# Table of Contents


## Cybersecurity Overview & Future Legal Insights — Page

1. Critics say attorney general's proposed CCPA regulations add confusion, not clarity — 1
2. Why every business should care about the California Consumer Privacy Act — 4

## Proposed Changes to LLC Statute — Page

3. Proposed LLC amendments — 10

## Recent Developments in Legal Ethics in Ohio — Page

4. Select Rules from the Ohio Rules of Professional Conduct — 122

## Compliance Law Panel: Varying Perspectives — Page

5. Evaluation of Corporate Compliance Programs — 129

## 10 Cases Every In-house Counsel Should Know — Page

6. DriveTime Car Sales Co. LLC v. Pettigrew — 148
7. Cruz v. G-Star Inc. — 157
8. Fourth Estate Pub. Ben. Corp. v. Wall-Street.com LLC — 171
9. Lorenzo v. SEC — 179
10. New Riegel Local Sch. Dist. Bd. of Ed. v. Buehrer Group Arch. & Eng., Inc. — 192
11. Home Depot U.S.A. Inc. v. Jackson — 204
12. Frank v. Gaos — 221
13. HD Media Co. LLC v. United States DOJ — 226
14. In re Nat'l Prescription Opiate Litig. — 244
15. Abdul Latif Jameel Transp. Co. v. FedEx Corp. — 246

## Women in the Legal Profession: Understanding & Eliminating Gender Bias — Page

16. Implicit Gender Bias in the Legal Profession An Empirical Study — 261

# Critics say attorney general's proposed CCPA regulations add confusion, not clarity

Oct 11, 2019 Save This ()

Angelique Carson, CIPP/US Angelique Carson, CIPP/US

This article by Angelique Carson originally appeared in the The Privacy Advisor, an IAPP publication. It is reprinted with permission.

Tanya Forsheit, CIPP/US, CIPT, PLS, was about to take the stage Thursday at a speaking engagement when a colleague asked her if she was watching the news conference. Forsheit assumed there must have been a news conference on U.S. President Donald Trump's impeachment hearings. But, like everyone else watching the California Consumer Privacy Act's progress as it nears its 2020 implementation date, Forsheit was surprised to learn that California's attorney general was, in fact, holding a news conference unleashing its long-awaited proposed regulations on the CCPA.

The regulations are important and have been eagerly anticipated because they've largely been heralded as the answers to companies' burning questions about some of the law's ambiguities. The CCPA itself mandated the attorney general would "solicit broad public participation to adopt regulations to further the purposes of this title ... ."

At Thursday's surprise news conference, California Attorney General Xavier Becerra stood with nine members of his staff touting the proposed regulations as a victory. "We were assigned this task, we made it clear what it would take to do it well, we intend to do it well, period," he said.

But some of those tasked with complying with the CCPA or helping their clients do so don't agree that the 24-page document is a win.

"Any of us who had spent the last year struggling to read this law and interpret it for clients, the hope was that the [attorney general] was actually going to help by giving more clarity and doing it in language that business could understand and could apply," said Forsheit, an attorney with Frankfurt Kurnit Klein & Selz. "Indeed, our friend Alastair Mactaggart [who drafted the initial CCPA] kept saying, 'Don't worry, the [attorney general] is going to provide clarity around this,' but they haven't; they've made it worse."

At a high level, the regulations focus on four specific areas of the CCPA: restoring choice, control, transparency and fostering innovation.

"Though they are to be made public today, these proposed regulations have taken a year to get to this point," Becerra said. "And they reflect changes from the legislature up until last month and feedback from the public during four public forums in the last year."

He added that the regulations explain how businesses would be required to notify consumers of their rights under the CCPA either at or before data collection, how businesses handle consumer requests about their data, clarify how businesses confirm identities during data subject access requests, and how they handle requests concerning information regarding children under the age of 16. The proposed regulations also describe what businesses need to do to avoid discriminating against customers who choose not to allow their data to be stored and sold, a choice granted to them under the CCPA.

Forsheit said some of the regulation's provisions are helpful and make progress in clarifying allowances for organizations dealing with subject-access requests to vet and, if necessary, deny requests for data deletion or receiving a copy of a subject's data if it is not possible to verify someone's identification. But that's about where her praise ends.

"This, even though it's 24 pages long, doesn't have anything that's truly helpful," Forsheit said. "There's nothing at all to help businesses, and that's what they ought to be trying to do if they are actually interesting in helping consumers."

"I'm glad I'm not responsible for CCPA compliance, because I think these new regulations may send some folks back to square one," Jerome said. "My reading of the regs is there's no more ignoring do-not-track signals, and that's on top of all the new documentation in this thing. Companies are going to have to think about how they value data — the regulations offer eight potential methodologies — and then document that."

Jerome is referring to the regulations section on "requests to opt out," which states: "A business shall provide two or more designated methods for submitting requests to opt-out [of the sale of their personal information], including, at a minimum, an interactive webform accessible via a clear and conspicuous link titled 'Do Not Sell My Personal Information,' or 'Do Not Sell My Info,' on the business's website or mobile application." Businesses can also use toll-free phone numbers, email addresses, or a browser plugin or privacy setting to communicate a user's choice to opt out, among other methods.

Lothar Determann of Baker McKenzie agrees with Jerome's assertion that the regulations confuse rather than clarify.

"Lawyers and lobbyists who had raised hopes for practical or business-friendly guidance should be disappointed," he said. "Where the proposed regulations add new substance, they seem to create additional ambiguities and burdens for businesses."

Given the regulations' provision that a browser plugin or privacy setting can communicate or signal the consumer's choice to opt out of the sale of their personal information, some claim that "should be read to imply that 'do not track' settings in web browsers constitute opt-out requests under the CCPA. (https://www.law.com/therecorder/2019/10/10/plowing-new-ground-californias-draft-data-privacy-rules-are-unveiled/?kw=%27Plowing%20New%20Ground%27:%20California%27s%20Draft%20Data-Privacy%20Rules%20Are%20Unveiled&utm_source=email&utm_medium=enl&utm_campaign=afternoonupdate&utm_content=20191010
According to the regulations, businesses have to implement opt-out requests in 15 days, [and] not the 45 days that the CCPA contemplates for data access/deletion requests."

Forsheit agrees this is troubling. She said that while it's helpful the attorney general clarified that a company can take up to 15 days to honor "do not sell" requests, the regulations go on to say that businesses must communicate to all third parties the do-not-sell request.

"I think 90 days is OK, but I don't think any of us thought companies were going to have to reach out to any imaginable third-party entity that might have that data to report a do not sell request, that isn't obvious from the face of the law," she said.

More importantly, though, Forsheit is very concerned with the regulations' distinction of when an entity can be designated as a "service provider" under the law.

"A lot of companies are struggling with are they a 'service provider,' are they a 'business,' what are they?" she said. "Many companies are trying to focus their compliance on making clear they're a service provider." But the regulations state a company has to claim it is not a service provider if it uses the same data element in one case as it does in another in order to provide a service. In that case, the data element counts as a "sale" when one company gives the second company the data under the CCPA, meaning a consumer could opt out of that transaction.

"Let's say I share data with a vendor for security services. A good use-case is if I'm a company and I get an IP address from another company in order to provide a service to them — say, a security-related service, a cybersecurity type company — and I get an IP address from a company in order to help them detect fraud. According to the regs, if I use that data, that IP address for another company to provide a service, then I'm no longer a service provider. If that individual says, 'Don't share my data,' the company has to stop sharing that information to protect against fraud. And that doesn't make sense, because companies often have to use identical pieces of data in order to provide services."

Added Forsheit, "The regs are again creating a disincentive for companies to engage in normal business activities that are actually to protect people from fraud by sharing certain pieces of information, and that's troubling to me."

Additionally, Determann takes issue with the length of the regulations themselves, which he says are "nearly as long as the CCPA itself and would double the word count of what businesses and their advisers have to process for compliance purposes, to nearly 20,000 words of highly complex, legalese and counterintuitive terminology and text."

He said the regulations "demand that businesses 'use plain, straightforward language and avoid technical or legal jargon' — a requirement that neither the CCPA or the regulations are trying to meet in the least, but, hey, 'Do as I say, not as I do.'"

"Privacy policies are going to get longer, too. Much longer," Jerome said. "There will be more paper disclosures all over the place."

said.

The regulations require such metrics as the "number of requests to delete the business received" and complied with or denied, the median number of days it took them, and disclose the information compiled within their privacy policy.

For all the critiques, however, Determann notes that "neither the [attorney general's] office nor the Legislature is entirely or even primarily to blame, though." He said the original ballot initiative laid out "confusing terminology, complex concepts and massive word count in motion to mislead voters at the 2018 general election (as ballot initiatives tend to do)."

The attorney general's team found itself in a difficult position, trying to draft the regulations while juggling CCPA hearings and the California Legislature's more than 40 bills aiming to amend the law, as recently as Sept. 13, when it "passed very wordy, complex and convoluted modifications and time-limited exceptions from the statute, which the governor has not yet signed into law."

Jerome, for his part, said while many are harping on the compliance costs of the CCPA, "some of this is good stuff and should be thought of as the proverbial [federal] privacy bill coming due. It's just going to be hard to do in three months — and that's on top of providing feedback on this and the looming CCPA 2.0."

Now, the attorney general's office takes public comment on the proposed regulations through Dec. 6, after which it will issue the final regulations ahead of CCPA's Jan. 1 effective date.

© 2019 International Association of Privacy Professionals.
All rights reserved.

Pease International Tradeport, 75 Rochester Ave.
Portsmouth, NH 03801 USA • +1 603.427.9200

# Legal Alert: California's New Privacy Law is Coming - Are You Ready?

Margaret M. Johnson
10.02.2019

**Professionals**

Margaret M. Johnson

**Related Practices**

Cybersecurity & Privacy

All eyes are on California as the countdown to California's Consumer Privacy Act (CCPA) continues. This attention is for good reason—the CCPA is a data privacy law with the potential to change the landscape of data collection practices in the U.S. Already, many states have proposed data privacy legislation similar to the CCPA, and the federal government has taken steps toward the creation of a U.S. federal privacy law.[1] Approximately 500,000 U.S. businesses in various industries will have to comply with this new law when it goes into effect on January 1, 2020.[2] This new law will require businesses to provide disclosures to consumers, allow consumers to request access to their information, delete consumer information at their request, allow consumers to opt-out of the sale of their information, and not discriminate against consumers who exercise these rights. Does your business need to comply? If so, is it ready for the CCPA?

**It applies to more than you think**

To determine whether your company needs to comply, first consider whether your company is a "business" under the CCPA. The CCPA applies to for profit businesses that collect personal information on California residents and satisfy one of the following:

- Has annual gross revenues in excess of $25 million; ***or***
- Annually, alone or in combination, buys, receives, sells, or shares the personal information of 50,000 or more consumers, households, or devices; ***or***
- Derives 50% or more of its annual revenues from selling consumers' personal information.[3]

Although at first glance these qualifications may seem to apply to only a small number of entities, the last two criteria are broader than they may appear. Notice that even a small business may easily meet the 50,000 threshold when one considers how many devices each household may use.[4] Similarly, due to the broad definitions of "sale" and "personal information" under the CCPA, many entities may derive half of their revenue from selling consumers' personal information (more on each of these definitions below).

Take note of what types of information your business collects, remembering that "personal information" is defined broadly. "Personal information" under the CCPA means "information that identifies, relates to, describes, is reasonably capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household."[5] This can be information collected electronically *or* through other methods, such as paper or an algorithm.[6] Examples of personal information include an IP address, account name, employment history, purchasing habits, biometric information, browsing history, geolocation data, and inferences drawn from other personal information to create consumer profiles. Yet, personal information does *not* include publicly available information, aggregated information, and deidentified information.[7]

Finally, determine whether the information your business collects includes information on California residents, as defined under tax law.[8] If so, your business may collect information on "consumers" under the CCPA. Note until January 1, 2021, personal information of employees and business contacts are largely exempt from the CCPA.[9] Nevertheless, businesses will still have certain obligations toward these individuals.[10]

**Be wary of selling personal information**

One of the rights that consumers will receive under the CCPA is the right to opt-out of the sale of their personal information.[11] For a business, this involves disclosing to consumers that they have this right and being prepared to receive and act on these requests. More specifically, a business must include "Do Not Sell My Personal Information" as a working link in the business's privacy notice and prominently on the homepage of the business's website.[12] This link must take the consumer to a webpage that allows the consumer to opt-out.

Typically, when one thinks of a "sale of personal information," a data broker transaction comes to mind. Yet, a "sale" under the CCPA is *any communication or transfer* of consumer's personal information to another business or third party for monetary *or other valuable consideration*.[13] The italicized words in the previous sentence have the potential to include a broad range of data activities. Yet, consumer requests, activities with service providers, transfers during a merger or acquisition, and honoring sale opt-out requests are not considered sales if a business follows the requirements for each of these exemptions.[14]

Under the first exemption, acting on a consumer's request to disclose personal information to a third party is not a sale if:

- the customer intentionally requests the action through a deliberate interaction; and
- the third party does not further sell the personal information through a disclosure inconsistent with the CCPA.[15]

Similarly, under the mergers and acquisitions exemption, personal information transferred as an asset through a transaction in which a third party assumes control of the business (in whole or part) is not a sale if:

- the use or sharing remains consistent with the CCPA general notice rights; and

- the third party does not materially alter how it uses or shares the personal information.[16]

However, the third party may alter how it uses the personal information if it provides prior notice to the consumer; and the change does not violate the Unfair and Deceptive Practices Act.[17] Finally, under the service provider exemption, the disclosure to a service provider is not a sale if:

- the business shares or uses personal information with the service provider that is necessary to perform a business purpose;
- the business previously provided a "Do Not Sell My Personal Information" notice disclosing the service provider's use or sharing; and
- the service provider does not further collect, sell, or use the consumer's personal information (except for the business purpose).[18]

That said, there are additional requirements for an entity to be considered a "service provider" under the CCPA, which include specific contractual provisions in a business's agreement with its service provider. In addition to providing an exemption to the sale opt-out requirements, the CCPA provides an opportunity for a business and service provider to limit its respective liability for CCPA misconduct of the other.[19] Therefore, it is highly beneficial to a business to follow the service provider requirements under the CCPA.

**Update your service provider contracts**

Under the CCPA, a "service provider" is a legal entity organized for profit that processes personal information on behalf of a business, to which the business discloses a consumer's personal information for a business purpose pursuant to a written contract.[20] This written contract must prohibit the service provider from:

- selling the personal information;
- retaining, using or disclosing the personal information for any purpose other than performing the services; and
- retaining, using or disclosing the personal information outside of the direct business relationship between the recipient and the business.[21]

Additionally, the contract must include a certification that the service provider understands these restrictions and will comply with them.[22]

**What to expect**

Currently, those monitoring the CCPA are waiting for the California governor to sign the amendments from the California State Legislature into law. The California State Legislature concluded its business for the term on Saturday, September 14.[23] A total of seven amendments to the CCPA were passed.[24] Now California's governor has until October 13, 2019 to sign these amendments into law. Any amendments that were stalled in committee will not be in the CCPA on January 1, 2019. However, due to the two-year legislative term in California, these amendments may be revisited when the California State Legislature reconvenes in 2020.[25]

Legal Alert: California's New Privacy Law is Coming - Are You Ready? Continued

From there, the CCPA will become operative on January 1, 2020. This means that individual consumers may exercise their private right of action starting on January 1, 2020. The private right of action gives consumers the right to bring a civil lawsuit against any business for a data breach of that consumer's nonencrpyted or nonredacted personal information where the business failed to implement and maintain reasonable security procedures.[26] A consumer that brings a civil action has the potential to recover $100 to $750 per consumer per incident or actual damages.[27]

The California Attorney General has until July 1, 2020 to adopt implementing regulations. Hopefully, these regulations will clarify any ambiguities in how businesses should comply with the CCPA. In addition to the limited private right of action for data breaches, the CCPA will be enforced by the California Attorney General. After giving a business notice and thirty days to cure the violation, the California Attorney General may issue civil penalties up to $2,500 per violation or $7,500 per intentional violation.[28] The California Attorney General may begin this enforcement on July 1, 2020 or six months after publication of the final regulations, whichever is sooner.

**Your business's CCPA To Do list**

Below is a list of action items a business should consider when complying with this new law:

- Make an inventory of personal information, using the CCPA's definition of "personal information" as a guide.
- Update your Privacy Notice and make other required disclosures wherever personal information is collected.
- Build technical capabilities and conduct necessary employee training to respond to verified consumer rights requests.
- Add "Do Not Sell My Personal Information" link and other technical opt-out capabilities (if the business "sells" personal information).
- Implement reasonable security practices and procedures.
- Add required contract provisions to service provider contracts (if the business "sells" personal information or desires limited liability).

In addition, the KMK Law Cybersecurity & Privacy Team is available to assist you in complying with the CCPA.

*KMK Legal Alerts are intended to bring attention to developments in the law and are not intended as legal advice for any particular client or any particular situation. Please consult with counsel of your choice regarding any specific questions you may have.*

[1] *US Federal & State Privacy Watch*, IAPP, https://iapp.org/resources/topics/us-federal-state-privacy-watch/ (last accessed Sept. 19, 2019).

[2] Patience Haggin, *Businesses Across the Board Scramble to Comply With California Data-Privacy Law*, Wall Street Journal (Sept. 8, 2019 9:00 am ET), (citing an International Association of Privacy Professionals statistic).

[3] Cal Civ Code § 1798.140(c)(1). Under § 1798.140(c)(2), these requirements also apply to any entity that controls or is controlled by a business that meets the criteria and that shares common branding with that business.

[4] Interestingly, "devices" is listed in the definition of a "business" but is not listed in the definition of "personal information." (Compare Cal Civ Code § 1798.140(c)(1) to Cal Civ Code § 1798.140(o)(1)). Also, note that "household" is not defined in the CCPA. Angelique Carson, *The Privacy Advisor Podcast: CCPA in its final form*, The Privacy Advisor: IAPP (Sept. 13, 2019), https://iapp.org/news/a/the-privacy-advisor-podcast-ccpa-in-its-final-form/.

[5] Cal Civ Code § 1798.140(o)(1), as amended by AB-874. California's governor has until October 13th to sign this amendment into law.

[6] Cal Civ Code § 1798.175.

[7] Cal Civ Code § 1798.140(o)(2), (3), as amended by AB-874. California's governor has until October 13th to sign this amendment into law.

[8] Cal Civ Code § 1798.140(g).

[9] Cal Civ Code § 1798.145(g), (m), as amended by AB-25. California's governor has until October 13th to sign this amendment into law.

[10] For example, businesses must still provide CCPA-compliant privacy notices to these employees and contractors, and non-discrimination and opt-out rights are still afforded to business contacts. Also, statutory relief remains available in the event of a data breach for employees and business contacts. Starr Drum, *A brief FAQ on the latest CCPA amendment updates*, Privacy Tracker: IAPP (Sept. 17, 2019), https://iapp.org/news/a/a-brief-faq-on-the-latest-ccpa-amendment-updates/.

[11] Cal Civ Code § 1798.115(d); Cal Civ Code § 1798.120(a), (d); Cal Civ Code § 1798.135(a) – (c). Note that consumers under the age of 16 must affirmatively opt-in to allow a business to sell their personal information. Cal Civ Code § 1798.120(c).

[12] Cal Civ Code § 1798.135(a).

[13] Cal Civ Code § 1798.140(t).

[14] Cal Civ Code § 1798.140(t)(2).

Legal Alert: California's New Privacy Law is Coming - Are You Ready? Continued

[15] Cal Civ Code § 1798.140(t)(2)(A).

[16] Cal Civ Code § 1798.140(t)(2)(D).

[17] Cal Civ Code § 1798.140(t)(2)(D).

[18] Cal Civ Code § 1798.140(t)(2)(C).

[19] Cal Civ Code § 1798.145(h).

[20] Cal Civ Code § 1798.140(v).

[21] Cal Civ Code § 1798.140(v), (w).

[22] Cal Civ Code § 1798.140(w)(2)(A)(ii).

[23] "Although scheduled to end Friday, Sept. 13, the California State Legislature was not able to conclude its business for the term until early Saturday morning. A protestor dropped blood onto the Senate floor Friday afternoon, necessitating an evacuation and cleanup that delayed the session's conclusion." Starr Drum, *A brief FAQ on the latest CCPA amendment updates*, Privacy Tracker: IAPP (Sept. 17, 2019), https://iapp.org/news/a/a-brief-faq-on-the-latest-ccpa-amendment-updates/.

[24] AB-25, AB-874, AB-1138, AB-1146, AB-1202, AB-1355, and AB-1564. *CCPA Amendment Tracker*, IAPP (last updated Sept. 18, 2019), https://iapp.org/resources/article/ccpa-amendment-tracker/?mkt_tok=eyJpIjoiWXpRMlpEazBNRGhtTW1RNSIsInQiOiJhWUd3UGF6a2lYNGVRU014ckdwU0JKNklZcXJ5RVwv-OFwvRm5jbUtSN0Z2MERTaE9ZdkhWN2hoV3h5ZkUrVitYazhRXC9pOVcydzNBVXF0eUZVM2sxS2Qxd-DNzNWI2dXR4c1FsM2dmVHUySEYxZEk1TGRaaUVUYlwvRUF1bkR0M2dkZ3oifQ%3D%3D.

[25] Angelique Carson, *The Privacy Advisor Podcast: CCPA in its final form*, The Privacy Advisor: IAPP (Sept. 13, 2019), https://iapp.org/news/a/the-privacy-advisor-podcast-ccpa-in-its-final-form/.

[26] Cal Civ Code § 1798.150(a), (b), (c).

[27] Cal Civ Code § 1798.150(a), (b), (c).

[28] Cal Civ Code § 1798.155(b).

Keating Muething & Klekamp PLL
Attorneys at Law
One East Fourth Street | Suite 1400 | Cincinnati, OH 45202
P: 513.579.6400 | F: 513.579.6457 | kmklaw.com

state, in addition to those items otherwise prescribed by this section, a statement signed by an authorized officer directing the foreign corporation to make application for a license to transact business in this state under an assumed business name or names that comply with the requirements of this division and stating that the foreign corporation will transact business in this state only under the assumed name or names. The application for a license shall be on a form prescribed by the secretary of state. 3364 3365 3366 3367 3368 3369 3370 3371 3372

**Sec. 1706.01.** As used in this chapter: 3373

(A) "Articles of organization" means the articles of organization described in section 1706.16 of the Revised Code, and those articles of organization as amended or restated. 3374 3375 3376

(B) "Assignment" means a transfer, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, or transfer by operation of law. 3377 3378 3379

(C) "Constituent limited liability company" means a constituent entity that is a limited liability company. 3380 3381

(D) "Constituent entity" means an entity that is party to a merger. 3382 3383

(E) "Contribution" means anything of value including cash, property, or services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, that a person contributes to a limited liability company, or a series thereof, in the person's capacity as a member. 3384 3385 3386 3387 3388 3389

(F) "Converted entity" means the entity into which a converting entity converts pursuant to sections 1706.72 to 1706.723 of the Revised Code. 3390 3391 3392

(G) "Converting limited liability company" means a converting entity that is a limited liability company. 3393 3394

(H) "Converting entity" means an entity that converts into a converted entity pursuant to sections 1706.72 to 1706.723 of the Revised Code. 3395 3396 3397

(I) "Debtor in bankruptcy" means a person who is the subject of an order for relief under Title 11 of the United States Code, a comparable order under a successor statute of general application, or a comparable order under any federal, state, or foreign law governing insolvency. 3398 3399 3400 3401 3402

(J) "Distribution" means a transfer of money or other property from a limited liability company, or a series thereof, to another person on account of a membership interest. 3403 3404 3405

(K) "Entity" means a general partnership, limited partnership, limited liability partnership, limited liability company, association, corporation, professional corporation, professional association, nonprofit corporation, business trust, real estate investment trust, common law trust, statutory trust, cooperative association, or any similar organization that has a governing statute, in each case, whether foreign or domestic. 3406 3407 3408 3409 3410 3411 3412

(L) "Foreign limited liability company" means an entity that is all of the following: 3413 3414

(1) An unincorporated association; 3415

(2) Organized under the laws of a state other than this state or under the laws of a foreign country; 3416 3417

(3) Organized under a statute pursuant to which an association may be formed that affords to each of its members limited liability with respect to the liabilities of the entity; 3418 3419 3420

(4) Not required to be registered, qualified, or organized under any statute of this state other than this chapter. 3421 3422

(M) "Governing statute" means the law that governs an entity's internal affairs. 3423 3424

(N) "Limited liability company," except in the phrase "foreign limited liability company," means an entity formed or existing under this chapter. 3425 3426 3427

(O) "Manager" means any person designated by the limited liability company or its members with the authority to manage all or part of the activities or affairs of the limited liability company on behalf of the limited liability company, which person has agreed to serve in such capacity, whether such person is designated as a manager, director, officer, or otherwise. 3428 3429 3430 3431 3432 3433 3434

(P) "Member" means a person that has been admitted as a member of a limited liability company under section 1706.27 of the Revised Code and that has not dissociated as a member. 3435 3436 3437

(Q) "Membership interest" means a member's right to receive distributions from a limited liability company or series thereof. 3438 3439 3440

(R) "Operating agreement" means any valid agreement, written or oral, of the members, or any written declaration of the sole member, as to the affairs and activities of a limited liability company and any series thereof. "Operating agreement" includes any amendments to the operating agreement. 3441 3442 3443 3444 3445

(S) "Organizational documents" means any of the following: 3446

(1) For a general partnership or foreign general partnership, its partnership agreement; 3447 3448

(2) For a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement; 3449 3450 3451

(3) For a limited liability limited partnership or foreign limited liability limited partnership, its certificate of limited partnership and partnership agreement; 3452 3453 3454

(4) For a limited liability company or foreign limited liability company, its articles of organization and operating agreement, or comparable records as provided in its governing statute; 3455 3456 3457 3458

(5) For a business or statutory trust or foreign business or statutory trust, its trust instrument, or comparable records as provided in its governing statute; 3459 3460 3461

(6) For a for-profit corporation or foreign for-profit corporation, its articles of incorporation, regulations, and other agreements among its shareholders that are authorized by its governing statute, or comparable records as provided in its governing statute; 3462 3463 3464 3465 3466

(7) For a nonprofit corporation or foreign nonprofit corporation, its articles of incorporation, regulations, and other agreements that are authorized by its governing statute or comparable records as provided in its governing statute; 3467 3468 3469 3470

(8) For a professional association or foreign professional association, its articles of incorporation, regulations, and other agreements among its shareholders that are authorized by its governing statute, or comparable records as provided in its governing statute; 3471 3472 3473 3474 3475

(9) For any other entity, the basic records that create the entity, determine its internal governance, and determine the 3476 3477

relations among the persons that own it, are members of it, or govern it. 3478 3479

(T) "Organizer" means a person executing the initial articles of organization filed by the secretary of state in accordance with section 1706.16 of the Revised Code. 3480 3481 3482

(U) "Person" means an individual, entity, trust, estate, government, custodian, nominee, trustee, personal representative, fiduciary, or any other individual, entity, or series thereof in its own or any representative capacity, in each case, whether foreign or domestic. As used in this division, "government" includes a country, state, county, or other political subdivision, agency, or instrumentality. 3483 3484 3485 3486 3487 3488 3489

(V) "Principal office" means the location specified by a limited liability company, foreign limited liability company, or other entity as its principal office in the last filed record in which the limited liability company, foreign limited liability company, or other entity specified its principal office on the records of the secretary of state. If no such location has previously been specified, then "principal office" means the location reasonably apparent to an unaffiliated person as the principal executive office of the limited liability company, foreign limited liability company, or other entity. 3490 3491 3492 3493 3494 3495 3496 3497 3498 3499

(W) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in written or paper form through an automated process. 3500 3501 3502 3503

(X) "Sign" means, with the present intent to authenticate or adopt a record, either of the following: 3504 3505

(1) To execute or adopt a tangible symbol; 3506

(2) To attach to or logically associate with the record an electronic symbol, sound, or process. 3507 3508

(Y) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. 3509 3510 3511 3512

(Z) "Surviving entity" means an entity into which one or more other entities are merged, whether the entity pre-existed the merger or was created pursuant to the merger. 3513 3514 3515

(AA) "Tribunal" means a court or, if provided in the operating agreement or otherwise agreed, an arbitrator, arbitration panel, or other tribunal. 3516 3517 3518

**Sec. 1706.02.** This chapter may be cited as the "Ohio Revised Limited Liability Company Act." 3519 3520

**Sec. 1706.03.** (A) A person knows a fact when either of the following is met: 3521 3522

(1) The person has actual knowledge of the fact. 3523

(2) The person is deemed to know the fact under law other than this chapter. 3524 3525

(B) A person has notice of a fact when any of the following is met: 3526 3527

(1) The person knows of the fact. 3528

(2) The person receives notification of the fact. 3529

(3) The person has reason to know the fact from all the facts known to the person at the time. 3530 3531

(4) The person is deemed to have notice of the fact under division (D) of this section. 3532 3533

(C) A person notifies another of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person knows the fact. 3534 3535 3536

(D) A person is deemed to have notice of the following: 3537

(1) The matters included in a limited liability company's articles of organization under divisions (A)(1) to (3) of section 1706.16 of the Revised Code, upon the filing of the articles; 3538 3539 3540 3541

(2) A limited liability company's dissolution, ninety days after a certificate of dissolution under section 1706.471 of the Revised Code becomes effective; 3542 3543 3544

(3) A limited liability company's merger or conversion, ninety days after a certificate of merger under section 1706.712 of the Revised Code or certificate of conversion under section 1706.722 of the Revised Code becomes effective. 3545 3546 3547 3548

(E) A member's knowledge, notice, or receipt of a notification of a fact relating to the limited liability company is not knowledge, notice, or receipt of a notification of a fact by the limited liability company solely by reason of the member's capacity as a member. 3549 3550 3551 3552 3553

**Sec. 1706.04.** (A) A limited liability company is a separate legal entity. A limited liability company's status for tax purposes shall not affect its status as a separate legal entity formed under this chapter. 3554 3555 3556 3557

(B) A limited liability company has perpetual duration. 3558

**Sec. 1706.05.** (A) A limited liability company may carry on any lawful activity, whether or not for profit. 3559 3560

(B) A limited liability company shall possess and may 3561

exercise all the powers and privileges granted by this chapter or by any other law or by its operating agreement, together with any powers incidental thereto, including those powers and privileges necessary or convenient to the conduct, promotion, or attainment of the business, purposes, or activities of the limited liability company. 3562 3563 3564 3565 3566 3567

(C) Without limiting the general powers enumerated in division (B) of this section, a limited liability company shall have the power and authority to make contracts of guaranty and suretyship and enter into interest rate, basis, currency, hedge, or other swap agreements, or cap, floor, put, call, option, exchange, or collar agreements, derivative agreements, or other agreements similar to any of the foregoing. 3568 3569 3570 3571 3572 3573 3574

(D) A series established under this chapter has the power and capacity, in the series' own name, to do all of the following: 3575 3576 3577

(1) Sue and be sued; 3578

(2) Contract; 3579

(3) Hold and convey title to assets of the series, including real property, personal property, and intangible property; 3580 3581 3582

(4) Grant liens and security interests in assets of the series. 3583 3584

**Sec. 1706.06.** (A) This chapter shall be construed to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements. 3585 3586 3587

(B) Unless displaced by particular provisions of this chapter, principles of law and equity supplement this chapter. 3588 3589

(C) Rules that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter. 3590 3591 3592

(D) Sections 1309.406 and 1309.408 of the Revised Code do not apply to any interest in a limited liability company, including all rights, powers, and interests arising under an operating agreement or this chapter. This division prevails over those sections, and is expressly intended to permit the enforcement of the provisions of an operating agreement that would otherwise be ineffective under those sections. 3593 3594 3595 3596 3597 3598 3599

(E) This chapter applies to all limited liability companies equally regardless of whether the limited liability company has one or more members or whether it is formed by a filing under section 1706.16 of the Revised Code or by merger, consolidation, conversion, or otherwise. 3600 3601 3602 3603 3604

**Sec. 1706.061.** The law of this state governs all of the following: 3605 3606

(A) The organization and internal affairs of a limited liability company; 3607 3608

(B) The liability of a member as a member for the debts, obligations, or other liabilities of a limited liability company; 3609 3610 3611

(C) The authority of the members and agents of a limited liability company; 3612 3613

(D) The availability of the assets of a limited liability company or series thereof for the obligations of the limited liability company or another series thereof. 3614 3615 3616

**Sec. 1706.07.** (A) The name of a limited liability company 3617

shall contain the words "limited liability company" or the abbreviation "L.L.C.," "LLC," "limited," "ltd.," or "ltd." 3618 3619

(B) Except as provided in this section and in sections 1701.75, 1701.78, 1701.82, 1705.36, and 1705.37 of the Revised Code, the name of a limited liability company shall be distinguishable on the records of the secretary of state from all of the following: 3620 3621 3622 3623 3624

(1) The name of a person that is not an individual and that is incorporated, organized, or authorized to transact business in this state; 3625 3626 3627

(2) A name reserved under division (H) of this section; 3628

(3) Any trade name to which the exclusive right, at the time in question, is registered in the office of the secretary of state pursuant to Chapter 1329. of the Revised Code. 3629 3630 3631

(C) A limited liability company may apply to the secretary of state for authorization to use a name that is not distinguishable from the names identified in division (B) of of this section if there also is filed in the office of the secretary of state, on a form prescribed by the secretary of state, the consent of the other person or, in the case of a registered trade name, the person in whose name is registered the exclusive right to use the name, which consent is evidenced in a writing signed by any authorized officer or any authorized representative of the other person. 3632 3633 3634 3635 3636 3637 3638 3639 3640 3641

(D) If a judicial sale or other transfer by order of a tribunal involves the right to use the name of a limited liability company or of a foreign limited liability company, then division (B) of this section shall not be applicable with respect to any person that is subject to the order. 3642 3643 3644 3645 3646

(E) Any person that wishes to reserve a name for a proposed new limited liability company, a limited liability company that intends to change its name, or an assumed name for a foreign limited liability company whose name is not available may submit to the secretary of state, on a form prescribed by the secretary of state, a written application for the exclusive right to use a specified name as the name of the company. If the secretary of state finds, consistent with this section, that the specified name is available for use, the secretary of state shall file the application. From the date of the filing, the applicant has the exclusive right for one hundred eighty days to use the specified name as the name of the limited liability company, counting the date of the filing as the first of the one hundred eighty days. The right so obtained may be transferred by the applicant or other holder of the right by filing in the office of the secretary of state a written transfer, on a form prescribed by the secretary of state, that states the name and address of the transferee. 3647 3648 3649 3650 3651 3652 3653 3654 3655 3656 3657 3658 3659 3660 3661 3662 3663 3664

**Sec. 1706.08.** (A) Except as otherwise provided in divisions (B) and (C) of this section, both of the following apply: 3665 3666 3667

(1) An operating agreement governs relations among the members as members and between the members and the limited liability company. 3668 3669 3670

(2) To the extent that an operating agreement does not otherwise provide for a matter described in division (A)(1) of this section, this chapter governs the matter. 3671 3672 3673

(B)(1) To the extent that, at law or in equity, a member, manager, or other person has duties, including fiduciary duties, to the limited liability company, or to another member or to 3674 3675 3676

another person that is a party to or is otherwise bound by an operating agreement, those duties may be expanded or restricted or eliminated by a written operating agreement. However, an operating agreement may not eliminate the implied covenant of good faith and fair dealing. 3677 3678 3679 3680 3681

(2) A written operating agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, including breach of fiduciary duties, of a member, manager, or other person to a limited liability company or to another member or to another person that is a party to or is otherwise bound by an operating agreement. However, an operating agreement may not limit or eliminate liability for any act or omission that constitutes a bad faith violation of the implied covenant of good faith and fair dealing. 3682 3683 3684 3685 3686 3687 3688 3689 3690 3691

(3) A member, manager, or other person shall not be liable to a limited liability company or to another member or to another person that is a party to or is otherwise bound by an operating agreement for breach of fiduciary duty for the member's or other person's good faith reliance on the operating agreement. 3692 3693 3694 3695 3696 3697

(4) An operating agreement may provide either or both of the following: 3698 3699

(a) That, a member or assignee who fails to perform in accordance with, or to comply with the terms and conditions of, the operating agreement shall be subject to specified penalties or specified consequences; 3700 3701 3702 3703

(b) That at the time or upon the happening of events specified in the operating agreement, a member or assignee may 3704 3705

be subject to specified penalties or consequences. 3706

(5) A penalty or consequence that may be specified under division (B)(4) of this section may include any of the following: 3707 3708 3709

(a) Reducing or eliminating the defaulting member's or assignee's proportionate interest in a limited liability company; 3710 3711 3712

(b) Subordinating the member's or assignee's membership interest to that of nondefaulting members or assignees; 3713 3714

(c) Forcing a sale of the member's or assignee's membership interest; 3715 3716

(d) Forfeiting the defaulting member's or assignee's membership interest; 3717 3718

(e) The lending by other members or assignees of the amount necessary to meet the defaulting member's or assignee's commitment; 3719 3720 3721

(f) A fixing of the value of the defaulting member's or assignee's membership interest by appraisal or by formula and redemption or sale of the membership interest at that value; 3722 3723 3724

(g) Any other penalty or consequence. 3725

(C) An operating agreement shall not do any of the following: 3726 3727

(1) Vary the nature of the limited liability company as a separate legal entity under division (A) of section 1706.04 of the Revised Code; 3728 3729 3730

(2) Except as otherwise provided in division (B) of section 1706.082 of the Revised Code, restrict the rights under 3731 3732

this chapter of a person other than a member, dissociated member, or assignee; 3733 3734

(3) Vary the power of a court under section 1706.171 of the Revised Code; 3735 3736

(4) Eliminate the implied covenant of good faith and fair dealing; 3737 3738

(5) Eliminate or limit the liability of a member or other person for any act or omission that constitutes a bad faith violation of the implied covenant of good faith and fair dealing; 3739 3740 3741 3742

(6) Waive the requirements of division (A) of section 1706.281 of the Revised Code; 3743 3744

(7) Waive the prohibition on issuance of a certificate of a membership interest in bearer form under division (D) of section 1706.341 of the Revised Code; 3745 3746 3747

(8) Waive the requirements of division (B) of section 1706.761 of the Revised Code. 3748 3749

**Sec. 1706.081.** (A) A limited liability company is bound by and may enforce its operating agreement, whether or not the limited liability company has itself manifested assent to its operating agreement. 3750 3751 3752 3753

(B) A person that is admitted as a member of a limited liability company becomes a party to and assents to the operating agreement subject to division (A) of section 1706.281 of the Revised Code. 3754 3755 3756 3757

(C) Two or more persons intending to be the initial members of a limited liability company may make an agreement providing that upon the formation of the limited liability 3758 3759 3760

company the agreement will become its operating agreement. One person intending to be the initial member of a limited liability company may assent to terms providing that upon the formation of the limited liability company the terms will become the operating agreement. 3761 3762 3763 3764 3765

(D) The operating agreement of a limited liability company having only one member shall not be unenforceable by reason of there being only one person who is a party to the operating agreement. 3766 3767 3768 3769

**Sec. 1706.082.** (A) An operating agreement may be amended upon the consent of all the members of a limited liability company or in such other manner authorized by the operating agreement. If an operating agreement provides for the manner in which it may be amended, including by requiring the approval of a person who is not a party to the operating agreement or the satisfaction of conditions, it may be amended only in that manner or as otherwise permitted by law; except that the approval of any person may be waived by that person and any conditions may be waived by all persons for whose benefit those conditions were intended. 3770 3771 3772 3773 3774 3775 3776 3777 3778 3779 3780

(B) An operating agreement may provide rights to any person, including a person who is not a party to the operating agreement, to the extent set forth in the operating agreement. 3781 3782 3783

(C) The obligations of a limited liability company and its members to a person in the person's capacity as an assignee or dissociated member are governed by the operating agreement. An assignee and dissociated member are bound by the operating agreement. 3784 3785 3786 3787 3788

**Sec. 1706.09.** (A) Each limited liability company and 3789

foreign limited liability company that has an effective registration as a foreign limited liability company under section 1706.511 of the Revised Code shall maintain continuously in this state an agent for service of process on the company. The agent shall be one of the following: 3790 3791 3792 3793 3794

(1) A natural person who is a resident of this state; 3795

(2) A domestic or foreign corporation, nonprofit corporation, limited liability company, partnership, limited partnership, limited liability partnership, limited partnership association, professional association, business trust, or unincorporated nonprofit association that has a business address in this state. If the agent is an entity other than a domestic corporation, the agent shall meet the requirements of Title XVII of the Revised Code for an entity of the agent's type to transact business or exercise privileges in this state. 3796 3797 3798 3799 3800 3801 3802 3803 3804

(B)(1) The secretary of state shall not accept original articles of organization of a limited liability company or an original registration of a foreign limited liability company for filing unless both of the following accompany the articles or registration: 3805 3806 3807 3808 3809

(a) A written appointment of an agent as described in division (A) of this section that is signed by an authorized representative of the limited liability company or foreign limited liability company; 3810 3811 3812 3813

(b) A written acceptance of the appointment that is signed by the designated agent on a form prescribed by the secretary of state. 3814 3815 3816

(2) In cases not covered by division (B)(1) of this section, the company shall appoint the agent described in 3817 3818

division (A) of this section and shall file with the secretary of state, on a form prescribed by the secretary of state, a written appointment of that agent that is signed by an authorized representative of the company and a written acceptance of the appointment that is signed by the designated agent. 3819 3820 3821 3822 3823 3824

(3) For purposes of divisions (B)(1) and (2) of this section, the filed written acceptance of an agent's appointment shall be a signed original document or a photocopy, facsimile, or similar reproduction of a signed original document. 3825 3826 3827 3828

(C) The written appointment of an agent shall set forth the name and address in this state of the agent, including the street and number or other particular description, and shall otherwise be in such form as the secretary of state prescribes. The secretary of state shall keep a record of the names of limited liability companies and foreign limited liability companies, and the names and addresses of their respective agents. 3829 3830 3831 3832 3833 3834 3835 3836

(D) If any agent described in division (A) of this section dies, resigns, or moves outside of this state, the limited liability company or foreign limited liability company shall appoint forthwith another agent and file with the secretary of state, on a form prescribed by the secretary of state, a written appointment of the agent and acceptance of appointment as described in division (B)(2) of this section. 3837 3838 3839 3840 3841 3842 3843

(E) If the agent described in division (A) of this section changes the agent's address from the address stated in the records of the secretary of state, the agent or the limited liability company or foreign limited liability company shall file forthwith with the secretary of state, on a form prescribed 3844 3845 3846 3847 3848

by the secretary of state, a written statement setting forth the new address. 3849 3850

(F) An agent described in division (A) of this section may resign by filing with the secretary of state, on a form prescribed by the secretary of state, a written notice of resignation that is signed by the agent and by mailing a copy of that notice to the limited liability company or foreign limited liability company at the current or last known address of its principal office. The notice shall be mailed to the company on or prior to the date that the notice is filed with the secretary of state and shall set forth the name of the company, the name and current address of the agent, the current or last known address, including the street and number or other particular description, of the company's principal office, a statement of the resignation of the agent, and a statement that a copy of the notice has been sent to the company within the time and in the manner specified in this division. The authority of the resigning agent terminates thirty days after the filing of the notice with the secretary of state. 3851 3852 3853 3854 3855 3856 3857 3858 3859 3860 3861 3862 3863 3864 3865 3866 3867

(G) A limited liability company or foreign limited liability company may revoke the appointment of its agent described in division (A) of this section by filing with the secretary of state, on a form prescribed by the secretary of state, a written appointment of another agent and an acceptance of appointment in the manner described in division (B)(2) of this section and a statement indicating that the appointment of the former agent is revoked. 3868 3869 3870 3871 3872 3873 3874 3875

(H)(1) Any legal process, notice, or demand required or permitted by law to be served upon a limited liability company may be served upon the company as follows: 3876 3877 3878

(a) By delivering a copy of the process, notice, or demand to the address of the agent in this state as contained in the records of the secretary of state; 3879 3880 3881

(b) If the agent described in division (A) of this section is a natural person, by delivering a copy of the process, notice, or demand to the agent. 3882 3883 3884

(2) If the agent described in division (A) of this section cannot be found or no longer has the address that is stated in the records of the secretary of state or the limited liability company or foreign limited liability company has failed to maintain an agent as required by this section and if the party or the agent or representative of the party that desires service of the process, notice, or demand files with the secretary of state an affidavit that states that one of those circumstances exists and states the most recent address of the company that the party who desires service has been able to ascertain after a diligent search, then the service of the process, notice, or demand upon the secretary of state as the agent of the company may be initiated by delivering to the secretary of state four copies of the process, notice, or demand accompanied by a fee of five dollars. The secretary of state shall give forthwith notice of that delivery to the company at either its principal office as shown upon the secretary of state's records or at any different address specified in the affidavit of the party desiring service and shall forward to the company at either address by certified mail, return receipt requested, a copy of the process, notice, or demand. Service upon the company is made when the secretary of state gives the notice and forwards the process, notice, or demand as set forth in division (H)(2) of this section. 3885 3886 3887 3888 3889 3890 3891 3892 3893 3894 3895 3896 3897 3898 3899 3900 3901 3902 3903 3904 3905 3906 3907 3908

(I) The secretary of state shall keep a record of each process, notice, and demand that pertains to a limited liability company or foreign limited liability company and that is delivered to the secretary of state's office under this section or another law of this state that authorizes service upon the secretary of state in connection with a limited liability company or foreign limited liability company. In that record, the secretary of state shall record the time of each delivery of that type and the secretary of state's subsequent action with respect to the process, notice, or demand. 3909 3910 3911 3912 3913 3914 3915 3916 3917 3918

(J) This section does not limit or affect the right to serve any process, notice, or demand upon a limited liability company or foreign limited liability company in any other manner permitted by law. 3919 3920 3921 3922

(K) A written appointment of an agent or a written statement filed by a limited liability company or foreign limited liability company with the secretary of state shall be signed by an authorized representative of the company. 3923 3924 3925 3926

(L) Upon the failure of a limited liability company or foreign limited liability company to continuously maintain a statutory agent or file a change of name or address of a statutory agent, the secretary of state shall give notice thereof by ordinary or electronic mail to the company at the electronic mail address provided to the secretary of state, or at the address set forth in the notice of resignation. Unless the default is cured within thirty days after the mailing by the secretary of state of the notice or within any further period of time that the secretary of state grants, upon the expiration of that period of time from the date of the mailing, the articles of the limited liability company or the registration of the 3927 3928 3929 3930 3931 3932 3933 3934 3935 3936 3937 3938

foreign limited liability company shall be canceled without further notice or action by the secretary of state. The secretary of state shall make a notation of the cancellation on the secretary of state's records. 3939 3940 3941 3942

A limited liability company or foreign limited liability company whose articles or registration has been canceled may be reinstated by filing, on a form prescribed by the secretary of state, an application for reinstatement and the required appointment of agent or required statement, and by paying the filing fee specified in division (Q) of section 111.16 of the Revised Code. The rights and privileges of a limited liability company or foreign limited liability company whose articles or registration has been reinstated are subject to section 1706.464 of the Revised Code. The secretary of state shall furnish the tax commissioner a monthly list of all limited liability companies and foreign limited liability companies canceled and reinstated under this division. 3943 3944 3945 3946 3947 3948 3949 3950 3951 3952 3953 3954 3955

**Sec. 1706.16.** (A) In order to form a limited liability company, one or more persons shall execute articles of organization and deliver the articles to the secretary of state for filing. The articles of organization shall set forth all of the following: 3956 3957 3958 3959 3960

(1) The name of the limited liability company; 3961

(2) The name and street address of the limited liability company's statutory agent; 3962 3963

(3) If applicable, a statement as provided in division (B)(3) of section 1706.761 of the Revised Code; 3964 3965

(4) Any other matters the organizers or the members determine to include in the articles of organization. 3966 3967

(B) A limited liability company is formed when the articles of organization are filed by the secretary of state or at any later date or time specified in the articles of organization. 3968 3969 3970 3971

(C) The fact that articles of organization are on file in the office of the secretary of state is notice of the matters required to be included by divisions (A)(1) to (3) of this section, but is not notice of any other fact. 3972 3973 3974 3975

(D) An operating agreement may be entered into before, at the time of, or after the filing of the articles of organization. Regardless of when the operating agreement is entered into, it may be made effective as of the filing of the articles of organization or any other time provided in the operating agreement. 3976 3977 3978 3979 3980 3981

**Sec. 1706.161.** (A) The articles of organization may be amended at any time. 3982 3983

(B) The articles of organization may be restated with or without amendment at any time. 3984 3985

(C) To amend its articles of organization, a limited liability company shall deliver to the secretary of state for filing, on a form prescribed by the secretary of state, a certificate of amendment containing all of the following information: 3986 3987 3988 3989 3990

(1) The name and registration number of the limited liability company; 3991 3992

(2) The date of filing of its articles of organization; 3993

(3) The changes the amendment makes to the articles of organization as most recently amended or restated. 3994 3995

(D) Restated articles of organization shall be delivered to the secretary of state for filing in the same manner as an amendment. Restated articles of organization shall be designated as such in the heading and state in the heading or in an introductory paragraph the limited liability company's name and the date of the filing of its articles of organization. Any amendment or change effected in connection with the restatement of the articles of organization shall be subject to any other provision of this chapter, not inconsistent with this section, which would apply if a separate certificate of amendment were filed to effect the amendment or change. 3996 3997 3998 3999 4000 4001 4002 4003 4004 4005 4006

(E) The original articles of organization, as amended or supplemented, shall be superseded by the restated articles of organization. Thereafter, the articles of organization, including any further amendment or changes made thereby, shall be the articles of organization of the limited liability company, but the original effective date of formation shall remain unchanged. 4007 4008 4009 4010 4011 4012 4013

(F) Amended or restated articles of organization shall be effective upon filing. 4014 4015

**Sec. 1706.17.** (A) A record delivered to the secretary of state for filing pursuant to this chapter shall be signed as provided by this section. 4016 4017 4018

(1) A limited liability company's initial articles of organization shall be signed by at least one person. 4019 4020

(2) A record signed on behalf of a limited liability company shall be signed by a person authorized by the limited liability company. 4021 4022 4023

(3) A record filed on behalf of a dissolved limited 4024

liability company that has no members shall be signed by the person winding up the limited liability company's activities under division (A) of section 1706.472 of the Revised Code or a person appointed under division (B) of section 1706.472 of the Revised Code to wind up those activities. 4025 4026 4027 4028 4029

(4) A statement of denial by a person under section 1706.20 of the Revised Code shall be signed by that person. 4030 4031

(5) Any other record shall be signed by the person on whose behalf the record is delivered to the secretary of state. 4032 4033

(B) Any record to be filed under this chapter may be signed by an agent, including an attorney-in-fact. Powers of attorney relating to the signing of the record need not be delivered to the secretary of state. 4034 4035 4036 4037

**Sec. 1706.171.** (A) If a person required by this chapter to sign a record or deliver a record to the secretary of state for filing under this chapter does not do so, any other person that is aggrieved by that failure to sign may petition the appropriate court to order any of the following: 4038 4039 4040 4041 4042

(1) The person to sign the record; 4043

(2) The person to deliver the record to the secretary of state for filing; 4044 4045

(3) The secretary of state to file the record unsigned. 4046

(B) If a petitioner under division (A) of this section is not the limited liability company or foreign limited liability company to whom the record pertains, the petitioner shall make the limited liability company or foreign limited liability company a party to the action. A person aggrieved under division (A) of this section may seek the remedies provided in that 4047 4048 4049 4050 4051 4052

division in a separate action against the person required to sign the record or as a part of any other action concerning the limited liability company in which the person required to sign the record is made a party. 4053 4054 4055 4056

(C) A record filed unsigned pursuant to this section is effective without being signed. 4057 4058

(D) A court may award reasonable expenses, including reasonable attorney's fees, to the prevailing party, in whole or in part, with respect to any claim made under division (A) of this section. 4059 4060 4061 4062

**Sec. 1706.172.** (A) Each record authorized or required to be delivered to the secretary of state for filing under this chapter shall meet all of the following requirements: 4063 4064 4065

(1) The record shall contain all information required by the law of this state to be contained in the record but, unless otherwise provided by law, shall not be required to contain other information. 4066 4067 4068 4069

(2) The record shall be on or in a medium and in such form acceptable to the secretary of state and from which the secretary of state may create a record that contains all of the information stated in the record. The secretary of state may require that the record be delivered by any one or more means or on or in any one or more media acceptable to the secretary of state. The secretary of state is not required to file a record that is not delivered by a means and in a medium that complies with the requirements then established by the secretary of state for the delivery and filing of records. If the secretary of state permits a record to be delivered on paper, the record shall be typewritten or machine printed, and the secretary of 4070 4071 4072 4073 4074 4075 4076 4077 4078 4079 4080 4081

state may impose reasonable requirements upon the dimensions, legibility, quality, and color of the paper and typewriting or printing and upon the format and other attributes of any record that is delivered electronically. The secretary of state shall, at the earliest practicable time, allow for the delivery of a record for filing to be accomplished electronically, without the necessity for the delivery of a physical original record or the image thereof, if all required information is delivered and is readily retrievable from the data delivered. If the delivery of a record for filing is required to be accomplished electronically, that record shall not be accompanied by any physical record unless the secretary of state permits that accompaniment. 4082 4083 4084 4085 4086 4087 4088 4089 4090 4091 4092 4093 4094

(3) The record shall be in English. A person's name set forth in the record need not be in English if expressed in English letters or Arabic or Roman numerals. Records of a foreign person need not be in English if accompanied by a reasonably authenticated English translation. 4095 4096 4097 4098 4099

(B) Unless the secretary of state determines that a record does not comply with the filing requirements of this chapter, the secretary of state shall file the record and do the following: 4100 4101 4102 4103

(1) For a statement of denial, send a certificate and a receipt for the fees to the person who submitted the record; 4104 4105

(2) For all other records, send a certificate and a receipt for the fees to the person who submitted the record. 4106 4107

(C) Upon request and payment of the requisite fee, the secretary of state shall furnish to the requester a certified copy of a requested record. 4108 4109 4110

(D) Except as otherwise provided in division (F) of section 1706.09 and section 1706.173 of the Revised Code, a record delivered to the secretary of state for filing under this chapter may specify an effective time and a delayed effective date of not more than ninety days following the date of receipt by the secretary of state. Subject to division (F) of section 1706.09 and section 1706.173 of the Revised Code, a record filed by the secretary of state is effective as follows: 4111 4112 4113 4114 4115 4116 4117 4118

(1) If the record does not specify an effective time and does not specify a delayed effective date, on the date the record is filed as evidenced by the secretary of state's endorsement of the date on the record; 4119 4120 4121 4122

(2) If the record specifies an effective time but not a delayed effective date, on the date the record is filed at the time specified in the record; 4123 4124 4125

(3) If the record specifies a delayed effective date but not an effective time, at 12:01 a.m. on the earlier of the following: 4126 4127 4128

(a) The specified date; 4129

(b) The ninetieth day after the record is filed. 4130

(4) If the record specifies an effective time and a delayed effective date, at the specified time on the earlier of the following: 4131 4132 4133

(a) The specified date; 4134

(b) The ninetieth day after the record is filed. 4135

**Sec. 1706.173.** (A) A limited liability company or foreign limited liability company may deliver to the secretary of state for filing a certificate of correction to correct a record 4136 4137 4138

previously delivered by the limited liability company or foreign limited liability company to the secretary of state and filed by the secretary of state if at the time of filing the record contained incorrect or inaccurate information or was defectively signed. 4139 4140 4141 4142 4143

(B) A certificate of correction under division (A) of this section shall not state a delayed effective date and shall do all of the following: 4144 4145 4146

(1) Describe the record to be corrected, including its filing date, or attach a copy of the record as filed; 4147 4148

(2) Specify the inaccurate information or the defect in the signing; 4149 4150

(3) Correct the incorrect or inaccurate information or defective signature. 4151 4152

(C) When filed by the secretary of state, a certificate of correction is effective retroactively as of the effective date of the record the statement corrects, but the statement is effective when filed as to persons that previously relied on the uncorrected record and would be adversely affected by the correction. 4153 4154 4155 4156 4157 4158

**Sec. 1706.174.** (A) A person who signs a record authorized or required to be filed under this chapter thereby affirms under the penalties of perjury that the facts stated in the record are true in all material respects. 4159 4160 4161 4162

(B) If a record delivered to the secretary of state for filing under this chapter and filed by the secretary of state contains incorrect or inaccurate information, a person that suffers a loss by reasonable reliance on the information may recover damages for the loss from a person that signed the 4163 4164 4165 4166 4167

record, or caused another to sign it on the person's behalf, and knew the information to be incorrect or inaccurate at the time the record was signed. 4168 4169 4170

**Sec. 1706.175.** (A) The secretary of state, upon request and payment of the requisite fee, shall furnish to any person a certificate of full force and effect for a limited liability company if the records filed in the office of the secretary of state show that the limited liability company has been formed under the laws of this state. A certificate of full force and effect shall state all of the following: 4171 4172 4173 4174 4175 4176 4177

(1) The limited liability company's name; 4178

(2) The limited liability company's date of formation; 4179

(3) That the limited liability company is in full force and effect on the records of the secretary of state. 4180 4181

(B) The secretary of state, upon request and payment of the requisite fee, shall furnish to any person a certificate of registration for a foreign limited liability company if the records filed in the office of the secretary of state show that the secretary of state has filed a certificate of registration for the foreign limited liability company, has not canceled the certificate of registration for the foreign limited liability company, and has not filed a statement of cancellation of the certificate of registration for the foreign limited liability company. A certificate of registration shall state all of the following: 4182 4183 4184 4185 4186 4187 4188 4189 4190 4191 4192

(1) The foreign limited liability company's name; 4193

(2) That the foreign limited liability company is authorized to transact business in this state; 4194 4195

(3) That the secretary of state has not canceled the foreign limited liability company's certificate of registration; 4196 4197

(4) That the secretary of state has not filed a statement of cancellation of the foreign limited liability company's certificate of registration. 4198 4199 4200

(C) Subject to any qualification stated in the certificate, a certificate of existence or certificate of registration issued by the secretary of state is, for a period of thirty days after the date of such certificate, conclusive evidence that the limited liability company is in existence or the foreign limited liability company is authorized to transact business in this state. 4201 4202 4203 4204 4205 4206 4207

**Sec. 1706.18.** No person shall have the power to bind the limited liability company, or a series thereof, except: 4208 4209

(A) To the extent the person is authorized to act as the agent of the limited liability company or a series thereof under or pursuant to the operating agreement; 4210 4211 4212

(B) To the extent the person is authorized to act as the agent of the limited liability company or a series thereof pursuant to division (A) of section 1706.30 of the Revised Code; 4213 4214 4215

(C) To the extent provided in section 1706.19 of the Revised Code; 4216 4217

(D) To the extent provided by law other than this chapter. 4218

**Sec. 1706.19.** (A) A limited liability company, on behalf of itself or a series thereof, may deliver to the secretary of state for filing on a form prescribed by the secretary of state a statement of authority. Such a statement: 4219 4220 4221 4222

(1) Shall include the name and registration number of the 4223

limited liability company; 4224

(2) May state the authority of a specific person, or, with respect to any position that exists in or with respect to the limited liability company or series thereof, of all persons holding the position, to enter into transactions on behalf of the limited liability company or series thereof. 4225 4226 4227 4228 4229

(B) To amend or cancel a statement of authority filed by the secretary of state, a limited liability company shall, on behalf of itself or a series thereof, deliver to the secretary of state for filing an amendment or cancellation on a form prescribed by the secretary of state stating all of the following: 4230 4231 4232 4233 4234 4235

(1) The name and registration number of the limited liability company; 4236 4237

(2) The date the statement was filed; 4238

(3) The contents of the amendment or a declaration that the statement to which it pertains is canceled. 4239 4240

(C) An effective statement of authority is conclusive in favor of a person that gives value in reliance on the statement, except to the extent that when the person gives value the person has knowledge to the contrary. 4241 4242 4243 4244

(D) Upon filing, a certificate of dissolution filed pursuant to division (B)(1) of section 1706.471 of the Revised Code operates as a cancellation, under division (B) of this section, of each statement of authority. 4245 4246 4247 4248

(E) After a certificate of dissolution becomes effective, a limited liability company may, on behalf of itself or a series thereof, deliver to the secretary of state for filing a 4249 4250 4251

statement of authority that is designated as a post-dissolution or post-cancellation statement of authority. 4252 4253

(F) Upon filing, a statement of denial filed pursuant to section 1706.20 of the Revised Code operates as an amendment, under division (B) of this section, of the statement of authority to which the statement of denial pertains. 4254 4255 4256 4257

**Sec. 1706.20.** A person named in a filed statement of authority may deliver to the secretary of state for filing on a form prescribed by the secretary of state a statement of denial that does both of the following: 4258 4259 4260 4261

(A) States the name and registration number of the limited liability company and the date of filing of the statement of authority to which the statement of denial pertains; 4262 4263 4264

(B) Denies the person's authority. 4265

**Sec. 1706.26.** A person who is a member of a limited liability company is not liable, solely by reason of being a member, for a debt, obligation, or liability of the limited liability company or a series thereof, whether arising in contract, tort, or otherwise; or for the acts or omissions of any other member, agent, or employee of the limited liability company or a series thereof. The failure of a limited liability company or any of its members to observe any formalities relating to the exercise of the limited liability company's powers or the management of its activities is not a factor to consider in, or a ground for, imposing liability on the members for the debts, obligations, or liability of the limited liability company. 4266 4267 4268 4269 4270 4271 4272 4273 4274 4275 4276 4277 4278

**Sec. 1706.27.** (A) In connection with the formation of a limited liability company, a person is admitted as a member of 4279 4280

the limited liability company upon the occurrence of either of the following: 4281 4282

(1) If the organizer was authorized by one or more persons intending to be members of the limited liability company to file the articles of organization on their behalf, the formation of the limited liability company; 4283 4284 4285 4286

(2) If the organizer was not authorized by any other person intending to be members of the limited liability company, each organizer shall have the authority of a member of the limited liability company upon the formation of the limited liability company until the admission of the initial member of the limited liability company. 4287 4288 4289 4290 4291 4292

(B) After formation of a limited liability company, a person may be admitted as a member of the limited liability company in any of the following manners: 4293 4294 4295

(1) As provided in the operating agreement; 4296

(2) As the result of a transaction effective under sections 1706.71 to 1706.74 of the Revised Code; 4297 4298

(3) With the consent of all the members or in the case of a limited liability company having only one member, the consent of the member; 4299 4300 4301

(4) If, within ninety consecutive days after the occurrence of the dissociation of the last remaining member, both of the following occur: 4302 4303 4304

(a) All holders of the membership interest last assigned by the last person to have been a member consent to the designation of a person to be admitted as a member; 4305 4306 4307

(b) The designated person consents to be admitted as a 4308

member effective as of the date the last person to have been a member ceased to be a member. 4309 4310

(C) A person may be admitted as a member without acquiring a membership interest and without making or being obligated to make a contribution to the limited liability company. A person may be admitted as the sole member without acquiring a membership interest and without making or being obligated to make a contribution to the limited liability company. 4311 4312 4313 4314 4315 4316

**Sec. 1706.28.** A contribution of a member to a limited liability company, or a series thereof, may consist of cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services. 4317 4318 4319 4320 4321

**Sec. 1706.281.** (A) A promise by a member to make a contribution to a limited liability company, or a series thereof, is not enforceable unless set forth in a writing signed by the member. 4322 4323 4324 4325

(B) A member's obligation to make a contribution to a limited liability company, or a series thereof, is not excused by the member's death, disability, or other inability to perform personally. If a member does not make a contribution required by an enforceable promise, the member or the member's estate is obligated, at the election of the limited liability company, or a series thereof, to contribute money equal to the value of the portion of the contribution that has not been made. The election shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the limited liability company, or a series thereof, may have under the operating agreement or applicable law. 4326 4327 4328 4329 4330 4331 4332 4333 4334 4335 4336 4337

(C)(1) The obligation of a member to make a contribution to a limited liability company may be compromised only by consent of all the members. A conditional obligation of a member to make a contribution to a limited liability company may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by that member. Conditional obligations include contributions payable upon a discretionary call of a limited liability company before the time the call occurs. 4338 4339 4340 4341 4342 4343 4344 4345 4346

(2) The obligation of a member associated with a series to make a contribution to the series may be compromised only by consent of all the members associated with that series. A conditional obligation of a member to make a contribution to a series may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by that member. Conditional obligations include contributions payable upon a discretionary call of that series before the time the call occurs. 4347 4348 4349 4350 4351 4352 4353 4354 4355

(3) Division (C)(1) of this section shall not apply to a member's obligation to make a contribution to a series of a limited liability company. 4356 4357 4358

**Sec. 1706.29.** (A)(1) All members shall share equally in any distributions made by a limited liability company before its dissolution and winding up. 4359 4360 4361

(2) A member has a right to a distribution before the dissolution and winding up of a limited liability company as provided in the operating agreement. A decision to make a distribution before the dissolution and winding up of the limited liability company is a decision in the ordinary course of activities of the limited liability company. A member's 4362 4363 4364 4365 4366 4367

dissociation does not entitle the dissociated member to a distribution. 4368 4369

(3) A member does not have a right to demand and receive a distribution from a limited liability company in any form other than money. Except as otherwise provided in division (C) of section 1706.475 of the Revised Code, a limited liability company may distribute an asset in kind if each member receives a percentage of the asset in proportion to the member's share of contributions. 4370 4371 4372 4373 4374 4375 4376

(4) If a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution. 4377 4378 4379 4380

(B)(1) All members associated with a series shall share equally in any distributions made by the series before its dissolution and winding up. 4381 4382 4383

(2) A member associated with a series has a right to a distribution before the dissolution and winding up of the series as provided in the operating agreement. A decision of the series to make a distribution before the dissolution and winding up of the series is a decision in the ordinary course of activities of the series. A member's dissociation from a series with which the member is associated does not entitle the dissociated member to a distribution from the series. 4384 4385 4386 4387 4388 4389 4390 4391

(3) A member associated with a series does not have a right to demand and receive a distribution from the series in any form other than money. Except as otherwise provided in division (C) of section 1706.7613 of the Revised Code, a series may distribute an asset in kind if each member associated with 4392 4393 4394 4395 4396

the series receives a percentage of the asset in proportion to the member's share of distributions from the series. 4397 4398

(4) If a member associated with a series becomes entitled to receive a distribution from the series, the member has the status of, and is entitled to all remedies available to, a creditor of the series with respect to the distribution. 4399 4400 4401 4402

(C) Division (A) of this section does not apply to a distribution made by a series. 4403 4404

**Sec. 1706.30.** (A)(1) The activities and affairs of the limited liability company shall be under the direction, and subject to the oversight, of its members. 4405 4406 4407

(2) The activities and affairs of a series shall be under the direction, and subject to the oversight, of the members associated with the series. 4408 4409 4410

(3) Division (A)(1) of this section shall not apply to the activities and affairs of a series. 4411 4412

(B)(1) Except as provided in division (C) of this section, a matter in the ordinary course of activities of the limited liability company may be decided by a majority of the members. 4413 4414 4415

(2) Except as provided in division (C) of this section, a matter in the ordinary course of activities of a series may be decided by a majority of the members associated with the series. 4416 4417 4418

(3) Division (B)(1) of this section shall not apply to matters of a series. 4419 4420

(C)(1) The consent of all members is required to do any of the following: 4421 4422

(a) Amend the operating agreement; 4423

(b) File a petition of the limited liability company for relief under Title 11 of the United States Code, or a successor statute of general application, or a comparable federal, state, or foreign law governing insolvency; 4424 4425 4426 4427

(c) Undertake any act outside the ordinary course of the limited liability company's activities; 4428 4429

(d) Undertake, authorize, or approve any other act or matter for which this chapter requires the consent of all members. 4430 4431 4432

(2) The consent of all members associated with a series is required to do either of the following: 4433 4434

(a) Undertake any act outside the ordinary course of the series' activities; 4435 4436

(b) Undertake, authorize, or approve any other act or matter for which this chapter requires the consent of all the members associated with a series. 4437 4438 4439

(D) Any matter requiring the consent of members may be decided without a meeting, and a member may appoint a proxy or other agent to consent or otherwise act for the member by signing an appointing record, personally or by the member's agent. 4440 4441 4442 4443 4444

(E) This chapter does not entitle a member to remuneration for services performed for a limited liability company. 4445 4446

**Sec. 1706.31.** (A) Unless either a written operating agreement for the limited liability company or a written agreement with a member establishes additional fiduciary duties, in the event that there have been designated one or more managers to supervise or manage the activities or affairs of the 4447 4448 4449 4450 4451

limited liability company, the only obligation a member owes, in the member's capacity as a member, to the limited liability company and the other members is to discharge the member's duties and obligations under this chapter and the operating agreement in accordance with division (E) of this section. Divisions (C) and (D) of this section shall not apply to such a member. 4452 4453 4454 4455 4456 4457 4458

(B) Unless either a written operating agreement for the limited liability company or a written agreement with a member establishes additional fiduciary duties or the duties of the member have been modified, waived, or eliminated as contemplated by section 1706.08 of the Revised Code, in the event that there have not been designated one or more managers to supervise or manage the activities of the limited liability company, the only fiduciary duties a member owes to the limited liability company and the other members is the duty of loyalty and the duty of care set forth in divisions (C) and (D) of this section. 4459 4460 4461 4462 4463 4464 4465 4466 4467 4468

(C) A member's duty of loyalty to the limited liability company and the other members is limited to the following: 4469 4470

(1) To account to the limited liability company and hold for it any property, profit, or benefit derived by the member in the conduct and winding up of the limited liability company business or derived from a use by the member of limited liability company property or from the appropriation of a limited liability company opportunity; 4471 4472 4473 4474 4475 4476

(2) To refrain from dealing with the limited liability company in the conduct or winding up of the limited liability company business as or on behalf of a party having an interest adverse to the limited liability company. 4477 4478 4479 4480

(D) A member's duty of care to the limited liability company and the other members in the conduct and winding up of the limited liability company business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. 4481 4482 4483 4484 4485

(E) A member shall discharge the member's duties to the limited liability company and the other members under this chapter and under the operating agreement and exercise any rights consistent with the implied covenant of good faith and fair dealing. 4486 4487 4488 4489 4490

(F) A member does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest. 4491 4492 4493

(G) All the members of a limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty. It is a defense to a claim under division (C)(2) of this section and any comparable claim in equity or at common law that the transaction was fair to the limited liability company. If, as permitted, by this division or the limited liability company's operating agreement, a member enters into a transaction with a limited liability company that otherwise would be prohibited by division (C)(2) of this section, the member's rights and obligations arising from the transaction are the same as those of a person that is not a member. 4494 4495 4496 4497 4498 4499 4500 4501 4502 4503 4504 4505 4506

(H) This section applies to a person winding up the limited liability company business as the personal or legal representative of the last surviving member as if the person were a member. 4507 4508 4509 4510

**Sec. 1706.311.** (A) Unless either a written operating agreement for the limited liability company or a written agreement with a manager establishes additional fiduciary duties or the duties of the manager have been modified, waived, or eliminated as contemplated by section 1706.08 of the Revised Code, the only fiduciary duties of a manager to the limited liability company or its members are the duty of loyalty and the duty of care set forth in divisions (B) and (C) of this section. 4511 4512 4513 4514 4515 4516 4517 4518

(B) A manager's duty of loyalty to the limited liability company and its members is limited to the following: 4519 4520

(1) To account to the limited liability company and hold for it any property, profit, or benefit derived by the manager in the conduct and winding up of the limited liability company business or derived from a use by the manager of limited liability company property or from the appropriation of a limited liability company opportunity; 4521 4522 4523 4524 4525 4526

(2) To refrain from dealing with the limited liability company in the conduct or winding up of the limited liability company business as or on behalf of a party having an interest adverse to the limited liability company. 4527 4528 4529 4530

(C) A manager's duty of care to the limited liability company in the conduct and winding up of the limited liability company activities is limited to acting in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the limited liability company. 4531 4532 4533 4534 4535

(D) For purposes of division (C) of this section, both of the following apply: 4536 4537

(1) A manager of a limited liability company shall not be determined to have violated the manager's duties under division 4538 4539

(C) of this section unless it is proved that the manager has not acted in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the limited liability company. 4540 4541 4542 4543

(2) A manager shall not be considered to be acting in good faith if the manager has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by any of the persons described in section 1706.331 of the Revised Code to be unwarranted. 4544 4545 4546 4547 4548 4549

(E) A manager shall be liable for monetary relief for a violation of the manager's duties under division (C) of this section only if it is proved that the manager's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the limited liability company or undertaken with reckless disregard for the best interests of the company. This division does not apply if, and only to the extent that, at the time of a manager's act or omission that is the subject of complaint, either of the following is true: 4550 4551 4552 4553 4554 4555 4556 4557 4558 4559

(1) The articles or the operating agreement of the limited liability company state by specific reference to division (E) of this section that the provisions of this division do not apply to the limited liability company. 4560 4561 4562 4563

(2) A written agreement between the manager and the limited liability company states by specific reference to division (E) of this section that the provisions of this division do not apply to the manager. 4564 4565 4566 4567

(F) All the members of a limited liability company may 4568

authorize or ratify, after full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty. It is a defense to a claim under division (B)(2) of this section and any comparable claim in equity or at common law that the transaction was fair to the limited liability company. If, as permitted by this division or the operating agreement, a manager enters into a transaction with the limited liability company that otherwise would be prohibited by division (B)(2) of this section, the manager's rights and obligations arising from the transaction are the same as those of a person that is not a manager. 4569 4570 4571 4572 4573 4574 4575 4576 4577 4578 4579

(G) A manager shall discharge the duties to the limited liability company and the members under this chapter and under the operating agreement and exercise any rights consistently with the implied covenant of good faith and fair dealing. 4580 4581 4582 4583

(H) Nothing in this section affects the duties of a manager who acts in any capacity other than the manager's capacity as a manager. If a manager of a limited liability company also is a member of the limited liability company, the actions taken in the capacity as a member of the limited liability company shall be subject to section 1706.31 of the Revised Code. Nothing in this section affects any contractual obligations of a manager to the limited liability company. 4584 4585 4586 4587 4588 4589 4590 4591

**Sec. 1706.32.** A limited liability company, or a series thereof, may indemnify and hold harmless a member or other person, pay in advance or reimburse expenses incurred by a member or other person, and purchase and maintain insurance on behalf of a member or other person. 4592 4593 4594 4595 4596

**Sec. 1706.33.** (A) Upon reasonable notice provided to the limited liability company, a member may inspect and copy during 4597 4598

regular business hours, at a reasonable location specified by the limited liability company, any record maintained by the limited liability company, to the extent the information is material to the member's rights and duties under the operating agreement or this chapter. 4599 4600 4601 4602 4603

(B) A limited liability company may charge a person that makes a demand under this section the reasonable costs of labor and materials for copying. 4604 4605 4606

(C) A member or dissociated member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the operating agreement or under division (E) of this section applies both to the agent or legal representative and the member or dissociated member. 4607 4608 4609 4610 4611 4612

(D) The rights under this section do not extend to an assignee who is not admitted as a member. 4613 4614

(E) In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may do either of the following: 4615 4616 4617 4618

(1) Impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient; 4619 4620 4621 4622 4623

(2) Keep confidential from the members and any other persons, for such period of time as the limited liability company deems reasonable, any information that the limited liability company reasonably believes to be in the nature of 4624 4625 4626 4627

trade secrets or other information the disclosure of which the limited liability company in good faith believes is not in the best interest of the limited liability company or could damage the limited liability company or its activities, or that the limited liability company is required by law or by agreement with a third party to keep confidential. 4628 4629 4630 4631 4632 4633

**Sec. 1706.331.** Each member and agent of a limited liability company shall be fully protected in relying in good faith upon the records of the limited liability company and upon information, opinions, reports, or statements presented by another member or agent of the limited liability company, or by any other person as to matters the member or the agent reasonably believes are within that other person's professional or expert competence, including information, opinions, reports, or statements as to any of the following: 4634 4635 4636 4637 4638 4639 4640 4641 4642

(A) The value and amount of the assets, liabilities, profits, or losses of the limited liability company, or a series thereof; 4643 4644 4645

(B) The value and amount of assets or reserves or contracts, agreements, or other undertakings that would be sufficient to pay claims and obligations of the limited liability company, or series thereof, or to make reasonable provision to pay those claims and obligations; 4646 4647 4648 4649 4650

(C) Any other facts pertinent to the existence and amount of assets from which distributions to members or creditors might properly be paid. 4651 4652 4653

**Sec. 1706.332.** If a member dies, the deceased member's personal representative or other legal representative may, for purposes of settling the estate, exercise the rights of a 4654 4655 4656

current member under section 1706.33 of the Revised Code. 4657

**Sec. 1706.34.** The only interest of a member that is assignable is the member's membership interest. A membership interest is personal property. 4658 4659 4660

**Sec. 1706.341.** (A) An assignment, in whole or in part, of a membership interest: 4661 4662

(1) Is permissible; 4663

(2)(a) Does not by itself cause a member to cease to be a member of the limited liability company; 4664 4665

(b) Does not by itself cause a member to cease to be associated with a series of the limited liability company. 4666 4667

(3) Does not by itself cause a dissolution and winding up of the limited liability company, or a series thereof; 4668 4669

(4) Subject to section 1706.332 of the Revised Code, does not entitle the assignee to do either of the following: 4670 4671

(a) Participate in the management or conduct of the activities of the limited liability company, or a series thereof; 4672 4673 4674

(b) Have access to records or other information concerning the activities of the limited liability company, or a series thereof. 4675 4676 4677

(B) An assignee has the right to receive, in accordance with the assignment, distributions to which the assignor would otherwise be entitled. 4678 4679 4680

(C) A membership interest may be evidenced by a certificate of membership interest issued by the limited liability company, or a series thereof. An operating agreement 4681 4682 4683

may provide for the assignment of the membership interest represented by the certificate and make other provisions with respect to the certificate. 4684 4685 4686

(D) A limited liability company, or a series thereof, shall not issue a certificate of membership interest in bearer form. 4687 4688 4689

(E) A limited liability company, or a series thereof, need not give effect to an assignee's rights under this section until the limited liability company, or a series thereof, has notice of the assignment. 4690 4691 4692 4693

(F) Except as otherwise provided in division (J) of section 1706.411 of the Revised Code, when a member assigns a membership interest, the assignor retains the rights of a member other than the right to distributions assigned and retains all duties and obligations of a member. 4694 4695 4696 4697 4698

(G) When a member assigns a membership interest to a person that is admitted as a member with respect to the assigned interest, the assignee is only liable for the member's obligations under section 1706.281 of the Revised Code to the extent that the obligations are known to the assignee when the assignee voluntarily accepts admission as a member. 4699 4700 4701 4702 4703 4704

**Sec. 1706.342.** (A) On application to a court of competent jurisdiction by any judgment creditor of a member or assignee, the court may charge the membership interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged and after the limited liability company has been served with the charging order, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise be 4705 4706 4707 4708 4709 4710 4711 4712

entitled in respect of the membership interest. 4713

(B) After the limited liability company is served with a charging order, the limited liability company or any member shall be entitled to pay to or deposit with the clerk of the court so issuing the charging order any distribution or distributions to which the judgment debtor would otherwise be entitled in respect of the charged membership interest, and the payment or deposit shall discharge the limited liability company and the judgment debtor from liability for the amount so paid or deposited and any interest that might accrue thereon. Upon receipt of the payment or deposit, the clerk of the court shall notify the judgment creditor of the receipt of the payment or deposit. The judgment creditor shall, after any payment or deposit into the court, petition the court for payment of so much of the amount paid or deposited as may be necessary to pay the judgment creditor's judgment. To the extent the court has excess amounts paid or deposited on hand after the payment to the judgment creditor, the excess amounts paid or deposited shall be distributed to the judgment debtor, and the charging order shall be extinguished. The court may, in its discretion, order the clerk to deposit, pending the judgment creditor's petition, any money paid or deposited with the clerk, in an interest bearing account at a bank authorized to receive deposits of public funds. 4714–4736

(C) A charging order constitutes a lien on the judgment debtor's membership interest. 4737–4738

(D) Subject to division (C) of this section, both of the following apply: 4739–4740

(1) A judgment debtor that is a member retains the rights of a member and remains subject to all duties and obligations of 4741–4742

a member. 4743

(2) A judgment debtor that is an assignee retains the rights of an assignee and remains subject to all duties and obligations of an assignee. 4744 4745 4746

(E) This chapter does not deprive any member or assignee of the benefit of any exemption laws applicable to the member's or assignee's membership interest. 4747 4748 4749

(F) This section provides the sole and exclusive remedy by which a judgment creditor of a member or assignee may satisfy a judgment out of the judgment debtor's membership interest, and the judgment creditor shall have no right to foreclose, under this chapter or any other law, upon the charging order, the charging order lien, or the judgment debtor's membership interest. A judgment creditor of a member or assignee has no right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the judgment debtor's membership interest or the property of a limited liability company. Court orders for actions or requests for accounts and inquiries that the judgment debtor might have made to the limited liability company are not available to a judgment creditor attempting to satisfy the judgment out of the judgment debtor's membership interest and may not be ordered by a court. 4750 4751 4752 4753 4754 4755 4756 4757 4758 4759 4760 4761 4762 4763 4764

**Sec. 1706.41.** (A) A person shall not voluntarily dissociate from a limited liability company. 4765 4766

(B) A person's dissociation from a limited liability company is wrongful only if one of the following applies: 4767 4768

(1) The dissociation is in breach of an express provision of the operating agreement. 4769 4770

(2) The person is expelled as a member by a determination 4771

of a tribunal under division (D) of section 1706.411 of the Revised Code. 4772 4773

(3) The person is dissociated by becoming a debtor in bankruptcy or making a general assignment for the benefit of creditors. 4774 4775 4776

(C) A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to section 1706.61 of the Revised Code, to the other members for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or liability of the member to the limited liability company or the other members. 4777 4778 4779 4780 4781 4782

**Sec. 1706.411.** A person is dissociated as a member from a limited liability company in any of the following circumstances: 4783 4784

(A) An event stated in the operating agreement as causing the person's dissociation occurs. 4785 4786

(B) The person is expelled as a member pursuant to the operating agreement. 4787 4788

(C) The person is expelled as a member by the unanimous consent of the other members if any of the following apply: 4789 4790

(1) It is unlawful to carry on the limited liability company's activities with the person as a member. 4791 4792

(2) The person is an entity and, within ninety days after the limited liability company notifies the person that it will be expelled as a member because the person has filed a statement of dissolution or the equivalent, or its right to transact business has been suspended by its jurisdiction of formation, the statement of dissolution or the equivalent has not been revoked or its right to transact business has not been 4793 4794 4795 4796 4797 4798 4799

reinstated. 4800

(3) The person is an entity and, within ninety days after the limited liability company notifies the person that it will be expelled as a member because the person has been dissolved and its activities are being wound up, the entity has not been reinstated or the dissolution and winding up have not been revoked or canceled. 4801 4802 4803 4804 4805 4806

(D) On application by the limited liability company, the person is expelled as a member by tribunal order for any of the following reasons: 4807 4808 4809

(1) The person has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the limited liability company's activities. 4810 4811 4812 4813

(2) The person has willfully or persistently committed, or is willfully or persistently committing, a material breach of the operating agreement or the person's duties or obligations under this chapter or other applicable law. 4814 4815 4816 4817

(3) The person has engaged, or is engaging, in conduct relating to the limited liability company's activities that makes it not reasonably practicable to carry on the activities with the person as a member. 4818 4819 4820 4821

(E) In the case of a person who is an individual, the person dies, a guardian or general conservator is appointed for the person, or a tribunal determines that the person has otherwise become incapable of performing the person's duties as a member under this chapter or the operating agreement. 4822 4823 4824 4825 4826

(F) The person becomes a debtor in bankruptcy, executes an assignment for the benefit of creditors, or seeks, consents, or 4827 4828

acquiesces to the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property. This division shall not apply to a person who is the sole remaining member of a limited liability company. 4829 4830 4831 4832

(G) In the case of a person that is a trust or is acting as a member by virtue of being a trustee of a trust, the trust's entire membership interest in the limited liability company is distributed, but not solely by reason of the substitution of a successor trustee. 4833 4834 4835 4836 4837

(H) In the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate's entire membership interest in the limited liability company is distributed, but not solely by reason of the substitution of a successor personal representative. 4838 4839 4840 4841 4842

(I) In the case of a member that is not an individual, the legal existence of the person otherwise terminates. 4843 4844

(J) There has been an assignment of all of the person's membership interest other than an assignment for security purposes. 4845 4846 4847

**Sec. 1706.412.** (A) A person who has dissociated as a member shall have no right to participate as a member in the activities and affairs of the limited liability company and is entitled only to receive the distributions to which that member would have been entitled if the member had not dissociated. 4848 4849 4850 4851 4852

(B) Upon a person's dissociation, the member's duty of loyalty and duty of care under divisions (C) and (D) of section 1706.31 of the Revised Code continue only with regard to matters arising and events occurring before the member's dissociation, unless the member participates in winding up the limited 4853 4854 4855 4856 4857

liability company's business pursuant to section 1706.472 of the Revised Code. 4858 4859

(C) A person's dissociation as a member does not of itself discharge the person from any debt, obligation, or liability to a limited liability company or the other members that the person incurred while a member. 4860 4861 4862 4863

**Sec. 1706.46.** (A) A limited liability company may have its articles of organization canceled under section 1706.461 of the Revised Code if the limited liability company fails to do one or both of the following: 4864 4865 4866 4867

(1) Pay a fee or penalty imposed by this chapter when it is due; 4868 4869

(2) Comply with the requirements of section 1706.09 of the Revised Code. 4870 4871

(B) A foreign limited liability company may have its registration canceled under section 1706.461 of the Revised Code if any of the following apply: 4872 4873 4874

(1) The foreign limited liability company does not pay a fee or penalty imposed by this chapter when it is due. 4875 4876

(2) The foreign limited liability company does not comply with the requirements of section 1706.09 of the Revised Code. 4877 4878

(3) The foreign limited liability company does not deliver for filing an appropriate certificate of correction when necessary to make its registration as a foreign limited liability company true in all respects. 4879 4880 4881 4882

(4) The secretary of state receives an authenticated certificate from the secretary of state or other official having custody of the foreign limited liability company records in the 4883 4884 4885

jurisdiction under the law of which the foreign limited liability company was formed to the effect that the limited liability company no longer exists as the result of a merger or otherwise. 4886 4887 4888 4889

**Sec. 1706.461.** (A) If the secretary of state determines that one or more grounds exist under section 1706.46 of the Revised Code for canceling the articles of a limited liability company or the registration of a foreign limited liability company, the secretary of state shall deliver written notice stating those grounds to the statutory agent of the company. The notice shall state that, if the company does not correct each ground within sixty days after delivery of the notice, the company's articles or registration shall be canceled following the expiration of the sixty days. 4890 4891 4892 4893 4894 4895 4896 4897 4898 4899

(B) If the limited liability company or foreign limited liability company does not correct each ground identified in the notice of the secretary of state or demonstrate to the reasonable satisfaction of the secretary of state that the ground does not exist within sixty days after delivery of the notice, the company's articles or registration shall be canceled following the expiration of the sixty days. Thereafter, the secretary of state shall deliver notice of the fact of cancellation to the statutory agent of the company or, if the cancellation resulted from the failure to maintain a statutory agent, in the manner provided in section 1706.09 of the Revised Code; except that failure to deliver the notice shall not affect the fact of cancellation, and no person shall have a cause of action if the notice is not delivered. 4900 4901 4902 4903 4904 4905 4906 4907 4908 4909 4910 4911 4912 4913

**Sec. 1706.462.** (A) When the articles of a limited liability company or the registration of a foreign limited 4914 4915

liability company has been canceled, the company shall cease to carry on business and shall do only such acts as are required to wind up its affairs or to obtain reinstatement of the articles in accordance with sections 1706.472, 1706.09, or 1706.463 of the Revised Code or are permitted upon reinstatement by division (C) of section 1706.464 of the Revised Code. 4916 4917 4918 4919 4920 4921

(B) A limited liability company or foreign limited liability company may not maintain a proceeding in any court in this state for the collection of its debts until it has cured any cancellation pursuant to section 1706.463 of the Revised Code, provided such cancellation does not cause dissolution under section 1706.47 of the Revised Code. 4922 4923 4924 4925 4926 4927

(C) A court may stay a proceeding commenced by a limited liability company or foreign limited liability company until it determines whether the company's articles or registration has been canceled. If the court determines that the company's articles or registration has been canceled, it may further stay the proceeding until the company cures the grounds for the cancellation pursuant to section 1706.463 of the Revised Code, provided such cancellation does not cause dissolution under section 1706.47 of the Revised Code. If a company so cures the grounds for the cancellation, provided such cancellation does not cause dissolution, no proceeding in any court in this state to which that company is a party shall thereafter be dismissed by reason of that instance of cancellation. 4928 4929 4930 4931 4932 4933 4934 4935 4936 4937 4938 4939 4940

(D) The cancellation of the articles of a limited liability company or registration of a foreign limited liability company does not terminate the authority of the statutory agent of the company. 4941 4942 4943 4944

(E) The existence of a limited liability company or 4945

foreign limited liability company continues notwithstanding any cancellation. 4946 4947

(F) Unless otherwise provided under this chapter, the cancellation of the articles of a limited liability company does not dissolve the limited liability company. 4948 4949 4950

(G) A limited liability company with canceled articles may be dissolved at any time and by any manner as may be provided or permitted by its operating agreement or this chapter and, if it has failed to cure the grounds for cancellation for three years or more, the company may be dissolved pursuant to section 1706.47 of the Revised Code. 4951 4952 4953 4954 4955 4956

**Sec. 1706.463.** (A) A limited liability company or foreign limited liability company whose articles or registration has been canceled may cure the grounds for cancellation and thereby have its articles or registration reinstated by doing both of the following: 4957 4958 4959 4960 4961

(1) Correcting each ground cited by the secretary of state in the notice delivered to the limited liability company or foreign limited liability company pursuant to section 1706.461 of the Revised Code; 4962 4963 4964 4965

(2) Paying all fees and penalties imposed by this chapter. 4966

(B) In lieu of curing the grounds for cancellation pursuant to division (A) of this section, a foreign limited liability company may cure the grounds for the cancellation of its registration by causing to be delivered to the secretary of state, for filing pursuant to section 1706.515 of the Revised Code, a certificate of cancellation of registration of a foreign limited liability company. 4967 4968 4969 4970 4971 4972 4973

(C) A delinquent limited liability company may cure 4974

delinquency by dissolving. 4975

**Sec. 1706.464.** 4976

(A) Except as otherwise provided in this division, upon reinstatement of a limited liability company's articles or a foreign limited liability company's registration in accordance with section 1706.09 or 1709.463 of the Revised Code, the rights and privileges, including all real or personal property rights and credits and all contract and other rights, of the company existing at the time its articles or registration was canceled shall be fully vested in the company as if its articles or registration had not been canceled, and the company shall again be entitled to exercise the rights and privileges authorized by its articles. The name of a company whose articles have been canceled shall be reserved for a period of one year after the date of cancellation. If the reinstatement is not made within one year after the date of the cancellation of its articles and it appears that a corporate name, limited liability company name, limited liability partnership name, limited partnership name, trade name, or assumed name has been filed, the name of which is not distinguishable upon the record as provided in section 1706.07 of the Revised Code, the secretary of state shall require the applicant for reinstatement, as a condition prerequisite to such reinstatement, to amend its articles or registration by changing its name. 4977 4978 4979 4980 4981 4982 4983 4984 4985 4986 4987 4988 4989 4990 4991 4992 4993 4994 4995 4996 4997 4998

(B) Upon reinstatement in accordance with section 1706.09 or 1709.463 of the Revised Code, both of the following apply to the exercise of or an attempt to exercise any rights or privileges, including entering into or performing any contracts, on behalf of the company by an officer, agent, or employee of the company, after cancellation and prior to reinstatement of 4999 5000 5001 5002 5003 5004

the articles or registration: 5005

(1) The exercise of or an attempt to exercise any rights or privileges on behalf of the company by the officer, agent, or employee of the company has the same force and effect that the exercise of or an attempt to exercise the right or privilege would have had if the company's articles or registration had not been canceled, if both of the following apply: 5006 5007 5008 5009 5010 5011

(a) The exercise of or an attempt to exercise the right or privilege was within the scope of the company's articles that existed prior to cancellation; 5012 5013 5014

(b) The officer, agent, or employee had no knowledge that the company's articles or registration had been canceled. 5015 5016

(2) The company is liable exclusively for the exercise of or an attempt to exercise any rights or privileges on behalf of the company by an officer, agent, or employee of the company, if the conditions set forth in divisions (B)(1)(a) and (b) of this section are met. 5017 5018 5019 5020 5021

(C) Upon reinstatement of a company's articles or registration in accordance with section 1706.09 or 1709.463 of the Revised Code, the exercise of or an attempt to exercise any rights or privileges on behalf of the company by an officer, agent, or employee of the company, after cancellation and prior to reinstatement of the articles or registration, does not constitute a failure to comply with division (A) of section 1706.462 or a violation of section 1706.09 of the Revised Code, if the conditions set forth in divisions (B)(1)(a) and (b) of this section are met. 5022 5023 5024 5025 5026 5027 5028 5029 5030 5031

(D) This section is remedial in nature and is to be construed liberally to accomplish the purpose of providing full 5032 5033

reinstatement of a limited liability company's articles of organization or a foreign limited liability company's registration, in accordance with this section, to the time of the cancellation of the articles or registration. 5034 5035 5036 5037

**Sec. 1706.465.** (A)(1) A limited liability company or foreign limited liability company may appeal a cancellation under division (B) of section 1706.461 of the Revised Code within thirty days after the effective date of cancellation under division (B) of section 1706.461 of the Revised Code within thirty days after the effective date of the cancellation. The appeal shall be made to one of the following: 5038 5039 5040 5041 5042 5043 5044

(a) The court of common pleas of the county in which the street address of the limited liability company or foreign limited liability company's principal office is located; 5045 5046 5047

(b) If the limited liability company or foreign limited liability company has no principal office in this state, to the court of common pleas of the county in which the street address of its statutory agent is located; 5048 5049 5050 5051

(c) If the limited liability company or foreign limited liability company has no statutory agent, to the Franklin county court of common pleas. 5052 5053 5054

(2) The limited liability company or foreign limited liability company shall commence its appeal by petitioning the appropriate court to set aside the cancellation or to determine that the limited liability company or foreign limited liability company has cured the grounds for cancellation and attaching to the petition copies of those records of the secretary of state as may be relevant. 5055 5056 5057 5058 5059 5060 5061

(B) The appropriate court may take, or may summarily order 5062

the secretary of state to take, whatever action the court considers appropriate. 5063 5064

(C) The appropriate court's order or decision may be appealed as in any other civil proceeding. 5065 5066

**Sec. 1706.47.** A limited liability company is dissolved, and its activities shall be wound up, upon the occurrence of any of the following: 5067 5068 5069

(A) An event or circumstance that the operating agreement states causes dissolution; 5070 5071

(B) The consent of all the members; 5072

(C) A limited liability company with canceled articles has failed to cure the grounds for cancellation for three years or more and any member or person authorized pursuant to section 1706.18 of the Revised Code consents to the dissolution; 5073 5074 5075 5076

(D) The passage of ninety consecutive days after the occurrence of the dissociation of the last remaining member; provided that upon dissociation of the last remaining member pursuant to division (E) of section 1706.411 of the Revised Code, the limited liability company shall not be dissolved if either of the following applies: 5077 5078 5079 5080 5081 5082

(1) The operating agreement provides for the admission of a substitute member effective prior to the passage of such time period; 5083 5084 5085

(2) A substitute member has been admitted, as evidenced by a written record, prior to the passage of such time period, which admission is to be effective as of the date of such dissociation. 5086 5087 5088 5089

(E) On application by a member, the entry by the 5090

appropriate court of an order dissolving the limited liability company on the grounds that it is not reasonably practicable to carry on the limited liability company's activities in conformity with the operating agreement. 5091 5092 5093 5094

**Sec. 1706.471.** (A) A dissolved limited liability company continues its existence as a limited liability company but may not carry on any activities except as is appropriate to wind up and liquidate its activities and affairs. Appropriate activities include all of the following: 5095 5096 5097 5098 5099

(1) Collecting its assets; 5100

(2) Disposing of its properties that will not be distributed in kind to persons owning membership interests; 5101 5102

(3) Discharging or making provisions for discharging its liabilities; 5103 5104

(4) Distributing its remaining property in accordance with section 1706.475 of the Revised Code; 5105 5106

(5) Doing every other act necessary to wind up and liquidate its activities and affairs. 5107 5108

(B) In winding up its activities, a limited liability company may do any of the following: 5109 5110

(1) Deliver to the secretary of state for filing, on a form prescribed by the secretary of state, a certificate of dissolution setting forth all of the following: 5111 5112 5113

(a) The name and registration number of the limited liability company; 5114 5115

(b) That the limited liability company has dissolved; 5116

(c) The effective date of the certificate of dissolution 5117

if it is not to be effective upon the filing. Such an effective date shall be a date certain and shall not be a date prior to the date of filing. 5118 5119 5120

(d) A copy of the notice it will publish pursuant to division (A) of section 1706.474 of the Revised Code. 5121 5122

(e) Any other information the limited liability company considers proper. 5123 5124

(2) Preserve the limited liability company's activities and property as a going concern for a reasonable time; 5125 5126

(3) Prosecute, defend, or settle actions or proceedings whether civil, criminal, or administrative; 5127 5128

(4) Make an assignment of the limited liability company's property; 5129 5130

(5) Resolve disputes by mediation or arbitration; 5131

(6) Merge or convert in accordance with sections 1706.71 to 1706.74 of the Revised Code. 5132 5133

(C) A limited liability company's dissolution, in itself: 5134

(1) Is not an assignment of the limited liability company's property; 5135 5136

(2) Does not prevent the commencement of a proceeding by or against the limited liability company in its limited liability company name; 5137 5138 5139

(3) Does not abate or suspend a proceeding pending by or against the limited liability company on the effective date of dissolution; 5140 5141 5142

(4) Does not terminate the authority of its statutory agent; 5143 5144

(5) Does not abate, suspend, or otherwise alter the application of section 1706.26 of the Revised Code. 5145 5146

**Sec. 1706.472.** (A) Subject to division (C)(5) of section 1706.471 of the Revised Code, after dissolution, the remaining members, if any, and if none, a person appointed by all holders of the membership interest last assigned by the last person to have been a member, may wind up the limited liability company's activities. 5147 5148 5149 5150 5151 5152

(B) The appropriate tribunal may order supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the limited liability company's activities as follows: 5153 5154 5155 5156

(1) On application of a member, if the applicant establishes good cause; 5157 5158

(2) On application of an assignee, if both of the following apply: 5159 5160

(a) The limited liability company does not have any members; 5161 5162

(b) Within a reasonable time following the dissolution, a person has not been appointed pursuant to division (A) of this section. 5163 5164 5165

(3) In connection with a proceeding under division (E) of section 1706.47 of the Revised Code. 5166 5167

**Sec. 1706.473.** (A) A dissolved limited liability company may dispose of any known claims against it by following the procedures described in division (B) of this section at any time after the effective date of the dissolution of the limited liability company. 5168 5169 5170 5171 5172

(B) A dissolved limited liability company may give notice of its dissolution in a record to the holder of any known claim. The notice shall do all of the following: 5173 5174 5175

(1) Identify the dissolved limited liability company; 5176

(2) Describe the information required to be included in a claim; 5177 5178

(3) Provide a mailing address to which the claim is to be sent; 5179 5180

(4) State the deadline, by which the dissolved limited liability company must receive the claim. The deadline shall not be sooner than ninety days from the effective date of the notice. 5181 5182 5183 5184

(5) State that if not sooner barred, the claim will be barred if not received by the deadline. 5185 5186

(C) Unless sooner barred by any other statute limiting actions, a claim against a dissolved limited liability company is barred in either of the following circumstances: 5187 5188 5189

(1) A claimant who was given notice under division (B) of this section does not deliver the claim to the dissolved limited liability company by the deadline. 5190 5191 5192

(2) A claimant whose claim was rejected by the dissolved limited liability company does not commence a proceeding to enforce the claim within ninety days from the effective date of the rejected notice. 5193 5194 5195 5196

(D) For purposes of this section, "claim" includes an unliquidated claim, but does not include either of the following: 5197 5198 5199

(1) A contingent liability that has not matured so that there is no immediate right to bring suit; 5200 5201

(2) A claim based on an event occurring after the effective date of dissolution. 5202 5203

(E) Nothing in this section shall be construed to extend any otherwise applicable statute or period of limitations. 5204 5205

**Sec. 1706.474.** (A) A dissolved limited liability company may publish notice of its dissolution and request that persons with claims against the dissolved limited liability company present them in accordance with the notice. 5206 5207 5208 5209

(B) The notice described in division (A) of this section shall meet all of the following requirements: 5210 5211

(1) It shall be posted prominently on the principal web site then maintained by the limited liability company, if any, and provided to the secretary of state to be posted on the web site maintained by the secretary of state in accordance with division (J) of this section. The notice shall be considered published when posted on both web sites or, if the limited liability company does not then maintain a web site, when posted on the web site maintained by the secretary of state. 5212 5213 5214 5215 5216 5217 5218 5219

(2) It shall describe the information that must be included in a claim and provide a mailing address to which the claim must be sent. 5220 5221 5222

(3) It shall state that if not sooner barred, a claim against the dissolved limited liability company will be barred unless a proceeding to enforce the claim is commenced within two years after the publication of the notice. 5223 5224 5225 5226

(C) If a dissolved limited liability company publishes a 5227

notice in accordance with division (B) of this section, unless sooner barred by any other statute limiting actions, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved limited liability company within two years after the publication of the notice: 5228 5229 5230 5231 5232 5233

(1) A claimant who was not given notice under division (B) of section 1706.473 of the Revised Code; 5234 5235

(2) A claimant whose claim was timely sent to the dissolved limited liability company but not acted on by the dissolved limited liability company; 5236 5237 5238

(3) A claimant whose claim is contingent at the effective date of the dissolution of the limited liability company, or is based on an event occurring after the effective date of the dissolution of the limited liability company. 5239 5240 5241 5242

(D) A claim that is not barred under this section, any other statute limiting actions, or section 1706.473 of the Revised Code may be enforced as follows: 5243 5244 5245

(1) Against a dissolved limited liability company, to the extent of its undistributed assets; 5246 5247

(2) Except as provided in division (H) of this section, if the assets of a dissolved limited liability company have been distributed after dissolution, against a member or assignee to the extent of that person's proportionate share of the claim or of the assets distributed to the member or assignee after dissolution, whichever is less. A person's total liability for all claims under division (D) of this section may not exceed the total amount of assets distributed to the person after dissolution of the limited liability company. 5248 5249 5250 5251 5252 5253 5254 5255 5256

(E) A dissolved limited liability company that published a notice under this section may file an application with the appropriate court in the county in which the dissolved limited liability company's principal office is located or, if it has none in this state, in the county in which the dissolved limited liability company's statutory agent is or was last located, for a determination of the amount and form of security to be provided for payment of the following claims: 5257 5258 5259 5260 5261 5262 5263 5264

(1) Claims that are contingent; 5265

(2) Claims that have not been made known to the dissolved limited liability company; 5266 5267

(3) Claims that are based on an event occurring after the effective date of the dissolution of the limited liability company but that, based on the facts known to the dissolved limited liability company, are reasonably estimated to arise after the effective date of the dissolution of the limited liability company. 5268 5269 5270 5271 5272 5273

Provision need not be made for any claim that is or is reasonably anticipated to be barred under division (C) of this section. 5274 5275 5276

(F) Within ten days after the filing of the application provided for in division (E) of this section, notice of the proceeding shall be given by the dissolved limited liability company to each potential claimant as described in division (E) of this section. 5277 5278 5279 5280 5281

(G) The appropriate court may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of the guardian, including all reasonable expert 5282 5283 5284 5285

witness fees, shall be paid by the dissolved limited liability company. 5286 5287

(H) Provision by the dissolved limited liability company for security in the amount and the form ordered by the appropriate court under division (E) of this section shall satisfy the dissolved limited liability company's obligation with respect to claims that are contingent, have not been made known to the dissolved limited liability company, or are based on an event occurring after the effective date of the dissolution of the limited liability company. Such claims shall not be enforced against a person owning a membership interest to whom assets have been distributed by the dissolved limited liability company after the effective date of the dissolution of the limited liability company. 5288 5289 5290 5291 5292 5293 5294 5295 5296 5297 5298 5299

(I) Nothing in this section shall be construed to extend any otherwise applicable statute of limitations. 5300 5301

(J)(1) Except as provided in division (J)(2) of this section, the secretary of state shall make both of the following available to the public in a format that is searchable, viewable, and accessible through the internet: 5302 5303 5304 5305

(a) A list of each limited liability companies that have filed certificates of dissolution; 5306 5307

(b) For each dissolved limited liability company on the list described in division (J)(1)(a) of this section, a copy of both the certificate of dissolution and the notice delivered under division (B) of this section. 5308 5309 5310 5311

(2) After the materials relating to any dissolved limited liability company have been posted for five years, the secretary of state may remove from the web site the information that the 5312 5313 5314

secretary posted pursuant to division (J)(1) of this section that relates to that dissolved company. 5315 5316

**Sec. 1706.475.** (A) Upon the winding up of a limited liability company, payment or adequate provision for payment, shall be made to creditors, including members who are creditors, in satisfaction of liabilities of the limited liability company. 5317 5318 5319 5320

(B) After a limited liability company complies with division (A) of this section, any surplus shall be distributed as follows: 5321 5322 5323

(1) First, to each person owning a membership interest that reflects contributions made on account of the membership interest and not previously returned, an amount equal to the value of the person's unreturned contributions; 5324 5325 5326 5327

(2) Then to each person owning a membership interest in the proportions in which the owners of membership interests share in distributions before dissolution. 5328 5329 5330

(C) If the limited liability company does not have sufficient surplus to comply with division (B)(1) of this section, any surplus shall be distributed among the owners of membership interests in proportion to the value of their respective unreturned contributions. 5331 5332 5333 5334 5335

**Sec. 1706.51.** (A) The law of the state or other jurisdiction under which a foreign limited liability company is formed governs all of the following: 5336 5337 5338

(1) The organization and internal affairs of the foreign limited liability company; 5339 5340

(2) The liability of a member as a member for the debts, obligations, or other liabilities of the foreign limited 5341 5342

liability company or a series thereof; 5343

(3) The authority of the members and agents of a foreign limited liability company or a series thereof; 5344 5345

(4) The liability of the following for the obligations of another series or the foreign limited liability company: 5346 5347

(a) The assets of the foreign limited liability company; 5348

(b) The assets of a series thereof. 5349

(B) A foreign limited liability company's application for registration as a foreign limited liability company may not be denied by reason of any difference between the laws of the jurisdiction under which the limited liability company is formed and the laws of this state. 5350 5351 5352 5353 5354

(C) A foreign limited liability company, including a foreign limited liability company that has filed a registration as a foreign limited liability company, may not engage in any activities in this state that a limited liability company is forbidden to engage in by the laws of this state. 5355 5356 5357 5358 5359

(D) A foreign limited liability company that has filed a registration as a foreign limited liability company shall in this state: 5360 5361 5362

(1) Have the same but no greater rights than a limited liability company; 5363 5364

(2) Have the same but no greater privileges than a limited liability company; 5365 5366

(3) Except as otherwise provided by this chapter, be subject to the same duties, restrictions, penalties, and liabilities now or later imposed on a limited liability company. 5367 5368 5369

**Sec. 1706.511.** (A) In order for a foreign limited liability company or any one or more of its series to transact business in this state, the foreign limited liability company shall register with the secretary of state. Neither a foreign limited liability company nor any one or more of its series may transact business in this state until the registration has been approved by the secretary of state and the foreign limited liability company or series is otherwise in compliance with sections 1706.51 to 1706.516 of the Revised Code. 5370 5371 5372 5373 5374 5375 5376 5377 5378

(B) The registration as a foreign limited liability company shall state all of the following: 5379 5380

(1) The name of the foreign limited liability company and, if the name does not comply with section 1706.07 of the Revised Code, the assumed name adopted pursuant to division (A) of section 1706.513 of the Revised Code; 5381 5382 5383 5384

(2) The foreign limited liability company's jurisdiction of formation; 5385 5386

(3) The name and street address of the foreign limited liability company's statutory agent in this state; 5387 5388

(4) That the foreign limited liability company is a foreign limited liability company; 5389 5390

(5) The information required by division (C) of this section, if applicable. 5391 5392

(C) If a foreign limited liability company establishes or provides for the establishment of one or more series of assets, it shall state all of the following in the registration as a foreign limited liability company: 5393 5394 5395 5396

(1) The fact that it provides for the establishment of one 5397

or more series of assets; 5398

(2) Whether the debts, liabilities, and obligations incurred, contracted for, or otherwise existing with respect to a particular series, if any, shall be enforceable against the assets of that series only, and not against the assets of the foreign limited liability company generally or any other series thereof; 5399 5400 5401 5402 5403 5404

(3) Whether any of the debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to the foreign limited liability company generally or any other series thereof shall be enforceable against the assets of that series. 5405 5406 5407 5408 5409

(D) Upon any change in circumstances that makes any statement contained in its filed registration as a foreign limited liability company no longer true, a foreign limited liability company authorized to transact business in this state shall deliver to the secretary of state for filing an appropriate certificate of correction, on a form as prescribed by the secretary of state, so that its statement of foreign qualification is in all respects true. 5410 5411 5412 5413 5414 5415 5416 5417

(E) A foreign limited liability company is authorized to transact business in this state from the effective date of its registration as a foreign limited liability company until the earlier of the effective date of its cancellation of foreign limited liability company or the effective date of the secretary of state's cancellation of the registration as a foreign limited liability company in accordance with section 1706.514 of the Revised Code. 5418 5419 5420 5421 5422 5423 5424 5425

**Sec. 1706.512.** (A) A foreign limited liability company 5426

shall not be considered to be transacting business in this state 5427
within the meaning of sections 1706.51 to 1706.516 of the 5428
Revised Code by reason of its or any one or more of its series' 5429
carrying on in this state any of the following actions: 5430

(1) Maintaining, defending, or settling in its own behalf 5431
any proceeding or dispute; 5432

(2) Holding meetings or carrying on any other activities 5433
concerning its internal affairs; 5434

(3) Maintaining accounts in financial institutions; 5435

(4) Maintaining offices or agencies for the assignment, 5436
exchange, and registration of the foreign limited liability 5437
company's or its series' own securities or interests or 5438
maintaining trustees or depositories with respect to those 5439
securities or interests; 5440

(5) Selling through independent contractors; 5441

(6) Soliciting or obtaining orders, whether by mail or 5442
electronic means or through employees or agents or otherwise, if 5443
the orders require acceptance outside this state before they 5444
become contracts; 5445

(7) Creating, as borrower or lender, or acquiring 5446
indebtedness, mortgages, or security interests in real or 5447
personal property; 5448

(8) Securing or collecting debts in its own behalf or 5449
enforcing mortgages or other security interests in real or 5450
personal property securing those debts, and holding, protecting, 5451
and maintaining property so acquired; 5452

(9) Owning real or personal property; 5453

(10) Conducting an isolated transaction that is not one in the course of repeated transactions of a like nature; 5454 5455

(11) Transacting business in interstate commerce. 5456

(B) A foreign limited liability company shall not be considered to be transacting business in this state solely because it or any one or more of its series: 5457 5458 5459

(1) Owns a controlling interest in an entity that is transacting business in this state; 5460 5461

(2) Is a limited partner of a limited partnership or foreign limited partnership that is transacting business in this state; 5462 5463 5464

(3) Is a member of a limited liability company or foreign limited liability company that is transacting business in this state. 5465 5466 5467

(C) This section does not apply in determining the contacts or activities that may subject a foreign limited liability company, or a series thereof, to service of process, taxation, or regulation under laws of this state other than this chapter. 5468 5469 5470 5471 5472

(D) Nothing in this section shall limit or affect the right to subject a foreign limited liability company, or a series thereof, to the jurisdiction of the courts of this state or to serve upon any foreign limited liability company, or series thereof, any process, notice, or demand required or permitted by law to be served upon a foreign limited liability company, or series thereof, pursuant to any other provision of law or pursuant to the applicable rules of civil procedure. 5473 5474 5475 5476 5477 5478 5479 5480

**Sec. 1706.513.** (A) A foreign limited liability company 5481

whose name does not comply with section 1706.07 of the Revised Code may not file a registration as a foreign limited liability company until it adopts, for the purpose of transacting business in this state, an assumed name that complies with section 1706.07 of the Revised Code. A foreign limited liability company that adopts an assumed name under this division and then files a registration as a foreign limited liability company under that assumed name need not file a name registration when transacting business under that assumed name. After filing the registration as a foreign limited liability company under an assumed name, a foreign limited liability company shall transact business in this state under the assumed name unless the foreign limited liability company has filed a name registration under another name and is authorized to transact business in this state under such name. 5482 5483 5484 5485 5486 5487 5488 5489 5490 5491 5492 5493 5494 5495 5496

(B) If a foreign limited liability company to which a registration as a foreign limited liability company has been filed changes its name to one that does not comply with section 1706.07 of the Revised Code, it may not thereafter transact business in this state until it complies with division (A) of this section by filing a certificate of correction. 5497 5498 5499 5500 5501 5502

**Sec. 1706.514.** (A) A registration as a foreign limited liability company may be canceled by the secretary of state in the manner provided in divisions (B) and (C) of this section if the foreign limited liability company fails to do one of the following: 5503 5504 5505 5506 5507

(1) Appoint and maintain a statutory agent as required by section 1706.09 of the Revised Code; 5508 5509

(2) Deliver for filing a statutory agent update under division (C) of section 1706.09 of the Revised Code within 5510 5511

thirty days after a change has occurred in the name or address of the statutory agent; 5512 5513

(3) File a certificate of correction as required by division (D) of section 1706.511 of the Revised Code. 5514 5515

(B) To cancel a registration as a foreign limited liability company, the secretary of state shall prepare, sign, and file a notice of cancellation and send copies to the foreign limited liability company's statutory agent in this state, as last filed by the secretary of state. The notice shall state both of the following: 5516 5517 5518 5519 5520 5521

(1) The cancellation's effective date. The effective date shall be at least sixty days after the date the secretary of state sends the copy of the notice of cancellation. 5522 5523 5524

(2) The grounds for cancellation under division (A) of this section. 5525 5526

(C) The authority of a foreign limited liability company, and all series thereof, to transact business in this state ceases on the effective date of the notice of cancellation unless before that date the foreign limited liability company cures each ground for cancellation stated in the notice filed under division (B) of this section. If the foreign limited liability company cures each ground, the secretary of state shall file a record so stating, in which case the notice of cancellation shall not have any further effect. 5527 5528 5529 5530 5531 5532 5533 5534 5535

(D) Cancellation of a registration as a foreign limited liability company shall not terminate the authority of any statutory agent appointed by the foreign limited liability company. 5536 5537 5538 5539

**Sec. 1706.515.** (A) A foreign limited liability company 5540

that has a registration as a foreign limited liability company in the records of the secretary of state may cancel its registration as a limited liability company by delivering for filing a certificate of cancellation of registration of a foreign limited liability company to the secretary of state. 5541 5542 5543 5544 5545

(B) A certificate of cancellation of registration of a foreign limited liability company shall set forth all of the following: 5546 5547 5548

(1) The name of the foreign limited liability company, any assumed name adopted for use in this state, and the name of the jurisdiction under whose law it is organized; 5549 5550 5551

(2) The name and street address of the statutory agent, or if a statutory agent is no longer to be maintained, a statement that the foreign limited liability company will not maintain a statutory agent, and the street address to which service of process may be mailed pursuant to section 1706.09 of the Revised Code; 5552 5553 5554 5555 5556 5557

(3) That the foreign limited liability company, and all series thereof, will no longer transact business in this state and that it relinquishes its authority to transact business in this state; 5558 5559 5560 5561

(4) That the foreign limited liability company is canceling its registration as a foreign limited liability company; 5562 5563 5564

(5) That any statement of assumed name it has on file in the records of the secretary of state and any assumed name with respect to the foreign limited liability company, are withdrawn upon the effective date of the cancellation of registration of a foreign limited liability company. 5565 5566 5567 5568 5569

(C) The cancellation of registration of a foreign limited liability company shall be effective upon filing by the secretary of state, whereupon the registration as a foreign limited liability company shall be canceled and the foreign limited liability company, and all series thereof, shall be without authority to transact business in this state. 5570 5571 5572 5573 5574 5575

**Sec. 1706.516.** (A) No foreign limited liability company, or a series thereof, transacting business in this state, nor anyone on its behalf, shall be permitted to maintain a proceeding in any court in this state for the collection of its debts unless an effective registration as a limited liability company for the foreign limited liability company is on file in the records of the secretary of state. 5576 5577 5578 5579 5580 5581 5582

(B) A court may stay a proceeding commenced by a foreign limited liability company, or series thereof, until it determines whether the foreign limited liability company should have a registration as a limited liability company on file in the records of the secretary of state. If the court determines that the foreign limited liability company should have a registration as a limited liability company on file in the records of the secretary of state, the court may further stay the proceeding until there is an effective registration as a limited liability company on file in the records of the secretary of state with respect to the foreign limited liability company. If a court determines that a foreign limited liability company should have a registration as a limited liability company on file in the records of the secretary of state, and the foreign limited liability company subsequently delivers for filing to the secretary of state a registration as a limited liability company, no proceeding in any court in this state to which the foreign limited liability company, or a series 5583 5584 5585 5586 5587 5588 5589 5590 5591 5592 5593 5594 5595 5596 5597 5598 5599 5600

thereof, is a party shall, after the effective date of the registration as a foreign limited liability company, be dismissed by reason of the foreign limited liability company's prior noncompliance with section 1706.511 of the Revised Code. 5601 5602 5603 5604

(C) If a foreign limited liability company, or a series thereof, conducts activities in this state without having on file in the records of the secretary of state a registration as a foreign limited liability company, the foreign limited liability company shall be liable to this state for an amount equal to the fee as prescribed by the secretary of state from time to time. 5605 5606 5607 5608 5609 5610 5611

No registration as a foreign limited liability company shall be filed until payment of the amounts due under this division is made. 5612 5613 5614

(D) The amounts due to this state under division (C) of this section may be recovered in an action brought by the attorney general. Upon a finding by the court that a foreign limited liability company, or series thereof, has conducted activities in this state in violation of sections 1706.51 to 1706.516 of the Revised Code, the court may issue, in addition to or in lieu of the imposition of a civil penalty, an injunction restraining the further conducting of activities by the foreign limited liability company and all of its series, and the further exercise of any rights and privileges of a foreign limited liability company in this state until all amounts plus any interest and court costs that the court may assess have been paid, and until the foreign limited liability company has otherwise complied with sections 1706.51 to 1706.516 of the Revised Code. 5615 5616 5617 5618 5619 5620 5621 5622 5623 5624 5625 5626 5627 5628 5629

(E) Notwithstanding divisions (A) and (B) of this section, 5630

the conducting of activities in this state by a foreign limited liability company, or a series thereof, without having a registration as a foreign limited liability company on file in the records of the secretary of state does not impair the validity of the acts of the foreign limited liability company, or a series thereof, or prevent the foreign limited liability company, or a series thereof, from defending any proceeding in this state. 5631 5632 5633 5634 5635 5636 5637 5638

(F) Neither a member nor agent of a foreign limited liability company nor a member associated with a series or agent of a series, is liable for the debts, obligations, or other liabilities of the foreign limited liability company, or a series thereof, solely because the foreign limited liability company, or a series thereof, conducted activities in this state without a registration as a foreign limited liability company being on file in the records of the secretary of state. 5639 5640 5641 5642 5643 5644 5645 5646

**Sec. 1706.61.** (A) A member may commence or maintain a derivative action in the right of a limited liability company to recover a judgment in favor of the limited liability company by complying with sections 1706.61 to 1706.618 of the Revised Code. 5647 5648 5649 5650

(B) A member associated with a series of a limited liability company may commence or maintain a derivative action in the right of the series to recover a judgment in favor of the series by complying with sections 1706.61 to 1706.618 of the Revised Code. 5651 5652 5653 5654 5655

**Sec. 1706.611.** (A) A member may commence or maintain a derivative action in the right of the limited liability company only if the member meets both of the following conditions: 5656 5657 5658

(1) The member fairly and adequately represents the 5659

interests of the limited liability company in enforcing the right of the limited liability company. 5660 5661

(2) The member either: 5662

(a) Was a member of the limited liability company at the time of the act or omission of which the member complains; 5663 5664

(b) Acquired a membership interest through assignment by operation of law from a person who was a member at the time of the act or omission of which the member complains. 5665 5666 5667

(B) A member associated with a series of a limited liability company may commence or maintain a derivative action in the right of the series only if the member meets both of the following conditions: 5668 5669 5670 5671

(1) The member fairly and adequately represents the interests of the series in enforcing the right of the series. 5672 5673

(2) The member either: 5674

(a) Was associated with the series at the time of the act or omission of which the member complains; 5675 5676

(b) Acquired a membership interest through assignment by operation of law from a person who was a member associated with the series at the time of the act or omission of which the member complains. 5677 5678 5679 5680

**Sec. 1706.612.** A member may not commence a derivative action in the right of the limited liability company, or a series thereof, until both of the following occur: 5681 5682 5683

(A) A written demand has been made upon the limited liability company or the series to take suitable action. 5684 5685

(B) Ninety days have expired from the date the demand was 5686

made unless either of the following applies: 5687

(1) The member has earlier been notified that the demand has been rejected by the limited liability company or the series; 5688 5689 5690

(2) Irreparable injury to the limited liability company or the series would result by waiting for the expiration of the ninety-day period. 5691 5692 5693

**Sec. 1706.613.** For the purpose of allowing the limited liability company or the series thereof time to undertake an inquiry into the allegations made in the demand or complaint commenced pursuant to sections 1706.61 to 1706.618 of the Revised Code, the court may stay any derivative action for the period the court deems appropriate. 5694 5695 5696 5697 5698 5699

**Sec. 1706.614.** (A)(1) A derivative action in the right of a limited liability company shall be dismissed by the court on motion by the limited liability company if one of the groups specified in division (A)(2) of this section has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative action is not in the best interests of the limited liability company. 5700 5701 5702 5703 5704 5705 5706 5707

(2) Subject to the requirements of division (A)(3) of this section, the determination of whether the maintenance of a derivative action in the right of a limited liability company is in the best interests of the limited liability company shall be made by a majority vote of either of the following: 5708 5709 5710 5711 5712

(a) The independent members of the limited liability company; 5713 5714

(b) The committee members of a committee consisting of 5715

independent members appointed by a majority of the independent members. 5716 5717

(3) If the determination is not made pursuant to division (A)(1) of this section, the determination shall be made by the person, or, in the case of more than one person, by a majority of the persons, sitting upon a panel of one or more persons appointed by a court upon motion filed with the court by the limited liability company for those purposes. 5718 5719 5720 5721 5722 5723

(B)(1) A derivative action in the right of a series of a limited liability company shall be dismissed on motion by the series if one of the groups specified in division (B)(2) of this section has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based that the maintenance of the derivative action is not in the best interests of the series. 5724 5725 5726 5727 5728 5729 5730

(2) Subject to the requirements of division (B)(3) of this section, the determination whether the maintenance of a derivative action on behalf of a series of a limited liability company is in the best interests of the series shall be made by a majority vote of either of the following: 5731 5732 5733 5734 5735

(a) The independent members associated with the series; 5736

(b) The committee members of a committee consisting of independent members associated with the series appointed by a majority of the independent members associated with the series. 5737 5738 5739

(3) If the determination is not made pursuant to division (B)(1) of this section, the determination shall be made by the person, or, in the case of more than one person, by a majority of the persons, sitting upon a panel of one or more persons appointed by a court upon motion filed with the court by the 5740 5741 5742 5743 5744

series for those purposes. 5745

(C) The court shall appoint only independent persons to the panel described in divisions (A)(3) and (B)(3) of this section. 5746 5747 5748

(D) The presence of one or more of the following circumstances, without more, shall not prevent a person from being considered independent for purposes of this section: 5749 5750 5751

(1) The naming of the person as a defendant in the derivative action or as a person against whom action is demanded; 5752 5753 5754

(2) The approval by that person of the act being challenged in the derivative action or demand where the act did not result in personal benefit to that person; 5755 5756 5757

(3) The making of the demand pursuant to section 1706.612 of the Revised Code or the commencement of the derivative action pursuant to sections 1706.61 to 1706.618 of the Revised Code. 5758 5759 5760

(E) Subject to section 1706.615 of the Revised Code, a panel appointed by the court pursuant to division (A)(3) or (B)(3) of this section shall have the authority to continue, settle, or discontinue the derivative proceeding as the court may confer upon the panel. 5761 5762 5763 5764 5765

(F) The plaintiff in the derivative action shall have the burden of proving that any of the requirements of division (A) or (B) of this section have not been met. 5766 5767 5768

**Sec. 1706.615.** A derivative action may not be discontinued or settled without the court's approval. If the court determines that a proposed discontinuance or settlement will substantially affect the interests of members of the limited liability 5769 5770 5771 5772

company, or the interests of members associated with a series of the limited liability company, the court shall direct that notice be given to the members affected. 5773 5774 5775

**Sec. 1706.616.** On termination of the derivative action the court may do any of the following: 5776 5777

(A) Order the limited liability company to pay the plaintiff's reasonable expenses, including attorney fees, incurred by the plaintiff in the derivative action if the court finds that the derivative action has resulted in a substantial benefit to the limited liability company; 5778 5779 5780 5781 5782

(B) Order a series to pay the plaintiff's reasonable expenses, including attorney fees, incurred by the plaintiff in the derivative action if the court finds that the derivative action has resulted in a substantial benefit to the series; 5783 5784 5785 5786

(C) Order the plaintiff to pay any defendant's reasonable expenses, including attorney fees, incurred by the defendant in defending the derivative action if it finds that the derivative action was commenced or maintained without reasonable cause or for an improper purpose; 5787 5788 5789 5790 5791

(D) Order a party to pay an opposing party's expenses incurred because of the filing of a pleading, motion, or other paper, if it finds both of the following: 5792 5793 5794

(1) That the pleading, motion, or other paper was not well grounded in fact, after reasonable inquiry, or not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. 5795 5796 5797 5798

(2) That the pleading, motion, or other paper was interposed for an improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of 5799 5800 5801

litigation. 5802

**Sec. 1706.617.** In any derivative action in the right of a foreign limited liability company, or a series thereof, the right of a person to commence or maintain a derivative action in the right of a foreign limited liability company, or a series thereof, and any matters raised in the action covered by sections 1706.61 to 1706.616 of the Revised Code shall be governed by the law of the jurisdiction under which the foreign limited liability company was formed; except that any matters raised in the action covered by sections 1706.613, 1706.615, and 1706.616 of the Revised Code shall be governed by the law of this state. 5803 5804 5805 5806 5807 5808 5809 5810 5811 5812 5813

**Sec. 1706.618.** (A) Subject to division (B) of this section, a member may maintain a direct action against another member or members or the limited liability company, or a series thereof, to enforce the member's rights and otherwise protect the member's interests, including rights and interests under the operating agreement or this chapter or arising independently of the membership relationship. 5814 5815 5816 5817 5818 5819 5820

(B) A member maintaining a direct action under division (A) of this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company, or series thereof. 5821 5822 5823 5824 5825

(C)(1) A member may maintain a direct action to enforce a right of a limited liability company if all members at the time of suit are parties to the action. 5826 5827 5828

(2) A member associated with a series may maintain a direct action to enforce a right of the series if all members 5829 5830

associated with the series at the time of suit are parties to the action. 5831 5832

**Sec. 1706.71.** (A) A limited liability company may merge with one or more other constituent entities pursuant to sections 1706.71 to 1706.713 of the Revised Code and to an agreement of merger if all of the following conditions are met: 5833 5834 5835 5836

(1) The governing statute of each of the other entities authorizes the merger. 5837 5838

(2) The merger is not prohibited by the law of a jurisdiction that enacted any of the governing statutes. 5839 5840

(3) Each of the other entities complies with its governing statute in effecting the merger. 5841 5842

(B) An agreement of merger shall be in a record and shall include all of the following: 5843 5844

(1) The name and form of each constituent entity; 5845

(2) The name and form of the surviving entity and, if the surviving entity is to be created pursuant to the merger, a statement to that effect; 5846 5847 5848

(3) The terms and conditions of the merger, including the manner and basis for converting the interests in each constituent entity into any combination of money, interests in the surviving entity, and other consideration as permitted under division (C) of this section; 5849 5850 5851 5852 5853

(4) If the surviving entity is to be created pursuant to the merger, the surviving entity's organizational documents that are proposed to be in a record; 5854 5855 5856

(5) If the surviving entity is not to be created pursuant 5857

to the merger, any amendments to be made by the merger to the surviving entity's organizational documents that are, or are proposed to be, in a record. 5858 5859 5860

(C) In connection with a merger, rights or securities of or interests in the constituent entity may be any of the following: 5861 5862 5863

(1) Exchanged for or converted into cash, property, or rights or securities of or interests in the surviving entity; 5864 5865

(2) In addition to or in lieu of division (C)(1) of this section, exchanged for or converted into cash, property, or rights or securities of or interests in another entity; 5866 5867 5868

(3) Canceled. 5869

**Sec. 1706.711.** (A) To be effective, an agreement of merger shall be consented to by all the members of a constituent limited liability company. 5870 5871 5872

(B) After the agreement of merger is approved, and at any time before a certificate of merger is delivered to the secretary of state for filing under section 1706.712 of the Revised Code, a constituent limited liability company may amend the agreement or abandon the merger: 5873 5874 5875 5876 5877

(1) As provided in the agreement; or 5878

(2) Except as otherwise prohibited in the agreement, with the same consent as was required to approve the agreement. 5879 5880

**Sec. 1706.712.** (A) After each constituent entity has approved the agreement of merger, a certificate of merger shall be signed on behalf of both of the following: 5881 5882 5883

(1) Each constituent limited liability company, as 5884

provided in division (A) of section 1706.17 of the Revised Code; 5885

(2) Each other constituent entity, as provided in its governing statute. 5886 5887

(B) A certificate of merger under this section shall include all of the following: 5888 5889

(1) The name and form of each constituent entity, the jurisdiction of its governing statute, and its registration number, if any, as it appears on the records of the secretary of state; 5890 5891 5892 5893

(2) The name and form of the surviving entity, the jurisdiction of its governing statute, and, if the surviving entity is created pursuant to the merger, a statement to that effect; 5894 5895 5896 5897

(3) The date the merger is effective under the governing statute of the surviving entity; 5898 5899

(4) If the surviving entity is to be created pursuant to the merger: 5900 5901

(a) If it will be a limited liability company, the limited liability company's articles of organization; 5902 5903

(b) If it will be an entity other than a limited liability company, any organizational document that creates the entity that is required to be in a public record. 5904 5905 5906

(5) If the surviving entity exists before the merger, any amendments provided for in the agreement of merger for the organizational document that created the entity that are in a public record; 5907 5908 5909 5910

(6) A statement as to each constituent entity that the 5911

merger was approved as required by the entity's governing statute; 5912 5913

(7) If the surviving entity is a foreign entity not authorized to transact business in this state, the street address of its statutory agent; 5914 5915 5916

(8) Any additional information required by the governing statute of any constituent entity. 5917 5918

(C) Each constituent limited liability company shall deliver the certificate of merger for filing in the office of the secretary of state. 5919 5920 5921

(D) A merger becomes effective under sections 1706.71 to 1706.74 of the Revised Code as follows: 5922 5923

(1) If the surviving entity is a limited liability company, upon the later of the following: 5924 5925

(a) Compliance with division (C) of this section; 5926

(b) As specified in the certificate of merger. 5927

(2) If the surviving entity is not a limited liability company, as provided by the governing statute of the surviving entity. 5928 5929 5930

**Sec. 1706.713.** (A) When a merger becomes effective, all of the following apply: 5931 5932

(1) The surviving entity continues or comes into existence. 5933 5934

(2) Each constituent entity that merges into the surviving entity ceases to exist as a separate entity. 5935 5936

(3) All property owned by each constituent entity, or series thereof, that ceases to exist vests in the surviving 5937 5938

entity without reservation or impairment. 5939

(4) All debts, obligations, or other liabilities of each constituent entity, or series thereof, that ceases to exist continue as debts, obligations, or other liabilities of the surviving entity. 5940 5941 5942 5943

(5) An action or proceeding pending by or against any constituent entity, or series thereof, that ceases to exist continues as if the merger had not occurred. 5944 5945 5946

(6) Except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent entity, or series thereof, that ceases to exist vest in the surviving entity. 5947 5948 5949 5950

(7) Except as otherwise provided in the agreement of merger, the terms and conditions of the agreement of merger take effect. 5951 5952 5953

(8) Except as otherwise agreed, if a constituent limited liability company ceases to exist, the merger does not dissolve the limited liability company for the purposes of sections 1706.47 to 1706.475 of the Revised Code and does not dissolve a series for purposes of sections 1706.76 to 1706.7613 of the Revised Code. 5954 5955 5956 5957 5958 5959

(9) If the surviving entity is created pursuant to the merger: 5960 5961

(a) If it is a limited liability company, the articles of organization become effective; 5962 5963

(b) If it is an entity other than a limited liability company, the organizational document that creates the entity becomes effective. 5964 5965 5966

(10) If the surviving entity existed before the merger, any amendments provided for in the certificate of merger for the organizational document that created the entity become effective. 5967 5968 5969 5970

(B) A surviving entity that is a foreign entity consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by a constituent entity, if before the merger the constituent entity was subject to suit in this state on the debt, obligation, or other liability. Service of process on a surviving entity that is a foreign entity and not authorized to transact business in this state for the purposes of enforcing a debt, obligation, or other liability may be made in the same manner and has the same consequences as provided in section 1706.09 of the Revised Code as if the surviving entity was a foreign limited liability company. 5971 5972 5973 5974 5975 5976 5977 5978 5979 5980 5981 5982

**Sec. 1706.72.** (A) An entity other than a limited liability company may convert to a limited liability company, and a limited liability company may convert to an entity other than a limited liability company pursuant to sections 1706.72 to 1706.723 of the Revised Code and a written declaration of conversion if all of the following apply: 5983 5984 5985 5986 5987 5988

(1) The governing statute of the entity that is not a limited liability company authorizes the conversion; 5989 5990

(2) The law of the jurisdiction governing the converting entity and the converted entity does not prohibit the conversion; 5991 5992 5993

(3) The converting entity and the converted entity comply with their respective governing statutes and organizational 5994 5995

documents in effecting the conversion. 5996

(B) A written declaration of conversion shall be in a record and include all of the following: 5997 5998

(1) The name and form of the converting entity before conversion; 5999 6000

(2) The name and form of the converted entity after conversion; 6001 6002

(3) The terms and conditions of the conversion, including the manner and basis for converting interests in the converting entity into any combination of money, interests in the converted entity, and other consideration allowed under division (C) of this section. 6003 6004 6005 6006 6007

(4) The organizational documents of the converted entity that are, or are proposed to be, in a record. 6008 6009

(C) In connection with a conversion, rights or securities of or interests in the converting entity may be any of the following: 6010 6011 6012

(1) Exchanged for or converted into cash, property, or rights or securities of or interests in the converted entity; 6013 6014

(2) In addition to or in lieu of division (C)(1) of this section, exchanged for or converted into cash, property, or rights or securities of or interests in another entity; 6015 6016 6017

(3) Canceled. 6018

**Sec. 1706.721.** (A) A declaration of conversion must be consented to by all the members of a converting limited liability company. 6019 6020 6021

(B) After a conversion is approved, and at any time before 6022

the certificate of conversion is delivered to the secretary of state for filing under section 1706.722 of the Revised Code, a converting limited liability company may amend the declaration or abandon the conversion: 6023 6024 6025 6026

(1) As provided in the declaration; or 6027

(2) Except as otherwise prohibited in the declaration, by the same consent as was required to approve the declaration. 6028 6029

**Sec. 1706.722.** (A) After a declaration of conversion is approved, both of the following apply: 6030 6031

(1) A converting limited liability company shall deliver to the secretary of state for filing a certificate of conversion. The certificate of conversion shall be signed as provided in division (A) of section 1706.17 of the Revised Code and shall include all of the following: 6032 6033 6034 6035 6036

(a) A statement that the converting limited liability company has been converted into the converted entity; 6037 6038

(b) The name and form of the converted entity and the jurisdiction of its governing statute; 6039 6040

(c) The date the conversion is effective under the governing statute of the converted entity; 6041 6042

(d) A statement that the conversion was approved as required by this chapter; 6043 6044

(e) A statement that the conversion was approved as required by the governing statute of the converted entity; 6045 6046

(f) If the converted entity is a foreign entity not authorized to transact business in this state, the street address of its statutory agent for the purposes of division (B) 6047 6048 6049

of section 1706.723 of the Revised Code. 6050

(2) If the converted entity is a limited liability company, the converting entity shall deliver to the secretary of state for filing articles of organization which shall include, in addition to the information required by division (A) of section 1706.16 of the Revised Code, all of the following: 6051 6052 6053 6054 6055

(a) A statement that the converted entity was converted from the converting entity; 6056 6057

(b) The name and form of the converting entity and the jurisdiction of the converting entity's governing statute; 6058 6059

(c) A statement that the conversion was approved as required by the governing statute of the converting entity. 6060 6061

(B) A conversion shall become effective as follows: 6062

(1) If the converted entity is a limited liability company, when the articles of organization take effect; 6063 6064

(2) If the converted entity is not a limited liability company, as provided by the governing statute of the converted entity. 6065 6066 6067

**Sec. 1706.723.** (A) When a conversion takes effect, all of the following apply: 6068 6069

(1) All property owned by the converting entity, or series thereof, remains vested in the converted entity. 6070 6071

(2) All debts, obligations, or other liabilities of the converting entity, or series thereof, continue as debts, obligations, or other liabilities of the converted entity. 6072 6073 6074

(3) An action or proceeding pending by or against the converting entity, or series thereof, continues as if the 6075 6076

conversion had not occurred. 6077

(4) Except as prohibited by law other than this chapter, all of the rights, privileges, immunities, powers, and purposes of the converting entity, or series thereof, remain vested in the converted entity. 6078 6079 6080 6081

(5) Except as otherwise provided in the plan of conversion, the terms and conditions of the declaration of conversion take effect. 6082 6083 6084

(6) Except as otherwise agreed, for all purposes of the laws of this state, the converting entity, and any series thereof, shall not be required to wind up its affairs or pay its liabilities and distribute its assets, and the conversion shall not be deemed to constitute a dissolution of the converting entity, or series thereof. 6085 6086 6087 6088 6089 6090

(7) For all purposes of the laws of this state, the rights, privileges, powers, and interests in property of the converting entity, and all series thereof, as well as the debts, liabilities, and duties of the converting entity, and all series thereof, shall not be deemed to have been assigned to the converted entity as a consequence of the conversion. 6091 6092 6093 6094 6095 6096

(8) If the converted entity is a limited liability company, for all purposes of the laws of this state, the limited liability company shall be deemed to be the same entity as the converting entity, and the conversion shall constitute a continuation of the existence of the converting entity in the form of a limited liability company. 6097 6098 6099 6100 6101 6102

(9) If the converted entity is a limited liability company, the existence of the limited liability company shall be deemed to have commenced on the date the converting entity 6103 6104 6105

commenced its existence in the jurisdiction in which the converting entity was first created, formed, organized, incorporated, or otherwise came into being. 6106 6107 6108

(B) A converted entity that is a foreign entity consents to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability for which the converting limited liability company, or series thereof, is liable if, before the conversion, the converting limited liability company, or series thereof, was subject to suit in this state on the debt, obligation, or other liability. Service of process on a converted entity that is a foreign entity and not authorized to transact business in this state for purposes of enforcing a debt, obligation, or other liability under this division may be made in the same manner and has the same consequences as provided in section 1706.09 of the Revised Code, as if the converted entity were a foreign limited liability company. 6109 6110 6111 6112 6113 6114 6115 6116 6117 6118 6119 6120 6121

**Sec. 1706.73.** (A) If a member of a constituent or converting limited liability company will have personal liability with respect to a surviving or converted entity, approval or amendment of a plan of merger or a declaration of conversion are ineffective without the consent of the member, unless both of the following conditions are met: 6122 6123 6124 6125 6126 6127

(1) The limited liability company's operating agreement provides for approval of a merger or conversion with the consent of fewer than all the members. 6128 6129 6130

(2) The member has consented to the provision of the operating agreement described in division (A)(1) of this section. 6131 6132 6133

(B) A member does not give the consent required by 6134

division (A) of this section merely by consenting to a provision of the operating agreement that permits the operating agreement to be amended with the consent of fewer than all the members. 6135 6136 6137

**Sec. 1706.74.** Sections 1706.71 to 1706.74 of the Revised Code do not preclude an entity from being merged or converted under law other than this chapter. 6138 6139 6140

**Sec. 1706.76.** (A) An operating agreement may establish or provide for the establishment of one or more designated series of assets that has both of the following: 6141 6142 6143

(1) Either or both of the following: 6144

(a) Separate rights, powers, or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations; 6145 6146 6147 6148

(b) A separate purpose or investment objective. 6149

(2) At least one member associated with each series. 6150

(B) A series established in accordance with division (A) of this section may carry on any activity, whether or not for profit. 6151 6152 6153

**Sec. 1706.761.** (A) Subject to division (B) of this section, both of the following apply: 6154 6155

(1) The debts, liabilities, obligations, and expenses incurred, contracted for, or otherwise existing with respect to a series shall be enforceable against the assets of that series only, and shall not be enforceable against the assets of the limited liability company generally or any other series thereof. 6156 6157 6158 6159 6160

(2) None of the debts, liabilities, obligations, and 6161

expenses incurred, contracted for, or otherwise existing with respect to the limited liability company generally or any other series thereof shall be enforceable against the assets of a series. 6162 6163 6164 6165

(B) Division (A) of this section applies only if all of the following conditions are met: 6166 6167

(1) The records maintained for that series account for the assets of that series separately from the other assets of the company or any other series. 6168 6169 6170

(2) The operating agreement contains a statement to the effect of the limitations provided in division (A) of this section. 6171 6172 6173

(3) The limited liability company's articles of organization contains a statement that the limited liability company may have one or more series of assets subject to the limitations provided in division (A) of this section. 6174 6175 6176 6177

**Sec. 1706.762.** (A) Assets of a series may be held directly or indirectly, including being held in the name of the series, in the name of the limited liability company, through a nominee, or otherwise. 6178 6179 6180 6181

(B) If the records of a series are maintained in a manner so that the assets of the series can be reasonably identified by specific listing, category, type, quantity, or computational or allocational formula or procedure, including a percentage or share of any assets, or by any other method in which the identity of the assets can be objectively determined, the records are considered to satisfy the requirement of division (B)(1) of section 1706.761 of the Revised Code. 6182 6183 6184 6185 6186 6187 6188 6189

**Sec. 1706.763.** The statement of limitation on liabilities 6190

of a series required by division (B)(3) of section 1706.761 of the Revised Code is sufficient regardless of whether either of the following applies: 6191 6192 6193

(A) The limited liability company has established any series under this chapter when the statement of limitations is contained in the articles of organization; 6194 6195 6196

(B) The statement of limitations makes reference to a specific series of the limited liability company. 6197 6198

**Sec. 1706.764.** (A) A person may not voluntarily dissociate as a member associated with a series. 6199 6200

(B) A person's dissociation from a series is wrongful only if one of the following applies: 6201 6202

(1) The person's dissociation is in breach of an express provision of the operating agreement. 6203 6204

(2) The person is expelled as a member associated with the series by determination of a tribunal under division (E) of section 1706.765 of the Revised Code. 6205 6206 6207

(3) The person is dissociated as a member associated with a series by becoming a debtor in bankruptcy or making a general assignment for the benefit of creditors. 6208 6209 6210

(C) A person that wrongfully dissociates as a member associated with a series is liable to the series and, subject to section 1706.61 of the Revised Code, to the other members associated with that series for damages caused by the dissociation. The liability is in addition to any other debt, obligation, or liability of the member associated with a series to the series or the other members associated with that series. 6211 6212 6213 6214 6215 6216 6217

**Sec. 1706.765.** A person is dissociated as a member 6218

associated with a series when any of the following occurs: 6219

(A) An event stated in the operating agreement as causing the person's dissociation from the series occurs. 6220 6221

(B) The person is dissociated as a member of the limited liability company pursuant to section 1706.411 of the Revised Code. 6222 6223 6224

(C) The person is expelled as a member associated with that series pursuant to the operating agreement. 6225 6226

(D) The person is expelled as a member associated with the series by the unanimous consent of the other members associated with that series and if any of the following applies: 6227 6228 6229

(1) It is unlawful to carry on the series' activities with the person as a member associated with that series. 6230 6231

(2) The person is an entity and, within ninety days after the series notifies the person that it will be expelled as a member associated with that series because the person has filed a certificate of dissolution or the equivalent, or its right to transact business has been suspended by its jurisdiction of formation, the certificate of dissolution or the equivalent has not been revoked or its right to transact business has not been reinstated. 6232 6233 6234 6235 6236 6237 6238 6239

(3) The person is an entity and, within ninety days after the series notifies the person that it will be expelled as a member associated with that series because the person has been dissolved and its activities are being wound up, the entity has not been reinstated or the dissolution and winding up have not been revoked or canceled. 6240 6241 6242 6243 6244 6245

(E) On application by the series, the person is expelled 6246

as a member associated with that series by tribunal order for any of the following reasons: 6247 6248

(1) The person has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, that series' activities. 6249 6250 6251

(2) The person has willfully or persistently committed, or is willfully or persistently committing, a material breach of the operating agreement or the person's duties or obligations under this chapter or other applicable law. 6252 6253 6254 6255

(3) The person has engaged, or is engaging, in conduct relating to that series' activities that makes it not reasonably practicable to carry on the activities with the person as a member associated with that series. 6256 6257 6258 6259

(F) In the case of a person who is an individual, the person dies, a guardian or general conservator is appointed for the person, or a tribunal determines that the person has otherwise become incapable of performing the person's duties as a member associated with a series under this chapter or the operating agreement. 6260 6261 6262 6263 6264 6265

(G) The person becomes a debtor in bankruptcy, executes an assignment for the benefit of creditors, or seeks, consents, or acquiesces to the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all of the person's property. This division shall not apply to a person who is the sole remaining member associated with a series. 6266 6267 6268 6269 6270 6271

(H) In the case of a person that is a trust or is acting as a member associated with a series by virtue of being a trustee of a trust, the trust's entire membership interest associated with the series is distributed, but not solely by 6272 6273 6274 6275

reason of the substitution of a successor trustee. 6276

(I) In the case of a person that is an estate or is acting as a member associated with a series by virtue of being a personal representative of an estate, the estate's entire membership interest associated with the series is distributed, but not solely by reason of the substitution of a successor personal representative. 6277 6278 6279 6280 6281 6282

(J) In the case of a member associated with a series that is not an individual, the legal existence of the person otherwise terminates. 6283 6284 6285

**Sec. 1706.766.** (A) A person who has dissociated as a member associated with a series shall have no right to participate in the activities and affairs of that series and is entitled only to receive the distributions to which that member would have been entitled if the member had not dissociated from that series. 6286 6287 6288 6289 6290 6291

(B) A person's dissociation as a member associated with a series does not of itself discharge the person from any debt, obligation, or liability to that series, the limited liability company, or the other members that the person incurred while a member associated with that series. 6292 6293 6294 6295 6296

(C) A member's dissociation from a series does not, in itself, cause the member to dissociate from any other series or require the winding up of the series. 6297 6298 6299

(D) A member's dissociation from a series does not, in itself, cause the member to dissociate from the limited liability company. 6300 6301 6302

**Sec. 1706.767.** A series may be dissolved and its activities and affairs may be wound up without causing the 6303 6304

dissolution of the limited liability company. The dissolution and winding up of a series does not abate, suspend, or otherwise affect the limitation on liabilities of the series provided by section 1706.761 of the Revised Code. 6305 6306 6307 6308

**Sec. 1706.768.** A series is dissolved and its activities and affairs shall be wound up upon the first to occur of the following: 6309 6310 6311

(A) The dissolution of the limited liability company under section 1706.47 of the Revised Code; 6312 6313

(B) An event or circumstance that the operating agreement states causes dissolution of the series; 6314 6315

(C) The consent of all of the members associated with the series; 6316 6317

(D) The passage of ninety days after the occurrence of the dissociation of the last remaining member associated with the series; 6318 6319 6320

(E) On application by a member associated with the series, the entry by the appropriate court of an order dissolving the series on the grounds that it is not reasonably practicable to carry on the series' activities in conformity with the operating agreement. 6321 6322 6323 6324 6325

**Sec. 1706.769.** (A) A dissolved series continues its existence as a series but may not carry on any activities except as is appropriate to wind up and liquidate its activities and affairs. Appropriate activities include all of the following: 6326 6327 6328 6329

(1) Collecting the assets of the series; 6330

(2) Disposing of the properties of the series that will not be distributed in kind to persons owning membership 6331 6332

interests associated with the series; 6333

(3) Discharging or making provisions for discharging the liabilities of the series; 6334 6335

(4) Distributing the remaining property of the series in accordance with section 1706.7613 of the Revised Code; 6336 6337

(5) Doing any other act necessary to wind up and liquidate the series' activities and affairs. 6338 6339

(B) In winding up a series' activities, a series may do any of the following: 6340 6341

(1) Preserve the series' activities and property as a going concern for a reasonable time; 6342 6343

(2) Prosecute, defend, or settle actions or proceedings whether civil, criminal, or administrative; 6344 6345

(3) Make an assignment of the series' property; 6346

(4) Resolve disputes by mediation or arbitration. 6347

(C) A series' dissolution, in itself: 6348

(1) Is not an assignment of the series' property; 6349

(2) Does not prevent the commencement of a proceeding by or against the series in the series' name; 6350 6351

(3) Does not abate or suspend a proceeding pending by or against the series on the effective date of dissolution; 6352 6353

(4) Does not abate, suspend, or otherwise alter the application of section 1706.7613 of the Revised Code. 6354 6355

**Sec. 1706.7610.** (A) Subject to division (C) of section 1706.769 of the Revised Code, after dissolution of a series, the remaining members associated with the series, if any, and if 6356 6357 6358

none, a person appointed by all holders of the membership interest last assigned by the last person to have been a member associated with the series, may wind up the series' activities. 6359 6360 6361

(B) The appropriate tribunal may order supervision of the winding up of a dissolved series, including the appointment of a person to wind up the series' activities for any of the following reasons: 6362 6363 6364 6365

(1) On application of a member associated with the series, if the applicant establishes good cause; 6366 6367

(2) On application of an assignee associated with a series, if both of the following apply: 6368 6369

(a) There are no members associated with the series. 6370

(b) Within a reasonable time following the dissolution a person has not been appointed pursuant to division (A) of this section. 6371 6372 6373

(3) In connection with a proceeding under division (E) of section 1706.768 of the Revised Code. 6374 6375

**Sec. 1706.7611.** (A) A dissolved series may dispose of any known claims against it by following the procedures described in division (B) of this section, at any time after the effective date of the dissolution of the series. 6376 6377 6378 6379

(B) A dissolved series may give notice of the dissolution in a record to the holder of any known claim. The notice shall do all of the following: 6380 6381 6382

(1) Identify the limited liability company and the dissolved series; 6383 6384

(2) Describe the information required to be included in a 6385

claim; 6386

(3) Provide a mailing address to which the claim is to be sent; 6387 6388

(4) State the deadline by which the dissolved series must receive the claim. The deadline shall not be sooner than one hundred twenty days from the effective date of the notice. 6389 6390 6391

(5) State that if not sooner barred, the claim will be barred if not received by the deadline. 6392 6393

(C) Unless sooner barred by any other statute limiting actions, a claim against a dissolved series is barred in either of the following circumstances: 6394 6395 6396

(1) If a claimant who was given notice under division (B) of this section does not deliver the claim to the dissolved series by the deadline; 6397 6398 6399

(2) If a claimant whose claim was rejected by the dissolved series does not commence a proceeding to enforce the claim within ninety days from the effective date of the rejected notice. 6400 6401 6402 6403

(D) For purposes of this section, "claim" includes an unliquidated claim, but does not include a contingent liability that has not matured so that there is no immediate right to bring suit or a claim based on an event occurring after the effective date of dissolution. 6404 6405 6406 6407 6408

(E) Nothing in this section shall be construed to extend any otherwise applicable statute of limitations. 6409 6410

**Sec. 1706.7612.** (A) A dissolved series may publish notice of its dissolution and request that persons with claims against the dissolved series present them in accordance with the notice. 6411 6412 6413

(B) The notice authorized by division (A) of this section shall meet all of the following criteria: 6414 6415

(1) It shall be posted prominently on the principal web site then maintained by the limited liability company, if any, and provided to the secretary of state to be posted on the web site maintained by the secretary of state in accordance with division (J) of section 1706.474 of the Revised Code. The notice shall be considered published when posted on the secretary of state's web site. 6416 6417 6418 6419 6420 6421 6422

(2) It shall describe the information that must be included in a claim and provide a mailing address to which the claim must be sent. 6423 6424 6425

(3) It shall state that if not sooner barred, a claim against the dissolved series will be barred unless a proceeding to enforce the claim is commenced within two years following the publication of the notice. 6426 6427 6428 6429

(C) If a dissolved series publishes a notice in accordance with division (B) of this section, unless sooner barred by any other statute limiting actions, the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved series within two years after the publication date of the notice: 6430 6431 6432 6433 6434 6435

(1) A claimant who was not given notice under division (B) of section 1706.7611 of the Revised Code; 6436 6437

(2) A claimant whose claim was timely sent to the dissolved series but not acted on by the dissolved series; 6438 6439

(3) A claimant whose claim is contingent at the effective date of the dissolution of the series, or is based on an event occurring after the effective date of the dissolution of the 6440 6441 6442

series. 6443

(D) A claim that is not barred under this section, any other statute limiting actions, or section 1706.7611 of the Revised Code may be enforced against either of the following: 6444 6445 6446

(1) A dissolved series, to the extent of its undistributed assets associated with the series; 6447 6448

(2) A member or assignee associated with the series to the extent of that person's proportionate share of the claim or of the assets of the series distributed to the member or assignee after dissolution, whichever is less, except as provided in division (H) of this section and only if the assets of a dissolved series have been distributed after dissolution. A person's total liability for all claims under division (D) of this section shall not exceed the total amount of assets of the series distributed to the person after dissolution of the series. 6449 6450 6451 6452 6453 6454 6455 6456 6457 6458

(E) A dissolved series that published a notice under this section may file an application with the appropriate court in the county in which the limited liability company's principal office is located or, if it has none in this state, in the county in which the limited liability company's statutory agent is or was last located. The application shall be for a determination of the amount and form of security to be provided for payment of claims that are contingent or have not been made known to the dissolved series or that are based on an event occurring after the effective date of the dissolution of the series but that, based on the facts known to the dissolved series, are reasonably estimated to arise after the effective date of the dissolution of the series. Provision need not be made for any claim that is or is reasonably anticipated to be 6459 6460 6461 6462 6463 6464 6465 6466 6467 6468 6469 6470 6471 6472

barred under division (C) of this section. 6473

(F) Within ten days after the filing of the application provided for in division (E) of this section, notice of the proceeding shall be given by the dissolved series to each potential claimant as described in that division. 6474 6475 6476 6477

(G) The appropriate court may appoint a guardian ad litem to represent all claimants whose identities are unknown in any proceeding brought under this section. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, shall be paid by the dissolved series. 6478 6479 6480 6481 6482

(H) Provision by the dissolved series for security in the amount and the form ordered by the appropriate court under division (E) of this section shall satisfy the dissolved series' obligation with respect to claims that are contingent, have not been made known to the dissolved series, or are based on an event occurring after the effective date of the dissolution of the series. Those claims may not be enforced against a person owning a membership interest to whom assets have been distributed by the dissolved series after the effective date of the dissolution of the series. 6483 6484 6485 6486 6487 6488 6489 6490 6491 6492

(I) Nothing in this section shall be construed to extend any otherwise applicable statute of limitations. 6493 6494

**Sec. 1706.7613.** (A) Upon the winding up of a series, payment or adequate provision for payment shall be made to creditors of the series, including, to the extent permitted by law, members who are associated with the series and who are also creditors of the series, in satisfaction of liabilities of the series. 6495 6496 6497 6498 6499 6500

(B) After a series complies with division (A) of this 6501

section, any surplus shall be distributed as follows: 6502

(1) First, to each person owning a membership interest associated with the series that reflects contributions made on account of that membership interest and not previously returned, an amount equal to the value of the person's unreturned contributions; 6503 6504 6505 6506 6507

(2) Then to each person owning a membership interest associated with the series in the proportions in which the owners of membership interests associated with the series share in distributions prior to dissolution of the series. 6508 6509 6510 6511

(C) If the series does not have sufficient surplus to comply with division (B)(1) of this section, any surplus shall be distributed among the owners of membership interests associated with the series in proportion to the value of their respective unreturned contributions. 6512 6513 6514 6515 6516

**Sec. 1706.81.** This chapter modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act," 15 U.S.C. 7001 et seq., but does not modify, limit, or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b). 6517 6518 6519 6520 6521 6522

**Sec. 1706.82.** A limited liability company formed and existing under this chapter may conduct its activities and affairs, carry on its operations, and have and exercise the powers granted by this chapter in any state, foreign country, or other jurisdiction. 6523 6524 6525 6526 6527

**Sec. 1706.83.** (A) Prior to January 1, 2022, this chapter shall govern the following limited liability companies: 6528 6529

(1) A limited liability company formed on or after January 6530

1, 2021, except a limited liability company that is continuing the business of a dissolved limited liability company under section 1705.44 of the Revised Code; 6531 6532 6533

(2) A limited liability company formed before January 1, 2021, that elects, pursuant to division (C) of this section, to be governed by this chapter. 6534 6535 6536

(B) On and after January 1, 2022, this chapter shall govern all limited liability companies, including every foreign limited liability company that files an application for registration as a foreign limited liability company on or after January 1, 2022, every foreign limited liability company that registers a name in this state on or after January 1, 2022, every foreign limited liability company that has registered a name in this state prior to January 1, 2022, and every foreign limited liability company that has filed an application for registration as a foreign limited liability company prior to January 1, 2022, pursuant to Chapter 1705. of the Revised Code. 6537 6538 6539 6540 6541 6542 6543 6544 6545 6546 6547

(C) On and after January 1, 2021, but prior to January 1, 2022, a limited liability company may elect, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this chapter. 6548 6549 6550 6551

**Sec. 1706.84.** Unless expressly stated to the contrary in this chapter, all amendments of this chapter shall apply to limited liability companies and members and agents whether or not existing as such at the time of the enactment of any such amendment. 6552 6553 6554 6555 6556

**Sec. 1729.36.** (A) An association may merge or consolidate with one or more entities, if such merger or consolidation is permitted by the laws under which each constituent entity exists 6557 6558 6559

<u>Select Rules from the Ohio Rules of Professional Conduct</u>

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify. . . .

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

> (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) comply as soon as practicable with reasonable requests for information from the client;
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance . . . .

RULE 1.5: FEES AND EXPENSES

(a) A lawyer shall not make an agreement for, charge, or collect an illegal or clearly excessive fee. A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. The factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) whether the fee is fixed or contingent. . . .

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (d) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary for any of the following purposes:

> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the commission of a crime by the client or other person;
>
> (3) to mitigate substantial injury to the financial interests or property of another that has resulted from the client's commission of an illegal or fraudulent act, in furtherance of which the client has used the lawyer's services;
>
> (4) to secure legal advice about the lawyer's compliance with these rules;
>
> (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was

involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order;

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of or unauthorized access to information related to the representation of a client.

(d) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to comply with Rule 3.3 or 4.1.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives informed consent, confirmed in writing;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies: (1) the representation is prohibited by law; (2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

RULE 1.9: DUTIES TO FORMER CLIENTS

(a) Unless the former client gives informed consent, confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent

another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client where both of the following apply:

> (1) the interests of the client are materially adverse to that person;
>
> (2) the lawyer had acquired information about the client that is protected by Rules 1.6 and 1.9(c) and material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter do either of the following:

> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known;
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

RULE 1.15: SAFEKEEPING FUNDS AND PROPERTY

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate interest-bearing account in a financial institution authorized to do business in Ohio and maintained in the state where the lawyer's office is situated. . . . Records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation or the appropriate disbursement of such funds or property, whichever comes first. . . .

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

RULE 1.16: DECLINING OR TERMINATING REPRESENTATION

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if any of the following applies:

> (1) the representation will result in violation of the Ohio Rules of Professional Conduct or other law;
>
> (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
>
> (3) the lawyer is discharged.

(b) Subject to divisions (c), (d), and (e) of this rule, a lawyer may withdraw from the representation of a client if any of the following applies:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

(7) the client gives informed consent to termination of the representation;

(8) the lawyer sells the law practice in accordance with Rule 1.17;

(9) other good cause for withdrawal exists.

(c) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(d) As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.

(e) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned, except when withdrawal is pursuant to Rule 1.17.

RULE 3.1: MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue in a proceeding, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RULE 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly do any of the following:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person, including the client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable measures to remedy the situation, including, if necessary, disclosure to the tribunal.

(c) The duties stated in divisions (a) and (b) of this rule continue until the issue to which the duty relates is determined by the highest tribunal that may consider the issue, or the time has expired for such determination, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6. (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RULE 4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, harass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

RULE 8.1: BAR ADMISSION AND DISCIPLINARY MATTERS

In connection with a bar admission application or in connection with a disciplinary matter, a lawyer shall not do any of the following:

(a) knowingly make a false statement of material fact;

(b) in response to a demand for information from an admissions or disciplinary authority, fail to disclose a material fact or knowingly fail to respond, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

RULE 8.4: MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(a) violate or attempt to violate the Ohio Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Ohio Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Ohio Rules of Professional Conduct, the applicable rules of judicial conduct, or other law;

(g) engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability;

(h) engage in any other conduct that adversely reflects on the lawyer's fitness to practice law.

**U.S. Department of Justice**

# U.S. Department of Justice
# Criminal Division

# Evaluation of Corporate Compliance Programs

## Guidance Document

## Updated: April 2019

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

## Introduction

The "Principles of Federal Prosecution of Business Organizations" in the Justice Manual describe specific factors that prosecutors should consider in conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. JM 9-28.300. These factors include "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and the corporation's remedial efforts "to implement an adequate and effective corporate compliance program or to improve an existing one." JM 9-28.300 (citing JM 9-28.800 and JM 9-28.1000). Additionally, the United States Sentencing Guidelines advise that consideration be given to whether the corporation had in place at the time of the misconduct an effective compliance program for purposes of calculating the appropriate organizational criminal fine. *See* U.S.S.G. §§ 8B2.1, 8C2.5(f), and 8C2.8(11). Moreover, the memorandum entitled "Selection of Monitors in Criminal Division Matters" issued by Assistant Attorney General Brian Benczkowski (hereafter, the "Benczkowski Memo") instructs prosecutors to consider, at the time of the resolution, "whether the corporation has made significant investments in, and improvements to, its corporate compliance program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future" to determine whether a monitor is appropriate.

This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations).

Because a corporate compliance program must be evaluated in the specific context of a criminal investigation, the Criminal Division does not use any rigid formula to assess the effectiveness of corporate compliance programs. We recognize that each company's risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make an individualized determination in each case. There are, however, common questions that we may ask in the course of making an individualized determination. As the Justice Manual notes, there are three "fundamental questions" a prosecutor should ask:

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?
3. "Does the corporation's compliance program work" in practice?

*See* JM § 9-28.800.

In answering each of these three "fundamental questions," prosecutors may evaluate the company's performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program. The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.[1] Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

## I. Is the Corporation's Compliance Program Well Designed?

The "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." JM 9-28.800.

Accordingly, prosecutors should examine "the comprehensiveness of the compliance program," JM 9-28.800, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce.

### A. Risk Assessment

The starting point for a prosecutor's evaluation of whether a company has a well-designed compliance program is to understand the company's business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.

Prosecutors should consider whether the program is appropriately "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business" and "complex regulatory environment[]." JM 9-28.800.[2] For example, prosecutors should consider whether the company has analyzed and addressed the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness

of the market, the regulatory landscape, potential clients and business partners, transactions with foreign governments, payments to foreign officials, use of third parties, gifts, travel, and entertainment expenses, and charitable and political donations.

Prosecutors should also consider "[t]he effectiveness of the company's risk assessment and the manner in which the company's compliance program has been tailored based on that risk assessment" and whether its criteria are "periodically updated." *See, e.g.*, JM 9-47-120(2)(c); U.S.S.G. § 8B2.1(c) ("the organization shall periodically assess the risk of criminal conduct and shall take appropriate steps to design, implement, or modify each requirement [of the compliance program] to reduce the risk of criminal conduct").

Prosecutors may credit the quality and effectiveness of a risk-based compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction in a low-risk area. Prosecutors should therefore consider, as an indicator of risk-tailoring, "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800.

> **Risk Management Process** – What methodology has the company used to identify, analyze, and address the particular risks it faces? What information or metrics has the company collected and used to help detect the type of misconduct in question? How have the information or metrics informed the company's compliance program?
>
> **Risk-Tailored Resource Allocation –** Does the company devote a disproportionate amount of time to policing low-risk areas instead of high-risk areas, such as questionable payments to third-party consultants, suspicious trading activity, or excessive discounts to resellers and distributors? Does the company give greater scrutiny, as warranted, to high-risk transactions (for instance, a large-dollar contract with a government agency in a high-risk country) than more modest and routine hospitality and entertainment?
>
> **Updates and Revisions** – Is the risk assessment current and subject to periodic review? Have there been any updates to policies and procedures in light of lessons learned? Do these updates account for risks discovered through misconduct or other problems with the compliance program?

### B. Policies and Procedures

Any well-designed compliance program entails policies and procedures that give both content and effect to ethical norms and that address and aim to reduce risks identified by the company as part of its risk assessment process. As a threshold matter, prosecutors should examine whether the company has a code of conduct that sets forth, among other things, the

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

company's commitment to full compliance with relevant Federal laws that is accessible and applicable to all company employees. As a corollary, prosecutors should also assess whether the company has established policies and procedures that incorporate the culture of compliance into its day-to-day operations.

> **Design** – What is the company's process for designing and implementing new policies and procedures, and has that process changed over time? Who has been involved in the design of policies and procedures? Have business units been consulted prior to rolling them out?
>
> **Comprehensiveness** – What efforts has the company made to monitor and implement policies and procedures that reflect and deal with the spectrum of risks it faces, including changes to the legal and regulatory landscape?
>
> **Accessibility** – How has the company communicated its policies and procedures to all employees and relevant third parties? If the company has foreign subsidiaries, are there linguistic or other barriers to foreign employees' access?
>
> **Responsibility for Operational Integration** – Who has been responsible for integrating policies and procedures? Have they been rolled out in a way that ensures employees' understanding of the policies? In what specific ways are compliance policies and procedures reinforced through the company's internal control systems?
>
> **Gatekeepers** – What, if any, guidance and training has been provided to key gatekeepers in the control processes (*e.g.*, those with approval authority or certification responsibilities)? Do they know what misconduct to look for? Do they know when and how to escalate concerns?

## C. <u>Training and Communications</u>

Another hallmark of a well-designed compliance program is appropriately tailored training and communications.

Prosecutors should assess the steps taken by the company to ensure that policies and procedures have been integrated into the organization, including through periodic training and certification for all directors, officers, relevant employees, and, where appropriate, agents and business partners. Prosecutors should also assess whether the company has relayed information in a manner tailored to the audience's size, sophistication, or subject matter expertise. Some companies, for instance, give employees practical advice or case studies to address real-life scenarios, and/or guidance on how to obtain ethics advice on a case-by-case basis as needs arise.

Prosecutors should also assess whether the training adequately covers prior compliance incidents and how the company measures the effectiveness of its training curriculum.

Prosecutors, in short, should examine whether the compliance program is being disseminated to, and understood by, employees in practice in order to decide whether the compliance program is "truly effective." JM 9-28.800.

**Risk-Based Training** – What training have employees in relevant control functions received? Has the company provided tailored training for high-risk and control employees, including training that addresses risks in the area where the misconduct occurred? Have supervisory employees received different or supplementary training? What analysis has the company undertaken to determine who should be trained and on what subjects?

**Form/Content/Effectiveness of Training** – Has the training been offered in the form and language appropriate for the audience? Is the training provided online or in-person (or both), and what is the company's rationale for its choice? Has the training addressed lessons learned from prior compliance incidents? How has the company measured the effectiveness of the training? Have employees been tested on what they have learned? How has the company addressed employees who fail all or a portion of the testing?

**Communications about Misconduct** – What has senior management done to let employees know the company's position concerning misconduct? What communications have there been generally when an employee is terminated or otherwise disciplined for failure to comply with the company's policies, procedures, and controls (*e.g.*, anonymized descriptions of the type of misconduct that leads to discipline)?

**Availability of Guidance** – What resources have been available to employees to provide guidance relating to compliance policies? How has the company assessed whether its employees know when to seek advice and whether they would be willing to do so?

## D. Confidential Reporting Structure and Investigation Process

Another hallmark of a well-designed compliance program is the existence of an efficient and trusted mechanism by which employees can anonymously or confidentially report allegations of a breach of the company's code of conduct, company policies, or suspected or actual misconduct. Prosecutors should assess whether the company's complaint-handling process includes pro-active measures to create a workplace atmosphere without fear of retaliation, appropriate processes for the submission of complaints, and processes to protect whistleblowers. Prosecutors should also assess the company's processes for handling

investigations of such complaints, including the routing of complaints to proper personnel, timely completion of thorough investigations, and appropriate follow-up and discipline.

Confidential reporting mechanisms are highly probative of whether a company has "established corporate governance mechanisms that can effectively detect and prevent misconduct." JM 9-28.800; *see also* U.S.S.G. § 8B2.1(b)(5)(C) (an effectively working compliance program will have in place, and have publicized, "a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation").

**Effectiveness of the Reporting Mechanism** – Does the company have an anonymous reporting mechanism, and, if not, why not? How is the reporting mechanism publicized to the company's employees? Has it been used? How has the company assessed the seriousness of the allegations it received? Has the compliance function had full access to reporting and investigative information?

**Properly Scoped Investigations by Qualified Personnel** – How does the company determine which complaints or red flags merit further investigation? How does the company ensure that investigations are properly scoped? What steps does the company take to ensure investigations are independent, objective, appropriately conducted, and properly documented? How does the company determine who should conduct an investigation, and who makes that determination?

**Investigation Response** – Does the company apply timing metrics to ensure responsiveness? Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings or recommendations?

**Resources and Tracking of Results** – Are the reporting and investigating mechanisms sufficiently funded? How has the company collected, tracked, analyzed, and used information from its reporting mechanisms? Does the company periodically analyze the reports or investigation findings for patterns of misconduct or other red flags for compliance weaknesses?

### E. Third Party Management

A well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the degree of appropriate due diligence may vary based on the size

and nature of the company or transaction, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.

Prosecutors should also assess whether the company knows its third-party partners' reputations and relationships, if any, with foreign officials, and the business rationale for needing the third party in the transaction. For example, a prosecutor should analyze whether the company has ensured that contract terms with third parties specifically describe the services to be performed, that the third party is actually performing the work, and that its compensation is commensurate with the work being provided in that industry and geographical region. Prosecutors should further assess whether the company engaged in ongoing monitoring of the third-party relationships, be it through updated due diligence, training, audits, and/or annual compliance certifications by the third party.

In sum, a company's third-party due diligence practices are a factor that prosecutors should assess to determine whether a compliance program is in fact able to "detect the particular types of misconduct most likely to occur in a particular corporation's line of business." JM 9-28.800.

**Risk-Based and Integrated Processes** – How has the company's third-party management process corresponded to the nature and level of the enterprise risk identified by the company? How has this process been integrated into the relevant procurement and vendor management processes?

**Appropriate Controls** – How does the company ensure there is an appropriate business rationale for the use of third parties? If third parties were involved in the underlying misconduct, what was the business rationale for using those third parties? What mechanisms exist to ensure that the contract terms specifically describe the services to be performed, that the payment terms are appropriate, that the described contractual work is performed, and that compensation is commensurate with the services rendered?

**Management of Relationships** – How has the company considered and analyzed the compensation and incentive structures for third parties against compliance risks? How does the company monitor its third parties? Does the company have audit rights to analyze the books and accounts of third parties, and has the company exercised those rights in the past? How does the company train its third party relationship

managers about compliance risks and how to manage them? How does the company incentivize compliance and ethical behavior by third parties?

**Real Actions and Consequences** – Does the company track red flags that are identified from due diligence of third parties and how those red flags are addressed? Does the company keep track of third parties that do not pass the company's due diligence or that are terminated, and does the company take steps to ensure that those third parties are not hired or re-hired at a later date? If third parties were involved in the misconduct at issue in the investigation, were red flags identified from the due diligence or after hiring the third party, and how were they resolved? Has a similar third party been suspended, terminated, or audited as a result of compliance issues?

### F. Mergers and Acquisitions (M&A)

A well-designed compliance program should include comprehensive due diligence of any acquisition targets. Pre-M&A due diligence enables the acquiring company to evaluate more accurately each target's value and negotiate for the costs of any corruption or misconduct to be borne by the target. Flawed or incomplete due diligence can allow misconduct to continue at the target company, causing resulting harm to a business's profitability and reputation and risking civil and criminal liability.

The extent to which a company subjects its acquisition targets to appropriate scrutiny is indicative of whether its compliance program is, as implemented, able to effectively enforce its internal controls and remediate misconduct at all levels of the organization.

**Due Diligence Process** – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What is the M&A due diligence process generally?

**Integration in the M&A Process** – How has the compliance function been integrated into the merger, acquisition, and integration process?

**Process Connecting Due Diligence to Implementation** – What has been the company's process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company's process for implementing compliance policies and procedures at new entities?

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

## II. Is the Corporation's Compliance Program Being Implemented Effectively?

Even a well-designed compliance program may be unsuccessful in practice if implementation is lax or ineffective. Prosecutors are instructed to probe specifically whether a compliance program is a "paper program" or one "implemented, reviewed, and revised, as appropriate, in an effective manner." JM 9-28.800. In addition, prosecutors should determine "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts." JM 9-28.800. Prosecutors should also determine "whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it." JM 9-28.800; *see also* JM 9-47.120(2)(c) (criteria for an effective compliance program include "[t]he company's culture of compliance, including awareness among employees that any criminal conduct, including the conduct underlying the investigation, will not be tolerated").

### A. Commitment by Senior and Middle Management

Beyond compliance structures, policies, and procedures, it is important for a company to create and foster a culture of ethics and compliance with the law. The effectiveness of a compliance program requires a high-level commitment by company leadership to implement a culture of compliance from the top.

The company's top leaders – the board of directors and executives – set the tone for the rest of the company. Prosecutors should examine the extent to which senior management have clearly articulated the company's ethical standards, conveyed and disseminated them in clear and unambiguous terms, and demonstrated rigorous adherence by example. Prosecutors should also examine how middle management, in turn, have reinforced those standards and encouraged employees to abide by them. *See* U.S.S.G. § 8B2.1(b)(2)(A)-(C) (the company's "*governing authority* shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight" of it; "[*h*]*igh-level personnel* … shall ensure that the organization has an effective compliance and ethics program" (emphasis added)).

> **Conduct at the Top** – How have senior leaders, through their words and actions, encouraged or discouraged compliance, including the type of misconduct involved in the investigation? What concrete actions have they taken to demonstrate leadership in the company's compliance and remediation efforts? How have they modelled proper behavior to subordinates? Have managers tolerated greater compliance risks in pursuit of new business or greater revenues? Have managers encouraged employees to act unethically to achieve a business objective, or impeded compliance personnel from effectively implementing their duties?

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

**Shared Commitment** – What actions have senior leaders and middle-management stakeholders (*e.g.*, business and operational managers, finance, procurement, legal, human resources) taken to demonstrate their commitment to compliance or compliance personnel, including their remediation efforts? Have they persisted in that commitment in the face of competing interests or business objectives?

**Oversight** – What compliance expertise has been available on the board of directors? Have the board of directors and/or external auditors held executive or private sessions with the compliance and control functions? What types of information have the board of directors and senior management examined in their exercise of oversight in the area in which the misconduct occurred?

**B. <u>Autonomy and Resources</u>**

Effective implementation also requires those charged with a compliance program's day-to-day oversight to act with adequate authority and stature. As a threshold matter, prosecutors should evaluate how the compliance program is structured. Additionally, prosecutors should address the sufficiency of the personnel and resources within the compliance function, in particular, whether those responsible for compliance have: (1) sufficient seniority within the organization; (2) sufficient resources, namely, staff to effectively undertake the requisite auditing, documentation, and analysis; and (3) sufficient autonomy from management, such as direct access to the board of directors or the board's audit committee. The sufficiency of each factor, however, will depend on the size, structure, and risk profile of the particular company. "A large organization generally shall devote more formal operations and greater resources . . . than shall a small organization." Commentary to U.S.S.G. § 8B2.1 note 2(C). By contrast, "a small organization may [rely on] less formality and fewer resources." *Id.* Regardless, if a compliance program is to be truly effective, compliance personnel must be empowered within the company.

Prosecutors should evaluate whether "internal audit functions [are] conducted at a level sufficient to ensure their independence and accuracy," as an indicator of whether compliance personnel are in fact empowered and positioned to "effectively detect and prevent misconduct." JM 9-28.800. Prosecutors should also evaluate "[t]he resources the company has dedicated to compliance," "[t]he quality and experience of the personnel involved in compliance, such that they can understand and identify the transactions and activities that pose a potential risk," and "[t]he authority and independence of the compliance function and the availability of compliance expertise to the board." JM 9-47.120(2)(c); *see also* JM 9-28.800 (instructing prosecutors to evaluate whether "the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law"); U.S.S.G. § 8B2.1(b)(2)(C) (those with "day-to-day operational

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

responsibility" shall have "adequate resources, appropriate authority and direct access to the governing authority or an appropriate subgroup of the governing authority").

**Structure** – Where within the company is the compliance function housed (e.g., within the legal department, under a business function, or as an independent function reporting to the CEO and/or board)? To whom does the compliance function report? Is the compliance function run by a designated chief compliance officer, or another executive within the company, and does that person have other roles within the company? Are compliance personnel dedicated to compliance responsibilities, or do they have other, non-compliance responsibilities within the company? Why has the company chosen the compliance structure it has in place?

**Seniority and Stature** – How does the compliance function compare with other strategic functions in the company in terms of stature, compensation levels, rank/title, reporting line, resources, and access to key decision-makers? What has been the turnover rate for compliance and relevant control function personnel? What role has compliance played in the company's strategic and operational decisions? How has the company responded to specific instances where compliance raised concerns? Have there been transactions or deals that were stopped, modified, or further scrutinized as a result of compliance concerns?

**Experience and Qualifications** – Do compliance and control personnel have the appropriate experience and qualifications for their roles and responsibilities? Has the level of experience and qualifications in these roles changed over time? Who reviews the performance of the compliance function and what is the review process?

**Funding and Resources** – Has there been sufficient staffing for compliance personnel to effectively audit, document, analyze, and act on the results of the compliance efforts? Has the company allocated sufficient funds for the same? Have there been times when requests for resources by compliance and control functions have been denied, and if so, on what grounds?

**Autonomy** – Do the compliance and relevant control functions have direct reporting lines to anyone on the board of directors and/or audit committee? How often do they meet with directors? Are members of the senior management present for these meetings? How does the company ensure the independence of the compliance and control personnel?

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

**Outsourced Compliance Functions** – Has the company outsourced all or parts of its compliance functions to an external firm or consultant? If so, why, and who is responsible for overseeing or liaising with the external firm or consultant? What level of access does the external firm or consultant have to company information? How has the effectiveness of the outsourced process been assessed?

## C. Incentives and Disciplinary Measures

Another hallmark of effective implementation of a compliance program is the establishment of incentives for compliance and disincentives for non-compliance. Prosecutors should assess whether the company has clear disciplinary procedures in place, enforces them consistently across the organization, and ensures that the procedures are commensurate with the violations. Prosecutors should also assess the extent to which the company's communications convey to its employees that unethical conduct will not be tolerated and will bring swift consequences, regardless of the position or title of the employee who engages in the conduct. *See* U.S.S.G. § 8B2.1(b)(5)(C) ("the organization's compliance program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct").

By way of example, some companies have found that publicizing disciplinary actions internally, where appropriate, can have valuable deterrent effects. At the same time, some companies have also found that providing positive incentives – personnel promotions, rewards, and bonuses for improving and developing a compliance program or demonstrating ethical leadership – have driven compliance. Some companies have even made compliance a significant metric for management bonuses and/or have made working on compliance a means of career advancement.

**Human Resources Process** – Who participates in making disciplinary decisions, including for the type of misconduct at issue? Is the same process followed for each instance of misconduct, and if not, why? Are the actual reasons for discipline communicated to employees? If not, why not? Are there legal or investigation-related reasons for restricting information, or have pre-textual reasons been provided to protect the company from whistleblowing or outside scrutiny?

**Consistent Application** – Have disciplinary actions and incentives been fairly and consistently applied across the organization? Are there similar instances of misconduct that were treated disparately, and if so, why?

**Incentive System** – Has the company considered the implications of its incentives and rewards on compliance? How does the company incentivize compliance and ethical behavior? Have there been specific examples of actions taken (*e.g.*, promotions or awards denied) as a result of compliance and ethics considerations? Who determines the compensation, including bonuses, as well as discipline and promotion of compliance personnel?

## III. Does the Corporation's Compliance Program Work in Practice?

The Principles of Federal Prosecution of Business Organizations require prosecutors to assess "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision." JM 9-28.300. Due to the backward-looking nature of the first inquiry, one of the most difficult questions prosecutors must answer in evaluating a compliance program following misconduct is whether the program was working effectively at the time of the offense, especially where the misconduct was not immediately detected.

In answering this question, it is important to note that the existence of misconduct does not, by itself, mean that a compliance program did not work or was ineffective at the time of the offense. *See* U.S.S.G. § 8B2.1(a) ("[t]he failure to prevent or detect the instant offense does not mean that the program is not generally effective in preventing and deterring misconduct"). Indeed, "[t]he Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees." JM 9-28.800. Of course, if a compliance program did effectively identify misconduct, including allowing for timely remediation and self-reporting, a prosecutor should view the occurrence as a strong indicator that the compliance program was working effectively.

In assessing whether a company's compliance program was effective at the time of the misconduct, prosecutors should consider whether and how the misconduct was detected, what investigation resources were in place to investigate suspected misconduct, and the nature and thoroughness of the company's remedial efforts.

To determine whether a company's compliance program is working effectively at the time of a charging decision or resolution, prosecutors should consider whether the program evolved over time to address existing and changing compliance risks. Prosecutors should also consider whether the company undertook an adequate and honest root cause analysis to understand both what contributed to the misconduct and the degree of remediation needed to prevent similar events in the future.

For example, prosecutors should consider, among other factors, "whether the corporation has made significant investments in, and improvements to, its corporate compliance

program and internal controls systems" and "whether remedial improvements to the compliance program and internal controls have been tested to demonstrate that they would prevent or detect similar misconduct in the future." Benczkowski Memo at 2 (observing that "[w]here a corporation's compliance program and controls are demonstrated to be effective and appropriately resourced at the time of resolution, a monitor will not likely be necessary").

### A. Continuous Improvement, Periodic Testing, and Review

One hallmark of an effective compliance program is its capacity to improve and evolve. The actual implementation of controls in practice will necessarily reveal areas of risk and potential adjustment. A company's business changes over time, as do the environments in which it operates, the nature of its customers, the laws that govern its actions, and the applicable industry standards. Accordingly, prosecutors should consider whether the company has engaged in meaningful efforts to review its compliance program and ensure that it is not stale. Some companies survey employees to gauge the compliance culture and evaluate the strength of controls, and/or conduct periodic audits to ensure that controls are functioning well, though the nature and frequency of evaluations may depend on the company's size and complexity.

Prosecutors may reward efforts to promote improvement and sustainability. In evaluating whether a particular compliance program works in practice, prosecutors should consider "revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47-120(2)(c) (looking to "[t]he auditing of the compliance program to assure its effectiveness"). Prosecutors should likewise look to whether a company has taken "reasonable steps" to "ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct," and "evaluate periodically the effectiveness of the organization's" program. U.S.S.G. § 8B2.1(b)(5). Proactive efforts like these may not only be rewarded in connection with the form of any resolution or prosecution (such as through remediation credit or a lower applicable fine range under the Sentencing Guidelines), but more importantly, may avert problems down the line.

> **Internal Audit** – What is the process for determining where and how frequently internal audit will undertake an audit, and what is the rationale behind that process? How are audits carried out? What types of audits would have identified issues relevant to the misconduct? Did those audits occur and what were the findings? What types of relevant audit findings and remediation progress have been reported to management and the board on a regular basis? How have management and the board followed up? How often does internal audit conduct assessments in high-risk areas?

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

**Control Testing** – Has the company reviewed and audited its compliance program in the area relating to the misconduct? More generally, what testing of controls, collection and analysis of compliance data, and interviews of employees and third-parties does the company undertake? How are the results reported and action items tracked?

**Evolving Updates** – How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices? Has the company undertaken a gap analysis to determine if particular areas of risk are not sufficiently addressed in its policies, controls, or training? What steps has the company taken to determine whether policies/procedures/practices make sense for particular business segments/subsidiaries?

**Culture of Compliance** – How often and how does the company measure its culture of compliance? Does the company seek input from all levels of employees to determine whether they perceive senior and middle management's commitment to compliance? What steps has the company taken in response to its measurement of the compliance culture?

### B. Investigation of Misconduct

Another hallmark of a compliance program that is working effectively is the existence of a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct by the company, its employees, or agents. An effective investigations structure will also have an established means of documenting the company's response, including any disciplinary or remediation measures taken.

**Properly Scoped Investigation by Qualified Personnel** – How has the company ensured that the investigations have been properly scoped, and were independent, objective, appropriately conducted, and properly documented?

**Response to Investigations** – Have the company's investigations been used to identify root causes, system vulnerabilities, and accountability lapses, including among supervisory manager and senior executives? What has been the process for responding to investigative findings? How high up in the company do investigative findings go?

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

## C. Analysis and Remediation of Any Underlying Misconduct

Finally, a hallmark of a compliance program that is working effectively in practice is the extent to which a company is able to conduct a thoughtful root cause analysis of misconduct and timely and appropriately remediate to address the root causes.

Prosecutors evaluating the effectiveness of a compliance program are instructed to reflect back on "the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned." JM 9-28.800; *see also* JM 9-47.120(3)(c) ("to receive full credit for timely and appropriate remediation" under the FCPA Corporate Enforcement Policy, a company should demonstrate "a root cause analysis" and, where appropriate, "remediation to address the root causes").

Prosecutors should consider "any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program." JM 98-28.800; *see also* JM 9-47-120(2)(c) (looking to "[a]ppropriate discipline of employees, including those identified by the company as responsible for the misconduct, either through direct participation or failure in oversight, as well as those with supervisory authority over the area in which the criminal conduct occurred" and "any additional steps that demonstrate recognition of the seriousness of the misconduct, acceptance of responsibility for it, and the implementation of measures to reduce the risk of repetition of such misconduct, including measures to identify future risk").

**Root Cause Analysis** – What is the company's root cause analysis of the misconduct at issue? Were any systemic issues identified? Who in the company was involved in making the analysis?

**Prior Weaknesses** – What controls failed? If policies or procedures should have prohibited the misconduct, were they effectively implemented, and have functions that had ownership of these policies and procedures been held accountable?

**Payment Systems** – How was the misconduct in question funded (*e.g.*, purchase orders, employee reimbursements, discounts, petty cash)? What processes could have prevented or detected improper access to these funds? Have those processes been improved?

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

**Vendor Management** – If vendors were involved in the misconduct, what was the process for vendor selection and did the vendor undergo that process?

**Prior Indications** – Were there prior opportunities to detect the misconduct in question, such as audit reports identifying relevant control failures or allegations, complaints, or investigations? What is the company's analysis of why such opportunities were missed?

**Remediation** – What specific changes has the company made to reduce the risk that the same or similar issues will not occur in the future? What specific remediation has addressed the issues identified in the root cause and missed opportunity analysis?

**Accountability** – What disciplinary actions did the company take in response to the misconduct and were they timely? Were managers held accountable for misconduct that occurred under their supervision? Did the company consider disciplinary actions for failures in supervision? What is the company's record (*e.g.*, number and types of disciplinary actions) on employee discipline relating to the types of conduct at issue? Has the company ever terminated or otherwise disciplined anyone (reduced or eliminated bonuses, issued a warning letter, etc.) for the type of misconduct at issue?

---

[1] Many of the topics also appear in the following resources:

- Justice Manual ("JM")
    - JM 9-28.000 Principles of Federal Prosecution of Business Organizations, Justice Manual ("JM"), *available at* https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations.
    - JM 9-47.120 FCPA Corporate Enforcement Policy, *available at* https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977#9-47.120.
- Chapter 8 – Sentencing of Organizations - United States Sentencing Guidelines ("U.S.S.G."), *available at* https://www.ussc.gov/guidelines/2018-guidelines-manual/2018-chapter-8#NaN.

**U.S. Department of Justice**
**Criminal Division**

**Evaluation of Corporate Compliance Programs**

**(Updated April 2019)**

---

- Memorandum entitled "Selection of Monitors in Criminal Division Matters," issued by Assistant Attorney General Brian Benczkowski on October 11, 2018, *available at* https://www.justice.gov/criminal-fraud/file/1100366/download.
- Criminal Division corporate resolution agreements, *available at* https://www.justice.gov/news (DOJ's Public Affairs website contains press releases for all Criminal Division corporate resolutions which contain links to charging documents and agreements).
- A Resource Guide to the U.S. Foreign Corrupt Practices Act ("FCPA Guide") published in November 2012 by the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) *available at* https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf.
- Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted by the Organization for Economic Co-operation and Development ("OECD") Council on February 18, 2010 *available at* https://www.oecd.org/daf/anti-bribery/44884389.pdf.
- Anti-Corruption Ethics and Compliance Handbook for Business ("OECD Handbook") published in 2013 by OECD, United Nations Office on Drugs and Crime, and the World Bank *available at* https://www.oecd.org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf.

[2] As discussed in the Justice Manual, many companies operate in complex regulatory environments outside the normal experience of criminal prosecutors. JM 9-28.000. For example, financial institutions such as banks, subject to the Bank Secrecy Act statute and regulations, require prosecutors to conduct specialized analyses of their compliance programs in the context of their anti-money laundering requirements. Consultation with the Money Laundering and Asset Recovery Section is recommended when reviewing AML compliance. *See* https://www.justice.gov/criminal-mlars. Prosecutors may also wish to review guidance published by relevant federal and state agencies. *See* Federal Financial Institutions Examination Council/Bank Secrecy Act/Anti-Money Laundering Examination Manual, *available at* https://www.ffiec.gov/bsa_aml_infobase/pages_manual/manual_online.htm).

Reprinted with the permission of LexisNexis

Neutral
As of: December 9, 2019 8:20 PM Z

# DriveTime Car Sales Co., LLC v. Pettigrew

United States District Court for the Southern District of Ohio, Eastern Division

April 18, 2019, Filed

Case No.: 2:17-cv-371

**Reporter**
2019 U.S. Dist. LEXIS 66339 *; 2019 WL 1746730

DRIVETIME CAR SALES COMPANY, LLC, Plaintiff, v. BRYAN PETTIGREW, et al., Defendants.

**Prior History:** Drivetime Car Sales Co. v. Pettigrew, 2018 U.S. Dist. LEXIS 20092 (S.D. Ohio, Feb. 7, 2018)

**Counsel:** **[*1]** For DriveTime Car Sales Company, Plaintiff: Jonathan Rea Secrest, LEAD ATTORNEY, Dickinson Wright PLLC, Columbus, OH.

For Bryan Pettigrew, Defendant: Theresa Lynn Nelson, LEAD ATTORNEY, Strauss Troy Co., LPA, Cincinnati, OH.

For Pauley Motor Car Company, Defendant: John Kevin West, LEAD ATTORNEY, Steptoe & Johnson PLLC, Columbus, OH; Alana Valle Tanoury, Steptoe & Johnson, PLLC.

**Judges:** GEORGE C. SMITH, UNITED STATES DISTRICT JUDGE. Magistrate Judge Vascura.

**Opinion by:** GEORGE C. SMITH

## Opinion

**OPINION AND ORDER**

This matter is before the Court upon Defendant Pauley Motor Car Co. Preowned Vehicles, LLC's Motion for Summary Judgment ("Pauley Motor's Motion") (Doc. 78), Defendant Bryan Pettigrew's Motion for Summary Judgment ("Pettigrew's Motion") (Doc. 85), and Plaintiff DriveTime Car Sales Company, LLC's Motion for Spoliation Sanctions ("DriveTime's Motion") (Doc. 94). The motions are fully briefed and ripe for disposition. For the following reasons, Pauley Motor's and Pettigrew's Motions are **DENIED** and DriveTime's Motion is **GRANTED IN PART and DENIED IN PART**.

**I. BACKGROUND**

Plaintiff DriveTime Car Sales Company, LLC ("DriveTime"), a citizen of Arizona, is a used vehicle retailer who acquires its vehicles primarily from **[*2]** used vehicle auctions around the country. (Doc. 12, Am. Compl. ¶ 11). Defendant Bryan Pettigrew, a citizen of Ohio, is a former employee of DriveTime, who was responsible for purchasing vehicles on DriveTime's behalf. (Doc. 77, Pettigrew Dep. at 53).

DriveTime's buyers, like Pettigrew, were provided with a buying guide that contained maximum purchase prices for different models, makes, and years. (*Id.* at 63; Doc. 84, Tyler Dep. at 21). DriveTime's buyers also used industry standard pricing information from the National Automotive Dealers Association ("NADA") when evaluating used cars for purchase. (Doc. 100-1, Sarchett Dec. ¶ 4). There is conflicting evidence as to whether buyers were permitted to exercise discretion to purchase vehicles above the maximum prices in the buying guides. (Doc. 80, Sarchett Dep. at 44-46,216).

Much of Pettigrew's buying activity for DriveTime occurred at the Columbus Fair Auto Auction (the "Auction"). Sellers bring their cars to the Auction, where buyers like Pettigrew bid on and purchase them. The

parties dispute whether the purchase contract for each vehicle is entered into with the Auction, as consignee, or directly with the vehicle sellers. (Doc. 78, Pauley Motor's **[*3]** Reply at 2; Doc. 100, DriveTime's Resp. at 22-23; Doc. 100-1, Sarchett Dec. ¶ 14).

During the period of January through June 2016, Pettigrew purchased at the Auction what DriveTime contends was an unusually large number of vehicles from Defendant Pauley Motor, and those vehicles were purchased at what DriveTime contends were above-market rates. DriveTime had available to it the buying guide and NADA pricing information for all vehicles purchased by Pettigrew, as well as the prices he agreed to for each vehicle, as each purchase was made. (Doc. 77, Pettigrew Dep. at 118-20). In March 2016, Pettigrew's supervisor spoke with him regarding the high volume and prices for vehicles he purchased from Pauley Motor. (Doc. 80, Sarchett Dep. at 96-97; Doc. 77, Pettigrew Dep. at 127).

In June 2016, DriveTime received a report from another of its buyers, Mitch Tyler. Tyler reported that he had been told by Shawn Stratton, another car dealer who sold vehicles at the Auction, that Stratton witnessed Bruce Pauley, of Pauley Motor, giving Pettigrew "a bunch of hundreds in the restroom . . . ." (Doc. 84, Tyler Dep. at 58-59). However, Tyler is adamant that "Nile only stuff I knew is what I was told about. **[*4]** And I never witnessed anything, I never saw anything. Nothing. I was told it by another buyer/seller that he witnessed Bryan taking money from Bruce. I never witnessed anything, I never saw it. So really, it's hearsay. That's all I know." (*Id.* at 57). More importantly, when Stratton was deposed, he categorically denied Tyler's report:

> Q: At any time, have you ever told Mitchell Tyler that you have seen, personally observed, Bryan Pettigrew take cash from anyone?
> A: Okay. So, I'm going to answer the question as I don't recall that conversation. I've never seen Bryan Pettigrew take any money from Bruce Pauley or any of the Palley associates.
> Q: Have you seen him take money from anyone?
> A: I have not.

(Doc. 65, Stratton Dep. at 48).

However, prior to Stratton's deposition, DriveTime was prompted by Tyler's report to look more closely at Pettigrew's buying patterns. DriveTime's analysis revealed that Pettigrew paid noticeably more for Pauley Motor vehicles (on average 106.75% of NADA value) than he did for vehicles purchased from other sellers (99.53%). (Doc. 100, Resp. at 7; Doc. 100, Sarchett Dec. ¶¶ 3-7; Doc. 100-2, Vehicle Purchase Records). Additionally, Pettigrew paid noticeably more for Pauley **[*5]** Motor vehicles (106.75%) than did Tyler when he purchased vehicles from Pauley Motor (98.71%). Finally, during discovery, Pettigrew's bank records showed that on at least five occasions, he made cash deposits of at least $1,000 within 24 hours of making a purchase from Pauley Motor. (Doc. 100, Resp. at 8; Doc. 104, Bank Records; Doc. 100-2, Vehicle Purchase Records).

DriveTime also learned that Pauley Motor regularly offered a $100 Visa gift card to the successful bidder for each of its vehicles sold at the Auction. (Doc. 84, Tyler Dep. at 69-70). Pettigrew had never forwarded the gift cards offered for the vehicles he purchased from Pauley Motor, despite an alleged DriveTime policy requiring buyers to accept any gift cards or other valuable property offered to them and to forward the items to DriveTime's home office. (Doc. 84, Tyler Dep. at 71-73; Doc. 80, Sarchett Dep. at 108). Pettigrew disputes that such a policy was in place.

On the basis of Tyler's report,[1] Pettigrew's buying patterns, and Pettigrew's failure to turn over the gift cards, DriveTime commenced this action on May 1, 2017. DriveTime's Amended Complaint alleged that Pettigrew and Pauley Motor entered into a kickback scheme **[*6]** whereby Pauley Motor would provide Pettigrew with cash payments in exchange for his agreement to higher purchase prices for Pauley Motor vehicles. (Doc. 12, Am. Compl.). DriveTime also sought recovery for the value of the gift cards Pettigrew failed to turn over. (*Id.*). After certain claims were dismissed on Pauley Motor's motion for judgment on the pleadings (Doc. 27, Opinion and Order), DriveTime asserts the following remaining claims: (1) theft of the gift cards, under *Ohio Revised Code § 2307.61*, against Pettigrew;

---

[1] Tyler is correct that his report to DriveTime is hearsay, and although it may be admissible to show the effect on the listener (*e.g.*, to demonstrate why DriveTime began to take a closer look at Pettigrew's buying activities at the Auction), it is inadmissible to prove the truth of the statement (*e.g.*, that Pettigrew did, in fact, accept cash from Pauley Motor). *See Fed. R. Evid. 801-802* (hearsay statements not admissible to prove the truth of the matter asserted); *Biegas v. Quickway Carriers, Inc., 573 F.3d 365,379 (6th Cir. 2009)* (statements offered to show their effect on the listener are not hearsay). The Court will therefore disregard Tyler's report in considering whether DriveTime has offered sufficient evidence of cash payments from Pauley Motor to Pettigrew.

(2) conversion of the gift cards, against Pettigrew; (3) fraud, against Pettigrew; (4) breach of the duty of good faith and loyalty, against Pettigrew; and (5) unjust enrichment, against Pauley Motor. Defendants now move for summary judgment on all remaining claims against them. (Does. 78, 85).

DriveTime has also filed a motion for spoliation sanctions against Pauley Motor. (Doc. 94). During discovery, Pauley Motor first stated in its interrogatory responses that no text messages between Pauley Motor representatives and Pettigrew exist; however, in his deposition as Pauley Motor's representative under *Fed. R. Civ. P. 30(b)(6)*, Bruce Pauley stated that he had exchanged text messages with Pettigrew. (Doc. 94-1, **[*7]** Pauley Motor's Interrog. Resps.; Doc. 96, Pauley Dep. at 59). Bruce Pauley was ultimately unable to produce the content of the text messages because he had obtained a new phone and had not preserved the contents of his previous phone, despite being put on notice to do so in November of 2016 by a litigation hold letter issued by DriveTime's counsel. (Doc. 96, Pauley Dep. at 72; Doc. 94-2, Litigation Hold Letter). DriveTime asks that, as a sanction for Pauley Motor's failure to take reasonable steps to preserve the text messages, the Court impose a mandatory adverse inference that the content of the text messages was unfavorable to Pauley Motor.

## II. DRIVETIME'S MOTION FOR SPOLIATION SANCTIONS

The Court turns first to DriveTime's motion for spoliation sanctions because its requested remedy—a mandatory adverse inference that the missing text messages were unfavorable to Pauley Motor—could affect the evidence the Court will consider in deciding the Defendants' motions for summary judgment.

Prior to the Federal Rule of Civil Procedure amendments of 2015, the standard in the Sixth Circuit was that a party seeking spoliation sanctions must establish: "(1) that the party having control over the **[*8]** evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claims or defenses such that a reasonable trier of fact could find that it would support that claim or defense." *Beaven v. U.S. Dep't of Justice, 622 F.3d 540, 553 (6th Cir. 2010)* (internal quotation marks omitted). However, effective December 1, 2015, *Federal Rule of Civil Procedure 37(e)* was amended to include the following:

> **(e) Failure to Preserve Electronically Stored Information**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > **(1)** upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> >
> > **(2)** only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> >
> > > **(A)** presume that the lost information was unfavorable to the party;
> > >
> > > **(B)** instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > **(C)** dismiss **[*9]** the action or enter a default judgment.

Although the amended rule clearly supplants certain aspects of the Sixth Circuit's standard, courts within the Sixth Circuit have continued to apply *Beavin* and amended *Rule 37(e)* in concert where they do not conflict. *E.g.*, *M.F. v. Perry Cty. Children & Family Servs., No. 2:15-CV-2731, 2017 U.S. Dist. LEXIS 213959, 2017 WL 6508573, at *9 (S.D. Ohio Sept. 13, 2017)* (Watson, J.), *aff'd*, *725 F. App'x 400 (6th Cir. 2018)*; *Nancy J. Brown, Plaintiff, v. Duke Energy Cop., No. 1:13CV869, 2019 U.S. Dist. LEXIS 54923, 2019 WL 1439402, at *5 (S.D. Ohio Mar. 31, 2019)* (Barrett, J.). In particular, *Beavin's* requirement that there be an obligation to preserve at the time of destruction, and that the destroyed evidence must have been relevant to the claims or defenses of the party seeking sanctions, are left intact by amended *Rule 37(e)*.

However, the *Beavin* standard's "culpable state of mind" no longer applies to less severe sanctions under *Rule 37(e)(1)*; instead, the party seeking sanctions under *Rule 37(e)(1)* must only demonstrate prejudice. *Yoe v. Crescent Sock Co., No. 1:15-CV-3-SKL, 2017 U.S. Dist. LEXIS 187900, 2017 WL 5479932, at *11 (E.D. Term. Nov. 14, 2017)*. On the other hand, to obtain the more severe sanctions available under *Rule 37(e)(2)*, the

party seeking sanctions must establish that the opposing party "acted with the intent to deprive another party of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2). "A showing of negligence or even gross negligence," which would have sufficed as a **[*10]** culpable state of mind under *Beavin*, "will not do the trick." Applebaum v. Target Corp., 831 F.3d 740, 745 (6th Cir. 2016).

Here, Pauley Motor does not dispute that it had an obligation to preserve text messages between its representatives and Pettigrew or that it failed to take reasonable steps to preserve them. (*See generally* Doc. 106, Resp.). DriveTime has also established that the text messages cannot be restored or replaced through additional discovery, because neither Pettigrew nor the wireless carriers for Pauley Motor's representatives have access to them either.[2] (Doc. 94, DriveTime's Mot. at 6; Doc. 66, Pauley Dec. ¶¶ 8-9). Thus, in order to obtain the mandatory adverse inference it seeks under Rule 37(e)(2), the only additional requirement under the Rule is that Pauley Motor acted with the intent to deprive DriveTime of the text messages' use in the litigation when it failed to preserve them.

The Court finds that DriveTime has not sufficiently demonstrated that Pauley Motor acted with the requisite intent. "Rule 37(e)(2)'s intent standard is stringent and does not parallel other discovery standards." Culhane v. Wal-Mart Supercenter, No. 2:17-CV-13061, 364 F. Supp. 3d 768, 2019 U.S. Dist. LEXIS 40670, 2019 WL 1097488, at *3 (E.D. Mich. Jan. 10, 2019) (quoting Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 431 (W.D.N.Y. 2017) and Jenkins v. Woody, 2017 U.S. Dist. LEXIS 9581, 2017 WL 362475, *17 (E.D. Va. 2017)) (internal quotation marks omitted). As noted by the Advisory Committee in connection with the **[*11]** December 2015 amendments to Rule 37,

> [A] party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have.

Rule 37, Advisory Committee Notes, 2015 Amendment. Accordingly, the Advisory Committee's intent was "to limit the most severe measures [to cure prejudice caused by the loss of electronically stored information] to instances of intentional loss or destruction." *Id.* These concerns apply equally to "the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial." *Id.* Therefore, the Court's analysis is not altered by the case's summary judgment posture.

Although Bruce Pauley failed to take reasonable steps to preserve the text messages when he switched to a different phone (Doc. 96, Pauley Dep. **[*12]** at 72), there is no evidence that he did so intentionally beyond DriveTime's speculation. This is not sufficient to impose a mandatory adverse inference under Rule 37(e)(2). *See* Yoe v. Crescent Sock Co., No. 1:15-CV-3-SKL, 2017 U.S. Dist. LEXIS 187900, 2017 WL 5479932, at *14 (E.D. Tenn. Nov. 14, 2017) (even where corporate plaintiff's data was destroyed intentionally, Rule 37(e)(2) sanctions were not warranted where the individual responsible destroyed it due to concerns that the defendant would commence a separate legal action against him personally, and not to deprive the defendant of its use in the current litigation); EPAC Techs., Inc. v. Harpercollins Christian Publ'g, Inc., No. 3:12-CV-00463, 2018 U.S. Dist. LEXIS 53360, 2018 WL 1542040, at *18 (M.D. Tenn. Mar. 29, 2018) (Rule 37(e)(2) sanctions not warranted even though the responsible party "failed to take its preservation obligations seriously" and made only "halfhearted attempts . . . to impose a litigation hold that was not implemented with sufficient guidance or monitored by counsel.").

However, less severe sanctions are available to DriveTime under Rule 37(e)(1) upon a finding of prejudice. The Advisory Committee notes make clear that "[t]he rule does not place a burden of proving or disproving prejudice on one party or another." Rule 37, Advisory Committee Notes, 2015 Amendment. In certain cases, such as when "the content of the lost information may be fairly evident, the information **[*13]** may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties," it may be reasonable to require the party seeking curative measures to prove prejudice. *Id.* But none of these circumstances are present here.

[2] Pettigrew reported his phone stolen in August 2016, and DriveTime does not argue that Pettigrew failed to take reasonable steps to comply with his preservation obligations. (Doc. 94, Resp. at 6).

If, as DriveTime alleges, Pauley Motor and Pettigrew entered into a kickback scheme, text messages between the two might provide highly relevant information. On the other hand, they might not—and at this point, we will never know. But the reason we will never know is that Pauley Motor failed to take reasonable measures to preserve the text messages, despite being on notice to do so via DriveTime's November 22, 2016 litigation hold letter. (Doc. 94-2, Litigation Hold Letter, expressly requesting Pauley Motor to preserve "text messages" stored on "PDAs (e.g. iPhones or Blackberries)"). It would be unjust to place the burden of proving prejudice on DriveTime under these circumstances. And while Pauley Motor rightly points out that the record is devoid of any direct evidence of a kickback scheme, this fact alone does not conclusively establish that DriveTime has not been prejudiced by the loss of the text messages.

Accordingly, **[*14]** the Court will order curative measures under *Rule 37(e)(1)*. The available measures are within the Court's discretion so long as they are "no greater than necessary to cure the prejudice" and "do not have the effect of measures that are permitted under *subdivision (e)(2)*." *Rule 37(e)(1)*, Advisory Committee Notes, 2015 Amendment. In this case, the Court finds it appropriate to order that DriveTime will be permitted to introduce evidence at trial, if it wishes, of the litigation hold letter and Pauley Motor's subsequent failure to preserve the text messages. DriveTime may argue for whatever inference it hopes the jury will draw. Pauley Motor may present its own admissible evidence and argue to the jury that they should not draw any inference from Pauley Motor's conduct. *See, e.g., HLV, LLC v. Page & Stewart, No. 1:13-CV-1366, 2018 U.S. Dist. LEXIS 225295, 2018 WL 2197730, at *4 (W.D. Mich. Mar. 2, 2018)* (permitting similar evidence to be presented at trial as a curative measure under *Rule 37(e)(1)*); *EPAC Techs., Inc. v. Thomas Nelson, Inc., No. 3:12-CV-00463, 2018 U.S. Dist. LEXIS 114620, 2018 WL 3322305, at *3 (M.D. Tenn. May 14, 2018)* (ordering a jury instruction to similar effect under *Rule 37(e)(1)*).

Additionally, "the Court recognizes that its ruling places [Pettigrew] in a precarious position." *HLV, 2018 U.S. Dist. LEXIS 225295, 2018 WL 2197730, at *4*. In *HLV*, one defendant negligently disposed of his phone after receipt of a litigation hold letter, and the Court permitted introduction of similar evidence as **[*15]** outlined above as a discovery sanction. *Id.* Recognizing that an inference adverse to the negligent defendant would also affect an alleged co-conspirator who was not implicated in the disposal of the phone, the *HLV* court also permitted the alleged co-conspirator "to move for a jury instruction, if necessary, that he be held harmless for [the negligent defendant's] disposal of the phone—assuming the trial proofs are consistent with the conclusion that he did not take part in [the] disposal of the phone." *Id.* The Court finds a similar allowance for Pettigrew to be appropriate here: he may move for a jury instruction, if necessary, that he be held harmless for Pauley Motor's failure to preserve the text messages, assuming the trial proofs are consistent with the conclusion that he did not take part in Pauley Motor's loss of the text messages.

Finally, in ruling on the defendants' motions for summary judgment, any inferences to be drawn from Pauley Motor's negligent failure to preserve the text messages must be left to the finder of fact. Thus, the Court will not bind itself to any adverse inference at this stage.

## III. PETTIGREW'S AND PAULEY MOTOR'S MOTIONS FOR SUMMARY JUDGMENT

### A. Standard [*16] of Review

Pettigrew and Pauley Motor move for summary judgment pursuant to *Rule 56 of the Federal Rules of Civil Procedure*. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Berryman v. Super Valu Holdings, Inc., 669 F.3d 714, 716-17 (6th Cir. 2012)*. The Court's purpose in considering a summary judgment motion is not "to weigh the evidence and determine the truth of the matter" but to "determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A genuine issue for trial exists if the Court finds a jury could return a verdict, based on "sufficient evidence," in favor of the nonmoving party; evidence that is "merely colorable" or "not significantly probative," however, is not enough to defeat summary judgment. *Id. at 249-50*.

The party seeking summary judgment shoulders the initial burden of presenting the Court with law and argument in support of its motion as well as identifying the relevant portions of "'the pleadings, depositions, answers to interrogatories, and admissions on file,

together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)* (quoting *Fed. R. Civ. P. 56*). If this initial burden is satisfied, the burden then shifts to the nonmoving party to set forth specific facts **[*17]** showing that there is a genuine issue for trial. *See Fed. R. Civ. P. 56(e)*; *see also Cox v. Kentucky Dep't of Transp., 53 F.3d 146,150 (6th Cir. 1995)* (after burden shifts, nonmovant must "produce evidence that results in a conflict of material fact to be resolved by a jury").

In considering the factual allegations and evidence presented in a motion for summary judgment, the Court "views factual evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor." *Barrett v. Whirlpool Corp., 556 F.3d 502, 511 (6th Cir. 2009)*. But self-serving affidavits alone are not enough to create an issue of fact sufficient to survive summary judgment. *Johnson v. Washington Cty. Career Ctr., 982 F. Supp. 2d 779, 788 (S.D. Ohio 2013)* (Marbley, J.). "The mere existence of a scintilla of evidence to support [the non-moving party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [non-moving party]." *Copeland v. Machulis, 57 F.3d 476, 479 (6th Cir. 1995)*; *see also Anderson, 477 U.S. at 251*.

**B. Discussion**

Pettigrew and Pauley Motor seek summary judgment on all remaining claims against them. The Court will consider each claim in turn.

**1. Count 1: Theft of the gift cards by Pettigrew**

DriveTime's claim for theft against Pettigrew arises out of *Ohio Revised Code § 2307.61*, which authorizes the recovery of damages from "any person . . . who commits a theft offense" by a property owner who "brings a civil action pursuant to division (A) **[*18]** of *section 2307.60* of the Revised Code." *§ 2307.61(A)*. *Section 2307.60(A)* provides that "[a]nyone injured in person or property by a criminal act has, and may recover full damages in, a civil action unless specifically excepted by law." DriveTime asserts the underlying theft offense is satisfied by *Ohio Revised Code § 2913.02*, which states:

> (A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either the property or services in any of the following ways:
>
> (1) Without the consent of the owner or person authorized to give consent;
> (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
> (3) By deception;
> (4) By threat;
> (5) By intimidation.

Pettigrew makes two arguments in favor of summary judgment on DriveTime's claim against Pettigrew for theft of the gift cards: (1) DriveTime was never the "owner" of the gift cards and (2) Pettigrew never "obtained" or "exerted control" over the gift cards. Both arguments lack merit.

First, "owner" is defined under the statute as "any person, other than the actor, who is the owner of, who has possession or control of, *or who has any license or interest in property* or services . . ." *Ohio Rev. Code § 2913.01(D)* (emphasis added). DriveTime has **[*19]** offered evidence that Pauley Motor offered a gift card to every winning bidder who purchases its vehicles. (Doc. 96, Pauley Dep. at 44). Pettigrew disputes that he was offered gift cards by Pauley Motor (Doc. 77, Pettigrew Dep. at 104), but viewing the evidence in favor of DriveTime, there is evidence that once Pettigrew's bid on a Pauley Motor vehicle was accepted, the gift cards were offered to Drive Time. Thus, there is an issue of fact as to whether DriveTime acquired an "interest in" the gift cards sufficient to satisfy *§§ 2913.01* and *2913.02*.

Second, although Pettigrew testified that he never accepted or took possession of any gift cards offered by Pauley Motor (Doc. 77, Pettigrew Dep. at 104), and DriveTime has offered no evidence in dispute, he nevertheless made the decision on behalf of DriveTime to decline acceptance of the gift cards. Moreover, there is evidence in the record that it was DriveTime's policy that buyers were required to accept any gift cards or other valuable property offered to them, and to forward the items to DriveTime's home office. (Doc. 84, Tyler Dep. at 71-73; Doc. 80, Sarchett Dep. at 108). Pettigrew was offered the gift cards as DriveTime's agent, and he could have **[*20]** decided to accept them and forward them to DriveTime's home office. However, he made the decision on behalf of DriveTime, possibly in violation of DriveTime's policy, to decline them. Thus, even though he never "obtained" the gift cards, there is an issue of fact as to whether he "exerted control" over them

sufficient to satisfy *§ 2913.02*. Accordingly, Pettigrew is not entitled to summary judgment on DriveTime's claim for theft of the gift cards.

**2. Count 2: Conversion of the gift cards by Pettigrew**

Under Ohio law, the essential elements of conversion are: (1) plaintiff's ownership or right to possess the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of Plaintiff's property; and (3) damages. *Kuvedina, LLC v. Cognizant Tech. Sols., 946 F. Supp. 2d 749, 761 (S.D. Ohio 2013)* (Watson, J.). Additionally, a demand and refusal are usually required to prove the conversion of property otherwise lawfully held. *Fenix Enterprises, Inc. v. M & M Mortg. Corp., 624 F. Supp. 2d 834, 843 (S.D. Ohio 2009)* (Rose, J.).

Pettigrew reiterates his arguments that DriveTime was not the owner of, and that he did not exercise control over, the gift cards. However, the same facts noted *supra* regarding DriveTime's theft claim also establish issues of fact as to these elements of DriveTime's conversion claim. Accordingly, Pettigrew is not **[*21]** entitled to summary judgment on DriveTime's claim for conversion of the gift cards.

**3. Count 3: Fraud by Pettigrew**

Under Ohio law, the elements of fraud are: (1) a representation (or concealment of a fact when there is a duty to disclose) (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, and (4) with intent to mislead another into relying upon it, (5) justifiable reliance, and (6) resulting injury proximately caused by the reliance. *Volbers-Klarich v. Middletown Mgt., Inc., 125 Ohio St. 3d 494, 501, 2010- Ohio 2057, 929 N.E.2d 434, 440 (2010)*.

Pettigrew argues that DriveTime's fraud claim must fail because he made no misrepresentations to DriveTime regarding the fair market value or price of the vehicles he purchased from Pauley. (Doc. 85, Mot. at 13-16). However, DriveTime's fraud claim also encompasses Pettigrew's failure to disclose the existence of the gift cards offered by Pauley Motor to winning bidders, as well as his failure to disclose the kickbacks he allegedly received from Pauley Motor in exchange for purchasing Pauley Motor vehicles at higher prices. (Doc. 12, Am. Compl. ¶ 71). As to the gift cards, DriveTime has offered evidence **[*22]** to create an issue of fact as to whether DriveTime's policy required buyers to accept any promotional items offered by sellers and to forward the promotional items to DriveTime's home office. (Doc. 84, Tyler Dep. at 71-73; Doc. 80, Sarchett Dep. at 108). This policy, if proven, would create a duty on Pettigrew's part to disclose the existence of the gift cards, such that his practice of refusing the gift cards and not informing DriveTime that they had been offered would constitute a concealment of material fact in violation of a duty to disclose.

As to the alleged kickback scheme, DriveTime has also introduced sufficient evidence to create an issue of fact. While Pettigrew has argued, and DriveTime has not disputed, that DriveTime had available to it the vehicles' fair market value and the price Pettigrew paid for them, DriveTime counters that Pettigrew concealed the fact that he could have obtained the vehicles for lower prices but for the existence of the kickback scheme. DriveTime has introduced sufficient evidence of the kickback scheme to prevent summary judgment for Pettigrew.

First, Pettigrew paid noticeably more for Pauley Motor vehicles (on average 106.75% of NADA value) than **[*23]** he did for vehicles purchased from other sellers (99.53%). (Doc. 100, Resp. at 7; Doc. 100, Sarchett Dec. ¶¶ 3-7; Doc. 100-2, Vehicle Purchase Records). Additionally, Pettigrew paid noticeably more for Pauley Motor vehicles (106.75%) than did Tyler when he purchased vehicles from Pauley Motor (98.71%). (*Id.*). Further, Pettigrew's bank records demonstrate that on at least five occasions, he made cash deposits of at least $1,000 within 24 hours of making a purchase from Pauley Motor. (Doc. 100, Resp. at 8; Doc. 104, Bank Records; Doc. 100-2, Vehicle Purchase Records). And although Pettigrew argues that Pauley Motor vehicles simply commanded a higher price at auction (Doc. 63, Malave Dep. at 10-11), and that the cash deposits were repayment installments from a loan Pettigrew made to a friend (Doc. 108, Reply at 4, citing Doc. 76, Pettigrew Dep. at 179-80), the Court decides a summary judgment motion by "view[ing] factual evidence in the light most favorable to the non-moving party and draw[ing] all reasonable inferences in that party's favor." *Barrett, 556 F.3d at 511*.

While DriveTime's evidence is circumstantial, the Court finds that DriveTime has sufficiently raised a genuine issue of material fact as to whether **[*24]** Pettigrew agreed to pay higher prices on Pauley Motor vehicles in exchange for cash remuneration by Pauley Motor.

Accordingly, Pettigrew is not entitled to summary judgment on DriveTime's claim for fraud.

#### 4. Count 4: Pettigrew's breach of the duty of good faith and loyalty

The parties agree that, as an employee of DriveTime, Pettigrew owed DriveTime a duty of loyalty. (Doc. 85, Pettigrew's Mot. at 19; Doc. 100, DriveTime's Resp. at 17-18). DriveTime's claim for breach of that duty stems from the same conduct underlying its theft, conversion, and fraud claims discussed *supra*. Pettigrew merely argues that because DriveTime lacks evidence of misconduct related to the gift cards and the kickback scheme, and because DriveTime has no additional evidence of his breach of the duty of loyalty, this claim must also fail. (Doc. 85, Mot. at 19-20). However, as discussed *supra*, DriveTime has offered evidence to create an issue of fact as to Pettigrew's obligation to turn over the gift cards and the existence of the kickback scheme. As a result, Pettigrew is also not entitled to summary judgment on DriveTime's claim for breach of the duty of loyalty.

#### 5. Count 5: Unjust enrichment against Pauley Motor [*25]

Under Ohio law, the elements of unjust enrichment are: "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ('unjust enrichment')." D.P. Dough Franchising, LLC v Southworth, No. 2:15-CV-2635, 2017 U.S. Dist. LEXIS 157951, 2017 WL 4315013, at *14 (S.D. Ohio Sept. 26, 2017) (Sargus, C.J.) (citing Source Assocs., Inc. v. Mitsui Chemicals Am., Inc., No. 5:15-CV-215, 2016 U.S. Dist. LEXIS 27123, 2016 WL 828785, at *4 (N.D. Ohio Mar. 3, 2016) and Hambleton v. R.G. Barry Corp., 12 Ohio St. 3d 179, 12 Ohio B. 246, 465 N.E.2d 1298, 1302 (Ohio 1984)).

DriveTime's unjust enrichment claim is based on the "excessive and above market rates for vehicles purchased" from Pauley Motor by Pettigrew. (Doc. 12, Am. Compl. ¶ 84).[3] Pauley Motor first argues that no unjust enrichment claim can succeed as to the vehicle purchases because they were governed by contracts.

Pauley Motor is correct that ordinarily, there can be no recovery for unjust enrichment when the relationship between the parties is governed by a contract. Aultman Hosp. Ass'n v. Cmty. Mut. Ins. Co., 46 Ohio St. 3d 51, 55, 544 N.E.2d 920, 924 (1989) (in the absence of fraud, illegality, or bad faith, plaintiffs may not recover in unjust enrichment and their only recourse is compensation in accordance with the terms of the written agreement). Pauley Motor further directs the Court to DriveTime's discovery responses in which DriveTime **[*26]** admits that (1) DriveTime "purchased vehicles from Pauley [Motor] at the Columbus Auto Auction," and (2) "subject to certain conditions," DriveTime "enters into a contract to purchase a vehicle" when it successfully bids on a vehicle at the Columbus Auto Auction. (Doc. 78-6, DriveTime's Resp. to Pauley Motor's Req. for Admis. at 3-4). Putting these two premises together, Pauley Motor argues, results in conclusive proof that DriveTime's purchase of vehicles from Pauley Motor were governed by express contracts between the parties. (Doc. 78, Reply at 2).

However, DriveTime argues that vehicles at the Auction were sold on consignment, such that DriveTime entered into a contract with the Auction, and not with Pauley Motor. (*See* Doc. 100, Resp. at 22-23; Doc. 100-1, Sarchett Dec. ¶ 14). Curiously, although both parties argue that the vehicle transactions were governed by express contracts of some sort, neither directs the Court to any such contract in the record. An issue of fact therefore remains as to whether the vehicle purchases in question were governed by a contract between DriveTime and Pauley.

Pauley Motor further argues that, even if no contract between DriveTime and Pauley Motor **[*27]** governed the vehicle purchase transactions, Pauley Motor has still not been unjustly enriched because DriveTime received the very vehicles that it paid for. In support, Pauley Motor cites Becker v. Cleveland Browns Football Co., No. 35169, 1976 Ohio App. LEXIS 7488, 1976 WL 191104, at *2 (Ohio Ct. App. Sept. 30, 1976); Gerboc v.

[3] In opposition to Pauley Motor's motion for summary judgment, DriveTime also argues that Pauley Motor was enriched by retaining gift cards that rightfully belonged to DriveTime. (Doc. 100, Resp. at 21). However, the gift cards were not included as a basis for unjust enrichment in the Amended Complaint. The Court therefore declines to consider the gift cards in relation to DriveTime's claim for unjust enrichment against Pauley Motor. Tucker v. Union of Needletrades, Indus. & Textile Employees, 407 F.3d 784, 787 (6th Cir. 2005) (district court need not consider claim first raised in opposition to summary judgment).

ContextLogic, Inc., 867 F.3d 675, 679 (6th Cir. 2017); and Phillips v. Philip Morris Companies Inc., 298 F.R.D. 355, 364 n. 10 (N.D. Ohio 2014) ("Under Ohio law, it would not be 'unjust' for sellers to retain the profits for a product that performed as promised."). In *Becker*, the court denied relief to plaintiffs who purchased season tickets, whose purchase price exceeded a ceiling price set by a Presidential executive order (which became effective only after the purchase), because the plaintiff "received the season tickets that he bargained for" and the price was not unlawful at the time the purchase was made. 1976 Ohio App. LEXIS 7488, 1976 WL 191104, at *1-2. Similarly, in *Gerboc*, the court found that a misleading statement concerning how much the price of a pair of speakers had been marked down did not result in unjust enrichment to the seller because the buyer got the exact set of speakers he paid for. 867 F.3d at 679.

While these cases are somewhat analogous, DriveTime's use of individual buyers to purchase vehicles on behalf of the company adds an extra layer of complication. DriveTime argues, "[i]n absence of wrongdoing, [DriveTime] would have purchased the vehicles at a lower price, as **[*28]** evidenced by the fact that Tyler's base cost for Pauley Motor purchases was 98.71% and Pettigrew's base cost for purchases from all other sellers was 99.53%." (Doc. 100, Resp. at 21). DriveTime's argument, in essence, is that Pettigrew purchased vehicles from Pauley Motor at prices outside the range of his authority to act on behalf of DriveTime—that Pettigrew could have purchased the vehicles at a lower price, but failed to do so, and Pauley Motor was unjustly enriched as a result.

But even if Pettigrew failed to obtain the lowest price he could for DriveTime, it does not necessarily follow that Pauley Motor's retention of the full purchase price is unjust. As the Sixth Circuit noted in *Gerboc*, "making money is still allowed." 867 F.3d at 679. While Pettigrew's actual authority to exceed the vehicle prices in DriveTime's buying guides is a disputed issue of fact, no party has argued that Pettigrew lacked apparent authority to purchase vehicles at the agreed-upon prices. In the absence of any kickback scheme, Pauley Motor would be entitled to rely on the apparent authority of DriveTime's buyers to purchase its vehicles at the price agreed to by the individual buyers. Master Consol. Corp. v. BancOhio Natl. Bank, 61 Ohio St. 3d 570, 576-77, 575 N.E.2d 817, 822-23 (1991). To hold otherwise would create **[*29]** an unworkable system in which corporate purchasers could second-guess the price agreed to by their representatives after the purchase was complete.

However, as discussed *supra*, DriveTime has introduced some evidence of a kickback scheme between Pauley Motor and Pettigrew such that unquestioned reliance on Pettigrew's apparent authority is not appropriate at the summary judgment stage. If the kickback scheme operated as DriveTime contends, then it would be unjust for Pauley Motor to retain the full purchase price of the vehicles. Accordingly, Pauley Motor is not entitled to summary judgment on DriveTime's claim for unjust enrichment.

## IV. CONCLUSION

For the foregoing reasons, Pettigrew's Motion for Summary Judgment and Pauley Motor's Motion for Summary Judgment (Dots. 78, 85) are **DENIED**. Further, DriveTime's Motion for Spoliation Sanctions (Doc. 94) is **GRANTED IN PART and DENIED IN PART**. Finally, the parties are directed to contact Magistrate Judge Vascura's chambers at (614) 719-3410 to schedule a mediation at their earliest convenience.

The Clerk shall remove Documents 78, 85, and 94 from the Court's pending motions list.

**IT IS SO ORDERED.**

/s/ George C. Smith

***/s/ Georze C. Smith***

**GEORGE C. [*30] SMITH, JUDGE**

**UNITED STATES DISTRICT COURT**

---

End of Document

Reprinted with the permission of LexisNexis

Neutral
As of: December 9, 2019 8:21 PM Z

# Cruz v. G-Star Inc.

United States District Court for the Southern District of New York

September 30, 2019, Decided; September 30, 2019, Filed

17 Civ. 7685 (PGG)

**Reporter**
2019 U.S. Dist. LEXIS 169445 *; 2019 WL 4805765

CHRISTINE HAZEL S. CRUZ, Plaintiff, - against - G-STAR INC., G-STAR USA LLC, and G-STAR RAW C.V., Defendants.

**Prior History:** *Cruz v. G-Star Inc., 2019 U.S. Dist. LEXIS 102686 (S.D.N.Y., June 19, 2019)*

**Counsel:** **[*1]** For Christine Hazel S. Cruz, Plaintiff: Gary Philip Adelman, Sarah Michal Matz, LEAD ATTORNEYS, Adelman Matz P.C., NY, NY.

For G-Star Inc., G-Star USA LLC, Defendants: Jami Lisa Mevorah, Kathleen M. Kundar, Fox Horan & Camerini LLP, New York, NY.

**Judges:** Paul G. Gardephe, United States District Judge.

**Opinion by:** Paul G. Gardephe

## Opinion

**MEMORANDUM OPINION & ORDER**

PAUL G. GARDEPHE, U.S.D.J.:

Before the Court are objections filed by Plaintiff Christine Hazel S. Cruz and Defendants G-Star Inc., G-Star USA LLC, and G-Star Raw C.V. to Magistrate Judge Ona Wang's June 19, 2019 Report & Recommendation ("R&R") concerning Plaintiff's motion for discovery sanctions based on alleged spoliation of evidence. (R&R (Dkt. No. 89)) In the R&R, Judge Wang grants Plaintiff's request for discovery sanctions. (Id. at 34; see also Pltf. Mot. for Sanctions (Dkt. No. 42))[1] For the reasons stated below, Plaintiff's objections will be overruled, and Defendants' objections will be sustained in part and overruled in part.

**BACKGROUND**

**I. FACTS**

**A. Plaintiff's Employment at G-Star and Her Termination**

Defendants G-Star USA LLC and G-Star Inc. are wholesale and retail denim clothing distributors formed under the laws of Delaware and based in New York. (R&R (Dkt. **[*2]** No. 89) at 3) On January 1, 2013, G-Star USA LLC merged with G-Star Inc. (Id.) Defendant G-Star Raw C.V., a company headquartered in Amsterdam, is the sole shareholder of G-Star Inc. (Id.)

Plaintiff is an Asian woman, and was employed by Defendants from November 1, 2012 to January 27, 2017. (Cmplt. (Dkt. No. 1-2) ¶ 3) From November 2012 until December 2015, Plaintiff was employed as a

[1] Except as to deposition transcripts, all citations in this Opinion reflect page numbers assigned by this District's Electronic Case Filing system. Citations to depositions reflect the transcript page numbers.

"senior sales back office employee." (Id. ¶¶ 14, 22) Her main role in that position "was to be the contact person for any problems that occurred with the [Point of Sale] system, inventory, and customer service representatives." (Id. ¶ 15) In December 2015, Plaintiff was promoted to Country Retail Operations Coordinator. (Id. ¶ 22) In this new position, Plaintiff retained her prior responsibilities but was also "required . . . to be involved in the operations aspect of G-Star owned stores." (Id. ¶ 23)

Plaintiff alleges that, during her employment with Defendants, she was not paid overtime (id. ¶¶ 17-31), and that she was subjected to race and gender discrimination, sexual harassment, and a hostile work environment. (Id. ¶¶ 32-78)

**1. Plaintiff's Complaints to Human Resources**

On September 24, 2016, Plaintiff **[*3]** sent an email to Willemien Storm, G-Star Inc.'s head of human resources, complaining about her working conditions. (Id. ¶ 83) Plaintiff states that she is "intentionally being overworked," that she is "being forced to carry other people's responsibility," that she "find[s] [herself] working well over 40 hours per week," and that she has been forced "to work in excess of 12 hours per day on multiple occasions." (Sept. 25, 2016 Cruz email (Dkt. No. 45-8)) Plaintiff further states that her concerns "have been overlooked" and that "senior management in the US office has ignored all my complaints." (Id.) She also complains that co-worker, Kendra Palmer, "is fostering a hostile work environment" by "conspir[ing] to fire [her]" by "overload[ing] [her] plate so much that [she] can't humanly keep up." (Id.)

In a September 28, 2016 email to Plaintiff, Storm asks for more information and offers to speak with Plaintiff over the telephone. (Sept. 28, 2019 Storm email (Dkt. No. 45-7 at 3)) Storm forwarded her response to Plaintiff in an email she sent to Palmer; Juan Garcia — GStar Inc.'s Vice President of Wholesale; Tony Lucia, G-Star Inc.'s CEO of North America; and Fanny Smits, another G-Star **[*4]** employee. (Sept. 28, 2019 Storm email (Dkt. No. 45-7 at 2)) That email also reflects legal advice Storm had obtained from Kathleen M. Kundar, Defendants' outside counsel. (Id. at 3)

On October 5, 2016, Plaintiff and Storm spoke by telephone about Plaintiff's concerns. (Oct. 5, 2016 Storm email (Dkt. No. 45-11 at 3-4)) Storm sent Plaintiff a follow-up email afterward, summarizing what they had discussed. (Id.) Storm's email states: "I asked if you are prepared to work on improving the relationship with [Palmer]. You answered that you are not comfortable answering that question and that you want to discuss with your lawyer first." (Id. at 3) Storm concludes her email by stating that "[w]e agreed that you will come back to me after you have consulted your lawyer. In the meantime, I will address the workload issues in the SBO team with [Garcia] and [Palmer]." (Id. at 4) In an October 7, 2016 email to Storm, Plaintiff states that Storm mischaracterized their discussion. (Oct. 7, 2016 Cruz email (Dkt. No. 45-11 at 2)) Plaintiff states: "we discussed the fact that [Palmer] is openly telling people she wants to fire me and I have texts that back up that claim. At this stage, on advice of counsel, I will not be forwarding **[*5]** the text[s]." (Id.) Although Plaintiff notes that she has asked "[Storm] to intervene, to ensure a safe, nonthreatening, pleasant work environment," Plaintiff's complaints are focused on Plaintiff "being forced to take on more work than humanly possible" and on her belief that Palmer is engaged in "a campaign . . . to terminate" her. (Id.)

In a January 9, 2017 email to Storm, Plaintiff complains that Palmer and other managers have submitted performance evaluations for Plaintiff's team — one of Plaintiff's job responsibilities — while Plaintiff was out on paid leave. (Jan. 9, 2017 Cruz email (Dkt. No. 45-13 at 2-4)) Plaintiff states that "[she] was not involved nor informed by" her co-workers "that evaluations were being conducted on [her] behalf." (Id. at 3) Storm replied to Plaintiff's email on January 13, 2017, stating that she believed the matter had been resolved, because Plaintiff had "already spoken with [Palmer]." (Jan. 3, 2017 Storm email (Dkt. No. 45-13 at 2))

**2. Plaintiff's Termination**

On October 10, 2016, Palmer sent Storm, Garcia, and another G-Star employee — Wouter Geerdink — an email listing examples of "behavioral and performance related issues . . . with [Plaintiff]." (Oct. 10, **[*6]** 2016 Palmer email (Dkt. No. 45-12 at 2)) On October 11, 2016, Storm provided Palmer with a draft of the reasons for [Plaintiff's] employment termination." (Oct. 11, 2019 Storm email (Dkt. No. 45-17 at 2)) Storm asked Palmer and Garcia to "fill in the blanks" so that the draft could he "reviewed by the lawyer" that same day. (Id. at 2-3)[2]

[2] As noted by Judge Wang, "[i]t is unclear whether Ms. Storm meant Ms. Kundar or Defendants' in-house counsel." (R&R (Dkt. No. 89) at 8)

After Plaintiff's September 24, 2016 email complaint to Storm, Defendants reduced Plaintiff's workload. (Cmplt. (Dkt. No. 1-2) ¶ 87) Moreover, at an October 13, 2016 meeting with Plaintiff, Storm, Palmer, and Garcia discussed "creating a team environment, better work, [and] better spirit." (Id. ¶ 85; Storm Dep. (Dkt. No. 50-3) at 181) Storm followed up with Plaintiff "about two weeks" later. (Id. at 181) According to Storm, Plaintiff "was not overly excited" and "not everything was solved at that time." (Id. at 182) Plaintiff claims that, after the October 13, 2016 meeting, Storm, Palmer and Garcia "t[ook] away the new responsibilities that [she] had been given, effectively demoting [her] to the role she was first in." (Cmplt. (Dkt. No. 1-2) ¶ 87) Plantiff further complains that "[she] was not even notified about some of these role reductions, until after they had been taken away **[*7]** from her, which was further humiliating and embarrassing." (Id. ¶ 92)

On January 27, 2017, G-Star, Inc. terminated Plaintiff. (Jan. 27, 2017 Ltr. (Dkt. No. 45-14)) In the notice of termination, Defendants offered Plaintiff a severance package in exchange for a release of all claims arising out of her employment. (Id.) Plaintiff rejected the offer and did not sign the release. (Palmer Dep. (Dkt. No. 50-4) 22-23)

**B. Alleged Spoliation of Evidence**

**1. Deletion of Plaintiff's Email Account and Notice of Claim**

On January 27, 2017, the date of Plaintiff's termination, G-Star shut down her email account. (van der Bent Decl. (Dkt. No. 51) ¶¶ 4-5) According to Rob van der Bent, a G-Star Information Communication Technology ("ICT") manager, when an employee is terminated, Human Resources informs the IT helpdesk of the termination of [the] employee and as per the date of termination, the Windows account which includes email is immediately shutdown. This means that the account is locked. The user cannot access or use it anymore." (Id.) Moreover, "about two months after an individual's employment ends, the Windows Account is deleted unless an instruction has been received to hold the account for litigation **[*8]** purposes or some other purpose." (Id. ¶ 6) On March 6, 2017, the ICT department "saw that [Plaintiff's] Windows account . . . had not yet been deleted and there was no record of a hold having been placed on the email account, so [the ICT department] proceeded with the deletion of it in accordance with our policy." (Id.)[3]

Gary Adelman, Plaintiff's counsel, states that he called Defendants "in or around late March of 2017" and "left a message with Defendants regarding claims that Plaintiff was contemplating bringing against Defendants." (Adelman Decl. (Dkt. No. 43) ¶ 3) Defense counsel Kundar returned Adelman's call on April 3, 2017. (Id. ¶ 4) In that conversation, Adelman "told [Kundar] that Plaintiff [was] planning to pursue claims against Defendants for among other things, FLSA and NYLL violations, based on unpaid overtime wages, as well as sexual harassment, hostile work environment, discrimination based on race and gender, and retaliation." (Id.) In response, Kundar asked Adelman to send her a letter "outlining the claims [Plaintiff" was contemplating bringing against Defendants." (Id. ¶ 5) To facilitate that communication, in an April 3, 2017 email, Kundar provided Adelman with her **[*9]** contact information. (Id.; see also April 3, 2017 Kundar email (Dkt. No. 43-1 at 3)) Kundar represents that "[f]rom April 3, 2017 until July 20, 2017, [she] did not have any contact with anyone representing Hazel Cruz." (Kundar Decl. (Dkt. No. 50) ¶ 14)

At about the time Adelman contacted Defendants, Lucia received a telephone call from Mourad Elayan, a former franchisee of G-Star, informing him that Plaintiff was going to sue G-Star, and that he and Palmer would be mentioned in the lawsuit. (Palmer Dep. (Dkt. No. 50-4) at 21-23; see also Def. Br. (Dkt. No. 53) at 8) Palmer then asked Human Resources whether Plaintiff had returned a signed severance agreement. (Palmer Dep. (Dkt. No. 50-4) 22-23) Human Resources informed Palmer that Plaintiff had not returned a signed severance agreement. (Id.)

In a July 20, 2017 letter to Kundar, Plaintiff outlines her claims and states that she intends to file a lawsuit alleging claims under the Fair Labor Standards Act, the New York Labor Law, and the New York City Human

[3] Defendants initially informed Judge Wang that Plaintiff's email account was deleted on June 3, 2017. (R&R (Dkt. No. 89) at 10) Defendants later informed the court that van der Bent had incorrectly reported the date of deletion, because he had assumed the date of the deletion log was in "European style," when in fact the deletion log was in US style dating." (van der Bent Decl. (Dkt. No. 51) ¶ 9) This Court does not see any error in Judge Wang's decision to credit van der Bent's explanation for the mistaken date. (R&R (Dkt. No. 89) at 10 n.7)

Rights Law. (July 20, 2017 Ltr. (Dkt. No. 50-8)) On July 25, 2017, Kundar "gave G-Star HR a first list of documents to assemble and, . . . , [] spoke with G-Star in-house counsel about **[*10]** the need to preserve evidence." (Kundar Decl. (Dkt. No. 50) ¶ 15) ITC manager van der Bent confirms that in "late July 2017," the ICT department was "informed to put a hold on various email accounts including for Hazel Cruz because litigation had been threatened by her lawyer." (van der Bent Decl. (Dkt. No. 51) ¶ 7) According to van der Bent, the ICT department put a hold on the requested email accounts, but "no one took note that the email of Hazel Cruz had already been deleted." (Id.)

**2. Post-Complaint Conduct**

The Complaint was filed in Supreme Court of the State of New York, New York County, on September 1, 2017. (Dkt. No. 1-2) In an October 2, 2017 email. Kundar provided Defendants' in-house counsel and Human Resources representatives with an -extended list of documents that were needed" for the litigation. (Kundar Decl. (Dkt. No. 50) ¶ 18) A copy of that e-mail is not in the record, but Kundar represents that she told her clients that "[Nv]e eventually will have to p[roduce] many emails from the years of Hazel's e[]mployment. I will work on a list of reasonable search terms." (Id. ¶ 18 (alterations in original))

On October 6, 2017, Defendants removed the action to federal court. **[*11]** (Dkt. No. 1) This Court scheduled a *Rule 16* conference for February 1, 2018. Prior to that conference, the parties had a telephonic *Rule 26(f)* conference, during which Plaintiff's counsel told defense counsel of his intention to seek email communications. (Matz Decl. (Dkt. No. 45) ¶ 20) Kundar represents that, at that time, "[she] did not know that Plaintiff's emails had been deleted. [She] assumed that they had been preserved based on [her] specific mention of Plaintiff's emails in the list [she] provided [her] clients on October 2, 2017." (Kundar Decl. (Dkt. No. 50) ¶ 22) According to Kundar, Plaintiff's counsel did not mention that he would be seeking "SAP, Retail Pro and Sales Force files" in discovery. (Id.)

On March 8, 2018, Plaintiff served her first request for production of documents. Plaintiff demanded, inter alia, "[d]ocuments and communications sufficient to evidence the time and date of Plaintiff's logins to or use of SAP, but not limited to a login report, log and/or audit trail," and "a table style printout of Plaintiff's sent and received email." (Pltf. First Doc. Req. (Dkt. No. 45-18) at 9, 10)[4]

In response to Plaintiff's document requests, Defendants' in-house counsel directed van **[*12]** der Bent to "search for various emails relating to G-Star Inc. and Hazel Cruz, and instructed [him] not to delete the account for Hazel Cruz and files attached to that account." (van der Bent Decl. (Dkt. No. 51) ¶ 8) Defendants' in-house counsel also instructed another ICT manager, Klaas Buist, to -provide documents and communications sufficient to evidence the time and date of Hazel Cruz['s] logins to or use of SAP, Retail Pro and Sales force including but not limited to a login report, log and/or audit trail." (Buist Decl. (Dkt. No. 52) ¶ 5) Van der Bent then informed in-house counsel that the email account of Hazel Cruz had already been deleted." (van der Bent Decl. (Dkt. No. 51) ¶ 8)

Buist asserts that the deletion of Plaintiff's email account in March 2017 "caused a glitch in the hold process" and "as a consequence the people performing the deletion of SAP, were not informed of any hold." (Buist Decl. (Dkt. No. 52) ¶ 7) As a result, Plaintiff's SAP account "was locked on 17 May 2017" and "finally deleted end of December 2017 during the periodic clean-up of SAP accounts." (Id.)

In late March 2018, Defendants' in-house counsel informed Kundar that Plaintiff's email had been deleted. **[*13]** (Kundar Decl. (Dkt. No. 50) ¶ 24) In-house counsel then instructed van der Bent to reconstruct Plaintiff's email file — in .pst format — from archived records. (van der Ben Decl. (Dkt. No. 51) ¶ 11) The ICT department was "able to assemble a PST file of [Plaintiff's email] messages . . . but the messages were not always complete because only a few lines of the text show in the archival form." (Id.; see, e.g., April 29, 2013 Cruz e-mail (Dkt. No. 58-5)) However, "all of the messages in the PST file showed who was the sender, receiver and copy readers," as well as "the date and time the messages were sent." (van der Ben Decl. (Dkt. No. 51) ¶ 11)

On April 9, 2018, Defendants served written responses to Plaintiff's first set of document requests. (Def. Resp. to Pltf.'s First Doc. Req. (Dkt. No. 45-19)) Defendants

---

[4] SAP is a computer program that Plaintiff used to "enter orders and run reports." (Cruz Decl. (Dkt. No. 44) ¶¶ 5-6) Plaintiff claims that she "frequently worked before and after regularly scheduled hours" and "would log into SAP and [her] email to respond to inquiries, enter orders and send reports to account managers." (Id.)

did not disclose that Plaintiff's email account and SAP data had been deleted. Instead Defendants objected to Plaintiff's request for documents evidencing the time and date of Plaintiff's logins to SAP as "overly broad, unduly burdensome, vague and ambiguous." (Id. at 15) Defendants also stated that they did not possess "login reports, logs, and/or audit trails." (Id.) As to Plaintiff's **[*14]** request for a "table style printout of Plaintiff's sent and received email[s]," Defendants objected on the grounds that (1) the request "is overly broad, unduly burdensome, oppressive, vexatious, and harassing"; (2) the request "seeks the disclosure of documents that are shielded from disclosure by the attorney work product doctrine"; (3) the request "seeks the disclosure of confidential, proprietary, or sensitive information"; and (4) the request seeks disclosure of "documents and information that are not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence." (Id. at 16-17)

After Defendants served their response to Plaintiff's document requests, the parties met and conferred on three separate occasions regarding outstanding discovery issues, including Defendants' failure to produce a "table style printout of Plaintiff's sent and received email." (Matz Decl. (Dkt. No. 45) ¶¶ 21, 26) The parties also participated in (1) a May 3, 2018 status conference before this Court; (2) a June 19, 2018 pre-settlement conference before Judge Wang; and (3) a June 28, 2019 telephone conference before Judge Wang. Defendants did not disclose at any of these **[*15]** meetings and conferences that Plaintiff's email account and SAP data had been deleted, or that Defendants had tried to reconstruct Plaintiff's email but were unable to do so. (Id. ¶¶ 21, 26-27)

On June 20, 2018, Defendants served an amended response to Plaintiff's document requests. (Dkt. No. 45-22) Defendants objected to Plaintiff's request for "[d]ocuments and communications sufficient to evidence the time and date of Plaintiff's logins to or use of SAP," asserting that the request is overly broad, unduly burdensome, vague, and ambiguous." (Id. at 16) Defendants also objected to Plaintiff's request for a "table-style printout" of Plaintiff's emails, arguing that the request (1) -is overly broad, unduly burdensome, oppressive, vexatious, and harassing"; and (2) seeks disclosure of "documents and information that are not relevant to this litigation and is not reasonably calculated to lead to the discovery of admissible evidence." (Id. at 17). In early July 2018, Defendants proposed that the parties use keyword search terms to identify relevant documents. (See July 3, 2019 Mevorah email (Dkt. No. 45-9)).

On July 18, 2018, the parties submitted a joint letter to this Court outlining outstanding discovery **[*16]** issues, and requesting a conference. (Dkt. No. 27). On July 23, 2018, this Court issued an amended Order of Reference referring the parties' discovery disputes to Judge Wang. (Dkt. No. 28). Judge Wang thereafter ordered the parties to meet and confer with respect to the issues raised in their July 18, 2018 letter, and scheduled a discovery conference for August 2, 2018. (Dkt. No. 29).

On July 26, 2018, the parties conducted a telephonic meet and confer in preparation for the August 2, 2018 conference. On that call, Defendants disclosed to Plaintiff — for the first time — that Defendants had deleted Plaintiff's email and SAP accounts. (Matz Decl. (Dkt. No. 45) ¶ 31; Kundar Decl. (Dkt. No. 50) ¶ 34) Kundar sent an email to Plaintiff's counsel later that day attaching G-Star policies concerning the deletion of SAP and certain other programs, not including email. (See July 26, 2018 Kundar email (Dkt. No. 45-23); Dkt. No. 45-24) In her July 26, 2018 email, Kundar wrote that "G-Star reports that mailboxes are deleted two months after the termination date unless blocked by HR or Legal in accordance with the IT Audit policy." (July 26, 2018 Kundar email (Dkt. No. 45-23)) Defendants have not **[*17]** provided a copy of their policy regarding deletion of email accounts.

On August 2, 2018, the parties appeared before Judge Wang. At that conference, Plaintiff asked that Defendants be directed to produce Plaintiff's entire email file. (Aug. 2, 2018 Tr. (Dkt. No. 32) at 4) Defendants informed Judge Wang — for the first time — that Defendants had deleted Plaintiff's email account. (See Aug. 2, 2018 Tr. (Dkt. No. 32) at 6-7) After hearing oral argument, Judge Wang ordered Defendants to produce Plaintiff's .pst email file in its entirety by August 9, 2019. (Id. at 16) Defendants delivered Plaintiff's .pst email file to Plaintiff's counsel on August 9, 2018. (See Aug. 9, 2018 Ltr. (Dkt. No. 45-25))

Judge Wang was not able to view the emails Defendants provided to Plaintiff, because the thumb drive provided by Defendants was corrupted. (R&R (Dkt. No. 89) at 18 n.9) However, based on the parties' representations, Judge Wang concluded that

> [o]f the 114,812 emails contained in the .pst file, 109,117, or approximately 95%, are in the archived format. (Pl. Mem. of Law at 7). 200 emails are virtually blank. (Pl. Mem. of Law at 8).
>
> In addition to the .pst email file, Defendants

> produced 2,541 pages of complete **[*18]** emails, (Kundar Decl., Ex. M), and complete versions of 2016 emails showing Plaintiff's work schedule on certain dates. (Kundar Decl. ¶ 39). Defendants do not identify where or how they obtained these emails. Ms. Kundar did represent that Defendants identified other employees whose email files would contain messages to or from Plaintiff or would have copied Plaintiff (Id. ¶ 25). Specifically, Defendants preserved seven other custodians' email files for use in this litigation. (Id. ¶ 33). The record is devoid of any evidence, however, on whether a search of these custodians' email files was ever conducted, and if so, whether the 2,541 pages and 2016 emails are the results of such a search.

(Id. at 18)

As to Plaintiff's SAP data, Judge Wang states that

> [i]n October 2018, Defendants attempted to restore Plaintiff's SAP data, which Defendants had deleted ten months earlier. In October 2018, with the assistance of a technical specialist, Mr. Buist was able to obtain data showing the date and time of each sales order created by Plaintiff's username. (Buist Decl. ¶ 10). Defendants produced tables from the SAP system for 2014-2017 showing the times Plaintiff used the SAP system to enter orders. (Kundar **[*19]** Decl. ¶ 37). Mr. Buist does not explain whether more information — such as Plaintiff's log-in and log-out times and data regarding the running and sending of reports — would have been available had Defendants not deleted Plaintiff's SAP account. Finally, Defendants produced more than 1,000 pages of daily log-in information for the office computers used by Plaintiff," weekly attendance lists, and Plaintiff's absence record. (Kundar Decl. ¶ 39).

(Id.)

### C. Plaintiff's Motion for Sanctions

On October 1, 2018, Plaintiff moved for sanctions, arguing that (1) Defendants acted willfully in destroying Plaintiff's email file and other electronically stored information ("ESI"); (2) the missing evidence is relevant to Plaintiff's claims; and (3) Plaintiff is entitled to sanctions in the form of a default judgment. (Pltf. Mot. (Dkt. No. 45); Pltf. Br. (Dkt. No. 46)) Plaintiff also claims that she is entitled to an adverse inference instruction. (Pltf. Br. (Dkt. No. 46) at 29-30)

#### 1. Judge Wang's R&R

On November 29, 2018, this Court referred Plaintiff's motion to Judge Wang for an R&R. (Dkt. No. 74) On June 19, 2019, Judge Wang issued her R&R, recommending that this Court grant Plaintiff's motion for sanctions. **[*20]** (Dkt. No. 89) Judge Wang concludes that (1) Defendants' duty to preserve Plaintiff's ESI arose in October 2016 when Plaintiff complained to G-Star's Human Resources Department; (2) Defendants failed to take reasonable steps to preserve Plaintiff's ESI; (3) Plaintiff's ESI cannot be restored or replaced; (4) Plaintiff has been prejudiced by Defendants' failure to preserve ESI; and (5) *Rule 37(e)(2)* sanctions should be imposed because "the circumstances surrounding Defendants' spoliation of ESI support an inference that Defendants acted with the intent to deprive Plaintiff of evidence." (Id. at 21-33) As to sanction, Judge Wang recommends that this Court give an adverse inference instruction at trial. (Id. at 33-34) On July 19, 2019, Judge Wang issued a separate order granting Plaintiff motion for an award of attorney's fees and costs. (Dkt. No. 90)[5]

#### 2. The Parties' Objections to the R&R

On July 3, 2019, Plaintiff filed an objection to the R&R, arguing that "[t]he [r]emedy of [a]dverse [i]nference [d]ocs [n]ot [f]it the [w]rong," and that "Defendants' [i]ntentional [s]poliation of ESI [w]arrants [e]ntry of [d]efault [j]udgment." (Dkt. No. 95 at 18, 22)

On July 9, 2019, Defendants filed objections to the R&R, arguing that an **[*21]** adverse inference instruction is not warranted because, inter alia, (1) as of October 2016, when Plaintiff complained to Human Resources, G-Star had no reason to believe that litigation with Plaintiff was likely; (2) Defendants took reasonable steps to preserve all relevant evidence; (3) Plaintiff has not suffered any prejudice, because the lost evidence can be obtained from other sources; and (4) Defendants' actions do not support an inference that they acted with "the intent to deprive Plaintiff of evidence for use in this litigation." (Def. Obj. (Dkt. No. 97) at 7-8)

Defendants have also filed an objection to Judge Wang's order granting Plaintiff an award of attorneys' fees and costs. (Dkt. No. 99)

---

[5] Judge Wang has not yet determined the amount of the award for attorneys' fees and costs.

**DISCUSSION**

**I. LEGAL STANDARDS**

**A. Standard of Review**

In Plaintiff's sanctions motion, she requests, inter alia, that the Court strike Defendants' answers and grant Plaintiff default judgment on her claims. (Pltf. Br. (Dkt. No. 46) at 27) Accordingly, this Court referred Plaintiff's motion to Judge Wang as a "dispositive motion" requiring a Report and Recommendation. (Dkt. No. 74)

Pursuant to *Rule 72(a) of the Federal Rules of Civil Procedure*, "[w]hen a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate **[*22]** judge to hear and decide," the district judge "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Pursuant to *Rule 72(b)(3)*, when a dispositive motion has been referred to a magistrate judge, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."

"To determine whether a magistrate judge's ruling regarding discovery sanctions is 'dispositive,' the Court must look to the effect of the sanction — if imposed." *Khatabi v. Bonura, No. 10 Civ. 1168 (ER), 2017 U.S. Dist. LEXIS 61921, 2017 WL 10621191, at *3 (S.D.N.Y. Apr. 21, 2017)*; see also *Kiobel v. Millson, 592 F.3d 78, 97 (2d Cir. 2010)* ("Analyzing the effects of the particular sanction imposed by a magistrate judge, to determine whether it is dispositive or nondispositive of a claim, is the approach that best implements Congress's intent."). "Thus, in determining between dispositive and non-dispositive discovery sanctions, the critical factor is what sanction the magistrate judge actually imposes, rather than the one requested by the party seeking sanctions." Id. (emphasis in original); see also *UBS Int'l Inc. v. Itete Brasil Instalacoes Telefonicas Ltd., No. 09 Civ. 10004 (LAK) (JCF), 2011 U.S. Dist. LEXIS 38978, 2011 WL 1453797, at *1 (S.D.N.Y. Apr. 11, 2011)* ("A magistrate judge . . . , has the authority to issue less severe sanctions, including preclusion orders, in the course of overseeing discovery.").

Here, Judge Wang denied **[*23]** Plaintiff's request to strike Defendants' answers and enter default judgment. (R&R (Dkt. No. 89) at 2) Because Judge Wang "did not impose any terminating sanctions," "the Court treats [her] ruling as non-dispositive." *Khatabi, 2017 U.S. Dist. LEXIS 61921, 2017 WL 10621191, at *3*; see also *Rosa v. Genovese Drug Stores, Inc., No. 16-cv-5105 (NGG) (LB), 2017 U.S. Dist. LEXIS 205333, 2017 WL 4350276, at *1 (E.D.N.Y. July 31, 2017)* (treating a magistrate judge's order imposing an adverse inference instruction sanction as non-dispositive, and reviewing the order under a "clearly erroneous" standard); *Apple Inc. v. Samsung Elecs. Co., 888 F. Supp. 2d 976, 988 (N.D. Cal. 2012)* (holding that adverse inference instruction sanction does not "'have an effect similar to those motions considered dispositive'" (quoting *Maisonville v. F2 Am., Inc., 902 F.2d 746, 748 (9th Cir. 1990)*)). Because Judge Wang's ruling is non-dispositive, this Court will review the portions of her Report & Recommendation to which the parties have objected under the more deferential "clearly erroneous" standard. See *Fed. R. Civ. P. 72(a)*.

**B. Sanctions Under *Fed. R. Civ. P. 37(e)***

> Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107 (2d Cir. 2001)* (internal quotation marks omitted) (quoting *West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999)*). A party seeking sanctions for spoliation has the burden of establishing the elements of a spoliation claim. *Id. at 109*; accord *Centrifugal Force, Inc. v. Softnet Commc'n, Inc., 783 F. Supp. 2d 736, 740 (S.D.N.Y. 2011)* (citations **[*24]** omitted).

*Leidig v. Buzzfeed, Inc., No. 16-cv-542 (VM) (GWG), 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *8 (S.D.N.Y. Dec. 19, 2017)*.

*Rule 37(e) of the Federal Rules of Civil Procedure*, amended as of December 1, 2015, governs sanctions for failure to preserve ESI, and provides as follows:

> (e) **Failure to Preserve Electronically Stored Information**. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to

take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) Upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) Only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(A) Presume that the lost information was unfavorable to the party;

(B) Instruct the jury that it may or must presume the information was unfavorable to the party; or

(C) Dismiss the action or enter a default judgment.

*Fed. R. Civ. P. 37(e)*.

*Rule 37(e)*

amended the traditional spoliation rule as it related to ESI in a number of ways — most significantly, by providing that the harsh sanctions listed in *Rule 37(e)(2)* were to be applied only in cases in which a party acted with "intent to deprive" **[*25]** another of ESI. See *Fed. R. Civ. P. 37(e)(2)* advisory committee's note to 2015 amendment.

*Leidig, 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *8*.

## II. ANALYSIS

### A. Defendants' Objections to the R&R

As discussed above, Defendants contend that no sanction is appropriate because (1) as of October 2016, when Plaintiff complained to Human Resources, G-Star had no reason to believe that litigation with Plaintiff was likely; (2) Defendants took reasonable steps to preserve all relevant evidence; (3) Plaintiff has not suffered any prejudice, because the lost evidence can be obtained from other sources; and (4) Defendants' actions do not support an inference that they acted with "the intent to deprive Plaintiff of evidence for use in this litigation." (Def. Obj. (Dkt. No. 97) at 7-8)

#### 1. When Defendants' Duty to Preserve Arose

Judge Wang concludes that "Defendants had a duty to preserve no later than October 2016," when Plaintiff complained to Willemien Storm of G-Star's Human Resources Department about her workload and her concerns that Palmer was scheming to terminate her employment. (R&R (Dkt. No. 89) at 22; see also Oct. 7, 2016 Cruz email (Dkt. No. 45-11 at 2)) In concluding that Defendants' duty to preserve arose in October 2016, Judge Wang cites the following facts: (1) **[*26]** within four days of receiving Plaintiff's complaint, Storm — Defendants' Human Resources director — contacted Defendants' senior management and sought legal advice from Defendants' outside counsel; (2) during the three weeks after Storm received Plaintiff's complaint, Defendants compiled reasons to terminate Plaintiff, which "included careful documentation and consultation with an attorney"; and (3) Defendants knew that Plaintiff was consulting an attorney in October 2016, because Plaintiff indicated as much in her exchanges with Defendants' human resources department.[6] (Id. at 22-23) According to Judge Wang, "[t]hese circumstances combined with the content of Plaintiff's complaint makes clear that the relevant people at G-Star anticipated litigation by October 2016." (Id. at 23)

Defendants contend that Judge Wang "incorrectly found that G-Star's duty to preserve was triggered in October 2016," because Defendants "had no reason to conclude that litigation was likely at that time." (Def. Obj. (Dkt. No. 97) at 19) Defendants argue that they did not know that litigation was likely in October 2016, because Plaintiff's complaints to Storm "did not mention any actionable harassment or discrimination or request **[*27]** any additional wages." (Id.) Moreover, "[a]lthough Plaintiff made mention of a lawyer at the time of [her complaint to Storm], Plaintiff never identified any lawyer and no lawyer ever surfaced during the parties' internal efforts to resolve the matter." (Id. at 20) Finally, Defendants contend that the fact "[t]hat G-Star contacted Ms. Kundar to discuss [Plaintiff's complaint to Storm] . . . amounts to nothing more than sensibly seeking advice." (Id. at 20) According to Defendants, "[i]t cannot be that anytime any employee complains to an employer —

[6] Given that (1) Plaintiff's first complaint to Storm was on September 24, 2016; (2) Storm forwarded her email traffic with Plaintiff to G-Star's senior management on September 28, 2016; and (3) Storm consulted outside counsel at this time (Sept. 28, 2016 Storm email (Dkt. No. 45-7)), it is not entirely clear to this Court why the parties and Judge Wang focus exclusively on October 2016.

regardless of whether any actionable conduct is asserted and regardless of whether the employer consults with counsel — the employer must immediately expect litigation to be likely and impose a litigation hold." (Id.)

The first element of the traditional spoliation test requires the moving party to demonstrate that "'the party having control over the evidence ... had an obligation to preserve it at the time it was destroyed.'" *Byrnie, 243 F.3d at 107* (quoting *Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998))* Generally, "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation." *Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001)*. The **[*28]** obligation arises "most commonly when suit has already been filed, providing the party responsible ... with express notice, but also on occasion ... when a party should have known that the evidence may be relevant to future litigation." *Kronisch, 150 F.3d at 126-27*.

Here, this Court disagrees with Judge Wang's determination that Defendants' duty to preserve evidence arose in October 2016, and concludes that that finding is clearly erroneous. As an initial matter, in none of Plaintiff's communications with Storm in September and October 2016 does she articulate any sort of legal claim. She does not complain, for example, that she is not being paid overtime compensation. Nor does she suggest that she is the victim of sexual harassment or that she is suffering discrimination based on race, sex, or another forbidden factor. While she accuses Palmer of creating a "hostile work environment," that accusation is based on Palmer's alleged practice of "overload[ing]" Plaintiff with work, and "conspir[ing] ... to fire her." (Sept. 25, 2016 Cruz email (Dkt. No. 45-8 at 2)) But Palmer's alleged practice of giving Plaintiff "more work than humanly possible [to complete]," and "campaign ... to terminate [Plaintiff]" (Oct. 7, **[*29]** 2016 Cruz email (Dkt. No. 45-11 at 2)) — standing alone — provide no basis for a legal claim. Although Plaintiff mentions that she is consulting with an attorney, she does not state that she is planning to bring a lawsuit against Defendants.

The Court concludes that Plaintiff's complaints to Storm in September and October 20] 6 were not sufficient to alert Defendants that "litigation was likely" (see *Fed. R. Civ. P. 37* advisory committee note to 2015 amendment), nor did they trigger an obligation on Defendants' part to preserve ESI in compliance with *Fed. R. Civ. P. 37(e)*.

*Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217 (S.D.N.Y. 2003)*, cited by Judge Wang, is not to the contrary. There, the court found that the duty to preserve evidence arose before the filing of plaintiff's August 2001 EEOC complaint because (1) plaintiff's immediate supervisor admitted at his deposition that he feared litigation in April 2001, and (2) while "one or two employees contemplat[ing] the possibility that fellow employee might sue does not generally impose a firm-wide duty to preserve," "it appear[ed] that almost everyone associated with [plaintiff] recognized the possibility that she might sue." *Id. at 216-17*. Here, there is no evidence that anyone at G-Star believed — in September and October 2016 — that Plaintiff **[*30]** would sue. Indeed, as discussed above, none of Plaintiff's complaints to Storm appeared to present a basis for liability.

That Storm consulted with senior management and outside counsel at this time does not demonstrate that Defendants believed that "litigation was likely." *Fed. R. Civ. P. 37* advisory committee note to 2015 amendment. Stated another way, seeking management or legal advice about how to address an employee's complaints, or about a possible future termination, does not demonstrate that one believes that litigation is imminent. Indeed, senior managers and legal counsel are often consulted so that litigation can be avoided. Similarly, the fact that Storm and Palmer began discussing a possible termination of Plaintiff in October 2016 does not demonstrate that they believed that litigation was likely. Not every termination of an employee results in litigation. Indeed, the vast majority of employee terminations do not result in litigation.

In sum, the possible future termination of a disgruntled employee does not present a likelihood of litigation where (1) the employee's complaints do not present a basis for a recognized cause of action; and (2) the employee has not threatened to bring a lawsuit **[*31]** or suggested that she will do so.

This Court concludes that Defendants' duty to preserve evidence arose on April 3, 2017, when Plaintiff's counsel told defense counsel "that Plaintiff [was] planning to pursue claims against Defendants for among other things, FLSA and NYLL violations, based on unpaid overtime wages, as well as sexual harassment, hostile work environment, discrimination based on race and gender, and retaliation." (Adelman Decl. (Dkt. No. 43) ¶ 4)

Because Plaintiffs' emails were deleted in March 2017, before Defendants' duty to preserve arose, Plaintiff "has failed to establish the first element of spoliation" as to those documents. Piccone v. Town of Webster, No. 09-CV-6266T, 2010 U.S. Dist. LEXIS 92409, 2010 WL 3516581, at *7 (W.D.N.Y. Sept. 3, 2010). Plaintiff's SAP account was, however, deleted in December 2017, when Defendants were on notice of Plaintiff's lawsuit. Accordingly, this Court must address Judge Wang's determination that Defendants' duty to preserve extends to Plaintiff's SAP account.

**B. Whether Defendants' Duty to Preserve Extends to Plaintiff's SAP Account**

"'While a litigant is under no duty to keep or retain every document in its possession[,] . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant **[*32]** in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.'" Zubulake, 220 F.R.D. at 217 (quoting Turner v. Hudson Transit Lines, Inc., 142 F.R.D. 68, 72 (S.D.N.Y. 1991)); see also Leidig, 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *9 (obligation to preserve evidence runs to "documents that a party knew or 'should have known' were relevant to future litigation"). For the purposes of Rule 37(e), "'relevance' means relevance for purposes of discovery, which is 'an extremely broad concept.'" Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 436 (S.D.N.Y. 2010) (quoting Condit v. Dunne, 225 F.R.D. 100, 105 (S.D.N.Y. 2004))

Judge Wang determined that Defendants should have known that Plaintiff's SAP account was relevant to Plaintiff's claims, thereby triggering an obligation to preserve that account. (R&R (Dkt. No. 89) at 24) The Court concludes that Judge Wang's determination that, Defendants had a duty to preserve Plaintiff's SAP account is not "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a).

On April 3, 2017, Plaintiff's counsel informed Defendants that Plaintiff intended to assert claims under the Fair Labor Standards Act and the New York Labor Law relating to unpaid overtime compensation. (Kundar Decl. (Dkt. No. 50) ¶ 13) Any evidence probative of the amount of hours Plaintiff worked is relevant to her claims for overtime compensation. **[*33]**

Here, Plaintiff claims that she "frequently worked before and after regularly scheduled hours" and "would log into SAP and [her] email to respond to inquiries, enter orders and send reports to account managers." (Cruz Decl. (Dkt. No. 44) ¶¶ 5-6) Plaintiff further claims that "[t]he majority of [her] work with Defendants is documented in emails, SAP, RetailPro, and SalesForce." (Id. ¶ 6) Defendants have not disputed these assertions. It is thus obvious that Plaintiff's SAP account could shed light on whether she worked more than forty hours a week. Moreover, the declaration filed by Defendants' ICT department manager, Buist, indicates that, were it not for a "glitch" in the system, the July 2017 litigation hold would have included Plaintiff's SAP account. (Buist Decl. (Dkt. No. 52) ¶ 7) The Court concludes that Plaintiff's SAP account falls within the scope of Defendants' duty to preserve.

**C. Whether Defendants Took Reasonable Steps to Preserve Plaintiff's SAP Account**

Plaintiff, as the party seeking sanctions, must show that defendants did not "take reasonable steps to preserve" Plaintiff's SAP account. Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 426 (W.D.N.Y. 2017); see also Fed. R. Civ. P. 37(e)(1).

In her R&R, Judge Wang concludes that

> Defendants deleted Plaintiff's SAP **[*34]** account in December 2017 despite the litigation hold. This deletion reflects that neither Defendants nor their counsel took "reasonable steps" to preserve Plaintiff's SAP account even after Plaintiff's Complaint had been filed. See Zubulake, 220 F.R.D. at 220 ("Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent."). Ms. Kundar's excuse that she was not aware of Plaintiff's SAP files is of no merit. Indeed, Ms. Kundar's ignorance of Plaintiff's SAP files (and both her and in-house counsel's ignorance of Plaintiff's emails' deletion until March 2018) indicates that neither counsel monitored Defendants' compliance with the litigation hold as required.

(R&R (Dkt. No. 89) at 25 (alterations in original))

Defendants argue, however, that Defense counsel took reasonable steps to preserve Plaintiff's SAP account by (1) "advis[ing] in-house counsel of the need to preserve evidence"; and (2) sending Defendants "list[s] of documents to assemble for use in this action." (Def. Obj. (Dkt. No. 97) at 22) Defense counsel's obligations

extend further than simply advising her clients as to what documents might be necessary in the litigation, however. Counsel has an obligation to "become fully **[*35]** familiar with her client's document retention policies, as well as the client's data retention architecture." *Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 432 (S.D.N.Y. 2004)* "This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's . . . policy." Id. Here, there is no evidence that defense counsel familiarized herself with Defendants' "document retention policies." And it appears that counsel was not aware of the technology that Plaintiff used every day at work. Accordingly, this Court finds no error in Judge Wang's conclusion that Defendants did not take reasonable steps to preserve Plaintiff's SAP account.

**D. Whether Defendants Acted with the Intent to Deprive Plaintiff of Data Stored In Her SAP Account**

*Rule 37(e)* "permits sanctions such as an adverse inference instruction or dismissal only in instances in which the spoliating party acted with 'intent to deprive another party of the information's use in the litigation.'" *Leidig, 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *10* (quoting *Fed. R. Civ. P. 37(e)(2)(A)-(C)*)

Judge Wang concludes that

> the circumstances surrounding Defendants' spoliation of ESI support an inference that Defendants acted with the intent to deprive Plaintiff of evidence. Defendants' **[*36]** duty to preserve arose no later than October 2016 when Defendants consulted their outside litigation counsel, Ms. Kundar. After that time, Defendants had an obligation to preserve Plaintiff's ESI in the anticipation or conduct of litigation, yet Defendants took no reasonable steps to preserve Plaintiff's ESI, and now that ESI cannot be restored or replaced through additional discovery. Plaintiffs emails and SAP information were lost because Defendants failed to take any steps to preserve them prior to their deletion. See *Ottoson v. SMBC Leasing & Fin., Inc., 268 F. Supp. 3d 570, 582 (S.D.N.Y. 2017)* (failure to take any reasonable steps to preserve" relevant evidence satisfies the requisite level of intent required by *Federal Rule of Civil Procedure 37(e)(2)*); *Ungar v. City of New York, 329 F.R.D. 8, 13 (E.D.N.Y. 2018)* ("[w]hether the spoliator affirmatively destroys the data, or passively allows it to be lost, is irrelevant; it is the spoliator's state of mind that logically supports the adverse inference"). Defendants' failure to take any steps to preserve Plaintiff's emails is particularly troubling because the particular individuals who received and discussed Plaintiff's first complaint to Human Resources — and consulted outside litigation counsel on a proper response — were the same individuals creating lists of reasons to terminate Plaintiff just two **[*37]** weeks later.
>
> Defendants' failure to impose a litigation hold before July 2017 was "so stunningly derelict as to evince intentionality." *Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410, 431-32 (W.D.N.Y. 2017)*. In October 2016, Defendants — aware that Plaintiff had actively consulted with an attorney on matters included in her internal complaint, and who themselves sought and received advice from outside litigation counsel and began taking steps to terminate Plaintiff's employment — did not impose a litigation hold. In early January 2017, Plaintiff filed a second complaint to Human Resources, but Defendants again chose not to impose a litigation hold. In late January 2017, after Defendants terminated Plaintiff's employment, Defendants again failed to impose a litigation hold. In March 2017, after Ms. Palmer noticed that Plaintiff had not returned the release of all claims arising out of her employment, and two months after Plaintiff's termination, Defendants still did not impose a litigation hold. In April 2017, Mr. Adelman called Ms. Kundar regarding Plaintiff's claims, but Defendants still did not impose a litigation hold. At each occasion, Defendants had more information and more reason to impose a litigation hold that would have preserved Plaintiff's **[*38]** ESI. Defendants failed at every opportunity. Such repeated failure, especially considering Ms. Kundar's involvement in providing advice since October 2016, evidences an intent to deprive. See *Moody, 271 F. Supp. 3d at 431-432* ("defendants' repeated failure over a period of years to confirm that the data had been properly preserved despite its ongoing and affirmative *Rule 11* and *Rule 26* obligations . . . evince[s] intentionality"); *O'Berry v. Turner, No. 15-CV-0064, 2016 U.S. Dist. LEXIS 55714, 2016 WL 1700403, at *4 (M.D. Ga. Apr. 27, 2016)* ("severe measures . . . are most appropriate to remedy the wrong"; "additional efforts to ensure the preservation of these materials once the spoliation letter was received" should have been

made; "[s]uch irresponsible and shiftless behavior can only lead to one conclusion — that [defendants] acted with the intent to deprive").

(R&R (Dkt. No. 89) at 30-31)

Defendants object to Judge Wang's finding of intent because (1) "the duty to preserve did not attach in October 2016"; (2) there is no evidence that Defendants acted with an intent to deprive Plaintiff of the SAP data; and (3) Defendants' efforts to reproduce Plaintiff's SAP data refute a finding of intent to deprive. (Def. Obj. (Dkt. No. 97) at 27-29)

In urging this Court to find that Defendants acted with an intent to deprive, Plaintiff contends that **[*39]** Defendants' "conduct in this litigation" is so egregious as to constitute "circumstantial evidence" of their intent to deprive Plaintiff of relevant information. (Pltf. Resp. (Dkt. No. 108) at 30)

This Court concludes that Plaintiff has not shown that Defendants acted with the intent to deprive Plaintiff of relevant evidence. As an initial matter, this Court has ruled that Defendants duty to preserve ESI did not arise until April 3, 2017, when Plaintiff's counsel alerted Defendants to Plaintiff's claims. By that time, Plaintiff's email account had already been deleted. Accordingly, Defendants failure to impose a litigation hold prior to April 3, 2017, is not proof of intent to deprive.

As to Plaintiff's SAP account, Defendants deleted this data in December 2017, several months after this lawsuit was filed. Accordingly, at the time Plaintiff's SAP account was deleted, Defendants were on notice of Plaintiff's claims and — as discussed above — knew or should have known that Plaintiff's SAP account would contain data relevant to her overtime compensation claims under the FLSA and the NYLL.

This Court concludes, however, that Defendants acted negligently, and not with culpable intent. As an **[*40]** initial matter, defense counsel appears not to have understood the relevance of SAP data until she received Plaintiff's first request for the production of documents in March 2018. (Kundar Decl. (Dkt. No. 50) ¶ 23) After receiving Plaintiff's requests, defense counsel requested the SAP data from Defendants. She then learned that there had been a "glitch" in the system that had caused Plaintiffs SAP account to be deleted along with her email. (Id. ¶ 26; Buist Decl. (Dkt. No. 52) ¶ 7) After discovering this deletion, defense counsel and Defendants worked to reproduce the missing data, expending significant resources in doing so. (Kundar Decl. ¶¶ 27, 37) While the record here demonstrates that Defendants were negligent in failing to preserve Plaintiff's SAP account, the record does not demonstrate that Defendants destroyed Plaintiff's SAP account with the "'intent to deprive [her] of the information's use in litigation.'" *Leidig, 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *11* (quoting *Fed. R. Civ. P. 37(e)(2)(A)-(C)*) (emphasis in Leidig).[7]

The cases relied on by Judge Wang (R&R (Dkt. No. 89) at 30-31) are not to the contrary. See *O'Berry v. Turner, No. 7:15-CV-00064-HL, 2016 U.S. Dist. LEXIS 55714, 2016 WL 1700403, at *1, *4 (M.D. Ga. Apr. 27, 2016)* (intent to deprive found where plaintiff, the victim of a car accident caused by defendants' **[*41]** truck driver, requested that defendants "preserve driver logs, information gathered from the truck, and information about the truck itself"; after receiving this request, defendants allowed "[t]he [relevant] documents [to be] moved from one building to another, during which individuals unaware of their importance had access to and control over the information," which was lost); *GN Netcom, Inc. v. Plantronics, Inc., No. CV 12-1318-LPS, 2016 U.S. Dist. LEXIS 93299, 2016 WL 3792833, at *7 (D. Del. July 12, 2016)* (defendant was involved in a "hotly-contested antitrust lawsuit between fierce competitors"; intent to deprive found where defendant's senior vice president "repeatedly direct[ed] Plantronics employees to delete emails, despite knowing of the litigation hold, and at least partly out of concern as to

[7] To be sure, defense counsel's conduct in this litigation has been troubling. She discovered in March and April 2018 that Plaintiff's emails and SAP data, respectively, had been deleted (Kundar Decl. (Dkt. No. 50) ¶¶ 24, 36), but she did not disclose the deletions to the Court or opposing counsel until July 26, 2018. (Id. ¶ 34) Defense counsel's explanation for the delay is that she thought that "Defendants might yet find a substitute way to provide what had been deleted." (Id. ¶ 30) This belief does not excuse the obligation to make a timely disclosure. To be clear, once counsel discovered that relevant information had been destroyed, disclosure should have been made immediately.

In making a determination as to intent, however, the Court must also consider Defendants' efforts to recover the SAP data. Defendants have devoted substantial resources to this task, and have recovered "tables from the SAP system from 2014, 2015, 2016, and 2017, which show the time Plaintiff used the SAP system to enter orders." (Kundar Decl. (Dkt. No. 50) ¶ 39; see also Pltf. Obj. (Dkt. No. 95) at 9 ("Defendants produced partially recovered SAP data.") This Court concludes that while Defendants were negligent in failing to preserve Plaintiff's SAP account, Plaintiff has not demonstrated that Defendants acted with an intent to deprive.

how those emails would be used in litigation against Plantronics if they were produced to GN").

In *Moody v. CSX Transportation, Inc., 271 F. Supp. 3d 410 (W.D.N.Y. 2017)*, also cited by Judge Wang, plaintiff was struck by a train and dragged approximately twenty feet, resulting in severe injuries. *Moody, 271 F. Supp. 3d at 414*. Defendant CSX uploaded certain event recorder data from the locomotive within hours of the accident. *Id. at 426*. That data was relevant to "(1) whether the bell and/or horn were sounded prior to train movement, (2) how fast the train was moving **[*42]** when Moody was struck; and (3) whether the brakes had been applied." Id. Over the next four years, CSX never checked whether the data had been properly uploaded, but destroyed the original source of the event recorder data. *Id. at 426, 428*. It later emerged that the data had not been properly uploaded. *Id. at 423*. The district court found that "[t]he proposition that a sophisticated railroad transportation corporation such as CSX could be involved in a serious accident in which an individual lost a limb and thereafter fail for four years to review critical data relating to how that accident occurred is unfathomable." *Id. at 426-27*. The court further concluded that CSX had acted with intent to deprive, because the destroyed evidence was "the most important evidence," and the defendants' decision to override the original source of the data was "so stunningly derelict as to evince intentionality." *Id. at 431*.

Here, the circumstances are not nearly as severe. Defendants deleted Plaintiff's email account at a time before their obligation to preserve had been triggered. Although (1) Defendants also deleted Plaintiff's SAP account, and (2) the SAP account contains data that is relevant to Plaintiff's overtime compensation claim, the SAP **[*43]** account is not a record of hours worked, and is not "the most important evidence" of her overtime claims. Moreover, once Defendants learned that Plaintiff was requesting the SAP data, they made expeditious efforts to recover the data, and succeeded in retrieving much of what had been lost.

In sum, while the record demonstrates that Defendants did not take "reasonable steps" to preserve Plaintiff's SAP account, it does not demonstrate that Defendants acted with a culpable state of mind in destroying the SAP account.

**E. Whether Plaintiff Has Been Prejudiced by the Destruction of the SAP Account**

Where, as here, a party acts negligently and not with intent to deprive, *Rule 37(e)(1)* "permits the imposition of sanctions only when there is 'prejudice to another party from loss of the information.'" *Leidig, 2017 U.S. Dist. LEXIS 208756, 2017 WL 6512353, at *12* (quoting *Fed. R. Civ. P. 37(e)(1)*) "The advisory committee's note to the 2015 amendment of *Rule 37(e)(1)* stated that '[a]n evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.'" Id. (quoting *Fed. R. Civ. P. 37(e)(1)* advisory committee's note to 2015 amendment) (alterations in Leidig). "The Advisory Committee further cautioned that '[t]he rule does not place a burden of proving or disproving **[*44]** prejudice on one party or the other,' and that '[t]he rule leaves judges with discretion to determine how best to assess prejudice in particular cases.'" Id. (quoting *Fed. R. Civ. P. 37(e)(1)* advisory committee's note to 2015 amendment) (alterations in Leidig).

Judge Wang states that "[p]rejudice to Plaintiff from the deletion of her email and SAP account is apparent." (R&R (Dkt. No. 89) at 28) Judge Wang focuses on the deletion of Plaintiff's email account, however, and does not analyze whether Plaintiff was prejudiced by the loss of her SAP account.

Plaintiff argues that she has been prejudiced by the destruction of her SAP account, "as she will be unable to rebut Defendants' defenses," including that (1) "Plaintiff did not work more than forty hours [per week]"; (2) Defendants lacked knowledge of the same; and (3) Plaintiff falsely reported her hours. (Pltf. Br. (Dkt. No. 46) at 28) Plaintiff contends that the SAP data Defendants recovered "only shows order entry, and does not contain login times, or evidence of other use and activity such as running reports, which Plaintiff did frequently." (Pltf. Response (Dkt. No. 108) at 15)

Defendants argue, however, that Plaintiff has not been prejudiced by the loss **[*45]** of the SAP data because Defendants were able to "produce[] SAP data from 2014-2017, more than 1,000 pages of Plaintiff's daily computer log-in records for two computers, weekly attendance sheets, a list of Plaintiff's absences, and work schedules for Plaintiff's use in confirming her work hours." (Def. Br. (Dkt. No. 53) at 20)

This Court is not prepared to resolve this dispute on the current record. As noted above, Judge Wang did not separately consider the degree to which Plaintiff has been prejudiced by the loss of the SAP data, and it is not clear to this Court whether the log-in information

available for Plaintiff's computers — together with the recovered SAP data and the other information reflecting Plaintiff's hours and work schedule — will permit Plaintiff to reconstruct the hours she worked. Assuming arguendo that Plaintiff has been prejudiced, it will be necessary to determine an appropriate sanction. Judge Wang recommends an adverse inference instruction, but that resolution is not appropriate in light of this Court's finding that Defendants did not act with culpable intent. See *Fed. R. Civ. P. 37(e)*. Moreover, the parties have not briefed the issue of what an appropriate *Rule 37(e)(1)* sanction would be.

Accordingly, **[*46]** this matter will be remanded to Judge Wang for purposes of determining whether Plaintiff has been prejudiced by the loss of her SAP account and, if so, determining an appropriate sanction.

**III. ATTORNEYS' FEE AWARD**

Judge Wang granted Plaintiff's application for an award of attorneys' fees and costs based on her findings in the R & R that (1) Defendants did not take reasonable steps to preserve relevant ESI; and (2) Plaintiff was prejudiced by the loss of relevant ESI. (See Order (Dkt. No. 90)) Defendants have objected to this order. (Dkt. No. 99)

In light of this Court's findings regarding Plaintiff's spoliation claim, Defendants' objection to the award of attorneys' fees and costs is sustained. If appropriate based on Judge Wang's determinations as to the SAP account and prejudice to Plaintiff', Plaintiff may renew her request for an award of attorneys' fees and costs.

**CONCLUSION**

For the reasons stated above, Plaintiff's objections to the R&R are overruled. Defendants' objections are sustained in part and overruled in part. The Clerk of Court is instructed to terminate the motion (Dkt. No. 42). The matter is referred again to Judge Wang for further proceedings consistent with this opinion. **[*47]**

Dated: New York, New York

September 30, 2019

SO ORDERED.

/s/ Paul G. Gardephe

Paul G. Gardephe

United States District Judge

---

End of Document

Reprinted with the permission of LexisNexis

Caution
As of: December 9, 2019 8:28 PM Z

# Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC

Supreme Court of the United States

January 8, 2019, Argued; March 4, 2019, Decided

No. 17-571.

**Reporter**

139 S. Ct. 881 *; 203 L. Ed. 2d 147 **; 2019 U.S. LEXIS 1730 ***; 129 U.S.P.Q.2D (BNA) 1453 ****; Copy. L. Rep. (CCH) P31,421; 2019 Media L. Rep. 391; 27 Fla. L. Weekly Fed. S 686; 2019 WL 1005829

FOURTH ESTATE PUBLIC BENEFIT CORPORATION, Petitioner v. WALL-STREET.COM, LLC, et al.

**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Prior History: [***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

*Fourth Estate Pub. Ben. Corp. v. Wall-Street.com, LLC, 856 F.3d 1338, 2017 U.S. App. LEXIS 8766 (11th Cir. Fla., May 18, 2017)*

**Disposition:** Affirmed.

## Case Summary

### Overview

HOLDINGS: [1]-In resolving a division among the U. S. Courts of Appeals, the U.S. Supreme Court held that registration of a copyright occurred in accordance with *17 U.S.C.S. § 411(a)*, and a copyright claimant could commence a copyright infringement suit, when the Copyright Office registered a copyright; [2]-Upon registration of the copyright, however, a copyright owner could recover for infringement that occurred both before and after registration; [3]-Rejecting petitioner's application approach, the Court concluded that the registration approach reflected the only satisfactory reading of *§ 411(a)*'s text; [4]-“Registration has been made” within the meaning of *§ 411(a)* not when an application for registration was filed, but when the Register of Copyrights had registered a copyright after examining a properly filed application.

### Outcome

Eleventh Circuit's judgment affirmed. 9-0 decision.

## Syllabus

**[*884]** Petitioner Fourth Estate Public Benefit Corporation (Fourth Estate), a news organization, licensed works to respondent Wall-Street.com, LLC (Wall-Street), a news website. Fourth Estate sued Wall-Street and its owner for copyright infringement of news articles that Wall-Street failed to remove from its website after canceling the parties' license agreement. Fourth Estate had filed applications to register the articles with the Copyright Office, but the Register of Copyrights had not acted on those applications. *Title 17 U. S. C. §411(a)* states that “no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title.” The District Court

dismissed the complaint, and the Eleventh Circuit affirmed, holding that "registration . . . has [not] been made" under §411(a) until the Copyright Office registers a copyright.

*Held:* Registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright **[***2]** owner can recover **[**151]** for infringement that occurred both before and after registration. *Pp. ___ - ___, 203 L. Ed. 2d, at 153-159*.

(a) Under the *Copyright Act of 1976*, as amended, a copyright author gains "exclusive rights" in her work immediately upon the work's creation. *17 U. S. C. §106*. A copyright owner may institute a civil **[*885]** action for infringement of those exclusive rights, *§501(b)*, but generally only after complying with *§411(a)*s requirement that "registration . . . has been made." Registration is thus akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights. *P. ___, 203 L. Ed. 2d, at 153*.

(b) In limited circumstances, copyright owners may file an infringement suit before undertaking registration. For example, a copyright owner who is preparing to distribute a work of a type vulnerable to predistribution infringement--*e.g.*, a movie or musical composition--may apply to the Copyright Office for preregistration. *§408(f)(2)*. A copyright owner may also sue for infringement of a live broadcast before "registration . . . has been made." *§411(c)*. Outside of statutory exceptions not applicable here, however, *§411(a)* bars a copyright owner from suing for infringement until "registration . . . has been made." Fourth Estate advances the "application **[***3]** approach" to this provision, arguing that registration occurs when a copyright owner submits a proper application for registration. Wall-Street advocates the "registration approach," urging that registration occurs only when the Copyright Office grants registration of a copyright. The registration approach reflects the only satisfactory reading of *§411(a)*s text. *Pp. ___ - ___, 203 L. Ed. 2d, at 153-159*.

(1) Read together, *§411(a)*s first two sentences focus on action by the Copyright Office--namely, its registration or refusal to register a copyright claim. If application alone sufficed to "ma[ke]" registration, *§411(a)*s second sentence--which permits a copyright claimant to file suit when the Register has refused her application--would be superfluous. Similarly, *§411(a)*s third sentence--which allows the Register to "become a party to the action with respect to the issue of registrability of the copyright claim"--would be negated if an infringement suit could be filed and resolved before the Register acted on an application. The registration approach reading of *§411(a)* is supported by other provisions of the *Copyright Act*. In particular, *§410* confirms that application is discrete from, and precedes, registration, while *§408(f)*s preregistration option would have **[***4]** little utility if a completed application sufficed to make registration. *Pp. ___ - ___, 203 L. Ed. 2d, at 154-159*.

(2) Fourth Estate primarily contends that the *Copyright Act* uses the phrases "make registration" and "registration has been made" to describe submissions by the copyright owner. Fourth Estate therefore insists that *§411(a)*s requirement that "registration . . . has been made in accordance with this title" most likely refers to a copyright owner's compliance with statutory requirements for registration applications. Fourth Estate points to other *Copyright Act* provisions that appear to use the phrase "make registration" or one of its variants to describe what a copyright claimant does. Fourth Estate acknowledges, **[**152]** however, that determining how the *Copyright Act* uses the word "registration" in a particular provision requires examining the "specific context" in which the term is used. The "specific context" of *§411(a)* permits only one sensible reading: The phrase "registration . . . has been made" refers to the Copyright Office's act granting registration, not to the copyright claimant's request for registration.

Fourth Estate's contrary reading stems in part from its misapprehension of the significance of certain 1976 revisions **[***5]** to the *Copyright Act*. But in enacting *§411(a)*, Congress both reaffirmed the general rule that registration must precede an infringement suit and added an exception in that provision's second sentence to cover instances in which registration is refused. That exception would have **[*886]** no work to do if Congress intended the 1976 revisions to clarify that a copyright claimant may sue immediately upon applying for registration. Noteworthy, too, in years following the 1976 revisions, Congress resisted efforts to eliminate *§411(a)*, which contains the registration requirement.

Fourth Estate also argues that, because "registration is not a condition of copyright protection," *§408(a)*, *§411(a)* should not bar a copyright claimant from enforcing that protection in court once she has applied for registration. But the *Copyright Act* safeguards copyright owners by vesting them with exclusive rights upon creation of their works and prohibiting infringement from that point

forward. To recover for such infringement, copyright owners must simply apply for registration and await the Register's decision. Further, Congress has authorized preregistration infringement suits with respect to works vulnerable to predistribution infringement, and **[***6]** Fourth Estate's fear that a copyright owner might lose the ability to enforce her rights entirely is overstated. True, registration processing times have increased from one to two weeks in 1956 to many months today. Delays, in large part, are the result of Copyright Office staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. Unfortunate as the current administrative lag may be, that factor does not allow this Court to revise §411(a)s congressionally composed text. Pp. ___ - ___, 203 L. Ed. 2d, at 156-159.

856 F. 3d 1338, affirmed.

**Counsel: Aaron M. Panner** argued the cause for petitioner.

**Peter K. Stris** argued the cause for respondents.

**Jonathan Y. Ellis** argued the cause for the United States, as amicus curiae, by special leave of court.

**Judges:** Ginsburg, J., delivered the opinion for a unanimous Court.

**Opinion by:** GINSBURG

## Opinion

**[****1455]** Justice **Ginsburg** delivered the opinion of the Court.

Impelling prompt registration of copyright claims, 17 U. S. C. §411(a) states that "no civil action for infringement of the copyright in any United States work shall be instituted until . . . registration of the copyright claim has been made in accordance with this title." The question this case presents: Has "registration . . . been made in accordance with [Title 17]" as soon as the claimant delivers the required application, copies of the work, and fee to the Copyright Office; or has "registration . . . been made" only after the Copyright Office reviews and registers the copyright? **[***7]** We hold, in accord with the United States Court of Appeals for the **[**153]** Eleventh Circuit, that [1] registration occurs, and a copyright claimant may commence an infringement suit, when the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright owner can recover **[*887]** for infringement that occurred both before and after registration.

Petitioner Fourth Estate Public Benefit Corporation (Fourth Estate) is a news organization producing online journalism. Fourth Estate licensed journalism works to respondent Wall-Street.com, LLC (Wall-Street), a news website. The license agreement required Wall-Street to remove from its website all content produced by Fourth Estate before canceling the agreement. Wall-Street canceled, but continued to display articles produced by Fourth Estate. Fourth Estate sued Wall-Street and its owner, Jerrold Burden, for copyright infringement. The complaint alleged that Fourth Estate had filed "applications to register [the] articles [licensed to Wall-Street] with the Register of Copyrights." App. to Pet. for Cert. 18a. [1] Because the Register had not yet acted on Fourth Estate's applications, [2] the District Court, on Wall-Street and Burden's **[***8]** motion, dismissed the complaint, and the Eleventh Circuit affirmed. 856 F. 3d 1338 (2017). Thereafter, the Register of Copyrights refused registration of the articles Wall-Street had allegedly infringed. [3]

We granted Fourth Estate's petition for certiorari to resolve a division among U. S. Courts of Appeals on when registration occurs in accordance with §411(a).

[1] The Register of Copyrights is the "director of the Copyright Office of the Library of Congress" and is appointed by the Librarian of Congress. 17 U. S. C. §701(a). The Copyright Act delegates to the Register "[a]ll administrative functions and duties under [Title 17]." *Ibid.*

[2] Consideration of Fourth Estate's filings was initially delayed because the check Fourth Estate sent in payment of the filing fee was rejected by Fourth Estate's bank as uncollectible. App. to Brief for United States as *Amicus Curiae* 1a.

[3] The merits of the Copyright Office's decision refusing registration are not at issue in this Court.

*585 U. S. ___, 138 S. Ct. 2707, 201 L. Ed. 2d 1095 (2018)*. Compare, *e.g., 856 F. 3d, at 1341* (case below) (registration has been made under *§411(a)* when the Register of Copyrights registers a copyright), with, *e.g., Cosmetic Ideas, Inc. v. IAC/Interactivecorp, 606 F. 3d 612, 621 (CA9 2010)* (registration has been made under *§411(a)* when the copyright claimant's "complete application" for registration is received by the Copyright Office).

**[****1456]** I

[2] Under the *Copyright Act of 1976*, as amended, copyright protection attaches to "original works of authorship"—prominent among them, literary, musical, and dramatic works—"fixed in any tangible medium of expression." *17 U. S. C. §102(a)*. An author gains "exclusive rights" in her work immediately upon the work's creation, including rights of reproduction, distribution, and display. See *§106*; *Eldred v. Ashcroft, 537 U. S. 186, 195, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003)* ("[F]ederal copyright protection . . . run[s] from the work's creation."). The *Copyright Act* entitles a copyright owner to institute a civil action for infringement of those exclusive rights. *§501(b)*.

[3] Before **[***9]** pursuing an infringement **[**154]** claim in court, however, a copyright claimant generally must comply with *§411(a)*'s requirement that "registration of the copyright claim has been made." *§411(a)*. Therefore, although an owner's rights exist apart from registration, see *§408(a)*, registration is akin to an administrative exhaustion requirement that the owner must satisfy before suing to enforce ownership rights, see Tr. of Oral Arg. 35.

[4] **[*888]** In limited circumstances, copyright owners may file an infringement suit before undertaking registration. If a copyright owner is preparing to distribute a work of a type vulnerable to predistribution infringement—notably, a movie or musical composition—the owner may apply for preregistration. *§408(f)(2)*; *37 CFR §202.16(b)(1) (2018)*. The Copyright Office will "conduct a limited review" of the application and notify the claimant "[u]pon completion of the preregistration." *§202.16(c)(7)*, *(c)(10)*. Once "preregistration . . . has been made," the copyright claimant may institute a suit for infringement. *17 U. S. C. §411(a)*. Preregistration, however, serves only as "a preliminary step prior to a full registration." *Preregistration of Certain Unpublished Copyright Claims, 70 Fed. Reg. 42286 (2005)*. An infringement suit brought in reliance on preregistration risks dismissal unless the copyright owner applies for registration promptly after **[***10]** the preregistered work's publication or infringement. *§408(f)(3)-(4)*. A copyright owner may also sue for infringement of a live broadcast before "registration . . . has been made," but faces dismissal of her suit if she fails to "make registration for the work" within three months of its first transmission. *§411(c)*. Even in these exceptional scenarios, then, the copyright owner must eventually pursue registration in order to maintain a suit for infringement.

II

All parties agree that, outside of statutory exceptions not applicable here, *§411(a)* bars a copyright owner from suing for infringement until "registration . . . has been made." Fourth Estate and Wall-Street dispute, however, whether "registration . . . has been made" under *§411(a)* when a copyright owner submits the application, materials, and fee required for registration, or only when the Copyright Office grants registration. Fourth Estate advances the former view—the "application approach"—while Wall-Street urges the latter reading—the "registration approach." The registration approach, we conclude, reflects the only satisfactory reading of *§411(a)*'s text. We therefore reject Fourth Estate's application approach.

A

[5] Under *§411(a)*, "registration . . . has been made," and a copyright **[***11]** owner may sue for infringement, when the Copyright Office registers a copyright. [4] *Section 411(a)*'s first sentence provides that no civil infringement action "shall be instituted until preregistration or registration of the copyright claim has been made." The **[**155]** section's next sentence sets out an exception to this rule: When the required "deposit, application, and fee . . . have been delivered to the Copyright Office in proper form and registration has

---

[4] *Section 411(a)* provides, in principal part: "[N]o civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim . . . ."

been refused," the claimant "[may] institute a civil action, if notice thereof . . . is served on the Register." Read together, §411(a)'s opening sentences focus not on the claimant's act of applying for registration, but on action by the Copyright Office—namely, its registration **[*889]** or refusal to register a copyright claim.

**[****1457]** If application alone sufficed to "ma[ke]" registration, §411(a)'s second sentence—allowing suit upon refusal of registration—would be superfluous. What utility would that allowance have if a copyright claimant could sue for infringement immediately after applying for registration without awaiting the Register's decision on her application? Proponents of the application approach urge that §411(a)'s second sentence serves merely to require a copyright claimant **[***12]** to serve "notice [of an infringement suit] . . . on the Register." See Brief for Petitioner 29-32. This reading, however, requires the implausible assumption that Congress gave "registration" different meanings in consecutive, related sentences within a single statutory provision. In §411(a)'s first sentence, "registration" would mean the claimant's act of filing an application, while in the section's second sentence, "registration" would entail the Register's review of an application. We resist this improbable construction. See, *e.g.*, Mid-Con Freight Systems, Inc. v. Michigan Pub. Serv. Comm'n, 545 U. S. 440, 448, 125 S. Ct. 2427, 162 L. Ed. 2d 418 (2005) (declining to read "the same words" in consecutive sentences as "refer[ring] to something totally different").

[6] The third and final sentence of §411(a) further persuades us that the provision requires action by the Register before a copyright claimant may sue for infringement. The sentence allows the Register to "become a party to the action with respect to the issue of registrability of the copyright claim." This allowance would be negated, and the court conducting an infringement suit would lack the benefit of the Register's assessment, if an infringement suit could be filed and resolved before the Register **[***13]** acted on an application.

Other provisions of the Copyright Act support our reading of "registration," as used in §411(a), to mean action by the Register. [7] Section 410 states that, "after examination," if the Register determines that "the material deposited constitutes copyrightable subject matter" and "other legal and formal requirements . . . [are] met, the Register shall register the claim and issue to the applicant a certificate of registration." §410(a). But if the Register determines that the deposited material "does not constitute copyrightable subject matter or that the claim is invalid for any other reason, the Register shall refuse registration." §410(b). Section 410 thus confirms that application is discrete from, and precedes, registration. Section 410(d), furthermore, provides that if the Copyright Office registers a claim, or if a court later determines that a refused claim was registrable, **[**156]** the "effective date of [the work's] copyright registration is the day on which" the copyright owner made a proper submission to the Copyright Office. There would be no need thus to specify the "effective date of a copyright registration" if submission of the required materials qualified as "registration."

Section 408(f)'s preregistration option, too, would **[***14]** have little utility if a completed application constituted registration. Preregistration, as noted *supra, at ____ - ____, 203 L. Ed. 2d, at 153-154*, allows the author of a work vulnerable to predistribution infringement to enforce her exclusive rights in court before obtaining registration or refusal thereof. A copyright owner who fears prepublication infringement would have no reason to apply for preregistration, however, if she could instead simply complete an application for registration and immediately commence an infringement suit. Cf. TRW Inc. v. Andrews, 534 U. S. 19, 29, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (rejecting an interpretation that "would in practical effect render **[*890]** [a provision] superfluous in all but the most unusual circumstances").

B

Challenging the Eleventh Circuit's judgment, Fourth Estate primarily contends that the Copyright Act uses "the phrase 'make registration' and its passive-voice counterpart 'registration has been made'" to describe submissions by the copyright owner, rather than Copyright Office responses to those submissions. Brief for Petitioner 21. Section 411(a)'s requirement that "registration . . . has been made in accordance with this title," Fourth Estate insists, most likely refers to a copyright owner's compliance with the statutory specifications for registration applications. **[***15]** In support, Fourth Estate points to Copyright Act provisions that appear to use the phrase "make registration" or one of its variants to describe what a copyright claimant does. See *id.*, at 22-26 (citing 17 U. S. C. §§110, 205(c), 408(c)(3), 411(c), 412(2)). Furthermore, Fourth Estate urges that its reading reflects the reality that, eventually, the vast majority of applications are granted. See Brief for Petitioner 41.

Fourth Estate acknowledges, however, that the Copyright Act sometimes uses "registration" to refer to activity by the Copyright Office, not activity undertaken by a copyright **[****1458]** claimant. See *id.*, at 27-28 (citing *17 U. S. C. §708(a)*). Fourth Estate thus agrees that, to determine how the statute uses the word "registration" in a particular prescription, one must "look to the specific context" in which the term is used. Brief for Petitioner 29. As explained *supra, at ___ - ___, 203 L. Ed. 2d, at 154-156*, the "specific context" of *§411(a)* permits only one sensible reading: The phrase "registration . . . has been made" refers to the Copyright Office's act granting registration, not to the copyright claimant's request for registration.

Fourth Estate's contrary reading of *§411(a)* stems in part from its misapprehension of the significance of certain 1976 revisions to the Copyright Act. Before that year, *§411(a)*'s precursor provided **[***16]** that "[n]o action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and **[**157]** registration of such work shall have been complied with." 17 U. S. C. §13 (1970 ed.). Fourth Estate urges that this provision posed the very question we resolve today—namely, whether a claimant's application alone effects registration. The Second Circuit addressed that question, Fourth Estate observes, in *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., 260 F. 2d 637 (1958)*. Brief for Petitioner 32-34. In that case, in an opinion by Judge Learned Hand, the court held that a copyright owner who completed an application could not sue for infringement immediately upon the Copyright Office's refusal to register. *Vacheron, 260 F.3d at 640-641*. Instead, the owner first had to obtain a registration certificate by bringing a mandamus action against the Register. The Second Circuit dissenter would have treated the owner's application as sufficient to permit commencement of an action for infringement. *Id., at 645*.

Fourth Estate sees Congress' 1976 revision of the registration requirement as an endorsement of the *Vacheron* dissenter's position. Brief for Petitioner 34-36. We disagree. The changes made in 1976 instead indicate Congress' agreement with **[***17]** Judge Hand that it is the Register's action that triggers a copyright owner's entitlement to sue. [8] In enacting *17 U. S. C. §411(a)*, Congress both reaffirmed the general rule that registration must precede an infringement suit, and added an **[*891]** exception in that provision's second sentence to cover instances in which registration is refused. See H. R. Rep. No. 94–1476, p. 157 (1976). That exception would have no work to do if, as Fourth Estate urges, Congress intended the 1976 revisions to clarify that a copyright claimant may sue immediately upon applying for registration. A copyright claimant would need no statutory authorization to sue after refusal of her application if she could institute suit as soon as she has filed the application.

Noteworthy, too, in years following the 1976 revisions, Congress resisted efforts to eliminate *§411(a)* and the registration requirement embedded in it. In 1988, Congress removed foreign works from *§411(a)*'s dominion in order to comply with the Berne Convention for the Protection of Literary and Artistic Works' bar on copyright formalities for such works. See §9(b)(1), 102 Stat. 2859. Despite proposals to repeal *§411(a)*'s registration requirement entirely, however, see S. Rep. No. 100–352, p. 36 (1988), Congress maintained **[***18]** the requirement for domestic works, see *§411(a)*. Subsequently, in 1993, Congress considered, but declined to adopt, a proposal to allow suit immediately upon submission of a registration application. See H. R. Rep. No. 103-338, p. 4 (1993). And in 2005, Congress made a preregistration option available for works vulnerable to predistribution infringement. See Artists' Rights and Theft Prevention Act of 2005, §104, 119 Stat. 221. See also *supra, at ___ - ___, 203 L. Ed. 2d, at 153-154*. Congress chose that course in face of calls to eliminate registration in cases of predistribution infringement. *70 Fed. Reg. 42286*. Time and again, then, Congress has maintained registration as prerequisite to suit, and rejected proposals that would have eliminated registration or tied it to **[**158]** the copyright claimant's application instead of the Register's action. [5]

Fourth Estate additionally argues that, as "registration is not a condition of copyright protection," *17 U. S. C. §408(a)*, *§411(a)* should not be read to bar a copyright claimant from enforcing that protection in court once **[****1459]** she has submitted a proper application for

[5] Fourth Estate asserts that, if a copyright owner encounters a lengthy delay in the Copyright Office, she may be forced to file a mandamus action to compel the Register to rule on her application, the very problem exposed in *Vacheron & Constantin-Le Coultre Watches Inc., v. Benrus Watch Co., 260 F. 2d 637 (CA2 1958)*, see *supra, at ___, 203 L. Ed. 2d, at 156*. But Congress' answer to *Vacheron*, codified in *§411(a)*'s second sentence, was to permit an infringement suit upon refusal of registration, not to eliminate Copyright Office action as the trigger for an infringement suit.

registration. Brief for Petitioner 37. But as explained *supra, at ___, 203 L. Ed. 2d, at 153*, the *Copyright Act* safeguards copyright owners, irrespective of registration, by vesting them with exclusive rights upon creation of **[***19]** their works and prohibiting infringement from that point forward. If infringement occurs before a copyright owner applies for registration, that owner may eventually recover damages for the past infringement, as well as the infringer's profits. *§504*. She must simply apply for registration and receive the Copyright Office's decision on her application before instituting suit. Once the Register grants or refuses registration, the copyright owner may also seek an injunction barring the infringer from continued violation of her exclusive rights and an order requiring the infringer to destroy infringing materials. *§§502*, *503(b)*.

Fourth Estate maintains, however, that if infringement occurs while the Copyright Office is reviewing a registration application, the registration approach will deprive the owner of her rights during the waiting period. Brief for Petitioner 41. **[*892]** See also 1 P. Goldstein, Copyright §3.15, p. 3:154.2 (3d ed. 2018 Supp.) (finding application approach "the better rule"); 2 M. Nimmer & D. *Nimmer, Copyright §7.16[B][3][a], [b][ii] (2018)* (infringement suit is conditioned on application, while prima facie presumption of validity depends on certificate of registration). The *Copyright Act's* explicit carveouts from *§411(a)*'s general **[***20]** registration rule, however, show that Congress adverted to this concern. In the preregistration option, *§408*(f ), Congress provided that owners of works especially susceptible to prepublication infringement should be allowed to institute suit before the Register has granted or refused registration. See *§411(a)*. Congress made the same determination as to live broadcasts. *§411(c)*; see *supra, at ___, 203 L. Ed. 2d, at 154*. [6] As to all other works, however, *§411(a)*'s general rule requires owners to await action by the Register before filing suit for infringement.

Fourth Estate raises the specter that a copyright owner may lose the ability to enforce her rights if the *Copyright Act's* three-year statute of limitations runs out before the Copyright Office acts on her application for **[**159]** registration. Brief for Petitioner 41. Fourth Estate's fear is overstated, as the average processing time for registration applications is currently seven months, leaving ample time to sue after the Register's decision, even for infringement that began before submission of an application. See U. S. Copyright Office, Registration Processing Times (Oct. 2, 2018) (Registration Processing Times), https://www.copyright.gov/registration/docs/processing-times-faqs.pdf **[***21]** (as last visited Mar. 1, 2019).

True, the statutory scheme has not worked as Congress likely envisioned. Registration processing times have increased from one or two weeks in 1956 to many months today. See GAO, Improving Productivity in Copyright Registration 3 (GAO-AFMD-83-13 1982); Registration Processing Times. Delays in Copyright Office processing of applications, it appears, are attributable, in large measure, to staffing and budgetary shortages that Congress can alleviate, but courts cannot cure. See 5 W. Patry, Copyright §17:83 (2019). Unfortunate as the current administrative lag may be, that factor does not allow us to revise *§411(a)*'s congressionally composed text.

***

For the reasons stated, we conclude that [9] "registration . . . has been made" within the meaning of *17 U. S. C. §411(a)* not when an application for registration is filed, but when the Register has registered a copyright after examining a properly filed application. The judgment of the Court of Appeals for the Eleventh Circuit is accordingly

*Affirmed.*

## References

*17 U.S.C.S. § 411(a)*

3 *Nimmer on Copyright § 12.08* (Matthew Bender)

L Ed Digest, Copyright and Literary Property §§13, 19, 22

L Ed Index, Copyright and Literary Property

[6] Further, in addition to the Act's provisions for preregistration suit, the Copyright Office allows copyright claimants to seek expedited processing of a claim for an additional $800 fee. See U. S. Copyright Office, Special Handling: Circular No. 10, pp. 1-2 (2017). The Copyright Office grants requests for special handling in situations involving, *inter alia*, "[p]ending or prospective litigation," and "make[s] every attempt to examine the application . . . within five working days." Compendium of U. S. Copyright Practices §623.2, 623.4 (3d ed. 2017).

Supreme Court's views as to when books or other written or printed materials **[***22]** are copyrightable under federal law. *113 L. Ed. 2d 771*.

Supreme Court's views as to what constitutes copyright infringement. *78 L. Ed. 2d 957*.

---

End of Document

Reprinted with the permission of LexisNexis

Positive
As of: December 9, 2019 9:18 PM Z

# Lorenzo v. SEC

Supreme Court of the United States

December 3, 2018, Argued; March 27, 2019, Decided

No. 17-1077.

**Reporter**
139 S. Ct. 1094 *; 203 L. Ed. 2d 484 **; 2019 U.S. LEXIS 2295 ***; Fed. Sec. L. Rep. (CCH) P100,382; 27 Fla. L. Weekly Fed. S 747; 2019 WL 1369839

FRANCIS V. LORENZO, Petitioner v. SECURITIES AND EXCHANGE COMMISSION

**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Prior History:** **[***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Lorenzo v. SEC, 872 F.3d 578, 432 U.S. App. D.C. 420, 2017 U.S. App. LEXIS 18823 (D.C. Cir., Sept. 29, 2017)

**Disposition:** 872 F. 3d 578, 432 U.S. App. D.C. 420, affirmed.

## Case Summary

### Overview

HOLDINGS: [1]-Dissemination of false or misleading statements with intent to defraud can fall within the scope of SEC Rule 10b-5(a) and (c), 17 C.F.R. § 240.10b-5, as well as the relevant statutory provisions. That is so even if the disseminator did not "make" the statements and consequently falls outside Rule 10b-5(b). By sending e-mails he understood to contain material untruths, a registered broker-dealer employed a device, scheme, and artifice to defraud within the meaning of Rule 10b-5(a), and § 17(a)(1) of the Securities Act of 1933, 15 U.S.C.S. § 77q(a)(1), even though the broker-dealer sent the e-mails at the direction of his client, who supplied the content and "approved" the messages. By the same conduct, the broker-dealer engaged in an act, practice, or course of business that operated as a fraud or deceit under Rule 10b-5(c).

### Outcome

Judgment of Court of Appeals affirmed. 6-2 decision; 1 dissent.

## Syllabus

**[**486]** **[*1096]** Securities and Exchange Commission Rule 10b-5 makes it unlawful to (a) "employ any device, scheme, or artifice to defraud," (b) "make any untrue statement of a material fact," or (c) "engage in any act, practice, or course of business" that "operates . . . as a fraud or deceit" in connection with the purchase or sale of securities. In Janus Capital Group, Inc. v. First Derivative Traders, 564 U. S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166, this Court held that to be a "*maker*" of a statement under subsection (b) of that Rule, one must have "ultimate authority over the statement, including its content and whether and how to communicate it." Id., at

142, 131 S. Ct. 2296 (emphasis added). On the facts of *Janus*, this meant that an investment adviser who had merely "participat[ed] in the drafting of a false statement" "made" by another could not be held liable in a private action under subsection (b). Id., at 145, 131 S. Ct. 2296.

Petitioner Francis Lorenzo, while the director of investment banking at an SEC-registered brokerage firm, sent two e-mails to prospective investors. The content of those e-mails, which Lorenzo's boss supplied, described a potential investment in a company with "confirmed assets" of $10 million. In fact, Lorenzo knew that the company had recently disclosed **[***2]** that its total assets were worth less than $400,000.

In 2015, the Commission found that Lorenzo had violated Rule 10b-5, §10(b) of the Exchange Act, and §17(a)(1) of the Securities Act by sending false and misleading statements to investors with intent to defraud. On appeal, the District of Columbia Circuit held that Lorenzo **[**487]** could not be held liable as a "maker" under subsection (b) **[*1097]** of the Rule in light of *Janus*, but sustained the Commission's finding with respect to subsections (a) and (c) of the Rule, as well as §10(b) and §17(a)(1).

*Held:*

Dissemination of false or misleading statements with intent to defraud can fall within the scope of Rules 10b-5(a) and (c), as well as the relevant statutory provisions, even if the disseminator did not "make" the statements and consequently falls outside Rule 10b-5(b). Pp. ___ - ___, 203 L. Ed. 2d 484.

(a) It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud. By sending e-mails he understood to contain material untruths, Lorenzo "employ[ed]" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of the Rule, §10(b), and §17(a)(1). By the same conduct, he "engage[d] in a[n] act, practice, or course of business" that **[***3]** "operate[d] . . . as a fraud or deceit" under subsection (c) of the Rule. As Lorenzo does not challenge the appeals court's scienter finding, it is undisputed that he sent the e-mails with "intent to deceive, manipulate, or defraud" the recipients. Aaron v. SEC, 446 U. S. 680, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611. Resort to the expansive dictionary definitions of "device," "scheme," and "artifice" in Rule 10b-5(a) and §17(a)(1), and of "act" and "practice" in Rule 10b-5(c), only strengthens this conclusion. Under the circumstances, it is difficult to see how Lorenzo's actions could escape the reach of these provisions. Pp. 1100-1102, 203 L. Ed. 2d 484.

(b) Lorenzo counters that the only way to be liable for false statements is through those provisions of the securities laws--like Rule 10b-5(b)-that refer *specifically* to false statements. Holding to the contrary, he and the dissent say, would render subsection (b) "superfluous." The premise of this argument is that each subsection governs different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. And the idea that each subsection governs a separate type of conduct is difficult to reconcile with the Rule's language, since at least some conduct **[***4]** that amounts to "employ[ing]" a "device, scheme, or artifice to defraud" under subsection (a) also amounts to "engag[ing] in a[n] act . . . which operates . . . as a fraud" under subsection (c). This Court's conviction is strengthened by the fact that the plainly fraudulent behavior confronted here might otherwise fall outside the Rule's scope. Using false representations to induce the purchase of securities would seem a paradigmatic example of securities fraud. Pp. ___ - ___, 203 L. Ed. 2d 484.

(c) Lorenzo and the dissent make a few other important arguments. The dissent contends that applying Rules 10b-5(a) and (c) to conduct like Lorenzo's would render *Janus* "a dead letter." Post, at ___, 203 L. Ed. 2d 484 at 501. But *Janus* concerned subsection (b), and it said nothing about the Rule's application to the dissemination of false or misleading information. **[**488]** Thus, *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information--provided, of course, that the individual is not involved in some other form of fraud. Lorenzo also claims that imposing primary liability upon his conduct would erase or at least weaken the distinction between primary and secondary liability under the statute's "aiding and abetting" provision. See 15 U. S. C. §78t(e). But the line the Court adopts **[***5]** today is clear: Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b-5(a) and (c), §10(b), and §17(a)(1), even if they are **[*1098]** secondarily liable under Rule 10b-5(b). As for Lorenzo's suggestion that those like him ought to be held secondarily liable, this offer will, too often, prove illusory. Where a "maker" of a false statement does not violate

subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the "aiding and abetting" statute. And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b-5, then such a fraud, whatever its intent or consequences, might escape liability altogether. That anomalous result is not what Congress intended. Pp. ___ - ___, 203 L. Ed. 2d 484.

872 F. 3d 578. Affirmed.

**Counsel: Robert Heim** argued the cause for petitioner. **Christopher G. Michel** argued the cause, pro hac vice, for respondent.

**Judges:** Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Alito, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed a dissenting opinion, in which Gorsuch, J., joined. Kavanaugh, J., took no part in the consideration or decision of the case.

**Opinion by:** BREYER

## Opinion

Justice **Breyer** delivered the opinion of the Court.

Securities and Exchange Commission Rule 10b-5 makes it unlawful: **[***6]**

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact . . ., or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . .
>
> in connection with the purchase or sale of any security." 17 CFR §240.10b-5 (2018).

In Janus Capital Group, Inc. v. First Derivative Traders, 564 U. S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011), we examined the second of these provisions, [1]Rule 10b-5(b), which forbids the "mak[ing]" of "any untrue statement of a material fact." We held that the "*maker* of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it." Id., at 142, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (emphasis added). We said that "[w]ithout control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." *Ibid.* And we illustrated our holding with an analogy: "[W]hen a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is **[**489]** the speaker who takes credit—or blame—for what is ultimately said." Id., at 143, 131 S. Ct. 2296, 180 L. Ed. 2d 166. On the facts of *Janus*, this meant that an investment adviser who had merely "participat[ed] in the drafting of a false statement" "made" by another could not be **[*1099]** held liable in a private action under subsection (b) of Rule 10b-5. Id., at 145, 131 S. Ct. 2296, 180 L. Ed. 2d 166.

**[***7]** In this case, we consider whether those who do not "make" statements (as *Janus* defined "make"), but who disseminate false or misleading statements to potential investors with the intent to defraud, can be found to have violated the *other* parts of Rule 10b-5, subsections (a) and (c), as well as related provisions of the securities laws, §10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. §78j(b), and §17(a)(1) of the Securities Act of 1933, 48 Stat. 84-85, as amended, 15 U. S. C. §77q(a)(1). We believe that they can.

I

A

For our purposes, the relevant facts are not in dispute. Francis Lorenzo, the petitioner, was the director of investment banking at Charles Vista, LLC, a registered broker-dealer in Staten Island, New York. Lorenzo's only investment banking client at the time was Waste2Energy Holdings, Inc., a company developing technology to convert "solid waste" into "clean renewable energy."

In a June 2009 public filing, Waste2Energy stated that its total assets were worth about $14 million. This figure included intangible assets, namely, intellectual property, valued at more than $10 million. Lorenzo was skeptical of this valuation, later testifying that the intangibles were a "dead asset" because the technology "didn't really

work."

During the summer and early fall of 2009, Waste2Energy hired Lorenzo's firm, Charles Vista, to sell to investors $15 million worth of debentures, a form of "debt secured only by the debtor's earning power, not by a lien on any specific asset," Black's Law Dictionary 486 (10th ed. 2014).

In early October 2009, Waste2Energy publicly disclosed, and Lorenzo was told, **[***8]** that its intellectual property was worthless, that it had "' "[w]rit[ten] off . . . all [of its] intangible assets," '" and that its total assets (as of March 31, 2009) amounted to $370,552.

Shortly thereafter, on October 14, 2009, Lorenzo sent two e-mails to prospective investors describing the debenture offering. According to later testimony by Lorenzo, he sent the e-mails at the direction of his boss, who supplied the content and "approved" the messages. The e-mails described the investment in Waste2Energy as having "3 layers of protection," including $10 million in "confirmed assets." The e-mails nowhere revealed the fact that Waste2Energy had publicly stated that its assets were in fact worth less than $400,000. Lorenzo signed the e-mails with his own name, he identified himself as "Vice President—Investment Banking," and he invited the recipients to "call with any questions."

B

In 2013, the Securities and Exchange Commission instituted proceedings against Lorenzo (along with **[**490]** his boss and Charles Vista). The Commission charged that Lorenzo had violated Rule 10b-5, §10(b) of the Exchange Act, and §17(a)(1) of the Securities Act. Ultimately, the Commission found that Lorenzo had run afoul of these provisions **[***9]** by sending false and misleading statements to investors with intent to defraud. As a sanction, it fined Lorenzo $15,000, ordered him to cease and desist from violating the securities laws, and barred him from working in the securities industry for life.

**[*1100]** Lorenzo appealed, arguing primarily that in sending the e-mails he lacked the intent required to establish a violation of Rule 10b-5, §10(b), and §17(a)(1), which we have characterized as "'a mental state embracing intent to deceive, manipulate, or defraud.'" *Aaron v. SEC, 446 U. S. 680, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611, and n. 5 (1980)*. With one judge dissenting, the Court of Appeals panel rejected Lorenzo's lack-of-intent argument. *872 F. 3d 578, 583, 432 U.S. App. D.C. 420 (CADC 2017)*. Lorenzo does not challenge the panel's scienter finding. Reply Brief 17.

Lorenzo also argued that, in light of *Janus*, he could not be held liable under subsection (b) of Rule 10b-5. *872 F. 3d, at 586-587*. The panel agreed. Because his boss "asked Lorenzo to send the emails, supplied the central content, and approved the messages for distribution," *id., at 588*, it was the boss that had "ultimate authority" over the content of the statement "and whether and how to communicate it," *Janus, 563 U. S., at 142, 131 S. Ct. 2296, 180 L. Ed. 2d 166*. (We took this case on the assumption that Lorenzo was not a "maker" under subsection (b) of Rule 10b-5, and do not revisit the court's decision on this point.)

The Court of Appeals nonetheless sustained (with **[***10]** one judge dissenting) the Commission's finding that, by knowingly disseminating false information to prospective investors, Lorenzo had violated other parts of Rule 10b-5, subsections (a) and (c), as well as §10(b) and §17(a)(1).

Lorenzo then filed a petition for certiorari in this Court. We granted review to resolve disagreement about whether someone who is not a "maker" of a misstatement under *Janus* can nevertheless be found to have violated the other subsections of Rule 10b-5 and related provisions of the securities laws, when the only conduct involved concerns a misstatement. Compare *e.g.*, *872 F. 3d 578, 432 U.S. App. D.C. 420*, with *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc., 655 F. 3d 1039, 1057-1058 (CA9 2011)*.

II

A

At the outset, we review the relevant provisions of Rule 10b-5 and of the statutes. See Appendix, *infra*. As we have said, subsection (a) of the Rule makes it unlawful to "employ any device, scheme, or artifice to defraud." Subsection (b) makes it unlawful to "make any untrue statement of a material fact." And subsection (c) makes it unlawful to "engage in any act, practice, or course of business" that "operates . . . as a fraud or deceit." See 17 CFR §240.10b-5.

There are also two statutes at issue. [2]Section 10(b) makes it unlawful to "use or employ . . . any manipulative or deceptive device or contrivance" in contravention of Commission rules and regulations. 15

U. S. C. §78j(b). By its authority under that section, the Commission promulgated **[***11]** Rule 10b-5. **[**491]** The second statutory provision is §17(a), which, like Rule 10b-5, is organized into three subsections. 15 U. S. C. §77q(a). Here, however, we consider only the first subsection, §17(a)(1), for this is the only subsection that the Commission charged Lorenzo with violating. Like Rule 10b-5(a), (a)(1) makes it unlawful to "employ any device, scheme, or artifice to defraud."

B

After examining the relevant language, precedent, and purpose, we conclude that (assuming other here-irrelevant legal requirements are met) [3]dissemination of false or misleading statements with intent to defraud can fall within the scope of subsections (a) and (c) of Rule 10b-5, as well as the relevant statutory provisions. **[*1101]** In our view, that is so even if the disseminator did not "make" the statements and consequently falls outside subsection (b) of the Rule.

It would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud. By sending emails he understood to contain material untruths, Lorenzo "employ[ed]" a "device," "scheme," and "artifice to defraud" within the meaning of subsection (a) of the Rule, §10(b), and §17(a)(1). By the same conduct, he "engage[d] in a[n] act, practice, or course of business" **[***12]** that "operate[d] . . . as a fraud or deceit" under subsection (c) of the Rule. Recall that Lorenzo does not challenge the appeals court's scienter finding, so we take for granted that he sent the emails with "intent to deceive, manipulate, or defraud" the recipients. Aaron, 446 U. S., at 686, n. 5, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611. Under the circumstances, it is difficult to see how his actions could escape the reach of those provisions.

Resort to dictionary definitions only strengthens this conclusion. A "'device,'" we have observed, is simply "'[t]hat which is devised, or formed by design'"; a "'scheme'" is a "'project,'" "'plan[,] or program of something to be done'"; and an "'artifice'" is "'an artful stratagem or trick.'" *Id., at 696, n. 13, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611* (quoting Webster's International Dictionary 713, 2234, 157 (2d ed. 1934) (Webster's Second)). By these lights, [4]dissemination of false or misleading material is easily an "artful stratagem" or a "plan," "devised" to defraud an investor under subsection (a). See Rule 10b-5(a) (making it unlawful to "employ any device, scheme, or artifice to defraud"); §17(a)(1) (same). The words "act" and "practice" in subsection (c) are similarly expansive. Webster's Second 25 (defining "act" as "a doing" or a "thing done"); *id.*, at 1937 (defining "practice" as an "action" or "deed"); see Rule 10b-5(c) (making it unlawful to "engage **[***13]** in a[n] act, practice, or course of business" that "operates . . . as a fraud or deceit").

These provisions capture a wide range of conduct. Applying them may present difficult problems of scope in borderline cases. Purpose, precedent, and circumstance could lead to narrowing their reach in other contexts. But we see nothing borderline about this case, where the relevant conduct (as found by the Commission) consists of disseminating false or misleading information to prospective investors with the intent to defraud. And while one can readily imagine other actors **[**492]** tangentially involved in dissemination—say, a mailroom clerk—for whom liability would typically be inappropriate, the petitioner in this case sent false statements directly to investors, invited them to follow up with questions, and did so in his capacity as vice president of an investment banking company.

C

Lorenzo argues that, despite the natural meaning of these provisions, they should not reach his conduct. This is so, he says, because the only way to be liable for false statements is through those provisions that refer *specifically* to false statements. Other provisions, he says, concern "scheme liability claims" and are violated **[***14]** only when conduct other than misstatements is involved. Brief for Petitioner 4-6, 28-30. Thus, only those who "make" untrue statements under subsection (b) can violate Rule 10b-5 in connection with statements. (Similarly, §17(a)(2) would be the sole route for finding liability for statements under §17(a).) Holding to the contrary, he and the dissent insist, would render *subsection (b) of Rule 10b-5* "superfluous." See *post, at 1108-1109, 203 L. Ed. 2d 484 at 499-500* (opinion of THOMAS, J.).

**[*1102]** The premise of this argument is that each of these provisions should be read as governing different, mutually exclusive, spheres of conduct. But this Court and the Commission have long recognized considerable overlap among the subsections of the Rule and related provisions of the securities laws. See *Herman & MacLean v. Huddleston, 459 U. S. 375, 383, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)* ("[I]t is hardly a novel proposition that" different portions of the securities laws

"prohibit some of the same conduct" (internal quotation marks omitted)). As we have explained, these laws marked the "first experiment in federal regulation of the securities industry." *SEC v. Capital Gains Research Bureau, Inc., 375 U. S. 180, 198, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963)*. It is "understandable, therefore," that "in declaring certain practices unlawful," it was thought prudent "to include both a general proscription against fraudulent and deceptive practices and, out of an abundance of caution, a specific **[***15]** proscription against nondisclosure" even though "a specific proscription against nondisclosure" might in other circumstances be deemed "surplusage." *Id., at 198-199, 84 S. Ct. 275, 11 L. Ed. 2d 237*. "Each succeeding prohibition" was thus "meant to cover additional kinds of illegalities—not to narrow the reach of the prior sections." *United States v. Naftalin, 441 U. S. 768, 774, 99 S. Ct. 2077, 60 L. Ed. 2d 624 (1979)*. We have found "'no warrant for narrowing alternative provisions . . . adopted with the purpose of affording added safeguards.'" *Ibid.* (quoting *United States v. Gilliland, 312 U. S. 86, 93, 61 S. Ct. 518, 85 L. Ed. 598 (1941))*; see *Affiliated Ute Citizens of Utah v. United States, 406 U. S. 128, 152-153, 92 S. Ct. 1456, 31 L. Ed. 2d 741 (1972)* (While "the second subparagraph of [*Rule 10b-5*] specifies the making of an untrue statement . . . [t]he first and third subparagraphs are not so restricted"). And since its earliest days, the Commission has not viewed these provisions as mutually exclusive. See, *e.g.*, *In re R. D. Bayly & Co., 19 S. E. C. 773 (1945)* (finding violations of what would become *Rules 10b-5(b)* and *(c)* based on the same misrepresentations **[**493]** and omissions); *In re Arthur Hays & Co., 5 S. E. C. 271 (1939)* (finding violations of both *§17(a)(2)* and *(a)(3)* based on false representations in stock sales).

The idea that each subsection of *Rule 10b-5* governs a separate type of conduct is also difficult to reconcile with the language of *subsections (a)* and *(c)*. It should go without saying that at least some conduct amounts to "employ[ing]" a "device, scheme, or artifice to defraud" under *subsection (a)* as well as "engag[ing] in a[n] act . . . which operates . . . **[***16]** as a fraud" under *subsection (c)*. In *Affiliated Ute*, for instance, we described the "defendants' activities" as falling "within the very language of one or the other of those subparagraphs, a 'course of business' or a 'device, scheme, or artifice' that operated as a fraud." *406 U. S., at 153, 92 S. Ct. 1456, 31 L. Ed. 2d 741*. (The dissent, for its part, offers no account of how the superfluity problems that motivate its interpretation can be avoided where *subsections (a)* and *(c)* are concerned.)

Coupled with the Rule's expansive language, which readily embraces the conduct before us, this considerable overlap suggests we should not hesitate to hold that Lorenzo's conduct ran afoul of *subsections (a)* and *(c)*, as well as the related statutory provisions. Our conviction is strengthened by the fact that we here confront behavior that, though plainly fraudulent, might otherwise fall outside the scope of the Rule. Lorenzo's view that *subsection (b)*, the making-false-statements provision, *exclusively* regulates conduct involving false or misleading statements **[*1103]** would mean those who disseminate false statements with the intent to cheat investors might escape liability under the Rule altogether. But using false representations to induce the purchase of securities would seem a paradigmatic example of securities **[***17]** fraud. We do not know why Congress or the Commission would have wanted to disarm enforcement in this way. And we cannot easily reconcile Lorenzo's approach with the basic purpose behind these laws: "to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry." *Capital Gains, 375 U. S., at 186, 84 S. Ct. 275, 11 L. Ed. 2d 237*. See also, *e.g.*, *SEC v. W. J. Howey Co., 328 U. S. 293, 299, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946)* (the securities laws were designed "to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits").

III

Lorenzo and the dissent make a few other important arguments. They contend that applying *subsections (a)* or *(c) of Rule 10b-5* to conduct like his would render our decision in *Janus* (which we described at the outset, *supra, at ___ - ___, 203 L. Ed. 2d 484 at 488-489*) "a dead letter," *post, at 1102, 203 L. Ed. 2d 484 at 501*. But we do not see how that is so. In *Janus*, we considered the language in *subsection (b)*, which prohibits the "mak[ing]" of "any untrue statement of a material fact." See *564 U. S., at 141-143, 131 S. Ct. 2296, 180 L. Ed. 2d 166*. We held that the "maker" of a "statement" is the "person or entity with ultimate authority over the statement." *Id., at 142, 131 S. Ct. 2296, 180 L. Ed. 2d 166*. And we found that *subsection (b)* did not (under the circumstances) cover an investment adviser who helped *draft* misstatements issued by **[**494]** a *different* entity that controlled **[***18]** the statements' content. *Id., at 146-148, 131 S. Ct. 2296, 180 L. Ed. 2d 166*. We said nothing about the Rule's application to the dissemination of false or misleading information. And we can assume that *Janus* would remain relevant (and

preclude liability) where an individual neither *makes* nor *disseminates* false information—provided, of course, that the individual is not involved in some other form of fraud.

Next, Lorenzo points to the statute's "aiding and abetting" provision. 15 U. S. C. §78t(e). [5]This provision, enforceable only by the Commission (and not by private parties), makes it unlawful to "knowingly or recklessly . . . provid[e] substantial assistance to another person" who violates the Rule. *Ibid.*; see Janus, 564 U. S., at 143, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (citing Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U. S. 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994)). Lorenzo claims that imposing primary liability upon his conduct would erase or at least weaken what is otherwise a clear distinction between primary and secondary (*i.e.*, aiding and abetting) liability. He emphasizes that, under today's holding, a disseminator might be a primary offender with respect to subsection (a) of Rule 10b-5 (by employing a "scheme" to "defraud") and also secondarily liable as an aider and abettor with respect to subsection (b) (by providing substantial assistance to one who "makes" a false statement). And he refers to two cases that, in his view, **[***19]** argue in favor of circumscribing primary liability. See Central Bank, 511 U. S., at 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119; Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U. S. 148, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008).

We do not believe, however, that our decision creates a serious anomaly or otherwise weakens the distinction between primary and secondary liability. For one thing, it is hardly unusual for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another. John, for **[*1104]** example, might sell Bill an unregistered firearm in order to help Bill rob a bank, under circumstances that make him primarily liable for the gun sale and secondarily liable for the bank robbery.

For another, the cases to which Lorenzo refers do not help his cause. Take *Central Bank*, where we held that Rule 10b-5's private right of action does not permit suits against secondary violators. 511 U. S., at 177, 114 S. Ct. 1439, 128 L. Ed. 2d 119. The holding of *Central Bank*, we have said, suggests the need for a "clean line" between conduct that constitutes a primary violation of Rule 10b-5 and conduct that amounts to a secondary violation. Janus, 564 U. S., at 143, and n. 6, 131 S. Ct. 2296, 180 L. Ed. 2d 166. Thus, in *Janus*, we sought an interpretation of "make" that could neatly divide primary violators and actors too far removed from the ultimate decision to communicate a statement. *Ibid.* (citing Central Bank, 511 U. S. 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119). The line we adopt today is just as administrable: **[***20]** [6]Those who disseminate false statements with intent to defraud are primarily liable under Rules 10b-5(a) and (c), §10(b), and §17(a)(1), even if they are secondarily liable under Rule 10b-5(b). Lorenzo suggests that classifying dissemination as a primary **[**495]** violation would inappropriately subject peripheral players in fraud (including him, naturally) to substantial liability. We suspect the investors who received Lorenzo's e-mails would not view the deception so favorably. And as *Central Bank* itself made clear, even a bit participant in the securities markets "may be liable as a primary violator under [Rule] 10b-5" so long as "all of the requirements for primary liability . . . are met." Id., at 191, 114 S. Ct. 1439, 128 L. Ed. 2d 119.

Lorenzo's reliance on *Stoneridge* is even further afield. There, we held that private plaintiffs could not bring suit against certain securities defendants based on *undisclosed* deceptions upon which the plaintiffs could not have relied. 552 U. S., at 159, 128 S. Ct. 761, 169 L. Ed. 2d 627. But [7]the Commission, unlike private parties, need not show reliance in its enforcement actions. And even supposing reliance were relevant here, Lorenzo's conduct involved the direct transmission of false statements to prospective investors intended to induce reliance—far from the kind of concealed fraud at issue **[***21]** in Stoneridge.

As for Lorenzo's suggestion that those like him ought to be held secondarily liable, this offer will, far too often, prove illusory. In instances where a "maker" of a false statement does *not* violate subsection (b) of the Rule (perhaps because he lacked the necessary intent), a disseminator of those statements, even one knowingly engaged in an egregious fraud, could not be held to have violated the "aiding and abetting" statute. That is because the statute insists that there be a primary violator to whom the secondary violator provided "substantial assistance." 15 U. S. C. §78t(e). And the latter can be "deemed to be in violation" of the provision only "to the same extent as the person to whom such assistance is provided." *Ibid.* In other words, if Acme Corp. could not be held liable under subsection (b) for a statement it made, then a knowing disseminator of those statements could not be held liable for aiding and abetting Acme under subsection (b). And if, as Lorenzo claims, the disseminator has not primarily violated other parts of Rule 10b-5, then such a fraud, whatever its

intent or consequences, might escape liability altogether.

That is not what Congress intended. Rather, Congress intended to root out all manner of fraud in the securities **[***22]** industry. And it gave to the Commission the tools to accomplish that job.

***

**[*1105]** For these reasons, the judgment of the Court of Appeals is affirmed.

*So ordered.*

Justice Kavanaugh took no part in the consideration or decision of this case.

APPENDIX

***17 CFR §240.10b-5***

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in **[**496]** order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person

in connection with the purchase or sale of any security."

***15 U. S. C. §78j***

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

***

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national **[***23]** securities exchange or any security not so registered, or any securities-based swap agreement[,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

***15 U. S. C. §77q***

"(a) Use of interstate commerce for purpose of fraud or deceit

"It shall be unlawful for any person in the offer or sale of any securities (including security-based swaps) or any security-based swap agreement . . . by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly—

> "(1) to employ any device, scheme, or artifice to defraud, or
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or
> "(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

***15 U. S. C. §78t***

"(e) Prosecution of persons who aid and abet violations

"For purposes of any **[***24]** action brought by the Commission . . ., any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed in violation of such provision to the same extent as the person to whom such assistance is provided.

**Dissent by:** THOMAS

## Dissent

Justice **Thomas**, with whom Justice **Gorsuch** joins, dissenting.

In *Janus Capital Group, Inc. v. First Derivative Traders, 564 U. S. 135, 131 S. Ct. 2296, 180 L. Ed. 2d 166 (2011)*, we drew a **[*1106]** clear line between primary and secondary liability in fraudulent-misstatement cases: A person does not "make" a fraudulent misstatement within the meaning of Securities and Exchange Commission (SEC) *Rule 10b-5(b)*—and thus is not **[**497]** primarily liable for the statement—if the person lacks "ultimate authority over the statement." *Id.,*

at 142, 131 S. Ct. 2296, 180 L. Ed. 2d 166. Such a person could, however, be liable as an aider and abettor under principles of secondary liability.

Today, the Court eviscerates this distinction by holding that a person who has not "made" a fraudulent misstatement can nevertheless be primarily liable for it. Because the majority misconstrues the securities laws and flouts our precedent in a way that is likely to have far-reaching consequences, I respectfully dissent.

I

To appreciate the sweeping nature **[***25]** of the Court's holding, it is helpful to begin with the facts of this case. On October 14, 2009, the owner of the firm at which petitioner Frank Lorenzo worked instructed him to send e-mails to two clients regarding a debenture offering. The owner explained that he wanted the e-mails to come from the firm's investment-banking division, which Lorenzo directed. Lorenzo promptly addressed an e-mail to each client, "cut and pasted" the contents of each e-mail—which he received from the owner—into the body, and "sent [them] out." App. 321. It is undisputed that Lorenzo did not draft the e-mails' contents, though he knew that they contained false or misleading statements regarding the debenture offering. Both e-mails stated that they were sent "[a]t the request of" the owner of the firm. *Id.*, at 403, 405. No other allegedly fraudulent conduct is at issue.

In 2013, the SEC brought enforcement proceedings against the owner of the firm, the firm itself, and Lorenzo. Even though Lorenzo sent the e-mails at the owner's request, the SEC did not charge Lorenzo with aiding and abetting fraud committed by the owner. See 15 U. S. C. §§ 77o(b), 78o(b)(4)(E), 78t(e). Instead, the SEC charged Lorenzo as a primary violator of multiple securities laws, [1] including **[***26]** Rule 10b-5(b), which prohibits "mak[ing] any untrue statement of a material fact . . . in connection with the purchase or sale of any security." 17 CFR §240.10b-5(b) (2018); see Ernst & Ernst v. Hochfelder, 425 U. S. 185, 212-214, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976) (construing Rule 10b-5(b) to require scienter). The SEC ultimately concluded that, by "knowingly sen[ding] materially misleading language from his own email account to prospective investors," App. to Pet. for Cert. 77, Lorenzo violated Rule 10b-5(b) and several other antifraud provisions of the securities laws. The SEC "barred [him] from serving in the securities industry" for life. *Id.*, at 91.

The Court of Appeals unanimously rejected the SEC's determination that Lorenzo violated Rule 10b-5(b). Applying *Janus*, the court held that Lorenzo did not "make" the false statements at issue because he merely "transmitted statements devised by [his boss] at [his boss'] direction." 872 F. 3d 578, 587, 432 U.S. App. D.C. 420 (CADC 2017). The SEC has not challenged that aspect of the decision below.

The panel majority nevertheless upheld the SEC's decision holding Lorenzo primarily liable for the same false statements under other provisions of the securities **[*1107]** laws—specifically, §10(b) of the Securities Exchange Act of 1934 (1934 Act), **[**498]** Rules 10b-5(a) and (c), and §17(a)(1) of the Securities Act of 1933 (1933 Act). Unlike Rule 10b-5(b), none of these provisions pertains specifically to fraudulent **[***27]** misstatements.

II

Even though Lorenzo undisputedly did not "make" the false statements at issue in this case under Rule 10b-5(b), the Court follows the SEC in holding him primarily liable for those statements under other provisions of the securities laws. As construed by the Court, each of these more general laws completely subsumes Rule 10b-5(b) and §17(a)(2) of the 1933 Act in cases involving fraudulent misstatements, even though these provisions specifically govern false statements. The majority's interpretation of these provisions cannot be reconciled with their text or our precedents. Thus, I am once again compelled to "disagre[e] with the SEC's broad view" of the securities laws. Janus, supra, at 145, n. 8, 131 S. Ct. 2296, 180 L. Ed. 2d 166.

A

I begin with the text. The Court of Appeals held that Lorenzo violated §10(b) of the 1934 Act and Rules 10b-5(a) and (c). In relevant part, §10(b) makes it unlawful for a person, in connection with the purchase or sale of a security, "[t]o use or employ . . . any manipulative or deceptive device or contrivance" in contravention of an SEC rule. 15 U. S. C. §78j(b). Rule 10b-5 was promulgated under this statutory authority. That Rule makes it unlawful, in connection with the purchase or sale of any security,

> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement **[***28]** of a

[1] For ease of reference, I use "securities laws" to refer to both statutes and SEC regulations.

material fact . . ., or

"(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit . . . ." 17 CFR §240.10b-5.

The Court of Appeals also held that Lorenzo violated §17(a)(1) of the 1933 Act. Similar to Rule 10b-5, §17(a) of the Act provides that it is unlawful, in connection with the offer or sale of a security,

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact . . . ; or

"(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U. S. C. §77q(a)(1).

We can quickly dispose of Rule 10b-5(a) and §17(a)(1). The act of knowingly disseminating a false statement at the behest of its maker, without more, does not amount to "employ[ing] any device, scheme, or artifice to defraud" within the meaning of those provisions. As the contemporaneous dictionary definitions cited by the majority make clear, each of these words requires some form of planning, designing, devising, or strategizing. See ante, at 1101, 203 L. Ed. 2d 484. We have previously observed that "the terms 'device,' 'scheme,' and 'artifice' all connote knowing or intentional *practices*." Aaron v. SEC, 446 U. S. 680, 696, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) (emphasis added). **[***29]** In other words, they encompass "fraudulent scheme[s]," such as a "'short selling' scheme," a wash sale, a matched order, **[**499]** price rigging, or similar conduct. United States v. Naftalin, 441 U. S. 768, 770, 778, 99 S. Ct. 2077, 60 L. Ed. 2d 624 (1979) (applying §17(a)(1)); see Santa Fe Industries, Inc. v. Green, 430 U. S. 462, 473, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977) (interpreting the term "manipulative" in §10(b)).

**[*1108]** Here, it is undisputed that Lorenzo did not engage in any conduct involving planning, scheming, designing, or strategizing, as Rule 10b-5(a) and §17(a)(1) require for a primary violation. He sent two e-mails drafted by a superior, to recipients specified by the superior, pursuant to instructions given by the superior, without collaborating on the substance of the e-mails or otherwise playing an independent role in perpetrating a fraud. That Lorenzo knew the messages contained falsities does not change the essentially administrative nature of his conduct here; he might have *assisted* in a scheme, but he did not himself plan, scheme, design, or strategize. In my view, the plain text of Rule 10b-5(a) and §17(a)(1) thus does not encompass Lorenzo's conduct as a matter of primary liability.

The remaining provision, Rule 10b-5(c), seems broader at first blush. But the scope of this conduct-based provision—and, for that matter, Rule 10b-5(a) and §17(a)(1)—must be understood in light of its codification alongside a prohibition specifically addressing primary **[***30]** liability for false statements. Rule 10b-5(b) imposes primary liability on the "make[r]" of a fraudulent misstatement. 17 CFR §240.10b-5(b); see Janus, 564 U. S., at 141-142, 131 S. Ct. 2296, 180 L. Ed. 2d 166. And §17(a)(2) imposes primary liability on a person who "obtain[s] money or property by means of" a false statement. 15 U. S. C. §77q(a)(2). The conduct-based provisions of Rules 10b-5(a) and (c) and §17(a)(1) must be interpreted in view of the specificity of these false-statement provisions, and therefore cannot be construed to encompass primary liability solely for false statements. This view is consistent with our previous recognition that "each subparagraph of §17(a) 'proscribes a distinct category of misconduct'" and "'is meant to cover *additional* kinds of illegalities.'" Aaron, supra, at 697, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (quoting Naftalin, supra, at 774, 99 S. Ct. 2077, 60 L. Ed. 2d 624; emphasis added).

The majority disregards these express limitations. Under the Court's rule, a person who has not "made" a fraudulent misstatement within the meaning of Rule 10b-5(b) nevertheless could be held primarily liable for facilitating that same statement; the SEC or plaintiff need only relabel the person's involvement as an "act," "device," "scheme," or "artifice" that violates Rule 10b-5(a) or (c). And a person could be held liable for a fraudulent misstatement under §17(a)(1) even if the person did not obtain money or property by means of the statement. In short, Rule 10b-5(b) and §17(a)(2) are rendered **[***31]** entirely superfluous in fraud cases under the majority's reading. [2]

This approach is in tension with **[**500]** "'the cardinal

[2] I recognize that §17(a)(1) could be deemed narrower than §17(a)(2) in the sense that it requires scienter, whereas §17(a)(2) does not. Aaron v. SEC, 446 U. S. 680, 697, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980). But scienter is not disputed in this case, and the specific terms of §17(a)(2) are otherwise completely subsumed within the more general terms of §17(a)(1), as interpreted by the majority.

rule that, if possible, effect shall be given to every clause and part of a statute.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U. S. 639, 645, 132 S. Ct. 2065, 182 L. Ed. 2d 967 (2012)* (quoting *D. Ginsberg & Sons, Inc. v. Popkin, 285 U. S. 204, 208, 52 S. Ct. 322, 76 L. Ed. 704 (1932))*. I would therefore apply the "old and familiar rule " that "the specific governs the general." *RadLAX, supra, at 645-646, 132 S. Ct. 2065, 182 L. Ed. 2d 967* (internal quotation marks omitted); see A. Scalia & B. Garner, Reading Law 51 (2012) (canon equally applicable to statutes and regulations). This canon of construction applies not only to resolve "contradiction[s]" between general **[*1109]** and specific provisions, but also to avoid "the superfluity of a specific provision that is swallowed by the general one." *RadLAX, 566 U. S., at 645, 132 S. Ct. 2065, 182 L. Ed. 2d 967*. Here, liability for false statements is "'specifically dealt with'" in *Rule 10b-5(b)* and *§17(a)(2)*. *Id., at 646, 132 S. Ct. 2065, 182 L. Ed. 2d 967* (quoting *D. Ginsberg & Sons, supra, at 208, 52 S. Ct. 322, 76 L. Ed. 704*). But *Rule 10b-5* and *§17(a)* also contain general prohibitions that, "'in [their] most comprehensive sense, would include what is embraced in'" the more specific provisions. *566 U. S., at 646, 132 S. Ct. 2065, 182 L. Ed. 2d 967*. I would hold that the provisions specifically addressing false statements "'must be operative'" as to false-statement cases, and that the more general provisions should be read to apply "'only [to] such cases within [their] general language as are not within the'" purview of the specific **[***32]** provisions on false statements. *Ibid.*

Adopting this approach to the statutory text would align with our previous admonitions that the securities laws should not be "[v]iewed in isolation" and stretched to their limits. *Hochfelder, 425 U. S., at 212, 96 S. Ct. 1375, 47 L. Ed. 2d 668*. In *Hochfelder*, for example, we concluded that the key words of *§10(b)* employed the "terminology of intentional wrongdoing" and thus "strongly suggest[ed]" that it "proscribe[s] knowing or intentional misconduct," even though the statute did not expressly state as much. *Id., at 197, 214, 96 S. Ct. 1375, 47 L. Ed. 2d 668*. We took a similar approach to *§17(a)(1) of the 1933 Act*. *Aaron, 446 U. S., at 695-697, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611*. We have also limited the terms of *Rule 10b-5* by recognizing that it was adopted pursuant to *§10(b)* and thus "encompasses only conduct already prohibited by *§10(b)*." *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 552 U. S. 148, 157, 128 S. Ct. 761, 169 L. Ed. 2d 627 (2008)*; see *Hochfelder, supra, at 212-214, 96 S. Ct. 1375, 47 L. Ed. 2d 668*.

Contrary to the suggestion of the majority, this approach does not necessarily require treating each provision of *Rule 10b-5* or *§17(a)* as "governing different, mutually exclusive, spheres of conduct." *Ante, at 1101, 203 L. Ed. 2d 484*. Nor does it prevent the securities laws from mutually reinforcing one another or overlapping to some extent. *Ante, at 1101-1102, 203 L. Ed. 2d 484*. It simply contemplates giving full effect to the specific prohibitions on false statements in *Rule 10b-5(b)* and *§17(a)(2)* instead of rendering them superfluous.

The majority worries that this approach would allow people who disseminate **[**501] [***33]** false statements with the intent to defraud to escape liability under *Rule 10b-5*. *Ante, at 1102, 203 L. Ed. 2d 484*. That is not so. If a person's only role is transmitting fraudulent misstatements at the behest of the statements' maker, the person's conduct would be appropriately assessed as a matter of secondary liability pursuant to provisions like *15 U. S. C. §§77o(b)*, *78t(e)*, and *78o(b)(4)(E)*. And if a person engages in *other* acts prohibited by the Rule, such as developing and employing a fraudulent scheme, the person would be primarily liable for that conduct.

The majority suggests that secondary liability may often prove illusory. It hypothesizes, for example, a situation in which the "maker" of a false statement does not know that it was false and thus does not violate *Rule 10b-5(b)*, but the disseminator knows that the statement is false. Under that scenario, the majority fears that the person disseminating the statements could be "engaged in an egregious fraud," yet would not be liable as an aider and abettor for lack of a primary violator. *Ante, at 1104, 203 L. Ed. 2d 484*. This concern is misplaced. As an initial matter, I note that *§17(a)(2)* does not require scienter, so the maker of the statement may still be liable under that provision. *Aaron, supra, at 695-697, 686, 100 S. Ct. 1945, 64 L. Ed. 2d 611*. Moreover, an ongoing, **[*1110]** "egregious" fraud is **[***34]** likely to independently constitute a primary violation of the conduct-based securities laws, wholly apart from the laws prohibiting fraudulent misstatements. Here, by contrast, we are concerned with the dissemination of two misstatements at the request of their maker. This type of conduct is appropriately assessed under principles of secondary liability.

B

The majority's approach contradicts our precedent in two distinct ways.

First, the majority's opinion renders *Janus* a dead letter.

In *Janus*, we held that liability under *Rule 10b-5(b)* was limited to the "make[r]" of the statement and that "[o]ne who *prepares or publishes* a statement on behalf of another is not its maker" within the meaning of *Rule 10b-5(b)*. *564 U. S., at 142, 131 S. Ct. 2296, 180 L. Ed. 2d 166* (emphasis added). It is undisputed here that Lorenzo was not the maker of the fraudulent misstatements. The majority nevertheless finds primary liability under different provisions of *Rule 10b-5*, without any real effort to reconcile its decision with *Janus*. Although it "assume[s] that *Janus* would remain relevant (and preclude liability) where an individual neither *makes* nor *disseminates* false information," in the next breath the majority states that this would be true only if "the individual is not involved in some **[***35]** other form of fraud." *Ante, at 1103, 203 L. Ed. 2d 484*. Given that, under the majority's rule, administrative acts undertaken in connection with a fraudulent misstatement qualify as "other form[s] of fraud," the majority's supposed preservation of *Janus* is illusory.

Second, the majority fails to maintain a clear line between primary and secondary liability in fraudulent-misstatement cases. Maintaining this distinction is important because, as the majority notes, there is no private right of action against mere aiders **[**502]** and abettors. *Ante, at 1103, 203 L. Ed. 2d 484*; see *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U. S. 164, 191, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994)*. Here, however, the majority does precisely what we declined to do in *Janus*: impose broad liability for fraudulent misstatements in a way that makes the category of aiders and abettors in these cases "almost nonexistent." *564 U. S., at 143, 131 S. Ct. 2296, 180 L. Ed. 2d 166*. If Lorenzo's conduct here qualifies for primary liability under *§10(b)* and *Rule 10b-5(a)* or *(c)*, then virtually any person who assists with the making of a fraudulent misstatement will be primarily liable and thereby subject not only to SEC enforcement, but private lawsuits.

The Court correctly notes that it is not uncommon for the same conduct to be a primary violation with respect to one offense and aiding and abetting with respect to another—as, for example, **[***36]** when someone illegally sells a gun to help another person rob a bank. *Ante, at 1103, 203 L. Ed. 2d 484*. But this case does not involve two distinct crimes. The majority has interpreted certain provisions of an offense so broadly as to render superfluous the more stringent, on-point requirements of a narrower provision of the same offense. Criminal laws regularly and permissibly overlap with each other in a way that allows the same conduct to constitute different crimes with different punishments. That differs significantly from interpreting provisions in a law to completely eliminate specific limitations in a neighboring provision of that very same law. The majority's overreading of *Rules 10b-5(a)* and *(c)* and *§17(a)(1)* is especially problematic because the heartland of these provisions is conduct-based fraud—"employ[ing] [a] device, scheme, or artifice to defraud" or "engag[ing] in any act, practice, or course of business"—not mere misstatements. **[*1111]** *15 U. S. C. §77q(a)(1)*; *17 CFR §§240.10b-5(a)*, *(c)*.

The Court attempts to cabin the implications of its holding by highlighting several facts that supposedly would distinguish this case from a case involving a secretary or other person "tangentially involved in disseminat[ing]" fraudulent misstatements. *Ante, at 1101, 203 L. Ed. 2d 484*. None of these distinctions **[***37]** withstands scrutiny. The fact that Lorenzo "sent false statements directly to investors" in e-mails that "invited [investors] to follow up with questions," *ibid.*, puts him in precisely the same position as a secretary asked to send an identical message from her e-mail account. And under the unduly capacious interpretation that the majority gives to the securities laws, I do not see why it would matter whether the sender is the "vice president of an investment banking company" or a secretary, *ibid.*—if the sender knowingly sent false statements, the sender apparently would be primarily liable. To be sure, I agree with the majority that liability would be "inappropriate" for a secretary put in a situation similar to Lorenzo's. *Ibid.* But I can discern no legal principle in the majority opinion that would preclude the secretary from being pursued for primary violations of the securities laws.

***

**[**503]** Instead of blurring the distinction between primary and secondary liability, I would hold that Lorenzo's conduct did not amount to a primary violation of the securities laws and reverse the judgment of the Court of Appeals. Accordingly, I respectfully dissent.

## References

*15 U.S.C.S. §§77j(b)*, *77q(a)(1)*

1 Federal Securities Exchange Act **[***38]** of 1934 § 5.04 (Matthew Bender)

Securities Law Techniques §§87.06, 91.04 (Matthew Bender)

L Ed Digest, Securities Regulation *§§16*, 16.5

L Ed Index, Securities Regulation

Supreme Court's construction and application of antifraud provisions of *§ 10(b)* of Securities Exchange Act of 1934 (*15 U.S.C.S. § 78jb*)) and SEC *Rule 10b-5* (*17 C.F.R. § 240.10b-5*). *99 L. Ed. 2d 950*.

Implication of private right of action from provision of federal statute not expressly providing for one--Supreme Court cases. *61 L. Ed. 2d 910*.

---

**End of Document**

Reprinted with the permission of LexisNexis

Neutral
As of: November 27, 2019 1:47 PM Z

# New Riegel Local Sch. Dist. Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc.

Supreme Court of Ohio

March 5, 2019, Submitted; July 17, 2019, Decided

Nos. 2018-0189 and 2018-0213

**Reporter**
157 Ohio St. 3d 164 *; 2019-Ohio-2851 **; 2019 Ohio LEXIS 1446 ***; 133 N.E.3d 482; 2019 WL 3209991

NEW RIEGEL LOCAL SCHOOL DISTRICT BOARD OF EDUCATION, APPELLEE, v. BUEHRER GROUP ARCHITECTURE & ENGINEERING, INC., ET AL., APPELLANTS.

**Prior History:** APPEALS from the Court of Appeals for Seneca County, No. 13-17-04, 2017-Ohio-8522, and Nos. 13-17-03 and 13-17-06, 2017-Ohio-8521 **[***1]** .

New Riegel Local Sch. Dist., Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc., 2017-Ohio-8521, 2017 Ohio App. LEXIS 4932 (Ohio Ct. App., Seneca County, Nov. 13, 2017)
New Riegel Local Sch. Dist., Bd. of Educ. v. Buehrer Grp. Architecture & Eng'g, Inc., 2017-Ohio-8522, 2017 Ohio App. LEXIS 4931 (Ohio Ct. App., Seneca County, Nov. 13, 2017)

**Disposition:** Judgments reversed and causes remanded.

## Case Summary

### Overview

HOLDINGS: [1]-The appellate court erred by finding that R.C. 2305.131 did not apply to breach-of-contract claims because, reading it as a whole and in a manner that gave effect to all provisions of the statute, Ohio's construction statute of repose applied to all causes of action, whether sounding in tort or contract, that sought to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arose out of a defective and unsafe condition of an improvement to real property against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property. The reading of the statute was consistent with the Ohio General Assembly's stated intention to protect defendants from having to defend against stale claims.

### Outcome

Judgments reversed and causes remanded.

**Counsel:** Bricker & Eckler, L.L.P., Christopher L. McCloskey, Tarik M. Kershah, and Bryan M. Smeenk, for appellee.

Gallagher Sharp, L.L.P., P. Kohl Schneider, and Richard C.O. Rezie, for appellant Charles Construction Services, Inc.

Frantz Ward, L.L.P., Marc A. Sanchez, Michael J. Frantz Jr., and Allison Taller Reich, for appellant Ohio Farmers Insurance Company.

Ritter, Robinson, McCready & James, Ltd., Shannon J. George, and Matthew T. Davis, for appellant Studer-Obringer, Inc.

McNeal, Schick, Archibald & Biro Co., L.P.A., Brian T. Winchester, and Patrick J. Gump, for appellants Buehrer Group Architecture & Engineering, Inc., Estate of Huber H. Buehrer, and Buehrer Group Architecture **[***2]** & Engineering.

Singerman, Mills, Desberg & Kauntz Co., L.P.A, Michael R. Stavnicky, and Stephen L. Byron, urging affirmance for amici curiae County Commissioners Association of Ohio, Ohio Municipal League, Ohio Township Association, Erie County, and Ohio School Boards Association.

Paul W. Flowers Co., L.P.A., Paul W. Flowers, and Louis E. Grube, urging affirmance for amicus curiae Ohio Association for Justice.

Murray & Murray Co., L.P.A., Dennis E. Murray Sr., Charles M. Murray, and Donna J. Evans, urging affirmance for amicus curiae Timothy Betton.

Graff and McGovern, L.P.A., and Luther L. Liggett Jr., urging reversal for amici curiae AIA Ohio and Ohio Society of Professional Engineers.

Vorys, Sater, Seymour & Pease, L.L.P., Natalia Steele, and Thomas E. Szykowny, urging reversal for amici curiae Ohio Insurance Institute, Ohio Manufacturers' Association, Ohio Chamber of Commerce, Ohio Chapter of the National Federation of Independent Business, and Surety & Fidelity Association of America.

Harpst, Ross & Becker Co., L.L.C., Todd A. Harpst, and Joseph R. Spoonster, urging reversal for amicus curiae Subcontractors Association of Northeast Ohio.

McDonald Hopkins, L.L.C., Peter D. Welin, Jason **[***3]** R. Harley, and John A. Gambill, urging reversal for amici curiae Associated General Contractors of Ohio; Allied Construction Industries (Cincinnati AGC); Associated General Contractors of Ohio, Akron; Builders Association of Eastern Ohio & Western Pennsylvania (AGC Youngstown); Central Ohio AGC; Associated General Contractors, Cleveland; Associated General Contractors of Northwest Ohio (Toledo AGC); West Central Ohio AGC (Dayton AGC); and Ohio Contractors Association.

Koehler Fitzgerald, L.L.C., and Timothy J. Fitzgerald, urging reversal for amicus curiae Ohio Association of Civil Trial Attorneys.

**Judges:** FRENCH, J. O'CONNOR, C.J., and FISCHER and DONNELLY, JJ., concur. KENNEDY, J., concurs in part and dissents in part, with an opinion joined by DEWINE, J. STEWART, J., dissents, with an opinion.

**Opinion by:** FRENCH

## Opinion

**[*164] French, J.**

**[**P1]** These consolidated appeals ask whether Ohio's construction statute of repose, R.C. 2305.131, applies to actions sounding in contract as well as to actions sounding in tort. We hold that R.C. 2305.131, as enacted in Am.Sub.S.B. No. 80, 150 Ohio Laws, Part V, 7915, 7937-7938, applies to any cause of action, whether sounding in tort or contract, so long as the cause of action meets the requirements of the statute. **[***4]**

*Facts and Procedural Background*

**[**P2] [*165]** These appeals arise from the design and construction of a public-school building (the "Project") for the New Riegel Local School District. The Project, which was substantially completed and approved for occupancy in December 2002, was built as part of the Ohio Classroom Facilities Assistance Program, administered by the Ohio School Facilities Commission. Appellee, the New Riegel Local School District Board of Education ("New Riegel"), alleges that condensation, moisture intrusion, and other deficiencies exist in various areas of the Project, as a result of improper design and construction.

**[**P3]** The Buehrer Group Architecture & Engineering contracted with New Riegel to provide design services for the Project; New Riegel alleges that the subsequently incorporated Buehrer Group Architecture & Engineering, Inc. (collectively, with the unincorporated entity, "the Buehrer Group"), adopted, benefited from, and provided services for New Riegel on the contract. Studer-Obringer, Inc., and Charles Construction Services, Inc., served as the general-trades contractor and the roofing contractor, respectively, on the Project, pursuant to contracts with the state; New Riegel **[***5]** was an intended beneficiary of those contracts. In January 2015, New Riegel served the Buehrer Group, Studer-Obringer, and Charles Construction with notices of claims regarding alleged defects in the school building. The Buehrer Group, Charles Construction, Studer-Obringer, and Ohio Farmers Insurance Company—the surety for Studer-Obringer and Charles Construction—are appellants here.

**[**P4]** New Riegel filed this action in April 2015.[1] New Riegel's second amended complaint asserts claims against the Buehrer Group, the Estate of Huber H. Buehrer, Studer-Obringer, Charles Construction, American Buildings Company d.b.a. Architectural Metal Systems, and Ohio Farmers. As relevant here, New Riegel alleges claims for breach of contract against the Buehrer Group, Studer-Obringer, and Charles Construction; a claim for breach of express warranty against Charles Construction; and claims against Ohio Farmers on its surety bonds. It alleges that the Buehrer Group, Studer-Obringer, and Charles Construction "failed to provide [services or work] in conformance to the terms of" their contracts and that Studer-Obringer and Charles Construction failed to conform "with the

---

[1] The original complaint named the Ohio School Facilities Commission as an involuntary plaintiff, but New Riegel dropped the Ohio School Facilities Commission as an involuntary plaintiff when it filed its first amended complaint.

requisite standard of care to perform **[***6]** in a workmanlike manner." New Riegel alleges that as a result, it has incurred damages, including damages for "physical damage to property."

**[**P5]** **[*166]** In their answers and/or motions for judgment on the pleadings, appellants argued that the statute of repose in *R.C. 2305.131* barred New Riegel's claims because substantial completion of the Project occurred more than ten years before New Riegel filed its claims. The trial court granted appellants' motions for judgment on the pleadings and dismissed as time-barred New Riegel's breach-of-contract claims against the Buehrer Group, Studer-Obringer, and Charles Construction. The trial court also dismissed New Riegel's claim against Ohio Farmers as surety for Studer-Obringer. Pursuant to *Civ.R. 54(B)*, the trial court certified that there was no just reason for delay and that the judgment entries were final, appealable orders.

**[**P6]** The Third District Court of Appeals reversed the trial court's judgment in two opinions containing nearly identical language. Although it stated that *R.C. 2305.131*, on its face, appeared to bar New Riegel's breach-of-contract claims, the Third District determined that it was required to follow this court's decision in *Kocisko v. Charles Shutrump & Sons Co., 21 Ohio St.3d 98, 21 Ohio B. 392, 488 N.E.2d 171 (1986)*, and to hold that *R.C. 2305.131* does not apply to claims for **[***7]** breach of contract. *2017-Ohio-8521, ¶ 11*; *2017-Ohio-8522, ¶ 8*. Having determined that *R.C. 2305.131* does not apply to breach-of-contract claims, the Third District did not address New Riegel's assignment of error arguing that *R.C. 2305.131* does not bar its claims against Studer-Obringer and Charles Construction, because the state, with which those entities had contracted, is not subject to statutes of repose. *2017-Ohio-8521 at ¶ 14*.

**[**P7]** This court accepted and consolidated appellants' discretionary appeals. *152 Ohio St.3d 1478, 2018-Ohio-1990, 98 N.E.3d 293*. Although phrased differently by different appellants, the accepted propositions of law essentially ask this court to hold (1) that *R.C. 2305.131*'s statute of repose applies to both tort and contract actions and (2) that stare decisis should not be applied when, as here, the General Assembly has repealed and replaced the statute construed in the precedent.

*Standard of Review*

**[**P8]** The trial court entered judgment on the pleadings for appellants pursuant to *Civ.R. 12(C)*. Dismissal is appropriate under *Civ.R. 12(C)* when a court construes as true the material allegations in the complaint, along with all reasonable inferences to be drawn therefrom, and finds, beyond doubt, that the plaintiff can prove no set of facts that would entitle him to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious, 75 Ohio St.3d 565, 570, 1996- Ohio 459, 664 N.E.2d 931 (1996)*. Appellate review of a judgment on the pleadings involves only **[***8]** questions of law and is therefore de novo. *Rayess v. Educational Comm. for Foreign Med. Graduates, 134 Ohio St.3d 509, 2012-Ohio-5676, 983 N.E.2d 1267, ¶ 18*. Similarly, questions of statutory construction constitute legal issues that we decide de novo **[*167]** on appeal. *New York Frozen Foods, Inc. v. Bedford Hts. Income Tax Bd. of Rev., 150 Ohio St.3d 386, 2016-Ohio-7582, 82 N.E.3d 1105, ¶ 8*.

*Analysis*

**[**P9]** The overarching issue before this court is the meaning of the current version of *R.C. 2305.131(A)(1)*, enacted as part of Am.Sub.S.B. No. 80, 150 Ohio Laws, Part V, 7915, and, particularly, whether the current statute applies to actions sounding in contract as well as to actions sounding in tort. In making that determination, we consider whether we are constrained by the doctrine of stare decisis. But before turning to the question of stare decisis, we briefly review the history of *R.C. 2305.131*.

**The evolution of *R.C. 2305.131***

**[**P10]** The General Assembly first enacted *R.C. 2305.131* in 1963. Am.S.B. No. 112, 130 Ohio Laws, Part I, 648. With the enactment of *R.C. 2305.131*, Ohio joined the many states that had enacted construction statutes of repose in the late 1950s and early 1960s in response to the expansion of the common-law liability of architects and builders to third parties with whom they lacked privity of contract. *Sedar v. Knowlton Constr. Co., 49 Ohio St.3d 193, 195, 551 N.E.2d 938 (1990)*, *overruled on other grounds*, *Brennaman v. R.M.I. Co., 70 Ohio St.3d 460, 1994 Ohio 322, 639 N.E.2d 425 (1994)*, citing *Hartford Fire Ins. Co. v. Lawrence, Dykes, Goodenberger, Bower & Clancy, 740 F.2d 1362, 1368 (6th Cir.1984)*; *Kocisko, 21 Ohio St.3d at 101, 488 N.E.2d 171* (Wright, J., dissenting) ("Almost every state, including Ohio, enacted this type of statute, recognizing that architects and builders were exposed **[***9]** to

liability for an indefinite time due to the longevity of buildings"); s*ee also* 2 Acret and Perrochet, *Construction Litigation Handbook*, Section 22:4, at 1249-1250 (2018-2019 Ed.2018).

**[**P11]** A statute of repose is a statute that bars "any suit that is brought after a specified time since the defendant acted * * *, even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1637 (10th Ed.2014). The repose period begins to run "'when a specific event occurs, regardless of whether a cause of action has accrued or whether any injury has resulted.'" *Id.*, quoting 54 Corpus Juris Secundum, Limitations of Actions, Section 4, at 20-21 (1987).

**[**P12]** This court first addressed R.C. 2305.131 in *Kocisko*. The relevant version of the statute, enacted in 1971, stated:

> No action to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property, nor any action for contribution or indemnity for damages sustained as a result of said injury, shall be brought **[*168]** against any person performing services for or furnishing the design, planning, supervision of construction, or construction of **[***10]** such improvement to real property, more than ten years after the performance or furnishing of such services and construction. This limitation does not apply to actions against any person in actual possession and control as owner, tenant, or otherwise of the improvement at the time the defective and unsafe condition of such improvement constitutes the proximate cause of the injury or damage for which the action is brought.

Am.S.B. No. 307, 134 Ohio Laws, Part I, 529, 530.

**[**P13]** We noted in *Kocisko* that the 1971 version of R.C. 2305.131 applied only to "actions for injury to real or personal property, bodily injury, or wrongful death, 'arising out of the **[*169]** defective and unsafe condition of an improvement to real property.'" *Kocisko, 21 Ohio St.3d at 99, 488 N.E.2d 171*, quoting Am.S.B. No. 307, 134 Ohio Laws, Part I, at 530. We stated that the statutory language was "uniformly used to describe tortious conduct" and that the statute's use of the terms "'defective' *and* 'unsafe' to describe the improvements at issue distinguish[ed] the actions contemplated within the statute from warranty or other contractual claims." (Emphasis sic.) *Id.* We therefore held that the 1971 version of R.C. 2305.131 applied only to tort actions. *Id.* at the syllabus.

**[**P14]** In 1994, this court held that the 1971 version of **[***11]** R.C. 2305.131—the version at issue in *Kocisko*—violated the right to a remedy guaranteed by *Article I, Section 16 of the Ohio Constitution* because it deprived claimants of the right to sue before they knew or could have known about their injuries. *Brennaman, 70 Ohio St.3d at 466-467, 639 N.E.2d 425*, overruling *Sedar, 49 Ohio St.3d 193, 551 N.E.2d 938*. *Brennaman* involved personal injuries that were incurred more than ten years after the defendants provided design and engineering services relating to the construction of a titanium metal plant. If applicable, the 1971 version of R.C. 2305.131 would have barred the plaintiffs' claims before they ever suffered an injury. We stated, "At a minimum, *Section 16, Article I* requires that the plaintiffs have a reasonable period of time to enter the courthouse to seek compensation after the accident." *Id. at 466*.

**[**P15]** In 1996, partly in response to *Brennaman*, the General Assembly repealed the 1971 version of R.C. 2305.131 and enacted a new version of the statute, which began:

> (A)(1) Notwithstanding an otherwise applicable period of limitations specified in this chapter and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, no cause of action to recover damages for an injury to real or personal property, bodily injury, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property **[***12]** * * * shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than fifteen years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction.

Am.Sub.H.B. No. 350 ("H.B. 350"), 146 Ohio Laws, Part II, 3867, 3917.

**[**P16]** Whereas the 1971 version of R.C. 2305.131 precluded the *commencement* of an action, the H.B. 350 version of R.C. 2305.131 precluded the *accrual* of a cause of action. The General Assembly stated its understanding that the H.B. 350 version of R.C. 2305.131 would not violate the right to a remedy, because it did not deny a remedy to a claimant with a

vested cause of action but instead precluded a cause of action from ever vesting. *Id.* at Section 5(E)(5), 146 Ohio Laws, Part II, at 4022. But after this court held that H.B. 350 violated the Ohio Constitution's single-subject rule, State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 1999- Ohio 123, 715 N.E.2d 1062 (1999), paragraph three of the syllabus, the General Assembly repealed R.C. 2305.131, "both as it results from and as it existed prior to its repeal and re-enactment by" H.B. 350. Sub.S.B. No. 108, Section 2.02(E), 149 Ohio Laws, Part I, 382, 499. The repeal took effect on July 6, **[***13]** 2001. *Id.* at Section 9, 149 Ohio Laws, Part I, at 511.

**[**P17]** In 2004, the General Assembly enacted the current version of R.C. 2305.131, which is substantially similar to the H.B. 350 version of the statute. It begins:

> (A)(1) Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code and except as otherwise provided in divisions (A)(2), (A)(3), (C), and (D) of this section, no cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property * * * shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years from the date of substantial completion of such improvement.

Am.Sub.S.B. No. 80, 150 Ohio Laws, Part V, at 7937-7938. The General Assembly recognized that the availability of evidence **[*170]** pertaining to an improvement to real property more than ten years after completion is problematic and that it is an unacceptable burden to require the maintenance of records and documentation pertaining to an improvement to real property for more than **[***14]** ten years after completion. *Id.* at Section 3(B)(3) and (4), 150 Ohio Laws, Part V, at 8029. It intended the current version of R.C. 2305.131 "to preclude the pitfalls of stale litigation." *Id.* at Section 3(B)(5), 150 Ohio Laws, Part V, at 8029.

**Stare decisis**

**[**P18]** The Third District held that stare decisis required it to follow *Kocisko* and to hold that the current version of R.C. 2305.131, like the 1971 version of the statute, applies only to claims sounding in tort. 2017-Ohio-8521 at ¶ 11; 2017-Ohio-8522 at ¶ 8. The doctrine of stare decisis requires a court to recognize and follow an established legal decision in subsequent cases in which the question of law is again in controversy. Clark v. Snapper Power Equip., Inc., 21 Ohio St.3d 58, 60, 21 Ohio B. 359, 488 N.E.2d 138 (1986). As a result, "[w]ell-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system." Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 1.

**[**P19]** Considerations of stare decisis are particularly apt in the area of statutory construction because if the legislature disagrees with a court's interpretation of a statute, it may amend the statute. Pearson v. Callahan, 555 U.S. 223, 233, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); Rocky River v. State Emp. Relations Bd., 43 Ohio St.3d 1, 6, 539 N.E.2d 103 (1989). But questions about the applicability of stare decisis arise when, as here, the legislature *has* amended a statute subsequent to a judicial interpretation of the statute. Appellants argue that stare decisis should not be applied here, because the General Assembly repealed the version of R.C. 2305.131 addressed in *Kocisko* and has enacted a substantially **[***15]** different version.

**[**P20]** We do not apply stare decisis to strike down legislation merely because it is similar to a previous enactment that we found unconstitutional. Groch v. Gen. Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 104. "To be covered by the blanket of stare decisis, the legislation must be phrased in language that is substantially the same as that which we have previously invalidated." *Id.*, citing Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 22-23. In Stetter v. R.J. Corman Derailment Servs., L.L.C., 125 Ohio St.3d 280, 2010-Ohio-1029, 927 N.E.2d 1092, ¶ 39, we conducted "a fresh review" of a statute that, despite a resemblance to previous legislation, differed from the prior statute "in significant and important ways." *See also* State v. Bodyke, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.3d 753, ¶ 33 (lead opinion) ("as a threshold question, we must determine whether the statute and facts presented today are the same as those presented in precedent").

**[**P21]** New Riegel argues that *Kocisko* remains controlling because the 1971 and the current versions of R.C. 2305.131 similarly define the actions to which **[*171]** they apply. The 1971 version of the statute applied to any "action to recover damages for any injury

to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property." Am.Sub.S.B. No. 307, 134 Ohio Laws, Part I, at 530. The current version of the statute applies to any "cause of action to recover damages for bodily injury, **[***16]** an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property." R.C. 2305.131(A)(1). But while the specific language defining the scope of the statute's coverage has not substantially changed, we must now read that language in light of, and in a manner consistent with, the expanded, current version of the statute.

**[**P22]** The current version of R.C. 2305.131 is sufficiently different from the 1971 version of the statute "'to avoid the blanket application of stare decisis,'" Groch at ¶ 106, quoting Arbino at ¶ 24. Unlike the single-paragraph 1971 version of R.C. 2305.131, the current version of the statute consists of nine paragraphs, which set out exceptions to its application, situations that give rise to extensions of the repose period, and instructions that it be applied in a remedial manner in any civil action commenced on or after its effective date. The current version of R.C. 2305.131, unlike the 1971 version, expressly refers to contract-law concepts, acknowledges that improvements to real property are generally designed and built pursuant to contract, and applies notwithstanding other general statutes of limitations, including those for contract actions. These **[***17]** substantial differences between the 1971 and the current versions of R.C. 2305.131 warrant "a fresh review" of the statute. Stetter at ¶ 39; *see also* McClure v. Alexander, 2d Dist. Greene No. 2007 CA 98, 2008-Ohio-1313, ¶ 53, quoting Groch at ¶ 106 (holding that the 1971 and the current versions of R.C. 2305.131 are "sufficiently different * * * 'to avoid the blanket application of stare decisis'"). We therefore conclude that the Third District erred by applying the doctrine of stare decisis to hold that the current version of R.C. 2305.131 applies only to tort claims.

**R.C. 2305.131 applies to both contract and tort claims**

**[**P23]** Now, freed from the constraints of Kocisko, we turn to the current version of R.C. 2305.131 to consider independently whether it applies to contract claims as well as to tort claims.

**[**P24]** "The primary goal of statutory construction is to ascertain and give effect to the legislature's intent in enacting the statute." State v. Lowe, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 9. We read words and phrases in a statute according to rules of grammar and common usage and in the context of the whole statute. R.C. 1.42; Commerce & Industry Ins. Co. v. Toledo, 45 Ohio St.3d 96, 102, 543 N.E.2d 1188 (1989). And we presume that the General **[*172]** Assembly intended the entire statute to be effective. R.C. 1.47(B). We may look beyond the plain statutory language only when a definitive meaning remains elusive despite a thorough, objective **[***18]** examination of the language. Ohio Neighborhood Fin., Inc. v. Scott, 139 Ohio St.3d 536, 2014-Ohio-2440, 13 N.E.3d 1115, ¶ 23, citing State v. Porterfield, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 11.

**[**P25]** R.C. 2305.131(A)(1) applies to "cause[s] of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arise[] out of a defective and unsafe condition of an improvement to real property." Although this court stated in Kocisko, 21 Ohio St.3d at 99, 488 N.E.2d 171, that similar language in the 1971 version of R.C. 2305.131 was "uniformly used to describe tortious conduct," that statement was shortsighted. More recently, for example, Ohio courts have recognized that a plaintiff, in appropriate circumstances, may seek damages for injury to property in an action for breach of contract. *See, e.g.*, Landis v. William Fannin Builders, Inc., 2011-Ohio-1489, 951 N.E.2d 1078, ¶ 36-38 (10th Dist.) (applying rule governing damages for temporary injury to real property in breach-of-contract claim); Booth v. Duffy Homes, Inc., 185 Ohio App.3d 260, 2009-Ohio-6767, 923 N.E.2d 1175, ¶ 9, 13 (10th Dist.) (same); *see also* Bauman Chevrolet, Inc. v. Faust, 66 Ohio Law Abs. 145, 113 N.E.2d 769 (Erie C.P.1953) (breach-of-contract claim sought damages for injury to personal property).

**[**P26]** Reading the current version of R.C. 2305.131 as a whole, we conclude that Ohio's construction statute of repose is not limited to tort actions but also applies to contract actions that meet the requirements of the statute. *See* State ex rel. Wray v. Karl R. Rohrer Assocs., Inc., 2018-Ohio-65, 104 N.E.3d 865, ¶ 30 (5th Dist.) ("It matters not whether the action is brought in tort or contract, if the resultant damages are injury to property of the type set forth in R.C. 2305.131, the statute applies").

**[**P27]** R.C. 2305.131(A)(1) states that **[***19]** the repose period applies, "[n]otwithstanding an otherwise

applicable period of limitations specified in this chapter." R.C. Chapter 2305 includes statutes of limitations for contract claims, *see* R.C. 2305.06 and 2305.07, as well as for tort claims, *see* R.C. 2305.09 and 2305.10. The uncodified language in Am.Sub.S.B. No. 80, Section 3(B)(1), 150 Ohio Laws, Part V, at 8028-8029, confirms the General Assembly's intention that the construction statute of repose "promote a greater interest than the interest underlying" not only the general tort statutes of limitations in R.C. 2305.09 and 2305.10 but also the interest underlying "other general statutes of limitation prescribed by the Revised Code." Had the General Assembly intended the construction statute of repose to apply only to tort claims, it could have specified those statutes of limitations applicable to tort claims in the introductory phrase of R.C. 2305.131(A)(1).

**[**P28] [*173]** Moreover, the General Assembly explicitly tied the commencement of the repose period to contractual performance. The ten-year repose period established in R.C. 2305.131(A)(1) begins to run upon "substantial completion" of an improvement. "Substantial completion" is defined as "the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use **[***20]** after having the improvement completed *in accordance with the contract or agreement covering the improvement*, including any agreed changes to the contract or agreement, whichever occurs first." (Emphasis added.) R.C. 2305.131(G). By enacting that definition, the General Assembly acknowledged that a defendant in an action to which R.C. 2305.131 applies—"a person who performed services for [an] improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of [an] improvement to real property," R.C. 2305.131(A)(1)—will generally operate pursuant to a contract. New Riegel does not dispute that "substantial completion" is a contract term, and it acknowledges that the professionals listed in R.C. 2305.131 "always provide their services under contracts."

**[**P29]** Perhaps the most persuasive indication that the General Assembly did not intend generally to exclude contract actions from the construction statute of repose, however, is found in R.C. 2305.131(D), which specifically excludes from the application of the statute of repose "a civil action for damages against a person who has expressly warranted or guaranteed an improvement to real property for a period longer than" the ten-year repose period. Express warranty **[***21]** is a creature of contract. *See* Houston-Starr Co. v. Berea Brick & Tile Co., 197 F.Supp. 492, 499 (N.D.Ohio 1961). And if R.C. 2305.131(A)(1) did not otherwise apply to a contractual warranty claim, the General Assembly would have had no reason to *exclude* warranty claims from the operation of the statute. We assume that the General Assembly does not use words or enact statutory provisions unnecessarily, and we avoid construing a statute in a way that would render a portion of the statute meaningless or inoperative. State v. Moore, 154 Ohio St.3d 94, 2018-Ohio-3237, 111 N.E.3d 1146, ¶ 13, citing State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn., 95 Ohio St. 367, 373, 116 N.E. 516 (1917).

**[**P30]** Reading R.C. 2305.131 as a whole and in a manner that gives effect to all provisions of the statute, we conclude that Ohio's construction statute of repose applies to all causes of action, whether sounding in tort or contract, that seek "to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arise[] out of a defective and unsafe condition of an improvement to real property * * * against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property." This reading of the statute is consistent with the General Assembly's stated intention to protect defendants from having to defend against stale claims, **[***22] [*174]** *see* Am.Sub.S.B. No. 80, Section 3(B)(3) through (5), 150 Ohio Laws, Part V, at 8029, the perils of which are the same whether the underlying claim is based in contract or tort.

**Whether R.C. 2305.131 bars New Riegel's claims is not before this court**

**[**P31]** In an argument that goes beyond either proposition of law that this court accepted, New Riegel argues that even if R.C. 2305.131 is applicable, the statute does not bar its claims, which accrued within ten years after substantial completion of the Project, because R.C. 2305.131(A)(1) does not limit commencement of an action once a claim has accrued. According to New Riegel, the 15-year statute of limitations for contract actions begins to run once a cause of action accrues within the repose period and R.C. 2305.131(A)(1) does not shorten the time to file an action on an accrued claim. In the court of appeals, New Riegel argued that R.C. 2305.131 will never bar a breach-of-contract claim because such a claim accrues, necessarily within the repose period, when the breach occurs, i.e., when an architect publishes a defective

design or when defective construction is performed. But the court of appeals did not address that argument.

**[**P32]** We do not decide the effect on these cases of our holding that R.C. 2305.131 applies to any cause of action, including a contract claim, that falls within the **[***23]** scope of R.C. 2305.131(A)(1), because that issue is beyond the scope of the propositions of law that we accepted and because neither the trial court nor the court of appeals addressed it.

*Conclusion*

**[**P33]** For these reasons, we reverse the judgments of the Third District Court of Appeals and remand these cases to that court to address New Riegel's remaining arguments.

Judgments reversed and causes remanded.

O'CONNOR, C.J., and FISCHER and DONNELLY, JJ., concur.

KENNEDY, J., concurs in part and dissents in part, with an opinion joined by DEWINE, J.

STEWART, J., dissents, with an opinion.

**Concur by:** KENNEDY (In Part)

**Dissent by:** KENNEDY (In Part), STEWART

## Dissent

**KENNEDY, J., concurring in part and dissenting in part.**

**[**P34]** Because R.C. 2305.131 applies to all causes of action for damages arising out of the defective and unsafe condition of an improvement brought against a person who furnished the design, planning, supervision of construction, or construction **[*175]** of that improvement, and because breach of contract is a cause of action, ***e.g.***, *Lucarell v. Nationwide Mut. Ins. Co., 152 Ohio St.3d 453, 2018-Ohio-15, 97 N.E.3d 458, ¶ 41*, I concur in the court's judgment to the extent that it reverses the judgments of the Third District Court of Appeals.

**[**P35]** I write separately, however, to address the assertion that R.C. 2305.131(A)(1) does not bar commencement of an action once a claim **[***24]** has accrued. Appellee, the New Riegel Local School District Board of Education, contends that the General Assembly intended R.C. 2305.131(A)(1) to apply only to causes of action sounding in tort, reasoning that "when a written contract exists related to the design or construction of an improvement to real property, the statute of repose would sit wholly impotent." According to the school board, a breach-of-contract claim can *never* be limited by the construction statute of repose because such a claim will always accrue before the ten-year period expires, and for this reason, the school board maintains that "[i]t makes no sense to say that the General Assembly intended" R.C. 2305.131(A)(1) to apply to breach-of-contract claims.

**[**P36]** Contrary to the majority's analysis, this statutory-construction argument responds directly to the propositions of law that we accepted for review. We cannot decide the issue presented in this case without addressing the school board's argument. Moreover, an appellee such as the school board can defend a judgment of the court of appeals with arguments that were not passed on by that court, ***see*** *O'Toole v. Denihan, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, ¶ 94*, and "'[r]eviewing courts are not authorized to reverse a correct judgment on the basis that some or all **[***25]** of the lower court's reasons are erroneous,'" *Goudlock v. Voorhies, 119 Ohio St.3d 398, 2008-Ohio-4787, 894 N.E.2d 692, ¶ 12*, quoting *State ex rel. McGrath v. Ohio Adult Parole Auth., 100 Ohio St.3d 72, 2003-Ohio-5062, 796 N.E.2d 526, ¶ 8*. The school board's argument is therefore properly before this court, and reaching it is necessary to decide this case. This court's remand of the case does nothing more than add further delay in resolving this matter.

**[**P37]** In *Oaktree Condominium Assn., Inc. v. Hallmark Bldg. Co., 139 Ohio St.3d 264, 2014-Ohio-1937, 11 N.E.3d 266*, we considered whether the application of R.C. 2305.131 to the plaintiff violated the Ohio Constitution's prohibition on retroactive laws. The cause of action had accrued prior to the enactment of the statute but was commenced more than ten years after construction had been completed. We recognized that R.C. 2305.131 was a statutory bar to the claim, because "[b]y its plain language, the real-property-construction statute of repose, which became effective on April 7, 2005, applies to civil actions commenced after the effective date of the statute *regardless of when the cause of action accrued*." (Emphasis added.) *Id. at ¶ 8*. And we noted that "[b]ecause [the plaintiff's] cause **[*176]** of action accrued and vested before the April 7, 2005 effective date of R.C. 2305.131, the retroactive

application of the statute of repose would take away [its] substantive right and conflict with Article II, Section 28 of the Ohio Constitution." Id. at ¶ 12. We therefore understood that the statute of repose bars causes **[***26]** of action that had accrued but were not commenced prior to the running of the ten-year period.

**[**P38]** The school board nonetheless asks us to construe the phrase "no cause of action * * * shall accrue," R.C. 2305.131(A)(1), to exempt causes of actions that did in fact accrue during the ten-year repose period. It reasons that had the General Assembly intended R.C. 2305.131 to be a true statute of repose, it would have provided that no cause of action "shall be commenced" after ten years.

**[**P39]** However, we may not read individual words of a statute in isolation; rather, we are obligated "to evaluate a statute 'as a whole and giv[e] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.'" Boley v. Goodyear Tire & Rubber Co., 125 Ohio St.3d 510, 2010-Ohio-2550, 929 N.E.2d 448, ¶ 21, quoting State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn. 95 Ohio St. 367, 373, 116 N.E. 516 (1917). ""[S]ignificance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act."" Id., quoting Weaver v. Edwin Shaw Hosp., 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶ 13, quoting Wachendorf v. Shaver, 149 Ohio St. 231, 78 N.E.2d 370 (1948), paragraph five of the syllabus.

**[**P40]** Construing R.C. 2305.131 as applying only to causes of action that accrue after the ten-year repose period has expired would render large swaths of the statute wholly superfluous. For **[***27]** example, R.C. 2305.131(A)(2) creates a discovery-rule exception to the statute of repose:

> **[*177]** Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, a claimant who discovers a defective and unsafe condition of an improvement to real property during the ten-year period specified in division (A)(1) of this section but less than two years prior to the expiration of that period may commence a civil action to recover damages as described in that division within two years from the date of the discovery of that defective and unsafe condition.

Similarly, R.C. 2305.131(A)(3) includes an exception to the statute of repose for plaintiffs "within the age of minority or of unsound mind" pursuant to R.C. 2305.16:

> Notwithstanding an otherwise applicable period of limitations specified in this chapter or in section 2125.02 of the Revised Code, if a cause of action that arises out of a defective and unsafe condition of an improvement to real property accrues during the ten-year period specified in division (A)(1) of this section and the plaintiff cannot commence an action during that period due to a disability described in section 2305.16 of the Revised Code, the plaintiff may commence a civil action to recover damages as described in that division within two years from the removal **[***28]** of that disability.

**[**P41]** Construing the statute of repose as not applying to causes of action that accrued within the ten-year repose period renders these two exceptions meaningless and inoperative. As the Fifth District Court of Appeals has explained, under that interpretation, R.C. 2305.131(A)(2) "would have no effect on any claimant because once a claimant's cause of action accrued, the statute of repose would no longer apply and the statute of limitations would apply." Tuslaw Local School Dist. Bd. of Edn. v. CT Taylor Co., Inc., 5th Dist. Stark No. 2018CA00099, 2019-Ohio-1731, __ N.E.3d __, ¶ 25. The same reasoning applies to R.C. 2305.131(A)(3).

**[**P42]** Moreover, in uncodified law, the General Assembly repeatedly described R.C. 2305.131 as a statute of repose. It explained that although "[s]tatutes of repose are vital instruments that provide time limits, closure, and peace of mind to potential parties of lawsuits," Ohio had stood virtually alone in failing to "adopt[] statutes of repose to protect architects, engineers, and constructors of improvements to real property from lawsuits arising after a specific number of years after completion of an improvement to real property." Am.Sub.S.B. No. 80, Section 3(A), 150 Ohio Laws, Part V, 7915, 8026-8027. The legislature acted to remedy that failing and eliminate the "unacceptable burden" of requiring architects, engineers, and constructors **[***29]** of improvements to real property to maintain insurance against liability, retain documents and records, and preserve evidence throughout the useful life of the improvement, explaining that "the ten-year statute of repose prescribed in [R.C. 2305.131(A)(1)] is a rational period of repose intended to preclude the pitfalls of stale litigation." *Id.* at 8027-8029. And it declared that R.C. 2305.131 was intended "to promote a greater interest than the interest

underlying * * * other general statutes of limitation prescribed by the Revised Code." *Id.* at 8028-8029.

**[**P43]** It is therefore manifest that the General Assembly understood R.C. 2305.131 to be a true statute of repose, i.e., one that bars accrued claims as well as those that have not yet vested. *See* Antoon v. Cleveland Clinic Found., 148 Ohio St.3d 483, 2016-Ohio-7432, 71 N.E.3d 974, ¶ 16. As the United States Supreme Court has explained, a statute of repose is akin to a discharge in bankruptcy; because it is a "cutoff" or absolute bar to liability that "puts an outer **[*178]** limit on the right to bring a civil action," application of a statute of repose does not depend on whether the cause of action has accrued. CTS Corp. v. Waldburger, 573 U.S. 1, 8-9, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014). It extinguishes liability regardless. *Id.*

**[**P44]** The plain language of R.C. 2305.131(A), read in its entirety, extinguishes liability for injuries arising out of a defective and unsafe condition of an improvement brought **[***30]** against a person who designed, planned, supervised, or constructed that improvement after ten years from its substantial completion, subject to the time extensions established in subdivisions (A)(2) and (A)(3) of that statute. Uncodified law and our caselaw support this conclusion. Because the school board brought this breach-of-contract action more than ten years after the substantial completion of its school building, the trial court correctly dismissed the breach-of-contract claims as time-barred. For this reason, I would reverse the judgments of the court of appeals and reinstate the judgments of the trial court.

DeWine, J., concurs in the foregoing opinion.

**STEWART, J.**

**[**P45]** I respectfully dissent from the majority's holding that R.C. 2305.131(A)(1), Ohio's construction statute of repose, applies to contract actions. R.C. 2305.131(A)(1) has not been changed in any significant way since this court interpreted it in Kocisko v. Charles Shutrump & Sons Co., 21 Ohio St.3d 98, 21 Ohio B. 392, 488 N.E.2d 171 (1986), syllabus, to apply "only to actions which sound in tort." We should reaffirm *Kocisko* and leave it to the General Assembly to amend the statute to provide that it applies to contract actions, if that truly is the General Assembly's intent.

**[**P46]** The majority concedes that the current version of R.C. 2305.131(A)(1) contains language "similar" to the version of **[***31]** the statute that we construed in *Kocisko*. Majority opinion at ¶ 25. That is an understatement: the version we construed in *Kocisko* applied to "action[s] to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death," Am.S.B. No. 307, 134 Ohio Laws, Part I, 529, 530, while the current version of the statute applies to "action[s] to recover damages for bodily injury, an injury to real or personal property, or wrongful death," R.C. 2305.131(A)(1). The same words are used but merely reordered, with no effect on the meaning of the statute.

**[**P47]** After we held in *Kocisko* that former R.C. 2305.131(A)(1) applied only to tort actions and that "[a]ctions in contract continue to be governed by the fifteen-year statute of limitations found in R.C. 2305.06," *Kocisko* at syllabus, the General Assembly could easily have amended R.C. 2305.131(A)(1) to add "contract actions" to the actions listed in that provision if that had been its intent **[*179]** when initially enacting the statute.[2] But subsequently, despite twice amending other parts of the statute, the General Assembly chose not to supersede *Kocisko* by adding contract actions to the actions listed in R.C. 2305.131(A)(1).

**[**P48]** Under the rules that the General Assembly enacted to guide courts when interpreting **[***32]** statutes, we are constrained to construe the amendments to R.C. 2305.131(A)(1) that did not expand the statute's applicability as "intended to be a continuation of the prior statute and not a new enactment, so far as it is the same as the prior statute," R.C. 1.54. "By the rules of construction of statutes, if a

---

[2] Notably, a number of states have enacted construction statutes of repose that explicitly apply to contract actions. *See, e.g.*, 735 Ill.Comp.Stat. 5/13-214(a) ("Actions based upon tort, contract or otherwise against any person for an act or omission of such person in the design, planning, supervision, observation or management of construction, or construction of an improvement to real property * * *"); Ind.Code Ann. 32-30-1-5(d) (applying to actions, "whether based upon contract, tort, nuisance, or another legal remedy," for any deficiency in design or construction of an improvement to real property or "an injury to real or personal property arising out of a deficiency"); N.J.Stat.Ann. 2A:14-1.1(a) (applying to any action, "whether in contract, in tort, or otherwise," for "any deficiency in the design, planning, surveying, supervision or construction of an improvement to real property, or for any injury to property, real or personal, or for an injury to the person, or for bodily injury or wrongful death"); ***Colo.Rev.Stat. 13-80-104(1)(c)*** (statute of repose for design and construction claims applies to "any and all actions in tort, contract, indemnity, or contribution, or other actions for the recovery of damages").

statute is amended in certain particulars, after the same has been interpreted and defined by the courts, without change in other respects, it will be presumed that the Legislature was satisfied with the court's interpretation upon these features which were unchanged, but that the amended portions were intended to be excepted from the operation of the court's decision." Spitzer v. Stillings, 109 Ohio St. 297, 305, 2 Ohio Law Abs. 100, 2 Ohio Law Abs. 119, 142 N.E. 365 (1924); *see also* State v. Hassler, 115 Ohio St.3d 322, 2007-Ohio-4947, 875 N.E.2d 46, ¶ 16 (despite amending statute eight times, legislature showed no intent to supersede judicial interpretation of statute). We recently noted this proposition in Wayt v. DHSC, L.L.C., 155 Ohio St.3d 401, 2018-Ohio-4822, 122 N.E.3d 92, ¶ 23, in which we presumed that the legislature had been aware of a prior decision of this court and "could easily have drafted the statute to prevent the holding from that case from affecting the outcome of this case" by adding a single term to an existing statute. The same reasoning applies here. The General Assembly is presumed to have been aware of our decision in *Kocisko* ***[***33]*** , and its failure to add contract actions to the actions listed in R.C. 2305.131(A)(1) shows that it has been content to let the statute stand as we previously interpreted it.

**[**P49]** Finding no support for its interpretation of R.C. 2305.131(A)(1) in the text of that provision, the majority maintains that the General Assembly nonetheless intended to include contract actions within the scope of the construction statute of repose because the current statute contains "contract-law concepts." **[*180]** Majority opinion at ¶ 22. Exactly what contract-law "concepts" are incorporated into the statute is unclear. The word "contract"—followed by its synonym, "agreement"—appears only twice in R.C. 2305.131, both times in division (G):

> As used in this section, "substantial completion" means the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

**[**P50]** The "substantial completion" of a contract or agreement to construct an improvement to property triggers the initiation of the repose **[***34]** period. R.C. 2305.131(A)(1). It has nothing to do with the actual cause of action for "bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property," *id.* As this court noted in *Kocisko*, language relating to injury or wrongful death is "uniformly used to describe tortious conduct." 21 Ohio St.3d at 99, 488 N.E.2d 171. None of these injuries encompass contract claims.

**[**P51]** The majority suggests that a party may seek damages for injury to property in a contract action but cites no authority from this court in support of that proposition. The breach-of-contract claims brought in this action sought economic damages—that is, the benefit of the bargain had the school building been designed and constructed according to applicable state standards. The "economic loss" doctrine states that when parties are in privity of contract and one party allegedly suffers purely economic damages as a result of an alleged breach of that contract, that party's exclusive remedy is in the law of contracts and no action is cognizable in tort. Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 42 Ohio St.3d 40, 45, 537 N.E.2d 624 (1989). "'When the promisee's injury consists merely of the loss of his bargain, no tort claim arises because the duty of the promisor **[***35]** to fulfill the term of the bargain arises only from the contract.'" *Id.*, quoting Battista v. Lebanon Trotting Assn., 538 F.2d 111, 117 (6th Cir.1976). Here, the plaintiff-school district did not allege that the defendants engaged in any tortious conduct that caused "injury to property."[3] The claims asserted in this case are purely contractual and outside the scope of the statute of repose.

**[**P52] [*181]** Although the majority asserts that *Kocisko* was "shortsighted," majority opinion at ¶ 25, *Kocisko* is consistent with decisions construing similar statutes of repose in other states. The Michigan Supreme Court considered a similarly worded construction statute of repose—former Mich.Comp.Laws 600.5839(1) ("[n]o person may maintain any action to recover damages for injury to property, real or personal, or for bodily injury or wrongful death, arising out of the defective and unsafe condition of an improvement to real property")—and held that that statute did "not apply to a claim against an engineer or contractor for a defect in an improvement when the nature and origin of the claim is the breach of a contract." Miller-Davis Co. v. Ahrens Constr., Inc., 489 Mich. 355, 370, 802 N.W.2d 33 (2011). The court quoted with approval the reasoning that a lower court provided in support of this conclusion

[3] Of course, there are torts involving real property; for example, trespass to property, vandalism, and nuisance.

in a prior case:

> "[T]his statute was enacted primarily to limit the engineers' and **[***36]** architects' exposure to litigation by injured third persons as evidenced by the legislation's timing and relation to case law. * * * If there is no causal connection between the defective condition and the injury, the provision does not apply. Similarly, where the suit is for deficiencies in the improvement itself, the injury is the defective condition, hence, the injury does not 'arise out of' the defective condition, but, rather, it is the condition. Therefore, claims for deficiencies in the improvement itself do not come within the scope of this special statute of limitation."

Id. at 369-370, quoting Marysville v. Pate, Hirn & Bogue, Inc., 154 Mich.App. 655, 660, 397 N.W.2d 859 (1986).

**[**P53]** And in Fid. & Deposit Co. of Maryland v. Bristol Steel & Iron Works, Inc., 722 F.2d 1160 (4th Cir.1983), the United States Court of Appeals for the Fourth Circuit construed Va.Code 8.01-250, which, like R.C. 2305.131(A)(1), applies to actions "for any injury to property, real or personal, or for bodily injury or wrongful death." The Fourth Circuit held, like this court in *Kocisko*, that "the statute, by its express terms, is restricted in its application to what are in effect tort actions to recover for 'injury' to property or persons and not to actions in contract"). Id. at 1162. These decisions show that *Kocisko* is not an outlier.

**[**P54]** We have acknowledged the General Assembly's prerogative, as the ""ultimate arbiter of public policy,""  **[***37]** to "refine[] Ohio's tort law to meet the needs of our citizens." Groch v. Gen. Motors Corp., 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 102, quoting Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 21, quoting State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network v. Dupuis, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 21. **[*182]** In the years following *Kocisko*, the General Assembly could easily have added contract actions to R.C. 2305.131(A)(1)'s list of actions to which the statute applies, but it has chosen not to. We therefore must assume that the General Assembly is content with this court's interpretation of the statute in *Kocisko*. A Virginia court reached the same conclusion in construing Va.Code 8.01-250, reasoning that the legislature had "presumably been aware of the Fourth Circuit's construction of the statute, and it has not amended it":

> Had the General Assembly intended § 8.01-250 to apply to actions for breach of contract, it could have added "breach of contract" to the enumerated actions in the statute or it could have omitted the words "to recover for any injury to property, real or personal, or for bodily injury or wrongful death." It did neither. *Inclusio unius est exclusio alterius*.

BurgerBusters, Inc. v. Ratley Constr. Co., Inc., 45 Va.Cir. 133, 135 (1998), citing Fid. & Deposit Co. at 1162.

**[**P55]** Indeed, in Minnesota, a former version of that state's construction statute of repose, Minn.Stat. 541.051(1), much like R.C. 2305.131(A)(1), applied to "action[s] to recover damages for any injury to property, real or personal, or for bodily injury or wrongful death." The Minnesota Supreme Court construed **[***38]** that statute as applying only to tort actions. Kittson Cty. v. Wells, Denbrook & Assocs., Inc., 308 Minn. 237, 241, 241 N.W.2d 799 (1976). In the wake of that decision, the Minnesota legislature did what our General Assembly has not done—it amended Minnesota's construction statute of repose to cover "action[s] by any person in contract, tort, or otherwise." Minn.Stat. 541.051(1); *see* Lietz v. N. States Power Co., 718 N.W.2d 865, 871 (Minn.2006).

**[**P56]** The General Assembly has the power to adopt a statute of repose and define the parameters of that law. We should not take it upon ourselves to do that which the legislature has chosen not to do. I would conclude that given the absence of any amendment to supersede our holding in *Kocisko*, R.C. 2305.131(A)(1) applies only to tort actions. I would therefore reject both propositions of law and affirm the judgments of the court of appeals.

---

End of Document

Reprinted with the permission of LexisNexis

Positive
As of: December 9, 2019 9:23 PM Z

# Home Depot U.S.A., Inc. v. Jackson

Supreme Court of the United States

January 15, 2019, Argued; May 28, 2019, Decided

No. 17-1471.

**Reporter**
139 S. Ct. 1743 *; 204 L. Ed. 2d 34 **; 2019 U.S. LEXIS 3558 ***; 27 Fla. L. Weekly Fed. S 857

HOME DEPOT U. S. A., INC., Petitioner v. GEORGE W. JACKSON

**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Subsequent History:** US Supreme Court rehearing denied by *Home Depot U.S.A. v. Jackson, 2019 U.S. LEXIS 4524 (U.S., Aug. 5, 2019)*

**Prior History:** **[***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

*Jackson v. Home Depot U.S.A., 880 F.3d 165, 2018 U.S. App. LEXIS 1422 (4th Cir. N.C., Jan. 22, 2018)*

**Disposition:** *880 F. 3d 165*, affirmed.

## Case Summary

### Overview

HOLDINGS: [1]-A third-party retailer that was named as a defendant in a class-action counterclaim could not remove the counterclaim under *28 U.S.C.S. § 1441(a)* because the term "the defendant or the defendants" who may remove a civil action referred only to the party sued by the original plaintiff, not a party named in a counterclaim; [2]-The retailer could not remove under the *Class Action Fairness Act of 2005* because the term "any defendant" in *28 U.S.C.S. § 1453(b)* simply clarified that certain limitations on removal that might otherwise apply did not limit removal under *§ 1453(b)*. Congress did not expand the types of parties eligible to remove a class action under *§ 1453(b)* beyond *§ 1441(a)*'s limits, so *§ 1453(b)* did not permit a third-party counterclaim defendant to remove.

### Outcome

Judgment affirmed. 5-4 decision; 1 dissent.

## Syllabus

**[**39]** **[*1744]** Citibank, N. A., filed a debt-collection action in state court, alleging that respondent Jackson was liable for charges incurred on a Home Depot credit card. As relevant here, Jackson responded by filing third-party class-action claims against petitioner Home Deport U. S. A., Inc., and Carolina Water Systems, Inc., alleging that they had engaged in unlawful referral sales and deceptive and unfair trade practices under state law. Home Depot filed a notice to remove the case from state to federal court, but Jackson moved to remand, arguing that controlling precedent barred removal by a third-party counterclaim defendant. The District Court

granted Jackson's motion, and the Fourth Circuit affirmed, holding that neither the general removal provision, 28 U. S. C. §1441(a), nor the removal provision in the Class Action Fairness Act of 2005, §1453(b), allowed Home Depot to remove the class-action claims filed against it.

*Held:*

1. Section 1441(a) does not permit removal by a third-party counterclaim defendant. Home Depot emphasizes that it is a "defendant" to a "claim," but §1441(a) refers to "civil action[s]," not "claims." And because the action as **[***2]** defined by the plaintiff's complaint is the "civil action . . . of which the district cour[t]" must have "original jurisdiction," "the defendant" to that action is the defendant to the complaint, not a party named in a counterclaim. This conclusion is bolstered by the use of the term "defendant" in related contexts. For one, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. See, *e.g.*, Rules 14, 12(a)(1)(A)-(B). And in other removal provisions, Congress has clearly extended removal authority to parties other than the original defendant, see, *e.g.*, §§1452(a), 1454(a), (b), but has **[*1745]** not done so here. Finally, if, as this Court has held, a counterclaim defendant who was the original plaintiff is not one of "the defendants," see Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 106-109, 61 S. Ct. 868, 85 L. Ed. 1214, there is no textual reason to reach a different conclusion for a counterclaim defendant who was not part of the initial lawsuit. This reading, Home Depot asserts, runs counter to the history and purposes of removal by preventing a party involuntarily brought into state-court proceedings from removing the claim against it to federal court. But the limits Congress has imposed on removal show that it did not intend to allow all defendants **[***3]** an unqualified right to remove, see, *e.g.*, §1441(b)(2), and Home Depot's interpretation makes little sense in the context of other removal provisions, see, *e.g.*, §1446(b)(2)(A). Pp. ___ - ___, 204 L. Ed. 2d, at 42-45.

2. Section 1453(b) does not permit removal by a third-party counterclaim defendant. Home Depot contends that even if §1441(a) does not permit removal here, §1453(b) does because it permits removal by "*any* defendant" to a "class action." But the two clauses in §1453(b) that employ **[**40]** the term "any defendant" simply clarify that certain limitations on removal that might otherwise apply do not limit removal under that provision. And neither clause--nor anything else in the statute--alters §1441(a)s limitation on *who* can remove, suggesting that Congress intended to leave that limit in place. In addition, §§1453(b) and 1441(a) both rely on the procedures for removal in §1446, which also employs the term "defendant." Interpreting that term to have different meanings in different sections would render the removal provisions incoherent. Pp. ___ - ___, 204 L. Ed. 2d, at 45-46.

880 F. 3d 165, affirmed.

**Counsel: William P. Barnette** argued the cause for petitioner.

**F. Paul Bland** argued the cause for respondent.

**Judges:** Thomas, J., delivered the opinion of the Court, in which Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Gorsuch and Kavanaugh, JJ., joined.

**Opinion by:** THOMAS

## Opinion

Justice **Thomas** delivered the opinion **[***4]** of the Court.

[1] The general removal statute, 28 U. S. C. §1441(a), provides that "any civil action" over which a federal court would have original jurisdiction may be removed to federal court by "the defendant or the defendants." The Class Action Fairness Act of 2005 (CAFA) provides that "[a] class action" may be removed to federal court by "any defendant without the consent of all defendants." 28 U. S. C. §1453(b). In this case, we address whether either provision allows a third-party counterclaim defendant—that is, a party **[*1746]** brought into a lawsuit through a counterclaim filed by the original defendant—to remove the counterclaim filed against it. Because in the context of these removal provisions the term "defendant" refers only to the party sued by the original plaintiff, we conclude that neither provision

allows such a third party to remove.

I

A

We have often explained that [2] "[f]ederal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America, 511 U. S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)*. *Article III, §2, of the Constitution* delineates "[t]he character of the controversies over which federal judicial authority may extend." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U. S. 694, 701, 102 S. Ct. 2099, 72 L. Ed. 2d 492 (1982)*. And lower federal-court jurisdiction "is further limited to those subjects encompassed within a statutory grant of jurisdiction." *Ibid.* Accordingly, "the district courts may not exercise jurisdiction **[***5]** absent a statutory basis." *Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U. S. 546, 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005)*.

[3] In *28 U. S. C. §§1331* and *1332(a)*, Congress granted federal courts jurisdiction over two general types of cases: cases that "aris[e] under" federal law, *§1331*, and cases in which the amount in controversy exceeds $75,000 and there is diversity of citizenship among the parties, *§1332(a)*. These jurisdictional grants are known as "federal-question jurisdiction" and "diversity jurisdiction," respectively. Each serves a distinct **[**41]** purpose: Federal-question jurisdiction affords parties a federal forum in which "to vindicate federal rights," whereas diversity jurisdiction provides "a neutral forum" for parties from different States. *Exxon Mobil Corp., supra, at 552, 125 S. Ct. 2611, 162 L. Ed. 2d 502*.

Congress has modified these general grants of jurisdiction to provide federal courts with jurisdiction in certain other types of cases. As relevant here, *CAFA* provides district courts with jurisdiction over "class action[s]" in which the matter in controversy exceeds $5,000,000 and at least one class member is a citizen of a State different from the defendant. *§1332(d)(2)(A)*. A "class action" is "any civil action filed under *Rule 23 of the Federal Rules of Civil Procedure* or similar State statute or rule of judicial procedure." *§1332(d)(1)(B)*.

[4] In addition to granting federal courts jurisdiction over certain types of cases, Congress has enacted provisions **[***6]** that permit parties to remove cases originally filed in state court to federal court. *Section 1441(a)*, the general removal statute, permits "the defendant or the defendants" in a state-court action over which the federal courts would have original jurisdiction to remove that action to federal court. To remove under this provision, a party must meet the requirements for removal detailed in other provisions. For one, a defendant cannot remove unilaterally. Instead, "all defendants who have been properly joined and served must join in or consent to the removal of the action." *§1446(b)(2)(A)*. Moreover, when federal jurisdiction is based on diversity jurisdiction, the case generally must be removed within "1 year after commencement of the action," *§1446(c)(1)*, and the case may not be removed if any defendant is "a citizen of the State in which such action is brought," *§1441(b)(2)*.

[5] *CAFA* also includes a removal provision specific to class actions. That provision permits the removal of a "class action" from state court to federal court "by any **[*1747]** defendant without the consent of all defendants" and "without regard to whether any defendant is a citizen of the State in which the action is brought." *§1453(b)*.

At issue here is whether the term "defendant" **[***7]** in either *§1441(a)* or *§1453(b)* encompasses a party brought into a lawsuit to defend against a counterclaim filed by the original defendant or whether the provisions limit removal authority to the original defendant.

B

In June 2016, Citibank, N. A., filed a debt-collection action against respondent George Jackson in North Carolina state court. Citibank alleged that Jackson was liable for charges he incurred on a Home Depot credit card. In August 2016, Jackson answered and filed his own claims: an individual counterclaim against Citibank and third-party class-action claims against Home Depot U. S. A., Inc., and Carolina Water Systems, Inc.

Jackson's claims arose out of an alleged scheme between Home Depot and Carolina Water Systems to induce homeowners to buy water treatment systems at inflated prices. The crux of the claims was that Home Depot and Carolina Water Systems engaged in unlawful referral sales and deceptive and unfair trade practices in violation of North Carolina **[**42]** law, Gen. Stat. Ann. *§§25A-37*, *75-1.1* (2013). Jackson also asserted that Citibank was jointly and severally liable for the conduct of Home Depot and Carolina Water Systems and that his obligations under the sale were null and void.

In September **[***8]** 2016, Citibank dismissed its claims against Jackson. One month later, Home Depot filed a

notice of removal, citing 28 U. S. C. §§1332, 1441, 1446, and 1453. Jackson moved to remand, arguing that precedent barred removal by a "third-party/additional counter defendant like Home Depot." App. 51-52. Shortly thereafter, Jackson amended his third-party class-action claims to remove any reference to Citibank.

The District Court granted Jackson's motion to remand, and the Court of Appeals for the Fourth Circuit granted Home Depot permission to appeal and affirmed. 880 F. 3d 165, 167 (2018); see 28 U. S. C. §1453(c)(1). Relying on Circuit precedent, it held that neither the general removal provision, §1441(a), nor CAFA's removal provision, §1453(b), allowed Home Depot to remove the class-action claims filed against it. 880 F. 3d, at 167-171.

We granted Home Depot's petition for a writ of certiorari to determine whether a third party named in a class-action counterclaim brought by the original defendant can remove if the claim otherwise satisfies the jurisdictional requirements of CAFA. *585 U. S. ___, 139 S. Ct. 51, 201 L. Ed. 2d 1129 (2018)*. We also directed the parties to address whether the holding in Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)—that an original plaintiff may not remove a counterclaim against it—should extend to third-party counterclaim defendants. [1] *585 U. S. ___, 139 S. Ct. 51, 201 L. Ed. 2d 1129*.

II

A

We first consider whether 28 U. S. C. §1441(a) permits a **[***9]** third-party counterclaim defendant to remove a claim **[*1748]** filed against it. [2] Home Depot contends that because a third-party counterclaim defendant is a "defendant" to the claim against it, it may remove pursuant to §1441(a). The dissent agrees, emphasizing that "a 'defendant' is a 'person sued in a civil proceeding.'" Post, at ___, 204 L. Ed. 2d, at 51 (opinion of Alito, J.). This reading of the statute is plausible, but we do not think it is the best one. Of course [6] the term "defendant," standing alone, is broad. But the phrase "the defendant or the defendants" "cannot be construed in a vacuum." Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Ibid.*; see **[**43]** also A. Scalia & B. Garner, Reading Law 167 (2012) ("The text must be construed as a whole"); accord, Bailey v. United States, 516 U. S. 137, 145-146, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995). Considering the phrase "the defendant or the defendants" in light of the structure of the statute and our precedent, we conclude that §1441(a) does not permit removal by any counterclaim defendant, including parties brought into the lawsuit for the first time by the counterclaim. [3]

Home Depot emphasizes that it is a "defendant" to a "claim," but [7] the statute **[***10]** refers to "civil action[s]," not "claims." This Court has long held that a district court, when determining whether it has original jurisdiction over a civil action, should evaluate whether that action could have been brought originally in federal court. See Mexican Nat. R. Co. v. Davidson, 157 U. S. 201, 208, 15 S. Ct. 563, 39 L. Ed. 672 (1895); Tennessee v. Union & Planters' Bank, 152 U. S. 454, 461, 14 S. Ct. 654, 38 L. Ed. 511 (1894). This requires a district court to evaluate whether the plaintiff could have filed its operative complaint in federal court, either because it raises claims arising under federal law or because it falls within the court's diversity jurisdiction. *E.g.*, Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U. S. 1, 10, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983); cf. Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U. S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002) ("[A] counterclaim . . . cannot serve as the basis for 'arising under' jurisdiction"); §1446(c)(2) (deeming the "sum demanded in good faith in the initial pleading . . . the amount in controversy"). Section 1441(a) thus does not permit removal based on counterclaims at all, as a

[1] In this opinion, we use the term "third-party counterclaim defendant" to refer to a party first brought into the case as an additional defendant to a counterclaim asserted against the original plaintiff.

[2] Section 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

[3] Even the dissent declines to rely on the dictionary definition of "defendant" alone, as following that approach to its logical conclusion would require overruling Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941). See post, at ___, n. 2, 204 L. Ed. 2d, at 52.

counterclaim is irrelevant to whether the district court had "original jurisdiction" over the civil action. And because the "civil action . . . of which the district cour[t]" must have "original jurisdiction" is the action as defined by the plaintiff's complaint, "the defendant" to that action is the defendant to that complaint, not a party named in a counterclaim. It is this statutory context, **[***11]** not "the policy goals behind the [well-pleaded complaint] rule," *post, at ___, 204 L. Ed. 2d, at 59*, that underlies our interpretation of the phrase "the defendant or the defendants."

**[*1749]** The use of the term "defendant" in related contexts bolsters our determination that Congress did not intend for the phrase "the defendant or the defendants" in *§1441(a)* to include third-party counterclaim defendants. For one, the Federal Rules of Civil Procedure differentiate between third-party defendants, counterclaim defendants, and defendants. *Rule 14*, which governs "Third-Party Practice," distinguishes between "the plaintiff," a "defendant" who becomes the "third-party plaintiff," and "the third-party defendant" sued by the original defendant. *Rule 12* likewise distinguishes between defendants and counterclaim defendants by separately specifying when "[a] defendant must serve an answer" and when "[a] party must **[**44]** serve an answer to a counterclaim." *Fed. Rules Civ. Proc. 12(a)(1)(A)-(B)*.

Moreover, in other removal provisions, Congress has clearly extended the reach of the statute to include parties other than the original defendant. For instance, *§1452(a)* permits "[a] party" in a civil action to "remove any claim or cause of action" over which a federal court would have bankruptcy jurisdiction. **[***12]** And *§§1454(a)* and *(b)* allow "any party" to remove "[a] civil action in which any party asserts a claim for relief arising under any Act of Congress relating to patents, plant variety protection, or copyrights." *Section 1441(a)*, by contrast, limits removal to "the defendant or the defendants" in a "civil action" over which the district courts have original jurisdiction.

Finally, [8] our decision in *Shamrock Oil* suggests that third-party counterclaim defendants are not "the defendant or the defendants" who can remove under *§1441(a)*. *Shamrock Oil* held that a counterclaim defendant who was also the original plaintiff could not remove under *§1441(a)*'s predecessor statute. *313 U. S., at 106-109, 61 S. Ct. 868, 85 L. Ed. 1214*. We agree with Home Depot that *Shamrock Oil* does not specifically address whether a party who was not the original plaintiff can remove a counterclaim filed against it. And we acknowledge, as Home Depot points out, that a third-party counterclaim defendant, unlike the original plaintiff, has no role in selecting the forum for the suit. But the text of *§1441(a)* simply refers to "the defendant or the defendants" in the civil action. If a counterclaim defendant who was the original plaintiff is not one of "the defendants," we see no textual reason to reach a different conclusion **[***13]** for a counterclaim defendant who was not originally part of the lawsuit. In that regard, *[9] Shamrock Oil* did not view the counterclaim as a separate action with a new plaintiff and a new defendant. Instead, the Court highlighted that the original plaintiff was still "the plaintiff." *Id., at 108, 61 S. Ct. 868, 85 L. Ed. 1214* ("We can find no basis for saying that Congress, by omitting from the present statute all reference to 'plaintiffs,' intended to save a right of removal to some plaintiffs and not to others"). Similarly here, the filing of counterclaims that included class-action allegations against a third party did not create a new "civil action" with a new "plaintiff" and a new "defendant."

Home Depot asserts that reading "the defendant" in *§1441(a)* to exclude third-party counterclaim defendants runs counter to the history and purposes of removal by preventing a party involuntarily brought into state-court proceedings from removing the claim against it. But [10] the limits Congress has imposed on removal show that it did not intend to allow all defendants an unqualified right to remove. *E.g.*, *§1441(b)(2)* (preventing removal based on diversity jurisdiction where any defendant is a citizen of the State in which the action is brought). Moreover, **[***14]** Home Depot's interpretation makes little sense in the context of other removal provisions. **[*1750]** For instance, when removal is based on *§1441(a)*, all defendants must consent to removal. See *§1446(b)(2)(A)*. Under Home Depot's interpretation, "defendants" in *§1446(b)(2)(A)* could be read to require consent from the third-party counterclaim defendant, the original plaintiff (as a counterclaim defendant), *and* the original defendant asserting **[**45]** claims against them. Further, Home Depot's interpretation would require courts to determine when the original defendant is also a "plaintiff" under other statutory provisions. *E.g.*, *§1446(c)(1)*. Instead of venturing down this path, we hold that [11] a third-party counterclaim defendant is not a "defendant" who can remove under *§1441(a)*.

B

We next consider whether *CAFA's* removal provision, *§1453(b)*, permits a third-party counterclaim defendant

to remove. [4] Home Depot contends that even if it could not remove under §1441(a), it could remove under §1453(b) because that statute is worded differently. It argues that although §1441(a) permits removal only by "the defendant or the defendants" in a "civil action," §1453(b) permits removal by "*any* defendant" to a "class action." (Emphasis added.) Jackson responds that this argument ignores the context of §1453(b), which he **[***15]** contends makes clear that Congress intended only to alter certain restrictions on removal, not expand the class of parties who can remove a class action. Although this is a closer question, we agree with Jackson.

[12] The two clauses in §1453(b) that employ the term "any defendant" simply clarify that certain limitations on removal that might otherwise apply do not limit removal under §1453(b). Section 1453(b) first states that "[a] class action may be removed . . . without regard to whether any defendant is a citizen of the State in which the action is brought." There is no indication that this language does anything more than alter the general rule that a civil action may not be removed on the basis of diversity jurisdiction "if any of the . . . defendants is a citizen of the State in which such action is brought." §1441(b)(2). Section 1453(b) then states that "[a] class action . . . may be removed by any defendant without the consent of all defendants." This language simply amends the rule that "all defendants who have been properly joined and served must join in or consent to the removal of the action." §1446(b)(2)(A). Rather than indicate that a counterclaim defendant can remove, "here the word 'any' is being employed in connection with the word 'all' **[***16]** later in the sentence—'by *any* . . . without . . . the consent of *all*.'" Westwood Apex v. Contreras, 644 F. 3d 799, 804 (CA9 2011); see *Palisades Collections LLC v. Shorts, 552 F. 3d 327, 335-336 (CA4 2008).* Neither clause—nor anything else in the statute—alters §1441(a)'s limitation on *who* can remove, which suggests that Congress intended to leave that limit in place. See supra, at ___ - ___, 204 L. Ed. 2d, at 42-44.

Thus,[13] although the term "any" ordinarily carries an "'expansive meaning,'" post, at ___, 204 L. Ed. 2d, at 51, the context here demonstrates that Congress did not expand the types of parties eligible to remove a class action under §1453(b) beyond §1441(a)'s limits. If anything, that the language of §1453(b) mirrors the language in the statutory provisions **[**46]** it is amending suggests that the term "defendant" is being used consistently across all provisions. Cf. **[*1751]** *Mississippi ex rel. Hood v. AU Optronics Corp., 571 U. S. 161, 169-170, 134 S. Ct. 736, 187 L. Ed. 2d 654 (2014)* (interpreting CAFA consistently with Rule 20 where Congress used terms in a like manner in both provisions).

To the extent Home Depot is arguing that the term "defendant" has a different meaning in §1453(b) than it does in §1441(a), we reject its interpretation. [14] Because §§1453(b) and 1441(a) both rely on the procedures for removal in §1446, which also employs the term "defendant," interpreting "defendant" to have different meanings in different sections would render the removal provisions incoherent. See First Bank v. DJL Properties, LLC, 598 F. 3d 915, 917 (CA7 2010) (Easterbrook, C. J.). Interpreting the removal provisions together, we determine **[***17]** that §1453(b), like §1441(a), does not permit a third-party counterclaim defendant to remove.

Finally, the dissent argues that our interpretation allows defendants to use the statute as a "tactic" to prevent removal, post, at ___, 204 L. Ed. 2d, at 50, but that result is a consequence of the statute Congress wrote. Of course, if Congress shares the dissent's disapproval of certain litigation "tactics," it certainly has the authority to amend the statute. But we do not.

***

Because neither §1441(a) nor §1453(b) permits removal by a third-party counterclaim defendant, Home Depot could not remove the class-action claim filed against it. Accordingly, we affirm the judgment of the Fourth Circuit.

*It is so ordered.*

**Dissent by:** ALITO

## Dissent

[4] Section 1453(b) provides that "[a] class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(c)(1) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants."

Justice **Alito**, with whom The Chief Justice, Justice **Gorsuch**, and Justice **Kavanaugh** join, dissenting.

The rule of law requires neutral forums for resolving disputes. Courts are designed to provide just that. But our legal system takes seriously the risk that for certain cases, some neutral forums might be more neutral than others. Or it might appear that way, which is almost as deleterious. For example, a party bringing suit in its own State's courts might (seem to) enjoy, so to speak, a home court advantage against outsiders. Thus, **[***18]** from 1789 Congress has opened federal courts to certain disputes between citizens of different States. Plaintiffs, of course, can avail themselves of the federal option in such cases by simply choosing to *file* a case in federal court. But since their defendants cannot, the law has always given defendants the option to *remove* (transfer) cases to federal court. *Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 105, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)*. The general removal statute, which authorizes removal by "the defendant or the defendants," thus ensures that defendants get an equal chance to choose a federal forum. *28 U. S. C. §1441(a)*.

But defendants cannot remove a case unless it meets certain conditions. Some of those conditions have long made important (and often costly) consumer class actions virtually **[**47]** impossible to remove. Congress, concerned that state courts were biased against defendants to such actions, passed a law facilitating their removal. The *Class Action Fairness Act of 2005 (CAFA)* allows removal of certain class actions "by any defendant." *28 U. S. C. §1453(b)*. Our job is not to judge whether Congress's fears about state-court bias in class actions were warranted or indeed whether *CAFA* should allay them. We are to determine the scope of the term "defendant" under *CAFA* as well as the general removal **[***19]** provision, *§1441*.

All agree that if one party sues another, the latter—the original defendant—is a **[*1752]** "defendant" under both removal laws. But suppose the original defendant then countersues, bringing claims against both the plaintiff and a new party. Is this new defendant—the "third-party defendant"—also a "defendant" under *CAFA* and *§1441*? There are, of course, some differences between original and third-party defendants. One is brought into a case by the first major filing, the other by the second. The one filing is called a complaint, the other a countercomplaint.

But both kinds of parties are defendants to legal claims. Neither chose to be in state court. Both might face bias there, and with it the potential for crippling unjust losses. Yet today's Court holds that third-party defendants are not "defendants." It holds that Congress left them unprotected under *CAFA* and *§1441*. This reads an irrational distinction into both removal laws and flouts their plain meaning, a meaning that context confirms and today's majority simply ignores.

I

A

To appreciate what Congress sought to achieve with *CAFA*, consider what Congress failed to accomplish a decade earlier with the *Private Securities Litigation Reform Act of 1995 (Reform Act), 109 Stat. 737* **[***20]** (codified at *15 U. S. C. §§77z-1* and *78u-4*). The Reform Act was "targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities," including spurious lawsuits, "vexatious discovery requests, and 'manipulation by class action lawyers of the clients whom they purportedly represent.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit, 547 U. S. 71, 81, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006)* (quoting H. R. Conf. Rep. No. 104-369, p. 31 (1995)). As a result of these abuses, Congress found, companies were often forced to enter "extortionate settlements" in frivolous cases, just to avoid the litigation costs—a burden with scant benefits to anyone. *547 U. S., at 81, 126 S. Ct. 1503, 164 L. Ed. 2d 179*. To curb these inefficiencies, the Reform Act "limit[ed] recoverable damages and attorney's fees, . . . impose[d] new restrictions on the selection of (and compensation awarded to) lead plaintiffs, mandate[d] imposition of sanctions for frivolous litigation, and authorize[d] a stay of discovery pending resolution of any motion to dismiss." *Ibid.*

But "at least some members of the plaintiffs' bar" found a workaround: They avoided the Reform Act's limits on federal litigation by "avoid[ing] the federal forum altogether" and heading to state court. *Id., at 82, 126 S. Ct. 1503, 164 L. Ed. 2d 179*. Once there, they were able to keep defendants **[**48]** from taking them back to federal **[***21]** court (under the rules then in force) simply by naming an in-state defendant. See *§1441(b)(2)*. And the change in plaintiffs' strategy was marked: While state-court litigation of such class actions had been "rare" before the Reform Act's passage, *id., at 82, 126 S. Ct. 1503, 164 L. Ed. 2d 179*, within a decade state courts were handling most such cases, see S. Rep. No. 109-14, p. 4 (2005).

Some in Congress feared that plaintiffs' lawyers were able to "'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." *Ibid.* The result, in Congress's judgment, was that "State and local courts" were keeping issues of "national importance" out of federal court, "acting in ways that demonstrate[d] bias against out-of-State defendants" and imposing burdens that hindered "innovation" and drove up "consumer prices." §§2(a)(4), (b), 119 Stat. 5.

**[*1753]** So Congress again took action. But rather than get at the problem by imposing limits on federal litigation that plaintiffs could sidestep by taking defendants to state court, Congress sought to make it easier for defendants to remove to federal court: thus CAFA.

B

To grasp how CAFA **[***22]** changed the procedural landscape for class actions, it helps to review the rules that govern removal in the mine run of cases, and that once limited removal of all class actions as well. Those general rules appear in 28 U. S. C. §§1441 and 1446.

Under §1441(a), "any civil action brought in a State court . . . may be removed by the defendant or the defendants" as long as federal district courts would have "original jurisdiction" over the case. Such jurisdiction comes in two varieties. Federal courts have "federal question jurisdiction" if the case "aris[es] under" federal law—for instance, if the plaintiff alleges violations of a federal statute. §1331. But even when the plaintiff brings only state-law claims—alleging a breach of a contract, for example—federal courts have "diversity jurisdiction" if the amount in controversy exceeds $75,000 and there is complete diversity of parties, meaning that no plaintiff is a citizen of the same State as any defendant. §1332(a); Lincoln Property Co. v. Roche, 546 U. S. 81, 89, 126 S. Ct. 606, 163 L. Ed. 2d 415 (2005). While §1441 normally allows removal of either kind of case, it bars removal in diversity cases brought in the home State of any defendant. §1441(b)(2).

Another subsection of §1441 addresses removal of a subset of claims (not an entire action) when a case involves some claims that would **[***23]** be removable because they arise under federal law and others that would not (because they involve state-law claims falling outside both the original *and* the supplemental jurisdiction of federal courts [1]). In these hybrid cases, §1441(c)(2) allows the federal **[**49]** claims to be removed while the state-law claims are severed and sent back to state court.

The procedural rules for removing an action or claim from state to federal court under §1441 are set forth in §1446. Section 1446(b)(2)(A) requires the consent of all the defendants before an entire case may be removed under §1441(a). (If a defendant instead invokes §1441(c)(2), to remove a subset of claims, consent is required only from defendants to the claims that are removed.) And if diversity jurisdiction arises later in litigation—which may occur if, for instance, dismissal of an original defendant creates complete diversity—§1446(c)(1) allows removal only within one year of the start of the action in state court.

To this general removal regime, CAFA made several changes specific to class actions. Instead of allowing removal by "the defendant or the defendants," see §1441(a), §5 of CAFA allowed removal by "any defendant" to certain class actions, §1453(b), even when the other defendants do not consent, the case was filed in a defendant's **[***24]** home forum, or the case has been pending in state court for more than a year. See 119 Stat. 12-13.

Of course, these changes would be of no use to a class-action defendant hoping to remove if there were no federal jurisdiction over its case. So CAFA also lowered **[*1754]** the barriers to diversity jurisdiction. While complete diversity of parties is normally required, CAFA eliminates that rule for class actions involving at least 100 members and more than $5 million in controversy. In such cases, CAFA vests district courts with diversity jurisdiction anytime there is minimal diversity—which occurs when at least one plaintiff and defendant reside in different States. See 28 U. S. C. §§1332(d)(2), (d)(5)(B).

We were asked to decide whether these loosened requirements are best read to allow removal by third-party defendants like Home Depot. The answer is clear when one considers Home Depot's situation against

[1] Supplemental jurisdiction covers those claims "so related" to federal claims that they are "part of the same case or controversy under Article III," 28 U. S. C. §1367(a), in that they "derive from a common nucleus of operative fact." Mine Workers v. Gibbs, 383 U. S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966).

*CAFA's* language and history.

C

This case began as a garden-variety debt-collection action: Citibank sued respondent George Jackson in state court seeking payment on his purchase from petitioner Home Depot of a product made by Carolina Water Systems (CWS). Jackson came back with a counterclaim class action that roped in Home Depot and CWS as **[***25]** codefendants. (Until then, neither Home Depot nor CWS had been a party.) Citibank then dismissed its claim against Jackson, and Jackson amended his complaint to remove any mention of Citibank. So now all that remains in this case is Jackson's class-action counterclaims against Home Depot and CWS.

Invoking *CAFA*, Home Depot filed a notice of removal; it also moved to realign the parties to make Jackson the plaintiff, and CWS, Home Depot, and Citibank the defendants (just before Citibank had dropped out entirely). The District Court denied the motion and remanded the case to state court, holding that Home Depot cannot remove under *CAFA* because *CAFA's* "any defendant" excludes defendants to *counterclaim* class actions. The Court of Appeals affirmed, citing Circuit precedent that hung on this Court's decision in *Shamrock Oil* ***[**50]*** *& Gas Corp. v. Sheets, 313 U. S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941)*. We granted certiorari to decide whether the lower court's reading of *Shamrock Oil* is correct and whether *CAFA* allows third-party defendants like Home Depot to remove an action to federal court.

All agree that the one dispute that now constitutes this lawsuit—Jackson's class action against Home Depot and CWS—would have been removable under *CAFA* had it been present from the start of **[***26]** a case. Is it ineligible for removal just because it was not contained in the filing that launched this lawsuit?

Several lower courts think so. In holding as much, they have created what Judge Niemeyer called a "loophole" that only this Court "can now rectify." *Palisades Collections LLC v. Shorts, 552 F. 3d 327, 345 (CA4 2008)* (dissenting from denial of rehearing en banc). The potential for that "loophole" was first spotted by a civil procedure scholar writing shortly after *CAFA* took effect. See Tidmarsh, Finding Room for State Class Actions in a Post-*CAFA* World: The Case of the Counterclaim Class Action, *35 W. St. U. L. Rev. 193, 198 (2007)*. The article outlined a "tactic" for plaintiffs to employ if they wanted to thwart a defendant's attempt to remove a class action to federal court under *CAFA*: They could raise their class-action claim as a *counterclaim* and "hope that *CAFA* does not authorize removal." *Ibid.* In a single stroke, the article observed, a defendant's routine attempt to collect a debt from a single consumer could be leveraged into an unremovable attack on the defendant's "credit and lending policies" brought on behalf of a whole class of plaintiffs—all in the very state courts that *CAFA* was designed **[*1755]** to help class-action defendants avoid. *Id., at 199*.

The article is right to call this **[***27]** approach a tactic; it subverts *CAFA's* evident aims. I cannot imagine why a Congress eager to remedy alleged state-court abuses in class actions would have chosen to discriminate between two kinds of defendants, neither of whom had ever chosen the allegedly abusive state forum, all based on whether the claim against them had initiated the lawsuit or arisen just one filing later (in the countercomplaint). Of course, what finally matters is the text, and in reading texts we must remember that "no legislation pursues its purposes at all costs," *Rodriguez v. United States, 480 U. S. 522, 525-526, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987)* (*per curiam*); Congress must often strike a balance between competing purposes. But a good interpreter also reads a text charitably, not lightly ascribing irrationality to its author; and I can think of no rational purpose for this limit on which defendants may remove. Even respondent does not try to defend its rationality, suggesting instead that it simply reflects a legislative compromise. Yet there is no evidence that anyone thought of this potential loophole before *CAFA* was enacted, and it is hard to believe that any of *CAFA's* would-be opponents agreed to vote for it in exchange for this way of keeping some cases in state court. The question **[***28]** is whether the uncharitable reading here is inescapable—whether, unwittingly or despite itself, Congress adopted text that compels this bizarre result.

II

There are different schools of thought about statutory interpretation, **[**51]** but I would have thought this much was common ground: If it is hard to imagine any purpose served by a proposed interpretation of *CAFA*, if that reading appears nowhere in the statutory or legislative history or our cases on *CAFA*, if it makes no sense as a policy matter, it had better purport to reflect the best reading of the text, or any decision embracing it is groundless. Indeed, far from relegating the text to an afterthought, our shared approach to statutory interpretation, "as we always say, *begins* with the text."

Ross v. Blake, 578 U. S. ___, ___, 136 S. Ct. 1850, 195 L. Ed. 2d 117, 123 (2016) (emphasis added). After all, as we have unanimously declared, a "plain and unambiguous" text "must" be enforced "according to its terms." Hardt v. Reliance Standard Life Ins. Co., 560 U. S. 242, 251, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010). And yet, though the text and key term here is "any defendant," 28 U. S. C. §1453(b), the majority has not one jot or tittle of analysis on the plain meaning of "defendant."

Any such analysis would have compelled a different result. According to legal as well as standard dictionary definitions available in 2005, a "defendant" is **[***29]** a "person sued in a civil proceeding," Black's Law Dictionary 450 (8th ed. 2004), and the term is "opposed to" (contrasted with) the word "*plaintiff*," Webster's Third New International Dictionary 591 (2002) (Webster). See also 4 Oxford English Dictionary 377 (2d ed. 1989) (OED) ("[a] person sued in a court of law; the party in a suit who defends; opposed to *plaintiff* "). What we have before us is a civil proceeding in which Home Depot is not a plaintiff and is being sued. So Home Depot is a defendant, as that term is ordinarily understood.

The fact that Home Depot is considered a "*third-party* defendant" changes nothing here. See N. C. Rule Civ. Proc. 14(a) (2018). Adjectives like "third-party" "modify nouns—they pick out a subset of a category that possesses a certain quality." **[*1756]** Weyerhaeuser Co. v. United States Fish and Wildlife Serv., 586 U. S. ___, ___, 139 S. Ct. 361, 202 L. Ed. 2d 269, 279 (2018). They do not "alter the meaning of the word" that they modify. Rimini Street, Inc. v. Oracle USA, Inc., 586 U. S. ___, ___, 139 S. Ct. 873, 203 L. Ed. 2d 180, 188 (2019). And so, just as a "'critical habitat'" is a habitat, Weyerhaeuser Co., supra, at ___, 139 S. Ct. 361, 202 L. Ed. 2d 269 , and "'full costs'" are costs, Rimini Street, Inc., supra, at ___, 139 S. Ct. 873, 203 L. Ed. 2d 180 , zebra finches are finches and third-party defendants are, well, defendants.

If further confirmation were needed, it could be found in CAFA's use of the word "any" to modify "defendant." Unlike the general removal provision, which allows removal by "the defendant **[***30]** or the defendants," §1441(a), CAFA's authorization extends to "*any* defendant." §1453(b) (emphasis added). As we have emphasized repeatedly, "'the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." '" Ali v. Federal Bureau of Prisons, 552 U. S. 214, 219-220, 128 S. Ct. 831, 169 L. Ed. 2d 680 (2008) (quoting United States v. Gonzales, 520 U. S. 1, 5, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997), in turn quoting Webster's Third New International Dictionary 97 (1976)). In case after case, we have given effect to this expansive sense of "any." See Small v. United States, 544 U. S. 385, 396, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (2005) (THOMAS, J., dissenting) **[**52]** (collecting cases). So too here: Contrary to the Court's analysis, Congress's use of "any" covers defendants of "whatever kind," Ali, supra, at 220, 128 S. Ct. 831, 169 L. Ed. 2d 680, including third-party defendants like petitioner. "In concluding that 'any' means not what it says, but rather 'a subset of any,' the Court distorts the plain meaning of the statute and departs from established principles of statutory construction." Small, supra, at 395, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (THOMAS, J., dissenting).

For these reasons, unless third-party defendants like Home Depot differ in some way that is relevant to removal (as a matter of text, precedent, or common sense), [2] they fall within CAFA's coverage of "any defendant." §1453(b).

III

Respondent and the majority contend that Congress meant to incorporate into CAFA a specialized sense of "defendant," derived from its use in the general **[***31]** removal statute, §1441. And in §1441, they assert, "defendant" refers only to an *original* defendant—one named in the plaintiff's complaint. As I will show, they are mistaken about §1441. See Part IV, *infra*. But even if that general removal law *were* best read to leave out third-party defendants, there would be ample grounds to conclude that such defendants are covered by CAFA. And the majority's and respondent's objections to this reading of CAFA, based on comparisons to other federal laws, are unconvincing.

A

---

[2] That is true only of counterdefendants—original plaintiffs who are countersued by their original defendant. For one thing, it is hard to say that these plaintiffs fall under the plain meaning of "defendant," when the word "defendant" is defined in opposition to the word "*plaintiff*." See Webster 591; 4 OED 377. Moreover, as original plaintiffs, these parties chose the state forum (unlike original or third-party defendants), so it makes less sense to give them a chance to remove the case from that same forum. Finally, our decision in Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 61 S. Ct. 868, 85 L. Ed. 1214 (1941), confirms this reasoning and result. See Part IV-A, *infra*.

1

The first basis for reading CAFA to extend more broadly than §1441 is that CAFA's *text* is broader. As discussed, see **[*1757]** supra, at 1756, CAFA sweeps in "*any* defendant," §1453(b) (emphasis added), in contrast to §1441's "the defendant or the defendants." So even if we read the latter phrase narrowly, we would have to acknowledge that "Congress did not adopt that ready alternative." Advocate Health Care Network v. Stapleton, 581 U. S. ___, ___, 137 S. Ct. 1652, 198 L. Ed. 2d 96, 104 (2017). "Instead, it added language whose most natural reading is to enable" *any* defendant to remove, and "[t]hat drafting decision indicates that Congress did not in fact want" to replicate in CAFA the (purportedly) narrower reach of §1441. *Ibid.*

Respondent scoffs at the idea that the word "any" could make the difference. In his view, "any defendant" in CAFA means **[***32]** "any *one of* the defendants," not "any *kind of* defendant." Thus, he contends, if §1441 covers only one kind of defendant—the original kind, the kind named in a complaint—CAFA must do the same. On this account, CAFA refers to "any defendant" only because it was meant to **[**53]** eliminate (for class actions) §1441's requirement that *all* "the defendants" agree to remove. Respondent is right that the word "any" in CAFA eliminated the defendant-unanimity rule. But the modifier's overall effect on the plain meaning of CAFA's removal provision is what counts in a case interpreting CAFA; and that effect is to guarantee a broad reach for the word "defendant."

Nor is it baffling how "any" could be expansive in the way respondent finds so risible. In ordinary language, replacing "the Xs" with "any X" will often make the term "X" go from covering only paradigm instances of X to covering all cases. Compare:

•"Visitors to the prison may not use the phones except at designated times."

•"Visitors to the prison may not use any phone except at designated times."

On a natural reading, "the phones" refers to telephones provided by the prison, whereas "any phone" includes visitors' cellphones. Likewise, even if the phrase "the **[***33]** defendant" reached only original defendants, the phrase "any defendant" would presumptively encompass all kinds. Again, putting the word "any" into a "phrase . . . suggests a broad meaning." Ali, 552 U. S., at 218-219, 128 S. Ct. 831, 169 L. Ed. 2d 680.

In fact, the text makes it indisputable that CAFA's "any defendant" is broader in some ways. CAFA reaches at least two sets of defendants left out by §1441: in-state (or "forum") defendants, and nondiverse defendants. See §§1332(d)(2), 1453(b). So respondent and the majority are reduced to claiming that when CAFA says "any defendant," it is stretching farther than §1441's "the defendant" in some directions but not others—picking up forum defendants and nondiverse defendants while avoiding all contact with third-party defendants. But the shape of "any" is not so contorted. If context shows that "any defendant" covers *some* additional kinds, common sense tells us it presumptively covers the others.

2

Respondent's answer from precedent backfires. Against our many cases reading the word "any" capaciously (which is to say, naturally), see Small, 544 U. S., at 396, 125 S. Ct. 1752, 161 L. Ed. 2d 651 (THOMAS, J., dissenting) (collecting cases), he cites two cases that assigned the word a narrower scope. But in both, context compelled that departure from plain meaning. In United States v. Palmer, 16 U.S. 610, 3 Wheat. 610, 631-632, 4 L. Ed. 471 (1818), we read "any person" **[***34]** to refer exclusively to those over whom the United States had jurisdiction, but only because that was the undisputed scope of other instances of the same phrase in the same Act. Here, by contrast, even the majority **[*1758]** agrees that petitioner's reading of "any defendant" in CAFA is "plausible." Ante, at ___, 204 L. Ed. 2d, at 42. And in Small, supra, at 388-389, 125 S. Ct. 1752, 161 L. Ed. 2d 651, the Court read "any court" to refer only to domestic courts because of the "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application." No presumption helps respondent here.

Indeed, our presumptions in this area cut *against* the majority and respondent's view. That view insists on reading CAFA's "any defendant" **[**54]** narrowly, to match the allegedly narrower scope of "the defendant" in §1441. But our case law teaches precisely that CAFA should *not* be read as narrowly as §1441. While removal under §1441 is presumed narrow in various ways out of respect for States' "rightful independence," Shamrock Oil, 313 U. S., at 109, 61 S. Ct. 868, 85 L. Ed. 1214, we have expressly limited this "antiremoval" presumption to cases interpreting §1441. As JUSTICE GINSBURG recently wrote for the Court:

> "*[N]o* antiremoval presumption attends cases invoking CAFA, which Congress enacted to

facilitate adjudication of certain class **[***35]** actions in federal court. See *Standard Fire Ins. Co., 568 U. S., at 595, 133 S. Ct. 1345, 185 L. Ed. 2d 439* ('*CAFA's* primary objective' is to 'ensur[e] "Federal court consideration of interstate cases of national importance." ' (quoting §2(b)(2), 119 Stat. 5)); S. Rep. No. 109-14, p. 43 (2005) (*CAFA's* 'provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant.')." *Dart Cherokee Basin Operating Co. v. Owens, 574 U. S. 81, 89, 135 S. Ct. 547, 190 L. Ed. 2d 495 (2014)* (emphasis added).

So the strongest argument for reading *§1441* to exclude third-party defendants is an interpretive canon that we have pointedly *refused* to apply to *CAFA*. Our precedent on this point is thus a second basis—apart from the plain meaning of "any defendant"—for holding that *CAFA* covers third-party defendants even if *§1441* does not.

B

Respondent and the majority object that this reading ignores the backdrop against which *CAFA* was enacted and the significance of *CAFA's* contrast with the language of other (subject-matter-specific) removal statutes. And to these objections, respondent adds a third and bolder claim: that *CAFA* does not empower petitioner to remove because it does not create removal authority at all, but only channels removals already authorized by *§1441* (on which petitioner cannot rely in this case). All three **[***36]** objections fail.

1

In respondent's telling, it has been the uniform view of the lower courts that a third-party defendant is not among "the defendants" empowered to remove under *§1441*. Since those courts' decisions studded the legal "backdrop" when Congress enacted *CAFA*, respondent contends, we should presume *CAFA* used "defendant" in the same narrow sense. But this story exaggerates both the degree of lower court harmony and the salience of the resulting "backdrop" to Congress's work on *CAFA*.

*First*, though respondent repeatedly declares that the lower courts have reached a "consensus," see Brief for Respondent i, 1, 14, 19, 32, 35, they have not. "Several cases . . . have permitted removal on the basis of a third party claim where a separate and independent controversy is stated." *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F. 2d 133, 135-136 (CA5 1980)* (collecting cases). Before *CAFA*, at **[*1759]** least a half-dozen district courts took this **[**55]** view. [3] And though courts of appeals rarely get to opine on this issue (because *§1447(d)* blocks most appeals from district court orders sending a removed case back to state court), two Circuits have actually allowed third-party defendants to remove under *§1441*. See *Texas ex rel. Bd. of Regents of Univ. of Tex. System v. Walker, 142 F. 3d 813, 816 (CA5 1998)*; *United Benefit Life Ins. Co. v. United States Life Ins. Co., 36 F. 3d 1063, 1064, n. 1 (CA11 1994)*. Even a treatise cited by respondent destroys his "consensus" claim, as it admits **[***37]** that courts take "myriad and diverging views on whether third-party defendants may remove an action." 16 J. Moore, D. Coquillette, G. Joseph, & G. Vario, Moore's Federal Practice §107.41[6] (3d ed. 2019).

*Second*, even if the lower courts all agreed, the "legal backdrop" created by their decisions would matter only insofar as it told us what we can "safely assume" about what Congress "intend[ed]." *McFarland v. Scott, 512 U. S. 849, 856, 114 S. Ct. 2568, 129 L. Ed. 2d 666 (1994)*. So the less salient that backdrop would have been to Congress, the less relevant it is to interpreting Congress's actions. And I doubt the backdrop here would have been very salient. For one thing, it consisted mostly of trial court decisions; and the lower the courts, the less visible the backdrop. Indeed, I can find no case where we have read a special meaning into a federal statutory term based mainly on trial court interpretations.

But even if several higher courts had spoken—and spoken with one voice—there would be a problem: We have no evidence Congress was listening. In preparing and passing *CAFA*, Congress never adverted to third-party defendants' status. By respondent's admission, Congress was "silen[t]" on them in the seven years of hearings, drafts, and debates leading up to *CAFA's* adoption. **[***38]** Brief for Respondent 45. Yet if Congress was not thinking about a question, neither was it thinking about lower courts' answer to the question. So we cannot presume it adopted that answer.

2

Respondent also thinks we should read *CAFA* to exclude third-party defendants in light of the contrast

---

[3] See *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury, 622 F. 2d 133, 135 (CA5 1980)* (collecting four); *Charter Medical Corp. v. Friese, 732 F. Supp. 1160 (ND Ga. 1989)*; *Patient Care, Inc. v. Freeman, 755 F. Supp. 644 (NJ 1991)*.

between CAFA's "any defendant" and the language of two other removal laws that more clearly encompass third-party defendants. The America Invents Act (AIA), for example, allows "any party" to remove a lawsuit involving patent or copyright claims. 28 U. S. C. §§1454(a), (b)(1). The Bankruptcy Code likewise allows "[a] party" to remove in cases related to bankruptcy. §1452(a). Thus, respondent says, when Congress *wanted* to include more than original defendants, it knew how. It used terms like "any party" and "a party"—as CAFA did not.

Note, however, that the cited terms would have covered even original plaintiffs, whom *no one* thinks CAFA meant to reach (and for good reason, see Part II, supra). So CAFA's terms had to be narrower than (say) the AIA's "any party," *regardless* of whether CAFA was going to cover third-party defendants. Its failure to **[**56]** use the AIA's and Bankruptcy Code's broader terms, then, tells us nothing about third-party defendants' **[***39]** status under CAFA. Only the meaning of CAFA's "any defendant" does that. And it favors petitioner. See Parts II, III-A, supra.

**[*1760]** 3

Respondent's final and most radical argument against petitioner's CAFA claim is that CAFA's removal language does not independently authorize removal at all. On this view, all that §1453(b) does is "make a few surgical changes [in certain class-action cases] to the *procedures* that ordinarily govern removal," while the actual power to remove comes from the general removal provision, §1441(a). Brief for Respondent 49 (emphasis added). And so, the argument goes, removals under CAFA are still subject to §1441(a)'s restriction to "civil action[s]" over which federal courts have "original jurisdiction." Since this limitation is often read to mean that federal jurisdiction must have existed from the start of the civil action, see Part IV-C, *infra*, and that was not the case here, no removal is possible.

The premise of this objection is as weak as it is audacious. If CAFA does not authorize removal, then neither does §1441. After all, they use the same operative language, with the one providing that a class action "may be removed," §1453(b), and the other providing that a civil action "may be removed," §1441(a). So §1453(b) must, after all, **[***40]** be its own font of removal power and not a conduit for removals sourced by §1441(a).

Respondent argues that this reading of CAFA's §1453(b) would render it unconstitutional. The argument is as follows: Section 1453(b) provides that a "class action" may be removed, but it does not specify that the class action must fall within federal courts' jurisdiction. So if §1453(b) were a separate source of removal authority, it would authorize removals of class actions over which federal courts lacked jurisdiction, contrary to Article III of the Constitution. By contrast, §1441(a) limits itself to authorizing removal of cases over which federal courts have "original jurisdiction." Thus, only if §1441(a)—including its jurisdictional limit—governs the removals described in CAFA will CAFA's removal language be constitutional.

This argument fails. Section 1453 implicitly limits removal to class actions where there is minimal diversity, thus satisfying Article III. After all, §1453(a) incorporates the definition of "class action" found in the first paragraph of §1332(d). See §1332(d)(1). But the very next paragraph, §1332(d)(2), codifies the part of CAFA that created federal jurisdiction over class actions involving minimal diversity. This proves that the class actions addressed by CAFA's removal language, in §1453(b), are those involving minimal **[***41]** diversity, as described in §1332(d). In fact, respondent effectively *concedes* that §1453(b) applies only to actions described in §1332(d), since the latter is also what codifies those CAFA-removal rules that respondent does acknowledge, see Brief for Respondent 52—the requirements of more than $5 million in controversy but only minimal diversity, see §1332(d)(2). Because CAFA's removal language in §1453(b) applies only to class actions described in §1332(d), it **[**57]** raises no constitutional trouble to read §1453(b) as its own source of removal authority and not a funnel for §1441(a).

IV

So far I have accepted, *arguendo*, the majority and respondent's view that third-party defendants are *not* covered by the general removal provision, §1441. But I agree with petitioner that this is incorrect. On a proper reading of §1441, too, third-party defendants are "defendants" entitled to remove. Though a majority of District Courts would disagree, their exclusion of third-party defendants has rested (in virtually every instance) on a misunderstanding **[*1761]** of a previous case of ours, and the mere fact that this misreading has spread is no reason for us to go along with it. Nor, contrary to the majority, does a refusal to recognize third-party defendants under §1441 find support in our precedent **[***42]** embracing the so-called "well-

pleaded complaint" rule, which is all about how a plaintiff can make its case unremovable, not about which defendants may seek removal in those cases that *can* be removed.

A

Look at lower court cases excluding third-party defendants from *§1441*. Trace their lines of authority—the cases and sources they cite, and those *they* cite—and the lines will invariably converge on one point: our decision in *Shamrock Oil*. But nothing in that case justifies the common reading of *§1441* among the lower courts, a reading that treats some defendants who never chose the state forum differently from others.

As a preliminary matter, *Shamrock Oil* is too sensible to produce such an arbitrary result. That case involved a close ancestor of today's general removal provision, one that allowed removal of certain state-court actions at the motion of "the defendant or defendants therein." *313 U. S., at 104, n. 1, 61 S. Ct. 868, 85 L. Ed. 1214*. And our holding was simple: If *A* sues *B* in state court, and *B* brings a counterclaim against *A*, this does not then allow *A* to remove the case to federal court. As the original plaintiff who chose the forum, *A* does not get to change its mind now. That is all that *Shamrock Oil* held. The issue of third-party defendants **[***43]** never arose. And none of the Court's three rationales would support a bar on removal by parties *other than* original plaintiffs.

*Shamrock Oil* looked to statutory history, text, and purpose. As to history, it noted that removal laws had evolved to give the power to remove first to "defendants," then to "'either party, or any one or more of the plaintiffs or defendants,'" and finally to "defendants" again. The last revision must have been designed to withdraw removal power from someone, we inferred, and the only candidate was the plaintiff. *Id., at 105-108, 61 S. Ct. 868, 85 L. Ed. 1214*. Second, we said there was no basis in the text for distinguishing mere plaintiffs from plaintiffs who had been countersued, so we would treat them the same; neither could remove. *Id., at 108, 61 S. Ct. 868, 85 L. Ed. 1214*. Third, we offered a policy rationale: "[T]he plaintiff, having submitted himself to the jurisdiction of the state court, was not entitled to avail himself of a right of removal conferred only on a defendant who has not submitted himself to the jurisdiction." *Id., at 106, 61 S. Ct. 868, 85 L. Ed. 1214*. In this vein, we quoted a House Report calling it **[**58]** "'just and proper to require the plaintiff to abide his selection of a forum.'" *Ibid., n. 2* (quoting H. R. Rep. No. 1078, 49th Cong., 1st Sess., 1 (1886)). So history, **[***44]** language, and logic demanded that original plaintiffs remain unable to remove even if countersued.

None of these considerations applies to third-party defendants. If anything, all three point the other way. First, the statutory history cited by the Court shows that Congress (and the *Shamrock Oil* Court itself) took "the plaintiffs or defendants" to be jointly exhaustive categories. By that logic, since third-party defendants are certainly not plaintiffs—in any sense—they must be "defendants" under *§1441*. Cf. Webster 591 (defining "defendant" as "opposed to *plaintiff* "); 4 OED 377 (same). Second, and relatedly, the text of the general removal statute, then and now, does not distinguish original from third-party defendants when it comes to granting removal power—any more than it had distinguished plaintiffs who were and were not countersued when it came to *withdrawing* **[*1762]** the right to remove, as *Shamrock Oil* emphasized. And finally, *Shamrock Oil*'s focus on fairness—reflected in its point that plaintiffs may fairly be stuck with the forum they chose—urges the opposite treatment for third-party defendants. Like original defendants, they never chose to submit themselves to the state-court forum.

Thus, **[***45]** all three grounds for excluding original plaintiffs in *Shamrock Oil* actually support *allowing* third-party defendants to remove under *§1441*.

B

Respondent leans on his claim that District Courts to address the issue have reached a "consensus" that *Shamrock Oil* bars third-party defendants from removing. But as we saw above, rumors of a "consensus" have been greatly exaggerated. See Part III-B-1, *supra*. And in any case, no interpretive principle requires leaving intact the lower courts' misreading of a case of ours.

Certainly there is no reason to presume that Congress embraces the lower courts' majority view. For one thing, the cases distorting *§1441* postdate the last revision of the relevant statutory language, so they could not have informed Congress's view of what it was signing onto. And it would be naive to assume that Congress now agrees with those lower court cases just because it has not reacted to them. Congress does not accept the common reading of every law it leaves alone. Because life is short, the U. S. Code is long, and court cases are legion, it normally takes more than a court's misreading of a law to rouse Congress to issue a correction. That is why "'Congressional inaction lacks **[***46]** persuasive significance' in most circumstances." *Star Athletica, L. L.*

C. v. Varsity Brands, Inc., 580 U. S. ___, ___, 137 S. Ct. 1002, 197 L. Ed. 2d 354, 373 (2017) (quoting Pension Benefit Guaranty Corporation v. LTV Corp., 496 U. S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990); quotation altered). In particular, "it is inappropriate to give weight to 'Congress' unenacted opinion' when construing judge-made doctrines, because doing so allows the Court to create law and then 'effectively codif[y]' it 'based only on Congress' failure to address it.'" Halliburton Co. v. Erica P. John Fund, Inc., 573 U. S. 258, 299, 134 S. Ct. 2398, 189 L. **[**59]** Ed. 2d 339 (2014) (THOMAS, J., concurring in judgment). Because the decisions misreading *Shamrock Oil* are not a reliable indicator of Congress's intent regarding §1441, we owe them no deference.

C

Finally, according to the majority, reading §1441 to include third-party defendants would run afoul of our precedent establishing the "well-pleaded complaint" rule (WPC rule). Assuming that I have been able to reconstruct the majority's argument from this rule accurately, I think it rests on a non sequitur. The WPC rule is all about a plaintiff's ability to choose the forum in which its case is heard, by controlling whether there is federal jurisdiction; the rule has nothing to do with the division of labor or authority among defendants.

Under the WPC rule, we consider only the plaintiff's claims to see if there is federal-question jurisdiction. Whether the defendant raises federal counterclaims **[***47]** (or even federal defenses) is irrelevant. See, *e.g.*, Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U. S. 826, 831, 122 S. Ct. 1889, 153 L. Ed. 2d 13 (2002). Likewise, in a case involving standard diversity jurisdiction (based on complete diversity under §1332(a) rather than minimal diversity under CAFA), it is "the sum demanded . . . in the initial pleading" that determines whether the amount in controversy **[*1763]** is large enough. §1446(c)(2). In both kinds of cases, a federal court trying to figure out if it has "original jurisdiction," as required for removal of cases under §1441(a), must shut its eyes to the defendant's filings. Only the plaintiff's complaint counts. So says the WPC rule.

But that is all about *jurisdiction*. The majority and respondent would take things a step further. Even after assuring itself of jurisdiction, they urge, a court should consult only the plaintiff's complaint to see if a party *is a "defendant"* empowered to remove under §1441. Since third-party defendants (by definition) are not named until the countercomplaint, they are not §1441 "defendants."

I cannot fathom why this rule about who is a "defendant" should follow from the WPC rule about when there is federal jurisdiction. And the majority makes no effort to fill the logical gap; it betrays almost no awareness of the gap, drawing the relevant **[***48]** inference in two conclusory sentences. See ante, at ___, 204 L. Ed. 2d, at 43. But since this Court's reasons for the WPC rule have sounded in policy, the argument could only be that the same policy goals would support today's restriction on who is a §1441 "defendant." [4] What *are* the policy goals behind the WPC rule? We have described them as threefold. See Holmes Group, Inc., 535 U. S., at 831-832, 122 S. Ct. 1889, 153 L. Ed. 2d 13.

First,

> "since the plaintiff is 'the master of the complaint,' the well-pleaded-complaint rule enables him, 'by eschewing **[**60]** claims based on federal law, . . . to have the cause heard in state court.' Caterpillar Inc., [482 U. S.,] at 398-399, 107 S. Ct. 2425, 96 L. Ed. 2d 318. [Allowing a defendant's counterclaims or defenses to create federal-question jurisdiction], in contrast, would leave acceptance or rejection of a state forum to the master of the counterclaim. It would allow a defendant to remove a case brought in state court under state law, thereby defeating a plaintiff's choice of forum, simply by raising a federal counterclaim." *Ibid.*

But this concern is not implicated here; adopting petitioner's reading of "defendant" would in no way reduce the extent of a plaintiff's control over the forum. Plaintiffs would be able to keep state-law cases in state court no matter what we **[***49]** held about §1441, and any cases removable by third-party defendants would have been removable by original defendants anyway. In other words, the issue here is *who* can remove under that provision, not *which cases* can be removed. However we resolved that "who" question, removability under §1441(a) would still require cases to fall within

[4] The Court insists that its position is based on "statutory context," not the logic behind the well-pleaded complaint rule. Ante, at ___ - ___, 204 L. Ed. 2d, at 43-44. But the only context to which the Court points is our precedent establishing the well-pleaded complaint rule. Ante, at ___, 204 L. Ed. 2d, at 43. It is that rule—the rule that federal jurisdiction over an action turns entirely on the plaintiff's complaint—that leads the Court to think furthermore that "'the defendant' to [an] action is the defendant to that complaint." *Ibid.*

federal courts' "original jurisdiction," §1441(a), and *that* would still turn just on the plaintiff's choices—on whether the plaintiff had raised federal claims (or sued diverse parties for enough money). So a case that a plaintiff had brought "in state court under state law," id., at 832, 122 S. Ct. 1889, 153 L. Ed. 2d 13, would remain beyond federal jurisdiction, and thus unremovable under §1441(a), even if we held that third-party defendants are "defendants" under that provision.

By the same token, such a holding would not undermine the *second* policy justification that *Holmes* gave for the WPC rule: **[*1764]** namely, to avoid "radically expand[ing] the class of removable cases, contrary to the '[d]ue regard for the rightful independence of state governments.'" Id., at 832, 122 S. Ct. 1889, 153 L. Ed. 2d 13. As noted, our decision on the scope of §1441's "defendants" would not expand the class of removable cases *at all*, because it would have no impact on whether a case fell within federal **[***50]** courts' jurisdiction. It would only expand the set of people ("the defendants") who would have to consent to such removal: Now third-party *and* original defendants would have to agree.

The majority declares that treating third-party defendants as among "the defendants" under §1441 "makes little sense." Ante, at ___, 204 L. Ed. 2d, at 44. Perhaps its concern is that such a ruling would make no meaningful difference since third-party defendants would still be powerless to remove unless they secured the consent of the original defendants, who are their adversaries in litigation. But for one thing, there may be cases in which original defendants do consent. Though original and third-party defendants are rivals as to claims brought by the one against the other, they may well agree that a federal forum would be preferable. After all, neither will have chosen the state forum in which both find themselves prior to removal. [5]

**[**61]** More to the point, even if third-party defendants could not secure the agreement needed to remove an entire civil action under §1441(a), counting them as "defendants" under §1441 would make a difference by allowing them to invoke §1441(c)(2), which would permit them to remove certain claims (not whole actions) **[***51]** *without* original defendants' consent. See Part I-B, supra. Being able to remove claims under §1441(c)(2) has, in fact, been the main benefit to third-party defendants in those jurisdictions that have ruled that they are "defendants" under §1441. See Carl Heck, 622 F. 2d, at 136. But *this* effect of such a ruling is immune to the objection that it would "radically expand the class of removable cases" since §1441(c)(2) does not address the removal of a whole case (a "civil action") at all, but only of some claims within a case—and only those that could have been brought in federal court from the start, "in a separate suit from that filed by the original plaintiff." Id., at 136. Notably, then, any claims that were raised by the original plaintiff would get to remain in state court. Here too, the WPC rule's concern to avoid "radically expand[ing] the class of removable cases" is just not implicated.

This leaves *Holmes*'s final rationale for the WPC rule: that it promotes "clarity and ease of administration" in the resolution of procedural disputes. 535 U. S., at 832, 122 S. Ct. 1889, 153 L. Ed. 2d 13. But petitioner's and respondent's views on who is a "defendant" are equally workable, so this last factor does not cut one way or the other.

In sum, the actual WPC rule, which limits the filings courts may consult in determining **[***52]** if they have jurisdiction, is based on policy concerns that do not arise here. There is, therefore, no justification for inventing an ersatz WPC rule to limit which filings may be consulted by courts deciding who is a "defendant" under §1441.

***

All the resources of statutory interpretation confirm that under CAFA and §1441, **[*1765]** third-party defendants are defendants. I respectfully dissent.

## References

28 U.S.C.S. §§1441(a), 1453(b)

3 Federal Litigation Guide §§42.21, 42.26 (Matthew Bender)

L Ed Digest, Removal of Causes § 24

[5] Or perhaps the majority fears that petitioner's position would make it harder for *original* defendants under §1441(a), by requiring them to get the consent of the third-party defendants against whom they have just brought suit. But this is an illusory problem. Original defendants hoping to remove under §1441(a) without having to get their adversaries to agree could simply remove the case *before* roping in any third-party defendants.

L Ed Index, Removal or Transfer of Causes

Supreme Court's view as to what is a “case or controversy” within the meaning of Article III of the Federal Constitution or an “actual controversy” within the meaning of the Declaratory Judgment Act (*28 U.S.C.S. § 2201*). *40 L. Ed. 2d 783*.

---

End of Document

Reprinted with the permission of LexisNexis

Positive
As of: December 9, 2019 9:25 PM Z

# Frank v. Gaos

Supreme Court of the United States

October 31, 2018, Argued; March 20, 2019, Decided

No. 17-961.

**Reporter**
139 S. Ct. 1041 *; 203 L. Ed. 2d 404 **; 2019 U.S. LEXIS 2089 ***; 103 Fed. R. Serv. 3d (Callaghan) 97; 27 Fla. L. Weekly Fed. S 728; 2019 WL 1264582

THEODORE H. FRANK, et al., Petitioners v. PALOMA GAOS, individually and on behalf of all others similarly situated, et al.

**Notice:** The LEXIS pagination of this document is subject to change pending release of the final published version.

**Prior History:** **[***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*Gaos v. Holyoak (In re Google Referrer Header Privacy Litig.), 869 F.3d 737, 2017 U.S. App. LEXIS 15955 (9th Cir. Cal., Aug. 22, 2017)*

## Case Summary

### Overview

HOLDINGS: [1]-In a case in which the parties negotiated a settlement agreement that would distribute more than $5 million to cy pres recipients, more than $2 million to class counsel, and no money to absent class members, substantial questions remained about whether any of the named plaintiffs had standing to sue in light of the Court's decision in Spokeo, Inc. v. Robins, which held that U.S. Const. art. III standing requires a concrete injury even in the context of a statutory violation. No court had analyzed whether any named plaintiff had alleged violations of the Stored Communications Act, , *18 U.S.C.S. § 2701 et seq.*, that were sufficiently concrete and particularized to support standing.

### Outcome

Judgment vacated and case remanded. Per curiam decision; 1 dissent.

**Counsel: Theodore H. Frank** argued the cause for petitioners.

**Jeffrey B. Wall** argued the cause for the United States, as amicus curiae, by special leave of court.

**Andrew J. Pincus** argued the cause for respondent Google LLC.

**Jeffrey A. Lamken** argued the cause for respondents Paloma Gaos, et al.

**Judges:** Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

## Opinion

**[**406]** **[*1043]** PER CURIAM.

Three named plaintiffs brought class action claims against Google for alleged violations of the Stored Communications Act. The parties negotiated a settlement agreement that would require Google to include certain disclosures on some of its webpages and would distribute more than $5 million to *cy pres* recipients, more than $2 million to class counsel, and no money to absent class members. We granted certiorari to review whether such *cy pres* settlements satisfy the requirement that class settlements be "fair, reasonable, and adequate." Fed. Rule Civ. Proc. 23(e)(2). Because there remain substantial questions about whether any of the named plaintiffs has standing to sue in light of our decision in **[*1044]** Spokeo, Inc. v. Robins, 578 U. S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016), we vacate the judgment of the Ninth Circuit and remand for further proceedings.

Google operates an Internet search engine. The search engine allows users to search for a word or phrase by typing a query into the Google website. Google returns a list of webpages that are relevant to the indicated term or phrase. The complaints alleged that when an Internet **[***2]** user conducted a Google search and clicked on a hyperlink to open one of the webpages listed on the search results page, Google transmitted information including the terms of the search to the server that hosted the selected webpage. This so-called referrer header told the server that the user **[**407]** arrived at the webpage by searching for particular terms on Google's website.

Paloma Gaos challenged Google's use of referrer headers. She filed a complaint in Federal District Court on behalf of herself and a putative class of people who conducted a Google search and clicked on any of the resulting links within a certain time period. Gaos alleged that Google's transmission of users' search terms in referrer headers violated the Stored Communications Act, 18 U. S. C. §2701 et seq. [1] The SCA prohibits "a person or entity providing an electronic communication service to the public" from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service." §2702(a)(1). The Act also creates a private right of action that entitles any "person aggrieved by any violation" to "recover from the person or entity, other than the United States, which engaged in that violation such relief **[***3]** as may be appropriate." §2707(a). Gaos also asserted several state law claims.

Google moved to dismiss for lack of standing three times. Its first attempt was successful. The District Court reasoned that although "a plaintiff may establish standing through allegations of violation of a statutory right," Gaos had "failed to plead facts sufficient to support a claim for violation of her statutory rights." Gaos v. Google, Inc., 2011 U.S. Dist. LEXIS 153563, 2011 WL 7295480, *3 (ND Cal., Apr. 7, 2011). In particular, the court faulted Gaos for failing to plead "that she clicked on a link from the Google search page." *Ibid.*

After Gaos filed an amended complaint, Google again moved to dismiss. That second attempt was partially successful. The District Court dismissed Gaos' state law claims, but denied the motion as to her SCA claims. The court reasoned that because the SCA created a right to be free from the unlawful disclosure of certain communications, and because Gaos alleged a violation of the SCA that was specific to her (*i.e.*, based on a search she conducted), Gaos alleged a concrete and particularized injury. Gaos v. Google Inc., 2012 U.S. Dist. LEXIS 44062, 2012 WL 1094646, *4 (ND Cal., Mar. 29, 2012). The court rested that conclusion on Edwards v. First American Corp., 610 F.3d 514 (2010)—a Ninth Circuit decision reasoning that an Article III injury exists whenever a statute gives an individual a statutory cause of action and **[***4]** the plaintiff claims that the defendant violated the statute. 2012 U.S. Dist. LEXIS 44062, 2012 WL 1094646, *3.

After the District Court ruled on Google's second motion to dismiss, we granted certiorari in *Edwards* to address whether an alleged statutory violation alone can support standing. *First American Financial Corp. v. Edwards, 564 U. S. 1018, 131 S. Ct. 3022, 180 L. Ed. 2d 843 (2011)*. In the meantime, Gaos and an additional named plaintiff filed a second amended complaint against Google. Google once again moved to dismiss. Google argued that the named plaintiffs did not have standing to bring their SCA claims because they had failed to allege facts establishing a cognizable **[*1045]** injury. Google recognized that the District Court had previously relied on *Edwards* to find standing based on the alleged violation of a statutory right. But because this Court had agreed to review *Edwards*, Google explained **[**408]** that it would continue to challenge the District Court's conclusion. We eventually dismissed *Edwards* as improvidently granted, 567 U. S. 756, 132 S. Ct. 2536, 183 L. Ed. 2d 611 (2012) (*per curiam*), and Google then

withdrew its argument that Gaos lacked standing for the SCA claims.

Gaos' putative class action was consolidated with a similar complaint, and the parties negotiated a classwide settlement. The terms of their agreement required Google to include certain disclosures about referrer **[***5]** headers on three of its webpages. Google could, however, continue its practice of transmitting users' search terms in referrer headers. Google also agreed to pay $8.5 million. None of those funds would be distributed to absent class members. Instead, most of the money would be distributed to six *cy pres* recipients. [2] In the class action context, *cy pres* refers to the practice of distributing settlement funds not amenable to individual claims or meaningful pro rata distribution to nonprofit organizations whose work is determined to indirectly benefit class members. Black's Law Dictionary 470 (10th ed. 2014). In this case, the *cy pres* recipients were selected by class counsel and Google to "promote public awareness and education, and/or to support research, development, and initiatives, related to protecting privacy on the Internet." App. to Pet. for Cert. 84. The rest of the funds would be used for administrative costs and fees, given to the named plaintiffs in the form of incentive payments, and awarded to class counsel as attorney's fees.

The District Court granted preliminary certification of the class and preliminary approval of the settlement. Five class members, including petitioners **[***6]** Theodore Frank and Melissa Holyoak, objected to the settlement on several grounds. They complained that settlements providing only *cy pres* relief do not comply with the requirements of *Rule 23(e)*, that *cy pres* relief was not justified in this case, and that conflicts of interest infected the selection of the *cy pres* recipients. After a hearing, the District Court granted final approval of the settlement.

Frank and Holyoak appealed. After briefing before the Ninth Circuit was complete, but prior to decision by that court, we issued our opinion in *Spokeo, Inc. v. Robins, 578 U. S. ___ , 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)*. In *Spokeo*, we held that [3] "Article III standing requires a concrete injury even in the context of a statutory violation." *Id., at ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 at 645*). We rejected the premise, relied on in the decision then under review and in *Edwards*, that "a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *578 U. S., at ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 at 645*; see also *id., at 517*). Google notified the Ninth Circuit of our opinion.

A divided panel of the Ninth Circuit affirmed, without addressing *Spokeo*. *In re Google Referrer Header Privacy Litigation, 869 F.3d 737 (2017)*. We granted certiorari, *584 U. S. ___, 138 S. Ct. 1697, 200 L. Ed. 2d 948 (2018)*, to decide whether a class action settlement that provides a *cy pres* award but no direct **[***7]** relief to class **[**409]** members satisfies the requirement that a settlement binding class members be "fair, reasonable, and adequate." *Fed. Rule Civ. Proc. 23(e)(2)*.

In briefing on the merits before this Court, the Solicitor General filed a brief as **[*1046]** *amicus curiae* supporting neither party. He urged us to vacate and remand the case for the lower courts to address standing. The Government argued that there is a substantial open question about whether any named plaintiff in the class action actually had standing in the District Court. Because Google withdrew its standing challenge after we dismissed *Edwards* as improvidently granted, neither the District Court nor the Ninth Circuit ever opined on whether any named plaintiff sufficiently alleged standing in the operative complaint.

[4] "We have an obligation to assure ourselves of litigants' standing under Article III." *DaimlerChrysler Corp. v. Cuno, 547 U. S. 332, 340, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)* (quoting *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U. S. 167, 180, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)*; internal quotation marks omitted). That obligation extends to court approval of proposed class action settlements. In ordinary non-class litigation, parties are free to settle their disputes on their own terms, and plaintiffs may voluntarily dismiss their claims without a court order. *Fed. Rule Civ. Proc. 41(a)(1)(A)*. By contrast, in a class action, the "claims, issues, or defenses of **[***8]** a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." *Fed. Rule Civ. Proc. 23(e)*. A court is powerless to approve a proposed class settlement if it lacks jurisdiction over the dispute, and federal courts lack jurisdiction if no named plaintiff has standing. *Simon v. Eastern Ky. Welfare Rights Organization, 426 U. S. 26, 40, n. 20, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)*.

When the District Court ruled on Google's second

motion to dismiss, it relied on *Edwards* to hold that Gaos had standing to assert a claim under the SCA. Our decision in *Spokeo* abrogated the ruling in Edwards that the violation of a statutory right automatically satisfies the injury-in-fact requirement whenever a statute authorizes a person to sue to vindicate that right. 578 U. S., at ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 at 645); see Edwards, 610 F. 3d, at 517-518. Since that time, no court in this case has analyzed whether any named plaintiff has alleged SCA violations that are sufficiently concrete and particularized to support standing. After oral argument, we ordered supplemental briefing from the parties and Solicitor General to address that question.

After reviewing the supplemental briefs, we conclude that the case should be remanded for the courts below to address the plaintiffs' standing in light of *Spokeo*. The supplemental **[***9]** briefs filed in response to our order raise a wide variety of legal and factual issues not addressed in the merits briefing before us or at oral argument. [5] We "are a court of review, not of first view." Cutter v. Wilkinson, 544 U. S. 709, 718, n. 7, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005). Resolution of the standing question should take place in the District Court or the **[**410]** Ninth Circuit in the first instance. We therefore vacate and remand for further proceedings. Nothing in our opinion should be interpreted as expressing a view on any particular resolution of the standing question.

***

The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

**Dissent by:** THOMAS

## Dissent

Justice **Thomas**, dissenting.

Respectfully, I would reach the merits and reverse. As I have previously explained, **[*1047]** a plaintiff seeking to vindicate a private right need only allege an invasion of that right to establish standing. Spokeo, Inc. v. Robins, 578 U. S. ___, ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 at 650 (2016) (concurring opinion). Here, the plaintiffs alleged violations of the Stored Communications Act, which creates a private right: It prohibits certain electronic service providers from "knowingly divulg[ing] . . . the contents of a communication" sent by a "'user,'" "subscriber," or **[***10]** "customer" of the service, except as provided in the Act. 18 U. S. C. §§2510(13), 2702(a)(1)-(2), (b); see §2707(a) (providing a cause of action to persons aggrieved by violations of the Act). They also asserted violations of private rights under state law. By alleging the violation of "private dut[ies] owed personally" to them "'as individuals,'" Spokeo, supra, at ___, ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 at 650 (opinion of THOMAS, J.), the plaintiffs established standing. Whether their allegations state a plausible claim for relief under the Act or state law is a separate question on which I express no opinion.

As to the class-certification and class-settlement orders, I would reverse. The named plaintiffs here sought to simultaneously certify and settle a class action under Federal Rules of Civil Procedure 23(b)(3) and (e). Yet the settlement agreement provided members of the class no damages and no other form of meaningful relief. * Most of the settlement fund was devoted to *cy pres* payments to nonprofit organizations that are not parties to the litigation; the rest, to plaintiffs' lawyers, administrative costs, and incentive payments for the named plaintiffs. Ante, at ___-___5, 203 L. Ed. 2d, at 407-408. The District Court and the Court of Appeals approved this arrangement on the view that the *cy pres* payments provided an "indirect" benefit to the class. In re Google Referrer Header Privacy Litigation, 87 F. Supp. 3d 1122, 1128-1129, 1137 (ND Cal. 2015); In re Google Referrer Header Privacy Litigation, 869 F. 3d 737, 741 (CA9 2017).

Whatever **[***11]** role *cy pres* may permissibly play in disposing of unclaimed or undistributable class funds, see Klier v. Elf Atochem North Am., Inc., 658 F. 3d 468, 474-476 **[**411]** (CA5 2011); id., at 480-482 (Jones, C. J., concurring), *cy pres* payments are not a form of relief to the absent class members and should not be treated as such (including when calculating attorney's fees). And the settlement agreement here provided no other form of meaningful relief to the class. This *cy pres*-only arrangement failed several requirements of Rule 23.

* The settlement required that Google make additional disclosures on its website for the benefit of "future users." App. to Pet. for Cert. 50. But no party argues that these disclosures were valuable enough on their own to independently support the settlement.

First, the fact that class counsel and the named plaintiffs were willing to settle the class claims without obtaining any relief for the class—while securing significant benefits for themselves—strongly suggests that the interests of the class were not adequately represented. *Fed. Rules Civ. Proc. 23(a)(4)*, *(g)(4)*; see *Amchem Products, Inc. v. Windsor, 521 U. S. 591, 619-620, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)* (settlement terms can inform adequacy of representation). Second, the lack of any benefit for the class rendered the settlement unfair and unreasonable under *Rule 23(e)(2)*. Further, I question whether a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy" when it serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief. *Fed. Rule Civ. Proc. 23(b)(3)*; see *Rule 23(b)(3)(A)* (courts must consider "the class members' interests **[***12]** in individually **[*1048]** controlling the prosecution . . . of separate actions").

In short, because the class members here received no settlement fund, no meaningful injunctive relief, and no other benefit whatsoever in exchange for the settlement of their claims, I would hold that the class action should not have been certified, and the settlement should not have been approved.

## References

U.S.C.S., Constitution, Article III

Class Action Playbook §§8.03, 8.04 (Matthew Bender)

Federal Class Action Deskbook *§§6.05-6.07* (Matthew Bender)

L Ed Digest, Appeal § 1692.3; Class Actions §§2, 19.5; Parties § 2

L Ed Index, Class Actions or Proceedings

Supreme Court's construction and application of *Rule 23 of Federal Rules of Civil Procedure*, concerning class actions. *144 L. Ed. 2d 889*.

Requirements of Article III of Federal Constitution as affecting standing to challenge particular conduct as violative of federal law--Supreme Court cases. *70 L. Ed. 2d 941*.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (*28 U.S.C.S. § 2201*). *40 L. Ed. 2d 783*.

---

End of Document

Reprinted with the permission of LexisNexis

Neutral
As of: December 9, 2019 9:29 PM Z

# HD Media Co., LLC v. United States DOJ (In re Nat'l Prescription Opiate Litig.)

United States Court of Appeals for the Sixth Circuit

May 2, 2019, Argued; June 20, 2019, Decided; June 20, 2019, Filed

File Name: 19a0133p.06

Nos. 18-3839/3860

**Reporter**
927 F.3d 919 *; 2019 U.S. App. LEXIS 18502 **; 2019 FED App. 0133P (6th Cir.)

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION.HD MEDIA COMPANY, LLC (18-3839); THE W.P. COMPANY, LLC, dba The Washington Post (18-3860), Intervenors-Appellants, v. UNITED STATES DEPARTMENT OF JUSTICE; DRUG ENFORCEMENT ADMINISTRATION, Interested Parties-Appellees, DISTRIBUTOR DEFENDANTS; MANUFACTURING DEFENDANTS; CHAIN PHARMACY DEFENDANTS, Defendants-Appellees.

**Prior History: [**1]** Appeal from the United States District Court for the Northern District of Ohio at Cleveland. No. 1:17-md-02804, Dan A. Polster, District Judge.

*In re Nat'l Prescription Opiate Litig., 325 F. Supp. 3d 833, 2018 U.S. Dist. LEXIS 126936 (N.D. Ohio, July 26, 2018)*

## Case Summary

### Overview

HOLDINGS: [1]-The court had jurisdiction to consider intervenor media companies' appeal from an order holding that DEA data from a drug reporting system could not be disclosed, except to public entities seeking to recover epidemic-related costs from manufacturers and sellers of prescription opiate drugs, because intervenors' stake pertained only to disclosure of the data, and the district court's order decided that issue; [2]-District court erred in finding "good cause" for the protective order under *Fed. R. Civ. P. 26(c)(1)* because public interest in solving the opioid crisis outweighed DEA and manufacturers' lesser interests that could be avoided by narrower means; [3]-District court erred in allowing court records to be filed under seal or redacted because they were subject to a strong presumption in favor of openness, and no findings or conclusions justifying nondisclosure were made.

### Outcome

Orders vacated and remanded.

**Counsel:** ARGUED: Patrick C. McGinley, Morgantown, West Virginia, for Appellant in 18-3839.

Karen C. Lefton, THE LEFTON GROUP, LLC, Akron, Ohio, for Appellant in 18-3860.

Sarah Carroll, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees.

Ashley W. Hardin, WILLIAMS & CONNOLLY, LLP, Washington, D.C., for Distributor, Manufacturer, and Chain Pharmacy Appellees.

ON BRIEF: Patrick C. McGinley, Morgantown, West Virginia, for Appellant in 18-3839.

Karen C. Lefton, THE LEFTON GROUP, LLC, Akron, Ohio, for Appellant in 18-3860.

Sarah Carroll, Mark B. Stern, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Federal Appellees.

Enu Mainigi, WILLIAMS & CONNOLLY, LLP, Washington, D.C., Geoffrey Hobart, COVINGTON & BURLING LLP, Washington, D.C., Mark S. Cheffo, DECHERT LLP, New York, New York, Kaspar J. Stoffelmayr, BARTLIT BECK LLP, Chicago, Illinois, for Distributor, Manufacturer, and Chain Pharmacy Appellees.

Bruce D. Brown, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, Washington, D.C., for Amici Curiae.

**Judges:** Before: GUY, CLAY, **[**2]** and GRIFFIN, Circuit Judges. CLAY, J., delivered the opinion of the court in which GRIFFIN, J., joined. GUY, J. (pp. 27-34), delivered a separate opinion concurring in part and dissenting in part.

**Opinion by:** CLAY

## Opinion

**[*923]** CLAY, Circuit Judge. Intervenors HD Media Company, LLC ("HDM") and The W.P. Company, LLC, d/b/a the Washington Post ("Washington Post") appeal the district court Opinion and Order holding that the data in the Drug Enforcement Administration's Automation of Reports and Consolidated Orders System ("ARCOS") database cannot be disclosed by Plaintiffs pursuant to state public records requests. Intervenors also argue on appeal that the district court erred in permitting pleadings and other documents to be filed under seal or with redactions.

For the reasons set forth below, we **VACATE** the district court's Protective Order and its orders permitting the filing of court records under seal or with redactions, and we **REMAND** to permit the district court to consider entering modified orders consistent with this opinion.

**BACKGROUND**

This interlocutory appeal arises out of a sweeping multidistrict litigation ("MDL"). Plaintiffs in the MDL consist of about 1,300 public entities including cities, counties, **[**3]** and Native American tribes.[1] Defendants consist of manufacturers, distributors, and retailers of prescription opiate drugs.[2] The United States Department of Justice and Drug Enforcement Administration (collectively, "the DEA") are not parties to the underlying MDL but are involved in this appeal as Interested Parties-Appellees; HDM and the Washington Post are not parties to the MDL but are involved in this appeal as Intervenors-Appellants.

In the underlying MDL, Plaintiffs seek to recover from Defendants the costs of life-threatening health issues caused by the opioid crisis. The district court presiding over this potentially momentous MDL has repeatedly expressed a desire to settle the litigation before it proceeds to trial. (*See, e.g.*, R. 800, Opinion and Order, Page ID# 18971 (noting that the court's order will assist "in litigating (and hopefully settling) these cases").)[3] President Trump has declared the opioid epidemic a national emergency, and as the district court noted, "the circumstances in this case, which affect the health and safety of the entire country, are certainly compelling." (R. 233, Order Regarding ARCOS Data, Page ID# 1119.)

The crux of this appeal is the question **[**4]** of who should receive access to the data in the DEA's ARCOS database, and the related question of how disclosure of the ARCOS data would further the public's interest in understanding the causes, scope, and context of this epidemic. The ARCOS database is "an automated, comprehensive drug reporting system which monitors the flow of DEA controlled substances from their point of manufacture **[*924]** through commercial distribution channels to point of sale or distribution at the dispensing/retail level — hospitals, retail pharmacies, practitioners, mid-level practitioners, and teaching

[1] Plaintiffs are not involved in this appeal.

[2] Defendants are involved in this appeal as Appellees.

[3] Unless otherwise stated, all citations to the record refer to Case No. 1:17-md-02804-DAP.

institutions." (R. 717-1, Martin Decl., Page ID# 16517.) The data in the database is provided by drug manufacturers and distributors[4] and includes "supplier name, registration number, address and business activity; buyer name, registration number and address; as well as drug code, transaction date, total dosage units, and total grams." (R. 717-1, Page ID# 16517.)

In an order, the district court aptly characterized the opioid epidemic that provides the tragic backdrop of this case, observing that "the vast oversupply of opioid drugs in the United States has caused a plague on its citizens and their local and State **[**5]** governments." (R. 233, Page ID# 1124.) Continuing its plague metaphor, the district court concluded that

> Plaintiffs' request for [production of] the ARCOS data, which will allow Plaintiffs to discover how and where the virus grew, is a reasonable step toward defeating the disease. *See* Buckley v. Valeo, 424 U.S. 1, 67, 96 S. Ct. 612, 46 L. Ed. 2d 659 [(1976)] ("Sunlight is said to be the best of disinfectants.") (quoting Justice Brandeis, *Other People's Money* 62 (1933)).

(R. 233, Page ID# 1124-25.) Despite its confidence that disclosing the ARCOS data to Plaintiffs constituted such a reasonable step, the court later rejected the argument that a further reasonable step would be to disclose the data to HDM and the Washington Post (and by extension to the public at large, who would learn about the contents of the ARCOS data via reporting by those entities).

The full quote from Justice Brandeis that the district court cited is as follows: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Buckley, 424 U.S. at 67 (quoting L. Brandeis, *Other People's Money* 62 (1933)). The question before us is whether it was reasonable for the district court to permit only Plaintiffs **[**6]** to examine the data in the otherwise complete darkness created by the Protective Order, or whether the court abused its discretion by denying Intervenors the opportunity to expose the data to the broad daylight of public reporting. For the reasons below, we hold that this denial was an abuse of the district court's discretion.

The events leading up to this appeal were set into motion when, in the course of the MDL, Plaintiffs subpoenaed the DEA to produce transactional data for all 50 States and several Territories from its ARCOS database. Plaintiffs and the DEA stipulated to a protective order concerning the DEA's disclosure of the ARCOS data. (R. 167, Protective Order, Page ID# 937-44.)[5] The district court adopted a Protective **[*925]** Order "determin[ing] that any [] disclosure [of the ARCOS data] shall remain confidential and shall be used only for litigation purposes or in connection with state and local law enforcement efforts." (R. 167, Page ID# 937.)

The Protective Order by its terms covered "ARCOS data" and defined this term to include "any data produced directly from DEA's ARCOS database; any reports generated from DEA's ARCOS database; any information collected and maintained by **[**7]** DEA in its ARCOS database; and any derivative documents that the parties or their employees, agents or experts create using ARCOS data." (R. 167, Page ID# 938.) The Order pertained to documents, as well as electronically stored information. The court restricted the use of the ARCOS data to "mediat[ing], settl[ing], prosecut[ing], or defend[ing] the above-captioned litigation," and "law enforcement purposes," specifically precluding its use "for commercial purposes, in furtherance of business objectives, or to gain a competitive advantage." (R. 167, Page ID# 939.) The Protective Order also authorized the parties to file pleadings, motions, or other documents with the court that would be redacted or sealed to the extent they contained ARCOS data. However, the court noted that if the parties could not agree to a settlement, "[t]he hearing, argument, or trial w[ould] be public in all respects" and there "w[ould] be no restrictions on the use of any document that may be introduced by any party during the trial" absent order of the court. (R. 167, Page ID# 941.) The Protective Order contemplated the return of the ARCOS data to the DEA after dismissal or entry of final judgment. Significantly **[**8]** for purposes of this appeal, the

---

[4] The district court noted that the ARCOS data "are not pure investigatory records compiled for law enforcement purposes, [but] simply business records of defendants; . . . the database does not include any additional DEA analysis or work-product[.]" (R. 233, Page ID# 1119.)

[5] The DEA and Defendants argue that this Protective Order was not stipulated because Plaintiffs and the DEA proposed rival protective orders; however, these rival orders were identical with respect to every aspect of the Protective Order relevant to this appeal. (*See* R. 167, Page ID# 937-38 (discussing the differences between the DEA's and Plaintiffs' proposed protective orders).) Because no party demonstrated "good cause" for these aspects of the Protective Order and no party challenged these aspects, we treat the Protective Order as one to which the parties stipulated.

Protective Order stated that if Plaintiffs received requests for any ARCOS data under "applicable Public Records Laws ('Public Records Requests')," Plaintiffs would "immediately notify the DEA and Defendants of the request." (R. 167, Page ID# 942.) After notification, the DEA and Defendants would be able to challenge the Public Records Request by filing their opposition to production of the records with the court.

After entering this Protective Order and over the objections of the DEA, the district court directed the DEA to comply with Plaintiffs' subpoena by producing ARCOS data pertaining to Ohio, West Virginia, Illinois, Alabama, Michigan, and Florida for the period of 2006 through 2014. (R. 233, Order Regarding ARCOS Data, Page ID# 1104.) Specifically, the DEA was ordered to provide Plaintiffs with Excel spreadsheets identifying

> the top manufacturers and distributors who sold 95% of the prescription opiates [] to each State [] during the time period of January 1, 2006 through December 31, 2014 [] on a year-by-year and State-by-State basis, along with [] the aggregate amount of pills sold and [] the market shares of each manufacturer and distributor. **[**9]**

(R. 233, Page ID# 1109.)

In overruling the DEA's objections to disclosure, the district court found that the DEA had not met its burden of showing "good cause" for not disclosing the data. (R. 233, Page ID# 1111 (citing *Fed. R. Civ. P. 45*).) The court's reasoning is highly relevant to this appeal. Regarding the interest in disclosure of the ARCOS data, the court found that "the *extent* to which each defendant and potential defendant engaged in the allegedly fraudulent marketing of opioids, filling of suspicious orders, and diversion of drugs . . . can be revealed only by all of the data." (R. 233, Order, Page ID# 1118.) Regarding the interests in nondisclosure of the data, the court rejected the arguments that "disclosure would reveal investigatory records compiled **[*926]** for law enforcement purposes [and] interfere with enforcement proceedings" and that "disclosure would violate DOJ's policy which prohibits the release of information related to ongoing matters." (R. 233, Page ID# 1119, 1120 (quoting 1:17-op-45041-DAP, R. 101, Page ID# 696, 698).) The court rejected these arguments for three reasons:

> First, Plaintiffs seek ARCOS data with an end-date of January 1, 2015. Given that the most recent data is over **[**10]** three years old, it is untenable that exposure of the data will actually or meaningfully interfere with any ongoing enforcement proceeding. Second, the ARCOS data are not pure investigatory records compiled for law enforcement purposes. Rather, the data is simply business records of defendants; these "[c]ompanies are legally required to submit the information" to ARCOS, the database does not include any additional DEA analysis or work-product, and the records are used for numerous purposes besides law enforcement. Indeed, Plaintiffs assert that part of the reason for the opioid epidemic is *lack* of law enforcement. And third, simply saying that disclosure of ARCOS records dating back to 2006 would detrimentally affect law enforcement does not make it so.

(R. 233, Page ID# 1119 (citation omitted).)

The court similarly rejected an argument that producing the data would cause Defendants "substantial competitive harm" by revealing "details regarding the scope and breadth of [each manufacturer's and distributor's] market share." (R. 233, Page ID# 1120 (alterations in original) (quoting 1:17-op-45041-DAP, R. 101, Page ID# 697).) The court rejected this objection to disclosure because "the assertion **[**11]** was conclusory and . . . market data over three years old carried no risk of competitive harm." (R. 233, Page ID# 1120.)

The DEA complied with the court's order and produced the relevant spreadsheets. Production of the ARCOS data allowed Plaintiffs to identify and add as defendants previously-unknown entities involved in the manufacturing and distribution of opioids and to identify and remove as defendants improperly-named entities. The court noted that other benefits of the ARCOS data included "allowing [the litigation] to proceed based on meaningful, objective data, not conjecture or speculation" and "providing invaluable, highly-specific information regarding historic patterns of opioid sales." (R. 397, Secord Order Regarding ARCOS Data, Page ID# 5323.) To expand upon these benefits, the court ordered the DEA to produce further ARCOS data pertaining to "all of the States and Territories" for the same period of 2006 to 2014, with such disclosure being subject to the Protective Order. (R. 397, Page ID# 5323.)

Once the complete production of the ARCOS data occurred, HDM filed a *West Virginia Freedom of Information Act* request with the Cabell County Commission seeking the ARCOS data that **[**12]** the county received as a Plaintiff in this litigation, and the Washington Post filed similar public records requests

with Summit and Cuyahoga counties in Ohio (also Plaintiffs in this litigation). Pursuant to the Protective Order, the three counties notified the district court, Defendants, and the DEA of the requests, and the DEA and Defendants objected to them.

The district court granted HDM and the Washington Post limited Intervenor status "for the limited purpose of addressing their Public Records Requests." (R. 611, Briefing Order, Page ID# 14995.) The arguments in the subsequent briefing as to why the Protective Order should or should not be modified to allow disclosure of the ARCOS data pursuant to Intervenors' **[*927]** requests largely tracked the arguments that had been made on the DEA's earlier objection to disclosing the ARCOS data to Plaintiffs: Defendants argued that the ARCOS data "is sensitive from the perspective of both the pharmacies and distributors because it is confidential business information, and it is sensitive from the perspective of DEA because it is crucial to its law-enforcement efforts." (R. 665, Defendants' Br. Opposing Disclosure, Page ID# 16012.) Intervenors argued **[**13]** that the risk of harm to Defendants and the DEA was speculative and conclusory, and that the public had a compelling interest in receiving "a more complete and accurate story" of a national emergency, which the ARCOS data would allow Intervenors to tell. (R. 718, Wash. Post Br. Supporting Disclosure, Page ID# 16534; *see also* R. 725, HDM Br. Supporting Disclosure, Page ID# 16601-16.)[6] In an Opinion and Order, the district court held that the public records requests must be denied because the requests were barred by the court's Protective Order and Defendants and the DEA had demonstrated "good cause" for the Protective Order's application to such requests, as required under *Rule 26(c)(1)*. (R. 800, Page ID# 18978.) The court specified that its holding extended to all present or future public records requests for the ARCOS data filed with any of the 1,300 public entity Plaintiffs in the underlying litigation.

In its analysis, the district court adopted language from Defendants' briefing, noting that the ARCOS data "is sensitive to pharmacies and distributors because it is confidential business information; and it is sensitive from the DEA's perspective because it is crucial to law enforcement efforts." **[**14]** (R. 800, Page ID# 18979-80.) The court further noted that the *Freedom of Information Act ("FOIA")* "exempts from public disclosure any confidential commercial information, the disclosure of which is likely to cause substantial competitive harm." (R. 800, Page ID# 18980 (citing *5 U.S.C. § 552(b)(4)* and *Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 39, 379 U.S. App. D.C. 354 (D.C. Cir. 2008))*.) It also found relevant that FOIA exempts "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement information could reasonably be expected to interfere with enforcement proceedings and criminal prosecutions." (R. 800, Page ID# 18981 (citing *5 U.S.C. § 552(b)(7)*).) Finally, the court concluded that the ARCOS data "is not a record generated by the Counties" that would be subject to state public records requests. (R. 800, Page ID# 18981.)

Intervenors appealed the Opinion and Order to this Court.

## DISCUSSION

Because the DEA challenges this Court's jurisdiction to hear this appeal, we begin with that issue. We will then address whether the district court abused its discretion in finding "good cause" to support its Protective Order forbidding Plaintiffs to disclose the ARCOS data pursuant to state public records requests. Finally, we will address whether the district **[**15]** court erred in allowing court records to be filed under seal or with redactions.

### [*928] I. Jurisdiction

We determine our own jurisdiction de novo. *Abu-Khaliel v. Gonzales, 436 F.3d 627, 630 (6th Cir. 2006)*.

While Defendants concede that Intervenors can appeal the district court order, the DEA disagrees, arguing that this Court lacks jurisdiction over this appeal because it does not concern a final order.

Under *28 U.S.C. § 1291*, this Court "ha[s] jurisdiction of appeals from all final decisions of the district courts of the United States." The DEA argues that the district court's Opinion and Order is not a final order under *§*

[6] The DEA initially filed its brief in support of objections with "heav[y] redact[ions]," and the Washington Post moved to access the unredacted brief. (R. 800, Page ID# 18972.) Before the district court ruled on this motion, the DEA filed an amended brief with fewer redactions. The district court ultimately dismissed the Washington Post's motion as moot, holding that the DEA's amended brief had "removed all but necessary redactions." (R. 800, Page ID# 18973.)

1291 because "[t]he district court has not entered judgment in the MDL from which these consolidated appeals arise; the litigation instead remains active." (DEA Br. 27.) For purposes of § 1291, a "final decision" "does not necessarily mean the last order possible to be made in a case." *Gillespie v. U.S. Steel Corp., 379 U.S. 148, 152, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964)*. Rather, "the requirement of finality is to be given a 'practical rather than a technical construction.'" *Id.* (quoting *Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949)*).

The collateral order doctrine first identified in *Cohen* gives content to the finality requirement. Pursuant to that doctrine, an order that does not terminate a case may be appealed, but the order "(1) must be 'conclusive' on the question it decides, (2) must **[**16]** 'resolve important questions separate from the merits' and (3) must be 'effectively unreviewable' if not addressed through an interlocutory appeal." *Swanson v. DeSantis, 606 F.3d 829, 833 (6th Cir. 2010)* (quoting *Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009)*). Further, "[t]he justification for immediate appeal must . . . be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes." *Id.* (quoting *Mohawk Indus., 558 U.S. at 107*).

The DEA acknowledges that this Court has found "collateral-order jurisdiction over an appeal by a media company that was denied access to sealed court filings and transcripts," (DEA Br. 27 (discussing *Nat'l Broad. Co. v. Presser, 828 F.2d 340 (6th Cir. 1987)*)), but it suggests that intervening precedent has undermined that decision. In support of that proposition, the DEA cites broad statements in which the Supreme Court "has repeatedly clarified the 'modest scope' of the collateral-order doctrine." (DEA Br. 28 (citing *Will v. Hallock, 546 U.S. 345, 350, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)*).) However, this is not a post-*Presser* development: from the collateral order doctrine's inception, the Supreme Court has acknowledged that the doctrine only applies to a "small class" of decisions. *Cohen, 337 U.S. at 546*.

*Presser* is on all fours with this case, and the DEA cites no persuasive reason to stray from this binding precedent. In *Presser*, NBC sought media access to sealed records relating to the federal **[**17]** government's ongoing prosecution of Jackie Presser. *828 F.2d at 341*. After the district court denied NBC's application for access to the documents, NBC appealed to this Court the district court's memorandum and order directing that all documents remain under seal. *Id. at 341-43*. The DEA is correct that this Court did not provide much analysis. Nevertheless, it unequivocally held, "Although all of these orders are interlocutory with respect to the underlying case, we have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291 [because] NBC was permitted to intervene in the district court, and the orders satisfy the 'collateral order doctrine' set forth in **[*929]** *Cohen*[.]" *Id. at 343* (citing *Cohen, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528*). Moreover, in *Presser*, this Court cited *Application of The Herald Co.*, in which the Second Circuit collected cases where federal courts of appeals found appellate jurisdiction to decide whether to grant intervenors access to evidence in pending litigation. *Id.*; *see Application of The Herald Co., 734 F.2d 93, 96 (2d Cir. 1984)* (collecting cases).

Indeed, little analysis is necessary to demonstrate that Intervenors meet the three *Swanson* requirements. First, the district court's Opinion and Order was conclusive on the question of public records requests for the ARCOS data, *see Swanson, 606 F.3d at 833*, in that its decision applied to all present or future **[**18]** public records requests for the ARCOS data filed with any of the 1,300 public entity Plaintiffs in the underlying litigation and no further consideration of this issue will be possible. Further, the broad scope of the order provides "sufficiently strong [justification] to overcome the usual benefits of deferring appeal." *Swanson, 606 F.3d at 833* (quoting *Mohawk Indus., 558 U.S. at 107*).

The order also plainly resolved important questions separate from the merits of the litigation, satisfying the second *Swanson* requirement. *See id. at 833*. The final requirement is that the order "be 'effectively unreviewable' if not addressed through an interlocutory appeal." *Id.* (quoting *Mohawk Indus., 558 U.S. at 106*). The DEA argues that neither the first nor third element is satisfied because there remains a possibility of trial, at which the ARCOS data may become public. The possibility of trial was certainly also present in *Presser*, and would seem to be present in virtually every case involving an interlocutory appeal. Thus, contrary to the DEA's assertion, the possibility of trial cannot be a categorical bar to appellate jurisdiction pursuant to the collateral order doctrine. Further, given the district court's strong desire for settlement, disclosure of the ARCOS data at trial in this **[**19]** case is not certain or even necessarily likely.

Because Intervenors' stake in the litigation pertains *only* to disclosure of the ARCOS data and because the district court's Opinion and Order finally and

conclusively decides that issue, we possess jurisdiction over this appeal of the Opinion and Order.

**II. "Good Cause" for the Protective Order**

This Court reviews the question of whether a district court's protective order was premised upon a showing of good cause for an abuse of discretion. *The Courier-Journal v. Marshall, 828 F.2d 361, 364 (6th Cir. 1987)*.

A protective order shall only be entered upon a showing of "good cause" by the party seeking protection. *Fed. R. Civ. P. 26(c)(1)*. *Rule 26(c)* contemplates the issuance of protective orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *Fed. R. Civ. P. 26(c)(1)*. To show good cause for a protective order, the moving party is required to make "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Nemir v. Mitsubishi Motors Corp., 381 F.3d 540, 550 (6th Cir. 2004)* (quoting *Gulf Oil Co. v. Bernard, 452 U.S. 89, 102 n.16, 101 S. Ct. 2193, 68 L. Ed. 2d 693 (1981))*. A district court abuses its discretion where it "ma[kes] neither factual findings nor legal arguments supporting the need for" the order. *Gulf Oil Co., 452 U.S. at 102*. Despite these formal requirements, "it is common practice for parties to stipulate to [protective] orders." **[**20]** *Procter & Gamble Co.* ***[*930]*** *v. Bankers Tr. Co., 78 F.3d 219, 229 n.1 (6th Cir. 1996)* (Brown, J., dissenting). Protective orders "are often blanket in nature, and allow the parties to determine in the first instance whether particular materials fall within the order's protection." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 305 (6th Cir. 2016)*.

Because parties may stipulate to a protective order, courts sometimes permit intervenors to challenge protective orders. *See, e.g.*, *Presser, 828 F.2d at 341*. If an intervenor challenges a protective order, "the burden of proof will remain with the party seeking protection when the protective order was a stipulated order and no party had made a 'good cause' showing." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp., 307 F.3d 1206, 1211 n.1 (9th Cir. 2002)*.

In this case, the parties stipulated to a protective order that would prevent Plaintiffs from disclosing the ARCOS data to the media, and the district court did not make a good cause finding on this issue before entering its Protective Order. The dissent disputes that the parties stipulated to the relevant aspects of the Protective Order, arguing that "the parties energetically fought over the terms of the protective order and never, in fact, fully agreed to all its terms." (Dissent at 31.) We disagree. It is true that during the parties' initial negotiations over disclosure of the ARCOS data (outside the presence of the district court), Plaintiffs "opposed the **[**21]** entry of a broad protective order and recommended that the data be disclosed leaving to the discretion of the Court the ability to share data and/or reports generated therefrom with . . . the media." (R. 137, Status Report, Page ID# 742.) However, the scant treatment that this issue receives in the parties' status reports on their disclosure negotiations (compared with issues relating to the scope and content of the data to be disclosed) suggests that this was not a central issue in the parties' discussions. More importantly, at a hearing after these negotiations—which represented the first opportunity Plaintiffs had to raise before the district court the issue of public disclosure of the ARCOS data—Plaintiffs declined to raise this issue. In fact, it does not appear that the district court was even *aware* that this issue was disputed, stating, "No one is proposing making all this publicly available." (R. 156, Hearing Tr., Page ID# 566.) It is a grave mischaracterization to state that Plaintiffs "energetically fought" over the issue of public disclosure when they neither raised it before the district court nor even objected when the district court stated that the issue was not disputed. **[**22]** Plaintiffs may have suggested the possibility of public disclosure in initial negotiations with Defendant, but they failed to ever raise this issue before the district court and instead stipulated to a protective order that barred public disclosure.

Because the issue of public disclosure of the ARCOS data was never squarely raised before the district court, the court never had occasion to find that Defendants or the DEA had made "a particular and specific demonstration of fact" justifying the Protective Order's permanent blanket ban on such disclosure. *Nemir, 381 F.3d at 550*. The dissent points to conclusory statements by the district court that "[n]othing is going to be revealed to the media unless there's a trial," as though these statements amounted to a good cause finding. (Dissent at 30 (quoting R. 156, Page ID# 861).) As mentioned, it is unclear that the district court was aware that this issue was disputed at all, so it seems unlikely the court intended these statements to represent a finding of good cause for this aspect of the Protective Order. Moreover, even if the district court intended to make a good **[*931]** cause finding, it failed to do so because it "made neither factual findings nor legal arguments supporting **[**23]** the need for" this aspect of the Protective Order, which it must do in order

"to provide a[] record useful for appellate review." Gulf Oil Co., 452 U.S. at 102.

Accordingly, although Intervenors challenge the Protective Order, the burden of demonstrating good cause not to disclose the ARCOS data remains with the DEA and Defendants (as the parties seeking protection). *See* Phillips, 307 F.3d at 1211 n.1.

Despite the "substantial latitude" afforded to district courts during the discovery process, *see* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984), we hold that the district court abused its discretion in finding that good cause existed to permanently and categorically prevent the ARCOS data from being disclosed pursuant to public records requests. In considering whether good cause for protection exists, we balance the interests in favor of disclosure against the interests in favor of nondisclosure. *See The Courier—Journal*, 828 F.2d at 367; Signature Mgmt. Team, LLC v. Doe, 876 F.3d 831, 838 (6th Cir. 2017). Accordingly, we will balance Intervenors' interest in reporting on the ARCOS data and the public interest in learning what such reporting would reveal against Defendants' and the DEA's interest in keeping the ARCOS data secret. We will also bear in mind that it was the burden of Defendants and the DEA to demonstrate good cause with particularity. *See* Nemir, 381 F.3d at 550; **[**24]** Phillips, 307 F.3d at 1211 n.1.

Ironically, the best evidence that good cause did *not* exist for the Protective Order comes from the district court's own balancing of the interests in disclosure versus nondisclosure.

In ordering the DEA to disclose the ARCOS data to Plaintiffs, the district court specifically held that the DEA did *not* meet its burden of showing "good cause" not to comply with Plaintiffs' subpoena for the ARCOS data. (R. 233, Page ID# 1111 (citing Fed. R. Civ. P. 45).) The court noted that the data "provid[es] invaluable, highly-specific information regarding historic patterns of opioid sales," (R. 367, Page ID# 5323), and emphasized that the role each Defendant played in the crisis "can be revealed *only by all of the data*." (R. 233, Page ID# 1118 (emphasis added).) The district court, comparing the opioid crisis to a plague, even stated that because it is possible to "discover how and where the virus grew" by studying the ARCOS data, disclosure of the ARCOS data "is a reasonable step toward defeating the disease." (R. 233, Page ID# 1124-25.)

In the same order concerning disclosure to Plaintiffs, the district court rejected Defendants' and the DEA's arguments that there was "good cause" for nondisclosure. The court specifically **[**25]** rejected the DEA's arguments that disclosing the data would interfere with law enforcement interests. Emphasizing the speculative nature of the harm given the age of the data, the court concluded that "it is untenable that exposure of the data will actually or meaningfully interfere with any ongoing enforcement proceeding." (R. 233, Page ID# 1119.)[7] In sum, the district court found the DEA's stated law enforcement interests to be vague and attenuated. (*See* R. 233, Page ID# 1119 ("[S]imply saying that disclosure of ARCOS records dating back to 2006 would detrimentally affect law enforcement does not make it so.").) **[*932]** The court likewise rejected the argument that producing the data would cause Defendants competitive harm, explaining that "the assertion was conclusory and . . . market data over three years old carried *no risk* of competitive harm." (R. 233, Page ID# 1120 (emphasis added).)

Between the time it ordered the DEA to produce the ARCOS data to Plaintiffs and the time it denied Intervenors' requests for the data, the district court seems to have done a complete about-face concerning the relevant interests at stake. It is true that this about-face might be explained in part by **[**26]** the different interests at stake when disclosure is made only to parties to a case pursuant to a protective order, as compared to third parties that intend to publicly report on the disclosed information. *Cf.* Shane Grp., 825 F.3d at 305 (recognizing that there is a lower requirement for protective orders relating to discovery, during which secrecy is permitted, than for orders to seal court records, which carry a strong presumption of openness).[8] In other words, the fact that the district

[7] The district court even noted as relevant that "Plaintiffs assert that part of the reason for the opioid epidemic is *lack* of law enforcement." (R. 233, Page ID# 1119.)

[8] Intervenors argue that this Court's line of cases emphasizing the "strong presumption in favor of openness in the courtroom" supports their position. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983); *see* Signature Mgmt. Team, LLC v. Doe, 876 F.3d 831, 836 (6th Cir. 2017); In re Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983). However, the strong presumption of openness *in* the courtroom and for court records does not apply to the discovery process, which occurs *before* the parties get to the courtroom. *See* Shane Grp., 825 F.3d at 305. These cases are thus inapplicable to this issue—except to the extent that they

court ordered the DEA to disclose the ARCOS data to Plaintiffs pursuant to the Protective Order does not necessarily imply that the same considerations would require disclosing that data to Intervenors and, by extension, the public.

However, it is readily apparent from the record that the district court's analysis in its first order *did* take into account the public's interest in obtaining the ARCOS data and the interests of Defendants and the DEA in keeping this data from the public.[9] If the district court ordered the DEA to disclose the ARCOS data with the understanding that it would only be seen by Plaintiffs and only used for litigation purposes, there would have been no reason to write that "market data over **[**27]** three years old carried *no risk* of competitive **[*933]** harm." (R. 233, Page ID# 1120 (emphasis added).) Nor would it have been necessary to state that "[g]iven that the most recent data is over three years old, it is untenable that exposure of the data will actually or meaningfully interfere with any ongoing enforcement proceeding." (R. 233, Page ID# 1119.) These statements speak to the interests that Defendants and the DEA had in keeping the ARCOS data away from *public* eyes—not just the eyes of Plaintiffs. The dissent argues that we take these quotes out of context; however, the totality of the district court's balancing analysis supports our position and nothing quoted in the dissent suggests otherwise.

Given the balancing of interests in its order compelling the DEA to disclose the ARCOS data to Plaintiffs, it is bizarre that the district court could later hold that the ARCOS data at issue "is sensitive to pharmacies and distributors because it is confidential business information; and it is sensitive from the DEA's perspective because it is crucial to law enforcement efforts." (R. 800, Page ID# 18979-80.) The district court repeatedly expressed its desire that the underlying litigation **[**28]** settle before proceeding to trial. The court also warned the parties when it was considering a protective order that if the case went to trial, the ARCOS data would likely become public. (*See* R. 156, Page ID# 861 ("Nothing is going to be revealed to the media unless there's a trial. If there's a trial, obviously trials in our country are public. Hopefully there will be no trials.").) These statements suggest that at least part of the reason for the district court's about-face on what interests Defendants and the DEA have in nondisclosure of the ARCOS data might have been a desire to use the threat of publicly disclosing the data as a bargaining chip in settlement discussions. If this was a motivation for its holding, then the district court abused its discretion by considering an improper factor. *See* *Just Film, Inc. v. Buono, 847 F.3d 1108, 1115 (9th Cir. 2017)* ("An abuse of discretion occurs when the district court, in making a discretionary ruling, relies upon an improper factor[.]" (quoting *Parra v. Bashas', Inc., 536 F.3d 975, 977-78 (9th Cir. 2008))*). And even if this was not part of the district court's motivation, it appears that the court abused its discretion by acting irrationally. *See* *United States v. Swift, 809 F.2d 320, 323 (6th Cir. 1987)* (noting that a court of appeals should "uphold the trial judge's exercise of discretion unless he acts arbitrarily **[**29]** or irrationally" (quoting *United States v. Robinson, 560 F.2d 507, 515 (2d Cir. 1977))*).

Further, the district court was largely correct in its initial analysis of the relevant interests in this case: Intervenors, as representatives of the public, have a substantial interest in disclosure of the ARCOS data, while the DEA and Defendants have only a lesser interest in avoiding potential harms that can be avoided by narrower, less categorical means. The district court correctly observed that the ARCOS data "provid[es] invaluable, highly-specific information regarding historic

demonstrate a more generalized, but less intense, public interest in the disclosure of documents related to litigation. Nevertheless, while there may not be a strong presumption in favor of disclosure in the discovery context, the party seeking nondisclosure still must demonstrate "good cause" for a protective order "specifying terms . . . for the disclosure or discovery." *Fed. R. Civ. P. 26(c)(1)*.

[9] Nor was this the first time that the district court had raised the risk of public disclosure of the ARCOS data notwithstanding the Protective Order. At the same hearing where the district court stated that any protective order it would enter would limit the use of the ARCOS data to "two purposes; litigation, law enforcement," it is clear that the court was also concerned with the potential for harm if the data leaked. (R. 156, Page ID# 861.) For example, before it was informed that the location of warehouses in which large quantities of drugs were stored was already publicly available, the district court was greatly concerned that this information would be part of the ARCOS data being disclosed to Plaintiffs. (R. 156, Page ID# 836-38.) The hearing transcript makes clear that the district court's concerns stemmed from the possibility that a criminal could steal drugs from these warehouses if he knew their locations. (*See* R. 156, Page ID# 836-38, 865, 888.) Obviously, if the Protective Order guaranteed that no one other than the parties would access the data, such concerns would be completely unfounded. The fact that the district court expressed concerns about the risk of public disclosure well before its order that the DEA disclose the ARCOS data to Plaintiffs provides strong evidence that these concerns were on the district court's mind when it considered that order as well.

patterns of opioid sales." (R. 397, Page ID# 5323.) The ARCOS data will aid us in understanding the full enormity of the opioid epidemic and might thereby aid us in ending it.

Intervenors' reporting bears out these conclusions. HDM was able to receive some ARCOS data from West Virginia's Attorney General in a previous, unrelated litigation. This data included "hundreds of printed pages of ARCOS data spreadsheets that revealed the number of hydrocodone and oxycodone dosage units sold to every retail pharmacy in West Virginia from 2007 to 2012." (HDM Br. 9.) That data was used in HDM's extensive reporting on the opioid crisis, which was awarded a Pulitzer Prize for exposing the **[**30]** causes, **[*934]** context, and scope of the epidemic. Reporting by Intervenors also prompted a committee of the House of Representatives to investigate and issue a report on the opioid epidemic. *See* Energy and Commerce Committee, *Red Flags and Warning Signs Ignored: Opioid Distribution and Enforcement Concerns in West Virginia* (2018), available at https://www.ruralhealthinfo.org/assets/2616-9819/Opioid-Distribution-Report-FinalREV.pdf.

The DEA and Defendants attempt to undermine the importance of the ARCOS data in educating the public about and drawing attention to the opioid crisis. Defendants argue that Intervenors "cannot explain why they need transaction-level data . . . to educate the public about the depth and magnitude of the prescription drug crisis" when "publicly-available reports [provide] the volume of opioids distributed per quarter in any three-digit zip code prefix." (Defendants Br. 34, 35 (citation omitted).) Intervenors respond:

> The aggregate data [] identifies narcotics only by weight and the number of grams that were shipped to a generalized geographic area; it does not identify the number of pills that were shipped, the type of pills that were shipped, the dosage units of the **[**31]** pills, the pharmacy that ordered the pills, or the manufacturers and the distributors that shipped them. This is all extraordinarily relevant information, essential to learn how, in little more than a decade, routine drug abuse escalated into the worst drug epidemic in American history.

(Wash. Post Reply Br. 3.) Intervenors convincingly argue that "[t]he dosage of the pill is of immense public interest, as people want to know whether their neighborhood was supplied with 5 mg oxycodone pills, such as Percocet, which are generally prescribed for minor dental procedures and routine injuries, or 30 mg oxycodone tablets, which have been shown to be the most abused and diverted pills[.]" (Wash. Post Reply Br. 2.)

Defendants' argument that aggregate data is sufficient might be more availing if there were no direct, tangible evidence of the compelling nature of specific transactional data. But, as Intervenors point out, specific transactional data has proved extremely effective and consequential in calling attention to the horrors of the opioid crisis. For example, in a report on the opioid crisis in West Virginia, the Energy and Commerce Committee of the United States House of Representatives **[**32]** noted that it became interested in the crisis after reading reporting in the Charleston Gazette-Mail (part of HDM) and the Washington Post. Energy and Commerce Committee Report, *supra* at 4. Not only did the Committee specifically reference reporting by Intervenors, it called out for special attention details from their reporting, like one instance in which "distributors sent more than 20.82 million doses of hydrocodone and oxycodone to two pharmacies located four blocks apart in a town of approximately 3,000 people" and another in which "a single pharmacy in a town of 406 people received nearly 13 million doses of hydrocodone and oxycodone from all distributors between 2006 and 2012." Energy and Commerce Committee Report, *supra* at 100. The available aggregate data does not provide such granular detail as the number of doses sent to individual pharmacies, meaning that this reporting would have been impossible without the ARCOS data. Thus, Intervenors have presented substantial evidence of the significant public interest in transactional-level data.

By contrast, as the district court recognized, most of Defendants' and the DEA's asserted interests pertain only to the potential for future **[**33]** harm. In its order requiring **[*935]** disclosure of the ARCOS data to Plaintiffs, the district court concluded that these harms were vague and speculative, even suggesting that there was *no* law enforcement interest in the data due to its age.[10]

---

[10] The DEA asserts that the district court reconsidered its position on the law enforcement interests at issue after reading the declaration of DEA Assistant Administrator John J. Martin. (DEA Br. 41 (citing R. 717-1, Martin Decl. Page ID# 16519.) There is no record evidence for the DEA's assertion, as the district court did not cite or refer to the Martin declaration in its Opinion and Order. Further, it would be surprising if this was the case, since the declaration asserted substantially the same points that the DEA had made in all of

We need not find, as the district court seemed to, that Defendants' and the DEA's interests carry no weight in order to hold that there was not "good cause" to protect the ARCOS data from disclosure pursuant to state public records requests. It is true that some of the identified harms are not sufficiently particularized to carry much weight, like the DEA's vague assertion that disclosing the ARCOS data "would undermine DEA's mission of investigating and prosecuting misconduct involving controlled substances." (DEA Br. 44.) How this interest would be impeded by the public release of the data is not made clear.

The law enforcement interests in the ARCOS data identified in the declaration of DEA Assistant Administrator John J. Martin are somewhat more concrete. Martin notes, "Frequently, DEA investigations remain open for multiple years . . . . Therefore, it is not unusual for ARCOS data first generated a decade ago to continue to have relevance in ongoing **[**34]** investigations and enforcement actions." (R. 717-1, Page ID# 16519.) But insufficient explanation is given as to how law enforcement interests are furthered by permanently and categorically keeping confidential data that is at least four years old. Even accepting Martin's statements, it is undeniable that data becomes less valuable as it ages—particularly in the case of ARCOS data, because there is a five-year statute of limitations on controlled substance offenses. *18 U.S.C. § 3282*.

Moreover, the interests set forth in Martin's declaration also suffer from a lack of particularity. In a redacted portion of his declaration, Martin notes an example of one ongoing case that the disclosure of the ARCOS data could impede: "Public release of ARCOS data that is the subject of this pending action would be detrimental to DEA's prosecution of [an administrative action involving DEA's efforts to revoke a distributor's DEA Certificate of Registration] because DEA intends to provide testimony regarding ARCOS data in this action." (R.662-1, SEALED Martin Decl., Page ID# 15973.)[11] It is not clear what this statement means or what **[*936]** we are supposed to take from it. Martin does not attempt to explain what the ARCOS data **[**35]** in the action will evidence or the nature of the testimony about the data. If the testimony will simply establish how the ARCOS database operates, for example, no law enforcement interest would be compromised by disclosing the ARCOS data to Intervenors. Martin's declaration is simply too vague in its evaluation of the law enforcement interests at issue to demonstrate "good cause" for a blanket, permanent Protective Order. Similarly, the one-page report included with Martin's declaration that provides the number of "open cases from 2006 to 2014 involving opioids" without explaining the nature or status of any of those cases, (R. 663-1, Page ID# 16001, 16005), fails to establish "good cause" for the Protective Order.

It is important to emphasize that the ARCOS data "are not pure investigatory records compiled for law enforcement purposes, [but] simply business records of defendants; . . . the database does not include *any* additional DEA analysis or work-product[.]" (R. 233, Page ID# 1119 (emphasis added).) At oral argument, the DEA was questioned about why a permanent blanket ban on disclosure was needed rather than a narrower protective order that would permit the DEA to object **[**36]** to disclosure of specific pieces of ARCOS data as they relate to specific investigations. The DEA responded that "if we delete [data relating to a specific investigation] from [the ARCOS] database and give [Intervenors] the data without those things, I suspect that [a] manufacturer [whose data was not included in the disclosure] will say, 'Huh, the Washington Post published this dataset that removed everything that was related to an ongoing investigation and I see that I'm not on there, so maybe I'm the subject of an ongoing investigation.'" (May 2, 2018, Oral Arg. 43:40-44:00.) However, it is difficult to understand this response given the nature of the ARCOS data. This response seems to assume that the DEA is unable to disclose data about a manufacturer under investigation—but it is unclear why this should be the case. If data about a manufacturer is

its previous briefing—points which the district court had rejected.

[11] We quote this portion of the declaration even though it was redacted in the unsealed court filing because, for reasons discussed in the following section, it was error for the district court to allow portions like this to be filed under seal. In brief, there is a "strong presumption in favor of openness" of court records, which include court filings (like the DEA Brief in Support of Objections to Disclosure of ARCOS Data) and exhibits thereto (like the Martin declaration). *See Shane Grp., 825 F.3d at 305*. "Only the most compelling reasons can justify non-disclosure of judicial records." *Id. at 305* (quoting *Knoxville News-Sentinel Co., 723 F.2d at 476*). The quoted sentence from Martin's declaration contains only very general information about an ongoing administrative action into an unidentified distributor. We reject the notion that compelling reasons justified redacting this sentence and therefore quote it without redaction. *See id. at 303-04* (quoting from a sealed report in an opinion vacating the district court's orders to seal court records).

included in the ARCOS data, it is only because the manufacturer (or an entity with which it transacted) kept the data as a business record and submitted it to the DEA. There would therefore be no compelling need for the DEA to *hide* the information from the very manufacturer that likely provided the information to the DEA. This is not **[**37]** to say that there could never be a law enforcement interest in keeping ARCOS data secret, but the DEA has not adequately explained why the data should be subject to a permanent blanket ban on disclosure, rather than a narrower protective order that would allow the DEA to object to disclosure as specific investigations may require.

Further, the DEA's argument as to the risk to law enforcement interests if the data is disclosed is undermined to some degree by the DEA's failure to point to any harm caused by HDM's reporting on the ARCOS data it received from the West Virginia Attorney General in 2016. Instead of doing so, the DEA asserts, without further explanation, that "HD[M] is in no position to assess the harm that publication of sensitive federal law-enforcement data may have done to DEA's law-enforcement activities." (DEA Br. 45.) The DEA argues that this prior disclosure "says nothing about the jeopardy that a much broader disclosure would create for the federal government's law-enforcement activities." (DEA Br. 45.) We disagree. At the very least, the fact that this disclosure occurred and the DEA cannot point to any resulting harm demonstrates that there is little chance of ***[**38]*** *imminent* harm from disclosure of the ARCOS data. In sum, the **[*937]** DEA's stated law enforcement interests do not seem very weighty, given that they primarily pertain to potential future harms that could be avoided by limited redactions to those particular portions of the ARCOS data that correspond to specific ongoing investigations.[12]

Last, but importantly, the DEA has never explained why it could not simply redact the portions of the ARCOS data that relate to this and other ongoing investigations. *Cf.* *Madel v. U.S. Dep't of Justice, 784 F.3d 448, 453 (8th Cir. 2015)* (holding that the DEA could "not automatically withhold an entire document when some information is exempt" from production). Our "good cause" inquiry takes into account "[t]he scope of the protective order" as it relates to the relevant interests. *In re Ohio Execution Protocol Litig., 845 F.3d 231, 238 (6th Cir. 2016)*; *see also* *The Courier—Journal, 828 F.2d at 366*. Because the Protective Order in this case prevented any disclosure of any ARCOS data by any Plaintiff, and because this ban on disclosure would remain in effect in perpetuity, the DEA and Defendants faced a high hurdle in demonstrating "good cause" for these extreme restrictions.

With respect to Defendants' interests, the district court correctly noted the great "public interest in solving the **[**39]** opioid crisis" and held that these and other interests "outweigh[ed] any slight risk of anticompetitive harm." (R. 199, Order, Page ID# 1008-09.) The ARCOS data does not contain sensitive information like trade secrets, and the age of the data makes the risk of anticompetitive harm slight and speculative. *See* *United States v. Int'l Bus. Machines Corp., 67 F.R.D. 40, 49 (S.D.N.Y. 1975)* (rejecting a business's request for continued protection of its commercial data, all of which was at least two years old, because "it reveals directly little, if anything at all, about [the business's] current operations" and because "the value of this data to [] competitors is speculative."). Defendants have not alleged any harm resulting from the publication of the ARCOS data HDM received from the West Virginia Attorney General in 2016. Defendants underscore the speculative nature of the harm they assert in stating that "[i]t likely is too soon in any event to draw firm conclusions about the competitive harm caused by those earlier disclosures." (Defendants' Br. 31.) Defendants have offered no new reasons on appeal to question the district court's analysis of their interest in nondisclosure,[13] and we conclude **[*938]** that

[12] The DEA also argues that allowing Intervenors to obtain the ARCOS data would be to allow them to get around the requirements of the *Freedom of Information Act*. However, for the reasons stated above, we do not believe that disclosing the ARCOS data, particularly with the option of partial redaction, "could reasonably be expected to interfere with enforcement proceedings," which means that the data would be available under FOIA. *5 U.S.C. § 552(b)(7)*.

[13] Instead, Defendants argue that the district court was correct in holding that "the ARCOS data is not a record generated by the Counties that are, or may be, subject to state public records requests." (R. 800, Page ID# 18981.) It is not clear why the district court found this relevant to its inquiry; there is no reason for this Court or any other federal court (rather than the courts of Ohio and West Virginia) to decide the scope of those state laws. Further, the text of both state statutes strongly suggests that the data would be subject to the public records request. *See* ***Ohio Rev. Code § 149.43(A)(1)*** ("'Public record' means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units[.]"); *W. Va. Code § 29B-1-2(5)* ("'Public record' includes any writing containing information prepared or

Defendants' interests are far outweighed by the specific, concrete **[**40]** interest Intervenors and the public have in disclosure of the ARCOS data.

The reporting on the ARCOS data that HDM received from the West Virginia Attorney General resulted in no demonstrated commercial harm to Defendants and no demonstrated interference with law enforcement interests; but this reporting did result in a Pulitzer Prize, a Congressional Committee report, and a broader public understanding of the scope, context, and causes of the opioid epidemic. Further disclosure of the ARCOS data is warranted because the DEA and Defendants have failed to demonstrate "good cause" not to disclose the data to Intervenors. As the district court acknowledged, "[s]unlight is said to be the best of disinfectants," and the ARCOS data and the insight it will provide into the opioid epidemic should be brought to light. *Buckley, 424 U.S. at 67* (quoting L. Brandeis, *Other People's Money* 62 (1933)).

For the foregoing reasons, we hold that the district court abused its discretion in finding "good cause" not to permit disclosure of the ARCOS data pursuant to state public records requests. We vacate the district court's Protective Order and remand to permit the district court to consider entering a new protective order **[**41]** consistent with the proper legal standards as set forth in this opinion. On remand the district court may entertain arguments by the DEA as to why *particular* pieces of ARCOS data that relate to *specific* ongoing investigations should not be disclosed; however, the district court shall not enter a blanket, wholesale ban on disclosure pursuant to state public records requests. Nor shall any modified protective order specify that the ARCOS data be destroyed or returned to the DEA at the conclusion of this litigation.

### III. Sealing and Redaction of Pleadings

Intervenors argue that the district court erred in allowing Defendants and the DEA to file pleadings and other court documents under seal and with redactions. We review a court's decision to seal its records for an abuse of discretion, but we note that "'[i]n light of the important rights involved, the district court's decision is not accorded' the deference that standard normally brings." *Shane Grp., 825 F.3d at 306* (quoting *In re Knoxville News-Sentinel Co., 723 F.2d 470, 476 (6th Cir. 1983))*.

As an initial matter, because the district court allowed Intervenors to intervene "for the limited purpose of addressing their Public Records Requests," (R. 611, Briefing Order, Page ID# 14995), Defendants and the DEA argue that this issue **[**42]** is beyond the scope of this appeal. However, we have in past cases "'reach[ed] the question' of the district court's seal 'on our own motion,'" without any party having raised the issue. *Shane Grp., 825 F.3d at 305* (quoting *Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1176 (6th Cir. 1983))*. We therefore need not concern ourselves with whether this issue is within the scope of Intervenors' intervention; rather, the issue is within our authority to decide regardless of whether or not the district court conferred intervenor status upon HDM or the Washington Post to make arguments about the issue. *See id.*

Concerning nondisclosure in litigation, this Court has distinguished between secrecy in the context of discovery, which as discussed above is permissible with a showing of "good cause," and secrecy **[*939]** in the context of adjudication, which is generally impermissible due to the "strong presumption in favor of openness" of court records. *Shane Grp., 825 F.3d at 305* (quoting *Brown & Williamson, 710 F.2d at 1179*). We have stated that "[t]he line between these two stages, discovery and adjudicative, is crossed when the parties place material in the court record." *Id.* The presumption in favor of openness of court records is justified because "[t]he public has an interest in ascertaining what evidence and records the District Court and this Court have **[**43]** relied upon in reaching our decisions." *Id.* (quoting *Brown & Williamson, 710 F.2d at 1181*). This strong presumption in favor of openness is only overcome if a party "can show a compelling reason why certain documents or portions thereof should be sealed, [and] the seal itself [is] narrowly tailored to serve that reason." *Id.* Further, "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Id.*

In this case, the sealed or redacted pleadings, briefs, or other documents that the parties have filed with the court, as well as any reports or exhibits that accompanied those filings,[14] are the sort of records that

---

received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business."). The fact that the Attorney General of West Virginia previously provided ARCOS data to HDM is further evidence that the West Virginia public records law covers the data.

[14] These documents include, but are not limited to, the DEA's Amended Brief in Support of Objections (R. 717), John J.

would help the public "assess for itself the merits of judicial decisions." *Id.*; *see* *id. at 304-05* (treating as court records entitled to the presumption of openness the following: pleadings, motions for class certification, evidentiary motions, and exhibits accompanying the parties' filings). These documents are therefore subject to the strong presumption in favor of openness, which applies here with extra strength given the paramount importance of the litigation's subject matter.

The district court abused its discretion in permitting Defendants **[**44]** and the DEA to file their pleadings under seal. "[A] district court that chooses to seal court records must set forth specific findings and conclusions 'which justify nondisclosure to the public,'" even if no party objects to their sealing. *Shane Grp., 825 F.3d at 306* (quoting *Brown & Williamson, 710 F.2d at 1176*). We have made clear that "a court's failure to set forth those reasons—as to why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary—is itself grounds to vacate" an order allowing court documents to be filed under seal or with redactions. *Id. at 306*. No such findings or conclusions were made in this case,[15] and the district court *ipso facto* abused its discretion. *Id.*

We therefore vacate any district court orders to the extent they permit sealing or redacting of court records. We remand for the district court to reconsider each pleading filed under seal or with redactions and to make a specific determination as to the necessity of nondisclosure in **[*940]** each instance. The court is advised to bear in mind that the party seeking to file under seal must provide a "compelling reason" to do so and demonstrate that the seal is "narrowly tailored to serve **[**45]** that reason." *Shane Grp., 825 F.3d at 305*.

On remand, if the district court permits a pleading to be filed under seal or with redactions, it shall be incumbent upon the court to adequately explain "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary." *Id. at 306*. In doing so, the district court is to pay special attention to this Court's statement that "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *Id. at 305* (internal quotation marks omitted). The district court's findings and conclusions must also be consistent with the proper balancing of interests with respect to the ARCOS data, as discussed in the previous section.

**CONCLUSION**

For the reasons stated above, we **VACATE** the district court's Protective Order and any orders permitting the parties to file pleadings under seal or with redactions, and **REMAND** to permit the district court to consider entering new orders consistent with this opinion.

**Concur by:** RALPH B. GUY, JR. (In Part)

**Dissent by:** RALPH B. GUY, JR. (In Part)

## Dissent

RALPH B. GUY, JR., Circuit Judge, concurring in part and dissenting in part. I agree with the majority on the narrow matter of the **[**46]** sealed records. Although I would affirm all of the decisions of the district court that were directly appealed from, I agree that the district court has not established adequate, on-the-record reasons for permitting many other docket entries to be filed under seal. I thus agree with the decision to proceed on our own motion and direct the district court to reevaluate those decisions on remand. I dissent, however, from the balance of the opinion.

Prescription opiates are being abused on a large scale throughout the country. In the face of this problem, different solutions are emerging. The United States is attempting to curb the trend through investigations and prosecutions. Cities, counties, and tribes are using private lawsuits to remedy the damage done. And

---

Martin's Declaration (R. 663-1), and any pleadings filed under seal or with redactions. On remand, the district court shall conduct a full review of court documents filed under seal or with redactions, and it shall in each instance reevaluate whether redaction or seal is necessary in light of the proper legal standards as set forth in this opinion.

[15] The DEA argues that the district court's statement, in a footnote, that the DEA's Amended Brief in Support of Objections had "removed all but necessary redactions" was sufficient analysis. (DEA Br. 64 (quoting R. 800, Page ID# 18973).) This statement does not explain "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary." *Shane Grp., 825 F.3d at 306*. It is therefore insufficient to justify the redactions. *Id.*

newspapers and other media outlets are attempting to educate the public on the matter. Those different approaches converged in this case and required the district court to balance the various interests at play.

Plaintiffs face a daunting task in their civil suit. At trial, they must ultimately prove which manufacturers, distributors, and pharmacies handled the pills that ended up in their specific jurisdictions. The task is daunting **[**47]** because drugs take a circuitous path from the manufacturer to the consumer and there are around 1,200 companies potentially involved. Fortunately for plaintiffs, the DEA has spent years compiling the ARCOS database, which gives plaintiffs precisely the information they need.

Also fortunately for plaintiffs, discovery is quite broad under the Federal Rules of Civil Procedure. *See Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 402 (6th Cir. 1998)*. *Rule 26(b)* draws the general scope of discovery:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, **[*941]** the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

*Fed. R. Civ. P. 26(b)(1)*. Such a permissive standard allows "extensive intrusion into the affairs of both litigants and third parties." *Seattle Times Co. v. Rhinehart, 467 U.S. 20, 30, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)*. Given that reality, **[**48]** it is not surprising that some persons and entities would prefer not to turn over certain documents or would prefer to do so only with certain protections in place. This is why *Rule 26* also allows courts to enter protective orders. Under *Rule 26(c)*, a party seeking information is obligated to first try and reach a compromise with the person or entity from which it seeks the information. Failing a compromise, the "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" *Fed. R. Civ. P. 26(c)(1)*.

That is what happened here. The DEA is not a party to this lawsuit but was pulled in by plaintiffs' subpoena. The DEA owns the ARCOS data and it initially resisted giving plaintiffs the data altogether, thus necessitating the court's involvement. Footnote five of the majority's opinion suggests that a stipulated protective order resolved the dispute. I disagree with that characterization, as I explain below. But it is true that the court entered a protective order, thus leading the DEA to give plaintiffs the data they sought. With this treasure trove of information, plaintiffs could continue their preparations for trial and engage in more meaningful **[**49]** settlement talks with defendants.

Then another group entered the fray. Some newspapers realized that the ARCOS data could be helpful in their own quest to educate the public about the cause and extent of the opioid crisis. But the newspapers are not parties to this lawsuit, so they do not have *Rule 26* on their side; they could not subpoena the DEA. They are, of course, free to file a federal *Freedom of Information Act (FOIA)* request, which the DEA recommended they do. Although the federal FOIA exempts certain types of records from disclosure, the Washington Post wrote in its briefing that it believes no FOIA exemption would be applicable. Yet for reasons of their own, the newspapers have not chosen to pursue that route for obtaining the records.

Instead, the newspapers took a roundabout way. Realizing that plaintiffs now possessed the information they sought, the newspapers filed the state-law equivalents of FOIA requests with three of the plaintiffs—one county in West Virginia and two counties in Ohio. The newspapers reasoned that the ARCOS data was now a "public record" of those counties and must be turned over upon request.

But the protective order stood in their way. Under the terms of the **[**50]** protective order, if a plaintiff governmental entity received a public record request for the ARCOS data, the plaintiff had to "immediately notify the DEA and Defendants of the request." (R. 167, PageID 942.) A defendant or the DEA could then "file an appropriate action in [the district court] opposing production of the records." (*Id.* at 943.) The plaintiff would then be forbidden to release the information absent an order from the district court. (*Id.*) This process played out and ultimately the district court decided not to allow plaintiffs to pass along the ARCOS data to the newspapers.

The majority concludes that this decision was an abuse

of discretion, but it **[*942]** begins with a false premise. According to the majority, the parties stipulated to a protective order. (Maj. Op. at 12.) The majority contends that although the parties submitted "rival orders" that differed in some respects, their orders were "identical with respect to every aspect of the Protective Order relevant to this appeal." (*Id.* at 4 n.5.) This conclusion skips over the relevant lead-up.

The entry of the protective order happened in stages. First, the district court directed the parties to "meet to see if they can reach agreement on what **[**51]** part of the [ARCOS] database the DEA will produce." (R. 112, PageID 686.) The district court affirmed that there "is a legitimate need for Plaintiffs to obtain this data," but "believe[d] that production must be tailored — perhaps through a protective order — in a way to address the DEA's concerns regarding breadth, years in question, potential interference in investigations and enforcement actions, and divulging the location of warehouses where opioids are stored." (*Id.*) The parties met, but failed to reach an agreement, and a summary of their competing status reports reveals why:

- The DEA was willing to share with plaintiffs only two years of data rather than the nine years of data requested;
- The DEA insisted on providing the data in Excel spreadsheets, rather than allow plaintiffs to access it in its native format;
- The DEA refused to disclose the names of the manufacturers, distributors, and pharmacies but instead suggested replacing them with numeric identifiers;
- The DEA insisted on replacing the city or county with the first three digits of the relevant postal code;
- Plaintiffs were unwilling to agree to a protective order that prevented them from disclosing the ARCOS data **[**52]** to the media.

(*See* R. 137, PageID 741-43; R. 139.) Thus, one of the sticking points was the parties' disagreement over whether the media should have access to the ARCOS data. And that dispute kept them from reaching an agreement.

The parties' failure to agree required the court to hold a hearing which lasted one hour and 45 minutes. (R. 112, PageID 686; R. 156.) At the hearing, the court rejected some of the restrictions that the DEA had been demanding,[1] but the court was clear that a protective order of some kind was going to be put into place and that the order would, at a minimum, limit the use of the information to "two purposes; litigation, law enforcement. That's it." (R. 156, PageID 861.) When counsel for defendants voiced concern about plaintiffs' insistence that they be allowed to disclose ARCOS data to the media, the district court interjected to flatly put that concern to rest. "Nothing is going to be revealed to the media unless there's a trial. If there's a trial, obviously trials in our country are public. Hopefully there will be no trials." (*Id.*) Counsel responded, "We appreciate that and appreciate the opportunity to work on a protective order, as DEA has suggested."[2] ( **[**53]** *Id.*) The court concluded the **[*943]** hearing by ordering the parties to jointly propose an order by the end of that week.

The DEA submitted a proposed order soon after but confessed the parties' inability to resolve two matters.[3] One matter concerned the tiers of confidentiality while the other concerned the extent to which ARCOS data could be shared with law enforcement agencies. (R. 162, PageID 915-16.) A few days later, the court entered a protective order that adopted the plaintiff's approach to the tiers of confidentiality and adopted the DEA's language defining when law enforcement could be given the ARCOS data. (R. 167, PageID 938, 939.)

So while it is true that the parties agreed to the relevant terms of the protective order, they only did so after the court told them at the hearing what type of order it was willing to enter. In my view, the parties energetically fought over the terms of the protective order and never, in fact, fully agreed to all its terms. Rather, they argued their positions at the hearing, accepted the court's decisions on those positions, and then did their best to come up with a document that complied with the court's requirements and timeline. The good cause for **[**54]** the protective order can thus be found throughout the transcript of the hearing. There, the court explains why a

---

[1] For instance, the DEA opposed disclosing where warehouses were located even though, as counsel for plaintiffs pointed out, the information was already publicly available. (*See* R. 156, PageID 838-41.)

[2] Contrary to the majority's suggestion, neither this exchange nor the others cited, when read in context, can be fairly described as "us[ing] the threat of publicly disclosing the data as a bargaining chip in settlement discussions." (Maj. Op. at 16.)

[3] The DEA's motion and the court's subsequent protective order suggest that plaintiffs independently submitted their own proposed order, but that proposed order is not part of the record. (R. 162-1, PageID 916; R. 167, PageID 938.)

protective order was necessary to protect investigations and trade secrets but also explains why the order need not be as restrictive as what the DEA and defendants were requesting. The court reemphasized this good-cause finding in its order sustaining the objections to releasing ARCOS data to the newspapers. (R. 800, PageID 18978.)

That leads to my second disagreement. According to the majority, the district court did "a complete about-face concerning the relevant interests at stake" when it declined to allow the newspapers to access the ARCOS data. (Maj. Op. at 15.) The majority concedes that "this about-face might be explained in part by the different interests at stake when disclosure is made only to parties to a case pursuant to a protective order, as compared to third parties that intend to publicly report on the disclosed information." (*Id.*) But the majority rejects this possibility outright because in its view, "it is readily apparent from the record that the district court's analysis in its first order *did* contemplate the public's interest in obtaining the ARCOS **[**55]** data" and the DEA's and defendants' interests in keeping it private. (*Id.*) The majority is correct that the court was balancing different interests, but misdescribes how the court balanced them.

Again, the context matters. The majority selectively quotes docket entry 233, which is the court's order directing the DEA to give plaintiffs the raw ARCOS data. The DEA had already given plaintiffs aggregate data from ARCOS, but with a trial date now firmly set, the court needed to consider whether plaintiffs were entitled to the more specific data direct from ARCOS. (*See* R. 182; R. 232; R. 233, PageID 1110-11.) In the 233 order, the court considered and rejected each of the DEA's objections to giving plaintiffs the raw ARCOS data. (*See generally* R. 233.) In my view, the majority misdescribes this order.

Here is the order's full discussion on the DEA's concern about competitive harm to drug companies:

> DEA "objects to the production of the requested information under DOJ's *Touhy* regulations (28 C.F.R. § 16.26(b)(6)) **[*944]** because disclosure would improperly reveal trade secrets without the owners' consent." Docket no. 101 at 6. Specifically, DEA asserts the data would reveal "details regarding the scope and breadth of [each **[**56]** manufacturer's and distributor's] market share, which is likely to cause [them] substantial competitive harm." *Id.* The *Madel* court explicitly rejected this argument, noting the assertion was conclusory and also that market data over three years old carried no risk of competitive harm. This objection is overruled.

(R. 233, PageID 1120.) The reference to *Madel* refers to Madel v. United States Dep't of Justice, 784 F.3d 448 (8th Cir. 2015) and the district court's decision on remand, Madel v. United States, No. 13-cv-2832, 2017 U.S. Dist. LEXIS 4362, 2017 WL 111302 (D. Minn. Jan. 11, 2017). That case arose when a man named Madel submitted a FOIA request for ARCOS data and the DEA largely refused to provide it on the grounds that it would cause competitive harm. 784 F.3d at 452. Madel sued and the district court granted summary judgment to the DEA. The court of appeals partially affirmed because the DEA had provided affidavits that supported the claim that substantial competitive harm was likely. Id. at 453. The court of appeals remanded the case, however, so that the district court could determine whether portions of some of the ARCOS data were segregable from the portions likely to cause harm. Id. at 453-54.

In my reading of the 233 order, the district court was simply pointing out that the DEA could not avoid giving plaintiffs the relevant discovery materials **[**57]** based on a blanket assertion about competitive harm, particularly when the data was several years old. The court was not making a finding that the release of "market data over three years old" *never* carries the risk of competitive harm, regardless of who receives it. Rather, the risk was simply not so great that *plaintiffs* should be deprived of relevant discovery material to which they are entitled under Rule 26, absent a stronger showing. "Plaintiffs," of course, is the operative word because the court was simply ordering the DEA to give only plaintiffs the ARCOS data—and even then, still subject to the protective order. That is why it ended the order with this paragraph:

> Having overruled DEA's objections, DEA shall produce the requested information for the States of Ohio, West Virginia, Illinois, Alabama, Michigan, and Florida. Use of the ARCOS database shall be limited to this litigation and for State and local law enforcement purposes only. No person shall disclose the data or allow use of the data except as necessary for a submission to the court or at trial. The ARCOS data produced pursuant to this Order shall be governed by the Protective Order previously entered at docket no. 167.

**[**58]** (R. 233, PageID1125.)

The same goes for the 233 order's discussion of ongoing criminal investigations. The DEA objected to providing plaintiffs with any raw ARCOS data because it "would interfere with enforcement proceedings" and other "ongoing matters." (*Id.* at 1119-20.) The court found it "untenable that exposure of the data will actually or meaningfully interfere with any ongoing enforcement proceeding" but invited the DEA to provide evidence that "specific data would interfere with a particular, pre-existing and ongoing enforcement proceeding," and to make any necessary showing about "non-segregability." (*Id.*) Here too, the court was speaking with the assumption that only plaintiffs (and some law enforcement agencies) would receive the ARCOS data and, even then, the data **[*945]** would still be subject to the protective order.

When properly viewed, I do not believe, as the majority does, that the court's subsequent decision to prevent the press from obtaining the ARCOS data was "bizarre." (Maj. Op. at 16.) The district court balanced different interests, under different circumstances, and at different times. The court's statements in the 233 order came with the caveat that the ARCOS data was not going to **[**59]** be made public unless and until the case went to trial and it became a public record. The court ordered the DEA to turn over the data because Rule 26 entitled plaintiffs to acquire it, even if it carried a risk of harm to the DEA or defendants. The newspapers are not parties and thus are not entitled to the material.[4] The bar for keeping discovery materials out of their hands is thus considerably lower. In my view, the court did not abuse its discretion in striking those balances.

The proper balance may change over time. If we were to affirm the district court's decision, as I believe we should, the newspapers would still be free to intervene in the future—perhaps after trial—and ask the district court to modify the protective order. Given that the DEA *did* establish good cause at the time the protective order was entered, the burden would be on the newspapers to show good cause for modifying it. *See* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 790 (3d Cir. 1994) (noting that the party seeking to modify a protective order "must come forward with a reason to modify the order"); *see also* Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1211 n.1 (9th Cir. 2002) (placing the burden on the party seeking the protection only because the protective order had been stipulated to and no party had made a "good cause" showing). **[**60]** The district court could then determine whether the DEA's concerns were still valid and compare the newspapers' need for the data with the parties' reliance interests. *See* Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc., 823 F.2d 159, 163 (6th Cir. 1987).

For now, the parties are attempting to negotiate a settlement while simultaneously preparing for a trial that is only a few months away. The district court is marshalling those efforts and did not abuse its discretion in keeping the protective order in place for the time being. The majority sees it otherwise, so I respectfully dissent.

End of Document

[4] The newspapers attempted to get the ARCOS data directly from plaintiffs shortly after they received it from the DEA. At that point, the data was "the raw fruit[] of discovery" not yet in the possession of the court. *See* Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980); *see also* Bond v. Utreras, 585 F.3d 1061, 1066 (7th Cir. 2009); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 252 (4th Cir. 1988).

Reprinted with the permission of LexisNexis

Neutral
As of: December 9, 2019 9:33 PM Z

# In re Nat'l Prescription Opiate Litig.

United States Court of Appeals for the Sixth Circuit

November 8, 2019, Filed

No. 19-0305

**Reporter**
2019 U.S. App. LEXIS 33631 *

In re: NATIONAL PRESCRIPTION OPIATE LITIGATION;In re: MCKESSON CORPORATION; CARDINAL HEALTH, INC., AMERISOURCEBERGEN DRUG CORPORATION; PRESCRIPTION SUPPLY, INC.; DISCOUNT DRUG MART, INC; WALMART, INC.; WALGREEN COMPANY; WALGREEN EASTERN CO. INC.; CVS PHARMACY, INC.; CVS INDIANA, LLC; CVS RX SERVICES, INC.; RITE AID OF MARYLAND, INC., dba Rite Aid of Mid-Atlantic Customer Support Center, Petitioners.

**Prior History:** *Cty. of Summit, Ohio v. Purdue Pharma L.P. (**In re Nat'l Prescription Opiate Litig**.), 2019 U.S. Dist. LEXIS 155118 (N.D. Ohio, Sept. 11, 2019)*

**Counsel:** **[*1]** For In re: MCKESSON CORPORATION, Petitioner: Beth S. Brinkmann, Covington & Burling, Washington, DC; Sonya Diane Winner, Covington & Burling, San Francisco, CA.

For Cardinal Health, Inc., Petitioner: Enu A. Mainigi, Williams & Connolly, Washington, DC.

For Amerisourcebergen Drug Corporation, Petitioner: Kim M. Watterson, Reed Smith, Los Angeles, CA.

For Prescription Supply, Inc., Petitioner: John J. Haggerty, Fox Rothschild, Warrington, PA.

For Discount Drug Mart, Inc., Petitioner: Timothy Dennis Johnson, Cavitch, Familo & Durkin, Cleveland, OH.

For Walmart, Inc., Petitioner: Tina M. Tabacchi, Jones Day, Chicago, IL.

For Walgreen Company, Walgreen Eastern Co., Inc., Petitioners: Kaspar Stoffelmayr, Bartlit Beck, Chicago, IL.

For Cvs Pharmacy, Inc., Cvs Indiana, Llc, Cvs RX Services, Inc., Petitioners: Alexandra W. Miller, Zuckerman Spaeder, Washington, DC.

For Rite Aid of Maryland, Inc., dba: Rite Aid of Mid-Atlantic Customer Support Center, Petitioner: Kelly A. Moore, Morgan, Lewis & Bockius, New York, NY.

For ALBANY COUNTY, NY, Negotiation Class's Class Representatives, Respondent: Jayne Conroy, New York, NY; Christopher A. Seeger, Seeger Weiss, Ridgefield Park, NJ; James Gerard Stranch IV, **[*2]** Branstetter, Stranch & Jennings, Nashville, TN.

For State of Alaska, State of Arizona, State of Delaware, State of Indiana, State of Kansas, State of Michigan, State of Nebraska, State of North Dakota, State of Ohio, State of South Dakota, State of Tennessee, State of Texas, District of Columbia, Amicus Curiaes: Benjamin Michael Flowers, Office of the Attorney General, Columbus, OH; Charles M. Miller, Office Counsel, Ohio Attorney General's Office, Appeals Section, Columbus, OH.

For Co-Lead Negotiation Class Counsel, Respondent: Christopher A. Seeger, Seeger Weiss, Ridgefield Park, NJ; Jayne Conroy, New York, NY.

For Co-Negotiation Class Counsel, Respondent: Samuel Issacharoff, Law Office, New York, NY; Diogenes P. Kekatos, Jennifer Rebecca Scullion, Seeger Weiss, Ridgefield Park, NJ; James Gerard

Stranch IV, Branstetter, Stranch & Jennings, Nashville, TN.

For Chamber of Commerce of The United States of America, Amicus Curiae: Andrew John Pincus, Mayer Brown, Washington, DC.

**Judges:** Before: GUY, GRIFFIN, and KETHLEDGE, Circuit Judges.

## Opinion

ORDER

In this multidistrict litigation, a group of defendants ("the Companies") petition under *Federal Rule of Civil Procedure 23(f)* for permission to appeal the district court's order certifying a "Negotiation **[*3]** Class." Respondent opposes the petition. The Companies move for leave to file a reply in support of their petition. Respondent opposes the motion. Twelve states and the District of Columbia move to file an amicus brief. The United States Chamber of Commerce has filed an amicus brief with the parties' consent.

This litigation encompasses more than 2,000 individual actions. The Negotiation Class is intended to provide counties and cities with a procedure for negotiating settlements with manufacturers, distributors, and other entities alleged to be responsible for the national opiate epidemic. The district court was mindful that a Negotiation Class was a novel procedure but concluded it was a legitimate one based on the unique facts of the case and the likelihood that it might facilitate a global settlement. The court considered each of the four prerequisites in *Rule 23(a)*—numerosity, commonality, typicality, and adequacy of representation—and found that the proposed class met the requirements in *Rule 23(b)(3)* and *23(c)(4)*. Under the proposed procedure, the Companies are not required to negotiate with the class. Any class member may opt out of the class. The underlying litigation will continue unabated. If a settlement **[*4]** is reached, the parties must move for judicial approval as required by *Rule 23(e)*.

Under *Rule 23(f)*, we are authorized to permit an appeal from the grant or denial of a motion for class certification. "[W]e eschew any hard-and-fast test in favor of a broad discretion to evaluate relevant factors that weigh in favor of or against an interlocutory appeal." *In re Delta Air Lines, 310 F.3d 953, 959 (6th Cir. 2002)* (per curiam). We pay special mind to four specific factors. First, if the case "raises a novel or unsettled question," it "may also be a candidate for interlocutory review." *Id. at 960*. "[T]his factor weigh[s] more heavily in favor of review when the question is of relevance not only in the litigation before the court, but also to class litigation in general." *Id.* The question here—whether this class-action procedure is permitted under *Rule 23*—is both novel and relevant to class litigation in general. Second, "the likelihood of the petitioner's success on the merits" is always relevant. *Id.* But "[w]here the petitioner seeks review of a novel and important question, success on the merits may take a diminished role." *Id.* Third, the "death-knell" factor recognizes "that the costs of continuing litigation for either a plaintiff or defendant may present such a barrier that **[*5]** later review is hampered." *Id.* Fourth, "the posture of the case as it is pending before the district court is of relevance." *Id.* Here, the district court entered a final order to certify the class, with no indication that it will review its decision in the future. Having reviewed the district court's memorandum opinion and order, the petition, response, reply, and amicus brief, we find that an interlocutory appeal is warranted.

The motions for leave to file a reply and an amicus brief are **GRANTED**. The petition for permission to appeal the class certification decision is **GRANTED**.

---

End of Document

Reprinted with the permission of LexisNexis

No *Shepard's* Signal™
As of: December 9, 2019 9:35 PM Z

# Abdul Latif Jameel Transp. Co. v. FedEx Corp. (In re Application to Obtain Discovery for Use in Foreign Proceedings)

United States Court of Appeals for the Sixth Circuit

August 8, 2019, Argued; September 19, 2019, Decided; September 19, 2019, Filed

File Name: 19a0246p.06

No. 19-5315

**Reporter**
939 F.3d 710 *; 2019 U.S. App. LEXIS 28348 **; 2019 FED App. 0246P (6th Cir.) ***; 2019 WL 4509287

IN RE: APPLICATION TO OBTAIN DISCOVERY FOR USE IN FOREIGN PROCEEDINGS. ABDUL LATIF JAMEEL TRANSPORTATION COMPANY LIMITED, Movant-Appellant, v. FEDEX CORPORATION, Respondent-Appellee.

**Prior History: [**1]** Appeal from the United States District Court for the Western District of Tennessee at Memphis. No. 2:18-mc-00021—Jon Phipps McCalla, District Judge.

## Case Summary

### Overview

HOLDINGS: [1]-In an action brought under *28 U.S.C.S. § 1782(a)* seeking assistance with discovery for use in a private commercial arbitration pending in a foreign country, the private arbitration proceeding was a "tribunal" within the meaning of the statute because, inter alia, that term was broad enough to include private arbitration, it had been used in that context in legal writings for quite some time, and there no tension between the court's holding and *§ 1782(a)*'s legislative history; [2]-Remand was required because the question of what outcome was appropriate under the Intel factors had not been presented with sufficient clarity and completeness" for the appellate court to consider it in the first instance.

### Outcome

Judgment reversed and action remanded.

**Counsel:** ARGUED: David Livshiz, FRESHFIELDS BRUCKHAUS DERINGER, US LLP, New York, New York, for Appellant.

Daniel T. French, FEDERAL EXPRESS CORPORATION, Memphis, Tennessee, for Appellee.

ON BRIEF: David Livshiz, Linda H. Martin, Paige von Mehren, FRESHFIELDS BRUCKHAUS DERINGER, US LLP, New York, New York, Shea Sisk Wellford, MARTIN, TATE, MORROW & MARSTON, P.C., Memphis, Tennessee, for Appellant.

Daniel T. French, Colleen Hitch Wilson, FEDERAL EXPRESS CORPORATION, Memphis, Tennessee, for Appellee.

**Judges:** Before: COLE, Chief Judge; GRIFFIN and BUSH, Circuit Judges.

**Opinion by:** JOHN K. BUSH

## Opinion

**[*713]** **[***2]** JOHN K. BUSH, Circuit Judge. Thomas Jefferson once counseled his nephew Peter Carr on how to think: "Fix reason firmly in her seat, and call to her tribunal every fact, every opinion."[1] This case calls upon us to do just that. We must decide whether Abdul Latif Jameel Transportation Company Limited ("ALJ"), a Saudi corporation, may rely on *28 U.S.C. § 1782(a)* to discover facts from FedEx Corporation ("FedEx Corp."), a U.S.-based corporation, for use in a commercial arbitration pending in a foreign **[**2]** country. Under *§ 1782(a)*, a federal district court may order discovery "for use in a proceeding in a foreign or international tribunal" upon application by "any interested person." Jefferson used the word "tribunal" in a metaphorical sense to refer to the mind. We must decide whether Congress used the words "foreign or international tribunal" **[*714]** in a literal sense that includes the commercial arbitration involved here.

In its *§ 1782(a)* discovery application, ALJ sought a subpoena for documents from FedEx Corp. and deposition testimony of a corporate representative of that company. ALJ alleges that FedEx Corp. was involved in contract negotiations and performance of two contracts between ALJ and FedEx International Incorporated ("FedEx International"), a subsidiary of FedEx Corp. Each contract became the subject of a commercial arbitration, one pending in Dubai in the United Arab Emirates ("UAE"), the other brought in the Kingdom of Saudi Arabia. As explained below, we only address the availability of discovery for the Dubai arbitration because the arbitration in Saudi Arabia was dismissed, rendering moot ALJ's application as it pertains to this latter proceeding.

The district **[**3]** court denied ALJ's application, holding that the phrase "foreign or international tribunal" in *§ 1782(a)* did not encompass either of the two arbitrations. ALJ now appeals, arguing that the phrase "foreign or international tribunal" does include such proceedings and that ALJ's discovery request should be granted.

**[***3]** The interpretive question is an issue of first impression in the Sixth Circuit, although the Supreme Court provided guidance for interpretation of *§ 1782(a)* in *Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)*. Upon careful consideration of the statutory text, the meaning of that text based on common definitions and usage of the language at issue, as well as the statutory context and history of *§ 1782(a)*, we hold that this provision permits discovery for use in the private commercial arbitration at issue. Accordingly, we **REVERSE** the district court's denial of ALJ's application and **REMAND** for the district court to determine, in the first instance, whether the application should be granted under four discretionary factors the Supreme Court outlined in *Intel* to guide that determination.

I. BACKGROUND

A. The Dispute Between ALJ and FedEx International

This dispute over statutory linguistics arises from supply-chain logistics. In 2014, after a period of negotiations, **[**4]** FedEx International entered a "General Service Provider" ("GSP") contract with ALJ. Under that contract (which was amended in 2015), ALJ agreed to be FedEx International's delivery-services partner in Saudi Arabia, where ALJ is incorporated. By agreement of the parties, disputes relating to the GSP were to be arbitrated in Dubai under the rules of the Dubai International Financial Centre-London Court of International Arbitration ("DIFC-LCIA").

In 2016, FedEx International and ALJ entered another contract, the Domestic Service Agreement ("DSA"), under which FedEx International promised to provide ALJ with "certain support services." R. 3, PageID 38. Those parties also agreed to arbitrate disputes arising under the DSA in Saudi Arabia under the rules and laws of that country.

After FedEx International and ALJ signed the GSP contract but before they entered the DSA, FedEx Corp.—the parent of FedEx International and appellee in this case—acquired TNT Express N.V. ("TNT"), a competitor in the delivery-services market in Saudi Arabia. According to ALJ, it did not become aware of the acquisition until it was already *fait accompli*.

**[***4]** The parties disagree in part about the causes of the underlying **[**5]** dispute. ALJ suggests that FedEx Corp. was significantly involved in luring ALJ into a contractual relationship with FedEx International. **[*715]** ALJ also indicates that FedEx Corp. and FedEx International kept ALJ in the dark about the impending TNT acquisition. According to ALJ, when it learned of

[1] Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1787), *in* 12 *The Papers of Thomas Jefferson* 14, 15 (Julian P. Boyd ed., 1955).

the TNT acquisition, FedEx Corp. and FedEx International misled ALJ to believe that the future of its contractual relationship with FedEx International was secure. ALJ contends that, for several weeks during the fall of 2017, FedEx International failed to provide ALJ with the support promised in the DSA. Then, "without warning," according to ALJ, FedEx International announced that it would not be renewing the GSP contract and that ALJ would have to bid against other potential contractors if it wanted to keep working with FedEx International. Appellant Br. at 10.

FedEx Corp. responds that ALJ's brief overstates, and makes false assertions about, FedEx Corp.'s involvement in the negotiations and communications between FedEx International and ALJ. Additionally, FedEx Corp. disagrees that FedEx International was at fault in causing the ALJ-FedEx International rift. According to FedEx Corp., the trouble **[**6]** between ALJ and FedEx International started when ALJ began providing unsatisfactory service; FedEx International sought to work with ALJ but eventually gave up and decided to open up ALJ's position as FedEx International's general service partner in Saudi Arabia to bidding among various applicants.

These factual disputes aside, ALJ and FedEx Corp. agree that attempts to reconcile soon broke down completely. On March 4, 2018, ALJ commenced arbitration against FedEx International (the "Saudi Arbitration") before a panel constituted under the rules and laws of Saudi Arabia, as provided in the DSA. A few weeks later, on March 21, FedEx International commenced arbitration against ALJ (the "DIFC-LCIA Arbitration") before a panel constituted under the rules of the DIFC-LCIA, as provided in the GSP contract.

The DIFC-LCIA Arbitration panel consists of three members appointed by the DIFC-LCIA Arbitration Centre. According to FedEx Corp., the DIFC-LCIA Arbitration Centre is a joint venture of the London Court of International Arbitration and the DIFC Arbitration **[***5]** Institute.[2] The DIFC Arbitration Institute, in turn, was established by statute in the emirate of Dubai. Awards of the arbitral panel **[**7]** are reviewable by the DIFC Court, which was also established by statute in Dubai. The DIFC Court reviews arbitral awards for procedural soundness under the DIFC Arbitration Law, which was promulgated by the Dubai government. In addition, if a party challenges an award alleging inconsistency with UAE public policy, the award is reviewed under the law of the UAE. Aside from these review provisions, however, awards of the panel are binding on the parties. A merits hearing in the pending DIFC-LCIA Arbitration between ALJ and FedEx International is currently scheduled for November 3-9, 2019.

As for the makeup and operations of the Saudi Arbitration panel, we do not go into details because on April 30, 2019 (shortly after ALJ filed this appeal), that panel issued an award dismissing ALJ's claims. ALJ has challenged the dismissal and is awaiting a decision. Below, in section II(A), we explain why the dismissal of the Saudi Arbitration has rendered moot the issues in this appeal as they pertain to that arbitration proceeding.

B. Procedural History of ALJ's *§ 1782(a)* Discovery Application

On May 14, 2018, ALJ filed an application for discovery under *28 U.S.C. § 1782(a)* **[*716]** against FedEx Corp. in the United States District Court **[**8]** for the Western District of Tennessee, the federal district where FedEx Corp. is headquartered. In the application, ALJ sought to compel production of documents from FedEx Corp. and to subpoena deposition testimony from a corporate representative of FedEx Corp. Although FedEx Corp. was not a party to either of ALJ's contracts with FedEx International, ALJ sought, among many other pieces of information:

> 1. All Documents and Communications concerning the negotiations of the Agreements between FedEx Corp. or FedEx International, on the one hand, and ALJ, on the other hand.
>
> 2. All Documents or Communications concerning or reflecting (i) any representations, assertions or assurances provided by FedEx Corp. or FedEx International, or any agent thereof, to ALJ, or any agent thereof, concerning the length of the Agreements, or FedEx Corp. or FedEx International's intent to enter into a long-term business relationship with ALJ; and (ii) all any [sic] knowledge **[***6]** or awareness on the part of FedEx Corp. or FedEx International of ALJ's need to make investments in connection with ALJ's agreed-upon provision of services to FedEx International.

R. 1-3, PageID 16.

The district court held a hearing on ALJ's **[**9]** application on July 17, 2018, and it denied the

[2] FedEx Corp. provided some of these details at oral argument, and they are undisputed.

application in an order dated March 13, 2019. In its order, the district court determined that neither the Saudi Arbitration panel nor the DIFC-LCIA Arbitration panel constituted a "foreign or international tribunal" within the meaning of § 1782(a). Therefore, the district court held that ALJ could not, as a matter of law, obtain discovery for use in those proceedings under § 1782(a). The district court did not consider whether it would have exercised its discretion to grant ALJ's application under § 1782(a) had it determined that either arbitration panel was a "foreign or international tribunal."

ALJ timely filed a notice of appeal, and on April 12, 2019, it moved this court to expedite the appeal in light of the pending arbitration proceedings. On April 22, 2019, we ordered an expedited briefing and argument schedule.

II. DISCUSSION

A. Whether the Saudi Arbitration Discovery Dispute is Justiciable

Before turning to the statutory interpretation inquiry, we must address a justiciability issue with regard to the Saudi Arbitration. As noted, that proceeding has been dismissed, and ALJ is appealing the dismissal. FedEx Corp. argues that because the Saudi Arbitration is **[**10]** no longer pending, it "is irrelevant to ALJ's § 1782 motion." Appellee Br. at 9-10. Therefore, FedEx Corp. focuses its substantive arguments on the DIFC-LCIA Arbitration only.

In response, ALJ argues that if we determine that the question regarding the Saudi Arbitration is moot and inappropriate for merits consideration, we should vacate the district court's denial of the § 1782(a) application with respect to that arbitration. ALJ worries that the Saudi Arbitration panel's dismissal may be reversed by a Saudi court and that if we do not bifurcate the district court's judgment and vacate as moot with respect to the Saudi Arbitration, **[***7]** the district court's reasoning as to that proceeding will stand and will preclude ALJ from bringing a future application.

We agree that the dismissal of the Saudi Arbitration makes the interpretive question moot with respect to that arbitration. Therefore, it would be inappropriate for us **[*717]** to make a merits ruling on the question presented as it pertains to the Saudi Arbitration panel. *See* Church of Scientology of Cal. v. United States, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992). But ALJ's preclusion fears are unfounded. ALJ brought one § 1782(a) application in the district court, relying on both the DIFC-LCIA Arbitration and the Saudi Arbitration as "foreign or international **[**11]** tribunal[s]" that would trigger the statute's applicability. And the district court entered one judgment rejecting both of ALJ's proffered reasons for needing discovery. Our conclusion that the DIFC-LCIA Arbitration panel is a "foreign or international tribunal" is sufficient for us to reverse that judgment and require the district court to consider ALJ's application anew. Therefore, we need not address the Saudi Arbitration, but the district court's judgment will not remain in place, so that judgment will not preclude a future application should ALJ want to bring one. *See* Dodrill v. Ludt, 764 F.2d 442, 444 (6th Cir. 1985) (noting that "the general rule is that a judgment which is vacated, *for whatever reason*, is deprived of its conclusive effect as collateral estoppel" as to all of the issues litigated and decided in the action (emphasis added) (citations omitted)); *see generally* id. at 444-45 (discussing and applying the rule).

B. Whether the DIFC-LCIA Arbitration Panel is a "Foreign or International Tribunal"

We must now determine whether the DIFC-LCIA Arbitration panel qualifies as a § 1782(a) "foreign or international tribunal." Neither the phrase "foreign or international tribunal" nor the word "tribunal" is defined in the statute, and the parties **[**12]** dispute whether the word "tribunal" includes a privately contracted-for commercial arbitration. The district court concluded that it does not.

We review the district court's decision on a question of statutory interpretation—a legal question—de novo. *See* United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998). "In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." Artis v. District of Columbia, 138 S. Ct. 594, 603, 199 L. Ed. 2d 473 (2018) (citation **[***8]** and internal quotation marks omitted). And ordinary meaning is to be determined retrospectively: we must go back to "the time Congress enacted the statute" and discern its meaning from that point in the past. *See New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019)* (citations omitted); *see also* Wisc. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070, 201 L. Ed. 2d 490 (2018).

Thus, we can sometimes determine the ordinary meaning of words in a statute by reference to dictionaries in use at the time the statute was enacted. *See* Food Marketing Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363-64, 204 L. Ed. 2d 742 (2019). Here, the

relevant language was added to § 1782(a) by amendment in 1964, *see* Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 248-49, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004), so we may consult dictionaries in use at that time. In addition, we may consult subsequently published dictionaries. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 419 ("Scalia & Garner, *Reading Law*") ("Dictionaries tend to lag behind linguistic realities . . . ."). However, we use later-published **[**13]** dictionaries carefully and would hesitate to rely upon definitions appearing *solely* in dictionaries published more than a decade or so after the statute's enactment.

**[*718]** We also may consider other evidence of usage in the years preceding the enactment: for example, the sense in which courts used a particular word or phrase. *See New Prime, 139 S. Ct. at 540* (looking to early-20th-century cases' use of the term "contract of employment" as an aid to determining the meaning of that phrase in a 1925 statute); *see also* Argus Leader Media, 139 S. Ct. at 2363. As a respected treatise on statutory interpretation notes, the context of a statute's text includes "a word's historical associations acquired from recurrent patterns of past usage." Scalia & Garner, *Reading Law* 33.

Of course, linguistic meaning of words may not always equate to statutory meaning if the structure of the statute suggests something else. Words "must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989) (citation omitted); *see also* Nat'l Air Traffic Controllers Ass'n v. Sec'y of Dep't of Transp., 654 F.3d 654, 657 (6th Cir. 2011) ("Plain meaning is examined by looking at the language and design of the statute as a whole." (citation omitted)). But if an examination of the **[***9]** statute's text, context, and structure produces an answer to our interpretation **[**14]** question, we need inquire no further. *See* Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004).

Applying these principles here, we address the statute in which the operative language—"foreign or international tribunal"—appears. Section 1782 provides:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in *a foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not **[**15]** prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.
>
> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

28 U.S.C. § 1782 (emphasis added).

As an initial matter, it is important to note that we have no evidence that the phrase "foreign tribunal" or the phrase "international tribunal" is a term of art. **[*719]** We have located no dictionary that defines either phrase.[3] *See New Prime, 139 S. Ct. at 539* (noting that the absence of dictionary definitions for the term "contract of employment" in 1925 was "a first hint the phrase wasn't then a term of art bearing some specialized meaning"). And we have found no other evidence that either phrase is a term of art with a specialized meaning.

**[***10]** We note also that there is no dispute that the DIFC-LCIA arbitration is "foreign or international" in

---

[3] We consulted *Merriam-Webster's Dictionary of Law* (1996); Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995); *Ballentine's* ***[**16]*** *Law Dictionary* (William S. Anderson ed., 3d ed. 1969); and *Black's Law Dictionary* (4th ed. 1957).

nature.[4] Thus, we focus on the meaning of "tribunal," which is hotly disputed.[5]

1. Dictionary Definitions

To determine the meaning of "tribunal," we turn first to dictionary definitions. There is dictionary support for ascribing a meaning that includes private arbitral panels. For example, several reputable legal dictionaries contain definitions of "tribunal" broad enough to include private arbitrations. *See Merriam-Webster's Dictionary of Law* (1996) ("a court or forum of justice: a person or body of persons having to hear and decide disputes so as to bind the parties"); Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed. 1995) ("(1) 'a court **[**17]** or other adjudicatory body[]' . . . . **[*720]** In its most usual application—sense (1)—*tribunal* is broader than *court* and generally refers to a body, other than a court, that exercises judicial functions . . . ."); *cf.* Max Radin, *Law Dictionary* (1955) ("A general word equivalent to court, but of more **[***11]** extensive use in public and international law."). Other legal dictionaries contain narrower definitions. *See Black's Law Dictionary* (5th ed. 1979) ("The whole body of judges who compose a jurisdiction; a judicial court; the jurisdiction which the judges exercise . . . ."); *Ballentine's Law Dictionary* (William S. Anderson ed., 3d ed. 1969) ("A court. The seat or bench for the judge or judges of a court."); *Black's Law Dictionary* (4th ed. 1951) (same as 1979 edition).

Turning to non-legal sources, at least two widely used English dictionaries define "tribunal" broadly enough to include private arbitrations. *See Webster's Third New International Dictionary* (1966) ("2: a court or forum of justice: a person or body of persons having authority to hear and decide disputes so as to bind the disputants . . . ."); *Webster's New International Dictionary of the English Language* (2d ed. 1950) (same). On the **[**18]** other hand, some English dictionaries contain narrower definitions whose inclusiveness of private proceedings is more debatable. *See Random House Unabridged Dictionary* (2d ed. 1993) ("1. a court of justice. 2. a place or seat of judgment."); *American Heritage Dictionary of the English Language* (1976) ("1. a seat or court of justice."); *see also The Oxford English Dictionary* (2d ed. 1989) ("2.a. A court of justice; a judicial assembly . . . c. Any of various local boards of officials empowered to settle disputes, esp. between an individual and a government department, to adjudicate on fair rents, exemption from military service, etc. . . . .").[6]

---

[4] Furthermore, we have no reason to doubt that the phrase "foreign or international" has a broad meaning that, at minimum, encompasses a proceeding like the DIFC-LCIA Arbitration that is taking place abroad and is not subject to United States laws or rules. For instance, consider the following definitions of "foreign": *Webster's New World College Dictionary* (3d ed. 1997) ("1. Situated outside one's own country, province, locality, etc. . . . . 4. Not subject to the laws or jurisdiction of the specified country."); *Merriam-Webster's Dictionary of Law* (1996) ("Not being within the jurisdiction of a political unit (as a state); *esp*: being from or in a state other than the one in which a matter is being considered . . . ."); *The Oxford English Dictionary* (2d ed. 1989) ("7. Situated outside the country; not in one's own land."); *Webster's Third New International Dictionary* (1961) ("1. Situated outside a place or country: as (a) situated outside one's own country . . . . 8.(a) not being within the sphere of operation of the laws of a country under consideration—opposed to *domestic* . . . ."); *cf. Ballentine's Law Dictionary* (3d ed. 1969) ("Belonging to another nation or country."). And consider the following definitions of "international": *Webster's New World College Dictionary* (3d ed. 1997) ("4. Of, for, or by people in various nations."); *The Random House Dictionary of the English Language* (2d ed. unabridged 1987) ("2. Of or pertaining to two or more nations or their citizens . . . ."); *The American Heritage Dictionary of the English Language* (1969) ("Of, relating to, or involving two or more nations or nationalities . . . ."); *Ballentine's Law Dictionary* (William S. Anderson ed., 3d ed. 1969) ("A characterization in a general manner of business or transactions between nations or between persons of different nations."); *Webster's Third New International Dictionary* (1961) ("1. Existing between or among nations or their citizens . . . ."). Because the question is not before us, we need not decide whether the DIFC-LCIA Arbitration panel is most aptly described as only "foreign," only "international," or both.

[5] We would be remiss if we did not note that both parties *agree* that the meaning of "tribunal" in [§ 1782(a)] is not limited to "court"—the narrower of the two definitions we will discuss. Furthermore, the Supreme Court's decision in [Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)], which we will also discuss later, applied the statute to a proceeding before a non-judicial entity. The Supreme Court seems to have thus implicitly rejected the narrower definition of the word. However, FedEx Corp. argues that the word is limited to government-sponsored entities and excludes private arbitration. Thus, for the sake of thoroughness, we will explain in section II(B)(2) why American courts' use of the word indicates both that the broader definition applies and that the word includes private arbitral proceedings. Below, in sections II(B)(4)(b) and II(B)(5)-(6), we will discuss FedEx Corp.'s counter-arguments in detail.

[6] *See also The Random House Dictionary of the English Language* (1973), *The Oxford English Dictionary* (1971), and

In sum, several legal and non-legal dictionaries contain definitions of "tribunal" broad enough to include private arbitration, while others contain narrower definitions that seem to exclude such proceedings. Because dictionaries leave room for interpretation, we turn to other indicators of usage to discern the word's linguistic meaning.

2. Use of the Word "Tribunal" in Legal Writing

A broader definition of "tribunal" finds more **[**19]** support in American courts' historical and continuing usage of the word to describe private arbitrations. *Cf. New Prime, 139 S. Ct. at 540 & nn.2-3* (reviewing American courts' prior usage of a phrase to determine the meaning of that **[***12]** phrase in a statute). American jurists and lawyers have long used the word "tribunal" in its broader sense: a sense that includes private, contracted-for, commercial arbitral panels. For example, Justice Joseph Story's *Commentaries on Equity Jurisprudence* used the word "tribunal" to describe private, contracted-for arbitrations:

> Neither will [courts of equity] . . . compel arbitrators to make an award; nor, when they have made an award, will they compel them to disclose the grounds of their judgment. The latter doctrine stands upon the same ground of public policy, as the others; that is to say, in the first instance, not to compel a resort to these domestic tribunals, and, on the other hand, not to disturb their decisions, when made, except upon very cogent reasons.

**[*721]** 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 1457 (6th ed. 1853) (footnotes omitted).

Furthermore, courts used the word to describe private, contracted-for commercial arbitrations for many years before Congress added **[**20]** the relevant language to *§ 1782(a)* in 1964. In *Henry v. Lehigh Valley Coal Co., 215 Pa. 448, 64 A. 635, 636 (Pa. 1906)*, for example, the Supreme Court of Pennsylvania described a panel of three engineers—to be chosen by a method prescribed by the parties' contract—as a "special tribunal to settle a special subject of dispute . . . , to wit, how much minable coal still remains unmined in the land." Similarly, in *Eastern Engineering Co. v. Ocean City, 11 N.J. Misc. 508, 167 A. 522, 523 (N.J. 1933)*, the Supreme Court of New Jersey stated: "The settlement of controversies by arbitration is an ancient practice at common law. In its broad sense, it is a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law." In *Susong v. Jack, 48 Tenn. 415, 416-17 (1870)*, the Supreme Court of Tennessee held that if parties to litigation referred their case to arbitration, the litigation would be discontinued. In so holding, the court stated that "it is the voluntary act of the parties in submitting their cause to another tribunal, that operates to discontinue" the pending court case. *Id.* The state-court reporters abound with other examples, some within a few years of the 1964 amendment that added the statutory language at issue. *See, e.g., Park Constr. Co. v. Indep. Sch. Dist., 209 Minn. 182, 296 N.W. 475, 477 (Minn. 1941)*; *United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus. of the U.S. & Can., Local Union 525, Las Vegas v. Stine, 76 Nev. 189, 351 P.2d 965, 974 (Nev. 1960)*; *Astoria Med. Grp. v. Health Ins. Plan, 11 N.Y.2d 128, 182 N.E.2d 85, 87, 227 N.Y.S.2d 401 (N.Y. 1962)*; **[***13]** *Gilbert v. Burnstine, 135 Misc. 305, 237 N.Y.S. 171, 178 (N.Y. Sup. Ct. 1929)*, *rev'd*, *255 N.Y. 348, 174 N.E. 706 (N.Y. 1931)*; *Comm'rs v. Carey, 1 Ohio St. 463, 468 (1853)*; *Green & Coates Sts. Passenger Ry. Co. v. Moore, 64 Pa. 79, 91, 17 Pitts. Leg. J. 43 (1870)*; *Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353, 356 (Utah 1932)*.

The Supreme Court of the United States, and our court, have used the same terminology. **[**21]** In *Toledo Steamship Co. v. Zenith Transportation Co., 184 F. 391, 400 (6th Cir. 1911)*, this court was addressing a private agreement to arbitrate when it stated that the "question [of fault] was settled against [the appellant] by his own tribunal." In *Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203, 76 S. Ct. 273, 100 L. Ed. 199 (1956)*, the Supreme Court observed: "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result." *Bernhardt* involved a contract under which the parties agreed to resolve disputes by "arbitration under New York law by the American Arbitration Association;" thus, the case involved a private arbitration. *Id. at 199*. As another example, in a 1955 case, Justice Hugo Black referred to the question "whether a judicial rather than an arbitration tribunal shall hear and determine [an] accounting controversy." *Baltimore Contractors v. Bodinger, 348 U.S. 176, 185, 75 S. Ct. 249, 99 L. Ed. 233 (1955)* (Black, J., dissenting), *overruled by* *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)*. *Bodinger* involved a contract in which the parties to a joint venture agreed to refer disputes to one of two

---

*The American College Dictionary* (1970) (all giving similar definitions).

named private arbitrators "or an accountant or auditor named by either of them." Id. at 177. And in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 121 n.1, 44 S. Ct. 274, 68 L. Ed. 582 **[*722]** (1924), the Supreme Court quoted an 1845 district court case that stated:

> Courts of equity do not refuse to interfere to compel a party specifically **[**22]** to perform an agreement to refer to arbitration[] because they wish to discourage arbitrations . . . . But when they are asked to . . . compel the parties to appoint arbitrators whose award shall be final, they necessarily pause to consider whether such tribunals possess adequate means of giving redress . . . .

*Id.* (quoting Tobey v. Cty. of Bristol, 23 F. Cas. 1313, 1320, F. Cas. No. 14065 (D. Mass. 1845)).[7]

**[***14]** More recently, the Supreme Court used the phrase "international arbitral tribunal" to describe a private arbitration. In Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985), the Court was addressing a proceeding in a private arbitral body, established pursuant to contract under the rules of the Japan Commercial Arbitration Association, when it stated: "To be sure, the international arbitral tribunal owes no prior allegiance to the legal norms of particular states . . . . The tribunal, however, is bound to effectuate the intentions of the parties." Id. at 636. Although *Mitsubishi* post-dates the 1964 amendment to § 1782(a) and is therefore less instructive than the earlier examples cited, it is nevertheless evidence of the common usage of the word "tribunal" to describe privately constituted arbitral bodies.

These sources show that American lawyers and judges have long understood, and still use, the word "tribunal" **[**23]** to encompass privately contracted-for arbitral bodies with the power to bind the contracting parties.

3. Other Uses of the Word "Tribunal" in the Statute

Many of the foregoing dictionary definitions and the cited instances of longstanding usage support a linguistic definition of "tribunal" that includes a privately contracted-for arbitral body. But if the overall context and structure of the statute indicate that Congress used the word in a different sense than its linguistic meaning, the congressional meaning controls. *See* Davis, 489 U.S. at 809. Here, other evidence of congressional usage does not compel a narrower understanding of that word's meaning than its linguistic meaning.

"[I]dentical words used in different parts of the same statute are generally presumed to have the same meaning." IBP, Inc. v. Alvarez, 546 U.S. 21, 34, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005) (citation omitted); *accord* Scalia & Garner, *Reading Law* 170; *see also* United States v. Detroit Med. Ctr., 833 F.3d 671, 676 (6th Cir. 2016). Therefore, if other uses of the word "tribunal" appeared in contexts clearly demanding a more limited reading, we would consider whether the broad ordinary meaning of that word might not be the meaning in § 1782(a).

However, other uses of the word in the statute do not dictate a more limited reading. First, a sentence in § 1782(a) provides that "[t]he [discovery] order **[**24]** may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country **[***15]** or the international tribunal, for taking the testimony or statement or producing the document or other thing." Although the phrase "practice and procedure of the foreign country or the international tribunal" may appear **[*723]** to support FedEx Corp.'s position (which we will address below) that § 1782(a) applies only to governmental entities, that phrase is consistent with the statute's application to private arbitrations of the sort at issue here. The sentence's permissive wording—"may be in whole or part"—indicates that this is an optional borrowing provision: if the foreign country or international tribunal for use in which the district court is ordering discovery has procedures governing the taking of evidence that the district court finds would be helpful, then the district court may order that evidence be collected pursuant to those procedures. The most that could be said of the sentence is that it may be read to assume that a foreign country or international tribunal will have evidence-gathering procedures governing any given proceeding. But the statute's terms do not **[**25]** require that such procedures exist or that a "foreign tribunal" be a governmental entity of a country that has prescribed such procedures.

Title 28, Chapter 117 (which is entitled "Evidence; Depositions" and includes § 1782(a)) contains only one

[7] *See also, e.g.,* Am. Airlines, Inc. v. Louisville & Jefferson Cty. Air Bd., 269 F.2d 811, 816 (6th Cir. 1959); Ky. River Mills v. Jackson, 206 F.2d 111, 119 (6th Cir. 1953); Wilko v. Swan, 201 F.2d 439, 444 (2d Cir. 1952), *rev'd*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953).

other instance of "tribunal," and that instance is not inconsistent with a definition of the word that includes private arbitrations.[8] Specifically, section 1781 addresses the transmittal of "a letter rogatory issued, or request made, by a foreign or international tribunal" to a "tribunal, officer, or agency in the United States." A private arbitral panel can make a request for evidence, so this section does not indicate that the word "tribunal" in the statute refers only to judicial or other public entities. Therefore, we see no reason to doubt our conclusion that the meaning of "tribunal" in § 1782(a) includes private arbitrations.

"[O]ur analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999) (citations and internal quotation marks omitted). Here, the text, context, and structure of § 1782(a) provide no reason to doubt that the word "tribunal" includes private commercial arbitral panels established pursuant **[**26]** to contract and having the authority to **[***16]** issue decisions that bind the parties. Therefore, we need look no further to hold that the DIFC-LCIA Arbitration panel is a "foreign or international tribunal" and reverse the district court's judgment.

4. The Supreme Court's Decision in *Intel*

Our holding finds support also in Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004). Although the Supreme Court has not addressed the particular question facing us here, its decision in *Intel* did address the scope of § 1782(a)'s use of "tribunal" in a different factual context. Both parties cite *Intel* in support of their respective positions on the statutory interpretation issue, so we will address whether the decision casts doubt on our textual conclusion. It does not. In fact, *Intel* determined that § 1782(a) provides for discovery assistance in non-judicial proceedings.

a. The Facts and Reasoning of *Intel*

*Intel* concerned an international antitrust enforcement complaint brought by Advanced Micro Devices, Inc. ("AMD") against Intel Corporation ("Intel") with **[*724]** the Directorate-General for Competition ("DG-Competition") of the Commission of the European Communities (the "Commission"). Intel, 542 U.S. at 246. The DG-Competition was the "primary antitrust law enforcer" of the European Union. Id. at 250. And the **[**27]** Commission was an "executive and administrative" body, *id.*, with the authority to "enforce the [Treaty Establishing European Community] with written, binding decisions, enforceable through fines and penalties," id. at 252 (citation omitted).

Antitrust proceedings in this system proceeded as follows. The DG-Competition would receive a complaint, which it would investigate. Id. at 254. If the DG-Competition decided to pursue the complaint, it would notify the investigation's target, which would then be subject to a hearing. Id. at 254-55. After the hearing, the officer who conducted the hearing would give the DG-Competition a report; the DG-Competition would provide a recommendation to the Commission on whether to dismiss the complaint or hold the target liable. Id. at 255. "The Commission's final action dismissing the complaint or holding the target liable [was] subject to review in the Court of First Instance and the European Court of Justice." *Id.*

**[***17]** In *Intel*, AMD filed a § 1782(a) application in federal district court to obtain evidence from Intel for use in the antitrust enforcement proceeding. Id. at 246. Relevant here, the Supreme Court had to ascertain whether the Commission was a "foreign or international tribunal" within the meaning of § 1782(a). **[**28]** *See* id. at 257. The Supreme Court concluded that it "ha[d] no warrant to exclude the . . . Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit." Id. at 258.

In reaching that conclusion, the Court noted that the pre-1964 version of the statute had empowered district courts to order discovery "in any judicial proceeding pending in any court in a foreign country." Id. at 248 (emphasis omitted); *see* id. at 258. In 1964, Congress replaced that phrase with "in a proceeding in a foreign or international tribunal." Id. at 248-49, 258. According to the *Intel* Court, "Congress understood that change to 'provid[e] the possibility of U.S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad].'" *Id.* (alterations in original) (quoting S. Rep. No. 88-1580, at 7-8 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3782, 3788 ("Senate Report")). Thus, on the Supreme Court's reasoning, the word "tribunal" applies to non-judicial proceedings.

[8] As quoted in section II(B) above, subsection (b) of § 1782 also contains the phrase "foreign or international tribunal." However, it appears in the same context as subsection (a)'s use of the phrase, and we do not believe it holds any clues to that phrase's meaning in subsection (a).

In further support of its conclusion that the Commission was a "tribunal," the Supreme Court quoted a law review article by a professor who had participated in drafting the 1964 amendments:

> "[T]he term 'tribunal' . . . includes investigating magistrates, administrative **[**29]** and *arbitral tribunals*, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts"; in addition to affording assistance in cases before the European Court of Justice, *§ 1782*, as revised in 1964, "permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers."

*Id.* (second and third alterations in original) (emphasis added) (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-27 & nn.71, 73 (1965)). Finally, the Supreme Court quoted an amicus brief from **[*725]** the Commission that explained how the Commission's "investigative function blur[red] into decisionmaking" when it decided what action to take pursuant to the DG-Competition's report. *Id.* (citation omitted).

**[***18]** As the foregoing shows, the Supreme Court seems to have primarily focused on the decision-making power of the Commission—and Congress's substitution in 1964 of the broad phrase "foreign or international tribunal" for the specific phrase "judicial proceeding in a foreign country"—in reaching its conclusion that the Commission was a "tribunal." In explaining its reasoning, the *Intel* Court said nothing **[**30]** that would make us doubt the outcome of our textual analysis in this case.[9] FedEx Corp. disagrees, however, so next we will address its reading of *Intel*.

b. Whether *Intel* Limits *§ 1782(a)* to "State-Sponsored" Arbitrations

Not disputing that some arbitrations fall within the statute's use of "tribunal," FedEx Corp. argues that only a certain type of arbitration qualifies: namely, "state-sponsored" arbitration. Appellee Br. at 24. By "state-sponsored," FedEx Corp. appears to refer to arbitral authorities permanently maintained by a national or international government to deal with certain categories of disputes, as opposed to arbitral authorities constituted pursuant to a contract between private parties to deal with particular commercial disputes as they arise.

FedEx Corp. does not provide any examples of "state-sponsored" arbitral bodies that would fit its reading of the statute. Instead, FedEx Corp. cites a line from the section of *Intel* describing four discretionary factors district courts should consider in deciding whether to grant a *§ 1782(a)* request. The second factor in the analysis is "the nature of the foreign tribunal, the character of the proceedings underway abroad, **[**31]** and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance." *Intel, 542 U.S. at 264*. Because a private arbitration panel "is not a 'foreign government' nor a 'court' nor an 'agency,'" **[***19]** FedEx Corp. argues, it "is not within the class of tribunals contemplated in *Intel*." Appellee Br. at 25.

When viewed in context, however, this sentence from *Intel* does not do the work FedEx Corp. asks of it. First, and most saliently, this portion of the *Intel* opinion simply describes one factor for district courts to consider when deciding whether to grant a *§ 1782(a)* request *after* making the threshold determination of whether a given proceeding is in a "tribunal." Nothing in the quoted sentence indicates that the *Intel* Court was attempting to define "tribunal" in this portion of the opinion.

**[*726]** Second, the quoted sentence does not foreclose the possibility that a district court might consider the privately constituted "nature" of a "tribunal" to counsel against granting discovery in a given case—for instance, if an arbitral panel has limited resources to consider outside evidence (a factual determination that the district court would be in a better position than an

---

[9] ALJ emphasizes the *Intel* Court's quotation from the Smit law review article, with its inclusion of "arbitral tribunals," as evidence that private arbitrations are included in the meaning of "tribunal." FedEx Corp. responds that (1) this portion of the Smit quotation was dicta and should be accorded minimal weight and (2) "arbitral tribunals" does not necessarily refer to *private* arbitral panels. Even granting that FedEx Corp.'s arguments have some merit, the Supreme Court's approving quotation of the Smit article certainly provides no affirmative support for FedEx Corp.'s reading of the statute. Furthermore, our conclusion about the guidance to be derived from *Intel* would be the same absent the Smit article's mention of "arbitral tribunals." The characteristics of the Commission mentioned by the *Intel* Court in reaching its conclusion support our conclusion here that the arbitration at issue is a "tribunal," *see* *Intel, 542 U.S. at 258*: the DIFC-LCIA panel is a "first-instance decisionmaker" with the power to bind the parties—an exercise of "quasi-judicial powers," *see* *id. at 257* (citation omitted).

appellate **[**32]** court to make). Indeed, that the Court made "the nature of the foreign tribunal" a factor for the district court to consider suggests that the Court was not attempting to contemplate any and all possible types of "tribunal" in which § 1782(a) discovery might be granted. As the Court noted, "[i]n light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding 'in a foreign or international tribunal.'" Intel, 542 U.S. at 263 n.15.

In conclusion, Intel contains no limiting principle suggesting that the ordinary meaning of "tribunal" does not apply here. FedEx Corp., however, argues that such a principle may be found in the legislative history of § 1782(a) and in policy considerations, and it directs our attention to two of our sister circuits' decisions that relied on those sources. To those decisions we now turn.

5. The Second Circuit and Fifth Circuit Decisions

Both parties have spent extensive resources briefing and arguing non-textual arguments, and we recognize that our decision today is at odds with two other circuits' decisions on this issue. *See* Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999) ("*Biedermann*"); National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc., 165 F.3d 184 (2d Cir. 1999) **[***20]** ("*NBC*"). Therefore, **[**33]** we will explain why the counter-arguments do not dissuade us from our conclusion.

FedEx Corp. relies on *NBC* and *Biedermann* to support its argument that only "state-sponsored" proceedings fall within § 1782(a)'s scope. In those decisions, the Second and Fifth Circuits, respectively, determined that the word "tribunal" in § 1782(a) does not clearly exclude private arbitrations but that the scope of the word is ambiguous. *See* Biedermann, 168 F.3d at 881; NBC, 165 F.3d at 188. After considering the legislative history of § 1782(a) as well as policy considerations, the Second and Fifth Circuits concluded that "tribunal" includes only "governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies." NBC, 165 F.3d at 190; *see* Biedermann, 168 F.3d at 882.

Although the word "tribunal" has a broad definition and a narrow definition in dictionaries, we do not agree that legislative history is required to resolve the scope of the word in § 1782(a). First, we believe the Second and Fifth Circuits turned to legislative history too early in the interpretation process. The *NBC* court turned to legislative history after determining that the definition of "tribunal" *is* broad enough to include private arbitrations. *See* NBC, 165 F.3d at 188; *see also* Biedermann, 168 F.3d at 881 (agreeing with the Second Circuit that the **[**34]** phrase "'foreign or international tribunal' is ambiguous" and relying on the history and apparent purpose of the statute to determine the meaning of that phrase). By contrast, we agree that dictionary definitions *alone* do not necessarily produce the conclusion that "tribunal" extends to the proceeding at issue here; however, courts' longstanding usage of the word shows not only that one permissible meaning of "tribunal" includes private arbitrations but **[*727]** also that that meaning is the best reading of the word in this context. Thus, it is not necessary or appropriate to consult extra-textual sources of information. *See* Lamie, 540 U.S. at 539.

Second, some scholars and judges have questioned the reliability of legislative history as an indicator of statutory meaning. *See generally* Scalia & Garner, *Reading Law* 369-90. For example, some scholars and judges have noted that comments on a statute's meaning in congressional reports do not undergo the rigorous process of political horse-trading, bicameralism, and presentment; thus, these commentators have argued, those comments are not **[***21]** an appropriate guide to the meaning of text that did go through that process. *See, e.g.*, John F. Manning, *Textualism as a Nondelegation* ***[**35]*** *Doctrine*, 97 Colum. L. Rev. 673, 728 (1997). A related concern is that, even assuming a court may properly consider the subjective intentions of those who voted on a bill, reliance on particular legislators' comments in congressional reports runs into a potential empirical pitfall: those comments may fail accurately to reflect the subjective intentions of a majority of lawmakers. *See, e.g.*, Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 Harv. J.L. & Pub. Pol'y 59, 59 (1988); *see also* Scalia & Garner, *Reading Law* 376.

Assuming that legislative history is a helpful aid in some cases, however, we do not find that it contradicts our conclusion here. In *NBC*, the Second Circuit relied largely on two facts from the legislative history of § 1782(a) to reach its conclusion that the provision applies only to government-run proceedings.[10] First, the court

---

[10] The Fifth Circuit's opinion in *Biedermann* also discussed § 1782(a)'s legislative history. We will not separately discuss that opinion's treatment of the legislative history because the arguments substantially duplicate those in *NBC*.

pointed out that although House and Senate reports accompanying the 1964 amendments spoke of a desire to expand discovery assistance beyond judicial proceedings, there was no mention of "private dispute resolution proceedings such as arbitration" in those reports. NBC, 165 F.3d at 189. Instead, the reports made statements such as, "[t]he word 'tribunal' is used to make it clear that assistance is not confined to **[**36]** proceedings before conventional courts." *Id.* (alteration in original) (quoting Senate Report at 3788; H.R. Rep. No. 88-1052, at 9 (1963) ("House Report")). In addition, the *NBC* court relied on the reports' statement that "[f]or example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries." *Id.* (alteration in original) (quoting Senate Report at 3788; House Report at 9).

The *NBC* court also discussed a second aspect of § 1782(a)'s lineage: a discovery-enabling statute that preceded and was replaced by § 1782(a). This statute, codified before its repeal at 22 U.S.C. §§ 270-270g, provided for discovery assistance in proceedings "before an international tribunal or commission, established pursuant to an agreement between the United States and any foreign government or governments." NBC, 165 F.3d at 192 (quoting repealed **[***22]** 22 U.S.C. § 270). Observing that this statute used the phrase "international tribunal," the *NBC* court stated that "[t]here is no question that the statute applied only to intergovernmental tribunals" and that the purpose of the 1964 amendments was "to broaden the scope of the repealed 22 U.S.C. §§ 270-270g by extending the reach of the surviving statute to **[**37]** intergovernmental tribunals not involving the United States," not to extend discovery assistance to private arbitrations. **[*728]** Id. at 189, 190. *NBC* stated, and FedEx Corp. echoes, that "[t]he legislative history's silence with respect to private tribunals is especially telling because . . . a significant congressional expansion of American judicial assistance to international arbitral panels created exclusively by private parties would not have been lightly undertaken by Congress without at least a mention of this legislative intention." Id. at 190 (footnote omitted).

We are unpersuaded. Even if we were inclined to permit statements in congressional reports to color our view of a statutory term, we would hesitate to rely upon such statements as did *NBC*. Those statements do not exclude privately constituted proceedings from the meaning of "tribunal." If anything, what the statements make clear is Congress's intent to *expand* § 1782(a)'s applicability. Although FedEx Corp. argues that "there is nothing in the legislative history suggesting the expansion extended to private arbitration," Appellee Br. at 18, this argument fails to appreciate that the legislative history does not indicate that the expansion *stopped short* of private **[**38]** arbitration. The facts on which the legislative history is most clear are that the substitution of "tribunal" for "judicial proceeding" broadened the scope of the statute, and the repeal of §§ 270-270g removed the requirement that the United States be a party to an international agreement under which a proceeding takes place. Further inferences from the legislative history must rely on speculation.

For the above reasons, we discern no tension between § 1782(a)'s legislative history and our textual conclusion regarding the scope of the word "tribunal."

6. Policy Considerations

Finally, FedEx Corp. draws our attention to some national policies that it says would be hampered by a reading of "tribunal" that includes private arbitrations. Although FedEx Corp. may be correct in its assessment of some of the interests at stake in extending discovery **[***23]** assistance to private arbitral bodies, "[a]chieving a better policy outcome . . . is a task for Congress, not the courts." *See* Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 13-14, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) (citations omitted). For us, "[i]t suffices that the natural reading of the text produces the result we announce." Id. at 13. But even if we were inclined to countenance policy arguments, we would not agree that they crown FedEx Corp.'s reading of **[**39]** § 1782(a) the correct one.

a. Breadth of § 1782(a) Discovery Compared to Federal Arbitration Act Discovery

FedEx Corp. argues that § 1782(a) provides broader discovery than is available to parties in domestic arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq. It would be incongruous, according to FedEx Corp., to permit foreign parties in arbitration overseas broader discovery than United States parties in arbitration here. In support, FedEx Corp. cites *Biedermann*, where the Fifth Circuit determined that differences between the FAA and § 1782(a) suggested that § 1782(a) should not apply to private arbitration. *See* Biedermann, 168 F.3d at 882-83. For example, the *Biedermann* court noted that § 1782(a) permits "any interested party" to seek a discovery order from a district court; by contrast, the FAA states only that arbitration

panels themselves may order production of witnesses or documents and seek enforcement of those orders in federal district court. *See* Biedermann, **[*729]** 168 F.3d at 883; *see also* NBC, 165 F.3d at 187 (citing 9 U.S.C. § 7).

These concerns fail to persuade us. As ALJ points out, *Intel*—which was decided after NBC and Biedermann—rejected similar proportionality arguments about the breadth of discovery assistance provided by § 1782(a). *See* Intel, 542 U.S. at 260-63. The petitioner, Intel, asked the Supreme Court to rule that district courts must not order **[**40]** discovery under § 1782(a) unless the applicant demonstrates that the same discovery would be available under the rules of the foreign jurisdiction. *See* id. at 260-61. After determining that the text and history of § 1782(a) failed to support a "foreign-discoverability" requirement, the Supreme Court addressed Intel's argument that imposing such a requirement would serve the policy of "maintaining parity between litigants":

> **[***24]** While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).
> . . . .
> . . . When information is sought by an "interested person," a district court could condition relief upon that person's reciprocal exchange of information. Moreover, the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate.
>
> *We also reject Intel's suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding.* Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States **[**41]** courts to engage in comparative analysis to determine whether analogous proceedings exist here.

Id. at 261-63 (emphasis added) (internal citations omitted).

The *Intel* Court also addressed a similar contention from Justice Breyer's dissent, which argued for limiting § 1782(a) to situations in which the party seeking discovery could obtain similar discovery either under foreign law or under domestic law "in analogous circumstances." Id. at 270 (Breyer, J., dissenting). The majority responded, "While we reject the rules the dissent would inject into the statute, we do suggest guides for the exercise of district-court discretion [in deciding whether to grant a particular discovery application]." Id. at 263 n.15 (internal citations omitted). Later, in detailing the four discretionary factors, the Court stated:

> [T]he grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country *or the United States*.

Id. at 264-65 (emphasis added) (internal citations omitted). Applying *Intel*'s reasoning, **[**42]** we decline to conclude that simply because similar discovery devices may not be available in domestic private arbitration, § 1782(a) categorically does not apply to foreign or international private arbitration.

**[***25]** b. Efficiency Considerations

Next, FedEx Corp. contends that we should not read § 1782(a) as authorizing discovery in private commercial arbitrations because doing so would defeat a principal purpose of arbitrating disputes: **[*730]** namely, saving the parties expenditures of money and time associated with civil litigation. *See* Biedermann, 168 F.3d at 883; *see also* NBC, 165 F.3d at 190-91.

This argument is not persuasive. As *Intel* explained, a district court can limit or reject "unduly intrusive or burdensome" discovery requests. Intel, 542 U.S. at 265. FedEx Corp.'s argument seems to assume that § 1782(a) discovery requests will inevitably become unduly burdensome, but the Supreme Court has made clear that district courts enjoy substantial discretion to shape discovery under § 1782(a). *See* id. at 261, 262, 265; *see also* Heraeus Kulzer, GmbH v. Biomet, Inc., 633 F.3d 591, 597-98 (7th Cir. 2011). As the Court has stated, a district court evaluating a § 1782(a) request may consider (among other factors) "the nature of the foreign tribunal" and "the character of the proceedings" for which discovery is sought. Intel, 542 U.S. at 264. The district court may well conclude, in some cases, that discovery of a scope appropriate **[**43]** for civil

litigation would be "unduly intrusive or burdensome" in the context of an arbitration. And the district court may withhold or shape discovery assistance accordingly.

c. The "Twin Aims" of § 1782

Finally, FedEx Corp. argues that providing § 1782(a) discovery assistance to participants in arbitration would not serve the "twin aims" of § 1782: "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." Appellee Br. at 20 (quoting JSC MCC Eurochem v. Chauhan, No. 18-5890, 2018 U.S. App. LEXIS 26226, at *5 (6th Cir. Sept. 14, 2018) (order)). Assuming for the sake of argument that these purposes indeed provided Congress's primary motivation to pass, and later amend, § 1782(a), we would not conclude that arbitration is *outside* the reach of the statute simply because providing discovery assistance for use in arbitration might serve those purposes less directly than providing assistance for use in litigation. But FedEx Corp. suggests that permitting § 1782(a) discovery in arbitrations actually disserves United States interests because it "encourage[s] foreign countries to undermine U.S. policy in favor of enforcing private **[***26]** arbitration agreements by granting discovery inconsistent with those agreements." Appellant **[**44]** Br. at 20.

If FedEx Corp.'s point is that parties who agree to arbitrate disputes generally want to avoid extensive discovery, we would again note that § 1782(a) is permissive: the district court "may" order discovery, and the Supreme Court has made clear that the district court has wide discretion in determining whether and how to do so. *See* Intel, 542 U.S. at 261, 262, 265, 266. This discretion presumably extends to consideration of any agreements between the contracting parties regarding the availability and scope of discovery in arbitration. *Cf.* id. at 266 n.19 ("The District Court might also consider the significance of the protective order entered by the District Court for the Northern District of Alabama [in related domestic litigation between AMD and Intel].").

To sum up, none of the policy arguments urged by FedEx Corp. affect our conclusion that the word "tribunal" in § 1782(a) encompasses private, contracted-for commercial arbitrations of the type at issue here.[11]

We hold that the DIFC-LCIA **[*731]** Arbitration panel is a "foreign or international tribunal," and the district court may order § 1782(a) discovery for use in the proceeding before that panel.

**[***27]** C. Whether ALJ is Entitled to § 1782(a) Assistance Under *Intel*

Next, ALJ asks us to rule that **[**45]** it is entitled to the discovery requested in its application. In *Intel*, the Supreme Court discussed four factors for district courts to consider in deciding whether to grant a § 1782(a) request:

> First, when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought

---

[11] FedEx Corp. also argues that even if we find private arbitrations are not categorically excluded from § 1782(a), we should apply a four-element "functional" analysis derived from *Intel* and employed by several district courts, including the court in this case. The only element of that functional test that is disputed here would require a non-judicial adjudicator's decisions to be subject to judicial review if it is to be considered a "tribunal." FedEx Corp. contends that the DIFC-LCIA Arbitration panel's decisions are not subject to judicial review, and therefore that panel is not a "tribunal." But we are not convinced that *Intel* spawned a functional test or that, if it did, that test includes judicial reviewability. The opinion does not purport to establish a test for future cases; more specifically, *Intel* does not say that a non-judicial "tribunal" must be subject to judicial review. Although the Ninth Circuit had characterized the proceeding before the Commission as, "at minimum, one leading to quasi-judicial proceedings," Intel, 542 U.S. at 252 (quoting Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 667 (9th Cir. 2002), *aff'd*, 542 U.S. 241, 124 S. Ct. 2466, 159 L. Ed. 2d 355 (2004)), the Supreme Court's own analysis focused more on the Commission's power "as a first-instance decisionmaker," id. at 258.

Even assuming that judicial reviewability is required, the DIFC-LCIA Arbitration easily passes that test. Chapter 7 of the DIFC Arbitration Law sets out several grounds on which a party may challenge an award; in addition, the Arbitration Law provides that the DIFC Court may set aside an award if it involves a subject matter not capable of resolution by arbitration under the Arbitration Law, if it is "expressly referred" to a different entity for resolution, or if it conflicts "with the public policy of the UAE." R. 41-1, PageID 1079-80. Indeed, the grounds for setting aside an arbitral award under the FAA are similar to the grounds for doing so under the DIFC Arbitration Law. *See* 9 U.S.C. § 10. And review of awards under the FAA is considered "judicial review." *See* Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008).

> from a nonparticipant in the matter arising abroad. . . . .
>
> Second, . . . a court . . . may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance . . . . [Third], a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. [Fourth], unduly intrusive or burdensome requests may be rejected or trimmed.

542 U.S. at 264-65 (internal citations omitted). The district court in this case did not address the *Intel* factors because doing so was unnecessary after the court concluded that § 1782(a) did not apply to the arbitrations at issue.

We decline to analyze the **[**46]** *Intel* factors in the first instance. "It is the general rule that a federal appellate court does not consider an issue not passed upon below." Jackson v. City of Cleveland, 925 F.3d 793, 812 (6th Cir. 2019) (citation omitted). Although we sometimes make an exception if "the issue is presented with sufficient clarity and completeness and its resolution will materially advance the progress of . . . already protracted litigation," id. at 812-13 (citation omitted), the **[*732]** general rule carries particular force here. As the Supreme Court has made clear, whether to grant § 1782(a) discovery is a discretionary decision: "a district court is not required to grant a § 1782 discovery application simply because it has the authority to do so." Intel, 542 U.S. at 264 (citation omitted). The *Intel* factors, which guide that discretionary decision, require careful consideration of the facts and circumstances of the case.

Some of the relevant facts and circumstances are not fully presented in the appellate record here and, even if they were, require judgment calls that a trial court is better positioned than an appellate court to make. For instance, the fourth *Intel* factor involves consideration of **[***28]** whether a discovery request is "unduly intrusive or burdensome;" if a request is overly broad, the district court may **[**47]** decide either to deny the request or to narrow it. *See* id. at 262 (noting how a district court may tailor discovery to serve the goal of "maintaining parity among adversaries"). In sum, the question of what outcome is appropriate under the *Intel* factors is not "presented with sufficient clarity and completeness" for us to consider it in the first instance. Jackson, 925 F.3d at 812-13 (citation omitted); *see also* Mees v. Buiter, 793 F.3d 291, 301 (2d Cir. 2015) (declining to "decide the [§ 1782(a)] application" in the first instance).

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's order and **REMAND** for the district court to consider whether ALJ's application should be granted under the *Intel* factors.

---

End of Document

# Implicit Gender Bias in the Legal Profession: An Empirical Study

JUSTIN D. LEVINSON* & DANIELLE YOUNG**

ABSTRACT

*Commentators have marveled at the continuing lack of gender diversity in the legal profession's most influential and honored positions. After achieving near equal numbers of male and female law school graduates for approximately two decades, the gap between men and women in law firms, legal academia, and the judiciary remains stark. Several scholars have argued that due to negative stereotypes portraying women either as workplace cutthroats or, conversely, as secretaries or housewives, decision-makers continue to subordinate women to men in the highest levels of the legal profession. Despite these compelling arguments, no empirical studies have tested whether implicit gender bias might explain the disproportionately low number of women attorneys in leadership roles.*

*In order to test the hypothesis that implicit gender bias drives the continued subordination of women in the legal profession, we designed and conducted an empirical study. The study tested whether law students hold implicit gender biases related to women in the legal profession, and further tested whether these implicit biases predict discriminatory decision-making. The results of the study were both concerning and hopeful. As predicted, we found that implicit biases were pervasive; a diverse group of both male and female law students implicitly associated judges with men, not women, and also associated women with the home and family. Yet the results of the remaining portions of the study offered hope. Participants were frequently able to resist their implicit biases and make decisions in gender neutral ways. Taken together, the results of the study highlight two conflicting sides of the ongoing gender debate: first, that the power of implicit gender biases persists, even in the next generation of lawyers; and second, that the emergence of a new generation of egalitarian law students may offer some hope for the future.*

## INTRODUCTION

Commentators have marveled at the continuing lack of gender diversity in the legal profession's most influential and honored positions. The passage of time, for years cited as a reason for hope, has failed to put a major dent in the huge disparities in both career advancement and pay. After achieving near

* Associate Professor of Law and Director, Culture and Jury Project, University of Hawai`i at Mānoa. The authors would like to thank Susan Serrano, Kapua Sproat, Galit Levinson, and Dina Shek for their input on previous drafts. Sara Ayabe and Jenelle Hughes contributed outstanding research assistance. Dean Aviam Soifer provided generous summer research support to the first author.

** Department of Psychology, University of Hawai`i at Mānoa.

equal numbers of male and female law school graduates for approximately two decades,[1] the gap between men and women in law firms, legal academia, and the judiciary remains stark. For example, only six percent of managing partners at the largest 200 American law firms are women[2] and approximately four out of five law school deans are men.[3] Scholarship focusing on the continuing gender gap has been detailed and interdisciplinary, offering a variety of potential explanations for the continued problem.[4] Of these explanations, the most convincing have been science-based, relying on the powerful role of implicit gender stereotypes. Scholars have argued that due to negative stereotypes portraying women either as workplace cutthroats or, conversely, as secretaries or housewives, decision-makers continue to subordinate women to men in the highest levels of the legal profession.[5] Despite these compelling arguments, many of which are grounded in social science theory, no empirical studies have tested whether implicit gender bias might explain the disproportionately low number of women attorneys in leadership roles.

---

1. NATIONAL ASSOCIATION OF WOMEN LAWYERS & THE NAWL FOUNDATION, REPORT OF THE FOURTH ANNUAL NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS (2009) [hereinafter *Fourth Annual National Survey*]; *see also* Elizabeth H. Gorman & Julie A. Kmec, *Hierarchical Rank and Women's Organizational Mobility: Glass Ceilings in Corporate Law Firms*, 114 AM. J. SOC. 1428, 1429 (2009) (surmising that "the passage of time has undermined the view that not enough women have yet made their way through the 'pipeline' to higher organizational levels").

2. *Fourth Annual National Survey*, *supra* note 1, at 2.

3. Patti Abdullina, *Statistical Report on Law School Faculty and Candidates for Law Faculty Positions*, ASS'N. AM. LAW SCH., http://www.aals.org/statistics/2009dlt/titles.html (last visited Oct. 25, 2010).

4. *See e.g.*, Deborah L. Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613 (2007) [hereinafter Rhode, *Subtle Side*]; Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994); Susan Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations about Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119, 122 (1997) (suggesting that the notion of "lawyer as gladiator," rather than "lawyer as problem-solver," heightens gender bias in the legal profession); Joan C. Williams, *The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 439 (2003).

5. *See* Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 295-96 (1995) (discussing the role of gender stereotypes in New York law firms); Iman Syeda Ali, Article, *Bringing Down the "Maternal Wall": Reforming the FMLA to Provide Equal Employment Opportunities for Caregivers*, 27 LAW & INEQ. 181, 182 (2009); Rhode, *Subtle Side*, *supra* note 4, at 615 ("[G]ender stereotypes and unconscious bias concerning female competence and appropriately feminine behavior constitute significant barriers, particularly to leadership positions."); Yvonne A. Tamayo, *Rhymes With Rich: Power, Law, and the Bitch*, 21 ST. THOMAS L. REV. 281, 282 (2009).

In order to test the hypothesis that implicit gender bias[6] drives the continued subordination of women in the legal profession, we designed and conducted an empirical study. The study tested whether people hold implicit gender stereotypes of women in the legal profession, and further tested whether these implicit stereotypes predict discriminatory decision-making. Specifically, the experiment consisted of several measures. First, based on the stereotype of male leaders and women clerical workers, we created and conducted a new Implicit Association Test (IAT), the "Judge/Gender IAT," a reaction-time based measure that tests whether people[7] hold implicit associations between men and judges and women and paralegals. Next, due to the stereotype of men as professionals and women as homemakers, we employed a well-known IAT that tests whether people associate men with the workplace and women with the home and family. In addition to testing for implicit gender bias in the legal setting, we also tested whether gender stereotypes predict biased decision-making. We thus included three additional gender-based measures in our study: a law firm hiring measure (participants were asked to select a candidate to hire), a judicial appointments measure (participants were asked to rank the desirability of masculine and feminine traits in appellate judges), and a law student organization budget cut measure (participants were asked to reallocate funds in response to budget cuts).

The results of the study were both concerning and hopeful. As predicted, we found that a diverse group of both male and female law students implicitly associated judges with men, not women, and also associated women with the home and family. For these implicit measures, results of the study indicated that law students were much like other studied populations in related IAT studies: implicit gender biases were pervasive. In addition, the results showed that for both male and female participants, their implicit gender biases predicted some, but not all, of their decisions on the remaining studies. For example, the more strongly male participants associated judges with men in the Judge/Gender IAT, the more they preferred that appellate judges possess masculine (compared to feminine) characteristics. This result demonstrates that implicit gender biases can affect decision-making.

The results of the remaining studies offered hope, however. Participants were frequently able to resist their implicit biases and make decisions in gender-neutral ways. In fact, for the resume study, male law student participants even

---

6. Many legal scholars have previously called this phenomenon "unconscious bias." *See, e.g.*, Charles R.
Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331-36 (1987) (introducing the concept to legal scholarship). Because social scientists prefer the term "implicit" to "unconscious," we will generally use this term except when referring to existing scholarship that uses the term "unconscious." We mean the term "implicit" to describe attitudes, memories, and stereotypes that are outside of "conscious, attentional control." *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 946 (2006); *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-1539 (2005) (explaining the foundations of scientific research on implicit attitudes). For an explanation of why psychologists prefer the term "implicit" to "unconscious," *see* Russell H. Fazio & Michael A. Olson, *Implicit Measures in Social Cognition Research: Their Meaning and Use*, 54 ANN. REV. PSYCHOL. 297, 303 (2003).

7. In our study, we tested law students, a group that presumably should strive for gender neutrality.

preferred female candidates to male candidates and held other pro-female job attitudes. Additionally, for the budget cut study, law student participants were no more likely to cut funds from a women's organization than from other organizations. Taken together, the results of our study highlight two conflicting sides of the ongoing gender debate: first, that the power of implicit gender biases persists, even in the next generation of lawyers; and second, that the emergence of a new generation of egalitarian law students may offer some hope for the future.

This Article considers implicit bias based theories of gender inequality in the legal profession and details the empirical study we conducted. Section II delineates the seriousness of the problem by providing a statistical overview of gender disparities in the legal profession. It then examines scholarship linking implicit gender stereotypes to gender disparities in the legal profession. It notes that although much legal scholarship hypothesizes that gender stereotypes (particularly those linking women to the home or family, questionable workplace character traits, or low status jobs) play a pernicious role in subordinating women, none have tested the hypothesis empirically.

Section III begins by reviewing the few empirical studies that have investigated continuing gender disparities in the legal profession. These studies have tested a variety of worthy hypotheses, such as the connection between masculine job descriptions and subsequent hiring, but have yet to examine the potential role of implicit gender bias in the legal profession. The section then sets the stage for our empirical study by outlining our research goals for the study, as well as providing a scientific overview of the IAT in the legal context. Section IV provides the particulars of the empirical study we conducted, from methods to results. It describes in detail the law student participants we recruited and the materials we used in the study. The results confirm implicit gender biases among law students, but simultaneously offer hope that some of these biases may be resisted. Section V provides a roadmap for future research on implicit gender bias in the legal profession and considers the implementation of debiasing measures. Section VI concludes.

## II. GENDER STEREOTYPES AND THE LEGAL PROFESSION

### A. The Statistics

Startling statistics document the disappointing state of gender equality among high-level attorneys. According to a 2009 report by the National Association of Women Lawyers, women are grossly underrepresented in leadership roles in the legal profession.[8] The report, which tracked the progress of women in the nation's largest 200 firms, found that only six percent of firms have women managing partners,[9] fifteen percent of firms have at least one woman on their management committee, and fewer than sixteen percent of firm

8. *Fourth Annual National Survey*, *supra* note 1, at 2-5.

9. *Id*. at 2. The report also notes that in 2006, just five percent of managing partners were women. *Id*. at 6.

equity partners are women.[10] Furthermore, males comprise the highest paid partners at ninety-nine percent of the nation's top firms.[11] This underrepresentation is particularly startling considering that law schools have been graduating equal numbers of women and men over the past two decades.[12]

The number of women in leadership roles in the nation's courts and law schools is only slightly better than in the private sector. Statistics show that less than thirty percent of judges in federal and state courts are women, including federal district court judges (25%),[13] federal appeals court judges (29%),[14] and state court judges (26%).[15] Within the leadership of legal academia, the gender gap is similarly stark. In 2008-2009, for example, there were four times more male than female law school deans.[16] In addition, women held less than thirty percent of coveted tenure track and tenured faculty positions (29%).[17]

The numbers make clear that the gender gap amongst leaders in the legal profession persists, and does so in an alarming fashion. Yet there is no scholarly consensus for the reasons behind the disparities. In the next subsections, we focus on a leading explanation—that implicit gender stereotypes lead to the continued subordination of women in the legal profession.[18]

### B. A Brief Primer on Gender Stereotypes

Before turning to legal scholarship linking gender stereotypes to the continuing subordination of women in the legal profession and beyond, we first provide a social science-based overview of gender stereotypes.[19] One of the most telling facts about stereotypes is that they emerge early in life, often influencing children as young as three years old.[20] These impressionable

---

10. *Id*. at 2. Even the female lawyers who are equity partners make substantially less than their male counterparts. *Id*. at 3.

11. *Id*. at 10.

12. *Id*. at 7.

13. NAT'L WOMEN'S LAW CTR., *Women in the Judiciary*, (2010), *available at* http:// lawprofessors.typepad.com/files/numberofwomeninjudiciary09.pdf.

14. *Id*.

15. *2010 Representation of United States State Court Women Judges*, NAT'L ASS'N WOMEN JUDGES, http://www.nawj.org/us_state_court_statistics_2010.asp (citing THE AMERICAN BENCH: JUDGES OF THE NATION (2010)).

16. Abdullina, *supra* note 3. According to the report, there were forty-one female deans and 158 male deans.

17. *Id*. By contrast, a majority of less elite non-tenure track positions are held by women. *Id.*

18. This sets the stage for our empirical study. *See infra* Section IV for a detailed description of the study.

19. Social science work on stereotypes is comprehensive. This section provides just an abbreviated summary of the relevant work. For more on stereotypes, their activation, and their effects, *see generally* Patricia G. Devine, *Implicit Prejudice and Stereotyping: How Automatic Are They? Introduction to the Special Section*, 81 J. PERSONALITY & SOC. PSYCHOL. 757 (2001); Daniel T. Gilbert & J. Gregory Hixon, *The Trouble of Thinking: Activation and Application of Stereotypic Beliefs*, 60 J. PERSONALITY & SOC. PSYCHOL. 509 (1991); Ziva Kunda & Steven J. Spencer, *When Do Stereotypes Come to Mind and When Do They Color Judgment? A Goal-Based Theoretical Framework for Stereotype Activation and Application*, 129 PSYCHOL. BULL. 522 (2003).

20. Antony Page, Batson's *Blind-Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L. REV. 155, 203-04 (2005).

children, who are constantly engaged in interpreting the world around them, quickly learn to ascribe certain characteristics to members of distinct ethnic and social groups.[21] Such associations derive from cultural and social beliefs, and are learned directly from multiple sources, including the children's parents, peers, and the media.[22] As the children grow older, their stereotypes harden.[23] Although they may develop non-biased (explicit) views of the world, their stereotypes remain largely unchanged and become implicit (or automatic).[24] In the context of gender stereotypes, children are likely to learn at an early age that men are "competent, rational, assertive, independent, objective, and self confident," and women are "emotional, submissive, dependent, tactful, and gentle."[25]

Once adults have ingrained implicit biases, the stereotypes they learned as children continue to affect the way they perceive the world. That is, people perceive information in ways that conform to their stereotypes.[26] Gary Blasi provides two brief exercises that help illustrate how the simple associations people learn as children affect the way they think about gender and career: First, "try to imagine, in sequence, a baseball player, a trial lawyer, a figure skater, and a U.S. Supreme Court justice - without a specific gender or race. . . ."[27] Did you succeed?[28] Next, "try to imagine a carpenter. When you have that image settled in your mind, describe the color of her hair."[29] Did you pause or do a double-take?[30] Blasi's exercises help illustrate the simple gender-based hurdles the mind must make in even basic career related situations. If we immediately picture a man when we think about a trial lawyer, for example, what might that mean for women seeking to reach the pinnacle of the profession?

Although Blasi's examples are concerning enough, gender stereotypes can play even more complicated mental tricks than the previous perception tasks illustrate. They have, for example, been shown to affect the way people make judgments about others and even change the way people remember information.[31] In a study testing how implicit gender stereotypes can change the way people evaluate others' traits and behaviors, Mahzarin Banaji and her colleagues primed gender stereotypes by exposing participants to phrases related to the female stereotype of dependence (e.g. some participants saw the

---

21. Rhode, *Subtle Side*, *supra* note 4, at 618.

22. Page, *supra* note 20, at 203.

23. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 363 (2007).

24. Timothy D. Wilson et al., *A Model of Dual Attitudes*, 107 PSYCHOL. REV. 101, 104 (2000).

25. Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581, 604 (1997) (explaining "these characterizations of women nevertheless prevent women from sharing fully in all levels of society, including in the work environment, because the traits associated with men and women are valued differently").

26. Rhode, *Subtle Side*, *supra* note 4, at 618.

27. Gary Blasi, *Advocacy Against the Stereotype*: *Lessons From Cognitive Social Psychology*, 49 UCLA L. REV. 1241, 1256 (2002).

28. Blasi doubts it, and so do we. *See id*.

29. *Id*. at 1255.

30. Blasi predicts that most people will, and here again, we agree. *See id*. at 1255-56.

31. Williams, *supra* note 4. *See generally* Levinson, *supra* note 23 (providing evidence of the power of stereotypes on the way people remember and misremember facts).

phrase "never leaves home").[32] Banaji and her colleagues predicted that this simple act, exposing participants to dependence related phrases, would trigger a broader set of female stereotypes that would affect the way participants would later evaluate women's behaviors.[33] Thus, after telling participants that they were beginning an unrelated study,[34] the researchers asked participants to read short stories about a person (either male or female) and rate the person's level of dependence, inhibition, insecurity, and passivity (all confirmed female stereotypes).[35] The results showed that study participants who previously had their gender stereotypes activated were more likely (than a control group whose stereotypes were not activated) to evaluate a woman's behavior as dependent, inhibited, insecure, passive, and weak.[36] The study demonstrates the dangerousness and sensitivity of activated gender stereotypes, particularly their ability to change the way people interpret and attribute women's behavior.[37]

A second study confirms the dangerousness of gender stereotypes, this time by focusing on how gender stereotypes can actually facilitate the creation of false memories.[38] In this study, Alison Lenton and her colleagues presented participants with a list of words.[39] Some of the word lists were stereotypic of women (such as secretary and nurse), and others were stereotypic of men (such as lawyer and soldier). After briefly distracting participants, the researchers asked the participants to identify the words they had seen.[40] Results showed that participants used gender stereotypes in creating false memories. That is,

---

32. Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 J. PERSONALITY & SOC. PSYCHOL. 272, 274 (1993). Other participants were exposed to phrases related to the male stereotype of aggression (*e.g.* "threatens other people"). *Id.* Participants in the control conditions were exposed to neutral phrases (*e.g.* "crossed the street"). *Id.*

33. *Id*. at 273. Similarly, they predicted that exposing participants to the aggression-related phrases would trigger male stereotypes, and that these stereotypes would change the way people evaluated subsequent behaviors by men. *Id.*

34. *Id*. at 274. At the end of the study, the researchers confirmed that the participants did not suspect that the two studies were related. *Id.*

35. *Id*. The researchers also had the participants rate a variety of other traits, including unrelated positive and negative traits. *Id.* at 275.

36. *Id*.

37. This study also demonstrates that stereotypes need to be activated in order to be most harmful. Unfortunately, as the study and other studies show, stereotypes are activated very easily. *See, e.g.*, Devine, *supra* note 19, at 759; Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 327-28 (2010) (providing examples); B. Keith Payne, *Prejudice and Perception: The Role of Automatic and Controlled Processes in Misperceiving a Weapon*, 81 J. PERSONALITY & SOC. PSYCHOL. 181 (2001); Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 4 GROUP PROCESSES & INTERGROUP REL. 133 (2002) (finding that simply playing music to participants can prime harmful stereotypes).

38. Much of this paragraph, and the description of the Lenton study (including footnotes), in particular, is more or less verbatim from Levinson's work. *See* Levinson, *supra* note 23, at 379.

39. Alison P. Lenton et al., *Illusions of Gender: Stereotypes Evoke False Memories*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 3, 5-6 (2001). All participants were shown seventy-five words that constituted gender-neutral roles and fifteen words that were gender stereotypes. Of these fifteen words, half of the participants received female stereotype roles and half received male stereotype roles. To obfuscate the gender context, the list of gender-specific stereotype roles was surrounded by the other sixty words. *Id.*

40. *Id*. at 6.

they more often (incorrectly) reported that they had seen gender stereotyped words than non-gender-stereotyped words.[41] Results also indicated that these false memories were elicited implicitly (i.e., automatically). Despite the nature of their errors, most participants were completely unaware of the gender stereotype theme of the word lists.[42] The researchers expressed concern that the implicit creation of stereotype-consistent false memories may help to explain the "self-perpetuating nature of stereotypes and their resistance to change."[43]

Research on stereotype biased perception, information processing, and memory each demonstrate the dangerous potential that implicit gender biases may have in the employer-employee relationship.[44] We next turn to legal scholarship and review the ways legal scholars have argued that these gender stereotypes might explain continuing gender disparities.

## C. Do Gender Stereotypes Explain Gender Disparities?

Commentators have offered a variety of explanations for the continuing gender disparities, and the debate continues. Some of the most interesting scholarly arguments range from those downplaying the numbers in light of the potential promise of future amelioration (claiming the low number of women in law school thirty years ago explains the small number of women judges today)[45]

---

41. *Id*. at 7.

42. *Id*. The researchers considered the low awareness level to support a theory of implicit activation of stereotype-consistent information. *Id*. at 10.

43. *Id*. at 11-12.

44. One study that helps explain how implicit gender stereotypes might affect various stages of the employee-employer relationship was conducted by Laurie Rudman and Richard Ashmore. Laurie A. Rudman & Richard D. Ashmore, *Discrimination and the Implicit Association Test*, 10 GROUP PROCESSES & INTERGROUP REL. 359, 361-65 (2007). The researchers were interested in whether implicit associations and stereotypes, as measured by the IAT, would predict the way study participants (in their study, undergraduate students) acted. *Id.* at 365. They examined this in two ways: (1) by testing whether participants' implicit biases predicted their level of (self-reported) discriminatory acts in Study 1, and (2) by testing whether participants' implicit biases predicted the way they would allocate funds when faced with a budget cut in Study 2. *Id.* at 361-65. In Study 2, participants were informed that a university-wide budget cut would affect student organizations' budgets and were asked to reallocate budget amounts to various student organizations. *Id.* at 364. The researchers measured whether implicit stereotypes the participants had about certain groups (namely Jews, Blacks and Asians) would predict how much money they cut from the original budgets of those organizations. *Id.* Results of this study confirmed the researchers' hypotheses in both studies. *Id.* at 368. Participants' implicit stereotypes predicted both their levels of self-reported discriminatory acts, as well as the amount of money they cut from certain student organizations. *Id.* The stronger the implicit stereotypes they held, the more racial and ethnic bias they displayed in their actions and decisions. *Id.* at 368-69. We loosely based part of our empirical study (the budget-cut measure) on Rudman and Ashmore's study.

45. *See* Gend. Bias in the Courts Task Force, *Gender Bias in the Courts of the Commonwealth: Final Report*, 7 WM. & MARY J. WOMEN & L. 705, 792 (2001). We expect that variations of the history argument will gain strength in light of the confirmation of Elena Kagan to the United States Supreme Court, raising the composition of women on the Supreme Court to thirty-three percent. During times of success for underrepresented individuals, it is typical to see resistance to the notion that inequality pervades. Thus, we would expect to see similar resurgence of the history argument as individual women enjoy various career successes. One example of the connection between history arguments and career success is the emergence of what some people call a "post-racial" America in the aftermath of President Obama's election. For critiques of this "post-racial" notion, *see generally*

to relying on gender differences in intentional career choices (e.g. women disproportionately "opt out" of the leadership race).[46] Perhaps the most compelling subset of scholarship, however, focuses on the ways in which gender stereotypes about women may affect women's hiring and career advancement and ultimately exclude large numbers of women from leadership positions.[47]

Legal scholarship discussing the impact of gender stereotypes on the leadership progression of women has been both diverse and comprehensive, and taken together it tends to support three main themes: first, stereotypes linking women to the home and family affect their prospects for career advancement; second, stereotypes about women's work styles, character traits, and job competencies hinder their ability to land and advance in high level leadership positions; and third, because certain jobs are consciously or unconsciously perceived as male jobs, females will be evaluated less favorably for those positions. This subsection provides a brief overview of legal scholarship that connects gender stereotypes to women's limited career advancement, focusing on the three main themes stated above.

The first theme that has emerged in legal scholarship is that stereotypes linking women to the home and family affect women's prospects for hiring and career advancement.[48] Deborah Rhode, a leading scholar in examining gender disparities in the workplace, argues that this "subtle side of sexism" manifests in a variety of automatic ways that may be neither obvious nor intentional.[49] For

---

Mario L. Barnes et al., *A Post-race Equal Protection*? 98 GEO. L.J. 967 (2010); Camille A. Nelson, *Racial Paradox and Eclipse: Obama as a Balm for What Ails Us*, 86 DENV. U. L. REV. 743 (2009); Charles J. Ogletree, Jr. & Johanna Wald, *After Shirley Sherrod, We All Need to Slow Down and Listen*, WASH. POST, July 25, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/23/AR2010072304583.html; Kathleen Schmidt & Brian A. Nosek, *Implicit (and Explicit) Racial Attitudes Barely Changed During Barack Obama's Presidential Campaign and Early Presidency*, 46 J. EXPERIMENTAL SOC. PSYCHOL. 308 (2010) (showing psychological evidence that President Obama's rise to the presidency did little to change implicit racial bias).

46. *See* Rhode, *Subtle Side*, *supra* note 4, at 615-17 (critiquing this scholarship) (citing Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003, at 42; Ann Marsh, *Mommy, Me, and an Advanced Degree*, L.A. TIMES, Jan. 6, 2002, at 1; JOAN C. WILLIAMS ET AL., CTR. FOR WORKLIFE LAW, "OPT OUT" OR PUSHED OUT? HOW THE PRESS COVERS WORK/FAMILY CONFLICT 4-6 (2006), *available at* http://www.uchastings.edu/site_files/WLL/OptOutPushedOut.pdf).

47. *See also* David L. Faigman et al., *A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias*, 59 HASTINGS L.J. 1389, 1389 (2008) (providing a review of social science research on implicit gender bias in the context of analyzing whether expert testimony on implicit bias might help finders of fact in Title VII employment discrimination litigation); *see generally* Rhode, *Subtle Side supra* note 4; Williams, *supra* note 4.

48. This is not just a theme in legal scholarship, but in broader social science discourse. *See generally*, Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. SOC. ISSUES 657 (2001) (focusing on the descriptive and prescriptive expectations that gender stereotypes can generate); Linda Hamilton Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. SOC. ISSUES 835 (2004); Laurie A. Rudman & Stephen E. Kilianski, *Implicit and Explicit Attitudes Toward Female Authority*, 26 PERSONALITY & SOC. PSYCOL. BULL. 1315, 1315 (2000) ("To the extent that individuals associate men with career and women with domestic roles, they may view female authorities as violating traditional gender role assignments (e.g., family values).").

49. *See* Rhode, *Subtle Side*, *supra* note 4, at 618. The argument that gender bias is unconscious and unintentional has triggered significant scholarly debate in the Title VII realm, particularly as it relates to the concept of "intentional" discrimination. Much of this work focuses not only on implicit

example, gender stereotypes connecting women to the home and family may cause colleagues to provide different attributions for men and women during a variety of common workplace circumstances. Rhode explains, "[I]f a working mother leaves the office early, her colleagues may infer that the reason involves family obligations. A working father's absence may not trigger the same assumption."[50] Relying on this example and others, Rhode argues that gender stereotypes account for a significant portion of the leadership gender disparity.[51]

Joan Williams also argues that the deeply held cognitive association connecting women to the home and family continually affects the workplace assumptions made by employers.[52] Williams uses the example of a traditional husband and wife couple who work for the same "high-hours employer": "[a]fter she had a baby, she was sent home at 5:30 p.m. every night - she had a baby to take care of. He, on the other hand, was kept later than before the baby's birth - he had a family to support."[53] Williams also provides another example from case law: a woman who had children was not considered for a promotion because her superiors assumed she would not want a position that

---

gender bias and employment discrimination, but also on implicit racial bias. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995) (introducing the concept of unconscious discrimination to the employment discrimination realm); *see also* Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. L. & POL'Y REV. 477 (2007) [hereinafter Bagenstos, *"Science" and Antidiscrimination Law*]; Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1 (2006); Faigman et al., *supra* note 47; Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997 (2006); Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481 (2005); Ann C. McGinley, *!Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999).

50. Rhode, *Subtle Side*, supra note 4, at 618. Importantly, Rhode also notes that "[s]uch cognitive bias can operate even if individuals' conscious beliefs are relatively free of prejudices." *Id.*; *see also* Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 587-91 (1996) (explaining the power of stereotypes in the workplace, including stereotypes that women are less committed and less competent than men).

51. Rhode, *Subtle Side*, *supra* note 4, at 615; *see also* Anna M. Archer, *From* Legally Blonde *to* Miss Congeniality*: The Femininity Conundrum*, 13 CARDOZO J.L. & GENDER 1 (2006) (focusing on the role of films in perpetuating gender stereotypes in the legal profession and beyond); Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 HOFSTRA L. REV. 1001 (2002) (discussing the self-reinforcing cycle of stereotypic expectations and calling for gender bias education); Laurie A. Rudman et al., *From the Laboratory to the Bench: Gender Stereotyping Research in the Courtroom*, *in* BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 83 (Eugene Borgida & Susan T. Fiske eds., 2008) (noting that in the workplace, a woman's behavior will be interpreted as stereotype-consistent so long as there is any ambiguity).

52. Williams, *supra* note 4, at 406.

53. *Id*. at 426-27. Some scholarship focuses on the heightened stereotypes with which mothers must contend, connecting these stereotypes to statistics showing that mothers have a harder time in the labor market than other women. *See, e.g.*, Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008); Amy J. C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701 (2004) (finding that mothers are perceived as less desirable to hire and promote); Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311 (2008).

required travel.[54] The impact of Rhode and Williams' examples is intuitive: if people automatically and unintentionally use stereotypes to help them evaluate women in the workplace, these stereotypes will undoubtedly have negative impacts on career opportunities.[55]

The second theme that has emerged in legal scholarship is that stereotypes about women's work styles, character traits, and job competencies hinder women's ability to land and advance in high level leadership positions. Although this theme is related to the first in that they are both based on gender stereotypes that hinder career advancement, it differs in that the first theme deals with women's perceived choices (commitment to the home and family), while the second theme relies on generalizations about women's personalities (work styles and character traits).[56] Williams provides two clear examples of how character or trait based gender stereotypes may arise in the workplace: first, assertiveness in a female makes her perceived as "a bitch," while for a male it is perceived as a sign of strength;[57] and second, social bonding behavior among men is considered to be work related (he's mentoring or rainmaking), but is considered to be frivolous among women (she's chatting or gossiping).[58]

These pervasive and pernicious character-related stereotypes begin a complex interaction in which women may attempt to dispel stereotypes by

---

54. Williams, *supra* note 4, at 427. Williams gives yet another example: "a Virginia employer terminated a woman's employment after she gave birth, reasoning that her 'place was at home with her child.'" *Id*. at 406.

55. *See generally* Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys,* 11 WM. & MARY J. WOMEN & L. 221; *see also id.* at 229-30 (2005) (noting that "[e]ssentializing female lawyers through detrimental acts of indiscriminate generalization is something that even profoundly feminist attorneys sometimes inadvertently or instrumentally engage in, despite the fact that doing so may be burdensome, and at times tremendously counterproductive").

56. Some social science work makes a similar distinction. *See, e.g.*, Peter Glick et al., *What Mediates Sex Discrimination in Hiring Decisions?*, 55 J. PERSONALITY & SOC. PSYCHOL. 178, 180 (1988) (conducting a resume study and suggesting the importance of stereotypes both on the personality traits relevant to a job and the gender appropriate to that occupation). Another way social scientists distinguish different types of gender stereotypes is by breaking them down into two categories: descriptive and prescriptive. Descriptive stereotypes are "beliefs about the characteristics that women do possess," while prescriptive stereotypes are "beliefs about the characteristics that women should possess." Diana Burgess & Eugene Borgida, *Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination*, 5 PSYCHOL. PUB. POL'Y & L. 665, 665-66 (1999) (arguing that these two types of stereotypes lead to different types of discrimination). Faigman and his colleagues summarize empirical studies of this trait-based research by stating, "gender stereotypes of men as agentic and women as communal are broadly shared in the population." Faigman et al., *supra* note 47, at 1426.

57. Williams, *supra* note 4, at 424-25. Rudman and her colleagues provide a similar example, noting that when women behave in ways that may be necessary for a high-powered job (such as exhibiting ambitious or dominant behavior), it can lead co-workers to reject them. Rudman et al., *supra* note 51, at 85.

58. Williams, *supra* note 4, at 416. Williams provides a related example focusing on stereotypes of part-time working women: "Take a fictional woman, Mary, who worked full time before she had children but cut her hours to part time thereafter. When Mary went part time, her employer decreased her hourly wage rate, on the theory that women who work part time are less committed and less competent." Joan C. Williams, *Correct Diagnosis; Wrong Cure: A Response To Professor Suk*, 110 COLUM. L. REV. SIDEBAR 24 (2010), http://www.columbialawreview.org/sidebar/volume/110/24_Williams.pdf.

changing workplace behavior. As Holning Lau proposes, a female lawyer concerned with stereotypes of female passivity, for example, may choose not to talk about her children "because her colleagues may be prone to infer that women who adhere to nurturing stereotypes also adhere to passivity stereotypes."[59] Devon Carbado and Mitu Gulati present a similar perspective on the complexity of navigating stereotype-infused relationships.[60] If, for example, a woman partner on a law firm's hiring committee suggests that the firm's hiring practices discriminate against women (and assuming the employer harbors the stereotype that female employees are hypersensitive), the authors argue that:

> [T]he employer may interpret the female employee's criticisms of the existing hiring procedures as knee-jerk political correctness. Alternatively (or additionally), the employer may conclude that the employee's criticism reflects unprofessional, crude, self-interested identity politics. Both interpretations reify the stereotype about the employee (that she is hypersensitive), and will likely cause the employer to disregard the criticism.[61]

These critiques reinforce the complexity of trait related stereotypes and underscore the near impossibility of combating them completely and effectively in the workplace.

The third theme that has emerged in legal scholarship is that because some jobs are consciously or unconsciously perceived as male jobs, females will be evaluated less favorably for those positions.[62] As Diane Bridge contends, because males have traditionally dominated certain positions, potential employers' choices will be affected by gender stereotypes about the ideal candidate for those positions.[63] This type of stereotype effect becomes

---

59. Holning Lau, *Identity Scripts and Democratic Deliberation*, 94 MINN. L. REV. 897, 906 (2010) (arguing that "identity scripts," such as gender stereotypes, undermine democracy, and calling upon Equal Protection doctrine for help in restoring the democracy lost).

60. Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000). Carbado and Gulati also argue that these relationships can actually create an economic incentive for firms to discriminate against stereotyped employees. They explain: "there is a rational economic reason to expect discrimination. Outsiders are not only more likely to say yes to [certain difficult] tasks, they are also more likely to be asked. This is likely to be so because: (1) outsiders are more likely to say yes to disconfirm negative stereotypes; (2) outsiders are susceptible to quick categorization (if they say no, it is easy to put them into the 'bad' category); and (3) to the extent that citizenship tasks have to be done by someone, the employer would rather that the outsiders perform them, since the employer may believe that outsiders are less likely to succeed anyway." *Id*. at 140. These results, they explain, reinforce the initial stereotypes. *Id*. at 141-45.

61. *Id*. at 116.

62. Bridge, *supra* note 25, at 608. Bridge argues that this places women workers in a "double bind" situation: "women who behave in a stereotypical manner face underestimation of their competence and effectiveness; while women who deviate from sex stereotypes are viewed as displaying inappropriate masculine behavior and are labeled abrasive or maladjusted." *Id.* at 607-08.

63. *Id*. at 606 (citing Benson Rosen & Thomas H. Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOL. 511, 512 (1974); Michele A. Paludi & Lisa A. Strayer, *What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name*, 12 SEX ROLES 353, 359 (1985); Barry Gerhart, *Gender Differences in Current and Starting Salaries: The Role of Performance, College Major, and Job Title*, 43

magnified in leadership jobs.[64] Williams summarizes, "when a task or setting is stereotypically masculine, as are most 'high-powered' jobs, the setting will activate assumptions that associate competence with masculinity, thereby increasing the perceived competence of men."[65] Thus, in addition to the litany of stereotypes that may hinder women professionals generally, the highest-level women professionals may face an additional layer of stereotypes related to the association between certain high-level jobs and masculinity.[66] One might expect these masculine stereotypes to be most potent in powerful legal jobs, such as appellate judge positions.[67]

Legal scholarship thus argues that women are hindered from career advancement by stereotypes that peg them as home and family-focused, as well as those that construe their personalities as weak and gossip-driven (or conversely, as workplace cutthroats). Additionally, women in contention for high-level positions are hindered by job-specific associations people have between certain jobs and the men that have historically held those positions. This powerful framework of stereotypes led us to develop our empirical study, which tested not only whether people hold many of the implicit gender biases described in this section, but whether those biases lead to discriminatory decision-making in the legal profession. Before detailing the study, however, we first describe existing empirical work that has investigated gender bias in the legal profession.

---

INDUS. & LAB. REL. REV. 418, 430 (1990); Robert L. Dipboye et al., *Sex and Physical Attractiveness of Raters and Applicants as Determinants of Resumé Evaluations*, 62 J. APPLIED PSYCHOL. 288, 293 (1977)).

64. *See, e.g.*, Rudman & Kilianski, *supra* note 48, at 1315-16 (surmising, "male dominance in powerful social roles (e.g., politics, law, religion, and the military) has produced an implicit male leader prototype. This prototype may be both cause and effect of a generalized belief that men are superior and thus deserve to control and receive more resources than do women.") (internal citations omitted).

65. Williams, *supra* note 4, at 407. Psychological research on gender stereotypes and leadership evaluations supports this contention. *See e.g.*, Alice H. Eagly et al., *Gender and The Evaluation of Leaders: A Meta-Analysis*, 111 PSYCHOL. BULL. 3 (1992); Alice H. Eagly & Steven J. Karau, *Role Congruity Theory of Prejudice Toward Female Leaders*, 109 PSYCHOL. REV. 573, 576 (2002); *see also* Marc R. Poirier, *Gender Stereotypes at Work*, 65 BROOK. L. REV. 1073, 1073-74 (1999) (pointing out that certain job categories can be gendered).

66. In our empirical study, we tested a similar concept, whether judges should have more masculine or feminine traits. *See infra* Section IV A. Similar stereotypes connecting males to high power legal positions may have effects outside of the hiring and promotion arena, for example, in the way jurors react to male and female lawyers. *See, e.g.*, Peter W. Hahn and Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533 (1996); Janet Sigal et al., *The Effect of Presentation Style and Sex of Lawyer on Jury Decision-Making Behavior*, 22 PSYCHOL.: Q. J. HUM. BEHAV. 13 (1985).

67. The extra potency of male stereotypes in the judicial realm was addressed by Mary Clark. Mary L. Clark, *One Man's Token Is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 541 (2004) (arguing that the appointment of female federal judges is particularly important because it "instructs present and future generations about women's talents, thereby shattering stereotypes and modeling possibilities of women's achievements").

## III. EXAMINING GENDER DISPARITIES IN THE LAW

### A. Empirical Studies

As gender disparities among practicing lawyers and judges have continued despite twenty years of near numerical equality among law school graduates, a limited number of scholars have begun devising empirical studies designed to investigate the sources of these gender disparities. This subsection reviews the few existing empirical studies on gender disparities in the legal profession and also reviews related studies of gender disparities in academia.[68] This review concludes that women are disproportionately affected in the legal profession and academia due to workplace expectations of masculinity and in-group preferences among male hiring attorneys. No empirical studies, however, have examined implicit gender biases among members of the legal profession.

A fascinating study of gender bias in law firm hiring investigated the relationship between hiring criteria and ultimate hiring decisions. Elizabeth Gorman hypothesized that the masculinity and femininity of law firms' published hiring criteria would be related to gender disparities in hiring decisions.[69] To pursue this hypothesis in a sample of over 700 firms during one hiring year, Gorman first reviewed each firm's published hiring standards.[70] Using previously established research on masculinity and femininity in language, Gorman counted the number of stereotypically masculine (e.g. assertive, decisive, or energetic) and feminine traits (e.g. cooperative, friendly, or verbally oriented) in each firm's published standards.[71] She then compared the number of masculine and feminine traits for each firm's standards to the number of male and female associates they hired. The results of the study showed that for every additional masculine characteristic listed by a firm, a woman's chance of getting hired decreased by approximately five percent.[72] This finding was significant both for entry-level attorney hires as well as for

---

68. For a review of empirical studies on gender bias outside of the legal profession, see Faigman et al., *supra* note 47, at 1416-17 (discussing several resume studies that have found gender bias in hiring) (citing Heather K. Davison & Michael J. Burke, *Sex Discrimination in Simulated Employment Contexts: A Meta-Analytic Investigation*, 56 J. VOCATIONAL BEHAV. 225, 232-34 (2000); Eagly et al., *supra* note 65, at 7-9; Judy D. Olian et al., *The Impact of Applicant Gender Compared to Qualifications on Hiring Recommendations: A Meta-Analysis of Experimental Studies*, 41 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 180, 180-95 (1988); Janet Swim et al., *Joan McKay Versus John McKay: Do Gender Stereotypes Bias Evaluations?* 105 PSYCHOL. BULL. 409, 414-19 (1989); Henry L. Tosi & Steven W. Einbender, *The Effects of the Type and Amount of Information in Sex Discrimination Research: A Meta-Analysis,* 28 ACAD. MGMT. J. 712, 713-19 (1985)).

69. Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOC. REV. 702, 705-06 (2005).

70. For example, one firm described its hiring criteria as follows: "High academic achievement, diversity, initiative, willingness to assume responsibility, maturity, judgment, nonacademic experience, extracurricular activities (including Law Review, Moot Court, other journals)." *Id.* at 709.

71. *Id*. (citing Sandra Bem, *The Measurement of Psychological Androgyny*, 42 J. CONSULTING & CLINICAL PSYCHOL. 155 (1974)).

72. *Id*. at 717.

lateral hires.[73] Gorman explains this result by focusing on the power of gender stereotypes. She claims:

> [O]rganizational decision makers perceive male and female candidates through the lens of gender stereotypes and compare those distorted perceptions to the cultural role-incumbent schemas that prevail within their organizations. When those schemas are more stereotypically masculine, male candidates appear to offer a better fit and are more likely to be selected.[74]

Further analysis revealed that firms that relied on more feminine hiring criteria were only more likely to hire women attorneys at the entry level. They did not hire more female "lateral" (i.e. higher level) attorneys.[75] Gorman analyzed this result by focusing on the strength of gender stereotypes at the more senior levels of law firms. Although gender stereotypes at entry hiring levels may still pose a formidable obstacle for women, as her study showed, the additional connection between the highest level jobs and historically male roles may create an additional hurdle. Gorman explains:

> [R]ole-incumbent schemas actually are somewhat different for jobs involving different levels of seniority and responsibility. Stereotypically feminine characteristics such as friendliness and cooperativeness may be more salient in lower-level positions, which often require 'team play' and cheerful obedience to superiors, than in higher positions, which are seen as demanding leadership.[76]

Finally, Gorman analyzed whether law firms with female hiring partners were more likely than firms with male hiring partners to hire women associates. The study's results confirmed this hypothesis. Firms with women hiring partners were in fact more likely to hire more female entry-level candidates.[77] However, this effect diminished in firms where women had already achieved a greater gender balance among firm partners.[78] This result confirms that the gender of the primary decision-maker matters, an effect consistent with what social psychologists call "in-group bias."[79]

In a separate project, Gorman collaborated with Julie Kmec to investigate women's promotion to partner in corporate law firms.[80] Examining data on a national basis, Gorman and Kmec compared law firms' hiring of incoming associates and tracked the firms' partnership decisions when that associate group became eligible for partner.[81] The results of the study found consistent gender bias at the upper levels of the corporate firms. Women who were hired

---

73. *Id*. at 717-18.

74. *Id*. at 722. This explanation echoes the conclusions of the legal scholarship reviewed in Section II.C.

75. Lateral attorneys are those who have previously practiced law elsewhere. In Gorman's study, she operationalized "lateral" hires as those attorneys who graduated law school at least two years prior to the graduating class being hired at the entry level. *See id.*

76. *Id*. at 722.

77. *Id*. at 719.

78. *Id*. at 719.

79. *Id*. at 707 (citing Marilynn B. Brewer & Rupert J. Brown, *Intergroup Relations*, *in* HANDBOOK OF SOCIAL PSYCHOLOGY 554 (Daniel T. Gilbert et al. eds. 1998)).

80. *See generally* Gorman & Kmec, *supra* note 1.

81. *Id*. at 1442-43.

as entry level associates by firms were much less likely than their male counterparts to be promoted to partner.[82] Gorman and Kmec predicted that these findings would likely hold true in other high level jobs both inside and outside of the legal field.[83] As long as decision-makers consciously or automatically rely on gender stereotypes in making hiring and promotion decisions, Gorman and Kmec concluded, continuing disparities should be expected.[84]

Outside of the few studies in the legal profession, empirical researchers have also focused on women's advancement in academia.[85] One particular study regarding women in academia helps highlight a phenomenon that might be present at the upper levels of the legal profession. This study, by Rhea Steinpreis and her colleagues, asked a sample of psychology faculty across the country to evaluate a *Curriculum Vitae* (CV).[86] The study was designed so that each professor evaluated one CV (thus, a "between subjects" design[87]): a female job applicant (recent Ph.D.), a male job applicant (recent Ph.D.), a female tenure candidate, or a male tenure candidate. Steinpreis and her colleagues drafted the CVs such that the job applicant CVs were identical (other than a female candidate name, Karen Miller, or a male candidate name, Brian Miller[88]) and the tenure candidate CVs were similarly identical.[89] The researchers hypothesized that CVs with male names would be evaluated more favorably than the identical

---

82. *Id*. at 1455-56. Interestingly, a similar trend did not hold true for lateral partner hiring. *Id.*

83. *Id*. at 1466. For a study of gender differences in the career outcomes of men and women in a specific legal market, see generally Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229 (2000) (finding unexplained gender disparities in Chicago area lawyers).

84. Gorman & Kmec, *supra* note 1, at 1466. In addition to focusing on the harmful effects of both conscious and automatic stereotypes, Gorman and Kmec point to in-group favoritism (males hire males) and reliance on gender as an indicator of competence as other causal factors. *Id*.

85. Although there have been few empirical studies on the topic, an abundance of non-empirical work focuses on women's advancement in academia. *See, e.g.*, Joe Alper, *The Pipeline is Leaking Women All the Way Along*, 260 SCIENCE 409 (1993); Mary Ann Mason & Marc Goulden, *Marriage and Baby Blues: Redefining Gender Equity in the Academy*, 596 ANNALS AM. ACAD. POL.& SOC. SCI. 86 (2004). Some work, however, is empirical in nature. *See e.g.*, L.S. Fidell, *Empirical Verification of Sex Discrimination in Hiring Practices in Psychology*, 25 AM. PSYCHOLOGIST 1094 (1970); Gerhard Sonnert & Gerald Holton, *Career Patterns of Women and Men in the Sciences*, 84 AM. SCIENTIST 63 (1996).

86. Rhea E. Steinpreis et al., *The Impact of Gender on the Review of the Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509, 509-10 (1999).

87. It is a "between-subjects design" because each professor participated in only one of the four conditions (*i.e.*, reviewed one of the four CVs).

88. *Id*. at 515.

89. The researchers used the actual CV of a female professor, altering only a few small items. One interesting alteration the researchers made was that they removed any indicia of membership in female scientific groups. This was done, according to the researchers, to "to avoid inducing subjects to hire or tenure the person because of any political ideology they may appear to have." *Id*. at 515. If the researchers had retained such information, it would have either communicated different messages about the candidates (psychologists might react different to a female versus a male candidate belonging to a female scientific organization) or required the researchers to change the organization name to a male organization for the male CVs (in which case it is possible no such organization exists).

CVs with female names.[90] The results of the study confirmed this hypothesis.[91] Psychology faculty members were more likely to state that they would hire the male candidate than the female candidate.[92] Other results showed that the faculty members claimed to support their decisions by making biased evaluations of the candidates' accomplishments. For example, the faculty members were more likely to judge that the CV with the male name had stronger research experience compared to the same CV with a female name.[93] Similarly, the faculty members were more likely to state that, compared to the female candidate, the male candidate had stronger teaching and service experience.[94] Overall, the gender bias illustrated by the results was compelling—identical candidates were judged very differently based only on their apparent gender.

Considered together, the empirical evidence for gender bias in the legal profession and in academia is convincing. Notwithstanding this scholarly progress in empirically understanding gender inequality, studies have yet to investigate whether implicit biases might help explain the perpetuation of gender disparities within the legal profession. We thus devised an implicit social cognition-based empirical study designed to test the role of implicit gender stereotypes in the legal profession. The next subsection describes how we devised a study that attempted to bridge scholarly discourse on gender stereotypes with existing knowledge of gender disparities in the legal profession and academia.

### B. Crafting an Empirical Study that Responds to Gender Disparity Research

In planning our empirical study, we established two goals: first, test whether members of the legal community harbor implicit gender biases, and second, test whether gender stereotypes affect decision-making at various levels of the legal profession.[95] These goals, of course, were influenced by both the strengths and limitations of existing discourse. For the first goal, to test whether members of the legal community harbor implicit gender biases, we strived to respond as directly as possible to the themes set forth by legal scholars.[96] That is, we set out to craft a test that would examine whether members of the legal

---

90. Similar empirical studies using resumes that vary the name of the job applicant have been conducted outside of the legal profession and academia. *See generally supra* note 68.

91. Steinpreis et al., *supra* note 86, at 520-22.

92. *Id*. at 520.

93. *Id*. at 521.

94. *Id*. There were, however, no significant differences based on gender for the tenure candidates' CVs. The researchers explained this finding by indicating that they may have used a CV that was essentially too good. According to the researchers, the "vast majority" of faculty indicated that they would tenure the candidate. Thus, it might be true that while a less outstanding candidate might experience gender bias in tenure decisions, a top-notch candidate will be too good not to tenure. *Id*. at 524.

95. Admittedly, this second goal oversimplifies things somewhat. The second goal really had two parts: (1) to test whether people discriminate against women in the legal profession, and (2) to test whether this discrimination (if any) would be predicted by either implicit gender bias or explicit gender preferences.

96. These themes were outlined in Section II.C.

community implicitly associate women with home and family, as well as whether they associate certain high level legal positions (such as judges) with males.[97] As we describe in the next subsections, we turned to the science of implicit social cognition (and in particular, the Implicit Association Test) to find an empirical test that would allow us to achieve our goal.

For the second goal, to test whether gender stereotypes affect decision-making at various level of the legal profession, we responded to the literature by choosing to test three separate potentially discriminatory areas of the legal profession. First, in light of Gorman's findings demonstrating that masculine and feminine job-related expectations might be at least partially to blame for some of the legal profession's gender disparities,[98] we decided to test directly whether, for leadership positions in law, people believe that the best legal thinkers should have masculine rather than feminine characteristics. For this area, we decided to focus on the relationship between masculinity and femininity and one of the most renowned positions in the legal profession, the appellate judgeship. Second, considering that Rheinpreis and others have found that some decision-makers evaluate male-named CVs more favorably than identical female-named CVs,[99] we resolved to create our own resume test to see if members of the legal community display the same biases when evaluating law student resumes. And third, because implicit stereotypes have been shown to predict decisions such as economic decision-making (moving funds away from already disadvantaged groups),[100] we decided to test whether members of the legal community, during a hypothetical fund shortage, would disproportionately shift funds away from women's lawyers organizations. Each of these studies would also allow us to examine whether in-group biases affect male and female participants' decisions.

In creating our study, we also needed to decide whom to test.[101] In the case of gender bias in the legal profession, there are several possibilities. One might choose to focus on existing decision-makers (those professionals already making hiring and promotion decisions, such as law firm partners or members of a state judicial selection committee), or on future decision-makers (those who are likely to be making the key decisions in the future, such as young lawyers or law students). We were interested in both groups. However, due to practical considerations, such as the ease of participant recruitment, we chose to focus our

---

97. Of the three themes in our literature review, the one theme that we did not test in this study is the theme connecting certain personality traits to women. This theme should be tested in future studies.

98. *See* Gorman, *supra* note 69, at 722.

99. *See* Steinpreis et al., *supra* note 86, at 520-22. Other resume studies have found similar results in the context of other stereotypes. *See, e.g.*, Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

100. *See* Rudman & Ashmore, *supra* note 44, at 363.

101. The selection of a study's "population" is important in empirical research. If the researchers' goal, for example, is to study "teenagers," then a researcher needs to find a sample that reasonably approximates the entire teenage population (so, if "all teenagers" means all of the world's teenagers, or all of the country's teenagers, then the researcher would need to find a sample that represented those teenagers).

study on future decision-makers. Because we are university-based researchers, obtaining a law student sample—and based on recent history, likely a strong sample of future decision-makers[102]—would not be difficult.[103]

With our preliminary goals set and the law student sample selected, we began devising our first measure, the test of implicit gender biases. Fortunately, within the field of implicit social cognition, exciting new studies[104] have validated ways to test for implicit biases. One of the more exciting and flexible methodologies for testing implicit bias is the Implicit Association Test (IAT).[105] Because we decided to create our own IAT as well as implement a previously validated IAT, we provide an overview of the IAT.

1. Understanding the Implicit Association Test

The IAT measures implicit cognitions in a simple and compelling way.[106] It asks participants to categorize information as quickly as possible, and then calculates a participant's reaction time (in milliseconds)[107] and accuracy in completing the categorization task.[108] The wisdom behind the IAT holds that statistically significant speed and accuracy-based differences in a person's ability to categorize different types of information reflects something meaningful in that person's automatic cognitive processes.

102. Graduates from the University of Hawai'i William S. Richardson School of Law have attained leadership positions including governor (John D. Waihee III), member of the United States House of Representatives (Colleen Hanabusa), appellate judge (alumni who are current appellate judges in Hawai`i include Alexa Fujise, Katherine Leonard, and Lisa Ginoza), U.S. attorney (Florence Nakakune), lieutenant governor (James "Duke" Aiona, Jr.), law school dean (Lawrence Foster and John Gotanda), and numerous trial judges, law firm partners and more. It would be safe to predict that current law students will one day enter senior roles in the legal community.

103. As we discuss *infra* Section V, future studies should seek to test whether existing decision-makers rely on implicit gender biases in making decisions.

104. "New" in this context means new in the history of science. The tests referred to here were first described in scientific journals in the early and mid-1990's. *See, e.g.*, Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998).

105. Within legal literature, the IAT has become a familiar symbol of implicit bias for scholars of race because of the numerous compelling IAT-based studies that have uncovered implicit racial bias. *See, e.g.*, Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 101-14 (2008); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CAL. L. REV. 1063 (2006); Krieger & Fiske, *supra* note 49.

106. The following three paragraphs describe the Implicit Association Test in detail. These three paragraphs are reprinted almost verbatim, including footnotes, from Justin D. Levinson et al., *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. CRIM. L.J. 187 (2010).

107. Researchers call the measurement of reaction time "response latency." *See, e.g.*, Greenwald et al., *supra* note 104; Mahzarin R. Banaji, *Implicit Attitudes Can Be Measured*, *in* THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 123 (Henry L. Roediger III et al. eds., 2001).

108. Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 803 (2001) (summarizing that, "[w]hen highly associated targets and attributes share the same response key, participants tend to classify them quickly and easily, whereas when weakly associated targets and attributes share the same response key, participants tend to classify them more slowly and with greater difficulty.")

The following is a detailed description of the way the IAT is typically conducted. Study participants, working on computers, press two pre-designated keyboard keys as quickly as possible after seeing certain words or images on the computer monitors. The words and images that participants see are grouped into meaningful categories. These categories require participants to "pair an attitude object (for example, man or woman. . .) with either an evaluative dimension (for example, good or bad) or an attribute dimension (for example, home or career, science or arts). . . ."[109] Participants complete multiple trials of the pairing tasks, such that researchers can measure how participants perform in matching each of the concepts with each of the other concepts. For example, in one trial of the most well-known IATs, participants pair the concepts Good/White together by pressing a designated response key and the concepts Bad/Black together with a different response key. After completion of the trial, participants then pair the opposite concepts with each other, here Good/Black and Bad/White.[110] The computer software that gathers the data[111] measures the number of milliseconds it takes for participants to respond to each task. Scientists can then analyze (by comparing reaction times and error rates using a statistic called "D-prime"[112]) whether participants hold implicit associations between the attitude object and dimension tested. Results of IATs conducted on race, for example, consistently show that "white Americans express a strong 'white preference' on the IAT."[113]

As a measure, the IAT is quite flexible. Researchers have created dozens of different kinds of IATs. Some examples include: Gender/Science IAT, Gay/Straight IAT, Obama/McCain IAT, and the Fat/Thin IAT, among many others.[114] The Gender/Science IAT, for example, requires participants to group together male and female photos with science and liberal arts words. It consistently shows that people associate men with science and women with liberal arts. It is worth noting the flexibility of the IAT to test either evaluative dimension words (such as grouping Male/Female with Good/Bad), or attribute dimension words (such as grouping Male/Female with Career/Family). The IAT we created, the Judge/Gender IAT, requires participants to group together male and female names and Judge and Paralegal related words (attribute dimension words). As we will discuss, our empirical study of the IAT tested

---

109. Levinson, *supra* note 23, at 355 (citing Banaji, *supra* note 107, at 123).

110. Because participants may naturally be quicker at responding with one of their hands, participants complete these tasks twice, once for each response key, to eliminate differences based on hand preference. The order of the IAT tasks is also usually randomized to reduce order effects.

111. In our empirical study, we used the software Inquisit, produced by Millisecond Software.

112. Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCHOL. 197 (2003).

113. Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV 1195, 1199 (2009); *see also* Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 612 (2009) (citing Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website*, 6 GROUP DYNAMICS 101, 105 (2002)).

114. *See* PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/demo/selectatest.html (last visited Oct. 25, 2010).

both the Judge/Gender IAT and the Gender/Career IAT, both of which we will describe in detail.[115]

2. The IAT in Legal Studies

Although a handful of legal scholars have employed IATs in empirical work,[116] just two projects have created new IATs for application in the legal domain.[117] A brief description of these projects illuminates the possibilities and potential for using IATs in the context of gender discrimination. In one such project, Levinson, Cai, and Young desired to test whether there was an implicit presumption of guilt for black defendants on trial.[118] Noting the flexibility of certain social cognition measures (including the IAT) for adoption into relevant legal domains, and encouraging future projects to create new IATs, the researchers created a Guilty/Not Guilty IAT that tested whether people associate black people with criminal guilt. The results of the study confirmed the authors' hypothesis, finding first, that people implicitly associate black people (compared to white people) with guilty,[119] and second, that people's levels of implicit bias predicted the way they evaluated evidence in a criminal trial.[120]

In another project, Jerry Kang and his colleagues created an IAT in order to test whether jurors rely on implicit ethnic biases when evaluating the performance of litigators.[121] In particular, the researchers were interested in how mock jurors would evaluate Asian male litigators compared to white male litigators.[122] They hypothesized that participants would associate white males with traits commonly associated with successful litigators (for example, eloquent, charismatic, and verbal) relative to Asian males, who would be more likely to be associated with traits commonly assigned to successful scientists.

---

115. Greenwald et al., *supra* note 104.

116. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542-44 (2004) (using a paper and pencil version of the IAT to test whether capital defense attorneys harbor implicit racial biases); Rachlinski et al., *supra* note 113, at 1198-1208 (testing a large sample of judges for implicit racial bias).

117. *See* Rachlinski et al., *supra* note 113, at 1204–05 (citing Robert Livingston, When Motivation Isn't Enough: Evidence of Unintentional Deliberative Discrimination Under Conditions of Response Ambiguity 9-10 (2002) (unpublished manuscript) (on file with the Notre Dame Law Review); Arnd Florack et al., *Der Einfluss Wahrgenommener Bedrohung auf die NutzungAutomatischer Assoziationen bei der Personenbeurteilung [The Impact of Perceived Threat on the Use of Automatic Associations in Person Judgments*], 32 ZEITSCHRIFT FÜR SOZIALPSYCHOLOGIE 249 (2001)).

118. Levinson et al., *supra* note 106.

119. *Id*. at 17.

120. *Id*. at 19 (explaining what the IAT did and did not predict).

121. Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness,* 7 J. EMPIRICAL LEG STUD. (forthcoming, 2010), *available at* http://papers.ssrn.com/sol3 papers.cfm?abstract_id=1442119.

122. *Id*. at 10 (explaining that the researchers intentionally did not examine ethnicity effects for women attorneys. "Our strategy was not to ignore gender, but to control for it, based on past evidence showing that lawyers are expected to be men rather than women . . . . As such, we expected that implicit and explicit stereotypes about ideal lawyers would activate thoughts of White men more than Asian men, but would not much activate thoughts of women of either race." (internal citations omitted)).

The results confirmed their hypothesis.[123] Participants did in fact implicitly associate white males with traits commonly assigned to successful litigators. Furthermore, these implicit associations predicted their judgments of white and Asian litigators' performance in a mock trial.[124] That is, participants with higher levels of implicit bias were more likely to favor the white litigators' performances.

These two IAT-based projects demonstrate that, so long as the categories researchers are interested in fit the IAT paradigm (which is typically, although not always, dichotomous), new IATs may be created to test further law related hypotheses. We believed that testing implicit gender bias in the legal context (and specifically testing implicit associations between men and judges, compared to women and paralegals) was one endeavor that would be well served by the IAT. The next Section describes the study we conducted in detail, beginning with the IAT we created.

## IV. THE EMPIRICAL STUDY

We designed an empirical study to test whether implicit gender biases may be driving gender discrimination in the legal profession. This Section reports on the details of study, including the research methods, study materials, and results.

The centerpieces of the empirical study were two IATs, the Judge/Gender IAT and the Gender/Career IAT, the first of which we created uniquely for this study and the second of which was adopted from a well-established social science test.[125] We developed the Judge/Gender IAT and selected the Career/Gender IAT for this study because they closely mirrored the themes of

---

123. *Id*. at 16-20.

124. Mock jurors' explicit preferences also predicted evaluations of litigator performance. As these results show, the IAT is useful not just because it is a creative and reliable measure of implicit attitudes and stereotypes. It is also valuable because it has been shown to predict the way people behave and make decisions. *See generally* Anthony Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17 (2009) (showing that the IAT predicts behaviors in many circumstances). It should be noted, however, that although the majority of research supports this claim, there has been vigorous debate over it. *See e.g.*, Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567 (2009) (disputing the results of prior articles that claim the race IAT predicts behaviors); Hart Blanton et al., *Transparency Should Trump Trust: Rejoinder to McConnell and Leibold (2009) and Ziegert and Hanges (2009)*, 94 J. APPLIED PSYCHOL. 598 (2009) (maintaining skepticism about whether the IAT reliably predicts discriminatory behavior). *But see, e.g.*, Allen R. McConnell & Jill M. Leibold, *Weak Criticisms and Selective Evidence: Reply to Blanton et al. (2009)*, 94 J. APPLIED PSYCHOL. 583 (2009) (responding to Blanton et al.'s critique); Jonathan C. Ziegert & Paul J. Hanges, *Strong Rebuttal for Weak Criticisms: Reply to Blanton et al. (2009)*, 94 J. APPLIED PSYCHOL. 590 (2009) (criticizing Blanton et al.'s critique of their prior data). Similar debates have appeared in the legal literature. *See* Bagenstos, *"Science" and Antidiscrimination Law*, *supra* note 49, at 484-90; Adam Benforado & Jon Hanson, *Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights*, 57 EMORY L. J. 1087, 1135-43 (2008). *See generally* Kristin A. Lane et al., *Implicit Social Cognition and Law*, 3 ANN. REV. L. & SOC. SCI. 427 (2007); Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737 (2009); Gregory Mitchell & Philip Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006); Amy L. Wax, *The Discriminating Mind: Define It, Prove It*, 40 CONN. L. REV. 979 (2008).

125. Nosek et al., *supra* note 113, at 101 (reporting results from 600,000 IATs).

legal scholarship on implicit gender bias. Recall the first theme in the legal scholarship outlined in Section II—women are subordinated because they are typically assumed to place greater emphasis on the home and family.[126] The Career/Gender IAT allowed us to test whether law students implicitly associate males with work and females with home and family. Recall the third theme in the legal scholarship—certain high status leadership roles are assumed to be male jobs, and female applicants are thus automatically evaluated less favorably. The Judge/Gender IAT allowed us to test whether law students associate judges with males and paralegals with females. The IATs thus became the centerpieces of our study, because they allowed us to test whether members of the legal profession (here, law students) hold the implicit gender biases that scholars have been most concerned about.

We also developed further tests, both to determine whether law students display gender bias in decision-making, as well as to test whether implicit biases predict that discriminatory decision-making. These additional measures consisted of a judicial appointments measure, a law firm hiring measure, and student organization budget cut measure. We also included a measure of explicit gender bias: the Modern Sexism Scale. We ran these studies on a participant pool of law students.[127]

### A. Measures

There were six major components to the study, including two IATs, a judicial appointments measure, a law firm hiring test, a budget cut task, and an explicit gender bias scale. Here, we provide specifics on each of the measures.

#### 1. Gender Implicit Association Tests

The first measure we designed was the Judge/Gender IAT. This test, like other IATs, requires participants to group together traits and attributes as quickly as possible and allows researchers to measure the strength of association between categories. We were specifically interested in whether members of the legal community consider judges, one of the most prestigious legal positions, as an "implicit male leader prototype."[128] Thus, the Judge/Gender IAT requires participants to group together words representing judges and paralegals with male and female names.[129] We could therefore test whether participants held implicit associations between men and judges and women and paralegals, as we predicted they would.

We next included a well-established IAT: the Gender/Career IAT.[130] Although this test is not directly related to law, it tests implicit associations related to gender and the workplace, as well as gender and home. Running this

---

126. *See supra* notes 48-55 and accompanying text.

127. Students received candy, but no other compensation, for participating in the study.

128. *See* Rudman & Kilianski, *supra* note 48, at 1315-16.

129. The words used to represent "Judges" were: Make Decision, Court, Preside, Opinion, and Robes. The words used to represent "Paralegals" were: Notetaker, Legal Assistant, Filing, Answer Phone, and Helper. The names used were Josh, Brandon, Peter, Ian, and Andrew for men, and Emily, Donna, Debbie, Katherine, and Jane for women.

130. Nosek et al., *supra* note 113.

IAT on law students allowed us to test whether implicit gender stereotypes connecting women to home and family may be pervasive in the legal profession.[131] In the Career/Gender IAT, participants group together words representing career and home with male and female names.[132] Consistent with commentators' arguments, we predicted that study participants implicitly associate male with career and female with home. Participants completed the two IATs in counterbalanced order, such that some participants completed the Judge/Gender IAT first and some completed the Gender/Career IAT first. [133]

The next three measures were not specific measures of implicit associations or stereotypes, but were measures we designed to test other ways gender biases might function in the legal profession. We selected three distinct areas: (1) judicial appointments, (2) law firm hiring, and (3) budget cuts.

2. Judicial Appointments Measure

The Judicial Appointments measure was designed to test participants' gendered assessments of high-level legal positions. This measure asks participants to rate the characteristics most important in the appointment of appellate level judges. In designing the measure, we selected potential judicial characteristics that were masculine, feminine, and neutral in nature. A pre-test on separate participants confirmed which characteristics were masculine and which were feminine.[134] Masculine characteristics included, for example, firm and competitive.[135] Feminine characteristics included, for example, empathic and compassionate.[136] Participants were instructed: "Based on your experience studying law and reading numerous judicial opinions, we are interested in your perceptions of the qualities that appellate judges should possess. Please read the following attributes and indicate on a scale of 1-7 how important it is for a judge to possess each attribute. Once again, we are interested in the attributes that appellate judges (those at the court of appeals level and higher, both in the federal and state system) should possess." Participants then viewed the masculine, feminine, and neutral words one at a time,[137] and rated each characteristic on a 7-point scale, ranging from "not important" (1) to "very important" (7). With this methodology, we could evaluate whether members of the legal community believe that appellate judges should possess more

---

131. Scholars have predicted as much. *See supra* notes 48-55 and accompanying text.

132. The words used to represent "Career" were: Management, Professional, Corporation, Salary, and Office. The words used to represent "Home" were: Home, Parents, Children, Family, and Relatives. The names used were Ben, John, Daniel, Paul, and Jeffrey for men, and Julia, Michelle, Anna, Emily, Rebecca for women.

133. In addition, the IATs were counterbalanced, such that within each IAT, participants encountered the tasks in varying orders. This counterbalancing was designed to eliminate order effects.

134. In the pre-test, we provided a separate group of participants with a list of words and asked them to rate the masculinity or femininity of those words on a seven-point scale. We only selected the masculine, feminine, and neutral words that had substantial pre-test agreement.

135. The other masculine characteristics were: Aggressive, Leader, Powerful, Risk-Taker, and Self-Assured.

136. The other feminine characteristics were: Cautious, Gentle, Sympathetic, Thoughtful, and Warm.

137. The words were presented in random order.

masculine or feminine traits. We predicted, first, that participants would select more masculine than feminine traits for appellate judges, and second, that the implicit bias measured by the IATs would predict these results.[138]

3. Law Firm Hiring Test

The Law Firm Hiring test was designed to measure whether gender affects hiring of law firm candidates. In this test, participants are informed that they are the hiring partner of a local law firm (with about 20 partners), and that there were two candidates vying for a final job slot as a summer associate. They are instructed: "There are two candidates remaining, and you plan to hire one of them. It is your job to choose the candidate. Please review both resumes in the envelope marked 'Resumes' on your desk, and answer the questions that will appear on your computer screen." They then review the resumes of each of the candidates. The first names of the two candidates are varied, such that all participants see the same two resumes (which we call Resume A and Resume B), but some participants see Resume A with a woman's name (Ashley), while other participants see Resume A with a man's name (David).[139] All participants review the same two resumes.[140] After reviewing the resumes, participants are asked to recommend the hiring of one of the candidates, and are also asked specific questions about the strengths and weaknesses of the candidates. We predicted that men and women would be hired in equal numbers. We made this prediction because we believed the "glass ceiling" to be significantly above the summer associate level. Although we would have preferred to test resumes of more senior lawyers (e.g. associates on the partnership track),[141] due to our law student population, it was most realistic to ask about entry-level decisions.[142]

4. Budget Cut

The Budget Cut measure was designed to test whether participants would allocate resources away from a women's law student organization and towards other student organizations in the face of a budget crisis. In this measure, participants are informed that budget cuts are occurring to national student

---

138. That is, we predicted that the greater the implicit bias measured by the IAT, the greater the selection would be of masculine traits.

139. Candidate A's last name was Suzuki and Candidate B's last name was Tanagawa. We intentionally chose Japanese-American surnames for the candidates because Japanese-American law students comprise one of the largest groups of law students at the University of Hawai`i (along with European-Americans) and one of the largest groups of attorneys in the Honolulu market. There are, of course, relevant stereotypes to Japanese Americans in Hawai`i, just as there are with European Americans. For more on local stereotypes in Hawai`i, see Eric Yamamoto, *The Significance of Local*, *in* SOCIAL PROCESSES IN HAWAI`I 138, 138-49 (Peter Manicus ed., 1974). In light of the fact that gender and ethnicity each have unique stereotypes that would likely affect the evaluation of resumes, we controlled for ethnicity by selecting the same apparent ethnicity for both candidates. We believed that Japanese-American stereotypes would be more consistent than European-American stereotypes, and thus selected a Japanese-American name for the resume.

140. *See infra* App. A.

141. If we had done so, we would have predicted that men would be hired more than women.

142. Future studies should strive to test more relevant populations for investigating law firm decision-making at the partnership level, for example.

organizations and their input is needed as guidance for how to implement budget cuts. They are then provided with a list of six student organizations, including the Women Lawyers Association. The list contains "current" budget allocations (ranging from $1650 to $2750) for each of the organizations and provides a target amount of total cuts (20% or approximately $2550 total). Participants then fill in new recommended amounts for each organization. Other than the Women Lawyers Association, the other student organizations listed in the measure include the Public Interest Law Association, The Criminal Justice Society, The Environmental Law Group, Moot Court (All Teams), and Law and Business Society. We predicted first that participants would reduce the budget of the Women Lawyer's Association by a greater percentage than most of the other groups, and that these budget reductions would be predicted by the participants' implicit gender biases.[143]

5. Modern Sexism Scale

Participants also completed a Modern Sexism Scale. This scale is designed to measure explicit, as contrasted with implicit, gender bias towards women.[144] The scale asks participants to respond to statements, such as "[d]iscrimination against women is no longer a problem in the United States."[145] Participants respond to eight such statements on a numerical scale and their responses are tallied and converted into a final score.

Regarding these non-IAT measures, it is important to note that we could evaluate statistically not only the results of each of the measures, but also whether the IATs (or the results on the Modern Sexism Scale) predicted the responses on these measures. More specifically, we could examine whether implicit gender biases predicted judgments on the resume measure, the judicial appointment measure, and the financial allocation measure.

## B. Methods

Participants were recruited from the law school library at the University of Hawai'i William S. Richardson School of Law. Fifty-five participants completed the study. Data for five of the participants was dropped because those participants had lived outside of the United States for more than ten years.[146] The remaining fifty participants included eight 1L's, thirty 2L's, and twelve 3L's.

---

143. That is, we predicted that the greater the implicit bias measured by the IAT, the greater the budget cut would be for the Women Lawyers Association.

144. *See* Janet K. Swim et al., *Sexism and Racism: Old-fashioned and Modern Prejudices*, 68 J. PERSONALITY & SOC. PSYCHOL. 199, 212 (1995).

145. *See id.* (Other items in the Modern Sexism Scale include, "2. Women often miss out on good jobs due to sexual discrimination. 3. It is rare to see women treated in a sexist manner on television. 4. On average, people in our society treat husbands and wives equally. 5. Society has reached the point where women and men have equal opportunities for achievement. 6. It is easy to understand the anger of women's groups in America. 7. It is easy to understand why women's groups are still concerned about societal limitations of women's opportunities. 8. Over the past few years, the government and news media have been showing more concern about the treatment of women than is warranted by women's actual experiences.").

146. Some of these participants were international LL.M. students. We dropped the data for these participants because, for this study, we were interested in stereotypes in the United States.

There was gender balance in the participant pool. Twenty-four of the participants were male and twenty-six were female. The population was ethnically diverse. Forty-six percent identified themselves as Asian American,[147] twenty-four percent as White/Euro-American, twelve percent as multi-racial, eight percent as Native Hawaiian, six percent as Pacific Islander, two percent as Latino/Hispanic, and two percent identified as Other. The mean age of the participants was 26.48. Two female research assistants recruited participants and conducted the study.[148] Participants completed the study in a laboratory with two separate computer stations.[149] Participants first completed the non-implicit measures, which were given to them in counterbalanced order.[150] Next, participants completed the IATs, which were also given to them in counterbalanced order.[151] At the end of the study the participants provided demographic information.

1. Limitations of the Study

A few limitations of the study should be clarified. First, it is important to highlight that the Research Assistants (who recruited participants and administered the study) were both female second year law students. There are several potential confounds that this method of recruitment introduced. First, it is possible that running the study with female research assistants (in a position of authority) altered the way participants responded to questions. For example, interacting with women functioning successfully in authority roles might temporarily help to combat implicit and explicit biases.[152] Second, it is also possible that interacting with the female research assistants created a confirmation bias. That is, if participants believed that the administrators were members of their University's women's lawyers group, for example, participants may have been more hesitant to cut funding to that group. Or, more simply, if the participants believed that the women research assistants wanted them to select the female resume, they may have acted in accordance with that expectation. Third, not only were the two female research assistants functioning in an authority role, but also at the time of the study they were successful students. Thus, using two academically successful female research assistants may have unintentionally created exemplar effects, such that it would be easier

147. Of the Asian participants (N=23), ten identified themselves as Japanese-American, six identified themselves as Chinese-American, three identified themselves as Korean-American, and four identified themselves as Other.

148. These research assistants were both second-year law students.

149. The computers were IBM desktop computers outfitted with Inquisit software. This software is one of the favorites used by reaction-time (such as the IAT) researchers.

150. The IATs were given after these measures so that participants would not be alerted as to the gendered theme of the study.

151. In addition, the IATs themselves were counterbalanced such that the order of the IAT tasks was presented differently.

152. See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 645 (2004) (finding that certain types of exposure to female role models temporarily reduced implicit bias).

for participants to value judge's feminine characteristics or to hire a female summer associate.[153]

Future studies should thus avoid using only female recruiters and administrators, and should endeavor to use administrators who are less known to the law student community (e.g. non-law student confederates). It should also be noted that participants were only recruited as volunteers (candy was provided as a thank you) and were not paid for their participation. Thus, there may have been an altruism effect, whereby more altruistic students were more likely to participate in the study. These students might not proportionally represent the law student population with regard to their decision-making. For example, perhaps altruistic students would be more likely to favor a public interest student organization compared to a business law organization in the budget cut measure.

## C. Results

### 1. Implicit Associations between Judge/Male and Paralegal/Female

As predicted, the first IAT, the Judge/Gender IAT, confirmed the hypothesis that law students hold implicit gender biases related to leadership positions in the legal profession.[154] Participants displayed a significant association between Judge and Male (M=822.48) compared to Judge and Female (M=1035.18), producing a significant IAT effect (D=.23, t(49)=3.66, p=.001). The results support the conclusion that law students implicitly associate men with judges, and women with paralegals, and therefore harbor an "implicit male leader prototype" in the legal setting.[155]

### 2. Implicit Associations between Work/Male and Home/Female

As hypothesized, the second IAT, the Gender/Career IAT, confirmed the hypothesis that law students hold implicit gender biases connecting women with the home and family. Participants displayed a significant association between Male and Career (M=850.37) compared to Female and Career (M=1101.60), producing a significant IAT effect (D=.33, t(49)=6.87, p>.001). The results of this study support the conclusion that law students implicitly associate

153. For more on the potential implicit bias reducing effects of exemplars, *see* Kang & Banaji, *supra* note 105.

154. In computing our results, we followed the scoring algorithms suggested by Greenwald and his colleagues. *See* Greenwald et al., *supra* note 112 (demonstrating that despite the complicated nature of the IAT and disagreement among social scientists about the best way to score it, scholars have generally agreed on an accepted algorithm since 2003); *see also* Levinson et al., *supra* note 106, at 17 (citing Greenwald et al., *supra* note 112) ("Greenwald, Nosek and Banaji's suggested improved scoring measure for the IAT, called a *D* score, has improved test-response detection (for instance, it throws out indiscriminate responses or responses that indicate a lack of attention) and incorporates an inclusive standard deviation for all congruent trials (for instance, both the practice and test block of white-guilty and black-not guilty). Mean latencies are computed for each block, and complimentary blocks are subtracted from each other (e.g., practice white-not guilty and black-guilty would be subtracted from practice white-guilty and black-not guilty). These two difference scores are divided by their inclusive standard deviation score, and the average of these two scores is called *D*.").

155. *See* Rudman & Kilianski, *supra* note 48, at 1315-16.

men with work and women with the home and family. These results replicated previous research outside of the legal profession.[156]

3. Relationship Between the Judge/Gender IAT and Gender/Career IAT

Because we created a new IAT, the Judge/Gender IAT, we were interested in whether it measured implicit constructs similar to the already established Career/Gender IAT. We thus conducted a correlational analysis. This analysis found that the two IAT scores (Judge/Gender, Career/Gender) were weakly, but significantly, correlated ($R=.33$, $p=.02$). This result suggests that while the two IATs tap into a similar general construct (gender bias), each IAT also measures a unique association.

4. The IATs and the Modern Sexism Scale

We also tested whether the responses to either of the IATs would be related to responses on the Modern Sexism Scale, in which participants report explicit gender attitudes. As predicted, neither of the IATs were correlated with the Modern Sexism Scale ($p>.1$). This result is expected, first because implicit and explicit measures are intended to test different constructs, and second because the Modern Sexism Scale is designed to test responses to somewhat different societal issues than the IATs we implemented. The difference between the responses to the IATs and the Modern Sexism Scale demonstrates the importance of investigating both implicit gender biases and explicit gender attitudes.[157]

5. Judicial Appointments

For the judicial appointments measure, participants rated masculine and feminine judge attributes to be equally important ($Mdiff=.5$, $t(49)=.47$, $p>.1$).[158] However, individuals' scores were not correlated ($R=.162$, $p>.1$), suggesting that there were individual differences in how attributes were rated. We thus were able to investigate whether implicit biases from the IATs predicted gender bias in the responses to the judicial appointments measure, as we hypothesized they would. A difference score was created by subtracting feminine judge attributes from male judge attributes, so that higher difference scores indicated a preference for masculine judge traits. A multiple regression analysis was run to

156. *See* Nosek et al., *supra* note 113, at 105 (reporting results on the gender-career IAT). Due to the nature of the IATs we conducted (it may become quickly apparent what the researchers are testing), our experiment was constructed so that the non-implicit experimental measures were always conducted before the IATs were taken. Analysis suggests that the experimental manipulation of seeing a female paired with an international resume and a male paired with a general business significantly lowered both Judge/Gender ($F=23.53$, $p>.001$) and Career/Gender ($F=16.17$, $p>.001$) IATs.

157. Measuring explicit gender attitudes without also investigating implicit gender biases would overlook the science underlying the field of implicit social cognition.

158. Analysis suggested that eliminating two items from the Judge Attribute scale would increase reliability of the scale. The two words were "Cautious" and "Risk-Taker." The resulting Cronbach's alpha was acceptable ($\alpha=.76$). The remaining terms were split into two groups based on pre-testing of words to create a Masculine Attribute Scale (Aggressive, Competitive, Firm, Leader, Powerful, Risk-taker, and Self-Assured) and a Feminine Attribute Scale (Compassionate, Empathic, Gentle, Sympathetic, Thoughtful, Warm).

determine if implicit scores (from both the Judge/Gender and the Gender/Career IATs) predicted an emphasis on feminine or masculine traits.[159]

The overall regression model was significant (F=6.06, p>.001), and explains 41% of the variance of the dependent variable ($R^2$=.41). The main effects of gender of participant (b=5.307, t=3.04, p<.05), Career/Gender IAT score (b=-18.42, t=-4.93, p<.05), and Judge/Gender IAT score (b=9.727, t=3.21, p<.05) all significantly predicted the difference between importance for masculine and feminine judge attributes. The interactions between participant gender and Career/Gender IAT (b=20.79, t=3.753, p<.05) and participant gender and Judge/Gender IAT (b=-10.686, t=-2.511, p<.05) were also significant predictors. Importantly, these interaction effects tell us that implicit bias predicted responses on the judicial appointments measure, but that the results differed depending on the gender of the participant.[160] Therefore, we report the results separately for male and female participants.

For the male participant regression model,[161] there were two interesting results demonstrating the IATs' predictive validity, but in different directions. First, as implicit associations between male and judge increased, ratings of masculine judge attributes increased as compared to female judge attributes (B=9.727). That is, the more implicit bias the participants displayed linking judges to males, the more they preferred masculine judge attributes. This finding supported our hypothesis that implicit gender bias would predict biased decision-making. Second, as implicit associations between home and female increased on the Career-Gender IAT, ratings of feminine judge attributes increased as compared to masculine judge attributes (B=-18.416). Put simply, the more implicit bias male participants displayed linking men to career, the more they preferred feminine judge attributes. The direction of this finding was thus not as we predicted.

For the female participant regression model,[162] there were also two results demonstrating predictive validity, but similar to the male participant regression, the results were in different directions. First, as implicit associations between female and home increased on the Career/Gender IAT, the gap between ratings of masculine and feminine judge attributes increased (B=2.375). Put simply, the more implicit bias the participants displayed linking men to career, the more

---

159. Since preliminary analysis demonstrated that females had a higher (m=1.57) preference for masculine attributes, while males had a higher (m=-2.75) preference for feminine traits in judges, gender and gender's interactions with the two IAT scores were included in the model. To control for multicolinearity, the IAT scores were centered around their means. The regression model was: Judge Attribute Difference Score = -3.845 + (Gender)* 5.307 + (Centered d_home)* -18.416 + (Centered d_law)* 9.727 + (gender*d_home)* 20.791 + (gender*d_law)* -10.686.

160. Since the variable of gender is coded as either a 0 (male) or a 1 (female), there are, in effect, two regression models, one for male participants and one for female participants. These models are best interpreted separately.

161. Male Regression Model: Judge Attribute Difference Score = -3.845 + (Centered d_home)* -18.416 + (Centered d_law)* 9.727. For this model, males with an average implicit score for both IATs gave higher ratings of feminine judge attributes than masculine judge attributes.

162. Female Regression Model: Judge Attribute Difference Score = 1.462 + (Centered d_home)* 2.375 + (Centered d_law)* -.959. For this model, females with average IAT scores (in this case slightly biased) rated masculine judge attributes slightly higher than female judge attributes (B=1.462).

they preferred masculine judge attributes. The direction of this finding was as we predicted. Second, as implicit associations between male and judge increased on the Judge/Gender IAT, ratings of feminine judge attributes increased as compared to masculine judge attributes (B=-.959). That is, the more implicit bias female participants displayed linking men to career, the more they preferred feminine judge attributes. The direction of this finding was thus not as we predicted. These interesting predictive validity results deserve further exploration, a task we will consider in subsection D.

6. Resume Study

Consistent with our hypothesis, participants hired the male and female job candidates at approximately the same rates, regardless of participant gender or the resume they saw ($\chi^2$=.00, p>.05; ($\chi^2$=2.35, p>.05). Ashley was hired slightly more (N=31) than David (N=19) for the summer position, although the difference was not statistically significant. The gender of the participants was also not a significant factor in determining which candidate was hired. However, there was a trend here as well: male participants hired Ashley more (N=17) than female participants (N=14), while female participants hired David more (N=12) than male participants (N=7). Male participants decided to hire Ashley more often when she was paired with an international resume (N=14) than with a business resume (N=4), suggesting that something about the female candidate with an international interest[163] appeared to impress participants.

Ashley was rated higher than David on all ratings of the resume, though many of these differences were small. Paired t-tests demonstrated that participants rated Ashley as more likely to succeed as a summer associate (Mdiff=.18, t(49)=2.64, p>.05) and to receive an offer at the end of the summer (Mdiff=.12, t(49)=2.20, p>.05 ). Participants also gave Ashley a significantly higher overall rating (Mdiff=.180, t(49)=2.137, p>.05). These ratings demonstrate that law students do not penalize female entry-level law candidates, and in some cases prefer them. This was true, of course, despite the implicit biases displayed by the participants.

A logistic regression was run to determine if either implicit measure predicted hiring decisions. The model did not approach significance (all p's>.1). This result indicates that participants' implicit biases did not likely affect their choice of resume.

7. Budget Cuts

Participants cut the budget in ways that were not equal across groups, but the cuts did not disadvantage the Women Lawyers Association in comparison to other groups. There were no gender differences on budget cuts; male and female participants made budget cuts similarly. The average amount cut from a group was 19%. Participants cut 15% from the Public Interest Law Association, 20% from Women Lawyers Association, 20% from Criminal Justice Society, 19% from the Environmental Law Group, 17% from Moot Court, and 25% from the Law and Business Society. The closeness of the cuts to the desired 20% cut demonstrates that participants preferred to make fairly equal cuts to all groups.

163. *See infra* App. A.

The target group, Women Lawyers Association, did not differ significantly from the other budget cuts (Mdiff =.00, t(.58), p>.05). IAT scores were not correlated with these differences, nor did it significantly predict them in a regression. This result indicates that participants' implicit biases did not likely affect their budget cuts.

D. Interpreting the Empirical Results

The results of our empirical study paint a picture of implicit gender bias in the legal profession that is both concerning and hopeful. The concerning part is that the law student participants consistently held implicit gender biases, and they did so on both the Judge/Gender IAT and the Career/Gender IAT. Contextualized within legal scholarship on gender stereotypes, these results confirm that law students associate men with career and women with home and family, as well as hold implicit male prototypes for the position of judge. Considered within the broader social science discourse, these findings document the existence of implicit gender bias in the legal profession, and also show that the job specific associations people hold can be implicit in nature.[164] The hopeful part of the results is that the participants were mostly able to resist their implicit biases and make decisions in non-biased ways. Namely, participants did not discriminate against women in the judicial appointments measure, the resume study, or the budget cut measure. In fact, in some instances, such as in the resume study, participants rated the female candidate more favorably than the male candidate. The remainder of this subsection interprets the results in more detail.

The results indicate that implicit gender bias affected the participants on both IAT measures. But what do these results mean? As social psychologists have surmised, implicit associations often predict the way people act and make important decisions.[165] For example, one study found that participants who showed more implicit bias on a White/Black IAT acted differently towards blacks,[166] and a subsequent study by different researchers found that it even predicted discriminatory behavior (such as making racial epithets).[167] A study on medical decision-making and race found that doctors with high implicit racial bias were less likely to order certain medical procedures for their black patients.[168] And, directly relevant to gender bias in the legal profession, a researcher found that employers in Sweden who harbored implicit biases related to Arabs were less likely to call Arab candidates for job interviews.[169] If

---

164. Of some complication to our analysis is that participants' implicit biases only sometimes predicted their decisions, such as in the judicial appointments study, and that these results were multidirectional and difficult to interpret.

165. *See* Greenwald et al., *supra* note 124; Rudman & Ashmore, *supra* note 44.

166. John F. Dovidio et al., *Implicit and Explicit Prejudice and Interracial Interaction*, 82 J. PERSONALITY & SOC. PSYCHOL. 62, 65-67 (2002).

167. Rudman & Ashmore, *supra* note 44, at 361-63.

168. Alexander R. Green et al., *Implicit Bias Among Physicians and Its Prediction of Thrombolysis Decisions for Black and White Patients*, 22 J. GEN. INTERNAL MED. 1231 (2007).

169. *See* Siri Carpenter, *Buried Prejudice: The Bigot in Your Brain*, SCI. AM. MIND, May 2008, at 32, 37 (citing Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence* (Inst. for the Study of

law students hold the implicit biases that were documented in this study, we must wonder whether they are truly able to navigate their professional lives without acting on those stereotypes. Studies of gender bias in law firm partnership decisions, for example, heighten this concern.[170]

Building on the research linking implicit biases to discriminatory actions, we designed the non-implicit measures to test whether law student participants would act on their implicit biases or whether they might resist them. The majority of our results support the argument that our law student participants successfully resisted or compensated for the implicit biases we tested.[171] First, they did not act in a discriminatory manner to women. And second, the results of their IATs did not predict their decisions on the non-implicit measures, other than the judicial appointments measure. And even for that particular measure, only some of the results indicated that the IATs predicted gender discrimination in the expected manner. Other results showed that participants sometimes acted in ways directly contrary to their implicit biases. There are several possibilities that might explain why the participants in our study harbored implicit biases but for the most part did not act on them. Here, we briefly consider these possibilities, focusing on the two strongest rationales.

First, participants may have been successful in resisting their implicit biases if they were implicitly motivated to control the influence of prejudicial stereotypes. Researchers have found that some participants can overcome their implicit biases either because they have high implicit motivations to avoid prejudice or they are temporarily influenced by their egalitarian surroundings.[172] Jack Glaser and Eric Knowles, for example, had participants take unique IATs that were designed first to test people's implicit motivation to avoid prejudice, and second to test how much they implicitly considered themselves prejudiced.[173] They also had participants complete a "shooter bias" task, which measures how people respond to visual images of black and white men with guns and non-gun objects in a video game-like setting, asking them either to shoot armed men as quickly as possible or to press a "safety" button when unarmed men appear.[174] Glaser and Knowles found that the more the

Labor, Discussion Paper No. 2764, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984432).

170. *See generally* Gorman & Kmec, *supra* note 80.

171. It is also possible that the participants' implicit biases might better predict gender-biased behaviors that we did not include in our study.

172. Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 164 (2008); Adam R. Pearson et al., *The Nature of Contemporary Prejudice: Insights from Aversive Racism*, 3 SOC. & PERSONALITY PSYCHOL. COMPASS 1, 15 (2009).

173. Glaser & Knowles, *supra* note 172, at 166-67.

174. *Id*. at 166. *See also* Levinson, *supra* note 23, at 357 (citing Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity to Disambiguate Potentially Threatening Individuals*, 83 J. PERSONALITY & SOC. PSYCHOL. 1314, 1321, 1325 (2002)) (describing shooter bias studies in more detail, "participants play a video game that instructs them to shoot perpetrators (who are holding guns) as fast as they can but not to shoot innocent bystanders (who are unarmed but holding a non-gun object, such as a cell phone). The 'shooter bias' refers to participants' propensity to shoot Black perpetrators more quickly and more frequently than White perpetrators and to decide not to shoot White bystanders more quickly and frequently than Black bystanders. Studies have also shown that participants more quickly identify handguns as weapons after seeing a Black face, and more quickly

participants were implicitly motivated to avoid prejudice, the less bias they displayed on the shooter bias measure.[175] Furthermore, they showed that the worst performers on the shooter bias measure were those who not only had low implicit motivation to control prejudice, but also did not implicitly consider themselves as prejudiced.[176]

The researchers therefore demonstrated that it is possible for people to hold harmful implicit biases and simultaneously hold egalitarian implicit norms that allow them to resist these biases. Related research has supported the idea that people who hold implicit egalitarian norms (even if they are only temporarily activated) can resist stereotypic thought activation.[177] Considered in the context of the results of our study, it is possible that a large part of our law student sample was implicitly motivated to resist gender bias. Although it might seem unlikely that the majority of our participants would hold such implicit views when the majority of the broader population likely does not, we might note that law students generally, and these law students in particular,[178] could have higher than average levels of implicit motivation to control prejudice.[179] After all, research has demonstrated that simply being in the presence of "egalitarian-minded others" can inhibit prejudice.[180] Without having tested for implicit motivation to control bias, however, we cannot speculate further as to whether that might account for the some of the results. Future studies on law students could test this possibility.

A second possible explanation why our participants were able to control the effects of their implicit biases is that they may have suspected the purpose of the study. In a study of implicit racial biases in trial judges, Jeffrey Rachlinski and his colleagues found that judges harbored implicit biases on the IAT favoring whites compared to blacks.[181] In a subsequent measure, when race was primed implicitly, the researchers found that white judges' sentencing decisions were predicted by their IAT scores.[182] However, when race was made explicit in yet another measure, the white judges' decisions were no longer predicted by

---

identify other objects (such as tools) as nonweapons after seeing a White face. In these studies, participants are entirely unaware that they have even seen a White or Black face. The quick flashing image registers in the unconscious; participants are not consciously aware of the prime.").

175. Glaser & Knowles, *supra* note 172, at 169-70.

176. *Id*. at 170.

177. Pearson et al., *supra* note 172, at 15.

178. There may be a unique emphasis on justice and egalitarian values at the University of Hawai`i law school. For example, all entering law students take the following pledge: "In the study of law, I will conscientiously prepare myself: To advance the interests of those I serve before my own, [t]o approach my responsibilities and colleagues with integrity, professionalism, and civility, [t]o guard zealously legal, civil and human rights which are the birthright of all people, [a]nd, above all, [t]o endeavor always to seek justice. This I do pledge." *Law Students' Pledge*, WILLIAM S. RICHARDSON SCH. OF LAW, UNIV. OF HAW. AT MANOA, http://www.law.hawaii.edu/students/law-students-pledge (last visited Oct. 25, 2010).

179. *See* Williams, *supra* note 4, at 447 (making a similar point that could explain how some law students may have heightened ability to control their implicit biases: "stereotypes may be automatic, but when actors are under social pressure to control them, they tend to do so."). Certain law school environments might create such a social pressure.

180. Pearson et al., *supra* note 172, at 16.

181. Rachlinski et al., *supra* note 113, at 1210.

182. *Id*. at 1215-16.

their IAT scores.[183] Interestingly, Rachlinski and his colleagues found that most of the judges they tested had suspected the purpose of their experiment was to test for race effects, even though the race-relevant goal of the study should not have been obvious. The researchers explained that when participants suspect the purpose of a study, they may take actions in response to that suspicion.[184] Such a response may include an increase in implicit or explicit motivation to control prejudice.[185]

Similar to Rachlinski and his colleagues' study, it is possible that here, too, participants suspected the purpose of the study. Two particular aspects of our methodology could have reinforced this belief: first, participants each saw one female resume and one male resume; and second, our study used only female law students as study administrators. Regarding the first possibility, other resume studies, such as Steinpreis' study of CVs, have only used one CV in a between subjects design.[186] In those studies, participants only see one CV, and therefore likely have no reason to suspect that gender is being tested. In our study, however, we created a forced choice by providing two somewhat comparable resumes, one with a male name and another with a female name. We chose this structure for the resume study because we believed it created a more realistic decision where participants would have more than one resume to review. Yet, its drawback may have been that it flagged the true purpose of the study to participants. Regarding the second possibility, it is also possible that participants' suspicions were created or heightened by the fact that our study was administered by two second year female law students.[187] Unfortunately, we did not include a measure that would have tested whether participants suspected the purpose of the study. The results of our study thus reinforce the dangers of implicit bias in the legal profession, as well as invigorate the hope that law students may have ways to compensate for their implicit biases. Future research should continue to investigate implicit bias in law schools specifically and in the legal profession more broadly. The next section makes specific

---

183. *Id*. at 1217-19.

184. *Id*. at 1203 (citing Green et al., *supra* note 168, at 1237). Rachlinski and his colleagues considered that implicit motivation to control prejudice might have accounted for their results: "We believe that the data demonstrate that the white judges were attempting to compensate for unconscious racial biases in their decisionmaking. These judges were, we believe, highly motivated to avoid making biased judgments, at least in our study. When the materials identified the race of the defendant in a prominent way, the white judges probably engaged in cognitive correction to avoid the appearance of bias." *Id*. at 1223.

185. *See id.* at 1223 (considering that implicit motivation to control prejudice might have accounted for study results. "We believe that the data demonstrate that the white judges were attempting to compensate for unconscious racial biases in their decisionmaking. These judges were, we believe, highly motivated to avoid making biased judgments, at least in our study. When the materials identified the race of the defendant in a prominent way, the white judges probably engaged in cognitive correction to avoid the appearance of bias.").

186. *See* Steinpreis et al., *supra* note 86, at 515.

187. It should be noted that second-year law students are the typical candidates for summer associate positions and that the empirical study was conducted during the fall semester, the traditional hiring season for summer associate positions. Thus, participants might have believed that the study had some particular relevance or importance to the administrators, who were presumably taking part in the summer associate interview process.

recommendations for this research, and then discusses what to do about pervasive implicit gender biases in the legal profession.

## V. FUTURE DIRECTIONS

### A. The Next Generation of Research

Although our research provided detailed information about implicit gender biases of law school students, further empirical testing should continue to investigate implicit gender bias in the legal profession. Conducting additional empirical research would provide both an opportunity to test new hypotheses about implicit gender bias in the legal profession, as well as allow a chance to improve on the current study. Here, we suggest several simple but worthy amendments that would improve the current study for future testing. First, for studies focused on implicit bias in the law school setting, these studies should examine a broader group of law students across multiple law schools. Using a broader sample would eliminate the possibility that there was something unique about our one school sample that influenced participant responses.[188] Second, whether or not the studies are conducted in law schools, future studies should always be conducted using researchers who are completely unknown to the participants.[189] Doing so will reduce the possibility that participants will speculate about the purpose of the study, or attempt to (implicitly or explicitly) please the researchers with their responses. Third, future studies should employ both male and female test administrators, and subsequent to the studies, should test whether the gender of the researchers affected participants' responses.[190] Although we do not know if our particular research design was compromised by any undesired affects, taking the steps described above will help minimize such risks.

There are yet additional amendments to the current study worth pursuing. Expansion of empirical testing beyond the law school domain is an important step in investigating the role of implicit gender bias in the legal profession. Although student participants might be easier to recruit, future research should test at least two new participant groups: current decision makers (such as law firm partners) and future decision makers (perhaps those five to ten years out of

---

188. There are some unique aspects of the University of Hawai`i law school that could influence how implicit biases predict decisions. For example, it is one of the most diverse law schools in the nation. *See University of Hawaii at Manoa William S. Richardson School of Law*, THE PRINCETON REVIEW, http://www.princetonreview.com/UniversityofHawaiiatManoaSchoolofLaw.aspx (last visited Nov. 12, 2010) (ranking the law school first nationally as "best environment for minority law students"). It is possible that the positive influences of diversity lead to motivations to resist implicit biases. The law school's mission also highlights the school's commitment to "social and economic justice," a theme consistent with the law school pledge that all first year students take. *See* THE UNIVERSITY OF HAWAI'I WILLIAM S. RICHARDSON SCHOOL OF LAW, http://www.law.hawaii.edu (last visited Nov. 13, 2010); *see also supra* note 178.

189. Using law student research assistants to conduct the study risks biasing the results, particularly if the students are known as exemplary students. Researchers should also seek to compensate student participants in order to minimize altruism effects.

190. *See* Daniel T. Gilbert & J. Gregory Hixon, *supra* note 19, at 515 (showing that simply exposing study participants to a researcher from a stereotyped group can have effects on the participants' decision-making).

law school). Conducting a study on these two groups would allow researchers to gain an understanding of whether there are differences in implicit gender bias at different levels of the legal profession.[191] It would also allow for adaptation of the resume study to encompass a job search for a more senior attorney position. Such a position, as the legal scholarship points out, is more likely to be subject to gender biases than entry-level positions, such as the summer associate hiring scenario we tested.[192]

Finally, future research can build on our study by adding a third implicit measure of stereotypes. Although we employed two implicit measures that specifically responded to two major themes of legal scholarship, there is one additional theme that remains untested. That theme—that gender biases relating to women's traits and characteristics affect hiring and promotion opportunities—should also be included in empirical studies of implicit gender biases in the legal profession. Researchers have previously found that some implicit stereotypes can predict decision-making when non-stereotype related implicit associations fail to do so.[193] Thus, we recommend including an implicit stereotype measure in future studies.

## B. Addressing Implicit Gender Bias

Remedies are needed to counter the harmful effects of implicit gender bias in the legal profession. Legal scholars have already done a thorough job in proposing systematic responses to gender stereotypes in the workplace. Rhode, for example, calls for a multifaceted approach that includes screening of performance evaluations for gender stereotypes,[194] increased mentoring activities and women's networks,[195] a redefinition of workplace assumptions to take into account female life patterns,[196] gender neutralizing policies like parental leaves and flexible schedules,[197] and a commitment to accountability from employers, complete with measurement systems.[198] This scholarship should serve as a jumping off point for discussions of remedies to implicit gender bias in the legal profession, as well as for the development of empirical tests that measure the efficacy of these remedies.[199] Encouraging law firms to implement gender-neutral policies, or asking that law schools, the American Bar Association, and the Association of American Law Schools support enrollment and course credit flexibility due to family status are straightforward solutions that should be considered and pursued.

---

191. It might also reveal generational differences.

192. *See supra* notes 64-67 and accompanying text.

193. *See* Rudman & Ashmore, *supra* note 44, at 359 (finding that stereotype IATs predicted decision-making but attitude IATs did not).

194. Rhode *Subtle Side*, *supra* note 4, at 638.

195. *Id*. at 638-39 (pointing out the particular need to keep "talented women, particularly women of color, from falling through the cracks").

196. *Id*. at 639-40.

197. *Id*. at 639.

198. *Id*. at 640-42. On a related note, Rhode argues that employers should be held responsible for the reinforcement of gender stereotypes concerning appearance. *Id*. at 642.

199. Rhode has made this later point. *See id.* at 637-38 (noting the conflicting results of workplace diversity training, and calling for more thorough studies).

Here, we propose two potential interventions aimed specifically at reducing implicit gender bias within law schools and throughout the legal profession.[200] These proposals are: first, implement a series of carefully crafted and empirically tested bias reduction training courses beginning in law school and continuing throughout law graduates' careers; and second, encourage law schools, firms, and other agencies to commit to hiring women for implicit male prototype jobs. Although neither of these suggestions will fully combat the harmful stereotypes that people form as children, both of them can be linked to social science research demonstrating the reduction of implicit bias. Thus, short of a more uniform solution to implicit gender bias, which would likely entail slow and steady cultural change,[201] we advocate for short-term bias reduction strategies.

Implementing a carefully crafted and empirically verified training that begins in law school and continues throughout attorneys' legal careers has the potential to reduce implicit gender biases of both law students and lawyers. The content of the trainings, undoubtedly its most important element, is nearly matched in significance by the necessity of implementing a consistent, continuous, and long-term training program. After all, most bias reduction strategies are only temporary measures. One cannot expect a simple training, or even a few sparse courses, to come close to permanently reversing the harmful effects of negative stereotypes. In fact, it is likely that the benefits gained even by a sustained program of trainings would be small, although measurable. Thus, the trainings must be regular and continue throughout attorneys' careers.[202]

Although bias-related training already exists and is prevalent in some industries,[203] here we note two elements that we believe should be incorporated in all training. These elements include diversity and multiculturalism training, as well as carefully confronting trainees with their own biases. Multiculturalism training in particular has been successful in reducing implicit biases. Jennifer Richeson and Richard Nussbaum designed a study where participants learned about either multiculturalism (celebrating differences across groups) or "color

200. We hope and expect that these suggestions will overlap with scholars' suggestions regarding dealing with gender stereotypes outside of the legal profession. Here, we pursue them specifically from an implicit-bias-reduction standpoint.

201. We hope, of course, that such cultural change is possible.

202. We do not engage with the mechanics of this suggestion here, although working directly with bar associations to implement mandatory trainings would be a first step.

203. Fortunately, scholars in various fields have considered how to reduce the dangerous harms caused by implicit biases and stereotypes. Within the medical profession in particular, attention has been given to devising training programs geared towards eliminating health care disparities. A plan suggested by Diana Burgess and her colleagues, including social psychologist Jon Dovidio, set forth a systematic approach to reduce bias-driven health care disparities. Diana Burgess et al., *Reducing Racial Bias Among Health Care Providers: Lessons from Social-Cognitive Psychology*, 22 J. GEN. INTERNAL MED. 882, 882 (2007) (centering approach on five goals, each based on research on how to reduce the effects of biases on decisions: "1) enhance internal motivation to reduce bias, while avoiding external pressure; 2) increase understanding about the psychological basis of bias; 3) enhance providers' confidence in their ability to successfully interact with socially dissimilar patients; 4) enhance emotional regulation skills; and 5) improve the ability to build partnerships with patients."). Although this plan was designed for training medical students and doctors, much of its social-science wisdom can be applied to law students and lawyers.

blindness" (ignoring differences across groups).[204] After finishing the short lesson, participants completed a Black/White IAT. Richeson and Nussbaum found that participants who learned about multiculturalism displayed lesser implicit biases than those who learned about color blindness.[205] A related study by Laurie Rudman and her colleagues put participants through a fourteen-week diversity training course where participants learned about intergroup conflict, engaged in discussions, and maintained journals.[206] The researchers found that participants in the training displayed less implicit and explicit bias than participants in a control group.[207] Lessons from these studies could likely be extrapolated to combat gender biases, especially if gender is included as an element of the training.

Researchers have also found that carefully confronting people with their biases can reduce implicit bias. A study by Alexander Czopp and his colleagues on reducing racial stereotypes found that even though confrontations can create hostility toward a confronter, they can (at least temporarily) also reduce stereotypes.[208] The study asked participants to participate in an online chat.[209] During this chat, the experimenters asked participants to give their impressions about pictures and statements. These pictures and statements were designed deliberately so that participants would necessarily respond in a racially stereotype-consistent manner, thus allowing the experimenter to set up a confrontation.[210] After the participants gave their stereotype-consistent responses, a collaborator (who was posing as another participant in the online chat) confronted them about their potentially racist responses.[211] After the confrontation, participants were given a confidential stereotype test (participants were alone—no collaborator was present to influence or confront them). The researchers found that post-confrontation participant responses displayed significantly fewer stereotypes (compared to responses given before the confrontation). Although this study was conducted in the context of racial stereotypes rather than gender stereotypes, the theory behind it should hold true for reducing gender stereotypes as well. It should be cautioned, however,

---

204. *See generally* Jennifer A. Richeson & Richard J. Nussbaum, *The Impact of Multiculturalism Versus Color-Blindness on Racial Bias*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 417 (2004). Participants read a lesson about their assigned topic and wrote about what they learned. *Id*. at 419.

205. *Id*. at 420.

206. Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001).

207. *Id*. at 860-61.

208. Alexander M. Czopp et al., *Standing up for a Change: Reducing Bias Through Interpersonal Confrontation*, 90 J. PERSONALITY & SOC. PSYCHOL. 784, 799 (2006). The description of the study by Czopp and his colleagues, including footnotes, is taken substantially verbatim. *See* Levinson, *supra* note 23, at 413-14.

209. Czopp et al., *supra* note 208, at 787.

210. *Id*. at 787-88.

211. *Id*. at 792. For example, one such confrontation included the following: "but maybe it would be good to think about Blacks in other ways that are a little more fair? it [*sic*] just seems that a lot of times Blacks don't get equal treatment in our society. you [*sic*] know what i [*sic*] mean?" *Id*. at 788. Whether in the form of low-level threats (such as the one quoted) or high-level threats (which involved mentioning that the participant's responses sounded racist), confrontations successfully reduced "subsequent stereotypic responding." *Id*. at 791.

that although these proposals are based on empirical research, they should be tested empirically before being implemented. This is particularly the case because some studies have found that certain bias reduction trainings might actually heighten some biases.[212] Confronting trainees with their biases, in particular, must be done in a thoughtful and controlled manner that fosters introspection and avoids defensive responses.

A second intervention for reducing implicit biases would be for members of the legal profession to commit to hiring women in counterstereotypical (implicit male prototype) roles.[213] Making such a policy choice for the purpose of implicit gender bias reduction can be supported by social science evidence.[214] Studies have demonstrated that exposing students to female exemplars, including women judges and professors, actually does reduce implicit gender biases. In a leading study on implicit gender bias reduction, Nilanjana Dasgupta and Shaki Asgari tested whether exposing female college student participants to women in counterstereotypic roles would reduce implicit gender biases.[215] The researchers tested their hypothesis by studying the effect of counterstereotypic exemplars on both short-term and long-term bias reduction. In the first study, they examined whether teaching female college students about female leaders would reduce their gender stereotypes of women as supporting figures (rather than leaders). To do this, the researchers had participants review photos and short biographies of counterstereotypic women, including Supreme Court Justice Ruth Bader Ginsburg.[216] They then conducted a stereotype/gender IAT in which participants had to group together male and female names with attributes of leaders and supporters.[217] They found that participants who had learned about the women leaders displayed less implicit gender bias than members of the control group[218]; these participants more quickly grouped together women with leadership attributes on the IAT.[219]

In the second portion of their study, Dasgupta and Asgari investigated whether implicit bias reduction benefits could be obtained naturally through potentially counterstereotype rich real-world settings, such as college campuses. They compared two groups of women participants, those in an all women's college with those in a coeducational college, hypothesizing that due to the underrepresentation of women leaders at co-ed colleges, women in a women's

---

212. Rhode, *Subtle Side*, *supra* note 4, at 637.

213. For a discussion of specific countertypical exemplars, see Kang & Banaji, *supra* note 105, at 1109.

214. There is also some precedent for making the commitment to hire more women for counterstereotypic roles. Although their actions have not been binding, the Hawai`i state senate adopted a resolution urging the appointment of more women judges. S. Res. 26, 25th Leg. (Haw. 2010).

215. *See generally* Dasgupta & Asgari, *supra* note 152.

216. *Id* at 646. Other counterstereotypic leaders included business leaders, scientists, and politicians. *Id*. at 645.

217. *Id*. at 646.

218. *Id* at 647. Members of the control group had seen photos of flowers and read descriptions of those flowers. *Id*. at 646.

219. *Id*. at 647. For the researchers' summary, *see id.* at 648 ("Situations that familiarize [women] with ingroup members who have succeeded in atypical leadership domains can have a strong impact on their automatic beliefs.").

college would display lesser implicit gender biases after one year of college.[220] To make sure that their participants had essentially equivalent levels of bias before college began, they tested the women both at the beginning of college and again after one year. They were thus able to conclude, when they analyzed the results, that although the women displayed nearly equal implicit gender biases upon beginning college, the women at the all women's college (but not the women at the co-ed college) displayed almost no automatic biases after one year.[221] In addition, they found that these results were driven by the number of women professors that the students had; the more female professors the students had, the less the implicit gender bias they expressed.[222] Dasgupta and Asgari's study demonstrates the exciting potential for real world situations to reduce real world biases; colleges that make a commitment to women faculty members will be sending a bias reducing message. Making a commitment to hire women in implicit male prototype positions in the legal profession will not only help reverse years of numerical disparities, but will likely have a bias reducing affect on the next generation.[223]

## VI. CONCLUSION

The continuing subordination of women in the legal profession must be challenged and remedied. We believe that one of the best ways to remedy an inequality is to understand it as fully as possible. The study we conducted began the empirical inquiry into implicit gender bias in the legal profession, and it confirmed that implicit gender bias is in fact widely present among a law student sample. Yet, it also showed that in some circumstances law students have the ability to control the effects of their own gender biases. This finding offers hope for future generations of attorneys, professors, and judges. Yet, it is not enough for the present day. Statistics demonstrate that decades of inequality in the legal profession have only shown slight amelioration. Further research must continue to examine these inequities and investigate pathways to gender equality.

---

220. *Id*. at 645.

221. *Id*. at 651. In fact, implicit gender biases for the women in co-ed college went up, while implicit gender biases for the women in an all women's college were essentially gone. *Id*.

222. *Id*.

223. As Dasgupta and Asgari summarize, "the more frequently counterstereotypic exemplars occur in the social environment the greater may be the decrement in automatic stereotyping." *Id*. at 644.

APPENDIX A

ASHLEY SUZUKI [OR] DAVID SUZUKI

2211 Kainoa Road, Honolulu, Hawaii 96822
Phone: 808-358-7940, Email: suzuki@hawaii.edu

EDUCATION

*William S. Richardson School of Law*, *University of Hawaii at Manoa*, Honolulu, Hawaii
Juris Doctorate candidate, expected graduation May 2011.
GPA: 3.56; Rank 19 out of 92
Honors and Awards:

- President, Law and Business Organization
- Staff Writer, Law Review
- Winner: Susan B. McKay Oral Advocacy Competition, Fall 2009

*Georgetown University,* Washington D.C.

- Bachelor of Business Administration, Focus on Real Estate Finance, May 2005
- Honors: Magna cum laude
- GPA: 3.74
- Wilson Scholarship Recipient
- 2nd Place Winner: Undergraduate Business Plan Competition

*London School of Economics*, United Kingdom

- Study abroad, Marketing & Management, Fall 2004

WORK EXPERIENCE

*Summer Intern, Office of the County Clerk*, Hilo, Hawaii, Summer 2009

- Researched and responded to legal inquiries from Council Members and the County Clerk.
- Briefed, catalogued, and organized Office of Information Practice opinions.

*Sales Manager, Hoku Scientific*, Honolulu, Hawaii, Sept. 2005-July 2008.

- Coordinated sales efforts in Asia-Pacific Region.
- Worked directly with executive team to generate sales strategy.
- Implemented multi-tiered sales strategy and met sales milestones.

*Real Estate Assistant, Caldwell Pacific Realty*, Honolulu, Hawaii, Summer 2004

- Researched and provided market analysis.
- Supported office operations.

LANGUAGES & ACTIVITIES

Fluent in Spanish. Trained in making presentations. Hobbies include calligraphy and tennis.

ASHLEY TANIGAWA [OR] DAVID TANAGAWA

2375 Woodlawn Drive • Honolulu, HI 96822 • (808) 988-3211 • tanigawa@hawaii.edu

**EDUCATION**

University of Hawaii, William S. Richardson School of Law, Honolulu, HI

**Juris Doctor Candidate, May 2011**
Class Rank: 17 of 92 GPA: 3.60

- Law Review, *Staff Writer*
- Pacific-Asian Legal Studies Organization, *President*

Honors:

- Top grade in Legal Practice II, Spring 2009

**Columbia University, New York, NY**
**Bachelor of Arts in International Relations, May 2005**
GPA: 3.68 *Cum Laude*

- Minor in History
- Hawaii Club, *Vice President*

**Waseda University**, Tokyo, Japan
International Exchange Program, 2005-2006

- Intensive Japanese language instruction

EXPERIENCE

**Honorable Ian Johnson**, U.S. District Court for the Central District of California **Summer 2009**
*Judicial Extern,* Los Angeles, CA

- Conducted extensive researched and drafted memoranda on various legal issues.
- Observed courtroom activities such as criminal trials and oral arguments.

**Port of Kobe 2007-2008**
*Coordinator for International Relations,* Kobe, Japan

- Edited English articles written by Japanese Port Guides. Assisted in translating letters, e-mails, and speeches from Japanese into English.

**Pacific Region Marketing Group 2005-2007**
*Marketing Manager*, Honolulu, HI

- Facilitated strategic planning sessions. Planned and executed special events and press conferences.

**Hawaii State Capitol Summer 2004**
*Summer Volunteer*, Honolulu, HI

- Fielded incoming telephone calls at the Governor's Office of Information and drafted letters on behalf of Governor Linda Lingle. Led tours of the Hawaii State Capitol.

**SKILLS AND INTERESTS**

Proficient in reading/writing/speaking Japanese. Enjoy hiking and playing soccer.