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CORPORATE RAIDING, SECRETS, AND THE BATTLE FOR DOMINATION OF THE COMPUTER CHIP INDUSTRY: AN ANALYSIS OF *APPLE INC. V. RIVOS INC. ET AL.*

by Wade S. Davis* and Todd S. Lundquist**

I. Introduction

Advanced chip technology is at the heart of the computing world and, as such, is central to the global economy and geopolitical power.[1] Virtually everything - from smartphones, cars, the stock market, the Internet, and artificial intelligence - run on them. The computer chip industry is dominated by the most valuable companies in the world along with the start-up companies gunning to hyperscale to their ranks. Apple, Inc. is a dominant force in the sector and the second most valuable company in the world, with a market capitalization of $2.63 trillion as of May 2024.[2]

The computer chip field is rapidly evolving as companies race to develop the next generation of increasingly compact, powerful, and efficient chips to tackle more sophisticated big data and artificial intelligence problems. The software used to design advanced chips are primarily developed in the U.S. and the machine tools that produce the chips are largely produced by five companies, three of which are based in California.[3]

These developments are built upon technological know-how that implicate several forms of intellectual property protection including patent, copyright, and trade secret law. Progress also depends on the specialists who design, create, and manufacture the chips and associated software. Technology companies fight for the same talent pool and employees, many of whom work and live in Silicon Valley, California, and aggressively protect their proprietary information with confidentiality and intellectual property agreements.

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1 Chris Miller, *Chip War: The Fight for the World's Most Critical Technology*, xxvi-xxvii (Scribner 2022).

2 Lyle Daly, *The Largest Companies by Market Cap in 2024*. MOTLEY FOOL, https://www.fool.com/research/largest-companies-by-market-cap/ (last visited May 29, 2024). Three of the world's other five largest companies (Microsoft, Nvidia, Alphabet) are also technology companies. *Id.*

3 Chris Miller, *The Battle Is on to the Control the World's Chip Supply*, BRINK NEWS, Nov. 1, 2022, https://www.brinknews.com/the-battle-is-on-to-control-the-worlds-chip-supply/ (last visited May 29, 2024).

Technology companies also often push the boundaries of unfair competition law in their battle for talent.[4] For instance, Apple is regularly involved in lawsuits over the poaching of employees.[5]

This article examines a lawsuit that arose when a new computer chip upstart, Rivos, Inc., recruited and hired approximately 50 chip engineers from Apple in 2021-22.[6] Apple sued six of the departing employees for misappropriation of trade secrets in violation of the Defend Trade Secrets Act and for breaching its Intellectual Property Agreement that restricted the copying and use of confidential information, prohibited solicitation of the remaining employees, and required employees to return Apple's property upon their departure.[7] Apple also asserted separate claims against Rivos for misappropriating its trade secrets.[8] The defendants countersued, alleging that Apple's overbroad restrictive contracts functioned as noncompetition agreements in violation of California law.[9] The case ultimately settled after two years of blistering litigation.[10]

The *Apple Inc. v. Rivos, Inc. et. al.* litigation illustrates the practical, strategic, and legal issues that arise in corporate raiding lawsuits in general and, more specifically, the tension between overreaching and enforcement of trade secrets, confidentiality/ nondisclosure agreements, and non solicitation provisions imposed against departing employees. Section II of the article provides background to and context for the lawsuit. Section III examines the parties' competing claims and counterclaims, their motions to dismiss, the court's rulings on those motions, and the terms of the eventual settlement. It also addresses the difficulty of striking the balance between legitimate protections of corporate secrets and employee mobility, particularly in settings where noncompetition agreements are prohibited. Finally, Section IV concludes by discussing practical and legal lessons learned from this lawsuit.

II. The Origin of the Lawsuit

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[4] *See, e.g.,* Lance Whitney, *Apple, Google, Others Settle Antipoaching Lawsuit for $415 Million*, CNET.COM, Sept. 3, 2015, https://www.cnet.com/tech/tech-industry/apple-google-others-settle-anti-poaching-lawsuit-for-415-million/ (last visited May 26, 2024); Mitchell Anderson, *Avoiding No-Poach Liability: Making Reasonable Choices to Qualify for the Rule of Reason*, 63 ARIZ. L. REV. 111, 1126-27 (2021) (discussing Apple, Google, Intel, and Adobe's 2015 payment of $415 million to settle an antitrust lawsuit arising from their collusive agreements to not cold call, poach, or otherwise compete for each other's employees); Final Judgment, USA v. Adobe Sys., Inc., et al., No. 1:10-CV-01629 (D.D.C. Mar. 17, 2011) (antitrust settlement with the Department of Justice based on similar claims).

[5] *Apple Sued Over Claims It Poached Battery Engineers for Top Secret Car Project*, Reuters (Feb. 19, 2015).

[6] Apple Inc. v. Rivos, Inc. et al., No. 5:22-CV-02637, 2023 U.S. Dist. LEXIS 140628, *5 (N.D. Cal. Aug. 11, 2023) (Order on Defendant's Motion to Dismiss Apple's Complaint).

[7] Apple's Compl., Apple Inc. v. Rivos, Inc. et al., No. 5:22-CV-02637, ¶¶ 73-84 (N.D. Cal. Apr. 29, 2022); *see also* Apple's Third Am. Compl., No. 5:22-CV-02637 (N.D. Cal. Aug. 29, 2022).

[8] *Id.*

[9] Defendants and Counterclaim Plaintiffs Counterclaims Against Apple Inc., Apple Inc. v. Rivos Inc. et al, 5:22-CV-2637 (Sept. 22, 2023).

[10] Stip. of Dismissal and Order, Apple Inc. v. Rivos Inc. et. al., No. 5:22-CV-02637 (N.D. Cal. Jan. 9, 2024).

A. The Dominant Company and Stealthy Upstart: Two Approaches to Developing New System-on-a-Chip Technology

Rivos, Inc. was formed in May 2021 to develop new advanced computer chip technology. It operated under "stealth mode" in which it kept its core product a secret during the development phase. Over the next year, Rivos hired almost 50 Apple employees to help develop advanced chip technology designed to drive artificial intelligence, data centers, and big data-related computations.[11] Most of the onboarding employees had been engineers working on Apple's system-on-a-chip design and manufacturing programs.[12]

The technology at issue is a computer chip design that integrates multiple processing components of a computer into a single chip that is referred to as a system-on-a-chip ("SoC"). Because SoCs use a tighter configuration and smaller physical footprint than traditional systems, they are often faster, more compact, more power-efficient, and offer improved computing power than their predecessors.[13] The computing power of today's SoCs, even for mobile devices, is equivalent to or exceeds the massive supercomputers of two decades ago and can carry more complex computational tasks on local powered devices without requiring the use of cloud computing.[14] The global market for SoC manufacturing is expected to grow from $159 billion in 2024 to $335 billion in 2032.[15]

SoCs are designed around a set of instructions known as an "instruction set architecture," or "ISA." The instruction set architecture acts as an interface between the hardware and software that specifies how the processor works and what it can do.[16] The ISA helps developers write more efficient code, debug problems, and accelerate programing.[17] In this case, the integrated software architecture is the Reduced Integrated Set Computer ("RISC") which is an architecture that simplifies and streamlines the instructions required for the computer to accomplish tasks.[18]

Apple and Rivos use different, but related, RSIC architectures. Apple builds its SoC chips using Advanced RISC Machine ("ARM") architecture that is owned and licensed by

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[11] Order on Defs. Mot. to Dismiss, *supra* note 6 at *4.

[12] *Id.;* Kyle Wiggers, *Apple Lawsuit Behind It, Chip Startup Rivos Plots Its Next Moves*, TECHCRUNCH, Apr. 16, 2024, https://techcrunch.com/2024/04/16/apple-lawsuit-behind-it-chip-startup-rivos-plots-its-next-moves/ (last visited May 29, 2024).

[13] Order on Defs. Mot. to Dismiss, *supra* note 6 at *2.

[14] MORGAN KAUFMANN, CLOUD COMPUTING: THEORY AND PRACTICE, Ch. 3 (Dan Marinescu ed., 3d ed. 2022).

[15] Acumen Research Consulting, *System on Chip Market is Forecasted to Reach USD 335.4 Billion by 2032,* GLOBAL NEWSWIRE, Oct. 3, 2023, https://www.globenewswire.com/news-release/2023/10/03/2754240/0/en/System-on-Chip-Market-is-forecasted-to-reach-USD-335-4-billion-by-2032-growing-at-a-7-9-CAGR-from-2023-to-2032.html (last visited May 16, 2024).

[16] Order on Defs. Mot. to Dismiss, *supra* note 6 at *3.

[17] Glossary, Instruction Set Architecture, ARM, https://www.arm.com/glossary/isa (last visited July 9, 2024).

[18] *Apple Lawsuit Behind It, Chip Startup Rivos Plots Its Next Moves,* TECH CRUNCH, APR. 16, 2024, https://techcrunch.com/2024/04/16/apple-lawsuit-behind-it-chip-startup-rivos-plots-its-next-moves/ (last visited Jul. 9, 2024).

Arm Ltd. Apple is a long-time partner with Arm Ltd. and licenses ARM Ltd.'s architecture to build custom processors for its computers, iPhones, and other devices.[19] In contrast, Rivos uses an open-source and free-to-use RSIC-V architecture.[20] This architecture is distinguishable from Apple's, in part, because its open-source framework negates the need to pay a licensing fee.[21] As a result, the ARM and RSIC-V architecture are analogous to, but different from, each other.[22]

Apple's ARM SoCs are incorporated into Apple's A15 chip used in recent iPhones and the M1 family of chips used in Apple's desktops, laptops, and select iPads. These ARM-based chips allow the iPhones and iPads "to seamlessly operate on macOS with state-of-the-art power consumption management and battery life among the M1 MacBook's head-to-head competing features with the same level of computing performance."[23] By the end of 2022, Apple controlled 90 percent of the ARM laptop market.[24] ARM-based chips are forecasted to grow to a global market share of 25 percent of all computers by 2027.[25]

As a new startup, Rivos was entering a high stakes battle for engineers capable of producing cutting edge computer chips and related software. "Apple [was] waging a talent war with companies in Silicon Valley and beyond."[26] Within months of Rivos emergence, Meta hired approximately 100 engineers from Apple, and Apple lured a key engineer from Meta. Competitors and Apple alike were offering Apple's engineers up to $180,000 bonuses to leave or stay with the company.[27]

B. Apple's Intellectual Property and Nonsolicitation Agreements

To protect its confidential and proprietary information, Apple required every employee to sign an Intellectual Property Agreement (hereinafter "IPA"), which states:

> You understand that your employment by Apple requires you to keep all Proprietary Information in confidence and trust for the tenure of your employment and thereafter, and that you will not use or disclose Proprietary Information without the written consent of Apple, except as necessary to perform your duties as an employee of Apple. Upon termination of your

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[19] Order on Defs. Mot. to Dismiss, *supra* note 6 at *4.

[20] *Id.* at *5. The name for Rivos, Inc. comes from "**RI**SC-**V** and **O**pen **S**ource." Rivos, *About Us*, https://www.rivosinc.com/about-us/ (last visited July 9, 2024).

[21] *About RISC-V*, https://riscv.org/about/ (last visited July 16, 2024).

[22] Order on Defs. Mot. to Dismiss, *supra* note 6 at *3-4.

[23] *Id.* at *4; Dennis Sellers, *Apple Captures 90% of the Arm-Based Laptop* Market, APPLEWORLD.TODAY, Apr. 10, 2023, https://appleworld.today/apple-captures-90-of-the-arm-based-laptop-market/ (last visited May 29, 2024).

[24] *Id., Apple Captures 90%*.

[25] Brady Wang, *Arm-based PCs to Nearly Double Market Share by 2027*, COUNTERPOINT RESEARCH, Apr. 10, 2023, https://www.counterpointresearch.com/insights/arm-based-pcs-to-nearly-double-market-share-by-2027/ (last visited May 22, 2024).

[26] Mark Gurman, *Apple Gives Top Engineers Bonuses Up of $180,000 to Curtail Defections to Meta, Other Rivals,* LAS ANGELES TIMES, Dec. 28, 2021.

[27] *Id.*

> employment with Apple, you will promptly deliver to Apple all documents and materials of any kind pertaining to your work at Apple, and you agree that you will not take with you any documents, materials, or copies thereof, whether on paper, magnetic or optical media, or any other medium, containing any Proprietary Information.[28]

The IPA also prohibited Apple employees from soliciting other Apple employees for one year following the end of their employment. It states:

> During your employment and for a period of one (1) year following your termination date, you will not, directly or indirectly, solicit, encourage, recruit, or take any action to Induce Apple employees or contractors to terminate their relationship with Apple.[29]

Apple also required departing employees from its Hardware Technologies divisions to sign a departure checklist. The checklist, which Apple acknowledged is not a contract, required the employees to affirm that they diligently searched for and returned or destroyed all of Apple's confidential information and would "not use or share Apple confidential information while you are an Apple employee and after you leave Apple." [30] In summary, the employees affirmed that, "[e]verything you worked on at Apple stays here."[31]

Notably, the Apple employees in this lawsuit did *not* enter into noncompetition agreements likely because they worked in California, which statutorily prohibits their use and enforcement.[32] This lawsuit is therefore uniquely relevant as the nation is facing a trend towards the elimination of noncompetition agreements.[33]

C. The Departing Employees Allegedly Saved or Took Apple's Confidential Proprietary Information When They Left Apple

As an upstart trying to design and manufacture a new system-on-a-chip in a rapidly evolving industry, Rivos needed a lot of worker firepower. Rivos moved quickly and aggressively to recruit workers for its grand project to develop, market, and sell its first SoC chips and related products.[34] It needed an experienced, sophisticated, and sizable workforce to accomplish these ambitions. In one year from starting up, Rivos recruited and hired nearly 50 of Apple's computer engineers and technical employees.[35]

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[28] Apple's Sec. Am. Compl. at ¶ 31 (*hereinafter* "Apple's Sec. Am. Compl."), and at Exs. A, B, C, D, E, F, and G at ¶ 2 (*hereinafter* "Intellectual Property Agreement").

[29] *Id.*, Intellectual Property Agreement at ¶ 3(d)

[30] Apple's Sec. Am. Compl., *supra* note 28 at ¶ 35.

[31] *Id.*

[32] Cal. Bus. & Prof. Code § 16600.1 ("It shall be unlawful to include a noncompete clause in an employment contract, or to require an employee to enter a noncompete agreement, that does not satisfy an exception in this chapter.").

[33] *See infra,* Sec. III(B)(2).

[34] Order on Defs. Mot. to Dismiss, s*upra* note 6 at *5-6.

[35] *Id.*

Apple sued Rivos and two former employees on April 29, 2022, for misappropriating its trade secret information and violation of the IPA.[36] In subsequent pleadings, Apple amended its complaint to focus on six former employees.[37]

Three employees allegedly downloaded and transferred hundreds of gigabytes of data, much of which related to Apple's SoC designs and activities, within days of leaving to Rivos. Ricky Wen, an Apple CPU Design Engineer, accepted employment from Rivos on July 23, 2021, and resigned ten days later.[38] During the interim period, Wen allegedly transferred 390 gigabytes of data from his Apple-issued computer to a personal external hard drive and web-based Google drive.[39] The day before he left, he accessed several unreleased Apples SoC designs and then connected an external drive to his computer.[40] Jim Hardage, a CPU architect for Apple, allegedly downloaded over 37 gigabytes of Apple's information to external drives in the days before leaving to Rivos.[41] Prabhu Rajamani, a Power Engineer who worked on power functions of Apple's mobile SoCs, allegedly transferred SoC designs to external drives up until his last day of work.[42] Each of these three employees worked in similar roles at Rivos.[43]

Three other employees present a different case because they saved data before discussing their departure with Rivos. Lauren Pinot, who worked on the physical design of Apple's SoC, set up a program to make weekly backups of his work computer's hard drive to cloud storage about eight months before his departure.[44] He allegedly continued to have access to after his departure.[45] Similarly, Wieidong Ye, who worked on architecture and platform designs, saved Apple information on his iCloud drive at an undetermined point during his employment.[46] Finally, Kia Wang, who worked to improve Apple's SoC components, maintained Apple files on his personal iCloud drive when he left.[47]

D. Apple's Complaint Did Not Allege Specific Facts Showing That Rivos Actively Encouraged its New Hires to Take or Use Apple's Confidential Information

While there is no doubt that Rivos actively recruited and hired Apple employees, Apple did not allege specific facts in its Complaint that Rivos encouraged the employees to keep, use, or disclose Apple's confidential information. Rather, Apple recognized that Rivos's

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[36] Apple's First Complaint, *supra* note 7 at ¶¶ 65-84; Apple's Sec. Am. Compl., *supra* note 28 at ¶¶ 145-65. Apple did not allege a trade secret misappropriation claim against Kai Wang. *Id.*

[37] Apple's Third Am. Compl., *supra* note 7.

[38] Apple's Sec. Am. Compl., *supra* note 28 at ¶¶ 57-61.

[39] *Id.* at ¶ 61, 65.

[40] *Id.* at ¶ 64.

[41] *Id.* at ¶ 72-74

[42] *Id.* at ¶ 105.

[43] *Id.* at ¶ 22.

[44] *Id.* at ¶¶ 87, 95.

[45] *Id.* at ¶ 95.

[46] *Id.* at ¶ 77.

[47] *Id.* at ¶ 112.

CEO advised the employees, prior to their resignation, to not retain Apple's confidential information when they left the company.[48]

III. The Lawsuit - Apple's and Rivos' Competing Claims

A. Apple's Claims & The Court's Ruling on Rivos' Motion to Dismiss

Apple's lawsuit alleged two claims, Misappropriation of Trade Secrets and Breach of the IPA Contract. The defendants moved to dismiss both under Rule 12 of the Federal Rules of Civil Procedure.[49]

1. Misappropriation of Trade Secrets:

a. The Legal Requirements of a Misappropriation Claim:

Apple asserted claims for Misappropriation of Trade Secrets individually against five of the former employees and Rivos under the Federal Defense of Trade Secrets Act.[50] To assert a viable claim, Apple needed to allege that it possessed one or more viable trade secrets and the defendants misappropriated the secrets.[51]

Trade secrets are statutorily defined to include "financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes" in which (1) the owner takes "reasonable measures to keep such information secret;" and (2) "the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means."[52] With this said, trade secrets are notoriously difficult to categorically define and often involve ad hoc evaluations based on changing circumstances.[53]

Apple argued that the departing employees had

> access to some of Apple's most closely guarded proprietary and trade secret information. These trade secrets include SoC designs, component designs,

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[48] *Id.* at ¶¶ 123-24.

[49] Defendant Rivos Inc.'s Notice of Motion and Motion to Dismiss, Apple Inc. v. Rivos, Inc. et al., No. 5:22-CV-02637, (N.D. Cal. June 30, 2022).

[50] Apple's Sec. Am. Compl., *supra* note 28 at ¶¶ 145-65 (Apple did not sue Kai Wang for misappropriation of trade secrets).

[51] 18 U.S. Code § 1836(b).

[52] 18 U.S.C. § 1839(3).

[53] The Sedona Conference, *Commentary on Protecting Trade Secrets Throughout the Employment Life Cycle,* 23 SEDONA CONF. J. 807 (2022). Trade secrets are often elusive to define because: (1) broad categories of information may be included and protected as trade secrets; (2) what qualifies as a trade secret can potentially change and evolve over time; (3) the value of information may range from 'crown jewels' to ephemeral data of minimal value but that technically qualifies as a trade secret; and (4) unlike other forms of intellectual property, there is no definitive registry of information that determines the parameters and ownership of a trade secret." *Id.*

> customized ISA instructions, source code for products incorporating Apple's SoCs, and other Apple-developed know-how gained from years of developing advanced SoCs.[54]

Apple argued that "[o]ne of the most critical agreements for protecting Apple's proprietary and trade secret information is the Intellectual Property Agreement."[55]

A plaintiff can prove misappropriation by showing (1) *acquisition* of a trade secret by improper means, or (2) *disclosure* or *use* of the trade secret without consent.[56] The Defend Trade Secrets Act defines "improper means" as "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[57] Furthermore, the owner of a trade secret can seek injunctive relief if the misappropriation is "actual or threatened."[58]

b. The Trial Court's 12(b)(6) Ruling on Apple's Trade Secrets Claim:

Rivos and the individual defendants moved to dismiss the trade secret claims for failure to state a claim under Rule 12(b)(6) of the Federal Rule of Civil Procedure in September and October 2022.[59] About 10 months later, the district court made three separate rulings on the defendants' motion on the trade secrets claim.[60]

First, the court held that Apple sufficiently pled its trade secrets misappropriation claims against three employees - Wen, Rajamani, and Hardage – reasoning that the "sheer quantity and content of data exfiltrated by these defendants in the immediate days before their departure, in conjunction with the substantially similar roles and technology they are working with at Rivos, readily lend themselves to an inference that these defendants have used or are using Apple confidential information in their new roles."[61] This ruling was based on the conclusion that, as alleged, these defendants posed a "threat of disclosure or use" of Apple's trade secrets without its consent.[62]

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[54] Order on Defs. Mot. to Dismiss, *supra* note 6 at ¶ 29.

[55] *Id.* at ¶ 31.

[56] 18 U.S.C. § 1839(5)(A)-(B).

[57] 18 U.S.C. § 1839(6)(A).

[58] 18 U.S.C. § 1836(b)(3)(A)(i).

[59] Def. Counterclaims, *supra* note 9. Fed. R. of Civ. P. 12(b)(6) allows a party to test the legal sufficiency of the claims alleged in the complaint. When deciding whether to grant a motion to dismiss, the court must generally accept as true all well-pleaded factual allegations in a complaint but is not required to accept the legal conclusions couched as fact allegations. Ashcroft v. Iqbal, 556 U.S. 662, 664, 678 (2009).

[60] Order on Defs. Mot. to Dismiss, *supra* note 6 at *35-36.

[61] *Id.* at *19 (citing Carl Zeiss Meditec, Inc. v. Topcon Med. Sys., Inc., 2021 U.S. DIST. LEXIS 64439, at *20-21 (N.D. Cal. Mar. 1, 2021) (collecting cases where the close timing strongly suggested that the defendants would use the information at their new employers), vacated in part on other grounds, 2022 U.S. APP. LEXIS 13078 (Fed. Cir. May 16, 2022); Power Integrations, Inc. v. De Lara, No. 20-CV-410, 2020 U.S. Dist. LEXIS 52724, at *54 (S.D. Cal. Mar. 26, 2020) (finding that "suspicious circumstances surrounding Defendants' resignation from employment with Plaintiff could indicate threatened misappropriation through disclosure or use")).

[62] Order on Defs. Mot. to Dismiss, *supra* note 6 at *20-21.

Second, the court dismissed the trade secrets claims against Defendants Pinot and Ye because they did not back-up or save Apple's information near the time of their recruitment by or departure to Rivos. Pinot had been creating regular weekly backups several months before he was recruited by Rivos. It is unclear when Ye saved information to his iCloud account.[63] The Court held that the mere allegation that Pinot and Ye backed-up confidential information was insufficient to reasonably infer that they used or disclosed the information.[64]

Likewise, the court concluded that Apple failed to plausibly allege that Pinot and Ye "acquired trade secrets by improper means" because Apple did not assert that they downloaded or transferred confidential information after they were offered jobs by Rivos.[65] It reasoned that "allegations that former employees merely possessed or failed to return lawfully required information are insufficient by themselves to establish misappropriation or show injury under the DTSA."[66]

Third, the court dismissed the trade secrets claim against Rivos. Because Apple abandoned its claim that Rivos used or disclosed Apple's trade secrets, its misappropriation claim was narrowed to a theory based on improper acquisition.[67] Apple argued that Rivos injected itself into the departure process and effectively "ratified the Individual Defendants' improper acquisition by interfering with Apple's attempts to get its documents back and insisting that Apple proceed through Rivos's counsel."[68]

The court concluded that Apple could not impute the employees' misappropriation to Rivos when it advised the employees about talking with their managers during their departure.[69] The court gave weight to Apple's acknowledgment that Rivos' CEO advised the employees to *not* retain confidential information when they left.[70] The court also rejected the ratification theory because Rivos did not employ the individuals at the time they allegedly acquired the information.[71]

While the court dismissed the trade secret claims against Rivos, Pinot, and Ye, it permitted Apple to amend its complaint to allege additional facts against each defendant.[72]

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[63] *Id.* at *20-21.

[64] *Id.* at *21-22.

[65] *Id.* at *22.

[66] *Id.* (citing Power Integrations, *supra* note 61, at *52 ("Both state and federal courts in California have held that a plaintiff must prove more than a defendant's mere possession of trade secrets. . . . [T]he Court cannot presume the transfer of trade secret information occurs simply because Defendants possess it"); and Norsat Int'l, Inc. v. B.I.P. Corp., 2014 U.S. Dist. LEXIS 74953, at *17 (S.D. Cal. May 30, 2014) ("'Mere possession of trade secrets by a departing employee' is not sufficient to establish misappropriation or show injury.")).

[67] *Id.* at *23.

[68] *Id.* at *24.

[69] *Id*.

[70] *Id.*

[71] *Id.* at *26.

[72] *Id.* at *28.

2. The Court's 12(b)(6) Ruling on Apple's Breach of Contract Claims:

The second prong of Apple's lawsuit involved breach of contract claims against each of the departing employees, but not Rivos. This claim was based on Apple's IPA that each employee signed, which requires them to, upon termination of their employment, "promptly deliver to Apple all documents and materials of any kind pertaining to your work at Apple."[73]

The Court found that Apple could proceed on its breach of contract claim against five of the six employees.[74] Apple's allegations, supported by expert forensic testimony, identified in some detail the steps used by Wen, Rajamani, and Hardage to save and transfer significant amounts of confidential information.[75]

Although the court found the allegations against Pinot to be insufficient to support a trade secret misappropriation claim, they did support a claim for breach of the IPA contract. Pinot allegedly backed-up "all of the files on Mr. Pinot's Apple-issued laptop's hard drive" on a personal drive, which the court concluded to reasonably include Apple's confidential information.[76] Likewise, Wang admitted that his personal iCloud drive contained Apple's files because the drive synched to his work computer.[77]

Finally, the court dismissed the breach of contract claim against Ye, which was based on the allegation that he saved and has access to Apple's source code repositories on his iCloud drive, because the allegation as pleaded was "too nebulous" to reasonably infer that he violated the IPA.[78] The complaint did not identify when the information was saved or whether Ye could access the information after his employment ended. Although the court dismissed the claim, it allowed Apple to amend its complaint to assert more specific allegations Ye.[79]

3. The Litigation Continued in Full Force During the Pendency of Defendants' Motion to Dismiss Stage.

During this 15-month period between the filing of the complaint and the Court's order on the defendants' motion to dismiss, Apple moved for a temporary restraining order and expedited discovery.[80] The parties engaged in ongoing discovery, navigated sealing of confidential information, and litigated the scope of discovery. Several forensic experts also examined how, when, and where the employees saved and used Apple's information.[81]

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[73] Apple's Sec. Amend. Compl., *supra* note 28 at ¶ 31.
[74] Order on Defs. Mot. to Dismiss, *supra* note 6 at *35-36.
[75] *Id.* at *30-33.
[76] *Id.* at *32.
[77] *Id.* at *33-34.
[78] *Id.* at *34.
[79] *Id.* at *35.
[80] *Id.* The parties entered a stipulated agreement to resolve the temporary restraining order. *Id.* at *10.
[81] *Id.* at *9-11.

B. The Defendants' Counterclaims Raise the Stakes of the Lawsuit

One month after the court's ruling on the defendant's motion to dismiss, the defendants went on the offense by asserting counterclaims against Apple.[82] Their premise was simple. Apple overreached when it forced its employees to sign an overbroad IPA and aggressively enforced it. As such, these tactics violated California's laws prohibiting noncompetition agreements and unfair competition.[83]

The individual defendants' counterclaims alleged that Apple was trying to crush upstarts and other legitimate competition in violation of California law. They argued:

> Afraid of any threat of legitimate competition in the marketplace, and hoping to frighten and send a message to any employees who might dare to leave Apple to work somewhere else, Apple has resorted to trying to thwart emerging startups through anticompetitive measures, including illegally restricting employee mobility. . . .
>
> Apple is relentless with these efforts. It forces employees to sign contract provisions that run afoul of California law as a condition of employment. These contracts purport to prohibit employees from retaining *anything* from their time at Apple – even know-how that is not a trade secret – and contain other provisions that are unenforceable because they violate California public policy. And yet Apple yields these provisions to scare current and former employees into submission, and to chill activity that California law expressly allows.[84]

The counterclaims focused on two provisions of the IPA – a non disclosure provision and a non solicitation provision.[85] The nondisclosure provision prohibits employees from ever using or improperly disclosing Apple's confidential, proprietary, or secret information without written consent.[86] It applies broadly to "any information of a confidential, proprietary, and secret nature" and "includes, but is not limited to information and material relating to past, present, or future inventions, marketing plans, manufacturing and product plans, technical specifications, hardware designs and prototypes, business strategies, financial information and forecasts, personnel information, and customer lists."[87] Employees were prohibited from ever using or disclosing such information without written consent.[88] To add gravitas, Apple required many departing employees to sign a checklist affirming that, "Everything you worked on at Apple stays here."[89]

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[82] Def. Counterclaims, *supra* note 9.

[83] *Id.* at ¶¶ 1-2.

[84] *Id.*

[85] *Id.* at ¶¶ 56-70.

[86] Apple's IPA, *supra* note 28 at ¶ 2.0.

[87] *Id.*

[88] *Id*.

[89] Apple's Sec. Amend. Compl., *supra* note 28 at ¶ 35.

The non solicitation provision prohibits employees from soliciting, encouraging, or recruiting any Apple employee to terminate their employment within one year of the employee's departure.[90]

1. The Counterclaims:

Rivos and the individual defendants asserted two counterclaims. First, they sought declaratory relief finding that Apple's IPA and associated conduct violated California's statutes prohibiting noncompetition agreements and unfair competition.[91] Section 16600(a) of the Business and Professions Code provides that,

> (a) Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.
>
> (b) (1) This section shall be read broadly. . . to void the application of any non compete agreement in an employment context, or any non compete clause in an employment contract, no matter how narrowly tailored, that does not satisfy an exception in this chapter.[92]

The remedies sought by the departing employees included "enjoining Apple from entering into such contracts and requiring Apple to modify the Apple IPA so that the employees are free to provide services in California or to a California-based employer."[93]

The second cause of action alleged that Apple's conduct constituted unfair competition under Section 17200 of California's Business and Professions Code which prohibits "any unlawful or practice and unfair, deceptive, untrue or misleading advertising prohibited by Chapter 1. . . of Part 3 of Division 7 of the. . . Code."[94] The counter claimants sought injunctive relief prohibiting Apple from (1) forcing employees to sign illegal contracts of adhesion, (2) seeking to enforce the IPA against current and former employees, and (3) engaging in or threatening anti-competitive litigation against Rivos or other California employers related to the nondisclosure and non solicitation provisions of the IPA. It also sought restitution, primarily related to the cost to defend the litigation, attorney fees, and costs.[95]

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[90] Apple's IPA, *supra* note 28 at ¶ 3.0(d).

[91] Defs. Counterclaims, *supra* note 9 at ¶¶ 56-62.

[92] Cal. Bus. Prof. Code § 16600. The California legislature expanded on and clarified the relief with new legislation going into effect in 2024. Employers are required to notify employees who started work after January 1, 2022, that their noncompete clauses were void and that a failure to do so constituted unfair competition under Section 17200. Cal. Bus. Prof. Code § 16600.1. The law also authorizes employees to bring a private action for injunctive relief and/or damages against employers that enter into or try to enforce a void non compete contract, and to receive attorney fees and costs if the employees prevail. Cal. Bus. Prof. Code § 16600.5(e).

[93] Def. Counterclaims, *supra* note 9 at ¶ 62.

[94] *Id.* at ¶¶ 63-70 (citing Cal. Bus. Prof. Code § 17200).

[95] *Id.* at Prayer for Relief.

The counterclaims raised the stakes of litigation by placing Apple's IPA in the crosshairs. If successful, the court's order would, at minimum, create precedent for other Apple employees and competitors to challenge Apple's IPA. And, at its broadest, it would invalidate or drastically narrow the IPA for all of Apple's current and former employees.

2. Does Apple's Nondisclosure Agreement Violate California Law Prohibiting Noncompetition Agreements?:

With all the pieces on the chessboard, it was Apple's turn to try to move the court to dismiss the counterclaims against it for failure to state a claim under Fed. R. Civ. P. 12(b)(6).[96]

Apple first argued that the nondisclosure agreement complied with Section 16600 of the California Business and Professions Code because the statute "does not invalidate an agreement between an employer and employee that seeks to maintain the confidentiality of an employer's trade secret or otherwise proprietary information."[97] It argued that its nondisclosure agreement was narrow; that the defendants were not prevented from engaging in any profession, trade, or business; [98] and that the return of property requirement was consistent with California case law. [99]

The counterclaimant employees responded that California courts regularly found similarly broad nondisclosure agreements invalid under Section 16600 because they "operate as a de facto non compete provision."[100] Apple's IPA and departure checklist were "impossibly broad" and used to "scare employees and prevent them from working elsewhere" because they prohibit employees from "retain[ing] anything, regardless of whether it is trade secret or confidential. This is exactly the sort of scheme that courts routinely reject."[101]

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[96] Apple's Motion to Dismiss Am. Counterclaims, Apple Inc. v. Rivos, Inc. et al., No. 5:22-CV-02637, 2003 U.S. DIST. CT. MOTIONS LEXIS 302762 (Nov. 17, 2023).

[97] *Id.* at Sec. 4(1) (quoting SPS Techs., LLC v. Briles Aerospace, Inc., 2021 WL 5785264, at *18 (C.D. Cal. Sept. 3, 2021)).

[98] *Id.* at Sec. 4(1) (citing SPS Techs., *supra* note 97, at *17 (finding valid an agreement that protected "all inventions, discoveries, improvements, developments, designs, methods, systems, computer programs, trade secrets or any other intellectual property," or "other private or confidential matters"); VibrantCare Rehab., Inc. v. Deol, 2021 WL 1614692, at *6 (E.D. Cal. Apr. 26, 2021) (holding valid an agreement that nondisclosure agreement designed to protect material that, if disclosed "would damage the company").

[99] *Id.* (citing Genasys Inc. v. Vector Acoustics, LLC, 2023 WL 4414222, at *9 (S.D. Cal. July 7, 2023) (holding the lack of authority finding a surrender of materials provision void under Section 16600); SPS Techs., *supra* note 97, at *16 (finding agreement valid that required employees to hand over all materials that relate the employer's intellectual property and other private or confidential matters).

[100] Defendants Resp. to Mot. Dismiss at Sec. 5(A)(1) (quoting Brown v. TGS Mgmt. Co., LLC, 57 Cal. App. 5th 303, 319 (Cal. Ct. App. 2020)).

[101] *Id.* (citing Action Learning Sys., Inc. v. Crowe, 2014 WL 12564011, at *12 (C.D. Cal. Aug. 11, 2014) ("These provisions, read literally, would include nearly everything related to the educational field that Defendants saw, learned, observed, or had access to during their nearly 10-year employment with ALS. As Defendants point out, after leaving ALS, they would essentially need a lobotomy in order to continue working in the educational field without violating these restrictions."); Dowell v. Biosense Webster, Inc., 179 Cal. App. 4th 564, 578 (2009) ("Given such an inclusive and broad list of confidential information, it seems nearly impossible that employees . . . would not have possession of such information.")).

Some California courts have gone so far as to find broad confidentiality agreements facially invalid per Section 16600. For instance, in *Brown v. TGS Mgmt. Co., LLC*, the court found that the employers' defined confidential information "so broadly as to prevent [the employee] in perpetuity from doing any work in the securities field;" it "operated as a de facto non-compete clause."[102] Several other courts have followed suit.[103] Interestingly, Apple cited *Brown* in a separate lawsuit against Masimo Corp., where Apple moved the court to find Massimo's "confidentiality provisions. . . facially invalid as a matter of law."[104]

While the ultimate ruling on this issue in the context of a Rule 12(b)(6) motion to dismiss was far from certain, it was highly likely that, throughout the litigation, the Court would closely scrutinize the scope of Apple's confidentiality and nondisclosure requirements and related enforcement efforts to determine if they functioned as noncompetition agreements.

Leading commentators in this area argue that many "confidentiality agreements generate such sweeping confidentiality obligations that it would be virtually impossible to work in the same field—let alone compete with a former employer - without breaching them. In other words, they have the functional effect of noncompetes."[105] This line between a valid restriction and functional non compete agreement can be crossed for several reasons. First, confidentiality agreements often protect "confidential" and "proprietary" information that far exceed the limitations of trade secret law. Second, many agreements implicitly cover employees' general knowledge, skills, and experience.[106] Third, the

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[102] Brown v. TGS Mgmt. Co., LLC, 57 Cal. App. 5th 303, 306, 319 (Cal. Ct. App. 2020).

[103] *See* Skye Orthobiologics, LLC v. CTM Biomedical, LLC, 2024 U.S. DIST. LEXIS 70271, at *16 (C.D. Cal. Apr. 17, 2024) (holding that confidentiality provision with specific limitations to content area is not unenforceable as a matter of law); VibrantCare Rehab., Inc. v. Deol, 2021 U.S. DIST. LEXIS 79718, *15-16 (E.D. Cal. Apr. 26, 2021) (denying motion to dismiss where nondisclosure provision did not restrict future employment and stating that the court could sever void provisions); Genasys Inc. v. Vector Acoustics, LLC, 2023 U.S. DIST. LEXIS 117439, *53 (S.D. Cal. Jul. 7, 2023) (denying motion to dismiss on the basis that contract language requiring employees to surrender company materials at termination of employment is void under Section 16600); BBBB Bonding Corp. v. Pilling-Miller, 2024 CAL. APP. UNPUB. LEXIS 2899, *23 (Cal. Ct. App., 6th Dist. May 10, 2024) (unpublished) (finding confidentiality provisions void because they "invade the statutory prohibition against contractual noncompetition agreements.").

[104] Masimo Corp. v. Apple Inc., 2023 U.S. Dist. LEXIS 50761, *10-11 (C.D. Cal. Mar 15, 2023). The Court did not consider the issue because Apple's argument was untimely raised.

[105] Camilla A. Hrdy et al., *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes*, 133 YALE LAW J. 669, 678 (2024); *See also* Deepa Varadarajan, *The Trade Secret-Contract Interface*, 103 IOWA L. REV. 1543, 1563-75 (2018) (discussing the use of confidentiality agreements to evade limitations of trade secret law).

[106] *Id.,* Hrdy at 678; *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 42 cmt. d (AM. L. INST. 1995) ("Information that forms the general skill, knowledge, training, and experience of an employee cannot be claimed as a trade secret by a former employer even when the information is *directly attributable to an investment of resources by the employer in the employee."); Camilla A. Hrdy, The General Knowledge, Skill, and Experience Paradox*, 60 B.C. L. REV. 2409, 2419-23, 2430-33 (2019); Kurt M. Saunders & Nina Golden, *Skill or Secret?—The Line Between Trade Secrets and Employee General Skills*

nondisclosure limitations prohibit "use" of confidential information as well as disclosure.[107] Fourth, most contracts state that a breach would cause irreparable harm and provide for injunctive relief against the employee.[108] Fifth, the agreements generally do not have geographic or temporal limitations, they last forever.[109] Finally, many agreements authorize employers to collect attorney fees and costs to enforce them.[110] With the exception of an attorney fees provision, Apple's IPA runs afoul of each of these problems.

The United States is amid a sea change in this arena. While courts have historically tended to view confidentiality agreements as presumptively enforceable, courts and legislators alike are starting to shift the standard to require employers to prove the reasonableness of the restrictions.[111] In 2021, the Uniform Law Commission approved the Uniform Restrictive Employment Agreement Act that characterizes confidentiality agreements as restrictive covenants and therefore presumptively unenforceable unless they meet certain restrictions.[112] More recently, in 2024, the Federal Trade Commission issued a rule that would effectively ban noncompetition agreements nationwide, applying a "functional test" to determine whether a restriction constitutes a noncompetition agreement.[113] Many other states legislators have also followed suit to explicitly prohibit or drastically restrict noncompete agreements.[114] Whether those statutes will be applied to confidentiality agreements is largely to be determined.

To proceed, Apple would risk the confidentiality provisions in its IPA being found invalid or significantly restricted across its entire workforce.

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and Knowledge, 15 N.Y.U. J.L. & BUS. 61, 83-84 (2018) (discussing how courts distinguish general skills and knowledge from trade secrets).

[107] *Id., Hrdy* at 678.

[108] *Id.*

[109] *Id.* at 679.

[110] *Id.* at 678.

[111] *Id.* at 674-75.

[112] UNIF. RESTRICTIVE EMPL. AGREEMENTS ACT § 9, Nat'l Conf. of Comm'rs on Univ. State L. (2021) https://www.uniformlaws.org/viewdocument/final-act-7?CommunityKey=f870a839-27cd-4150-ad5f-51d8214f1cd2&tab=librarydocuments.

[113] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023, effective Sept. 4, 2024) (to be codified at 16 C.F.R. pt. 910). 16 C.F.R. pt. 910 defines non compete clause as "[a] term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from: (i) seeking or accepting work in the United States with a different person. . . after the conclusion of the employment. . .").

[114] Five states and the District of Columbia statutorily prohibit most noncompetes. *See* Cal. Bus. Prof. Code § 16600-16600.5 (California), Col. Rev. Stat. § 8-2-113.2 (Colorado), Minn. Stat. § 181.988 (Minnesota), N.D.C.C. § 9-08-06 (North Dakota), 15 OK Stat § 219A (Oklahoma), D.C. Code § 32-581.02 (District of Columbia). Nine states statutorily ban noncompetes for people making below a certain pay threshold or are categorized as non-exempt. Colo. Rev. Stat. § 8-2-113 (Colorado), 820 ILCS § 90 (Illinois), 26 Unif. Maine Stat. §599-A (Maine), Md. Code, Lab. & Empl. § 3-716 (Maryland), NH Rev Stat § 275:70-70a (New Hampshire), Or. Rev. Stat. § 653.295 (Oregon), R.I. Gen. Laws § 28-59-3 (Rhode Island), Code of Va. § 40.1-28.7:8 (Virginia), and Rev. Code of Wa. § 49.62.020 (Washington).

3. Does the Nonsolicitation Provision Violate California's Law Prohibiting Noncompetition Agreements?:

Apple also moved to dismiss the Section 16600 counterclaim arguing that the non solicitation provision was consistent with California law.[115] While there is no definitive California ruling that nonsolicitation agreements are invalid as a matter of law, California courts highly scrutinize them and restrict their application.[116]

In *Loral Corporation v. Moyes*, a 1985 California Court of Appeals case set the standard to determine the validity of non-solicitation agreements in light of Section 1660.[117] *Loral* reasoned that nonsolicitation agreements that allow employees to apply for and accept work with a new employer were enforceable because the restriction only "slightly affected" the competitor's business "in a small way."[118] Several courts followed *Loral*'s finding that non-solicitation of employee provisions are "not prohibited by Section 16600 so long as they do not restrain those employees from leaving the company and seeking employment with a third party."[119]

In 2018, the California Supreme Court decided *Edwards v. Arthur Andersen LLP,* which held that an agreement with noncompetition and nonsolicitation provisions was invalid.[120] A few courts hold that *Edwards* does not control *Loral* and will still enforce non-solicitation restrictions that have little or no impact on employees or competitors.[121] In *AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, California's Fourth District Court of Appeals interpreted *Edwards* to prohibit employee and customer non-solicitation clauses

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[115] Apple's Mot. to Dismiss Am. Counterclaims, *supra* note 96, at *9.

[116] *See, e.g.,* Barker v. Insight Global, LLC, 2019 WL 176260, at *3 (N.D. Cal. Jan. 11, 2019) ("[T]he Court is convinced by the reasoning in AMN that California law is properly interpreted post-Edwards to invalidate employee non-solicitation provisions."); WeRide Corp. v. Huang, 379 F. Supp. 3d 834, 2019 WL 1439394, at *10 (N.D. Cal. Apr. 1, 2019) (finding non solicitation of employee provision void under California law).

[117] Loral Corporation v. Moyes, 174 Cal. App. 3d 268 (Cal. Ct. App. 1985).

[118] MSC.Software Corp. v. Altair Eng'g, Inc., 2014 U.S. Dist. LEXIS 134165, *7-8 (E.D. Mi. Sept. 23, 2014) (characterizing *Loral*).

[119] Loral, *supra* note 117, at 279-80.

[120] Edwards v. Arthur Andersen LLP, 44 Cal. 4th 937, 81 Cal. Rptr. 3d 282 (2008).

[121] Aramark Mgmt., LLC v. Borgquist, 2021 WL 3932258, at *9 (C.D. Cal. July 8, 2021) (holding that employee non solicitation provision that did not prevent former employee from engaging in his chosen profession was enforceable); Hamilton v. Juul Labs, Inc., 2020 WL 5500377, at *7 (N.D. Cal. Sept. 11, 2020) (holding that non solicitation provision was valid under Section 16600 because plaintiff did not allege that "the NDA prevent[ed] her from engaging in her profession like the plaintiffs in AMN who were recruiters--i.e., their entire profession was completely based on solicitation"); W. Air Charter, Inc. v. Schembari, 2018 WL 10157139, at *14 (C.D. Cal. Nov. 21, 2018) (holding that nonsolicitation agreements "are not prohibited by Section 16600 so long as they do not restrain those employees from leaving the company and seeking employment with a third party."); Sonic Auto., Inc. v. Mohammed Younis, 2015 WL 13344624, at *2 (C.D. Cal. May 6, 2015) ("[A] contract may prohibit employees, upon termination of their employment, from soliciting other employees to join them at their new employment.") (citing Loral).

as a matter of law.[122] Following *AMN's*, more California courts are moving closer to a blanket prohibition of non-solicitation agreements.[123]

If the litigation proceeded, Apple would have faced a steep uphill climb to convince the court that its non solicitation provision was valid. Because the primary dispute in this case focused on the copying and use of confidential information, it is unclear whether an adverse ruling on the non-solicitation provision would affect the confidentiality and trade secrets claims.

4. Does Apple's Intellectual Property Agreement Restrictions Constitute Unlawful Competition Under Section 17200?:

The employees' second counterclaim alleged that Apple's restrictions constitute unfair competition under Section 17200 of California's Business Professions Code. This claim is largely derivative of Section 16600 claim.[124] California courts allow Section 17200 claims to proceed at the initial pleading stage of litigation where the companion Section 16600 claims are sufficiently plead.[125] So, Apple's motion to dismiss Section 17200 claim would likely have failed.

What made the Section 17200 claim unique is that the counter claimants sought broad negative injunctive relief:

> The negative injunctive relief includes, but is not limited to, a public injunction prohibiting Apple from: (i) forcing employees to sign illegal contracts of adhesion that purport to impose restrictions on them that are inconsistent with California law, (ii) seeking to enforce the Apple IPA

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[122] MN Healthcare, Inc. v. Aya Healthcare Services, Inc., 28 Cal. App. 5th 923, 939 (Cal. Ct. App. 2018) ("We thus doubt the continuing viability of [Loral] post-Edwards."); *see also* Barker, *supra* note 116, at *3 ("California law is properly interpreted post-Edwards to invalidate employee non-solicitation provisions").

[123] Parsable, Inc. v. Landreth, 2022 U.S. Dist. LEXIS 241809, 2022 WL 19692034, at *3-4 (N.D. Cal. Aug. 5, 2022) (voiding a non-solicitation clause at the pleading state on the basis that that "[a] non-solicitation clause works a restraint on any former employee by restricting who may work alongside them") (collecting cases); Barker, *supra* note 116 at *3 ("[T]he Court is convinced by the reasoning in AMN that California law is properly interpreted post-Edwards to invalidate employee non-solicitation provisions."); WeRide Corp., 379 F. Supp. 3d at 852 (N.D. Cal. 2019), modified in part, 2019 WL 5722620 (N.D. Cal. Nov. 5, 2019); Conversion Logic, Inc. v. Measured, Inc., 2019 WL 6828283, at *4 (C.D. Cal. Dec. 13, 2019) (same).

[124] Def. Counterclaims, *supra* note 9 at ¶ 64-68; *see* Apple's Mot. To Dismiss Am. Counterclaims, *supra* note 96, at *5; Opposition/Response to Motion to Dismiss Amended Counterclaims, 5:22 Apple Inc. v. Rivos, Inc. et al., No. 5:22-CV-02637, 2673, 2023 U.S. DIST. CT. MOTIONS LEXIS 312015 (N.D. Cal. Dec. 8, 2023).

[125] *See* Sequoia Benefits & Ins. Servs., LLC v. Sageview Advisory Grp., Inc., 2021 WL 2115390, at *19 (N.D. Cal. May 25, 2021) (denying motion to dismiss Section 17200 claim where counterclaim alleged "Sequoia is engaged in unfair competition by requiring employees to sign employment agreements with void non-solicitation provisions"); Applied Materials, Inc. v. Advanced Micro-Fabrication Equip. (Shanghai) Co., 630 F. Supp. 2d 1084, 1091-92 (N.D. Cal. 2009) (granting summary judgment on section 17200 claim where a non compete provision was unlawful under section 16600); Calif Cal. Bus. Prof. Code § 16600.1 (making the enforcement of an unlawful non compete clause as a violation of Section 17200) (effective Jan. 1, 2024).

> against its current and former employees as described herein, and (iii) engaging in threatened or actual anti-competitive litigation against Rivos and other California employers arising from its illegal and unenforceable non competes/NDAs as reflected in the Apple IPA[126]

They also sought restitution, attorney fees, and costs under this claim.[127] Again, this counterclaim provided the defendants with leverage to call into question the validity and enforceability of Apple's IPA across its entire workforce.

C. The Settlement and Resolution of the Lawsuit

The conclusion of briefing on Apple's motion to dismiss on December 22, 2023, created an inflection point in the litigation. The parties had completed enough discovery to have a good sense of what information was retained by the employees and whether confidential information or trade secrets were used at Rivos. The parties also more fully appreciated the substantial costs and risks of moving forward with the litigation.

They had been aggressively litigating for 18 months and expending an incredible amount of money, energy, and focus on the lawsuit. The cloud of the lawsuit loomed particularly large over Rivos as it was forced to delay a $400 billion round of fundraising and lay off six percent of its workforce in August of 2023.[128] Meanwhile Apple was facing rulings that would call into question the legality of its IPA and possibly narrow its trade secret and confidentiality protections across its workforce.[129]

Facing these decisions, Apple, Rivos, and the individual defendants entered settlement agreements in January and February 2024 in which they dismissed their claims against each other.[130] The settlements required the individual employees to confirm that they had cooperated with a forensic investigation and returned or deleted Apple's confidential information.[131] Their stipulations of dismissal also included broad representations that the individuals would not "access, use, or disclose, for any purposes, Apple confidential information" including electronically stored information.[132] "Confidential information"

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[126] Def. Counterclaims, *supra* note 9 at Prayer for Relief.

[127] *Id*.

[128] Wayne Ma, *Chip Startup Sued by Apple Has Struggled to Raise Capital*, THE INFORMATION, https://www.theinformation.com/articles/chip-startup-sued-by-apple-has-struggled-to-raise-capital; Kyle Wiggers, *Apple Lawsuit Behind It, Chip Startup Plots Its Next Moves*, TECHCRUNCH, Arp. 16, 2024, https://techcrunch.com/2024/04/16/apple-lawsuit-behind-it-chip-startup-rivos-plots-its-next-moves/ (last visited May 29, 2024).

[129] *See* Apple's Mot. To Dismiss Am. Counterclaims, *supra* note 96.

[130] Stip. of Dismissal and Order, Apple Inc. v. Rivos Inc. et. al., No. 5:22-CV-02637 (N.D. Cal. Jan. 9, 2024) (dismissing claims and counterclaims between Weidong Ye and Apple); Stipulation of Dismissal and Order, No. 5:22-CV-02637, (N.D. Cal. Jan. 9, 2024) (dismissing claims and counterclaims between Apple and Ricky Wen).

[131] *Id.*

[132] *Id.*

was not explicitly defined. The parties also authorized the court to retain continuing jurisdiction in the enforcement and future adjudication of violations of the order.[133]

Apple and Rivos' settlement was predicated on Rivos allowing for a forensic examination of its systems and networks and the return of Apple confidential information.[134] The parties agreed to an order stating that, "Rivos shall not use or disclose, for any purposes, Apple Information including any electronically stored information."[135] "Apple Information" includes "confidential or non-public proprietary information," which was, again, not further defined.[136] Finally, each party bore its own costs and attorney fees and authorized the Court to maintain continuing jurisdiction over the enforcement of the order.[137]

So, in the end, Apple obtained the concessions that it sought in its complaint and was able to verify its concerns through a forensic investigation into Rivos' systems. Meanwhile, Rivos was able to continue employing Apple's former employees and, with the lawsuit behind it, aggressively move forward with its business. It is unclear whether any Apple trade secrets were ever used or disclosed by the defendants.

IV. A Few Take-Aways from the Lawsuit

This lawsuit illustrates the high legal and business stakes in play when companies compete for, and poach, each other's employees. Trade secret claims, confidentiality and nondisclosure provisions, non solicitation provisions, and noncompetition agreements seek to balance the rights of an employer to protect its business with the rights of employees to move between employers and prospective companies to compete in the market.

A. Trade Secret Claims Add Firepower and Will Become More Central as Noncompete Agreements Become Less Viable

Trade secret claims will play a more central role for employers to protect their secrets as noncompete agreements, the longstanding method to lock up employee talent, become less viable options. They also offer companies unique advantages over contract-based claims, such as confidentiality agreements. Trade secret statutes provide for a wide range of legal and equitable remedies, which may include attorney fees and exemplary (double) damages.[138] Unlike contract claims, which require a privilege between parties, misappropriation claims can be asserted against departing employees *and* their new

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[133] *Id.*

[134] *See* Joint Update and [Proposed] Order to Continue to Stay the Action, Apple Inc. v. Rivos Inc. et al, No. 5:22-CV-02637 (N.D. Cal. Mar. 15, 2024); Joint Stip. and Order to Dismiss Action, No. 5:22-CV-02637 (N.D. Cal. Mar. 19, 2024).

[135] *Id.*, Joint Stip. and Order to Dismiss Action.

[136] *Id.*

[137] *Id.*

[138] 18 U.S.C. § 1836(b)(3)(C-D) (double damages); Minn. Stat. §§ 325C.03(b) (double damages) & 325C.04 (attorney fees).

employers. Finally, the federal Defend Trade Secrets Act authorizes parties to sue in federal court.[139]

Companies must, however, focus on the truly confidential information that provides them an advantage in the marketplace, and focus their energy on protecting those secrets.[140]

B. Confidentiality and Nondisclosure Contracts Allow Broader Protection than Trade Secret Law, But Come With a Risk

Confidentiality agreements are critical to create trade secrets because employers must show that they took reasonable measures to protect their secrets. One primary advantage of confidentiality agreements is that they can protect a broader range of materials and information that might not rise to the level of a trade secret. The broader the agreements are in scope, however, the more likely they will be called into question and possibly invalidated.[141] If pushed too far, they may start to function as unenforceable noncompetition agreements and tools for unfair competition.

Some commentators persuasively argue that courts and other decision makers should treat confidentiality agreements that exceed the scope of trade secrets as presumptively unenforceable, thus shifting the burden to the employer to prove the agreements are reasonably designed to protect legitimate secret information and do not function as noncompetes.[142] And, in some jurisdictions, overbroad restrictions may subject the employer to private declaratory judgment claims, damages, and attorney fees.[143]

C. Corporate Raiding Lawsuits Send a Broader Message and May Hobble the Smaller Company

Corporate raiding and trade secret lawsuits are high stakes and, when involving departing employees, are often intensely litigated at the outset of litigation. While this case involves a handful of employees jumping ship to an upstart, Apple's lawsuit sends a much broader message to its employees considering other jobs and hundreds of other Apple employees who had already moved to a competitor. Apple would aggressively pursue litigation if they took proprietary information with them.

In the end, Apple was presumably able to recover the information taken by the employees and ensure that the information was not used by Rivos. But the litigation also had significant consequences on Rivos. Apple forced the smaller upstart Rivos to invest a significant portion of its time, energy, and money on the dispute, and its progress as a

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[139] 18 U.S.C. § 1836(c).

[140] *See,* e.g., *The Sedona Conference, supra* note 53; Wade Davis & Jeffrey Post, *Practical Strategies to Protect Corporate Trade Secrets and Avoid Misappropriation Claims,* 32 SOUTHERN LAW JOURNAL 58 (Fall 2022); Timothy Murphy, *How Can a Departing Employee Misappropriate Their Own Creative Outputs*, 66 VILL. L. REV. 529, 546-50 (2021).

[141] *Hrdy*, *supra* note 85 at 679-82.

[142] *Id.*

[143] *See* Cal. Bus. & Prof. Code § 16600.5(e).

company was inevitably delayed.[144] Under the shadow of the lawsuit, Rivos struggled to hire more employees and was forced to lay off nearly two dozen employees, or six percent of its workforce, in August 2023.[145] It was also forced to delay a significant round of fundraising.[146] Within one month of settling the lawsuit with Apple, Rivos raised $250 million in a round of Series A funding that enabled it to move forward with its product development and to expand its manufacturing operation, hardware, and software engineering efforts.[147]

D. Companies (On All Sides) Need to Revisit How They Identify and Control Trade Secrets and How the Navigate Employee Mobility

There is a quandary in the employer/employee relationship. While employees have a duty to maintain confidence regarding their employer's confidential information, information that forms the "general skill, knowledge, training, and experience of an employee cannot be claimed as a trade secret by a former employer" even when it is attributable to the employer's investment in the employee.[148] *Apple Inc. v. Rivos Inc. et al.* illustrates the risk and problem of implementing intellectual property policies based on broad restrictions of "any information of a confidential, proprietary, and secret nature" that "relates to past, present, or future" of broad categories of the business. All concerned would be better served by a clear and specific understanding of what a company claims its trade secrets are during employee onboarding, the term of employment, and offboarding.[149] Companies should also resist the temptation to define confidential information well beyond the scope of actual trade secrets, doing so chills employee rights to move between companies and may result in subsequent restrictions or, possibly, legal liability.

Likewise, hiring employers must insist that onboarding employees not bring or use their former employer's property and confidential information in their new position. If a hiring employer learns that a new hire downloaded gigabytes of their former employer's data

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[144] Apple has been involved in several high stakes trade secrets and patent lawsuits to fight over industry control, in which occasionally forces the smaller company into a "bet the business" mode. *See cf*. Christopher Yasiejko, *Apple Fights to Block Masimo's New Watch on Heels of Import Ban*, BLOOMBERG LAW, Jan. 23, 2024, https://news.bloomberglaw.com/ip-law/apple-fights-to-block-masimos-new-watch-on-heels-of-import-ban (addressing Apple's suit to sue Masimo for patent infringement after Apple was found liable for infringing Masimo's patents).

[145] Kyle Wiggers, *Apple Lawsuit Behind It, Chip Startup Rivos Plots Its Next Moves*, TECHCRUNCH, Apr. 16, 2024, https://techcrunch.com/2024/04/16/apple-lawsuit-behind-it-chip-startup-rivos-plots-its-next-moves/ (last visited May 29, 2024).

[146] *Id.*

[147] *Id.*; Press Release, Rivos, *Rivos raises more than $250M targeting Data Analytics and Generative AI markets*, Apr. 16, 2024, https://www.rivosinc.com/pr/fundinga3/ (last visited May 29, 2024).

[148] RESTATEMENT 3D OF UNFAIR COMPETITION, § 42, cmt. d (1995).

[149] Sedona Conference, *supra* note 53.

within days of their departure, the employer should recognize that the new hire poses a significant problem and require them to take remedial measures before starting work.[150]

Apple Inc. v. Rivos Inc. et al. is a cautionary tale for employers and employees alike. Particularly in high stakes industries fighting over employees where the noncompete agreements are unenforceable, employers will increasingly rely heavily on trade secrets statutes and contract-based restrictions to protect their proprietary information. In doing so, all parties will be well-served to focus on their core secrets and establish clear procedures that comply with the emerging law in this area.

[150] *Id.*

ESG TRANSITIONING: THE POLITICS OF CLIMATE CHANGE

by Mary V. Papazian * and Christine M. Westphal **

INTRODUCTION

Socially Responsible Investing (SRI) began in 1928 with the establishment of an investment fund created by Pioneer Investments. The idea was to avoid "morally questionable investments"[1]. While individuals might choose to invest or not invest in individual companies based on both their perception of the possible return on their investment and their belief in the mission of a company, the Pioneer Investment Fund was the first effort to organize a group of investors around the idea that you should evaluate a company's impact on society as well as its financial performance. It was not a very popular idea and did not receive much attention until the 1970s and the 1980s when concerns about the war in Vietnam and South African Apartheid caused significant numbers of investors, and some segments of the general population, to become interested in assuring that investments did not support causes and activities that they opposed. The SRI investing during this period used two tools to achieve its goals. The first idea was the withdrawal of funds completely (divestment), and the second idea was to establish goals that companies would have to meet in order to retain investors, such as the Sullivan Principles that were used to impact the apartheid practices in South Africa.[2] SRI established the idea that investments could be used to achieve desirable social outcomes and essentially set the stage for the development of the process for evaluating corporations by reviewing their policies' environmental impacts, and social impact and their governance structure. ESG investing started being discussed seriously as part of this movement in 2006 with the release of the United Nations Principles for Responsible Investing (PRI), which encouraged the use of ESG criteria as part of the financial evaluation of an investment.[3] While there has been a lot of controversy about how ESG activities should be reported and accounted for, the standards and reporting rules are evolving. There is already significant scholarship about ESG reporting**,** but this paper only seeks to explore the political implications of pursuing an ESG investing philosophy.

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[1] Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 Stan. L. Rev 381, 393 (2020).

[2] [2] *Id.*

[3] Betsy Atkins, *Demystifying ESG: Its History & Current Status*, Forbes (June 8, 2020), https://www.forbes.com/sites/betsyatkins/2020/06/08/demystifying-esgits-history--currentstatus/?sh=5feb19f82cdd.

As concerns about climate change and global warming have increased, governments have begun to respond by addressing what are believed to be the underlying causes of these environmental phenomena. The Paris Climate Agreement sought to have countries limit and decrease the release of greenhouse gases. As part of the Paris Agreement, the United States originally set a target of bringing down its release of carbon emissions by 26 percent to 28 percent below 2005 levels by 2025.[4]

Achieving reductions in greenhouse gases in developed economies such as the United States requires both government action and cooperation from industries that produce greenhouse gases. To encourage and advance the participation of multi-national companies in the international movement to limit greenhouse gasses, a number of organizations have come into existence, such as the Net-Zero Climate Alliance, Climate Action 100+, and the Net-Zero Insurance Alliance. While these organizations are international in scope, the participation of American companies in these efforts has made them easy targets for those seeking to limit the use of ESG metrics in evaluating the financial condition of American companies. In addition, a number of American CEOs have become vocal in support of both ESG initiatives and decarbonization.[5]

One of the most outspoken proponents of ESG initiatives has been Larry Fink, BlackRock Investments CEO and Chairman of their Board. In 2018, he began advocating that companies consider the impact of ESG metrics on their long-term viability in the annual letter he writes to the CEO's of companies where BlackRock has invested.

Typical of these letters is his 2020 letter that stated:

> Climate change has become a defining factor in companies' long-term prospects. Last September, when millions of people took to the streets to demand action on climate change, many of them emphasized the significant and lasting impact it will have on economic growth and prosperity – a risk that markets to date have been slower to reflect. But awareness is rapidly changing, and I believe we are on the edge of a fundamental reshaping of finance.
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> The evidence on climate risk is compelling investors to reassess core assumptions about modern finance. Research from a wide range of organizations – including the UN's Intergovernmental Panel on Climate Change, the BlackRock Investment Institute, and many others, including new studies from McKinsey on the socioeconomic implications of physical climate risk – is deepening our understanding

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[4] Veronica Stracqualursi & Kevin Liptak, *What You Need to Know About the Paris Climate Agreement Now that the US has Rejoined*, CNN (Feb. 19, 2021, 11:36 AM), https://www.cnn.com/2021/02/19/politics/what-is-paris-climate-agreement/index.html.

[5] Mark S. Bergman, Ariel J. Deckelbaum & Brad S. Karp, *Introduction to ESG,* HLS Forum on Corp. Governance (Aug. 1, 2020), https://corpgov.law.harvard.edu/2020/08/01/introduction-to-esg/.

> of how climate risk will impact both our physical world and the global system that finances economic growth.[6]

TEXAS

In 2020, an oil executive complained to a Texas official that his company was having trouble finding a bank to lend it money.[7] He blamed Larry Flint, claiming that BlackRock was encouraging banks to boycott oil companies. As an immediate response, the Comptroller of Texas withdrew the funds of the Texas State Pension that had been invested in BlackRock products. In 2021, the Texas legislature passed a law, Senate Bill 13, which required the Comptroller of Texas to create a list of firms that were boycotting energy companies, and then the bill required all Texas State entities to divest from those firms. Their general feeling was, "If you boycott Texas energy, then Texas will boycott you."[8]

BlackRock was the only American company to make the list that was initially compiled by the Comptroller of Texas, and some writers have suggested that the list is just political grandstanding and has had little impact.[9] "BlackRock responded to the comptroller's announcement, noting that it 'does not boycott fossil fuels-investing over $100 billion in Texas energy companies' on behalf of its clients."[10]

Unfortunately, this argument leads to another issue that has been raised by anti-ESG advocates, which involves criticism of how investment firms vote the stock that they hold in their portfolios. In 2021, several money managers supported the election of climate change advocates to the Exxon Board of Directors during a proxy fight. "The Exxon vote showed the GOP how much influence the top three money managers - BlackRock, Vanguard, and State Street - have over public companies."[11]

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[6] Larry Fink, *2020 Letter to CEOs*, BlackRock, (May 29, 2024, 2;18 p.m.), https://www.blackrock.com/americas-offshore/en/larry-fink-ceo-letter.

[7] David Gelles, *The Cultural and Partisan Divide of Socially Conscious Investing,* N.Y. Times, Mar. 1, 2023 at A1.

[8] Ryan McGlashan, *The Rise of State Anti ESG Legislation*, Fordham J. of Corp. & Fin. Law Blog (Nov. 11, 2022), https://news.law.fordham.edu/jcfl/2022/11/11/the-rise-of-state-anti-esg-legislation.

[9] Shivaram Rajgopal, *Did the Texas ESG Ban Have Any Bite?* Forbes (Oct. 14, 2022), https://www.forbes.com/sites/shivaramrajgopal/2022/10/14/did-the-texas-esg-ban-have-anybite/?sh=1ddc666175d4.

[10] Felix Mormann, *Texas's War Against ESG Investing Is Ingenious But Futile*, Wash. Post (Sep. 19, 2022), https://www.washingtonpost.com/opinions/2022/09/19/texas-pension-funds-pointless-esgdivestment/.

[11] Jessica Guynn, *GOP vs. ESG: Why Florida Gov. Ron DeSantis, Republicans are fighting 'woke' ESG Investing*, USA Today (Feb. 14, 2023), https://www.usatoday.com/story/money/2022/12/19/what-are-esg-investmentsbusinesses/10898841002/.

Texas has continued its anti-ESG legislative push by passing Senate Bill 833 in 2023, which prevents insurance companies from using ESG criteria when they set rates. Again, the bill appears to be political grandstanding since it contains no penalties for violations.[12]

The Texas legislature has also required BlackRock and State Street to testify at a committee hearing on 'woke' investing. The Texas Senate committee was interested in determining whether the organizations had breached their fiduciary duty by incorporating ESG metrics into their investment decisions. Vanguard avoided the hearing by dropping out of the Net-Zero Climate Alliance. The two remaining fund managers argued that they had not violated any fiduciary duty rules because their focus was on obtaining the best risk-adjusted returns for clients. [13]

THE STATE FINANCIAL OFFICERS FOUNDATION

The anti-ESG movement essentially went national in early 2022 when a group of Republican state financial officers were gathered by the State Financial Officers Association to meet in New Orleans. The State Financial Officers Association appears to be supported by several conservative groups '…including the 1792 Exchange, the Heritage Foundation, Consumers' Research, American Legislative Exchange Council and Mercatus Center…"[14] and only includes Republicans. As a result of discussions at that meeting, by August of 2022, 17 states had proposed or passed bills seeking to ban state investment in companies that encouraged the boycott of fossil fuel firms. [15]

In addition to the anti-ESG legislation, many of the states involved in these legislative actions have included companies that encourage the boycott of firearms manufacturers in a political push to combine conservative agenda items. As noted above, investment firms such as BlackRock are not actually boycotting fossil fuel or energy firms, instead they are attempting to have firms understand and evaluate climate and environmental risks to

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[12] Amal Ahmed, Floodlight, *Lawmakers Passed a Bill to Stop Insurers from Considering ESG Criteria in Setting Rates*, Tex. Trib. (Oct. 12, 2023), https://www.texastribune.org/2023/06/12/texas-legislature-insurance-esg-rates/.

[13] Ramsey Touchberry, *Texas State Republicans Grill BlackRock in Committee Hearing Over 'Woke' Investment Practices*, Wash. Times (Dec. 15, 2022), https://www.washingtontimes.com/news/2022/dec/15/texas-state-republicans-spar-blackrock-faceface-o/.

[14] Brian Schwartz, *How Trump Allies and Wealthy Donors Helped to Fuel the GOP Fight Against ESG Investing Platforms*, CNBC (March 1, 2023), https://www.cnbc.com/2023/03/01/esg-investing-gop-opposition-has-ties-to-trump-allieswealthy-donors.html.

[15] Lance Dial, Elizabeth Goldberg & Rachel Mann*, The Challenge of Investing in the Face of State Anti-ESG Legislation*, Reuters, (Aug. 24, 2022), https://www.reuters.com/legal/legalindustry/challenge-investing-face-state-anti-esg-legislation-202208-24/.

improve their long-term financial performance. [16] Many of the states passing anti-ESG laws seem to be trying to protect fossil fuel firms in order to protect the state revenue that those firms generate. For instance, Texas collected nearly 25 billion dollars from the oil and gas industry in 2022.[17] While the Louisiana Treasurer stated that his opposition to ESG investing was necessary to preserve the state's economy, which might be crippled if fossil fuel income was lost.[18] The result of these actions is a patchwork of laws that are making investment decisions by state employee pension funds more difficult, and as investment managers try to minimize the damage to their organizations by these laws, they are being faced with a significant backlash from both interest groups and the pension fund managers in more liberal states. By 2023 two states had passed pro-ESG laws that would require ESG factors to be considered when making investment decisions, and three more states have pro-ESG bills under consideration.[19]

THE ARGUMENTS BEING MADE BY ANTI-ESG ADVOCATES

There are four basic arguments being made by anti-ESG advocates. The first argument is that ESG investing violates the fiduciary duty of the investment firms because they are not prioritizing return on investment.[20]

The second argument is that they are voting the shares they buy with other people's money to pursue their own political agendas.[21]

The third argument made by some legislators is that ESG is a conspiracy to create a regulatory system that targets "industries and policies supported by conservatives."[22] This is essentially the argument that is most often heard as part of what is known as the culture wars; 'the people and political ideas we oppose are trying to destroy our way of life.' Or as one manager put it, "Anti-ESG is a proxy for opposition to the spread of 'liberal

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[16] Touchberry, *supra* note 13.

[17] Sharon Udasin & Saul Elbein, *Texas Republicans Take ESG Battle to Insurers*, The Hill (May 10, 2023), https://thehill.com/newsletters/sustainability/3998561-texas-republicans-take-esg-battle-toinsurers/.

[18] Ron Lieber, *Politicians Challenge E.S.G. Fund Investments,* N.Y. Times, Jan. 30, 2023, at B1.

[19] Leah Malone, Emily Holland & Carolyn Houston, *ESG Battlegrounds: How The States Are Shaping the Regulatory Landscape in the U.S.*, HLS Forum on Corp. Governance (Mar. 11, 2023), https://corpgov.law.harvard.edu/2023/03/11/esg-battlegrounds-how-the-states-are-shaping-theregulatory-landscape-in-the-u-s/.

[20] Touchberry, *supra* note 13.

[21] Dan Mangan, '*That Is Not Capitalism, That Is Abusing The Market:' Sen. Ted Cruz Blasts BlackRock's Larry Fink's 'Woke' ESG Policies*, CNBC (May 24, 2022 at 12:23PM), https://www.cnbc.com/2022/05/24/sen-ted-cruz-blasts-larry-finkover-woke-shareholder-votes-on-climate.html?&qsearchterm=ESG%20news.

[22] Charles Donefer, ed. Practical Law, *State ESG Laws in 2023: The Landscape Fractures*, Thomson Reuters (May 31, 2023), https://www.thomsonreuters.com/en-us/posts/esg/state-laws/.

values' in civil society."[23] Republican politicians have linked ESG considerations to the culture war code word 'woke' claiming that "…the nation's top money managers are pursuing an ideological agenda at the expense of financial returns in violation of their fiduciary duty."[24]

Finally, and most recently, anti-ESG advocates have argued that the participation by investment firms such as BlackRock, State Street, and JPMorgan in the Group Climate Action 100+ and similar international organizations is a violation of antitrust laws.[25]

The main problem faced by both those who support ESG initiatives and those who support anti-ESG initiatives is that there are no firm guidelines that define ESG metrics. Both the SEC and the Department of Labor have recently released rules that try to provide some consistent guidelines. The Department of Labor has released guidelines about how pension funds should consider ESG issues. The SEC has set reporting standards that hope to clarify how corporations should report on ESG activities. These new rules were expected to go into effect this year, but they have faced legal challenges, and it is too soon to tell if they will be successfully implemented.

INVESTMENT FIRMS RESPOND

As noted above, investment fund managers who advocate for the use of ESG metrics when evaluating the financial health of a firm or the prudence of an investment claim that ESG considerations are just another way to determine the safety and risk factors involved in an investment. During the Texas Senate hearings on ESG and fiduciary duty, Lori Heinel, the spokesperson for BlackRock, tried to explain how environment considerations related to investment risk using two hypothetical real estate projects on the coast of Florida. "One is 2 feet above sea level, one is 20 feet above sea level. That is climate risk…this is how you think about it, one would have more unpriced risks than the other."[26] The "risk-return" analysis aligns with the fiduciary duty of investment advisors, but there is also an argument to be made that it is not the sole motivator for proponents of the use of ESG in making investments. Some scholars have argued that ESG investing can also be motivated by a desire to achieve what they describe as "collateral benefits" and that when the ESG evaluation is used to advance those "collateral benefits" such as decarbonization, it does violate the fiduciary duty of the investment advisor.[27]

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[23] Andrew Winston, *Corporate Social Responsibility Why Business Leaders Must Resist the Anti-ESG Movement,* Harv. Bus. Rev. (Apr. 05, 2023), https://hbr.org/2023/04/whybusiness-leaders-must-resist-the-anti-esg-movement.

[24] Guynn, *supra* note 11.

[25] Meera Gorjala, Suzanne L. Wahl & J. Michael Showalter, *ESG Litigation Update: Antitrust Claims*, Nat'l. L. Rev. (Mar. 9, 2023), https://www.natlawreview.com/article/esg-litigation-update-antitrust-claims.

[26] Touchberry, *supra* note 13.

[27] Schanzenbach & Sitkoff, *supra* note 1 at 453.

Of course, this requires that the motivation for the decision can be determined, and mind reading can be difficult, so in theory, you are either guessing about motivation or taking the decision maker's word to determine the motivation. This will continue to present problems for regulators who are seeking to eliminate ESG metrics from the investment decision. In fact, one of the outcomes of the attempts to regulate ESG investing is that investment advisors are backing away from the use of the ESG shorthand for a particular type of investment analysis. Larry Fink, who some would argue was the ESG advocate who started Texas and the State Financial Officers Foundation down this anti-ESG road has been quoted as saying, "I'm not going to use the word ESG because it's been misused by the far left and the far right, we talk a lot about decarbonization, we talk a lot about governance…or social issues, if that's something we need to address."[28] Or as another writer has observed, "U.S. businesses have been getting more sophisticated and transparent about their sustainability data…they still have good reasons to do those things because they make money - but talking about them now invites blowback from GOP officials."[29]

BlackRock was the first investment firm to essentially abandon the use of the ESG acronym and is now engaged in what it is calling Transition Investing by focusing investments on the infrastructure that will be required to become carbon neutral.[30] As the political fallout from the use of ESG as a factor in making investment decisions has increased, other investment firms have followed Larry Fink and BlackRock in abandoning the use of the acronym ESG. They have also begun to pull out of international climate groups such as Climate Action 100+.[31] While there has been a significant political fight over whether membership in such groups constitutes a violation of American Antitrust laws, it is simply easier to leave these groups and pursue more "neutral" methods to achieve the carbon reductions that are needed to address climate change.[32]

In answer to the charge that they are voting shares in the companies where they have invested "other people's money," BlackRock claims that it gives their investors 'proxy voting choice' and they are the industry leader in expanding voter choice for their clients, claiming that "we're committed to democratizing proxy voting…".[33]

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[28] John Frank, *Larry Fink "Ashamed" To Be Part of ESG Political Debate,* Axios Denver (JUN. 25, 2023), https://www.axios.com/2023/06/26/larry-fink-ashamed-esg-weaponized-desantis.

[29] Adam Aton, *Inside Texas' Attempt To Turn ESG Upside Down*, E&E News by Politico (Sep. 06, 2022 at 6 :35AM), https://www.eenews.net/articles/inside-texas-attempt-to-turn-esg-upside-down/.

[30] Jack Pitcher & Amrith Ramkumar, *Step Aside, ESG. BlackRock Is Doing 'Transition Investing' Now.,* Wall St. J. (Mar. 3, 2024), https://www.wsj.com/finance/investing/step-aside-esg-blackrock-is-doing-transition-investing-now-59df3908.

[31] David Gelles, *More Wall Street Firms Are Flip-Flopping on Their Climate Pledges*, N.Y. Times, Feb. 20, 2024, at B2.

[32] Gorjala, Wahl & Showalter, *supra* note 25.

[33] Mangan, *supra* note 21.

PROXY VOTING AND SHAREHOLDER ACTIVISM

Oil companies have become more sensitive to shareholder activism since ExxonMobil had several climate action advocates elected to its board of directors.[34] As a result, ExxonMobil has engaged in aggressive actions to limit activists from proposing shareholder votes on climate action.[35] In January 2024, Exxon sued two activist investors, Arjuna Capital and a group called "Follow This", to prevent them from adding shareholder proposals to the annual meeting agenda that would require the company to disclose greenhouse gas emissions. They have continued the lawsuit, which seeks attorney's fees, expenses, and other "just and proper" relief even though the groups proposing the shareholder initiative have withdrawn their request.[36]

ExxonMobil felt that they could not rely on the informed guidance they received from the SEC staff that they could ignore the greenhouse gas proposal because it "does not seek to improve ExxonMobil's economic performance or create shareholder value".[37] They seem to feel that the SEC will not be consistent in its guidance and the courts will provide more certainty when they are making decisions about the exclusion of shareholder motions, which is why they have continued the lawsuit against Arjuna Capital and Follow This.

Finally, BlackRock, in answer to the charge that they are voting shares in the companies where they have invested "other people's money," has given their investors 'proxy voting choice' and they are the industry leader in expanding voter choice for their clients, claiming that "we're committed to democratizing proxy voting…".[38] It seems likely that other major investment firms will follow BlackRock's lead in this area, but it is unclear how that will affect shareholder activism in fossil fuel companies.

CONCLUSION

It is clear that Environment, Social, and Governance issues, when combined under the ESG heading, have joined the culture wars, which is to say that some conservative politicians have identified the ESG shorthand for these issues closely with the 'liberal values' that they find problematic and that they expect to use for political gain. Governor DeSantis of Florida made his fight against 'woke capitalism' a main feature of his failed campaign for the Republican presidential nomination. Senator Ted Cruz of Texas has publicly criticized Larry Fink and BlackRock for their 'woke' ESG policies. While this

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[34] Guynn, *supra* note 11.

[35] J. Edward Moreno, *Exxon Sues To Prevent Climate Proposal From Getting A Shareholder Vote,* N.Y. Times (Jan. 22, 2024), https://www.nytimes.com /2024/01/22/business/exxon-climate-change-lawsuit.html.

[36] Ron Bousso, Ross Kerber & Sabrina Valle, *Exxon Pursues Lawsuit Despite Activist Investor Climb-Down*, Reuters (Feb. 2, 2024), https://www.reuters.com/sustainability/climate-energy/exxon-says-investers-withdrawing-climate-proposal-annual-shareholder-meeting-2024-02-02/.

[37] Moreno, *supra* note 35.

[38] *Id.*

has caused some money managers to avoid the ESG designation for their analysis of environmental risk it is unlikely to eliminate the consideration of those environmental risks when making investment decisions. It may not even win the conservative politicians the votes they are hoping for because a majority of both Democrats and Republicans are opposed to the anti-ESG initiatives. Recent polling shows that a majority of voters (63%) oppose anti-ESG laws. Democrats view ESG positively and are opposed to the anti-ESG agenda. Republicans are opposed to the new laws because they interfere with the functioning of the free market.[39]

Investment firms are adjusting both their language and their participation in international groups in response to the political pressure that has been applied to ESG investing. While some have argued that Wall Street's commitment to combating climate change was "always cosmetic" it does not appear that Wall Street is abandoning climate initiatives, rather it is changing its language and strategy**.** [40] BlackRock's move to Transition Investing seems to be a compromise that many firms can adopt.

Oil companies are actively opposing the reduction in fossil fuel use, calling the belief that the use of oil and gas can be phased out over time a "fantasy."[41] While at the same time they are adjusting their investments to recognize a future when oil and gas sales may be negatively impacted. ExxonMobil has recently invested in a lithium mining operation and hopes to be a leading supplier for the lithium needed by electric car batteries.[42]

Shell is engaged in developing a network of charging stations for electric cars and is beginning to phase out some of its traditional gas stations.[43] While the anti-ESG movement has managed to change some of the behavior and language of investment firms, the push to reduce carbon emissions and address climate change concerns will continue, and the investments by both ExxonMobil and Shell seem to indicate that even they understand that the changes are inevitable.

A more significant result of the anti-ESG movement is that "Wall Street's largest asset managers, private equity firms and brokers have warned that a backlash against

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[39] Guynn, *supra* note 11.

[40] Gelles, *supra* note 31.

[41] Sam Meredith *Big Oil's Green-Bashing Stokes Backlash As Campaigners Hit Out At 'Talking Points From the 1970s'* CNBC *(Mar. 20, 2024),* https://www.cnbc.com/2024/03/20/big-oils-green-bashing-at-texas-energy-conference-stokes-backlash.html?qsearchterm=oil%20industry%20fossil%20fuel.

[42] ExxonMobil, Press Release, Nov. 13, 2023, https://corporate.exxonmobil.com/news/news-releases/2023/1113_exxonmobil-drilling-first-lithium-well-in-arkansas

[43] Shell, https://www.shell.us/motorist/electric-vehicle-charging.html Accessed Mar. 29, 2024)

sustainable investing is now a material risk…".[44] The risk to firms that are identified with ESG and 'woke' investing is being identified as economic (divestments), political (firms may be boycotted) and reputational in their annual reports. Even firms that have not been criticized for their investment policies feel the need to report about the differing views among stakeholders about sustainable investment.[45]

There has also been a shift in how money managers vote the shares in the companies they invest in, which is causing them to be both more transparent and more cautious. As noted above, BlackRock is now giving its investors more options to participate in how they vote the shares and it is also reporting its votes. Their voting guidelines still require that the boards of directors "…demonstrate fluency in how climate risk affects the business and how management approaches assessing, adapting to, and mitigating that risk."[46] But BlackRock seems to be pulling back on its shareholder activity.[47]

State Street also appears to be moderating its shareholder activity. The anti-ESG movement has clearly caused money managers to become more cautious about their activities and support for decarbonization, but it does not seem to have changed their minds about the need to continue advocating for change. In a recent letter to the CEO's, Larry Fink answered his critics directly

> "Stakeholder capitalism is not about politics. It is not a social or ideological agenda. It is not 'woke'… it is capitalism driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper. This is the power of capitalism."[48]

He may have a hard time selling that in Texas, but so far it does not appear to have hurt his business, BlackRock had "net flows of 200 billion from U.S. clients"[49]. It was their best year ever.

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[44] Patrick Temple-West & Brooke Masters, *Wall Street Titans Confront ESG Backlash As New Financial Risk,* Financial Times (Mar. 1, 2023), https://www.ft.com/content/f5fe15f8-3703-4df9-b203-b5d1dd01e3bc.

[45] *Id.*

[46] Atkins, *supra* note 3.

[47] Michael Thrasher, *BlackRock Supporting Fewer Environmental And Social Shareholder Proposals*, Pens. & Inv. (Jul. 26, 2022 at 3:30PM), https://www.pionline.com/esg/blackrock-supporting-fewer-esg-shareholder-proposals.

[48] Mangan, *supra* note 20.

[49] Frank, *supra* note 28.
Larry Fink 'Ashamed' to be Part of ESG Debate, Axios (Jun. 25, 2023), https://www.axios.com/2023/06/26/larry-fink-ashamed-esg-weaponized-desantis.

PURDUE PHARMA, OXYCONTIN AND THE ETHICS OF BANKRUPTCY

by Jason Peterson*, Tom Sullivan** and John McCoy***

INTRODUCTION

In September of 2019 Purdue Pharma filed for Bankruptcy in the United States Bankruptcy Court for the Southern District of New York.[1] The case, it can be argued, was as much about invoking the automatic stay afforded Bankruptcy debtors as it was about attempting to reorganize Purdue for financial purposes.[2] In New York, "Bankruptcy means bankruptcy under the United States Bankruptcy Code, as amended, or insolvency under any state insolvency act."[3]

There is nothing particularly novel about this approach as corporations and businesses have used Bankruptcy as an opportunity to resolve legal disputes that are grounded in tortious conduct of the organization, in addition to more traditional situations in which over leveraging or simply mismanaging has led to a filing for bankruptcy.[4] In a sense the debts and obligations of a business or corporation outweigh the revenue of assets due to the pending potential of massive financial losses at the hands of litigants. Again, to a practitioner or legal professional this use of Bankruptcy is both predictable and appropriate. In the case of Purdue, it is not just the use of Bankruptcy that has spurred controversy and public outcry, but rather the use of Bankruptcy in conjunction with third party non-debtor releases that have led to concerns about the Purdue bankruptcy. More particularly the release and indemnification of the Sackler' family members and their spouses, estates, and descendants.[5] But the legal precedent is clear. The Bankruptcy Court has used third party non-debtor releases for decades. So why in this case is their use enough to draw the attention and disagreement of the United States Government? In short, the extensive harm to society caused by opioids has caused intensive scrutiny in this case.

In fact, not just the harm but Purdue's restructuring agreement and settlement with the Justice Department have led to the scrutiny as explained by Adam J. Levitin, Anne Fleming Research Professor & Professor of Law at Georgetown

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[1] *In re Purdue Pharma L.P. v. Purdue Pharma L.P.*, 634 B.R. 240 (2021).
[2] 11 U.S.C.S § 362 (2020)
[3] NY CLS LLC § 102 (2020).
[4] *BANKRUPTCY SYMPOSIUM: Interpreting the Bankruptcy Code: An Empirical Study of the Supreme Court's Bankruptcy Decisions*, 3 CHAP. L. REV. 173, 175 (2000).
[5] *In re Purdue Pharma L.P. v. Purdue Pharma L.P.*, 634 B.R. 240 (2021).

University.[6] According to Professor Levitin, "the judge's hands were all but tied because of a previous settlement he approved between Purdue and the Department of Justice. The settlement contains a "poison pill" - a provision that would have triggered a complete forfeiture for all of Purdue's creditors unless Purdue's restructuring plan, including the release of the Sacklers, was approved by the Bankruptcy Court."[7] And herein lies the rub, the restructuring allows the Sacklers to retain their perceived ill-gotten profits from Purdue while numerous plaintiffs are bound by a *take it or leave it* settlement that was negotiated without their involvement.

BACKGROUND

Oxycontin and the Harm

The opioid epidemic is relatively recent but opioids have been in use since 3400 B.C. They are prescribed to dull the senses and in the best case scenario, relieve pain.[8] However, over prescription and use can result in coma, convulsions and death.[9] The horrors of addiction concerns and the associated harmful effects have been documented for close to 200 years.[10] During the 1990s there was a dramatic increase in the number of prescriptions as physicians appeared to be reassured by pharmaceutical companies claims that opioids were neither habit forming nor addictive.[11] This, coupled with the medical community's increased focus on untreated pain and the recognition of pain as the fifth vital sign, resulted in a large-scale increase in the use of Oxycontin to treat pain.

While Purdue Pharma was not the only participant in the exacerbation of opioid use, it was perhaps the most egregious. Purdue heavily marketed the unsupported claim that only 1 out 10,000 patients' physicians treated with opioids would become addicted.[12] In brochures, representatives claimed that the "fear of addiction" should not prevent patients from pain relief through communication

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[6] Adam J. Levitin, *Purdue's Poison Pill: The Breakdown of Chapter 11's Checks and Balances*, 100 TEX. L. REV. 1079 (2022).
[7] *Id*.
[8] Caitlyn Edgell, *It's Time to Finish What They Started: How Purdue Pharma and the Sackler Family Can Help End the Opioid Epidemic*, 125 PENN ST. L. REV. 255, 261-264 (2020).
[9] *Id*. *See also* Bryson T Strachan, *Duped by Dope: The Sackler Family's Attempt to Escape Opioid Liability and the Need to Close the Non-Debtor Release Loophole*, 57 U. RICH. L. REV. 1031, 1035 (noting over 75,000 opioid induced overdoses).
[10] *See* Strachan, *supra* note *11*.
[11] *Id*.
[12] *See* Strachan, *supra* note 11 at 1041.

and self-advocacy in managing *their* pain.[13] Incredibly, Oxycontin prescriptions increased from 670,000 in 1997 to over 6 million in 2002.[14] As addiction rates soared, overdoses and crime predictably climbed.[15] Purdue, however, continued with its fraudulent claims during this period as its revenue approached $3 billion over the same period.

Legal Fallout

The court system of the United States is awe inspiring. Our 50 states have their own courts.[16] Our federal government has courts. Article III of our Constitution creates our highest court and the right to avail yourself of our courts is an individual right. Judges, lawyers, clerks, jurors, and a myriad of workers routinely ensure the lights stay on and wheels of justice turn. It's a fair assessment that in many ways our court system is a clockwork, mechanism, flawlessly designed to allow aggrieved, harmed, or injured parties to pursue a remedy at law. It's an amazing tool if you're seeking compensation, validation, or justice. It's not so amazing to be on the receiving end of a lawsuit, no less thousands of lawsuits.

Following the revelations of Purdue's very prominent role in the opioid epidemic a landslide of litigation ensued. Private lawsuits were filed in forty-eight (48) of the fifty (50) states. The states themselves sued for the harm caused to their citizens. Purdue was facing a deluge of complaints with alleged potential damages in the tens of trillions.[17]

It was not just the physical harm that Purdue's product, OxyContin caused to those prescribed the medication, *and that harm is reprehensible*, but Purdue's knowledge of the harmfully, addictive, nature of OxyContin, while purposely misleading the medical community and the public, that made Purdue's behavior so abhorrent.[18] It's not unusual that the cover up is sometimes equal to or worse than the crime. So, by 2021, Purdue was facing hundreds of thousands of lawsuits and the landslide of litigation had turned into an avalanche.[19] The onslaught of litigation was so great that Purdue had no choice but to declare bankruptcy and seek the protection of the same system that assailed it. Inarguably, the decision to

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[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] UNITED STATES COURTS, https://www.uscourts.gov/ (last visited April 5, 2024)
[17] *See* Strachan*, supra* note *11*.
[18] *In re Nat'l Prescription Opiate Litig.*, 2019 U.S. Dist. LEXIS 144579 (2019); *In re Purdue Pharma, L.P.*, 635 B.R. 26, 35 (2021).
[19] *Bridges v. Purdue Pharma L.P.,* 2024 U.S. Dist. LEXIS 49341 at Page 2.

declare bankruptcy was strategically the only choice left to Purdue.[20] But indemnifying the Sacklers as part of the bankruptcy proceeding doesn't sit well with the public.

In addition to civil liability, Purdue Pharma has also faced criminal liability. And while the legal system has circled the wagons with respect to Purdue Pharma in a number of ways, the family has largely escaped accountability.[21] In 2020, Purdue pleaded guilty to criminal charges relating to the manner in which it marketed OxyContin. Penalties related to the criminal charges amount to close to $8.3 billion which includes $3.54 in criminal fines, $2 billion forfeiture of profits, and $2.8 billion in civil penalties. And while the Sacklers agreed to contribute $225 million in civil penalties as part of the DOJ settlement, there was no release of further criminal liability. Notably, the family statement after the settlement stated that they "acted ethically and lawfully" and that "Purdue's management team … was meeting all legal requirements."[22]

Bankruptcy Law

Federal Bankruptcy Law provides organizations and individuals with the opportunity to relieve themselves of the burden of overwhelming debt with the possibility of getting a fresh start. In the case of business entities, reorganization under Chapter 11 of the Bankruptcy Code can result in a streamlined organization that as an ongoing entity can provide more value to creditors than that which would be provided through a Chapter 7 liquidation of the debtor.[23]

The Chapter 11 Bankruptcy process begins with an organization or individual (identified as the "debtor") filing a petition with the bankruptcy court.[24] The debtor is required to identify all assets and liabilities and other material information in schedules that may accompany the petition.[25] During the bankruptcy process, the court will attempt to work with the debtor and creditors to produce a reorganization plan.[26] The reorganization plan will identify how and to

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[20] *In re Purdue Pharma, L.P.*, 635 B.R. 26, 36 (2021).
[21] Katie Benner, *Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales*, N.Y. TIMES, Oct. 21, 2020.
[22] *See* Barry Meier, *In Guilty Plea, OxyContin Maker to Pay $600 Million*, N.Y. TIMES, July 18, 2019 (noting Purdue blaming individual employees but not management). Management instructed employees to make statements inconsistent with F.D.A approved prescription information but those statements violated company policy. *Id*.
[23] *See* Strachan, *supra* note *11*.
[24] *Id*.
[25] *Id*.
[26] *Id*.

what extent creditors' claims against the company are satisfied as part of the reorganization.[27] Once the reorganization is approved by the Bankruptcy Court, the debtor emerges from the bankruptcy with its prior obligations to creditors discharged.[28]

Of particular importance to many debtors, is that after the filing of the bankruptcy petition, all litigation against the debtor is stayed.[29] This stay includes collection actions brought by creditors as well as other actions against the debtor including product liability and fraud actions.[30] The reorganization under Chapter 11 releases the debtor from obligations and legally releases them from all liability in related lawsuits.[31]

While typically, it is only the debtor that is released from claims as a result of a bankruptcy proceeding, in some cases, non-debtors with some type of relationship to the debtor may also be released from future claims.[32] Non-debtors typically include those with a close relationship to the debtor such as shareholders, executives and board members.[33]

The Plan

Before laying out the key components of the plan it's important to note that for nearly a decade prior to filing for Purdue's bankruptcy the Sackler family drained considerable cash[34] from the corporation as a direct response to the voluminous litigation directed against Purdue and the Sackler family personally.[35]

According to the ruling of the Appeals Court of the United States District Court, Southern District of New York the key components of the plan were as follows:

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[27] *Id*.
[28] *Id*.
[29] *Id*.
[30] *Id*.
[31] *Id*.
[32] *Id*.
[33] *Id*.
[34] *In re Purdue Pharma, L.P*., 635 B.R. 26, 75 (2021). Purdue began distributing close to 70 percent of its revenue after 2007 and close to 90 percent of its free cash. *Id*. The result was distributions approaching $10.4 billion. *Id*.
[35] *In re Purdue Pharma, L.P.,* 635 B.R. 26, 74 (2021) citing Dkt. No. 91-4, at App.1425-1429; see Dkt. No. 91-1, at App.28). Just 10% of the claims so filed would give rise to over $140 trillion in aggregate liability – more than the whole world's gross domestic product. (Dkt. No. 91-4, at App.1421; see Dkt. No. 91-1, at App.28).35. Those having clams are a diverse body including government, medical professionals, and Native Americans. *Id*.

1. Trusts created.[36]
2. The Public Document Repository. Under the Plan the Debtors are required to create a public document repository of Purdue material available for public review.[37]
3. Purdue Pharma Will Cease to Exist.[38]
4. The Newco will continue to produce opioids for a limited market with all earnings going to the newly formed benefit corporation.[39]
5. The Sackler family will give $4.275 billion, in exchange for releases.[40]
6. All potential claimants agree to look to the newly established Trusts for compensation.[41]

ANALYSIS AND COMMENTARY

The Bankruptcy Court's decision confirming Purdue's reorganization plan was not terribly surprising.[42] The decision appeared consistent with bankruptcy norms notwithstanding that in typical civil litigation, a verdict against Purdue would not limit independent litigation against the Sacklers.[43] However, here, the decision by the Bankruptcy Court resulted in an order for creditors to forgo pursuing any claims against the Sacklers.[44] It certainly appears that the third-party release is the more efficient outcome, and arguably provides the most benefit to the victims

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[36] *In re Purdue Pharma, L.P.*, 635 B.R. 26, 103 (2021). Purdue Pharma nor the Sacklers will control the financial aspects going forward. *Id*. Trusts will be used to ensure that the victims of opioids are compensated. Id. While most of the trusts are for the purpose of abatement only, there are two trusts that will handle compensating any personal injury claims. *Id*.

[37] *In re Purdue Pharma, L.P.*, 635 B.R. 26, 100 (2021).

[38] *In re Purdue Pharma, L.P.*, 635 B.R. 26, 67 (2021). "Under the Plan, Purdue Pharma will cease to exist." *Id*. Purdue Pharma will be morphed into a benefit corporation for the purpose of ensuring that creditor and victims can be compensated from an income stream but the Sacklers will no longer control or benefit financially from the sale of products. *Id*.

[39] *In re Purdue Pharma, L.P.*, 635 B.R. 26, 67 (2021). "NewCo will manufacture products, including Betadine, Denokot, Colace, magnesium products, opioids and opioid-abatement medications, and oncology therapies." (See Oral Arg. Tr., Nov. 30, 2021, at 157:19-159:23).

[40] *In re Purdue Pharma, L.P.,* 635 B.R. 26, 65 (2021). "[T]he Sackler family will give $4.275 billion toward the Purdue estate." (Plan, at 37; Dkt. No. 91-3, at App.1042, 1045-1046, 1050).

[41] *In re Purdue Pharma, L.P.*, 635 B.R. 26, 103 (2021). In order to receive compensation, in any amount or based upon any claim, claimants must now look to the Trusts created thereby releasing Purdue and the Sacklers if compensation is desired. *Id*.

[42] Jonathan M. Seymour, *Against Bankruptcy Exceptionalism*, 89 U. CHI. L. REV. 1925, 1936-38 (2022).

[43] *Id*.

[44] *Id*.

of the crisis by avoiding the uncertainty of further litigation.[45] The Bankruptcy Code may not provide the answer either.[46] When the district court rejected what may have been in the best financial interest of the victims, it was embracing an outcome distinct from a utilitarian perspective as applied to many of the creditors and most notably the victims.

The similarities to the Johns Manville Bankruptcy are eerie.[47] In the Johns Manville bankruptcy a settlement for restructuring was brought about by Johns Manville finding itself in the defendant's position with an ever increasing number of future plaintiffs.[48] At the time, asbestos, and Johns Manville as the face of the crisis, was one of the largest product liability causes of action in United States history and the courts were crowded with plaintiffs pursuing remedies at law.[49] Just like Manville, Purdue availing itself of bankruptcy protection has more to do with litigants and future litigants than mismanagement or financial problems. In both cases, it was the harm caused by their products, which provided ample return on investment to their shareholders that was the catalyst for seeking bankruptcy protection. And therein lies the main argument, as well as, the main motivation for the current procedural arguments against Purdue's use of Bankruptcy. Imagine creating a product that generated huge sales and great profits. Imagine further that it's determined that the product is harmful to consumers. In the case of Johns Manville, it turns out that after a certain degree of analysis and investigation, asbestos is found to be carcinogenic. In the case of Purdue, it turns out that OxyContin is highly addictive.[50]

The Ford Pinto is another example of a product that was infamously the subject of numerous product liability lawsuits. Due to the placement of the gas tank, in the event of a rear collision, the Pinto gas tank could rupture spilling gasoline into an accident scene where, by the nature of gasoline's combustibility, an inferno resulted.[51] Not optimal, but not a guaranteed outcome either.[52] But, in

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[45] *Id*. "This unique framework for a comprehensive resolution will dedicate all of the assets and resources of Purdue for the benefit of the American public. This settlement framework avoids wasting hundreds of millions of dollars and years on protracted litigation, and instead will provide billions of dollars and critical resources to communities across the country trying to cope with the opioid crisis.." Jan Hoffman & Mary Williams Walsh, *Purdue Pharma, Maker of OxyContin, Files for Bankruptcy*, N.Y. TIMES, Nov. 24, 2020.
[46] *Id*.
[47] *In re Johns-Manville Corp*., 68 B.R. 618 (1986).
[48] Sandra Friedman, *Manville: Good Faith Reorganization or "Insulated" Bankruptcy*, 12 HOFSTRA L. REV. 121 (1983).
[49] *Id*.
[50] *In re Purdue Pharma, L.P.,* 635 B.R. 26, 44 (2021).
[51] *Grimshaw v. Ford Motor Co*., 119 Cal. App. 3d 757, 775 (1981).
[52] *Grimshaw v. Ford Motor Co*., 119 Cal. App. 3d 757 (1981).

the case of asbestos, it turns out to be carcinogenic one hundred percent of the time when ingested in great quantities, usually by breathing the fibers, and OxyContin is addictive arguably in one hundred percent of those who use it for pain on a continuous basis[53] So while the Ford Pinto can be retrofitted to render it safer, at least as the release of gasoline is concerned, there seems to be no way to make asbestos non carcinogenic or OxyContin non-addictive.[54] Further, considering the latency period of developing asbestosis, as well as, exposure beyond manufacturing or installation workers, there are future claims that may still arise.[55] The same applies to Purdue. Many users of OxyContin abuse the drug and the harm extends far beyond the user to family, society, and community.[56] So while Ford had a pretty good handle on the amount of claims they might face with the Ford Pinto, even to the point of conducting a cost benefit analysis to determine the financial implications of releasing the product[57], both Johns Manville and Purdue couldn't quantify the financial implication because of the potential of future plaintiffs.[58] If only there was a way to put a fence around the ever growing financial exposure due to lawsuits.

Luckily, our legal system, in particular, bankruptcy, not only provides the needed fence, it will help install it at no extra cost. By treating Plaintiffs as creditors and forcing them to file a proof of claim or interest, a corporation or other form of business entity can turn the tables on plaintiffs, and more specifically plaintiff' lawyers, concerned with financial compensation.[59] In short, the corporations now have a shield provided by the bankruptcy court. According to the federal rules concerning bankruptcy, plaintiffs must take a seat at the table like any other creditor.[60] But plaintiffs are not like any other creditor. While investors, banks, vendors, and others seek monetary payments based primarily on contractual obligations, plaintiffs are seeking compensation for damages due to personal injury.[61] So how did we arrive at this moment where declaring

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[53] *In re Johns-Manville Corp*., 68 B.R. 618 (1986); *In re Purdue Pharma L.P. v. Purdue Pharma L.P.*, 634 B.R. 240 (2021).
[54] *National Prescription Opiate Litig. v. Purdue Pharma L.P.* (In re Nat'l Prescription Opiate Litig.), 2018 U.S. Dist. LEXIS 176260, *121).
[55] *Purdue Pharma, L.P. v. City of Grande Prairie*, 69 F.4th 45, 64 (2023).
[56] Eric Snowbird, Trevor Fetter, & Amy Shulman, *The Business of Pain: Johnson & Johnson and the Promise of Opioids*, HARVARD BUSINESS SCHOOL, Dec. 16, 2019.
[57] *Grimshaw v. Ford Motor Co.,* 119 Cal. App. 3d 757, 803 (1981).
[58] *Purdue Pharma, L.P. v. City of Grande Prairie*, 69 F.4th 45, 71 (2023).
In re Johns-Manville Corp., 68 B.R. 618 (1986).
[59] Evan Caplan, *'Milking the Dow': Compensating the Victims of Silicone Gel Breast Implants at the Expense of the Parent Corporation*, 29 RUTGERS L. J. 121, 30-34 (1977).
[60] 11 USC App Rule 3002: Filing Proof of Claim or Interest.
[61] *Ritzen Grp., Inc. v. Jackson Masonry, LLC*, 589 U.S. 35, 46 (2020).

bankruptcy is not due to fiscal mismanagement or economic woes but crisis management?

According to Gerald Cavanaugh and Jacques Boettcher, when a corporation chooses bankruptcy protection in Chapter 11 as a means to avoid or retard a crisis or for other strategic reasons it's referred to as strategic bankruptcy.[62] This is an important point, when we consider the economies of scale involved. Actual litigation and potential litigation can prove financially devastating to a corporation. Costs, lost time, and damage to reputation can cripple an organization in its attempts to monetize its product or service.[63] Strategically, the firms are forced to focus on court cases rather than on providing products or services. Litigation and its incalculable costs need to be assessed by a firm prior to the filing of a first pleading.[64] So a crisis, particularly one where consumers of a product are harmed, colloquially referred to as toxic torts, have the potential to inflict severe monetary losses on a corporation.[65] So, although a corporation incurs some costs in defending against plaintiffs, it's the judgments or potential judgments awarded to plaintiffs that spell possible financial disaster, and can lead to ethical failings.[66]

And here is where Ford, Johns Manville, Purdue share a common unethical thread in the origins of their respective crises with the later companies declaring bankruptcy. All three companies trace their litigation woes to perceived or actual ethical failings. The issues Ford faced with the Pinto's misplaced gas tank might be the most notorious. Due to a design flaw the Pinto was at risk of explosion when involved in a rear end collision.[67] When we view the Pinto matter through a utilitarian ethical lens we see that, although the case invokes a rather powerful emotional response, Ford weighed the potential harm against the benefit, albeit one that included Ford's own profitability. Irrespective, Ford considered the harm and established it was de minimis, then released the Pinto.[68]

Johns Manville and Purdue engaged in no such deliberations and interestingly when the scope and the scale of the harm exposed them to litigation, they availed

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[62] J. Boettcher, Gerald Cavanagh, & Min Xu, *Ethical Issues That Arise in Bankruptcy*, BUS. & SOCIETY REV., Dec. 2014.
[63] *Grimshaw v. Ford Motor Co*., 119 Cal. App. 3d 757 (1981).
[64] David Silverstein, *The Litigation Audit: Preventive Legal Maintenance for Management*, BUS. HORIZONS, November–December, 1988, at 34-42
[65] See Caplan, supra note 62, 30-34.
[66] *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981).
[67] *Grimshaw v. Ford Motor Co.,* 119 Cal. App. 3d 757 (1981).
[68] *Grimshaw v. Ford Motor Co*., 119 Cal. App. 3d 757, 792 (1981).

themselves of the same United States Bankruptcy Court for the Southern District of New York, which according to Cavanaugh, is a "debtor-friendly district."[69]

It is well documented with a proverbial paper trail establishing Johns Manville's knowledge of the horrific effects of asbestos on its employees.[70] That's not debated or denied by Johns Manville.[71] Similarly, Purdue also was well aware of harm caused by its product and again that's not debated or denied by Purdue.[72] When we view both Johns Manville and Purdue through a utilitarian ethical lens we see that it's more difficult than the Ford case to rationalize the benefit outweighing the harm. While Ford's Pinto problems were dependent on the occurrence of a rear end collision, millions of Pinto owners benefited greatly from the affordability and fuel efficiency of the vehicle with no adverse effect.[73] But, asbestos in any amount is carcinogenic and OxyContin is highly addictive.[74] And both companies moved forward with selling their respective products in spite of the harm they were well aware their products would cause. While the National Transportation Safety Board cites the official death toll from the Ford Pinto fire issue at 27, [75] the death toll for Asbestos and OxyContin is considerably greater. The death toll from asbestos is listed as roughly 130,000.[76] The death toll for OxyContin is more difficult to sift out but according to the Center for Disease Control, "mainly synthetic opioids (other than methadone)—are currently the main driver of drug overdose deaths. Nearly 88% of opioid-involved overdose deaths involved synthetic opioids."[77] Further, over 1 million since the 90's with over 75% of drug overdose deaths involving opioids.[78]

According to Cavanaugh, "Bankruptcy provides a new opportunity for a failing business firm, and offers some relief to stakeholders. Chapter 11 bankruptcy in the United States allows a firm to use its assets in a more efficient and less disruptive way than liquidation, even though it cannot fully compensate its creators and shareholders."[79] Again, this use of Bankruptcy assumes some type of pejorative

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[69] *See* Boettcher, *supra* note 65.
[70] See Friedman, *supra* note 51.
[71] *In re Johns-Manville Corp*., 68 B.R. 618 (1986).
[72] *In re Purdue Pharma L.P. v. Purdue Pharma L.P.*, 634 B.R. 240 (2021).
[73] https://www.automobile-catalog.com/production/ford_usa/pinto.html#google_vignette
[74] *In re Purdue Pharma L.P. v. Purdue Pharma L.P.*, 634 B.R. 240 (2021).
[75] Larry Kramer, *Fire Hazard Seen in 2 Million Pintos*, THE WASHINGTON POST, My 8, 1978.
[76] Furuya S, Chimed-Ochir O, Takahashi K, David A, Takala J. *Global Asbestos Disaster*. INT. J. ENVIRON. RES. PUBLIC HEALTH. (2018).
[77] Centers for Disease Control and Prevention, Increase in Fatal Drug Overdoses Across the United States Driven by Synthetic Opioids Before and During the COVID-19 Pandemic https://dhhs.ne.gov/han%20Documents/ADVISORY01042021.pdf
[78] *Id.*
[79] *See* Boettcher, *supra* note 65.

financial situation resulting in the corporation's inability to meet its financial obligations. Ford's crisis with the Pinto did not result in Ford seeking Bankruptcy protection. Whether due to the scope of the litigation against Ford allowing them to absorb the financial burden or the immense size of Ford and its diversification across numerous models of automobile, Ford weathered the storm.[80]

Options were available to Ford, by recall or settlement and it was a fault in the particular product's design (the Pinto), not the product (the Automobile) itself that created the risk of harm. Automobiles are inherently dangerous products in their own right but the potential negligence of other drivers, road conditions, and road maintenance complicates the matter of the dangerousness of a product, in this case the Pinto, and allows for options in resolving the crisis. In fact, it's not that an option to make the Pinto safer in crashes wasn't available or possible, it's Ford's decision to move forward because the resolution to the gas tank issue was allegedly cost prohibitive.[81]

This was not the case in the matter of Johns Manville and is not the case in the current matter of Purdue. Both the asbestos produced and used by Johns Manville in insulation and the OxyCotin produced by Purdue for pain management are inherently unsafe.[82]Therefore, both Johns Manville and Purdue faced crises that required a different approach than Ford to effectively resolve current and future litigation due to the harm caused by their respective products, and reorganization through Bankruptcy provided the escape hatch. And, it's that very escape hatch through the use of Bankruptcy's Chapter 11 reorganization that glaring ethical issues arose. According to Cavanaugh, "Bankruptcy provides a new opportunity for a failing business firm, and it offers relief for stakeholders.[83] For Johns Manville that "relief for stakeholders" was the attempted compensation of those impacted by the horrific effects of asbestos exposure. With the aid of the Bankruptcy Court for the Southern District of New York, Johns Manville was able to resolve all litigation against it for injury due to asbestos by the creation of a trust that would compensate victims.[84] Strategically, the plan balanced the interests of all stakeholders allowing the continuance of Johns Manville as a going concern, while providing some compensation for the victims of asbestos exposure. But the harm caused by Johns Manville had consequences beyond its

[80]https://d18rn0p25nwr6d.cloudfront.net/CIK-0000037996/0e469ea4-7b3e-4819-b837-9deb8857679d.pdf

[81] *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981).

[82] *In re Purdue Pharma, L.P.,* 635 B.R. 26, 43 (2021); *Wilson v. Johns-Manville Sales Corp*., 684 F.2d 111, 117 (1982).

[83] *See* Boettcher, *supra* note 65.

[84] *In re Johns-Manville Corp*., 68 B.R. 618 (1986).

ability to adequately compensate the victims of asbestos exposure.[85] Purdue's Bankruptcy in the Southern District of New York resulted in a reorganization that, while attempting to ensure compensation for the victims of OxyContin, provided personal immunity from liability to the Sacklers through the use of used third party non debtor releases.[86] Again, the use of non-consensual, third party debtor releases have been used by Bankruptcy Courts, in particular the Southern District of New York for decades.[87]

It appears from the ruling of the United States Court of Appeals for the Second Circuit that the law is clear on the Bankruptcy Court's ability to include the personal release of the Sacklers.[88] So why is this matter now presently before the Supreme Court? The matter is before the Supreme Court because of the severe harm caused by OxyContin. While the legal issues are fairly clear cut, the ethical issues are not because ethics can be viewed from different perspectives, with different views and through different ethical lenses. In short, it depends.. It's the devastating harm that Purdue, and others, caused socially, economically, and physically by being at the perceived epicenter of the opioid crisis.[89] If the Sacklers keeping what is perceived by some to be blood money[90] is so abhorrent that the use of non-consensual, third party debtor releases used for decades by Bankruptcy Courts is appealed to the Supreme Court it's time for a legislative remedy.[91]

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[85] *In re Johns-Manville Corp*., 68 B.R. (1986). *See also* Friedman, *supra* note 51.
[86] *In re Purdue Pharma, L.P*., 635 B.R. 26, x (2021).
[87] *Purdue Pharma, L.P. v. City of Grande Prairie*, 69 F.4th 45 66 (2023). "The district court erred in holding that the bankruptcy court lacked the authority to approve a plan that included the non-consensual third-party releases of direct claims against non-debtors; the bankruptcy court acted within its jurisdiction over the bankruptcy estate, even if the third-party claims were not actually the property of the estate, and did not violate due process." *Id*.
[88] *Id*. A direct claim brought against non-debtors that nevertheless poses the specter of direct impact on the rest of the bankrupt estate may just as surely impair the bankruptcy court's ability to make a fair distribution of the bankrupt's assets as a third-party suit alleging derivative liability. *Id*. Accordingly, if the litigation of the settled claims would almost certainly result in the drawing down of the bankruptcy estate of the debtor, the exercise of bankruptcy jurisdiction to enjoin third-party direct claims is appropriate. *Id*, Thus, as to statutory jurisdiction, the key inquiry is into the likely impact on the res. *Id*.
[89] *See* Snowbird, *supra* note 59, at 1-5.
[90] *In re Purdue Pharma, L.P.,* 635 B.R. 26 (2021).
[91] *See* Strachan, *supra* note 11, 1033-34 (noting introduction of House Bill 2096 and House Bill 4777 intending to close the bankruptcy loophole used by the Sacklers to avoid opioid liability) Both bills preclude individuals who have not filed bankruptcy from receiving individual releases of liability. *Id*

CONCLUSION

The similarities of the Johns Manville and Purdue Pharma bankruptcy are uncanny. Each company caused harm at a scale only possible in our modern age. Each company pursued Chapter 11 bankruptcy in the Southern District of New York. Each company proposed the use of trusts in restructuring to administer compensation for claims, insulating themselves from liability. In the case of Purdue that insulation extended to the personal liability of the Sackler family resulting in some claimants appealing the decision of the Bankruptcy Court. Although Johns Manville caused harm mainly to its employees and Purdue Pharma harmed its customers both companies engaged in unethical behavior. For example, Johns Manville knew that its employees were being harmed and rather than protect them, Johns Manville choose to relocate them off the production line if they became ill. Purdue, knowing its drug, OxyCotin as highly addictive, choose to deceive doctors concerning the true nature of OxyContin and addiction. His point is well documented and in many instances the evidence of malfeasance comes directly from the comments of the officers or each company.[92] But maybe the bell has tolled and time has run out; and depending on the decision of the Supreme Court, the similarities might end. The Sacklers are counting on the approved plan for restructuring being implemented. It is their ticket to freedom. Unlike Johns Manville, whose restructuring plan was allowed and implemented, Purdue Pharma and the Sacklers must await the decision of the Supreme Court. How will the Court rule? Will the Court uphold the order of the Southern District of New York or declare the use of third party non-consensual releases exposing the Sacklers to personal liability? That's the Billion-dollar question.

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[92] *In re Purdue Pharma*, L.P., 635 B.R. 26, 63 (2021).