PACs for, among other things, information on volunteering for candidates or requesting bumper stickers. Multiple attempts by an undercover law enforcement officer to contact certain of the Scam PACs for those advertised purposes, using undercover names and contact information, were unsuccessful.

Statutory Allegations

4. In or about 2018, in the Southern District of New York and elsewhere, WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit an offense against the United States, to wit, wire fraud, in violation of Title 18, United States Code, Section 1343.

5. It was a part and an object of the conspiracy that WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, and others known and unknown, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire, radio, and television communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343, to wit, TIERNEY participated in a scheme to defraud donors and potential donors to certain PACs, including National Campaign PAC, Voter Education PAC, Grassroots Awareness PAC, Americans For Law Enforcement PAC, Action Coalition PAC, and Protect Our Future PAC, by, among other things, causing to be transmitted fundraising solicitations, including through the use of interstate phone calls, containing false and misleading statements regarding the operation of the PACs and the use of donor money.

Overt Act

6. In furtherance of said conspiracy and to effect the illegal object thereof, the following overt act, among others, was committed in the Southern District of New York:

a. In or about 2018, WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, caused certain of the PACs to make solicitation calls and send written solicitation materials that contained false and misleading statements to donors and potential donors located in the Southern District of New York.

(Title 18, United States Code, Section 371.)

FORFEITURE ALLEGATION

7. As a result of committing the offense alleged in Count One of this Information, WILLIAM TIERNEY, a/k/a "Bill Johnson," the defendant, shall forfeit to the United States, pursuant to Title 18, United States Code Section 981(a)(1)(C) and Title 28, United States Code Section 2461(c), any and all property, real or personal, which constitutes or is derived from proceeds traceable to the commission of the offense charged in Count One of this Information.

SUBSTITUTE ASSETS PROVISION

8. If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third person;

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be subdivided without difficulty; it is the intent of the United States, pursuant to Title 18, United States Code, 981(a)(1)(C), Title 21, United States Code, Section 853(p), and Title 28, United States Code, Section 2461(c), to seek forfeiture of any other property of the defendant up to the value of the forfeitable property.

(Title 18, United States Code, Section 981(a)(1)(C), Title 21, United States Code, Section 853(p), Title 28, United States Code, Section 2461(c).)

<<signature>>

GEOFFREY S. BERMAN
United States Attorney

End of Document

GATTO

2018 WL 4567253 (S.D.N.Y.) (Trial Pleading)
United States District Court, S.D. New York.

UNITED STATES OF AMERICA,
v.
James GATTO, a/k/a "Jim," Merl Code, and Christian Dawkins, Defendants.

No. S2 17 Cr. 686 (LAK).
August 14, 2018.

Superseding Indictment

Robert S. Khuzami, for the United States, Acting Under Authority Conferred by 28 U.S.C. § 515.

Overview

1. The charges in this Indictment stem from a scheme to defraud National Collegiate Athletic Association ("NCAA") Division I universities by causing them to issue athletic-based financial aid under false and fraudulent pretenses, and by intentionally concealing from them significant and material information necessary to the universities' ability to exercise their right to control their financial assets. As set forth herein, scheme participants, who included individuals employed by and affiliated with a global athletic apparel company ("Company-1"), financial advisors and business managers, made or attempted to make illicit cash payments to the families of high school basketball players in connection with commitments by those student-athletes to matriculate at specific universities sponsored by Company-1, and with the further aim that these student-athletes would later sign lucrative contracts with the scheme participants upon entering the National Basketball Association ("NBA").

2. As alleged herein, JAMES GATTO, a/k/a "Jim," the defendant, an executive at Company-1, conspired with other Company-1 employees and/or consultants, including MERL CODE, the defendant, a consultant for Company-1 and its high school and college basketball programs, and another consultant for Company-1 ("CC-3"), to funnel payments to the families of high school basketball players in connection with commitments by those players to attend and play for Company-1 sponsored universities. In addition, CHRISTIAN DAWKINS, the defendant, along with a co-conspirator not named as a defendant herein ("CC-1"), brokered and facilitated at least some of the payments to the families of high school basketball players described herein, in exchange for an expectation that these players also would retain the services of DAWKINS, a business manager, and CC-1, a financial advisor, upon turning professional.

3. The scheme described herein served to defraud the relevant universities in several ways. First, because the illicit payments to the families of student-athletes described herein rendered those student-athletes ineligible to participate in Division I athletics, scheme participants conspired to conceal these payments from the universities, thereby causing them to provide or agree to provide athletic-based scholarships and financial aid under false and fraudulent pretenses. Indeed, the defendants and their co-conspirators, who included the families of the student-athletes and, in certain instances, one or more corrupt coaches at the universities, knew that, for the scheme to succeed and the athletic scholarships to be awarded, the illicit payments described herein had to be concealed from the universities, and that certifications, falsely representing that the student-athletes were eligible to compete in Division I athletics, would be submitted to the universities.

4. Second, the scheme participants further defrauded the universities, or attempted to do so, by depriving the universities of significant and necessary information regarding the non-compliance with NCAA rules by the relevant student-athletes and their families, and, in some cases, by certain corrupt coaches involved in the scheme. In doing so, the scheme participants interfered with the universities' ability to control their assets and created a risk of tangible economic harm to the universities, including, among other things, decision-making about the distribution of their limited athletic scholarships; the possible disgorgement of certain profit-sharing by the NCAA; monetary fines; restrictions on athlete recruitment and the distribution of athletic scholarships; and the potential ineligibility of the universities' basketball teams to compete in NCAA programs generally, and the ineligibility of certain student-athletes in particular.

Relevant Entities

5. At all relevant times, Company-1 was a multi-national corporation that designed and manufactured shoes, clothing, and accessories for multiple sports, including basketball. Company-1 sponsored numerous high school, college, and professional basketball

programs, including a program for amateur pre-college athletes, and sponsored the athletic programs of a number of universities that regularly had top-ranked NCAA Division I men's basketball teams, including the University of Louisville, the University of Miami, North Carolina State University, and the University of Kansas.

6. At all relevant times, the University of Louisville was a public research university located in Kentucky. At all relevant times, the University of Louisville fielded multiple varsity sports teams in NCAA Division I competition, including men's basketball. At all relevant times, the University of Louisville athletics department maintained an exclusive apparel endorsement contract with Company-1.

7. At all relevant times, the University of Miami was a private research university located in Florida. At all relevant times, the University of Miami fielded multiple varsity sports teams in NCAA Division I competition, including men's basketball. At all relevant times, the University of Miami athletics department maintained an exclusive apparel endorsement contract with Company-1.

8. At all relevant times, the University of Kansas was a public research university located in Kansas. At all relevant times, the University of Kansas fielded multiple varsity sports teams in NCAA Division I competition, including men's basketball. At all relevant times, the University of Kansas athletics department maintained an exclusive apparel endorsement contract with Company-1.

9. At all relevant times, North Carolina State University was a public research university located in North Carolina. At all relevant times, North Carolina State University fielded multiple varsity sports teams in NCAA Division I competition, including men's basketball. At all relevant times, the North Carolina State University athletics department maintained an exclusive apparel endorsement contract with Company-1.

The Defendants and Relevant Individuals

10. At all relevant times, JAMES GATTO, a/k/a "Jim," the defendant, was the head of Global Sports Marketing - Basketball for Company-1. In that capacity, GATTO oversaw significant components of Company-1's high school and college basketball programs, including a multi-million dollar annual budget, and facilitated payments to the families of student-athletes as a part of the scheme described herein.

11. At all relevant times, MERL CODE, the defendant, was a consultant for Company-1 and its high school and college basketball programs. In that capacity, CODE worked directly with amateur and college basketball coaches and players and facilitated payments to the families of student-athletes as a part of the scheme described herein.

12. From in or about 2015 until in or about May 2017, CHRISTIAN DAWKINS, the defendant, worked for a sports management company ("SMC-1"). DAWKINS was not a registered sports agent, and his work at SMC-1 primarily consisted of recruiting athletes as clients and maintaining client relationships for SMC-1. In or about May 2017, SMC-1 terminated DAWKINS in connection with DAWKINS's alleged misuse of an athlete's credit card to pay for expenses from a ride services company without the athlete's authorization. Beginning in May 2017, DAWKINS endeavored to start his own sports management business with CC-1, among others.

13. At all relevant times, CC-3 was a consultant for Company-1 and its high school and college basketball programs. In that capacity, CC-3 worked directly with amateur and college basketball coaches and players and facilitated payments to players and their families as a part of the scheme described herein.

14. At all relevant times, CC-1 was a financial advisor and the founder of an investment services company in New Jersey.

15. At all relevant times, another co-conspirator not named herein ("CC-2") was the director of a high-school aged amateur athletic or "AAU" basketball team sponsored by Company-1.

Background on the NCAA and Relevant NCAA Rules

16. The NCAA is a non-profit organization headquartered in Indianapolis, Indiana, which regulates athletics for over 1,000 colleges and universities, conferences, and other associations. As detailed herein, the NCAA also governs the recruitment of amateur student-athletes and the provision, by member schools, of athletic-based financial aid. In 2 017, NCAA member schools provided more than $3.3 billion in athletic scholarships to more than 150,000 student-athletes and their families.

17. NCAA member schools are organized into three separate Divisions: Division I, Division II, and Division III. The University of Louisville, the University of Miami, the University of Kansas, and North Carolina State University are all in NCAA's Division I, which is the highest level of intercollegiate athletics sanctioned by the NCAA.

18. Division I schools typically have the biggest student bodies, manage the largest athletics budgets and offer the most athletic scholarships. Among other things, Division I schools must offer a minimum amount of financial assistance (in the form of scholarships) to their athletes; however, at all relevant times, the NCAA set a maximum number of scholarships available for each sport that a Division I school could not exceed. In particular, at all relevant, schools could offer no more than 13 athletic scholarships for men's basketball.

19. Among the NCAA's core principles for the conduct of intercollegiate athletics is a directive that "[s]tudent-athletes shall be amateurs in an intercollegiate sport" and that "student-athletes should be protected from exploitation by professional and commercial enterprises." The NCAA Constitution further states that "an institution found to have violated the [NCAA]'s rules shall be subject to disciplinary and corrective actions as may be determined by the [NCAA]."

20. Consistent with the NCAA's core principles, NCAA rules, known as "bylaws," prohibit any financial assistance to current or prospective student-athletes other than from the university itself or the athletes' legal guardians without express authorization from the NCAA. In addition, under NCAA rules, neither student-athletes, prospective student-athletes, nor their relatives can accept benefits, including money, travel, clothing or other merchandise directly or indirectly from outside sources such as agents, financial advisors, or apparel companies.

21. At all relevant times, a student-athlete was rendered "ineligible" to participate in Division I sports if the athlete was recruited by a university or any "representative of its athletics interests," such as an outside sponsor of the university's athletic teams or a "booster," in violation of NCAA rules. Under NCAA rules, the acceptance of prohibited financial benefits by the family of a current or prospective student-athlete renders the student-athlete ineligible to compete, regardless of whether the student-athlete has knowledge that his or her relatives have accepted such benefits.

22. At all relevant times, coaches and other team staff at NCAA Division I schools also were subject to various prohibitions, including, among other things, prohibitions on arranging for or giving or offering any benefits (other than those expressly permitted by NCAA regulations) to prospective student-athletes and their friends and relatives.

23. To enforce these core principles and related rules, at all relevant times, current and prospective student-athletes (and, in some cases, their parents or guardians), were required to complete various certifications regarding their compliance with NCAA rules and their eligibility to participate in NCAA-sponsored sports. Similarly, coaches and other staff members of university athletics departments were required to complete annual certifications regarding their compliance with NCAA rules and knowledge of NCAA rules violations occurring at their university.

24. For example, at all relevant times, student-athletes attending Division I schools were required, on an annual basis, to "sign a statement ... in which the student-athlete submit[ted] information related to eligibility, recruitment, financial aid, [and] amateur status," which was known as the "Student-Athlete Statement." In the Student-Athlete Statement, the student-athlete represented, among other things, that "[a]ll information provided to the NCAA ... and the institution's admissions office [wa]s accurate and valid, including ... [his] amateur status" and further certified his understanding that "if you sign this statement falsely or erroneously, you violate NCAA legislation on ethical conduct and you will further jeopardize your eligibility."

25. Consistent with these core principles, at all relevant times, many Division I universities required student-athletes (and, in some cases, their families) to complete additional certifications attesting to their amateur status as a condition of receiving athletic-based financial aid. For example, at all relevant times, the University of Kansas required a student-athlete (and a parent or guardian, if the student-athlete was a minor) to sign a "Financial Aid Agreement" in which the student-athlete certified his understanding that "to qualify for this athletic aid, I must ... [m]eet and maintain the eligibility requirements for athletic participation and financial aid established by the [NCAA]." (emphasis in original).

26. Additionally, at all relevant times, coaches and staff members were required to certify annually that they had reported to their university any knowledge of violations of NCAA rules involving their institution. Moreover, at all relevant times the NCAA rules required any contracts between a member-school and a coach to include a stipulation that a coach found to have violated NCAA regulations shall be subject to disciplinary and corrective actions, including suspension without pay or termination of employment for significant and repetitive violations.

27. In addition, at all relevant times, the Bylaws prohibited student-athletes, coaches and staff members of athletics departments from "knowingly furnishing or knowingly influencing others to furnish the NCAA or the individual's institution false or misleading information concerning an individual's involvement in or knowledge of matters relevant to a possible violation of an NCAA regulation."

28. Violations of NCAA rules by a university or any individual affiliated with that university may lead to penalties including, but not limited to, limitations on a university's "participation in postseason play in the involved sport"; financial penalties including "requirements that an institution pay a fine, return revenue received from a specific athletics event or series of events, or ... reduction[s] in or elimination of monetary distribution by" the NCAA; "limitations on the number of financial aid awards that may be provided" by the university to student-athletes; and recruiting restrictions including on the ability to conduct off-campus recruiting activities or to communicate by telephone or letter with prospective student-athletes.

Allegations Related to North Carolina State University

29. In or around 2015, JAMES GATTO, a/k/a "Jim," the defendant, CC-3, and others known and unknown, conspired to illicitly funnel approximately $40,000 from Company-1 to the father of a student-athlete ("Parent-1") who was, at the time, widely regarded as the top high school recruit in the state of Worth Carolina and who had played for a Company-1 sponsored AAU team. The payments were intended to help secure and maintain the student-athlete's commitment to play basketball at North Carolina State University, a school sponsored by Company-1.

30. In or around September 2 015, the student-athlete publicly committed to attend North Carolina State University, and to play for its men's basketball team beginning in the fall of 2016. Shortly thereafter, and based on concerns that the student-athlete might change his mind and select another university, JAMES GATTO, a/k/a "Jim," the defendant, and CC-3, among others, agreed to make a payment to Parent-1 to ensure that the student-athlete remained committed to North Carolina State University. In particular:

a. In or around October 2 015, a coach at North Carolina State University ("Coach-4") informed CC-3, in substance, that the student-athlete was not happy with his selection of North Carolina State University and was considering de-committing before the 2016-17 college basketball season that fall.

b. Accordingly, and to secure the student-athlete's willingness to remain committed to the university, GATTO and CC-3 agreed to make a payment of $40,000 to Coach-4, which Coach-4 would in turn deliver to Parent-1.

c. In or about October 2015, CC-3 withdrew $40,000 in cash from an account CC-3 controlled, and delivered the funds to Coach-4 in North Carolina. Coach-4, in turn, represented that the funds would be delivered to Parent-1. GATTO caused Company-1 to reimburse CC-3 for the cash payment by approving one or more transfers to CC-3 from Company-1 pursuant to sham invoices.

d. On or about December 2015, the student-athlete signed a financial aid agreement with North Carolina State University and provided certifications necessary to establish his eligibility for an athletic scholarship. In particular, the student-athlete was asked whether, in the past year, he "or any member of [his family] [had] been paid money, borrowed money, or received any benefit of any kind from an athletics booster, sports agent, runner, or financial advisor," to which the student-athlete answered "no."

e. Thereafter, the student-athlete enrolled at North Carolina State University and played for the university's men's basketball team for the 2 016-17 NCAA season before entering the NBA draft in June 2017.

31. The payment described above was designed to be concealed, including from the NCAA and officials at North Carolina State University, in order for the scheme to succeed and for the student-athlete to receive an athletic scholarship from North Carolina State University. In particular, and as a part of the scheme, scheme participants, including, among others, JAMES GATTO, a/k/a "Jim," the defendant, CC-3, Parent-1, and one or more coaches at North Carolina State University, made, intended to make, or caused or intended to cause others to make false certifications to North Carolina State University and the NCAA about the existence of the payments and the known violations of NCAA rules.

Allegations Related to the University of Louisville

32. Beginning in approximately May 2017, and continuing into at least September 2017, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, CC-3, and others known and unknown, conspired to illicitly funnel approximately $100,000 from Company-1 to the father of a student-athlete who was an All-American high school basketball player and considered at the time to be one of the top recruits in his class ("Parent-2"). The payments were intended to help secure the student-athlete's commitment to play basketball at the University of Louisville, a school sponsored by Company-1, and to further ensure that the student-athlete ultimately retained the services of DAWKINS.

33. The plan to funnel $100,000 in payments to Parent-2 was formulated by JAMES GATTO, a/k/a "Jim," MERL CODE, CHRISTIAN DAWKINS, the defendants, and CC-3, among others, in or around May 2017, after most of the top high school basketball recruits

from the Class of 2017 had already committed to various universities. At the time, the student-athlete had not yet committed to a particular university.

34. On or about June 3, 2017, the student-athlete publicly announced his intention to enroll at the University of Louisville and to play for its NCAA Division I men's basketball team, becoming the highest-ranked recruit to commit to Louisville in nearly a decade. At the time, and as part of that commitment, the student-athlete completed certain paperwork required by the University of Louisville, including a Student Athlete Statement in which the student-athlete represented that "all information provided" regarding "your amateur status" is "accurate and valid," and further affirmed his " understand[ing] that if you sign this statement falsely or erroneously, you violate NCAA legislation and ... will further jeopardize your eligibility."

35. The scheme participants agreed to conceal the $100,000 payments, which was to be made to Parent-2 in four cash installments of $25,000 each, by causing the money to be transferred indirectly from Company-1 to third parties who then facilitated the cash payments to the student-athlete's family. In particular, JAMES GATTO, a/k/a "Jim," and MERL CODE, the defendants, agreed to and caused the first two $25,000 installments to be wired by Company-1 pursuant to sham invoices to an organization under CODE'S control, from which the payments were then funneled to an account controlled by CHRISTIAN DAWKINS, the defendant. DAWKINS, in turn, was responsible for delivering the cash payments to Parent-2. In particular:

a. On or about July 10, 2017, CODE spoke by telephone with CC-1, among others, about the payments to the student-athlete's family. During the call, CODE explained the involvement of Company-1 in funneling money to the athlete's family, noting that "this is one of those instances where we needed to step up and help one of our flagship schools in [the University of Louisville], you know, secure a five star caliber kid. Obviously that helps, you know, our potential business... and that's an [Company-1-sponsored] school." CODE explained that Company-1 was having difficulty generating the funds to pay the first installment of the money because of internal "processes" at Company-1 and asked DAWKINS and CC-1 to cover the first $25,000 payment, with the understanding that they would ultimately be reimbursed by Company-1.

b. Consistent with the call described above, on or about July 13, 2017, Parent-2 traveled through New York, New York to receive the first cash payment, which he did during a meeting with CC-1 in New Jersey. In a subsequent telephone call with DAWKINS, CC-1 informed DAWKINS that, based on CC-1's conversation with Parent-2 at the time of the meeting, CC-1 believed that the student-athlete would sign with DAWKINS and CC-1 upon entering the NBA.

c. On a telephone call in or around July 24, 2017, DAWKINS and CODE discussed how GATTO and others at Company-1 were inaccurately accounting for the unlawful transfer of funds to the student-athlete's family by booking it on Company-1's records as a payment to an outside organization affiliated with CODE. On the call, CODE confirmed that GATTO had identified the payments on Company-1's books "as a payment to my team, to my organization, so it's on the books, [but] it's not on the books for what it's actually for."

d. On or about August 1, 2017, GATTO approved a sham invoice for $30,000 from Company-1 to an AAU team managed by CODE. GATTO and CODE concealed the true purpose and destination of the payment by describing it on the Company-1 invoice as "July Travel Team Expenses" for the AAU team. After the payment was wired by Company-1 to a bank account in the name of the AAU team, CODE caused $25,000 of the funds to be paid to DAWKINS as reimbursement for the first cash payment made to Parent-2, as described above.

e. On or about September 18, 2017, Company-1 wired another $25,000 to the same AAU team account associated with CODE pursuant to a second sham invoice, approved by GATTO, for an additional $25,000 for "Novmeber [*sic*] Travel Team Expenses" for the AAU team. In fact, the $25,000 was intended to be funneled to Parent-2 as the second installment of the promised $100,000 for the student-athlete's attendance at the University of Louisville. After the payment was transferred by Company-1 to the AAU team, CODE caused $25,000 to be paid to a bank account controlled by DAWKINS. However, before DAWKINS could make the second $25,000 payment to Parent-2, the defendants were arrested.

36. The scheme participants also planned to influence another student-athlete to, among other things, attend the University of Louisville, in exchange for payments. For example:

a. On or about July 27, 2017, CHRISTIAN DAWKINS, the defendant, met with CC-2 and a men's basketball coach at the University of Louisville ("Coach-1"), among others. During the meeting, DAWKINS and others discussed making payments to the family of another high school-aged student-athlete in order to secure his commitment. to attend the University of Louisville, and then to retain the services of DAWKINS upon entering the NBA.

b. At that meeting, and in the presence of Coach-1, an envelope containing approximately $12,700 in cash was handed to CC-2, which was intended to be funneled to the family of the student-athlete. During the same meeting, DAWKINS described the role of another men's basketball coach at the University of Louisville ("Coach-2") in securing money from Company-1 to pay the student-athlete, as part of the scheme described in paragraphs 32 through 35, above. Specifically, DAWKINS explained that while Coach-2 and the University of Louisville were recruiting the student-athlete, DAWKINS asked Coach-2 to call JAMES GATTO, a/k/a "Jim," the defendant, to request that Company-1 provide the money requested by the family of the student-athlete, which Coach-2 agreed to do.

37. On or about August 23, 2017, in New York, New York, CC-1 received a cash payment of $20,000, of which $5,000 was intended to be provided by CC-1 and CHRISTIAN DAWKINS, the defendant, to CC-2 as part of the scheme to pay money to the family of the student-athlete described in paragraph 36, above.

38. The payments described herein were designed to be concealed, including from the NCAA and officials at the University of Louisville, in order for the scheme to succeed and for the student-athletes to receive athletic scholarships from the University of Louisville. In particular, and as a part of the scheme, scheme participants, including, among others, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, Parent-2, and one or more coaches at the University of Louisville, made, intended to make, or caused or intended to cause others to make false certifications to the University of Louisville and the NCAA about the existence of the payments and the known violations of NCAA rules.

Allegations Related to the University of Kansas

39. Beginning in or around approximately October 2016, and continuing into at least in or around November 2017, JAMES GATTO, a/k/a "Jim," the defendant, CC-3, and others known and unknown, conspired to illicitly funnel approximately at least $90,000 from Company-1 to the mother of a top high school basketball player ("Parent-3"). The payments were made in connection with a commitment by the student-athlete to attend the University of Kansas, a school sponsored by Company-1.

40. The agreement to funnel payments to Parent-3 was formulated by JAMES GATTO, a/k/a "Jim," and CC-3, among others, in or around October 2016, shortly after the student-athlete, who was considered one of the top recruits in his class, unofficially committed to attend the University of Kansas. The scheme participants further agreed to conceal the payments, which were made to Parent-3 in a series of installments, by causing the money to be transferred indirectly through an AAU team under CC-3's control, and pursuant to sham invoices approved by GATTO. Specifically, GATTO caused Company-1 to transfer funds to CC-3's team pursuant to those sham invoices, and CC-3 facilitated the payments to the student-athlete's family. In particular:

a. On or about October 21, 2016, GATTO caused Company-1 to make a $50,000 payment to an AAU team managed by CC-3, much of which was intended for Parent-3. To conceal the true purpose and destination of the payment, GATTO and CC-3 described it on the Company-1 invoice as a "Basketball Team Tournaments Fee" for the AAU team.

b. On or about October 31, 2016, CC-3 withdrew the $50,000 payment from Company-1 in cash, and, thereafter, personally delivered approximately $30,000 to Parent-3 at a hotel room in New York, New York.

c. On or about November 9, 2016, the student-athlete and Parent-3 each signed certain paperwork submitted to the University of Kansas in connection with the student-athlete's intention to enroll and accept an award of athletic-based financial aid from the university. In those documents, the student-athlete certified his understanding that in order "to qualify for this athletic aid, I **must** ... [m]eet and maintain eligibility requirements for participation and financial aid established by" the NCAA and the University of Kansas. (emphasis in original).

d. On January 18, 2017, GATTO caused Company-1 to make a $90,000 payment to the AAU team under CC-3's control, a portion of which was intended for Parent-3. To conceal the true purpose and destination of the payment, GATTO and CC-3 described it on the Company-1 invoice as "2017 1st Quarter Consultant Fee and T & E for 1st Quarter 2017." On or about January 19, 2017, CC-3 withdrew approximately $27,500 of those funds and subsequently delivered approximately $20,000 in cash to Parent-3 in a hotel room in Las Vegas, Nevada.

e. On or about May 31, 2017, GATTO caused Company-1 to make a $70,000 payment to the AAU team under CC-3's control, a portion of which was intended for Parent-3. To conceal the true purpose and destination of the payment, GATTO and CC-3 described it on the Company-1 invoice as "Tournament Activation/Fee." On or about June 14, 2017, CC-3 transferred by wire $15,000 to Parent-3.

41. The scheme participants also agreed to make payments to the legal guardian of another student-athlete who was a top-rated high school basketball player ("Guardian-1") in order to secure the commitment of the student-athlete to attend the University of Kansas rather than another school sponsored by a rival athletic apparel company. For example:

a. In or around August 2017, Guardian-1 informed CC-3 that Guardian-1 had received illicit payments in return for a commitment to steer the student-athlete to a university sponsored by a rival athletic apparel company. According to Guardian-1, the student-athlete was more interested in attending the University of Kansas, but Guardian-1 would need to repay the illicit payments in order to do so. CC-3 informed Guardian-1, in substance, that CC-3 and Company-1 would be willing to make payments to Guardian-1 to help secure the student-athlete's commitment to attend the University of Kansas. CC-3 subsequently confirmed with JAMES GATTO, a/k/a "Jim," the defendant, that GATTO would approve of such payments and cause Company-1 to fund them.

b. On August 30, 2017, the student-athlete announced he would not attend the school sponsored by the rival apparel company but would instead enroll at the University of Kansas.

c. On or about September 11, 2017, CC-3 spoke with GATTO by phone. During the call, CC-3 informed GATTO that CC-3 would need to make "another $20,000" payment to Guardian-1, as part of the scheme described above, and, in particular, to help get the student-athlete "out from under" the deal to attend the school sponsored by the rival athletic apparel company. GATTO and CC-3 proceeded to discuss how GATTO and Company-1 would reimburse CC-3 for the payment.

d. On or about November 13, 2017, the student-athlete and Guardian-1 each signed certain paperwork submitted to the University of Kansas in connection with the student-athlete's intention to enroll and accept an award of athletic-based financial aid from the university. In those documents, the student-athlete certified his understanding that in order "to qualify for this athletic aid, I **must** ... [m]eet and maintain eligibility requirements for participation and financial aid established by" the NCAA and the University of Kansas, (emphasis in original).

42. The payments described herein were designed to be concealed, including from the NCAA and officials at the University of Kansas, in order for the scheme to succeed and for the student-athletes to receive athletic scholarships from the University of Kansas. In particular, and as a part of the scheme, scheme participants, including, among others, JAMES GATTO, a/k/a "Jim," the defendant, CC-3, Parent-3, and Guardian-1, made, intended to make, or caused or intended to cause others to make false certifications to the University of Kansas and the NCAA about the existence of the payments and the known violations of NCAA rules.

Allegations Related to the University of Miami

43. Beginning in approximately July 2 017, and continuing into at least September 2017, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, and others known and unknown, conspired to illicitly funnel approximately $150,000 from Company-1 to the family of another student-athlete who was a top high school basketball player expected to graduate in 2018, in an effort to secure the student-athlete's commitment to play basketball at the University of Miami, and to further ensure that the student-athlete ultimately signed with DAWKINS.

44. On or about August 9, 2017, CHRISTIAN DAWKINS and MERL CODE, the defendants, spoke by telephone about the scheme to pay money to the family of the student-athlete described in paragraph 43, above, in order to secure his commitment to play at the University of Miami. During the call, DAWKINS and CODE discussed the fact that a coach at the University of Miami ("Coach-3") would need to call JAMES GATTO, a/k/a "Jim," the defendant, as part of the scheme. As DAWKINS indicated to CODE, Coach-3 "knows something gotta happen for it to get done."

45. On or about August 11, 2017, JAMES GATTO, a/k/a "Jim," and MERL CODE, the defendants, spoke by telephone about the scheme to pay money to the family of the student-athlete in order to secure his commitment to play at the University of Miami. In particular, during the call:

a. CODE informed GATTO that they had "another [University of Louisville] situation" - referring to the payments to a student-athlete to influence him to attend the University of Louisville, as described above in paragraphs 32 through 35 - and explained that coaches at the University of Miami, including Coach-3, wanted to recruit a particular high school athlete for its class of 2018. GATTO confirmed that he already had learned about the request from coaches at the University of Miami for assistance in securing the particular student-athlete's commitment to attend the University of Miami, informing CODE that he had spoken to Coach-3 about the student-athlete.

b. GATTO indicated his willingness to cause Company-1 to pay money to the family of the student-athlete in order to secure his commitment to attend the University of Miami but, with respect to the proposed $150,000 sum, GATTO asked CODE to try to negotiate the payment down to $100,000, such that the amount was commensurate with what they had agreed to funnel from Company-1 to the family of the student-athlete described in paragraphs 32 through 35, above.

46. JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, among others, intended to conceal the planned payments to the family of the student-athlete from the NCAA and officials at the University of Miami, in order for the scheme to succeed and for the student-athlete to receive an athletic scholarships from the University of Miami. In particular, and as a part of the scheme, scheme participants, including, among others, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, intended to make, or intended to cause others to make, false certifications to the University of Miami and the NCAA about the planned payments and resulting violations of NCAA rules.

COUNT ONE
(Conspiracy To Commit Wire Fraud)

The Grand Jury charges:
47. The allegations set forth in paragraphs 1 through 46 of this Indictment are repeated and realleged as if fully set forth herein.

48. From at least in or about 2015, up to and including in or about November 2017, in the Southern District of New York and elsewhere, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, and others known and unknown, willfully and knowingly did combine, conspire, confederate, and agree together and with each other to commit wire fraud in violation of Title 18, United States Code, Section 1343.

49. It was a part and object of the conspiracy that JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, and others known and unknown, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, would and did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343, to wit, GATTO, CODE, DAWKINS, and others known and unknown, including parents of certain student-athletes, as well as basketball coaches employed by certain of the universities, participated in a scheme to defraud, by telephone, email, and wire transfers of funds, among other means and methods, North Carolina State University, the University of Louisville, the University of Kansas, and the University of Miami, by making and agreeing to make, payments to the families of high school student-athletes in connection with the student-athletes' commitment to play basketball for those universities, knowing and intending that the payments would be concealed from the universities, and thereby causing the universities to agree to provide athletic scholarships to student-athletes who, in truth and in fact, were ineligible to compete as a result of the payments, and depriving the universities of their right to control the use of their assets, including the decision of how to allocate a limited amount of athletic scholarships, and further exposing the universities to tangible economic harm, including monetary and other penalties imposed by the NCAA.

(Title 18, United States Code, Section 1349.)

COUNT TWO
(Wire Fraud - The University of Louisville)

The Grand Jury further charges:
50. The allegations set forth in paragraphs 1 through 28, 32 through 38 of this Indictment are repeated and realleged as if fully set forth herein.

51. From at least in or about May 2017, up to and including in or about September 2017, in the Southern District of New York and elsewhere, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit, GATTO, CODE, and DAWKINS defrauded the University of Louisville by making and causing to be made payments to Parent-2 in connection with the commitment by Parent-2's son to play basketball for the university, knowing and intending that the payments would be concealed from the university, and thereby causing the university to agree to provide an athletic scholarship to Parent-2's son who, in truth and in fact, was ineligible to compete as a result of the payments, and depriving the university of the right to control the use of its assets, including the decision of how to allocate a limited amount of athletic scholarships, and further exposing the university to tangible economic harm, including monetary and other penalties imposed by the NCAA.

(Title 18, United States Code, Sections 1343 and 2.)

COUNT THREE
(Wire Fraud - The University of Kansas)

The Grand Jury further charges:

52. The allegations set forth in paragraphs 1 through 28, and 3 9 through 42 of this Indictment are repeated and realleged as if fully set forth herein.

53. From at least in or about October 2016, up to and including in or about November 2017, in the Southern District of New York and elsewhere, JAMES GATTO, a/k/a "Jim," the defendant, willfully and knowingly, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did transmit and cause to be transmitted, by means of wire and radio communication in interstate and foreign commerce, writings, signs, signals, pictures, and sounds for the purpose of executing such scheme and artifice, to wit, GATTO defrauded the University of Kansas by making and causing to be made payments to Parent-3 in connection with the commitment by Parent-3's son to play basketball for the university, knowing and intending that the payments would be concealed from the university, and thereby causing the university to agree to provide an athletic scholarship to Parent-3's son who, in truth and in fact, was ineligible to compete as a result of the payments, and depriving the university of the right to control the use of its assets, including the decision of how to allocate a limited amount of athletic scholarships, and further exposing the university to tangible economic harm, including monetary and other penalties imposed by the NCAA.

(Title 18, United States Code, Sections 1343 and 2.)

FORFEITURE ALLEGATION

54. As a result of committing one or more of the offenses charged in Count One, Two and Three of the Indictment, JAMES GATTO, a/k/a "Jim," MERL CODE, and CHRISTIAN DAWKINS, the defendants, shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C) and 28 U.S.C. § 2461(c), any and all property, real and personal, that constitutes or is derived from proceeds traceable to the commission of said offenses, including but not limited to a sum of money in United States currency representing the amount of proceeds traceable to the commission of said offenses that the defendants personally obtained.

Substitute Assets Provision

55. If any of the above-described forfeitable property, as a result of any act or omission of the defendants:
a. cannot be located upon the exercise of due diligence;
b. has been transferred or sold to, or deposited with, a third party;
c. has been placed beyond the jurisdiction of the Court;
d. has been substantially diminished in value; or
e. has been commingled with other property which cannot be subdivided without difficulty; it is the intent of the United States, pursuant to 21 U.S.C. § 853 (p) and 28 U.S.C. § 2461(c), to seek forfeiture of any other property of the defendants up to the value of the above forfeitable property.

(Title 18, United States Code, Section 981, Title 21, United States Code, Section 853, and Title 28, United States Code, Section 2461.)

<<signature>>
FOREPERSON

August 14, 2018

<<signature>>
ROBERT S. KHUZAMI
Attorney for the United States
Acting Under Authority Conferred by 28 U.S.C. § 515

End of Document

PETA

2018 WL 5761689
Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., Plaintiff,
v.
TRI-STATE ZOOLOGICAL PARK OF WESTERN MARYLAND, INC., et al., Defendants.

Civil Action No. 1:17-cv-02148-PX

11/01/2018

Paula Xinis, United States District Judge

MEMORANDUM OPINION

***1** Pending before the Court are Defendants Tri-State Zoological Park of Western Maryland, Inc., Animal Park, Care & Rescue, Inc., and Robert Candy's Motion for Judgment on the Pleadings, Motion for Sanctions, and Interim Motion to Seal Filed in Support of Defendants' Motion for Sanctions. ECF Nos. 55, 71, 72. The motions are fully briefed, and no hearing is necessary. *See* Local Rule 105.6. For the reasons that follow, the Court denies Defendants' motion for judgment on the pleadings, grants in part and denies in part Defendants' motion for sanctions, and grants the joint motion to redact a portion of the motion for sanctions.

I. Background

Defendants own and operate a zoological park in Cumberland, Maryland ("the Zoo"). ECF No. 1 ¶¶ 12–15. The Zoo houses many animals, including five tigers, one lion, and two lemurs.[1] ECF No. 1 ¶ 3. Plaintiff People for the Ethical Treatment of Animals, Inc. ("PETA") filed suit under the Endangered Species Act ("ESA"), seeking, *inter alia*, to enjoin the Zoo from owning or possessing endangered or threatened species. *Id.* at 38. According to the Complaint, the animals at the Zoo live in unsanitary and unsafe conditions, are not fed sufficiently, and are not provided adequate enrichment in the Zoo habitat . *Id.* ¶ 25.

PETA is a nonprofit organization "dedicated to protecting animals, including animals used in entertainment, from abuse, neglect, and cruelty." *Id.* ¶¶ 11, 110. To advance this mission, PETA educates the public on animal-welfare issues, rescues animals, advocates for protective animal-welfare legislation, and organizes mission-related protests and fundraisers. *Id.* ¶ 111. For purposes of standing, PETA avers that the Zoo's public mistreatment of animals has frustrated PETA's mission by contributing to the increasing population of animals in need of rescue and by "making it harder to persuade the public that it should not tolerate the use of animals in entertainment." *Id.* ¶¶ 112, 113. Similarly, PETA avers that it has diverted its resources toward investigating the Zoo and engaging in a public-relations campaign aimed at exposing the Zoo's adverse treatment of the animals. *Id.* ¶¶ 115–16. PETA contends that the effort expended in the name of protecting the Zoo's animals has diverted resources away from its other animal rescue missions and campaigns. ECF No. 1 ¶ 118.

PETA undertook this investigation at the direction of its counsel, and in anticipation of filing this lawsuit. ECF No. 71-3 at 1. Specifically PETA deployed undercover investigators who posed as volunteers offering their services to the Zoo. ECF No. 71-1 ¶ 10. PETA's volunteers gained entry to Zoo, and subsequently denied to Defendant Candy any affiliation with an animal-rights organization. *Id.* ¶ 11; ECF No. 87 at 4 n.4. The volunteers surreptitiously took over 300 photographs and 70 video recordings. ECF No. 71-1 ¶ 2; ECF No. 71-3 at 1. At least some of the video recordings also seem to include audio of conversations between PETA investigators and Defendant Candy. ECF No. 71-4 at 10.

***2** Defendants initially moved to dismiss the Complaint, arguing that the Animal Welfare Act preempted PETA's claims, that the treatment of the animals did not rise to the level of actionable harm, that the Complaint was vague, and that the Court did not have power to award the requested relief. ECF No. 15-1. The Court denied Defendants' motion in its entirety. ECF No. 23. Defendants

now attempt to relitigate several of the same claims, which, for the reasons discussed below, will not be revisited. Defendants also now contend that PETA lacks standing to bring the claims and that dismissal is warranted as a sanction for PETA having "illegally obtain[ed] evidence." ECF No. 55; ECF No. 71-1 at 3.

II. Standard of Review

Under Federal Rule of Civil Procedure 12(c), a party may move for judgment on the pleadings after the pleadings are closed. Fed. R. C. P. 12(c). A motion under Rule 12(c) "is assessed under the same standards as a motion to dismiss under Rule 12(b)(6)." *Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013). The well-pleaded allegations are accepted as true and viewed most favorably to the party pursuing the allegations. *ImpactOffice, LLC v. Siniavsky*, No. TDC-15-3481, 2017 WL 1410773, at *3 (D. Md. Apr. 19, 2017). The motion will not be granted unless "no genuine issues of material fact remain and the case can be decided as a matter of law." *Bell Atl.-Md., Inc. v. Prince George's Cty.*, 155 F. Supp. 2d 465, 473 (D. Md. 2011).

In resolving a motion brought pursuant to Rule 12(c), the court "considers the pleadings, which consist of the complaint, the answer, and any written instruments attached to those filings." *ImpactOffice*, 2017 WL 1410773, at *3. The court, may, in its discretion, also consider evidence beyond the four-corners of the pleadings. *A.S. Abell Co.*, 338 F.2d at 193. However, in that circumstance, "the motion must be treated as one for summary judgment" and "the parties must be given a reasonable opportunity to present all the material pertinent to the motion." *Jones v. Nucletron Corp.*, No. RDB-11-02953, 2013 WL 663304, at *4 (D. Md. Feb 20, 2013) (quoting Fed. R. Civ. P. 12(d)) (internal quotation marks omitted).

III. Analysis

A. Motion for Judgment on the Pleadings

1. Grounds for Dismissal Previously Decided

Defendants seek to re-litigate whether the ESA is preempted by the Animal Welfare Act and whether the harm to the tigers, as pleaded in the Complaint, is actionable. *Compare* ECF No. 55-1 at 4, 17; *with* ECF No. 15-1 at 5, 12, *and* ECF No. 23 at 15, 19. The Court will not allow Defendants a second bite at the dismissal apple. As a preliminary matter, the Court notes that Rule 12(g) prohibits the refiling of a motion already brought pursuant to Rule 12, absent limited exceptions set forth in Rule 12(h)(2) and (3). *Smith v. Integral Consulting Servs., Inc.*, No. DKC 14-3094, 2015 WL 4567317, at *1 (D. Md. July 27, 2015). Challenges to the Court's subject matter jurisdiction or a defense of failure to state a claim upon which relief can be granted are two such exceptions. Fed. R. Civ. P. 12(h)(2)–(3).

However, Defendants have previously sought dismissal on these grounds, which the Court rejected. Accordingly, the Court will only reconsider its previous decision based on: (1) a change in controlling law; (2) additional evidence that was not previously available; or (3) a showing that that the prior decision was clearly erroneous or manifestly unjust. *See Boyd v. Coventry Health Care Inc.*, 828 F. Supp. 2d 809, 814 (D. Md. 2011); *Paulone v. City of Frederick*, No. CIV. WDQ-09-2007, 2010 WL 3000989, at *2 (D. Md. July 26, 2010). The Court cannot discern any of the above-described bases that would support reconsideration. The Court will not revisit these claims, and so the motion for dismissal on these grounds is denied.

***3** The Court next turns to Defendants' arguments not previously raised.

2. Standing

A court retains jurisdiction only where the plaintiff has standing to bring the claim. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Pursuant to Article III of the United States Constitution, federal courts are of limited jurisdiction, hearing only live "Cases" and "Controversies." *Id.* at 559; U.S. Const. art. III, § 2. A legal action meets the case-or-controversy requirement where the "questions [are] presented in an adversary context." *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007) (quoting *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (internal quotation marks omitted). For a case to satisfy the case-or-controversy requirement, the plaintiff must have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Massachusetts*, 549 U.S. at 517. The plaintiff must demonstrate that "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

In addition to the constitutional standing requirements, courts impose prudential limitations on legal actions. *Lujan*, 504 U.S. at 560. Among the prudential considerations is the requirement that a plaintiff's grievance "fall within the zone of interests protected or regulated by the statutory provision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997). However, prudential limits may be "modified or abrogated by Congress." *Id.* at 162. Congress enacted a citizen-suit provision of "remarkable breadth" in the ESA, which allows "any person" to file suit to enforce ESA protections. *Id.* at 164; 16 U.S.C. § 1540(g)(1). Congress thus expanded the zone of interests "to the full extent permitted under Article III of the Constitution." *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1338 (S.D. Fla. 2016), *aff'd*, 879 F.3d 1142, 1146 n.5 (11th Cir. 2018), *adhered to on denial of reh'g*, No. 16-14814-BB, 2018 WL 4903081 (11th Cir. Oct. 9, 2018); *see also Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 559 (D. Md. 2009).

Defendants' standing challenge is confined to whether PETA has suffered a sufficiently concrete and particularized injury under the Constitution. ECF No. 55-1 at 4–14. Taking the alleged facts in the Complaint as true, *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982), the Court disagrees.

PETA, as an organization, may establish what is known as organizational standing on its own behalf. *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 719 (D. Md. 2011). Organizational standing is conferred where the defendants' misconduct causes injury to the organization by frustrating the organizational mission, thus requiring the organization to divert resources in response. *Id.* at 720; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). PETA contends that it has organizational standing because the Defendants' "take," as defined under the ESA, directly frustrates PETA's mission to reduce animal abuse. ECF No. 59 at 22. The ESA prohibits the unlawful taking of any endangered or threatened animal species. 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.21(c); 50 C.F.R. § 17.31(a). To "take" an animal means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. § 1532(19); *see also* 50 C.F.R. § 17.3 (defining "harass" and "harm"). The Complaint particularly avers that the Zoo has taken animals that the ESA protects. As a result of the Defendants' unlawful taking, the number of abused animals has risen, as has the public's tolerance for animal abuse, thereby frustrating PETA's mission to forestall the same. ECF No. 1 ¶¶ 112–13.

***4** The Defendants contend, however, that PETA merely has an "inchoate ideological interest" in the animals. ECF No. 55-1 at 5. Although PETA had no prior involvement with the Zoo's individual animals, this fact alone does not eviscerate organizational standing. *See Equal Rights Ctr. v. AvalonBay Communities, Inc.*, No. AW-05-2626, 2009 WL 1153397, at *4 (D. Md. Mar. 23, 2009) (finding organizational standing for nonprofit that could not "identify any person that it had to counsel, refer, or educate as a result of the alleged...violations"). The Zoo's current unlawful take of the animals "is in direct conflict with PETA's mission of protecting animals." *Miami Seaquarium*, 189 F. Supp. 3d at1338. Additionally, given PETA's broad campaigns for public education and advocacy, the Court credits PETA's argument that the Zoo's normalization and display of alleged mistreatment undermines PETA's educational programming. *See Organic Consumers Assoc. v. Sanderson Farms, Inc.*, 284 F. Supp. 3d 1005, 1011 (N.D. Cal. 2018) (finding standing for organizations that promote organic consumption in suit against company that deceptively labeled products as "natural"). Taking all facts in the light most favorable to PETA, the Court finds that PETA has pleaded sufficient injury to PETA's mission arising from Defendants' alleged misconduct.

The Complaint also avers that PETA has devoted its limited resources toward investigating and uncovering the Zoo's ESA violations and thus away from funding other animal rescues and mission-related public campaigns. ECF No. 1 ¶ 118. The resources specifically diverted include those used to extensively investigate the Zoo, distribute press releases related to the Zoo's violations, and draft and submit formal complaints to government agencies. *Id.* ¶¶ 115–16. The Complaint, therefore, plausibly avers that this diversion of resources perceptibly impaired PETA's ability to advance its mission. *See Equity Residential*, 798 F. Supp. 2d at 722; *AvalonBay*, 2009 WL 1153397, at *4, 6. Accordingly, these facts, accepted as true and most favorably to PETA, confer organizational standing.

3. Tigers' Protection under the ESA

Defendants next argue that PETA fails to state a claim with respect to the "take" of the Zoo's tigers because these tigers are captive-bred, "generic," and, thus, exempted from ESA protection. Defendants misapprehend the reach of the ESA as to tigers.

As a preliminary matter, the Court recognizes that the Secretary of the Interior maintains authority to determine which species are deemed endangered or threatened and thus protected under the ESA. 16 U.S.C. § 1533(a)(1). Further, the United States Fish and Wildlife Service ("the Service"), under the direction of the Secretary of the Interior, has promulgated regulations "to encourage responsible breeding efforts" with such species. Captive-bred Wildlife Regulation, 58 Fed. Reg. 68,323, 68,324 (Dec. 27, 1993). These regulations allow for the taking of captive-bred, endangered animals when the purpose of the take "is to enhance the propagation or survival of the affected species." 50 C.F.R. § 17.21(g)(1). Said differently, "taking" is permitted in limited circumstances when such taking increases the tiger population. Any such taking under this exception, however, requires the person taking the animals to be

registered with the Service, unless the species falls within certain enumerated exemptions. 50 C.F.R. § 17.21(g)(2), (g)(6). However, between 1998 and 2016, the Service exempted from registration "inter-subspecific crossed or generic" tigers. Endangered and Threatened Wildlife and Plants; U.S. Captive-Bred Inter-subspecific Crossed or Generic Tigers, 81 Fed. Reg. 19,923, 19,923 (Apr. 6, 2016); *see also* 50 C.F.R. § 17.21(g)(6) (2005). "Crossed" and "generic" tigers are those who cannot be readily identified or identifiable as a particular subspecies. 81 Fed. Reg. at 19,923.[2]

Against this regulatory backdrop, Defendants argue that while the exemption was in place before 2016, the Service had effectively removed altogether the ESA protections as to the taking of generic tigers. ECF No. 55-1 at 16. This is incorrect. The pre-2016 exemption governed solely the requirement to register with the Service to take the generic tigers for reproductive purposes; it did not affect the underlying legal protections afforded to generic tigers more broadly. Indeed, the Service explicitly announced that "[e]ven with this exemption, inter-subspecific crossed or generic tigers *were still protected under the Act*" because the "regulations under the ESA prohibit[ed] the taking of any tiger, including generic tigers." 81 Fed. Reg. at 19,924 (emphasis added). Importantly, tigers are listed as an endangered species, which includes "any subspecies." 16 U.S.C. § 1532(16) (defining "species"); 50 C.F.R. § 17.11 (listing tigers as endangered); *see also United States v. Kapp*, 419 F. 3d 666, 672–73 (7th Cir. 2005). As an endangered species, taking of tigers—all tigers—is permitted only to promote responsible propagation, *see* 58 Fed. Reg. at 68,325, not simply for the display of wildlife.

***5** No facts averred in the Complaint allow the plausible inference that the Defendants' taking of the tigers was designed for the propagation of the species. Rather, the Complaint alleges that the take of the tigers was for exhibition purposes only. Because if true, these facts support an ESA violation, judgment on the pleadings is denied as to the tigers.

4. Lions' Protection under the ESA

Defendants assert that the ESA only protects two subspecies of lions, neither of which are the lions kept in captivity at the Zoo. ECF No. 55-1 at 23.[3] Historically, classification of lion subspecies for ESA protection purposes has been difficult. Endangered and Threatened Wildlife and Plants; Listing Two Lion Subspecies, 80 Fed. Reg. 80,000, 80,001 (Dec. 23, 2015) ("[T]raditional classifications recognize anywhere from zero subspecies (classifying lions as one monotypic species) up to nine subspecies."). In 2015, the Service adopted for lion classification the International Union for Conservation of Nature ("IUCN")'s taxonomy, which recognizes that all lions fall into one of two lion subspecies: *Panthera leo leo* and *Panthera leo melanochaita*. *Id.* at 80,000. Thus, under ESA regulations, all lions are classified as either *P. l. leo* or *P. l. melanochaita*, and most important for this case, all enjoy ESA protection. 50 C.F.R. § 17.11.[4]

Defendants contend that because their lions are both in captivity and in the United States, their lions do not fall into either of the protected subspecies. This is so, say Defendants, because the classification of a lion as belonging to a particular subspecies is not determined by "genetics or appearance, but by *what country on the African continent*" in which the lion is currently located. ECF No. 55-1 at 19 (emphasis in original). In support of this contention, Defendants primarily point to the Service's description of the countries where each subspecies of lion is found in the wild—a fact integral to the Service's inquiry of whether a particular subspecies is in danger of extinction. *See* 80 Fed. Reg. at 80,004. But Defendants apparently missed where the Service states that IUCN taxonomy is based on "recent genetic research." *Id.* at 80,001. And nowhere in the fifty-six page publication does the Service suggest that a lion "could in theory change his or her subspecies daily just in the normal course of travel" between countries. *See* ECF No. 55-1 at 19 n.2. Most significantly, the Service itself has noted that "captive-held specimens are not eligible for separate consideration for listing," and that effectively all lions, captive or wild, enjoy ESA protection. 80 Fed. Reg. at 80,055.[5] The prohibitions on taking endangered and threatened species thus apply to all lions, including the lions at Defendants' Zoo. *See* 50 C.F.R. §§ 17.21(c)(1), 17.40(r), 17.31(a)–(c). Judgment on the pleadings as to the lions is denied.

B. Motion for Sanctions

***6** Defendants also seek to dismiss the Complaint as a sanction for "illegally obtain[ing] evidence." ECF No. 71-1 at 3. Courts retain inherent authority to sanction bad-faith conduct, including "wrongfully obtaining the property or confidential information of an opposing party." *Glynn v. EDO Corp.*, No. JFM-07-01660, 2010 WL 3294347, at *3 (D. Md. Aug 20, 2010). However, the Court must only exercise this authority "with restraint and discretion." *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 518 (D. Md. 2010). A court must reserve the "extraordinary sanction of dismissal" for only those instances where the misconduct caused prejudice to the movant sufficiently severe to outweigh the public policy in favor of resolving claims on the merits. *Glynn*, 2010 WL 3294347, at *6. Dismissal is warranted where the wrongdoing "deceives a court or abuses the process at a level that is utterly inconsistent with the orderly administration of justice or undermines the integrity of the process." *Glynn*, 2010 WL 3294347, at *3 (quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993)) (internal quotation marks omitted). The court considers the following factors:

> (1) the degree of the wrongdoer's culpability; (2) the extent of the client's blameworthiness if the wrongful conduct is committed by its attorney, recognizing that we seldom dismiss claims against blameless clients; (3) the prejudice to the judicial process and the administration of justice; (4) the prejudice to the victim; (5) the availability of other sanctions to rectify the wrong by punishing culpable persons, compensating harmed persons, and deterring similar conduct in the future; and (6) the public interest.

Glynn, 2010 WL 3294347, at *3 (quoting *Shaffer Equip.*, 11 F.3d at 462–63) (internal quotation marks omitted). The movant must demonstrate by clear and convincing evidence the propriety of the requested sanctions. *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 3:16-CV-545, 2018 WL 2023128, at *5 (E.D. Va. May 1, 2018).

Defendants argue that PETA illegally obtained evidence outside the bounds of court-supervised discovery. ECF No. 71-1 at 3. Specifically, Defendants assert that PETA gained access to the Zoo by posing as volunteers, surreptitiously took photographs and video recordings, and illegally recorded audio of unconsenting persons in violation of the Maryland Wiretap Act. *Id.* at 2–3. Defendants also allege that PETA's counsel participated in this misconduct. *Id.* at 16. The Court considers each allegation in turn.

First with respect to PETA's presence on Zoo property, Defendants contend that access was obtained by fraud and thus constituted a trespass. A civil trespass is "an intentional or negligent intrusion upon or to the possessory interest in property of another." *Litz v. Md. Dep't of Env't*, 446 Md. 254, 276–77 (2016) (quoting *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 475 (2013)). Courts across the country are split on whether consent is a viable defense to trespass when such consent was obtained through fraud. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 517 (4th Cir. 1999). Neither this Court nor the parties unearthed any Maryland controlling law. Because the law in this respect is unsettled, the Court is hard-pressed to find that obtaining evidence in this manner warrants the sanction of dismissal.

Defendants next contend that, once on the property, PETA gathered evidence by surreptitious recordings in violation of the Maryland Wiretap Act, thus warranting sanctions. The court recognizes that merely taking photographs and videos without audio does not constitute a Wiretap Act violation. *See Holmes v. State*, 236 Md. App. 636, 654 (2018) ("[A] video recording without audio or oral communication is not prohibited under the wiretap statute."); *cf. Furman v. Sheppard*, 130 Md. App. 67, 73 (2000) (noting, in context of tort law, that "[i]f surveillance is 'conducted in a reasonable and non-obtrusive manner, it is not actionable' ") (quoting *Pemberton v. Bethlehem Steel Corp.*, 66 Md. App. 133, 164 (1986)). Under Maryland's Wiretap Act, a person must obtain all parties' consent before recording oral communications. Md. Code, Cts. & Jud. Proc. § 10-402. Indeed, "the use of a cell phone by a private citizen to secretly record a face-to-face oral conversation without the consent of all participants is...a presumptive violation of Maryland's wiretap law." *Holmes*, 236 Md. App. at 649.

***7** PETA's own internal memorandum and deposition testimony strongly suggest that certain of its video recordings also include audio. ECF No. 71-4 at 10; ECF No. 71-9 at 27:5–6. Further PETA appears to have unlawfully recorded audio without first obtaining consent of those who were recorded. *See* ECF No. 71-9 at 27:20–21 (stating, in deposition of PETA, that agents "would not have asked [for] permission" to record audio). Such recordings violate the Wiretap Act and will be excluded entirely from this case.

Defendants further contend that the recordings were made with counsel's knowledge and endorsement. ECF No. 71-1 at 17. In support, Defendants attach a privilege log, which notes that videos were "prepared pursuant to attorney direction." ECF No. 71-3 at 1. However, little evidence links specific "attorney direction" to the PETA agents having obtained recordings in violation of the Wiretap Act. Defendants do not show what direction counsel gave PETA, whether the videos taken on those dates included audio, or even a single concrete example of counsel using the video recordings.

In light of the strong public policy in favor of deciding cases on the merits and the availability of lesser sanctions, the Court declines to dismiss the case. The Court recognizes, however, that as to any video recorded with audio, those videos will not be accepted as evidence for any and all purposes in future court proceedings. *See* Md. Code, Cts. & Jud. Proc. § 10-405. Exclusion of such evidence, in the Court's view, cures any prejudice that otherwise would have been visited on Defendants. At this stage in the litigation, and now that PETA has been specifically put on notice regarding the lawful limits of its investigative techniques, the Court does not believe additional sanction is warranted. *See Victor Stanley*, 269 F.R.D. at 536. Any future similar violations, however, will be viewed as knowing, willful and contemptuous, and will be sanctioned accordingly.

C. Motion to Seal

Defendants and PETA jointly request that the Court allow the parties to redact the name of PETA's undercover investigator. ECF Nos. 72, 88, 53. Before granting a motion to seal, the parties must rebut the general presumption that the public enjoys free and unfettered

access to court records. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). The presumption of access may be rebutted to protect individual privacy concerns or corporate confidential, proprietary information. *Interstate Fire & Cas. Co. v. Dimensions Assur. Ltd.*, No. GJH-13-3908, 2014 WL 6388334, at *1 (D. Md. Nov. 13, 2014). PETA contends that preserving the investigator's anonymity will, in turn, preserve the investigator's future ability to investigate instances of animal abuse in an undercover capacity. ECF No. 88 at 7. PETA's concern is legitimate, and the redaction request is narrowly circumscribed to meet this concern. The Court, therefore, grants the request. The Defendants shall file a public version of the motion for sanctions (ECF No. 71) with the investigator's name redacted.

IV. Conclusion

For the foregoing reasons, Defendants' motion for judgment on the pleadings is denied, Defendants' motion for sanctions is granted in part and denied in part, and Defendants' motion to seal is granted. A separate Order follows.

November 1, 2018_____ __/S/_____

Date Paula Xinis United States District Judge

All Citations

Slip Copy, 2018 WL 5761689

Footnotes

1 After the pleadings closed, one lemur, Bandit, passed away and the other lemur, Alfredo, was transferred to the Maryland Zoo. ECF No. 55-1 at 24. For purposes of the motion for judgment on the pleadings brought pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, the Court, in its discretion, considers only the facts included in the pleadings. *See A.S. Abell Co. v. Balt. Typographical Union No. 12*, 338 F.2d 190, 193 (4th Cir. 1964).

2 There are four subspecies of tigers: Bengal (P*anthera tigris tigris*), Sumatran (*P. t. sumatrae*), Siberian (*P. t. altaica*), and Indochinese (*P. t. corbetti*). *Id.*

3 Defendants argue that two lions, Peka and Mbube, are not protected by the ESA. *Id.* However, PETA appears to only allege the unlawful taking of Peka, and discusses Mbube solely as evidence of the alleged inadequacy of Defendants' veterinary care. ECF No. 1 ¶¶ 83–109. For the purposes of this motion, the Court will address Defendants' argument about both lions, rather than focusing solely on Peka.

4 *P. l. leo* is listed as endangered and *P. l. melanochaita* is listed as threatened. *Id.*

5 Defendants' stray line suggesting that their lions are hybrid lion subspecies, and thus unprotected by the ESA, is also unavailing. *See Kapp*, 419 F.3d at 673.

End of Document

HOLWILL

2018 WL 4905500 (N.D.Ill.) (Trial Pleading)
United States District Court, N.D. Illinois.

Mayuko HOLWILL, Individually and on Behalf of All Others Similarly Situated, Plaintiff,
v.
ABBVIE INC., Richard A. Gonzalez, and William J. Chase, Defendants.

No. 1:18-cv-06790.
October 9, 2018.

Class Action Complaint for Violation of the Federal Securities Laws

Jeremy A. Lieberman, J. Alexander Hood II, Pomerantz LLP, 600 Third Avenue, 20th Floor, New York, NY 10016, Telephone: (212) 661-1100, Facsimile: (212) 661-8665, Email: jalieberman@pomlaw.com, Email: ahood@pomlaw.com; Patrick V. Dahlstrom, Pomerantz LLP, Ten South LaSalle Street, Suite 3505, Chicago, Illinois 60603, Telephone: (312) 377-1181, Facsimile: (312) 377-1184, Email: pdahlstrom@pomlaw.com, for plaintiff.

JURY TRIAL DEMANDED

Plaintiff Mayuko Holwill ("Plaintiff"), individually and on behalf of all other persons similarly situated, by Plaintiff's undersigned attorneys, for Plaintiff's complaint against Defendants (defined below), alleges the following based upon personal knowledge as to Plaintiff and Plaintiff's own acts, and information and belief as to all other matters, based upon, inter alia, the investigation conducted by and through Plaintiff's attorneys, which included, among other things, a review of the defendants' public documents, conference calls and announcements made by defendants, United States Securities and Exchange Commission ("SEC") filings, wire and press releases published by and regarding AbbVie Inc. ("AbbVie" or the "Company"), analysts' reports and advisories about the Company, and information readily obtainable on the Internet. Plaintiff believes that substantial evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

NATURE OF THE ACTION

1. This is a federal securities class action on behalf of a class consisting of all persons and entities other than Defendants who purchased or otherwise acquired the publicly traded securities of AbbVie between October 25, 2013 and September 18, 2018, both dates inclusive (the "Class Period"). Plaintiff seeks to recover compensable damages caused by Defendants' violations of the federal securities laws and to pursue remedies under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder, against the Company and certain of its top officials.

2. AbbVie discovers, develops, manufactures, and sells pharmaceutical products worldwide. HUMIRA is AbbVie's blockbuster drug, which is used to treat Crohn's disease, rheumatoid arthritis, ulcerative colitis, psoriasis, and other ailments.

3. The Company's securities are traded on New York Stock Exchange ("NYSE") under the ticker symbol "ABBV."

4. Throughout the Class Period, Defendants made materially false and misleading statements regarding the Company's business, operational and compliance policies. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (1) AbbVie's strategy to increase the sales growth of its blockbuster drug, HUMIRA, relied in part upon illegal kickbacks and unlawful sales and marketing tactics; (2) such practices would foreseeably lead to heightened scrutiny by State governments and agencies; and (3) as a result, Defendants' public statements were materially false and misleading at all relevant times.

5. On September 18, 2018, the State of California, through its Insurance Commissioner, filed suit against AbbVie, alleging that the Company "systematically and repeatedly" violated anti-kickback laws by "pa[ying] healthcare providers to prescribe HUMIRA far in excess of the amount that they would have prescribed this expensive and dangerous drug absent the illegal kickbacks.."

6. On this news, AbbVie's stock price fell $4.35 per share, or over 4.5%, over the next two trading days, to close at $91.02 per share on September 19, 2018.

7. As a result of Defendants' wrongful acts and omissions, and the precipitous decline in the market value of the Company's securities, Plaintiff and other Class members have suffered significant losses and damages.

JURISDICTION AND VENUE

8. The claims asserted herein arise under and pursuant to §§ 10(b) and 20(a) of the Exchange Act (15 U.S.C. §§ 78j(b) and § 78t(a)) and Rule 10b-5 promulgated thereunder by the SEC (17 C.F.R. § 240.10b-5).

9. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 and § 27 of the Exchange Act.

10. Venue is proper in this Judicial District pursuant to § 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1391(b) as AbbVie maintains its principal executive offices in this Judicial District.

11. In connection with the acts, conduct and other wrongs alleged in this Complaint, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including but not limited to, the United States mail, interstate telephone communications and the facilities of the national securities exchange.

PARTIES

12. Plaintiff, as set forth in the accompanying certification, incorporated by reference herein, purchased AbbVie common stock during the Class Period, and suffered damages as a result of the federal securities law violations and false and/or misleading statements and/or material omissions alleged herein.

13. Defendant AbbVie is a Delaware corporation, with its headquarters in North Chicago Illinois. AbbVie discovers, develops, manufactures, and sells pharmaceutical products worldwide. The Company's securities are traded on NYSE under the ticker symbol "ABBV."

14. Defendant Richard A. Gonzalez ("Gonzalez") has served as AbbVie's Chief Executive Officer ("CEO") since 2012 and serves as Chairman of the Board of Directors.

15. Defendant William J. Chase ("Chase") has served as AbbVie's Executive Vice President, Chief Financial Officer ("CFO") during the Class Period.

16. Defendants Gonzalez and Chase are sometimes collectively referred to hereinafter as the "Individual Defendants."

17. The Individual Defendants possessed the power and authority to control the contents of the Company's SEC filings, press releases, and other market communications. The Individual Defendants were provided with copies of the Company's SEC filings and press releases alleged herein to be misleading prior to or shortly after their issuance and had the ability and opportunity to prevent their issuance or to cause them to be corrected. Because of their positions with the Company, and their access to material information available to them but not to the public, the Individual Defendants knew that the adverse facts specified herein had not been disclosed to and were being concealed from the public, and that the positive representations being made were then materially false and misleading. The Individual Defendants are liable for the false statements and omissions pleaded herein.

18. The Company and the Individual Defendants are referred to herein, collectively, as the "Defendants."

SUBSTANTIVE ALLEGATIONS

Factual Background

19. HUMIRA is the brand name for adalimumab, a tumor necrosis factor (TNF) inhibiting anti-inflammatory drug administered by subcutaneous injection. HUMIRA was a top-selling drug for AbbVie in 2017, with sales of over $12 billion.

20. On April 5, 2013, the Company filed its amended annual report for the fiscal year ended December 31, 2012 on Form 10-K (the "2012 10-K/A") with the SEC, which provided the Company's annual financial results and position. The 2012 10-K/A was signed by Defendants Gonzalez and Chase.

21. The 2012 10-K/A provided the Company's strategic objectives, stating in relevant part:

Strategic Objectives

AbbVie's long-term strategy is to maximize its existing portfolio through new indications, share gains, increased reach and geographic expansion in underserved markets while also advancing its new product pipeline. To successfully execute its long-term strategy, AbbVie will focus on expanding HUMIRA sales, advancing the pipeline, expanding its presence in emerging markets and managing its product portfolio to maximize value.

AbbVie expects to continue to drive strong HUMIRA sales growth in several ways. AbbVie seeks to expand the HUMIRA patient base by applying for regulatory approval of new indications for HUMIRA, treating conditions such as axial and peripheral spondyloarthritis and uveitis. AbbVie will also seek to drive HUMIRA sales growth by expanding its market share and its presence in underserved markets.

(Emphasis added.)

Materially False and Misleading Statements Issued During the Class Period

22. The Class Period begins on October 25, 2013, when the Company filed a Form 8-K with the SEC announcing its third quarter 2013 fiscal results ("3Q 2013 Press Release"). In the 3Q 2013 Press Release, Defendant Gonzalez stated that AbbVie's "third-quarter performance demonstrates the strength and durability of our product portfolio and the continued execution of our key strategic priorities as an independent biopharmaceutical company[.]"

23. On February 21, 2014, the Company filed its annual report for the fiscal year ended December 31, 2013 on Form 10-K (the "2013 10-K") with the SEC, which provided the Company's annual financial results and position. The 2013 10-K was signed by Defendants Gonzalez and Chase. The 2013 10-K also contained signed certifications pursuant to the Sarbanes-Oxley Act of 2002 ("SOX") by Defendants Gonzalez and Chase attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company's internal controls over financial reporting, and the disclosure of all fraud.

24. The 2013 10-K enumerated the Company's strategic objectives to "drive HUMIRA sales growth[,]" stating in relevant part:

Strategic Objectives

AbbVie's long-term strategy is to maximize its existing portfolio of products through new indications, share gains, increased geographic expansion in underserved markets while also advancing its new product pipeline to meet unmet medical needs. ***To successfully execute its long-term strategy, AbbVie will focus on expanding HUMIRA sales, advancing the pipeline, expanding its presence in emerging markets and managing its product portfolio to maximize value.***

AbbVie expects to continue to drive strong HUMIRA sales growth in several ways. AbbVie seeks to expand the HUMIRA patient base by applying for regulatory approval of new indications for HUMIRA, treating conditions such as uveitis, hidradenitis suppurativa and pediatric Crohn's disease. AbbVie will also seek to drive HUMIRA sales growth by expanding its market share and its presence in underserved markets.

(Emphasis added).

25. The 2013 10-K stated the Company is subject to anti-kickback laws and state laws relating to sales and marketing practices, stating in relevant part:

Laws and regulations affecting government benefit programs could impose new obligations on AbbVie, require it to change its business practices, and restrict its operations in the future.

The health care industry is subject to various federal, state, and international laws and regulations pertaining to government benefit programs reimbursement, rebates, price reporting and regulation, and health care fraud and abuse. In the United States, these laws include anti-kickback and false claims laws, the Medicaid Rebate Statute, the Veterans Health Care Act, and individual state laws relating to pricing and sales and marketing practices. Violations of these laws may be punishable by criminal and/or civil sanctions, including, in some instances, substantial fines, imprisonment, and exclusion from participation in federal and state health care programs, including Medicare, Medicaid, and Veterans Administration health programs. These laws and regulations are broad in scope and they are subject to change and evolving interpretations, which could require AbbVie to incur substantial costs associated with compliance or to alter one or more of its sales or marketing practices. In addition, violations of these laws, or allegations of such violations, could disrupt AbbVie's business and result in a material adverse effect on its business and results of operations.

26. On February 20, 2015, the Company filed its annual report for the fiscal year ended December 31, 2014 on Form 10-K (the "2014 10-K") with the SEC, which provided the Company's annual financial results and position. The 2014 10-K was signed by Defendants Gonzalez and Chase. The 2014 10-K also contained signed SOX certifications by Defendants Gonzalez and Chase attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company's internal controls over financial reporting, and the disclosure of all fraud.

27. The 2014 10-K enumerated the Company's strategic objectives for 2015 to "continue to drive strong HUMIRA sales growth[,]"stating in relevant part:

2015 Strategic Objectives

In 2015, AbbVie expects sales performance to be driven by continued strong growth from HUMIRA, the launch of VIEKIRA PAK, and sales growth in certain key products including Creon and Duodopa, partially offset by a decline in several products due to generic competition, including AndroGel 1% and the remainder of the lipid franchise. In addition, AbbVie expects to achieve operating margin improvements while continuing to invest in its pipeline in support of opportunities in oncology, HCV, and immunology, as well as continued investment in key products. AbbVie expects to grow operating cash flows in 2015, which will enable the company to continue to augment its pipeline through concerted focus on strategic licensing, acquisition and partnering activity and returning cash to shareholders via dividends and share repurchases. AbbVie expects to continue to drive strong HUMIRA sales growth in several ways. AbbVie seeks to expand the HUMIRA patient base by applying for regulatory approval of new indications for HUMIRA, treating conditions such as uveitis and hidradenitis suppurativa. AbbVie will also seek to drive HUMIRA sales growth by expanding its market share and its presence in underserved markets. AbbVie plans to continue making investments in key emerging markets, including Brazil, China, and Russia.

(Emphasis added.)

28. The 2014 10-K stated the Company is subject to anti-kickback laws and state laws relating to sales and marketing practices, stating in relevant part:

Laws and regulations affecting government benefit programs could impose new obligations on AbbVie, require it to change its business practices, and restrict its operations in the future.

The health care industry is subject to various federal, state, and international laws and regulations pertaining to government benefit programs reimbursement, rebates, price reporting and regulation, and health care fraud and abuse. In the United States, these laws include anti-kickback and false claims laws, the Medicaid Rebate Statute, the Veterans Health Care Act, and individual state laws relating to pricing and sales and marketing practices. Violations of these laws may be punishable by criminal and/or civil sanctions, including, in some instances, substantial fines, imprisonment, and exclusion from participation in federal and state health care programs, including Medicare, Medicaid, and Veterans Administration health programs. These laws and regulations are broad in scope and they are subject to change and evolving interpretations, which could require AbbVie to incur substantial costs associated with compliance or to alter one or more of its sales or marketing practices. In addition, violations of these laws, or allegations of such violations, could disrupt AbbVie's business and result in a material adverse effect on its business and results of operations.

29. On February 19, 2016, the Company filed its annual report for the fiscal year ended December 31, 2015 on Form 10-K (the "2015 10-K") with the SEC, which provided the Company's annual financial results and position. The 2015 10-K was signed by Defendants Gonzalez and Chase. The 2015 10-K also contained signed SOX certifications by Defendants Gonzalez and Chase attesting to the

accuracy of financial reporting, the disclosure of any material changes to the Company's internal controls over financial reporting, and the disclosure of all fraud.

30. The 2015 10-K enumerated the Company's strategic objectives for 2016 to increase "HUMIRA sales growth[,]" stating in relevant part:

2016 Strategic Objectives

AbbVie's mission is to be an innovation-driven, patient-focused specialty biopharmaceutical company capable of achieving top-tier financial performance through outstanding execution and a consistent stream of innovative new medicines. ***AbbVie intends to continue to advance its mission in a number of ways, including (i) growing revenues through continued strong performance from its existing portfolio of on-market products, including its flagship brands, HUMIRA, IMBRUVICA and VIEKIRA PAK, as well as growth from pipeline products;*** (ii) expanding gross and operating margins; (iii) continued investment in its pipeline in support of opportunities in immunology, oncology, and virology, as well as continued investment in key on-market products; (iv) augmentation of its pipeline through concerted focus on strategic licensing, acquisition and partnering activity with a focus on identifying compelling programs that fit AbbVie's strategic criteria; and (v) returning cash to shareholders via dividends and share repurchases. In addition, AbbVie anticipates several regulatory submissions and key data readouts from key clinical trials in 2016.

AbbVie expects to achieve its revenue growth objectives as follows:

• ***HUMIRA sales growth by driving biologic penetration across disease categories, increasing market leadership, strong commercial execution and expansion to new indications for hidradenitis suppurativa (regulatory approval in the United States and EU achieved in 2015) and uveitis (regulatory submissions in the United States and the EU are under review with approval expected in 2016).***

(Emphasis added.)

31. The 2015 10-K stated the Company is subject to anti-kickback laws and state laws relating to sales and marketing practices, stating in relevant part:

Laws and regulations affecting government benefit programs could impose new obligations on AbbVie, require it to change its business practices, and restrict its operations in the future.

The health care industry is subject to various federal, state, and international laws and regulations pertaining to government benefit programs reimbursement, rebates, price reporting and regulation, and health care fraud and abuse. In the United States, these laws include anti-kickback and false claims laws, the Medicaid Rebate Statute, the Veterans Health Care Act, and individual state laws relating to pricing and sales and marketing practices. Violations of these laws may be punishable by criminal and/or civil sanctions, including, in some instances, substantial fines, imprisonment, and exclusion from participation in federal and state health care programs, including Medicare, Medicaid, and Veterans Administration health programs. These laws and regulations are broad in scope and they are subject to change and evolving interpretations, which could require AbbVie to incur substantial costs associated with compliance or to alter one or more of its sales or marketing practices. In addition, violations of these laws, or allegations of such violations, could disrupt AbbVie's business and result in a material adverse effect on its business and results of operations.

32. On February 17, 2017, the Company filed its annual report for the fiscal year ended December 31, 2016 on Form 10-K (the "2016 10-K") with the SEC, which provided the Company's annual financial results and position. The 2016 10-K was signed by Defendants Gonzalez and Chase. The 2016 10-K also contained signed SOX certifications by Defendants Gonzalez and Chase attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company's internal controls over financial reporting, and the disclosure of all fraud.

33. The 2016 10-K enumerated the Company's strategic objectives for 2017 to drive "HUMIRA sales growth[,]"stating in relevant part:

2017 Strategic Objectives

AbbVie's mission is to be an innovation-driven, patient-focused specialty biopharmaceutical company capable of achieving top-tier financial performance through outstanding execution and a consistent stream of innovative new medicines. ***AbbVie intends to continue to advance its mission in a number of ways, including: (i) growing revenues through continued strong performance***

from its existing portfolio of on-market products, including its flagship brands, HUMIRA and IMBRUVICA as well as growth from pipeline products; (ii) expanding operating margins; (iii) continued investment in its pipeline in support of opportunities in immunology, oncology, virology and neurology as well as continued investment in key on-market products; (iv) augmentation of its pipeline through concerted focus on strategic licensing, acquisition and partnering activity with a focus on identifying compelling programs that fit AbbVie's strategic criteria; and (v) returning cash to shareholders via dividends and share repurchases. In addition, AbbVie anticipates several regulatory submissions and key data readouts from key clinical trials in the next twelve months.

AbbVie expects to achieve its strategic objectives as follows:

• ***HUMIRA sales growth by driving biologic penetration across disease categories, increasing market leadership, strong commercial execution.***

(Emphasis added.)

34. The 2016 10-K stated the Company is subject to anti-kickback laws and state laws relating to sales and marketing practices, stating in relevant part:

Laws and regulations affecting government benefit programs could impose new obligations on AbbVie, require it to change its business practices, and restrict its operations in the future.

The health care industry is subject to various federal, state and international laws and regulations pertaining to government benefit programs reimbursement, rebates, price reporting and regulation and health care fraud and abuse. In the United States, these laws include anti-kickback and false claims laws, the Medicaid Rebate Statute, the Veterans Health Care Act and individual state laws relating to pricing and sales and marketing practices. Violations of these laws may be punishable by criminal and/or civil sanctions, including, in some instances, substantial fines, imprisonment and exclusion from participation in federal and state health care programs, including Medicare, Medicaid and Veterans Administration health programs. These laws and regulations are broad in scope and they are subject to change and evolving interpretations, which could require AbbVie to incur substantial costs associated with compliance or to alter one or more of its sales or marketing practices. In addition, violations of these laws, or allegations of such violations, could disrupt AbbVie's business and result in a material adverse effect on its business and results of operations.

35. On February 16, 2018, the Company filed its annual report for the fiscal year ended December 31, 2017 on Form 10-K (the "2017 10-K") with the SEC, which provided the Company's annual financial results and position. The 2017 10-K was signed by Defendants Gonzalez and Chase. The 2017 10-K also contained signed SOX certifications by Defendants Gonzalez and Chase attesting to the accuracy of financial reporting, the disclosure of any material changes to the Company's internal controls over financial reporting, and the disclosure of all fraud.

36. The 2017 10-K enumerated the Company's strategic objectives for 2018 to drive "HUMIRA sales growth[,]"stating in relevant part:

2018 Strategic Objectives

AbbVie's mission is to be an innovation-driven, patient-focused specialty biopharmaceutical company capable of achieving top-tier financial performance through outstanding execution and a consistent stream of innovative new medicines. AbbVie intends to continue to advance its mission in a number of ways, including: (i) growing revenues by diversifying revenue streams, driving late-stage pipeline assets to the market and ensuring strong commercial execution of new product launches; (ii) continued investment and expansion in its pipeline in support of opportunities in immunology, oncology and neurology as well as continued investment in key on-market products; (iii) expanding operating margins; and (iv) returning cash to shareholders via dividends and share repurchases. In addition, AbbVie anticipates several regulatory submissions and key data readouts from key clinical trials in the next twelve months.

AbbVie expects to achieve its strategic objectives through:

• ***HUMIRA sales growth by driving biologic penetration across disease categories, increasing market leadership, strong commercial execution and expansion.***

(Emphasis added).

37. The 2017 10-K stated the Company is subject to anti-kickback laws and state laws relating to sales and marketing practices, stating in relevant part:

Laws and regulations affecting government benefit programs could impose new obligations on AbbVie, require it to change its business practices, and restrict its operations in the future.

The health care industry is subject to various federal, state and international laws and regulations pertaining to government benefit programs reimbursement, rebates, price reporting and regulation and health care fraud and abuse. In the United States, these laws include anti-kickback and false claims laws, the Medicaid Rebate Statute, the Veterans Health Care Act and individual state laws relating to pricing and sales and marketing practices. Violations of these laws may be punishable by criminal and/or civil sanctions, including, in some instances, substantial fines, imprisonment and exclusion from participation in federal and state health care programs, including Medicare, Medicaid and Veterans Administration health programs. These laws and regulations are broad in scope and they are subject to change and evolving interpretations, which could require AbbVie to incur substantial costs associated with compliance or to alter one or more of its sales or marketing practices. In addition, violations of these laws, or allegations of such violations, could disrupt AbbVie's business and result in a material adverse effect on its business and results of operations.

(Emphasis added).

38. The statements contained in ¶¶ 22-37 were materially false and/or misleading because they misrepresented and failed to disclose the following adverse facts pertaining to the Company's business, operational and financial results, which were known to Defendants or recklessly disregarded by them. Specifically, Defendants made false and/or misleading statements and/or failed to disclose that: (1) AbbVie's strategy to increase the sales growth of its blockbuster drug, HUMIRA, relied in part upon illegal kickbacks and unlawful sales and marketing tactics; (2) such practices would foreseeably lead to heightened scrutiny by State governments and agencies; and (3) as a result, Defendants' public statements were materially false and misleading at all relevant times.

The Truth Begins to Emerge

39. On September 18, 2018, Bloomberg published an article entitled, "California Sues AbbVie Over Alleged Arthritis Drug Kickbacks," asserting the State of California filed a lawsuit against AbbVie for engaging in a kickback scheme aimed to boost HUMIRA sales (the "California Complaint"). The article provides that the lawsuit seeks damages involving "private insurance claims." The article states, in relevant part:
California's insurance regulator is suing AbbVie Inc., alleging that the pharmaceutical giant gave illegal kickbacks to health-care providers in order to keep patients on its blockbuster rheumatoid arthritis drug Humira.

The company "engaged in a far-reaching scheme including both classic kickbacks -- cash, meals, drinks, gifts, trips, and patient referrals -- and more sophisticated ones -- free and valuable professional goods and services to physicians to induce and reward Humira prescriptions," the California Department of Insurance said in a statement.

According to the state, AbbVie paid for registered nurses that it called ambassadors to help doctors with patients who were taking Humira. While the nurses were represented to patients as an extension of the doctor's office, they were trained to tout the drug while downplaying its risks, the state said.

"AbbVie spent millions convincing patients and health care professionals that AbbVie Ambassadors were patient advocates -- in fact, the Ambassadors were Humira advocates hired to do one thing, keep patients on a dangerous drug at any cost," Insurance Commissioner Dave Jones said in the statement.

The alleged misconduct "is particularly egregious because it's well known the drug has very adverse side effects," said Jones in a press conference. Under the ambassador system, complaints or concerns about serious infections, blood problems, or even heart failure -- all known side effects of Humira -- could go unreported to patients' physicians, he said.

***

Humira is one of the world's biggest-selling medications. The drug brought in $18.4 billion in 2017, accounting for roughly two-thirds of North Chicago, Illinois-based AbbVie's revenue. Private insurers have paid out $1.2 billion in Humira-related claims, according to Jones.

***

Jones is intervening in a whistleblower complaint filed in California by a nurse who was employed as an AbbVie ambassador in Florida several years ago. The suit, filed in Alameda County Superior Court, seeks three times the amount of each claim made for Humira as a result of the alleged kickbacks. The lawsuit involves private insurance claims, said Nancy Kincaid, a spokeswoman for the California Department of Insurance.

40. According to the California Complaint, relator-plaintiff Lazaro Suarez worked for AbbVie via its sub-contractor, Quintiles Transactional Holdings, Inc., as a "Nurse Educator" and "Patient Ambassador" from approximately March 23, 2013 and October 2014. In that position, he "became aware of AbbVie's [kickback] scheme nationwide, including in California, because of his role as a trainer, among other ways. After leaving his employment, Mr. Suarez continued to obtain information about the allegations [described in the California Complaint], including through ongoing contacts with AbbVie and Quintiles personnel." The California Complaint states the alleged fraudulent conduct occurred from 2013 to the present.

41. On this news, shares of AbbVie fell $4.35 per share or over 4.5% over the next two consecutive trading days to close at $91.02 per share on September 19, 2018.

PLAINTIFF'S CLASS ACTION ALLEGATIONS

42. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of a Class, consisting of all those who purchased or otherwise acquired the publicly traded securities of AbbVie during the Class Period (the "Class"); and were damaged upon the revelation of the alleged corrective disclosures. Excluded from the Class are Defendants herein, the officers and directors of the Company, at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns and any entity in which Defendants have or had a controlling interest.

43. The members of the Class are so numerous that joinder of all members is impracticable. Throughout the Class Period, AbbVie securities were actively traded on the NYSE. While the exact number of Class members is unknown to Plaintiff at this time and can be ascertained only through appropriate discovery, Plaintiff believes that there are hundreds or thousands of members in the proposed Class. Record owners and other members of the Class may be identified from records maintained by the Company or its transfer agent and may be notified of the pendency of this action by mail, using the form of notice similar to that customarily used in securities class actions.

44. Plaintiff's claims are typical of the claims of the members of the Class as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

45. Plaintiff will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class and securities litigation. Plaintiff has no interests antagonistic to or in conflict with those of the Class.

46. Common questions of law and fact exist as to all members of the Class and predominate over any questions solely affecting individual members of the Class. Among the questions of law and fact common to the Class are:

• whether the federal securities laws were violated by Defendants' acts as alleged herein;

• whether statements made by Defendants to the investing public during the Class Period misrepresented material facts about the financial condition, business, operations, and management of the Company;

• whether Defendants' public statements to the investing public during the Class Period omitted material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading;

• whether the Individual Defendants caused the Company to issue false and misleading SEC filings and public statements during the Class Period;

• whether Defendants acted knowingly or recklessly in issuing false and misleading SEC filings and public statements during the Class Period;

• whether the prices of AbbVie securities during the Class Period were artificially inflated because of the Defendants' conduct complained of herein; and

• whether the members of the Class have sustained damages and, if so, what is the proper measure of damages.

47. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

48. Plaintiff will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

• Defendants made public misrepresentations or failed to disclose material facts during the Class Period;

• the omissions and misrepresentations were material;

• AbbVie securities are traded in efficient markets;

• the Company's securities were liquid and traded with moderate to heavy volume during the Class Period;

• the Company traded on the NYSE, and was covered by multiple analysts;

• the misrepresentations and omissions alleged would tend to induce a reasonable investor to misjudge the value of the Company's securities; and

• Plaintiff and members of the Class purchased and/or sold AbbVie securities between the time the Defendants failed to disclose or misrepresented material facts and the time the true facts were disclosed, without knowledge of the omitted or misrepresented facts.

49. Based upon the foregoing, Plaintiff and the members of the Class are entitled to a presumption of reliance upon the integrity of the market.

50. Alternatively, Plaintiff and the members of the Class are entitled to the presumption of reliance established by the Supreme Court in Affiliated Ute Citizens of the State of Utah v. United States, 406 U.S. 128, 92 S. Ct. 2430 (1972), as Defendants omitted material information in their Class Period statements in violation of a duty to disclose such information, as detailed above.

COUNT I

Violation of Section 10(b) of The Exchange Act and Rule 10b-5 Against All Defendants

51. Plaintiff repeats and realleges each and every allegation contained above as if fully set forth herein.

52. This Count is asserted against the Company and the Individual Defendants and is based upon Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder by the SEC.

53. During the Class Period, the Company and the Individual Defendants, individually and in concert, directly or indirectly, disseminated or approved the false statements specified above, which they knew or deliberately disregarded were misleading in that they contained misrepresentations and failed to disclose material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

54. The Company and the Individual Defendants violated § 10(b) of the 1934 Act and Rule 10b-5 in that they:

• employed devices, schemes and artifices to defraud;

• made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or

• engaged in acts, practices and a course of business that operated as a fraud or deceit upon plaintiff and others similarly situated in connection with their purchases of AbbVie securities during the Class Period.

55. The Company and the Individual Defendants acted with scienter in that they knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated, or acquiesced in the issuance or dissemination of such statements or documents as primary violations of the securities laws. These defendants by virtue of their receipt of information reflecting the true facts of the Company, their control over, and/or receipt and/or modification of the Company's allegedly materially misleading statements, and/or their associations with the Company which made them privy to confidential proprietary information concerning the Company, participated in the fraudulent scheme alleged herein.

56. Individual Defendants, who are the senior officers and/or directors of the Company, had actual knowledge of the material omissions and/or the falsity of the material statements set forth above, and intended to deceive Plaintiff and the other members of the Class, or, in the alternative, acted with reckless disregard for the truth when they failed to ascertain and disclose the true facts in the statements made by them or other personnel of the Company to members of the investing public, including Plaintiff and the Class.

57. As a result of the foregoing, the market price of AbbVie securities was artificially inflated during the Class Period. In ignorance of the falsity of the Company's and the Individual Defendants' statements, Plaintiff and the other members of the Class relied on the statements described above and/or the integrity of the market price of AbbVie securities during the Class Period in purchasing AbbVie securities at prices that were artificially inflated as a result of the Company's and the Individual Defendants' false and misleading statements.

58. Had Plaintiff and the other members of the Class been aware that the market price of AbbVie securities had been artificially and falsely inflated by the Company's and the Individual Defendants' misleading statements and by the material adverse information which the Company's and the Individual Defendants did not disclose, they would not have purchased AbbVie securities at the artificially inflated prices that they did, or at all.

59. As a result of the wrongful conduct alleged herein, Plaintiff and other members of the Class have suffered damages in an amount to be established at trial.

60. By reason of the foregoing, the Company and the Individual Defendants have violated Section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder and are liable to the Plaintiff and the other members of the Class for substantial damages which they suffered in connection with their purchases of AbbVie securities during the Class Period.

COUNT II
Violation of Section 20(a) of The Exchange Act Against the Individual Defendants

61. Plaintiff repeats and realleges each and every allegation contained in the foregoing paragraphs as if fully set forth herein.

62. During the Class Period, the Individual Defendants participated in the operation and management of the Company, and conducted and participated, directly and indirectly, in the conduct of the Company's business affairs. Because of their senior positions, they knew the adverse non-public information regarding the Company's business practices.

63. As officers and/or directors of a publicly owned company, the Individual Defendants had a duty to disseminate accurate and truthful information with respect to the Company's financial condition and results of operations, and to correct promptly any public statements issued by the Company which had become materially false or misleading.

64. Because of their positions of control and authority as senior officers, the Individual Defendants were able to, and did, control the contents of the various reports, press releases and public filings which the Company disseminated in the marketplace during the Class Period. Throughout the Class Period, the Individual Defendants exercised their power and authority to cause the Company to engage in the wrongful acts complained of herein. The Individual Defendants therefore, were "controlling persons" of the Company within the meaning of Section 20(a) of the Exchange Act. In this capacity, they participated in the unlawful conduct alleged which artificially inflated the market price of AbbVie securities.

65. Each of the Individual Defendants, therefore, acted as a controlling person of the Company. By reason of their senior management positions and/or being directors of the Company, each of the Individual Defendants had the power to direct the actions of, and exercised the same to cause, the Company to engage in the unlawful acts and conduct complained of herein. Each of the Individual Defendants exercised control over the general operations of the Company and possessed the power to control the specific activities which comprise the primary violations about which Plaintiff and the other members of the Class complain.

66. By reason of the above conduct, the Individual Defendants are liable pursuant to Section 20(a) of the Exchange Act for the violations committed by the Company.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff demands judgment against Defendants as follows:

A. Determining that the instant action may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, and certifying Plaintiff as the Class representative;

B. Requiring Defendants to pay damages sustained by Plaintiff and the Class by reason of the acts and transactions alleged herein;

C. Awarding Plaintiff and the other members of the Class prejudgment and post-judgment interest, as well as their reasonable attorneys' fees, expert fees and other costs; and

D. Awarding such other and further relief as this Court may deem just and proper.

DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands a trial by jury.

Dated: October 9, 2018

Respectfully submitted,

POMERANTZ LLP

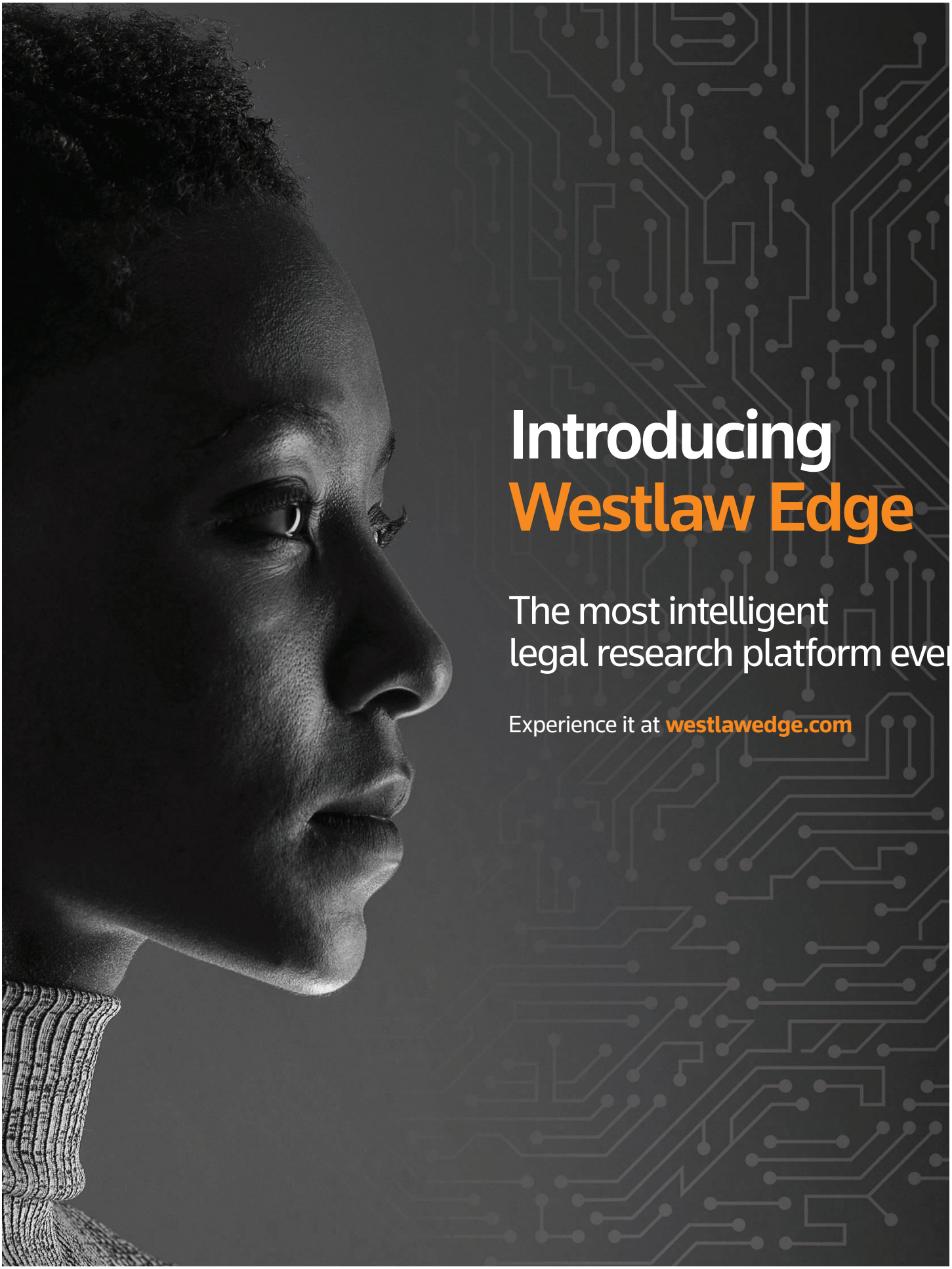
/s/ Jeremy A. Lieberman

Jeremy A. Lieberman
J. Alexander Hood II
600 Third Avenue, 20th Floor
New York, NY 10016
Telephone: (212) 661-1100
Facsimile: (212) 661-8665
Email: jalieberman@pomlaw.com
Email: ahood@pomlaw.com

POMERANTZ LLP
Patrick V. Dahlstrom
Ten South LaSalle Street, Suite 3505
Chicago, Illinois 60603
Telephone: (312) 377-1181
Facsimile: (312) 377-1184
Email: pdahlstrom@pomlaw.com

Attorneys for Plaintiff

End of Document


Introducing
Westlaw Edge
The most intelligent
legal research platform eve
Experience it at westlawedge.com